



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

DALE A. COMER
ASSISTANT ATTORNEY GENERAL
CHIEF, LEGAL SERVICES BUREAU

March 2, 2012

Mr. Don Smith, Publisher
Ms. Tracy Overstreet, Reporter
Grand Island Independent
422 West First Street
P.O. Box 1208
Grand Island, NE 68802-1208

Re: *File No. 12-R-101; Grand Island City Council; Grand Island Independent.*

Dear Mr. Smith and Ms. Overstreet:

In correspondence dated January 10, 2012, you requested our assistance in obtaining certain information which the City of Grand Island, Nebraska (the "City"), and the Grand Island City Council (the "Council") refused to provide to you. We received your correspondence and the materials enclosed with it on January 11, 2012. We considered your correspondence and the materials with it to be a petition for access to records under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2010, Supp. 2011), and a complaint under the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2008, Cum. Supp. 2010, Supp. 2011)(the "Act"). Allen Beermann, Executive Director of the Nebraska Press Association, joined in your records petition and in your open meetings complaint.

In a letter dated January 26, 2012, we wrote to you and indicated that, based upon our preliminary review of your public records petition, we had "determined that the City has not improperly withheld public records from inspection or otherwise failed to comply with the Public Records Statutes." In that same letter, we indicated further that we would provide you with a determination regarding your open meetings complaint and a more detailed analysis of our determination regarding your public records petition at a later date. This response sets out our final conclusions with respect to both matters.

Mr. Don Smith
Ms. Tracy Overstreet
March 2, 2012
Page 2

FACTS

Our understanding of the facts in this case is based upon your correspondence and the materials you provided to us with it. In addition, we requested a response to your complaint from the City, and we received such a response from Grand Island City Attorney Robert Sivick on January 20, 2012.

At its meeting on December 6, 2011, the Council went into closed or executive session, and its motion to do so indicated that the closed session was "for the purpose of a strategy session with respect to pending litigation." The agenda item for that discussion on the Council's meeting agenda for the December 6 meeting stated as follows:

Strategy Session with Respect to Pending Litigation

The City Council may vote to go into Executive Session as required by State law to discuss possible litigation for the protection of the public interest

You wish to know what specific litigation was the subject of the Council's closed session. Therefore, since there is nothing in the Council's agenda item or motion which identifies that litigation, you sent the City a public records request for:

All documents reflecting the identity of the litigation, or imminently pending litigation, discussed by the Grand Island City Council in closed session at its meeting held on Dec. 6, 2011.

The City provided you with a timely response to your records request, and denied you access to the records at issue.

Subsequently, at its meeting on December 20, 2011, the Council again went into closed or executive session based upon a motion which indicated that the executive session was "for the purpose of a strategy session with respect to litigation which is imminent and strategy session with respect to pending litigation." In that instance, the agenda items for the closed session on the Council's meeting agenda stated as follows:

Strategy Session with Respect to Litigation which is Imminent.

The City Council may hold a closed or Executive Session as permitted by Neb. Rev. Stat. Sec. 84-1410. Closed sessions may be held for, but shall not be limited to, such reasons as:

1. *Protection of the public interest;*
2. *Needless injury to the reputation of an individual*

Mr. Don Smith
Ms. Tracy Overstreet
March 2, 2012
Page 3

3. *Strategy sessions with respect to*
 - a. *collective bargaining,*
 - b. *real estate purchases,*
 - c. *pending litigation, or*
 - d. *imminent or threatened litigation.*
4. *Discussion regarding deployment of security personnel or devices.*
5. *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.*

Strategy Session with Respect to Pending Litigation.

The City Council may hold a closed or Executive Session as permitted by Neb. Rev. Stat. Sec. 84-1410. Closed sessions may be held for, but shall not be limited to, such reasons as:

1. *Protection of the public interest;*
2. *Needless injury to the reputation of an individual*
3. *Strategy sessions with respect to*
 - a. *collective bargaining,*
 - b. *real estate purchases,*
 - c. *pending litigation, or*
 - d. *imminent or threatened litigation.*
4. *Discussion regarding deployment of security personnel or devices.*
5. *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.*

Once again, in order to determine what litigation was discussed during the closed session on December 20, you sent the City a public records request seeking:

The document(s) reflecting the identity of the litigation, or imminently pending litigation, discussed by the Grand Island City Council in closed session at its meeting held on Dec. 20, 2011. We do not seek any privileged or confidential information, only the name of the person/entity making the threat and the nature of the threat made.

And, once again, the City, acting through its City Attorney, denied you access to the records requested in your records request.

After the second denial of access to records by the City, you sent your public records petition and open meetings complaint to this office. You believe that the City

Mr. Don Smith
Ms. Tracy Overstreet
March 2, 2012
Page 4

improperly denied you access to records which would identify what litigation and imminently pending litigation was at issue during the Council's closed sessions on December 6 and December 20. You also maintain that the agendas and minutes for the Council meetings on those dates were insufficient under the Open Meetings Act because those agendas and minutes did not identify the specific pending litigation and imminent litigation which were discussed in the Council's closed sessions. We will address both issues below.

PUBLIC RECORDS

The Nebraska Public Records Statutes generally allow interested persons in Nebraska the right to examine public records in the possession of public agencies during normal agency business hours, to make memoranda and abstracts therefrom, and to obtain copies of records in certain circumstances. However, we have consistently taken the position over time that those statutes do not require public officials to answer questions, or to create records which do not otherwise exist. Op. Att'y Gen. No. 94092 (November 22, 1994); Op. Att'y Gen. No. 94089 (May 13, 1994). In light of those rules, we have also taken the position over time that the Public Records Statutes do not require public agencies to respond to records requests which, in effect, require the agency to answer a question in order to prepare a records response and produce records. Under such circumstances, we have concluded that a public records request of that nature is simply a question posed to the agency in the guise of a records request.

In the present situation, it appears to us that the information which you actually seek from the City is what specific litigation or imminent litigation was discussed during the Council's closed sessions on December 6 and December 20. As a result, your records requests were designed to require the City to answer those questions in order to produce the appropriate records. Based upon our long-standing position with respect to records requests which pose questions, we conclude that the City was not required to answer your questions by the production of particular public records.

OPEN MEETINGS

Your Open Meetings complaint goes to the adequacy of the agendas and the minutes for the Council meetings on December 6 and December 20. As noted above, the agendas for those meetings simply indicated that the Council would likely vote to go into executive session to conduct strategy sessions with respect to pending litigation and litigation which was imminent. There is no indication in those agendas as to what specific litigation was the subject of the Council's discussions. Similarly, the minutes for both meetings indicate that the Council went into closed session to discuss pending

Mr. Don Smith
Ms. Tracy Overstreet
March 2, 2012
Page 5

litigation and litigation which was imminent without any disclosure of what litigation was as issue. You contend that the agendas and the minutes for the meetings on those dates were insufficient under the Open Meetings Act because they did not identify the specific litigation and imminent litigation which were the subject of the closed sessions.

The purpose of the agenda requirement in the Open Meetings Act is to give some notice of the matters to be considered at a meeting of a public body so that persons who are interested will know the matters which are under consideration. *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010); *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979). The agenda requirement in Section 84-1411 was also amended in 2006 to state that agenda items must be "sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting." 2006 Neb. Laws LB 898. Within that context, however, it is also clear under the language of § 84-1410 that public bodies may go into closed or executive session for strategy sessions regarding "pending litigation, or litigation which is imminent as evidenced by communication of a claim or threat of litigation to or by the public body."

With respect to minutes of public meetings, Section 84-1413 (1) simply provides that the minutes of meetings of public bodies must show the "substance of all matters discussed." We have also indicated that detailed minutes of all matters discussed by a public body need not be maintained when the body is meeting in closed or executive session. Op. Att'y Gen. No. 98045 (November 4, 1998).

To resolve your Open Meetings complaint, we must determine whether, in our view, the Act requires public bodies to identify specific litigation or imminent litigation in their agendas and minutes when they conduct strategy sessions regarding such litigation in private. We are aware of no cases from our supreme court which address that specific issue directly. As a result, we are left with the language of the Act and its purposes. In that regard, it is clear that § 84-1411 was amended to require more specificity in agendas. On the other hand, the language of § 84-1410 clearly recognizes the public interests served by confidentiality with respect to the discussion of pending and imminent litigation.

On balance, we conclude that the better answer to the question before us in this instance is that public bodies are *not* required to identify specific litigation or imminent litigation in their agendas or minutes when they conduct proper closed sessions regarding such matters. There are several reasons for our determination. First, an agenda item or minute entry such as those prepared by the City in this case actually does give members of the public "reasonable notice of the matters to be considered at the [City's] meeting," i.e., that litigation involving the City will be or was discussed at the meeting in closed session. Second, we agree with the Grand Island City Attorney that

Mr. Don Smith
Ms. Tracy Overstreet
March 2, 2012
Page 6

there is no specific language in the Open Meetings Act which requires public bodies to identify the particular litigation which is the subject of a proper closed session. Third, we also agree with the City Attorney there may be instances where identification of the particular litigation which is the subject of a closed session of a public body may adversely or detrimentally affect the conduct of that litigation or negotiations regarding its disposition.¹ And, as noted, the Act clearly does recognize the need for confidentiality regarding the discussion of litigation matters and the public interests served thereby. Finally, there are other existing means for members of the public to obtain information regarding litigation or imminent litigation involving public bodies. For example, in this case, a search of court records or an appropriate public records request to the City would identify any cases where the City is involved in litigation. In addition, most significant settlements of claims and settlement agreements involving cities and other public bodies must be reported under Neb. Rev. Stat § 84-713 (Cum. Supp. 2010), and any final decisions regarding litigation involving the City would have to be undertaken and voted upon at an open meeting. Therefore, since we do not believe that the City was required to identify the litigation or imminent litigation which was the subject of the Council's closed sessions on December 6 and December 20, we conclude that the City's agendas and minutes for those meetings were sufficient under the Open Meetings Act.

We will note, however, that there appears to be a problem with the content of the Council's motions to go into closed session on December 6 and December 20, as reported in the Council's minutes. Under § 84-1410 (1), a motion to go into closed or executive session by a public body must identify *both* "the subject matter and the reason necessitating the closed session." However, the minutes from the Council's meetings of December 6 and December 20 indicate that the motions to go into closed session on those dates only indicated that they were for strategy sessions with respect to pending litigation and litigation which was imminent. As a result, the motions to go into closed session on both occasions appear to be improper in that they did not include the reason for the closed session. Instead, the reasons for the closed sessions were included in the agendas for both meetings. Therefore, we will suggest to the Council, by means of a copy of this letter to the City Attorney, that both the subject matter of the closed session and the reason for the closed session should be included in the motion to go into closed session as well as in the agenda item for the closed session.

¹ At least one case involving a somewhat different state Open Meetings Act recognizes that identification of the litigation to be discussed in an executive session could have a detrimental effect on the litigating position of the public body. *Norris, District Attorney v. Monroe City School Board*, 535 S.2d 840 (La. Ct. App. 1988).

Mr. Don Smith
Ms. Tracy Overstreet
March 2, 2012
Page 7

If you disagree with our analysis under the Public Records Statutes or the Open Meetings Act set out above, you may wish to discuss this matter with your private attorney to determine what additional remedies, if any, are available to you under those statutes.

Sincerely yours,

JON BRUNING
Attorney General

A handwritten signature in black ink, appearing to read "Dale A. Comer", with a long horizontal flourish extending to the right.

Dale A. Comer
Assistant Attorney General
Chief, Legal Services Bureau

cc. Robert Sivick
Grand Island City Attorney

05-355-30