

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

**JON BRUNING**  
ATTORNEY GENERAL

**NATALEE J. HART**  
ASSISTANT ATTORNEY GENERAL

September 27, 2011

Michael Pethoud  
Captain, Adams Rescue  
825 7<sup>th</sup> Street  
Adams, NE 68301

Re: *File No. 10-MR-128; Gage County EMS Advisory Board, Gage County Board of Supervisors; Michael Pethoud*

Dear Mr. Pethoud:

This letter is in response to your correspondence dated July 18, 2011, in which you requested that this office investigate certain alleged violations by the Gage County EMS Advisory Board ("EMS Advisory Board") and the Gage County Board of Supervisors ("County Board") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2008, Cum. Supp. 2010, 2011) and the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2010, 2011). In accordance with our normal procedures, we requested a response from the EMS Advisory Board and the County Board after we received your complaint. We initially were able to contact the Gage County Attorney, Roger Harris, and spoke regarding your complaints on August 5, 2011. In the course of that conversation, we requested certain documents from the County. We followed up on that request with Mr. Harris on August 11, 2011 and August 30, 2011, but Mr. Harris was uncooperative in providing the documents we sought. We subsequently contacted the City Clerk on September 13, 2011, who provided us with one of the Interlocal Agreements for Emergency Medical Services and the contract between the County Board and Dr. Donald Rice. We have now had an opportunity to review your allegations and the documents provided in detail, and our conclusions are set out below.

### **FACTS**

Our understanding of the facts in this case is based upon your correspondence, the Interlocal Agreement for Emergency Medical Services, the County Board's contract with Dr. Rice, and our August 5, 2011 phone conversation with the County Attorney.

Michael Pethoud  
September 27, 2011  
Page 2

Your Open Meetings Act concerns relate to the EMS Advisory Board which was formed by the County Board through the Interlocal Agreement for Emergency Medical Services ("Interlocal Agreement"). We received one representative example of the Interlocal Agreement, between the County Board and the Cortland Rural Fire Board, but understand several other Rural Fire Boards have also signed substantially similar Interlocal Agreements with the County Board. The only difference in the Interlocal Agreements is the amount of money provided by the County Board to the individual rural fire boards.

The Interlocal Agreement states:

The administrator of this agreement shall be the Gage County Emergency Medical Services Advisory Committee, to which both parties agree to provide a representative.

The Cortland Rural Fire Board shall appoint a representative to the Gage County Emergency Medical Service Advisory Committee and shall require their attendance at the meetings thereof.

The EMS Advisory Committee is comprised of members from each Rural Fire Board that has signed an Interlocal Agreement, and is led by Dr. Donald Rice, who is under contract with the County Board. It is our understanding that Adams Rescue has not signed an Interlocal Agreement with the County Board.

The County Attorney advised that the EMS Advisory Board advises, or reports to, the County Board. However, no members of the County Board are members of the EMS Advisory Committee.

On or about January 22, 2011, Adams Rescue Squad received a letter from Dr. Rice in which Adams Rescue was invited to attend the EMS Advisory Board meetings as a guest. However, Dr. Rice advised that Adams Rescue may not send you (Mr. Pethoud) as its representative to these meetings. Your Open Meetings Act complaint concerns the propriety of this restriction.

You also have made complaints regarding public records requested of the County Board. You provided a copy of a letter dated November 12, 2010 in which you requested the following from the County Board: (1) the salary of Dr. Rice, (2) the job duties of Dr. Rice, and (3) reports of ambulance response times for those rescue squads that had signed an Interlocal Agreement with the County Board.

We will address each of your complaints, in turn, below. The remainder of your letter questions whether the Interlocal Agreement conflicts with regulations promulgated

by the Nebraska Department of Health and Human Services ("DHHS"). This office has no general supervisory authority over the Interlocal Agreement, and your query does not implicate either the Open Meetings Act or the Public Records Statutes. The appropriate agency to which to direct such questions is DHHS. Therefore, this office will not address the substance of the Interlocal Agreement.

### **ANALYSIS – OPEN MEETINGS ACT**

Your complaint surrounds the January 22, 2011 letter from Dr. Rice, which you have characterized as a "ban" on you from the EMS Advisory Board meetings. The Open Meetings Act requires that "[e]very meeting of a public body shall be open to the public." Neb. Rev. Stat. § 84-1408 (2008). The relevant questions for analysis of your complaint are, first, whether the EMS Advisory Board is a "public body" for purposes of the Open Meetings Act, and if it is, whether that public body may exclude members of the public from its meetings.

#### ***Whether the EMS Advisory Board is a Public Body***

Neb. Rev. Stat. § 84-1408 states that it is "the policy of this state that the formation of public policy is public business and may not be conducted in secret." As a result, the Nebraska open meetings laws are a statutory commitment to openness in government. *Wasikowski v. The 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). Their purpose is to ensure that public policy is formulated at open meetings of the bodies to which the law is applicable. *Dossett v. First State Bank, Loomis, NE*, 261 Neb. 959, 627 N.W.2d 131 (2001); *Marks v. Judicial Nominating Commission for Judge of the County Court of the 20th Judicial District*, 236 Neb. 429, 461 N.W.2d 551 (1990); *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979).

Neb. Rev. Stat. § 84-1409 (2011) defines "public body" for purposes for the Open Meetings Act. This definition, in relevant part, states:

(1)(a) Public body means (i) governing bodies of all political subdivisions of the State of Nebraska. . . (iii) all independent boards, commissions, bureaus, committees, councils, subunits, or any other bodies created by the Constitution of Nebraska, statute, or otherwise pursuant to law . . . (v) advisory committees of the bodies referred to in subdivisions (i), (ii), and (iii) of this subdivision, and (vi) instrumentalities exercising essentially public functions; and

(b) Public body does not include (i) subcommittees of such bodies unless a quorum of the public body attends a subcommittee meeting or unless such subcommittees are holding hearings, making policy, or taking formal action on behalf of their parent body. . .

Thus, if the actions and organization of the EMS Advisory Board are consistent with any of these classifications, it is a public body, and the analysis moves to whether the EMS Advisory Board may exclude individuals from its meetings. If the EMS Advisory Board is not a public body, our analysis ends there, as meetings of a non-public body are not subject to the requirements of the Open Meetings Act.

The County Board itself is the "governing body of a political subdivision," and therefore, the EMS Advisory Board does not fall under this definition in § 84-1409 (1)(a)(i). Second, the EMS Advisory Board is not an "independent board, commission, bureau, committee, council, subunit, or any other body" created pursuant to law as found in § 84-1409(1)(a)(iii). As already stated, the EMS Advisory Board was created by the Interlocal Agreements, thus, it does not qualify as a public body under this subsection.

Third, and most significantly, we must examine whether the EMS Advisory Board is an "advisory committee" of the County Board, as defined in § 84-1409(1)(a)(v). Based upon the information we have been supplied, the EMS Advisory Board was formed by the Interlocal Agreements, contains members from each of the rural rescue or fire units, is headed by Dr. Rice who contracts with the County Board, and advises the County Board. However, the County Attorney does not believe the EMS Advisory Board is a public body subject to the Open Meetings Act. We disagree.

The EMS Advisory Board was formed by the Interlocal Agreements, which requires a representative from the rural fire or rescue unit attend its meetings. By definition, the EMS Advisory Board, created by the Interlocal Agreement, is a public body of the state. Neb. Rev. Stat. § 13-804 (2007). As a public body, the entity formed by the Interlocal Agreement is therefore subject to the Open Meetings Act and must comply with the provisions therein. In addition, the EMS Advisory Board is led by Dr. Rice, who contracts with the County Board, and the EMS Advisory Board reports back to the County Board.

However, we must also consider whether the EMS Advisory Board is a subcommittee of a governing body of a political subdivision. A subcommittee is generally considered to be made up of only members of the parent body from which it was formed. In this case, we have no information to suggest that any members of the

County Board are also members of the EMS Advisory Board. Thus, the EMS Advisory Board is not a subcommittee.

These facts leave no doubt that the EMS Advisory Board is a public body and is subject to the Open Meetings Act.

***Whether the EMS Advisory Board may restrict members of the public from attending its meetings***

Neb. Rev. Stat. § 84-1412 (2008) provides that the public has the right to attend and speak at meetings of public bodies, except for closed sessions. A public body cannot prohibit the attendance of a member of the public at its meetings. However, public bodies have the right to make and enforce reasonable rules regarding the conduct of persons attending, speaking at, or recording the public meeting.

Under § 84-1412 (2), a public body is not required to permit public comment at each of its meetings. However, the public body must set aside *some time* at *some* of its meetings for members of the public to address it. Accordingly, there is no absolute right for members of the public to address a public body at any given meeting or on any given agenda item, so long as there is some time at some meetings set aside for public comment. Public bodies can rightfully refuse to allow public comment at a given meeting, or as they consider a particular agenda item. In addition, public bodies should set aside some time at some of their meetings for members of the public to address them on any topic whatsoever, so long as those comments are not obscene or threatening in any way.

Your complaint is that Dr. Rice has informed Adams Rescue that you will not be permitted to represent Adams Rescue and attend the meetings of the EMS Advisory Board. Adams Rescue is not a member of the EMS Advisory Board, as no Interlocal Agreement is in place between that organization and the County Board. Therefore, you are attending as a member of the public. The EMS Advisory Board may not prevent your attendance at its meetings. It may, however, place reasonable rules on the conduct of the members of the public attending or speaking at its meetings. It may also restrict the participation of members of the public to public comment periods at some or all of its meetings. The rules of the EMS Advisory Board should be made known to the members of the public attending the meetings. Should someone violate those rules, the EMS Advisory Board may enforce its rules by asking the violator to leave the meeting.

Dr. Rice cites that the "meetings cover protected health care information." If the EMS Advisory Board finds it necessary to discuss HIPPA protected health information, it may go into closed session to do so. However, it may not close the entire meeting because at some point protected health information is to be discussed.

We would advise the EMS Advisory Board that it may not prohibit your attendance at future meetings, for any reason other than you have violated one of its reasonable rules for conduct at meetings. However, when you attend meetings of the EMS Advisory Board, you must remember that you are not a member of that Board and are only attending as a member of the public.

### **ANALYSIS – PUBLIC RECORDS STATUTES**

On or about November 12, 2010, you made a Public Records request to the County Board for: (1) the salary of Dr. Rice, (2) the job duties of Dr. Rice, and (3) reports of ambulance response times for those rescue squads that had signed an Interlocal Agreement with the County Board.

The Nebraska Public Records Statutes are found at Neb. Rev. Stat. §§ 84-712 through 84-712.09. Neb. Rev. Stat. § 84-712 (2008) provides:

(4) Upon receipt of a written request for access to or copies of a public record, the custodian of such record shall provide to the requester as soon as is practicable and without delay, but not more than four business days after actual receipt of the request, 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.

Neb. Rev. Stat. § 84-712(4) requires the custodian of the records to reply within four business days of the receipt of a written request for records. It is our understanding that you received no response from the County Board pursuant to your Public Records Request. Failing to respond, whether to provide records, deny a request for a statutorily acceptable reason, or to explain that no such records exist or are maintained by the public body to whom the request is made, within four business days is a violation of the Public Records Statutes.

#### ***Documents concerning Dr. Rice***

Your first public records request to the County Board was for the salary of Dr. Rice and his job duties. Mr. Harris indicated on August 5, 2011 that this information is contained in the contract between Dr. Rice and the County Board. On that date, he

Michael Pethoud  
September 27, 2011  
Page 7

agreed to send you that contract. As we have had no contact from Mr. Harris since that date, we have been unable to verify that he has provided you with Dr. Rice's contract. However, this was one of the documents we received from the County Clerk, and we have enclosed it herein.

Our office does not typically intervene in this manner. However, given the lack of response we received from Mr. Harris, we question whether Mr. Harris will provide the records to you. Therefore, in this single instance, we have assisted you in obtaining the record you seek regarding Dr. Rice. The County Board and Mr. Harris are instructed, however, that they must respond to all future public records requests, from you or any other member of the public, within four business days. Failing to do so, and the failure to provide records for which they are the custodian(s), is a violation of the Public Records Statutes.

***Documents concerning ambulance response times***

Your November 2010 letter to the County Board also contained a request for reports of ambulance response times for each of the rural rescue units that have signed an Interlocal Agreement. We queried Mr. Harris regarding these records. He informed this office that such records are not maintained by the County Board, but by each individual rescue unit. However, we are unclear as to whether the records may be, or are, maintained by the EMS Advisory Board.

This office has previously stated that Neb. Rev. Stat. § 84-712 does not require a public agency to review documents and create abstracts or other lists, to answer questions or to create documents which do not otherwise exist. Op. Att'y Gen. No. 94092 (November 22, 1994); Op. Att'y Gen. No. 94035 (May 11, 1994); Op. Att'y Gen. No. 87104 (October 27, 1987). This means the requestor is entitled only to make a request for specific documents or records, and the custodian is required only to provide documents or records responsive to the records request, if any exist. The requestor is not entitled to ask, and the custodian is not required to answer, any questions in the request. The custodian is also not required to create documents that do not exist, or to interpret a public records request to determine what records are being requested.

Therefore, if the County Board does not maintain the records you requested, they are not required to produce them to you. However, as it is unclear if the EMS Advisory Board might maintain these records, we would instruct Mr. Harris, and Dr. Rice, through a copy of this letter, that if this is the case, those records are to be provided to you immediately.

Michael Pethoud  
September 27, 2011  
Page 8

### CONCLUSION

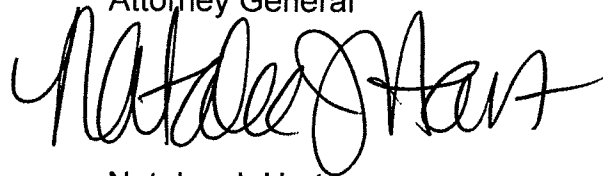
Based on our analysis, we believe that the EMS Advisory Board is a "public body" subject to the Open Meetings Act. Thus, the EMS Advisory Board is subject to the requirements of the Open Meetings Act, and should comply with those requirements for all future meetings.

The County Board also improperly failed to provide you with Public Records requested by you within four business days. However, as the public record maintained by the County Board has been provided with this letter, we will take no further action regarding this complaint.

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 or Public Records Statutes.

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: Roger Harris, Gage County Attorney  
Dr. Donald Rice, Gage County EMS Medical Director