

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

December 11, 2014

Brook Curtiss
Publisher, The Plainview News, Inc.
PO Box 9
Plainview, NE 68769

Re: *File No. 14-M-115; 5 School Feasibility Committee; Complainant Brock Curtiss*

Dear Mr. Curtiss:

This letter is in response to your correspondence in which you requested that this office investigate certain alleged violations by the "5 School Feasibility Committee," (the "Committee") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2014). In accordance with our normal procedures, we requested a response from each of the school districts which are members of the Committee after we received your complaint, and we subsequently received a response from the attorney for each. We have now had an opportunity to review your allegations and the school districts' responses in detail, and our conclusions are set out below.

FACTS

Our understanding of the facts in this case is based upon your correspondence, the response from each of the five school boards, and information we compiled from the website of the Committee. Your complaint concerns the Committee, which is made of members from five school boards: Bloomfield, Creighton, Osmond, Plainview, and Wausa. These five school districts are exploring the possibility of creating a collaborative school district which would serve two or more of the member districts. Four of the five school boards¹ have stated that the five school boards formed the Committee. One of the school boards² denied that the school boards created the Committee, instead stating that its school board formed a subcommittee, which meets

¹ Bloomfield, through its attorney John Recknor; Creighton, through its attorney John Higgins; Osmond, through its attorney Steve Williams; and Wausa, through its attorney John Recknor

² Plainview Public Schools, through its attorney Gregory Perry

jointly with four other subcommittees from the other four districts. The distinction made is not relevant for our purposes. Whether the Committee was officially formed, as a “committee,” by the school districts or whether each district formed a subcommittee that meets jointly with others, the analysis is the same.

Each member district has designated three of its school board members to attend meetings of the Committee and report back to the home school board. Your Open Meetings Act concerns are, first, that the Committee is an advisory committee of the five school boards and is subject to the Open Meetings Act. In support of your position, you state that the Committee has formulated agendas, held meetings, met with officials from Northeast Community College, made decisions, accepted funding from the five school districts, included superintendents and principals at its meetings, published minutes of its meetings, and answered questions from the public via its website. Your other Open Meeting Act concern is that the Committee is a tool for the five school boards to circumvent the Open Meetings Act. In support of this, you state that the members of the committee have been interchanged “in order to expose more members to the meetings,” and the school boards have each placed an additional member on subcommittees of the Committee. You also state that the individual school boards have not reviewed the Committee minutes and discussed the Committee meetings in public.

ANALYSIS

Your ultimate concern is that the Committee meetings are not open to the public. The Open Meetings Act requires that “[e]very meeting of a public body shall be open to the public.” Neb. Rev. Stat. § 84-1408 (2014). The relevant questions for analysis of your complaint are, first, whether the Committee is a “public body” for purposes of the Open Meetings Act, and if it is, whether that public body held “meetings,” as defined in the Open Meetings Act, which were not open to the public.

Whether the Committee 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 (2014) 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 Committee are consistent with any of these classifications, it is a public body, and the analysis moves to whether the Committee held meetings. If the Committee 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.

Each school board itself is the “governing body of a political subdivision.” As the five school districts at issue here have not yet formed a collaborative district, that joint district is not yet a “political subdivision,” and therefore, the Committee does not fall under this definition in § 84-1409 (1)(a)(i). Second, the Committee 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). While this Committee may appear to be an “instrumentality exercising essentially public functions” under § 84-1409 (1)(a)(vi), that language was added in 1989 specifically to reach the Nebraska Investment Finance Authority and other entities which have been granted the power and authority to issue bonds and to borrow and expend public money³. That description does not fit this Committee.

³ Op. Att’y Gen. No. 95014 (February 22, 1995).

Advisory Committee

Most significantly, we must examine whether the Committee is an “advisory committee” of the five school boards, as defined in § 84-1409(1)(a)(v)⁴. In this case, the question is whether the Committee provides advice on how to act to the five member school boards on the topic of the formation of a collaborative district.

The minutes from the first meeting of the Committee, on February 26, 2014, state that the “Study Committees from each of the five districts,” which consisted of three members from each school board, met for the first time, along with district superintendents and school principals from each district. However, it does not appear that the superintendents or principals are official members of the Committee. The Committee has met with various other individuals, such as a representative from Northeast Community College and the Nebraska Department of Education in information-gathering sessions to determine if a collaborative district is appropriate and what direction it might take. The minutes from each meeting of the Committee are found on its website, and this office has reviewed each. In our review, we found that the Committee discussed various topics related to collaboration and that any decisions related to a potential collaborative district are taken back to each individual school board. Each school board then may discuss the issue and take a vote of the board. It does not appear from the minutes of the Committee meetings that any advice was given from the Committee, as a whole, to any of the school boards. There is no evidence in the minutes that any decisions were made by the Committee or that any actions were taken by the Committee other than information gathering. While the three members designated by their parent bodies as members of the Committee likely provided information and may have made suggestions during their respective school board meetings, it appears to us that the five school boards each made their own determination independent of anything the others did.

You point to a listing on the Committee’s website of “Progress/Decisions that have been made” as evidence that the Committee itself is making decisions. Each district denies that the Committee has made any decisions; instead each decision is made by each school board independently. Our review of the list to which you refer indicates that each of the five districts acted independently.⁵ While each district came to the same decision, it does not appear to us that any decisions have been made by the Committee itself.

⁴ We note that this office has issued two opinions relating to advisory committees of public bodies. However, neither Op. Att’y Gen. No. 95014 nor Op. Att’y Gen. No. 92020 are applicable here, as both opinions dealt with whether committees formed by the head of an administration, i.e., the Mayor of Omaha and the Chancellor of the University of Nebraska, not containing any members of an elected body were nonetheless advisory committees. Consequently, these opinions will not be discussed herein.

⁵ Numbers 13, 14, and 14 of the “Progress/Decisions” list each begin “The five districts have acted. . .”

Additionally, your position is that the Committee is an advisory committee because it has formulated agendas, held meetings, met with outside officials, included superintendents and principals at its meetings, accepted funding from the five school districts, published minutes of its meetings, and answered questions from the public via its website. However, none of these are factors in determining if a body is an advisory committee.

For the above reasons, we do not believe the Committee is an advisory committee of the five school boards.

Subcommittee

Finally, we must consider whether the Committee 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, a subcommittee of each school board would be made up only of members of each board, and would not include members from other school boards. As the Committee is made up of fifteen members, three each from separate school boards, it cannot be a subcommittee.

Even if this were not true, the Committee is still not a subcommittee. Each full school board is certainly a public body, and any subcommittee thereof which contains a quorum of the full Board would also be a public body. It is our understanding that each school board is composed of six members, and that a majority of the members constitute a quorum.⁶ In other words, a quorum is reached by the attendance of four school board members. However, the Committee at issue here is made up of three Board members from each district, and therefore does not contain a quorum of any school board. Based on the information presented to us, at no time did the Committee include a quorum of any one school board, and we have no information to suggest that a quorum of any one school board was ever present at any Committee meetings. In fact, several of the school boards made clear that the presence of only three members from each school board was deliberate and done in order that a quorum from a school board would not attend Committee meetings. As a result, the Committee is only a public body if it is a subcommittee "holding hearings, making policy, or taking formal action on behalf of the parent body."

You state that the Committee has "clearly made decisions" on behalf of the five member school boards, and reference the "Progress/Decisions We Have Made" document we discussed, above. However, as we have previously mentioned, we do not believe that this document, or the minutes of the Committee meetings, indicate that the Committee itself has made any decisions on behalf of the member school boards.

⁶ See Neb. Rev. Stat. § 17-105 (2007).

For these reasons, we do not believe the Committee is a subcommittee.

Circumvention of the Open Meetings Act

Finally, you complain that the five school districts are using the Committee as a tool to circumvent the Open Meetings Act. You state that the members of the committee have been interchanged “in order to expose more members to the meetings,” and the school boards have each placed an additional member on subcommittees of the Committee. You also state that the individual school boards have not reviewed the Committee minutes and discussed the Committee meetings in public.

The school boards admit that they designated three members of each school board to attend Committee meetings. The Creighton, Bloomfield, Wausa, and Osmond School Boards⁷ have admitted that it does “rotate” board members and differing board members attend subsequent meetings. However, this does not alter our conclusion that the Committee is not an advisory committee or subcommittee. That the school boards are ensuring that a quorum of each board never attends a Committee meeting, but that each school board member is exposed to the work of the Committee may seem suspicious. However, we do not believe this rises to the level of circumvention of the Open Meetings Act.

Similarly, the creation of subcommittees of the Committee is not evidence that the Open Meetings Act is being circumvented. The five member school boards indicated, and the July 23, 2014 minutes of the Committee support, that the subcommittee is made up of members designated to the Committee, not additional school board members. The Committee is able to form subcommittees without violating the Open Meetings Act.

Finally, you allege that there has been no review of the Committee minutes by the individual school boards, and “no discussion other than random comments from Board members on their opinions of the meetings.” However, the Open Meetings Act would not require the review of Committee minutes during the meetings of the five school boards. Nor would it require Committee members to give their opinions of the Committee meetings. The Open Meetings Act would require a public vote by each school board of any decision to be made regarding the collaborative district. There is no indication that this has not occurred.

⁷ The Plainview School Board states that it has designated three of its members as “Study Committee” subcommittee members, which then meets jointly with other subcommittees from the four other school boards. Plainview states that the members of its Study Committee have remained consistent since its creation.

Brook Curtiss
December 11, 2014
Page 7

There is no evidence to conclude that the school boards are using the Committee to circumvent the Open Meetings Act.

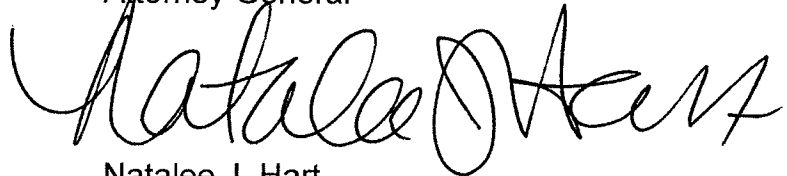
CONCLUSION

Based on our analysis, we do not believe that the Committee is a "public body" subject to the Open Meetings Act. While we understand your concerns that matters are being discussed that may ultimately affect each district, and any collaborative district that might be formed, the Committee is not required to hold its meetings open to the public. However, our office would encourage the Committee do so in order to further the purpose of the Open Meetings Act of openness in government. We understand that the Committee has already considered this idea, and may be holding open meetings in the future.

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 a large initial "N" and "H".

Natalee J. Hart
Assistant Attorney General

cc: John Higgins
Gregory Perry
Steve Williams
John Recknor

02-462-30