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July 3, 2024

Via email: [REDACTED]
Josh Henningsen

RE: *Open Meetings Matter Regarding the Papio-Missouri River NRD*
Our File No. 20241054

Dear Mr. Henningsen:

This disposition letter is in response to your complaint received by our office on March 13, 2024, in which you allege potential violations of the Open Meetings Act (“Act”), Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2014, Cum. Supp. 2022)¹, by the Papio-Missouri River Natural Resources District (“P-MRNRD”) and, more specifically, its Board of Directors (“Board”). These alleged violations pertain to Board members’ attendance at the 2024 Nebraska Association of Resources Districts (“NARD”) Legislative Conference (“Conference”) and corresponding discussions among the attending Board members. As is our normal practice with complaints alleging violations of the Act, we contacted the public body involved and requested a response. In this case, we forwarded your complaint to Board chairperson Kevyn Sopinski. On April 10, 2024, we received a response from Brent A. Meyer, who serves as counsel for the P-MRNRD in this matter. We have now had an opportunity to consider your complaint and the P-MRNRD’s response in detail. Our conclusions and determinations regarding further action in this matter 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 events alleged 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 P-MRNRD and its Board will thereafter be required to comply with the amended provisions of the Act.

FACTS

Our understanding of the facts in this matter is based on your complaint, the documents attached thereto, and the P-MRNRD's response through Mr. Meyer.

You are a member of the Board, representing Subdistrict 7. As a preliminary matter, you allege the P-MRNRD held a regular meeting on January 11, 2024, during which the Board "was briefed by its lobbyist on the legislative session and 'Bills of Interest'" and further briefed on the Conference. Per your complaint, the Board did not take action or otherwise formulate policy during this meeting regarding these "Bills of Interest" or the Conference.

The Conference was held from January 22 through January 24, 2024. This letter primarily focuses on the Conference session labeled "Caucus" scheduled for January 23, 2024, at 1:30 P.M. as set forth in the agenda attached to your complaint. While the agenda provided no additional information or description of the Caucus session, the Caucus session came between two other sessions: the "Framing Legislative Issues and Discussion of Proposed Legislation of Interest" session at 10:00 A.M. and the "Action on Proposed Legislation" session at 3:00 P.M. These three sessions, considered as a whole, are the primary guides for our discussion of the allegations raised in your complaint.

You state that "[m]ost board members from NRDs across the state were present at" the "Framing Legislative Issues and Discussion of Proposed Legislation of Interest" session. The NARD provided "a list of bills" during this session alongside a "recommended position from both NRD Managers and the NARD Legislative Committee." You further believed that it was apparent the recommended positions were voted on in the NRD Managers Meeting and NARD Legislative Committee Meeting held on January 22 and that the P-MRNRD General Manager had participated in such votes. We note that the P-MRNRD's response does not dispute these factual claims.

The Conference thereafter transitioned to the Caucus session, during which individual NRDs separately convened "to discuss the proposed legislative action and direct their delegates on how to proceed" at the "Action on Proposed Legislation" session.² You claim that "at least 9 members" of the Board met during the Caucus session "to discuss the P[-]MRNRD's positions on the proposed legislative action and directed the delegate on how to proceed"³ The P-MRNRD's response states that "the sole

² The Board selected Director Rich Tesar as the NARD delegate and Director Tim Fowler as the alternate during its July 13, 2023, meeting.

³ We briefly note you believe "many of the other NRD Boards also met at this time for similar discussions and actions" and that this "same practice had been followed at [the] NARD Legislative Conference for several years." These allegations are beyond the scope of this letter, and this letter will not address allegations raised against entities other than the P-MRNRD in connection with the Conference.

purpose of the Caucus was . . . to discuss introduced state legislation and direct the P-MRNRD's NARD Delegate on how to present the P-MRNRD's considerations to the NARD Board and the NARD's lobbying consultant during the legislative session." There is no dispute that there was no public notice provided for this Caucus or minutes kept of these discussions.

Your complaint does not specifically discuss the purpose of the Action on Proposed Legislation session or what actions were taken during that session. It appears from our review that this session involved the voting by NARD delegates to determine the NARD's positions on specific proposed legislation and policy during the upcoming legislative session.

As set forth in your complaint, you have brought this matter to our attention due to your belief that the Caucus constituted a public meeting as contemplated under the Act and that the Board members present at the Caucus violated the Act's requirements.

DISCUSSION

Section 84-1408 of the Act provides as follows:

It is hereby declared to be the policy of this state that the formation of public policy is public business and may not be conducted in secret.

Every meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies, except as otherwise provided by the Constitution of Nebraska, federal statutes, and the Open Meetings Act.

The Act reflects a "statutory commitment to openness in government." See *Wasikowski v. Nebraska Quality Jobs Bd.*, 264 Neb. 403, 418,648 N.W.2d 756, 768 (2002). Moreover, the intent of the Act is to "ensure that the formation of public policy is public business [and] not conducted in secret." See *Schauer v. Grooms*, 280 Neb. 426, 442, 786 N.W.2d 909, 923 (2010). The Act imposes certain requirements on public bodies when holding meetings, such as the publication of reasonable advance notice for the meeting, maintenance of an up-to-date agenda, and keeping of minutes for all meetings. See *generally* §§ 84-1410 through 84-1413.

The primary question before us is whether the Caucus session constituted a meeting requiring the present Board members to comply with the Act. Over time, this office has consistently taken the position that two things must occur for a public body to hold a "meeting" subject to the requirements of the Act. First, a quorum of a public body must be present. Second, the public body must engage in at least one of the activities set out in the definition of "meeting" in § 84-1409(2). See, e.g., Disposition Letter in *File No. 13-M-134; Scotts Bluff County Board of Commissioners; Mary Avery, Auditor's Office,*

Complainant (June 20, 2014). In our view, no “meeting” of a public body can occur in the absence of these two requirements.

Concerning the first requirement that a quorum be present for any “meeting,” we note that the total number of Board directors for the P-MRNRD is not specifically provided by statute other than those options set forth in Neb. Rev. Stat. § 2-3213 (2022). It appears, however, that the Board is comprised of eleven directors based on the P-MRNRD’s website. As discussed above, your complaint indicated that “at least 9 members” of the Board were present at the Caucus session, and P-MRNRD’s response did not dispute this claim. Therefore, under the known facts that nine Board directors were together during the Caucus session, a quorum of the Board was present.

Turning to the second requirement, § 84-1409(2) defines a “meeting” to include “all regular, special, or called meetings, formal or informal, of any public body for the purposes of briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body.” Thus, the disposition of this matter is determined by the nature of the Caucus session attended by the nine Board directors. We observe that, as relevant to this matter, Black’s Law Dictionary defines “caucus” as “a meeting of a group . . . within a deliberative assembly[] of people aligned by party or interest to formulate policy or strategy.” *Caucus*, BLACK’S LAW DICTIONARY (10th ed. 2019).

P-MRNRD’s response to the complaint draws upon the Nebraska Supreme Court’s decision in *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010) [*“Schauer”*], and its reliance on *Board of Com’rs v. Costilla Conservancy*, 88 P.3d 1188 (Colo. 2004) [*“Costilla Conservancy”*]. As part of our discussion, we will briefly summarize the relevant facts and conclusions in these cases.

Schauer concerned the attendance of three out of five members of the city council for the City of Ord, Nebraska, and its mayor at “a dinner and a tour of an ethanol facility” hosted by the Valley County Economic Development Board in connection with the City of Ord’s proposed annexation of neighboring land. *Id.* at 431, 786 N.W.2d at 916. The *Schauer* plaintiffs alleged that the dinner and tour constituted a public meeting under the Act and that the Ord city council failed to properly post public notice as required. *Id.* at 444, 786 N.W.2d at 924. The court observed that “there was never a group of more than two city council members” during the tour of the ethanol facility and concluded that the tour therefore could not constitute a public meeting. *Id.* at 446, 786 N.W.2d at 925. Concerning the dinner, the court found that the plaintiffs “were unable to present any evidence that the dinner was ‘for the purposes of briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body,’” as the mayor and attending city council members “testified that at the dinner, they did not discuss or receive information associated with the redevelopment plan and contract and that they did not hold any hearing, make policy, or take any formal action on behalf of the city council.” *Id.* at 447, 786 N.W.2d at 926. Consequently, the court determined that although

a quorum of a public body may be present at a gathering, there is “no meeting of a public body when . . . there is no interaction as to the policy in question.” *Id.*

In arriving at its decision, the Nebraska Supreme Court relied on the Colorado Supreme Court’s holding in *Costilla Conservancy*. That case concerned the attendance of two Costilla County commissioners at a meeting held by the Colorado Department of Public Health and Environment, the Department of Natural Resources, and the operator of a gold mine within Costilla County, Colorado, at a local restaurant. *Id.* at 1190. The commissioners did not provide public notice for this meeting, and the meeting was not open to the public. *Id.* A commissioner testified that this was because it was not a county meeting and the Costilla County Board of Commissioners “did not have any pending business related to the mine” at the time of the meeting. *Id.* The court held that there was no evidence that subsequent county actions relating to the mine operator “were linked in any way” to the restaurant meeting. *Id.* at 1195. As the Nebraska Supreme Court noted in *Schauer*, the Costilla County Commission members “testified that they did nothing other than listen passively to a highly technical presentation, eat dinner, and leave.” See *Schauer*, 280 Neb. at 448, 786 N.W.2d at 927 (summarizing findings of Colorado Supreme Court). Thus, there was no “connection between the [restaurant] meeting and the policy-making function of the Board” that would require the Board of Commissioners to provide public notice of the meeting. See *Costilla Conservancy*, 88 P.3d at 1195-96.

The P-MRNRD asserts that “[t]he issues discussed during the Caucus—introduced legislation that may affect NRDs throughout the state—and the delegate’s recommendations to the NARD Board are not issues over which the P-MRNRD has supervision, control, jurisdiction, or advisory power” since those matters reside with the Nebraska Unicameral. It also contends that “[t]he polling of the P-MRNRD Directors and eventual vote of the NARD Delegate are non-binding recommendations to the NARD Board and its lobbying consultant,” and the Caucus session was therefore not subject to the Act pursuant to § 84-1410(5).

The facts in this matter indicate the following series of events:

- (1) The NARD first briefed the gathered NRD representatives, including the P-MRNRD delegate and/or the Board directors present at the Conference, on certain legislative items and recommended positions proposed by NRD managers and the NARD Legislative Committee.
- (2) During the Caucus session, at least nine Board directors met for additional briefing and/or discussion regarding the P-MRNRD delegate’s votes on the NARD’s collective positions on those legislative items.
- (3) The NARD took votes from each NRD delegate on whether to collectively adopt the recommended positions on legislation introduced for the legislative session.

When considering this sequence as a whole, the two cases discussed above and the present matter differ significantly from one another. Namely, the facts demonstrate there are substantial connections between the policymaking function of the Board in this matter and the Conference Caucus that were not present in either *Schauer* or *Costilla Conservancy*. We observe that the Act “does not require policymakers to remain ignorant of the issues they must decide until the moment the public is invited to comment on a proposed policy.” See *Schauer*, 280 Neb. at 445, 786 N.W.2d at 925. However, the Caucus session was not simply a gathering where Board directors merely “listen[ed] passively” to information presented to them, as was the case in *Schauer*. As we noted in the Disposition Letter in *File No. 13-M-134; Scotts Bluff County Board of Commissioners; Mary Avery, Auditor of Public Accounts, Complainant* (June 20, 2014), active participation at a meeting, in which a quorum of county commissioners discussed county business rather than merely listening as originally intended, resulted in our finding a violation of the Act. While there are no minutes or recordings of the Caucus session, it is plain that the Board directors actively discussed the legislative positions recommended by the NARD and the P-MRNRD’s stance on those recommendations.

Moreover, the characterization that this matter solely concerns the impact of the P-MRNRD delegate’s votes on the NARD’s recommended positions, over which the P-MRNRD does not have control, misses the mark. It is true that the Act “does not apply to chance meetings or to attendance at or travel to conventions or workshops of members of a public body” where “there is no vote or other action taken regarding any matter over which the public body has supervision, control, jurisdiction, or advisory power.” See § 84-1410(5). However, the Caucus session involved more than the Board’s input on its delegate’s participation and voting during the “Action on Proposed Legislation” session. These discussions directly implicate the P-MRNRD’s present and prospective policies on legislation proposed during the 2024 legislative session. We disagree that the Board’s contemplation and construction of its own policies fall outside of matters over which the P-MRNRD “has supervision, control, jurisdiction, or advisory power.”

In light of the foregoing, the Board directors should have treated their participation at the Caucus session as a meeting of the Board contemplated under the Act. It was therefore required that the Board comply with the Act’s requirements relating to proper notice, agenda, minutes, etc. The Board failed to do so. Consequently, we believe the Board violated the Act when nine directors met during the Conference’s Caucus session on January 23, 2024.

FURTHER ACTION BY THE DEPARTMENT OF JUSTICE

Since we have determined that the Board violated the Act with respect to the meeting during the Caucus session on January 23, 2024, we must also determine what further enforcement action by this office, if any, is appropriate under the circumstances. We believe that a civil lawsuit to void is unnecessary because there is no evidence that the nine Board directors took formal action on matters discussed during the meeting to

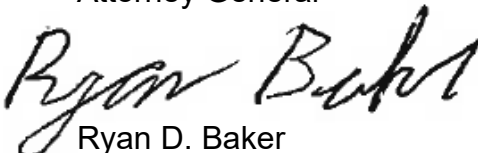
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formulate Board policy beyond directing the delegate how to vote. We also do not believe that criminal prosecution of Board directors is appropriate in this situation since the Board was presumably acting on advice of its legal counsel through this event. Also pertinent to our determination is that prior Board meetings addressed and discussed the Conference in connection with the Board's votes for delegates to the Conference, although we note that such discussions and votes would likely not have apprised the public and other Board directors that the Caucus session would involve an individual gathering of Board directors to discuss the P-MRNRD's positions on certain legislation. Instead, we will caution the Board, through a copy of this letter to Mr. Meyer, that they must not conduct any activities which constitute a meeting in those instances where a quorum is assembled except in a meeting satisfying all requirements of the Act.

Since we have determined that no further action by this office is appropriate at this time, we are closing this file. If you disagree with our analysis set forth above, you may wish to discuss this matter with your private attorney to determine what additional remedies, if any, are available to you under the Act.

Sincerely,

MIKE HILGERS
Attorney General



Ryan D. Baker
Assistant Attorney General

cc: Brent A. Meyer

55-039-31