

Investigative Report

STATE OF IOWA CITIZENS' AIDE/OMBUDSMAN



INVESTIGATION INTO RANDOLPH PUBLIC LIBRARY'S CLOSED SESSION VIOLATIONS

TO: Kathe Fichter
Randolph Public Library Director

and

Daisy Malcolm
Randolph Library Board President

FROM: William P. Angrick II
Citizens' Aide/Ombudsman

RE: Case File 0600432

Issued: October 12, 2006

Published: December 11, 2006

Role of the Ombudsman

The Office of Citizens' Aide/Ombudsman (Ombudsman) is an independent, nonpartisan, investigative agency of the Iowa General Assembly. Its powers and duties are defined in Iowa Code chapter 2C.

The Ombudsman investigates complaints against most Iowa state and local governmental agencies. The Ombudsman can investigate to determine whether agency action is unlawful, contrary to policy, unreasonable, unfair, oppressive, or otherwise objectionable. After an investigation, the Ombudsman may issue an investigative report, stating its findings and conclusions, as well as any recommendations for improving agency law, policy, or practice. Before publishing the report, the Ombudsman provides the agency the opportunity to reply, and appends the unedited reply to the report.

Complaint and Investigation

The Ombudsman received a complaint alleging the Randolph Library Board (Board) did not have a quorum at its December 2005 meeting when it terminated a library employee. During the investigation, the Ombudsman became aware of additional violations of closed session and meeting notices. In addition, there appeared to be contradictory rules regarding the Board's proxy voting and required number of members on the Board.

The investigation was assigned to Assistant Citizens' Aide/Ombudsman Andy Teas. Actions taken by Mr. Teas will be attributed to the Ombudsman in this report.

The Ombudsman interviewed Library Director Kathe Fichter, Board President Daisy Malcolm, and reviewed materials provided by them, including the December 2005 meeting minutes and January 2006 meeting agenda. The Ombudsman also analyzed relevant Iowa statutes on open meetings law, treatises on conducting public meetings, Iowa Library Trustee's Handbook, and Attorney General's "Sunshine Advisory" bulletins, and consulted Robert's Rules of Order Newly Revised.

In addition, the Ombudsman presented the Board the initial findings, conclusions, and recommendations in a letter dated June 5, 2006. (Appendix A.) A Reply was drafted by Kathe Fichter and delivered in person by Randolph Mayor Vance Trively on July 13, 2006. (Appendix B.)

Findings and Analysis

I. Closed Session.

At the December 27, 2005 meeting, the Randolph City Library Board discussed business matters regarding Nobah, a company with which the Board was in legal negotiations. Shantelle Nagunst, an assistant librarian, was asked to leave at this time due to a conflict of interest since she was a partner in the company. (Appendix C.) The Board was following the city attorney's direction who recommended the Board have Ms. Nagunst leave.

The Ombudsman informed the Board in the letter dated June 5, 2006, that he found the Board effectively held a closed session under § 21.5(1)(c) to discuss matters that are

presently in litigation. The Ombudsman concluded the Board could legally discuss litigation matters in closed session, but it failed to follow the necessary procedure for going into a closed session when it did not hold a public vote for a closed session. The Ombudsman also found the Board discussed Ms. Nagunst's termination while in closed session, a matter unrelated to the litigation. The Ombudsman concluded this violated the open meetings law because Ms. Nagunst did not request a closed session to discuss her employment status.

In the Reply, the Board defended its actions, claiming it had not held a closed session, did not vote to go into a closed session, and did not declare a closed session. The Board asserted it asked Ms. Nagunst to leave so it could discuss the litigation:

We did not have a closed session at any time. It was not voted to go into a closed session, we just asked her to leave at this particular time regarding the newspaper project. She left the building and did not return for the remainder of the meeting.

This explanation does not absolve the Board. If the Board asked Ms. Nagunst to leave the open session, the Board violated Iowa Code § 21.3, regulating open meetings. This section reads:

Meetings of governmental bodies . . . shall be held in open session unless closed sessions are expressly permitted by law. Except as provided in section 21.5, all action and discussions at meetings of governmental bodies, whether formal or informal, shall be conducted and executed in open session.

Iowa Code defines "open session" as "a meeting to which all members of the public have access." Iowa Code 21.2(3) (2005). Ms. Nagunst, as a member of the public, had the right to be present during the open session.

Conclusion: Whether or not the Board entered into a closed session or remained in an open session, its actions violated Iowa's Open Meetings law. The Ombudsman finds sufficient indicia that the Board effectively went into a closed session and in doing so, failed to follow the procedures required under section 21.5 and improperly discussed Ms. Nagunst's termination in addition to discussing legal strategy. If the Board wanted to discuss pending litigation privately, it should have followed the procedures to hold a closed session under section 21.5(1)(c). Even if the Board remained in open session, as it claims, the Board violated section 21.3 by requesting Ms. Nagunst to leave the meeting. A governmental body cannot conduct an open meeting and exclude certain members of the public of its choosing.

II. Agenda.

The Ombudsman investigated an alleged violation of Iowa Code § 21.4 relating to an agenda for the Board's January 24, 2006 meeting. This meeting was cancelled just prior to the date it was to be held, but an agenda was drawn up and distributed before the cancellation. A copy of the agenda Ms. Nagunst received had the bottom portion cut off. The Ombudsman reviewed the complete January agenda provided by Kathe Fichter, the library director. The complete agenda had a hand-written notation stating "Shantelle was

not given this information due to conflict. KLF,” and had an arrow pointing to an underlined section titled “Will ask Shantelle to leave to discuss.” (Appendix D.) Ms. Fichter later stated she did not know why Ms. Nagunst did not receive the complete agenda.

Iowa Code § 21.4(1) states reasonable notice of a public meeting shall include “posting the notice on a bulletin board or other prominent place which is easily accessible to the public and clearly designated for that purpose at the principle office of the body holding the meeting.” The Attorney General Sunshine Advisory, March 2002, states the following regarding an agenda’s content:

- Agendas must provide notice sufficient to inform the public of the specific actions to be taken and matters to be discussed at the meeting. (An agenda that merely states "Approve minutes, old business, new business" does not provide reasonable notice to the public.) Notice also must include the time, date and place of meetings.
- The precise detail needed to communicate effectively will depend on the situation, including whether the public is familiar with an issue. The less the public knows about an issue, the more detail is needed in the tentative agenda.

http://www.state.ia.us/government/ag/Sunshine_adv/advisory_Mar02_agendas.htm.
(Accessed May 25, 2006).

In his June 5 letter, the Ombudsman concluded the Board acted contrary to law by providing only a partial agenda to Ms. Nagunst. The January agenda contained adequate information to inform the public of the issues that were going to be discussed at the meeting. However, the complete agenda must be available to everyone who requests it or to whom it is provided. The Ombudsman found when Ms. Nagunst was given only a portion of the agenda, she was not provided with sufficient notice of the specific actions to be taken and the matters to be discussed.

The Board, in a response drafted by Kathe Fichter, did not offer a rationale for providing only a partial agenda to a member of the public. Instead, the Board defended itself in its Reply, stating, “[the] January meeting was cancelled and such agenda would be null and void.”

Conclusion: Even if cancellation of the meeting may have rendered the contents of the agenda null and void for purposes of the meeting, it did not negate the action associated with making an agenda available. The Ombudsman finds the Board acted contrary to law when it provided Ms. Nagunst with a partial agenda before the meeting was cancelled.

III. Proxy Voting and Voting Outside of Meeting.

The Ombudsman also inquired about proxy voting by the Board. The December minutes revealed the Board took action to terminate Ms. Nagunst’s employment. Sherry Perkins moved for her termination, and it was seconded. The minutes state, “Daisy reported that she had vote by proxy from board members Carol Scott and Cindy Heywood. The motion carried.”

Neither Library Board President Daisy Malcolm nor Library Director Kathe Fichter could reference a Board policy governing proxy voting. There appeared to have been an assumption that proxy voting was allowed, with no formal written policy being relied on. The Ombudsman was informed the Board follows the Robert's Rules of Order Newly Revised, which does address proxy voting. The relevant section provides:

A proxy is a power of attorney given by one person to another to vote in his stead; the term also designates that person who holds the power of attorney. ***Proxy voting is not permitted in ordinary deliberative assemblies unless the law of the state in which the society is incorporated require it, or the charter or bylaws of the organization provide for it. Ordinarily it should neither be allowed nor required, because proxy voting is incompatible with the essential characteristics of a deliberative assembly in which membership is individual, personal, and nontransferable.*** (RONR, 10th Edition, p. 414, l. 15-25) [emphasis added].

The Ombudsman, in his June 5, 2006 letter, said if the Board adhered to the Robert's Rules of Order Newly Revised, 10th Edition (2000), it should not have allowed proxy voting. Even if the Board did not use Robert's Rules of Order, the Ombudsman still had concerns about the legality of proxy voting, and advised the Board to consult with legal counsel if it chose to incorporate this policy.

In its Reply, the Board stated the reference to "proxy voting" in the minutes was a clerical mistake by the secretary. The Board explained:

[A]ll members were called by the President about the monthly meeting. Those who couldn't be there then had their vote declared to the President through the phone conversation.

Even if the Ombudsman accepts this explanation no proxy voting occurred, despite the Board defining this action as proxy voting in the minutes, and no previous explanation by Library officials the action was anything but proxy voting, the Ombudsman believes another violation of the open meetings law occurred.

Conclusion: Iowa Code 21.3 states "all actions and discussions at meetings of governmental bodies, whether formal or informal, shall be conducted and executed in open session," unless closed session is permitted by law. That section also requires the minutes "indicate the vote of each member present" and "[t]he vote of each member present shall be made public at the open session." [emphasis added]. There is no provision allowing a member to vote on a matter prior to and outside of the meeting at which the matter is decided. It is the Ombudsman's opinion the open meetings law implicitly prohibits such action, and what occurred in this instance as contrary to the spirit and intent of the law.

In the event the Board considered the telephone call(s) to be an electronic meeting, how it was handled did not comply with § 21.8 of the Iowa Code. The Iowa Attorney General Sunshine Advisory, July 2006, states a governmental body may meet electronically, but only if meeting in person is impossible or impracticable, and the minutes must state why a meeting in person was impossible or impracticable. (<http://www.state.ia.us/>

[government/ag/Sunshine_adv/2006July_electronically.html](#), Accessed July 14, 2006). Also, the electronic meeting can only be conducted if the public has access to hear the meeting.

The advisory provides the following points when an individual is going to participate in a meeting electronically:

- **Parliamentary procedure:** The parliamentary rules of the governmental body should be consulted to determine if they permit individual members to participate electronically.
- **Discussion:** Any member participating electronically should be connected by speaker phone or other device, so that the public can hear any discussion by that member. If the session is closed under Iowa Code section 21.5, the tape recording of the closed session must pick up the discussion by any member who is participating electronically. Iowa Code sec. 21.5(4).
- **Voting and minutes:** The vote of any member participating electronically must be made public at the open session, and the minutes must include information sufficient to indicate the vote of each member participating electronically. Iowa Code sec. 21.3. (The vote of the member should be audible to the public through a speaker connection.)

IV. Number of Members on the Board.

The Ombudsman learned the Board had six board members, though it is not known by the Board how long it has been operating with six members. The Randolph City Ordinance, which the Board had been operating under for much of this time, stated the Board was to have “three resident members.” According to Ms. Fichter, the original intent was to have six members on the Board, and at some point, whether through clerical error or otherwise, the number of members was listed at three.

It is unknown how the Board came to have six members. According to a State of Iowa Library representative, an even-numbered board is very rare. The Ombudsman received conflicting statements from Board members on what action the Board takes in cases of tie votes. One version held the president’s vote was thrown out in a tie, while another held the president had no vote at all. The Board had no written policy to rely on if confronted with a tie vote.

The Ombudsman recommended the Board consult with the city attorney and the city council about making changes in the number of Board members and necessary procedures for making the change. The Board stated in its Reply it had approached the city and will file with the State that it has voted to have five members.

V. Quorum.

The Board’s policy regarding quorums was as unique as its choice in board size. The Board required only three of its six Board members to be present at a meeting to call a quorum. The Board did not have a written policy on quorum requirements.

Iowa Code Section 372.13(1), which regulates city officers, states “[a] majority of all council members is a quorum.” The Ombudsman recommended the Board change its quorum policy from three members to four, a majority, before it calls a quorum, as required under Iowa Code § 372.13(1). The Board replied it will require three members be present at a meeting before it calls a quorum, and will add this to their policy. Because the Board has changed the number of members on the Board to five instead of six, three members make a majority of the Board, and is in accordance with Iowa law.

VI. Relying on Advice from Legal Representative and Liability.

The Board justified some of its actions pertaining to Ms. Nagunst by saying it relied on the advice of the city attorney, who no longer represents the city. It must be noted that relying on an attorney’s advice is a partial defense, but a government body may still be liable for damages. (Attorney General Sunshine Advisory, August 2004, http://www.state.ia.us/government/ag/Sunshine_adv/04August_advisory_legal_advice.html. Accessed May 25, 2006). The government body has an obligation to be knowledgeable of the applicable laws that govern its actions.

“When a violation of Open Meetings Law and Open Records Law is found by a court, each member of the governmental body who is found to have participated in the violation will be assessed damages ranging from \$100 to \$500.” (Attorney General Sunshine Advisory, December 2003, http://www.state.ia.us/government/ag/Sunshine_adv/03Dec_Non_compliance.html. Accessed May 25, 2006). In addition, “citizens who bring successful enforcement actions in court will be awarded the costs of the litigation and reasonable attorney’s fees for the trial and appeal.” If no one is assessed damages, costs and attorney fees are paid from the governmental body’s budget.

Under Iowa law, public officials who relied on legal advice for proven violations are shielded from liability for monetary damages (Iowa Code § 31.6(3)(a)(3)). According to the Attorney General Sunshine Advisory, “if no public officials remain on whom liability can be imposed, *attorney’s fees and costs are paid from the offending government body’s budget, or its parent’s budget.*” (Attorney General Sunshine Advisory, August 2004) [emphasis added]. “Reliance on legal advice is a narrow defense to assessment of monetary damages against individual public officials, or payment of attorney fees and costs by them. But, if a violation is proven, governmental bodies remain accountable.” *Id.* It is important for the Board to become familiar with the Iowa open meetings law that governs it in order to avoid liability in the future.

Recommendations

In summary, the Ombudsman makes the following recommendations:

1. The Board should not exclude any members of the public from its open meetings. If the Board wants to discuss a matter privately, it should determine if it can go into a closed session under Iowa Code section 21.5 and follow that procedure.
2. If the Board wants to go into a closed session, it should do so only under one or more of the eleven enumerated reasons stated in Iowa Code section 21.5, and only after it has followed the required procedures. In addition, the Board should limit the discussion to those matters for which it went into the closed session.

3. The Board should provide the complete agenda to all members of the public. Agendas must be posted in a prominent place that is easily accessible to the public. Agendas should contain sufficient information to inform the public the actions to be taken and matter to be discussed at the meeting.
4. Robert's Rules of Order Newly Revised, states proxy voting "is not permitted in ordinary deliberative bodies" and generally discourages its use. The Ombudsman believes it also contravenes the intent of Iowa's open meetings law for governmental decisions, and the basis and rationale for those decisions, be easily accessible to the people. Because it is highly questionable whether proxy voting is legally permissible to be used by Iowa governmental bodies, the Ombudsman recommends against its usage.
5. The Board should cease the practice of allowing a member to declare his or her own vote to the President prior to and outside the meeting at which the matter will be decided. The Ombudsman believes such action violates the intent and the implicit requirement of the open meetings law for members to deliberate and vote at the appointed meeting.
6. If the Board conducts an electronic meeting, it should ensure the public can hear the absent member through a speaker phone or other means. The minutes must state why a meeting in person is impossible or impracticable. The Ombudsman recommends the Board incorporate written rules on how and when electronic meetings will be conducted, and ensure they are in compliance with Iowa Code section 21.8.
7. The Board should ensure all its members are knowledgeable about the Iowa Open Meetings Law and Iowa Open Records Law, Chapters 21 and 22 of the Iowa Code, respectively. Relying solely on the legal council's advice will not shield the government body from liability if the body fails to follow these laws.

Ombudsman's Comment

The Ombudsman sent Randolph Public Library Board President, Daisy Malcolm, and Librarian, Kathe Fichter, a "Notice of Intent to Reply" form together with the Report on October 10, 2006. The Ombudsman offered the opportunity to reply within 30 days from the date they received the Report. Ms. Fichter returned the form and indicated a reply would follow an October 25 Board of Trustees meeting. Assistant Ombudsman Andy Teas contacted Ms. Malcolm and Ms. Fichter on November 20, 2006. Ms. Malcolm stated Ms. Fichter would reply on behalf of the Board. Ms. Fichter stated the Board had accepted the recommendations and no reply would be submitted.

Appendix A

Telephone: (515) 281-3592
Toll Free: 1-888-426-6283
TTY: (515) 242-5065
Fax: (515) 242-6007
E-mail: ombudsman@legis.state.ia.us
Website: <http://www.legis.state.ia.us/ombudsman>

STATE OF IOWA



WILLIAM P. ANGRICK II
CITIZENS' AIDE/OMBUDSMAN

June 5, 2006

CITIZENS' AIDE/OMBUDSMAN
OLA BABCOCK MILLER BUILDING
1112 EAST GRAND AVENUE
DES MOINES, IOWA 50319

Randolph Library Board
Attn. Kathe Fichter, Randolph Public Library Director
Randolph Public Library
106 S. Main
Randolph, Iowa 51649

Daisy Malcolm, President
Bernie Wolfe
Sherry Perkins
Cindy Heywood
Carol Scott
Karen Madison

Re: Open Meetings Law Violations

Dear Board Members:

I am writing regarding several alleged violations of the Iowa Open Meetings Law by the Randolph City Library Board (Board). The Office of Citizens' Aide/Ombudsman (Ombudsman) received a complaint alleging the Board did not have a quorum when it voted to terminate a library employee. During my investigation I became aware of additional violations of closed sessions and meeting notices. In addition, there appeared to be contradictory rules regarding the Board's proxy voting and the required number of members on the Board.

The Ombudsman's office is an independent and impartial investigative agency located in the legislative branch of Iowa state government. Its powers and duties are defined in Iowa Code chapter 2C.

The Ombudsman investigates complaints against Iowa state and local government agencies. The Ombudsman can investigate to determine whether agency action is unlawful, contrary to policy, unreasonable, unfair, oppressive or otherwise objectionable. After an investigation, the Ombudsman may issue an investigative report stating its findings and conclusions, as well as any recommendations for improving agency law, policy or practice. If the Ombudsman decides to publish a critical report, the agency or

its officials will have the opportunity to submit a reply which will be appended unedited to the report.

I. Closed Session.

At the December 27, 2005, meeting, the Randolph City Library Board discussed business matters regarding Nobah, a company with which the Board was in legal negotiations. Shantelle Nagunst, an assistant librarian, was asked to leave at this time due to a conflict of interest since she was a partner in the company. Kathe Fitcher, the Randolph Library Director, told me the Board was following the city attorney's direction who recommended the Board have Ms. Nagunst leave.

Iowa Code § 21.3 states, "[m]eetings of governmental bodies . . . shall be held in open session unless closed sessions are expressly permitted by law." By asking Ms. Nagunst to leave the meeting, the Board effectively created a closed meeting. Iowa Code § 21.5(1) states, "[a] government body may hold a closed session only by affirmative public vote of either two-thirds of the members of the body or all of the members present at the meeting." (Iowa Code § 21.5)

The Iowa Code does allow a governmental body to hold a closed session when it is necessary "to discuss strategy with counsel in matters that are presently in litigation or where litigation is imminent where its disclosure would be likely to prejudice or disadvantage the position of the government body in that litigation." (Iowa Code 21.5(1)(c)) I believe the Board had a legitimate reason to go into closed door session; however, it appears the board did not follow the necessary procedures for going into closed session.

I have further concerns the Board discussed additional issues not related to pending litigation while in closed session. The minutes for the December meeting do not indicate the Board allowed Ms. Nagunst to re-enter the room at any point during the meeting. Therefore, it appears the Board remained in closed session until the close of the meeting. The minutes, after Ms. Nagunst was asked to leave the meeting, briefly address the issues regarding Nobah, and then immediately address Ms. Nagunst's employment:

It may become necessary to cut back on the number of hours the library is open. It was clarified that Randolph Library is in tier 1 and cutting back on hours would not affect our state funding. Following lengthy discussion of the lawyer's recommendations, Sherry Perkins moved to dismiss Shantelle Nagunst as assistant librarian effective February 6, 2006. The motion was seconded. Daisy reported that she had vote by proxy from board members Carol Scott and Cindy Heywood. The motion carried.

The Iowa Code also provides when a governmental body may go into closed session to discuss personnel issues. Closed session is allowed to:

evaluate the professional competency of an individual whose appointment, hiring, performance or discharge is being considered when necessary to prevent needless and irreparable injury to that individual's reputation *and that individual requests a closed door session.* (Iowa Code 21.5(1)(i)) [emphasis added].

The closed session should have ended before the Board discussed Ms. Nagunst's termination from the library. When discussing personnel issues, the government body may only go into closed session when the individual whose performance is being discussed requests the body to go into closed door session. There is no indication, and library officials have never asserted, Ms. Nagunst requested a closed session. I find the Board violated Iowa's open meeting requirements under Iowa Code §21.3 when it discussed Ms. Nagunst's employment status in closed session without Ms. Nagunst's request for a closed session

II. Minutes.

In addition to following the procedures to properly enter into a closed session, it is equally important to record the procedures used to enter into and to end a closed session. Based on the minutes, it appears there were several issues discussed in the closed session after the closed session should have ended. The May 2002 Sunshine Advisory (http://www.state.ia.us/government/ag/Sunshine_adv/advisory_may02_minutes.htm) issued by the Iowa Attorney General's Office states that if a closed session is held, minutes and decisions in the open session shall include:

1. The reason for holding the closed door session, with reference to the specific legal basis.
2. The roll call vote of each member on the question of whether to go into closed session.
3. The final action on any matter discussed in closed session.

In addition to keeping proper minutes for going into and coming out of a closed session, "government bodies must keep detailed minutes of all discussion, persons present, and actions occurring at a closed session, and must tape-record the entire closed session." (Attorney General Sunshine Advisory, April 2003, http://www.state.ia.us/government/ag/Sunshine_adv/advisory_April_3_Closed_Doors.html). The minutes and tape must be sealed and maintained for at least one year under section 21.5(4). The minutes and tapes may later determine if the body closed the session properly, and determine if the body strayed into discussion not related to the purpose of the closed door session.

I find the Board failed to properly record its entrance into closed session in the minutes. Though the minutes stated the Board asked Ms. Nagunst to leave, and stated she is a partner in the company with which the Board is in legal negotiations, the minutes do not cite the legal basis for entering closed session. Nor is there reference to the roll call vote, if any, from the board members to enter closed session, and no statement of final agency action taken, if any, of the issue discussed in closed session.

III. Agenda.

Another issue I investigated related to the agenda provided to Ms. Nagunst for the January 24, 2006, meeting. This meeting was cancelled just prior to the date it was to be held, but an agenda was drawn up and distributed. A copy of the agenda Ms. Nagunst received and provided to me has the bottom portion cut off. I requested and was provided a complete January agenda from Kathe Fichter. The complete agenda I received from Ms. Fichter had a hand-written notation that stated "Shantelle was not given this information due to conflict. KLF," and had an arrow pointing to an underlined section titled "Will ask Shantelle to leave to discuss." Ms. Fichter later stated she did not know why Ms. Nagunst did not receive the complete agenda.

The Iowa Code states reasonable notice of a public meeting shall include "posting the notice on a bulletin board or other prominent place which is easily accessible to the public and clearly designated for that purpose at the principle office of the body holding the meeting." (Iowa Code § 21.4(1)). The Attorney General Sunshine Advisory, March 2002 states the following regarding an agenda's content:

- Agendas must provide notice sufficient to inform the public of the specific actions to be taken and matters to be discussed at the meeting. (An agenda that merely states "Approve minutes, old business, new business" does not provide reasonable notice to the public.) Notice also must include the time, date and place of meetings.
- The precise detail needed to communicate effectively will depend on the situation, including whether the public is familiar with an issue. The less the public knows about an issue, the more detail is needed in the tentative agenda.

Because the agendas are public record, I find the Randolph Library Board acted contrary to law by providing only a partial agenda to Ms. Nagunst. The January agenda contained adequate information to inform the public of the issues that were going to be discussed at the meeting. However, the complete agenda must be available to everyone who requests it or to whom it is provided. When Ms. Nagunst was given only a portion of the agenda, she was not provided with sufficient notice of the specific actions to be taken and the matters to be discussed.

IV. Proxy Voting.

The December minutes reveal the Board took action to terminate Ms. Nagunst's employment. Sherry Perkins moved for her termination, and it was seconded. The minutes state, "Daisy reported that she had vote by proxy from board members Carol Scott and Cindy Heywood. The motion carried."

When I inquired if there was any written policy concerning proxy voting, neither Library Board President Daisy Malcolm nor Library Director Kathe Fichter could find a policy governing proxy voting. There appears to have been an assumption that proxy voting

was allowed, with no formal written policy being relied on. I was informed that the Board follows the Robert's Rules of Order, Newly Revised, which does address proxy voting. The relevant section provides:

A proxy is a power of attorney given by one person to another to vote in his stead; the term also designates that person who holds the power of attorney. Proxy voting is not permitted in ordinary deliberative assemblies unless the law of the state in which the society is incorporated require it, or the charter or bylaws of the organization provide for it. Ordinarily it should neither be allowed nor required, because proxy voting is incompatible with the essential characteristics of a deliberative assembly in which membership is individual, personal, and nontransferable. (RONR, 10th Edition, p. 414, l. 15-25) [emphasis added].

There is no Iowa law that explicitly gives city governments authority to use proxy voting. If the Board adheres to the Robert's Rules of Order, Newly Revised, 10th Edition (2000), it should not have allowed proxy voting. Even if the Board does not use Robert's Rules of Order, I still have concerns about the legality of proxy voting, and believe the Board should consult with legal counsel if it chooses to incorporate this policy.

V. Number of Members on the Board.

The Board has had six board members for at least several years, though it is not known by the Board how long it has been operating with six members. The Randolph City Ordinance, which the Board has been operating under for much of this time, stated the Board was to have "three resident members." Library Director Kathe Fichter told me the original intent was to have six members on the Board, and at some point, whether through clerical error or otherwise, the number of members was listed at three. The city code has read "three resident members" for a number of decades. Ms. Fichter stated the city council took action recently to have this ordinance changed to allow six members.

When I asked how the Board decided on six members, Ms. Fichter stated it had always been six since she has worked for the library. When I inquired what happens when there is a tie vote, I received conflicting answers from library officials. I was told by one official that in case of a tie, the Board President's vote is thrown out. I was told by another official the Board President does not vote at all. The Board has no written policy to rely on if confronted with a tie vote.

I informed Kathe Fichter that a State of Iowa Library representative whom I had spoken with had never heard of a library board with six members. Ms. Fichter replied she was receptive to changing the number of members to an odd number, such as five, seven, or nine. Ms. Fichter believed seven members would work best for the Randolph Library Board. I agree having an odd number of members will help avoid situations where a tie vote may occur.

VI. Quorum.

The Board's policy regarding quorums was equally unique as its choice in board size. Board President Daisy Malcolm told me four voting members are required to make up a quorum. When I reaffirmed with her four members must be present at a meeting to have a quorum, she corrected me by stating they only have to have four *votes*, which is different than the number of members who must actually be present at a meeting. According to Ms. Malcolm, a "fourth vote" can be acquired by the proxy vote, discussed above, and qualify as a quorum. In addition, Kathe Fichter stated in a March 16, 2006 email that three members are needed for the President to call a quorum. When I asked if this policy was written down, Ms. Fichter stated she was not aware of any written policy.

The July 2003 Attorney General Sunshine Advisory defines a quorum as "the number of members entitled to vote who must be present in order for business to be transacted legally. The number is set by law, but different public bodies have different quorum requirements. Iowa Code dictates that for county, city and school governmental bodies, a quorum is a majority of the number of members fixed by statute. Section 372.13(1) which regulates city officers states "[a] majority of all council members is a quorum." Robert's Rules of Order, Newly Revised, 10th Edition, states in committees and boards, the quorum is a majority of the members of the board or committee unless a different quorum is fixed (1) by the bylaws, or (2) by the parent body or organization. A board does not have the power to determine its quorum unless the bylaws so provides. Robert's Rules further states the quorum "refers to the number of such members *present*, not the number actually voting on a particular question." (RONR (10th), p. 336, l. 13-22)

I find the Board did not have a quorum, and therefore violated Iowa Code § 372.13(1) when it conducted its December 2005 meeting without a majority of the board members present. Robert's Rules states in the absence of a quorum, any business transacted is null and void.

VII. Relying on Advice from Legal Representative and Liability.

The Board has justified some of its actions pertaining to Ms. Nagunst by saying it relied on the advice of the city attorney, who no longer represents the city. It must be noted that relying on an attorney's advice is a partial defense, but a government body may still be liable for damages. (Attorney General Sunshine Advisory, August 2004, http://www.state.ia.us/government/ag/Sunshine_adv/04August_advisory_legal_advice.html)). The government body has an obligation to be knowledgeable of the applicable laws that govern its actions.

"When a violation of Open Meetings Law and Open Records Law is found by a court, each member of the governmental body who is found to have participated in the violation will be assessed damages ranging from \$100 to \$500." (Attorney General Sunshine Advisory, December 2003, http://www.state.ia.us/government/ag/Sunshine_adv/03Dec_Non_compliance.html.) In addition, "citizens who bring successful enforcement actions in court will be awarded the costs of the litigation and reasonable attorney's fees for the

trial and appeal.” If no one is assessed damages, costs and attorney fees are paid from the governmental body’s budget.

Under Iowa law, public officials who relied on legal advice for proven violations are shielded from liability for monetary damages (Iowa Code § 31.6(3)(a)(3)). According to the Attorney General Sunshine Advisory, “if no public officials remain on whom liability can be imposed, *attorney’s fees and costs are paid from the offending government body’s budget, or its parent’s budget.*” (Attorney General Sunshine Advisory, August 2004) [emphasis added]. “Reliance on legal advice is a narrow defense to assessment of monetary damages against individual public officials, or payment of attorney fees and costs by them. But, if a violation is proven, governmental bodies remain accountable.” *Id.* It is important for the Board to become familiar with the Iowa open meetings law that governs it in order to avoid liability in the future.

VIII. Summary and Recommendations.

In summary, the Ombudsman makes the following findings and recommendations:

1. The Board does not appear to have entered or ended the closed session properly, or at least the procedures were not recorded in the minutes. The Ombudsman recommends the Board should ensure it states the reason for entering a closed session and take any final action in the open meeting. The Board should also ensure these procedures are accurately recorded in the minutes.
2. The Board discussed multiple issues during a closed door session. The Ombudsman recommends the Board should ensure it only discusses issues during closed session that are stated in the reasons for going into closed session. After discussing the stated issue, no additional issues should be discussed and the Board should properly end the closed session.
3. The Ombudsman recommends the Board ensure the issues it plans to discuss during closed session are allowed by law. The Open Meetings Law only allows certain topics to be discussed during closed session. Consideration of an employee’s termination may only be discussed in closed session when necessary to prevent needless and irreparable injury to the individual’s reputation, *and* when the individual requests a closed session. Since Ms. Nagunst did not request a closed session to discuss her termination, the Board acted contrary to law by discussing her termination in closed session.
4. Agendas must be posted in a prominent place that is easily accessible to the public. Agendas must contain sufficient information to inform the public the actions to be taken and matters to be discussed at the meeting. Agendas available to the public must include the same information. The Ombudsman finds the Board acted contrary to law when it provided a partial or incomplete agenda to Ms. Nagunst.

5. The Ombudsman questions whether proxy voting by the Board is permissible in the absence of a law allowing it. The Board should consult with its attorney regarding proxy voting. Even if it is permissible, proxy voting by a government body is discouraged. It is important each member of a government body have an individual, independent and nontransferable vote. If proxy voting is permissible and the Board insists on allowing proxy voting, the Board should incorporate a written policy detailing how proxy voting will be conducted.
6. Roberts Rules of Order, Newly Revised 10th Edition (2000) states the basic requirement for approving an action by a deliberative assembly is a majority vote, and a tie is not a majority. The Ombudsman believes eliminating a member's vote is not an acceptable procedure to break a tie vote, and in the case of a tie vote an action should be considered lost. The Ombudsman believes it would be preferable to have an odd-numbered board member limit. Iowa Code § 392.5 states that a "proposal to alter the composition, manner of selection or charge of a library board . . . is subject to the approval of the voters of the city" which the council can do on its own motion. The Ombudsman recommends the Board confer with the City Council and City Attorney regarding making this change and the process for doing so.
7. The Board currently requires only three members to be present at a meeting in order to call a quorum. This is not supported by written policy. Iowa Code §372.13(1) and Robert's Rules of Order, Newly Revised 10th Edition (2000), require a majority of the members to be present before a quorum exists. The Board should change its current policy and require a majority of the Board members be present before a quorum is called.
8. It is the Board's responsibility to be knowledgeable about the Iowa Open Meetings Law and Iowa Open Records Law, Chapters 21 and 22 of the Iowa Code, respectively. Relying solely on the legal council's advice will not shield the government body from liability if the body fails to follow these laws.

I am providing you with the following resources to assist the Library Board with on-going education and training on the Board's responsibilities regarding Public Records and Open Meetings laws:

- Ten copies of the "Iowa Open Meetings, Open Records Handbook" published by the Iowa Freedom of Information Council.
- The Iowa Attorney General's office publishes monthly bulletins called Sunshine Advisories, which I have cited throughout this letter, to advise citizens and government officials about their rights and responsibilities regarding Iowa Open Meeting's Law and Public Records Law. These bulletins are available at:
http://www.state.ia.us/government/ag/Sunshine_adv/sunshine.html

- If the City is a member of the Iowa League of Cities, utilize the training resources and publications available from this organization.
9. Given the above findings of Iowa Open Meetings Law violations, the Board should consult with its city attorney regarding what remedial action is appropriate and should be taken.

XI. Action Requested

Thank you for your time and cooperation in this investigation. I believe I have accurately presented all of the relevant information collected. I make my recommendations based on all the information collected pursuant to Iowa Code section 2C.16. I believe my recommendations, if implemented, will improve the Board's conduct of meetings.

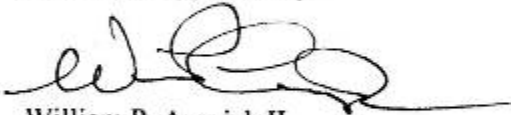
Please notify me in writing within thirty (30) days of your receipt of this letter of any action taken or intended on my recommendations or the reasons for not complying with them. Tell me which recommendations will be implemented; and, for those recommendations you do not accept, your reasons for not accepting them. Depending on your response to the recommendations, the Ombudsman may or may not issue a public report. If you have any questions, please contact me at 515-281-4739. Again, thank you.

Sincerely,



Andy Teas
Assistant Citizens' Aide/ Ombudsman

Reviewed/Approved by:



William P. Angrick II
Citizens' Aide/Ombudsman

cc: Steven H. Krohn, Smith Peterson Law Firm, LLP, 35 Main Place, Suite 300, P.O. Box 249, Council Bluffs IA 51502-0249

Enclosure: Iowa Open Meetings, Open Records Handbook, 10 copies.

R0600432a

Appendix B

Randolph Public Library

To: Ombudsman

Attention: Anton Anday

1. Closed Session
We did not go into closed session. We did not declare a closed session. We asked the employee Shantelle Nagunst to leave so we could discuss the Randolph Newspaper Project. She is a partner in Nobah who was doing our work. She left and went home and she did not come back to the building. We then proceeded with our business. The use of the word "proxy" was not correct by the secretary. The board president had called on the phone and visited with all members for their opinions and votes as some could not attend.
2. January meeting was cancelled and such agenda would be null and void. The next proper meeting would be held in February the 4th Tuesday of the month as listed on the window of the Library. We were in contact with our Lawyer on proceedings of dismissal.
3. Proxy voting: This was a word that was used wrong by the secretary. She meant that all members were contacted by the President about the monthly meeting . Those who could not be there then had their vote declared to the President through the phone conversation. An anonymous letter was sent to them about them not being official on the board. They did not want conflict from this volunteered job so they resigned.
4. Roberts Rules of Order : are a *guideline* for us. We have used this process (somewhat loosely) for over 30 years. We have an agenda we proceed from and do offer comments from the floor from visitors during meetings. We have never limited the time they speak and value their input. We have never told a visitor they could not speak and all are greeted when entering the door.
5. Board members: According to the State Library of Iowa we have filed with them when the Library was formed 4 city and 3 rural members. At some time the code book in Randolph was revised to 3 members from the city without our knowledge. When I came on as a trustee 33 years ago, there were 2 rural and 4 city. I was one of the rural members out of 2. This is my mistake in not looking at the official filed report at the State Library when I was made Librarian. The President did not have a vote unless a tie breaker was needed at the meetings I had attended, she just conducted the meetings. I assumed this was proper. In a small town it is hard to find qualified volunteers. We have since approached the city and will file with the state that we have voted to have 5 members. One rural and four city. This will give us the odd number of members and they will have 2,4,6 year staggered terms. I believe that the code book has not had a revision yet, and this will be sent to the state for revision.
6. Three (3) members must be present at a meeting to call a quorum. The President shall declare "a quorum is present" and so duly noted by the secretary's minutes. This will be added to our laws.

7. We used the legal advice of the city attorney, before his resignation as city attorney, because we wanted to make sure we were correct in our procedures. We wanted to make sure we were handling this correctly in her termination and according to him and his legal advise, we proceeded. We did not have a closed session at any time. It was not voted to go into a closed session, we just asked her to leave at this particular time regarding the newspaper project. She left the building and did not return for the remainder of the meeting. We hope we have covered all possible questions and recommendations. We in no terms had any intention of not proceeding with her termination that was not legal. She did not fulfill her duties as were required, budget constraints and with circulation so poor that we are not meeting state requirements action had to be taken. We feel we made the right decision for our Library. We have still to make the decision what to do for the next fiscal year.

At this time I, and a few volunteers are running the library but I will have to curtail my time as I will be back at my job as a school librarian this fall. This spring I came after school to be open for 2 hours each day. Children want only to play games on the computers and not read, our older population is dwindling, we have major concerns to consider. Hopefully things will look up for us in the coming years and the Library will be a major center for our citizens once again and we can meet the state requirements.

Respectfully

Kathe Fichter, Director
Randolph Public Library
July 7, 2006

Appendix C

Randolph Library Board Meeting
December 27, 2005

Present: Daisy Malcom, Sherry Perkins, Shantelle Nagunst, Kathe Fichter, Barb Wolfe

The meeting was called to order by Daisy Malcom. The minutes of the November meeting were read and approved.

The Librarian's report was reviewed. Kathe added the following items to the agenda: pictures on the internet, Fremont County Attorney paper on library break-in, cataloging grant, Helen and Ralph Carl Grant. Sherry Perkins moved we accept the librarian's report. The motion was seconded and carried.

New Business:

- There was discussion of developing a long range plan for the library. Suggestions to be thinking about include: regular library events to increase book circulation, limitation on time spent on computers, historical resource. Further work on this plan will be done at our next meeting.
- Library rates for mail are going up. We need to monitor the cost of our ILL program.
- Library patrons need to be reminded to log off the computer when finished, but do not shut down.
- Finance report was reviewed.
- There is an excessive number of overdue items. It is necessary to be more firm about overdue items. Make sure fines are collected. A list of overdue items needs to be posted – do not allow patrons with overdue items to check out new items.
- We need to purchase anti virus programs for the computers. It may total up to \$200 for all computers. We could use money from Enrich and Direct Aid for this purchase.
- Pictures of library patrons should not be posted on any website .
- Kathe will complete the paper on the library break-in and return it to the Fremont County Attorney's office.
- Marc Wizard can be downloaded any time.
- Kathe received notification that the Ralph Carl Grant proposal for \$1200 has been approved.

Assistant Librarian Shantelle Nagunst was asked to leave the meeting at this time. Shantelle is a partner in Nobah and we are currently in legal negotiations with this company. Kathe and Daisy provided an update on their discussion with Mr. Wearin. It may become necessary to cut back on the number of hours the library is open. It was clarified that Randolph Library is in tier 1 and cutting back on hours would not affect our state funding. Following a lengthy discussion of the lawyer's recommendations, Sherry Perkins moved to dismiss Shantelle Nagunst as assistant librarian effective February 6, 2006. The motion was seconded. Daisy reported that she had vote by proxy from board members Carol Scott and Cindy Heywood. The motion carried.

The next meeting will be by January 24, 2006.
Sherry Perkins moved the meeting be adjourned. The motion was seconded and carried.

Barb Wolfe, Secretary

Appendix D

Library board of trustees: January 24, 2006

Librarian's report

Items we need to work on to meet state guidelines for funding

- 1) In service to Iowa Public Library Measures of Quality 12)* must meet
PLAN: A document that projects up to 5 years into the future and outlines the library's goals and objectives for maintaining and developing collections and services to meet the community's needs.
 - a) mission statement which describes the library's purpose in the community
 - b) addresses community needs and shows goals to be achieved over a period not to exceed five years and specific, annual actions to achieve the goals
 - c) plan is reviewed and updated annually by the library board; an evaluation of the library's progress toward the plan's goals, objectives and timetable
- 2) Must meet: The library conducts a community analysis at least every five years as part of its planning efforts.
 - a) Survey on computers in homes
 - b) Survey on computers with internet connection
 - c) Wireless, high speed and dial up
 - d) Use of Library computers for continuing education
 - e) What patron generally uses the computer for in the Library
 - f) Would patrons like computer classes
- 3) Must meet: Circulation per capita
 - a) Library determines the number of items that circulate. Circulation per capita is computed by dividing total circulation by jurisdiction population. Level C/not less than .5
 - b)

**COMPUTERS FOR GAMES: VOTE 1/2 HOUR OR 1 HOUR PER WEEK

Kattie Roberts has been taking computer courses through Peru, her knowledge has been helpful with the computers.

Will ask Shantelle to leave to discuss:

← Shantelle was not given this information due to conflict
KLF

Newspapers:

I am having the disks looked at by a professor of computer/technology at Peru college. Kattie Roberts will be taking them down this week. All of our disks will not open and says insert disk in drive. This includes the program he showed us at our board meeting. Problem could be/ what we need to know:

1. What program written in and can it be converted
2. In what program does it become word searchable
3. any passwords or security codes are on disks to keep us from using disks
4. what program does Dave have on his computer that would read/open/print that we need to have
5. does his computer have all this information on his hard drive

Lawyer: Next step needed to collect our money and information if on Dave's hard drive

IOWA West foundation: Letter sent about project a month ago...no answer yet.