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NEBRASKA OPEN MEETINGS LAW

Nebraska Open Meetings Act

The Nebraska Open Meetings Act guarantees that 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. The information below details NEB. REV. STAT. §§ 84-1407 TO 84-1414 (**2008, Supp 2009**) [From Attorney General's website, 9-4-12.]

BASIC PROVISION

The basic statement of our state policy on public meetings is found at Neb. Rev. Stat. § 84-1408. That statute provides, "[i]t 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 the State of Nebraska, federal statutes, and the Open Meetings Act."

1. **History.** Section 84-1408 was passed as a part of LB 325 in 1975. That bill repealed previously existing public meetings provisions and substituted new provisions which were intended to preserve the features of the previous law and strengthen and expand their authority. Government Committee Statement on LB 325, 84th Nebraska Legislature, First Session (1975). LB 325 was passed to ensure that all meetings of public bodies would be open to the public, except when protection of the public interest clearly called for a closed session concerning specific matters. Id. 2004 Neb. Laws LB 821, § 34 formally established the name of §§ 84-1407 through 84-1414 as the "Open Meetings Act."
2. **Purpose.** The Nebraska open meetings laws are a statutory commitment to openness in government. *Wasikowski v. The Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W.2d 756 (2002); *Steenblock v. Elkhorn Township Board*, 245 Neb. 722, 515 N.W.2d 128 (1994); *Grein v. Board of Education of the School District of Fremont*, 216 Neb. 158, 343 N.W.2d 718 (1984). Their purpose is to ensure that public policy is formulated at open meetings of the bodies to which the law is applicable. *Dossett v. First State Bank, Loomis, NE*, 261 Neb. 959, 627 N.W.2d 131 (2001); *Marks v. Judicial Nominating Commission for Judge of the County Court of the 20th Judicial District*, 236 Neb. 429, 461 N.W.2d 551 (1990); *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979). In Nebraska, the formation of public policy is public business, which may not be conducted in secret. *Johnson v. Nebraska Environmental Control Council*, 2 Neb. App. 263, 509 N.W.2d 21 (Neb. Ct. App. 1993).
3. **Construction.** The open meetings laws should be broadly interpreted and liberally construed to obtain their objective of openness in favor of the public. *State ex rel. Upper Republican Natural Resources District v. District Judges of the District Court for Chase County*, 273 Neb. 148, 728 N.W.2d 275 (2007); *State ex rel. Newman v. Columbus Township Board*, 15 Neb. App. 656, 735 N.W.2d 399 (Neb. Ct. App. 2007); *Alderman v. County of Antelope*, 11 Neb. App. 412, 653 N.W.2d 1 (Neb. Ct. App. 2002); *Rauert v. School District I-R of Hall County*, 251 Neb. 135, 555 N.W.2d 763 (1996); *Grein, supra*. The beneficiaries of the openness sought by the Open Meetings Act include citizens, members of the general public, and reporters or other representatives of the news media. *State ex rel. Newman v. Columbus Township Board*, 15 Neb. App. 656, 735 N.W.2d 399 (Neb. Ct. App. 2007).
4. **Exceptions.** Section 84-1408 requires open meetings except "as otherwise provided by the Constitution of the State of Nebraska, federal statutes, and the Open Meetings Act." The Attorney General has concluded that the Nebraska Legislature is not covered under the open meetings statutes because the Nebraska Constitution separately provides for public access to that body. *Op. Att'y Gen. No. 120* (July 25, 1985).
5. **Subsequent legislative limitations.** The Legislature holds the power to decide the scope of citizen access to governmental meetings. As a result, the Legislature has the right to limit access to public meetings and the effect of the Open Meetings Act through later statutory provisions which provide that certain information in the possession of government should remain confidential without exception or limitation. *Wasikowski v. The Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W.2d 756 (2002).

PUBLIC BODIES WHICH ARE COVERED

Under § 84-1409(1), public bodies covered by the public meetings statutes include: (1) governing bodies of all political subdivisions of the State, (2) governing bodies of all agencies of the executive department of state government created by law, (3) all independent boards, commissions, bureaus, committees, councils, subunits, or any other bodies created pursuant to law, (4) all study or advisory committees of the executive department of the state whether of continuing or limited existence, (5) advisory committees of the governing bodies of political subdivisions, of the governing bodies of agencies of the executive branch of state government, or of independent boards, commissions, etc., and (6) "instrumentalities exercising essentially public functions."

1. **History.** The initial portion of § 84-1409(1) defining public bodies was originally part of LB 325 passed in 1975. It has been amended several times to add additional entities to the list of bodies covered, and the Certificate of Need Review Committee was removed in 1997. See 1997 Neb. Laws LB 798; 1989 Neb. Laws LB 429 and LB 311; 1983 Neb. Laws

LB 43. The language concerning "instrumentalities exercising essentially public functions" was added in 1989 to reach entities such as the Nebraska Investment Finance Authority. Floor Debate on LB 311, 91st Nebraska Legislature, First Session, May 9, 1989, at 6039, 6040.

2. **Cases and Opinions.** A number of cases and opinions of the Attorney General deal with various aspects of the definitions of public body found in § 84-1409(1).
 - a. "Political subdivision" is not defined within the public meetings statutes. However, the Attorney General has indicated that generally the term denotes any subdivision of a state which has as its purpose carrying out functions of the state which are inherent necessities of government and which have always been regarded as such by the public. 1979-80 Rep. Att'y Gen. 140 (Opinion No. 98, dated April 25, 1979). Presumably, this term includes cities, counties, villages, etc., and their governing boards are covered by the open meetings statutes.
 - b. In *Nixon v. Madison County Agricultural Society*, 217 Neb. 37, 348 N.W.2d 119 (1984), the Court held that a county agricultural society, organized under the Nebraska statutes, was subject to the provisions of the open meetings law. The Court noted that, although the society at issue resembled a private corporation in some respects, the fact that it had the right to receive support from the public revenue gave it a public character. The agricultural society apparently was an "independent board . . . created by constitution, statute, or otherwise pursuant to law." Based upon the Nixon case, the Attorney General concluded that county extension services which have the right to receive support from public revenues are subject to the open meetings law. Op. Att'y Gen. No. 219 (July 24, 1984). Also based upon the Nixon case, the Attorney General has indicated that county agricultural societies are subject to the open meetings statutes. Op. Att'y Gen. No. 91007 (January 28, 1991). In addition, Neb. Rev. Stat. § 2-238 requires that result.
 - c. In *Marks v. Judicial Nominating Commission for Judge of the County Court of the 20th Judicial District*, 236 Neb. 429, 461 N.W.2d 551 (1990), the Court held that the open meetings statutes do not apply to the activities of a judicial nominating commission which is meeting to select nominees for judicial vacancies. Such a nomination procedure does not involve the formulation of public policy subject to the act.
 - d. The Nebraska Court of Appeals, in *Johnson v. Nebraska Environmental Control Council*, 2 Neb. App. 263, 509 N.W.2d 21 (Neb. Ct. App. 1993), held that the open meetings statutes apply to the governing bodies of all agencies of the executive branch of government, including the Nebraska Environmental Control Council.
 - e. In *State ex rel. Newman v. Columbus Township Board*, 15 Neb. App. 656, 735 N.W.2d 399 (Neb. Ct. App. 2007), the Nebraska Court of Appeals concluded that the electors of a Nebraska township, when assembled at the township's annual meeting, constitute a governing body of the township which is subject to the Open Meetings Act and its provisions concerning notice and preparation of an agenda.
 - f. The Nebraska Court of Appeals indicated in *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009) that a county board of equalization is a public body as defined in § 84-1409. The court also held in that case that when two boards are made up of the same members, the duties and functions of the two boards, rather than their membership, determine if they are the same or separate and distinct bodies.
 - g. Committees of faculty, administration and students created by the Board of Regents of the University of Nebraska to advise the Chancellor of the University in his administrative/management function with respect to budget cuts were part of the management structure of the University and not public bodies subject to the open meetings statutes. Op. Att'y Gen. No. 92020 (February 12, 1992).
 - h. In Op. Att'y Gen. No. 11 (January 20, 1983), the Attorney General indicated that the Environmental Control Council is a public body subject to the open meetings law. On the other hand, the Department of Environmental Control is not. Section 84-1409 applies to governing bodies of state agencies, not the agencies themselves.
 - i. An employee grievance appeal hearing conducted by a hearing officer is not a meeting of a public body since the word "body" is commonly understood to refer to a group or number of persons, and thus does not include an individual conducting a hearing. Op. Att'y Gen. No. 210 (May 16, 1984).
 - j. In 1989, the Attorney General indicated that the Central Low-Level Radioactive Waste Compact Commission was not subject to the Nebraska open meetings law because it was a multi-state body which was not created by constitution or statute and which was not a governing body of a Nebraska state agency. Op. Att'y Gen. No. 89008 (February 14, 1989). However, Neb. Rev. Stat. § 71-3521 (the Waste Compact agreement itself) provided that meetings of the Compact Commission must be open to the public with reasonable advance publicized notice, and that the Compact Commission must adopt by-laws consistent in scope and principle with the open meetings law of the host state. Section 71-3521 was repealed by 1999 Neb. Laws LB 530, § 2, and Nebraska withdrew from the Central Low-Level Radioactive Waste Compact.
 - k. A county welfare board is subject to the open meetings law as an independent board created by statute. 1979-80 Rep. Att'y Gen. 351 (Opinion No. 244, dated March 4, 1980).

- l. In Op. Att'y Gen. No. 95014 (February 22, 1995), the Attorney General indicated that the Mayor's Citizen Review Board, appointed by the Mayor of Omaha to advise the Mayor with respect to alleged misconduct of police officers, was not subject to the open meetings statutes because it did not fall under the definition found in § 84-1409(1), and because the board was essentially an administrative body which was part of the management structure of the City.
 - m. In Op. Att'y Gen. No. 93065 (July 27, 1993), the Attorney General concluded that parole reviews under Neb. Rev. Stat. § 83-1,111 may be closed, and are not subject to open meetings requirements.
 - n. The Excellence in Education Council created to make recommendations to the Governor regarding selection of projects for Education Innovation grants is a public body which is subject to the open meetings statutes, and its decisions concerning specific recommendations must be done in open session. Op. Att'y Gen. No. 94092 (November 22, 1994).
 - o. The Division of Rehabilitation Services of the State Department of Education is a public body, and its business must be conducted in compliance with the provisions of the open meetings statutes. Op. Att'y Gen. No. 93091 (October 22, 1993).
 - p. The Quality Jobs Board created under the Quality Jobs Act, Neb. Rev. Stat. §§ 77-4901 through 77-4935 is a public body subject to the Open Meetings Act. Op. Att'y Gen. No. 96071 (October 28, 1996).
 - q. A County Hospital Authority formed under the Hospital Authorities Act, Neb. Rev. Stat. §§ 23-3579 through 23-35,120 is a public body which is subject to the Open Meetings Act. Op. Att'y Gen. No. 97012 (February 14, 1997).
 - r. The Nebraska State Board of Agriculture (the State Fair Board) is not a public body which is subject to the Open Meetings Act, primarily because it has no statutory right to public revenue and also because of case law which indicates that it is a private corporation. Op. Att'y Gen. No. 01038 (November 27, 2001).
 - s. A county clerk, county attorney and county treasurer acting as a group under § 32-567 (3) to make an appointment to fill a vacancy on a county board constitute a public body which is subject to the Open Meetings Act. Op. Att'y Gen. No. 97050 (September 18, 1997).
 - t. The Attorney General has indicated informally that the Nebraska Board of Pardons and the Board of Inquiry and Review created under Neb. Rev. Stat. §§ 80-317 through 80-319 to receive and act upon applications submitted for membership in Nebraska Veterans Homes are subject to the state's open meetings statutes.
3. **Other Statutes.** Neb. Rev. Stat. § 2-238 requires county agricultural societies and county fair boards to comply with the open meetings statutes. Under Neb. Rev. Stat. § 85-1502 all coordination activities conducted by the association of community college area boards are subject to the open meetings statutes.
4. **Exceptions.** The latter portion of § 84-1409(1) provides that two entities are not public bodies for purposes of the Open Meetings Act:
- a. Subcommittees. Subcommittees of the various bodies described earlier in § 84-1409 are not public bodies under the Open Meetings Act unless a quorum of the public body attends a subcommittee meeting, or unless those subcommittees are holding hearings, making policy or taking formal action on behalf of the parent body. For example, in *Meyer v. Board of Regents of the University of Nebraska*, 1 Neb. App. 893, 510 N.W.2d 450 (Neb. Ct. App. 1993), the court indicated that meetings of an executive subcommittee of the University of Nebraska Board of Regents with the University President to discuss his tenure were not subject to the open meetings laws because of that portion of the statute.
 - i. In *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 880- 881, 725 N.W.2d 792, 805-806 (2007), the court indicated that, while "subcommittee" is not defined in the Open Meetings Act, a subcommittee is generally a "group within a committee to which the committee may refer business." In addition, "making policy," which subjects a subcommittee to the Open Meetings Act under § 84-1409, apparently includes "receiving background information about a policy issue to be decided." *Id.* In contrast, "nonquorum gatherings" of members of a public body "intended to obtain information or voice opinions" do not seem to involve violations of the Act. *Id.*
 - ii. The language applying the open meetings statutes to certain subcommittee meetings when there is a quorum of the public body present was added to § 84-1409(1) as a result of LB 1019 passed by the Legislature during the 1992 regular session.
 - b. Entities Conducting Judicial Proceedings. Entities conducting judicial proceedings are not public bodies under the Open Meetings Act unless the court or other judicial body is exercising rule making authority, deliberating, or deciding upon the issuance of administrative orders. LB 325, the original open meetings statute of 1975, was

directed strictly at policy making bodies which were legislative or quasi-legislative. Floor Debate on LB 325, 84th Nebraska Legislature, First Session, May 14, 1975, at 4618.

- i. In *McQuinn v. Douglas County School District No. 66*, 259 Neb. 720, 612 N.W.2d 198 (2000), the Nebraska Supreme Court held that a hearing before a school board on the question of the nonrenewal of a probationary certificated teacher's contract where the matters before the board pertained solely to disputed adjudicative facts involved a judicial function, and on that basis, the hearing was not subject to the open meetings statutes. In that context, a school board exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner. Adjudicative facts are those ascertained from proof adduced at an evidentiary hearing which relate to a specific party. The *McQuinn* case is discussed further in *Bligh v. Douglas County School District No. 0017*, 2008 WL 2231063, 2008 Neb. App. LEXIS 106 (Neb. Ct. App. 2008)(Not approved for publication).
- ii. The Attorney General has determined that hearings before various agencies are judicial and not subject to the open meetings law: 1975-76 Rep. Att'y Gen. 127 (Opinion No. 105, dated July 14, 1975) (hearing before a County Board of Mental Health); Op. Att'y Gen. No. 184 (January 31, 1984) (hearing before the Nebraska Equal Opportunity Commission); Op. Att'y Gen. No. 210 (May 16, 1984) (hearing before a hearing officer appointed by the State Personnel Board); Op. Att'y Gen. No. 02016 (May 21, 2002)(contested case hearing before the Power Review Board on application of electricity suppliers for construction or acquisition of generation facilities); Op. Att'y Gen. No. 05014 (October 19, 2005)(appeal hearing regarding the Nebraska Veterans' Aid Fund before the Nebraska Veterans' Advisory Commission). But, the Attorney General has concluded that a hearing before the Certificate of Need Review Committee is covered by the open meetings statutes. Op. Att'y Gen. No. 87019 (February 13, 1987).
- iii. Parole hearings conducted by the Board of Parole are judicial in nature and not subject to the open meetings statutes. However, other statutes specifically pertaining to operation of the Board of Parole require that such parole hearings be conducted with elements of notice and in a manner open to the public. Op. Att'y Gen. No. 93065 (July 27, 1993).
- iv. When the State Board of Education holds hearings in contested cases under the state Administrative Procedure Act, such hearings are not subject to the Open Meetings Act. The Board is not required to give notice of such hearings to the public under those statutes, and it may conduct its deliberations and decision-making process for such hearings by a telephone conference call. Op. Att'y Gen. No. 99046 (November 15, 1999).

MEETING DEFINED

Under § 84-1409(2), meetings, for purposes of the open meetings statutes, are defined 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." Section 84-1410(5) also provides that the open meetings statutes shall 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."

1. The legislative history of LB 325, from 1975, indicates that meetings of a public body do not include social meetings or meetings which were not called by the body. Government Committee Hearing on LB 325, 84th Nebraska Legislature, First Session (1975) at 3.
2. However, § 84-1409 was amended by LB 43 in 1983 to include "formal or informal" meetings. The legislative history of that bill indicates that a meeting between a state senator and the members of a local school board to discuss legislation would constitute an "informal called meeting." Government, Military and Veterans' Affairs Committee Hearing on LB 43, 88th Nebraska Legislature, First Session (1983) 5-8.
3. The provision of § 84-1410(5) pertaining to "chance" meetings, etc., was added by LB 43 in 1983.
4. The legislative history of LB 43 from 1983 indicates that a "meeting" does not occur absent a quorum. Government Military and Veterans' Affairs Committee Hearing on LB 43, 88th Nebraska Legislature, First Session (1983) at 19. In addition, the Attorney General has concluded that the presence of a majority of the members of a public body is necessary for a meeting to occur. 1975-76 Rep. Att'y Gen. 150 (Opinion No. 116, dated August 29, 1975). In *Johnson v. Nebraska Environmental Control Council*, 2 Neb. App. 263, 509 N.W.2d 21 (Neb. Ct. App. 1993), the Nebraska Court of Appeals indicated that "private quorum conferences" are an evasion of the law. The Nebraska Supreme Court also indicated that subgroups of the Omaha City Council constituting less than a quorum of that body were not public bodies on that ground. *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).
5. In *Johnson v. Nebraska Environmental Control Council*, 2 Neb. App. 263, 509 N.W.2d 21 (Neb. Ct. App. 1993), the Court of Appeals held that informational sessions where the Council heard reports from staff of the Department of Environmental Control were briefings which were subject to the requirements of the open meetings statutes. The Court stated that listening and exposing itself to facts, arguments and statements constitutes a crucial part of a governmental

body's decision making. As a result, receiving information triggers the requirements of the statutes, and the open meetings law applies to meetings at which briefing or the formation of tentative policy takes place, as well as to meetings where action is contemplated or taken.

6. *Rauert v. School District I-R of Hall County*, 251 Neb. 135, 555 N.W.2d 763 (1996), involved allegations by the plaintiff that a quorum of the defendant school board met in the office of the superintendent of schools on a regular basis for "clandestine" meetings before the beginning of most scheduled board meetings where business was discussed and decided and checks were signed to pay claims which had not been approved in public session. The board then allegedly moved and voted on business at its public meeting with little or no discussion in order to deprive the public of the right to be fully informed. The Supreme Court held that the District Court properly failed to find a violation of the Open Meetings Act with respect to those allegations in the absence of any evidence as to the specific dates and details of the alleged "clandestine" meetings.
7. The Attorney General has indicated that an "emergency meeting" may be conducted by electronic and telecommunications equipment including radio and telephone conferences. 1975-76 Rep. Att'y Gen. 150 (Opinion No. 116, dated August 29, 1975). On the other hand, the open meetings statutes do not generally authorize the use of telephone conference calls for non-emergency meetings of a public body, and absent members of a public body may not be counted to achieve a quorum through the use of a conference call. Op. Att'y Gen. No. 92019 (February 11, 1992). [Section 84-1411 has been amended a number of times to allow specified public bodies including the governing body of an entity formed under the Interlocal Cooperation Act, the Joint Public Agency Act or the Municipal Cooperative Financing Act, the board of an educational service unit, or the governing body of a risk management pool or its advisory committees organized in accordance with the Intergovernmental Risk Management Act to meet by telephone conference call in certain circumstances. See 1999 Neb. Laws LB 461; 2000 Neb. Laws LB 968; 2007 Neb. Laws LB 199; 2009 Neb. Laws LB 361.]
8. An "informational and educational" meeting of a public body governing a political subdivision where members generally discuss matters pertaining to their subdivision, hear reports from various department heads of the subdivision as to their duties and learn the workings of the subdivision is a meeting of the public body for "briefing" purposes which is subject to the open meetings statutes. Op. Att'y Gen. No. 92043 (March 17, 1992). In addition, the Attorney General has also indicated informally that a meeting of a public body "for the purpose of receiving training or doing planning (such as a retreat)" should probably be treated as subject to the Open Meetings Act.
9. In Op. Att'y Gen. No. 94035 (May 11, 1994), the Attorney General indicated that discussions and deliberations by the State Board of Education in connection with the selection of a Commissioner of Education were subject to the requirements of the open meetings statutes. In addition, that opinion indicated that interviews with individual candidates for the Commissioner position were also subject to the requirements of the open meetings statutes, if a quorum of the Board was present for those interviews. However, in the latter interview situation, a brief closed session (as discussed below) might be warranted for a candid discussion by the Board and the candidate which might potentially elicit responses injurious to the reputation of an individual.
10. A workshop held by the Board of Regents of the University of Nebraska with a professional facilitator to discuss communication practices and the roles of the Board and the University President was not subject to the Open Meetings Act on the basis of § 84-1410 (5) which exempts chance meetings or attendance at or travel to conventions or workshops. The University also asserted that there would be no briefing, discussion of public business, formation of tentative policy, vote, or taking of other action at the workshop. Op. Att'y Gen. No. 04027 (October 20, 2004).

PUBLIC MEETINGS BY VIDEOCONFERENCING AND TELEPHONE CONFERENCE CALL

Section 84-1411 allows certain public bodies to meet by videoconferencing and by telephone conference call.

1. **Videoconferencing.** Section 84-1411 was first amended by LB 635 in 1993 to allow meetings of certain public bodies by means of videoconferencing. Under the current amended § 84-1411(2), public bodies which are allowed to meet by videoconferencing include: (1) various bodies of state government including state agencies, boards, commissions, councils and committees, together with their advisory committees; (2) organizations created under the Interlocal Cooperation Act, the Joint Public Agency Act or the Municipal Cooperative Financing Act; (3) governing bodies of public power districts with chartered territories of more than 50 counties in this state; (4) boards of educational service units; and (5) the governing body of a risk management pool or its advisory committees organized in accordance with the Intergovernmental Risk Management Act.
 - a. The public bodies listed above may hold meetings by videoconferencing if the following requirements are met: (1) reasonable advance publicized notice is given, (2) reasonable arrangements are made to accommodate the public's right to attend, hear and speak at the meeting, including seating, recording by audio and visual recording devices, and an reasonable opportunity for input such as public comment or questions to at least the same extent as would be provided absent videoconferencing, (3) at least one copy of all documents being considered is available to the public at each site of the videoconference, (4) at least one member of the public body is present at each site of the videoconference, and (5) no more than one-half of the public body's meetings in a calendar year are held by videoconferencing.

- b. Under an amended § 84-1409(3), videoconferencing is defined as "conducting a meeting involving participants at two or more locations through the use of audio-video equipment which allows participants at each location to hear and see each meeting participant at each other location, including public input. Interaction between meeting participants shall be possible at all meeting locations."
 - c. Under § 84-1411(6) a public body may allow a member of the public or any other witness other than a member of the public body to appear before the public body by means of video or telecommunications equipment.
 - d. 1999 Neb. Laws LB 87, § 100 added organizations created under the Joint Public Agency Act to the list of entities permitted to conduct meetings by videoconferencing. 2009 Neb. Laws LB 361 added the boards of educational service units to the list.
2. **Telephone Conference Call.** Section 84-1411 was also amended by a number of legislative bills over time (1999 Neb. Laws LB 461; 2000 Neb. Laws LB 968; 2007 Neb. Laws LB 199, 2009 Neb. Laws LB 361) to allow the governing body of an entity formed under the Interlocal Cooperation Act, the Joint Public Agency Act or the Municipal Cooperative Financing Act, the board of an educational service unit, or the governing body of a risk management pool or its advisory committees organized in accordance with the Intergovernmental Risk Management Act to meet by telephone conference call if:
- 1) the territory represented by the educational service unit or the member public agencies of the entity or pool covers more than one county,
 - 2) reasonable advance publicized notice is given which identifies each telephone conference location at which an educational service unit board member or member of the entity's or pool's governing body will be present,
 - 3) all telephone conference meeting sites identified in the notice are located within public buildings used by members of the educational service unit board or of the entity or pool or at a place which will accommodate the anticipated audience,
 - 4) reasonable arrangements are made to accommodate the public's right to attend, hear, and speak at the meeting, including seating, recordation by audio recording devices, and a reasonable opportunity for input such as public comment or questions to at least the same extent as would be provided if a telephone conference call was not used,
 - 5) at least one copy of all documents being considered is available to the public at each site of the telephone conference call,
 - 6) at least one member of the educational service unit board or of the governing body of the entity or pool is present at each site of the telephone conference call identified in the public notice,
 - 7) the telephone conference call lasts no more than one hour, and
 - 8) no more than one-half of the board's, entity's or pool's meetings in a calendar year are held by telephone conference call, except that a governing body of a risk management pool that meets at least quarterly and the advisory committees of the governing body may each hold more than one-half of its meetings by telephone conference call if the governing body's quarterly meetings are not held by telephone conference call or videoconferencing.

Nothing in this section dealing with telephone conference calls prevents the participation in the call by consultants, members of the press, and other nonmembers of the governing body at sites not identified in the public notice. These telephone conference calls may not be used to circumvent any of the public government purposes established in the Open Meetings Act.

- a. 1999 Neb. Laws LB 47, § 2 also amended § 84-1411 (2) to provide that certain meetings of the Judicial Resources Commission may be held by telephone conference if the criteria for videoconferencing listed above are met.
3. Circumvention of Open Meetings Act. Under § 84-1411, videoconferencing, telephone conferencing or conferencing by other electronic communication may not be used to circumvent any of the public government purposes established by the Open Meetings Act. Neither may emails, faxes, or other electronic communications be used for such purposes.

PUBLIC MEETINGS; NOTICE REQUIRED AND AGENDA

Section 84-1411 sets out several requirements for the notice which must be given for a public meeting and for the agenda which must be prepared: (1) the public body must give reasonable advance publicized notice of the time and place of each meeting by a method designated by the body and recorded in its minutes, (2) that notice must be transmitted to all members of the body and to the public, (3) the notice must contain an agenda of subjects known at the time of the publicized notice, or a statement that such an agenda, which must be kept continually current, is readily available for inspection at the principal office of the public body during normal business hours.

- 1. **Agenda.** Under § 84-1411(1), an agenda maintained at the office of a public body for public inspection must be kept continually current and may not be altered later than 24 hours before the scheduled commencement of the public meeting (or 48 hours before commencement of a meeting of a city council if that meeting is noticed outside the corporate limits of the municipality). A public body may modify an agenda to include items of an emergency nature only at such public meeting.

2. **Specificity of the Agenda** . LB 898 from 2006 added language to § 84-1411 (1) which states that agenda items shall be "sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting." That statutory change arose out of a sense that lack of specificity in meeting agendas was a major issue of concern around the state. Government Military and Veterans' Affairs Committee Hearing on LB 898, 99th Nebraska Legislature, Second Session (2006) at 19. The intent of the change was to require public bodies to include sufficient detail in their agendas regarding issues to be discussed or acted upon so as to provide information and notice to the public. Floor Debate on LB 898, 99th Nebraska Legislature, Second Session, March 28, 2006 at 11701 (Statement of Senator Preister). The change was also intended to require sufficient detail in an agenda so that members of the public are not forced to look at past agendas in order to understand the issue to be discussed and/or the action to be taken. Id.
3. **News Media**. Section 84-1411(4) requires that the secretary or other designee of each public body shall maintain a list of news media requesting notification of meetings and shall make reasonable efforts to provide advance notification to that list of media of the time and place of each meeting and the subjects to be discussed at that meeting.
4. **History**. The provision of § 84-1411 which prohibits altering an agenda within 24 hours of a meeting was added in 1983 to prevent addition of last minute matters to an agenda which did not really represent emergencies. Floor Debate on LB 43, 88th Nebraska Legislature, First Session, March 22, 1983, at 1896.
5. In *Rauert v. School District I-R of Hall County*, 251 Neb. 135, 555 N.W.2d 763 (1996), the court stated that the Open Meetings Act requires public bodies to give reasonable advance publicized notice of the time and place of their meetings, in part so that the public may attend and speak at those meetings.
6. The Legislature has imposed only two conditions on public bodies regarding the method of notification for their meetings: 1. the public body must give reasonable advance publicized notice of the time and place of each meeting, and 2. the method of notification must be recorded in the public body's minutes. *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007). There is no minimum time period for public notification of a special meeting, and an agenda for a public meeting can be created (not altered) later than 24 hours before the scheduled meeting. Id. In the *City of Elkhorn* case, the court held that notice of a meeting of the Omaha City Council posted and placed on the city's website at 10:15 a.m. for a meeting at 10:00 p.m. 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 television broadcasters were present at the meeting. The court also indicated that any defect in notice intended for the benefit of council members would not invalidate a council meeting when all of the members of the council attended without objection.
7. The purpose of the agenda requirement is to give some notice of the matters to be considered at the meeting so that persons who are interested will know which matters are under consideration. *State ex rel. Newman v. Columbus Township Board*, 15 Neb. App. 656, 735 N.W.2d 399 (Neb. Ct. App. 2007); *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979). In *Pokorny*, the agenda at issue, considered with all the previous records of the city council involved, was sufficient to satisfy the open meetings statutes. *Pokorny* also indicates 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. Posting notice one week ahead does.
8. In *Hansmeyer v. Nebraska Public Power District*, 6 Neb. App. 889, 578 N.W.2d 476 (1998), *aff'd*, 256 Neb. 1, 588 N.W.2d 589 (1999), the Court of Appeals considered whether an agenda item which simply stated "Work Order Reports" was sufficient to give 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 to connect two power substations. The Court held that the agenda item was insufficient under the Open Meetings Act. The court also seemed to suggest, based upon the *Pokorny* case, that the sufficiency of an agenda item might be measured, at least to some degree, in the context of the other meetings of the public body immediately prior to the public meeting in question.
9. A member of the public should not be required to hunt up and read the documents underlying an agenda of a public body to determine what is actually on that agenda. *Hansmeyer v. Nebraska Public Power District*, 6 Neb. App. 889, 578 N.W.2d 476 (1998), *aff'd*, 256 Neb. 1, 588 N.W.2d 589 (1999).
10. If a public body uses or publishes its agenda to give the required notice for a particular meeting, then the notice contained in the agenda must comport with the law for giving notice of what is to be considered at the meeting. *Hansmeyer v. Nebraska Public Power District*, 6 Neb. App. 889, 578 N.W.2d 476 (1998), *aff'd*, 256 Neb. 1, 588 N.W.2d 589 (1999).
11. A notice of a hearing, given by a school board, which stated that a hearing would be held, and that an agenda would be available for inspection, once established, is not proper notice. An agenda must be available. *Allen v. Greeley County School District No 501*, 1994 WL 272223, 1994 Neb. App. LEXIS 186 (Neb. Ct. App. 1994)(Not approved for publication)
12. When governmental subdivisions which hold annual meetings, such as townships, conduct their annual meeting, electors who participate in the annual meeting must place matters which they wish to discuss on the agenda for the annual meeting. *State ex rel. Newman v. Columbus Township Board*, 15 Neb. App. 656, 735 N.W.2d 399 (Neb. Ct. App.

2007). Electors under those circumstances may not simply appear at the annual meeting and bring up any subject falling within the broad powers of electors if that subject is not on the agenda. Id.

13. Two separate public bodies may publish notice of their meetings on the same sheet of paper and need not use separate sheets when the notices contain only the time and place of their meetings, and when the notices direct interested citizens to the place where agendas for each body may be found. *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009). In addition, two separate public bodies may combine their agendas when the combined agendas make it clear which items are to be addressed by each body. Id. The same rule applies to combined minutes. Id. The *Wolf* case involved a situation where a county board met both as a county board and as a county board of equalization.
14. Placing notice of future meetings in minutes of a prior meeting does not give sufficient notice under the Open Meetings Act. *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009).
15. Notice of recessed or reconvened meetings of a public body must be given in the same fashion as notice of the original meeting. *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009).
16. The Attorney General has concluded that "advance publicized notice" means a separate, specific advance notice must be given for each meeting. 1971-72 Rep. Att'y Gen. 314 (Opinion No. 137, dated August 8, 1972).
17. The Attorney General has also determined that: (1) an agenda may not be used as the minutes of a meeting, (2) reasonable notice under the statute means notice reasonably calculated to give appropriate notice to citizens of the time and place of a meeting and notice which complies with the formal requirements of the statute. 1975-76 Rep. Att'y Gen. 150 (Opinion No. 116, dated August 29, 1975).
18. In Op. Att'y Gen. No. 96071 (October 28, 1996), the Attorney General indicated that the Quality Jobs Board should give its normal 10-day published notice of meeting rather than an "informal" notice where the Board had recessed a previous meeting on a tax credit application pending a renewed meeting call from the Governor after issuance of an opinion from the Attorney General.

EMERGENCY MEETINGS

Section 84-1411(5) allows public bodies to hold emergency meetings without reasonable advance public notice. There are several statutory requirements with respect to such emergency meetings: (1) the nature of the emergency shall be stated in the minutes, and any formal action taken shall pertain only to the emergency, (2) the provisions of § 84-1411(4) dealing with notice to the media shall be complied with in connection with an emergency meeting, (3) complete minutes of the emergency meeting specifying the nature of the emergency and any formal action taken at the meeting shall be made available to the public no later than the end of the next regular business day.

1. Under § 84-1411(5), emergency meetings may be held by electronic or telecommunications equipment.
2. In *Steenblock v. Elkhorn Township Board*, 245 Neb. 722, 515 N.W.2d 128 (1994), the Court indicated, in a case involving allegations of a violation of the open meetings statutes, that an emergency is defined as "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." In that case, the Court held that a township board meeting to consider the job status of a township employee, convened as an emergency meeting because of a snowstorm, was not a proper emergency meeting because the employee was given two week's notice of his resultant termination, and because the reasons given for the employee's termination were based upon his past performance.
3. In *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009) the Court of Appeals considered whether a number of items taken up at meetings of a county board without any listing on the board's agenda were "emergency" items. In making that determination in each case, the court focused upon whether there was anything in the record which indicated that a particular item required immediate action or involved pressing necessity.
4. The Attorney General has also stated that an item of an emergency nature is one that requires immediate resolution by the public body, and one which has arisen in circumstances impossible to anticipate at a time sufficient to place on the agenda of a regular, called, or special meeting of the body. 1975-76 Rep. Att'y Gen. 150 (Opinion No. 116, dated August 29, 1975).
5. In Op. Att'y Gen. No. 95063 (August 9, 1995), the Attorney General indicated that action taken during a meeting of the Nebraska Equal Opportunity Commission by a telephone conference call which did not comply with the requirements of the open meetings statutes for emergency meetings was void.

PUBLIC MEETINGS; MINUTES AND VOTING PROCEDURES

Section 84-1413 contains several provisions regarding the minutes which are to be maintained by public bodies and regarding voting procedures for public bodies.

1. **Minutes.** Every public body shall keep minutes of all meetings showing the time, place, members present and absent, and the substance of all matters discussed. The minutes of all meetings and evidence or documentation received or

disclosed during open session shall be public records, open to public inspection during normal business hours. Minutes shall be written and available for inspection within 10 working days or prior to the next convened meeting, whichever occurs earlier, except that cities of the second class and villages may have an additional 10 working days if the employee responsible for writing the minutes is absent due to a serious illness or emergency.

2. **Voting procedures**. Any action taken on any question or motion duly made 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 vote to elect leadership within a public body may be by secret ballot, but the total number of votes for each candidate shall be recorded in the minutes.
 - a. **Electronic Voting Devices**. The roll call or viva voce vote requirements of the Open Meetings Act may be satisfied by a municipality, a county, a learning community, a joint entity created pursuant to the Interlocal Cooperation Act, a joint public agency created pursuant to the Joint Public Agency Act or an agency formed under the Municipal Cooperative Financing Act which uses an electronic voting device which allows the vote of each member of the governing body to be readily seen. The governing bodies permitted to use electronic voting devices was broadened by 2009 Neb. Laws. LB 361.
3. In *State ex rel. Schuler v. Dunbar*, 208 Neb. 69, 302 N.W.2d 674 (1984), the Supreme Court held that the requirement of § 84-1413(2) that the record shall state how each member of a body voted could not be satisfied by a nunc pro tunc amendment to the body's minutes showing that the recording of the vote in the minutes was performed prior to the time the actual recording in the minutes took place. However, when the same case was before the court a second time, the court held that, as a general rule, a public body may, if no intervening rights of a third person have arisen, order the minutes of its own proceedings at a previous meeting to be corrected according to the facts to make them speak the truth. *State ex rel. Schuler v. Dunbar*, 214 Neb. 85, 333 N.W.2d 652 (1983).
4. Section 84-1413 is violated by a failure to make or take a vote in accordance with the statute rather than a failure to record a properly taken vote. *State ex rel. Schuler v. Dunbar* (1983), *supra*.
5. Section 84-1413(2) dealing with roll call votes does not require the record to state that the vote was by roll call but only requires that the record show if and how each member voted. Neither does that statute set a time limit for recording the results of a vote. *State ex rel. Schuler v. Dunbar* (1983), *supra*.
6. The statutory requirements here dealing with voting and minutes are mandatory since the Legislature provided that action taken in violation of this statute is void. *State ex rel. Schuler v. Dunbar* (1981), *supra*.
7. *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009) seems to indicate that the Open Meetings Act does not require that minutes of meetings be "published," but only that they be written and available for inspection within 10 working days or prior to the next convened meeting of the public body.
8. The legislative history of the original open meetings statutes, LB 325 from 1975, indicates that the requirement of a roll call vote was directed at votes on questions that would bind the particular public body. Other procedural questions were not covered. Government Committee Hearing on LB 325, 84th Nebraska Legislature, First Session, (1975) at 10.
9. The Attorney General has stated that nothing in the open meetings statutes requires approval of the minutes of a public body prior to their publication. Op. Att'y Gen. No. 162 (December 28, 1981).
10. In Op. Att'y Gen. No. 98045 (November 4, 1998), the Attorney General indicated that 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 of § 84-1410 pertaining specifically to the minute entries necessary for a closed session are met.

PUBLIC MEETINGS; RIGHTS OF THE PUBLIC ATTENDING

Section 84-1412 establishes the rights of members of the public attending a meeting of a public body.

1. Members of the public have the right to attend and the right to speak at meetings of public bodies, and all or any part of a public meeting except closed sessions under § 84-1410, may be videotaped, recorded, televised, broadcast, photographed, etc. by any person.
2. Public bodies may make and enforce reasonable rules and regulations regarding the conduct of persons attending, speaking at, videotaping, or recording their meetings. A public body is not required to allow citizens to speak at each meeting, but it may not forbid public participation at all meetings.
3. Members of the public cannot be required to identify themselves as a condition for admission to a public meeting. The public body may require persons desiring to address the body to identify themselves.
4. No public body shall, to circumvent the open meetings laws, hold its meeting in a place known to be too small to accommodate the anticipated audience. However, a public body shall not be in violation of this prohibition if it meets in its traditional meeting place in this state.

5. LB 898 from 2006 added language to § 84-1412 which provides that public bodies shall make available at least one current copy of the Open Meetings Act posted in the meeting room at a location accessible to members of the public. At the beginning of any meeting, the public shall be informed about the location of the posted information. The legislative history of LB 898 indicates that "posting" a copy of the Open Meetings Act means putting it up in some fashion, including attaching it to a bulletin board, hanging it by a chain or fastening it to a wall. Floor Debate on LB 898, 99th Nebraska Legislature, Second Session, March 28, 2006 at 11697 (Statement of Senator Preister). "Posting" does not include placing the Act on a table as a loose document which can be removed and therefore might not be available throughout the meeting. Id. If a meeting of a public body is moved to another location to accommodate a larger audience, then the posted copy of the act should be moved and posted in the new location. Id.
6. In 2008, LB 962 amended § 84-1412 to provide that public bodies may not require that "the name of any member of the public be placed on the agenda prior to . . . [a] meeting in order to speak about items on the agenda." That change was made so that members of the public are not required to place themselves on the agenda of a public body prior to a meeting in order to speak on agenda items during the times at that meeting set aside for public comment. Floor Debate on LB 962, 100th Nebraska Legislature, Second Session, February 28, 2008 at 2 (Statement of Senator Preister). That change in statutory language was not intended to affect the right of a public body to make reasonable rules and regulations regarding the conduct of persons attending, speaking at, videotaping, or recording its meetings. Id.
7. A public body may hold a meeting outside the State of Nebraska only if all the following conditions are met: a. a member entity of the public body is located outside of the state and the meeting is in that member's jurisdiction, b. all out-of-state locations identified in the notice of meeting are located within public buildings used by members of the entity or at a place which will accommodate the anticipated audience, c. reasonable arrangements are made to accommodate the public's rights to attend, hear and speak at the meeting, including making a telephone conference call available at an in-state location to members, the public, or the press, if requested twenty-four hours in advance, d. no more than 25% of the public body's meetings in a calendar year are held out-of-state, e. out-of-state meetings are not used to circumvent any of the public government purposes established by the Open Meetings Act, f. reasonable arrangements are made to provide viewing at other in-state locations for a videoconference meeting if requested fourteen days in advance and if economically and reasonably available in the area, and g. the public body publishes notice of the out-of-state meeting at least 21 days before the date of the meeting in a legal newspaper of statewide circulation. These requirements for out-of-state meetings were added to § 84-1412 by 2001 Neb. Laws. LB 250, § 2.
8. A public body shall, upon request, make a reasonable effort to accommodate the public's right to hear discussion and testimony at a public meeting. Public bodies shall make at least one copy of reproducible written material discussed at an open meeting available at the meeting or at the in-state location for a telephone conference call or video conference for examination and copying by members of the public.
9. **History.** Many of the initial provisions in § 84-1412 dealing with the rights of the public were added as a result of LB 43 in 1983.
10. The language requiring a reasonable effort to allow all parties to hear a public meeting does not involve an absolute requirement that all persons present shall be able to hear. Floor Debate on LB 43, 88th Nebraska Legislature, First Session, March 21, 1983, at 1794-1795.

CLOSED SESSIONS OF A PUBLIC BODY

Section 84-1410, pertaining to closed sessions of public body, has generated the most controversy of all the portions of the open meetings statutes. Section 84-1410(1) provides that 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 (1) for the protection of the public interest, or (2) for the prevention of needless injury to an individual, if such individual has not requested a public meeting. Closed meetings may not be held for discussion of the appointment or election of a new member to any public body. Nothing in ' 84-1410 should be construed to require that any meeting be closed to the public.

1. Under § 84-1410(1), examples of reasons for a closed session include:
 - 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.

These examples are not exclusive; they are merely examples, and other reasons may exist. Government Committee Hearing on LB 325, 84th Nebraska Legislature, First Session (1975) at page 3; 1975-76 Rep. Att'y Gen. 150 (Opinion No. 116, dated August 29, 1975); Op. Att'y Gen. No. 65 (April 17, 1985).

2. LB 898 from 2006 amended some of the provisions of § 84-1410 pertaining to the mechanics of holding a closed session. The subject matter of the closed session and reason necessitating the closed session shall be identified in the motion to hold a closed session. The vote to hold a closed session must be taken in open session, and the entire closed session motion, the vote of each member on the question of holding a closed session, and the time when the closed session commences and ends must be recorded in the minutes. If the motion to close passes, then the presiding officer shall restate on the record immediately prior to the closed session the limitation of the subject matter of the closed session. The public body holding a closed session shall restrict its consideration of matters during the closed session to only those purposes set forth in the motion to close as the reason for the closed session. The meeting must be reconvened in open session before any formal action may be taken, and "formal action" in that context is defined in § 84-1410(2) to 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. Under an amendment to § 84-1410(2) effected by LB 621 in 1994, formal action by the body in that context does not include, "negotiating guidance given by members of the public body to legal counsel or other negotiators in a closed [strategy] session authorized [for collective bargaining, real estate purchases, etc.] under subdivision 1(a) of [Section 84-1410]."
3. Any member of the public body can challenge the continuation of a closed session if he or she determines that the session has exceeded the original reason for the closed session, or if he or she contends that the closed session is neither clearly necessary for the protection of the public interest or the prevention of needless injury to the reputation of an individual. Such a challenge can only be overruled by a majority vote of the members of the public body. Such challenge and its disposition shall be recorded in the minutes.
4. **History.** One of the purposes for the initial open meetings statute, LB 325 from 1975, was to tighten restrictions on closed or executive sessions of public bodies. Introducer's Statement of Purpose for LB 325, 84th Nebraska Legislature, First Session (1975). The fourth example of reasons for closed meetings was added by LB 43 in 1983. The provisions dealing with pending or imminent litigation and defining formal action in a closed session were added as a part of LB 1019 in 1992.
5. It is not entirely clear what vote of the public body is necessary to go into closed session. The statute states that "an affirmative vote of a majority of [the body's] voting members" is necessary for a closed session. On its face, the normal meaning of this language would presumably be a majority of those members present and voting. This is particularly true since the later subsection (3) of § 84-1410 requires a "majority vote of the members of the public body" to overrule a challenge to the continuation of the closed session. However, the legislative history of LB 325 makes it quite clear that the legislators intended to make the requirement for a closed session a vote of the majority of the body rather than a vote of the majority of those present and voting. Floor Debate on LB 325, 84th Nebraska Legislature, First Session, May 14 and May 20, 1975, at 4616, 5015. Moreover, there is some indication that "voting" members in § 84-1410(1) refers to particular members of bodies such as the Board of Regents which has both voting and non-voting members. Government Committee Hearing on LB 325, 84th Nebraska Legislature, First Session (1975) at 27-28. The safer approach is to authorize a closed session of the public body by a majority vote of the members of the body rather than by a majority vote of just those members present.
6. The landmark case for what is permissible in a closed session is *Grein v. Board of Education of the School District of Fremont*, 216 Neb. 158, 343 N.W.2d 718 (1984). *Grein* involved a closed session by a school board for discussion of the low bid on a construction project. The supreme court held that the closed session was improper. That case indicates:
 - a. Provisions of the statute permitting closed sessions must be narrowly and strictly construed. See also *State ex rel. Upper Republican Natural Resources District v. District Judges of the District Court for Chase County*, 273 Neb. 148, 728 N.W.2d 275 (2007).
 - b. The public interest which is protected in § 84-1410(1) is "that shared by citizens in general and by the community at large concerning pecuniary or legal rights and liabilities." 216 Neb. at 165, 343 N.W.2d at 723. See also *Wasikowski v. The Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W.2d 756 (2002).
 - c. Good faith motivation for a closed session is not a cure for non-compliance with the public meetings laws.
 - d. The prohibition against decisions or formal actions in a closed session proscribes crystallization of a secret decision and then ceremonial acceptance in open session.
 - e. There is a guiding principle with respect to closed sessions: "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." 216 Neb. at 168, 343 N.W.2d at 724.
7. *Pokorny v. City of Schuyler*, supra, indicates that there is nothing in the open meetings statutes which requires that negotiations for the purchase of land be conducted in open meeting, but deliberations of a public body as to whether an offer to purchase should be made must be done in an open meeting.

8. In a case involving the revocation of a land surveyor's license, the supreme court held that a closed session was improper since there was no showing of either necessity or of the reasons set out in § 84-1410(1). *Simonds v. Board of Examiners of Land Surveyors*, 213 Neb. 259, 329 N.W.2d 92 (1983).
9. Neb. Rev. Stat. § 79-832 (1996), dealing with hearings involving cancellation, amendment or termination of a teacher's contract mandates a closed hearing upon an affirmative vote of a majority of the school board's members present and voting and upon specific request of the certificated employee or the certificated employee's representative. However, under that section, formal action by the school board requires that the school board reconvene in open session. *Stephens v. Board of Education of School District No. 5, Pierce County*, 230 Neb. 38, 429 N.W.2d 722 (1988).
10. The provisions of the open meetings statutes dealing with closed sessions, in part, reflect the Legislature's judgment of the appropriate balance between the public's interest in open discussion of governmental issues and the rights of individuals, such as state employees, to have their performance as employees considered in private if they so choose. *Meyer v. Board of Regents of the University of Nebraska*, 1 Neb. App. 893, 510 N.W.2d 450 (Neb. Ct. App. 1993).
11. If the primary purpose for a closed session of a public body is authorized under the open meetings statutes, then any necessary discussion of incidental matters is also authorized. *Meyer v. Board of Regents of the University of Nebraska*, 1 Neb. App. 893, 510 N.W.2d 450 (Neb. Ct. App. 1993). In the Meyer case, the Nebraska Court of Appeals indicated that the University Board of Regents could properly discuss the appointment of an interim president for the University during a closed session called to evaluate and consider the employment status of the president.
12. In *Wasikowski v. The Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W.2d 756 (2002), the court held that 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 closed session and fails to object, then that person waives his or her right to object to the closed session at a later date. However, that case appears to be legislatively overruled by LB 898 from 2006 which provides that it shall not be a defense to a citizen lawsuit under § 84-1414 (3) that the citizen attended the meeting and failed to object at that time.
13. There is no absolute evidentiary privilege which applies to all communications made during a closed session of a public body, and communications made during such closed sessions are discoverable. *State ex rel. Upper Republican Natural Resources District v. District Judges of the District Court for Chase County*, 273 Neb. 148, 728 N.W.2d 275 (2007). However, to the extent that communications made during a closed session implicate other recognized privileges such as the attorney/client privilege, those communications are protected. *Id.*
14. The statutory provision allowing public bodies to hold closed sessions for "strategy sessions" regarding litigation or threatened litigation by necessity encompasses discussions and decisions regarding whether to make or reject a settlement offer. Such decisions regarding litigation strategy should not have to be discussed publicly, during an open session, in front of the body's opponent. *Becker v. Allen*, 1996 WL 106217, 1996 Neb. App. LEXIS 73 (Neb. Ct. App. 1996) (Not approved for publication). In addition, the strategic meetings which a public body has with its attorney when threatened with or engaged in litigation, in which the public body may give direction to its attorney, are protected by the attorney-client privilege. *Id.*
15. Opinions of the Attorney General:
 - a. A closed session is not proper simply because matters permitting a closed session might arise. Such a closed session is permitted only when such matters do arise and must be dealt with. *Op. Att'y Gen. No. 94035* (May 11, 1994); *Op. Att'y Gen. No. 11* (January 20, 1983).
 - b. Discussions of legal matters between a county board and a county attorney involving pending litigation or legal consequences of specific action are suitable for a closed session. 1975-76 Rep. Att'y Gen. 150 (Opinion No. 116, dated August 29, 1975).
 - c. 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. *Op. Att'y Gen. No. 89063* (October 12, 1989).
 - d. The closed session exception for prevention of needless injury to reputation is for the protection of individual employees and not for the protection of governmental officers on the public body. *Id.*
 - e. In *Op. Att'y Gen. No. 98045* (November 4, 1998), the Attorney General indicated that 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 of § 84-1410 pertaining specifically to the minute entries necessary for a closed session are met.
 - f. A county clerk, county attorney and county treasurer acting as a group under § 32-567 (3) to make an appointment to fill a vacancy on a county board may not go into closed session for evaluation of the merits of the candidates based upon the express language of § 84-1410 (1). *Op. Att'y Gen. No. 97050* (September 18, 1997).

- g. The Attorney General has indicated informally that developing testimony for an upcoming Legislative hearing is not a proper reason for a state agency to go into closed session. On the other hand, the Attorney General has also indicated informally that discussion of "sensitive medical and financial information" pertaining to specific individuals who applied for admission to a state home could be conducted in a closed session so long as the actual vote on admission was done in an open meeting.

CIRCUMVENTION OF THE OPEN MEETINGS ACT

Section 84-1410(4) prohibits a person or a public body from circumventing the purpose of the open meetings statutes by failing to invite a portion of its members to a meeting or by designating itself as a subcommittee of the whole body. That section also prohibits the use of any closed session, informal meeting, chance meeting, social gathering, e-mail, fax or other electronic communication for the purpose of circumventing the requirements of the open meetings statutes.

1. This provision was added to the open meetings statutes by LB 43 in 1983. This section was directed at the intentional circumvention of the open meetings statutes rather than inadvertent acts. Government, Military and Veterans' Affairs Committee Hearing on LB 43, 88th Nebraska Legislature, First Session (1983) at 5.
2. 2004 Neb. Laws LB 1179 added e-mails, faxes and other electronic communications to the list of mediums which could not be used to circumvent the requirements of the Open Meetings Act.
3. Similar language prohibiting the use of telephone conference calls, emails, faxes, or other electronic communications to circumvent any of the public government purposes of the Open Meetings Act is contained in § 84-1411 (3).
4. The Attorney General has indicated that intent is a necessary element of the conduct prohibited by § 84-1410 (4), and that members of a public body can communicate with other members of that body by electronic means, even if that communication is directed to a quorum of the body, so long as there is no course of communication which becomes sufficiently involved so as to evidence an intent or purpose to circumvent the Open Meetings Act. Op. Att'y Gen. No. 04007 (March 8, 2004).

ACTIONS FOR ENFORCEMENT

Section 84-1414 sets out various enforcement options available to individuals who believe that the open meetings statutes have been violated.

1. Any motion, resolution, rule, ordinance, or formal action of a public body made or taken in violation of the public meetings statutes shall be declared void by the district court if the suit is commenced within 120 days of the meeting of the public body at which the alleged violation occurred. Any such motion or other action taken in substantial violation of the public meeting statutes shall be voidable by the district court if the suit is commenced after more than 120 days but within one year of the meeting of the public body in which the alleged violation occurred. A suit to void any final action shall be commenced within one year of the action.
2. Under § 84-1414(3), any citizen of this state may commence a suit in the district court of the county in which the public body ordinarily meets or in which the plaintiff resides for the purpose of requiring compliance with or preventing violations of the open meetings statutes, for the purpose of declaring an action of a public body void, or for the purpose of determining the applicability of the open meetings statutes to discussions or decisions of the public body. *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007). The court may order payment of reasonable attorney's fees and court costs to a successful plaintiff in a suit brought under § 84-1414(3). Under LB 898 from 2006, it shall not be a defense to such a suit that the citizen attended the meeting and failed to object to violations at such time.
3. The Attorney General and the county attorney of the county in which the public body ordinarily meets shall enforce the provisions of the open meetings statutes.
4. **History.** The original version of § 84-1414(1), which was a part of LB 325 passed in 1975, simply provided that actions taken in violation of the public meetings statutes should be void. The void/voidable distinction was added by LB 43 in 1983. The apparent intent of that later language was to allow a court to void an action by a public body taken when there was any violation of the open meetings statutes if the action was filed within four months of the meeting in question. After four months, the violation of the open meetings statutes would have to be substantial to allow a court to void the action of the public body. In any event, no action could be brought after one year of the public meeting in question. Floor Debate on LB 43, 88th Nebraska Legislature, First Session, March 22, 1983, at 1892.
5. The legislative history of LB 325 from 1975 indicates that the initial intent of that statute was to have the county attorney responsible for enforcement proceedings involving public bodies at a local level. The Attorney General would be responsible for enforcement against state entities. Floor Debate on LB 325, 84th Nebraska Legislature, First Session, May 14 1975, at 4620.
6. The Nebraska Supreme Court has indicated that action by a public body which is proper under the open meetings statutes may cure defects in actions previously taken by the same public body. In such an instance, an action by a public body which previously might have been declared void will be declared proper. *Pokorny v. City of Schuyler*, supra. On the other hand, under those circumstances, the original improper meeting itself is still void. *Steenblock v. Elkhorn*

Township Board, 245 Neb. 722, 515 N.W.2d 128 (1994). Pokorny also indicates that the effect of an invalid public meeting under the open meetings laws is the same as if the meeting had never occurred.

7. A county lacks capacity to maintain an action to declare its official conduct void for non-compliance with the open meetings statutes. *County of York v. Johnson*, 230 Neb. 403, 432 N.W.2d 215 (1988).
8. Reading of a city ordinance in accordance with a city charter constitutes "formal action" of a city council which may be voided in a lawsuit under § 84-1414 (1). *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).
9. A number of Nebraska cases deal with waiver of rights under the Open Meetings Act by a failure to make a timely objection to violations of the Act. *Stoetzel & Sons, Inc. v. City of Hastings*, 265 Neb. 637, 658 N.W.2d 636 (2003) (if a person who attends a meeting of a public body believes that copies of documents discussed by the body should be made available to the public at the meeting, a timely objection should be made, or that person waives his or her right to object); *Wasikowski v. The Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W.2d 756 (2002); *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992); *Witt v. School District No. 70, Frontier County*, 202 Neb. 63, 273 N.W. 2d 669 (1979) (any person who has notice of a meeting and attends the meeting is required to object specifically to a lack of public notice at the meeting or waive his rights to object on that ground under the open meetings statutes); *Hauser v. Nebraska Police Standards Advisory Council*, 264 Neb. 944, 653 N.W.2d 240 (2002) (if a person present at a meeting observes and fails to object to an alleged open meetings violation in the form of a failure to conduct roll call votes before taking action on questions or motions pending, that person waives his or her right to object at a later date); *Alexander v. School District No. 17 of Thurston County*, 197 Neb. 251, 248 N.W.2d 335 (1976) (where teachers had notice of a termination hearing, appeared, and no objection was made to a failure of the school board to give proper notice under the open meetings statutes, those teachers waived any objection they might have had to violations of the open meetings law). Those cases appear to be legislatively overruled by LB 898 from 2006 which provides that it shall not be a defense to a citizen lawsuit under § 84-1414 (3) that the citizen attended the meeting and failed to object at that time.
10. Actions for relief under the open meetings statutes are tried as equitable cases, given the fact that the relief sought is in the nature of a declaration that particular action taken in violation of the laws is void or voidable. Such cases are also considered as equitable cases on appeal. *Stoetzel & Sons, Inc. v. City of Hastings*, 265 Neb. 637, 658 N.W.2d 636 (2003); *Hauser v. Nebraska Police Standards Advisory Council*, 264 Neb. 944, 653 N.W.2d 240 (2002); *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W. 2d 499 (Neb. Ct. App. 2009); *Hansmeyer v. Nebraska Public Power District*, 6 Neb. App. 889, 578 N.W.2d 476 (1998), *aff'd*, 256 Neb. 1, 588 N.W.2d 589 (1999).
11. The *Hansmeyer* case also discusses the distinction between "void" and "voidable" under § 84-1414. "Void" means ineffectual and having no legal force or binding effect, while "voidable" means that which may be avoided or declared void, not absolutely void. In *Hansmeyer*, the court considered factors such as whether any purpose would be served or whether decisions were made in secret without public discussion in determining whether a voidable vote by the Nebraska Public Power District should, in fact, be voided.
12. Once a meeting has been declared void pursuant to the Open Meetings Act, the members of the public body involved are prohibited from considering any information which they obtained at the illegal meeting. *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009); *Alderman v. County of Antelope*, 11 Neb. App. 412, 653 N.W.2d 1 (2002).
13. The decision to award attorney fees to a "successful plaintiff" in an action under § 84-1414 is discretionary with the trial court. *Hansmeyer v. Nebraska Public Power District*, 6 Neb. App. 889, 578 N.W.2d 476 (1998), *aff'd*, 256 Neb. 1, 588 N.W.2d 589 (1999). The court in *Hansmeyer* also held that the plaintiffs in that case were "successful plaintiffs" who could recover attorney fees under § 84-1414 because there was a finding that a substantial violation of the open meetings statutes had occurred, and because the public body involved amended its practices to prepare proper agendas after the plaintiffs filed their action. The court reached that conclusion even though it ultimately determined that the improper action of the public body at issue should not be voided. *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009) also contains a discussion regarding the basis for an award of attorney fees in that case, including the court's analysis of why it reduced a fee award on appeal.
14. Voiding an entire meeting is a proper remedy for violations of the Open Meetings Act. *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009). The court in the *Wolf* case also specifically considered whether violations of the Open Meetings Act were "substantial" violations in determining whether it was appropriate to void actions of a county board when the enforcement lawsuit was filed more than 120 days after the meetings in question.
15. In *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (Neb. Ct. App. 2009) there was no evidence in the record which established that a county board had published notice of its meetings anywhere. The Court of Appeals held that in the absence of contrary evidence, it may be presumed that public officers faithfully performed their official duties. *Id.* In addition, absent evidence showing misconduct or disregard for the law, the regularity of official acts is also presumed. *Id.* In *Wolf*, the court also indicated that the plaintiffs had the burden at all times to show that it was more probable that notices of meetings were not posted than probable that they were.

16. The United States District Court for the District of Nebraska has indicated that it has supplemental jurisdiction over claims under § 84-1414 based upon 28 U.S.C. § 1367 (a). *Buzek v. Pawnee County Nebraska*, 207 F.Supp.2d 961 (D. Neb. 2002).

CRIMINAL SANCTIONS

Section 84-1414(4) provides that any member of a public body who knowingly violates or conspires to violate the Open Meetings Act, or who attends or remains at a meeting knowing that the public body is in violation of any provision of that Act, shall be guilty of a Class IV misdemeanor for a first offense, and a Class III misdemeanor for a second or subsequent offense.

1. The legislative history of LB 325 from 1975 indicates that the criminal sanctions included in this section were originally directed at intentional behavior rather than at inadvertence. Government Committee Hearing on LB 325, 84th Nebraska Legislature, First Session (1975) at 16.
2. The criminal sanctions for violation of the open meetings statutes were first increased as a result of LB 1019 passed in 1992. Also, that same bill in 1992 added language which made knowingly remaining at or attending a meeting in violation of the open meetings statutes a crime. The present language which applies criminal sanctions to those members of a public body who remain at a meeting knowing that the public body is in violation of the open meetings statutes was added by LB 621 in 1994.
3. Under Neb. Rev. Stat. § 28-106 (2008), a Class IV misdemeanor is punishable by a fine of from \$100 to \$500 and no imprisonment. In addition, a Class III misdemeanor is punishable by up to 3 months imprisonment or up to a \$500 fine, or both. A Class III misdemeanor has no minimum penalty.

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