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November 19, 2018

Via email at [REDACTED]
Susan Jacobus

Re: *File No. 18-M-125; City of Fremont City Council and City of Fremont Utility and Infrastructure Board; Complainant Susan Jacobus*

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 Utility and Infrastructure Board ("Board") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (Reissue 2014, Cum. Supp. 2016, Supp. 2017). In accordance with our normal procedures, we requested a response from the City Council and the Board after we received your complaints. We subsequently received responses from Scott Schaller, President of the City Council, and Allen Sawtelle, Chairman of the Board, as to your complaints. We have now had an opportunity to review your allegations and the responses of the City Council and the Board 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 Council and the Board. Your complaints concern the July 31, 2018 meetings of each of these public bodies. Your allegations as to the City Council are that two items which were not on the agenda were discussed at the meeting; as to the Board, your allegation is that a member of the public was allowed time to speak at the Board meeting, without there being a corresponding agenda item.

As to the City Council, you complain that the Assistant City Administrator briefed the City Council on fees during the informal study session which takes place before the City Council meeting, without such item being on the agenda. The City Council admits that this item was not on the agenda, but says that the informal study session was properly noticed to the public and no action was taken on the fee issue. You also allege that during the City Council meeting on July 31, 2018, a member of the City Council asked for an explanation from the City's legal counsel regarding permission given by the Mayor for the public to violate the Fremont Municipal Code as to fireworks. This item

was also not on the agenda. The City Council again admits that the member of the council did comment on an item not on the agenda, but believes that the City Council members are not restricted to commenting only on items on the agenda. The City Council believes its members have the same rights as members of the public to comment on any topic they wish, regardless of whether that item is on the agenda.

Finally, as to the Board, you complain that a member of the public was permitted to comment during the meeting on the topic of a downtown parking structure, without either that item, or public comment, being on the agenda. In response, the Board states that public comment is permitted at the end of each of its meetings, regardless of whether it is on the agenda.

ANALYSIS

The Open Meetings Act requires a public body to give “reasonable advance publicized notice” of its meetings, which “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.” Neb. Rev. Stat. § 84-1411(1) (2017).

City Council

Your first allegation is that the City “fee schedule” was discussed during an informal study session of the City Council held before the July 31, 2018 City Council meeting¹ without being on the agenda. The City Council admits this item was not on the agenda. It is a violation of the Open Meetings Act for a public body to discuss an item which is not properly on its agenda.

Your second complaint with respect to the City Council is that one of its members initiated a discussion which was not found on the agenda of its July 31, 2018 meeting. You state that in early July, the Mayor of Fremont “gave permission to citizens to ignore [Fremont] municipal code and continue to shoot fireworks after the July 4 midnight deadline” and City Council member Mark Legband asked for the City Council’s legal counsel to give an explanation of the “controversy” at the July 31 meeting. The City Council responded to your allegation, admitting that Councilman Legband posed “a question” during the meeting, presumably regarding the fireworks matter, but does not

¹ While we have limited information on the informal study sessions, they appear to us to meet the definition of a “meeting” under the Open Meetings Act. These informal sessions are attended by at least a quorum of the City Council members and some of the activities set out in the statutory definition of “meeting” found at Neb. Rev. Stat. § 84-1409(2) (2014) occur during these informal sessions. It also appears that the City Council treats these informal study sessions properly under the Open Meetings Act, as they are on the agenda, notice is published, and they are open to the public. Additionally, the City Council is prohibited by the Fremont Municipal Code from taking action during the informal study session.

Susan Jacobus
November 19, 2018
Page 3

believe that City Council members are restricted to addressing their fellow Council members only on agenda items, and does not believe that Council members should be treated differently than members of the public in being permitted to comment on items not on the agenda. However, members of the City Council, as part of the public body, *are* treated differently under the Open Meetings Act, which very specifically requires a public body to notify members of the public of the items which are to be addressed by the public body during its meetings. The members of the public body are restricted to discussing only those items which are found on the agenda. Councilman Legband had sufficient time between the July 4 holiday and the July 31 meeting to place the matter at issue on the City Council's agenda for proper discussion. By discussing, commenting, or asking questions regarding an item not on the agenda, the City Council is in violation of the Open Meetings Act as to this portion of your complaint.

The City Council did not take any action on either the fee schedule or the fireworks matter on July 31, 2018. Consequently, there is no decision to void or be voidable under Neb. Rev. Stat. § 84-1414(1). However, we will admonish the City Council for these violations and will remind it that the Open Meetings Act requires all items upon which a quorum of its members receives a briefing, discusses, or takes action must be found on the agenda.

We would also note that, while not part of your complaint, our review of the material provided by you indicated that the discussion regarding fireworks is not found in the minutes of the July 31 meeting. We are troubled by this omission. Neb. Rev. Stat. § 84-1413 requires the City Council to "keep minutes of all meetings showing the time, place, members present and absent, and the substance of all matters discussed." This is also a violation by the City Council of the Open Meetings Act. We will remind the City Council of its responsibilities as to the accuracy and thoroughness of its minutes of future meetings.

Utility and Infrastructure Board

Your complaint as to the Board is that a citizen was permitted to comment on an item not found on the agenda of the Board's July 31, 2018 meeting. The Board responded by stating that public comment is allowed at each of its meetings, but is not listed on the agenda. The Board did not respond to the public comment or take any action as to the topic discussed during public comment.

Neb. Rev. Stat. § 84-1412 provides that the public has the right to attend and speak at meetings of public bodies, subject to reasonable rules. The public body is not required to allow public comment at each of its meetings, provided that it allows comment at some of its meetings. It is not a violation of the Open Meetings Act for a public body to allow public comment on an item not found on the agenda, provided no discussion is held by the public body as to that topic in response to the public comment. However, under Neb. Rev. Stat. § 84-1411(1), public comment should be placed on the agenda for meetings in which the public comment will be permitted; omitting this as an

Susan Jacobus
November 19, 2018
Page 4

agenda item is a violation of the Open Meetings Act. We understand that the Board allows public comment at each of its meetings; its agendas should so reflect. We would instruct the Board to add an agenda item to its meetings for public comment to properly alert members of the public that they will be permitted to address the Board at its meetings. The Board, however, may allow members of the public to address it on any topic and is not required to limit public comment only to items found on the agenda, provided that the public comment period itself is on the agenda.

CONCLUSION

Since we have determined that the City Council and the Board have violated the Open Meetings Act, it is now necessary for us to determine what action, if any, will be taken by this office. We do not believe that a criminal prosecution for a knowing, intentional violation of the Open Meetings Act is warranted here. There is also no basis for a civil lawsuit, as there was no action taken by the City Council or the Board as to any of the items not found on their agendas. As a result, no further action by this office is appropriate at this time and 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: Scott Schaller
Allen Sawtelle

02-708-29