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October 22, 2020

Lee and Johanna Jeffres



RE: *File No. 20-M-112; City of Burwell Officials; Lee and Johanna Jeffres, Complainants*

Dear Mr. and Mrs. Jeffres:

This disposition letter is in response to your correspondence received by our office on May 8 and August 10, 2020. You have alleged that the mayor of the City of Burwell, Jim Roblyer, and Burwell City Council members Cody Feecken and Jerome Zulkoski, violated the Open Meetings Act ("Act"), Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2014, Cum. Supp. 2018, Supp. 2019), with respect to a letter they sent on or about April 7, 2020, and by participating in a conference call with retained legal counsel. We sent your correspondence¹ to Mr. Roblyer and City Attorney Heather Sikyta, and requested responses to the allegations raised. We subsequently received a response from Mr. Roblyer as to your initial correspondence, and attorney Mark Fahleson, Rembolt Ludtke, responded to your August 10, 2020, email. We have now completed our review of your complaints and the responses provided to us by Messrs. Roblyer and Fahleson. Our conclusion and future action in this matter is set forth below.

Before we begin, we would like to point out the scope of the Attorney General's authority over local governmental entities. Our authority is set out in express statutory provisions requiring us to enforce the Open Meetings Act and the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2018, Supp. 2019). This office also has concurrent jurisdiction, along with the state's county attorneys, to prosecute criminal matters. We do not, however, have general supervisory power over local government entities, like the City of Burwell. Officers of such entities are responsible to the citizens who elected them rather than to any state agency. As a result, your allegations regarding the employment status of the economic development

¹ We did not provide Mr. Roblyer a copy of the audit report you included in your correspondence since that report has no bearing on whether Burwell officials violated the Open Meetings Act.

director, the allegations of slander made by city officials, or the continued operation of the city's economic development program, etc., are local matters, which we have no authority to address. Consequently, our response will focus solely on whether City of Burwell officials violated the Act.

RELEVANT FACTS

May 8, 2020 Complaint

On March 10, 2020, the Burwell City Council ("Council") held a regular public meeting. During the meeting, the Council discussed and approved motions to begin the process of terminating the "Management Agreement for Economic Development and Business Promotion" between the City of Burwell ("City") and the Burwell Chamber of Commerce ("Chamber"), and the "Interlocal Agreement for Economic Development and Tourism Promotion" between the City of Burwell and Garfield County. According to the meeting minutes, the motions involved the City providing written notice of termination to the other party within the timeframe designated in each agreement.

Subsequently, on March 16, 2020, Mayor Roblyer sent a letter addressed to (1) the Garfield County Board chair, (2) David Sawyer, on behalf of the Burwell Economic Development Board ("Economic Development Board"), and (3) the chair of the Garfield County/Burwell Area Convention & Visitors Bureau Advisory Committee. The subject line of the letter read: NOTICE TO TERMINATE INTERLOCAL AGREEMENT.

On or around April 7, 2020, a letter was mailed to the Chamber Board President and David Sawyer, on behalf of the Economic Development Board. This letter was signed by Mayor Roblyer, Mr. Feeken and Mr. Zulkoski. The subject line read: NOTICE OF PROPOSED CHANGE OR TERMINATION: ECONOMIC DEVELOPMENT DIRECTOR. This letter invited the members of both entities to discuss this matter at the next Council meeting to be held on April 14. The "invitation" was subsequently rescinded by letter dated April 10, 2020, signed by Mayor Roblyer. This letter indicates that "the item NOTICE OF PROPOSED CHANGE OR TERMINATION: ECONOMIC DEVELOPMENT DIRECTOR referenced in the April 7, 2020 Letter . . . will not be scheduled as an Agenda Item for the April 14, 2020 Burwell City Council Meeting."

In a letter dated April 27, 2020, mailed to the Chamber and Economic Development Board, Mayor Roblyer formally revoked the April 7 letter. That letter states as follows:

The City of Burwell, Nebraska, hereby revokes the Notice dated April 7, 2020, signed by Mayor Roblyer and Councilors Feeken and Zulkoski. The issue of whether to send that Notice will be considered by the full City Council at a future meeting prior to any additional action being taken as it relates to the Economic Development Director.

We apologize for any inconvenience the prior Notice caused. The City looks forward to working with the Chamber, Economic Development Board, County and Convention and Visitors Bureau to make the necessary changes to protect all entities involved and continue to make Burwell a vibrant community.

With respect to the April 7 letter, you allege that Mayor Roblyer, Mr. Feeken and Mr. Zulkoski violated the Act by forming a subcommittee and taking action without a quorum or properly advertised meeting. You further allege that “[s]ending the letter of April 7 appears to be action taken by a subcommittee where other members were specifically left out and not informed. If this is the case, it would seem by the action taken with sending that letter, their objective was to by-pass the Open Meetings Act.” You point out the enforcement provisions in Neb. Rev. Stat. § 84-1414 and state that the boards of all of the impacted entities “should take these statues [sic] very seriously and take action against [these individuals] for sending out a letter, that looks to me like it is illegal, and in violation of the Nebraska Statutes.”

In response, Mr. Roblyer informs us that after reviewing the two agreements, he believed it necessary to contact the Chamber and the Economic Development Board “to propose to change or terminate the employment of Economic Development Director David Sawyer, who is a City Employee.” Mr. Roblyer states that he “met separately and individually with [Feeken and Zulkoski] to discuss the proposed letter” and that they “signed the April 7, 2020 letter at different times.” Mr. Roblyer represents that they did not intend to form a subcommittee or circumvent the Act. He further states that it was his belief “that this action was part of what was approved at the March 10, 2020 meeting related to the agreements.” Mr. Roblyer further states that upon learning of the April 7 letter, Ms. Sikyta advised of the potential Open Meetings Act violations. At her suggestion, they immediately sent the April 27 letter revoking the April 7 letter. He states that they “understand that any further action related to the April 7, 2020 notice would need to be on the agenda and discussed at a properly called council Meeting. We know that subcommittees cannot take action on behalf of the Council.”

August 1, 2020 Complaint

This complaint involves information on a billing statement from the Rembolt Ludtke law firm addressed to the City of Burwell. In his response to this office, Mr. Fahleson questions how his firm’s billing statement was released or how you obtained a copy. He confirms that his “firm was retained by the City of Burwell to provide legal advice on certain matters.” He states that the descriptions in the billing statement are privileged, that the privilege is held by the City, not by any City official, and the City does not waive the privilege. Mr. Fahleson also indicates that the descriptions constitute attorney work product, and “detail . . . telephone communications with elected members of the City Council during which I provided legal advice and during which no quorum of the Council was present; these were individual communications.”

You indicate that Council members Jason Roblyer and Jeff Anderson did not participate in any call with counsel, nor were aware of the subject matter “until they received the agenda for that particular meeting, two hours before the meeting.” You further indicate that you would address this issue with the mayor and the Council members on the call at the next scheduled meeting.

DISCUSSION

Neb. Rev. Stat. § 84-1408 (2014) of the Act provides:

It is hereby declared to be the policy of this state that the formation of public policy is public business and may not be conducted in secret.

Every meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies, except as otherwise provided by the Constitution of Nebraska, federal statutes, and the Open Meetings Act.

The Act is a statutory commitment to openness in government. *Wasikowski v. 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). In this regard, the Act creates a number of *procedural* requirements for public bodies in Nebraska, including requirements for meeting notices, agenda, closed sessions, voting and minutes.

In our enforcement capacity over the Act, this office has indicated that two things must be present before a “meeting” under the Act occurs. First, a quorum of a public body must be present.² Second, the public body must engage in at least one of the activities included in the definition of “meeting” set out in Neb. Rev. Stat. § 84-1409(2) (2014), i.e., “briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body” In the absence of either element, we have concluded that no “meeting” of a public body has occurred. Under Neb. Rev. Stat. § 84-1409(1)(b)(i), a public body subject to the Act does not include a subcommittee of the public body except when a quorum of the public body is present at the subcommittee meeting or “such subcommittees are holding hearings, making policy, or taking formal action on behalf of their parent body”

You allege that Messrs. Roblyer, Feeken and Zulkoski violated the Act when they formed a subcommittee and sent the April 7 letter to the Chamber and the Economic

² Burwell is a city of the second class. As such, “[a] majority of all the members elected to the city council shall constitute a quorum for the transaction of any business” Neb. Rev. Stat. § 17-105 (Cum. Supp. 2018). Thus, three Council members constitute a quorum.

Development Board. Except in certain contexts,³ the mayor is not a member of the Council, so his participation in composing and sending the letter does not implicate the Act. “Subcommittee” is not defined in the Act, but is generally defined as “[a] group within a committee to which the committee may refer business, standing in the same relation to its parent committee as the committee stands to the deliberative assembly.” Black’s Law Dictionary (11th ed. 2019), committee. There is no evidence to suggest the Council created a subcommittee, comprised of Mr. Feeken and Mr. Zulkoski, and referred the matter of the economic development director’s employment to these individuals. Mayor Roblyer confirms that they had no intention to form a subcommittee.

The question before us is whether the actions of Mr. Feeken and Mr. Zulkoski, in signing and sending the April 7 letter, violated the Act. As noted, the presence of three Council members is necessary for the transaction of business. So Mr. Feeken and Mr. Zulkoski could not legally take formal action on behalf of the Council. However, while there may not have been a clear violation of the Act, it seems to us that any decision regarding this particular employee’s status should have been made by the entire Council at a properly convened public meeting. That did not occur in the present case. In any event, no specific action occurred as a result of the April 7 letter. Any proposal to change or terminate the economic development director’s employment was removed from the April 14 meeting agenda by letter dated April 10, and the April 27 letter outright revoked the April 7 letter. Moreover, Mayor Roblyer represents to this office that further action relating to the notice set out in the April 7 letter would have to be placed on the agenda and discussed at a scheduled Council meeting.

With respect to your second complaint, we share Mr. Fahleson’s concern that someone in City government disclosed privileged information to you. And Mr. Fahleson is correct that two Council members does not establish a quorum. In this regard, Mr. Fahleson represents that he had “individual conversations” with certain members of the Council. While it is unclear to us why Mr. Fahleson did not speak to the other Council members at that time, that particular question does not implicate the Act. Since no quorum was established, the telephone conference call did not violate the Act.⁴

³ Neb. Rev. Stat. § 17-110 (Cum. Supp. 2018) provides, in pertinent part: “The mayor may vote when his or her vote would provide the additional vote required to attain the number of votes equal to a majority of the number of members elected to the city council on any pending matter, legislation, or transaction, and the mayor shall, for the purpose of such vote, be deemed to be a member of the city council.” However, effective November 14, 2020, “the mayor shall be deemed a member of the city council for purposes of establishing a quorum when the mayor’s presence is necessary to establish a quorum.” Neb. Rev. Stat. § 17-105, amended by 2020 Neb. Laws LB 1003, § 170.

⁴ In *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010), the Nebraska Supreme Court considered the propriety of a situation where two separate groups of a city council, neither of which constituted a quorum of that body, toured an ethanol facility for informational purposes. The court ultimately concluded that there was no meeting of the city council as a result of the tours—there was no quorum of the council present, the small groups were merely acquiring information, and there was no evidence that the council was, through the tour, attempting to reach a consensus and form public policy in secret.

We note that your complaint indicates that Council members Jason Roblyer and Jeff Anderson did not learn of the particular subject matter being discussed “until they received the agenda for that particular meeting, two hours before the meeting.” While it is not entirely clear from your complaint, we will take this opportunity to remind the mayor and the members of the Council that at the time a meeting notice is published, an agenda must be prepared and kept current and readily available for public inspection at the principal office of the public body during regular business hours. In addition, “[e]xcept for items of an emergency nature, the agenda shall not be altered later than . . . twenty-four hours before the scheduled commencement of the meeting” Neb. Rev. Stat. § 84-1411(1) (Supp. 2019).

Since we have determined that no clear violation of the Open Meetings Act occurred with respect to the April 7, 2020, letter, we will take no further action, and are closing our file. We will, however, remind Mr. Feeken and Mr. Zulkoski, by sending a copy of this letter to Ms. Sikyta, that as elected officials for the City of Burwell, they have a responsibility under the law to conduct the City’s business in an open and transparent manner.

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, may be available to you under the Open Meetings Act.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

c: Heather Sikyta (via email)
Mark Fahleson (via email)
Jim Roblyer (via email)