

City of Scottsbluff, Nebraska

Tuesday, August 18, 2020

Regular Meeting

Item Reports¹

Review Open Meetings Act.

Staff Contact: Starr Lehl

MEMO

To: City of Scottsbluff EDPARC.

From: Adam A. Hoelsing

Date: 8/17/20

RE: Open Meetings Act Statutes

The Open Meetings Act (“Act”) of the Nebraska Revised Statutes generally declares it is a public policy of the State that meetings of public bodies be held open to the public. It also declares the public shall be informed, in advance, of the time and place for the meeting and the agenda for the meeting. The Act, however, provides specific exceptions to these public policies. This Memo addresses those exceptions, and more generally, the Act as whole as it relates to the EDPARC.

1. Closed Sessions

Under Nebraska Revised Statute § 84-1410, the ARC can hold a closed session during any meeting if the closed session is “necessary for the protection of public interest or the prevention of needless injury to the reputation of an individual and if such individual has not requested a public meeting.” The statute then lists topics that affirmatively qualify for closed sessions, such as (1) strategy sessions for collective bargaining, real estate purchases, pending litigation, or imminent litigation as evidenced by a threatened claim, (2) the deployment or use of security personnel or devices, (3) the investigations of alleged criminal misconduct, and (4) the evaluation of a person’s job performance when necessary to prevent injury to the person’s reputation, but only if such person has not requested an open session. The statute does not state that those topics are an exhaustive list of topics which qualify for closed sessions, as another unenumerated topic may be equally “necessary for the protection of the public interest.” Thus,

in determining whether a closed session can be held, the ultimate test is whether the closed session is “necessary for the protection of the public interest.”

Given the confidentiality requirements of the Economic Development Program, and the need to protect commercially and competitively sensitive information of applicants, it has been rather uncontroversial for the ARC to enter into closed session, even though that particular topic is not provided for in Nebraska Revised Statute § 84-1410. It is important, though, to remember that the license or privilege to discuss a matter in closed session by the ARC should truly be for protecting the commercially and competitively sensitive information of applicants. Using a closed session as a shield from media and meeting minutes simply to share an unpopular opinion regarding an application would be inappropriate. The same would be the case for the desire to discuss tertiary concerns of an application when commercially and competitively sensitive information is not of issue. The ARC should therefore be careful in using closed session only for those purposes necessary to maintain the confidentiality guarantee of the Economic Development Program.

Procedurally, in order to have a closed session, the ARC must take a number of actions. First, a member must make a motion to enter a closed session. The motion must identify the subject matter of the closed session and it must identify the reason for the closed session. Without any discussion in that regard, a court is likely to determine that the closed session was a violation of the Open Meetings Act, for it has no basis upon which to find that a closed session is necessary.

During the closed session, the ARC must only discuss and consider the subject matter set forth in the motion for the closed session. If a member feels that the discussion of the closed session strays from the subject matter of the motion, he or she may challenge the continuation of

the closed session. The ARC will then revote on the closed session, continuing the closed session only if the challenge is overruled by a majority of the ARC. A member may also challenge the closed session if he or she feels the session is not clearly necessary for the protection of the public interest or the prevention of needless injury to the reputation of a person. A challenge for necessity is voted upon in the same manner as a challenge for subject matter propriety. Any challenge and subsequent disposition must be recorded in the minutes.

The public meeting must be re-convened before any formal action can be taken regarding the subject matter of the closed session. The term “formal action” is defined as 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.” It does not, however, include any guidance the ARC gives to legal counsel or other negotiators for strategies of collective bargaining, real estate purchases, pending litigation, or imminent litigation, etc. Those latter actions can be made during the closed session.

2. Meeting Agenda

Under Nebraska Revised Statute § 84-1411, the ARC must give “reasonable advance publicized notice” of the time and place for any public meeting. The notice must provide the agenda of subject matter to be discussed at the public meeting, if known by the ARC at the time of giving the notice, although a statement in the notice is sufficient if it provides that the agenda of subject matter is continually current and can be viewed at the City’s office during normal business hours. Generic statements that fail to inform the public of the issue are not sufficient.

The agenda of subject matter cannot be altered later than 24 hours before the public meeting, except for emergency items. Emergency items can be added to the agenda within 24 hours before the public meeting only if added during the actual public hearing. The statute does

not define an “emergency” agenda item, but case law holds that an “emergency” is any event or circumstance which calls “for immediate action or remedy; pressing necessity; exigency; a sudden or unexpected happening; [or] an unforeseen occurrence or condition. It is difficult to believe that the ARC may ever be presented with an emergency agenda item, given that definition.

Thus, the ARC must be careful not to discuss or formulate a “formal action” (i.e., “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”) on any topic or item that *is not* listed on the meeting agenda at least 24 hours before the meeting. For instance, a general discussion to formulate a “general consensus” for “next time” would be inappropriate, if the topic or item is not on that meeting’s agenda.