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Troy Bredenkamp  
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P.O. Box 82048  
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**RE: Open Meetings**

Dear Troy:

### **Question**

You have asked me to provide commentary as to whether a workshop constitutes a meeting for purposes of the Open Meetings Act ("Act").

### **Short Answer**

There is no short answer. An extensive, fact intensive analysis will be required for each set of circumstances. The content to be addressed, the purpose for conducting the workshop, and those in attendance will lead to the ultimate conclusion.

### **Analysis of the Act**

The question presented in this opinion goes to the central purpose and intent behind the Open Meetings Act. Historically, the open meetings laws are a commitment to openness in government (*Wasikowski v. The Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W.2d 756 (2002)). This concept is also statutorily reflected in NEB. REV. STAT. § 84-1408, which provides as follows:

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 Nebraska Revised Statutes turn on the definitional meanings of a few key words. Most importantly, what is a meeting? What types of entities are public bodies? Essentially, what is the coverage scope of the Act. But what may seem like an easy task, simply looking to the statutorily provided definitions, is muddled and made difficult by ambiguous definitions.

### **1. Application of Open Meeting Act.**

NEB. REV. STAT. § 84-1410(5) attempts to clarify the Act's scope of applicability. It states: "The act does not apply to chance meetings or to attendance at or travel to conventions or workshops of members of a public body at which there is no meeting of the body then intentionally convened, if there is no vote or other action taken regarding any matter over which the public body has supervision, control, jurisdiction, or advisory power."

### **2. Meeting Defined.**

NEB. REV. STAT. § 84-1409 provides definitions for both terms "meeting" and "public body." A meeting "means all regular, special, or called meetings, formal or informal, of any public body for the purposes of briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body."

### **3. Public Body Defined.**

A public body is defined as "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."

The definitions provided by statute use language in itself that is ambiguous. For instance, what is a "briefing?" What is the "formation of tentative policy?" Case law becomes critically important in interpreting these terms.

### **4. Case Law Review.**

#### **Is there a "meeting?"**

A review of several Nebraska cases brings insight to the definition of a "meeting." This is the most important question to ask because if there is no "meeting" as per the state statute, then the Act is inapplicable. It would not matter who attends or what is discussed. Because the Act's applicability to workshops turns on whether such an event would be considered a "meeting," consider the following cases for a better understanding of what exactly constitutes a meeting.

In *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010), the issue was whether a city council tour of an ethanol facility constituted a “meeting.” Members of the City Council took tours of an ethanol plant. After one of the tours, three of the council members and the mayor went to dinner together. No discussion of public business took place at the dinner, they did not receive any information related to public business, and there was no formation of tentative policy. The small group tours were simply to gather information for which the public could provide comment at a subsequent meeting. The court concluded that since there was no evidence of discussion or interaction regarding public business, no “meeting” had occurred.

In *Johnson v. Nebraska Environmental Control Council*, 2 Neb. App. 263, 509 N.W.2d 21 (Neb. Ct. App. 1993), the plaintiff sought to challenge the Council’s rules and regulations regarding incinerator waste. Plaintiff alleged that no notice was provided and minutes were not taken at a public meeting at which the issue was discussed and information was received from its own staff. In the interest of “openness in favor of the public,” the court stated, “...the fact that the Council may have received information triggers coverage under the public meeting law.” The Court did not decide the case upon the merits; rather, it found that summary judgment was not appropriate. A genuine dispute of material fact existed as to whether a briefing occurred, which would trigger the Act’s requirements of notice and minutes taken.

The Attorney General addressed a similar question in Attorney Gen. Op. 92043 (1992). The question presented was whether an informational and educational meeting could be offered to the governing board, specifically to benefit new members of a political subdivision to learn the workings of their duties and responsibilities. Such a meeting would constitute a “briefing” under the dictionary definition of “brief,” “to supply with all the pertinent instructions or information.” Therefore, because NEB. REV. STAT. § 84-1410 requires that a meeting, whether formal or informal, for the purpose of briefing, discussing public business, forming tentative policy, or taking action, comply with the Act’s formal requirements, this “briefing” was a public meeting.

The question of the Open Meeting Act’s applicability to workshops was directly addressed in Attorney Gen. Op. 04027. The Board of Regents hired a professional facilitator to put on a workshop at Mahoney State Park. The Board was clear that there would be “no briefing, discussion of public business, formation of tentative policy, vote or taking of other action regarding any matter over which the Board has supervision, control, jurisdiction, or advisory power...” The Opinion stated that such a gathering was not subject to the Open Meeting Act for the reasons stated above and because the Board was not intentionally convening a meeting to conduct public business.

### **Is there a “meeting” of a “public body?”**

Though the definition of “public body” can also be rather ambiguous, it does not pose challenges to the present question. It is undisputed that a Public Power District is a political subdivision of the State of Nebraska. As a political subdivision, the governing body is explicitly considered to be a “public body” pursuant to NEB. REV. STAT. § 84-1409. The only relevant caveat can be found in the following case:

In *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007), the City of Omaha quickly passed ordinances that sought to annex the City of Elkhorn. The City of Elkhorn passed an ordinance that would effectively make the population large enough to insulate the city from annexation. Whichever ordinance was first passed determined whether Elkhorn could be annexed. The issue was whether Omaha had complied with the Open Meetings Act. Elkhorn alleged that informal meetings held before/after the public meetings provided an opportunity to conduct business in secret. However, at most, three councilmen attended each meeting. The City Charter required a quorum of four to conduct business. Since no quorum was ever present, it was impossible for business to be conducted at these informal meetings because there was no “public body.” Therefore, the informal meetings with less than a quorum were not Open Meeting Act violations.

### **Summary of Case Law**

1. A “meeting” does not occur unless a majority of the members of the public body are present. (Attorney General Opinion No. 116, August 29, 1975).
2. A quorum is required to be a “public body.” (*City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007)).
3. The public body must interact or discuss policy to consider the gathering a “meeting.” (*Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010)).
4. If a board is gathered to hear informational reports from staff, it is subject to the Open Meetings statutes because such is considered “briefing.” Receiving information that results in decision-making does equate to a briefing. (*Johnson v. Nebraska Environmental Control Council*, 2 Neb. App. 263, 509 N.W.2d 21 (Neb. Ct. App. 1993)).
5. Informational and Educational meetings still are subject to Open Meetings statutes because it would be “briefing.” (Op. Attorney Gen. No. 92043 (March 17, 1992)).
6. A workshop with a professional facilitator is not subject to Open Meetings Act because there must be a meeting intentionally convened; a vote or action taken on a matter the public body has control or jurisdiction over; briefing, discussion of public business, or formation of tentative policy. (Op. Attorney Gen. No. 04027 (October 20, 2004)).

### **Is a workshop subject to the Open Meetings Act?**

As the case law indicates, the answer depends on the purpose for which the workshop is held and who attends. If, as in *Johnson* or Op. Attorney Gen. No. 92043, information will be received as a step in the decision-making process, and a quorum is present, it will be subject to the Open Meetings Act. However, if the workshop is held on matters unrelated to the duties, responsibilities, or jurisdiction of the Board, then it will likely not be subject to the Open Meetings Act.

To help make these determinations, follow the checklist:

1. Q: Is there a “public body?”

Is a quorum present?

2. Q: Is there a “meeting?”

Not a chance meeting/travel to convention or workshop where a meeting will not be intentionally convened?

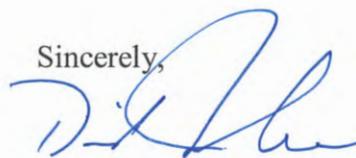
Was there interaction or discussion regarding policy making, briefings, action taken?

If a quorum of the Board is present, then the statutory definition of a “public body” has been met since governing boards of political subdivisions are public bodies (Attorney Gen. Op. No. 98 (1979)). If there has been an intentional convening of the public body and the Board has been briefed, taken a vote, or discussed public business, then there is a meeting and the Act applies.

### **Conclusion**

An analysis of the facts is required in order to accurately assess whether a workshop is subject to the Open Meetings Act. The rationale is that public business shall not be conducted in secret. Therefore, if the workshop is directly related to matters of public business, the Act will likely apply. If the workshop is unrelated to matters of public business, there is a strong argument that the Act does not apply. To determine if or when a workshop constitutes a public meeting necessarily requires an analysis as set forth herein.

Sincerely,



David A. Jarecke

DAJ/cs