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February 5, 2018

Via U.S. Mail

Mr. David L. Waite
[REDACTED]

Re: Lincoln County School District Board of Trustees - Open Meeting Law Complaint, OAG File No. 13897-254

Dear Mr. Waite:

The Office of the Attorney General ("OAG") is in receipt of your complaint (Complaint) filed on behalf of your client, Kenneth Higbee, alleging a violation of the Open Meeting Law ("OML") by the Lincoln County School District Board of Trustees (Board) regarding whether three (3) Board members participated in a walking quorum concerning Agenda Item 3(B) on the Board's agenda of November 9, 2017, prior to participating in the meeting.

The OAG has statutory enforcement powers under the OML, and the authority to investigate and prosecute violations of the OML. Nevada Revised Statutes ("NRS") NRS 241.037; NRS 241.039; and, NRS 241.040. In response to the Complaint, the OAG reviewed the Complaint and attachments; the response to the Complaint from the Board's counsel, Ann M. Alexander, and attachments thereto; and, the agenda, minutes, and audio from the Board's November 8, 2017, meeting, and the Board's November 9, 2017, meeting.

FACTUAL BACKGROUND

The Commission is a "public body" as defined in NRS 241.015(4) and subject to the OML. Mr. Higbee was suspended with pay on or about December 2, 2015, based on alleged financial improprieties regarding the funds of C.O. Bastian High School ("COB"). Mr. Higbee was the principal of COB at the time of his suspension. On April

10, 2017, a criminal complaint was filed against Mr. Higbee concerning the allegations. On or about June 9, 2017, Pam Teel, Superintendent of the Lincoln County School District, notified Mr. Higbee that his pay status while on suspension would be changed to suspension without pay pursuant to NRS 391.760, effective July 1, 2017. Ms. Teel subsequently changed the effective date of the change to October 1, 2017. Mr. Higbee, through you, requested an agenda item be placed on a Board agenda for a recommendation to Ms. Teel regarding his pay status while on suspension. Such action item was placed on an agenda as Agenda Item 3(B) on the Board's meeting of November 9, 2017.

On November 8, 2017, the Board held a special meeting to approve the 2017 annual audit of the Lincoln County School District. At this meeting, the results of the audit were discussed, including a negative fund balance of \$129,629 for COB which could have to be made up from the Lincoln County School District general fund.

On November 9, 2017, prior to the Board meeting, the Board met with its counsel concerning potential litigation regarding Mr. Higbee's pay status. In the response from the Board's counsel to the OML Complaint, counsel indicated she presented information concerning NRS 391.760, the financial implications related to Mr. Higbee's pay status should the criminal charges against him be resolved in his favor, and the process for making motions. Counsel indicated no Board member discussed his or her vote during this meeting.

Ms. Teel and each of the Board members provided sworn affidavits with the Board's response affirmatively setting out that outside of the meeting, each did not discuss any vote on this item with a Board member, and each did not discuss any contemplated motions on this item with a Board member.

The Complaint avers the actions of the Board members during the meeting show a walking quorum occurred prior to the meeting where Ms. Teel lobbied at least three (3) of the Board members concerning their votes. Ms. Teel is not a member of the Board.

DISCUSSION AND LEGAL ANALYSIS

Chapter 241 of the Nevada Revised Statutes requires the actions of public bodies "be taken openly and that their deliberations be conducted openly." NRS 241.010(1); see *McKay v. Bd. of Supervisors*, 102 Nev. 644, 651 (1986). A "meeting" is a "gathering of members of a public body at which a quorum is present, whether in person or by means of electronic communication, to deliberate toward a decision or to take action . . ." NRS 241.010(3)(a)(1). A quorum may be established through a series of gatherings involving members of the public body. NRS 241.010(3)(a)(2). In short, a public body may not deliberate or take action outside of a public meeting whether a quorum of the public body meets in person or the thoughts and opinions of

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members of a public body are shared amongst the members through serial meetings or communications where no individual meeting or communication involves a quorum of members.

Your Complaint alleges the Board violated the OML because three (3) Board members participated in a walking quorum concerning Agenda Item 3(B) prior to the meeting. The evidence you propound to support this allegation consists of the actions of the Board members at the meeting; specifically; the Board members had no questions of you at the meeting; the motion to continue Mr. Higbee's suspension without pay was based on the financial solvency of the district; such financial solvency had not been discussed during the meeting; and, member Patrick Kelley seemed to be familiar with NRS Chapter 391. You further aver that the financial solvency information came from Ms. Teel; that at least three (3) members of the Board had been lobbied by Ms. Teel; and, that the motion and vote had been rehearsed.

The OAG is not convinced by your propounded evidence of a walking quorum. Your evidence is speculative and rebutted by the direct evidence provided with the Board's response; specifically; the affidavits concerning the lack of discussions about voting and motions; the meeting with counsel to discuss potential litigation; and, the special meeting discussing finances held the day before. The OAG finds the evidence does not support the existence of the alleged walking quorum. Thus, the OAG does not find a violation of the OML.

CONCLUSION

The OAG has reviewed the available evidence and determined that no violation of the OML has occurred. The OAG will close the file regarding this matter.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By: 

JOHN S. MICHELA
Senior Deputy Attorney General
Gaming Division

JSM:sad
c: Ann M. Alexander, Esq.