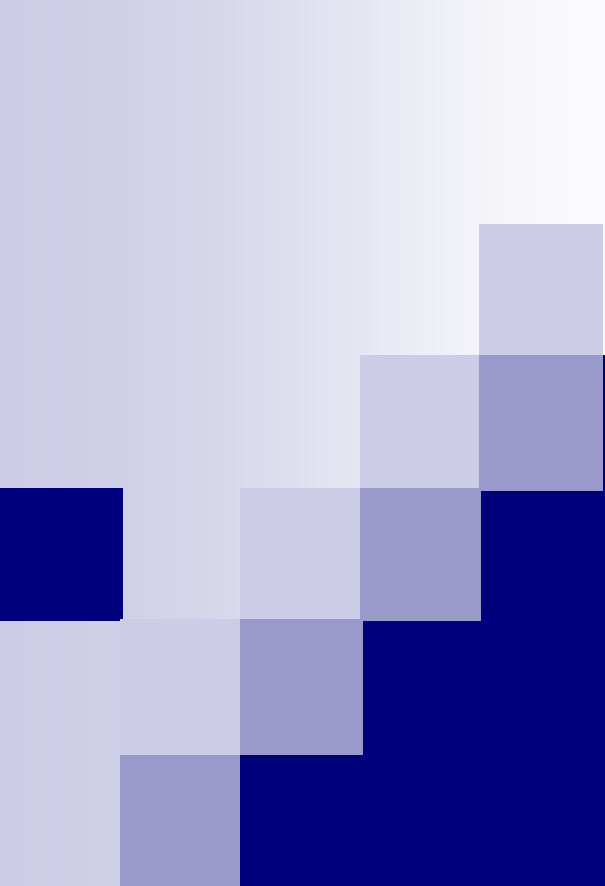


# What you need to Know About Public Records and Open Meetings in Nebraska

David J. A. Bargaen, Esq.  
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# Overview of the Nebraska Open Meetings Act

David J. A. Bargaen, Esq.

# History and Public Policy—Basis for Open Meetings Act

- Theories of democratic governance
  - Direct democracy
    - New England town hall meetings
    - Direct involvement of the public in policy formation
    - Some examples at state and local level
      - Initiative
      - Referendum
      - Recall

# History and Public Policy—Basis for Open Meetings Act

- Indirect democracy
  - republican (representative) democracy
  - No direct involvement of public in policy formation
  - Most governance in United States based on this theory
    - Elect persons to *represent* the people
    - Public's involvement is *indirect*
    - Elections
    - Lobbying/contact with elected representatives
    - Final decision on policy rests with elected representative
    - Final decision on elected representative rests with the people

# History and Public Policy—Basis for Open Meetings Act

- Government in Nebraska Based on Mix of Direct and Indirect Democracy
  - Indirect (republican, or representative) democracy
    - Governor and Legislature
    - State Constitutional Officers
      - Attorney General
      - Treasurer
      - Auditor
    - University Board of Regents, State College Board of Trustees, Community College Boards of Governors
    - County Boards of Commissioners
    - City councils and mayors; Village boards of trustees
    - School boards
    - Natural Resource District boards
    - Special boards

# History and Public Policy—Basis for Open Meetings Act

- Purpose of Governing Bodies: Formation and Execution of Public Policy
  - Public's input in formation of public policy primarily voting and lobbying
  - Need information for informed voting decisions
  - Decisions of voters based on actions of elected officials
  - No common law right of public to attend meetings of governing bodies
  - Legislature established statutory right of attendance/speaking at public meetings—Open Meetings Act
  - Legislature ultimately controls amount of public access to meetings of governing bodies

# Rights Established in Open Meetings Act

- Legislative policy
  - Formation of public policy must be done in public
- Right to attend
- Right to speak
- Right to record
- Right to review (minutes and documents)
- Right to enforce
- Subject to Nebraska Constitution, federal statutes, Open Meetings Act

# Coverage of the Open Meetings Act

- Neb. Rev. Stat. § 84-1408: “Every *meeting* of a *public body* shall be open to the public . . . .”

# Coverage of the Open Meetings Act

- Neb. Rev. Stat. § 84-1409 (1)(a): “**Public body** means:
  - Governing bodies of all **political subdivisions**
    - any subdivision of the state that is to carry out functions of state power that are inherent necessities of government
    - Political Subdivisions Tort Claims Act (Neb. Rev. Stat. §§ 13-901 to 13-907) definition
      - villages, cities of all classes, counties, school districts, public power districts, and all other units of local government, including entities created pursuant to the Interlocal Cooperation Act or Joint Public Agency Act.
  - Governing bodies of all agencies of executive department of state government created by law
  - Independent boards, commissions, bureaus, committees, councils, subunits, any other bodies created by law
  - Study or advisory committees of executive department of state government, whether continuing or temporary
  - Advisory committees of governing bodies of political subdivisions, executive branch of state government, or of independent boards, commissions, etc.
  - Instrumentalities exercising essentially public functions

# Coverage of the Open Meetings Act

- Indicators:
  - whether group is assembled as part of the *management structure* of an entity (university, city) instead of policy-making structure
  - whether a body is engaged in *judicial*, as opposed to *policy-making*, function
  - whether a body has a statutory right to receive public revenues

# Coverage of the Open Meetings Act

- Neb. Rev. Stat. § 84-1409 (1)(b): “Public body does ***not*** include”:
  - Subcommittees where quorum not present and/or where policy not being made, formal action not being taken, or hearings not being conducted

# Coverage of the Open Meetings Act

- Neb. Rev. Stat. § 84-1409 (2): “**Meeting** means”:
  - Regular, special, or called meetings, formal or informal
  - For the purpose of briefing, discussion of public business, formation of tentative policy, taking any action
- Neb. Rev. Stat. § 84-1410 (5): Meeting does **not** mean:
  - Chance meetings of members of governing body
  - Attendance at or travel to conventions or workshops where no meeting is intentionally convened and no votes taken on matters within control of body

# Right to attend

- General right (Neb. Rev. Stat. § 84-1412 (1))

# Right to attend

- Limitations on closed sessions (Neb. Rev. Stat. §84-1410)
  - Majority vote
  - Legal purpose
    - > “clearly necessary”
      - > “protection of public interest”
      - > “prevention of needless injury to reputation of individual, IF individual has not requested public hearing”

# Right to attend

- Procedure
  - Motion identifying subject matter and reason necessitating closed session
  - Vote taken in open session
    - Motion, vote of each member, time of closed session recorded in minutes
  - Presiding officer restates limitation of subject matter of closed session
  - Discussion during closed session limited to reason in motion
  - Reconvene in open session before any “**formal action**” taken
    - “**Formal action**” means
    - Collective decision
    - Collective promise or commitment to make a decision
    - NOT negotiating guidance to legal counsel

# Right to attend

- Acceptable subject matters
  - Anything that fits 2 main reasons of Act's legal purpose
  - *Examples* given in Act are not *limitations* of subject matters

# Right to attend

- Notice requirements (Neb. Rev. Stat. § 84-1411)
  - “**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**”
    - *Pokorny v. City of Schuyler*, 202 Neb. 334 (1979)
      - Notice at 10:30 p.m. of meeting at 10:30 a.m. following morning
      - “could hardly be considered to be reasonable advance publicized notice as required by [the Act]”
    - *City of Elkhorn v. City of Omaha*, 272 Neb. 867 (2007)
      - Notice of special meeting given around 10:00 a.m. of meeting to be held at 10:00 p.m. that same evening
      - Reasonable advance publicized notice measured not so much by time, but rather by the likelihood that notice given will reach the public
      - Ordinance outlining method of notice in place
      - Passage of ordinance recorded in minutes
      - Do what is possible to make sure public informed
      - Media
      - Posting

# Right to attend

- Notice must contain agenda or refer public to agenda kept at principal office of public body during normal business hours
- Special meetings of city councils
  - Neb. Rev. Stat. § 17-106
    - Submit object of meeting to council in writing
    - Call, object, disposition entered upon journal by city clerk
- Article: David J. A. Barga, *Annexation Battle Is Opportunity For Guidance From Supreme Court*, available at <http://www.remboltludtke.com/pdf/111414.pdf>

# Right to attend

- Agenda requirements (Neb. Rev. Stat. § 84-1411)
  - Items sufficiently descriptive to provide “reasonable notice”
  - May not be altered later than 24 hours prior to meeting
    - but agendas may be *created* later than 24 hours prior to meeting (*City of Elkhorn v. City of Omaha*, 272 Neb. 867 (2007))
      - thus, special meetings may be called with less than 24 hours notice
  - May modify agenda at public meeting to include emergency items

# Right to attend

- No requirement of identification to attend (Neb. Rev. Stat. § 84-1412 (3))
- Meeting must be held in normal location or site large enough, or outside of state if certain conditions met (Neb. Rev. Stat. § 84-1412 (4), (5))

# Right to speak (Neb. Rev. Stat. § 84-1412 (1))

- Subject to “reasonable rules and regulations” made and enforced by public body
- Public bodies not required to allow public to speak at every meeting, but may not forbid public participation at every meeting
- LB 962: persons need not be on the agenda to speak about items on the agenda
  - More about this later

# Right to record

- Videotape, televise, photograph, broadcast, record by persons ***in attendance***
- Subject to “reasonable rules and regulations” made and enforced by public body

# Right to review (Neb. Rev. Stat. § 84-1413)

- Requirements regarding minutes
  - minutes of all meetings
    - must show time, place, members present and absent, substance of all matters discussed
    - public record available to public during business hours
    - must be prepared within 10 working days or prior to next meeting (10-day extension for cities of second class and villages where illness delays minutes)
- Requirements regarding roll call votes
  - Roll call votes (or electronic board voting) required on all matters except leadership elections

# Right to enforce (Neb. Rev. 84-1414)

- Cause of action: motion, resolution, rule, regulation, ordinance, formal action made or taken in **violation** or **substantial violation** of Open Meetings Act
  - Action must be brought within 1 year of violation
    - If brought within 120 days of suspect meeting, district court **shall** void action taken if it **violates** Open Meetings Act
    - If brought after 120 days of suspect meeting, district court **may** void action taken if it **substantially violates** Open Meetings Act
  - Action may be brought by any citizen of state in county where meeting took place, or in county where citizen resides
- NOT a defense that citizen attended meeting but did not object
- Court may award attorneys fees and court costs

# Right to enforce (Neb. Rev. 84-1414)

- Criminal liability for members of public body (enforceable by county attorney or state Attorney General)
  - >knowingly
  - >violates or conspires to violate the Act
- OR
  - >attends or remains at meeting
  - >knowing it violates the Act
- GUILTY OF
  - Class IV misdemeanor first offense
  - Class III misdemeanor second or subsequent offense

# Common Questions/Special Situations

- Public participation and LB 962
  - LB 962: “nor shall such public body require that the name of any member of the public be placed on the agenda prior to such meeting in order to speak about items on the agenda” (Neb. Rev. Stat. § 84-1412 (3))

# Common Questions/Special Situations

- read in conjunction with other portions of act
  - “Subject to Open Meetings Act, the public has the right to attend and the right to speak at meetings” (Neb. Rev. Stat. § 84-1412 (1))
  - Public bodies may “make and enforce reasonable rules and regulations regarding the conduct of persons . . . speaking at . . . its meetings” (Neb. Rev. Stat. § 84-1412 (2))
  - Public bodies do not have to allow public to “speak at each meeting” (Neb. Rev. Stat. § 84-1412 (2))
- read in conjunction with purpose of representative democracy
  - not town hall meetings
- result:
  - Public body may not require person be on agenda before being able to speak on agenda item
  - Public body may limit public comments on agenda items to a “public comments” section in which persons may make “statements” and public body will not engage in discourse or with persons
  - Public bodies may limit time of public statements

# Common Questions/Special Situations

- What remains “secret” in a closed session?
  - *Upper Republican Natural Resources District v. District Judges of the District Court for Chase County*, 273 Neb. 148 (2007)
    - For litigation purposes, Open Meetings Act does not create absolute privilege for all communications in closed session
    - Communications during closed session that fit under separate privilege doctrine are privileged
      - Attorney-client privilege

# Common Questions/Special Situations

- Meetings by e-mail or other electronic communication?
  - Electronic communication among even a quorum of members of public body is acceptable so long as there is no ***intent*** to circumvent Open Meetings Act
    - ***intent*** might be determined by
      - fact that communication was to quorum of body
      - frequency of such communications
      - subject matter of communications

# Common Questions/Special Situations

- Deadline for minutes preparation
  - Open Meetings Act: must be prepared within 10 working days or prior to next meeting (10-day extension for cities of second class and villages where illness delays minutes)
  - Neb. Rev. Stat. §§ 19-1101 to 19-1103: requires city council or village board in city of less than 100,000 to publish minutes meetings within 30 days of the meeting in newspaper of general circulation, and must include statement of claims.



# Application of the Nebraska Open Meetings Act

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# Meetings Covered



*Rauert v. School District I-R of Hall County*  
*251 Neb. 135, 555 N.W.2d 763 (1996)*

- Plaintiff alleged that a quorum of the school board met on a regular basis for “clandestine” meetings
  - Meetings allegedly occurred before the beginning of most scheduled board meetings
  - Alleged that business was discussed and decided and checks were signed to pay claims not approved in public session.
- Alleged that school board then voted on business at its public meetings with little or no discussion in order to deprive the public of its right to be fully informed.

# *Rauert* cont.

## ■ Holding?

- No violation in the absence of any evidence as to the specific dates and details of the alleged “clandestine” meetings.

## ■ Effect?

- An “informal and educational” meeting of a public body where members generally discuss matters pertaining to their public body is a meeting of the public body for “briefing” purposes.
- The AG has also indicated that a meeting of a public body for the purpose of receiving training or doing planning should probably be treated as a public meeting.



# Notice Required and Agenda

- There is no minimum time period for public notification of a special meeting.
  - An agenda for a public meeting can be created (not altered) later than 24 hours before the scheduled meeting.
- *City of Elkhorn v. City of Omaha (2007)*
  - Holding:
    - Notice of a meeting of the Omaha City Council posted and placed on the city's website at 10:15 am for a meeting at 10:00 pm the same day was sufficient under the facts of the case where the local newspaper printed an article about the meeting in its afternoon edition and four TV broadcasters were present at the meeting.

## ■ *Pokorny v. City of Schuyler* (1979)

- City was considering sanitary sewer project and held public hearing on issue of acquiring land for project.
- City subsequently obtained second appraisal and called special meetings to decide purchase offer.
- Agenda at issue, considered with all the previous records of the city council involved, was sufficient to satisfy the open meetings statutes.
- Court agreed with Plaintiff that posting notice at 10 p.m. on March 15 before a meeting at 10:30 a.m. on March 16 does not constitute reasonable notice.



- *Hansmeyer v. Nebraska Public Power District* (1998)

- Agenda Item: “Work Order Reports”

- Issue: Was this sufficient to provide adequate public notice of a decision to approve a work order which involved expenditure of over \$47 million for the construction of a 96-mile power transmission line across privately held property

- Holding?

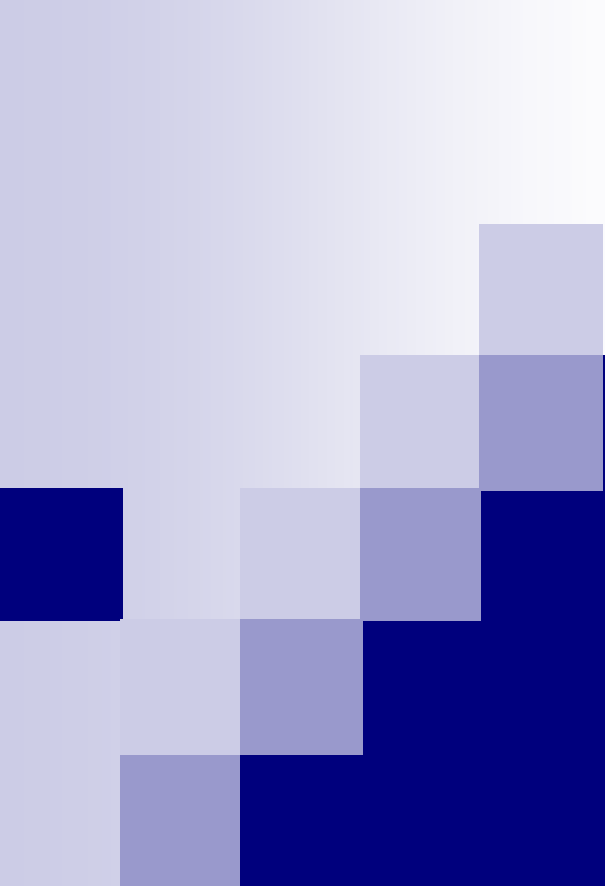
- The Court of Appeals held that the agenda item was insufficient under the Open Meetings Act.



# Public Meetings- Minutes and Voting Procedures

## ■ AG Opinions

- 1981 Opinion: Nothing in the open meetings statutes requires approval of the minutes of a public body prior to their publication.
- 1998 Opinion: Detailed minutes of all matters discussed need not be maintained when a public body is meeting in closed or executive session, so long as the requirements pertaining specifically to the minute entries necessary for a closed session are met.



# Closed Sessions of a Public Body

## ■ *Grein v. Board of Education of the School District of Fremont (1984)*

- Closed session by a school board for discussion of the low bid on a construction project.
- Holding?
  - Statutes allowing closed sessions must be narrowly and strictly construed.
  - Good faith motivation for a closed session is not a cure.
  - Prohibition against decisions or formal actions in a closed session proscribes crystallization of a secret decision and then ceremonial acceptance in open session.
  - Guiding principle:
    - “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.”

## ■ *Pokorny v. City of Schuyler* (1979)

### □ Holding?

- Nothing in the open meetings statutes requires that negotiations for the purchase of land be conducted in open meeting.
- However, deliberations of a public body as to whether an offer to purchase should be made must be done in an open meeting.

## ■ *Wasikowski v. The Nebraska Quality Jobs Board* (2002)

### □ Holding?

- If a person who is present at a meeting of a public body observes an alleged violation of the Open Meetings Act in the form of an improper session and fails to object, then that person waives his or her right to object

### □ Overruled?

- Legislatively overruled by LB898 from 2006.
  - Provides that it shall not be a defense to a citizen lawsuit that the citizen attended the meeting and failed to object at that time.

## ■ AG Opinions

- 1994 Opinion: A closed session is not proper simply because matters permitting a closed session might arise.
- 1989 Opinion: A public body can go into a proper closed session for discussion of personnel matters and then reconvene for a public vote with no lengthy explanation of the rationale underlying the decision.
  - The closed session exception for prevention of needless injury to reputation is for the protection of individual employees, not governmental offices on the public body.
- 1975 Opinion: Discussions of legal matters between a county board and a county attorney involving pending litigation or legal consequences or specific action are suitable for a closed session



# Emergency Meetings

## ■ Emergency?

- “Any event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency; a sudden or unexpected happening; an unforeseen occurrence or condition.”

## ■ *Steenblock v. Elkhorn Township Board* (1994)

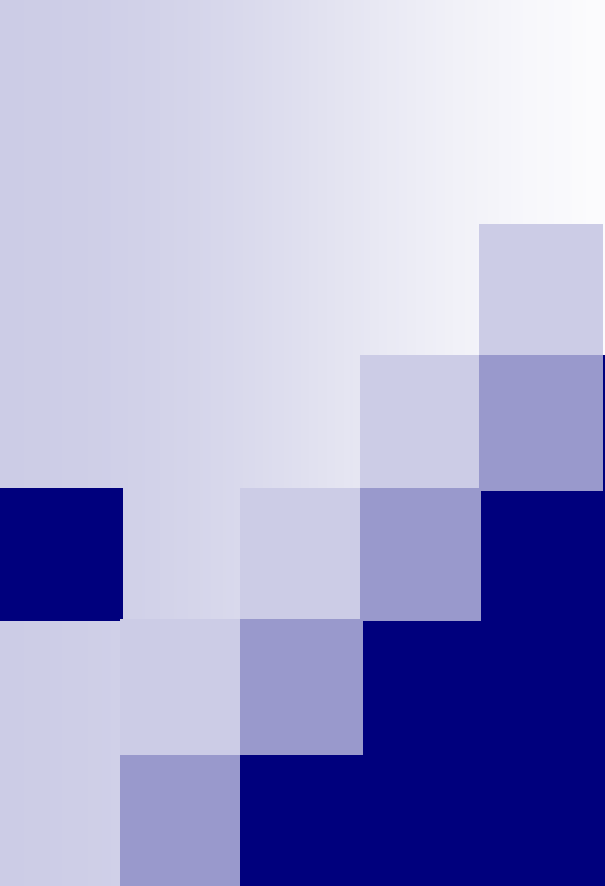
### □ Holding?

- Township board meeting to consider the job status of an employee, convened as an emergency meeting because of a snowstorm, was not a proper emergency meeting.
- Employee was given 2 week’s notice of his termination
- Reasons given for the employee’s termination were based upon his past performance.



# Common Mistakes

- “Meetings”
- Agendas
- Closed Sessions
- Conduct of meetings
- Documentation received or disclosed in open session



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