Nebraska Law Review

Volume 73 | Issue 2 Article 8

1994

The Incidental Matters Rule and Judicially Created Exceptions to the Nebraska Public Meetings Law: A Call to the Legislature in *Meyer v. Board of Regents*, 510 N.W.2d 450 (Neb. App. 1993)

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Note

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The belief that a truly democratic people must have access to information about governmental decision-making, coupled with our society's inherent distrust of secrecy and closed-door government, has led to the passage of some form of open-meeting law, or sunshine law, in nearly every jurisdiction in the United States during the past two decades.[1]

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1. Frank A. Vickory, *The Impact of Open-Meetings Legislation on Academic Freedom And The Business Of Higher Education*, 24 AM. BUS. L.J. 427, 427 (1986). These open meetings acts may be found at: ALA. CODE § 13A-14-2 (1992); ALASKA STAT. § 44.62.310-.312 (1989); ARIZ. REV. STAT. ANN. § 38-431 to 431.09 (1985); ARK. CODE ANN. § 25-19-106 (Michie 1992); CAL. GOV'T CODE § 11120-11131 (West 1992); COLO. REV. STAT. § 24-6-101 to 402 (1988); CONN. GEN. STAT. ANN. § 1-18a to 21k (West 1988); DEL. CODE ANN. tit. 29, § 10001-10005 (1992); FLA. STAT. ANN. § 286.0105-286.011 (West 1991); GA. CODE ANN. § 50-14-1 to 50-14-6 (1990); HAW. REV. STAT. § 92-1 to 13 (1985); IDAHO CODE § 67-2340 to 2347 (1989); ILL. ANN. STAT. ch. 102, § 41-46 (Smith-Hurd 1993); IND. CODE ANN § 5-14-1.5-1

Although the various state statutory grants in favor of open government are unique, there are many reoccurring themes and policy rationales that can be deduced from an examination of these various state statutes. Therefore, when faced with a potential open meetings violation, attorneys would be well served to examine the broad spectrum of approaches that various states have employed regarding open meetings acts and ensuing litigation.[2]

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to 5-14-1.5-8 (Burns 1994); IOWA CODE ANN. § 21.1-.10 (West 1989); KAN STAT. ANN. § 75-4317 to 4320 (1989); KY. REV. STAT. ANN. § 61.805-.850 (Baldwin 1992); LA. REV. STAT. ANN. § 42:4.1-:13 (West 1989); ME. REV. STAT. ANN. tit. 1, § 401-410 (1989); MD. CODE ANN., State Gov't § 10-501 to 10-512 (1990); MASS. GEN LAWS ANN. ch. 30A § 11A-11A.5 (West 1992); MICH. COMP. LAWS. ANN. § 15.261- .275 (West 1993); MINN. STAT. § 471.705 (1993); MISS. CODE ANN. § 25-41-1 to -17 (1991); MO. ANN. STAT. § 610.010-.030 (Vernon 1988); MONT. CODE ANN. § 2-3-201 to 221 (1993); NEB. REV. STAT. § 84-1408 to -1414 (Cum. Supp. 1992); NEV. REV. STAT. § 241.010-.040 (1991); N.H. REV. STAT. ANN. § 91-A:1 to :8 (1990); N.J. STAT. ANN. § 10:4-6 to 21 (West 1993); N.M. STAT. ANN. § 10-15-1 to -4 (1993); N.Y. PUB. OFF. LAW § 101-111 (McKinney 1983); N.C. GEN STAT. § 143-318.9 to .18 (1988); N.D. CENT. CODE § 44-04-19 to -21 (1993); OHIO REV. CODE ANN. § 121.22 (1990); OKLA. STAT. ANN. tit. 25, § 301-314 (1987); OR. REV. STAT. § 192.610-.710 (1991); PA. STAT. ANN. tit. 65, § 271-286 (1993); R.I. GEN. LAWS § 42-46-1 to -13 (1992); S.C. CODE ANN. § 30-4-10 to 110 (Law Co-op 1991); S.D. CODIFIED LAWS ANN. § 1-25-1 to -5 (1992); TENN. CODE ANN. § 8-44-101 to 106 (1988); TEX. REV. CIV. STAT. ANN. art. 6252-17 (Vernon 1993); UTAH CODE ANN. § 52-4-1 to -9 (1992); VT. STAT. ANN. tit. 1, § 311-314 (1985); VA. CODE ANN. § 2.1-340 to 346.1 (Michie 1987); WASH. REV. CODE ANN. § 42.30.010-.920 (West 1991); W. VA. CODE § 6-9A-1 to -7 (1993); WIS. STAT. ANN. § 19.81-.98 (West 1986); WYO. STAT. § 16-4-401 to 407 (1993). The federal government must also comply with the Government In The Sunshine Act, 5 U.S.C. § 552 (1988).

2. In the context of higher education the following articles will provide a general overview. *See e.g.*, Caroline Bensabat, *Open Meetings In Higher Education - An Analysis And A Proposal For Florida*, 34 UNIV. FLORIDA L. REV. 250 (1982); Harlan Cleveland, *The Costs And Benefits Of Openness: Sunshine Laws And Higher Education*, 12 J.C. & U.L. 127 (1985); Jon Dilts, *Open Meetings In Higher Education*, COMM. & L., June 1987, at 31. The Nebraska Public Meetings Law is specifically addressed in the following articles: Leonard Jay Bartel, *State Ex Rel. Shuler v. Dunbar: The Nebraska Open Meetings Law*, 15 CREIGHTON L. REV. 357 (1981); Kim M. Robak, *Nebraska Unicameral Rule 3, Section 15: To Whom Must The Door Be Open?*, 64 NEB. L. REV. 282 (1985); Steven L. Willborn, *Off The Mark: The Nebraska Supreme Court And Judicial Nominating Commissions*, 70 NEB. L. REV. 277 (1991); The Reporters Committee For Freedom Of The Press, *Tapping Officials' Secrets: A State Open Government Compendium - Nebraska* (Rebecca Daugherty ed. 1993); Meredith L. Oakes, *Bridging The Gaps: The Nebraska Open Meetings Law*, Masters Thesis Presented To The University of Nebraska Dec., 1989. Finally, the following articles will provide a survey of various public meetings laws. W. Richard Fossey & Peggy Alayne Roston, *Invalidation As A Remedy For Violation Of Open Meeting Statutes: Is The Cure Worse Than The Disease?*, 20 U.S.F. L. REV. 163 (1986); Eleanor Barry Knoth, *The Virginia Freedom Of Information Act: Inadequate Enforcement*, 25 WILLIAM & MARY L. REV. 487 (1984); John J. Watkins, *Open Meetings Under The Arkansas Freedom Of Information Act*, 38 ARK. L. REV. 268 (1984); Comment, *Open Meeting Statutes: The Press Fights For The "Right To Know"*, 75 HARV. L. REV. 1199 (1962); Comment, *The Personnel Matters Exception To The Mississippi Open Meetings*

This Note will first address the facts of the Nebraska Court of Appeals decision in *Meyer v. Board of Regents*,[3] and then generally discuss the Nebraska Public Meetings Law.[4] At this point the specific holdings of *Meyer* will be critiqued. The final Parts of this Note will consist of two features. First, in order to assist practioners, the author will suggest procedures for public entity negotiations that should avoid most Nebraska Public Meetings Law violations. Second, the author will suggest that the holding in *Meyer* can best be explained by the court's concern for the real world consequences and dangerous precedential value that would have been set if the court would have invalidated the actions taken by the Board of Regents. In the final analysis, such result-oriented decision making is criticized and the Nebraska Legislature is invited to take appropriate corrective action.

Act - A Cloud Over The Sunshine Law, 7 MISS. COLLEGE L. REV. 181 (1987); Eunice A. Eichelberger, Annotation, *Construction And Application Of Exemptions, Under 5 USCS Sec. 552b(c), To Open Meeting Requirement Of Sunshine Act*, 82 A.L.R. Fed. 465 (1987); Andrea G. Nadel, Annotation, *What Constitutes Personal Matters Exempt From Disclosure By Invasion Of Privacy Exemption Under State Freedom Of Information Act*, 26 A.L.R.4th 666 (1983); Peter G. Guthrie, Annotation, *Validity, Construction, And Application Of Statutes Making Public Proceedings Open To The Public*, 38 A.L.R.3d 1070 (1971).

3. 510 N.W.2d 450 (Neb. App. 1993)

4. NEB. REV. STAT. §§ 84-1401 to 84-1414 (Reissue 1987, Cum. Supp. 1992 & Supp. 1993). Interpretations of the Nebraska Public Meetings Law may be found at: Steenblock v. Elkhorn Township Bd., 245 Neb. 722, 515 N.W.2d 128, (1994); Otey v. State, 240 Neb. 813, 485 N.W.2d 153 (1992); Marks v. Judicial Nominating Comm., 236 Neb. 429, 461 N.W.2d 551 (1990); County of York v. Johnson, 230 Neb. 403, 432 N.W.2d 215 (1988); Stephens v. Board of Educ., 230 Neb. 38, 429 N.W.2d 722 (1988); Leibbrandt v. Lomax, 228 Neb. 552, 423 N.W.2d 453 (1988); Aldridge v. School Dist., 225 Neb. 580, 407 N.W.2d 495 (1987); Tracy Corp. II v. Nebraska Pub. Serv. Comm'n, 218 Neb. 900, 360 N.W.2d 485 (1984); Nixon v. Madison County Agric. Soc'y, 217 Neb. 37, 348 N.W.2d 119 (1984); Grein v. Board Of Educ., 216 Neb. 158, 343 N.W.2d 718 (1984); State *ex rel.* Schuler v. Dunbar, 214 Neb. 85, 333 N.W.2d 652 (1983); Simonds v. Board of Examiners, 213 Neb. 259, 329 N.W.2d 92 (1983); Lake v. Piper, Jaffray And Hopwood, Inc., 212 Neb. 570, 324 N.W.2d 660 (1982); State *ex rel.* Schuler v. Dunbar, 208 Neb. 69, 302 N.W.2d 674 (1981); Box Butte County v. State Bd. of Equalization, 206 Neb. 696, 295 N.W.2d 670 (1980); Banks v. Board of Educ., 202 Neb. 717, 277 N.W.2d 76 (1979); Pokorny v. City of Schuyler, 202 Neb. 334, 275 N.W.2d 281 (1979); Copple v. City of Lincoln, 202 Neb. 152, 274 N.W.2d 520 (1979); Witt v. School Dist. No. 70, 202 Neb. 63, 273 N.W.2d 669 (1979); Alexander v. School Dist. No. 17, 197 Neb. 251, 248 N.W.2d 335 (1976); Chase v. Board of Trustees, 194 Neb. 688, 235 N.W.2d 223 (1975); South Maple St. Ass'n v. Board of Adjustment, 194 Neb. 118, 230 N.W.2d 471 (1975); State *ex rel.* Hansen v. Seiler, 193 Neb. 9, 225 N.W.2d 388 (1975); Ford v. County of Perkins, 190 Neb. 304, 207 N.W.2d 694 (1973); Holden v. City of Tecumseh, 188 Neb. 117, 195 N.W.2d 225 (1972); State *ex rel.* Medlin v. Choat, 187 Neb. 689, 193 N.W.2d 739 (1972); Shadbolt v. County of Cherry, 185 Neb. 208, 174 N.W.2d 733 (1970); Johnson v. Nebraska Envt'l Control Council, 2 Neb. App. 263 (1993); Meyer v. Board of Regents, 510 N.W.2d 450 (Neb. App. 1993); Nucor Corp. v. Nebraska Public Power District, 891 F.2d 1343 (8th Cir. 1989).

I. FACTS—*MEYER v. BOARD OF REGENTS*

The plaintiff, Dan Meyer, a citizen and taxpayer, instituted this action in Lancaster County District Court pursuant to the Nebraska Public Meetings Law.[5] The plaintiff alleged that the University of Nebraska Board of Regents violated the Public Meetings Law on the evening of July 31, 1989. Specifically, the plaintiff alleged the Board: (1) had impermissibly negotiated the resignation of University President Dr. Ronald Roskens while in closed session; and (2) had likewise impermissibly negotiated with and selected as interim president, Dr. Martin Massengale, in closed session at the "emergency" meeting of the Board of Regents held on July 31, 1989.[6]

The controversy began on May 12, 1989 when the Board of Regents declared a closed session to consider the evaluation of then President Dr. Roskens.[7] The Board had become concerned since Dr. Roskens had expressed his intentions to leave the University of Nebraska.[8] On June 23, the Board again conducted a closed session and directed an executive subcommittee to "convey the board's concerns to Dr. Roskens and to try to reach a mutually beneficial agreement whereby Dr. Roskens would vacate the office of president."[9] Once again on July 21, the Board convened in closed session, and directed the executive subcommittee to request a:

> definitive position from Dr. Roskens concerning his tenure in office and . . . to reach an agreement with Dr. Roskens in the following three week period. . . . Dr. Roskens [informed the board he] would be unable to consider an agreement as he was on his way to Japan for one week and then to Minnesota for a two week vacation.[10]

On July 31, upon returning from Japan, Dr. Roskens presented a proposal to vacate his office as president to the Board's executive subcommittee.[11] Regent Chairman Nancy Hoch felt that an agreement seemed likely and ordered the Board's secretary to give notice of an "emergency" meeting to occur that evening.[12] At this "emergency" meeting, the Board went into closed session to consider Dr. Roskens' proposal.

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5. NEB. REV. STAT. §§ 84-1408 to 84-1414 (Reissue 1987 & Supp. 1989).
6. "The only relief appellant [Meyer] sought from the district court, other than attorney fees, was a declaration that the Board's actions were not in compliance with the public meeting law." Meyer v. Board of Regents, 510 N.W.2d 450, 457 (Neb. App. 1993). It is important to note the court's apparent aversion to the appellant's motivations in bringing this suit, and perhaps this explains the court's willingness to expand the Nebraska Public Meetings Law. *See* discussion *infra* Part III.
7. Meyer v. Board of Regents, 510 N.W.2d 450, 452 (Neb. App. 1993).
8. *Id.*
9. *Id.*
10. *Id.* at 453.
11. *Id.*
12. *Id.*

> In the closed session the executive subcommittee relayed Dr. Roskens' proposal to the board, and the board then discussed the proposal at length. Negotiations were carried on between the board meeting in closed session and Dr. Roskens and his counsel. . . . The negotiations proceeded until the parties had reached a preliminary understanding.
>
> Once it became apparent during the negotiations that Dr. Roskens would be vacating the office of president, the board felt it necessary to deal with the questions of who would take over the immediate leadership of the university, as they felt that continuity was 'critical' . . . University chancellor Martin Massengale was contacted, and after discussions and negotiations it was agreed that he would take over as interim president.[13]

Needless to say, the secrecy surrounding Dr. Roskens' removal as university president raised many eyebrows in the Nebraska Legislature[14] and in the general community.[15] In fact, over ninety-four percent of the Nebraska populous felt that the financial terms of Dr. Roskens' buyout were too generous.[16]

This public outcry prompted State Senator Ron Withem to request Attorney General Robert Spire to investigate the procedures used by the Board of Regents on July 31, 1989. Thereafter, Attorney General Spire issued an opinion concluding that the university had complied with the technical requirements of the Nebraska Public Meetings Law.[17]

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13. *Id.* at 453. Subsequently on August 23, 1989 the Board executed a written agreement in conformance with the understandings reached on the evening of July 31, 1989. Further, on September 8, 1989, the Board ratified all of the agreements that had arisen during the closed sessions on July 31, 1989. *Id.*
14. The Legislature's frustration with the Board of Regents was expressed in a 1991 amendment to the Nebraska Public Meetings Law.

    > The initial prompting of it would go back to the frustrations voiced to me by members of my district who are constituents regarding the actions taken by the board of regents and the Ronald Roskens incident. Nobody knows what happened, why he was terminated, whatever. I think people just wanted to know why they were spending a couple hundred thousand dollars, not necessarily that they disagree with it, but they just wanted to know why. And since we are spending their money, maybe we should know.

    COMMITTEE RECORDS OF L.B. 288, 92D LEG., 1ST SESS. 1991, at 45.
15. Rogers Worthington, *Secrecy in University Firing Fuels Anger*, CHI. TRIB., Oct. 26, 1989, at 39. The buyout of Dr. Roskens was likely to cost hundreds of thousands of dollars. *Cost of Buying out Roskens High*, U.P.I. B.C. CYCLE NOV. 6, 1990.
16. *Survey Shows Disagreement With Roskens' Ouster*, U.P.I. B.C. CYCLE, Aug. 22, 1989.
17. 89063 Op. Neb. Att'y Gen. (1989). However, Attorney General Spire did scold the Regents for their secretive behavior, notwithstanding any technical violation of the law.

    > This accountability, so essential to responsible functioning of representative government, transcends the limited legal obligations of the Open Meetings Law and other statutes describing governmental procedures. In other words, beyond the strict legal issue of Open Meetings Law compliance, there is the larger issue of public accountability. Thus, although

II. PUBLIC MEETINGS LAW AND HIGHER EDUCATION

Before critically examining *Meyer*, it is necessary to examine the historical interaction of institutions of higher education and state public meetings legislation. The various public meetings laws now facilitate closer scrutiny of many activities within a university system.[18] In this era of rising university budgets and corresponding revenue shortfalls, legislators and the general public are demanding more accountability and compelling justifications for university expenditures.[19]

As a result, nearly half of the public universities in the country have been involved in some form of public meetings litigation.[20] Nearly all of this litigation has revolved around the fundamental public meetings question: when may a public body go into closed or executive session?[21] When drafting open meetings legislation, legislators are attempting to balance the public's right to know against both organizational efficiency and matters of individual privacy which may compel the use of a closed or executive session.[22]

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not legally required, the concept of open and accountable government suggests a fuller public explanation than that made by the Regents.

Id. at 1-2. The University received a similar scolding from present Attorney General Don Stenberg, regarding a subsequent charge of secrecy within university subcommittee meetings. "[T]he fact that a particular meeting *may* be conducted in secret is not the same as saying that the meeting *should* be conducted in secret." 92020 Op. Neb. Att'y Gen. (1992).

18. Vickory, *supra* note 1, at 427. In fact, universities have been so inconvenienced by public meetings requirements they are considering seeking special exemption's from their respective legislatures. Dilts, *supra* note 2, at 33.

19. Bensabat, *supra* note 2, at 252. "It is further argued that decisions which result in the expenditure of public funds ought to be made openly so that the people can see how their money is being spent; publicity of expenditures further serves to deter misappropriations, conflicts of interest, and all other forms of official misbehavior." Grein v. Board of Educ., 216 Neb. 158, 164, 343 N.W.2d 718, 722-23 (1984). *See also* Ridenour v. Board of Educ., 314 N.W.2d 760, 764 (Mich. Ct. App. 1982)(holding open meetings to evaluate the local community college president is not an unjustified invasion of privacy).

20. Dilts, *supra* note 2, at 35.

21. Cleveland, *supra* note 2, at 136. "The only obstacle to such openness in government is the so-called executive session, for which members of the governmental body can vote to exclude the press and public, usually while they debate the finer points of a personnel or internal matter." Oakes, *supra* note 2, at 29 (referring to Nebraska Law).

22. Some states require a two-thirds or even majority vote of the board members before a body may go into closed session. Cleveland, *supra* note 2, at 137. In fact, one state, Tennessee, has decided to always opt for openness and allows no closed sessions. Dorrier v. Dark, 537 S.W.2d 888 (Tenn. 1976). Nebraska is unique in that the public entity has broad discretion to go into closed session if it is determined that a closed session would best serve the public interest. Cleveland, *supra* note 2, at 139.

Many university administrators have argued that the costs of openness are uniquely high in the university setting.[23] Given this viewpoint, it is not surprising to discover that universities are perceived as the worst open meetings act offenders.[24]

III. NEBRASKA PUBLIC MEETINGS LAW

> It is hereby declared to be the policy of this state that the formation of public policy is public business and may not be conducted in secret.
>
> Every meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies.[25]

In Nebraska, the Public Meetings Law ensures that public policy is formulated in the open, creating a commitment to openness that is essential to the democratic process.[26] The Nebraska Public Meetings Law endorses the widely held view that free speech is largely meaningless if the public is unable to obtain complete information about the government's operations and activities.[27]

When called upon to interpret the Nebraska Public Meetings Law, the Nebraska courts generally follow the universally accepted view that "public meetings laws are [to be] broadly interpreted and liberally

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23. It can be argued that public meetings laws have many negative effects on discourse within the university, such as loss of candor, loss of freedom of speech, and overall, a more simplified administration and trivialized discourse. Additionally, it is felt by some that the overall decision making process and evaluation procedures are less effective. Cleveland, *supra* note 2 at 146-56. It is further suggested that open meetings laws may unconstitutionally hinder academic freedom. Bensabat, *supra* note 2, at 255.

24. Cleveland, *supra* note 2, at 144. "Board of Regents frequently attempt to conduct their operations in secret, but almost invariably lose when there is a battle over private meetings." *Cleveland, supra* note 2, at 145. It is interesting to note that University of Nebraska testified against the adoption of any public meetings law in Nebraska. COMMITTEE RECORDS OF L.B. 325, 84TH LEG., 1ST SESS., COMMITTEE STATEMENT 1975. If this antagonistic atmosphere is maintained, more states may opt for allowing removal from office as an additional open meetings act enforcement mechanism. Four states have already provided for this procedure. Knoth, *supra* note 2, at 513-15.

25. NEB. REV. STAT. § 84-1408 (Reissue 1987). Additionally, Nebraska statutes provide that "[a]ll meetings of the Board of Regents shall be open to the public. The board may hold closed sessions in accordance with sections 79-327, 84-1408 to 84-1414, and 85-104." NEB. REV. STAT. § 85-104 (Reissue 1987).

26. Marks v. Judicial Nominating Comm., 236 Neb. 429, 461 N.W.2d 551 (1990); Grein v. Board of Educ., 216 Neb. 158, 343 N.W.2d 718 (1984).

27. Cleveland, *supra* note 2, at 130. In fact, it is possible to assert that open meetings act violations infringe upon a citizen's First Amendment right not to be excluded from public forums. Rowe v. Brown, 599 A.2d 335 (Vt. 1991). "The denial of a public hearing in itself impaired the rights of the public." Menominee Cty. Tax A. v. Menominee City Cl., 362 N.W.2d 871, 874 (Mich. Ct. App. 1984). *See also* David M. O'Brien, THE PUBLIC'S RIGHT TO KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT (1982).

construed to obtain the objective of openness in favor of the public. Provisions permitting closed sessions and exemptions from openness of a meeting must be narrowly and strictly construed."[28]

Unfortunately for practioners and public officials, the Nebraska Public Meetings Law jurisprudence resembles a complex maze. The public body is constantly placed in the position whereby one misstep can lead to complete invalidation of any formal action taken by the board.[29]

> 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.[30]

A. Emergency Meetings

Under Nebraska law a public body is required to give "reasonable advance publicized notice" of its meetings, unless cause exists for an emergency meeting.[31] "Each public body shall give reasonable advance publicized notice of the time and place of each meeting. . . . Except for items of an emergency nature, the agenda shall not be altered later than twenty-four hours before the scheduled commencement of the meeting . . ."[32] Though inadequately addressed by the Nebraska courts,[33] the Nebraska Attorney General has previously determined that an "emergency", as defined within the context of the Nebraska Public Meetings Law is a matter that "requires immediate resolution."[34]

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28. Grein v. Board of Educ., 216 Neb. 158, 164-65, 343 N.W.2d 718, 723 (1984); Cleveland, *supra* note 2, at 132-33. Further, many states place a heavy burden on the public body to prove its actions fit within an open meetings act exemption. Booth Newspapers v. University of Mich., 481 N.W.2d 778, 782 (Mich. Ct. App. 1992); Eichelberger, *supra* note 2, at 474.
29. *See* NEB. REV. STAT. § 84-1414 (Reissue 1987).
30. Grein v. Board of Educ., 216 Neb. 158, 168, 343 N.W.2d 718, 724 (1984). For the most part this policy appears to be adhered to in Nebraska, as Nebraska is rated as having the sixth most "open" state government. Cleveland, *supra* note 2, at 164.
31. It somewhat unclear as to what is sufficient for reasonable advance notice. Porkorny v. City of Schuyler, 202 Neb. 334, 338, 275 N.W.2d 281, 284 (1979)(finding twelve and one-half hours is not reasonable advance notice). *But see* Banks v. Board of Educ., 202 Neb. 717, 722-23, 277 N.W.2d 76, 80 (1979)(finding two days advance notice of school board meeting met requirements of Public Meetings Law).
32. NEB. REV. STAT. § 84-1411. (Supp. 1993).
33. The Nebraska Supreme Court in dictum has suggested that courts should not hold public entities to the "hyper-technical" notice requirements of the Nebraska Public Meetings Law. Box Butte County v. State Bd. of Equalization, 206 Neb. 696, 703, 295 N.W.2d 670, 676 (1980).
34. "In general an item of an emergency nature is one which requires immediate resolution by the appropriate body, which has arisen in circumstances impossible

The legislative history of the Nebraska Public Meetings Law defines "emergency" by reference to an example: The boiler at the local school house needs to be repaired before the next school day, therefore that evening the school board convenes an emergency meeting and authorizes the necessary repairs.[35] Clearly, Dr. Roskens' tenure and the need for an interim president does not constitute an emergency similar to the foregoing example. It was not a matter that had "arisen under circumstances impossible to anticipate,"[36] or one which required "immediate resolution."[37]

This narrow interpretation of "emergency" has been endorsed in other jurisdictions.[38] These courts refused to broadly interpret "emergency" so as to ensure that public bodies are not circumventing the open meetings act and the people's right to free and open government.[39]

Giving the Board of Regents every benefit of the doubt, there was at most seven hours advance notice of the July 31, 1989 meeting.[40] Therefore, according to the court of appeals, unless the meeting could properly be classified as an emergency, the actions of the Board on July 31, 1989, would be void for the lack of reasonable advance notice pursuant to sections 84-1411 and 84-1414 of the Nebraska Statutes.[41]

The Nebraska Court of Appeals held that given the circumstances surrounding Dr. Roskens' tenure, there was an actual emergency on July 31, 1989.[42] The court of appeals reasoned that because of Dr.

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to anticipate at a time sufficient to place it upon the agenda of the regular, called or special meeting of the particular board." 75116 Op. Neb. Att'y Gen. (1975). *See also* 92020 Op. Neb. Att'y Gen. (1992)(stating proper advance notice is essential in a democratic government); Carefree Imp. Ass'n v. City of Scottsdale, 649 P.2d 985, 992 (Ariz. Ct. App. 1982)("An 'emergency' is generally defined as an unforeseen combination of circumstances which call for immediate action.").

35. COMMITTEE RECORDS OF L.B. 325, 84TH LEG., 1ST SESS. 1975.

36. In fact, the Board admitted that concerns about Dr. Roskens' performance had surfaced as early as May 12, 1989, as a result of which an executive subcommittee had been trying to achieve a settlement with Dr. Roskens. *See supra* text accompanying notes 7-10.

37. The record also reveals that the Board did not even reach an ultimate agreement with all the parties involved until September 8, 1989. *See supra* note 13.

38. Carefree Imp. Ass'n v. City of Scottsdale, 649 P.2d 985 (Ariz. 1982); Town of Lebanon v. Wayland, 467 A.2d 1267 (Conn. 1983).

39. Carefree Imp. Ass'n v. City of Scottsdale, 649 P.2d 985 (Ariz. 1982); Town of Lebanon v. Wayland, 467 A.2d 1267 (Conn. 1983).

40. Meyer v. Board of Regents, 510 N.W.2d 450, 456 (Neb. App. 1993).

41. *Id.* at 456.

42. Because of Dr. Roskens' self imposed schedule, any further discussions would have been put off until mid-August. . . . In less polite vocabulary [the board] felt that there was a problem with Dr. Roskens' performance and conduct and that he was evading them. . . . The Board was trying to shoot a moving target, and on July 31, the target stood still. Therefore argues appellee [regents], notice of the meeting was reasonable given the exigencies of the situation. We agree.

Roskens' "self-imposed schedule," an emergency existed when the Regents felt that a mere possibility of agreement could be reached on July 31, 1989.[43] The plaintiff had argued that Dr. Roskens' vacation schedule should not amount to a bona fide emergency under the Nebraska Public Meetings Law.[44]

Under the Nebraska Attorney General's definition of "emergency", it appears that the court of appeals erred in concluding that the Roskens' situation constituted an actual emergency.[45] The Board had been seeking Dr. Roskens' resignation for the past three months. This clearly was not a matter that had arisen under "circumstances impossible to anticipate" and that required "immediate resolution" by the Board.[46] The court's broad interpretation of "emergency" has created an empty vessel which will allow almost any meeting to constitute an emergency; hence no reasonable advance notice need be provided to the public.

Further, the court of appeals' reasoning ignores the employer-employee relationship that existed between the Board of Regents and Dr. Roskens. An employee's vacation schedule should not constitute an actual emergency for a public body under the Nebraska Public Meetings Law. Faced with a similar instance, the Oregon Court of Appeals concluded that as a general rule personal scheduling convenience will not amount to an actual emergency within the public meetings law.[47] "An actual emergency within the contemplation of the [public meetings] statute, must be dictated by events and cannot be predicated solely on the convenience or inconvenience of members of the governing body."[48] Accordingly, the Nebraska Court of Appeals should not have let something as trivial as an employee's vacation plans constitute an emergency.

The Nebraska Public Meetings Law is a statutory commitment to open government, but this commitment is largely meaningless if the public is not given "reasonable advance notice" of government meetings.[49] The public's right to observe the formation of public policy is severely infringed upon if there is no notice of upcoming meetings.[50]

Id.

43. *Id.*
44. Brief for Appellant at 18-19, Meyer v. Board of Regents, 510 N.W.2d 450 (Neb. App. 1993)(No. A-91-942).
45. *See supra* notes 34-37 and accompanying text.
46. Carefree Imp. Ass'n v. City of Scottsdale, 649 P.2d 985 (Ariz. 1982); Town of Lebanon v. Wayland, 467 A.2d 1267 (Conn. 1983).
47. Oregon Ass'n of Classified Employees v. Salem-Keizer Sch. Dist. 24J, 767 P.2d 1365, 1368 (Or. App. 1989). The court further noted that the school board has the authority to direct staff to attend regular, special, and emergency meetings. *Id.*
48. *Id.*
49. 92020 Op. Neb. Att'y Gen. (1992).
50. Grein v. Board of Educ., 216 Neb. 158, 164-65, 343 N.W.2d 718, 723 (1984); Cleveland, *supra* note 2, at 132-33. Further, many states place a heavy burden

Given this legislative policy, the Nebraska Court of Appeals erred by allowing an employee's vacation schedule to suffice for an actual emergency under the Nebraska Public Meetings Law.[51] Such a result is even more distressing since it would appear that the Board of Regents could have complied with the notice provisions of the Public Meetings Law with little or no additional effort.[52]

Further, it is difficult to imagine how the appointment of Dr. Massengale as interim president constituted an actual emergency within the meaning of the Nebraska Public Meetings Law.[53] The university had already shown its ability to live without a "king for a day."[54] In the unlikely event that an actual emergency arose, the Board had already demonstrated it had the ability to assemble and conduct business in a very short time.[55] In effect, the court allowed the Board to create an emergency with respect to Dr. Massengale, simply by the Board's removal of Dr. Roskens. One might ask, how far this chain of self-created emergencies might go? Even assuming the Roskens' situation constituted an actual emergency, the court of appeals should have required the Regents to provide reasonable advance notice before the Board would consider further matters such as the need for an interim president.[56]

In summary, the situation facing the Board of Regents may have been pressing but it did not amount to an actual emergency under the Nebraska Public Meetings Law.[57] Even though it may have been

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on the public body to prove its actions fit within an open meetings act exemption. Booth Newspapers v. University of Mich., 481 N.W.2d 778, 782 (Mich. Ct. App. 1992); Eichelberger, *supra* note 2, at 474. *See* COMMITTEE RECORDS OF L.B. 325, 84TH LEG., 1ST SESS. 1975.

51. *See supra* notes 35-50 and accompanying text.

52. The Board could have called a special meeting and given the required two days reasonable advance notice. If Dr. Roskens refused to comply with the Regent's request to attend such a meeting, it would seem that the Board would have had further cause to terminate an insubordinate employee. This would be entirely consistent with the Board's powers under section 85-106 which states "the Board of Regents shall have power . . . (2) to elect a president . . . (3) to prescribe the duties of such persons . . . (8) to remove the president, . . . when the interests of the University shall require it." NEB. REV. STAT. § 85-106 (Cum. Supp. 1992).

53. The Board argued that continuity was critical. Meyer v. Board of Regents, 510 N.W.2d 450, 455 (Neb. App. 1993).

54. The parties agreed that during the summer Dr. Roskens was going to be in Japan for one week, and at the time of the emergency meeting he was scheduled to depart on a two week absence for a vacation in Minnesota.

55. Meyer v. Board of Regents, 510 N.W.2d 450, 453 (Neb. App. 1993).

56. In emergency meetings, discussion should be limited to only those matters which require "immediate resolution." *See supra* notes 37-38 and accompanying text. In fact, section 84-1411 requires that "any formal action taken in such a[n] [emergency] meeting shall pertain only to the emergency." NEB. REV. STAT. § 84-1411 (Supp. 1993).

57. *See supra* text accompanying notes 35-56.

bothersome, the Public Meetings Law required the Board to give reasonable advance publicized notice to the citizens of Nebraska.[58]

It should be noted that in *Steenblock v. Elkhorn Township Board*,[59] a decision subsequent to *Meyer*, the Nebraska Supreme Court has given a definition of "emergency" in the context of the Nebraska Public Meetings Law. In *Steenblock*, the court defined emergency 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."[60] In *Steenblock*, the public entity claimed that an emergency meeting was necessary to terminate the employment of a snow plow contractor that the board felt was performing poorly. The court rejected the notion that this personnel matter constituted an actual emergency.[61] The court reasoned that the board's willingness to give Steenblock "2 weeks' notice establishes that the meeting was not an event that called for immediate action, nor was it an unforeseen occurrence or condition, since the reasons given for termination were based upon past performance by Steenblock."[62]

Applying this new definition to the facts of *Meyer*, it becomes even more clear that an emergency did not exist on July 31, 1989. The Roskens' matter clearly was not an "unforeseen occurrence" or a "pressing necessity." Further, since the parties did not reach a final settlement agreement until September 8, 1989, the *Steenblock* court would appear to say that the lack of an emergency on July 31, 1989 is self-evident.

B. Closed Sessions

This Note will next address the closed session decisions and deliberations that occurred on July 31, 1989. The Nebraska Public Meetings Law allows a public body to go into closed session: (1) if it is

58. Since the court of appeals found that no Public Meetings Law violation occurred, the court did not reach the Regents' argument that any Public Meetings Law violation was cured at a September 8, 1989 meeting in which all of the actions taken on July 31, were ratified. However, the Nebraska Supreme Court has previously recognized that a public entity may ratify an action that was taken at a previous meeting that was not in compliance with the Public Meetings Law. Pokorny v. City of Schuyler, 202 Neb. 334, 275 N.W.2d 281 (1979). In *Pokorny*, the court held that the subsequent "good" meeting does not make up for the previous "bad" meeting; however the court reasoned that the validity of any formal action taken at the "good" meeting is not tainted by a previous "bad" meeting. *Id.* at 338. In essence, a plaintiff can seek to invalidate the "bad" meeting and ask for attorney's fees, but cannot seek to harness the public entities ultimate authority to govern.

59. 245 Neb. 722, 515 N.W.2d 128 (1994).

60. *Id.* at 726, 515 N.W.2d at 130.

61. *Id.* at 726, 515 N.W.2d at 130-131.

62. *Id.*

clearly necessary for the protection of the public interest, or (2) for the prevention of needless injury to the reputation of an individual.[63] The legislative history of the Nebraska Public Meetings Law clearly indicates that the closed session provisions were narrowly tailored and were intended to apply in very limited circumstances.[64] Even though the Nebraska statute provides no hard and fast rule for when a closed session is permissible, it is clear that a bare recital of the statutory exemption is insufficient given the public policy in favor of open government.[65]

Above and beyond the two aforementioned general guidelines, the Nebraska Public Meetings Law provides a non-exhaustive list of matters which generally will satisfy the criteria for closed sessions. Of particular importance is section 84-1410, which provides an exemption for "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 an open hearing."[66] This exemption is commonly referred to as the personnel matters exemption. In theory this exemption protects the government employee's right to privacy, as well as providing for efficient staff management for the governing board.[67] Despite these good intentions, many courts have struck down a governing board's attempt to circumvent a public meetings law under the guise of personnel matters.[68] Given the legislative history of the Nebraska Public Meetings Law, the Nebraska courts should strictly construe the personnel matters exemption, in order to opt for openness in government.[69]

The strong presumption in favor of openness was recently reenforced by the Nebraska Court of Appeals in *Johnson v. Nebraska Environmental Control Council*.[70] According to the court in *Johnson*,

63. NEB. REV. STAT. § 84-1410 (Cum. Supp. 1992).
64. COMMITTEE RECORDS OF L.B. 325, 84TH LEG., 1ST SESS. 1975, INTRODUCERS STATEMENT OF PURPOSE; Bartel, *supra* note 2, at 358; Oakes, *supra* note 2, at 45.
65. Meyer v. Board of Regents, No. A-91-942 (Neb. Ct. App. 1993) (order on motion for summary judgment); Oakes, *supra* note 2, at 123. *E.g.*, Board of Trustees v. Mississippi Publishers Corp., 478 So. 2d 269 (Miss. 1985).
66. NEB. REV. STAT. § 84-1410 (Cum. Supp. 1992).
67. "The public's right to know and to participate in the decision-making process frequently comes into sharp conflict with the need for confidentiality in certain areas." Hokanson v. High Sch. Dist. No. Eight, 589 P.2d 907, 910 (Ariz. Ct. App. 1978). *See* Watkins, *supra* note 2, at 314.
68. Miglionico v. Birmingham News Co., 378 So. 2d 677 (Ala. 1979); Dale v. Birmingham News. Co., 452 So. 2d 1321 (Ala. 1984); San Diego Union v. City Council, 196 Cal. Rptr. 45 (Ct. App. 1983); Hinds City Bd. of Sup'rs v. Common Cause, 551 So. 2d 107 (Miss. 1989); Board of Trustees v. Mississippi Publishers Corp., 478 So. 2d 269 (Miss. 1985); McKay v. Board of Sup'rs, 730 P.2d 438 (Nev. 1986); Gannett Satellite Info. Net. v. Board of Educ., 492 A.2d 703 (N.J. 1984); Guthrie, *supra* note 2, at 1082.
69. *See supra* note 28 and accompanying text.
70. 509 N.W.2d 21 (Neb. App. 1993).

"listening and exposing itself to facts, arguments and statements constitutes a crucial part of a governmental body's decisionmaking."[71]

Before critically examining the closed sessions of the Board of Regents, one must first take note of the Nebraska Public Meetings Law "crystallization doctrine." The Nebraska Supreme Court has indicated that if a decision has been crystallized in closed session, a mere ceremonial acceptance in a subsequent open session will not cure the Public Meetings Law violation.[72] Thus, the doctrine provides that the meeting shall be reconvened in open session before any formal action may be taken.[73] Therefore, the Nebraska courts are in line with the generally held view that closed sessions allow board members to speak freely on very limited issues, but a closed session may not be used to reach agreements or determine public policy.[74]

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71. *Id.* at 31.

72. Aldridge v. School Dist., 225 Neb. 580, 582, 407 N.W.2d 495, 496 (1987)(recognizing that if the "real" decision with regard to the superintendent's employment status was made in closed session, there is a Nebraska Public Meetings Law violation).

> The necessary inference is that the vote during the reconvened open session was the extension, culmination, and product of the closed session. To deny that deduction would not be a tax but a surtax on credibility, and naivete to the nth degree. 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. Board of Educ., 216 Neb. 158, 167-68, 343 N.W.2d 718, 724 (1984). *See* Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974). *But see* Karol v. Board of Educ. Trustees, 593 P.2d 649, 652 (Ariz. 1979)("We do not believe, in order to conduct a meeting openly, the public body need disclose every fact, theory, or argument pro or con raised in its deliberations, [in closed session] or every detail of the recommended decision on which a vote is about to occur."); Hudspeth v. Board of County Com'rs of Routt, 667 P.2d 775 (Colo. Ct. App. 1983)(holding that public meetings statute prohibits rubber stamping decisions previously made in private, but permits review and deliberation of evidence in closed session where no final action is taken); St. Aubin v. Ishpeming City Council, 494 N.W.2d 803 (Mich. Ct. App. 1992)(holding informal canvas in closed session, by one member of a public body to find out where the votes would be on a particular issue does not violate the crystallization doctrine); Board of Trustees v. Cox Enterprises, Inc., 679 S.W.2d 86 (Tex. 1984)(ruling that board members may express their opinions on an issue and announce how they expect to vote during the open session).

73. NEB. REV. STAT. § 84-1410 (Cum. Supp. 1992); Stephens v. Board of Educ., 230 Neb. 38, 41, 429 N.W.2d 722, 725 (1988). "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." NEB. REV. STAT. § 84-1410 (Cum. Supp. 1992).

74. Cleveland, *supra* note 2, at 134; Watkins, *supra* note 2, at 303.

1. Employee Buyout Arrangements

With this background, it is now appropriate to examine the closed session surrounding the discussion of Dr. Roskens' status as university president. The court of appeals accepted the university's argument that the evaluation of Dr. Roskens fit squarely within the personnel matters exemption, on the basis that "public consideration of Dr. Roskens' employment status might result in needless injury to his reputation which would be unnecessary if he were to vacate his office by agreement."[75] The Board argued that the closed session to "evaluate the president" was proper given Dr. Roskens' right to privacy.[76] However, "not all 'personnel matters' may properly be discussed in closed session. Like the catchword 'budget,' the word 'personnel' is often too readily invoked to justify an arguably improper executive session."[77] The personnel matters exception was not intended to be an all-protecting shield for all discussions relating to personnel; only those cases in which there is a significant threat to an employee's reputational interests are exempted from public scrutiny.[78]

Many courts have reasoned that given the clear legislative purpose behind public meetings laws, a proper judicial construction "requires a public body to make its decision in open meetings whenever possible in keeping with the spirit of open meetings laws."[79] It was clear that there was no significant threat to Dr. Roskens' reputation and that public interest weighed heavily in favor of a public meeting.[80] Indeed, one accepting the prestigious and highly compensated position of university president can hardly expect to be shielded from public scrutiny and candid job performance evaluations.[81] Under this standard, the

75. Meyer v. Board of Regents, 510 N.W.2d 450, 452 (Neb. App. 1993).

76. However, upon closer examination of the record, it appears that during the July 31, 1989 closed sessions Dr. Roskens' job performance was not even at issue. Brief for Appellant at 13, Meyer v. Board of Regents, 510 N.W.2d 450 (Neb. App. 1993)(No. A-91-942). It would appear, therefore, that this mere recital of a statutory exemption should not withstand a public meetings challenge.

77. The Reporters Committee For Freedom of The Press, *Tapping Officials' Secrets: A State Open Government Compendium- Alaska* 61 (Rebecca Daugherty ed.)(1993).

78. Dale v. Birmingham News Co., 452 So. 2d 1321 (Ala. 1984); Miglionico v. Birmingham News Co., 378 So. 2d 677 (Ala. 1979).

79. McKay v. Board of Sup'rs, 730 P.2d 438, 443 (Nev. 1986). *See e.g.*, Dale v. Birmingham News. Co., 452 So. 2d 1321 (Ala. 1984); Miglionico v. Birmingham News Co., 378 So. 2d 677 (Ala. 1979); San Diego Union v. City Council, 196 Cal. Rptr. 45 (Ct. App. 1983); Hinds Cty. Bd. of Sup'rs v. Common Cause, 551 So. 2d 107 (Miss. 1989); Board of Trustees v. Mississippi Publishers Corp., 478 So. 2d 269 (Miss. 1985); Gannett Satellite Info. Net. v. Board of Educ., 492 A.2d 703 (N.J. 1984); Guthrie, *supra* note 2, at 1082.

80. *See* Cleveland, *supra* note 2, at 134; Watkins, *supra* note 2, at 303.

81. *See e.g.*, McKay v. Board of Sup'rs, 730 P.2d 438 (Nev. 1986)(holding that termination of city manager could not be in closed session because character or reputation was not even an issue).

Board of Regents could not justify a closed session to negotiate a settlement agreement with Dr. Roskens. In fact, a governing body deliberating the wisdom of a buyout arrangement that may ultimately cost the university more than $200,000, is exactly the type of public policy decision that should not be made behind closed doors.[82]

The Nebraska Court of Appeals erred in concluding that the balance tips in favor of a closed meeting to evaluate the president of the state's largest university.[83] The public interest in education and university governance[84] clearly outweighs any harm that may have resulted from an open and candid discussion and evaluation of Dr. Roskens, especially since there appeared to be no threat of injury to Dr. Roskens' reputation during the closed sessions on July 31, 1989.[85] Given Nebraska precedent and the strong public policy in favor of openness, the court of appeals was wrong to allow the deliberations regarding Dr. Roskens' tenure on July 31, 1989 to be held in secret.[86]

It is of purely academic interest that neither the parties nor the court discussed whether the Board's actions in closed session on July 31, 1989, violated the rule against crystallization. However, it is clear from the record that public policy was formed during the closed session and that the vote in open session regarding the Roskens buyout amounted to no more than "ceremonial acceptance."[87]

2. *Incidental Matters Rule*

This Note next addresses the closed sessions dealing with Dr. Massengale's promotion to interim president. In order to justify the closed session to appoint Dr. Massengale as interim president the statute requires Board to show either (1) a substantial public interest, or (2)

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82. "It is difficult to imagine a more critical time for public scrutiny of its governmental decision-making process than when the latter is determining how it shall spend public funds." San Diego Union v. City Council, 196 Cal. Rptr. 45, 49 (Ct. App. 1983).

83. Booth Newspapers v. University of Mich., 481 N.W.2d 778 (Mich. Ct. App. 1992). *Contra* Missoulian v. Board of Regents of Higher Educ., 675 P.2d 962, 974 (Mont. 1984)("[C]losure of the [university presidents'] job performance evaluations [meetings] was necessary to protect the individual privacy of the university presidents and other university personnel.").

84. Booth Newspapers v. University of Mich., 481 N.W.2d 778 (Mich. Ct. App. 1992).

85. *See supra* note 76.

86. Anyone believing that it was more salutary to spare the low bidder embarrassment over an honest mistake ignores that some people often draw the most cruel conclusions from sinister silence. We believe the slight discomfort, if any, experienced by a low bidder in the arena of public lettings is far outweighed by the policy favoring openness in the meetings of a public body.

Grein v. Board of Educ., 216 Neb. 158, 166, 343 N.W.2d 718, 724 (1984).

87. *See* Meyer v. Board of Regents, 510 N.W.2d 450, 453 (Neb. App. 1993); *supra* text accompanying notes 72-74.

that the desire to prevent needless injury to reputation required closure of the public meeting.[88]

When analyzing the first test, it is important to note that there is a strong public interest when a university president is selected to oversee the education of future generations.[89] This strong public interest led the Kentucky Attorney General to conclude that the Regents of Morehead State University violated the open meetings law when they held a closed session to discuss the selection process for a new university president.[90] By contrast, the Nebraska Board of Regents went beyond mere discussions regarding the selection process for a replacement president and actually conducted the selection process when they awarded Dr. Massengale the position.

"Given the significant public interest in selecting Dr. Massengale as Dr. Rosken's replacement, an interest at least as significant as the $200,000 buy-out, the reasoning that applied to the buy-out applies with equal force to Dr. Massengale's selection."[91] Notwithstanding the Board of Regents' position, there is no Public Meetings Law exemption for the sensitive search for a new university president.[92] Therefore, the Board failed to show that the public interest required a closed session discussion regarding an interim president.

Under the second test, the Board could not justify the closed session discussions on an interim president either as a personnel matter or based on the need to prevent "needless injury to reputation."[93] In a situation analogous to the selection of a new university president, courts have held that "the selection of a new school superintendent was not in the same category as ordinary personnel matters, and labels such as 'personnel' failed as a description of that subject."[94] As previously discussed, the personnel matters exemption should not be used unless there is a reputational interest at stake.[95] Such reputational interests are defined as "information of a personal nature where

88. NEB. REV. STAT. § 84-1410 (Cum. Supp. 1992).
89. Vickory, *supra* note 2, at 445.
90. 83-489 Op. Ky. Att'y Gen. (1983).
91. Brief for Appellant at 20, Meyer v. Board of Regents, 510 N.W.2d 450 (Neb. App. 1993) (No. A-91-942).
92. Booth Newspapers v. University of Mich., 481 N.W.2d 778 (Mich. Ct. App. 1992). *Contra* The Minnesota Daily v. University of Minnesota, 432 N.W.2d 189 (Minn. Ct. App. 1988). In fact, some states exempt the search process for a new university president from the open meetings law. Cleveland, *supra* note 2, at 153.
93. *See supra* text accompanying note 63.
94. Cox Enterprises v. Board of Trustees, 706 S.W.2d 956, 959 (Tex. 1986). *See also* Miglionico v. Birmingham News Co., 378 So. 2d 677 (Ala. 1979)(holding city council meeting to appoint board of education member must be open to public); Gannett Satellite Info. Net. v. Board of Educ., 492 A.2d 703 (N.J. Super. Ct. 1984)(holding closed meeting to interview candidates and to fill board vacancy is illegal notwithstanding personnel exemption).
95. *See supra* text accompanying note 80.

the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy."[96] Indeed it is difficult to imagine how the elevation of Dr. Massengale to interim president of the University of Nebraska would cause any "needless injury to reputation." Therefore, a straightforward application of the exemptions that permit closed sessions under the Nebraska Public Meetings Law would have invalidated the action the Board of Regents took regarding Dr. Massengale.

In order to avoid finding for the plaintiff, the Nebraska Court of Appeals resorted to some creative judicial interpretation. The court determined that:

> it was appropriate for the board to consider in closed session not only Dr. Roskens' resignation, but also the immediate steps the board would take in response to that action. The Board considered continuity of leadership at the level of presidency to be critical. The issues were interrelated, and it was appropriate that they be discussed together.[97]

The court of appeals accepted the argument that since the discussion surrounding Dr. Roskens' tenure was proper for closed session, it was permissible for the Board to also discuss incidental topics, even if these incidental matters standing alone would be an impermissible subject matter of a closed session.[98]

This represents the first time that a Nebraska court has adopted the incidental matters rule with regard to closed sessions.[99] The incidental matters rule allows a board to discuss collateral and germane incidental matters to an exempt topic while still in closed session, even if these incidental matters are not exempt from public scrutiny under the public meetings law.[100]

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96. Ridenour v. Board of Educ., 314 N.W.2d 760, 764 (Mich. Ct. App. 1981). *See also* Miglionico v. Birmingham News Co., 378 So. 2d 677 (Ala. 1979)(defining reputation "as the estimate the public places on a person" including traits such as honesty, loyalty and integrity); McKay v. Board of Sup'rs, 730 P.2d 438 (Nev. 1986)(defining threat to reputation as a serious assault upon one's good name, such as alleged sexual misconduct).

97. Meyer v. Board of Regents, 510 N.W.2d 450, 455 (Neb. App. 1993).

98. *Id.*

99. The legislative history of the Nebraska Public Meetings Law clearly rejects the notion of an "incidental matters rule."

> The only change there is to make quite clear that in executive session the public body should not go beyond those purposes which it went into the executive session to discuss. . . . We're not changing that *but we wanted to make it extremely clear that it's limited to those purposes that it actually went into the closed session for.*

COMMITTEE RECORDS OF L.B. 43, 88TH LEG., 1ST SESS. 1983, at 18 (emphasis added). *See also* The Reporters Committee For Freedom Of The Press, *Tapping Officials' Secrets: A State Open Government Compendium - Alabama* 34-35 (Rebecca Daugherty ed. 1993)(stating it is improper for a court to read exemptions into the public meetings law that were not adopted by the legislature).

100. Brief for Appellee at 27, Meyer v. Board of Regents, 510 N.W.2d 450 (Neb. App. 1993) (No. A-91-942). *See* Gosnell v. Hogan, 534 N.E.2d 434 (Ill. App. Ct. 1989);

The court of appeals erred in finding that the Board of Regents had shown that discussions regarding the interim president were proper for closed sessions. "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 minutes as the reason for the closed session."[101] Therefore, it would appear that a plain reading of this statute would dictate that the Board of Regents violated the Public Meetings Law by selecting and negotiating with Dr. Massengale to assume the role of interim president, during the closed session which was originally called to evaluate the status of then-President Dr. Roskens.[102]

As previously mentioned, drawing the line between open and closed sessions is one of the fundamental questions of open meetings jurisprudence.[103] Practical experience shows that even when a public body has gone into closed session, the difficult issue of when to re-open must still be addressed.[104] One must ask whether a board chairman or legal counsel can reasonably be expected to insure that every word spoken during a closed session is on a topic exempt from public discourse.[105]

Regardless of such real world considerations, the court of appeals was wrong to accept the incidental matters rule into Nebraska Public Meetings Law jurisprudence.[106] It is now permissible for a public body to hide in closed session a non-exempt topic as long as the board can say that the non-exempt topic is incidental to an exempt topic.

Kansas v. Board of Educ., 764 P.2d 459 (Kan. 1988)("Discussion, in executive session of board of education, of matters relating to employment of superintendent properly encompassed goals of superintendent's office, even though the latter matters were not enumerated in exceptions to Open Meetings Law.").

101. NEB. REV. STAT. § 84-1410 (Cum. Supp. 1992). "Almost invariably executive sessions are limited in scope to discussion of the particular topics for which they have been closed." Cleveland, *supra* note 2, at 137.

102. "The board may then go into executive session to discuss this one matter and, when concluded, must re-open the meeting. No other matter may be discussed at the executive session than the announced subject." Hinds Cty. Bd. of Sup'rs v. Common Cause, 551 So. 2d 107, 111 (Miss. 1989).

103. *See supra* note 22.

104. "We realize that it may be difficult to draw the line and separate such discussion in executive session, respecting "character or good name" from general discussions respecting personnel matters." Miglionico v. Birmingham News Co., 378 So. 2d 677, 682 (Ala. 1979). In fact, section 84-1410 provides a procedure for an individual board member who feels that the closed session is no longer authorized to request a re-opening of the meeting when the discussion turns to improper matters or topics that were not stated as the original justification for the closed session. NEB. REV. STAT. § 84-1410 (Cum. Supp. 1992).

105. *See* COMMITTEE RECORDS L.B. 288, 92D LEG., 1ST SESS. 1991, at 56; Cleveland, *supra* note 2.

106. *See e.g., The Minnesota Daily v. University of Minnesota*, 432 N.W.2d 189 (Minn. Ct. App. 1988)([J]udicially created exceptions [to the scope of open meetings law] are generally not permitted.").

Such a rule is contrary to the clear legislative policy that "the formation of public policy is public business and may not be conducted in secret."[107] The rule has the potential to greatly reduce the openness of government in Nebraska.

Other courts have recognized that the personnel matters exemption was narrowly tailored to protect the privacy interests of individual employees and have refused to accept an incidental matters defense.[108] These courts appreciate the danger of institutions using the incidental matters rule to hide discussions, that should be held in public, behind the mask of the personnel matters exemption.[109] Public entities have attempted to close discussions ranging from salary expenditures to any discussions which related to the work environment under the guise that such discussions were incidental to personnel matters.[110] As a matter of fundamental statutory construction as well as legislative policy, it was improper for the court to attach or apply the incidental matters rule to the personnel matters exception.[111]

The incidental matters rule serves only to expand the topics which may be discussed in a closed session.[112] In fact, by definition such a rule allows for closed session discussion of non-exempt topics.[113] Given the strong public policy the Legislature has announced through the Public Meetings Law, the Nebraska judiciary should not provide more exemptions for public bodies, only in the name of convenience.[114]

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107. NEB. REV. STAT. § 84-1408 (Reissue 1987).

108. Hinds County Bd. of Sup'rs v. Common Cause, 551 So. 2d 107 (Miss. 1989); Gannett Satellite v. Board of Educ., 534 N.E.2d 1239 (Ohio 1988).

109. Hinds County Bd. of Sup'rs v. Common Cause, 551 So. 2d 107 (Miss. 1989); Gannett Satellite v. Board of Educ., 534 N.E.2d 1239 (Ohio 1988). Some courts place the burden on the public body to segregate exempt from non-exempt discussions, and require that all non-exempt discussions be held in public if at all practicable. *E.g.*, Philadelphia Newspapers v. Nuclear Regulatory Comm'n, 727 F.2d 1195 (D.C. Cir. 1984); Shurberg Broadcasting of Hartford, Inc. v. F.C.C., 617 F. Supp. 825 (D.D.C. 1985).

110. San Diego Union v. City Council, 196 Cal. Rptr. 45 (1983); Board of Trustees v. Miss. Publishers Corp., 478 So. 2d 269 (Miss. 1985); Gannett Satellite v. Board of Educ., 534 N.E.2d 1239 (Ohio 1983).

111. *See* Gannett Satellite v. Board of Educ., 534 N.E.2d 1239 (Ohio 1988); Eichelberger, *supra* note 2, at 475-77.

112. It is not for the courts to expand the legislature's definition of personnel matters. *See* San Diego Union v. City Council, 196 Cal. Rptr. 45 (1983).

113. *See supra* text accompanying note 100.

114. > [A] statute will not be extended to include situations by implication when its language is specific and not subject to reasonable doubt. In the construction of statutes, implications which in effect are necessarily contrary to or incompatible with the spirit and purpose of the enactment being construed will not be judged in.
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> SUTHERLAND STAT. CONST. § 55.03 (4th Ed. 1984)(footnotes omitted). *See* City of Lincoln v. Nebraska Workmen's Comp. Court, 133 Neb. 225, 231, 274 N.W. 576, 580 (1937). *See also* State Dep't of Roads v. Melcher, 240 Neb. 592, 483 N.W.2d

Once again, the court's failure to address the issue of crystallization is perplexing. The Board readily admits that in closed session the following public policy was formed: The university should have an interim president, who should be Dr. Massengale, and whose terms and conditions of status as interim president and chancellor were agreed upon.[115]

In short, the Board of Regents determined that the University of Nebraska could not survive without a president for two days. The Board then selected the interim president behind closed doors.[116] In hindsight, one can speculate that if the Board had taken the time to call a special meeting with regard to Dr. Roskens' replacement and conduct an open dialogue, the university would have been better off.[117]

IV. RETROSPECTIVE ON NEGOTIATIONS

In order to assist practioners, the author will now suggest a procedural alternative that, if it had been utilized, would have ensured no Public Meetings Law violation would have occurred.

At this point it is important to revisit the crystallization doctrine implicitly underlying the decision in this case. In a nutshell, a public body violates the Nebraska Public Meetings Law if a collective decision is reached by the *entire* board in closed session. However, there is Nebraska precedent that suggests if a public body can properly work its way through the "negotiations maze," Public Meetings Law violations may be avoided.[118]

> There is nothing in the [Nebraska Public Meetings Law] that requires negotiations for the purchase of land to be conducted at open meetings, but deliberations of the council as to whether an offer to purchase should be made is an action that should be taken at an open meeting.[119]

In *Pokorny*, the Nebraska Supreme Court appeared to recognize that in many situations public discourse may be harmful to the negotiations process and, therefore, may adversely affect the public interest as a whole.[120] In such a case, it appears that the Nebraska Public Meetings Law does not require public discourse during the *entire* ne-

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540 (1992)("[W]hen statutory language is plain and unambiguous, no judicial interpretation is needed.").

115. *See supra* note 13.

116. Meyer v. Board of Regents, 510 N.W.2d 450, 452-53 (Neb. App. 1993).

117. It is possible that the selection of Dr. Massengale as permanent president (even though he was not a search committee finalist) would have raised fewer concerns if Dr. Massengale's original promotion to interim president would have been made in open session. *Withem Says Regents Destroyed Trust*, *U.P.I. B.C.* CYCLE Nov. 23, 1990.

118. Porkorny v. City of Schuyler, 202 Neb. 334, 275 N.W.2d 281 (1979).

119. *Id.* at 339, 275 N.W.2d at 284.

120. *Id.*

gotiations process. Imagine the advantage a party contracting with a public body would have if the public entity was required to openly disclose all of its positions, bottom lines, and overall strategy.

What this would have meant for the Board of Regents is largely a matter of speculation. However, it could be argued that part of the negotiations with Dr. Roskens and Dr. Massengale necessitated private discussions and closed sessions. In the present situation, the Board erred in continuing the *entire* negotiations process as a *complete* board in closed session, thereby illegally crystallizing policy decisions behind closed doors. If, however, on July 31, 1989, the Board would have remained in open session and voted on Dr. Roskens' proposal as submitted, there would have been no Public Meetings Law violations. If the Board felt that Dr. Roskens' initial proposal was insufficient, it could have *openly* rejected it and then directed its representatives to try again. Such a procedure would have preserved the opportunity for public comment and open deliberations regarding the wisdom of such a proposal.[121]

Even though this recommendation may appear to be form over substance, there is some authority supporting this procedure.[122] In fact, such a procedure would ensure the opportunity for public discourse on the proposed agreement. Yet, some of the face to face negotiations could still maintain a degree of privacy.[123]

V. REAL WORLD POLICY CONSIDERATIONS AND IMPLICATIONS

Up to this point, this Note has examined how the Nebraska Court of Appeals erred as a matter of judicial construction in interpretation

121. However, it is uncertain if such a public disclosure would have led to the best settlement agreement for the citizens tax dollars. *See infra* text accompanying note 132.

122. The Nebraska Supreme Court has previously recognized that many times public meetings litigation does amount to form over substance. Porkorny v. City of Schuyler, 202 Neb. 334, 339, 275 N.W.2d 281, 284 (1979). Nevertheless, even a technical violation of the Public Meetings Law will entitle the plaintiff to relief. *Id.*

123. Where the Board of Regents erred was in trying to conduct negotiations as an entire board in closed session. However, in 1994 the Legislature amended the Public Meetings Law in an attempt to address some of these concerns by allowing closed sessions to "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." L.B. 621, 93d Leg., 2d Sess. 1994 (codified at NEB. REV. STAT. §§ 84-1410, 84-1414 (Cum. Supp. 1994)). Whether the board can remain in closed session while negotiations are ongoing, and eventually come to an agreement while still in closed session is unclear. In effect, the courts will have to determine when the line between "negotiating guidance" and illegal crystallization of public policy is crossed.

of the Nebraska Public Meetings Law.[124] Upon a closer reading of *Meyer*, it appears that the Nebraska Court of Appeals strayed away from a strict judicial construction of the Nebraska Public Meetings Law, in light of some real world compliance problems such a strict construction would have created.

An examination of the legislative history of the Nebraska Public Meetings Law reveals that the Legislature did not intend to unduly harness public bodies.[125] The Legislature realized it would be very difficult for the local school board member or village council member to understand the technical requirements of the Public Meetings Law.[126]

> Most public bodies consist of people who are not paid at all for their efforts; they are volunteers to their communities, to their school districts, or to their political subdivisions, being paid almost nothing for their hard work, and it's quite a burden to have to accept the danger of liability of this nature.[127]

It is possible that in light of these concerns the Nebraska Court of Appeals refused to hold the Board of Regents, and consequently all public bodies within the state, to a strict judicial interpretation of emergency under the Nebraska Public Meetings Law.[128]

The legislative history of the closed session provisions of the Nebraska Public Meetings Law reveals the Legislature's deep concern that if the ability to go into closed session was too restricted, the actual discussions would be pushed even farther into the back room.[129] Indeed, there appears to be an inverse relationship between the restrictiveness of the provisions on closed sessions and the sum total of open government.[130] "[P]ublic officials are prone to waste time making speeches for the benefit of an audience, while in closed meetings they 'are less on their dignity, less inclined to oratory.' "[131] It has even been suggested that by prohibiting a public body from going into closed session, the public receives in return thoughtless actions and policies.[132]

Attorneys that frequently represent public entities argue that much of the discussions that occur in closed sessions are protected by

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124. *See supra* Part III.
125. COMMITTEE RECORDS OF L.B. 325, 84TH LEG., 1ST SESS. 1975, INTRODUCER'S STATEMENT OF PURPOSE.
126. Many times these smaller community boards will not even have an attorney present at the board meeting. COMMITTEE RECORDS OF L.B. 325, 84TH LEG., 1ST SESS. 1975, at 2; COMMITTEE RECORDS OF L.B. 43, 88TH LEG., 1ST SESS. 1983, at 43.
127. Oakes, *supra* note 2, at 61 (addressing potential for criminal penalties under the Nebraska Public Meeting Law).
128. *See* 92020 Op. Neb. Att'y Gen. (1992)(defining item of emerging nature). *But see* Steenblock v. Elkhorn Township Bd., 245 Neb. 722, 515 N.W.2d 128 (1994).
129. COMMITTEE RECORDS OF L.B. 325, 84TH LEG., 1ST SESS. 1975, at 3.
130. Oakes, *supra* note 2, at 47.
131. Comment, *Open Meetings Statutes: The Press Fights For The Right To Know*, 75 HARV. L. REV. 1199, 1202 (1962)(footnote omitted).
132. Oakes, *supra* note 2, at 64.

the attorney-client privilege.[133] They claim that a closed session can effectively be used to "clear the air," and a better overall decision making process is the end result.[134] It appears that the Nebraska Court of Appeals was receptive to these practical concerns when it examined the closed sessions that were used to negotiate with Dr. Roskens and Dr. Massengale.[135]

It is important to remember that the Nebraska Public Meetings Law allows a citizen to invalidate action of a public body that was not in complete compliance with the law.[136] This possibility of invalidation may have provided an additional reason for the Nebraska Court of Appeals to read flexibility into the Nebraska Public Meetings Law.[137]

> The finality of governmental action is questioned any time an open meeting violation is alleged. No one can rely on challenged legislation until a court rules on whether a violation occurred. Further, invalidation permits special interest groups to veto popular legislation for purely private motives. Invalidation of governmental decisions under such circumstances undermines the political process. . . . Invalidation has been used to challenge a broad range of substantive action. Collective bargaining agreements, decisions to consolidate educational institutions, personnel actions, zoning ordinances, and a host of other important government decisions have been attacked on the grounds that public officials violated sunshine statutes somewhere in the decision-making process.[138]

This blatant thwarting of the governmental process leads one to question whether a public meetings law is more trouble than it is worth. In fact, when the Nebraska Public Meetings Law was first debated, many opponents argued that as long as the final decisions of a public body were made public, the ballot box will provide all of the public accountability that is necessary.[139]

Despite these real world concerns, it was improper for the court of appeals to expand the definition of "emergency" and "personnel matters" to approve the Board of Regents' actions under the Nebraska Public Meetings Law.

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133. COMMITTEE RECORDS OF L.B. 325, 84TH LEG., 1ST SESS. 1975, at 31; Guthrie, *supra* note 2, at 1080.

134. COMMITTEE RECORDS OF L.B. 325, 84TH LEG., 1ST SESS. 1975, at 31.

135. The legislative history of the Nebraska Public Meetings Law also reveals that the Legislature was warned that as a practical matter it is impossible to have a closed session without the discussion of incidental matters. COMMITTEE RECORDS L.B. 288, 92D LEG. 1ST SESS. 1991, at 53-56.

136. NEB. REV. STAT. § 84-1414 (Reissue 1987).

137. Even though invalidation was not sought by the plaintiff in *Meyer*, the court was still cognizant of the fact that a contrary holding may lead to future invalidation of a wide range of governmental decisions.

138. Fossey & Roston, *supra* note 2, at 165, 168-69 (footnotes omitted). *See also* Guthrie, *supra* note 2, at 1086.

139. COMMITTEE RECORDS OF L.B. 43, 88TH LEG., 1ST SESS. 1983, at 28, 66. *See also* Tolar v. School Bd. of Liberty County, 398 So. 2d 427, 429 (Fla. 1981)(declining to invalidate school board action which violated Sunshine Law).

> In passing, we would note that the trial court's holding created an exception to the Public Meetings Act for the sensitive search for a president of the University of Michigan. While it may be that the exceptions in our statute should be broadened to permit closed sessions under such circumstances, we consider that to be a legislative matter better decided within the framework of the legislative process.[140]

Meyer is a call to the Legislature to reform the Nebraska Public Meetings Law. The real world compliance problems existing in the Nebraska Public Meetings Law should be addressed by the Nebraska Legislature.[141]

VI. SOLUTION

The Nebraska Legislature has several options to consider when clarifying the Nebraska Public Meetings Law. First, it could tighten up the exemptions under the Public Meetings Law, either by completely eliminating closed sessions or attempting to make the current exemptions more restrictive. Second, on a somewhat smaller scale, the Legislature could simply clarify how public entities may conduct negotiations in compliance with the Nebraska Public Meetings Law. Alternatively, the Legislature could add a substantial compliance[142]

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140. Booth Newspapers, Inc. v. University of Mich., 481 N.W.2d 778, 784 (Mich. App. 1992).

> The board also made policy arguments to the effect that the assurance of anonymity of the applicants was of crucial importance. . . . Notwithstanding the absence of any express exception in the [public meetings law] covering the precise situation involved, the board would have this court impose limitations on public access to the interviews by application of a "rule of reason." . . . The legislature has not amended the statute, and we deem it inappropriate to engraft by judicial fiat a change the legislature has apparently chosen not to make.

Dale v. Birmingham News Co., 452 So. 2d 1321, 1323 (Ala. 1984). *See also* Hinds County Bd. Of Sup'rs v. Common Cause, 551 So. 2d 107, 111 (Miss. 1989)(noting that it is not for the court to consider the wisdom of a narrow personnel matters exemption).

141. *See* Kometscher v. Wade, 177 Neb. 299, 308, 128 N.W.2d 781, 787 (1964)(explaining that it is not province of court to provide interpretation which legislature might have adopted); Board of Trustees v. Cox Enterprises, Inc., 679 S.W.2d 86, 89 n.4 (Tex. Ct. App. 1984)(finding that difficulty of enforcement is not a proper canon for statutory interpretation of a public meetings law).

142. In *Meyer*, the court held that "while we find no substantial violation here, we do find that this pronouncement of opting for openness is worth stating." Meyer v. Board of Regents, 510 N.W.2d 450, 458 (Neb. App. 1993). It is uncertain whether the reference to "substantial" compliance was a mere oversight by the court of appeals. Section 84-1414 provides three levels of review when addressing public meetings law violations. If the plaintiff challenges the board action within 120 days of the alleged violation any technical violation will result in invalidation of the board's action, from 120 days to one year a "substantial violation" is necessary before invalidation, and after one year no action for invalidation can be brought. NEB. REV. STAT. § 84-1414 (Cum. Supp. 1992). In *Meyer*, the plaintiff challenged the Regents' action within 120 days, hence strict compliance was re-

and/or a substantial reconsideration provision that would still maintain the principle of open government, yet make the statute more workable.[143]

Other legislatures have provided provisions for a good faith/substantial compliance defense to an alleged public meetings law violation.[144] In these states, in order to prevail the plaintiff must show more than a mere technical violation of the public meetings law.[145] "The fact that violations carry misdemeanor penalties acts as a deterrent to public officials who, by virtue of their positions, are particularly sensitive to the risk of criminal prosecution."[146] Still other states will allow a public body the unlimited use of closed sessions as long as there is substantial reconsideration at a public meeting before any formal action is taken.[147] Further, some states allow a subsequent ratification at a public meeting to cure any previous public meetings law violations.[148]

Arguably, the substantial reconsideration test may be the best alternative for the Nebraska Legislature. Such a procedure would allow public bodies the unlimited use of closed sessions. The current law is riddled with too many technical requirements and truly has turned into form over substance. However, a provision for substantial reconsideration ensures that the public still is informed. Such a provision is also likely to lead to a better overall decisionmaking process.[149]

Ultimately, it is for the Legislature to determine which change should be made. However, the opinion in *Meyer* illustrates how a strict statute may not be strictly followed.

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quired and not the "substantial violation" standard which was apparently utilized by the court of appeals.

143. *See* COMMITTEE RECORDS OF L.B. 325, 84TH LEG., 1ST SESS. 1975, INTRODUCER'S STATEMENT OF PURPOSE.

144. *See* Karol v. Board of Educ. Trustees, 593 P.2d 649 (Ariz. 1979)(analyzing ARIZ. REV. STAT. ANN. §§ 38-431.01 to .09); Carefree Improvement Ass'n v. City of Scottsdale, 649 P.2d 985 (Ariz. Ct. App. 1982); Fossey & Roston, *supra* note 2, at 169. In fact, the Nebraska Legislature has previously been urged to adopt a complete substantial compliance defense. COMMITTEE RECORDS OF L.B. 43, 88TH LEG., 1ST SESS. 1983, at 42.

145. *See* Hokanson v. High Sch. Dist. No. Eight, 589 P.2d 907, 911 (Ariz. Ct. App. 1979).

146. Fossey & Roston, *supra* note 2, at 173.

147. *See, e.g.*, Brookwood Area Homeowners Ass'n, Inc. v. Anchorage, 702 P.2d 1317 (Alaska 1985); Board of Trustees v. Cox Enterprises, Inc., 679 S.W.2d 86 (Tex. Ct. App. 1984); Fossey & Roston, *supra* note 2, at 173.

148. Guthrie, *supra* note 2, at 1089. The Nebraska Supreme Court has previously endorsed a similar procedure via a *nunc pro tunc* amendment to a public entities minutes. State *ex rel.* Schuler v. Dunbar, 214 Neb. 85, 333 N.W.2d 652 (1983).

149. *See supra* notes 125-132 and accompanying text.

VII. CONCLUSION

In summary, the Nebraska Public Meetings Law is intended to ensure citizen's access to the governmental process. Unfortunately, the University of Nebraska Board of Regents seems to be following the nationwide trend of resistance and hostility toward open governance that is prevalent in academia.[150]

Perhaps more distressing is that the Nebraska Court of Appeals allowed the Board of Regents to create an emergency in order to limit the notice provided to the public regarding the status of the president of the University of Nebraska. Contrary to judicial doctrine and principles of statutory interpretation, the court of appeals stretched the Nebraska Public Meetings Law statutory exemptions, even recognizing a new incidental matters rule, in order to hold that the Board of Regents had acted within the law.

It is clear that under a proper reading of the applicable statutes as they existed, the Board of Regents violated the Nebraska Public Meetings Law on the night of July 31, 1989. Rather than forcing courts to expand the Nebraska Public Meetings Law in order to maintain a real world compliance perspective, the Nebraska Legislature should amend the Public Meetings Law, either by removing the invalidation provisions or providing a defense for substantial compliance with the Public Meetings Law requirements. Perhaps the Legislature should go so far as allowing for unlimited closed sessions, so long as there is substantial reconsideration at an open meeting before any final action is taken.

Finally, public bodies can greatly simplify matters for themselves if they will remember this guiding principle: Opt for openness.

R.J. Shortridge '95

150. *See supra* notes 20-24 and accompanying text.