

STATE OF NEBRASKA
Office of the Attorney General

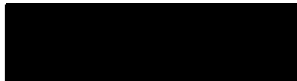
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April 15, 2019

Susan Jacobus



Re: *File No. 18-M-139; City of Fremont City Council and Fremont Planning Commission; Susan Jacobus, Complainant*

Dear Ms. Jacobus:

This letter is in response to your correspondence in which you requested that this office investigate alleged violations by the City of Fremont City Council ("City Council") and the City of Fremont Planning Commission ("Planning Commission") (collectively "City") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (Reissue 2014, Cum. Supp. 2018). In accordance with our normal procedures, we requested a response from the City after we received your complaints. We subsequently received a response from Mayor Scott Getzschman and Planning Commission Chair Dev Sookram. Following our initial review of the City's response, we requested further information from the City as to one of your complaints, and received clarification from the City in a second response. We have now had an opportunity to review your allegations and the responses of the City in detail, and our conclusions are set out below.

FACTS

Our understanding of the facts in this matter is based upon your correspondence, along with the responses from the City. You filed a number of complaints with this office, which we will consolidate in this disposition letter.

Complaint #1

You first complain about what you call a "mayoral committee" formed to discuss the potential sale of city property to the Dodge County Humane Society ("DCHS"). You allege that this committee is made up of four members of the City Council, along with Mayor Getzschman, members of the board of the DCHS, and the executive director of the DCHS. You state that meetings of this committee were also attended by the City Administrator and his assistant. You believe these meetings were held in violation of

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the Open Meetings Act, as they were held not at city offices but at a local bank office, the public was not provided notice of the meetings, and agendas and minutes were not available to the public. You also allege these meetings were held in violation of the City of Fremont municipal code. However, this office has no general supervisory authority over governmental subdivisions in Nebraska. Our review is limited to determining compliance with the Open Meetings Act. We do not have the authority to investigate or enforce complaints related to municipal codes and your complaint related to the Fremont Municipal Code will not be discussed further herein.

The City's response to this portion of your complaint is that the committee at issue ("Committee") was established by the Mayor and consisted of four City Council members to "negotiate the potential sale of city property to the Dodge County Humane Society." We made further inquiry of the City as to this Committee after receiving the City's initial response. Subsequently, the City has clarified that the Mayor appointed four City Council members to advise him and meet with members of the DCHS as to the possible sale of city property to that entity. The City states that the Mayor did not appoint anyone from outside the City Council to the Committee, including anyone from the DCHS as your complaint alleges. The purpose of the Committee was to advise the Mayor and assist him with negotiations with the DCHS as to the potential property sale. The Committee itself took no action. Ultimately, based on the negotiations by the Committee, the Mayor drafted a purchase agreement for the sale of the city property, which was then voted upon by the full City Council at its October 30, 2018 meeting, following public discussion and the opportunity for public comment. The Mayor subsequently signed the agreement, based upon the authorization from the City Council.

Complaint #2

Your second complaint relates to the Planning Commission. You allege that copies of the minutes of the November 19, 2018 meeting were not available at the next Planning Commission meeting held on November 26, 2018. The City admits you verbally requested a copy of the November 19, 2018 Planning Commission meeting minutes at the conclusion of its next meeting on November 26, 2018. The minutes of the November 19 meeting had been prepared. However, as the city offices were closed at that time, the City's Legal Clerk did not have a printed copy available, and allowed you to review the electronic copy; she offered to print you a copy during normal business hours. The City denies any violation of the Open Meetings Act as to this portion of your complaint.

Complaint #3

Your third complaint concerns the Planning Commission and the City Council. You state that the Planning Commission held a meeting on November 26, 2018. You complain that the agenda for this meeting did not include an item for reading and approving the minutes from the prior meeting. You believe this to be a violation of the

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Open Meetings Act. Further, you complain that the following day the City Council met and discussed an agenda item which had also been discussed the previous evening by the Planning Commission, without the public knowing the decision from the Planning Commission's meeting. You believe this to be a violation of the Open Meetings Act.

In response to this complaint, the City states that it is not prohibited by the Open Meetings Act "from scheduling an agenda item for consideration on back to back meeting agendas as long as each meeting was given advanced public notice and that each agenda item was sufficiently descriptive to give the public reasonable notice of the matter to be discussed at each meeting, per Neb. Rev. Stat. § 84-1411(1). Similarly, we do not believe there is a requirement to let the public know of a decision made by the Planning Commission prior to item (sic) being considered by the City Council."

We will now address each of your complaints.

ANALYSIS

Complaint #1

Your first complaint is that the Committee was formed and met in violation of the Open Meetings Act. We must first determine whether the Committee is a public body which is subject to the Open Meetings Act.

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 . . . (v) advisory committees of the bodies referred to in subdivisions (i), (ii), and (iii) of this subdivision . . . 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.

The City Council itself is the “governing body of a political subdivision.” The classifications which may apply to the Committee at issue here which may subject it to the Open Meetings Act are an advisory committee to the City Council under § 84-1409(1)(a)(v); or a subcommittee which either contains a quorum of the City Council or is holding hearings, making policy, or taking formal action on behalf of the City Council.

Advisory Committee

First, we must examine whether the Committee is an advisory committee of the City Council as defined in § 84-1409(1)(a)(v), which would subject it to the Open Meetings Act. Typically, advisory committees under this provision are made up, at least in part, of members who are not a part of the parent public body. Here, all members of the Committee are members of the City Council. In addition, in order to be an advisory committee under this section of the Open Meetings Act, the Committee must have been formed in order to advise the parent body, which is the City Council. It does not appear to us that the Committee advised the City Council, you do not allege that the Committee advised the City Council, and the City asserts that the Committee advised the Mayor. While both you and the City call the Committee a “mayoral advisory committee,” such a body is not contemplated or defined in the Open Meetings Act.

This office has issued two opinions relating to advisory committees of public bodies which relate to the Committee here. The first, Op. Att’y Gen. No. 95014, dealt with a committee created by the mayor of Omaha. That committee did not contain any members of the city council, nor did it report to the city council; instead, the committee reported to the mayor. This office determined that the committee was not an “advisory committee” subject to the Open Meetings Act, but was serving in a management or administrative function. The second opinion, Op. Att’y Gen. No. 92020, analyzed whether a committee formed by the Chancellor of the University of Nebraska, which reported directly back to the Chancellor and the membership of which did not contain any of the Board of Regents, was an advisory committee. Again, that committee was determined to be an administrative body of the office of the Chancellor, and was not subject to the Open Meetings Act.

While the City states that the Committee reports to the Mayor, it is distinguishable from the committees in these opinions in a very important way. The Committee here is made up only of members of the City Council, which is highly unusual for an administrative body formed to advise a public official. Because it contains no members from outside the City Council, we do not believe the Committee here to properly be an administrative committee under these opinions. Such a committee would contain members from outside the City Council, such as members of the public or members of other City departments or public bodies.

However, while we do not believe the Committee to be an administrative committee under our prior opinions, we also do not believe it to be an advisory committee under Neb. Rev. Stat. § 84-1409(1)(a)(v). The Committee is made up only of members of the City Council, and it does not report to or advise the City Council. For these reasons, we cannot conclude that the Committee is an advisory committee under the provisions of the Open Meetings Act.

Subcommittee

Our inquiry into the Committee does not end there, however. While we do not believe the Committee to be an advisory committee, 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, the Committee consists of four members of the City Council and no members from outside the City Council. While the Committee was organized by the Mayor rather than the City Council for the purposes of assisting him in negotiations related to the sale of city property, it is the membership of the Committee that is paramount in determining whether the Committee is a subcommittee, rather than the impetus for, or method of, its formation. Consequently, because it contains only a subset of the City Council, we believe the Committee is a subcommittee.

It is our understanding that the City Council is composed of eight members, and that a majority of the members constitute a quorum.¹ In other words, a quorum is reached by the attendance of five City Council members. The Committee at issue here is made up of four City Council members, and therefore a quorum of the City Council was never in attendance at the meetings. As a result, under Neb. Rev. Stat. § 84-1409(1)(b)(i), the Committee is only a public body if it is “holding hearings, making policy, or taking formal action on behalf of the parent body.” We have no information which would suggest that the Committee held hearings, made policy or took any formal action on behalf of the City Council. The City has stated that the Committee advised the Mayor and that it was then the Mayor who submitted a draft agreement between the City and the DCHS at the October 30, 2018 City Council meeting; the City Council as a whole then discussed and voted on the agreement.

¹ See Neb. Rev. Stat. § 17-105 (2007).

It is our conclusion that this Committee is a subcommittee of the City Council under Neb. Rev. Stat. § 84-1409(1)(b)(i) and we find no violation of the Open Meetings Act related to this complaint.

Complaint #2

Your second complaint is that the minutes from the Planning Commission's November 19, 2018 meeting were not printed out and available for members of the public at the Planning Commission's next meeting held on November 26. Neb. Rev. Stat. § 84-1413, in pertinent part provides:

(4) The minutes of all meetings and evidence and documentation received or disclosed in open session shall be public records and open to public inspection during normal business hours.

(5) Minutes shall be written, except as provided in subsection (6) of this section, and available for inspection within ten working days or prior to the next convened meeting, whichever occurs earlier, except that cities of the second class and villages may have an additional ten working days if the employee responsible for writing the minutes is absent due to a serious illness or emergency.

Your complaint is that the Planning Commission did not have a copy of the minutes of its prior meeting available upon demand at its meeting. To be clear, your complaint is not that the minutes were not written and available upon request, or that you requested a copy of the minutes and were denied; the minutes had been written and you were shown an electronic copy. Your complaint is that the Planning Commission did not have copies of the prior minutes available at its next meeting. However, this is not required by the Open Meetings Act. The City states you were shown an electronic copy of the minutes at the meeting upon your request for a copy and that you were offered a printed copy once the city offices reopened for normal business hours. The Planning Commission clearly complied with the requirements of the Open Meetings Act as to the minutes of the November 19, 2018 meeting and there is no violation as to this portion of your complaint.

We would also note that Neb. Rev. Stat. § 84-1412(8) provides that "[p]ublic bodies shall make available at the meeting or the in-state location for a telephone conference call or videoconference, 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." The agenda for the November 26, 2018 meeting does not list a discussion or approval item related to the minutes from the prior meeting. Consequently, the agenda for this meeting did not trigger a requirement that a copy of the minutes be available at the meeting site for inspection. The Planning Commission has not violated the Open Meetings Act as to this complaint.

Complaint #3

Your final complaint is two-fold. First, you complain that the agenda for the Planning Commission meeting of November 26, 2018 lacks an item for discussion and approval of the minutes of the prior meeting. There is no such requirement in the Open Meetings Act and the Planning Commission has not violated the Open Meetings Act by not having such an agenda item.

The second part of your final complaint is that the City Council placed an item on its agenda for its November 27, 2018 meeting for discussion and vote which had been discussed and voted upon by the Planning Commission on November 26, 2019. You appear to believe that this violates the Open Meetings Act notice provisions. The Open Meetings Act provides:

Each public body shall give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes. Such notice shall be transmitted to all members of the public body and to the public. Such notice shall contain an agenda of subjects known at the time of the publicized notice or a statement that the agenda, which shall be kept continually current, shall be readily available for public inspection at the principal office of the public body during normal business hours. Agenda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting. Except for items of an emergency nature, the agenda shall not be altered later than (a) twenty-four hours before the scheduled commencement of the meeting or (b) forty-eight hours before the scheduled commencement of a meeting of a city council or village board scheduled outside the corporate limits of the municipality. The public body shall have the right to modify the agenda to include items of an emergency nature only at such public meeting.

Neb. Rev. Stat. § 84-1411(1). The notice provisions found in the Open Meetings Act apply to each distinct public body. There is no restriction placed on one public body based upon the agenda of a separate public body. You believe that the City Council cannot hear an agenda item which had been discussed by the Planning Commission the prior day. This is not an accurate interpretation of the Open Meetings Act and there is no such burden placed on public bodies to rely on the schedule of a separate public body to determine when it may hear items on its own agenda. Your complaint does not allege that the City Council did not provide proper notice of its agenda item or that the agenda item was not sufficiently descriptive for members of the public to know what was to be discussed. Consequently, the City Council has not violated the Open Meetings Act as to this complaint.

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CONCLUSION

For the reasons stated above, we do not believe the City has violated the Open Meetings Act as to the allegations in your complaints. Since we have determined that no further action by this office is warranted, 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 Act.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Mayor Scott Getzschman
Chairman Dev Sookram

02-717-29