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March 29, 2002

Jay Holmquist
General Manager
Nebraska Rural Electric Association
800 So. 13th Street
PO Box 82048
Lincoln, NE 68501

Re: Public Meetings Law-Closed Session

Dear Jay:

You have asked that I set out the legal requirements for holding a closed (executive) session under the Public Meetings Law and then comment on whether there is a requirement to take minutes of what transpires in the closed session.

I. PUBLIC MEETING LAW

The requirements of the so-called "Public Meeting Law" are set out in *Neb. Rev. Stat.* §§ 84-1408 to 84-1414 (Reissue 1999).

A. Intent. The legislature in *Neb. Rev. Stat.* § 84-1408 declared that the policy of the State is that the formation of public policy is public business and may not be conducted in secret and that every meeting of a public body shall be open to the public except as otherwise provided by the Nebraska Constitution, federal statutes, and sections 79-317 (pertaining to the State Board of Education), 84-1408 to 84-1414, and 85-104 (pertaining to the Board of Regents of the University of Nebraska).

B. Meeting defined. Meeting is defined in *Neb. Rev. Stat.* § 84-1409(2) as "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."

C. Public Body defined. Public body is defined in *Neb. Rev. Stat.* § 84-1409(1) as "governing bodies of all political subdivisions of the State of Nebraska" which includes Public Power Districts, but does not include Electric Cooperative Corporations or Electric Membership Associations.

D. Closed Session. *Neb. Rev. Stat.* § 84-1410 sets out the conditions that must be complied with before a public body is authorized to hold a closed session.

(1) First, an affirmative vote of a majority of its voting members must be obtained. A majority as used here means a majority of all of the members of the board and not a majority of the members present at the meeting.

(2) Second, in order to hold a closed session, the board must determine that 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. Closed sessions may be held for, ***but shall not be limited to,*** such reasons as:"

(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."

(e) "Nothing in this section shall permit a closed meeting for discussion of the appointment or election of a new member to any public body."

It should be noted that the above list is not all-inclusive. There may be other legitimate reasons for holding a closed session. One is to receive legal advice from an attorney.

(3) Third, the vote to hold a closed session must be taken in open session. The vote of each member on the question of holding a closed session, the reason for the closed session and the time when the closed session commenced and concluded must be recorded in the minutes.

(4) Fourth, while in closed session, the board may only consider matters for which the board voted to hold a closed session. These are the matters that are recorded in the minutes as the reason for holding a closed session.

(5) Fifth, the meeting shall be reconvened in open session before any formal action may be taken. Formal action means "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 . . ." *Neb. Rev. Stat.* § 84-1410(2).

E. Minutes. The requirement for keeping minutes is set out in *Neb. Rev. Stat.* § 84-1413, as follows:

(1) "Each public body shall keep minutes of all meetings showing the time, place, members present and absent, and the substance of all matters discussed."

(2) "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."

F. Is there a requirement to keep minutes of what transpires in closed session?

The Public Meetings Law is silent on the question of whether minutes are required to be taken of a closed session. Nevertheless, a close reading of the statutes and an analysis of the rationale for holding a closed session lead to the conclusion that there is no requirement for taking minutes of a closed session. First, § 84-1413 requires that minutes be kept "of all meetings showing the time, place, members present and absent, and the substance of all matters discussed." Secondly, the same statute requires that "minutes of all meeting and evidence and documentation received in ***open session*** shall be public records and open to public inspection . . ."
(Emphasis added.). If minutes are required to be taken of matters discussed in closed session, then such minutes may be considered public records that are required to be disclosed to the public under the Public Meetings Law and the Public Records Act, *Neb. Rev. Stat.* §§ 84-712 to 84-712.09.[1]

The purpose of a closed session is to protect the confidentiality of specific matters authorized by statute to be discussed in such closed session. If minutes of such matters were required to be taken and then disclosed to the public, the confidentiality of the protected matters would be breached which defeats the very purpose of holding closed sessions. This result would render the purpose of closed sessions meaningless and reach an absurd result. The Legislature would not on the one hand authorize a closed session in order to protect confidential matters and then on the other hand require the disclosure of such matters by making minutes of the closed session available to the public.

The following cases on statutory construction support the above analysis. In *State v. Spurgin,* 261 Neb. 427, 623 N.W.2d 644 (2001) the Nebraska Supreme Court held that in reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. In *Armour v. L.H.,* 259 Neb. 138, 608 N.W.2d 599 (2000) the Nebraska Supreme Court held that in construing a statute, an appellant court will, if possible, try to avoid a construction which would lead to an absurd, unconscionable, or unjust result.

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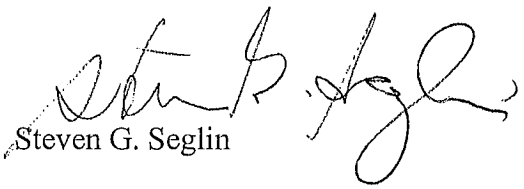
[1] *Neb. Rev. Stat.*§ 84-712.05 of the Public Record's Act authorizes the lawful custodian of the records to withhold records, "unless publicly disclosed in an open court, open administrative proceeding, or open meeting, or disclosed by a public entity pursuant to its duties"... "(4) which represent the work product of an attorney and the public body involved which are related to preparation for litigation, labor negotiations, or claims made by or against the public body or which are confidential communications as defined in section 27-503" (attorney-client privilege)

In addition, the § 84-1413 only requires that evidence and documents received in open session shall be public records, implying that evidence and records received in closed session are not public records. If evidence and documents received in closed session are not public records, then it stands to reason that matters discussed in confidence in closed session should not be made public by requiring minutes to be taken and disclosed of the matters discussed in closed session.

Very truly yours,

CROSBY GUENZEL LLP

By 
Steven G. Seglin

SGS:rrk