



STATE OF NEBRASKA
Office of the Attorney General

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May 25, 2023

Via email at [REDACTED]
Charles McKay

RE: *Your Complaints Against the Saline County Board of Commissioners*
File No. 20231055

Dear Mr. McKay:

This letter is in response to the series of complaints you submitted to this office on May 10, 2023, and another complaint emailed to us on May 24. Your complaints allege violations of both the Nebraska Open Meetings Act ("Act"), Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2014, Cum. Supp. 2022), and the Nebraska Public Records Statutes ("NPRS"), Neb. Rev. Stat. §§ 84-712 to 84-712.09 (2014, Cum. Supp. 2022), by the Saline County Board of Commissioners ("Board"). On May 16, the undersigned discussed the May 10 complaints with the Saline County Clerk, Anita Bartels. On May 25, we spoke to the Saline County Attorney David Solheim. We have now concluded our review. Our responses immediately follow each of your complaints below.

May 10 Complaints

- I. **Phil Hardenburger [Board chair] has used county funds to create a home town housing group and has not opened the meetings to the public nor informed the public of dealings on home town housing.**

According to Ms. Bartels, the Board contracted with Hometown Housing, USA to address housing concerns countywide. Other political subdivisions have expressed interest in the program. American Rescue Plan Act funds were used to cover the cost of the contract. While Board members Hardenburger and Marvin A. Kohout are listed as "initial contacts," see August 16, 2022, Board meeting minutes, there is no "group" subject to the Act affiliated with the contract/program.

II. Phil Hardenburger has violated open meeting laws on April 25th during citizens form [sic], against Gary Veprovsky interrupted gary and bullied him throughout his speach [sic].

The undersigned viewed the “Citizens Forum” portion of the April 25, 2023, Board meeting.¹ Mr. Veprovsky began speaking at approximately the 22:45 point in the recording until he was asked to stop speaking at 29:15, at which point you began speaking. In our view, the chair did not appear to bully Mr. Veprovsky and he was only “interrupted” after speaking for over six minutes. Board chairs have some discretion to ensure that meetings are conducted in an orderly fashion. Even assuming that the chair’s actions could be construed as “bullying” or “interrupting,” such conduct would not constitute a violation of the Act.

III. The saline county board of commissioners video tape the meetings on Facebook and at the end of the meeting go into private sessions and never come back on to adjourn the meeting this has been going on for over a year.

According to Ms. Bartels, Board meetings are in fact adjourned, but not done live, i.e., the Facebook recording is turned off. Ms. Bartels represents that the Board takes no action upon reconvening from a closed session, but acknowledges that it may be confusing to individuals if the stream ends at the point when Board members go into closed session. Ms. Bartels represents that, in the future, the stream/recording will be left on until the meeting is formally adjourned.

IV. When I have asked for a copy of the video or audio of the saline county meetings I was told I have to bring in a hard drive for them to transfer the information. This seems like alot for your average citizens to retrieve information.

We note initially that you did not provide us a copy of your public records request(s) for the recordings submitted to the Clerk’s Office, nor did you provide any correspondence received in response to your requests. With respect to the recordings you seek, Ms. Bartels informs us that the recordings are large files and cannot be provided on a CD or a thumb drive and would have to be downloaded on an external hard drive. Under Neb. Rev. Stat. § 84-712(3)(b), Ms. Bartels is authorized to “charge a fee for providing copies of . . . public record[s] pursuant to subdivision (1)(b) of [§ 84-712], which fee shall not exceed the actual added cost of making the copies available.” The “actual added costs” are described as follows:

¹ Accessible at <https://www.facebook.com/salinecountyne/videos/225794120133178/>.

For purposes of this subdivision, (i) for photocopies, the actual added cost of making the copies available shall not exceed the amount of the reasonably calculated actual added cost of the photocopies, which may include a reasonably apportioned cost of the supplies, such as paper, toner, and equipment, used in preparing the copies, as well as any additional payment obligation of the custodian for time of contractors necessarily incurred to comply with the request for copies, (ii) for printouts of computerized data on paper, the actual added cost of making the copies available shall include the reasonably calculated actual added cost of computer run time and the cost of materials for making the copy, and (iii) for electronic data, the actual added cost of making the copies available shall include the reasonably calculated actual added cost of the computer run time, any necessary analysis and programming by the public body, public entity, public official, or third-party information technology services company contracted to provide computer services to the public body, public entity, or public official, and the production of the report in the form furnished to the requester.

Ms. Bartels has agreed to provide you meeting recordings on external hard drives solely at her cost. Your access to these recordings begins by submitting a written request to the Clerk's Office. Neb. Rev. Stat. § 84-712(4) (2014). Once received, the Clerk's Office has four business days to provide you a written response containing the following:

[A]n estimate of the expected cost of the copies and either (a) access to or, if copying equipment is reasonably available, copies of the public record, (b) if there is a legal basis for denial of access or copies, a written denial of the request together with the information specified in section 84-712.04, or (c) if the entire request cannot with reasonable good faith efforts be fulfilled within four business days after actual receipt of the request due to the significant difficulty or the extensiveness of the request, a written explanation, including the earliest practicable date for fulfilling the request, an estimate of the expected cost of any copies, and an opportunity for the requester to modify or prioritize the items within the request.

Upon receipt of the Clerk's response, you then have ten business days to review the estimated costs and decide how you would like to proceed. For example, you may ask the Clerk to proceed with your request, you may narrow or simplify the request or withdraw it. If you do not respond to the Clerk's estimate within the ten business days, she has no legal obligation to fulfill your request. Also, keep in mind that under § 84-712(3)(f), public officials may request a deposit prior to fulfilling the request when the estimate to produce copies of records exceeds \$50. Further, public officials have no legal obligation to provide public records in the absence of a written request. Finally, we will note that you already have online access to the meetings free of charge at <https://www.facebook.com/salinecountyne/>.

May 23 Complaint

You state in this complaint that during its meeting held on May 23, 2023, the Board, with the advice of this office, “voted to limit the time a constituents has during citizens form [sic].” Previously, individuals could speak for five minutes. You further state that you “feel the BOC does not want any citizen to question the elected officials.” You also allege that the Board did not follow its agenda and moved up the discussion on limiting public comment to the beginning of the meeting.

The Act contains several provisions which deal with the public’s right to speak at open meetings of public bodies. In particular, Neb. Rev. Stat. § 84-1412(1) and (2) provide:

(1) Subject to the Open Meetings Act, the public has the right to attend and the right to speak at meetings of public bodies

(2) It shall not be a violation of subsection (1) of this section for any public body to make and enforce reasonable rules and regulations regarding the conduct of persons attending, [or] speaking at . . . its meetings A body may not be required to allow citizens to speak at each meeting, but it may not forbid public participation at all meetings.

As you can see, the Act authorizes public bodies to enact rules to govern how people speak at public meetings. In our opinion, there is nothing unreasonable in limiting public comment to three minutes. Thus, the Board’s actions in this respect were appropriate under the Act.


Further, public bodies in Nebraska generally operate as a form of representative democracy. See *Distinctive Printing and Packaging Company v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989); *State ex rel. Strange v. School District of Nebraska City*, 150 Neb. 109, 33 N.W.2d 358 (1948). That is, Nebraska citizens elect individuals to represent them on various boards, commissions, etc., rather than having all who are present at a particular meeting of a public body act as members of that body. Therefore, when members of the public attend meetings of public bodies in Nebraska, they most often attend as observers, not members of the body itself, and they have no right, apart from periods set aside for public comment, to engage in the body’s debate, to question members of the body, to comment on particular decisions, or to vote on the issues at hand. Those latter rights go to the members of the public body, who ran for and were elected to office. While any particular public body may certainly choose to allow citizens to participate in its meetings, citizens attending a meeting of a particular public body are not members of that body.

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Finally, we have reviewed the agenda for the May 23 meeting posted at <https://meeting.sparqdata.com/Public/Agenda/507?meeting=580586>. You are correct that the item "Discuss/Approve Resolution #2023-28 – Open Meetings Act – Establish a rule of three (3) minutes per person attending to speak" was listed under "10:45." Although public bodies have some discretion with respect to the order in which items are discussed during public meetings, that discretion becomes limited when the public body ascribes a specific time for agenda items. While we have not independently confirmed whether this in fact occurred, we will suggest to the Board that, in the future, if it chooses to assign times to agenda items, then it should avoid moving any item ahead of its prescribed time stated in the agenda. In this way, individuals who may be interested in a certain agenda item are ensured the ability to see and hear the Board's discussion.

Sincerely,

MIKE HILGERS
Attorney General



Leslie S. Donley
Assistant Attorney General

C: Anita Bartels (via email only)
David Solheim (via email only)

49-3225-30