

Open Meetings Gone Wrong

Bobby Truhe

[KSB School Law](#)

(402) 804-8000

bobby@ksbschoollaw.com



KSB School Law



@btruhe



Publishing Notice

- Policy: "Notice shall be published in the XYZ Times."
- Minutes: silent dating back to 1999

84-1411. Meetings of public body; notice; contents; when available; right to modify; duties concerning notice; videoconferencing or telephone conferencing authorized; emergency meeting without notice; appearance before public body.

(1) Each public body shall give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes. Such notice shall be transmitted to all members of the

Publishing Notice

84-1411. Meetings of public body; notice; contents; when available; right to modify; duties concerning notice; videoconferencing or telephone conferencing authorized; emergency meeting without notice; appearance before public body.

(1) Each public body shall give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes. Such notice shall be transmitted to all members of the

- Recommendation: designate quickest posting method and add permissible or even recommended “other” methods
- Unless LB 127 passes
 - “Such notice shall be published in a newspaper of general circulation in each county within the public body's jurisdiction and may also be provided by any other appropriate method designated by the public body.”

Snow Days

- *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009)
 - Notice of recessed or reconvened meeting must be given in same fashion as notice of original meeting
- Op. Att'y Gen. No. 96071 (October 28, 1996)
 - Quality Jobs Board recessed previous meeting
 - AG: must give normal 10-day notice, not “informal” notice

The Dreaded Closed Session

- Board agenda is published with the notice in the paper each month the Thursday before the meeting
- Last agenda item each meeting: "Closed Session"
- The day of the meeting the superintendent is roasted on Facebook because he was heard over the weekend saying he wouldn't support a proposed dance program
- 100 members of the public show up
- The board goes into closed session to "protect the reputation of the superintendent"
- The board secretary doesn't get all the notes down

Agenda issues: 84-1411

84-1411. Meetings of public body; notice; contents; when available; right to modify; duties concerning notice; videoconferencing or telephone conferencing authorized; emergency meeting without notice; appearance before public body.

(1) Each public body shall give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes. Such notice shall be transmitted to all members of the public body and to the public. Such notice 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. Except for items of an emergency nature, the agenda shall not be altered later than (a) twenty-four hours before the scheduled commencement of the meeting or (b) forty-eight hours before the scheduled commencement of a meeting of a city council or village board scheduled outside the corporate limits of the municipality. The public body shall have the right to modify the agenda to include items of an emergency nature only at such public meeting.

Pick a method: Louisville Case

The Board admits that it did not have an agenda which was made available to the public before the work sessions on September 14 and September 25. The Board states there was some sort of “miscommunication” as to who was charged with the duty of making the agenda for these two meetings. However, the Board asserts that the publicized notice of each of these meetings listed the topic to be discussed, which was the only agenda item. It is permissible for a public body to list the agenda in its notice of meeting in order to meet the requirements of Neb. Rev. Stat. § 84-1411. Our office has not been provided with a copy of the notice to verify the Board’s assurances that the notice contained the only agenda item. However, we will assume that the Board is acting in good faith. Additionally, as the Board has assured us that its practices have been corrected to ensure that work sessions and Board meetings will have agendas made available to the public in compliance with Neb. Rev. Stat. § 84-1411, we will only remind the Board of its statutory duties in this respect.

Agenda issues: 84-1411

84-1411. Meetings of public body; notice; contents; when available; right to modify; duties concerning notice; videoconferencing or telephone conferencing authorized; emergency meeting without notice; appearance before public body.

(1) Each public body shall give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes. Such notice shall be transmitted to all members of the public body and to the public. Such notice 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. Except for items of an emergency nature, the agenda shall not be altered later than (a) twenty-four hours before the scheduled commencement of the meeting or (b) forty-eight hours before the scheduled commencement of a meeting of a city council or village board scheduled outside the corporate limits of the municipality. The public body shall have the right to modify the agenda to include items of an emergency nature only at such public meeting.

Closed session reasons: 84-1410

84-1410. Closed session; when; purpose; reasons listed; procedure; right to challenge; prohibited acts; chance meetings, conventions, or workshops.

(1) Any 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 individual and if such individual has not requested a public meeting. The subject matter and the reason necessitating the closed session shall be identified in the motion to close. Closed sessions may be held for, but shall not be limited to, such reasons as:

Only 2 reasons: Louisville Case

First, we will address the motions made by the Board to close, and the stated reasons for executive session. The motions state that it was in the best interests of both the school district and the public to enter into closed session. While the Open Meetings Act allows a public body to go into closed session if it is “clearly necessary for the protection of the public interest or for the prevention of needless injury to the reputation of an individual and if such individual has not requested a public meeting,” the Act does not provide for a closed session when the closed session is in the best interests of the public body. Neb. Rev. Stat. § 84-1410 (1). This is an important distinction of which the Board should be aware. While the motions to close did contain a proper purpose under the Act, that of the public’s best interest, they also contained an improper purpose, that of the school district’s best interest. The Board will be cautioned, by a copy of this letter, to ensure that it does not include an improper purpose in future motions to close.

Stated school purposes: 84-1410

- (a) Strategy sessions with respect to collective bargaining, real estate purchases, pending litigation, or litigation which is imminent as evidenced by communication of a claim or threat of litigation to or by the public body;
- (b) Discussion regarding deployment of security personnel or devices;
- (c) Investigative proceedings regarding allegations of criminal misconduct;
- (d) Evaluation 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;

Other Possibly Permissible Reasons

- Receive legal advice
- Non-CBA contract negotiations
- Protect student confidences—but why?
- Protect staff confidences—but why?
- ~~It makes us uncomfortable~~
- Others?

Other key req's: 84-1410

(2) The vote to hold a closed session shall be taken in open session. The entire motion, the vote of each member on the question of holding a closed session, and the time when the closed session commenced and concluded shall be recorded in the minutes. If the motion to close passes, then the presiding officer immediately prior to the closed session shall restate on the record the limitation of the subject matter of the closed session. The public body holding such a closed session shall restrict its consideration of matters during the closed portions to only those purposes set forth in the motion to close as the reason for the closed session. The meeting shall be reconvened in open session before any formal action may be taken. For purposes of this section, formal action shall mean a collective decision or a collective commitment or promise to make a decision on any question, motion, proposal, resolution, order, or ordinance or formation of a position or policy but shall not include negotiating guidance given by members of the public body to legal counsel or other negotiators in closed sessions authorized under subdivision (1)(a) of this section.

Finally, the *Grein* Court concluded:

From all this there evolves a guiding principle relatively simple and fundamental: If a public body is uncertain about the type of session to be conducted, open or closed, bear in mind the policy of openness promoted by the Public Meetings Laws and opt for a meeting in the presence of the public.

216 Neb. at 168, 343 N.W.2d at 724 (emphasis added).

Closed Session Recommendations

- Admit “how you’ve always done it” may not be perfect
- Use scripts when closed session is expected

The Board President may ask for a motion as follows:

Is there a motion for the board to enter closed session to evaluate the job performance of an employee and to receive, review, and discuss the legal advice from the school district’s attorney? I believe such a motion is clearly necessary to protect the public’s interest, to maintain the attorney-client privilege, and to prevent needless injury to the employee’s reputation?

Board Member #1: So moved.

Board Member #2: Second.

Discussion:

Issues in Administrator Hiring

Discussions at Meetings

- Closed session appropriate?
 - Formulating interview questions
 - Discussing Contract
 - Discussing Compensation
 - Narrowing Applicants

Scottsbluff

According to the meeting minutes, a motion was made to go into executive session at 6:05 p.m. "to review superintendent interview questions and protocol/procedures/format, discuss/review compensation package data, and review superintendent's contract/job description/evaluation. . . ." A roll call vote was taken, and all members present approved the motion. The meeting minutes further indicate that at 8:38 p.m., a motion was made and approved to come out of executive session. Immediately following the approved motion to reconvene, a motion was made and approved to adjourn the meeting.

Interview Questions: Scottsbluff / Louisville

- Forming interview questions:
 - Does not “protect the public interest”

We have previously stated that we question the necessity of formulating interview questions in closed session and how doing so is in the public interest. The Board has not convinced us any differently in this matter. We fail to see how the Board’s discussion of interview questions was “clearly necessary for the protection of the public interest” (emphasis added).

Discussing Applicants: Scottsbluff / Louisville

- “Closed session may be appropriate to discuss particular aspect of candidate’s background”
- AG: closed session may be okay with “good and bad” in evaluations
- Anonymous scoring systems make protections of reputation more difficult

While we could imagine a scenario where the Board wished to discuss one or more applicants in closed session to protect the reputation of that person, the Board’s stated reason for the closed session was not to protect the reputation of the candidates.

Discussing Applicants: Scottsbluff / Louisville

The screening of all twelve superintendent candidates should have been done primarily in open session, with closed sessions permitted to discuss discrete issues meeting the statutory requirements.² We fully understand that the discussion of some of the candidates' applications may have warranted a closed session to protect injury to their reputations. But not all of the candidates. Moreover, as indicated in *Grein*, the Board's good faith motivation for the closed sessions, i.e., protecting non-finalists' names and applications from disclosure, is not a cure for noncompliance of the Open Meetings Act. Consequently, we find the Board's closed sessions to discuss each of the twelve superintendent candidates were improper.

Contract Updating: Scottsbluff

- Discussing Contract terms and Evaluation Instrument
 - OMA authorizes closed session for “evaluation of job performance,” not evaluation document
 - General contract terms should be discussed in open session

Negotiations

- Finalize contract before negotiating
 - Can use closed session when “actually negotiating” issues like salary
- Authorize district representative to negotiate
 - You can set parameters in closed session on appropriate issues
- Closed session for salary offer?
 - AG: difference between setting range and making offers

So, call your lawyer?

Over the years, this office has encountered situations similar to this one. However, in those situations, we declined to prosecute members of the public body because we believed they were acting on the advice of counsel during their meetings. In this instance, we are of the opinion that the members of the Board were acting on advice of counsel as well. However, we will admonish the members of the Board, through a copy of this letter to their counsel, that they must strictly adhere to the provisions of the Open Meetings Act, particularly with respect to closed sessions.

Outside Discussion

Outside Discussion

- 2004 Amendments: can't use "emails, faxes, and other electronic communications to circumvent" OMA
- *Beatrice*: "serial" phone call issues
 - "I'll just call and ask the board"
- The dreaded "reply all" function
- Group texts, Facebook group chats; Google hangouts

In the meeting...

- Messages sent and received during public meeting
- Complaint to police
- Investigated for Public Records and Open Meeting violations



Public Record Issues

Except when any other statute expressly provides that particular information or records shall not be made public, **public records shall include all records and documents, regardless of physical form, of or belonging to** this state, **any** county, city, village, **political subdivision**, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. Data which is a public record in its original form shall remain a public record when maintained in computer files.

Easy Issues: 84-1413

(4) The minutes of all meetings and evidence and documentation received or disclosed in open session shall be public records and open to public inspection during normal business hours.

Tough Issues

84-712.09. Violation; penalty.

Any official who shall violate the provisions of sections 84-712, 84-712.01, and 84-712.03 to 84-712.08 shall be subject to removal or impeachment and in addition shall be deemed guilty of a Class III misdemeanor.

84-1213. Records; property of state or local agencies; protected; willfully mutilate, destroy, transfer, remove, damage, or otherwise dispose of; violation; penalty.

(2) Any person who willfully mutilates, destroys, transfers, removes, damages, or otherwise disposes of such records or any part of such records, except as provided by law, and any person who retains and continues to hold the possession of any such records, or parts thereof, belonging to the state or local agency and refuses to deliver up such records, or parts thereof, to the proper official under whose authority such records belong upon demand being made by such officer or, in cases of a defunct office, to the succeeding agency or to the State Archives of the Nebraska State Historical Society, shall be guilty of a Class III misdemeanor.

84-1213.01. Records; violation; prosecute.

The State Records Administrator, or any official under whose authority such records belong, shall report to the proper county attorney any supposed violation of section 84-1213 that in its judgment warrants prosecution. It shall be the duty of the several county attorneys to investigate supposed violations of such section and to prosecute violations of such section.

It could happen to you...

- Text at negotiations to members not there: "\$400 or \$500 on the base"
- Facebook message: "Hope we settle tonight, but no more increase on the base."
- Tweets after negotiating: "Hope we settle tonight!"
- SnapChat to 2 other members: "These people don't realize how good they have it."

Open Meetings Gone Wrong

Bobby Truhe

[KSB School Law](#)

(402) 804-8000

bobby@ksbschoollaw.com



KSB School Law



@btruhe

