

Office of
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State of Utah

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School Boards Closed Meetings Do Not Comply with Statute

Most of Utah's local school boards do not fully comply with Utah's Open Meetings Act. Specifically, most school boards we reviewed are not keeping adequate records, are not reviewing the minutes they do keep, and follow questionable closed meeting practices making it impossible to determine the appropriateness of many closed meeting discussions. These problems are compounded because most school boards meet more frequently in closed meetings than other public bodies or boards that are subject to the Open Meetings Act. School boards' actions do not comply with the law and raise concern that school boards may be circumventing the legislative intent of the Open Meetings Act that the "peoples business" be done openly and in the public.

School districts vary on how they interpret compliance with provisions of the Open Meetings Act, thus displaying a wide variety of closed meeting procedures. District officials explain this variation by reporting that school board members and district staff have received insufficient and inconsistent training on the legal requirements of closed meetings from the Utah School Boards Association (USBA) and the Utah State Office of Education (USOE). Because of these varying interpretations, the Legislature may need to clarify provisions of the Open Meetings Act.



**School boards may
be circumventing
the Legislative intent
of the Utah Open
Meetings Act.**

The office of the Utah Legislative Auditor General was requested to conduct a performance audit of school boards compliance with the Open Meetings Act. *Utah Code* section 52, chapter 4 titled Open and Public Meetings, or the Open Meetings Act as referred to in this report, sets provisions for public bodies to hold meetings and requirements of those meetings. The Open Meetings Act also specifies reasons for closing meetings and procedures to be followed when a public body meets in a closed meeting. The following sections discuss this review in greater detail.

School Boards Are Not Following Closed Meeting Requirements

Most Utah school boards that we reviewed do not comply with all of the provisions of the Open Meetings Act. School boards generally follow procedures of the Open Meetings Act for open meetings, but do not follow procedures for closed meetings. Of particular concern, school boards are not keeping adequate minutes of closed meeting discussions. School boards typically do not review or approve their closed meeting minutes and the lack of closed meeting minutes is a problem that is magnified by the fact that school boards meet in closed sessions more frequently than other public bodies. Another concerning aspect is the variety of ways that the Open Meetings Act is being interpreted by school districts.

School boards generally follow the Open Meetings Act procedures for open meetings, but do not follow procedures for closed meetings.

We reviewed school boards compliance with the Open Meetings Act by reviewing records and interviewing staff at ten school districts: Salt Lake, Jordan, Nebo, Tooele County, Granite, Provo, North Sanpete, Carbon, Iron County and Washington County. These school districts represents 25 percent of the forty school districts in the State of Utah. We selected these school districts to ensure that rural and urban school districts, both on and off the Wasatch Front, were reviewed. We interviewed staff charged with the responsibility of maintaining records for the school boards. Specifically, interviewing superintendents, business administrators and board secretaries where applicable. Staff and records at the Utah State Office of Education (USOE) and several state agencies were also reviewed in order to compare how frequently other public bodies were meeting in closed sessions.

School Boards Closed Meeting Minutes Are Insufficient

In most instances, records were insufficient to assess the validity of the closed meeting discussions.

School boards generally tape record and keep detailed written minutes of their open meetings, but this is not the case for closed meetings. Most school boards do not tape record closed meetings or keep detailed written minutes of their closed meeting discussions. Without further explanations records were insufficient to assess the validity of the closed meeting discussions. In most instances, when closed meeting minutes were kept, the minutes contained only summary information about the topic discussed, that information was so brief that further explanations had to be sought from district officials to obtain an explanation of the actual topics of discussion.

We reviewed the open and closed meeting minutes dating back to January 2004 and found that of the ten school boards reviewed, closed meeting minutes for eight school boards were not in compliance with the Open Meetings Act. Specifically, four school boards did not keep minutes of their closed meetings. The other six school boards did, but four of the school boards minutes were determined to be of insufficient detail and the other two were of sufficient detail. Of the two school boards whose minutes were in compliance with the Open Meetings Act, one keeps detailed written minutes and the other one records their closed meetings.

Minutes were considered sufficiently detailed if a review of the minutes could, without outside explanation, determine the appropriateness of the discussion. According to legal counsel, such a review is what a court would do if the legality of a closed meeting discussion was ever called into question (which will be discussed later in this report). Figure 1 illustrates the type of minutes that each reviewed district maintains.

Figure 1. Review of closed meeting minutes maintained by school boards. Most school boards only keep summary minutes of closed meeting discussions or no minutes at all.

School District	Closed Meeting Minutes Comply with Law	Reason(s) Why
Jordan	No	No closed meeting minutes kept
Nebo	No	No closed meeting minutes kept
N. Sanpete	No	No closed meeting minutes kept
Iron Co.	No	No closed meeting minutes kept
Salt Lake	No	Summary- Insufficient detail
Granite	No	Summary- Insufficient detail
Provo	No	Summary- Insufficient detail
Washington Co.	No	Summary- Insufficient detail
Tooele Co.	Yes	Detailed- Records and keeps summary minutes.
Carbon	Yes	Detailed

Note: Under the reason(s) why column, detailed means the minutes contained sufficient detail for us to make an independent assessment of the appropriateness of the discussion, summary- insufficient detail, means that the minutes contained some detail but were often insufficient for us to make an independent assessment as to the appropriateness of the discussion. No closed meeting minutes kept includes boards that only acknowledge in open meeting minutes that a closed meeting occurred.

According to legal counsel, the closed meeting records of Jordan, Nebo, North Sanpete, and Iron County School Boards do not constitute minutes. While the open meeting minutes of these school boards often show the motions, time(s), attendance, and reason(s) for closed meetings, no other specific records are kept of the closed meetings. District officials from these school districts reported that they were not aware that anything else was supposed to be maintained, often times citing the reasoning, that no motions are made in closed meetings.

The superintendent of Nebo School District started keeping handwritten notes of closed meetings in November 2004, but these notes only contained a list of the topics discussed. As will be shown in a later section of this report, we believe that these four school boards are not in compliance with the Open Meetings Act.

Salt Lake, Granite, Provo, and Washington County School Boards keep closed meeting minutes that contain greater detail, but often the minutes did not contain enough information to assess whether or not the topic discussed was appropriate for a closed meeting. To verify whether or not the topic of discussion was appropriate for a closed meeting, we had to rely on the explanations provided by district officials. As will be shown in a later section of this report, we believe that the closed meeting minutes of these four school boards are also not in compliance with the Open Meetings Act.

Tooele County School District tape records their boards closed meetings and also types-up summary minutes of those meetings. Carbon School District keeps detailed written minutes of their closed meetings. We were able to independently determine the appropriateness of these two school boards closed meeting minutes by reviewing the records alone.

Boards Not Reviewing Closed Meeting Minutes

School boards will acknowledge closed meetings in their open meeting minutes, but most school boards do not have closed meeting minutes or review the closed meeting minutes they do have. Of the ten school boards reviewed, only two had a member of the board actually review and/or approve the closed meeting minutes. Carbon and Tooele County School Districts have their Board Presidents review and approve the closed meeting minutes. Consequently, these were the only two districts whose closed meeting minutes were in compliance with the Open Meetings Act.

The Open Meetings Act does not require approval of closed meeting minutes. However, closed meeting minutes are an official record of a public body, and it is implied that they be reviewed and approved. Having the school board review and approve the closed meeting minutes will also aid school districts in verifying that their closed meeting minutes are adequate and appropriate.

Approval of closed meeting minutes can be done by the board's presiding officer, or the board as a whole in an open meeting as long as there is no discussion revealing information that would defeat the purpose of closing the meeting in the first place. We found that the Utah Transportation Commission formally approves their closed meeting minutes in the same manner as their open meeting minutes, in an open

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meeting. The Transportation Commission does not discuss the detail of the closed meeting minutes, but give the closed meeting minutes a simple yes or no vote for approval. We view approval of closed meeting minutes as an important control for public bodies who meet in closed meetings and one that should be incorporated by school boards.

Closed Meeting Frequency and Other Practices are Concerning

School boards generally meet often in closed meetings when compared to other public bodies in the executive branch and have closed meeting practices that are concerning. Specifically, discussions with district officials and review of the records have shown that school boards are having frequent discussions in closed meetings that should be taking place in open meetings and some school boards are moving from closed to open meetings inappropriately.

Most school boards hold a closed meeting during every regular board meeting. Some school boards meet much more frequently in closed meetings than other school boards. For example, Iron County School Board only held eight closed meetings over the last sixteen months while Washington County School Board held approximately thirty-two closed meetings in the same time period. The fact that school boards meet frequently in closed meetings combined with the lack of records taken of closed meeting discussions raises the concern that school boards may be circumventing the legislative intent of the Open Meetings Act that the “peoples business” be done openly and in the public.

Other public bodies generally do not meet in closed meetings as frequently as local school boards do. We interviewed staff and reviewed records for the Utah State Board of Education, the Utah State Building Board, the Utah Transportation Commission, and the Department of Environmental Quality and found varying degrees of lesser frequency. Education appears to rely more heavily on closed meetings. Utah State Office of Education (USOE) staff reported that the State Board of Education needs to meet in closed sessions to address a high volume of professional conduct cases.

The Utah State Board of Education meets regularly in closed meetings, while executive branch agencies typically do not meet in closed sessions. As examples, the Utah State Building Board has only met in four closed

School boards generally meet often in closed meetings when compared to other public bodies in the executive branch.

A fair amount of inappropriate discussions are taking place in closed meetings.

Opening the door from a closed meeting does not constitute an open meeting.

District officials have reported to us that the training they have been receiving from the USOE and the USBA has been minimal at best.

sessions in the last six years. The Transportation Commission has only met in a closed session twice in the last three years, and the Department of Environmental Quality believe they have only held one closed board session in the last ten years.

Besides the frequency of school boards closed meetings, the amount of discussions taking place in closed meetings that should be taking place in open meetings is also concerning. For example, in one district the board talked about the possibility of a program expansion and the superintendent sought guidance from the board regarding taxing levies—all in a closed meeting. Most of the inappropriate discussions were informational in nature, but nonetheless should have been discussed in an open meeting. In districts where closed meeting minutes were not kept, it was impossible to independently validate what was discussed. But, in a number of instances, staff was able to identify inappropriate discussions occurring in closed meetings.

Another concerning practice found in four school districts was that of physically opening the door in a closed meeting and therefore considering the meeting open. Officials in these four districts told us that if a closed meeting discussion drifts into something inappropriate for a closed meeting they either stop the discussion or open the doors. This is concerning because just opening the door is not holding an open meeting, but it is in the opinion of some district officials. Clearly, this practice and others previously discussed do not adhere to provisions of the Open Meetings Act. Part of the problem why closed meeting requirements are not being followed could be attributed to insufficient training.

District Training Has Been Insufficient and Inconsistent

School district training on the requirements of the Open Meetings Act has been insufficient and inconsistent. District officials report that the training they have been receiving from the Utah State Office of Education (USOE), and the Utah School Boards Association (USBA) has been minimal at best, taking on the form of only answering questions when they arise.

District officials reported that they have received training on the reasons for closing a meeting, but no real training on the record requirements of closed meetings. District officials reported that the only

School District officials reported that their training suggested that summary minutes for closed meetings were acceptable.

form of training they have received from the USOE and the USBA addressing the minute requirements of closed meetings has been in the form of answers to specific questions brought up in general meetings. They also report that they received the advice that summary only minutes for closed meetings is acceptable.

Officials from six of the ten districts we visited reported to us that the advice they have received from either the USOE or the USBA is that summary minutes is all that is needed for closed meetings. Some also reported that they have been advised that the less information contained in closed meeting minutes, the better. We view this advice as a direct contradiction to the Open Meetings Act requirement of tape recordings or detailed written minutes of closed meetings.

It is clear that the actual minutes of school boards closed meetings vary substantially in the way school boards interpret and implement the Open Meetings Act. District officials informed us that further clarification on what constitutes closed meeting minutes would be helpful to them.

The Open Meetings Act Specifies Reasons and Procedures for Closed Meetings

The Utah Open Meetings Act was enacted by the Legislature to ensure that the “people’s business” is done publicly and in the open. The *Utah Code* 52-4-1, Declaration of Public Policy, states:

In enacting this chapter, the Legislature finds and declares that the state, its agencies and political subdivisions, exist to aid in the conduct of the people’s business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

While the Legislature enacted the Open Meetings Act to ensure openness in public proceedings, some exceptions provide for public bodies to close meetings. The Legislative intent of the closed meeting provisions is to protect the public’s interests or an individual from premature disclosure of sensitive information. Figure 2 identifies the reasons a public body may close a meeting.

The Utah Open Meetings Act was enacted to ensure that the people’s business was done publicly and openly.

Figure 2. Utah Code 52-4-5—Purposes of closed meetings. These exceptions are the only reasons a public body may close a meeting under the Open Meetings Act.

(1) (a) A closed meeting may be held pursuant to Section 52-4-4 for any of the following purposes:

(i) discussion of the character, professional competence, or physical or mental health of an individual;

(ii) strategy sessions to discuss collective bargaining;

(iii) strategy sessions to discuss pending or reasonably imminent litigation; or

(iv) strategy sessions to discuss the purchase, exchange, or lease of real property when public discussion of the transaction would disclose the appraisal or estimated value of the property under consideration or prevent the public body from completing the transaction on the best possible terms;

(v) strategy sessions to discuss the sale of real property when:

(A) public discussion of the transaction would disclose the appraisal or estimated value of the property under consideration or prevent the public body from completing the transaction on the best possible terms;

(B) the public body had previously given public notice that the property would be offered for sale; and

(C) the terms of the sale are publicly disclosed before the public body approves the sale;

(vi) discussion regarding deployment of security personnel, devices, or systems; and

(vii) investigative proceedings regarding allegations of criminal misconduct.

To protect the interests of the public and individual(s), there are seven purposes for a closed meeting.

The seven purposes listed in Figure 2 are the only allowable closed meeting discussions by the Open Meetings Act. The Utah Supreme Court interprets the Open Meetings Act broadly to further the declared statutory purpose of openness, it therefore follows that the reasons for closure of a meeting follow the statute.

In an excerpt from a unanimous Utah Supreme Court decision, *Kearns-Tribune Corp. V. Salt Lake County Commission* (2001), Justice Wilkins wrote:

The general nature and tone of the seven exceptions in section 52-4-5(1), however, suggest a clear legislative intent to ensure that the public's business is done in full view of the public except in those specific instances where either the public, or a specific individual who is the subject of the meeting, may be significantly disadvantaged by premature public disclosure of sensitive information.

In addition to specifying why public bodies may close a meeting, the Legislature also requires that meeting records be maintained. Figure 3 identifies acceptable record keeping for closed meetings.

Figure 3. Utah Code 52-4-7.5. Record of closed meetings. These provisions clearly state that public bodies are required to document closed meeting proceedings.

(1) If a public body closes a meeting to discuss the character, professional competence, or physical or mental health of an individual under Subsection 52-4-5(1)(a)(i) or to discuss the deployment of security personnel, devices, or systems under Subsection 52-4-5(1)(a)(vi), the person presiding shall sign a sworn statement affirming that the sole purpose for closing the meeting was to discuss:

(a) the character, professional competence, or physical or mental health of an individual; or

(b) the deployment of security personnel, devices, or systems.

(2) (a) If a public body closes a meeting under Subsection 52-4-5(1) for any purpose other than to discuss the character, professional competence, or physical or mental health of an individual or to discuss the deployment of security personnel, devices, or systems, the public body shall either tape record the closed portion of the meeting or keep detailed written minutes that disclose the content of the closed portion of the meeting.

Public bodies that close a meeting are expected to maintain records of the closed meetings.

If the content of a closed meeting was ever called into question, the courts are charged with the responsibility of reviewing the records to determine their legality.

According to *Utah Code* 52-4-7.5, public bodies are required to keep tape recordings of closed meetings or detailed written minutes that disclose the content of the closed portion of the meeting, unless the sole purpose of the closed meeting was to discuss the character, professional competence, or physical or mental health of an individual or the deployment of security personnel, devices or systems. In those instances, a sworn statement signed by the presiding person stating that this was all that was discussed is sufficient.

The closed meeting minute requirements of the Open Meetings Act assists a public body that convenes into a closed session validate that the meeting was legally appropriate. If the content of a closed meeting was ever called into question, the courts are charged with the responsibility of reviewing the records to determine their legality. Figure 4 addresses the action challenging closed meetings.

Figure 4. *Utah Code* 52-4-10. Action challenging closed meeting. These provisions charge the courts with the responsibility of determining the legality of closed meeting discussions by reviewing the records.

- (1).....in any action brought under the authority of this chapter to challenge the legality of a closed meeting held by a public body, the court shall:
- (a) review the tape recording or written minutes of the closed meeting in camera; and
 - (b) decide the legality of the closed meeting.
- (2)(a) If the judge determines that the public body did not violate the law governing closed meetings, the judge shall dismiss the case without disclosing or revealing any information from the tape recording or minutes of the closed meeting.
- (b) If the judge determines that the public body violated the law governing closed meetings, the judge shall publicly disclose or reveal from the tape recordings or minutes of the closed meeting all information about the portion of the meeting that was illegally closed.

School boards practices with regards to closed meetings is concerning because many districts are not fully complying with the Open Meetings

Act. In most cases, closed meeting minutes are insufficient to make an independent assessment of the appropriateness of the closed meeting discussions. In many cases, if a closed meeting discussion of a school board was ever called into question, a judge would be unable to determine the legality of the discussion by reviewing the records that most school boards are currently maintaining. Because interpretations of the Open Meetings Act varies, the Legislature may want to consider clarifying the statute.

Interpretations of the Open Meetings Act Varies

The manner in which districts implement the Open Meetings Act for closed sessions varies substantially. While school districts similarly implement open meeting requirements, they vary in their interpretation of requirements for closed meetings. School districts interpretations of closed meeting requirements have resulted in practices that inappropriately minimize the importance of closed meeting records. For further clarification we sought legal opinions on the requirements for closed meetings from the Attorney General’s Office and from Legislative General Counsel.

Law Requires Detailed Minutes of Closed Meetings

Legislative General Counsel and the Utah Attorney General’s Office agreed that the statute clearly requires tape recordings or detailed written minutes. Minutes for closed meetings, if not tape recorded, need to be more detailed than those of open meeting minutes. We were informed by Legislative General Counsel that one could look at the open meeting minutes as a baseline, and closed meeting minutes require significantly more detail.

We also reviewed the procedures of the Utah Judicial Council on the minutes they require for their council meetings. Figure 5 shows Rule 2-104— Minutes of Council Meetings. Taken from the Judicial Council Rules of Judicial Administration.

Closed meeting minutes, if not recorded, need to be detailed.

Figure 5. Judicial Council Rules of Judicial Administration. Rule 2-104—Minutes of Council meetings. These rules state requirements for Judicial Council open meeting minutes and that closed meeting minutes are to contain the same level of detail, unless the discussion is about an individual or the deployment of security.

(1) Written minutes shall be kept of all open meetings of the Council. Minutes shall include:

(1)(A) the date, time, and place of the meeting;

(1)(B) the names of members present and absent and the names of staff and guests present;

(1)(C) the substance of all matters proposed, discussed, or decided;

(1)(D) the substance of the testimony of guests and the reports of staff or a summary reference to such testimony or report if a copy thereof is filed with the minutes;

(1)(E) a record of the vote taken on any question, and, if the vote is a roll call vote, a record of the vote of individual members; and

(1)(F) any other information that any member requests be entered in the minutes.

(4) Written summary minutes of closed Council meetings shall be kept. Summary minutes are public records and shall be made available for inspection and copying within a reasonable time after Council approval. Summary minutes shall include:

(4)(A) the date, time and place of the meeting;

(4)(B) the names of members present and absent;

(4)(C) the names of all others present, unless disclosure would infringe on the confidence necessary to fulfill the original purpose of closing the meeting;

(4)(D) the reason for holding the closed meeting; and

(4)(E) the vote, either for or against the motion to hold a closed meeting, cast by each member by name.

(5) In addition to summary minutes, if the meeting is closed for any purpose other than to discuss the character, competence, or physical or mental health of an individual or to discuss the deployment of security personnel or devices, the meeting shall be recorded or written minutes shall be kept as for an open meeting.

The Judicial Council enacted rules to ensure that they were in compliance with the Open Meetings Act. They list the requirements for open and closed meeting minutes in their administrative rules in accordance with the *Utah Code*. In rule 2-104(5), the Judicial Council interprets the language of detailed written minutes for closed meetings as containing the same level of detail as open meeting minutes. It states,

“...the meeting shall be recorded or written minutes shall be kept as for an open meeting.” The Judicial Council also defined what constitutes open meeting minutes in rule 2-104 1(A) thru 1(F).

Staff from the Attorney General’s Office and Legislative General Counsel interpret the closed meeting minute provisions of the Open Meetings Act as requiring more detail than open meeting minutes. The Judicial Council’s Administrative Rules require closed meeting minutes to contain the same level of detail as open meeting minutes. School boards, on the other hand, vary substantially in how they interpret the closed meeting minute requirements of the Open Meetings Act, they range from detailed minutes to summary minutes to no minutes at all.

Clarification of Statute Might Be Needed

Because various entities are interpreting the Open Meetings Act differently, the Legislature may want to consider revising *Utah Code* 52-4-7.5 (2)(a), clarifying the current language of “... the public body shall either tape record the closed portion of the meeting or keep detailed written minutes that disclose the content of the closed portion of the meeting.” Clarifying the word “detailed” may help resolve some of the confusion surrounding what is actually expected.

The Open Meetings Act currently lacks adequate provisions to compel public bodies to comply with the law if they choose not to. Currently, the only sanctions provided for non-compliance are found in *Utah Code* 52-4-9, which requires an individual(s) to file suit in order for the Open Meetings Act to be enforced. It reads:

- (1) The attorney general and county attorneys of the state shall enforce this chapter.
- (2) A person denied any right under this chapter may commence suit in a court of competent jurisdiction to compel compliance with or enjoin violations of this chapter or to determine its applicability to discussions or decisions of a public body. The court may award reasonable attorney fees and court costs to a successful plaintiff.

We agree with the interpretation provided to us by Legislative General Counsel, that closed meeting minutes should be more detailed than open

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meeting minutes. Closed meeting minutes need to be detailed because the business done in closed meetings is not done in the public's eyes. School boards closed meeting minutes can be detailed without fear of sensitive information being released because recordings and written minutes of closed meetings are protected records under Title 63, Chapter 2 of the Government Records Access and Management Act.

The Legislature may want to consider strengthening sanctions for non-compliance with the Open Meetings Act to ensure that public bodies are complying with all of the provisions of the law. Further, the Legislature may want to explore mandatory training for public bodies subject to the Act.

Recommendations

1. We recommend that the Legislature consider revising *Utah Code* 52-4-7.5 (2)(a), to clarify the need for closed meeting minutes to contain detailed, substantive information on all matters discussed.
2. We recommend that the Legislature consider studying methods to gain greater compliance with the Open Meetings Act.
3. We recommend that the Legislature consider requiring public bodies or the presiding officer of a public body to review and approve closed meeting minutes.
4. We recommend that the Utah Attorney General issue a directive to all public bodies subject to the Open Meetings Act clearly stating the legal requirements for public bodies, with an emphasis placed on closed meeting requirements.
5. We recommend that the Utah State Office of Education provide clear and consistent training on an annual basis to school district superintendents and business administrators on the provisions of the Open Meetings Act, with an emphasis on closed meeting requirements.

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Agency Response

June 26, 2005

John M. Schaff
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Dear Mr. Schaff:

Thank you for allowing us to review the Exposure Draft of the *School Boards Closed Meetings Do Not Comply with Statute* report (Report No. 2005-08). The Utah State Office of Education (USOE) has reviewed the draft carefully and has visited with Brian Dean, Chief Auditor. We appreciate Brian's time and deliberation in this audit report.

We concur with the audit findings and support a clarification of roles and responsibilities surrounding adherence to the Open Meetings Act. As the USOE, by statute, does not now have responsibility for ensuring local board and district compliance, and whereas the Utah School Boards Association (USBA) has taken responsibility for the training of local boards and new board members in the past, we are hopeful that any revision will provide clarification of responsibilities for such compliance. It may be reasonable to expect that the USOE would provide training to superintendents and business administrators and that the USBA would do so for board members.

Thank you, again, for the opportunity to review the report. We will plan to attend the public review of this audit as it is scheduled.

Sincerely,



Patti Harrington, Ed.D.
State Superintendent of Public Instruction