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STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

In the Matter of:

Attorney General File No. 07-001

**THE NEVADA STATE BOARD OF
MEDICAL EXAMINERS**

I.

INTRODUCTION

In a letter received December 19, 2006, by the Office of the Nevada Attorney General, David Edwards, M.D., H.M.D., filed a complaint with this Office alleging violations of the Nevada Open Meeting Law, NRS Chapter 241. Specifically, Dr. Edwards alleges that the Investigative Committee (Committee) for the Nevada State Board of Medical Examiners (Board) violated the Open Meeting Law by failing to publish and post an agenda for a meeting as required by NRS 241.020 and that the Committee failed to notify him prior to a meeting as required by NRS 241.033. Dr. Edwards further alleges that the Board violated the Open Meeting Law by failing to publish and post an agenda regarding the Committee's recommendations to the Board in violation of NRS 241.020.

The Office of the Nevada Attorney General has primary jurisdiction to investigate and prosecute alleged violations of the Open Meeting Law and issues this opinion pursuant to that authority. This opinion is issued as a guideline for enforcing the Open Meeting Law. In investigating this matter, this Office reviewed the complaint, agenda, minutes, and supporting documents.

II.

FINDINGS OF FACT

On November 30, 2006, the Board's Committee met to review complaints regarding the investigation of certain licensees and to determine whether to recommend dismissal of those cases to the Board or to proceed with potential disciplinary action against the licensees.

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1 Dr. Edwards' case was considered by the Committee at this meeting. On December 1 and 2,
2 2006, at a regularly scheduled meeting, the Board accepted the Committee's
3 recommendation regarding Dr. Edwards and dismissed the complaint against him.

4 The Committee did not publish or post an agenda regarding the November 30, 2006
5 meeting, nor did the Committee send any individual notice to Dr. Edwards concerning the
6 meeting. The Board did publish and post an agenda for the December 1 and 2, 2006 meeting
7 as required by NRS 241.020.

8 **III.**

9 **ISSUES**

10 A. Did the Committee violate the Open Meeting Law by failing to publish and post
11 an agenda and by failing to individually notice Dr. Edwards of the November 30, 2006
12 meeting?

13 B. Did the Board violate the Open Meeting Law regarding the requirement to
14 publish and post an agenda pursuant to NRS 241.020?

15 **IV.**

16 **CONCLUSIONS OF LAW**

17 NRS 241.015(3) specifically includes committees within the definition of a "public body"
18 that are subject to the requirements of the Open Meeting Law.

19 NRS 241.020(1), however, reads as follows:

20 Except as otherwise provided by specific statute, all meetings of
21 public bodies must be open and public, and all persons must be
permitted to attend any meeting of these public bodies.

22 NRS 241.020(1) creates an exception from the requirements of the Open Meeting Law
23 provided that the provisions of a specific statute create an exemption from a public body's
24 compliance with NRS Chapter 241. A specific statutory exemption exists for the Board's
25 Committee.

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1 NRS 622.320(1) reads as follows:

2 The provisions of NRS 241.020 do not apply to proceedings relating to
3 an investigation to determine whether to proceed with disciplinary action
4 against a licensee, unless the licensee requests that the proceedings be
conducted pursuant to those provisions.

5 Pursuant to NRS 630.311, the Board's Committee is charged with reviewing
6 complaints and conducting investigations to determine if disciplinary action against a licensee
7 may be warranted. Consistent with the Committee's responsibilities is the requirement to
8 meet to discuss the outcome of the investigation and to determine what recommendation
9 concerning a case will be made to the Board. NRS 622.320(1) creates a specific statutory
10 exemption for the Committee from the requirements of NRS Chapter 241. As such, the
11 Committee is not required to publish and post an agenda or to individually notify Dr. Edwards
12 of their proceedings. Additionally, there is no evidence to indicate that Dr. Edwards requested
13 the Committee to conduct its proceedings pursuant to the provisions of NRS Chapter 241. As
14 a result, the Committee is not in violation of the Open Meeting Law.

15 Pursuant to the requirements of NRS 241.020, the Board published and posted an
16 agenda for the December 1 and 2, 2006 meeting. Item #16 on the agenda included language
17 that the Board would consider cases recommended for closure from the Committee. The
18 Board took action with regard to agenda item #16 and followed the Committee's
19 recommendation. This Office finds no Open Meeting Law violation on behalf of the Board.

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V.

CONCLUSION

Pursuant to the specific provisions of NRS 622.320(1), the Board's Investigative Committee is exempt from the requirements of NRS Chapter 241. The Board published and posted an agenda in accordance with NRS 241.020 and did not violate the Open Meeting Law.

DATED this 31ST day of JANUARY, 2007.

CATHERINE CORTEZ MASTO
Attorney General

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CERTIFICATE OF MAILING

I hereby certify that I am employed by the Office of the Attorney General of the State of Nevada, and that on this 31st day of January, 2007, I mailed a copy of the Findings of Fact and Conclusions of Law, by mailing true copies by U.S. Mail to:

Bonnie Brand, General Counsel
Nevada State Board of Medical Examiners
P.O. Box 7238
Reno, NV 89510-7238

David A. Edwards, M.D., H.M.D.
David A. Edwards, M.D., H.M.D., Ltd.
c/o Sierra Rose Drive, Suite 3
Reno, NV 89511-2060


An Employee of the Office of the Attorney General

1 Attorney, interim manager Robert Hadfield, several Lyon County department heads and some
2 County staff members. Commissioner Bob Milz gave both a statement and disclosed his
3 correspondence records for the period February 6, 2007 through February 15, 2007, in
4 response to the investigation.

5 **II.**
6 **FACTS**

7 This Office confirmed that the termination item placing Complainant's name on the
8 February 15, 2007 agenda began with a breakfast meeting on February 6, 2007, between
9 Robert Auer, Lyon County District Attorney (D.A. Auer) and two Commissioners—Bob Milz and
10 Don Tibbals. D.A. Auer stated that the meeting was to review County issues since he was
11 newly elected as the Lyon County District Attorney. Among the issues discussed was
12 Commissioner Milz's request for help to put an agenda action item on the Commission's
13 agenda to remove the Manager upon 90 days' notice pursuant to Lyon County Ordinance
14 1.07.03 and to suspend the Manager's duties during those 90 days. D.A. Auer agreed to
15 draft the notice (NRS 241.033) of the agenda item for service on the Manager as well as the
16 agenda items for the February 15, 2007 Commission meeting.

17 Commissioner Milz told D.A. Auer that the Manager's performance had been an issue
18 before the Commission in 2006. Mediation of issues between the Manager and the
19 Commission had been scheduled, but the Manager cancelled the mediation just before it was
20 scheduled to begin. Commissioner Milz claimed matters between the Manager and the
21 Commission had gotten worse since the mediation was cancelled.

22 Commissioner Tibbals stated he was not aware that termination would be discussed at
23 the breakfast meeting until Commissioner Milz brought it up. He also stated he did not
24 discuss the termination of the Manager with Commissioner Milz prior to the meeting with
25 D.A. Auer on February 6, 2007.

26 D.A. Auer stated that the Commissioner's request to place the removal item and the
27 hiring of an interim manager on the agenda was done under his supervision and authority.

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1 Commissioner Milz stated he did not discuss the removal/termination matter, agenda
2 item #2, with any other Commissioner prior to the February 15, 2007 Commission meeting.
3 He also told the Attorney General's (A.G.'s) investigator that he assumed Commissioner
4 Tibbals would vote to terminate the Manager based on Commissioner Tibbals' comments
5 made six months prior at a board meeting on the Manager's performance. Commissioner
6 Milz did not directly ask Commissioner Tibbals how he would vote.

7 Commissioner Milz and D.A. Auer confirm that agenda item #3, the selection of an
8 interim manager, was D.A. Auer's suggestion, not the suggestion of any Commissioner.
9 Once the selection of an interim manager was placed on the agenda, Commissioner Milz
10 spoke with Chairwoman Hunewill regarding the selection of an interim manager.
11 Commissioner Milz had spoken with several people to gauge their interest in serving as
12 interim manager.

13 Among those he spoke with was Edrie LaVoie, the Lyon County Director of Human
14 Services. He asked her whether she would be interested in serving as interim manager since
15 she had served in that capacity while the Manager was away during the past year. Director
16 LaVoie suggested Commissioner Milz call Mr. Robert Hadfield.

17 Commissioner Milz called Robert Hadfield prior to the February 15, 2007 Commission
18 meeting to gauge Mr. Hadfield's interest in serving as the interim manager. Mr. Hadfield said
19 he would serve as interim manager if the Commission voted to remove the Manager.
20 Commissioner Milz notified Chairwoman Hunewill that Mr. Hadfield had agreed to serve as
21 interim manager should the vote to remove the Manager succeed. Chairwoman Hunewill
22 stated to the A.G.'s investigator that she did not speak about the termination with any other
23 Commissioner between February 6, 2007 and February 15, 2007. Commissioner Milz said
24 that after this discussion with Chairwoman Hunewill, he did not speak to any other
25 Commissioner about item # 3 (the selection of the interim manager) on the agenda.

26 Commissioner Hunewill said she learned of the agenda item to remove the Manager
27 when she was contacted by a reporter for the Nevada Appeal. She also said that the
28 previous day she had spoken with D.A. Auer who informed her of his meeting with

1 Commissioners Milz and Tibbals and the drafting of paperwork to notice the Manager
2 regarding possible termination. She also said she later contacted D.A. Auer to speak with
3 him about conducting the Commission meeting on February 15, 2007, since she had recently
4 been elected chairwoman of the Commission.

5 Commissioner Hunewill stated when she saw the agenda she noticed the need for an
6 interim manager, so she contacted staff to find out if anyone was interested in serving as
7 interim manager. They were not, so she contacted Commissioner Milz to ask for the
8 telephone number of an individual they had discussed during the fall of 2006 when they
9 thought the Manager's position might become vacant. Commissioner Milz notified her that he
10 had already contacted Robert Hadfield and believed he might agree to serve as interim
11 manager should the Commission vote to terminate the current Manager.

12 Commissioners Milz, Hunewill, and Tibbals (the three Commissioners who voted for
13 termination) all denied speaking with each other and with any other Commissioner about
14 termination of the Manager, agenda item #2, prior to the February 15, 2007 Commission
15 meeting.

16 **III.**

17 **ISSUE**

18 Whether three Lyon County Commissioners collectively engaged in serial
19 communications which constituted a "meeting" in violation of NRS 241.015(2) to remove the
20 Manager from her employment with the County, and with the intent to avoid the provisions of
21 the Open Meeting Law.

22 **IV.**

23 **CONCLUSIONS OF LAW**

24 Resolution of the allegations in this complaint, that three members of the Lyon County
25 Commission impermissibly engaged in serial communications which constituted a "meeting"
26 under the OML and which resulted in Complainant's employment termination during a
27 Commission meeting on February 15, 2007, must begin with examination of the statute that

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1 proscribes such conduct and with an understanding of the legislative purpose underlying the
2 OML.¹

3 The legislative purpose underlying the OML is established in the opening statute in
4 NRS Chapter 241. In it the legislature declares that “all public bodies exist to aid in the
5 conduct of the people’s business. It is the intent of the law that their actions be taken openly
6 and that their deliberations be conducted openly.” NRS 241.010. The issue to be decided in
7 this complaint requires determination of whether three members of the Lyon County
8 Commission (a quorum) violated the legislative purpose and engaged in serial
9 communications, which constituted a “meeting” under NRS 241.015. For a violation of the
10 OML to be found, it would have to be shown that these three members deliberated and acted
11 upon the removal of the Manager without the benefit of an open public meeting that had been
12 duly noticed.

13 The Nevada Supreme Court reviewed the subject of the OML and serial
14 communications in at least two recent cases. *Dewey v. Redevelopment Agency of the City of*
15 *Reno*, 119 Nev. 87, 64 P.3d 1070 (2003), and *Del Papa v. Board of Regents of the University*
16 *and Community College System of Nevada*, 114 Nev. 388, 956 P.2d 770 (1998). These two
17

18 ¹ “Meeting” is defined in NRS 241.015(2) as follows:

19 2. “Meeting”:

20 (a) Except as otherwise provided in paragraph (b), means:

21 (1) The gathering of members of a public body at which a quorum is present to
22 deliberate toward a decision or to take action on any matter over which the public
23 body has supervision, control, jurisdiction or advisory power.

24 (2) Any series of gatherings of members of a public body at which:

25 (I) Less than a quorum is present at any individual gathering;

26 (II) The members of the public body attending one or more of the gatherings
27 collectively constitute a quorum; and

28 (III) The series of gatherings was held with the specific intent to avoid the
provisions of this chapter.

(b) Does not include a gathering or series of gatherings of members of a public body,
as described in paragraph (a), at which a quorum is actually or collectively present:

(1) Which occurs at a social function if the members do not deliberate toward a
decision or take action on any matter over which the public body has supervision,
control, jurisdiction or advisory power.

(2) To 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.

1 cases are critical for a determination of whether the allegations of this complaint support
2 finding a violation of the OML's prohibition of serial communications. In addition, in the past,
3 this Office has considered this issue and issued opinions on the basis of factual allegations of
4 improper serial communications involving members of a public body.² Our opinions have
5 consistently applied the Nevada Supreme Court ruling, which states that mere back-to-back
6 meetings of members of a public body (even if done electronically among themselves) with
7 staff, or its attorney, without evidence of specific intent to avoid the OML and without evidence
8 that these serial communications included deliberations and action on a matter over which the
9 public body has supervision and control, is not a violation of the OML.

10 There is no dispute that the Commission took action to terminate the employment of
11 the Manager in an open meeting. The question posed is whether three Commissioners
12 engaged in serial communications, which collectively and impermissibly determined the
13 outcome of the vote on the item to remove the Manager. The OML proscribes this conduct,
14 which is called a "constructive quorum." *Dewey v. Redevelopment Agency of the City of*
15 *Reno*, 119 Nev. 87, 98-99 64 P.3d 1070, 1077-78 (2003).

16 First, it is important to realize that Nevada law applies a "quorum" standard as the test
17 for determining when the OML applies to gatherings of the members of a public body.

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19 ² OMLO 2004-11 — mayor contacted all members of his council individually regarding matter arguably
20 within council's jurisdiction, but the evidence following investigation did not support finding that the Council was
21 collectively making a decision or deliberating toward a decision; no violation of OML found, *citing Dewey v.*
22 *Redevelopment Agency*, 119 Nev. 87, 98-99 64 P.3d 1070, 1077-78 (2003). AGO 2001-13 — no quorum present
23 since mayor not member of public body, but public body cautioned that serially meeting with quorum of council
24 members invites speculation that a quorum may be deliberating or taking action on a matter within their
25 supervision or control. OMLO 99-06 — three members-elect of public body observed engaged in twenty minute
26 conversation; however, complainant did not hear their conversation and in light of member's denial of discussion
27 of Board business, no violation was found. AG Letter opinion August 18, 1998 — where quorum of public body
28 attended a three member subcommittee meeting; some attended meeting in the audience yet also participated in
asking questions of candidates for job; evidence showed that at no time did the six directors sit together or
engage in collegial consensus building such as vote taking, motions, debate or significant dialog, there was no
"meeting" and thus no violation. AGO 97-017 — member of public body made public remarks indicating she had
had discussions with other members of the board; her statement warranted investigation; after investigation it was
determined no quorum was achieved with other members of the board and furthermore it did not appear these
conversations with other members of the board were for polling purposes or had sufficient connection with each
other to constitute a gathering to deliberate. OMLO 2003-11 — it is not a meeting where two county
commissioners (two commissioners were a quorum) met with attorney at different times, but did not discuss the
same subject, although related to the same employment contract; no evidence that the meetings took place with
specific intent to avoid the OML.

1 Dewey 119 Nev. at 95, 64 P.3d at 1075. A quorum is necessary before the OML can be
2 applied to a given situation. *Id.* This is made necessary because of the definition of “meeting”
3 in NRS 241.015(2). A “meeting” within the OML is dependent on having a quorum present
4 during which deliberations occur and a decision is made on matters under the public body’s
5 supervision and control.

6 Secondly, it is important to understand that the OML “is not intended to prohibit every
7 private discussion of a public issue. Instead, the Open Meeting Law only prohibits collective
8 deliberations or actions where a quorum is present. *Id.* at 94-95. The Nevada Supreme
9 Court strictly applies the definition of “meeting” so that a physical quorum, or a constructive
10 quorum achieved by electronic means or by serial communications, must be present before
11 the OML is applicable. Furthermore, it is necessary, before the OML is applicable to a
12 constructive quorum, that the quorum actually deliberate toward a decision and decide or take
13 action on any matter over which the public body has supervision, control, or jurisdiction.
14 *Del Papa v. Board of Regents of the University and Community College System of Nevada*,
15 114 Nev. 388, 400, 956 P.2d 770, 778 (1998) (the court found that when a quorum of the
16 Regent’s Board appearing by telephone actually voted to take action on a draft statement of
17 university policy, the Board violated the OML).³

18 The Nevada Supreme Court has been consistent in holding that the OML does not
19 prohibit all communications by and between members of a public body. The Court in
20 *Del Papa* reiterated its opinion in its prior decision in *McKay v. Board of County*
21 *Commissioners*, 103 Nev. 490, 746 P.2d 125 (1987), that, “members of a public body may
22 ultimately make decisions on public matters based upon individual conversations with
23 colleagues, . . . [but] the collective process of decision making, whether legal counsel is
24 present or not, must be accomplished in public.” *Del Papa*, 114 Nev. at 400, 956 P.2d at 778.
25 The *Dewey* court in 2003 also reiterated the holding in *McKay* that members of a public body

26 ³ The Attorney General’s Office adopted a definition of “deliberate” as “to examine, weigh and reflect
27 upon the reasons for or against the choice. . . thus connot[ing] not only collective discussion, but the collective
28 acquisition or the exchange of facts preliminary to the ultimate decision.” *Nevada Open Meeting Law Manual*
p. 30 (10th ed. 2005). See *Sacramento Newspaper Guild v. Sacramento Co. Bd. of Supervisors*, 263 Cal. App.
2nd 41 (1968).

1 are not prohibited from discussing public matters with each other as long as there is not a
2 quorum and as long as deliberations take place in a public meeting. *Dewey* 119 Nev. at 96.
3 (In the absence of a quorum, members of a public body may privately discuss public issues or
4 even lobby for votes.)

5 These cases teach that there are two important criteria to be applied before the OML
6 may be invoked: (1) a quorum or constructive quorum, and (2) deliberation or actual vote on
7 a matter.

8 The *Dewey* Court discussed the basis for its holding that the actions of the public body
9 in which staff conducted two briefings each one with less than a quorum of the body, did not
10 implicate the OML. Again, it is important to note that this is important direction from the Court
11 about how to apply the OML to facts in which the presence of a quorum must be determined.

12 It said:

13 "[R]equiring members of [a] board to consider only information
14 obtained through public comment and staff recommendations
15 presented in formal sessions would cripple the board's ability to
16 conduct business." [Quoting *Hispanic Educe. Com. V. Houston Ind. Such. Dist.*, 886 F. Supp. 606,610(S.D. Texas, 1995) off's, 68 F.3d
17 467 (5th Cir. 1995)] This reasoning underscores the need for other
18 action, such as polling or collective discussions designed to reach a
19 decision, to create a constructive quorum between the briefings.
When less than a quorum is present, private discussions and
information gathering do not violate the Open Meeting Law. *Id.*
Here, absent serial communication of the discussions, there was
no quorum and therefore no deliberations in violation of the Open
Meeting Law."

20 *Dewey v. Redevelopment Agency of the City of Reno*, 119 Nev. 87, 98–99, 64 P.3d 1070,
21 1078 (2003).

22 The *Dewey* Court found that mere back-to-back briefings, without more, did not
23 constitute a collective quorum. The *Dewey* Court decided there was not substantial evidence
24 in the record showing that the public body met with staff for the purpose of taking action on, or
25 collectively discussing, a matter of public business within the control of the public body. *Id.* at
26 100.

27 Based on the investigation into this matter by this Office, it is clear that there was no
28 physical quorum present at any time after the termination item was placed on the agenda, so

1 unless a constructive quorum was achieved via electronic means or by serial
2 communications, and unless there is evidence that the three Commissioners deliberated
3 toward a decision on whether to terminate the Manager, the OML is inapplicable to the facts
4 of this case.

5 Even if Commissioners Milz and Hunewill discussed the termination of the Manager
6 between themselves at any time before or after the matter was agendized, the OML is not
7 offended because NRS 241.015(2) sets the serial communication bar at "collective
8 deliberations or actions" (exchange of facts that reflect upon reasons for or against the
9 choice) involving a quorum of members of a public body. *Dewey v. Redevelopment Agency*
10 *of the City of Reno*, 119 Nev. 87, 64 P.3d 1070. Two Commissioners do not constitute a
11 quorum.

12 The investigation clearly shows that two Commissioners, Goodman and McPherson,
13 both of whom voted to retain the Manager, did not engage in any communication with either
14 Milz or Hunewill. That leaves only Commissioner Tibbals, whose involvement with discussions
15 on item #2 regarding termination could implicate the OML and its prohibition against serial
16 communications by a quorum of a public body. But, Commissioner Tibbals stated he
17 attended the breakfast meeting on February 6, 2007 unaware of Milz's purpose to seek an
18 agenda item for termination of the Manager until Commissioner Milz asked D.A. Auer to draft
19 the agenda item and the five day notice letter. Commissioner Milz stated that he always
20 assumed Commissioner Tibbals would vote to terminate the Manager based on
21 Commissioner Tibbals' representations during a Commission meeting some six months
22 before. Both Commissioners Milz and Hunewill deny speaking with any Commissioner about
23 termination of the Manager prior to the February 15, 2007 meeting. The investigation did not
24 disclose any evidence that these Commissioner statements were untrue.

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V.

CONCLUSION

There is no evidence that Commissioners Milz, Hunewill, or Tibbals deliberated on reasons supporting the Manager's termination, nor is there evidence that they exchanged any facts supporting termination prior to the meeting. Also. There is no evidence they polled each other prior to the February 15, 2007 meeting. Therefore, there has been no violation of the OML's prohibition against serial communications.

DATED this 11th day of June, 2007.

CATHERINE CORTEZ MASTO
Attorney General

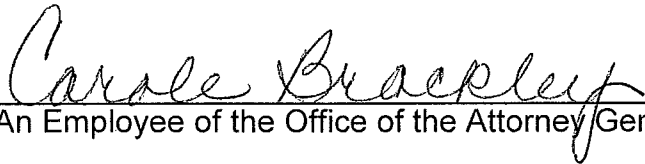
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1 **CERTIFICATE OF MAILING**

2 I hereby certify that I am employed by the Office of the Attorney General of the State of
3 Nevada, and that on this 11th day June, 2007, I mailed a copy of the Findings of Fact and
4 Conclusions of Law, by mailing true copies by U.S. mail to:

5 Phyllis Hunewill, Chair
6 Lyon County Board of Commissioners
7 27 South Main Street
8 Yerington, NV 89447

9 Donna A. Kristaponis
10 690 Saint Andrews Drive
11 Dayton, NV 89403

12 
13 An Employee of the Office of the Attorney General

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

In the Matter of:

HUMBOLDT COUNTY SCHOOL
BOARD

Attorney General File No. 07-015

I.

INTRODUCTION

Several resident citizens of Humboldt County drafted a letter dated March 23, 2007 addressed to the President of the Humboldt County School Board (HCSB) asking for an investigation into several substantive matters including alleged violations of the Open Meeting Law (OML).¹ Complainants, two members of the citizens group, forwarded the letter to this Office asking for an investigation into the alleged OML violations.

There are three charges in the complaint alleging OML violations. First, it is alleged two members of the HCSB attended a private meeting to discuss HCSB business along with HCSB's Superintendent and the Principal of Lowry High School. Secondly, it is alleged that Kris Stewart, an HCSB member, contacted all other HCSB members via e-mail concerning another member of HCSB in order to "solicit affirmative votes" from other HCSB members. Lastly, it is alleged that the Superintendent has violated the OML by meeting with HCSB members prior to the open meeting of the HCSB.

This Office has primary jurisdiction to investigate and prosecute violations of Nevada's OML. NRS Chapter 241. This opinion is issued as guidance to the HCSB and is based on review of the citizens' complaint as well as the detailed response to the allegations in the complaint by Dr. Del Jarman, Superintendent for the Humboldt County School District; a

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¹ The citizens group also asked for an investigation by HCSB into allegations of (1) misappropriation of school district funds to remodel district offices and the purchase of PERS benefits for the retiring Principal of Lowry High School, (2) misrepresentation by the Superintendent of facts concerning his employment history, and (3) Code of Ethics violations by a member of HCSB. These three substantive matters are addressed to HCSB and are not within the purview of the OML. Consequently, they are not addressed in this opinion.

1 signed statement from Kris Stewart, HCSB member; and the minutes and audio copies of the
2 March 13 and 15, 2007 HCSB meetings.

3 II.

4 FACTS

5 **The Meeting with two HCSB members, Principal Brower
6 and Dr. Jarman to discuss the Principal's employment**

7 HCSB Superintendent Dr. Del Jarman met with Lowry High School principal, Kirk
8 Brower, and two members of HCSB, Kris Stewart and Shelley Noble, some time before the
9 March 13, 2007 regularly scheduled HCSB meeting.² The purpose of the meeting was to
10 discuss Principal Brower's commitment to continue to serve as Lowry High School Principal,
11 which is certainly a matter within the supervision and control of HCSB.

12 Dr. Jarman states in his written response to the complaint that Mr. Brower had
13 mentioned to him on more than one occasion his desire to "take his career in a different
14 direction," but he needed an additional year and a half in the Public Employees Retirement
15 System (PERS), so he could leave with ten years of time in PERS. During the meeting with
16 Mr. Brower, with two HCSB members present, Dr. Jarman asked Mr. Brower if he would
17 prefer a PERS buyout if the HCSB would be in agreement. Subsequently, Mr. Brower
18 submitted a letter to HCSB tendering his resignation conditioned on approval of a buyout of
19 enough time to leave Humboldt County employment with ten years in PERS.

20 Because there were only two members of HCSB present during the meeting with
21 Mr. Brower, there was no quorum of HCSB. The complaint alleges Ms. Stewart promised or
22 guaranteed four votes in favor of the buyout. Four votes would be a majority of the members
23 of HCSB and would be sufficient to take favorable action on the buyout request. Ms. Stewart
24 denied the allegation that she guaranteed Principal Brower at the meeting four votes from
25 HCSB members toward an early PERS buyout in her written response to the complaint (which
26 she first sent to the HCSB's attorney, John Doyle). She states that she never made any of the

27 _____
28 ² Dr. Del Jarman and Kris Stewart submitted written responses to the allegation in the complaint that it
was a secret meeting held in violation of the OML. The findings of fact as to this allegation are based on their
responses and the statements made by HCSB members during the March 13 and 15, 2007 HCSB meetings.

1 guarantees or promises as alleged in the complaint. She also is emphatic that there were no
2 decisions made during that meeting.³

3 The audiotape of the March 13, 2007 meeting at which HCSB heard an item listed as
4 "Update on Administrative Position at Lowry High School"⁴ reveals that Dr. Jarman asked
5 Mr. Brower point blank to respond to allegations that his resignation had been solicited.
6 Mr. Brower can be heard to say that he was in agreement with Dr. Jarman's characterization
7 of the manner in which the buyout proposal and conditional resignation was worked out.

8 HCSB's discussion of Principal Brower's conditional resignation on March 13, 2007,
9 was lively and lengthy which indicates to this Office there was no prearranged vote. Most
10 members of HCSB were heard to comment. The audience was allowed to comment during
11 HCSB's discussion of the matter.

12 The minutes of the meeting show that there was considerable discussion of whether
13 the buyout was consistent with HCSB policy. There was discussion about other instances of
14 action by HCSB and approval of early buyouts. The exact monetary figure to achieve buyout
15 was discussed. In fact, one HCSB member explicitly alleged during the meeting that
16 Mr. Brower's conditional letter of resignation was not voluntary, but instead the member
17 asserted that Dr. Jarman and two members of the HCSB asked Mr. Brower to submit his
18 resignation. HCSB members expressed opinions about the financial impact of early buyouts
19 on the school district.

20 Finally, the HCSB voted four to two to approve the early buyout.

21 **Allegation of serial communications among HCSB members.**

22 Complainants allege that Kris Stewart e-mailed to her fellow HCSB members her own
23 personal statement concerning fellow HCSB member Linda Schrempp's competency. It is
24

25 ³ No minutes or recording of this private meeting with the Principal were made.

26 ⁴ This item does not give clear notice to the public of the topic to be discussed. No mention is made of
27 the fact that Principal Brower would be submitting his conditional resignation to HCSB, which was clearly an item
28 of important interest to the community. Use of the word "update" is misleading since it implies mere notice of a
continuing issue and does not give the public notice that HCSB could take final action on the resignation of
Principal Brower. The item is too generic as it could apply to many other administrative positions, perhaps none
of which would be of as much interest to the community as the resignation of Principal Brower.

1 alleged that this is a violation of the OML based on communication among public body
2 members through the telephone, letters, personal conversations, or e-mails which concern
3 future board issues.

4 In a written statement Ms. Stewart admitted to sending an e-mail to all other HCSB
5 members as well as to members of the community, but she states that the purpose of the
6 e-mail communication was as a statement of support for Dr. Jarman.⁵ She further elaborated
7 by stating that she was "looking for proactive ideas for responding to rumors and false
8 information circulating throughout the district and the community." She stated the "information
9 contained in the e-mail dealt with things covered in past board meetings and ideas as
10 opposed to concrete decision or steps to be taken" and that as a result of the e-mail
11 correspondence "[n]o decisions were made; no votes were counted, cast or sought." She
12 states she does not believe that "mere discussion with other board members outside the
13 boardroom constitutes a violation of OML" and that "[t]here must be intent to circumvent the
14 law or spirit thereof."

15 The matter of Ms. Stewart's "Statement of Support" was agendaized⁶ for a special
16 meeting on March 15, 2007, just two days after the regular meeting at which Principal
17 Brower's conditional resignation was discussed. We have reviewed the minutes of the
18 March 15, 2007 meeting and the audiotapes of the meeting,⁷ but neither party submitted a

19 ⁵ Dr. Jarman was under some public scrutiny at this time. His administration of the district had been
20 criticized by the public and perhaps by some HCSB members. Some of the criticism related to his administration
21 and some related to his former employment appeared in the local media. Dr. Jarman sent a copy of an article
22 appearing in the local paper with his response to the complaint.

23 ⁶ This item is also not "clear and complete" for the same reasons as expressed earlier in this opinion in
24 footnote 4. It is impossible for the public to understand what the "Statement of Support" referred to unless one
25 had received the e-mail correspondence from Ms. Stewart.

26 ⁷ Both the audiotapes and the minutes are substandard. The minutes are incomplete based on the
27 length of these meetings. The minutes for the March 15, 2007 meeting comprise only two pages for a meeting
28 that lasted four hours. The minutes do not state whether there was action/vote on the Statement of Support even
though it was listed as an action item. We learned that HCSB declined to issue a statement of support only
because Ms. Stewart mentioned it in her written response. After listening to the audiotape (even though it is
largely unintelligible) it is clear that many comments by HCSB members and the public were not included. The
fidelity of the audiotape of the meetings suffers to the point of unintelligibility. We were unable to understand
many voices and their comments. Only the voices of President Pharr and Dr. Jarman were satisfactorily audible.
Other voices had to compete with a substantial amount of background noise and from being too distant from a
microphone.

1 copy of the disputed e-mail for our review. The fact that the March 15, 2007 meeting had as
2 an item the "Statement of Support" leads to the conclusion that Ms. Stewart circulated her own
3 personal statement of support for Dr. Jarman. Because this Office cannot take action against
4 HCSB at this time, and because this opinion is being issued solely for guidance, it is not
5 necessary to review the e-mail.

6 **Whether the Superintendent's private briefings with**
7 **HCSB members violated the OML**

8 The complaint alleges that Dr. Jarman meets with members of the HCSB before open
9 meetings to discuss agenda items and issue directions.

10 Dr. Jarman's written response acknowledges that he meets with members of HCSB
11 individually and in small groups, although he assures us there is never a quorum present at
12 these group meetings. Dr. Jarman states his role is to explain the pros and cons of the issues
13 presented to HCSB on their agenda. He said he does not solicit votes by any member of
14 HCSB since his role is advisory.

15 Ms. Stewart's written response also acknowledges routinely meeting privately with the
16 Superintendent to discuss issues, sometimes just before open meetings.

17 The complainants do not allege Dr. Jarman has met with a quorum of HCSB in any
18 private briefing. There is no indication in the written responses from Dr. Jarman and
19 Ms. Stewart that a private briefing ever included a quorum of HCSB.

20 **III.**

21 **ISSUES**

22 A. Whether the private meeting with Principal Brower which was attended by two
23 HCSB members was a violation of the OML?

24 B. Whether HCSB member Kris Stewart engaged in "serial communications" when
25 she e-mailed the other HCSB members with a personal statement of support for the
26 Superintendent?

27 C. Whether the Superintendent's "private briefings" with members of HCSB is a
28 violation of the OML?

1 IV.

2 CONCLUSIONS OF LAW

3 ISSUE NO. 1

4 Whether the private meeting with Principal Brower which was attended by two HCSB
5 members was a violation of the OML?

6 Nevada's OML applies only to a quorum of a public body. The Nevada Supreme Court
7 explicitly stated that the OML only applies to a "gathering of members of a public body at
8 which a quorum is present to deliberate toward a decision or to take action on any matter over
9 which the public body has supervision, control, jurisdiction or advisory power." *Dewey v.*
10 *Redevelopment Agency of the City of Reno*, 119 Nev. 87, 95, 64 P.3d 1070, 1076 (2003)
11 (quoting NRS 241.015(2) (1999)).

12 It is important to understand that the OML "is not intended to prohibit every private
13 discussion of a public issue. Instead, the Open Meeting Law only prohibits collective
14 deliberations or actions where a quorum is present." *Id.* at 94-95, 64 P.3d at 1075. The
15 Nevada Supreme Court strictly applies the definition of "meeting"⁸ so that a physical quorum,
16

17
18 ⁸ "Meeting" is defined in NRS 241.015(2) as follows:

19 2. "Meeting":

20 (a) Except as otherwise provided in paragraph (b), means:

21 (1) The gathering of members of a public body at which a quorum is present
22 to deliberate toward a decision or to take action on any matter over which the
23 public body has supervision, control, jurisdiction or advisory power.

24 (2) Any series of gatherings of members of a public body at which:

25 (I) Less than a quorum is present at any individual gathering;

26 (II) The members of the public body attending one or more of the
27 gatherings collectively constitute a quorum; and

28 (III) The series of gatherings was held with the specific intent to avoid
the provisions of this chapter.

(b) Does not include a gathering or series of gatherings of members of a public
body, as described in paragraph (a), at which a quorum is actually or collectively
present:

(1) Which occurs at a social function if the members do not deliberate toward
a decision or take action on any matter over which the public body has
supervision, control, jurisdiction or advisory power.

(2) To 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.

1 or a constructive quorum⁹ achieved by electronic means or by serial communications, must be
2 present before the OML is applicable. Furthermore, it is necessary before the OML is
3 applicable to a constructive quorum that the quorum actually deliberate toward a decision and
4 decide or take action on any matter over which the public body has supervision, control, or
5 jurisdiction. *Del Papa v. Board of Regents of the University and Community College System*
6 *of Nevada*, 114 Nev. 388, 400, 956 P.2d 770, 778 (1998). The court found that a quorum of
7 the Regent's Board, responding by telephone at different times, constituted a "meeting." The
8 court then found the Board had voted to take action on a draft statement of university policy,
9 which violated the OML.¹⁰

10 The Nevada Supreme Court has been consistent in holding that the OML does not
11 prohibit all communications by and between members of a public body. The Court in
12 *Del Papa* reiterated its opinion in its prior decision in *McKay v. Board of County*
13 *Commissioners*, 103 Nev. 490, 746 P.2d 125 (1987), that, "members of a public body may
14 ultimately make decisions on public matters based upon individual conversations with
15 colleagues, . . .[but] the collective process of decision making, whether legal counsel is
16 present or not, must be accomplished in public." *Del Papa*, 114 Nev. at 400, 956 P.2d at 778.
17 The *Dewey* court in 2003 also reiterated the holding in *McKay* that members of a public body
18 are not prohibited from discussing public matters with each other as long as there is not a
19 quorum and as long as deliberations take place in a public meeting. *Dewey*, 119 Nev. at 96,

20
21 ⁹ The Nevada Supreme Court's holding in *Del Papa v. Board of Regents*, 114 Nev. 388, 400, 956 P.2d
22 770, 778 (1998) defines constructive quorum as the foundation for a possible violation of the OML:

23 [W]e hold that a quorum of a public body using serial electronic communication
24 to deliberate toward a decision or to make a decision on any matter over which
25 the public body has supervision, control, jurisdiction or advisory power violates
26 the Open Meeting Law. That is not to say that in the absence of a quorum,
27 members of a public body cannot privately discuss public issues or even lobby
28 for votes. However, if a quorum is present, or is gathered by serial electronic
communications, the body must deliberate and actually vote on the matter in a
public meeting.

29 ¹⁰ The Nevada Open Meeting Law Manual defines "deliberate" as: "to examine, weigh and reflect upon
the reasons for or against the choice . . . thus connot[ing] not only collective discussion, but the collective
acquisition or the exchange of facts preliminary to the ultimate decision." Open Meeting Law Manual § 5.01, at
27 (10th ed. 2005). See also *Dewey*, 119 Nev. at 97, 64 P.3d at 1077; *Sacramento Newspaper Guild v.*
Sacramento Co. Bd. of Supervisors, 263 Cal. App. 2nd 41, 47 (1968).

1 64 P.3d at 1076 (stating that in the absence of a quorum, members of a public body may
2 privately discuss public issues or even lobby for votes).

3 These cases teach that there are two important criteria to be applied before the OML
4 may be invoked: (1) a quorum or constructive quorum must be present, and (2) the quorum
5 must deliberate or vote on a matter under the supervision of the public body.

6 *Dewey* is particularly appropriate to cite here, because the facts of that case involved
7 private briefings by agency staff with members of the Reno Redevelopment Agency (the
8 public body) concerning evaluation of six responses to the Agency's RFP concerning possible
9 rehabilitation of the Mapes Hotel. There were two back-to-back private briefings given by
10 agency staff to members; at each briefing the attending members of the agency did not
11 comprise a quorum. Nevertheless, the complaint alleged that during the private briefings,
12 agency members both deliberated and took action on the RFPs. It was alleged that action
13 was achieved through the act of polling a quorum of members by agency staff as to how they
14 would vote on the issue in an open meeting, which would be a violation of the OML.

15 The case went to trial in district court. Agency members testified that they did not
16 provide their opinion or vote on the Mapes Hotel issue nor were they polled as to their opinion
17 or vote. They also testified that their discussions were not intended to promote a decision or
18 course of action at that time. Finally, they testified that they made their final decision
19 regarding demolition of the Mapes Hotel at the public meeting.

20 The district court found that the public meeting following the private briefings was not a
21 perfunctory acknowledgement of the private briefings. The court, in making this finding,
22 examined the length and nature of the debate at the public meeting, the lack of unanimity
23 among the members' final vote, and the fact that the public meeting substantially mirrored the
24 information conveyed and discussed during the private briefings.

25 We believe that attendance by two HCSB members at the private meeting with
26 Principal Brower and Dr. Jarman did not constitute a quorum of HCSB, unless either HCSB
27 member or both of them communicated with and/or polled additional HCSB members
28 (sufficient in number to collectively constitute a quorum) regarding the issue of the PERS

1 buyout. There is no evidence that either Ms. Stewart or Ms. Noble polled other HCSB
2 members regarding the proposed PERS buyout.

3 The evidence shows that there was no quorum present (a quorum of the HCSB is four
4 members), there was no further communication with additional HCSB members so as to
5 create a "constructive quorum" and no decisions were made in the private meeting that would
6 be applicable to the whole HCSB (apparently, Principal Brower decided to submit a
7 conditional resignation). Based on the foregoing, no violation of the OML occurred.

8 **ISSUE NO. 2**

9 Whether HCSB member Kris Stewart engaged in "serial communications" when she
10 e-mailed all the other HCSB members with a personal statement of support for the
Superintendent?

11 HCSB member Stewart's e-mail to other HCSB members may have been a violation of
12 the OML if she had polled the other members to gauge their support of her Statement of
13 Support or if she had openly asked them how they would vote. There is no evidence that she
14 polled other members or asked how they would vote. Our review of the March 15, 2007
15 meeting at which the "Statement of Support" was thoroughly discussed, reveals a spirited and
16 lengthy discussion which suggests that the open meeting discussion was not a result of a
17 prearranged vote orchestrated via the distribution of Ms. Stewart's e-mail. The fact that
18 HCSB did not take action on the agenda item and decided not to release a final statement of
19 support adds further reinforcement to our conclusion that no violation based on improper
20 serial communications occurred.

21 We remind the members of HCSB of the risks and pitfalls associated with private
22 communications with other HCSB members. In a case decided by the Nevada Supreme
23 Court, the Board of Regents of the University and Community College System (Regents)
24 engaged in nonpublic communications with each other that were similar in nature to the e-mail
25 distributed by Ms. Stewart, but unlike the e-mail communication at issue here, the Regents
26 actually voted on a proposal to issue a "media advisory" to counter the criticism
27 on a proposal to issue a "media advisory" to counter the criticism of the Board by one Board
28 member. *Del Papa*, 114 Nev. at 401, 956 P.2d at 779. The Court in *Del Papa* determined that

1 the Regents acted in their official capacity, utilized University resources and took action on the
2 proposed media advisory via a non-public vote utilizing serial communications; therefore, the
3 Regents violated the OML's prohibition against closed meetings, the meeting was without
4 notice, and the Regents *used electronic communications to circumvent the spirit or letter of*
5 *the OML. Id.* (Emphasis added).

6 Our review of the facts of Ms. Stewart's e-mailed letter of support for Dr. Jarman is
7 similar to the facts in *Del Papa*. However, we are persuaded that no violation occurred after
8 listening to the debate during the March 15, 2007 meeting at which the matter of the letter of
9 support for Dr. Jarman was discussed. Even though HCSB chose not to issue the letter of
10 support, just as the Regents did in the cited case, a violation could have occurred if HCSB had
11 responded to the e-mail with expressions of support or potential vote or if there was evidence
12 of deliberations among the members in the non-public forum of the e-mail correspondence.
13 We do not find any evidence of deliberation or polling.

14 A quorum of members of a public body may not deliberate or take action in a
15 non-public forum, whether they are physically gathered or gathered electronically. Members
16 may privately discuss public issues with other members individually, but the risk is that the
17 process of collective discussion may filter into communications with other members thus
18 creating a quorum and then there is the potential for violation of the OML.

19 We urge the members of HCSB to refrain from communicating with a quorum of other
20 members in non-public forums if public business is the topic of discussion. We do not find a
21 violation here, but we hope HCSB will remember the Legislature's admonition that "all
22 meetings of public bodies must be open and public, and all persons must be permitted to
23 attend any meeting of these bodies." NRS 241.020(1). Communications among a quorum of
24 HCSB creates the impression in the public that public business is being conducted in violation
25 of the OML. This is an unnecessary risk. It might be true that board members may feel more
26 comfortable discussing matters in depth when asked in private, or that decisions may be
27 made more quickly and with certainty when done privately, but the Legislature has determined

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1 that public bodies must forego these types of aids to decision making and conduct public
2 business in open meetings.

3 **ISSUE NO. 3**

4 Whether the Superintendent's "private briefings" with members of the HCSB is a
5 violation of the OML?

6 Private briefings concerning public business between Dr. Jarman and less than a
7 quorum of the HCSB is not a violation of the OML in the absence of a constructive quorum as
8 described above. The *Dewey* Court stated that "[d]iscussions with less than a quorum are not
9 deliberations within the meaning of the act." *Dewey*, 119 Nev. at 98, 64 P.3d at 1077.

10 The *Dewey* Court said the following in reference to the facts of the case:

11 If a constructive quorum did not exist, there was no violation of the
12 Open Meeting Law. This is because the quorum standard is a
13 "brightline standard [in] legislative recognition of a demarcation
14 between the public's right of access and the practical necessity that
15 government must function on an orderly, but nonetheless
legitimate, basis. . . . The public's right of access at later stages in
the decision making process, and its accompanying right to
question, is a strong safeguard that public servants remain
accountable to the citizens.

16 *Dewey*, 119 Nev. at 98, 64 P.3d at 1078 (citing *Delaware Solid Waste Authority v. News-*
17 *Journal*, 480 A.2d 628, 635 (Del. 1984)) (citations omitted).

18 Following our review of Dr. Jarman's written response and Ms. Stewart's written
19 response, we do not believe the described private briefings violate the OML.

20 V.

21 **CONCLUSION**

22 All public bodies, in non-public forums, must be careful to avoid the collective
23 discussion of a public issue that is within the public body's supervision or control with the goal
24 of reaching a decision.


25 Our opinions have consistently applied the Nevada Supreme Court precedent, which
26 states that mere back-to-back meetings of members of a public body (even if done
27 electronically among themselves) with staff, or its attorney, without evidence of specific intent
28 to avoid the OML, and without evidence that these serial communications included

1 deliberations and action on a matter over which the public body has supervision and control, is
2 not a violation of the OML.

3 We did not find any violation of the OML on the facts of this case; however, we urge
4 HCSB to avoid non public communications among a quorum of HCSB which might be viewed
5 by the public as an attempt to circumvent the OML. The OML allows considerable
6 latitude to members of public bodies so as not to hamper the public body's ability to conduct
7 business efficiently and yet insure the public's confidence that the public body's actual
8 decision making is done in public meetings.

9 DATED this 10th day of September, 2007.

10 CATHERINE CORTEZ MASTO
11 Attorney General


12 By: 
13 GEORGE H. TAYLOR
14 Senior Deputy Attorney General
15 Nevada State Bar No. 3615
16 100 North Carson Street
17 Carson City, Nevada 89701-4717
18 (775) 684-1230

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 10th day of September, 2007, I mailed a copy of the Findings of Fact and Conclusions of Law, by mailing a true copy to the following:

Dr. Delbert W. Jarman
Superintendent of Schools
Humboldt County School District
310 East Fourth Street
Winnemucca, NV 89445-2831

Sue Bosch
Kristie Grantham
c/o The Country Rose
311 S. Bridge Street
Suite D
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Employee of the Office of the Attorney General

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STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

In the Matter of:

TRUCKEE-CARSON IRRIGATION
DISTRICT BOARD OF TRUSTEES

Attorney General File No. 07-019

I.

INTRODUCTION

On April 25, 2007, this Office received a complaint from Christy Lattin (Complainant), reporter for the Lahontan Valley News, alleging that the Truckee-Carson Irrigation District (TCID) Board of Directors (Board) twice violated the Nevada Open Meeting Law (OML). Complainant first alleged the Board failed to take public comment following discussion of an item during a special meeting on April 24, 2007, and secondly, that the Board's stated agenda procedure for taking public comment at the end of each meeting "as time allows" is a violation of the public's right to speak to public bodies. Both issues are discussed below.

This opinion is issued pursuant to the Attorney General's statutory authority for enforcement of the requirements of the OML as applied to public bodies. The Attorney General has primary jurisdiction to investigate and prosecute violations of Nevada's OML (NRS Chapter 241). This opinion is based on review of recent Board agendas, minutes of the April 24, 2007 special Board session, correspondence from TCID's project manager, David Overvold, and discussions with TCID personnel and the Complainant.

II.

FACTS

Public Comment at the April 24, 2007 Special Meeting

TCID's Board¹ met in a special meeting on April 24, 2007 to consider, among other items, an item to rescind a prior Board decision to offer a real property lease to two individuals for the purpose of developing a motocross track on land controlled or owned by TCID in Lyon County. When the action item to rescind the approval of an offer to lease TCID property for

¹ There is no dispute among the parties that the Board is a public body subject to the OML.

OMLO-2007-02

1 the purpose of development of a motocross track was discussed by the Board, no public
2 comment was solicited by the chairman before the Board voted on the item. Previously, at
3 the Board's regularly scheduled meeting on April 9, 2007, when the proposed lease was
4 being considered and a vote was taken to approve the offer to lease property, the Board did
5 take comments from the public.

6 In correspondence from Mr. David Overvold, TCID's project manager, he explained
7 that no comment was solicited from the public on April 24, 2007, because the motion before
8 the Board was to rescind the previously approved lease of real property for a motocross track.
9 Mr. Overvold states in his correspondence that the public in attendance was not there to
10 speak against the motion so no comment was taken. He stated that had the motion failed,
11 public comment would have been taken under the next agenda item, which was for review of
12 the approved proposed lease.

13 **The Board's Public Comment Policy**

14 Complainant sent the Attorney General a copy of the agenda for the Board special
15 session on April 24, 2007. It clearly states in bold at the end of the agenda: "AS TIME
16 PERMITS: ACTION WILL BE TAKEN ON ALL OF THE FOLLOWING AGENDA ITEMS." The
17 list of items following this declaration included public comment.

18 **III.**

19 **ISSUES**

20 1. Whether the failure to call for public comment following the action item calling
21 for a decision by the Board to rescind the previously approved offer to lease property for a
22 motocross track was a violation of the OML?

23 2. Whether the Board's declaration that public comment will be taken as time
24 permits fulfills the requirement of NRS 241.020(2)(c)(3) that every public body meeting
25 provide a period for public comment?

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1 IV.

2 CONCLUSIONS OF LAW

3 ISSUE NO. 1

4 Review of the detailed minutes of this special session did not reveal any public
5 comment period, noted to have occurred, either during the Board's consideration of items on
6 the agenda or at the end of the meeting. Complainant's complaint indicates that the public
7 was afforded public comment, but it was at the end of the agenda and only after the Board
8 had escorted Senator Ensign's representative on a tour of TCID facilities.² The minutes do
9 not reflect that public comment was solicited at any time either on the tour or after the Board
10 reassembled at its Harrigan Road offices, if in fact they reassembled there. There is nothing
11 in the materials reviewed by the Attorney General that indicates whether the public in
12 attendance at the meeting accompanied the tour and if there was any public comment at the
13 conclusion of the tour at the dam or at the Harrigan Road district offices. The minutes of the
14 meeting do reveal that before the tour, but after the vote on the motion to rescind, an attorney
15 for "44 bench residents" (all presumably in opposition to the track) asked President Schank if
16 the Board would like a comment from him for the record. He made his comment for the
17 record. No other notation in the minutes suggests that the public was ever solicited for their
18 comments about any item.

19 Although the law only requires one period for public comment, these facts don't clearly
20 indicate compliance with that rule, despite Complainant's statement that public comment was
21 taken. If the Board's policy is to allow public comment following each item, the agenda must
22 clearly announce that policy and any reasonable restrictions to the public comment deemed
23 necessary by the Board. Since the Board called for public comment on the agenda item
24 related to the lease on April 9, 2007, the chairman should have called for comment during the
25 Board's consideration of rescinding the approval of the lease. It matters not that the chairman
26 believed no one in the audience was there to oppose the motion, he should have taken a few
27

28 ² The meeting minutes state that a Board recess was taken at 3:10 p.m., the Board reconvened at 5:00 p.m., and the meeting was adjourned at 7:00 p.m. No mention of public comment was made in the minutes.

1 minutes to call for public comment regardless of who was in the audience. It was error to fail
2 to call for public comment.

3 **ISSUE NO. 2**

4 The Attorney General has taken the position that "reasonable rules and regulations
5 that ensure orderly conduct of a public meeting and ensure orderly behavior on the part of
6 those attending the meeting may be adopted by a public body, "and the Attorney General
7 believes that "reasonable restrictions, including time limits, can be imposed on speakers."
8 *Nevada Open Meeting Law Manual*, § 8.04 (10th ed. 2005). It is the position of the Attorney
9 General that any practice or policy that discourages or prevents public comment, even if
10 technically in compliance with the law, may violate the spirit of the OML. *OMLO 99-11* (forcing
11 the public to sign up for public comment three hours before the meeting was a violation). The
12 declaration found in the Board's agenda for April 24, 2007, that public comment would be
13 allowed *time permitting*, suggests or implies that public comment was optional at the whim of
14 the Board. This implication is a violation of the OML because the public comment rule
15 appearing on the April 24, 2007 agenda could well have discouraged public comment in that
16 anyone in attendance wishing to speak might feel that, even after waiting to speak until the
17 end of the meeting, his/her opportunity might vanish because time might run out. The way
18 the agenda was written appeared to give the Board discretion that the OML does not allow.

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1 After discussion of this matter with TCID staff, we understand the policy has been
2 clarified. We have been provided with a revised agenda announcement, which we are
3 assured will appear in each TCID Board agenda in the future, that clearly announces in bold
4 letters: **“Public comment is permitted during each action item but may be limited to**
5 **5 minutes per person.”** While this declaration clearly announces Board policy allowing
6 public comment during each agenda item, the declaration must also allow for general
7 public
8 comment during the meeting as required by NRS 241.020(2)(c)(3) and it may also consider
9 reasonable restrictions on any public comment offered during this period.³

10 Even if the public was given the opportunity during a public comment period as noted
11 on the agenda, the minutes were clearly deficient in reporting it. It is a fundamental
12 requirement of the OML to provide a period of public comment. The Attorney General
13 expects that minutes of meetings reflect all periods of public comment, even those called for
14 during discussion of individual agenda items. Even if there is nothing in the OML requiring a
15 public comment period on specific agenda items if there is no public comment, the minutes
16 must reflect the opportunity. The chairman’s call for public comment can only take a few
17 seconds. Although our investigation did not reveal that anyone was denied the opportunity to
18 comment during the meeting, or that anyone was denied the opportunity to give comment on
19 those specific agenda items where public comment was allowed, the purpose and intent of
20 the OML was not served by this omission.

21 After discussion with TCID and reviewing its correspondence, we believe the Board
22 generally recognizes and adheres to these principles. The Attorney General has discussed
23 the allegations in the complaint with TCID and with the Complainant with the view to resolve
24

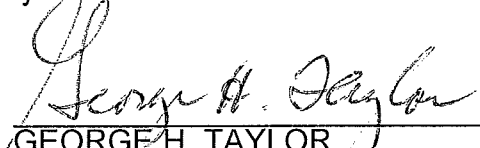
25 ³ However, any public comment limitation, including when public comment will be allowed and whether
26 public comment will be allowed on current items on the agenda, should be clearly articulated on the public body’s
27 agenda. OMLO 99-08 (July 8, 1999). Accordingly, if the Board adopts and clearly articulates a reasonable policy
28 regarding when public comment will be taken, it will be recognized by the Attorney General. OMLO 99-12
29 (October 14, 1999); OMLO 99-08 (July 8, 1999). The following is an example of a public comment agenda item:
30 “Public comment will be allowed on each action item on the agenda and will be limited to five minutes in duration.
31 General public comments will be allowed during the meeting and are also limited to five minutes per speaker. No
32 action may be taken during the public comment period.”

1 the issues in a voluntary manner. The Board has been willing to carefully analyze past
2 practices and also to amend those practices, where necessary, in order to meet both the
3 letter and spirit of the OML. The Attorney General appreciates the cooperativeness shown by
4 the Board to resolve the allegations in the complaint. Therefore, this opinion will serve to
5 memorialize the Board's intent to make clear on each agenda that it will provide the
6 opportunity for public comment for each agenda item subject to reasonable restrictions. It is
7 also important that the Board draft the agenda so that general public comment is allowed
8 during the meeting subject only to reasonable restrictions. The public must be fairly apprised
9 of any restriction applicable during comment periods on each agenda.

10 DATED this 17th day of July, 2007.

11 CATHERINE CORTEZ MASTO
12 Attorney General

13
14 By:


15 GEORGE H. TAYLOR
16 Senior Deputy Attorney General
17 Nevada State Bar No. 3615
18 100 North Carson Street
19 Carson City, Nevada 89701-4717
20 (775) 684-1230

1 **CERTIFICATE OF MAILING**

2 I hereby certify that I am employed by the Office of the Attorney General of the State of
3 Nevada, and that on this 17th day of July, 2007, I mailed a copy of the
4 Findings of Fact and Conclusions of Law, by mailing true copies by U.S. Mail to:

5 Ernest P. Shank, President
6 Board of Directors
7 Truckee-Carson Irrigation District
8 P.O. Box 1356
9 Fallon, NV 89407-1356

10 David P. Overvold
11 Project Manager
12 Truckee-Carson Irrigation District
13 P.O. Box 1356
14 Fallon, NV 89407-1356

15 Christy Lattin
16 Reporter
17 Lahontan Valley News
18 562 North Maine Street
19 Fallon, NV 89406

20 Carole Buckleey
21 An Employee of the Office of the Attorney General
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STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

In the Matter of:

WALKER BASIN PROJECT
STAKEHOLDERS GROUP

Attorney General File No. 07-025

I.

INTRODUCTION

Several individuals with agricultural and domestic well interests in Mason Valley (Lyon County, Nevada), through which the Walker River flows, have collectively filed an Open Meeting Law (OML) complaint with this Office.¹ The complaint alleges that a group known as the Walker Basin Project Stakeholders Group (WBPSG) is a public body within the meaning of the OML, and has violated the OML by not recording meetings, by not generating minutes in a timely manner, and by not seeking approval of those minutes.

It is alleged in the complaint that WBPSG has held two meetings (December 13, 2006 and March 29, 2007) which were "substantive meetings" with detailed presentations by experts and detailed objections by members of the public. The complaint requested this Office to remedy the violations described above.

This Office has primary jurisdiction to investigate and prosecute violations of Nevada's OML (NRS Chapter 241). This opinion is based on review of the complaint as well as a detailed response to the allegations in the complaint by WBPSG's attorney.

II.

FINDINGS OF FACT

WBPSG is a product of the Walker Basin Project (WBP), a University of Nevada project, which was created by federal law (Pub. L. No. 109-103, § 208). Pub. L. No. 109-103, § 208 authorizes funding to the University of Nevada for the WBP in an amount up to \$70,000,000 for the preservation of Walker River and its watershed. Section 208 authorizes

¹ The complaint was prepared and filed by and through their attorney, Bill Schaeffer, Esq., Battle Mountain, Nevada.

OMLO 2007-03

1 the University of Nevada, among other objectives, to use the funds to acquire from willing
2 sellers, land, and water appurtenant to the land, and related interests in the Walker River
3 Basin.²

4 Following the passage of the Act, Chancellor James Rogers, Chief Executive Officer of
5 the Nevada System of Higher Education (NSHE), directed University of Nevada Reno
6 (University) Executive Vice Chancellor, Daniel Klaich (Vice Chancellor Klaich), to administer
7 the Act's directives and take whatever action he deemed necessary to meet the objectives of
8 Pub. L. 109-103. Day-to-day responsibility for the project was delegated to Vice Chancellor
9 Klaich who provides updates on a regular basis to the Research and Economic Development
10 Committee of the Nevada Board of Regents.

11 Vice Chancellor Klaich created a staff organization, the Walker Basin Executive
12 Steering Committee (Steering Committee), to develop projects, proposals, and investigate the
13 availability of water rights and other real property interests in the basin as targets for eventual
14 acquisition. Any real property identified for acquisition by the University under the authority of
15 the public law would eventually have to be approved by the full Board of Regents, otherwise
16 all decisions and other day-to-day work is done under supervision of the Steering Committee
17 and Vice Chancellor Klaich.

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25 ² "The overall objective of the WBP is to develop, test and implement a computer-based Decision
26 Support Tool (DST) for the Walker River basin to evaluate the effectiveness of proposed water right acquisitions
27 for increasing water deliveries to Walker Lake. The DST will capture important relationships among climate [sic],
28 simulate the evaporation from open water surfaces such as streams and ditches and the transpiration from
different vegetation sources, river flows, groundwater-surface water exchange along the river, irrigation practices,
groundwater pumping, lake volume, and total dissolved solids levels in Walker Lake." Taken from WBP's
website: nevada.edu/walker/research/index.html.

1 WBPSG, the body at issue in this complaint, was formed at the invitation of the staff Steering
2 Committee.³ Letters appointing stakeholders were sent by the Steering Committee in
3 November of 2006 inviting members of the public and others with an interest in the Walker
4 River to form the WBPSG. The letter inviting members of the public to join, informed them
5 that their role would be advisory and that they would receive updates on the research and
6 communications activities related to the WBP at regular meetings. WBP's web page FAQ's
7 explains the role of the WBPSG:⁴

8 What is the Stakeholders Committee? The NSHE Walker Working
9 Group, which consists of representatives of the project partners,
10 chose to create the Stakeholders Committee to provide for
11 stakeholder input and involvement, and to become better informed
12 about the interests and concerns that stakeholder groups may
13 have in the project. Creation of the Stakeholders Committee was
14 not required, but was intended to provide a way for interested
15 Walker Basin residents to keep up-to-date on the project.

16 The meetings of WBPSG are designed to be an open forum for discussion of issues
17 regarding the WBP. Although an agenda is prepared WBPSG, the meetings are informal. No
18 recordings of the meetings have been made. The body does not take action on any matter,
19 and it is not funded by the University, nor does it spend or disburse any money.⁵ The
20 WBPSG meetings are open to the public and are held in public venues. The project

21 ³ WBPSG members include: Mauricia Baca, member-at-large selected by U.S. Senator Harry Reid;
22 AILEN Biaggi, representing the Nevada Department of Conservation and Natural Resources; David Fulstone,
23 member-at-large selected by U.S. Senator John Ensign; Steve Fulstone, member-at-large; Lisa Heki,
24 representing U.S. Fish and Wildlife Service; County Commissioner Phyllis Hunewill, representing Lyon County;
25 Dan Jacquet, representing the Bureau of Land Management; Jon McMasters, representing the Walker River
26 Paiute Tribe; Willie Molini, representing the hunting and fishing community; County Supervisor Bill Reid,
27 representing Mono County; John Sarna, representing the California Department of Water Resources; Loretta
28 Singletary, representing University of Nevada Cooperative Extension; Lou Thompson, representing the Walker
Lake Working Group; County Commissioner Jerrie Tipton, representing Mineral County; Ken Spooner,
representing the Walker River Irrigation District; and Pam Wilcox, representing the Nevada Division of State
Lands.

⁴ Nevada.edu/walker

⁵ Travel expenses, meals, lodging and other expenses of Project Coordinator Ms. Karen Grillo are paid
for from federal funding of the project as released by the Bureau of Reclamation. No tax revenues are used to
support the WBPSG.

1 coordinator, Karen Grillo, an independent contractor, will prepare a report regarding
2 discussions held at meetings for distribution.⁶

3 III.

4 ISSUE

5 Whether the WBPSG is a public body subject to the Open Meeting Law.

6 IV.

7 CONCLUSIONS OF LAW

8 Consideration of whether the WBPSG is a public body begins with the statutory
9 definition of "public body." NRS 241.015(3) defines public body as:

10 [A]ny administrative, advisory, executive or legislative body of the
11 state or a local government which expends or disburses or is
12 supported in whole or in part by tax revenue or which advises or
13 makes recommendations to any entity which expends or disburses
or is supported in whole or in part by tax revenue, including, but
not limited to, any board, commission, committee, subcommittee
or other subsidiary thereof

14 Breaking the components down further, this statute requires two elements to be
15 satisfied before an entity may be considered a public body. Op. Nev. Att'y Gen. No. 2002-19,
16 at 2 (May 2, 2002). First, the entity must be an "administrative, advisory, executive or
17 legislative body of the state or a local government." *Id.* (quoting NRS 241.015(3)). To satisfy
18 this first element, "the entity must: (1) owe its existence to and have some relationship with a
19 state or local government; (2) be organized to act in an administrative, advisory, executive or
20 legislative capacity; and (3) must perform a government function." *Id.*; (See Open Meeting
21 Law Manual, § 3.01 (10th ed. 2005). Second, the entity must "expend or disburse or be
22 supported in whole or in part by tax revenue, or advise or make recommendations to any
23 entity which expends or disburses or is supported in whole or in part by tax revenue." *Id.*

24 Under the three requirements for the first element, it is clear that the WBPSG does not
25 meet two of the three. Even if it is an entity which owes its existence to and has some
26

27
28 ⁶ In an exchange of emails from Ms. Grillo to Mr. David Haight, attached to the complaint, Ms. Grillo referred to her report as "minutes." This office has not seen a copy of the so-called report. It was not provided by the WBPSG. Because of the determination made by this opinion, it will not be necessary to view the "minutes."

1 relationship with a state or local government, (i.e. NSHE and Vice Chancellor Klaich),⁷
2 WBPSG is not organized to act in an administrative, advisory, executive or legislative
3 capacity; meaning it does not perform a governmental function.⁸

4 The WBPSG is a private group invited by the University to convene in an informal
5 setting to receive information about WBP's efforts to proceed under the congressional act that
6 created the WBP. It is generally recognized in the case law from other state courts that have
7 considered this issue that:

8 [p]urely private entities are typically not within the scope of open
9 meeting acts. Private entities that work for or with a government
10 are not necessarily subject to the open meeting law by virtue of
11 that relationship. . . . Special circumstances may arise, however, if
the private entity is receiving public funds and acting as a
governmental agency, or has been delegated decision making
power by a public body.

12 [A. Schwing, *Open Meeting Laws*, 2nd, § 4.100 (2000) (citations omitted).]

13 Based on the facts developed in this case, the WBPSG receives no funds, is not an
14 advisory body, and does not have decision making power over any issue. So, there are no
15 special circumstances that would make the OML applicable. It is also clear that the WBPSG
16 does not expend nor disburse tax revenue or advise or make recommendations to an entity
17 that does, thereby dispelling any issue of applicability of the OML under the second element
18 for determining whether a body is a public body under the OML.⁹

19 ///

21 ⁷ UCCSN now called NSHE was determined to be a state entity in *Simonian v. UCCSN*, 122 Nev. 187,
22 128 P.3d 1057 (2006).

23 ⁸ Nevada's Open Meeting Law manual describes in detail the characteristics of a public body. It must be
24 collegial: the members must share voting power; its members are concerned with meetings, gatherings,
25 decisions, and actions obtained through a collective consensus of all members. Open Meeting Law Manual §
26 3.01 (10th ed. 2005). None of these attributes characterize the WBPSG. Furthermore, the entity to be
27 considered a public body, must exercise a governmental function which is defined in NRS 241.015(3) as
"administrative, advisory, executive or legislative" functions such as: the power to tax, the regulation of the
conduct of individuals, and/or the supervision of or control over public business or policy. This list is certainly not
exclusive, only illustrative, of the governmental function attributes of a public body. WBPSG is a passive body
that was invited to convene to receive information. According to the website, nevada.edu/walker, it does not have
any advisory power, and it certainly does not have executive, legislative, or administrative power.

28 ⁹ Although the WBPSG does not advise or make recommendations to anyone, Vice Chancellor Klaich, is
in charge of the project. He is an individual who is not subject to the OML as he is not a collegial body. See Op.
Nev. Att'y Gen. 2002-06 (a public body must be a multi-member entity, not an individual.)

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V.

CONCLUSION

The WBPSG does not take action on any matter, it does not vote on any matter, and it is not organized as a collegial body to consider Walker Basin issues or advise or recommend any action to the Steering Committee or Vice Chancellor Klaich. The WBPSG is not funded by the University nor does it spend or disburse any tax money to support its activities. Its sole purpose, as described on its web page, is to "provide a way for interested Walker Basin residents to keep up-to-date on the project." We conclude that the WBPSG is not a public body within the meaning of NRS 241.015(3).

DATED this 17th day of July, 2007.

CATHERINE CORTEZ MASTO
Attorney General

By:


GEORGE H. TAYLOR
Senior Deputy Attorney General
Nevada State Bar No. 3615
100 North Carson Street
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CERTIFICATE OF MAILING

I hereby certify that I am employed by the Office of the Attorney General of the State of Nevada, and that on this 17th day of July, 2007, I mailed a copy of the Findings of Fact and Conclusions of Law, by mailing true copies by U.S. Mail to:

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An Employee of the Office of the Attorney General

1 STATE OF NEVADA
2 OFFICE OF THE ATTORNEY GENERAL

3 In the Matter of:

4 CITIZEN ADVISORY PANEL

} Attorney General File No. 07-030

5
6 I.

7 INTRODUCTION

8 A complaint has been filed with this Office alleging that a violation of the Open Meeting
9 Law (OML) was committed by the "Citizen Advisory Panel for a Financially Feasible Approach
10 to Providing FIRE/EMS Services" (CAP) in the City of Las Vegas. The CAP is composed of
11 citizens who were invited by the Las Vegas City Manager to serve on a panel to develop
12 recommendations for the provision of fire services. It is alleged that the CAP held a
13 telephonic meeting without complying with the notice or agenda provisions of the OML. As
14 evidence of the meeting, the Complainant submitted a three-page document entitled "CAP
15 Telephone Conversations."

16 This Office has primary jurisdiction to investigate and prosecute violations of Nevada's
17 OML. NRS Chapter 241. This opinion is based on review of the complaint, as well as a
18 detailed response to the allegations in the complaint by the assistant city attorney
19 representing the City of Las Vegas (City). In addition, both the Complainant and the attorney
20 for the CAP have been interviewed for this opinion.

21 II.

22 FINDINGS OF FACT

23 Background

24 The City's response to the complaint states that the CAP is not a public body subject to
25 the OML because it is advisory to the City Manager, who as an individual is not subject to the
26 OML; therefore, the CAP is also not subject to the OML. Agendas and notices for the CAP
27 meetings were prepared and posted because the City Manager wanted to "advertise" the
28 meetings so as to avoid any charge from the public that these policies or recommendations

1 were developed in secret. It is asserted by the City that agendas and notices were not
2 prepared so as to be in compliance with the OML but only to advertise the meetings.

3 The complaint alleges that the CAP held a telephone conference in June of 2007
4 without notice or a posted agenda. The Complainant felt that the CAP was a public body
5 which had violated the OML when it held a non-posted meeting. Neither the City nor the CAP
6 had informed the public that the CAP was not a public body, but only an advisory body to the
7 City Manager, and thus not subject to the OML.

8 The City points out that the CAP had no delegation of authority from the City Manager
9 to act formally on behalf of the City, it never voted on any issue, and it never elected a
10 chairman. The CAP listened to presentations on the City budget, City funding of fire services,
11 and it listened to a briefing on how fire services are currently provided. All of these briefings
12 were delivered by City staff. The CAP asked questions of staff, then it compiled a list of
13 recommendations to each of the areas in which the City Manager was interested. That list
14 became the Final Report. The CAP finished its assignment from the City Manager and issued
15 the Final Report in June of 2007.

16 **CAP Formation and Meetings**

17 Beginning in 2006, City Manager Douglas Selby decided to study more cost effective
18 or supplementary means of providing fire and emergency medical services in the City
19 including the means of financing these services. The issues to be studied were known as
20 "fire services issues" and seemed to involve an effort to create innovative methods of
21 providing services and funding given the impact fire services have on the City's budget.¹

22 After discussion with City staff, Mr. Selby determined that a committee of community
23 members with expertise in fire services issues should be asked to conduct a study and
24 recommend solutions. Early in 2007, Mr. Selby invited several individuals from the
25

26 ¹ The Final Report issued by the CAP stated that the "Las Vegas Fire & Rescue Department currently
27 absorbs over One Hundred Million dollars per year of the City's general fund budget." The Final Report also
28 states that "[b]ecause of the growth in the Las Vegas Valley, it is anticipated that the City will need to finance an
additional five fire stations . . . over the next five years." Therefore the goal of the CAP was to determine and
recommend to the City Manager a financially feasible approach to providing fire/EMS services to the residents of
Las Vegas.

1 community knowledgeable and experienced in several fire service areas to serve on a
2 "Citizen Advisory Panel." The members' expertise included firefighting at the command level,
3 experience in working with the firefighter's union, experience in providing ambulance services,
4 experience in homebuilding, and experience in City affairs and public relations.

5 Early in March of 2007, before the first meeting of the CAP, Mr. Selby briefed the Las
6 Vegas City Council about his decision "to empanel a committee of community members to
7 study the long-term financing options for provision of the City's fire services." Thereafter,
8 invitations were sent to designated community members asking them to serve on a CAP.
9 Mr. Selby and the City's fire chief signed the invitations. There did not appear to be any
10 involvement from the City Council with the formation or mission of the CAP.

11 The CAP's work was envisioned to take two months after the first meeting took place
12 on April 23, 2007, with the help of a facilitator engaged by the City. The CAP prefaced each
13 meeting with a Notice (published at three prominent places), an Agenda (identifying the
14 meeting time, place, and items for discussion), and then minutes of meetings were prepared
15 and distributed.²

16 III.

17 ISSUE

18 Whether the CAP violated the OML by holding a secret telephone conference
19 meeting?

20 IV.

21 CONCLUSIONS OF LAW

22 As mentioned earlier in this opinion, it is obvious that the Complainant considered that
23 the CAP was a public body. After all, it met with all or most of the requirements of a public
24 body. It posted notice and an agenda for each of its meetings; it kept minutes which always
25 indicated whether there was public comment, which is a fundamental signature of a public
26

27 ² The agendas did not meet other lawful OML requirements for agendas including: the presence of an
28 item allowing public comment, there was no segregation of items for action or discussion only, and there were no
statements that the notice and agenda were legally published prior to the meetings. Roll was not taken, meetings
were not recorded, and there were no action items for adjournment.

1 body. Complainant was only concerned that the CAP held a secret telephone conference
2 meeting.³

3 Because the City challenges the complaint's implicit assumption that the CAP was a
4 public body, we will examine the attributes of "public body" and determine whether the CAP
5 meets that definition. The determination of whether the CAP is a public body is a
6 fundamental issue necessary for resolution of this complaint. There is no question that the
7 City did not intend to conduct meetings in violation of the OML.

8 The purpose underlying the OML is succinctly expressed by the Nevada Legislature at
9 NRS 241.010. It states that "public bodies exist to aid in the conduct of the people's
10 business. It is the intent of the law that their actions be taken openly and that their
11 deliberations be conducted openly."⁴

12 Implicit in the Legislature's purpose as expressed in statute is the belief that the OML
13 should apply to any body that has the right to decide and make choices on public business.
14 This opinion examines this issue in the context of a CAP, which was only charged to make
15 recommendations to the City Manager, but it never enjoyed any power to make decisions or
16 other authority over public issues or policy.

17 Consideration of whether the CAP is a public body begins with the statutory definition
18 of "public body."

19 ///

20 ///

21 ³ The City's response to the complaint stated that because the June 4, 2007 meeting was cancelled, and
22 because formulation of the Final Report was the next step, the City Manager asked Mr. Cameron, the facilitator,
23 to make telephone contact with the panel's members to solicit their specific recommendations on key policy
24 issues. Mr. Cameron called six of eight members individually; there was no conference call among the panel
25 members. The City's response contained assurances that the facilitator was careful to avoid passing information
26 from one member to the next so as to avoid any serial contact between each of the six panel members. The
27 City's response also assures us that no deliberation, vote, or decision occurred in any of the telephone calls to the
28 panel members.

26 ⁴ The purpose of open meetings is expressed differently by legislatures and courts, but the California
27 legislature expressed the underlying importance of open meeting legislation very aptly when it said, "The people,
28 in delegating authority, do not give their public servants the right to decide what is good for the people to know
and what is not good for them to know. The people insist on remaining informed so that they may retain control
over the instruments they have created." California Government Code § 54950 (2007).

1 NRS 241.015(3) defines public body as:

2 [A]ny administrative, advisory, executive or legislative body of the
3 State or a local government which expends or disburses or is
4 supported in whole or in part by tax revenue or which advises or
5 makes recommendations to any entity which expends or disburses
6 or is supported in whole or in part by tax revenue, including, but
7 not limited to, any board, commission, committee, subcommittee
8 or other subsidiary thereof

9 Breaking the components down further, this statute requires two elements to be
10 satisfied before an entity may be considered a public body. Op. Nev. Att’y Gen. No. 2002-19,
11 at 2 (May 2, 2002). First, the entity must be an “administrative, advisory, executive or
12 legislative body of the state or a local government.” NRS 241.015(3). To satisfy this first
13 element, “the body must: (1) owe its existence to and have some relationship with a state or
14 local government, (2) be organized to act in an administrative, advisory, executive or
15 legislative capacity, and (3) must perform a government function.” NEVADA’S OPEN MEETING
16 LAW MANUAL, § 3.01 (10th ed. 2005). Second, the body must expend or disburse or be
17 supported in whole or in part by tax revenue, or advise or make recommendations to any
18 entity which expends or disburses or is supported in whole or in part by tax revenue. *Id.* The
19 Nevada Open Meeting Law Manual states that the OML does not apply to individuals such as
20 the Governor or the executive officer of a board or commission. NEVADA’S OPEN MEETING LAW
21 MANUAL, § 3.02 (10th ed. 2005). It is clear that the OML does not apply to Douglas Selby, Las
22 Vegas City Manager, when acting in his official capacity, nor does the OML apply to routine
23 meetings between the City Manager and his staff. *Id.* at § 3.03. But the issue presented here
24 is whether the OML applies to a citizen’s advisory body appointed by Mr. Selby. Does it
25 matter that the CAP was appointed by an individual not subject to the OML and does it matter
26 that the CAP’s recommendations will ultimately be presented to the Las Vegas City Council?
27 Prior opinions issued by this Office state that generally the OML does not apply to internal
28 staff groups or *committees reporting to an individual*. [Emphasis added.] OMLO 2002-02,

1 January 20, 2004 (finding that “interagency meetings of groups which have no independent
2 legal authority, no independent budget, and no formal mission or purpose will not fall within
3 the definition of a public body if these groups . . . do not advise or make recommendations to
4 a public body.”); Op. Nev. Att’y. Gen. No. 2002-06, February 8, 2002 (staff committee plus
5 one deputy attorney general not subject to OML as it was advisory only to the Commissioner
6 of Insurance); Op. Nev. Att’y. Gen. No. 2002-13, March 14, 2002 (stating that “[a] committee
7 formed by an individual who is not subject to the Open Meeting Law is likewise not subject to
8 the Open Meeting Law).

9 **IV.**

10 **CONCLUSION**

11 The CAP is not a public body subject to the OML. Therefore, the conference call
12 initiated by the facilitator was not violative of the OML. This determination is due to the
13 identity of the parent body—Douglas Selby, City Manager—who is an individual not subject to
14 the OML. This Office has endorsed the long-standing exemption of committees and
15 subordinate bodies appointed by or invited by an individual executive head of an agency. In
16 this case, Mr. Selby, as City Manager for the City of Las Vegas, invited eight citizens to serve
17 on a temporary advisory body charged with a limited task and without any policy making or
18 delegated decision making authority. This body was a permissible exemption from the OML.⁵

19 In the future this Office encourages public bodies and those executive individuals in a
20 similar position to Mr. Selby, to consider carefully whether an appointed or volunteer advisory
21 body should comply with the OML. An advisory body should not act like a public body and
22 then claim it is not subject to the OML. If it was important to “advertise” the meetings, the

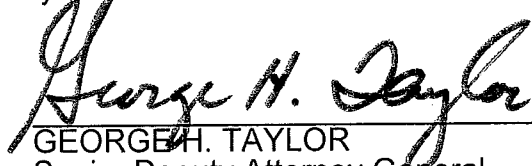
23 _____
24 ⁵ This Office issued OMLO 2002-50 (November 20, 2002) which found that a private citizen task force
25 organized by request of a Clark County Commissioner (not the entire commission) to “evaluate all of the facts,
26 issues, options and implications involved in the possible sale of the Indian Springs Sewer and Water Company”
27 was a body subject to the OML. The task force’s purpose was to make a non-binding recommendation to
28 Commissioner Maxfield, the Clark County Commissioner who was instrumental in organizing the task force of
private citizens. The task force did not have a chairman, secretary or other designated leader, nor did it have any
governing or decision making power. It was purely an ad hoc committee, or in other words, a citizen’s advisory
panel much like the CAP at issue in reporting to the Clark County Manager. To the extent that OMLO-50 found
the citizens advisory body it examined to be a public body based on its creation that is clearly attributable to an
individual-Commissioner Maxfield-it is overruled.

1 OML is uniquely positioned to do just that. Compliance with the OML has the additional
2 benefit of providing a defense to claims that the endeavor was secret.

3 DATED this 10th day September, 2007.

4 CATHERINE CORTEZ MASTO
5 Attorney General

6
7 By:



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1 **CERTIFICATE OF MAILING**

2 I hereby certify that I am employed by the Office of the Attorney General of the State of
3 Nevada, and that on this 10th day September, 2007, I mailed a copy of the Findings of Fact
4 and Conclusions of Law, by mailing true copies by U.S. Mail to:

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An Employee of the Office of the Attorney General

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STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

In the Matter of:

NEVADA DISCOVERY MUSEUM

} Attorney General File No. 07-042
} OMLO 2008-01

I.

INTRODUCTION

This office received a request for an opinion as to whether the Nevada Discovery Museum (Museum) is subject to the Open Meeting Law (OML) because the 2007 Legislature appropriated \$1 million for its use. The 2007 Legislature appropriated \$1 million for construction and initial operating expenses for the Museum.¹ The issue is whether the Museum (a private nonprofit corporation) and its Board of Directors is subject to the OML based on receipt of public money.

II.

FINDINGS OF FACT

The Museum's Articles of Incorporation and Bylaws show it was incorporated in 2004 as a private nonprofit corporation (NRS Chapter 82) and is recognized under federal law as a Section 501(3)(c) corporation. We reviewed Senate Bill 443 § 16 (2007) for more information regarding the purpose for which the Legislature appropriated \$1 million. The Legislative appropriation was exclusively designated for construction and initial operating expenses. The Legislative appropriation sunsets June 30, 2011, after which the remaining balance of the appropriation may not be committed by the Museum for future use. S.B. 443, § 17 (2007). The Museum is empowered to raise money by solicitation and donation. Following construction and initial operation, the Museum must become self supporting.

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¹ Senate Bill No. 443 (2007), Sec. 16. (1.) states: "There is hereby appropriated from the State General Fund to the disbursement account created by section 1 of this act for the use of the Nevada Discovery Museum in Reno the sum of \$1,000,000 for capital construction and initial operating expenses."

1 The Museum's corporate purposes are constrained by Section 501(c)(3) of the Internal
2 Revenue Code. It must be operated exclusively for charitable, religious, educational,
3 scientific and literary purposes. Our review of the corporate Bylaws does not reveal any
4 affiliation with state or local government, nor is there a requirement that the Board of Directors
5 act in any administrative, advisory, or executive role to a state or local governmental entity.
6 The absence of any affiliation with state or local government was also confirmed in our
7 interview with the Museum Board's secretary.

8 III.

9 ISSUE

10 Whether the Museum is subject to the OML (NRS Chapter 241) because of the
11 Legislative grant of \$1 million (public funds) for construction and initial operations?

12 IV.

13 CONCLUSIONS OF LAW

14 The Museum's purpose as expressed in its Bylaws and Articles of Incorporation show
15 that it is a civic organization intended to advance certain educational and scientific purposes.
16 In Nevada, if a civic organization is intended to perform any administrative, advisory,
17 executive, or legislative function for state or local government and if it expends or disburses or
18 is supported in whole or in part by tax revenue, or if it is intended to advise or make
19 recommendations to any other Nevada governmental entity which expends or disburses or is
20 supported in whole or in part by tax revenue, then it is a public body subject to the OML.
21 Open Meeting Law Manual § 3.09 (10th ed. 2005); See e.g., *Seghers v. Community*
22 *Advancement, Inc.*, 357 So. 2d 626, 627 (La. Ct. App. 1978); *Raton Public Service Co. v.*
23 *Hobbes*, 417 P.2d 32, 34-35 (N.M. 1966); accord *OMLO 2001-17* (April 12, 2001). Neither
24 the Articles of Incorporation nor the Museum's Bylaws grant the Museum traditional
25 governmental functions. It will not act in administrative or advisory roles.

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1 The Open Meeting Law Manual (10th ed. 2005) states that if a government body or
2 agency establishes a civic organization (i.e. the Discovery Museum, for example), even
3 though the new organization is composed of private citizens, the new organization may well
4 constitute a "public body" under the law. *Palm Beach v. Gradison*, 296 So. 2d 473, 476 (Fla.
5 1974). Our examination of the Articles of Incorporation and Bylaws does not show any
6 connection to state or local government by any of the means expressed above.

7 Finally, the Open Meeting Law Manual (10th ed. 2005) also clarifies that the mere
8 receipt of a grant of public money does not by itself transform a private, nonprofit civic
9 organization into a "public body" for purposes of the OML, nor does the membership of a few
10 government officials on the organization's board of directors, per se, make the organization a
11 "public body." Open Meeting Law Manual, § 3.09 (10th ed. 2005); See *OMLO 2004-03*
12 (February, 10, 2004) citing *OMLO 1999-05* (January 20, 1999).

13 V.

14 CONCLUSION

15 We conclude that the Museum is not subject to the OML. This office has consistently
16 opined that private organizations may be subject to the OML unless the private organization
17 has no connection to state or local government and secondly, the private organization does
18 not perform any tasks the state or local government would otherwise have to perform. See
19 *OMLO 2001-17* (April 12, 2001). The Board of Directors does not act in an executive,
20 legislative, or advisory role to any state or local government. The Museum was not created
21 by a state or local government, instead it is a private nonprofit corporation incorporated for
22 charitable, educational, scientific, or literary purposes. The legislative appropriation from the

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1 State's general fund is only to be used for capital construction and initial operating expenses.
2 There is no tax revenue stream supporting the Museum. The Museum will be self-supporting.
3 The Museum is not subject to the OML.

4 DATED this 24th day of January, 2008.

5 CATHERINE CORTEZ MASTO
6 Attorney General

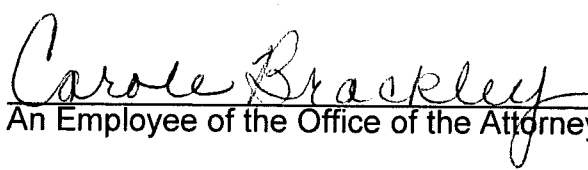
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CERTIFICATE OF MAILING

I hereby certify that I am employed by the Office of the Attorney General of the State of Nevada, and that on this 24th day January, 2008, I mailed a copy of the Findings of Fact and Conclusions of Law, by mailing true copies by U.S. Mail to:

Beth Wells
Nevada Discovery Museum
490 S. Center Street
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An Employee of the Office of the Attorney General

1 II.

2 ISSUES

3 1. Whether a quorum of members of the Commission met in violation of
4 NRS 241.015(2)(a)(1)?

5 2. Whether the Commission's subsequent action and disclosure of the facts of the
6 gathering immediately following the recess cured any violation?

7 III.

8 FACTS

9 The Commission met on November 13, 2007 to consider a zoning text amendment
10 (item 11, DA 07-112) to the Douglas County Code that would control the division of certain
11 agricultural land for conservation purposes. The controversial portion of the amendment
12 would force the landowner (rancher) to lose a development right in order to create a two-acre
13 parcel every five years because of the application of a special standard (loss of a
14 development right) if these new parcels were in a primary flood plain.

15 Those affected by the proposed zoning textual amendment included members of the
16 agricultural community (ranchers) who own more than 100 acres of irrigated land. Mr. Mark
17 Neddenriep, an unofficial spokesperson for the agricultural community, spoke during public
18 comment stating that the central issue for the ranchers was whether ranchers must give up a
19 development right in order to create a two-acre parcel under the terms of staff's proposed
20 amendment. Mr. Neddenriep stated he felt staff's objective was to stop the proliferation of
21 19 acre parcels carved out of agricultural land, but even that laudable goal conflicted with the
22 practical economics for a rancher. If a rancher had to give up a development right in order to
23 create a two-acre parcel, the rancher might lose incentive to keep water on his 19 acre
24 agricultural parcel. There would be a risk that the rancher would be tempted to strip the water
25 leaving a "weedette." It was these issues that seemed to underlie the Commission's
26 discussion and it was the issue of development rights vis-à-vis the creation of two-acre
27 parcels that appears to have been discussed during the recess gathering.

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1 After public comment closed, Douglas County Senior Planner, Harmon Zuckerman
2 raised staff's concerns about the possibility of conflict between the amendment and the
3 county code if the Commission followed the agricultural community's desire to change staff's
4 proposed textual amendment. He was concerned about the potential increase in
5 development rights in the flood zone and the impact the proposed changes to the amendment
6 advocated by the agricultural community might have on the flood plain by future owners of
7 agricultural land who might want to do the same thing that the current owners would be
8 allowed to do if the Commission adopted the rancher's proposed change.

9 Because of the tension between the ranchers' desires and staff's proposed
10 amendment, the chairman ordered a ten minute recess so that counsel could research the
11 legal issue of whether a continuance of the matter to another public meeting was feasible.

12 During the recess a quorum of the commissioners appeared to have gathered behind
13 the dais, in the Commission's meeting room. There was no recording or minutes taken of this
14 gathering. Mr. Slade, the complainant observed the gathering and he also approached to
15 listen to the conversations.

16 Whether a quorum gathered is somewhat disputed. The complainant stated he
17 observed the gathering of Commissioners Howell, Madsen, Pross and McKinney who were in
18 discussion with Mr. Neddenriep and Mr. Leising, two members of the public (ranchers). He
19 approached them to hear what was being discussed. The complaint alleges that the ranchers
20 were lobbying the commissioners to accept their version of the amendment, rather than staff's
21 version.

22 Each commissioner involved in the gathering submitted signed statements to this office
23 in the course of our investigation, in which they described the substance of and their
24 involvement in the conversation during the recess.

25 Commissioner Howell's recollection of his conversation with the ranchers was that one
26 of the ranchers was explaining that their residences on the flood plain never flooded because
27 they knew where to build. Commissioner Howell noticed that Mr. Neddenriep, another
28 rancher had approached them presumably to listen in. Commissioner Howell states he

1 responded to a question from Mr. Leising before he realized three other commissioners had
2 gathered behind him. He knew then that a quorum was gathered. He stated he exited the
3 room when he noticed that a quorum had gathered. Despite the presence of a quorum, he
4 denied there was a violation of the OML saying that he was not aware of a discussion of the
5 agenda item.

6 Commissioners Madsen and McKinney admit that during the recess they discussed
7 with the ranchers proposed solutions to the apparent problem with the amendment caused by
8 staff's treatment of development rights. Commissioner McKinney's recollection of the recess
9 gathering was that he along with Commissioners Madsen, and Pross were in conversation
10 with Mr. Neddenriep at the dais. Commissioner Howell's seat is adjacent to Commissioner
11 Madsen. Commissioner McKinney states that when Commissioner Pross approached and
12 asked a question, Commissioner Howell departed, but he was unsure whether Commissioner
13 Howell participated in the conversation. Mr. Leising and Mr. Slade also approached the
14 gathering "during this period" according to Commissioner McKinney. Both commissioners
15 state that the recess conversation did not arrive at a solution, that no promises or decisions
16 were made by them, nor did the discussion influence their votes.

17 Commissioner Pross's statement and the recollection of Mr. Slade's account of the
18 recess offer a contrasting view to the accounts of the other commissioners of the recess
19 gathering. Commissioner Pross spoke on the record about the apparent OML violation
20 immediately upon the Commission reconvening. She stated for the record that the ranchers
21 and the commissioners were discussing a solution to the ranchers' objection to staff's
22 requirement that they give up a development right in order to create a two-acre parcel.
23 Following her apology, she said, in response to questions from counsel, that no promises, or
24 decisions had been given or made during the recess meeting. The other commissioners were
25 invited to comment on her recounting of the facts, but none did so. This would have been an
26 appropriate place commissioners who did not believe that an OML violation had occurred to
27 voice their opinions.

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1 Mr. Slade's complaint stated that when he observed four Commissioners talking with
2 two ranchers he approached to listen in. He says that the meeting lasted about 10 minutes
3 and that Commissioner Howell left about half way through. Commissioner Pross's statement
4 and her video apology leave no doubt that she believed an OML violation occurred during the
5 recess. She remembers four Commissioners on their side of the dais conversing with two
6 ranchers and that Mr. Slade was about two feet from the group.

7 Our review of the video and audio of this portion of the meeting showed that following
8 Commissioner Pross' statement the Chairman invited the ranchers to comment about the
9 possibility of a continuance to allow for more dialog with staff. Several ranchers spoke urging
10 the Commission to bring the matter to a vote. Following those comments, the Chairman
11 re-opened item 11, DA -07-112 to any public comment. He can be heard on the audio saying
12 he would accept any other public comment since he "opened the can of worms" by soliciting
13 the ranchers' reaction to the issue of a continuance. Eight people spoke during this second
14 period of public comment including Mr. Slade who addressed the potential OML violation. He
15 also commented that he favored a continuance so that the ranchers and county staff could
16 have more time to resolve their differences.

17 IV.

18 CONCLUSIONS OF LAW

19 1. Whether a quorum of members of the Commission met in violation of
20 NRS 241.015(2)(a)(1)?

21 There is no video or audio of the recess period during which it is alleged that a quorum
22 of the Board met. After review of each Commissioner's statement, the complainant's
23 recollection of the recess gathering and the counsel's response to the complaint, the facts
24 show that a quorum of the Board met in an unscheduled non-noticed meeting during the
25 recess while counsel researched a legal issue. This recess meeting appears to have been
26 unintentional as it took place in the open with the public free to approach; nevertheless, a
27 quorum was gathered at one time for at least a part of the recess and it appears the agenda
28 item was considered by a quorum of the Commission.

1 Commissioner Pross's apology on the record immediately following convening of the
2 Board admitted to an OML violation which was not contradicted by the other Commissioners
3 who were asked to comment on her brief apology. None did. Had there been a question in
4 their minds about the presence of a quorum that was the time to assert it.

5 2. Whether the Commission's subsequent action and disclosure of the facts of the
6 gathering immediately following the recess gathering, cured the violation?

7 We have carefully reviewed the audio and video record of the Board's consideration of
8 item 11 as well as commissioner's statements, and counsel's response to the complaint.
9 Counsel's response presents a compelling argument that the disclosure of the violation by
10 Commissioner Pross coupled with her recitation of the conversation between the
11 Commissioners and the two ranchers, cured the violation so that the Commission was
12 justified in voting on item 11 that evening.

13 Actions taken in violation of the OML are void. NRS 241.036. But even though a
14 violation of the OML may have occurred during the recess, it is also clear that no action
15 occurred as a result. Therefore, we must consider whether the Commission cured the
16 violation through disclosure. It is our opinion that the disclosure on the record and the
17 subsequent actions of the commissioners did cure the violation so that no further action by
18 the Commission or by this office is necessary.

19 We believe the record supports our view, as Commissioner Pross and all the other
20 Commissioner statements attest, that no promises, or commitments were made during the
21 recess. The gathering was in plain view of the public in the Commission's meeting room,
22 hardly a fact suggesting an intentional violation. We are persuaded by Commissioner Pross's
23 apology and the statements of the other Commissioners, that the discussion with the ranchers
24 during the recess meeting did not affect their votes. OMLO 2004-16 (written statements from
25 members of public body accepted as evidence.)

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1 Many other states allow a public body to cure a violation as does Nevada.² The OML
2 manual encourages public bodies to cure violations voluntarily. OML Manual, §11.01 – 11.04,
3 pps. 71–72 (10th ed. 2005). It does so by encouraging public bodies to “stop, contain, and
4 correct violations,” – advice that is set forth in examples in the manual. See *a/so* OML
5 Attorney General Opinion 06-013 (violation with regard to public comment and adjournment
6 were cured by the remaining members of the Board following the chairman’s abrupt
7 departure).

8 V.

9 CONCLUSION

10 The public was not deprived of access to the Commission’s deliberation and vote on
11 agenda item DA 07-112. During the recess gathering, there was no action on the pending
12 matter. To the extent there was deliberation among the quorum, it was cured by immediate
13 disclosure of what was discussed when the Commission reconvened. The chairman
14 reopened public comment following the recess to allow anyone to comment. Public comment

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23 ² It seems that whether a discussion during a recess is in violation of the law is in part dependent on
24 factual details surrounding the discussion such as: (1) location of the discussion, i.e. whether it took place behind
25 closed doors, in secret, or whether it took place in the same room where the public meeting was being conducted
26 and whether the discussion barred the public from participation or whether the public was free to overhear the
27 conversation (2) whether the discussion was recorded (3) length of discussion (4) whether a quorum was present
28 (5) whether the discussion took place during consideration of one matter or between consideration of different
matters on the agenda (6) whether the public body voted immediately following the recess without further public
discussion (7) the substance of the discussion (8) whether there was evidence of prejudice to the public and (9)
whether the public body acted in good faith. Anne Taylor Schwing, *Open Meeting Laws 2d* § 6.54, pps. 314-316
(2000).

1 was not restricted. This prompt action satisfies the Legislative mandate found in
2 NRS 241.020. The Commission took effective remedial action to cure an acknowledged
3 violation of the Open Meeting Law during its November 13, 2007 public meeting.

4 DATED this 6th day of February, 2008.

5 CATHERINE CORTEZ MASTO
6 Attorney General

7 By:


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