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December 3, 2021

Via U.S. Mail and Email

Sylvia Lazos

[REDACTED]

[REDACTED]

Email: [REDACTED]

Danielle Ford

[REDACTED]

[REDACTED]

Email: [REDACTED]

**Re: Open Meeting Law Complaint, OAG File No. 13897-410,
Clark County School District Board of Trustees**

Dear Ms. Lazos and Ms. Ford:

The Office of the Attorney General (OAG) is in receipt of your complaints alleging violations of the Open Meeting Law (OML) by the Clark County School District Board of Trustees (Board) regarding private gatherings with the Board's counsel leading up to its May 13, 2021 meeting.

The OAG has statutory enforcement powers under the OML, and the authority to investigate and prosecute violations of the OML. Nevada Revised Statutes (NRS) 241.037; NRS 241.039; NRS 241.040. In response to your complaints, the OAG reviewed your complaints; the Board's responses and attachments; and the agenda, minutes and video recording for the Board's May 13, 2021, meeting. After investigating the matter, the OAG does not find a violation of the OML.

FACTUAL BACKGROUND

The Board is created by NRS Chapter 386 and is comprised of elected officials. It is a "public body" as defined in NRS 241.015(4) and subject to the OML.

In early 2021, a dispute arose between the Board and its Superintendent, Jesus Jara, regarding the interpretation of Superintendent Jara's employment contract. Multiple gatherings occurred between a quorum of Board Trustees and the Board's attorney, Mary-Anne Miller, between January and May 2021, regarding threatened litigation and settlement efforts in the contract dispute. These gatherings were not open to the public.

In April 2021, Ms. Miller held an attorney-client session with a quorum of the Board wherein she discussed the status of settlement efforts and inquired of the Board Trustees their preferences with respect to the direction of her representation. There are allegations that Board Trustees were polled during this meeting. Subsequent to the April attorney-client session, Superintendent Jara made statements to third parties regarding an agreed contract extension that had not yet gone before the Board.

On May 13, 2021, the Board held a public meeting. An extension to Superintendent Jara's contract was listed on the agenda. The Board received 45 minutes of public comment specific to the contract extension and then deliberated on the matter for about 30 minutes prior to voting on the extension. Multiple Board Trustees voiced concerns over the process leading up to the meeting and requested legal advice on the record regarding the OML. The Board ultimately approved the extension by a 4-3 vote.

The Complaints allege that (1) the events of the closed attorney-client sessions rose to the level of an OML violation; (2) Board Trustees' and/or Superintendent Jara's breach of confidentiality regarding contract negotiations negates the exception to the OML for attorney-client communications; and (3) the contract amendment language was not given to or reviewed by Board Trustees prior to the May 13, 2021 meeting.

DISCUSSION AND LEGAL ANALYSIS

The legislative intent of the OML is that actions of public bodies "be taken openly, and that their deliberations be conducted openly." NRS 241.010(1); *see also McKay v. Board of Supervisors*, 102 Nev. 644, 651, 730 P.2d 438, 443 (1986) ("the spirit and policy behind NRS chapter 241 favors open meetings"). All exceptions to the OML must be construed narrowly and in favor of openness. *Chanos v. Nevada Tax Comm'n*, 124 Nev. 232, 239, 181 P.3d 675, 680 (2008). "[T]he narrow construction of exceptions to the Open Meeting Law stems from the Legislature's use of the term 'specific' in NRS 241.020(1) and that such exceptions must be explicit and definite." *Id.* The OML "mandates open meetings unless 'otherwise specified by statute . . .'" *McKay*, 102 Nev. at 651.

A. Attorney-Client Exception

The first issue here is whether polling public body members during an attorney-client session constitutes a violation of the OML.¹ The OAG finds that where a consensus occurs as part of deliberation that is a precursor to an action taken during a public meeting, it does not violate the OML.

The Nevada Legislature has excepted from the OML gatherings of a public body at which a quorum is present “[t]o receive information from the attorney employed or retained by the public body regarding potential or existing litigation involving a matter over which the public body has supervision, control, jurisdiction or advisory power and to **deliberate toward a decision on the matter**, or both.” NRS 241.015(3)(b)(2) (emphasis supplied). “Deliberate’ means collectively to examine, weigh and reflect upon the reasons for or against the action. The term includes, without limitation, the collective discussion or exchange of facts preliminary to the ultimate decision.” NRS 241.015(2). However, to make a decision or take action, a public body must do so during a public meeting. NRS 241.015(1) (“Action’ means: (a) A decision made by a majority of the members present, whether in person or by means of electronic communication, during a meeting of a public body”).

The Nevada Legislature chose to specifically allow deliberation when adding the attorney-client exception to the OML in 2001. In fact, a prior draft of the bill specifically excluded deliberation from the exception and an amendment added it into the final bill.² “[A] public body may deliberate with its attorney over strategy decisions regarding potential or existing litigation.” *In re Board of Mineral County Commissioners*, Nevada Open Meeting Law Opinion (OMLO) 04-069 at 4 (Mar. 2005). The purpose of the attorney-client privilege “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. *Finn v. City of Boulder City*, 2016 WL 4529950 at 1 (D. Nev. 2016) (Finding that where the purpose of a closed session and discussion involved a threat of litigation and corresponding settlement demand, it fit within NRS 241.015(3)(b)(2)’s exception.). Deliberation “may include members of the public body providing guidance to its attorney on how each expects the public body to be represented. For example, each member of the public body may express his or her opinion on the amount he or she would be willing to settle a case.” OMLO 04-069 at 4. While the attorney-client exception extends to deliberations, it cannot be extended to include a final decision to take an action, such as settle existing or threatened litigation. *The Comm’n on Ethics of the State of Nevada v. Hansen*, 134 Nev. 304, 307, 419 P.3d 140, 142 (2018).

¹ It is not clear from the evidence presented whether polling actually occurred during the attorney client session at issue. The OAG assumes it did for purposes of this analysis.

² Assembly Bill 225 of the 2001 Nevada Legislative Session First Reprint at 2, *available at* <https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/2001/AB225,2001.pdf>.

Here, public body members attended several sessions with their counsel where they received advice regarding threatened litigation. Ms. Miller advised Trustees that any opinions they expressed during the meeting were not binding and in order for any action to be taken on the matter, it would have to occur during a public meeting. The OAG finds from the evidence that Trustees indicated to Ms. Miller what type of settlement they might be willing to accept to give guidance to her in settlement negotiations. This follows past guidance from the OAG in OMLO 04-069. Upon reaching an agreement with Superintendent Jara's counsel, Ms. Miller then had the Board place on an agenda the contract extension, which was a settlement in this matter for all intents and purposes. The Board subsequently took action by vote during a public meeting. The OAG finds that where a consensus may be reached by a public body while deliberating on potential or existing litigation during an attorney-client session, it does not violate the OML, so long as the deliberations are not treated as action by the public body. *See Hansen* at 307.³ Here, the Board made clear that any consensus reached during the closed meeting was not action and a majority vote of the Board during a public meeting was required for action. Thus, the OAG finds that the Board did not violate the OML in this respect.

The Complaints also allege that breaches of confidentiality by Superintendent Jara or Board Trustees negates the attorney-client exception to the OML. The OAG finds that this allegation does not hold merit.⁴ While the attorney-client exception in NRS 241.015(3)(b)(2) exists to preserve the attorney-client privilege, the plain language of the statute does not contain a limitation regarding confidentiality. Thus, the OAG finds that regardless of whether a public body member or other person may breach the confidentiality of an attorney-client session, the OML exception still applies.

B. Collective Bargaining Exception

The Board has further argued that gatherings to discuss Superintendent Jara's contract fit within NRS 288.220's exception to the OML. The OAG agrees. NRS 288.220 excepts from the OML any "meeting of the governing body of a local government employer with its management representative or representatives." NRS 288.220(4). The Clark County School District meets the definition of a local government employer

³ Were a public body prevented from reaching any type of consensus during an attorney-client session, the ability to deliberate toward a decision would be completely negated. Indeed, the Legislature's inclusion of deliberation in the attorney-client exception was specifically so that public bodies could assist their counsel in settlement negotiations without destroying their negotiating power. "Senator Raggio argued that in attempting to reach a settlement, if the opposing side were aware of the range proposed for settlement, it would naturally choose the high end." Minutes of the Senate Committee on Government Affairs at 9 (May 8, 2001), available at <https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/2001/AB225.2001.pdf>.

⁴ This opinion does not address whether there were any breaches of the attorney-client privilege or contractual confidentiality provisions, only whether such a breach would change the application of the OML exception.

in NRS 288.060. The OAG has repeatedly found this provision to be a complete exception from the OML's requirements. *In re Clark County Board of School Trustees*, OMLO 08-020 at 3-4 (Oct. 2008) ("The statute does not require any part of the meeting of a local government employer with its management representative to be open."). In OMLO 08-020, the OAG found NRS 288.220(4) to completely except a meeting between a local government employer and its management representative whether the meeting discussed negotiating strategy or approval of a final agreement. *Id.* at 5. Thus, the OAG finds that the gatherings with Ms. Miller, the Board's representative in negotiations, to discuss Superintendent Jara's employment contract did not violate the OML.

C. Amendment Language Being Provided to the Board

Lastly, the Complaints allege that the amendment to Superintendent Jara's contract provided to the Board at the May 13, 2021, meeting for approval contained language that had not been presented to members or discussed previously. The OML does not contain a requirement regarding whether and when supporting material is provided to members of a public body. It only addresses when that material must be available to the public. NRS 241.020(8). Thus, the OAG finds the Board did not violate the OML in this respect.

CONCLUSION

The OAG has reviewed the available evidence and determined that no violation of the OML has occurred on which formal findings should be made. The OAG will close the file regarding this matter.

Sincerely,

AARON D. FORD
Attorney General

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