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

DOUGLAS J. PETERSON
ATTORNEY GENERAL

LESLIE S. DONLEY
ASSISTANT ATTORNEY GENERAL

February 13, 2018

Gary Aldridge
[redacted]

RE: *File No. 17-M-124; Lower Platte South Natural Resources District Board of Directors; Gary Aldridge, Complainant*

Dear Mr. Aldridge:

This disposition letter is in response to your correspondence received by our office on April 25, 2017, in which you allege violations of the Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2014, Cum. Supp. 2016, Supp. 2017) ("Act"), by the Board of Directors ("Board") of the Lower Platte South Natural Resources District ("LPSNRD"). When we receive complaints of this nature, our normal practice is to contact the public body involved and request a response to the allegations raised in the complaint. In the present case, we contacted Board chair Ray Stevens and requested a response. On May 23, 2017, we received a written response from the Board's general counsel, Steven G. Seglin, who responded on behalf of the Board. We have now completed our review of your complaint and Mr. Seglin's response. Our conclusion and future action in this matter are set forth below.

RELEVANT FACTS

You are an elected member of the Board. You indicate that the Board held a regular meeting on February 15, 2017. The agenda for that particular meeting contained the following item:

13. Consideration of items requiring closed session.
    a. Attorney advice on emails and per diem. [NO ACTION]
    b. Prairie Corridor on Haines Branch Conservation Easement — consideration of the Honvlez appraisal and landrights negotiation. [ACTION]

According to the meeting minutes, all of the other Board members present voted to approve the motion to go into closed session. You did not vote. You indicate that as the Board was considering item 13a, you asked the chair "for a/the reason to consider these issues in a 'closed session.'" You indicate that Mr. Seglin responded that "it was necessary or appropriate to consider emails and per diem in closed session as legal advice by the LPSNRD Board attorney." You indicate that the chair was silent on the matter. You state that at the beginning of Mr. Seglin's presentation on the topics, you specifically "challenged consideration of this subject in closed session," stating, to the best of your recollection, "'I object to consideration of this matter in closed session.'" Your challenge was directed to the chair. You state that you received no response. When a motion was made to come out of closed session, you repeated your objection to the chair. You also asked that your objection be recorded in the minutes. No action was taken and your objection was neither noted nor recorded.

ISSUES RAISED

You have set out two distinct issues in your complaint. First, you point out that Neb. Rev. Stat. § 84-1410, along with the Board's operating policies,[1] allow a public body to convene a closed session when it is clearly necessary for the protection of the public interest. However, you disagree with the position of legal counsel, accepted by other Board members, that receiving advice or guidance on these particular topics meets the statutory requirement. In this regard, you state that a per diem reflects the expenditure of public funds, and that "[a]n understanding of how public money is/may be used or expended is absolutely essential to the public interest." With respect to emails, you assert that an understanding as to how public policy may be formulated, through the use of email, "is absolutely essential to the public interest."

Your second issue relates to your attempts to challenge the closed session to discuss emails and per diem. You indicate that you voiced your objections twice, directing your concerns to the Board chair. However, no effort was made "to place [your] challenge before the entire Board for a vote on the continuation in closed session."

DISCUSSION

As you correctly note in your complaint, Neb. Rev. Stat. § 84-1410(1) (2014) of the Act allows public bodies to go into closed session when it "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 statute further provides that

---

[1] *See* specifically Board Operating Policy, C-19: Closed Session. Under Neb. Rev. Stat. § 84-1414(2) (2014), this office is authorized, concurrently with the county attorney located in the county where the public body normally meets, to enforce the provisions of the Open Meetings Act. We do not consider the operating rules or policies of governmental bodies in determining whether a public body has violated the Act.

> [c]losed 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;
>
> (e) For the Community Trust created under section 81-1801.02, discussion regarding the amounts to be paid to individuals who have suffered from a tragedy of violence or natural disaster; or
>
> (f) For public hospitals, governing board peer review activities, professional review activities, review and discussion of medical staff investigations or disciplinary actions, and any strategy session concerning transactional negotiations with any referral source that is required by federal law to be conducted at arms length.

(Emphasis added.) As indicated by the express language in the statute, the list of examples is not meant to be exhaustive, and other reasons may exist to close a meeting. Government Committee Hearing on LB 325, 84th Nebraska Legislature, First Session 3 (February 13, 1975).[2]

In 1975-76 Rep. Att'y Gen. 150 (Opinion No. 116, August 29, 1975), we discussed the application of LB 325 to the operation of county government. There the requester asked whether "the county attorney [may] confer with the county commissioners either individually or collectively in private?" While noting the divergent views existing in other jurisdictions, we concluded that

---

[2] *See also* Op. Att'y Gen. No. 65 (April 18, 1985), where we considered the effect of pending legislation on the Open Meetings Act in the context of the Nebraska Supreme Court case *Grein v. Board of Education*, 216 Neb. 158, 343 N.W.2d 718 (1984) ("We simply do not read this decision, as some have apparently suggested, to mean that the court limited the reasons for a closed session to the four examples contained in § 84-1410(1). The court did not even find it necessary to concern itself with the examples listed in the statute, but applied only the two broad criteria for a closed session found in the statute."). *Id.* at 3.

> [u]nder the statutory scheme of L.B. 325, it would be our opinion that Section 3 is a sound basis for private conversations between the Board of County Commissioners and the County Attorney with regard to legal matters involving the county both for pending litigation or discussions of the legal consequences of specific action.[3]

We further noted that section 3(1)(a) of LB 325 specifically listed "litigation" as one of the reasons to go into closed session, and recommended that consultations with the "collectively assembled board be had only pursuant to Section 3 . . . ." *Id.* at 152.

As you can see, this office has taken the position since the enactment of the recodification of the Open Meetings Act in 1975 that public bodies may receive legal advice from attorneys in closed session. Through the years, we determined that it was not necessary that the legal advice at issue relate strictly to "litigation," as recommended in our 1975 opinion, realizing that legal advice may not, in every instance, relate to a pending lawsuit. We have considered your arguments that discussing these topics in a closed session, particularly per diems, was not warranted. However, this office has determined that closed sessions to receive legal advice from counsel are appropriate under § 84-1410, and we are not in a position to determine that Mr. Seglin's presentation to the members of the Board on these topics did not constitute legal advice. As a result, there is nothing on the face of your complaint that leads us to conclude that the propriety of the closed session was at issue.

With respect to the second issue raised in your complaint, Neb. Rev. Stat. § 84-1410(3) (2014) provides that

> [a]ny member of any public body shall have the right to challenge the continuation of a closed session if the member determines that the session has exceeded the reason stated in the original motion to hold a closed session or if the member contends that the closed session is neither clearly necessary for (a) the protection of the public interest or (b) the prevention of needless injury to the reputation of an individual. Such challenge shall be overruled only by a majority vote of the members of the public body. Such challenge and its disposition shall be recorded in the minutes.

In his response, Mr. Seglin's only defense to the Board's failure to comply with this statutory procedure is to argue that you failed to use the proper terminology to invoke operation of the statute. Specifically, Mr. Seglin asserts that "[i]t is not the prerogative of the Chairman of the District to recognize the word 'objection' to mean the same thing as a 'challenge' under the above statute, as requested by the Complainant." We view this

---

[3] LB 325, Section 3 provided three examples of reasons to close a public meeting: "(1) Strategy sessions with respect to collective bargaining, real estate purchases, or litigation; (b) Discussion regarding deployment of security personnel or devices; or (c) Investigative proceedings regarding allegations of criminal misconduct."

argument as hypertechnical, and disagree that an individual challenging a closed session must state the word "challenge" to actually effect a challenge. In our view, there is little question that you sought to challenge the propriety of the closed session to discuss emails and per diem, voicing your objection to the Board chair on two occasions. Consequently, the Board chair should have called for a vote on whether to continue the closed session. And the challenge and resulting vote should have been recorded in the Board's meeting minutes. This statutory procedure was not followed. Thus, we conclude that the Board violated the Open Meetings Act when it failed to comply with the requirements of § 84-1410(3) with respect to your challenge of the closed session to discuss emails and per diem held during its February 15, 2017 meeting.

Consequently, under the situation in this case, we will admonish the Board, through a copy of this letter to Mr. Seglin, that all technical requirements of the Open Meetings Act regarding closed session are to be strictly observed. Failure of the Board to heed that admonishment could lead to challenges to Board actions 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, may be available to you under the Open Meetings Act.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

Leslie S. Donley
Assistant Attorney General

c: Steven G. Seglin
David A. Derbin

49-1941-29