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October 2, 2019

Via U.S. Mail

James Slade
[redacted]

Re: Douglas County Board of Commissioners - Open Meeting Law Complaint, OAG File No. 13897-312

The Office of the Attorney General (OAG) is in receipt of your complaint alleging violations of the Open meeting Law (OML) by the Douglas County Board of Commissioners (DCBC). Your Complaint alleges that the DCBC violated the OML at its October 18, 2018 meeting (Meeting) by: 1.) failing to provide written personal notice to Jennifer Davidson that her competence and character would be discussed at the Meeting; 2.) DCBC's failure to provide on its agenda a "clear and complete statement of the topics scheduled to be considered during" its Meeting; and 3.) the DCBC violated NRS 241.035 by failing to keep the entire video recording of the Meeting.

The OAG has statutory enforcement powers under the OML, and the authority to investigate and prosecute violations of the OML. NRS 241.037; NRS 241.039; NRS 241.040. In response to your Complaint, the OAG's review of the record included: the Complaint and attachments; DCBC's Meeting agenda; the audio recording of the Meeting; the video recording of DCBC's November 20 2018 meeting (November Meeting); and the DCBC's response to the Complaint (Response) and attachments.

FACTUAL BACKGROUND

The DCBC is a "public body" as defined in Nevada Revised Statute (NRS) 241.015(4), and subject to the OML.

On October 18, 2018, the DCBC held an open public meeting. Amongst the enumerated topics on the Meeting's agenda was an item detailed under "item 5" as:

> For presentation only. Discussion and updates from the Human Resources Department regarding the recruitment process for the County Manager (Wendy Lang).

When "Item 5" was called, Wendy Lang, Human Resources Director, updated the DCBC on the recruitment process for the open County Manager position (Position). Immediately after Ms. Lang's presentation, Ms. Davidson, Acting County Manager, addressed the DCBC and declared that she would like to be considered as an applicant for the Position, and asked to be removed from administrating the recruitment process. The record indicates that prior to the Meeting Ms. Davidson had been involved in the Position's recruitment and that this declaration was intended to avoid a conflict of interest by removing her from that process. The record further indicates that this was the first time that the DCBC had been apprised of Ms. Davidson's desire for the Position as the DCBC's resulting conversation included discussion on the ramifications of Ms. Davidson's recusal. During the discussion on this agenda item, as well as the public comment immediately following it, it was stated that this agenda item would be placed on the next agenda for "possible action" and would be amended to take into consideration Ms. Davidson's application for the Position.

DISCUSSION AND LEGAL ANALYSIS

1. The DCBC Did Not Violate NRS 241.033 by Failing to Provide Notice to Ms. Davidson of the Meeting.

The primary allegation of the Complaint is that Ms. Davidson was not given notice that the DCBC was going to hold a meeting to consider her character and/or competence. Chapter 241 of the NRS requires the actions of public bodies "be taken openly and that their deliberations be conducted openly." NRS 241.010(1); see *McKay v. Bd. Of Supervisors*, 102 Nev. 644, 651 (1986). NRS 241.033(1) sets out: "...a public body shall not hold a meeting to consider the character, alleged misconduct, professional competence , or physical or mental health of any person..." unless it has properly notified the person. In order for a public body to violate NRS 241.033(1), it must as a whole, without notice, consider and deliberate with regard to a person's character, alleged misconduct, professional competence, or physical or mental health. *See* OMLO 2005-08 (May 2005). "The unilateral comments of one Board member that touch on such matters do not, without facts implicating the conduct of the Board generally, cause a violation of the notice requirement under NRS 241.033(1)." *Id.* Additionally, the subject of the meeting may, by a valid express or implied waiver, relinquish the statutory right to this notice. A waiver of a statutory right is deemed valid if it is clear and unambig-

uous, given voluntarily, and intended to relinquish a known statutory right. *CBS, Inc. v. Merrick,* 716 F.2d 1292 (9th Cir. 1983); *State Board of Psychological Examiners v. Norman,* 100 Nev. 241, 679 P.2d 1263 (1984).

In determining whether a violation of the notice requirement contained in NRS 241.033 occurred, the OAG reviews the actual discussion during which a public body is alleged to have considered a person's character, alleged misconduct, professional competence, or physical or mental health. In doing so, the OAG evaluates the substance of the discussion and contextual cues to determine whether the notice requirement applies. *See generally,* OMLO 2005-13 (July 22, 2005).

In the instant case, in evaluating the substance and contextual cues of the comments involving Ms. Davidson, consideration is given to the fact that Ms. Davidson did not, at any time, object to the discussion. More weight is given to this fact where the record shows that the Chairman of the DCBC, Steven Thaler, verbalized to the Commission and Ms. Davidson who was in the audience, that when competence/character of a person is considered there are statutory notice requirements. Where the apparent intent of NRS 241.033's notice requirement is to the benefit of the subject (here Ms. Davidson), and Ms. Davidson did not vocalize an objection, even after comment of the statutory right to notice, the lack of objection serves as an implied voluntary relinquishment of her known statutory right to notice. *Id.*

Furthermore, as the Response points out, additional consideration is given to the fact that Ms. Davidson's recusal was designed to make her an applicant for the Position. Per NRS 241.033(7)(a), "an applicant for employment is not subject to the notice requirements...imposed by this section." Applying NRS 241.033(7)(a) to the instant case, Ms. Davidson's stated desire to be considered for the Position effectively made her an applicant not subject to NRS 241.033's notice requirement.

2. The DCBC Did Not Violate NRS 241.020(2)(d)'s Requirement for a "Clear and Complete Statement of Topics Scheduled to be Considered During the Meeting."

NRS 241.020 requires that an agenda must include a "clear and complete statement of the topics scheduled to be considered during the meeting." NRS 241.020(2)(d)(1). *See also, Sandoval v. Board of Regents,* 119 Nev. 148, 154, 67 P.3d 902 (2003). As such, a public body may not engage in discussion during a public meeting that exceeds the scope of a clearly and completely stated agenda topic.

In the instant case, as stated above, agenda "Item 5" was for the presentation of the recruitment process for the Position. Immediately after the presentation, Ms. Davidson declared her intention to apply for the Position and requested that she be removed from administrating the recruitment process. The DCBC's resulting conversation included comments that ranged from whether there was a need to hire a company to recruit for the Position, that Ms. Davidson's interest in the Position doesn't change anything about the recruitment process for the Position, comment on Ms. Davidson's qualifications for the Position, as well as direction to agendize on a future meeting whether to adjust the recruitment process for the Position. The comments that followed Ms. Davidson's recusal, whether by the members of the DCBC or the public during public comment, all were within the scope of the agenda's topic of the recruitment process for the Position. As such, there is no violation of NRS 241.020(2)(d)(1).

3. DCBC's Meeting Minutes Satisfies its Requirements Under NRS 241.035.

Through a supplement to his Complaint, Mr. Slade also alleges that the video recording of the DCBC's discussion of "Item #5" during the Meeting is no longer available to the public. Mr. Slade asserts that this is a violation of the OML. Nevada Revised Statute (NRS) 241.035 governs public meeting minutes and audio recordings and it provides that minutes *or* an audio recording of a meeting "must be made available for inspection by the public within 30 working days after adjournment of the meeting." NRS 241.035(2). NRS 241.035 further requires that a copy of the minutes or audio recording be made available to a member of the public upon request at no charge. *Id.* The OML designates a "working day" as "every day of the week except Saturday, Sunday, and any day declared to be a legal holiday pursuant to NRS 236.015." NRS 241.015(6).

Here, the DCBC kept written minutes of the Meeting. The Meeting minutes, which are available on the DCBC's website, include the substance of the discussion on "Item #5." As there is no statutory requirement to keep a video recording of a meeting of a public body, and the DCBC has kept and maintained minutes of the Meeting, there is no OML violation by the DCBC for failure to observe NRS 241.035[1].

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[1] Attached to the Response as an exhibit was an October 29, 2018 email between Mr. Slade and Kathy Lewis, Douglas County Clerk Treasurer, in which Ms. Lewis offered to provide Mr. Slade the audio recording of the Meeting.

CONCLUSION

The OAG has reviewed the available evidence and determined that no violation of the OML has occurred.

Sincerely,

AARON D. FORD
Attorney General

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MDD/dt

cc: Douglas County Board of Commissioners
c/o Cynthea Gregory, Deputy District Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 10th day of October, 2019, I served the foregoing letter by depositing a copy of the same in the United States mail, properly addressed, postage prepaid, Certified Mail, addressed as follows:

James Slade
[redacted]

Certified Mail No. 7009 3410 0002 3251 4731

Cynthea Gregory, Deputy District Attorney
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