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DOUGLAS J. PETERSON
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July 27, 2022

Via email at [REDACTED]
Mark Koch

RE: *File No. 22-M-123; Sargent City Council; Mark Koch, Complainant*

Dear Mr. Koch:

This letter is in response to several complaints submitted by you on May 9, 2022, July 1, 2022, and July 11, 2022. This letter will address your allegations of violations of the Nebraska Open Meetings Act ("Act"), Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2014, Supp. 2021), amended 2022 Neb. Laws LBs 742, 908 and 922, by members of the City Council ("Council") for the City of Sargent at meetings held on May 9, 2022 and June 13, 2022. In accordance with our normal procedure with respect to such complaints, we sent a copy of your complaint materials to the Council for a response. On June 23, 2022, we received a response from City Attorney Carl F. Haberstick. We have now completed our review of your complaints, and our findings and conclusion are set out below.

You have also submitted complaints that do not relate to violations of the Act. First, you describe your disagreement with policies, relating to public sidewalks and sewer systems, enacted by the Council. This complaint does not allege any violations under the Act. Section 84-1414 of the Act gives this office general enforcement authority over the Act. This authority requires us to determine whether a public body has complied with the various procedural provisions of the Act, relating to agenda, notice, closed session, voting, minutes, etc. Our authority does not extend to scrutinizing substantive decisions made by a public body in the course of a public meeting. These are matters inherent to a public body's *governance*, over which we have no authority or jurisdiction. Second, you allege that the Council improperly suspended the rule that an ordinance be read on three different days. This requirement is found in Neb. Rev. Stat. § 17-614(1)(b) which is not a part of the Act. We cannot determine the legality or appropriateness of a decision, act, motion, etc. made by a public body which does not implicate a provision of the Open Meetings Act. Therefore, these complaints will not be addressed in this letter.

FACTS

Our understanding of the facts in this case is based upon your complaint and the response we received from the Council.

The City of Sargent is a city of the second class. The Council has four elected members. Two elected Council members, Ricky Hightower and Tim Clayton, and mayor Mick Kozeal were present at the commencement of the May 9, 2022 Council meeting. The Council proceeded to conduct business and vote on agenda items including ordinance # 524. Each of the agenda items passed by the affirmative vote of two elected Council members and the mayor. At one point, the Council went into executive session to discuss a tort claim.

During the June 13, 2022 Council meeting, you voiced your concern that a quorum was not present. When the Council began to take up agenda items you interrupted and were told by the mayor that the Council would not accept further comment. You were asked to leave the meeting when you continued to interrupt the Council's proceedings. You refused to leave until the city police chief intervened.

ALLEGED VIOLATIONS

You allege that, at the May 9, 2022 meeting, the Council conducted business without a quorum, in violation of the Act. In addition, you allege that the Council entered executive session without the vote of a majority of voting members.

You also allege that you were improperly ordered to leave the June 13, 2022 meeting. You assert that you "have a right to object to anything in the city council meeting."

DISCUSSION

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). "The purpose of the open meeting law is to insure that public policy is formulated at open meetings of the bodies to which the law is applicable." *Pokorny v. City of Schuyler*, 202 Neb. 334, 339, 275 N.W.2d 281, 284 (1979). The open meetings laws should be broadly interpreted and liberally construed to obtain their objective of openness in favor of the public. *State ex rel. Upper Republican NRD v. District Judges*, 273 Neb. 148, 728 N.W.2d 275 (2007).

Both the Attorney General and the county attorney of the county in which the public body ordinarily meets have the authority to enforce the Act. Neb. Rev. Stat. § 84-1414(2). However, only the district court can declare the act of a public body void. Neb. Rev. Stat. § 84-1414(1).

First, you allege that the Council transacted business without a quorum. For cities of the second class, a quorum means “[a] majority of all the members elected to the city council” Neb. Rev. Stat. § 17-105 (Cum. Supp. 2020). Where, as here, the city council for a city of the second class consists of four council members, “the mayor shall be deemed a member of the city council for purposes of establishing a quorum when the mayor’s presence is necessary to establish the quorum.” Neb. Rev. Stat. § 17-105. Two of the elected council members and the mayor were present at the May 9, 2022 meeting. This was sufficient to establish a quorum. The Council, having established a quorum, had the authority to conduct business.

During the meeting the Council took several votes, including a vote on ordinance # 524. Pursuant to Neb. Rev. Stat. § 17-614(1)(a) (Supp. 2021), “[a]ll ordinances and resolutions . . . shall require for their passage or adoption the concurrence of a majority of all members elected to the city council in a city of the second class The mayor of a city of the second class may vote when his or her vote would provide the additional vote required to attain the number of votes equal to a majority of the number of members elected to the city council, and the mayor shall, for the purpose of such vote, be deemed to be a member of the city council.” Similarly, the mayor of a city of the second class “may vote when his or her vote would provide the additional vote required to attain the number of votes equal to a majority of the number of members elected to the city council on any pending matter, legislation, or transaction, and the mayor shall, for the purpose of such vote, be deemed to be a member of the city council.” Neb. Rev. Stat. § 17-110 (Cum. Supp. 2020). Each of the items voted on during the meeting, including the ordinance and several motions, were passed by the affirmative vote of two elected Council members and the mayor. The mayor’s vote was properly counted to attain the number of votes equal to a majority of elected Council members, which is three.

Second, you allege that the Council improperly entered executive session without a sufficient number of votes. Pursuant to Neb. Rev. Stat. § 84-1410(1) (2014), “[a]ny public body may hold a closed session by the affirmative vote of a majority of its voting members” under specific circumstances. As discussed above, the “mayor may vote when his or her vote would provide the additional vote required to attain the number of votes equal to a majority of the number of members elected to the city council on any pending matter . . . and the mayor shall, for the purpose of such vote, be deemed to be a member of the city council.” Neb. Rev. Stat. § 17-110. Therefore, the Council is permitted to enter executive session with the affirmative vote of two elected members and the mayor.

Finally, you allege that you were improperly ordered to leave the June 13, 2022 meeting even though you believe you “have a right to object to anything in the city council meeting.” While members of the public have the right to be present and observe a public meeting, they do not have the right to interrupt the proceedings or be heard on every issue. The Council has the authority to implement reasonable rules governing the conduct of persons who attend its meetings. The statutory provisions relating to the public’s right to speak at public meetings are found at § 84-1412 of the Act, which provide:

(1) Subject to the Open Meetings Act, the public has the right to attend and the right to speak at meetings of public bodies, and all or any part of a meeting of a public body, except for closed sessions called pursuant to section 84-1410, may be videotaped, televised, photographed, broadcast, or recorded by any person in attendance by means of a tape recorder, a camera, video equipment, or any other means of pictorial or sonic reproduction or in writing.

(2) It shall not be a violation of subsection (1) of this section for any public body to make and enforce reasonable rules and regulations regarding the conduct of persons attending, speaking at, videotaping, televising, photographing, broadcasting, or recording its meetings, including meetings held by virtual conferencing. A body may not be required to allow citizens to speak at each meeting, but it may not forbid public participation at all meetings.

(3) No public body shall require members of the public to identify themselves as a condition for admission to the meeting nor shall such body require that the name of any member of the public be placed on the agenda prior to such meeting in order to speak about items on the agenda. The body shall require any member of the public desiring to address the body to identify himself or herself, including an address and the name of any organization represented by such person unless the address requirement is waived to protect the security of the individual.

Based upon these statutory provisions, along with other applicable authorities, this office has formulated several general “rules” which set out the public’s right to speak at open meetings of public bodies. Those rules pertinent to your complaint include the following:

1. Public bodies in Nebraska generally operate as a form of representative democracy, i.e., citizens elect individuals to represent them on various boards, commissions, etc., rather than having all who are present at a particular meeting of a public body act as members of that body.¹ Therefore, when members of the public attend meetings of public bodies in Nebraska, they most often attend as observers, not members of the body itself. Consequently, members of the public have no right, apart from periods set aside for public comment, to engage in the body’s debate, to question members of the body, to comment on particular decisions, or to vote on the issues at hand. Those latter rights go to the members of the public body who ran for and were elected to office. While any particular public body may certainly choose to allow citizens to participate in its meetings in any fashion, citizens attending a meeting of a particular public body are not members of that body.

¹ See *State ex rel. Strange v. School District of Nebraska City*, 150 Neb. 109, 33 N.W.2d 358 (1948).

2. Under the language found in Neb. Rev. Stat. § 84-1412(2), public bodies must set aside some time at some of their meetings for members of the public to address them, and we strongly encourage public bodies in Nebraska to allow public comment as frequently as possible. Public comments may be accepted on a particular agenda item or during a specified public comment period. The Act does not require that a public comment period be offered at any particular point in a meeting, and if and when public comment will be part of a meeting is at the discretion of the public body.
3. Since Neb. Rev. Stat. § 84-1412(2), in effect, requires public bodies to set aside some time at some of their meetings for members of the public to address them, the statute does not create an absolute right for members of the public to address a public body at any given meeting or on any given agenda item. Consequently, public bodies can rightfully refuse to allow public comment at a given meeting, or as they consider a particular agenda item, provided that they do offer opportunities for citizens to speak to them on other occasions.
4. Public bodies have the right to make reasonable rules for those members of the public who choose to address them. That includes setting reasonable time limits for public comment.

Pursuant to these rules, we do not find that your right to speak as a member of the public was violated when you were ordered to leave the June 13, 2022 meeting. The public's rights as audience members attending a Council meeting do not extend to speaking outside of the time allotted for public comment or taking part in the formation of Council policy. The public is present primarily to observe the Council, and to make public comment if they choose, when it is offered by the Council. As indicated above, § 84-1412(2) does not require that a public body have public comment every time it meets—so long as it sets aside some time at some of its meetings for this purpose. The Council has the authority to make and enforce reasonable rules of conduct for persons attending a meeting. Certainly, a rule prohibiting members of the public from speaking outside of the period set aside for public comment is reasonable.

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CONCLUSION

For the reasons discussed above, we have found no evidence to support your allegations. We have closed this file and plan no further action with respect to your complaints. If you disagree with our analysis, you may wish to contact your private attorney to determine what additional remedies, if any, may be available to you under the Act.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Elizabeth O. Gau
Assistant Attorney General

CC: Carl F. Haberstick, Attorney for the City of Sargent
03-036-30