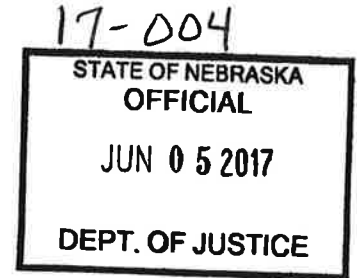




STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

DOUGLAS J. PETERSON
ATTORNEY GENERAL



SUBJECT: Application of the Open Meetings Act in Certain Circumstances

REQUESTED BY: Tim Schram, Chairman
Nebraska Public Service Commission

WRITTEN BY: Douglas J. Peterson, Attorney General
Leslie S. Donley, Assistant Attorney General

You have requested an opinion from this office as to whether the Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2014, Cum. Supp. 2016) ("Act"), requires the Public Service Commission ("Commission") to discuss certain issues in a public meeting "in order to have a quorum of Commissioners present for those discussions." You indicate that the Commission would like to discuss these issues collectively, but needs guidance as to whether the Act requires those discussions to be open to the public. Your opinion request letter includes a list of five issues that you wish us to consider, as follows:

- (1) Discussion of internal management of the agency concerning job responsibilities and duties of staff;
- (2) Informal budget discussions with various departments and preparation of the proposed budget;¹

¹ With respect to this item, you indicate that the Commission formally approves the final budget for submission to the Governor's office and the Legislature.

- (3) Internal control policies and procedures including but not limited to, processing and managing operations and accounting functions;
- (4) Standard operating procedures in various departments; and
- (5) Security procedures.

You have asked us to give our opinion on each issue presented, if possible. Our responses to your inquiries are set forth below.

ANALYSIS

Neb. Rev. Stat. § 84-1408 (2014) of the Open Meetings Act provides:

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 is a statutory commitment to openness in government. *Wasikowski v. Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W.2d 756 (2002); *Steenblock v. Elkhorn Township Board*, 245 Neb. 722, 515 N.W.2d 128 (1994); *Grein v. Board of Education of the School District of Fremont*, 216 Neb. 158, 343 N.W.2d 718 (1984). The Act applies to all public bodies listed in Neb. Rev. Stat. § 84-1409(1)(a), including governing bodies of the agencies of the executive branch of the State of Nebraska. Thus, the Commission is subject to the Act. Neb. Rev. Stat. § 84-1409(1)(a)(ii) (2014); *Johnson v. Nebraska Environmental Control Council*, 2 Neb. App. 263, 509 N.W.2d 21 (Neb. Ct. App. 1993). Generally, no meeting can occur under the Act without a quorum of the public body present.² Under Neb. Rev. Stat. § 84-1409(1)(b)(i), a public body subject to the Act does not include a subcommittee of the public body except when a quorum of the public body is present at the subcommittee meeting or “such subcommittees are holding hearings, making policy, or taking formal action on behalf of their parent body” Public bodies are not subject to the Act when “conducting judicial proceedings.”³ Neb. Rev. Stat. § 84-1409(1)(b)(ii).

² *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010); *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007) (Informational sessions of less than a quorum of a public body’s members do not constitute public meetings under the Open Meetings Act). See also Government, Military & Veterans Affairs Committee Hearing on LB 43, 88th Nebraska Legislature, First Session (1983) at 19; 1975-76 Rep. Att’y Gen. 150 (Opinion No. 116, dated August 29, 1975).

³ *McQuinn v. Douglas County School District No. 66*, 259 Neb. 720, 731, 612 N.W.2d 198, 206 (2000) (“A board exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner. . . . ‘Adjudicative facts’ are those ascertained from proof adduced at an evidentiary

The Act defines “meeting” as “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[.]*” Neb. Rev. Stat. § 84-1409(2) (2014) (emphasis added). The secret formation of public policy forbidden by the Open Meetings Act is the formation of public policy as a group. *Schauer* at 447, 786 N.W.2d at 926; *City of Elkhorn* at 881, 725 N.W.2d at 806. Even though there is a quorum of members present, there can be no meeting under the Act if there is no interaction or discussion among members of the body regarding policymaking for the public body. *Schauer* at 447, 786 N.W.2d at 926.

In our enforcement capacity over the Act, this office has indicated on multiple occasions what constitutes a “meeting” subject to the Open Meetings Act. In this regard, we have stated that two things must be present for a meeting to occur under 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 included in the definition of “meeting” set out in § 84-1409(2). In the absence of either element, we have concluded that no “meeting” of a public body has occurred.⁴

Your question to this office suggests that there may be instances when it would be appropriate for all five Commission members to discuss Commission business outside of the requirements of the Act. However, the only time such an arrangement would be permissible is on those occasions where the Commission is acting in a quasi-judicial manner. In that context, we have considered the list of issues the Commission wishes to discuss, i.e., staff duties and responsibilities, department⁵ budgets, internal control policies and procedures relating to operations and accounting functions, standard operating procedures for Commission departments, and security procedures. All of these items appear to pertain to the internal operations and management of the Commission, and would not likely require the Commission to hold hearings and decide disputes of adjudicative facts. Since it appears that the Commission will not be conducting judicial proceedings with respect to the listed topics, no exemption from the requirements of the

hearing which relate to a specific party.”); *Stoneman v. United Nebraska Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998) (When an administrative body acts in a quasi-judicial manner, due process requires notice and an opportunity for a full and fair hearing at some stage of the agency proceedings); *Kaplan v. McClurg*, 271 Neb. 101, 106, 710 N.W.2d 96, 100 (2006) (“Generally, the exercise of discretion to grant or deny a license, permit, or other type of application is a quasi-judicial function.”).

⁴ See, e.g., the Attorney General’s disposition letter issued in response to File No. 13-M-134; *Scotts Bluff County Board of Commissioners; Mary Avery, Auditor of Public Accounts, Complainant* (June 20, 2014).

⁵ We understand that the Commission is comprised of several departments including, but not limited to, Natural Gas and Pipeline, Nebraska Telecommunications, Administration, Transportation, Next Generation 911, Housing and Recreational Vehicles, and Grain Warehouse and Dealers.

Act exists. And, as noted above, your question on its face contains the two elements which this office has said constitute a meeting for the purposes of the Open Meetings Act—i.e., a quorum and the discussion of public business. Consequently, we believe the Commission is required to discuss these particular matters in an open meeting which complies with all of the requirements of the Open Meetings Act.

However, our conclusion to your question does not foreclose the possibility that one or all of the issues may be discussed in a closed session so long as all statutory requirements are met. Under Neb. Rev. Stat. § 84-1410, public bodies may hold a closed session when approved by “a majority of its voting members if a closed session is *clearly necessary* for the protection of the public interest or for the prevention of needless injury to the reputation of an individual and if such individual has not requested a public meeting.” (Emphasis added.) The statute contains six examples of reasons to go into closed session, four of which are set out below:

- (a) Strategy sessions with respect to collective bargaining, real estate purchases, pending litigation, or litigation which is imminent as evidenced by communication of a claim or threat of litigation to or by the public body;
- (b) Discussion regarding deployment of security personnel or devices;
- (c) Investigative proceedings regarding allegations of criminal misconduct;
- (d) Evaluation of the job performance of a person when necessary to prevent needless injury to the reputation of a person and if such person has not requested a public meeting[.]⁶

This list is not exclusive, and the statute specifically provides that there may be other reasons to close a public meeting.⁷ Public bodies must also comply with several technical requirements set out in the Act pertaining to closed sessions, e.g., identifying the subject matter to be discussed and the statutory reason to close the meeting in the motion to close.⁸ Section 84-1410(4) further provides, in part, that “[n]o closed session, informal

⁶ Section 84-1410(1)(e) and (f) relate to the Community Trust created under Neb. Rev. Stat. 81-1801.02 (2014) and public hospitals, respectively.

⁷ Op. Att’y Gen. No. 65 (April 18, 1985); Government, Military & Veterans Affairs Committee Hearing on LB 325, 84th Nebraska Legislature, First Session (1975) at 3.

⁸ Neb. Rev. Stat. § 84-1410(2) (2014) provides, in pertinent part:

The vote to hold a closed session shall be taken in open session. The entire motion, the vote of each member on the question of holding a closed session, and the time when the closed session commenced and concluded shall be recorded in the minutes. If the motion to close passes, then the presiding officer immediately prior to the closed session shall

meeting, chance meeting, social gathering, email, fax, or other electronic communication shall be used for the purpose of circumventing the requirements of the [A]ct.”

The landmark case in Nebraska regarding the propriety of closed sessions is *Grein v. Board of Education*, 216 Neb. 158, 343 N.W.2d 718 (1984). In *Grein*, the Nebraska Supreme Court considered the propriety of a closed session in an action to void a contract between the school board and a contractor submitting the second-lowest bid on a school boiler project. Due to an apparent error in bidding, the low bidder on the project sought support from the project’s architect to possibly increase the amount of the bid. In a subsequently held meeting of the school board, at which the low bidder did not attend, the architect recommended that the school board accept the next lowest bid, and requested a closed session to discuss the reasons for his decision. A closed session was then convened based on an opinion expressed by the school attorney “that this would be appropriate both for the purpose of protecting the persons involved and in the interest of the school district, generally, that this be discussed privately.” *Id.* at 161, 343 N.W.2d at 721. Following the closed session, the school board immediately voted, without further discussion, to accept the second-lowest bid. *Id.* at 162, 343 N.W.2d at 721.

The court began its analysis regarding the propriety of the closed session by holding that the

[p]ublic meetings laws are broadly interpreted and liberally construed to obtain the objective of openness in favor of the public. . . . Provisions permitting closed sessions and exemption from openness of a meeting must be narrowly and strictly construed.

Id. at 164-165, 343 N.W.2d at 723. The court found that the school board was not entitled to go into closed session based on “the protection of the public interest,” stating:

The “public interest” mentioned in § 84-1410 is that shared by citizens in general and by the community at large concerning pecuniary or legal rights and liabilities. . . .

It is axiomatic that concerns of citizens and taxpayers of a school district include the fiscal policy and cost of operating the district. The district's expenses will ultimately be reflected in taxes borne by the taxpayers. Here, there was a decision to be made: Should the low bid be accepted? Any answer to the question would have an impact on the pocketbooks and

restate on the record the limitation of the subject matter of the closed session. The public body holding such a closed session shall restrict its consideration of matters during the closed portions to only those purposes set forth in the motion to close as the reason for the closed session. The meeting shall be reconvened in open session before any formal action may be taken. . . .”

wallets of the public. The question and answer did indeed involve the public interest, but protection of that public interest in this case demanded deliberations in a public meeting rather than resolution in the recesses of a closed session.

Id. at 165, 343 N.W.2d at 723 (internal citations omitted).

The court also found that the school board was not entitled to convene a closed session to prevent needless injury to an individual's reputation, initially questioning whose reputation—the architect's or the school board's—was at stake. The court determined that there were no allegations critical of the school board or its representatives, and that the low bid appeared to be nothing more than an honest but erroneous computation. However, by convening a closed session, the architect was allowed to discuss the "honest mistake" and "expressed some rather suspect, speculative conclusions." *Id.* at 166, 343 N.W.2d at 723. The court determined that whatever "slight discomfort" experienced by a low bidder in the arena of public bidding "is far outweighed by the policy favoring openness in the meetings of a public body." *Id.* at 166, 343 N.W.2d at 724. The court further rejected an attempt by the school board to assert "good faith motivation" as a defense to cure its noncompliance with § 84-1410. *Id.* at 167, 343 N.W.2d at 724.

With these legal principles in mind, we will shift our analysis to determine whether the issues listed in your letter may be appropriate topics for a closed session. Since we have only been provided the topics the Commission wishes to discuss, our analysis will be limited in scope. Also, as this office has previously noted, a closed session of a public body is not appropriate merely because matters requiring a closed session might arise. Rather, a closed session is permitted only when such matters have arisen and must be dealt with by the public body.⁹

- (1) Discussion of internal management of the agency concerning job responsibilities and duties of staff.

This issue contemplates that there may be instances in the course of candid discussion where the job performance, skills or abilities of a particular employee or employees could be discussed, which might be injurious to their reputations. Thus, it may become necessary to close the meeting to avoid needless injury to the reputation of the individual(s) involved. However, if the Commission determines that a closed session is necessary, § 84-1410 requires that the individual who may be the subject of the closed session be given the opportunity to have the discussion held in open session.¹⁰

⁹ Op. Att'y Gen. No. 94035 (May 11, 1994); Op. Att'y Gen. No. 11 (January 20, 1983).

¹⁰ This requirement appears in § 84-1410 twice. See subsection (1) ("Any public body may hold a closed session . . . if a closed session is clearly necessary . . . for the prevention of needless injury to the reputation of an individual and if such individual has not requested a public meeting[.]"); and subsection (1)(d) ("Evaluation of the job performance of a person when necessary to prevent needless injury to the reputation of a person and if such person has not requested a public meeting[.]").

- (2) Informal budget discussions with various departments and preparation of the proposed budget.

Since discussions about the Commission's budget and preparation would not likely result in injury to an individual's reputation, the Commission would have to establish that a closed session is clearly necessary under these circumstances to protect the public interest. *Grein* instructs us that the "public interest" referenced in § 84-1410 relates to the "pecuniary or legal rights and liabilities" of the community and its citizens. While the *Grein* court agreed that the question as to whether the school board should accept the low bid involved the public interest, the answer to the question ultimately had a bearing on the taxpayers of the school district. Thus, the protection of the public interest demanded that the discussion regarding the low bid be held publicly. We draw a similar conclusion with respect to discussions relating to the finances of the Commission. Based on *Grein*, we believe a serious question exists as to whether a closed discussion to discuss budgets and budget preparation would be warranted.

- (3) Internal control policies and procedures including but not limited to, processing and managing operations and accounting functions.

As we stated in our response to Item Number 2, it is unlikely that a closed session to prevent needless injury to the reputation of any individual would arise under these circumstances. Therefore, the Commission would have to articulate, if challenged, that discussing internal control policies and procedures in a closed session was clearly necessary to protect the public interest. It appears to us that a closed session may be possible to the extent that holding such discussions publicly would disclose material weaknesses and vulnerabilities in the Commission's operations and could possibly expose the Commission to unnecessary risk and potential fraud. Consequently, a closed session for the protection of the public interest may be warranted under these circumstances.

- (4) Standard operating procedures in various departments.

Please refer to our response to Item Number 3.

- (5) Security procedures.

Section 84-1410(1)(b) expressly authorizes a public body to go into closed session to discuss "deployment of security personnel or devices[.]" Although Item Number 5 provides little context as to what the Commission wishes to discuss in this regard, there is a strong argument to be made for holding such discussions in a closed session. It seems imprudent, and potentially reckless, to disclose information regarding security procedures and measures undertaken by the Commission for the safety of Commission personnel and property to the general public. As such, a closed session to discuss this topic is likely appropriate.

Neb. Rev. Stat. § 84-1410(4) of the Act indicates, in pertinent part, that “[n]othing in this section shall be construed to require that any meeting be closed to the public.” Our Supreme Court has indicated that the guiding principle with respect to closed sessions of a public body is, “[i]f a public body is uncertain about the type of session to be conducted, open or closed, bear in mind the policy of openness promoted by the Public Meetings Laws and opt for a meeting in the presence of the public.” *Grein* at 168, 343 N.W.2d at 724. Thus, Commission members must be particularly circumspect as they determine, based on the circumstances presented, whether a closed session is *clearly necessary* in the context of the two statutory standards.

Finally, another option available to the Commission would be to establish two-member subcommittees to consider and discuss the issues raised in your request letter. As previously noted, subcommittees of public bodies are not subject to the Act, so long as a quorum of the parent body does not attend the subcommittee meetings, and the subcommittee is not holding hearings, making policy, or taking formal action on behalf of the parent body. A subcommittee established by the Commission could meet with Commission staff and discuss privately the issues affecting Commission operations and management. The subcommittee could then report to the full Commission its findings, deliberations and recommendations. Any recommendations would be subject to approval by the entire Commission. We believe that the use of subcommittees would allow Commission members to study and consider issues at a more comprehensive level than what could be achieved in the course of a public meeting, and do so without running afoul of the Open Meetings Act.¹¹

CONCLUSION

Based on the foregoing, we conclude that the Commission may not discuss the issues set out in its opinion request letter outside of a duly convened public meeting which satisfies all of the requirements of the Open Meetings Act, except when the Commission is conducting judicial proceedings. Under limited circumstances, as noted above, the

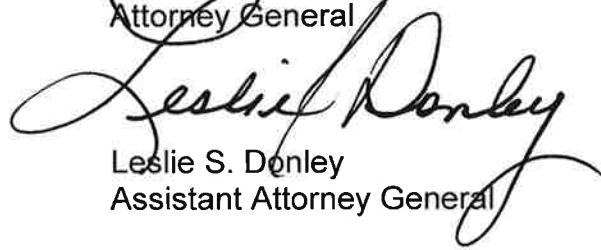
¹¹ It is our understanding that the University of Nebraska Board of Regents and the State Board of Education have adopted rules and policies regarding the establishment of committees to assist in the operations of the full boards. See Standing Rules of the Board of Regents of the University of Nebraska, § 1.3 Committees (December 3, 2015); State Board Policy B5, Board Committees (December 2, 2016).

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Commission may be justified in discussing some matters in closed session. Alternatively, the Commission has the authority under § 84-1409(1)(b) to establish subcommittees of less than a quorum to meet with appropriate Commission staff to discuss and consider the management and operational issues raised in your request letter.

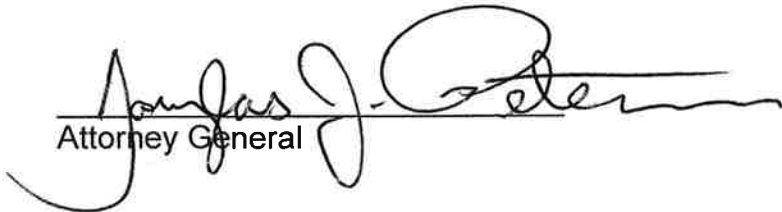
Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

Approved by:



Attorney General

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