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STATE OF NEVADA  
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street  
Carson City, Nevada 89701

July 22, 2020

*Sent via U.S. Mail*

Mr. Jake Wiskerchen



Re: **Open Meeting Law Complaint, OAG File No. 13897-298**  
**Division of Health Care Financing and Policy**

Dear Mr. Wiskerchen:

The Office of the Attorney General (OAG) is in receipt of your complaint (Complaint) alleging violations of the Open Meeting Law (OML) by the Division of Health Care Financing and Policy (DHCFP) regarding the alleged failure to post minutes of workshops from 2015-2018.

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 complaint, the OAG reviewed your complaint and the supplementary email; agendas from the workshops in question, agendas from other DHCFP hearings, and the relevant authority.

### **FACTUAL BACKGROUND**

The DHCFP is a division of the Department of Health and Human Services created pursuant to NRS chapter 422. The DHCFP is not a “public body” as defined in NRS 241.015(4) and generally not subject to the OML. In the follow up email to your Complaint, you clarified that the DHCFP was exercising the regulatory authority granted to it by NRS 422.2369 and the complaint was regarding the DHCFP’s failure to follow the relevant provisions of chapter 422. The DHCFP possesses regulatory power under NRS 422.2369, which also applies some portions of the OML to the DHCFP when it exercises

this authority. Thus, the DHCFP could be found in violation of the OML if it were acting within the capacity defined by NRS 422.2369 and it failed to comply with the required OML provisions.

DHCFP noticed thirty-eight (38) workshops in 2018 indicating that one was cancelled.<sup>1</sup> DHCFP also noticed thirteen (13) Medicaid Services Manual Public Hearings, indicating two (2) were cancelled.<sup>2</sup> Generally the workshops followed a similar format of presentation of a possible revision to the Medicaid Services Manual followed by public comment on that specific change, and finally general public comment. None of the workshops noticed in 2018 stated that action would be taken or considered on any agenda item. Workshop notices were frequently published within thirty (30) days of the date of the workshop.

Public Hearing notices generally included multiple different proposed revisions to the Medicaid Services Manual that were agenda items “for possible action”. Public Hearing notices were published at least thirty (30) days in advance of the date of the hearing.

The email follow up to the Complaint specifically referenced a workshop held on June 20, 2018. The single topic agenda item at June 20, 2018 appeared for possible action at a public hearing agenda on December 27, 2018.<sup>3</sup>

## DISCUSSION AND LEGAL ANALYSIS

The Administrator of the DHCFP is granted regulatory authority under NRS 422.2368. The Administrator is required to follow certain procedures for the adoption of regulations by NRS 422.2369. Among the requirements that the Administrator must follow is the obligation to

“... keep, retain and make available for public inspection written minutes and an audio recording or transcript of each public hearing held pursuant to this section in the manner provided in NRS 241.035. A copy of the minutes or audio recordings must be

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<sup>1</sup>[http://dhcfp.nv.gov/Public/AdminSupport/MeetingArchive/Workshops/2018/2018\\_Workshops/](http://dhcfp.nv.gov/Public/AdminSupport/MeetingArchive/Workshops/2018/2018_Workshops/)

<sup>2</sup><http://dhcfp.nv.gov/Public/AdminSupport/MeetingArchive/PublicHearings/2018/2018MSMArchive/>

<sup>3</sup> Other topics also appeared on both workshop and public hearing agendas. See Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) Medicaid Services Manual (MSM) Chapter 1300 Update on January 25, and June 26.

made available to a member of the public upon request at no charge pursuant to NRS 241.035.”<sup>4</sup>

Thus, the Administrator, when adopting regulations pursuant to chapter 422 of the Nevada Revised Statutes, must follow chapter 241 when conducting a public hearing to adopt a regulation. This statute is similar to the general requirement applicable to all agencies exercising regulatory authority.<sup>5</sup>

#### NRS 422.2369 Regulatory Process

NRS 422.2369, contains is no requirement for a workshop. The Administrator must give thirty (30) days’ notice of the intent to adopt a regulation.<sup>6</sup> The Administrator must also keep and retain minutes or an audio recording of each public hearing in accordance with chapter 241.<sup>7</sup> Thus, while NRS 422.2369 requires that adoption hearings comply with certain aspects of the OML, **it contains no requirements regarding workshops.**<sup>8</sup>

DHCFP uses the term workshop to refer to these informational discussions regarding possible Medicaid Services Manual revisions. However, as noted in the Complaint, these regulations are adopted pursuant to chapter 422 of NRS, which includes no workshop requirements at all.

DHCFP’s process of utilizing the term workshop created confusion regarding its requirements for these meetings because, despite the use of the term workshop, these meetings were not part of an NRS 233B process and thus carried no OML obligations at all. Thus, DHCFP’s process of discussing items at workshops prior to adoption hearings does not violate the OML, because chapter 422 conveys no OML requirements on these meetings.

DHCFP is copied on this response so that it is made aware of the confusion that its naming conventions have caused. It may wish to consider naming changes or increased communication with the public to better communicate the public’s ability to participate in the process. However, DHCFP is not in violation of the OML and thus not required to take any action by this letter.

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<sup>4</sup> NRS 422.2369(4).

<sup>5</sup> NRS 233B.061(5).

<sup>6</sup> NRS 422.2369(1).

<sup>7</sup> NRS 422.2369(4).

<sup>8</sup> This is different from the more common and widely used regulatory provisions of NRS 233B which require workshops to comply with all provisions of chapter 241. NRS 233B.061(5).

## CONCLUSION

The Office of the Attorney General has reviewed the available evidence and determined that no violation of the Open Meeting Law has occurred on which formal findings should be made. The Office of the Attorney General will close the file regarding this matter.

Respectfully,

AARON D. FORD  
Attorney General

By: /s/ Greg Ott  
GREG OTT  
Chief Deputy Attorney General

GDO/mxf2

cc: Homa Woodrum, Deputy Attorney General  
Office of the Attorney General

CERTIFICATE OF SERVICE

I certify that on the 19<sup>th</sup> day of August, 2020, I mailed the foregoing letter by depositing a copy of the same in the U.S. mail, properly addressed, postage prepaid, first class mail, to the following:

Mr. Jake Wiskerchen

██████████  
██████████

And via inter-office mail:

Homa Woodrum, Deputy Attorney General  
Office of the Attorney General  
Carson City, NV

/s/ Debra Turman  
An employee of the State of Nevada  
Office of the Attorney General