

STATE OF NEBRASKA
Office of the Attorney General

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DOUGLAS J. PETERSON
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October 20, 2015

Rhonda Clark



RE: *File No. 15-M-132; Johnson-Brock Board of Education; Complainant Rhonda Clark*

Dear Ms. Clark:

This letter is in response to your series of complaints received by us in which you have requested that this office investigate alleged violations of the Nebraska Open Meetings Act (hereinafter, the "Act"), Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2008 & Cum. Supp. 2014), by the Johnson-Brock Board of Education ("Board"). As is our normal practice with such complaints, we forwarded copies of your complaints to the public body which is the subject of the complaint. We have received a response from the attorney for the Board, Steve Williams, and have now had an opportunity to review in detail your complaints, all of the accompanying documentation, and the Board's response. Our conclusions in this matter are set forth below.

FACTS

Our understanding of this matter is based upon your complaints and the response we received from the Board. You have made complaints about numerous meetings of the Board, each of which will be addressed in detail, below. Your complaints can be summarized as being primarily related to the Board's motions to enter into closed session at nearly every meeting for which you provided us documentation, the notices of meeting and the place of publication of notice, and whether certain agenda items were sufficiently descriptive to give the public notice of what business would be conducted at certain meetings. We received complaints and/or supporting documentation from you on July 22, 2015, August 6, 2015, August 17, 2015, August 20, 2015 and an additional follow-up email on September 22, 2015. We also received a voice mail on August 10, 2015 containing additional concerns you had

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regarding a Board meeting, which was later documented by you in writing. All but the September 22, 2015 e-mail were provided to the Board for their review and response.

In your initial complaint of July 22, 2015, in addition to specific allegations we asked the Board to address, you also make general allegations that the Board does “not make complete agenda’s (sic) available to the public before meetings, do[es] not post special meetings at times and minutes are incomplete and very brief, leaving out many things such as policy discussion and changes.” You also state you “believe [the Board is] discussing pertinent public policy and issues during closed session” and that “the school board has historically and continues to go into executive session for hours at a time.” Additionally, as to Board Policy 6007 discussed on December 8, 2014, you “assume this was discussed during an improper closed session” at a prior meeting. These generalized allegations are not accompanied by dates on which they allegedly occurred, or any supporting documentation. As we cannot investigate such vague complaints, we will not respond to these general allegations herein.

We also note that your complaint asks us to review certain Board policies. However, this office has no general supervisory authority over governmental subdivisions in Nebraska, including the Johnson-Brock Board of Education. We have enforcement duties related to the Nebraska Open Meetings Act (Neb. Rev Stat. §§ 84-1407 through 84-1414) and the Nebraska Public Records Statutes (Neb. Rev. Stat. §§ 84-712 through 84-712.09), but do not have authority over Board policies. As such, we will not discuss this portion of your complaint.

Additionally, in the first set of documentation you submitted to us on August 6, 2015, you included meeting minutes beginning in February 2014 and continuing to June 2015. The first five meetings at which you allege violations occurred, those of February 10, 2014 through July 14, 2014, occurred more than one year prior to our receipt of your first Open Meetings Complaint on July 22, 2015. As a result, we will focus our review on those additional meetings which occurred subsequent to July 2014, based upon the statute of limitations for void or voidable actions of a public body found in Neb. Rev. Stat. § 84-1414 (1).

Our review of your complaint will begin with the October 15, 2014 meeting and include meetings through August 10, 2015. In general, the Board admits that its compliance with the Open Meetings Act has been “imperfect” and has “made arrangements to receive further Open Meetings Act training and education.”

ANALYSIS

Neb. Rev. Stat. § 84-1408 (2008) of the Nebraska Open Meetings Act provides:

It is hereby declared to be the policy of this state that the formation of public policy is public business and may not be conducted in secret.

Every meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies, except as otherwise provided by the Constitution of Nebraska, federal statutes, and the Open Meetings Act.

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). 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); *Grein v. Board of Education of the School District of Fremont*, 216 Neb. 158, 343 N.W.2d 718 (1984).

Agendas and Notice of Meetings

You have alleged that “since March 2015” the agenda for the Board’s meetings have not been available to the public. You state that school officials have informed you that the agenda is posted in the post office in Johnson and in Brock, the school entrance, and published in the local newspaper. You have enclosed an e-mail from the superintendent listing these locations as the places where the notice will be posted.

The Open Meetings Act requires a public body to give “reasonable advance publicized notice” of each of its meetings, which is to include either the agenda, or notice of where the agenda is available for public inspection. Neb. Rev. Stat. § 84-1411 (1) (2014). The agenda must be kept “continually current” and may not be altered, except for items of an emergency nature, within 24 hours of the meeting. *Id.* “Agenda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting.” *Id.*

You make a complaint as to the agenda for the December 8, 2014 meeting, specifically agenda item “IX. Superintendent’s Report (Appendix B)” and that during this agenda item the Board discussed and voted upon proposed changes to Board Policy 6007. The minutes for this meeting show that the Board voted on a motion to “change Board Policy 6007 to include Summa Cum Laude, Magna Cum Laude and limit Valedictorian and Salutatorian to one student each.” The motion failed to pass. We were not provided with Appendix B to the agenda. The Board states that Appendix B

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includes a "reference to 'Valedictorian.'" The Board admits, and we agree, that the agenda item "Superintendent's Report" was not sufficiently descriptive to allow the public to know that the Board would be discussing and voting upon a change to Board Policy 6007. The Board has been reminded by its counsel "of the specificity required for agenda entries." As the Board has taken action to ensure that future agendas will meet the requirements of the Open Meetings Act for items to be "sufficiently descriptive," this office will take no action as to the Board's noncompliance as to the agenda for the December 8, 2014 meeting. Additionally, the vote as to this item failed so no action by the Board was ultimately taken that is void or voidable under Neb. Rev. Stat. § 84-1414(1).

Your complaint also includes an allegation that the agenda for the March 9, 2015 meeting contained an item that was not sufficiently descriptive. Agenda item XI states "approve the first reading of revised Board Policy 6008; Class Rank." The minutes of this meeting indicate that the Board discussed Policy 6008 during this section of the meeting, but also discussed Board Policy 6007 and "whether it should be changed from 4.0 to a percentage." The Board argues that no action was taken as to Policy 6007 and that as Policy 6007 is interrelated to Policy 6008, a "possible change to Policy 6007 is a direct corollary to the revised Policy 6008." While these policies might be so interrelated that they should be discussed together, it is inappropriate to discuss a policy that was not found on the agenda, even in relation to another policy. We do not agree with the Board's assertion that it was acceptable for these two policies to be discussed together without Policy 6007 being on the agenda. If the Board wished to discuss Policy 6007, it should have been included on the agenda along with Policy 6008. We do find that that Board violated the Open Meetings Act with respect to this portion of your complaint. However, as the Board took no action regarding Policy 6007, and the action taken on Policy 6008 was taken before the discussion of Policy 6007 occurred, there is no action to void or be voidable under Neb. Rev. Stat. § 84-1414(1) and no further action by this office is warranted as to this violation.

You also complain that you did not have notice of the February 23, 2015 special meeting of the Board. You have enclosed an e-mail from the superintendent dated March 5, 2015 in which you were informed that notice of meetings of the Board are placed at the school front entrance, and the post offices in Johnson and Brock. You state that Brock does not have a post office and that the February 23, 2015 meeting notice was not posted at the Johnson Post Office. The Board states in its response to this office that its policy is to place notice at the community center in Brock, the Bank of Johnson, and the front entrance of the school and that notice was placed in these three places for the February 23, 2015 meeting. You were misinformed by the superintendent, but that information was provided after the meeting about which you complain you did not have notice. Additionally, the Board states that the Board President verbally informed you in March that notice is posted at the Brock community

center, not the Brock Post Office. You also complain that the notice was not placed in the school newsletter, but that is not one of the designated locations for notice to be placed. We agree that you have been given conflicting information regarding where the notice of meeting will be posted in your community. While the superintendent is not a member of the Board, he should be providing correct information regarding Board meetings to members of the public when asked. However, we cannot find a violation of the Open Meetings Act in this instance. First, the misinformation was provided to you after the date of the meeting about which you complain not having notice. Second, the Board has assured us that it has followed its policies about the three places at which it posts notice of meetings and special meetings. In the absence of clear evidence to the contrary, we must assume that the Board is accurately representing itself and acting in good faith. Without more evidence that the notices were not posted at the school, or the locations in Johnson and Brock, we cannot find that the Board has violated the Open Meetings Act with respect to this portion of your complaint.

The supplemental complaints you filed with this office, on August 17 and August 20 concerning two August 10, 2015 Board meetings allege that these meetings were not properly noticed. You also left a voice mail for the undersigned attorney concerning whether the August 10, 2015 meeting had been properly noticed. The Board held two meetings on August 10, 2015: the regular meeting and a special meeting. You state that the meeting notices were not posted on the day of the meeting. You state you verified that the notices were not posted at the Johnson Post Office, and "don't think" the notices were posted at the school because school was not yet in session. You were provided with agendas via email by the school's business manager. The Board denies that the meeting notices were not properly posted, stating that the notices were placed 48 hours before the meeting at the Brock community center, the Bank of Johnson, and the front door of the school per its policy. The Board does not post its notice at the Johnson Post Office. You cannot verify that the notice was not at the school, because from your August 20, 2015 letter, it does not appear you looked for the notice at the school on or before August 10. As the Board has assured us that the meetings were properly noticed per its policy, we cannot find that the Board has violated the Open Meetings Act in this respect.

You also complain that the agenda you were provided by the Board's business manager for the August 10 regular Board meeting did not contain the time for the commencement of the regular meeting. The agenda is not required to contain a time for the meeting. Only the notice of the meeting is required to contain a time for the meeting. Your e-mails with the business manager indicate that she informed you that the regular meeting would begin following the special meeting. The special meeting agenda stated that meeting would begin at 8:00 pm. on August 10, 2015. There is no violation of the Open Meetings Act with respect to this portion of your complaint.

As to the agenda for the August 10, 2015 meeting you also complain that the agenda references the Principal's Report, Appendix A, and the Superintendent's Report, Appendix B, but those documents were not attached to the agenda. The Open Meetings Act requires public bodies to "make available at the meeting . . . for examination and copying by members of the public, at least one copy of all reproducible written material to be discussed at an open meeting." You do not complain that the reports of the principal and the superintendent were not available for inspection at the August 10, 2015 meeting. You also do not complain that you requested Appendix A and Appendix B and were denied access to these documents. The agenda is required only to list the items to be discussed at the meeting, not to contain all materials that will be discussed. The Board states that the two appendices were available to the public before the meeting at the superintendent's office and at the meetings held on August 10. There is no violation of the Open Meetings Act with respect to this portion of your complaint.

Finally, you complain that the minutes for the August 10, 2015 meeting include the vote on an item that was not found on the agenda. The minutes state: "Moved by Steve Clark to approve the bid as presented by Michael Weiss, of Weiss Construction to finish out the cement at the football field." The motion passed. However, the agenda does not contain an item to be discussed involving the football field, or a bid from Weiss Construction. The Board admits that it took a vote on an item not specifically found on the agenda. The Board states that the football field bid was contained in the Superintendent's Report, agenda Item VII, and that the superintendent could have approved the bid without Board approval. However, as the Board took a vote on this topic, even if it was not required to do so, the agenda should have clearly indicated that the Board intended to vote on the expenditure of these funds. The Board recognizes that it has violated the Open Meetings Act in this regard, and will take action at its next meeting to cure this violation. Provided that the Board places this item on an agenda and then re-takes its vote in open session, the Board can cure 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).

Closed Sessions

You have also made a number of complaints relating to closed sessions of the Board at its meetings on October 15, 2014, November 13, 2014, December 8, 2014, January 12, 2015, February 9, 2015, February 23, 2015, June 8, 2015, July 13, 2015, and August 10, 2015. Your complaints regarding each of these closed session involves the motion made by the Board to close, in that it does not contain both the subject matter and the reason necessitating the closed session, and that the Board does not restate the limitation of the closed session immediately preceding the closed session.

Neb. Rev. Stat. § 84-1410 of the Open Meetings Act provides, in pertinent part:

- (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;
 - (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;

* * * *

- (2) The vote to hold a closed session shall be taken in open session. The entire motion, the vote of each member on the question of holding a closed session, and the time when the closed session commenced and concluded shall be recorded in the minutes. If the motion to close passes, then the presiding officer immediately prior to the closed session shall restate on the record the limitation of the subject matter of the closed session. The public body holding such a closed session shall restrict its consideration of matters during the closed portions to only those purposes set forth in the motion to close as the reason for the closed session. The meeting shall be reconvened in open session before any formal action may be taken. For purposes of this section, formal action shall mean a collective decision or a collective commitment or promise to make a decision on any question, motion, proposal, resolution, order, or ordinance or formation of a position or policy but shall not include negotiating guidance given by members of the public body to legal counsel or other negotiators in closed sessions authorized under subdivision (1)(a) of this section.

* * * *

- (4) Nothing in this section shall be construed to require that any meeting be closed to the public. No person or public body shall fail to invite a portion of its members to a meeting, and no public body shall designate itself a subcommittee of the whole body for the purpose of circumventing the Open Meetings Act. No closed session, informal meeting, chance meeting, social gathering, email, fax, or other electronic communication shall be used for the purpose of circumventing the requirements of the act.

We have reviewed the motions to enter into closed session from each of the meetings listed above. The motion is generally the same, and we will use the motion from October 15, 2014 as a general sample of the language used by the Board in each of these motions. "Moved by [Board member] to enter into executive session at [time] to protect the public interest and prevent the needless injury to the reputation of an individual. Seconded by [Board member]. Roll call vote: All ayes. Motion carried. The Board returned to regular session at [time]."

While the Board stated that reason for its closed session, i.e, protection of the public interest or prevention of needless injury to the reputation of a person, 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. While the Board's motion contains the reason for the closed session, the motion does not contain the required language as to the subject matter to be discussed in closed session. The Open Meetings Act also requires that if a motion for closed session passes, the "limitation of the subject matter of the closed session" shall be restated on the record, which is not reflected in the minutes.

Therefore, the Board did not comply with the Open Meetings Act in its motions to enter into closed session on October 15, 2014, November 13, 2014, December 8, 2014, January 12, 2015, February 9, 2015, February 23, 2014, June 8, 2015, July 13, 2015 and August 10, 2015. The Board has recognized, in its response, that its motions to close were deficient on these dates. The Board states that the subject matter was indicated verbally during the meetings, but now understands this was insufficient to meet the requirements of the Open Meetings Act. The Board also admits that some agenda items for which it entered into closed session were not "sufficiently descriptive" under the Open Meetings Act to provide notice of the topic to be discussed in closed session. The Board has taken steps to ensure that all subsequent motions to close contain both the subject matter and the reason necessitating the motion to close and that the limitation of the subject matter of the closed session is restated on the record before the Board closes its meeting to the public. We trust that the Board will follow those steps, and future motions to close will fully comply with the Open Meetings Act. For those reasons, we will not take any action against the Board for the deficiencies in its 2014 and 2015 motions to close.

As to the closed sessions, you also complain that the Board places a notification on its agenda that “[a]n executive session may be held on any of the agenda items listed above.” It is not a violation of the Open Meetings Act to provide such a notification on an agenda.

Committees

In your July 22 narrative, you state that “a small committee within the school was formed by the school board to change [grading] policy.” However, your review of meetings for the Board did not show that the full Board had discussed grading policy as of December 2014. You claim the “committee was formed by the [B]oard and the committee did not include the public in there (sic) meetings and that committee made a decision to change the policy without any public knowledge or involvement.” We did not find any further information about this committee in any of your submissions or supporting documentation, including the membership of the committee and when this committee allegedly met. The Board did not address this committee in its response. We have very limited information on this committee, but without any further information, including evidence that it met, we cannot evaluate whether the committee was subject to the provisions of the Open Meetings Act.

Your complaint regarding the January 12, 2015 meeting contained an allegation that the “senior recognition committee” had been formed, but has not held meetings open to the public. The Board states that the senior recognition committee is formed by the superintendent and made of teachers and parents. This group provides information and recommendations to the superintendent, not the Board.

The Open Meetings Act defines “public body” as the governing body, i.e. the Johnson-Brock Board of Education, and any advisory committee of the Board. Neb. Rev. Stat. § 84-1409 (2014). As the senior recognition committee was not formed by, nor does it advise, the Board, it is not an advisory committee under the Open Meetings Act and is not subject to the provisions of that Act. There is no violation of the Open Meetings Act as to this portion of your complaint.

Minutes

The Open Meetings Act requires a public body to “keep minutes of all meetings showing the time, place, members present and absent, and the substance of all matters discussed.” Neb. Rev. Stat. § 84-1413 (2014). The Open Meetings Act does not require a public body to transcribe the minutes of its meetings, nor does it require the minutes to provide detail about the public comment period.

Your complaint alleges that the minutes documenting the January 12, 2015 Board meeting do not “reflect accurately that I addressed the board about policies 6007 & 6008 and the minutes do not disclose that I provided the board a document.” The minutes from this meeting state: “Rhonda Clark addressed the board regarding her concerns about the potential grading system changes that are being considered.” The Open Meetings Act does not require that the Board’s minutes document the public comment period of a meeting, other than to reflect that public comment occurred at a meeting. The Board’s minutes are only required to show the “substance of all matters discussed” by the Board, not by members of the public. There is no violation of the Open Meetings Act with respect to this portion of your complaint.

Your complaint also alleges that the minutes of February 9, 2015 do not show the discussion of an item that appeared on the agenda as Item XIII, “extend the contract with Peyton Lewis as K-12 Principal for the 2015-2016 contract year.” However, the minutes do not make mention of this agenda item. The Board explains in its response to us that the Board did not take up this agenda item. As the Board did not discuss this matter, it is not required by the Open Meetings Act to appear in the minutes of the meeting. The Board states that “it may be a best practice to indicate in the minutes that an item on the agenda was not discussed and that no action was taken,” however this is not a requirement of the Open Meetings Act and there is no violation of the Act as to this item.

ACTION BY THE ATTORNEY GENERAL

For the reasons stated above, we conclude that the Board violated the Open Meetings Act in its procedure for going into closed session on a number of different dates and by failing to have sufficiently descriptive agenda items on three occasions. The question now becomes what action to take in light of our conclusions that the Board has violated the Open Meetings Act. We do not believe that a criminal prosecution for a “knowing” violation of the Open Meetings Act is appropriate under the facts of this matter. Further, we will not pursue a civil suit to void because the Board has already taken steps to ensure that the violations will not be repeated in the future. Instead, we will admonish the Board, through a copy of this letter to its legal counsel Mr. Williams, that all requirements of the Open Meetings Act as to closed sessions and the sufficiency of agenda items are to be strictly adhered to in the future.

We would also like to point out to the members of the Board that they have now been fully advised as to how their conduct violated the Open Meetings Act. As a result, it will be far more difficult for those individuals to argue in the future that they did not “knowingly” violate the Act should any future questionable conduct occur. However,

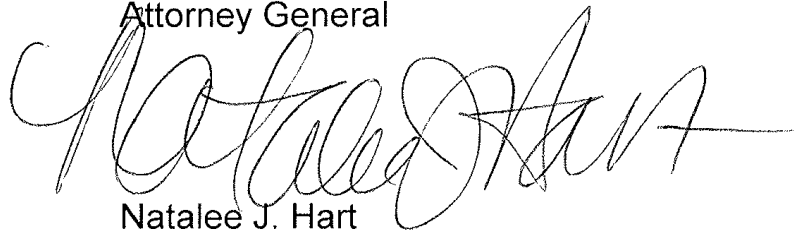
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based on Mr. Williams' assurances, we are confident that this Board will not repeat the errors made in the present case.

Since we have determined that no further action by this office is appropriate at this time, we are closing this file. If you disagree with our analysis, you may wish to discuss this matter with 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

A handwritten signature in black ink, appearing to read "Natalee J. Hart". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Natalee J. Hart
Assistant Attorney General

cc: Steve Williams

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