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May 28, 2024

Via email: Monalisa.mcgee@usc.salvationarmy.org
Dr. Monalisa McGee-Baratta
Chairperson
Nebraska Health Information Technology Board
PO Box 27842
Omaha, NE 68127

RE: *Open Meetings Matter Regarding the Nebraska Health Information
Technology Board*
Our File No. 20241049

Dear Dr. McGee-Baratta:

We understand that you serve as the chairperson for the Nebraska Health Information Technology Board ("Board"). This letter is in response to a complaint we received from Board member Philip Vuchetich on March 7, 2024. Mr. Vuchetich has alleged violations of the Nebraska Open Meetings Act ("Act"), Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2014, Cum. Supp. 2022)¹, by the Board in connection with several meetings, including the virtual meeting held by the Board on March 7, 2024. Mr. Vuchetich indicates in his complaint that he raised these concerns with Board management, including at the March 7 meeting, but his concerns have not been resolved. We have reviewed Mr. Vuchetich's complaint and the attached documents in detail, and our findings and conclusions are set forth below.

¹ During the pendency of this matter, the Legislature amended sections of the Act as reflected in 2024 Neb. Laws. LB 43 and LB 287. These bills were approved by the Governor after the March 7, 2024, meeting and our receipt of the complaint in this matter. As such, the amendments do not impact our conclusions regarding past meetings. However, these amendments will become effective on July 19, 2024, and the Board will thereafter be required to comply with the amended provisions of the Act.

RELEVANT FACTS AND CLAIMS

Our understanding of the facts in this matter stems from the complaint and attached documents submitted to our office. The complaint raises concerns regarding the Board's manner of conducting meetings and, specifically, the Board's virtual meeting on March 7, 2024. In particular, the complaint made the following claims:

1. Dating back to at least October 2022, the Board has not made all reproducible written material to be discussed at the Board's meetings available to Board members and/or members of the public in either paper or electronic form.
2. On March 7, 2024, the Board held a virtual meeting that had been previously scheduled to be held in-person. Our understanding is that this change was made approximately three hours prior to the meeting and was due to the inability of some Board members to attend in-person.
3. In addition to holding the March 7 meeting virtually, the Board took formal action on certain items not set forth in the meeting agenda.

The materials received by our office alongside the complaint contain additional specific information supporting these claims, and we will address applicable facts known to us as relevant to our discussion below.

DISCUSSION

Availability of Materials Considered and Discussed at Public Meetings

Under the Act, the Board is required to

make available at the meeting . . . for examination and copying by members of the public, at least one copy of all reproducible written material to be discussed at an open meeting, either in paper or electronic form. Public bodies shall make available at least one current copy of the Open Meetings Act posted in the meeting room at a location accessible to members of the public. At the beginning of the meeting, the public shall be informed about the location of the posted information.

See Neb. Rev. Stat. § 84-1412(8).

Turning specifically to the March 7 meeting, the documents in our possession indicate that the Board considered documents and a slide deck relating to the "Social Care Data Standards Specification" and "Behavioral Health Medication Use in Nebraska" agenda items. These materials, and any others considered and discussed by the Board, were required to have been made available pursuant to the Act. We have independently reviewed the March 7 meeting agenda (posted at <https://cynchealth.org/resource->

center/nebraska-hit-board/) and the meeting notice published on Nebraska's public meeting calendar. Neither contains a link or reference to materials that may have been or were discussed at the March 7 meeting.

The information provided also indicates that the Board failed to make either paper or electronic copies of *all* materials discussed by the Board at previous meetings dating back to at least October 2022. As § 84-1412(8) makes clear, the Board must make available to the public at least one copy, physical or electronic, of "*all reproducible written material to be discussed*" at the Board's meetings, and the failure to do so constitutes a violation of the Act.

Virtual Meetings

We understand the Board held its March 7, 2024, meeting by virtual conferencing due to the inability for Board members to attend the meeting in person. The Board is a public body permitted to hold virtual public meetings in lieu of in-person meetings. See Neb. Rev. Stat. § 84-1411(2)(a). However, § 84-1411(2)(b) sets forth requirements that must be met for virtual meetings to comply with the Act. These requirements are as follows:

1. Reasonable advance publicized notice must be given as provided in § 84-1411(1)(a), including public access to a dial-in number or link to the virtual conference.
2. Reasonable arrangements must be made to accommodate the public's right to attend and participate at a physical site as provided in Neb. Rev. Stat. § 84-1412, including reasonable seating, in at least one designated site in a building open to the public and identified in the notice. At least one member of the Board, or his or her designee, must be present at each physical site for the meeting.
3. A recording of the hearing must be made by an audio or video recording device.
4. A reasonable opportunity for public input, such as public comment or questions, must be provided to at least the same extent as would be provided if virtual conferencing was not used.
5. At least one copy of all documents to be considered at the meeting must be available at any physical site open to the public where individuals may attend the virtual meeting. Links to electronic copies of the agenda, all documents being considered at the meeting, and the current version of the Act must also be provided.

In addition to the foregoing requirements, § 84-1411(2)(b)(iv) provides that a public body such as the Board may not hold more than one-half of its meetings by virtual conferencing in a calendar year.

The information provided to us indicates that the Board failed to meet at least one of these requirements for its March 7 meeting. Particularly, we observe the following:

1. It appears that the Board provided notice to its members that the March 7 meeting would be held by virtual conferencing approximately three hours before the meeting's scheduled start. Further, email correspondence indicates the notice posted to Nebraska's public meeting calendar was altered to reflect this change within two hours before the meeting's start time. Neither timeframe can constitute "reasonable advance publicized notice" as required by § 84-1411(2)(b)(i), and no exception to this requirement would apply to the March 7 meeting based on the available information.
2. The meeting notice posted to Nebraska's public meeting calendar and the meeting agenda do not indicate that the Board set up a physical site for public participation as required by § 84-1411(2)(b)(ii). It is consequently apparent that neither a Board member nor his or her designee was present at any such location.
3. It is unclear whether a recording of the March 7 meeting was made by either audio or video means.
4. As discussed previously concerning the availability of paper or electronic copies of materials discussed by the Board, it does not appear that the Board provided paper copies of such materials at any physical meeting site or otherwise provided public access to electronic copies as required by § 84-1411(2)(b)(iii).

Any one of these deficiencies would constitute a violation of the Act that renders any formal action taken by the Board at the March 7 meeting void or voidable. See Neb. Rev. Stat. § 1414(1).

Agenda Descriptiveness and Actions Taken

In addition to the Board's obligation to publish notice for all public meetings, it must also maintain an agenda concerning the matters to be considered at a public meeting known at the time notice is published. With respect to the agenda itself, "[a]genda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting." See § 84-1411(1)(e). Further, as generally applicable to the Board, "the agenda shall not be altered later than . . . twenty-four hours before the scheduled commencement of the meeting" except for items of an emergency nature. See *id.*

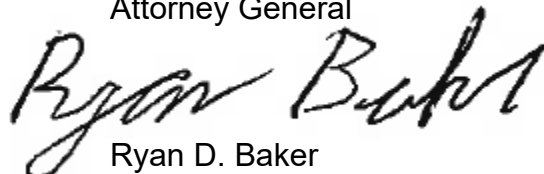
We focus primarily on the agenda item listed as "General Updates." The information provided to our office indicates that the Board voted on leadership matters at the March 7 meeting. Specifically, a vote appears to have been called to extend the terms of the Board's chair and vice-chair. There was no indication in the agenda that any such vote would take place, and the "General Updates" agenda item cannot be construed to provide sufficient notice to the public that the Board would vote on leadership matters or otherwise consider any other matter not specifically set forth in the agenda. The Board is required under the Act to sufficiently apprise both its members and the public of the subjects to be discussed and actions to be considered and taken at any of its meetings.

CONCLUSION

Based on the foregoing, we conclude the Board has not complied with its obligations under the Act. While our office does not contemplate further action on this matter, we will advise the Board, via this letter, that strict compliance with the Act is *mandatory and imperative* under Nebraska law. This does not solely relate to the matters expressly discussed in this letter, but to all aspects of the Act with which the Board must fully comply.

Sincerely,

MIKE HILGERS
Attorney General

A handwritten signature in black ink, appearing to read "Ryan Baker", written over the printed name of Ryan D. Baker.

Ryan D. Baker
Assistant Attorney General

cc: Philip Vuchetich
Meghan Chaffee
Catherine Kopti