

Open Meetings Law Workshop



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"We drilled down, but we didn't like what we found, so we filled it all back in."

The Plan for Tonight

- Open Meetings Act overview
- Where we see boards stumble

Open Meetings Act

Sections 84-1408 to 84-1414

- 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, [except as otherwise provided by law/Constitution]

Remedies for Violation

- Complaint to Attorney General
- Attorney General, county attorney or a citizen may file suit
- Any motion, resolution, regulation, rule or formal action will be:
 - VOID if suit filed w/in 120 days
 - VOIDABLE if suit filed w/in 1 year and violation is substantial
- Attorney fees are available to citizens who sue successfully.

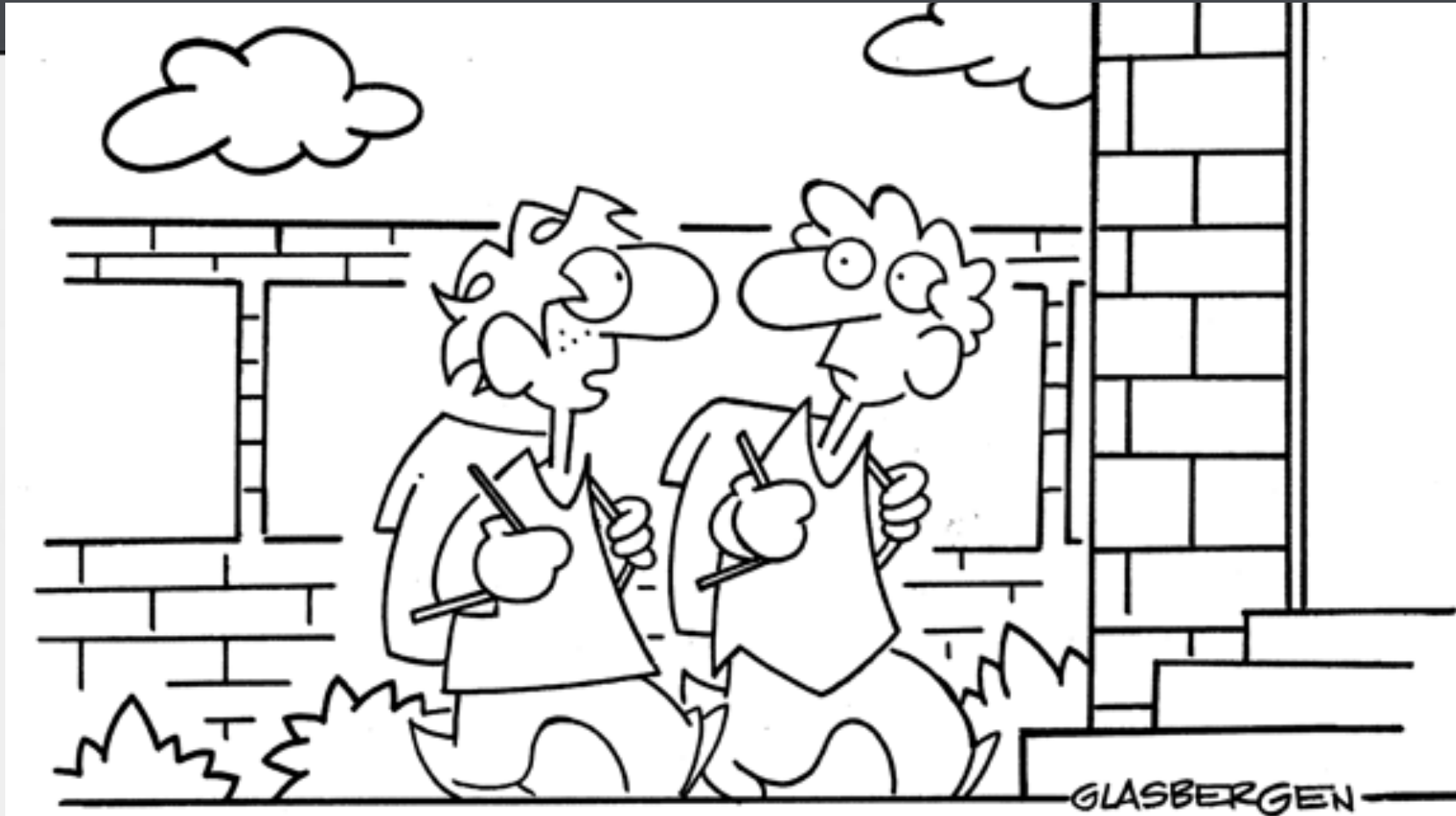
Don't Be a Criminal!

Any member of a public body who **knowingly** violates or **conspires to violate** or who attends **or remains at a meeting knowing that the public body is in violation** of any provision of the Open Meetings Act shall be guilty of a **Class IV misdemeanor** [\$100 min/\$500 max] for a first offense and a **Class III misdemeanor** [up to 3 mo., \$500] for a second or subsequent offense.

Our Advice

- Sections 84-1408 to 84-1414
 - 8 statutes – Read them!
- If in doubt . . . always err on the side of caution and keep it open.

So How Does this Work?



“If knowledge is the ultimate weapon, wouldn’t that be a violation of the school’s security policy?”

What is a Meeting?

- Meetings include:
 - 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
 - Taking of any action of the public body
- What do you call a board retreat?

What is NOT a Meeting?

- Meetings do not include:
 - Chance meetings
 - Attendance at or travel to workshops or conventions as long as:
 - Meeting not intentionally convened
 - No vote or other action taken over public body business
- Gathering of quorum if no interaction or discussion of public business

What is NOT a Meeting?

- Schauer v. Grooms, 280 Neb. 426 (2010)
 - Informal tour and dinner
- Rauert v. School Dist. 1-R, 251 Neb. 135 (1996)
 - “Clandestine” Meetings
 - Good example of why board members need to be careful about non-meeting gatherings

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

So where do we see public boards struggle with the Act?



"Before you begin, I have a number of preconceived notions I'd like to spout."

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.

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- Recommendation: designate quickest posting method and add permissible or even recommended “other” methods

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
- Solution? Place inclement weather notice in your policy

Agenda issues: 84-1411

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(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.

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Parli Pro and Robert's Rules

- Instead of Robert's Rules or complex procedures, use the Open Meetings Act

(2) Any action taken on any question or motion duly moved and seconded shall be by roll call vote of the public body in open session, and the record shall state how each member voted or if the member was absent or not voting. The requirements of a roll call or viva voce vote shall be satisfied by a public body which utilizes an electronic voting device which allows the yeas and nays of each member of such public body to be readily seen by the public.

(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

Creighton Decision

- Motions cannot be “amended” through discussion only
- A stated motion is presumed to be the basis of the board’s action, even if the subsequent conversation clearly changes the scope
- True for at least closed session, where the motion must be recorded as given

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**“Here are the minutes from our last meeting:
Marty wasted 12 minutes, Janice wasted 7 minutes,
Carl wasted 27 minutes, Eileen wasted 9 minutes...”**

What is a Public Body?

- Neb. Rev. Stat. 84-1409
 - Governing bodies of all political subdivisions
 - Governing bodies of all agencies created by NE law
 - All independent boards, commissions, bureaus, committees, councils, subunits or any other body created by NE law
 - All study or advisory committees of the executive department
 - Advisory committees of any of these bodies

Committees

- Two most common: Advisory and Sub
 - Advisory committees CAN be subcommittees
 - Subcommittees CAN be advisory committees

Subcommittees of Public Bodies

- Generally made up only of members of parent body
- Subcommittees are public bodies **ONLY if:**
 - A quorum of the board attends OR
 - It holds hearings, makes policy, or takes formal action on behalf of school board
 - *City of Elkhorn v. City of Omaha* (2007)

Advisory Committees

- May be made up of members of the parent body
- May also include patrons, advisors, etc.
- Are all subcommittees advisory committees?

Neligh Oakdale

- Meeting of six individuals.
 - One from Clearwater
 - One from Unified School Board
 - Two from Neligh-Oakdale School Board
 - Two from Ewing School Board
- Public body?
- Advisory Committee?



"We should probably take one of those down."

Closed / Executive Session

- Most violated section of the Act?
- Only two initial reasons for closed session articulated in the Act:
 - prevention of needless injury to an individual's reputation, unless they object
 - "Individual" cannot be a board member
 - Protection of the public interest
 - Not the "board's" interest, unless they overlap

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.

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:

Closed Sessions

- “Closed sessions may be held for, but shall not be limited to, such reasons as:”
 - Strategy sessions with respect to collective bargaining, real estate purchases, pending litigation, or litigation which is imminent as evidenced by communication of claim or threat of litigation to or by public body

Closed Sessions

- “Closed sessions may be held for, but shall not be limited to, such reasons as:”
 - Discussion regarding deployment of security personnel or devices;
 - Investigative proceedings regarding allegations of criminal misconduct;

Closed Sessions

- “Closed sessions may be held for, but shall not be limited to, such reasons as:”
 - Evaluation of the job performance of a person when necessary to prevent needless in-jury to the reputation of a person AND if such person has not requested a public meeting;

Closed Sessions

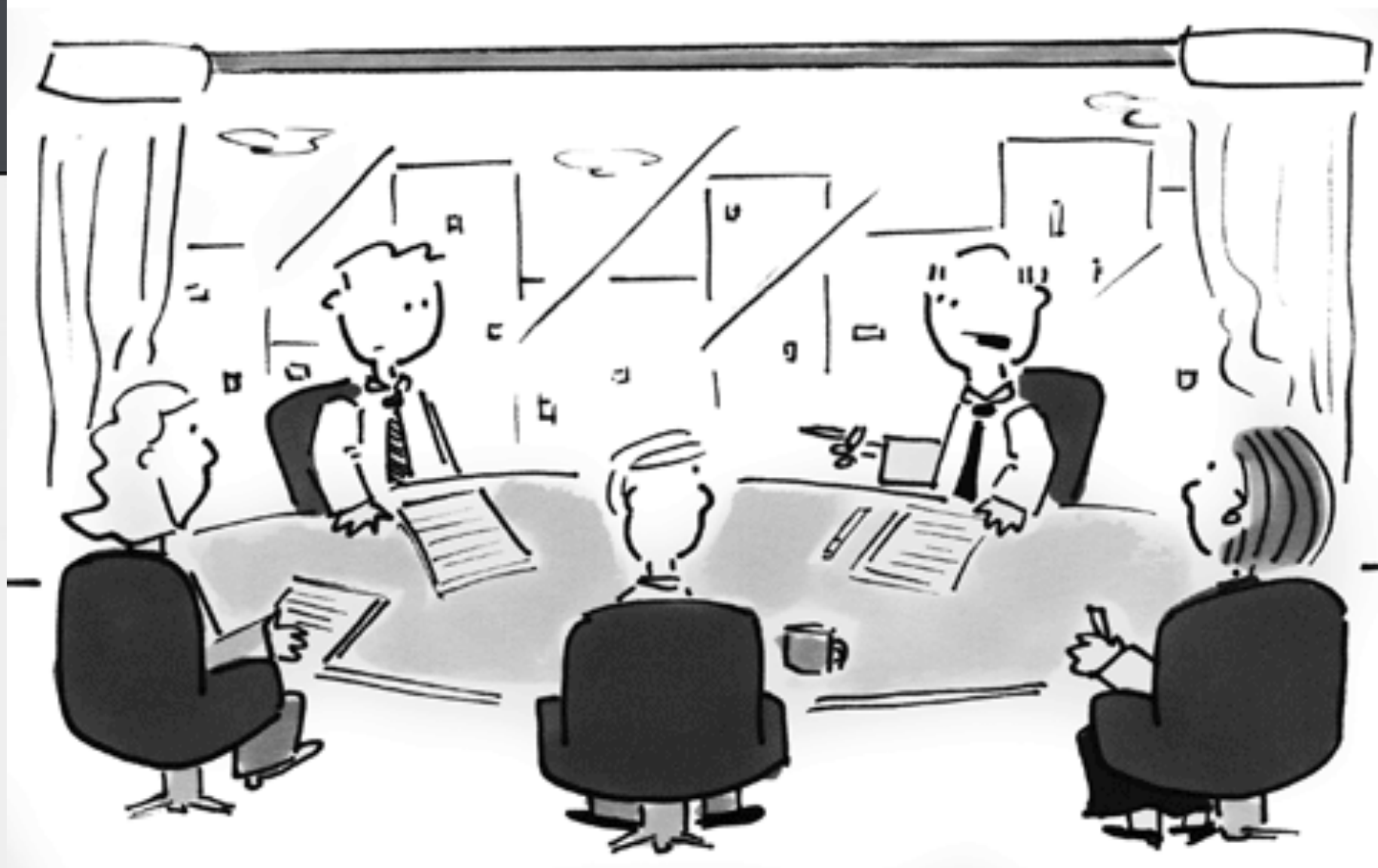
- “Closed sessions may be held for, but shall not be limited to, such reasons as:”
 - Community Trust - \$ to be paid to individuals who have suffered from a tragedy of violence or natural disaster;
 - Public hospitals - peer review & prof. review activities, discussion of staff investigations or discipline, and strategy session re transactional negotiations

Closed Sessions

- Cannot discuss appointment or election of new member in closed session
- Closed session inappropriate because matter *might* arise. Only permitted when such matter does arise and must be dealt with. Op. Att'y Gen. No. 94035 (May 11, 1994); Op. Att'y Gen. No. 11 (January 20, 1983)

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?



"Not to be argumentative, but go to hell, Ernie."

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.

Closed Session Procedure

- Vote taken in open session
- Must record the following in minutes:
 - Entire motion
 - Vote of each member
 - Time when closed session begins and ends
- If motion passes, president restates the limited subject matter for closed session
- Board can only discuss and consider to stated matter(s) - AG wording about related matters???

Closed Session Procedure

- Must reconvene in open session before taking any “formal action”
- “Formal action” means collective decision or collective commitment or promise to make a decision on any question, motion, proposal, resolution, order, or ordinance or formation of a position or policy

Closed Session Procedure

- “Formal action” does NOT include negotiating guidance given by members of the school board to legal counsel or other negotiators in closed sessions for collective bargaining, real estate purchases, or pending or imminent litigation

Closed Session – Right to Challenge

- Board member has right to challenge the continuation of a closed session if:
 - Determines that session has exceeded reason stated in closed session motion; OR
 - Contends that closed session is not clearly necessary for protection of the public interest OR prevention of needless injury to individual's reputation.

Closed Session – Right to Challenge

- Takes majority vote of the members of the public body to overrule challenge.
 - Does vote occur in or out of closed session?
- Challenge and its result must be recorded in the minutes.

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:



Straw Poll

Which one sucks the least?

Grein v. Bd. of Ed. of Fremont **216 Neb. 158 (1984)**

- THE decision about what is allowed in closed session
- School board went into closed session to discuss low bid on construction project
- The NSC held that the closed session was improper

Grein v. Bd. of Ed. of Fremont

- Closed session provision must be narrowly and strictly construed.
- “Public interest” which is protected is “that shared by citizens in general and by the community at large concerning pecuniary or legal rights and liabilities.”
- Good faith motivation for a closed session is not a cure for non-compliance with the public meetings laws.

Grein v. Bd. of Ed. of Fremont

“The prohibition against decisions or formal action in a closed session also proscribes crystallization of secret decisions to a point just short of ceremonial acceptance, and rubberstamping or reenacting by a pro forma vote any decision reached during a closed session.”

Grein v. Bd. of Ed. of Fremont

- “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.”



**“I want you to find a bold and innovative way
to do everything exactly the same way
it’s been done for 25 years!”**

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.