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SENT VIA EMAIL

Idaho Education News
ATTN: Tim Fleming
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Nampa School District
ATTN: Scott Marotz
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Re: Open Meeting Law violation

Gentlemen,

Thank you for your communication regarding the open meeting violation complaint submitted to the Canyon County Prosecuting Attorney ("CCPA") by Idaho Education News ("IEN") on May 10, 2017.[1] I appreciate your courtesy and professionalism and offer this comment, intended as neither condemnation nor affirmation of your respective positions at this preliminary juncture, in that spirit. I apologize in advance for its length, but believe that time may be of the essence in resolving this matter.

I understand IEN's complaint to primarily allege that the Nampa School District Board of Trustees ("NSD") violated Idaho's Open Meeting Law, Idaho Code §§ 74-201, et seq., by deliberating and voting in open session on matters related to the hiring of one of two named finalists to its superintendent position using pseudonymous identifiers for those finalists. In short, the complaint presumes the existence of a logical nexus, and suggests its legal corollary, between the State's general policy that the public business be not conducted in secret with a conclusion that the use of pseudonyms necessarily and unlawfully imposes such secrecy.

In response, I understand NSD to acknowledge the salient facts while categorically denying that they constitute a violation. The District asserts that the subject meeting, along with the deliberation and vote, complied with the Law because the relevant statutes do not require disclosure of specific identity, and that the action to offer Candidate "A" the position occurred in open session. NSD further responds that the use of pseudonyms was appropriate to protect the privacy interests of the chosen candidate pending decision on the job offer, that the candidate's identity was immediately revealed upon accepting the job, and that this procedure (deliberation in

[1] The letter is dated and makes reference to 2018, clearly a typographical error.

executive session followed by a final decision in open session using pseudonymous identifiers) is readily accepted practice in employee disciplinary matters.

Please let me know if my understanding of either the complaint or the response is in error, as the Canyon County Prosecuting Attorney has a broad duty to enforce the Open Meeting Law in relation to local public agencies within his jurisdiction and I have been charged with providing him a recommendation regarding this matter. Again note that this Office construes its enforcement duty to include provision of a reasoned statement designed to afford interested persons/entities timely redress as they accordingly see fit, should their interests or conclusions differ from those of the CCPA.

To do so, I respectfully request your continued prompt input regarding several matters identified below.

As an initial factual matter, and as previously pointed out by Mr. Fleming, the record available to me does not reflect when or how the pseudonymous identifiers were assigned to the candidates. Although I.C. § 74-206(1)(a) plainly allows deliberation regarding the respective qualities of candidates for employment to occur in executive session, its subsections (2) and (3) just as plainly forbid any final action or decision to be made in executive session and require narrow construction of any exceptions to the State's general policy that the public business not be conducted in secret. More, I.C. § 33-510 provides for the transaction of trustee business such that "[u]nless otherwise provided by law, all questions shall be determined by a majority of the vote cast." Note also my understanding, pursuant to *City of McCall v. Buxton*, 146 Idaho 656 (2009), that administrative and ministerial actions necessarily come after, and cannot come before, an approved decision.

Accordingly, Mr. Marotz, please advise as to when and how the pseudonymous identifiers were assigned to the candidates by the District, understanding that the answers may prompt additional comment and analysis from you both.

Turning to matters of legal interpretation, I submit the following propositions for your input and note my willingness to seek the guidance of the Attorney General as to these issues if possible as well.

First, the absence of an affirmative statutory duty in the Open Meeting Law that a governing board identify the subject of a motion by name, given the relevant legislative policy and statutory mandate that the exceptions thereto be narrowly construed, does not necessarily or definitively confer authority to use pseudonymous identifiers in place of proper names. Rather, such absence might at most raise an open question of law appropriate for judicial resolution pending legislative clarification.[2] Having heard this bell be rung for the first time under this

[2] My preliminary research results for similar fact patterns have been curiously sparse. Please advise if you have found otherwise, as the only potentially analogous case regarding the use of pseudonyms in a similar context I have yet reviewed is *News-Press Pub. Co. v. Wisher*, 345 So. 2d 646 (Supreme Court of Florida, 1977) (where the Court held that "The policy of this state as expressed in the public records law and the open meeting statute eliminate any notion that the commission was free to conduct the county's personnel business by pseudonyms or cloaked references. We cannot allow the purpose of our statutes to be thwarted by such obvious ruses.")

Prosecuting Attorney, it would seem incumbent upon him to pursue a judicial declaration now, lest present inaction be construed as tacit approval and serve as a potential rhetorical defense to subsequent enforcement in similar situations. This perceived urgency, in my opinion, is heightened by a May 16, 2017 editorial in the Idaho Press Tribune, the local paper of record, acclaiming NSD's process – specifically including the delay in making public the identity of the chosen candidate – as open and transparent.

Should the matter accordingly move forward in what I would strive to be a non-adversarial pursuit of judicial clarification, it seems likely that the reviewing Court would search for precedent or analogue. Lacking squarely relevant comparatives, it seems possible that the best, if limited, guidance available might be by reference to the sort of review undertaken when a court considers whether to allow the identity of a party to a civil or criminal action to be concealed. I understand the general rule in those cases to be that use of pseudonyms can be allowed in exceptional or unusual circumstances when necessary to protect a person from harassment, injury, ridicule or personal embarrassment. *See, Doe v. Holder*, 736 F.3d 871 (9th Cir. Court of App., 2013). Application of this kind of rule would seem to afford public entities some potentially necessary operational leeway in certain circumstances but would not necessarily justify NSD's approach in this case.

Second, assuming without conceding that the procedure adopted by NSD in this instance is readily accepted in cases of employee discipline, such circumstances appear distinguishable under both the review process outlined above and by Idaho statute. Of course, the I.C. § 74-206(1)(b) discipline clause is an obvious analogue to the antecedent hiring subsection of the statute, but I.C. §§ 33-513(5) and 33-518 seem relevant too. I read those statutes to establish presumptions of confidentiality, insofar as school districts go, in employee disciplinary proceedings and personnel files. The burden of imposing confidentiality upon the files' evaluations rests with the school district, just as the burden of ensuring the openness of disciplinary proceedings must be carried by the school district; in both, the employee him/herself appears solely empowered to authorize deviation from the presumption. I have found no similar statutory authority that grants such discretion to either the school district or a potential hire and am unable, given my research and present understanding, to infer the existence of such presumptions in the Open Meeting Law.

Note that I read I.C. § 74-106(1) to potentially bolster this conclusion as well, as it appears to functionally equate the privacy rights of final candidates to certain types of public employment (like a district superintendent, in my opinion) to those enjoyed by current or former public employees. Their identity, public service or employment history, classification, pay grade and step, longevity, gross salary and salary history, *status*, workplace and employing agency are a matter of public record. *Emphasis* added.

I continue to appreciate the time and attention you have both brought to bear on resolution of this unique matter. As a fellow recipient and issuer of allegations regarding perceived procedural defects in public proceedings, I well understand the difficulties and priorities that you each intend to balance in service of the public interest. Premature disclosure of public information can compromise solutions arrived at by solid process and with the best of intentions, and the operational realities of governance by committee inevitably expose gaps in its legislative structure.