



STATE OF NEBRASKA
Office of the Attorney General

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LAURA A. NIGRO
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November 5, 2021

Via email at [REDACTED]
Mark Koch
[REDACTED]

RE: *File No. 21-M-125; Columbus City Council, Mark Koch; Complainant*

Dear Mr. Koch:

This letter is in response to your correspondence in which you requested that this office address alleged violations by the Columbus City Council ("Council") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2014, Cum. Supp. 2020, 2021 Neb. Laws LB 83, §§ 11-14) ("Act"). In accordance with our normal procedures, we requested a response from the Council after we received your complaint and we subsequently received a response from the City Attorney, Neal Valorz. We have now had an opportunity to review your allegations and the Council's response, and our conclusions are set out below.

ALLEGED VIOLATIONS

Upon review of your complaint, we have identified four alleged violations of the Open Meetings Act, as follows:

1. The Council changed the location of its August 2, 2021 meeting and did not properly notice the change;
2. The Council denied you the opportunity to speak on an agenda item at its August 2, 2021 meeting, and the Council did not have a public comment period;
3. The Mayor spoke on items not appearing on the agenda at the August 2, 2021 meeting; and

4. The Council did not hear your objection before it went into an executive session at its August 2, 2021 meeting, and the executive session was not appropriate.

The remainder of your allegations against the Council are not related to the Open Meetings Act. The Attorney General does not have general supervisory authority over local political subdivisions such as a city council. Therefore, we will not address the remainder of your allegations.

ANALYSIS

Meeting Location

Your complaint alleges the Council changed the location of its August 2, 2021 meeting without properly noticing the change. You allege this change was due to ongoing construction at the Council's regular meeting location. Neb. Rev. Stat. § 84-1411(1)(a) provides that "[e]ach public body shall give reasonable advance publicized notice of the time and place of each meeting" In its response, the Council states it did not change the location of its August 2, 2021 meeting. It further states it held the meeting at the "Council Chambers," which is located at 1369 25th Avenue, Columbus, Nebraska. All regular and special meetings of the Council have been held at the Council Chambers for the last twenty-eight years. The construction you refer to was not in the Council Chambers area. Accordingly, there was no change to the meeting location once the meeting notice was published. The Council did not violate the Act regarding this portion of your complaint.

Public Comment

Although it is not entirely clear, your next complaint appears to be the Council did not have a public comment period at its August 2, 2021 meeting. You also allege you were not allowed to give public comment on a particular agenda item, although you do not say which agenda item. A review of the August 2, 2021 meeting recording shows you gave public comment on agenda item No. 13A: "Applications of Casey's General Store Nos. 1177, 1965, 2881, and 3089 for Krystal M. Carter as manager in conjunction with liquor licenses." A review of the meeting also shows you wished to speak during agenda item No. 14: "Resolutions." The Mayor informed you that you could speak on the resolution but could not make comments unrelated to the agenda item. You then objected to the Council not having a public comment section unrelated to agenda items. In the Council's response, it states that public comment is allowed on agenda items but not on non-agenda items because "[i]f individuals are allowed to speak about non-agenda items, then the public and the community are not being provided proper notice and other interested individuals would then be denied an opportunity to attend and/or speak."

While Neb. Rev. Stat. § 84-1412(2) provides “the public has the right to attend and speak at meetings of public bodies . . . ,” it also allows public bodies 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 conference. A body may not be required to allow citizens to speak at each meeting, but it may not forbid public participation at all meetings.” The Council allows public comment on agenda items only. It is reasonable for the Council to restrict public comment in this manner. Additionally, there is nothing in the Act which requires the Council to have a public comment agenda item for its meetings. While the Council believes it would be a violation of the Act to permit public comment on non-agenda items, we note that nothing in the Act would prohibit this. If the Council wishes to add a public comment period in the future, it may do so. However, the Act does not require it. The Council did not violate the Act regarding this portion of your complaint.

Comments on Non-Agenda Items

Your next complaint is that the Mayor spoke on subjects not appearing on the agenda for the August 2, 2021 meeting. Specifically, that he made comments regarding a fire at the Archer Daniels Midland (“ADM”) plant. In its response, the Council states that on agenda item No. 13.B: “Comments from mayor and city council members,” the Mayor made a statement about a coal fire that had been ongoing at a local ethanol plant, owned and operated by ADM, and gave a health update regarding the fire. There was no further discussion about the fire, no action was taken, and no policy was created. A review of the meeting shows the Mayor spoke for approximately one minute on the coal fire. Neb. Rev. Stat. § 84-1411(1)(e) provides “[a]genda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting.” (Emphasis added.) The comments you complain of were not considered or acted upon in any way by the Council. The Mayor was simply giving an update on an item of public interest and public health. We have some concern about the lack of description in the agenda item “[c]omments from mayor and city council members.” The preferred practice for the such an agenda item would be to include some description of matters upon which the mayor or city council may comment. In any event, we find no actionable violation of the Act regarding this portion of your complaint.

Executive Session

You next complain that the Council did not hear your objection before going into an executive session at its August 2, 2021 meeting. Further, it appears you also object to the Council going into the executive session. In its response, the Council states it unanimously voted in favor of going into a closed session on agenda item No. 19.A.: “Performance evaluation of City Administrator Tara Vasicek.” Neb. Rev. Stat. § 84-1410(1) provides “[a]ny 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

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individual and if such individual has not requested a public meeting.” Section 84-1410(1) further provides that closed sessions may be held for “[e]valuation 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.” The motion to go into closed session stated the subject matter was the performance evaluation of the City Administrator, and the reason for the closed session was to prevent needless injury to the reputation of an individual. The City Administrator, Ms. Vasicek, did not request a public meeting. Since the closed session was held to conduct a job performance evaluation of Ms. Vasicek and to prevent needless injury to the reputation of an individual, and Ms. Vasicek did not request a public meeting, the closed session was appropriate. Further, nothing in the Act requires the Council to hear your objection prior to going into a closed session. The Council did not violate the Act regarding this portion of your complaint.

CONCLUSION

For the reasons stated above, we do not believe the Council has violated the Open Meetings Act with respect to the issues raised in your complaint. 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,

DOUGLAS J. PETERSON
Attorney General



Laura A. Nigro
Assistant Attorney General

cc: Neal Valorz