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Via U.S Mail and Email

Jenny Brekhus
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Reno, Nevada 89501
Email: brekhusj@Reno.gov

**Re: Open Meeting Law Complaint, OAG File No. 13897-454
Washoe County Board of Commissioners, Reno City Council and
Sparks City Council**

Dear Ms. Brekhus:

The Office of the Attorney General (“OAG”) is in receipt of your complaint (“Complaint”) alleging violations of the Open Meeting Law (“OML”) by the Washoe County Board of Commissioners, Reno City Council and Sparks City Council (collectively “Public Bodies”) at their joint meeting on July 22, 2022.

The OAG has statutory enforcement powers under the OML and the authority to investigate and prosecute violations of the OML. NRS 241.037; NRS 241.039; NRS 241.040. The OAG’s investigation of the Complaint included a review of the Complaint and supplemental material, responses from all three Public Bodies, and the agenda and recording of the joint meeting.

After investigating the Complaint, the OAG determines that the Public Bodies did not commit a technical violation of the OML, but as discussed in this opinion, the Public Bodies’ actions did not comport with the spirit and policy of the OML.

FACTUAL BACKGROUND

The Washoe County Board of Commissioners, Reno City Council and Sparks City Council held a joint meeting between all three public bodies on

July 22, 2022. The agenda for the meeting listed the Washoe County Commission Chambers as the single physical location for the meeting and included the following notice:

This meeting will be held at the physical location designated on this agenda, but one or more of the County Commissioners and/or County staff may attend and participate by remote technology system. Members of the public wishing to attend may do so and participate as provided in the agenda at the designated physical location. The Chair or his designee will make reasonable efforts to ensure that members of the public body and members of the public present at the physical location can hear or observe each member attending by remote technology system, and each member of the public body in attendance can participate in the meeting.

Prior to the meeting, members of the Public Bodies were notified that the meeting would be conducted via virtual means and given instructions on how to log into the meeting from their homes.

Ms. Brekhus, a Reno City Councilmember, arrived at the physical location for the meeting. Washoe County staff instructed Ms. Brekhus that she could not participate as a public body member from the physical location, only as a member of the general public, and would need to attend via virtual means if she wished to deliberate and vote. Ms. Brekhus stayed at the physical location long enough to make public comment and then traveled to her home and participated in the rest of the meeting via the remote technology system. Ms. Brekhus attempted to participate via phone while traveling home, but due to technical difficulties, she was not able to participate in the first action item and her vote was not counted.

Ms. Brekhus filed the instant Complaint alleging the Public Bodies violated the OML by failing to list on the agenda that the meeting would be virtual and by refusing to allow her to participate in the meeting as a member from the physical location.

LEGAL ANALYSIS

As governing bodies of local governments within Nevada, the Washoe County Board of Commissioners, Reno City Council and Sparks City Council are all “public bodies” as defined in NRS 241.015(4) and are subject to the OML.

The OML was enacted to ensure public access to government as it conducts the people’s business. NRS 241.010. The spirit and policy behind the OML, as with other so-called “sunshine laws” favors meetings to be as open as possible. *McKay v. Board of Supervisors of Carson City*, 102 Nev. 644, 651, 730 P.2d 438, 443 (1986); *Chanos v. Nevada Tax Com’n*, 124 Nev. 232, 239, 181 P.3d 675, 680 (2008) (“[M]eetings of public bodies should be open ‘whenever possible’ to comply with the spirit of the Open Meeting Law.”). Use of a remote technology system or other electronic communication is permitted under the OML, so long as certain requirements are met with respect to public access. NRS 241.020(3); 241.023. However, electronic communication “must not be used to circumvent the spirit or letter” of the OML. NRS 241.016.

Members of public bodies are permitted to attend meetings via electronic communication, deliberate over items and cast their votes. NRS 241.015(3)(a)(1). While entirely virtual meetings are permissible under the OML, where the public body consists entirely of elected officials, a physical location must be provided where members of the public may attend and participate. NRS 241.023(2)(a). This physical location was provided here. The question presented before the OAG is whether a public body *member* can be prevented from participating and voting in the physical location.

The OML is a public facing law. Its goal is to ensure that the actions of government “be taken openly and that their deliberations be conducted openly.” NRS 241.010. With this stated intent, the law does not address how a public body treats its members, how motions are made and seconded, or how long individual members are permitted to speak. When the OML’s current provisions regarding the use of electronic communication were enacted, the Legislature’s concern was that the general public’s ability to view and comment would be protected. Assembly Bill 65 of the 77th Legislative Session of Nevada: Minutes of the Assembly Committee on Government Affairs at 14-15 (Mar. 13, 2013) (“[Videoconference or teleconference] is an acceptable technology to utilize, but in order to fulfill the spirit and intent of the law, you

still need to ensure that everybody can follow the discussion, the deliberation, and any action.”). The law was not intended to *require* public bodies to allow their members to participate electronically. It was intended to be at the discretion of the public body. Assembly Bill 70 of the 80th Legislative Session of Nevada: Minutes of the Assembly Committee on Government Affairs at 8 (Mar. 6, 2019). The legislature did not consider that a public body member would be forced to participate electronically by the body itself. *See* Assembly Bill 253 of the 81st Legislative Session of Nevada: Minutes of the Senate Committee on Government Affairs at 22-25 (May 7, 2021). However, it was acknowledged that the law allows for electronic participation by public body members. *Id.*

As the OML does not address how a member is permitted to attend by the rest of the public body, but specifically allows for electronic participation by members, the OAG cannot find a technical violation of the letter of the law in this instance. However, the OAG notes that the spirit of the law is to protect public access and participation in the conduct of the people’s business. As such, preventing a public body member who desires to attend a public meeting in person with his or her constituents from attending the physical location while performing his or her duties runs contrary to that spirit and intent.

The Public Bodies offer two defenses to their actions in this matter: because Ms. Brekhus had been told that the meeting would be virtual, it was not a violation to prevent her from participating in person; and that the County Commission Chambers were not designed to hold a meeting with 17 elected officials and they wished to reduce the spread of COVID-19 “caused by overcrowded indoor congregant gatherings.” This does not change the OAG’s analysis as at no point was Ms. Brekhus given the option to participate in person, including after she attempted to attend in person. The OAG does not possess any evidence that the County Commission Chambers, where the meeting was held, was at capacity at the time Ms. Brekhus arrived or otherwise could not have allowed for her participation. Indeed, Ms. Brekhus was permitted to attend as a member of the public.

Lastly, Ms. Brekhus alleged that the agenda’s lack of notice that all Public Body members would be attending via the remote technology system was a violation of the OML. The OML’s agenda provisions do not contain a requirement that the location of public body members’ attendance be listed.

NRS 241.020(3). Thus, the OAG does not find a violation of the OML in this respect.

CONCLUSION

Upon review of your Complaint and available evidence, the OAG has determined that no technical violation of the OML has occurred. However, the OAG cautions the Public Bodies to be cognizant of the spirit and policy behind the OML and to make efforts to further that spirit at their meetings. The OAG will close the file regarding this matter.

Sincerely,

AARON D. FORD
Attorney General

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