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April 26, 2012

Ed Mayo, Mayor
City of Gering
1025 P Street
Gering, NE 69341

Re: *File No. 11-M-146; City of Gering City Council; Complainant Ed Mayo*

Dear Mr. Mayo:

This letter is in response to correspondence received by us through Scotts Bluff County Attorney Douglas Warner in which it has been requested that this office investigate alleged violations, reported by you, by the City of Gering City Council ("Council") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (Reissue 2008, Cum. Supp. 2010, 2011). In accordance with our normal procedures, we requested a response from the Council after we received the complaint, and we subsequently received a response from attorney Richard Douglas, on behalf of the Council. We have now had an opportunity to review your allegations and the Council's response in detail, and our conclusions are set out below.

FACTS

Our understanding of the facts in this case is based upon Mr. Warner's correspondence and the response from the Board, and its supporting documentation. On November 14, 2011, the Council went into closed session to discuss the authority of the Mayor over City Department heads, and complaints that had been lodged by city employees regarding the Mayor's directive for departments to complete city property inventories.

While Mr. Warner's communication was not specific in what complaints you had relayed to him regarding the Open Meeting Act, other than that they related to a closed session of the Council on November 14, we have identified the following issues related to that closed session:

- (1) The topic of meeting with the Mayor to discuss "personnel issues" and the authority of the Mayor over City Department heads was not on the agenda for the November 14, 2011 meeting;

- (2) The motion to enter into closed session to discuss the Mayor's authority was not proper; and
- (3) The topic discussed was not appropriate for a closed session and should have been addressed in an open forum.

ANALYSIS

Agenda

Neb. Rev. Stat. § 84-1411(1) (2010) provides the general agenda and notice requirements for purposes for the Open Meetings Act.

Each public body shall give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes. Such notice shall be transmitted to all members of the public body and to the public. Such notice shall contain an agenda of subjects known at the time of the publicized notice or a statement that the agenda, which shall be kept continually current, shall be readily available for public inspection at the principal office of the public body during normal business hours. Agenda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting. Except for items of an emergency nature, the agenda shall not be altered later than (a) twenty-four hours before the scheduled commencement of the meeting or (b) forty-eight hours before the scheduled commencement of a meeting of a city council or village board scheduled outside the corporate limits of the municipality. The public body shall have the right to modify the agenda to include items of an emergency nature only at such public meeting.

The purpose of these requirements is to give some notice of the matters to be considered at the meeting so that persons who are interested will know which matters are under consideration. *State ex rel. Newman v. Columbus Township Board*, 15 Neb. App. 656, 735 N.W.2d 399 (2007); *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979).

Any item to be discussed by a public body, whether during open or closed session, must be on the agenda for that meeting. The agenda for the November 14, 2011 meeting states that the Council would enter into "[c]losed session to discuss contract negotiations, threat of potential litigation, and protection of the public interest concerning the golf course restaurant." The agenda does not mention that the Council will discuss any topic related to the Mayor's authority.

The minutes for this meeting show that the Council originally made a motion to enter into closed session for the purpose as stated in the agenda. However,

Councilmember Escamilla then asked to go into closed session “for another purpose and reason.” After some discussion, the following occurred:

Councilmember McFarland then said that she would change her motion to reflect the need for closed session for the purpose of potential litigation concerning the golf course restaurant and to discuss Personnel. The Mayor repeated the closed session motion and its exceptions.

The Council then entered into closed session for more than an hour.

The agenda did not include an agenda item for discussion, either in open or closed session, regarding “Personnel,” or a topic related to the Mayor’s authority. The agenda only listed the need to discuss the golf course restaurant in closed session; anything beyond that was improper. All topics the Council will discuss must be on the agenda. For this reason, the Council violated the Open Meetings Act by discussing a matter in closed session that was not found on the agenda.

In reviewing the agenda and minutes from this meeting, we also were concerned by another matter. The agenda lists an item titled “Business not scheduled on the agenda.” It appears this is a time for Council members and the public alike to bring up topics for information or discussion that are not otherwise on the agenda. However, as each item the Council is briefed on, discusses, or takes action upon must be listed on the agenda, we must strongly encourage the Council, through a copy of this letter, to discontinue this agenda item as it is currently styled. See Neb. Rev. Stat. § 84-1409. If this is meant to be a public comment period, the Council may continue to allow public comment. In that case, we would also suggest changing the title of this section of the meeting to “Public Comment.” Any topics raised or discussed by members of the Council must be on the agenda, as a separate, sufficiently descriptive, agenda item.

Motion for Closed Session

The next issue we must address is the motion that was made to enter into closed session, as it relates to the topic given as “Personnel.” The Open Meetings Act states:

(1) Any public body may hold a closed session by the affirmative vote of 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. The subject matter and the reason necessitating the closed session shall be identified in the motion to close. Closed sessions may be held for, but shall not be limited to, such reasons as:

(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; or

(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.

Neb. Rev. Stat. § 84-1410 (2008).

While the Council stated “personnel” as the reason for its closed session on November 14, 2011, that is insufficient to meet the requirements of the Open Meetings Act. The Board is required to state both the subject matter and the reason for the closed session, and indicate why the closed session was clearly necessary for the protection of the public interest or the prevention of needless injury to the reputation of an individual. “Personnel” is not sufficiently descriptive as a subject matter, and the motion does not contain the required language as to why the closed session is necessary for the protection of the public interest or the reputation of an individual. The discussion indicated that Councilmember Escamilla stated that the closed session was “for protection of private and personal information,” which doesn’t clearly define the necessity of the closed session. In addition, this was not stated in the motion itself.

Therefore, the Council did not comply with the Open Meetings Act in its motion to enter into closed session, as it related to the issue of “Personnel.” The Council has conceded this point in its response to this office and admits that motion should have better defined the purpose of the closed session.

Propriety of the Closed Session

Finally, we will address the area that Mr. Warner addresses in his letter to you, the propriety of the topic discussed in closed session on November 14, 2011. The Council has indicated that they discussed an issue of governance of the City and the “inappropriate actions of the Mayor.”

The Council has described the closed session as discussion with the Mayor regarding “alleged overstepping of his authority, and also to protect the department heads who were caught in the middle between the mayor and the city council concerning governance and role of the city administration in fulfilling duties established by city ordinance.”

As discussed, to comply with the Open Meetings Act, a closed session must be for the protection of the public interest or to prevent needless injury to the reputation of an individual if such individual has not requested a public meeting. We fail to see how discussing issues of "governance" or the role of city administrators in the City of Gering in closed session would protect the public interest or the reputation of an individual. Should the Council wish to discuss the job performance of an individual, or items of a more sensitive nature relating to a specific person that would harm his or her reputation, and that person has not requested an open forum, the Council may enter into closed session. However, we are not of the opinion that the Council's closed session on November 14, 2011 relating to its reason of "Personnel" was appropriate.

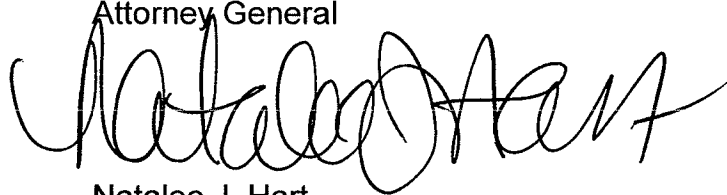
CONCLUSION

For the reasons stated above, we do believe that the Council failed to comply with the Open Meetings Act, on November 14, 2011. However, on December 12, 2011, the Council held a discussion in open session relating to "governance of city affairs, city ordinances, and city administrator and chain of command/Gering code of conduct, and . . . modification of the mayor ordinance to comply with state statutes." Therefore, the Council has cured its violation of the Open Meetings Act, and this situation does not require further inquiry or action by this office. *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979).

If you disagree with the analysis we have set out above, you may wish to contact your private attorney to determine what additional remedies, if any, are available to you under the Open Meetings Act.

Sincerely,

JON BRUNING
Attorney General

A handwritten signature in black ink, appearing to read "Natalee J. Hart". The signature is fluid and cursive, with the first name being the most prominent.

Natalee J. Hart
Assistant Attorney General

Cc: Richard Douglas
Doug Warner