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August 16, 2017

Muriel Clark


RE: *File No. 16-M-140; Village of Sutherland; Muriel Clark, Complainant*

Dear Ms. Clark:

This letter is in response to your correspondence dated December 29, 2016, in which you requested that this office investigate certain alleged violations by the Village of Sutherland Board of Trustees (the "Board") of the Nebraska Open Meetings Act (the "Act"), Neb. Rev. Stat. §§ 84-1407 through 84-1414 (Reissue 2014, Cum. Supp. 2016). In accordance with our normal procedures, we requested a response from the Board after we received your complaint, and we subsequently received a response jointly signed by Village Chairman John Lutz ("Lutz"), Village Vice Chairman Ray Ravenscroft ("Ravenscroft"), and Village Trustee Dave Einspahr ("Einspahr"), and, after granting a request for additional time to respond, from attorney for the Board, Kent Florom. We have now had an opportunity to review your allegations and the Board's responses in detail, and our conclusions are set out below.

FACTS

As an initial matter, subsequent to your original correspondence this office received a large number of communications and unsolicited information, all purporting to relate to this Open Meetings Act complaint. Please note, however, our understanding of the facts in this case is based solely upon your correspondence and the responses from the Board. Your Open Meetings Act concerns characterize the Board as conducting Village business outside public meetings, and relate specifically to two meetings, held on December 14, 2016 and December 22, 2016, as well as events surrounding those meetings.

The first meeting after the election of the two new Board members occurred the evening of December 14, 2016. Einspahr and Ravenscroft assumed their duties and took their oath of office at the meeting. The facts provided indicate that during the meeting, a vote by secret ballot resulted in Lutz being elected Chairman of the Board. Chairman Lutz then used the word "we" to describe concerns of the Board, and one item on the agenda was moved from its original order to be made the final item of the meeting.

The Board met in emergency session on December 22, 2016 at 11:00 a.m. The meeting was called in response to the abrupt resignation, on December 16, 2016, of the Village Clerk and Deputy Clerk. The emergency meeting was originally scheduled for December 21, 2016, with notice and an agenda posted on December 19, 2016. On December 21, 2016 at 11:51 a.m., Lutz posted a new meeting notice and agenda for the emergency meeting, rescheduling the emergency meeting for December 22, 2016 at 11:00 a.m. The new agenda contained two items, first, to declare an emergency, and second, to appoint a temporary clerk for the Village.

The complaint contains additional allegations about Board members conducting business outside of public meetings. You note that on the morning of December 14, 2016, Einspahr and Lutz gathered at the home of Ravenscroft. Additionally, after the December 14 meeting, a Board member contacted the insurance agent for the Village, a Board member contacted the health insurance provider for the Village, and together two Board members requested to see wage and benefit information for Village employees. The response to these requests included the Village Clerk informing the Board members that they did not have full Board authorization to make these inquiries. It was after one of these exchanges that the Village Clerk and Deputy Clerk resigned their positions.

The Board maintains generally that none of the facts in the complaint support any violations of the Open Meetings Act. Additionally, the Board states specifically that the gathering at Ravenscroft's home the morning of December 14, 2016 was an informal and partially impromptu gathering to get to know one another. The Board points out that two of the three individuals gathered that morning were not yet sworn in as Board members.

Further, Ravenscroft, Einspahr, and Lutz each provided affidavits attesting to the fact that no Village business was discussed at the morning gathering. Instead, Ravenscroft had reached out to Einspahr to have coffee and get to know one another better. At some point prior to that day, Ravenscroft had requested Lutz, who performs home repairs, to estimate the cost of a project at Ravenscroft's home. Lutz stopped by Ravenscroft's home on the morning of December 14 to prepare the estimate. As Lutz was completing his work, Einspahr arrived. Ravenscroft invited Lutz to join them for a cup of coffee, which Lutz did do, and the conversation that ensued consisted of their work histories, families, and other personal topics.

DISCUSSION

The primary purpose of the open meetings law is to ensure that public policy is formulated at open meetings. *Marks v. Judicial Nominating Comm.*, 236 Neb. 429, 461 N.W.2d 551 (1990). While Neb. Rev. Stat. § 84-1414 of the Open Meetings Act gives this office general enforcement authority over the Act, our authority is not without limits. This office is granted the authority to determine whether a public body has complied with the various procedural provisions of the Act relating to notice, agenda, closed session, public comment, voting, minutes, etc. Our authority does not extend to analyzing matters inherent to a public body's governance over which we have no authority or jurisdiction. As a result, we cannot determine the legality or appropriateness of an action made by a member of the public body which does not implicate a provision of the Open Meetings Act.

December 14, 2016 Meeting

As an initial matter, there is no suggestion that there was a defect in either the notice or the agenda for the December 14 meeting. The complaint does imply concern over several actions which occurred during the meeting. First, at the meeting, a secret ballot vote resulted in the election of Lutz as Chairman of the Board. While it is true that any action on a question or motion should generally be conducted by roll call vote of the public body in open session, the "vote to elect leadership within a public body may be taken by secret ballot" provided that the "total number of votes for each candidate shall be recorded in the minutes." Neb. Rev. Stat. § 84-1413(3). You do not allege that the total number of votes for each candidate was not properly recorded in the minutes. The Open Meetings Act expressly authorizes vote by secret ballot to elect leadership of the body, in this case the Chairperson of the Board, and absent evidence showing misconduct or disregard for the law, the regularity of official acts, in this case votes properly recorded in the minutes, is presumed. *Wolf v. Grubbs*, 17 Neb.App. 292, 759 N.W.2d 499 (2009). The secret ballot vote did not violate the Act.

Next, you suggest that Chairman Lutz's use of the term "we" to represent concerns of the Board may indicate some type of collusion and suggests that Board members were conducting Village business outside of a public meeting. We cannot reach the same conclusion. The mere fact that the Chair of a governing body used an inclusive pronoun to indicate the position of the public body is insufficient to support a violation of the Open Meetings Act.

Finally, you assert that during the meeting one item on the agenda was moved to be the last item discussed. There is a prohibition against altering an agenda less than twenty-four hours before the scheduled meeting, Neb. Rev. Stat. § 84-1411(1). The Act also requires that an agenda be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting. *Id.* No evidence suggests the agenda was deficient or altered in the twenty-four hours preceding the meeting, or that

the public did not have a sufficient description or notice of the item to be discussed. While perhaps not the best practice, the act of moving an agenda item to a different location on the agenda after the meeting commences does not, by itself, create a clear violation under the Open Meetings Act.

December 22, 2016 Meeting

Next, on December 19, 2016, the Board scheduled an emergency meeting to be held December 21, 2016 with notice and two agenda items: (1) to declare an emergency existed; and (2) to go into executive session. On December 21, 2016, the Board posted notice rescheduling the meeting for December 22, 2016. The Board also posted a new two-item agenda: (1) to declare an emergency existed; and (2) to appoint a temporary clerk.

It appears from the facts presented that the December 22, 2016 emergency meeting was conducted properly pursuant to the Open Meetings Act. The Act authorizes emergency meetings, provided an emergency exists. Neb. Rev. Stat. § 84-1411(5). An emergency is defined as “any event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency; a sudden or unexpected happening; an unforeseen occurrence or condition.” *Steenblock v. Elkhorn Township Board*, 246 Neb. 722, 515 N.W.2d 128 (1994). When an emergency exists, the public body can hold an emergency meeting without reasonable advance public notice, but the nature of the emergency is to be stated in the minutes and any formal action taken must relate to the emergency which prompted the meeting. Neb. Rev. Stat. § 84-1411(5).

The meeting was held in response to the unexpected resignations of the Village Clerk and Deputy Clerk. Though not required to do so under the Act, the Board provided notice and an agenda for the emergency meeting. The action taken at the meeting to appoint a temporary clerk related to the stated emergency which prompted the meeting. There is no allegation or evidence that the nature of the emergency was not properly stated in the minutes of the meeting. “In the absence of contrary evidence, it may be presumed that the public officers faithfully performed their official duties.” *Wolf, supra*. The December 22, 2016 emergency meeting does not appear to violate the Act.

You assert that at both meetings little or no discussion occurred on certain agenda items. The Open Meetings Act does not require that each item be discussed for any particular length of time, only that any discussion that does occur be done in public, unless one of the reasons to move into closed session exists. Based on the facts before us, and the presumption in favor of officials faithfully performing their official duties, lack of discussion does not support a violation of the Open Meetings Act.

Conduct Outside of Meetings

Your complaint reflects your main concern to be that “members of the Village of Sutherland Board of Trustees have behaved in such a manner as to suggest that they have been conducting Village business outside of public meetings.” In addition to the allegations relating directly to the two meetings, you assert several additional actions constitute conducting Village business outside of a public meeting, including a gathering of Einspahr, Lutz, and Ravenscroft at Ravenscroft’s home the morning of December 14, 2016, and that outside of a meeting, individual Board members asked for information about Village insurance and wage and benefits of Village employees. Your complaint implies that these actions are potential violations of the Act.

The meeting on the morning of December 14, 2016 did not violate the Open Meetings Act. A meeting includes “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). The Board can only conduct Village business if a quorum is present. “At all meetings of the village board of trustees, a majority of the trustees shall constitute a quorum to do business.” Neb. Rev. Stat. § 17-205. It is unlikely the meeting on the morning of December 14, 2016 constituted a quorum or a meeting under the Act. Neither Einspahr nor Ravenscroft was fully qualified as a member of the Board when they gathered that morning.

“Every village trustee, before entering upon the duties of his or her office, shall take an oath to support the Constitution of the United States and the Constitution of Nebraska and faithfully and impartially to discharge the duties of his or her office.” Neb. Rev. Stat. § 17-204. Einspahr and Ravenscroft did not take their oaths of office until later that night, as prescribed by law, after the election at the “first regular meeting of the village board of trustees in December.” *Id.* If they were not fully qualified to act as trustees under the law, they could not constitute part of a quorum to conduct the business of the public body the morning of December 14, 2016.

Even if this gathering did establish a quorum of the public body, that fact alone does not necessarily implicate a violation of the Open Meetings Act. The Open Meetings Act is not so broad and sweeping as to require public access to any gathering of any sort that is attended by a quorum of a public body. *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010). Open meeting statutes do not apply to chance meetings where no meeting of the body is intentionally convened, if there is no vote or other action taken regarding any matter over which the public body has supervision, control, jurisdiction, or advisory power. Neb. Rev. Stat. § 84-1410(5). When a quorum of a public body is present in one location, there is no meeting under the Open Meetings Act if there is no interaction or discussion among members of the body regarding policymaking for the public body. *Schauer, supra*.

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Ravenscroft, Einspahr, and Lutz each provided an affidavit attesting that no Village business was discussed or conducted at the meeting on the morning of December 14, 2016. The affidavits reflect that Lutz stopped by Ravenscroft's home in response to a request for an estimate on a home project, and separate and apart from that, Ravenscroft had asked Einspahr to stop by so they could get to know one another better before the meeting that night. Lutz was still at Ravenscroft's home acting as a private businessperson when Einspahr arrived. Ravenscroft asked Lutz to join them for a cup of coffee, which Lutz did do. They discussed personal details, not policymaking for the public body.

The final assertion involves whether one or two Board members seeking information regarding insurance policies, and wage and benefit packages, exceeded their authority. The alleged actions appear to be requests for information or to review information, not attempts to formulate public policy. 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, supra* (where small groups of the body, less than a quorum, were merely acquiring information, and there was no evidence that the body was attempting to reach a consensus and form public policy in secret, there was no meeting and no violation of the Open Meetings Act). Similarly in this case, the Board members' attempts to obtain information as alleged in the complaint do not fall within the purview of the Open Meetings Act.

Since we have concluded that the Village of Sutherland Board of Trustees did not clearly violate the Open Meetings Act regarding its December 14, 2016 and December 22, 2016 meetings, or by any additional alleged conduct, no further investigation by our office is necessary, and we are closing this file. If you disagree with our analysis 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,

DOUGLAS J. PETERSON
Attorney General



Marna Munn
Assistant Attorney General

cc: Kent Florom, Attorney for the Village of Sutherland