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December 20, 2013

Chris Rodgers
Douglas County Board of Commissioners
1819 Farnam Street
Suite LC 2 Civic Center
Omaha, NE 68183

Re: *File No. 13-M-112; Nebraska Workforce Investment Board, Performance Committee; Complainant Chris Rodgers*

Dear Mr. Rodgers:

This letter is in response to your correspondence received by us on May 31, 2013, in which you requested that this office respond to your inquiry as to whether a committee related to the Nebraska Workforce Investment Board is subject to the Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2008, Cum. Supp. 2012). As we cannot provide you with an Attorney General's Opinion on this matter, we have considered your letter to be a complaint under the Open Meetings Act and have investigated your question accordingly. In accordance with our normal procedures, we requested a response from the Nebraska Workforce Investment Board after we received your letter, and we, and you, subsequently received a response from Thomas Ukinski of the Nebraska Department of Labor. We have now had an opportunity to review this matter in detail, and our conclusions are set out below.

FACTS

Our understanding of the facts in this case is based upon your correspondence and the response from the Nebraska Workforce Investment Board (NWIB). Your Open Meetings Act concerns relate to the Performance Committee of the NWIB, which is comprised of nine members -- six members from the NWIB and three members who are not also members of the NWIB. The six members of the Performance Committee who are also on the NWIB are the only members with authority to vote; the other three members do not have voting rights. The full NWIB has a total of 34 members (one position is currently vacant, giving 33 sitting members). Consequently, the Performance Committee does not contain a quorum of members from the NWIB. You are concerned that the Performance Committee should be conducting its meetings subject to the Open

Meetings Act. The Performance Committee, however, is currently operating as a subcommittee not subject to that Act. The NWIB has responded that the Performance Committee is a subcommittee of the NWIB, with authority to "investigate and make recommendations to the NWIB" or the Executive Committee of the NWIB, on various topics, and lacks the ability to act on behalf of the NWIB. Therefore, the NWIB has concluded the Performance Committee is not subject to the Open Meetings Act.

ANALYSIS

Your question is whether the Performance Committee is subject to the Open Meetings Act. Neb. Rev. Stat. § 84-1409 (2011) defines "public body" for purposes of the Open Meetings Act.

(1)(a) Public body means (i) governing bodies of all political subdivisions of the State of Nebraska, (ii) governing bodies of all agencies, created by the Constitution of Nebraska, statute, or otherwise pursuant to law, of the executive department of the State of Nebraska, (iii) all independent boards, commissions, bureaus, committees, councils, subunits, or any other bodies created by the Constitution of Nebraska, statute, or otherwise pursuant to law, (iv) all study or advisory committees of the executive department of the State of Nebraska whether having continuing existence or appointed as special committees with limited existence, (v) advisory committees of the bodies referred to in subdivisions (i), (ii), and (iii) of this subdivision, and (vi) instrumentalities exercising essentially public functions; 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, except that all meetings of any subcommittee established under section 81-15,175 are subject to the Open Meetings Act, and (ii) entities conducting judicial proceedings unless a court or other judicial body is exercising rulemaking authority, deliberating, or deciding upon the issuance of administrative orders.

While the full NWIB is certainly a public body, and any subcommittee thereof which contains a quorum of the full NWIB would also be a public body, the Performance Committee at issue here does not contain a quorum of the parent body and is only a public body if it is a subcommittee "holding hearings, making policy, or taking formal action on behalf of the parent body" or if it is an advisory committee.

The Performance Committee is comprised of nine members; six of those members are voting members from the NWIB and three are non-voting members who are not members of the NWIB. Whether the Performance Committee is a subcommittee or an advisory committee of the NWIB¹ is not immediately clear. The Open Meetings Act does not provide a definition of either body. Therefore, we must look to the plain meaning of the statutory language. Typically, a subcommittee is made up of only members from the parent body and an advisory committee is made of a number of different people, some of whom could be members of the parent body, but the majority of whom are "other" people. The language found in *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 880-881, 725 N.W.2d 792, 805-806 (2007) supports this definition². However, here, the question of whether the Performance Committee is a subcommittee or an advisory committee is a close one. The majority of the members of the Performance Committee are members of the NWIB. They are also the only members permitted to vote. The "other" members of the Performance Committee are the minority of the body and have no authority to vote. We think, based on the majority of the members being on the NWIB, and those members being the only ones permitted to vote, the more correct answer here is that the Performance Committee is a subcommittee of the NWIB.

Because we have concluded that the Performance Committee is more likely a subcommittee than an advisory committee, it is subject to the Open Meetings Act only if it is holding hearings, making policy, or taking formal action on behalf of the parent body. We have no evidence that any of that is occurring. Therefore, it is our conclusion that the Performance Committee is likely not required to adhere to the Open Meetings Act.

Finally, we would note that any concerns about whether the public has the opportunity to provide input as to any recommendations made by the Performance Committee should be assuaged by the fact that any decisions or recommendations of the Performance Committee will be acted upon by the NWIB or the Executive Committee during meetings subject to the Open Meetings Act.

¹ The Department of Labor asserts that the Performance Committee is "clearly a subcommittee of the Executive Committee." We do not agree. The Executive Committee is certainly a subcommittee of the NWIB. It has 11 members, all of which are also members of the NWIB. However, only two members of the Executive Committee also sit on the Performance Committee. Four voting members, or a majority, of the Performance Committee are not on the Executive Committee. Therefore, the Performance Committee cannot be a subcommittee of the Executive Committee. The Performance Committee can still be a subcommittee of the NWIB.

² The court stated that a subcommittee is generally a "group within a committee to which the committee may refer business."

CONCLUSION

Based on our analysis, we believe that the Performance Committee at issue is not subject to the Open Meetings Act. 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,

JON BRUNING
Attorney General

A handwritten signature in black ink, appearing to read "Natalee Hart". The signature is written in a cursive, flowing style.

Natalee J. Hart
Assistant Attorney General

cc: Thomas Ukinski

02-389-30