STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

January 5, 2001

Marjorie I. Detraz
Post Office Box 177
Alamo, Nevada 89001

Re: Open Meeting Law Complaint
Joint City/County Impact Alleviation Committee (JCCIA)
OMLO 2001-01/AG File No. 00-040

Dear Ms. Detraz:

On August 25, 2000, this office received from you, via fax, the minutes of a meeting held on March 12, 1998, by the Joint City/County Impact Alleviation Committee (JCCIAC), a public body within the purview of the Open Meeting Law. We were subsequently apprized, based on conversations with you and with Lincoln County Clerk Corrine Hogan, that you intended to allege an Open Meeting Law complaint based on concerns that minutes of the March 12, 1998 meeting of the JCCIAC might be missing, and that the HCCIAC had met in a location outside Lincoln County.

This office has jurisdiction over complaints alleging violations of the Open Meeting Law as found in Nevada Revised Statutes chapter 241. Pursuant to NRS 241.037, the Attorney General has 120 days from the date of the alleged violation to file an action in District Court for injunctive or declaratory relief if, after an investigation, we believe a violation occurred. As we discussed at length during our meeting with you on September 19, 2000, because your inquiries regarding possible violations of the Open Meeting Law concern a March 12, 1998 meeting of the JCCIAC, which is beyond the 120-day statutory period for bringing an action, we are without jurisdiction to take action concerning your complaint.

Nevertheless, we did request the agenda for the March 12, 1998 meeting to determine if there were minutes taken and whether minutes were missing minutes. We also looked to see if the meeting was properly posted in advance, and obtained a copy of the March 12, 1998 meeting agenda from the coordinator for the JCCIAC.

Responding to the two components of your complaint, the allegation that the JCCIAC's meeting out of county is a violation of the Open Meeting Law is not supported by the statutes. The Open Meeting Law, set forth in Chapter 241 of the Nevada Revised Statutes, does not contain a requirement that a public body must meet within the county. NRS 241.020 does

provide that meetings of public bodies must be open to the public and that written notice of the meeting must be given at least three days in advance. There may be designated places for meetings in a public body's by-laws or in county ordinances, in the case of a political subdivision, but those requirements do not fall within the purview of the Open Meeting Law.

A review of the agenda for the March 12, 1998 meeting discloses that it was properly posted in four appropriate places in Lincoln County as attested to by the County Clerk. By comparing the agenda with the minutes of the meeting (which you supplied to this office), it appears that there were agenda items for which the minutes do not reflect discussion. The minutes appear incomplete. If discussion of agenda items were put off to another meeting, there is no indication in the minutes of this action. Additionally, there does not appear in the minutes any call for public comment nor the receipt of any public comment. This office requested clarification about these apparent discrepancies from the JCCIAC coordinator, but unfortunately we have not received any response.

As noted, this matter is beyond the statutory period within which this office may take action. NRS 241.037(3). Nevertheless, we encourage the JCCIAC to review this letter and their meeting processes to ensure full compliance with the Open Meeting Law in the future. We also encourage the JCCIAC to contact this office with any questions it may have concerning Open Meeting Law compliance and to receive training materials that are available to all public bodies.

Thank you for bringing these matters to our attention.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
GEORGE H. TAYLOR
Deputy Attorney General
Civil Division
(775) 684-1230

cc: Jason Pitts, Coordinator
Joint City/County Impact Alleviation Committee

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

January 24, 2001

Ms. Lisa Bennett
Post Office Box 380
Virginia City, Nevada 89440

Re: Complaint of Open Meeting Law Violation by Storey County School District Board of Trustees
OMLO 2001-03/AG File No. 00-043

Dear Ms. Bennett:

This office has received your letter dated September 18, 2000, in which you state a belief that you were the subject of discussion in September during a closed session of the Storey County School District Board of Trustees (the Board) in violation of the State's Open Meeting Law (OML). In a second letter dated October 14, 2000, you assert a belief that you were similarly discussed at a closed meeting of the Board on October 11, 2000, again in violation of the OML. This letter is provided to address your concerns regarding both meetings.

Although your specific request is for the Attorney General's assistance to gain access to, or copies of, the Board's minutes and tapes from these meetings, we have also examined the propriety of the Board's actions, since the Attorney General is the principal public official responsible for enforcement of the OML. NRS 241.037. In particular, we have examined whether the Board violated any notice provision of the OML in its conduct of the closed sessions.

PROCEDURE

We took several steps to ascertain what specific matters were discussed by the Board at the September 13 and October 11 closed sessions. First, we obtained and reviewed the published agendas for both meetings. Item 12 in the former agenda and item 9 in the latter are specifically denoted as closed personnel sessions.

We obtained and reviewed written minutes from the two closed sessions. In addition, we obtained and listened to an audiocassette tape recording made of the closed session that occurred on October 11, 2000. We were provided with a tape marked to indicate it came from the September 13, 2000, closed session, although no audio record exists on the tape.

Finally, an investigator has interviewed two officials who were present during the two closed sessions.

ANALYSIS

From the information garnered, we have concluded that, during the relevant closed meetings, the Board did not discuss your character, alleged misconduct, professional competence, or physical or mental health. This being the case, the Board was not required by NRS 241.033 to provide you with personal notice of the meetings. This also renders inapplicable the inspection and copy requirements contained in NRS 241.033(3)[1] and NRS 241.035(2).[2]

Rather than discussing any of the enumerated items in NRS 241.030 which justify closure of a meeting, the Board briefly addressed—but did not decide—its own future course in the personnel proceedings in which you are a party. Your name was mentioned once at the October 11 closed session as a way to identify the controversy, but you were not thereafter specifically mentioned by name, inference, or otherwise.

We have determined, based upon the nature of the Board's deliberations in closed session that you are not an individual entitled under the statutes to assert special statutory rights to notice and information. This resolution absolves the Board of the inference that it failed to provide proper notice to you as a subject of a closed session, and it also relieves it of the special duty to provide you copies of records from the closed sessions. To like effect, see letter to Dr. Karen Watson, Administrative Specialist, Storey County School District, dated April 7, 1999, which is enclosed.

However, this resolution leaves certain other concerns which the Board should address in the future. In particular, closed sessions are only authorized for discussion of the matters specifically listed in NRS 241.030. The statutes do not authorize closure of general "personnel sessions" or of legal strategy sessions.

We also note and approve the Board's acknowledgement that whenever a public meeting is tape-recorded, any closed session conducted during that meeting also must be tape-recorded.

Finally, we noted some general confusion among Board members regarding the OML, apparent on the taped record of the October 11 meeting. By copy of this letter to the Board's Counsel, we strongly urge a general review session for the Board in the various OML requirements. We also ask Board Counsel for his written assurances that he has apprised the Board of the contents of this letter and that the Board agrees to abide by this advice.

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[1] "A public body shall provide a copy of any record of a closed meeting prepared pursuant to NRS 241.035, upon the request of any person *whose character, alleged misconduct, professional competence, or physical or mental health was considered at the meeting*." NRS 241.033(3) (emphasis added).

[2] "[The person whose character, conduct, competence or health was discussed] is entitled to a copy of the minutes upon request whether or not they become public records." NRS 241.035(2).

Please call on me if you have any questions regarding the foregoing.

Cordially,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
C. WAYNE HOWLE
Senior Deputy Attorney General
Civil Division
(775) 684-1227

CWH:sg
Enclosure
c: Douglas R. Hill, Esq.

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

January 30, 2001

Billy D. Mildice
Post Office Box 443
Logandale, Nevada 89021

Re: *Complaint against the Moapa Valley Town Advisory Board*
OMLO 2001-04/AG File No. 00-056

Dear Mr. Mildice:

Pursuant to Nevada Law, the Attorney General's office has primary jurisdiction for investigating and prosecuting complaints alleging violations of the Nevada Open Meeting Law, Chapter 241 of Nevada Revised Statutes.

On December 5, 2000, you filed a complaint alleging the Moapa Valley Town Advisory Board heard a matter pertaining to public roads that was not properly noticed on the November 29, 2000, agenda. You also allege that supporting materials were not faxed to the Advisory Board prior to November 27, but that copies were available to you at the time of the meeting.

We have completed our investigation and have concluded that the agenda was not clear and complete and that this is a violation of the Open Meeting Law. We also conclude that copies provided to you at the meeting did not violate the Open Meeting Law. The reasons for these conclusions are stated below.

QUESTION ONE

The agenda or notice of public meeting must consist of a "clear and complete" statement of the topics scheduled to be considered during the meeting. NRS 241.020(2)(c)(1)(2) provides as follows:

> (c) An agenda consisting of:
> (1) A clear and complete statement of the topics scheduled to be considered during the meeting.
> (2) A list describing the items on which action may be taken and clearly denoting that action may be taken on those items.

The real issue in this complaint is whether the agenda contained sufficient detail to describe the matters that were ultimately approved for work by the Board. Specifically, it is not clear from the agenda that the meeting was intended to cover gravel roads for maintenance.

The agenda in this case stated as follows: "Discussion and possible action on the updated Clark County Public Works road paving priority list and maintenance recommendations made by Public Works officials." This agenda item was a violation of the Open Meeting Law since it refers to "discussion," "paving," "maintenance," and "possible action" and did not disclose that gravel road maintenance was going to be acted upon. The agenda was internally contradictory, in that the notice to the public appeared to deal with paving and not specifically gravel road maintenance. An agenda for a meeting of a public body in Nevada must reflect the range of action contemplated by the meeting. The legislature requires that the agenda must contain a clear and complete statement. NRS 241.020(2)(c)(1). This office has provided guidance regarding the drafting of agendas. In the Open Meeting Law Manual, Eighth Edition, February 2000, the following statement has been made in section 7.01:

> A public body's failure to adhere to agenda requirements will result in an Open Meeting Law violation. *Thurston v. Phoenix*, 757 P.2d 619 (Ariz. Ct. App. 1988). Further, if a matter is acted upon which was not clearly denoted on the agenda, the action could be void under NRS 241.036.

This office uses a standard of reasonableness to determine the preparation of the agenda. In mitigation, Judy Metz, Chair of the Town Advisory Board, stated that the agenda item was provided by the public works employees who were sent to attend the town meeting. Further, she stated that road paving matters were not discussed at the meeting, since the county paving schedules were not available for public distribution at the meeting. The agenda item must be specific as to what will be discussed. Since agenda item IV(B) violates the spirit and intent of the "clear and complete statement" requirement of the Open Meeting Law, the item which is the subject of the complaint must be re-noticed and a further meeting held to consider the item.

QUESTION TWO

You have indicated that the supporting materials pertaining to gravel roads were available to the public at the meeting but were not available prior to the meeting. For the following reasons, we do not find this to be a violation of the Open Meeting Law. NRS 241.020(4) requires that supporting material must be made immediately available at the meeting. The Open Meeting Law Manual, § 6.06, provides guidance to public officers regarding materials discussed at the meeting. In conclusion, supporting materials referenced to an agenda item must be supplied immediately upon request and were supplied in this case.

CONCLUSION

By copy of this letter to the Advisory Board, we find a violation of the Open Meeting Law since the agenda did not clearly state that gravel road maintenance was going to be discussed. It was a violation of the Open Meeting Law for the agenda to list paving as a possible action item and then allow the Board to act upon gravel road maintenance. Such action is subject to a court proceeding to determine the same void; therefore, this agenda item must be rescheduled and action be taken upon the same.

This office will consider failure to properly notice the item and take valid action to be a willful violation of the Open Meeting Law.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
JAMES C. SMITH
Deputy Attorney General
(775) 684-1100

cc: Judy Metz
Moapa Valley Town Advisory Committee
c:\files\smith\opinions\00-056

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

February 14, 2001

Dell Ray Rhodes
3697 Mendacino Street
Las Vegas, Nevada 89115

Re: *Open Meeting Law Complaint: Clark County School District, Shirley Barber and Yolanda Arrington, and the Clark County School District Police*
OMLO 2001-05/AG File No. 00-057

Dear Mrs. Rhodes:

Pursuant to Nevada Law, the Attorney General's office has primary jurisdiction for investigating and prosecuting complaints alleging violations of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes.

As we have discussed by telephone, the facts of your complaint involve two incidents: the first occurred at an open meeting of the Board of School Trustees (Board) of the Clark County School District (CCSD) on November 20, 2000, and second, at the December 7, 2000 dedication of a CCSD service facility. The Board met at an open meeting on November 20, 2000, at a retreat held at an H&H bar-b-que in Las Vegas. To summarize your complaint, you stated during the public comment section of the November 20, 2000 meeting, that certain studies should be added to the curriculum of the school district. You have alleged that as a consequence of your November 20 statement, you were escorted off the premises of the CCSD service facility during a dedication ceremony held on December 7, 2000. You have stated in your complaint that you believe that the actions of several employees of the CCSD were improperly motivated when they escorted you off the CCSD service facility on December 7, 2000.

Based upon an investigation of the facts surrounding your complaint, we do not find a violation of the Open Meeting Law. First, you were allowed to speak during the public comment section of the November 20, 2000, meeting. NRS241.020(2)(c)(3) provides authority to allow members of the public to make comments. The public body may limit the time of comments to assure orderly conduct at meetings, and you have stated that you were able to make your views

known to the Board. Second, the alleged retaliatory action that occurred at the CCSD service facility dedication ceremony on December 7 did not occur during a meeting of the Board of Trustees. Our investigation indicates that you have an ongoing dispute with an employee of the school district, and the events occurring on December 7, 2000, are part of that ongoing dispute. The dedication of the service facility was not a meeting of a public body subject to the Open Meeting Law, for the reason that such a meeting requires a quorum of a public body meeting to make actions through a collective consensus of the members. NRS 241.015(3) provides as follows:

> 3. Except as otherwise provided in this subsection, "public body" means any administrative, advisory, executive or legislative body of the state or a local government which expends or disburses or is supported in whole or in part by tax revenue or which advises or 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 and includes an educational foundation as defined in subsection 3 of NRS 388.750 and a university foundation as defined in subsection 3 of NRS 396.405. "Public body" does not include the legislature of the State of Nevada.

Since the later action did not occur during the open meeting of a public body, the matter is outside the jurisdiction of the Attorney General's Office. Thank you for your letter and if you have any questions regarding this response, please do not hesitate to call me at the number listed below.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
JAMES C. SMITH
Deputy Attorney General
Civil Division
(775) 684-1100

cc: Ann Bersi, Deputy District Attorney
c:\files\smith\00-057

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

March 5, 2001

Mr. Gerald A. Lent
831 Keystone Avenue
Reno, Nevada 89503

Re: Open Meeting Law Complaint
Nevada Board of Wildlife Commission
OMLO 2001-06/AG File No. 01-001

Dear Mr. Lent:

This is in response to your Open Meeting Law complaint dated December 28, 2000, against the Board of Wildlife Commissioners. As you are aware, the Attorney General's Office is responsible for the enforcement of the Open Meeting Law. Neither the Board or the Department of Wildlife or their attorneys took part in the investigation of the complaint. We have reviewed the audiotape of the meeting of the Board of Wildlife Commissioners on October 21, 2000. Specifically, you have complained that the Board Chairman, Mr. Boyd Spratling, did not fully allow you to express your opinions concerning two nonagenda items during the public comment section of the meeting. The first item was the past financial problems of the Nevada Department of Wildlife (NDOW) and the second item was your comment about the character of the Administrator of the Department of Wildlife. We will address these matters in the above order.

In the first instance, you commented on the NDOW's tag system report. The Chairman noted that the matters that you raised were "old matters." You responded to his comments and indicated that you understood. You continued on with your comments.

In the second instance, a few moments later, you spoke concerning the conduct of the Administrator. The Chairman interrupted your comments. During the exchange of statements, Ms. Rhonda Moore, Deputy Attorney General, advised the Board concerning certain matters that related to your comments. Ms. Moore is assigned to the Board as legal counsel. You have specifically complained that the comments of the Chairman and the attorney for the Board violated your rights under the U.S. Constitution, the Constitution of the State of Nevada, and the Open Meeting Law.

Issue Number One

Did the Chairman's statement to you to limit your comments to current matters violate the Open Meeting Law?

The Open Meeting Law specifically provides for public comment. NRS 241.020(2)(c)(1)-(3), which specifies what is to be included in an open meeting agenda requires:

> (1) A clear and complete statement of the topics scheduled to be considered during the meeting.
> (2) A list describing the items on which action may be taken and clearly denoting that action may be taken on those items.
> (3) A period devoted to comments by the general public, if any, and discussion of those comments. No action may be taken upon a matter raised under this item of the agenda until the matter itself has been specifically included on an agenda as an item upon which action may be taken pursuant to subparagraph (2).

The Nevada Open Meeting Law Manual (8th ed. 2000), § 7.04 addresses public comment and provides in pertinent part:

> The designated public comment period required by NRS 241.020(2)(c)(3) should be content neutral, and not restricted to nonagenda items unless the public is permitted to speak on agenda items as they are heard. *See* OMLO 99-12 (October 14, 1999).

The Open Meeting Law Manual (8th ed. 2000) in § 8.04 provides in pertinent part:

> The Office of the Attorney General believes that any practice or policy that discourages or prevents public comment, even if technically in compliance with the law, may violate the spirit of the Open Meeting Law. *See* OMLO 99-11 (August 26, 1999) where the Office of the Attorney General opined that in its practical application, the practice of requiring persons to sign up three and one-half hours in advance to speak at a public meeting can have the effect of unnecessarily restricting public comment, and therefore does not comport with the spirit and intent of the Open Meeting Law.

We have reviewed the audiotape of the meeting. In the pertinent section of the meeting, you are discussing issues involving the cost of providing tags, and are expressing your concern that the rate charged to hunters greatly exceeds the cost incurred by the private contractor

engaged with providing this service. You expressed your concern about the prior financial difficulties of the NDOW, and how citizen involvement improved the process. The Chairman spoke as follows: "Let's make sure we're talking about current problems." It would not be proper for a public body to limit public comment to what the public body deems to be "current problems." The Chairman did, however, give you time to express your thoughts. The Chairman's response to you was content neutral and did not stifle public comment or unreasonably limit your right to express your comments on the history of the tag system. You were able to express your comments concerning the tag system, its history, and the role of sportsmen in resolving problems in the past. We conclude no violation occurred, thus no curative action is warranted.

Issue Number Two

The second issue relates to your comments concerning the Administrator. In your comments you indicated that you were responding to a personal attack during the morning session stating as follows: "You can't accuse me of lying, Crawforth." The Chairman interrupted to limit your comments. Thereafter, Ms. Moore, the Board's attorney, advised that NRS 241.031 and 241.033 control meetings concerned with character of public employees. Her advice was directed to the Board, and not to you. In this case, Ms. Moore was balancing the public comment period with the requirements of NRS 241.033 by cautioning the Board that it may not consider the allegations (emphasis added). Her comments were of a cautionary nature, and concerned the specific application of NRS 241.033, which controls the conduct of meetings that concern the character of public officials. That statute is as follows:

> 1. A public body shall not hold a meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of any person unless it has given written notice to that person of the time and place of the meeting. Except as otherwise provided in subsection 2, the written notice must be:
>
> (a) Delivered personally to that person at least 5 working days before the meeting; or
>
> (b) Sent by certified mail to the last known address of that person at least 21 working days before the meeting.
>
> A public body must receive proof of service of the notice required by this subsection before such a meeting may be held.
>
> 2. The Nevada Athletic Commission is exempt from the requirements of paragraphs (a) and (b) of subsection 1, but must give written notice of the time and place of the meeting and must receive proof of service of the notice before the meeting may be held.
>
> 3. A public body shall provide a copy of any record of a closed meeting prepared pursuant to NRS 241.035, upon the request of any person whose character, alleged misconduct, professional competence, or physical or mental health was considered at the meeting.

We conclude that the Board properly limited its consideration of such matters on advice of its counsel. Because your comments were addressed to the character of the Administrator, the appropriate procedure would be to submit any allegations concerning an individual's character or alleged misconduct in writing to the Board.

Conclusion

Based upon the above analysis, we conclude that the Board did not unreasonably or improperly limit your right to speak during the public comment section of the meeting and that there was no violation of the Open Meeting Law. You were able to speak concerning the tag system and its history. With regard to the second issue, counsel properly advised the Board of the provisions of NRS 241.033. This was not a violation of the Open Meeting Law. The Open Meeting Law places express obligations on public bodies before the public body may consider the character or alleged misconduct of an individual. In this case, counsel was directing advice concerning your comments to the Board, and the advice given was appropriate under the circumstances.

Thank you for bringing your concerns to the attention of this office.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
JAMES C. SMITH
Deputy Attorney General
(775) 684-1100

cc: Boyd Spratling
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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

March 7, 2001

Theodore Beutel, District Attorney
Eureka County District Attorney's Office
P.O. Box 190
Eureka, NV 89316

Re: *Open Meeting Law Complaint*
Eureka County Board of Commissioners
OMLO 2001-07/AG File No. 01-005

Dear Mr. Beutel:

I. Introduction

On January 22, 2001, this office received a written complaint from Betty Krambs addressing concerns she has regarding the January 19, 2001 meeting of the Eureka County Board of Commissioners. A copy of the complaint is attached as Exhibit 1. In response to the complaint, I have contacted you and requested the production of various documents. See Exhibit 2. A copy of the Agenda for the January 19, 2001 meeting you provided is attached as Exhibit 3. I requested copies of the tapes from the January 19, 2001 meeting and you represented that tapes were not available and that Minutes had been taken and you provided the same. A copy of the Minutes is attached as Exhibit 4.

II. The Complaint

In the January 22, 2001 complaint, Ms. Krambs alleged that she was precluded from discussing complaints that she had regarding a county employee. She provided a letter to the Board members, a copy of which is attached as Exhibit 5.

NRS 241.033(1) provides in pertinent part:

> NRS **241.033 Closed meeting to consider character, misconduct, competence or health of person: Written notice to person required; exception; copy of record.**

> 1. A public body shall not hold a meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of any person unless it has given written notice to that person of the time and place of the meeting. Except as otherwise provided in subsection 2, the written notice must be:
>
> (a) Delivered personally to that person at least 5 working days before the meeting; or
>
> (b) Sent by certified mail to the last known address of that person at least 21 working days before the meeting.
>
> A public body must receive proof of service of the notice required by this subsection before such a meeting may be held.

The relevant portion of the Board's Minutes reflect the following with regard to the above-referenced complaint:

> Betty Krambs appeared before the Board and read a letter of various complaints signed by 23 Crescent Valley citizens. When complaints involving a county employee were started to be read the District Attorney advised Mrs. Krambs that complaints regarding county employees were not to be discussed in an open meeting and could be taken up in an executive session if any Board Member so desires. Mrs. Krambs submitted the letter to the Board.

Thus, pursuant to NRS 241.033(1) you were correct in advising the Board of County Commissioners to terminate any discussion regarding the professional competence of a county employee. You represented that the requisite notice to the county employee had not been provided. Failure to provide the requisite notice (5 days via personal delivery or 21 working days via certified mail) precludes discussion on matters regarding the professional competence of an individual. To proceed with a discussion without proper notification would have resulted in a violation of the open meeting law. Moreover, there was no Agenda item description that delineated the professional competence of any county employee. Thus, in addition to the notice deficiencies listed above, the matter had not been agendized and any discussion in that regard would be inappropriate.

III. Determination Regarding Complaint

As to the specific allegations in the complaint, this office finds no violation of the open meeting law occurred and commend you, the District Attorney, for properly advising the Eureka Board of County Commissioners in this regard.

IV. Other Open Meeting Law Violations

As part of our investigation into this complaint, we reviewed the Agenda and Minutes of the January 19, 2001 meeting. Our investigation has found that both the Agenda and the Minutes contain various open meeting law violations. We will address the Agenda deficiencies first and then the deficiencies in the Minutes.

V. Agenda Deficiencies

The Agenda violates two separate provisions of the open meeting law.

NRS 241.020(2)(c)(2) provides that all items on an agenda must clearly designate which items are action and/or discussion.[1] The January 19, 2001 Agenda does not delineate any item as either "discussion" or "action." The failure to designate an agenda item as a discussion or action item is a clear violation of the open meeting law. What is most problematic about the deficiency in the Agenda is that this office, on December 5, 1996, told the District Attorney in office at that time that "the Commission should have described this topic on its agenda with detail so that in fact the public would receive '***notice of what was to be discussed or acted upon***.'" [Emphasis added.] In addition, on January 29, 1999, you provided a briefing to the Board of County Commissioners that specifically discussed that agenda item topics must designate which agenda items are "discussion" and which items are "action" items. See Exhibit 7. The Eureka County Board of Commissioners has failed to follow both our warning and your legal advice.[2]

The second violation regarding the Agenda is that many of the Agenda item descriptions do not adhere to the clear and complete standard for agenda items as delineated in NRS 241.020(2)(c)(1). For example, the second item on the Agenda delineates the following: "Approve Bills for Payment." The Agenda item description is both vague and overbroad. The Minutes of the January 19, 2001 meeting reflect that over 250 bills were paid ranging from bills for legal services to the payment of taxes. Moreover, the amount of the bills ranged from a low of $3.25 to over $22,925. By reading this Agenda item description there is no way that a citizen reviewing this description could glean from the Agenda the variety and respective sums of bills to be approved. Thus, the Agenda should have contained a similar listing to that listed in the Minutes of the meeting in order to satisfy the clear and complete requirements of NRS 241.020(2)(c)(1). In addition to the example delineated above, there are other Agenda description items in the January 19, 2001 Agenda that are either vague, too general in description

[1] On December 5, 1996, the Office of the Attorney General issued a warning letter to Eureka County for failing to meet the "clear and complete" standard delineated in NRS 241.020(2)(c)(1). A copy of the warning letter is attached as Exhibit 6.

[2] Each Agenda item is designated with an asterisk. There is no explanation on the agenda as to what the asterisk represents. Since this office was unable to determine what an asterisk represents, we do not believe the citizens of Eureka County could do the same.

or otherwise unclear (e.g., reports, correspondence, interim payments, etc.). See also OMLO 99-03.

VI. Minutes Deficiency

NRS 241.035(1)(c) provides:

> **NRS 241.035 Public meetings: Minutes; aural and visual reproduction.**
> 1. Each public body shall keep written minutes of each of its meetings, including:
> (a) The date, time and place of the meeting.
> (b) Those members of the body who were present and those who were absent.
> (c) The substance of all matters proposed, discussed or decided and, at the request of any member, a record of each member's vote on any matter decided by vote.

In comparing your Agenda with the applicable Minutes, it is clear that the Minutes do not adequately reflect the ***substance*** of all matters discussed or proposed. As an example, an Agenda item "Gravel Roads" was delineated.[3] There is no portion of the Minutes that addresses either a substantive recordation of a discussion in this regard or an absence of a discussion on this Agenda item. To that end, we find the Minutes are deficient as they are required to record the substance of ***all*** items proposed, discussed or decided.[4] See NRS 241.035(1)(c).

Another example where the Minutes are insufficient is that there is no recordation regarding the substance of the public discussion or the absence of the public being present to engage in public comments. Again, this omission constitutes a violation of the open meeting law. See NRS 241.035(1)(c).

Finally, NRS 241.035(1)(c) requires that all minutes contain "a record of each member's vote on any matter decided by vote." In reviewing your Minutes, the following provision is delineated with respect to the payment of the bills: "The following bills were approved by the Board." There is no provision in the Minutes indicating who made the motion, who seconded the motion or who voted to approve the payment of the bills. This is again a violation of the open meeting law.

---

[3] This Agenda item description is insufficiently detailed and thus violative of NRS 241.020(2)(c)(1).

[4] The open meeting law contemplates that either minutes or taping meetings is appropriate. Careful consideration of audio taping future meetings should be given by the Eureka County Board of Commissioners to preclude any inadvertent oversights attributable to manual recordation of meetings.

VII. Curative Action

The violations of the open meeting law noted in this response need curative action. Because the Eureka Board of County Commissioners has previously been warned by the Office of the Attorney General to adhere to the clear and complete standard of NRS 241.020(2)(c)(1), as well as being recently advised by the Board's legal counsel to adhere to the clear and complete standard in NRS 241.020(2)(c)(1), this office respectfully requests the Eureka Board of County Commissioners reschedule a properly noticed and agendized meeting to reconsider all items discussed or acted upon at the January 19, 2001 meeting of the Eureka County Board of Commissioners.

Upon receipt of this letter, please respond within ten working days as to whether your Board intends to comply with this directive. If the Board chooses not to respond, or fails to respond, this office will pursue other legal resource to void or enjoin the items acted upon or discussed at the January 19, 2001 meeting.

Further, please provide this office with a copy of all Agendas and Minutes for all Board meetings that occurred in the 90 days previous to the date of this correspondence so that we may investigate the same.

I look forward to hearing from you in this regard and look forward to your professional cooperation and courtesy.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
NORMAN J. AZEVEDO
Chief Deputy Attorney General
Civil Division
(775) 684-1222

NJA:srh
Cc: Frankie Sue Del Papa, Attorney General
Chairman Pete Goicoechea

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

March 12, 2001

Vernon Van Winkle
Executive Producer
KPVM-TV
Post Office Box 2075
Pahrump, Nevada 89041

Re: ***Valley Electric Association, Inc.***
***OMLO 2001-08/*AG File No. 00-055**

Dear Mr. Van Winkle:

This letter is in response to your inquiry regarding whether Valley Electric Association, Inc. (Valley Electric) is a "public body" required to comply with the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes.

NRS 241.015(3) defines a "public body" as:

> [A]ny administrative, advisory, executive or legislative body of the state or a local government which expends or disburses or is supported in whole or in part by tax revenue or which advises or 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…

The definition in NRS 241.015(3) specifies that a "public body" is an "administrative, advisory, executive or legislative body of the state or a local government." As such, a "public body" must: (1) owe its existence to and have some relationship with a state or local government; (2) be organized to act in an administrative, advisory, executive or legislative capacity; and (3) must perform a government function. *See* Nevada Open Meeting Law Manual § 3.01 (8th Ed., February 2000). Additionally, a "public body" must expend or disburse or be supported in whole or in part by tax revenue, or advise or make recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue.

Courts construing the scope of various state open meeting laws have determined that

private entities are generally not within the purview of these acts. *See Hallas v. Freedom of Information Comm'n*, 557 A.2d 568 (Conn. App. 1980), *appeal den'd*, 561 A.2d 945 (Conn. 1989) (holding that private law firm acting as bond counsel was not "public body" within the definition of Connecticut's open meeting law). Similarly, not-for-profit corporations assisting governmental entities have generally been regarded as falling outside the scope of the open meeting laws. *Kubick v. Child & Family Services, Inc*., 429 N.W.2d 881 (Mich. App. 1988) (holding nonprofit foster care corporation receiving less than half of its funding from government sources is not a "public body" for purposes of state or federal Freedom of Information Acts). Under certain circumstances, however, courts have found that not-for profit corporations that receive public funds and function as a governmental agency are "public bodies" and must comply with open meeting laws. *Rehabilitation Hospital Services Corp. v. Delta-Hills Health Systems Agency, Inc*., 687 S.W.2d 825 (Ark. 1985) (non-profit regional health planning corporation primarily funded by federal government is subject to the open meeting laws); *Cf*, *UNT v. Aerospace Corp*., 765 F.2d 1440,1447-48 (9th Cir. 1985) (holding private nonprofit corporation is not subject to federal Privacy Act merely because it receives some funding and is regulated by federal authority).

The Nevada Supreme Court has not had occasion to decide whether a not-for-profit private electric utility company comes within the purview of the definition of "public body" under Chapter 241. However, other jurisdictions have dealt with this issue. *Jean Hunerjager v. Dixie Electric Membership Corporation*, 434 So.2d 590 (La. App. 1983); *see also, Perlongo v. Iron River Cooperative TV Antenna Corp.*, 332 N.W.2d 502 (Mich. App. 1983) (holding that non-profit, non-stock utility company regulated by a local or state authority was not a "public body" for purposes of Michigan's Freedom of Information Act). In *Dixie Electric*, a Louisiana Appellate Court held that a not-for profit private electric utility corporation was not a "public body" and thus, not subject to the Louisiana Open Meeting laws. *Id*.at 592. In *Dixie Electric*, the Board of Directors closed its regular monthly meeting to the public to adopt rate increases and approve loans from the federal government. Member customers filed suit to declare the Board's actions void. However, the Court in *Dixie Electric* noted that although the not-for profit corporation set rates for electricity similar to an "authority," Dixie Electric was neither publicly funded, nor was it "directly involved with a governmental function," such as public education or anti-poverty programs. *Id*.

In this instance, Valley Electric's Articles of Incorporation provide that it is a not-for-profit corporation and does not offer stock to the public. The Articles of Incorporation further indicate Valley Electric is an association organized for the purpose of promoting and supporting electrical utility services to the citizens of Pahrump, Nevada. We have not been informed that any state or local authority created Valley Electric or that the Board of Directors is controlled by state or local officials. Furthermore, we have not been informed that Valley Electric is supported in whole or in part by public funding. Merely because Valley Electric provides utility service to the public does not alone make it subject to the Open Meeting Laws. Accordingly, Valley Electric is not a "public body" and, thus, is not subject to the Open Meeting Laws, Chapter 241 of the Nevada Revised Statutes. Therefore, Valley Electric may exclude KPVM-TV, Channel 41 and any other media organization from attending and/or video or audio taping Association

meetings.

Based on the foregoing reasons, the Nevada Attorney General's Office concludes that Valley Electric is not a "public body" as defined pursuant to NRS 241.105(3) and, thus, is not required to comply with the Open Meeting Laws, Chapter 241 of the Nevada Revised Statutes. The Nevada Attorney General's Office thanks you for bringing this important matter to its attention.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
PETER C. SIMEONI
Deputy Attorney General
Tax Section
(775) 684-1206

PCS:jm

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

March 28, 2001

The Honorable Michael Montandon, Mayor
John K. Rhodes, Councilman
Shari Buck, Councilwoman
Stephanie Smith, Councilwoman
William Robinson, Councilman
North Las Vegas City Council
2200 Civil Center Drive
North Las Vegas, Nevada 89030-6307

Sean T. McGowan, City Attorney
Clay Fritsch, City Manager
City of North Las Vegas
2200 Civil Center Drive
North Las Vegas, Nevada 89030-6307

Re: Open Meeting Law Complaint: North Las Vegas City Council
OMLO 2001-09/AG File No. 00-050

Dear Mayor, Councilmen, Mr. McGowan and Mr. Fritsch:

On October 23, 2000, Councilman John Rhodes filed a complaint against members of the North Las Vegas City Council (Council) and the City Manager for possible violations of Nevada's Open Meeting Law. The allegations were that serial communications had been conducted to reach a majority consensus prior to a September 6, 2000 Council meeting on the issue of changing the City's travel policy, and serial communications were conducted concerning whether a presentation by Habitat for Humanity would be placed on the agenda for the October 4, 2000 meeting of the Council.

More specifically, the allegations were that, prior to the commencement of the September 6, 2000 meeting, Councilman Rhodes received a telephone call from Clay Fritsch, the City Manager, who advised him that the issue of changing the Council's travel policy was on the agenda, that Mr. Fritsch had spoken with "everybody on the Council," and that the Council was going to change the policy. Mr. Rhodes also alleged that, on September 25, 2000, he contacted

Executive Assistant Donna Gamble to advise her to direct Mr. Fritsch to include a presentation from Habitat for Humanity as an agenda item for the October 4, 2000 meeting. Subsequent to Mr. Rhodes' telephone conversation with Ms. Gamble, Mr. Fritsch contacted Mr. Rhodes by

telephone and advised him that the presentation would not be allowed because a majority of the Council wanted all presentations to go through the Request for Proposal (RFP) process. Mr. Rhodes alleges that Mr. Fritsch stated he had spoken to "everybody except for Councilman Robinson" regarding not having this as an agenda item. As a result, Mr. Rhodes believed serial communications were used to reach a majority consensus in violation of the Open Meeting Law in both of these instances.

This office has primary jurisdiction to investigate violations of the Open Meeting Law, pursuant to NRS 241.037. As part of those duties, this office investigated the complaint by interviewing Mayor Michael L. Montandon, Councilmen William Robinson, Stephanie Smith, Shari Buck, John Rhodes, and City Manager Kurt Fritsch. We also reviewed a "verbatim transcript" of a November 15, 2000 "Closed Personnel Session Regarding the City Manager."

Our investigation revealed that Councilwoman Buck did contact two other Councilmen regarding the travel policy. However, Ms. Buck states that she only told the other Councilmen that she wanted to initiate a change of the travel policy and did not ask them their opinion or poll them for how they would vote. This account corresponds to the accounts of both Councilwoman Stephanie Smith and Councilman William Robinson, obtained through separate interviews. The fact that both of these Councilmen disagreed with the travel policy in place at the time the conversations took place was public knowledge, as these Councilmen had made their positions known at prior open meetings of the Council.

Those interviewed were also questioned regarding the placing of a presentation by Habitat for Humanity on the agenda. The only Councilmen acknowledging that they talked about this agenda item with Mr. Fritsch were Smith and Rhodes. It appears that Habitat for Humanity was interested in a piece of land in North Las Vegas to renovate. There were two other organizations interested in the land. The Council initiated a bid process, and the organizations were to submit Requests for Proposals (RFPs). Councilman Rhodes talked to Mr. Fritsch and requested that Habitat for Humanity's presentation be placed on the agenda. Councilwoman Smith acknowledges that Mr. Fritsch talked to her about this agenda item, and told Councilwoman Smith he did not want only one organization presenting information regarding the item related to the RFP. However, no one else acknowledged that they were approached by Mr. Fritsch regarding this agenda item.

The Open Meeting Law requires that, except as otherwise provided by specific statute, all meetings of public bodies must be open and public. NRS 241.020(1). A "meeting" is defined as a "gathering of members of a public body at which a quorum is present to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction or advisory power." When members of a public body meet with each other or other people, one at a time or in small groups of less than a quorum, and conduct a series of such nonquorum meetings, this is

sometimes referred to as "serial communications." Serial communications could invite abuse to the Open Meeting Law if they are used to accumulate a secret consensus or vote of the members of a public body, or to set up what is sometimes referred to as a "walking quorum."

The Nevada Supreme Court has held that:

> [A] quorum of a public body using serial electronic communication to deliberate toward a decision or to make a decision on any matter over which the public body has supervision, control, jurisdiction or advisory power violates the Open Meeting Law. That is not to say that in the absence of a quorum, members of a public body cannot privately discuss public issues or even lobby for votes.

Del Papa v. Board of Regents, 114 Nev. 388, 400, 956 P.2d 770, 778 (1998).

Under NRS 241.015(1) the term "action" includes not only taking a vote, but also making a decision, or making a promise or commitment by a majority of public body members present during a meeting. However, even deliberating toward a decision, by a quorum, is a violation of the Open Meeting Law. To "deliberate" is to examine, weigh and reflect upon the reasons for or against the choice. Deliberation thus connotes not only collective discussion, but also the collective acquisition or the exchange of facts preliminary to the ultimate decision. *See Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*, 69 Cal. Rptr. 480 (Cal. Ct. App. 1968).

Requesting an item be placed on the agenda is not an "action" pursuant to the statute. The evidence supports the finding that the communications Councilwoman Buck had with Councilwoman Smith and Councilman Robinson were only to advise them that Councilwoman Buck was requesting the issue of the travel policy be placed on the agenda. The evidence does not support a finding that Councilwoman Buck was asking for a promise or commitment for how the other Councilmen would vote on the item, or even that any "deliberation" took place toward either Councilman making a decision on the issue of the travel policy.

The allegation that serial communications had been conducted to reach a majority consensus on the presentation of Habitat for Humanity has even less evidence to support it. Only two Councilmen acknowledge talking to Mr. Fritsch regarding this item, and one of them was Councilman Rhodes. There is no evidence that a quorum of the Council discussed this item with Mr. Fritsch or anyone else, or that a quorum deliberated towards or made a commitment to a certain decision.

While it is true that serial communications could invite abuse to the Open Meeting Law if they

are used to accumulate a secret consensus or vote of the members of a public body, or to set up what is sometimes referred to as a "walking quorum," there is no evidence that this occurred in this instance. Additionally, the vote on changing the travel policy was taken at the public meeting that was duly noticed and where public comment opportunity was provided. Therefore, this office finds no violation of the Open Meeting Law regarding the September 6, 2000 and October 4, 2000 meetings of the Council, on the agenda items of the travel policy and Habitat for Humanity.

Normally, this office responds to Open Meeting Law complaints within 60 to 120 days of the alleged violation. However, during the investigation of the complaint regarding the September 6, 2000 and October 4, 2000 meetings, we reviewed a verbatim transcript of a closed personnel session held on November 15, 2000, which required further review of this case as the discussion during the closed session is linked to the complaint at issue here. A review of the transcript from the closed session held on November 15, 2000, leads us to conclude that the closed session did not comply with NRS 241.020(1) and (2)(c)(1), and 241.030.

NRS 241.020 provides, in relevant part:

> 1. Except as otherwise provided by specific statute, all meetings of public bodies must be open and public, and all persons must be permitted to attend any meeting of these bodies . . .

Pursuant to NRS 241.030, a public body may close a meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of a person. The agenda for the November 15, 2000 meeting provides, in relevant part:

> 40. Non-Action Item: Closed Personnel Session regarding the City Manager (at the request of the City Manager)

The transcript of the closed session reveals that discussion took place concerning the City Manager's performance, which is allowable under NRS 241.030. However, during the closed session, the Council also discussed other topics, including but not limited to, the Council's travel policy, the police department, possible Open Meeting Law violations and the workload of City staff related to requests of Council Members. Furthermore, the Council described, during the open portion of the meeting immediately prior to the closed session, that the purpose of closing the meeting was "to air things out." The purpose of this session appeared to have evolved into comments on Councilman Rhodes' actions rather than to truly discuss the performance of the City Manager, and more comments were made addressing Councilman Rhodes' actions than those of the City Manager. These items were outside the parameters of NRS 241.030 and should not have been discussed by the Council in the closed session.

In addition, we do not believe the description in the agenda of the closed session met the requirements of NRS 241.020(2)(c)(1), which requires that an agenda for a meeting of a public body must consist of a clear and complete statement of the topics scheduled to be considered during the meeting. The agenda item stated it was a "Closed Personnel Session regarding the City Manager." However, it should have more specifically stated that it was to consider the City Manager's ***performance***, if that was the true intent behind the agenda item.

We warn the Council that it must not discuss matters during closed session that are not specifically authorized by NRS 241.030, or other statutory provision, and that agendas must meet the requirements of NRS 241.020 regarding a clear and complete description of the agenda item. Because no action was taken as a result of the closed session, and the Council does not have a recent history of this type of conduct, no further action outside of this letter will be taken at this time by this office. We caution the Council, however, that future Open Meeting Law violations of a similar nature may result in legal action.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
ELAINE S. GUENAGA
Senior Deputy Attorney General
Tax Section
(775) 684-1223

ESG:br

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

March 29, 2001

Larry Blank, Ph.D.
Tahoe Economics, LLC
Post Office Box 3722
Carson City, Nevada 89702

Re: *Open Meeting Law Complaint*
Churchill County Board of Commissioners
OMLO 2001-10/AG File No. 01-004

Dear Dr. Blank:

This is in response to the Open Meeting Law complaint that you filed with this office concerning the Churchill County Board of County Commissioners ("Board"). Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigating and prosecuting complaints alleging violation of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes.

In the complaint, you have inquired whether the Board held a public meeting to consider the issue of Virtual Hipster and a December 28, 2000, letter to the Federal Communications Commission that was signed by the Chair of the Commission. That letter contains a statement that "The Board of County Commissioners of Churchill County, Nevada (the "Board"), submits these comments in opposition to the request of Virtual Hipster...."

Facts

This office has contacted the district attorney seeking copies of agendas or minutes of public meetings involving the letter of December 28, 2000, and to determine whether it reflects a violation of the Open Meeting Law. We have further reviewed the agenda and minutes of the Churchill County Commissioners - CC Communications Management meeting of January 2, 2001. In the minutes of the January 2, 2001 meeting, in a report by Don Mello, the following notation was found: "We submitted comments signed by Commissioner Washburn to the FCC filing of the Virtual Hipster."

A reply has been received from Thomas Stockard, Deputy District Attorney. He has stated, in his March 14, 2001 letter, that the Board did not hold a public meeting to consider the application of Virtual Hipster. The Board further did not hold a public meeting to approve the letter or the comments filed with the FCC. We have enclosed a copy of his letter and attachment for your review.

Analysis and Conclusions

The Open Meeting Law was enacted by the Legislature for the following purpose: "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010. In this case, the District Attorney's Office has written that the Board had not noticed a public meeting and had not held a public meeting to consider the December 28, 2000 letter to the FCC. We accept this explanation, and based upon the forgoing, it is the finding of this office that no violation of the Open Meeting Law has taken place.

We thank you for bringing these matters to our attention.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
JAMES C. SMITH
Deputy Attorney General
(775) 684-1100

Enclosures
cc: Arthur E. Mallory, District Attorney (w/encls.)

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

March 29, 2001

Mr. & Mrs. Glenn Reed
Post Office Box 901
Lovelock, Nevada 89419

Re: *Open Meeting Law Complaint*
Pershing County School District Board of Trustees
OMLO 2001-11/ AG File No. 01-010

Dear Mr. and Mrs. Reed:

This is in response to the Open Meeting Law complaint that you filed with this office concerning the Board of School Trustees of the Pershing County School District ("Board"). Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigating and prosecuting complaints alleging violation of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes. In the complaint, you have inquired whether the Board met and considered any matter concerning your son and an incident that occurred on April 19, 2000.

Facts

This office has contacted the school district seeking copies of agendas or minutes of public meetings involving the incident. A reply has been received from Daniel W. Fox, Superintendent of Schools. He has stated in the letter, that the Board, "has not held a public meeting to consider the discipline of a teacher, Mr. Cerini, nor have they held a public meeting to discuss the incident itself or their son." We have enclosed a copy of the letter and attachment for your review. The attachment references a public meeting of the Board held on December 18, 2000. In that meeting, the Board declined to discuss this matter because it was not on the agenda.

Analysis and Conclusions

The Open Meeting Law was enacted by the Legislature for the following purpose: "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010. In this case, the Superintendent has written that the Board has not noticed a public meeting and has not held a public meeting to consider the incident. As you have requested, I have included a copy of NRS 388.521-388.5315. Please be advised that questions arising under NRS 388.521 are outside the Open Meeting Law jurisdiction of this office.

We thank you for bringing this matter to our attention.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
JAMES C. SMITH
Deputy Attorney General

Attachments

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

March 29, 2001

Ron Cuzze
State Peace Officer's Council
1250 South Burnham, Suite 203
Las Vegas, Nevada 89104

Re: Open Meeting Law Complaint
Public Employees Benefits Board
OMLO 2002-12/AG File No. 01-014

Dear Mr. Cuzze:

On February 20, 2001, you filed a complaint against the Public Employees Benefits Board ("PEBB") alleging possible violations of Nevada's Open Meeting Law. Specifically, the allegations were that PEBB failed to comply with notice requirements and also failed to provide materials in advance of its meeting which was scheduled on February 21, 2001.

This office has primary jurisdiction to investigate violations of the Open Meeting Law pursuant to NRS 241.037. As a part of those duties, this office investigated the above-referenced complaint and reviewed all of the materials and documentation submitted by PEBB and The State Peace Officers Council ("SPOC"). Our investigation revealed that, while PEBB was certainly aware of SPOC's interest in attending the meeting of February 21, 2001, and as a courtesy could have notified SPOC of its scheduled meeting, there was no actual violation of the Open Meeting Law.

The Open Meeting Law requires written notice of all public meeting at least 3 working days prior to the meeting. The minimum public notice requirement mandates that the public body post a copy of the notice at several prominent locations throughout the state, including its principal office or the building in which the meeting is to be held, and *mail a copy of the notice to any person who has requested notice of the meetings of the body*. NRS. 241.020(3). In addition, a public body is only required to provide copies of its agenda and other supporting materials relating to items on the agenda *upon request of an interested party*. NRS 241.020(4). Accordingly, an agency is only required to mail notification of its meeting and supporting materials upon the request of an interested party.[1]

[1] Please note that, pursuant to NRS 241.020(3)(b), the request for notice lapses 6 months after it is made.

In this case, our investigation revealed that PEBB timely posted the notice of its February 21, 2001, meeting at 7 different locations throughout the state. In addition, PEBB properly mailed notices to all interested parties who had requested such notification. Although SPOC had an interest in attending the PEBB meeting as evidenced by the legislative history regarding the regulation at issue, Nevada's Open Meeting Law only requires that, in addition to the posting requirements, PEBB provide notice by mail to those that have requested such notice.[2] This office's investigation found that SPOC was not listed on PEBB's request list and no evidence of a request by SPOC was established. Thus, this office does not find a violation of the Open Meeting Law.

In conclusion, the PEBB acted in conformance with the Open Meeting Law requirements and this office finds no violation of Nevada's Open Meeting Law, as set forth above, on the issues of notification of the February 21, 2001, meeting and providing of materials for items on the agenda for that meeting. If SPOC would like notice of meetings in the future, it must submit a written request to PEBB every 6 months. Also, if specific materials are desired, SPOC should submit a specific request for those materials. Thank you for contacting our office in this regard. I hope this information is responsive.

Sincerely,
FRANKIE SUE DEL PAPA
ATTORNEY GENERAL

By: _____
Darlene Barrier, Deputy Attorney General
Civil Division
(702) 486-3785

DB:krf

[2] The supporting materials attached to your letter indicate that PEBB did not post notification of its meeting nor the revised regulatory language on its website. However, Nevada's Open Meeting Law does not mandate the posting of such information on a public body's website. In fact, posting on a public body's website is generally insufficient when the statute requires that the notice be posted at the meeting place or other physical locations. *See* Ky.Op.Atty.Gen. 98-OMD-119 (July 27, 1998).

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

March 30, 2001

Mr. Charles E. Weller
Chairman
Justice Facilities Working Committee
527 Humboldt Street
Reno, Nevada 89509

Re: Open Meeting Law Complaint: Justice Facilities Working Committee
OMLO 2001-13/AG File No. 01-013

Dear Mr. Weller:

This is in response to an Open Meeting Law complaint filed by Mr. Robert Mulvana with the Attorney General concerning the February 12, 2001 meeting of the Justice Facilities Working Committee ("Committee"). Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigating and prosecuting complaints alleging violation of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes.

Mr. Mulvana's complaint alleges that he, as a member of the public, was excluded from the tour of the court-related facilities at the Regional Jail Facility at 911 Parr Boulevard. Mr. Mulvana further contends that as a result of the exclusion, he was unable to observe the reaction of the committee members who were authorized to take the tour.

Facts

We have reviewed the agenda and the minutes of the public meeting of the Justice Facilities Working Committee held on February 12, 2001. In your letter to this office of March 9, 2001, you indicate that you were unaware that Mr. Mulvana was excluded from the tour of the facilities. According to Mr. Mulvana, the Sheriff's department representatives allowed all of the participants of the meeting to attend the tour, except for Mr. Mulvana.

The agenda for the meeting provides in pertinent part as follows:

> *Unless otherwise indicated by asterisk (*), all items on the agenda are action items upon which the Justice Facilities Working Committee will take action. (emphasis in the original)*
>
> **4. Tour of court-related facilities.*

Analysis and Conclusions

The Open Meeting Law was enacted by the Legislature for the following purpose: "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010. The Committee opened the meeting at 5:15 p.m. Apparently, when the time for the facilities tour began, Mr. Mulvana was excluded from the tour at the request of Undersheriff Dianne Nicholson of the Washoe County Sheriff's Office. NRS 241.020(1) provides that "Except as otherwise provided by specific statute, all meetings of public bodies must be open and public, **and all persons must be permitted to attend any meeting of these bodies.**" [Emphasis added.] Failure to allow the public to be present and to observe the tour of the facilities was a violation of the Open Meeting Law. The Committee is held to the standard set forth in NRS 241.020(1). We direct the attention of the Committee to the provisions of § 8.02 of The Nevada Open Meeting Law Manual (8th Ed., Feb. 2000) for further discussion of the point.

Based upon the forgoing, it is the conclusion of this office that the Committee violated the Open Meeting Law on February 12, 2001, by excluding Mr. Mulvana from the tour. This office therefore issues a warning to the Committee members that they must allow the public to be present during the meeting. Members of the Committee are admonished to avoid such violations in the future.

We thank Mr. Mulvana for bringing this matter to our attention. Please distribute this determination to the Committee members.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
JAMES C. SMITH
Deputy Attorney General
(775) 684-1100

cc: Robert W. Mulvana

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

April 5, 2001

Donald A. Doelle, #27781
Post Office Box 1989
Ely, Nevada 89301-1989

Re: *Open Meeting Law Complaint*
Psychological Review Panel
OMLO 2001-14/AG File No. 01-006

Dear Mr. Doelle:

This is in response to Open Meeting Law complaint that you filed with this office concerning the Psychological Review Panel ("Panel"). Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigating and prosecuting complaints alleging violation of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes. In the complaint, you have inquired whether the Panel's meeting of November 13, 2000, violated elements of the Open Meeting Law. You have specifically complained that you were not afforded notice of the meeting of the Panel.

Facts

This office has contacted the Department of Prisons seeking a copy of the agenda and minutes of the November 13, 2000, public meeting of the Panel. The Department of Prisons has responded to the letter of February 23, 2001, by providing a copy of four documents concerning the hearing:

1. The agenda of the hearing;

2. The proof of service;

3. The minutes of the open session of the meeting; and

4. The minutes of the closed session of the meeting.

We have enclosed a copy of the above documents for your review.

Analysis and Conclusions

The Open Meeting Law was enacted by the Legislature for the following purpose: "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010. In this case, the agenda of the meeting was posted, you were served with a copy of the meeting agenda, and the open and closed meetings complied with the provisions of Chapter 241 of NRS.

Based upon a review of these documents, it is the conclusion of this office that the meeting of November 13, 2000, was proper. This office finds no violation of the Open Meeting Law, Chapter 241 of NRS.

We thank you for bringing these matters to our attention.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
JAMES C. SMITH
Deputy Attorney General

Enclosure
cc: Adam Endel, Ely State Prison (e/encl.)

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

April 5, 2001

Mr. David Rowles
Director, Administrative Services
Clark County Health Department
625 Shadow Lane
Las Vegas, Nevada 89127

Re: *Open Meeting Law Complaint*
Clark County Health District
OMLO 2002-15/AG File No. 01-002

Dear Mr. Rowles:

This is in response to the Open Meeting Law complaint filed by Mr. Robert Hall with the Attorney General concerning the December 14, 2000 meeting of the Clark County Health District Board of Health ("Board"). Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigating and prosecuting complaints alleging violation of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes.

Mr. Hall's complaint alleges that the public was excluded from the opening moments of the meeting of the Board. Mr. Hall further contends that as a result of the exclusion, he was unable to testify on an item that was adopted on the consent agenda.

Facts

We have conducted interviews with Board members and staff concerning the circumstances surrounding the consent agenda of the meeting of December 14, 2000. In the interviews, Board members acknowledge beginning the meeting promptly at 8 a.m. on the morning of December 14, 2000. The security guards opened the doors to the health department building at 8 a.m. and allowed the public to enter the building. Our investigation revealed that the time shown on the clock in the meeting room was different than the time at the guard station. Our investigation also reveals that members of the public were outside the meeting room when the pledge, a moment of silence, and consent agenda were conducted.

The agenda for the meeting provides in pertinent part as follows:

> *Pledge of Allegiance*
> *Call to Order*
> *I. Consent Agenda….*
>
> *8. Petition #93-00 - Request to: Authorize the Chief Health Officer to Execute Agreements with Participants in the Clean Diesel Engine Incentive Program*
> *9. Memorandum #44-00 Board Approval of Confidential Settlement Agreement*
>
> *IV. Citizen Participation....*

Analysis and Conclusions

The Open Meeting Law was enacted by the Legislature for the following purpose: "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010. The Board started the meeting at 8:00 a.m., several minutes before the public could enter the room, sign in and prepare for the meeting. The meeting started on time, but the public was not provided access to the meeting before the meeting started or contemporaneously with the start of the meeting. NRS 241.020(1) provides that "Except as otherwise provided by specific statute, all meetings of public bodies must be open and public, and all persons must be permitted to attend any meeting of these bodies." Failure to allow the public to be present and to observe the adoption of the consent agenda was a violation of the Open Meeting Law, since the public must be able to have adequate facilities to attend the meeting. The Board is held to the standard set forth in NRS 241.020(1). We direct the attention of the Board to the provisions of § 8.02 of the Nevada Open Meeting Law Manual (8th ed. 2000) for further discussion of the point.

Public comment was reserved to the "Citizen Participation" section of the meeting (Item IV of the agenda). The public comment section is an important requirement that must be contained in the agenda and observed during the meeting. The public, in the instant case, was not allowed to speak during the consent portion of the agenda. Members of the public were, however, able to present written and oral comments to the Board during the Citizen Participation portion of the meeting.

Based upon the forgoing, and the interviews conducted by this office, it is the conclusion of this office that the Board violated the Open Meeting Law on December 14, 2000, by starting the meeting before the public was allowed into the room in violation of the requirements of the Open Meeting Law as provided in Chapter 241 of NRS. This office therefore issues a warning to the Board members that they must allow the public to be present during the entire meeting. Members of the Board are admonished to avoid similar violations in the future or this office may

be constrained to initiate legal proceedings.

During the interviews with the Board members, our office provided guidance on adhering to the letter, spirit and intent of the Open Meeting Law. The guidance emphasized that the public must be allowed to be present for the entire meeting and the Board must wait until the public has been admitted to the meeting facility before commencing a public meeting.

We thank Mr. Hall for bringing these matters to our attention. Please distribute this determination to the Board members.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
JAMES C. SMITH
Deputy Attorney General

cc: Robert W. Hall
Donald Kwalick

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FRANKIE SUE DEL PAPA
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THOMAS M. PATTON
First Assistant Attorney General

April 12, 2001

Belinda Quilici
Pershing County District Attorney
Post Office Box 299
Lovelock, Nevada 89419

Re: Open Meeting Law Complaint
Pershing County Board of Commissioners
OMLO 2001-16/AG File No. 01-003 & AG File No. 01-008

Dear Ms. Quilici:

This is in response to Open Meeting Law complaints filed by Ms Kristy Berge and Mr. Brad Arnold with the Attorney General regarding the Pershing County Board of County Commissioners ("Commissioners"). Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigating and prosecuting complaints alleging violation of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes.

Ms. Berge's complaint alleges that two newly elected members of the Pershing County Board of County Commission, Dave Ayoob and Ron Hardy, met with Mr. Chris Holt and representatives of economic development interests at a restaurant in Lovelock on November 15, 2000. The complaint further alleged that as a consequence of the meeting, after these officials were sworn into office, they took action at the January 2, 2001 meeting of the County Commission to grant a contract with Mr. Holt.

Mr. Arnold's complaint alleges that the two newly elected Commissioners Hardy and Ayoob had meetings in Lovelock prior to the January 2, 2001 meeting. He alleges that they drive around together, socialize and have meals together with staff persons. At the meeting of January 2, 2001, Mr. Arnold's at-will position as General Services Administrator was abolished and he was relieved of his duties as Road Superintendent.

Facts

We have conducted interviews with Commissioners Hardy and Ayoob concerning the allegations made in the Complaints. In the interviews, they acknowledge meeting at the restaurant in Lovelock on November 15, 2001. "Commissioner Ayoob stated that this meeting was to discuss economic development and growth for Pershing County and Lovelock businesses. He said they discussed ways to help bring new businesses to the area and to try and change the attitude of the community so that businesses could prosper." The Commissioners denied that they discussed the contract with Mr. Holt at that meeting or at any other time prior to the meeting of January 2, 2001. Thereafter, at the January 2, 2001 meeting of the Board, Commissioners Ayoob and Hardy voted to approve a county contract with Chris Holt. The agenda (Item 8) for the meeting of the Board listed the contract as follows:

> 8. INDUSTRIAL PARK MATTERS: Discussion regarding matters relating to the Industrial Park; Approval of contract with Chris Holt for recruitment of businesses for the industrial park and other areas of Pershing County*.

With regard to the second complaint involving Brad Arnold, the Commissioners deny that they attended a meeting prior to the January 2, 2001 Board meeting, to discuss Mr. Arnold's employment with Pershing County. In their interviews, they state that the decision to place the Arnold matter on the agenda was arrived at independently, after separately discussing the matter with your office. The agenda provides as follows:

> 3. Discussion regarding elimination of the General Services Administrator position*.
>
> 4. Discussion and possible action regarding termination of the Road Department Superintendent*.

The Pershing County Board of County Commissioners is composed of three elected Commissioners. As such, a gathering of two members would constitute a quorum of the Board. A quorum of a public body is defined in NRS 241.015(4) as a simple majority of the constituent membership of a public body or another proportion established by law.

Analysis and Conclusions

. Newly elected members of a public body are held to the same standard as members of the public body. The Nevada Open Meeting Law Manual, in §3.06 provides as follows:

> Although the literal language of the Open Meeting Law appears to limit its application to actual members of a public body, the Office of the Attorney General believes the better view is set forth in *Hough v. Stembridge*, 278 So. 2d 288 (Fla. Dist. Ct. App. 1973), where the court held that members-elect of boards and

> commissions are within the scope of an open meeting law. Otherwise, members-elect could gather with impunity behind closed doors and make decisions on matters soon to come before them in clear violation of the purpose, intent and spirit of our Open Meeting Law. Application of the provisions of the statute to members-elect of public bodies is consistent with the liberal interpretation mandated for the Open Meeting Law. *See* OMLO 99-06 (March 19, 1999).

This principle is recognized in an opinion of the Florida Attorney General that "[T]hose candidates who have been elected to membership on a board or commission, but have yet to assume the office, are subject to the Sunshine Law as any other member of the board or commission would be." Fla.Op.Atty.Gen.92-5 (Jan. 8, 1992). See also, *Mitchell v. School Board*, 335 So.2d 354, 355 (Fla.App.1976).

A meeting between two commissioners of Pershing County, at which public business is discussed, is a public meeting. A strict interpretation would prevent any contact outside an open meeting between Commissioners when a quorum is present to discuss public business. The term "meeting" is defined in NRS 241.015(2) as follows:

> 2. "Meeting" means the gathering of members of a public body at which a quorum is present to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.

In § 5.02 of the Open Meeting Law Manual (Eighth Ed., 2000), the question was discussed regarding the application of the Open Meeting Law in an informal (restaurant) setting as follows:

> In *Sacramento Newspaper Guild*, all five members of the Sacramento County Board of Supervisors went to a luncheon gathering at the Elks Club with the county counsel, county executive, county director of welfare, and some AFL-CIO labor leaders to discuss a strike of the Social Workers Union against the county. Newspaper reporters were not allowed to sit in on the luncheon, and litigation resulted.
>
> . . .

> An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic, pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry in discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices. As operative criteria, formality and informality are alien to the law's design, disposing it to the very evasions it was designed to prevent. Construed in light of the Brown Act's objectives, the term "meeting" extends to informal sessions or conferences of board members designed for the discussion of public business. The Elks Club luncheon . . . was such a meeting.
>
> 54 Cal. L. Rev. 1650 (1966).

Based upon the above authorities and factual interviews conducted by this office, it is the conclusion of this office that Commissioners Ayoob and Hardy violated the Open Meeting Law on November 15, 2001, by meeting at a restaurant in Lovelock and discussing economic development, without complying with the requirements of the Open Meeting Law as provided in Chapter 241 of NRS. This office therefore issues a warning to these Commissioners that they must not meet and discuss public business outside of properly noticed public meetings that comply with the Open Meeting Law.

Based upon the interviews conducted by this office, it is the conclusion of this office that Commissioners Ayoob and Hardy did not meet outside a public meeting to discuss the termination of Brad Arnold and did not commit a violation of the Open Meeting Law in this regard.

We thank Ms. Kristy Berg and Mr. Brad Arnold for bringing these matters to our attention. Please distribute this determination to the Commissioners.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
JAMES C. SMITH
Deputy Attorney General

cc: Kristy Berge
Brad Arnold

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

April 12, 2001

Mr. Ted Vernes, Chairman
Eureka County Taxpayer's League
Post Office Box 273
Eureka, Nevada 89316

Re: Open Meeting Law Complaint Against the Community Development Corporation (CDC) and the Eureka County Economic Development Council (ECEDC)
OMLO 2001-17/AG File No. 00-030

Dear Mr. Vernes:

In July of 2000 you filed a complaint with this office alleging that the CDC and ECEDC do not comply with the Open Meeting Law when conducting meetings of their board of directors or committees. This office has primary jurisdiction to investigate violations of the Open Meeting Law, pursuant to NRS 241.037. As part of those duties, this office investigated the complaint by interviewing officials of CDC and ECEDC and reviewing records and information given to us by those officials as well as a review of relevant statutes and regulations.

FACTS

This office received the complaint on July 21, 2000, seeking this office's assistance with seeking an injunction to insure that CDC complies with Nevada's Open Meeting Law. The complaint also states that your organization also believes that ECEDC is a public body as well and thus subject to the Open Meeting Law.

CDC

CDC was organized in 1997 as a private non-profit corporation. The Articles of Incorporation were originally filed with the Nevada Secretary of State on October 1, 1997. According to the Articles of Incorporation filed with the Secretary of State, there were two original incorporators, Pete Goicoechea and Sandra Green, both of whom were Eureka County Commissioners. These two incorporators were also two of the three original directors.

The bylaws for CDC were adopted on October 20, 1998. The bylaws were signed by Michel Griswold, Sandra Green and William Riggs, as directors of CDC. These bylaws provide for the Eureka County Commissioners to review all candidate lists for directors and to return a selection list to the current directors of CDC. These bylaws also provide that if no quorum for electing a replacement director can be had, a replacement director shall be appointed by the Eureka County Commission. The bylaws also contain provisions that the audited budget of CDC must be submitted annually to the Commission; that the Commission may designate funds to CDC; that all amendments to CDC's bylaws have to be approved by a 2/3 majority of County Commissioners; and, that in the event of dissolution, all assets of CDC will revert to the County.

On May 6, 1999, the bylaws of CDC were ratified by the Eureka County Commission and the Commission resolved to release monies to CDC. Two of the Commissioners voting for the resolution were Goicoechea and Green, the original incorporators of CDC. It appears that CDC did not make the required annual filings with the Secretary of State after filing the Articles of Incorporation. However, on September 28, 1999, the Secretary of State reinstated CDC, after the required filings of list of officers and appropriate fees and penalties were paid. At that time, the list of officers and directors listed six names, none of whom appear to be county commissioners.

The purpose of CDC, as stated in its bylaws, is to further economic development in Eureka County, mainly by establishing one or more revolving loan funds on behalf of the corporation and making loans from those funds to further the development of the Eureka County economy. The bylaws declare that the corporation is not a local government or a public body and shall not be subject to the Open Meeting Law. In its 1999 operating budget, CDC received 100 percent of its revenue from a grant from Eureka County.

ECEDC

ECEDC was granted a corporate charter on July 29, 1999, as a non-profit corporation. The incorporators were Ronald Carrion and Cornelius Hyzer, Sr. The original board of directors, including Carrion and Hyzer, also included Ken Benson, Dan Green and Wayne Robinson. None of the incorporators or directors appears to have been county commissioners at the time of incorporation. The original bylaws of ECEDC were adopted on March 30, 1999. Those bylaws provided that the Eureka County Commission may designate operating funds to the corporation on an annual basis, disbursement of such funds to be through the regular budget operation of the county under the control of the county auditor. This provision was removed from the amended bylaws, which are not dated other than with the year 1999. The bylaws, both original and amended, also provide that one county commissioner shall serve as a director, that the treasurer of the corporation shall submit an audited budget to the county commission annually, and that upon dissolution of the corporation, all assets will become the property of

Eureka County. The bylaws also state that ECEDC is not a public body subject to the Open Meeting Law

An Agreement for Services dated September 20, 1999, was entered between Eureka County and ECEDC, reflecting that ECEDC will direct businesses seeking capital to CDC. The Agreement also requires ECEDC to report on economic development action to the County Commissioners on a monthly basis. Additionally, by contract, ECEDC has the use of a county employee, and county office space.

ANALYSIS

The Open Meeting Law applies to public bodies and NRS 241.015(3) defines a "public body" as

> ". . . any administrative, advisory, executive or legislative body of the state or a local government which expends or disburses or is supported in whole or in part by tax revenue or which advises or 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 . . .

The statute requires two elements for being considered a public body. First, it must be an "administrative, advisory, executive or legislative body of the state or a local government," which means that the body must (1) owe its existence to and have some relationship with a state or local government, (2) be organized to act in an administrative, advisory, executive or legislative capacity, and (3) must perform a government function. Second, it must also expend or disburse or be supported in whole or in part by tax revenue, or advise or make recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue. *See Nevada Open Meeting Law Manual, Eighth Edition*, February 2000, § 3.01; *see also* OMLO 99-05 (January 12, 1999).

This office has considered the application of the Open Meeting Law to another economic development entity, the Economic Development Authority of Western Nevada (EDAWN). *See* OMLO 99-05 (January 12, 1999). In that opinion, this office found that the receipt of money from a public body does not by itself transform a private corporation into a public body. To hold otherwise would mean that every charity that receives grants, every government contractor that receives payment for services or products, and every trade group or common interest organization to which a government body belongs, would automatically become a public body under the Open Meeting Law. EDAWN was organized as a private nonprofit corporation. Its organizers were seven private citizens. There was no evidence that EDAWN was created by the order of or otherwise owed its existence to any state or local government body, and there was no evidence that EDAWN was organized to act in an administrative, advisory, executive or legislative capacity. Therefore, this office's opinion was that EDAWN was not subject to the Open Meeting Law. *See id*.

Other jurisdictions with open meeting law provisions similar to Nevada's have looked at various factors to determine whether an entity is a public body or agency. Some of those factors are: (1) whether the agency has the authority to make governmental decisions and act for the state or local government, *McLarty v. Board of Regents*, 200 S.E.2d 117, 119 (1973); (2) whether the agency has independent authority in the exercise of its functions, *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971); and (3) whether the agency is subject to governmental audits or otherwise has its business procedures supervised, *Recap v. Indiek*, 539 F.2d 174, 177 (D.C. Cir. 1971). Additionally, where a private non-profit corporation was subject to close monitoring by the county as to its budget and programs, and the corporation provided services in compliance with certain statutes, the corporation was considered an agency of the county. *See* Op. Kan. Att'y Gen. No. 94-111 (August 30, 1994).

Courts have found two types of entities which are not subject to the open meetings laws: (1) those which are merely advisory and have no decision-making authority; and (2) those which are basically independent entities which have some connection, by contract or other tie to a government entity, but are not actually created by some form of government action. *Memorial Hospital Ass'n, Inc. v. Knutson*, 722 P.2d 1093, 1099 (Kan. 1986). Where it can be shown that a public body has intentionally and for the purpose of avoiding the light of public scrutiny, appointed a board of non-elected citizens to determine for the elected board what course should be pursued, or where the actions of the private citizens are in any way binding upon the elected officials, the meetings of such groups should be open to public scrutiny. "Public bodies cannot be allowed to do indirectly what the legislature has forbidden." *Id*.

Corporate instrumentalities which have been charged with performing public functions and exercising decision-making authority on behalf of governmental entities bring such entities within the ambit of open meetings statutes. Op. Okla. Att'y Gen. No. 80-215 (October 8, 1980). There is a difference between a contract to provide material, such as police cars, fire trucks or computers, or services such as legal services, accounting services, or other professional services for the public body to sue in performing its obligations, as compared to contracting to relieve a public body from the operation of a public obligation, for example operating a jail or providing fire protection, using the same facilities or equipment acquired by public funds previously used by the public body. The second scenario cannot avoid public scrutiny. *News-Journal Corporation v. Memorial Hospital-West Volusia, Inc*., 695 So.2d 418, 420 (F. 1987). If the corporate entity was formed at the behest of a public body, is funded by the public body, the public body has some control over that entity, the services contracted for are an integral part of the public body's decision-making process, and the entity operates for the public body's benefit, the entity is subject to the open meeting law. *Id*.

Where a private non-profit corporation had its board appointed by a county board of commissioners, it occupied premises owned and provided by the county under a lease, and in the event of dissolution, the entity was obligated to transfer its assets to the county, the entity was found to be an agent of the county. *The News and Observer Publishing Company v. Wake County Hospital System, Inc.*, 284 S.E.2d 542, 547 (N.C. 1981).

CDC is a private non-profit corporation. However, it was formed at the direction of the Commission, and incorporated by two of the three Commissioners.[1] Where a government body

or agency itself establishes a civic organization, even though it is composed of private citizens, it may well constitute a "public body" under the law. *Palm Beach v. Gradison*, 296 So. 2d 473, 476 (Fla. 1974). Even though a county commissioner may not sit on the current board of directors, the directors are selected by the Commission pursuant to CDC's bylaws. The assets of CDC, in the event of dissolution, revert to the County. Furthermore, the CDC's purpose is to grant loans to persons or entities coming before it, where the money for those loans comes directly from the County. The purpose of the loans is economic development, a goal and function of the County government. CDC clearly owes its existence to Eureka County, it was organized to act in an administrative capacity, as the entity granting loans of county funds for economic development, and it performs the government function of granting such loans. Thus, CDC meets the first element of being considered a public body, as it can be considered an "administrative, advisory, executive or legislative body" of "a local government." CDC also clearly meets the second element of disbursing and being supported in whole or in part by tax revenue, as its funding comes directly from the County. Therefore, CDC is subject to the Open Meeting Law.

ECEDC's status requires more in depth analysis. ECEDC was incorporated by private citizens, and its board of directors is not selected by the Commission. However, the County provided the start up funds for ECEDC and the assets of ECEDC revert to the County upon the dissolution of ECEDC. Furthermore, there are indications that ECEDC was formed at the direction of the Commission. See news articles. Additionally, ECEDC performs functions previously performed by the County, had the use of a County employee, at least initially during a transition period when ECEDC took over the functions previously performed by the County.

The facts of ECEDC's formation and operations most closely resemble those where a private corporation was found to be a public body subject to the state's open meeting law. In *News-Journal Corporation v. Memorial Hospital-West Volusia, Inc*., the public body had nothing to do with the physical acts involved in incorporating the entity but it played a role in the corporation's formation because the public body required the formation in order to transact the venture at issue. The corporation took over functions previously the obligation of the public body. Additionally, the corporations' sole purpose for existence was to perform the agreement with the public body to provide these functions. Additionally, the corporation was functioning for the benefit of the public body in the sense of providing services that the public body would otherwise be forced to provide. *News-Journal Corporation v. Memorial Hospital-West Volusia, Inc*., at 420-421.

The facts are also similar to those in *The News and Observer Publishing Company v. Wake County Hospital System, Inc.*, where a private non-profit corporation had its board appointed by a county board of commissioners, occupied premises owned and provided by the county under a lease, and in the event of dissolution, the entity was obligated to transfer its assets to the county. *The News and Observer Publishing Company v. Wake County Hospital System, Inc.*, at 547. The only difference here is that ECEDC's board is not appointed by the

[1] While this office did not obtain evidence that the Commission voted to form CDC, the fact that two of the three County Commissioners were incorporators is sufficient to find that CDC was formed at the direction of the Commission, as a majority of the Commission incorporated CDC.

Commission. However, it is apparent ECEDC was formed at the direction of the Commission.

Nevada's Open Meeting Law is entitled to a broad interpretation to promote openness in government. *See McKay v. Board of Supervisors*, 102 Nev. 644, 651, 730 P.2d 438, 443 (1986). Under a broad interpretation, ECEDC is found to be a public body under the Open Meeting Law. ECEDC was formed at the direction of the Commission, it performs a function previously performed by the County, with County-provided funds, and uses County space. Thus, ECEDC is subject to the requirements of the Open Meeting Law.

Enclosed are copies of the letters to CDC and ECEDC, issuing advice and a warning. Even though CDC was incorporated in 1997, both CDC and ECEDC did not start taking any real action until 1999. The issue of whether this type of entity is a "public body" under the Open Meeting Law is a relatively new issue, and the question of violation of the Open Meeting Law is one of more prospective than retroactive application in this case. Under the Open Meeting Law, the actions that may be taken are to void actions taken in violation of the law and to enjoin future violations. NRS 241.037. Because the entities believed they were not subject to the Open Meeting Law, and because the complaint was received more than 60 days after a specific violation was alleged, so no action could have been taken to void the CDC's actions at its May meeting, this office will limit its action to advice and a warning at this time. However, as provided in the letters, if future conduct of CDC and ECEDC violates the Open Meeting Law this office may take legal action necessary to enforce the requirements of the Open meeting Law.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
NORMAN J. AZEVEDO
Chief Deputy Attorney General
Civil Division
(775) 684-1222

NJA:srh

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

April 13, 2001

Mr. Leroy Marx
1450 Dixie Drive
Fallon, Nevada 89406

Re: *Open Meeting Law Complaint*
Churchill County School Board of Trustees
OMLO 2001-18/AG File No. 01-017

Dear Mr. Marx:

This is in response to the Open Meeting Law complaint you filed with this office concerning the Board of School Trustees of the Churchill County School District ("Board"). Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigating and prosecuting complaints alleging violation of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes. In the complaint, you have inquired whether the Board violated the Open Meeting Law when it met and discussed litigation filed against Gateway to Success Charter School ("Charter School") and its employee at two public meetings.

Facts

This office has contacted the Board seeking copies of agendas or minutes of the February 8 and March 8, 2001, public meetings of the Board. The Board responded by a letter from its counsel, Donald A. Lattin, on March 22, 2001. The letter contained the agendas and the minutes for the February 8 and March 8, 2001 Board meetings. As you are aware, the items pertaining to the litigation at these meetings are also involved in an Open Meeting Law complaint filed by Vicki Jones. The agendas and the minutes of the meetings reflect that the Board has discussed litigation filed against the Charter School. The Board has discussed the implications of the litigation, and requested information about the Charter School concerning legal questions arising from the litigation. You have written that the litigation should have been considered in a closed meeting, for the reason that the lawsuit addresses alleged misconduct. NRS 241.033. We have enclosed a copy of Mr. Lattin's letter of March 22, 2001 for your review.

The agenda for the meeting of February 5, 2001 provides in pertinent part:

"VIII. NEW BUSINESS, ACTION ITEMS

….

2. Discussion and Action Regarding Litigation Filed Against Gateways to Success Charter School and Possible Impact on Churchill County School District As Sponsoring District (District Goals 2 & 8)"

The minutes of the February 8, 2001 meeting reflect that the Board discussed the risk exposure of the Charter School and the potential impact of the litigation on the Board. Mr. Lattin further stated that he had been informed, in a conversation with plaintiff's counsel, that another claim of sexual harassment was pending.

The agenda for the meeting of March 5, 2001 provides in pertinent part:

"VII. OLD BUSINESS, ACTION ITEMS

1. Continuing Report by District's Legal Counsel on Matters Relating to Gateways to Success Charter School"

The minutes of the meeting reflect that several issues pertaining to the Charter School were discussed at the meeting of March 8, 2001. These matters included the litigation, the availability of insurance coverage, the need for an internal investigation, and matters pertaining to an audit. Neither the agendas nor the minutes of the meetings reflect that any person's name was mentioned.

Analysis and Conclusions

The Open Meeting Law was enacted by the Legislature for the following purpose: "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010. In this case, the agendas reflect that legal matters pertaining to the Board and to the Charter School would be discussed. The minutes reflect that the litigation was discussed. The attorney-client privilege does not provide an exception to the Open Meeting Law for discussions of public body with its attorney. *McKay v. Board of County Commissioners*, 103 Nev. 490 at 493, 746 P.2d 124 (1987). The *McKay* case requires attorneys to meet in a public meeting with a quorum of a public body to discuss legal matters. The court held that "A public body that meets as a body must meet in public." Id. at 495, 746 P.2d at 127. The court recognized that meetings to consider the advice of legal counsel in a public meeting may create a measure of frustration or inconvenience. While the discussion of the litigation may appear awkward in this case, it is important to the public's right to know the nature and extent of the legal liability of a public body. The public body must meet and discuss legal cases and potential liability in a public meeting.

You have requested that the Board be held in violation of the Open Meeting Law because it did not close the meeting to discuss the litigation, which involves claims of sexual harassment and wrongful termination. You have sought to have the Board found in violation of the Open Meeting Law because you view these claims as alleged misconduct, and therefore entitled to a closed meeting. These claims were part of the discussion of the above agenda items pertaining to the litigation. In response, we note that the ability to close a meeting for discussion of alleged misconduct is discretionary. NRS 241.030 (1) provides: "Except as otherwise provided in NRS 241.031 and 241.033, nothing contained in this chapter prevents a public body from holding a closed meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of a person." We direct your attention to § 9.04 of the Nevada Open Meeting Law Manual, (8th ed. 2000) where it states: "Finally, it should be noted that while such closed sessions are permitted, they are not required under the Open Meeting Law." The right to confidentiality that you raise pursuant to NRS 241.030(1) is not sufficient to close the meeting. In fact, closure of a public meeting to discuss litigation may subject the Board to liability for violation of the Open Meeting Law.

Your complaint further concerns the provisions of NRS 241.033(1), which pertain to written notice of certain meetings under the Open Meeting Law. In that statute, the legislature requires that a public body not hold a meeting to consider the character, alleged misconduct, professional competence or physical or mental health of a person unless it has given notice as provided in NRS 241.033(1)(a) or (b). You have written that the Board considered claims of sexual harassment and wrongful termination that were not part of the litigation. You write that this was a violation of the Open Meeting Law for the reason that the purpose of the meeting was to discuss alleged misconduct and you cite § 6.09 of the Nevada Open Meeting Law Manual (8th ed. 2000) in support of your contention.

In analyzing this question, we look at the purpose of the statute. NRS 241.033(1) requires written notice be given to a person of the time and place of a meeting. The question presented is whether the discussions of the litigation violated the Open Meeting Law because the Charter School was not given written notice of the time and place of meetings that would consider the alleged misconduct of the Charter School and of its employees. In response to this question, this office further reviewed the agenda items to ascertain the purposes of the meetings. Since the Board was discussing litigation with its attorney, the meeting was required to be open. It does not appear from the agenda or minutes that the purpose of the meeting was to consider the character, alleged misconduct, physical or mental health of a person, or of the Charter School. While both you and the Charter School are named defendants, the purpose of the discussion was to assess the responsibility of the school district with regard to the litigation. The meeting did not consider you directly. The discussion focused on the impact the litigation would have on the school district, and its obligations to the students, the teachers, and the parents. By way of contrast, if the purpose of the meeting were to terminate an employee for one of the protected categories defined in NRS 241.033(1), then the opinion of this office would be to provide the notice required in that statute. In resolving the above issue, it was important to note that the

purpose of the discussion was to assess the potential for litigation involving the Board arising from the litigation. For this reason, this office finds that the Board was not required to provide special notice to you or to the Charter School, and that the discussion of the litigation did not violate the Open Meeting Law.

The Board is, however, admonished that if, in the future, the purpose of a meeting is the consideration of one or more of the protected categories defined in NRS 241.033, then notice is required to be given as provided in the statute. Since the Board has held a public meeting to consider the matters on the agenda pertaining to litigation, and since the other allegations relate to the same subject matter, this office finds no violation of the Open Meeting Law, Chapter 241 of the Nevada Revised Statutes.

We thank you for bringing these matters to our attention.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
JAMES C. SMITH
Deputy Attorney General

Enclosure
cc: Donald A. Lattin, Esq. (w/o encl.)

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FRANKIE SUE DEL PAPA
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THOMAS M. PATTON
First Assistant Attorney General

April 18, 2001

Jeffrey S. Blanck, Esq.
General Counsel, Washoe County School District
Legal Division
425 East Ninth Street
P.O. Box 30425
Reno, Nevada 89520-3425

Re: *Open Meeting Law Complaint*
Washoe County School District Board of Trustees
OMLO 2001-19/AG File No. 01-015

Dear Mr. Blanck:

This is in regard to the above-mentioned Open Meeting Law complaint that was filed with this office. The complaint was in regard to the December 18, 2000 meeting held by the Washoe County School District Board of Trustees ("Board"). Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigating and prosecuting complaints alleging violation of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes.

The complaint inquired whether the Board's review of a report of aversive behavior management regarding a pupil was appropriately noted on the agenda. The complaint also questioned whether the pupil's parents received appropriate notification that the Board was considering an item regarding their child's reports. The complaint also expresses concern that the parents were not afforded an opportunity to address issues regarding aversive behavior management of their child with the Board.

I will address these questions one at a time. The first question is whether the action item regarding aversive behavior management was appropriately noted on the agenda. NRS 241.020(2) provides in pertinent part:

> "Except in an emergency, written notice of all meetings must be given at least three working days before the meeting. The notice must include:
> . . .
> (c) An agenda consisting of:
> (1) A clear and complete statement of the topics scheduled to be considered during the meeting.
> (2) A list describing the items on which action may be taken and clearly denoting that action may be taken on those items."

The agenda for the December 18, 2000 meeting of the Board has an item[1] specified as follows:

CONSENT CALENDAR

Items listed under the consent calendar will be voted on as a block with no Board or public comment. If a member of the public wishes to comment on an item in the consent calendar, please fill out and submit a yellow "Citizen's Request To Speak" card to the Board President before this point in the agenda.
RECOMMENDATION: That the Board of Trustees approve the Superintendent's Recommendation on Consent Calendar Items A and B as appended):

A. WARRANTS FOR THE WEEK ENDING DECEMBER 15, 2000

B. SCHOOL BOARD REVIEW-AB280 AVERSIVES AND PHYSICAL/MECHANICAL RESTRAINTS

The purpose of requiring that agenda items be described in clear and complete detail is to give notice to the public what topics will be considered by the public body. An agenda should give the public notice of what the public body is doing, has done, or may do. A member of the public should be able to review an agenda and identify if there are any items the public body will be dealing with that are of interest to them.

[1] The Consent Calendar item on the agenda was not done in a closed session. The Consent Calendar is a group of items that are voted on in a block. The Board receives a packet with the items that are placed on the Consent Calendar. There may be some number, for instance 16 separate items on a consent agenda. The Board reviews each item prior to the meeting. When it comes time to vote on the Consent Calendar, the Board makes one motion to approve the items on the Consent Calendar. If any Board member has a problem or a question about an item on the Consent Calendar, he or she can pull it off of the Consent Calendar for separate discussion and action.

The agenda for the December 18, 2000 meeting of the Board is lacking in clear and complete statements of certain topics to be considered at the meeting. Not all items are designated as being for "Action" or for "Discussion". For example, the Consent Calendar is not listed under Action Items on the agenda. Under the Consent Calendar item, there is a notation that the Consent Calendar will be voted on. The topics listed under Consent Calendar, rather than clearly indicating the action being taken, are very vague and non-descriptive. A person that may have an interest in item B under the Consent Calendar could not ascertain, from the agenda, whether their child's reports were being considered or not.[2]

Although there may be some limitations imposed by the Family Educational Rights and Privacy Act (FERFA) on listing the names of the children's reports to be considered, it would be possible to list reports by case number or some other designation. Even though the notation under Consent Calendar says a member of the public can submit a "Citizen's Request To Speak" card to comment on an item on the Consent Calendar, the agenda does not provide a clear and complete description of the items to be considered on the Consent Calendar, thereby depriving the citizen of actual notice.

Of equal concern is item A. The description of this action item is not clear and complete. An interested citizen could not ascertain from the agenda what type of action the Board is considering. The agenda should include a description of the Warrants and of the action to be taken.

The agenda topics listed under Consent Calendar are in violation of the Open Meeting Law. NRS 241.020(2). Items A and B are not listed in a clear and complete manner that would give notice to the public what action the Board is considering. Additionally, the Consent Calendar is not listed under the heading Action Items that list the items the Board is acting on. Even though the items listed on the Consent Calendar are voted on in a block, they should be listed under Action Items and they should be listed with the same specificity as the other items listed under Action Items.

The next question was whether the parents received appropriate notification that the Board may be considering an item regarding their child's records. NRS 241.033(1) provides:

> "A public body shall not hold a meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of any person unless it has given written notice to that person of the time and place of the meeting. Except as otherwise provided in subsection 2, the written notice must be:

[2] According to NRS 388.5275 and NRS 388.528, if a physical or mechanical restraint is used on a pupil with a disability, a report must go to the Board. The Board must then consider whether the use of a physical or mechanical restraint on a pupil with a disability has resulted in a denial of the pupil's rights.

(a) Delivered personally to that person at least 5 working days before the meeting; or
(b) Sent by certified mail to the last known address of that person at least 21 working days before the meeting.

A public body must receive proof of service of the notice required by this subsection before such a meeting may be held."

As noted, pursuant to NRS 388.5275(3), the Board must consider whether the use of a physical or mechanical restraint on a pupil with a disability has resulted in a denial of the pupil's rights.

The question then is whether in making the determination whether a pupil's rights have been denied by the use of physical or mechanical restraints, the Board is required to consider a pupil's character, misconduct or physical or mental health. Having reviewed a number of these reports, they clearly involve consideration of a pupil's alleged misconduct. The Board, in making the determination whether a pupil's rights have been violated, are given a report with a narration of the incident with the pupil that resulted in the use of a Physical or Mechanical Restraint. The Board must then determine whether, in light of the alleged misconduct of the pupil, the use of the physical or mechanical restraint is justified. The Board, since they are considering the alleged misconduct of a pupil, must give notice of the meeting to the pupil, or in the case of a minor, his or her guardian, prior to considering the information in the report. Because the Board has failed to notify the parents that a determination would be made concerning the misconduct of their child at the December 18, 2000 Board meeting, the Board is in violation of the Open Meeting Law. NRS 241.033(1).

The parents should also be aware that the Board is required to provide anyone with advance notice of meetings if requested to do so. NRS 241.020. The parents can request notice and the Board must honor their request for 6 months, at which time the parents must renew their request. NRS 241.020(4) states:

"Upon any request, a public body shall provide, at no charge, at least one copy of:

(a) An agenda for a public meeting;
(b) A proposed ordinance or regulation which will be discussed at the public meeting; and
(c) Any other supporting material provided to the members of the body for an item on the agenda, except materials:
    (1) Submitted to the public body pursuant to a nondisclosure or confidentiality agreement;
    (2) Pertaining to the closed portion of such a meeting of the public body; or
    (3) Declared confidential by law."

The complaint also expresses concern that the parents have not been afforded an opportunity to address these issues with the Board. The agenda is ambiguous as far as whether a member of the public is able to make comments regarding items on the Consent Calendar. On the one hand, under Consent Calendar, it states: "Items listed under the consent calendar will be voted on as a block with no Board or public comment." It also states: "If a member of the public wishes to comment on item in the consent calendar, please fill out and submit a yellow 'Citizen's Request To Speak' card to the Board President before this point in the agenda." (Emphasis in the original).

This issue also relates back to the question whether the agenda for the December 18, 2000 provided sufficient notice of the topics to be considered and acted upon by the Board. Had the parents known that the Board would be considering the use of physical or mechanical restraints on their child, then, in all likelihood, they would have asked to address the Board as provided under the Consent Calendar. As discussed above, the description of the Consent Calendar item regarding Aversives and Physical/Mechanical Restraints was inadequate in that it failed to give the parents notice that the Board would be taking action on an item regarding their child. This, in turn, prevented the parents from having an opportunity to address the Board on this issue.

There are also a number of miscellaneous Open Meeting Law violations unrelated to the Consent Calendar. There are a number of generic agenda items such as "Superintendent's Report", "Student Representative's Report" and "Board Reports/Requests". These items do not provide a clear and complete statement of topics scheduled to be considered. For example, the Minutes for the December 18, 2000 meeting indicate that, during the Superintendent's Report, the Board actually discussed passage by the United States Senate of a bill allowing for the transfer of land at Incline Village for an elementary school. The discussion that occurred at the December 18, 2000, meeting regarding the transfer of land was not clearly and completely described on the agenda and as a result is a violation of the Open Meeting Law. *See* OMLO 99-03 (January 11, 1999).

Some other minor violations included the agenda item "Adoption of the Agenda" that was voted on, but was not designated as an action item; and, there is no notation on the agenda that items may be considered out of order. The minutes and the tapes of the meeting indicate that a number of topics were considered out of order.

In conclusion, there are a number of Open Meeting Law violations apparent in regards to the December 18, 2000 meeting of the Board. The agenda items are not described as required by law in a fashion that is clear and complete. The Board did not notice the parents when they met to consider the reports concerning their child. Not all of the action items on the agenda are clearly marked as action items. The Consent Calendar is not included under the list of action items.

Counsel for the Board has cooperated in this office's investigation of this matter. After being notified of the pending complaint, counsel immediately advised the Board to discontinue the consideration of AB280 aversives and physical/mechanical restraints until such time as their consideration can be brought into compliance with the Open Meeting Law. *See* Minutes April 10, 2001, Board Meeting. Because counsel has agreed to address and correct the violations noted in this report, the Office of the Attorney General will issue this as a warning letter and will not take any further action. If this office receives further complaints concerning the Board, we will take enforcement action in the future.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
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Deputy Attorney General
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GCS:dy

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April 19, 2001

Ron Cuzze
State Peace Officer's Council
1250 South Burnham, Suite 203
Las Vegas, Nevada 89104

Re: Open Meeting Law Complaint
Public Employees Benefits Program
OMLO 2001-20/AG File No. 01-019

Dear Mr. Cuzze:

On March 22, 2001, you filed a second formal complaint against the Public Employees Benefits Program ("PEBP") alleging possible violations of Nevada's Open Meeting Law. Specifically, the allegations were that PEBP violated the open meeting notice requirements by failing to inform the State Peace Officers Council ("SPOC") of its March 20, 2001, meeting.

This office has primary jurisdiction to investigate violations of the Open Meeting Law pursuant to NRS 241.037. As a part of those duties, this office investigated the above-referenced complaint and reviewed all of the materials and documentation submitted by PEBP and SPOC. Our investigation revealed that, while PEBP was certainly aware of SPOC's interest in attending any meetings involving regulations related to NRS 287.0479, and as a courtesy should have notified SPOC of its scheduled meeting, there was no distinct violation of the Open Meeting Law.

The Open Meeting Law requires written notice of all public meeting at least 3 working days prior to the meeting. The minimum public notice requirement mandates that the public body post a copy of the notice at several prominent locations throughout the state, including its principal office or the building in which the meeting is to be held, and *mail a copy of the notice to any person who has requested notice of the meetings of the body*. NRS. 241.020 (3). Accordingly, an agency is only required to mail notification of its meeting upon the request of an interested party.[1]

[1] Please note that, pursuant to NRS 241.020(3)(b), the request for notice lapses 6 months after it is made.

In this case, our investigation revealed that PEBP timely posted the notice of its March 20, 2001, meeting at following seven (7) different locations throughout the state:

Blasdel Building
209 East Musser Street
Carson City

Public Employees' Benefits Program
400 W. King Street #300
Carson City

Motor Vehicles & Public Safety Bldg.
305 Galetti Way
Reno

Governor's Office – Las Vegas
555 E. Washington Ave. Suite 5100
Las Vegas

Motor Vehicles & Public Safety
2701 E. Sahara Avenue
Las Vegas

UNLV - Human Resources Office
4505 Maryland Parkway
Las Vegas

UNR – Artemesia Bldg.
70 Artemesia Way
Reno

In addition, PEBP properly mailed notices to all interested parties who had requested such notification. Although SPOC had an interest in attending the PEBP meeting as evidenced by the legislative history regarding the regulation at issue and the letter dated January 10, 2001, from the Legislative Counsel Bureau, Nevada's Open Meeting Law only requires that, in addition to the posting requirements set forth above, PEBP provide notice by mail to those that have requested such notice. This office's investigation found that SPOC was not listed on PEBP's request list at the time the meeting was noticed[2] and that the letter from LCB to PEBP does not constitute a request for notification by SPOC. Thus, this office does not find a violation of the Open Meeting Law.

In conclusion, the PEBP acted in conformance with the Open Meeting Law requirements and this office finds no violation of Nevada's Open Meeting Law, as set forth above, on the issues of notification of the March 20, 2001, meeting.

[2] Since that time SPOC has made a specific request for notice, including an agenda and supporting documents, of all meeting or hearings concerning NRS 287.0479 and related issues. That request was made on March 21, 2001, and should resolve all future issues relating to notification by PEBP. *But see* footnote 1.

Thank you again for contacting our office in this regard.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
Darlene Barrier
Deputy Attorney General

DB:krf

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First Assistant Attorney General

December 17, 2002

A. Stanyan Peck, Esq.
Marshall Hill Cassas & de Lipkau
Post Office Box 2790
Reno, Nevada 89505-2790

Re: *Open Meeting Law Complaint: Regional Transportation Commission*
OMLO 2001-22/AG File No. 00-047

Dear Mr. Peck:

This letter is written in response to your two questions regarding the Regional Transportation Committee's compliance with the open meeting law. The questions were:

1. What limitations may a public body place on a member of the public's participation in the public comment period of the body's meeting, particularly if that person's comments are not pertinent to or consider matters outside the scope of the body's authority and are disruptive?

2. What discretion does a public body have to refuse to place an item on its public meeting agenda if a member of the public asks that such item be placed on the agenda?

These questions are addressed hereafter, in turn.

1. Restrictions on Public Comment.

This review of the legality of restrictions adopted by a public body in Nevada on public participation in a public comment period focuses on whether such a restriction complies with the First Amendment of the United States' Constitution's protection of free speech, and Nevada's Open Meeting Law.

a. First Amendment Analysis.

Through the Open Meeting Law, the Nevada Legislature has given members of the public the right to address public bodies. NRS 241.020(2)(c)(3) (Except in emergency situations, public body must include public comment period on every agenda). Although there is no constitutional right to participate in an open session of a public body, *Minnesota State Board for Community Colleges v. Knight,* 465 U.S. 271, 283 (1984), once a person is given a right to address a public body, that right may be limited only within constitutional parameters. *Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 829 (1995); *see White v. City of Norfolk,* 900 F.2d 1421, 1425-27 (9th Cir. 1990); *Leventhal v. Vista United School District,* 973 F. Supp. 951 (S.D. Cal. 1997); Tex. Op. Atty. Gen. 96-111 (Oct. 28, 1996) (in restricting public participation at an open meeting, public body must not discriminate on the basis of the particular views expressed).

A review of whether a restriction on speech passes constitutional muster typically begins with an analysis of the type of public forum at issue. Forums can be traditional public forums, limited public forums, or private forums, and the level of constitutional scrutiny placed on a governmental restriction on speech lessens as the public nature of the forum lessens. *See generally Kindt v. Santa Monica Rent Control Board,* 67 F.3d 266, 270-71 (9th Cir. 1995). The United States Supreme Court has not specifically defined which type of forum is created when a State opens a public meeting to public comment. *See Cornelius v. NAACP Legal Defense & Educ. Fund,* 473 U.S. 788, 802 (1985) (public forum may be created by government designating "place or channel of communication . . . for the discussion of certain subjects"); *Madison School Dist. v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167, 175 (1976) (public meetings, once opened, have been regarded as public forums, *albeit limited ones*); *White v. City of Norwalk,* 900 F.2d 1421, 1425 (9th Cir. 1990). The United States Circuit Court of Appeals for the Ninth Circuit has opined that:

> It seems to us that the highly structured nature of city council and city board meetings makes them fit more neatly into the nonpublic forum niche. But, as we intimated in *City of Norwalk,* the important thing is not whether we call the meetings highly regulated limited public fora or nonpublic fora. The fact remains that limitations on speech at those meetings must be reasonable and viewpoint neutral, but that is all they need to be.

Kindt, 67 F.3d at 270-71.

The *Kindt* court's reasoning that limitations on speech at a public meeting need only be "reasonable and viewpoint neutral" is supported by Supreme Court precedent. Due to the "necessities of confining a forum to the limited and legitimate purposes for which it was created" a public body may reserve a public meeting for certain groups or for the discussion of certain topics. *Rosenberger,* 515 U.S. at 829, *citing to Cornelius,* 473 U.S. at 806. To determine whether a public body's speech restriction is a legitimate effort "to preserve the limits of the forum," the Supreme Court has observed a distinction between content and viewpoint

discrimination. *Rosenberger*, 515 U.S. at 829-30. Speech restrictions can legitimately be based on content/subject matter so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. *Id.* at 829, *citing to Cornelius*, 473 U.S. at 804-06.

For instance, when a public body is dealing with agenda items, it "does not violate the first amendment when it restricts public speakers to the subject at hand." *White v. City of Norwalk*, 900 F.2d 1421, 1425-26 (9th. Cir. 1990). **"**Plainly, public bodies may confine their meetings to specified subject matter." *City of Madison*, 429 U.S. at 175 n.8. Also, while a public body should not stop a member of the public from speaking because the body disagrees with the viewpoint expressed, it may limit public comment if the "speech becomes irrelevant or repetitious." *City of Norwalk*, 900 F.2d at 1425-26 ("A speaker may disrupt a [public] meeting by speaking too long, by being unduly repetitious, or by extended discussion of irrelevancies.").

Also, a person's right to speak may be limited by reasonable time restraints. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). A public body's time restriction on public commentary at the end of each meeting is "the kind of reasonable time, place, and manner restrictions that preserve a board's legitimate interest in conducting efficient, orderly meetings."[1] *Kindt* 67 F.3d at 271; *see City of Norwalk*, 900 F.2d at 1425-26 (a meeting is disrupted if a public body is prevented from accomplishing its business in a reasonably efficient manner and such conduct may interfere with the rights of other speakers).

Finally, a public body may place limitations on caustic personal attacks made by members of the public during the public comment period. "When a person does initially engage in protected First Amendment speech on matters of a public concern, they may not use this protection, in the guise of public concern, to also level personal attacks." *Smith v. Cleburne County Hospital*, 870 F.2d 1375, 1383 (8th Cir. 1988); *see Dunn v. Carroll*, 40 F.3d 287, 293 (8th Cir. 1994). A rule against personal and slanderous remarks, like other rules of decorum, serves the important governmental interest of preventing disruptions to its meetings. *Scroggins v. City of Topeka*, 2 F. Supp. 2d 1362, 1373 (D. Kan. 1998). "Emotionally charged personal attacks could antagonize and even incite others and . . . a rule restricting such attacks is both a

[1] Several courts, including the United States Supreme Court, recognize the government's significant interest in conducting orderly, efficient, effective and dignified meetings of its public bodies. *See, e.g., City of Madison*, 429 U.S. at 175 n.8; *Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d at 271 (board has "legitimate interest in conducting efficient, orderly meetings."); *City of Norwalk*, 900 F.2d at 1425 ("City Council meeting is still just that, a governmental process with a governmental purpose."); *Jones v. Heyman*, 888 F.2d 1328, 1332-33 (11th Cir. 1989) (City Commission has significant governmental interest "in conducting orderly, efficient meetings."); *Devine v. Village of Port Jefferson*, 849 F. Supp. 185, 190 (E.D.N.Y. 1994) (village board has "a significant interest in conducting its meeting in an orderly and effective fashion."); *Godwin v. East Baton Rouge Parish School Bd.*, 408 So. 2d 1214, 1218 (La. 1981) (school "board's interest in conducting its meetings in an orderly and dignified manner is a substantial consideration and a valid governmental objective."), *appeal dismissed*, 459 U.S. 807 (1982); *State v. Smith*, 218 A.2d 147, 150 (N.J. 1966) (sustained disorderly conduct convictions for disturbances during city council meeting. "Whether the forum be the courtroom or the chamber of the legislature itself or of a political subdivision of the State, there must be order. It is frivolous to suggest the First Amendment stands in the way of that imperative."), *cert. denied*, 385 U.S. 838 (1966).

rational and reasonable means" for achieving a public body's orderly, efficient, effective, and dignified meetings. *Id.; see also Jones v. Heyman*, 888 F.2d 1328 (11th Cir. 1989).

Accordingly, a restriction placed by a public body in Nevada that limits public comment to a particular purpose, i.e. subjects within the public body's scope of authority, should be considered a legitimate viewpoint neutral restriction. Such a restriction should be considered legitimate because it reasonably serves to "preserve the limits" of an open meeting. For the same reason, a restriction that requires public comments to refrain from making personal attacks should be considered constitutionally sound.

b. Open Meeting Law Analysis.

With respect to whether restrictions on public comment comply with Nevada's Open Meeting Law, that law requires public bodies to provide a period for public comment at any public meeting. NRS 241.020(2)(c)(3). Because reasonable rules and regulations that ensure orderly conduct at a public meeting can be adopted by a public body, it would also be appropriate for a public body to set reasonable regulations, including time limits, on a member of the public's participation in the public comment portion of an open meeting. *Open Meeting Law Manuel, Eighth Edition* § 8.04.

> [L]ocal governments surely have the right to establish and enforce rules and regulations governing individuals' conduct at public municipal meetings. Furthermore, there is no requirement that any individual attending a public meeting be given unlimited time to address the body on real or imagined evils or on any other matter. To rule otherwise would be to permit any person to destroy the effectiveness of a local government by monopolizing its time at public meetings where its business must be conducted.

Commonwealth v. Eisemann, 453 A.2d 1045, 1048 (1982).

However, any public comment limitation should be clearly articulated on the public body's agenda. OMLO 99-08 (July 8, 1999). One test for whether a rule regulating participation in the public comment period is reasonable appears to be whether the rule discourages or prevents public comment. OMLO 99-11 (August 26, 1999). Accordingly, if the Washoe County Regional Transportation Authority adopts and clearly articulates a reasonable time limit on public comment, it can enforce such a time limit on persons who speak during the public comment period. OMLO 99-12 (October 14, 1999); OMLO 99-08 (July 8, 1999).

Beyond a time limit, however, you have asked whether a public body can restrict the subject matter that may be discussed during a public comment period. Specifically, you have inquired whether a public body can restrict public comments to those that are not outside the scope of the public body's authority and are not disruptive. In analyzing this question, it is important to point out the public may comment on non-agenda items during a public comment

period, particularly if the public is allowed to comment on agenda items as the public body considers them. OMLO 99-08 (July 8, 1999). However, this determination does not expressly require a public body to allow public comment on topics that are clearly outside its authority or not considered public business.[2]

The legality of a restriction on the public's ability to comment on topics outside a public body's authority will depend upon whether such a restriction interferes with the intent of the Open Meeting Law and is reasonable. Op. Nev. Att'y Gen. No. 79-8 (March 26, 1979) (standard of reasonableness guides interpretation of Open Meeting Law in absence of clear standards or guidance). The most important purpose of the public comment period is to allow members of the public to comment on action items under consideration by a public body or on topics within the scope of the public body's authority. *See* NRS 241.020. Further, public comment is necessary to allow citizens to present grievances or concerns to their government so they may receive redress or influence their government's decision-making process. Neither of these purposes is served when a member of the public discusses a topic that is clearly outside the scope of a public body's authority. Therefore, even though such a restriction could be interpreted to discourage or prevent public comment, as described in the First Amendment analysis above, such a restriction is reasonable because the public's ability to comment on topics over which a public body has no authority does not further the purposes of the Open Meeting Law.

With respect to whether a public body can limit public comment if the comment is disruptive, the Open Meeting Law provides that a willfully disruptive person may be removed from an open meeting. NRS 241.030(3)(b). Accordingly, it would be reasonable for a public body to restrict a person's participation in a public comment period if that person's comments are offensive, potentially inflammatory, irrational, or otherwise disruptive to maintain order in a public meeting. *See Dunn v. Carroll*, 40 F.3d 287 (8th Cir. 1994); *Jones v. Heyman*, 888 F.2d 1328 (11th Cir. 1989); *Smith v. Cleburne County Hospital*, 870 F.2d 1375 (8th Cir. 1988); *Scroggins v. City of Topeka,* 2 F. Supp. 2d 1362 (D. Kan. 1998).

2. Decision to Place Item on Agenda.

The breadth of discretion a public body has to refuse to place an item on its public meeting agenda if a member of the public asks that such item be placed on the agenda appears to present administrative law issues, not Open Meeting Law issues. Appended to your request for guidance is a copy of the Washoe County Regional Transportation Commission's Guidelines for Scheduling Agenda Items. Based on this Office's review of those guidelines, it is apparent the Commission has properly provided a clear articulation of the process by which the public may request that an item be placed on the Commission's agenda. The particular guideline at issue here provides "the Executive Director shall determine whether or not the request is most

[2] Also, a public body may not use the public comment period to consider, on its own initiative, subjects that were not properly placed on an agenda for discussion pursuant to the Open Meeting Law. *See* NRS 241.020; *Frankie Sue Del Papa v. Board of Regents, et al.*, Case No. 00-01632A, First Judicial District Court of Nevada (currently pending case involving public body's use of public comment period to raise subjects on its own initiative).

appropriately addressed through administrative action or should be included in the agenda." While this provision clearly authorizes the Executive Director to refuse to place a requested item on an agenda, your inquiry focuses on what discretion the Executive Director has in making that decision.

To the extent the Commission's discretion is limited by the Open Meeting Law, since the Open Meeting Law does not provide express standards and guidelines regarding the Commission's discretion, this question should be answered based on the intent of the Open Meeting Law and the reasonableness standard. Op. Nev. Att'y Gen. No. 79-8 (March 26, 1979). Accordingly, the Executive Director could decline to place an item on an agenda if its placement thereon would not further the purposes of the Open Meeting Law. For instance, it would be appropriate for the Executive Director to exercise his discretion and decline to place an item on the agenda if the request to place the item on the agenda is not understandable, if the item addresses subjects outside the Commission's authority or would be disruptive.

We hope this information is useful to you. Please do not hesitate to contact us should you have any questions or require additional information.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
PAUL G. TAGGART
Deputy Attorney General
Civil Division
(775) 684-1232

PGT:py

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

May 10, 2001

Chairman Steve Hollister
Genoa Town Advisory Board
Post Office Box 14
Genoa, Nevada 89411

Re: *Open Meeting Law Complaint*
Genoa Town Advisory Board
OMLO 2001-23/AG File No. 01-007

Dear Mr. Hollister:

Pursuant to Nevada law, the Attorney General's office has primary jurisdiction for investigating and prosecuting complaints alleging violation of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes.

As you know, this office received a complaint from Martha Williams dated January 31, 2001, alleging that the Genoa Town Advisory Board ("Board") violated the Open Meeting Law on two occasions, September 12, 2000, and January 9, 2001. This office has received another complaint concerning the same violation.

Facts

We have reviewed the agendas and minutes of the above meetings. The relevant portion of the agenda and the minutes from each meeting are delineated below.

A. September 12, 2000 Meeting

1. The agenda of the September 12, 2000 meeting reflects the following:

9. COMMITTEE REPORTS:
BEAUTIFICATION
CANDY DANCE
CHURCH
TOWN HALL

2. The minutes of the September 12, 2000 meeting reflect the following:

PUBLIC COMMENTS

Margaret Northway stated that a Walley's Hot Springs shuttle would be available to transport customers for the Candy Dance weekend, and that Rogers had requested that she discuss details with Bob Fairman, Transportation. N. Miluck suggested a thank you letter be sent to A. Evans and D. Walters for fixing the Candy Dance banner over the Labor Day weekend.
Candy Dance: S. Giovacchini asked for clarification on L&M Productions Peddler's Faire use of Candy Dance copyright in their signage and advertising. R. Saunders requested clarification on use of Candy Dance Peddler's Faire and rental of 50-100 booths.

MOTION: DONOHOE moved to contact District Attorney Scott Doyle and the Secretary of State regarding use of the copyrighted Candy Dance name by the Peddler's Faire L&M Productions, and to cease and desist usage.
SECOND: WHITE
DISCUSSION: Member White asked for clarification of the business license. Member Hollister stated the District Attorney's office needs to clarify use of Candy Dance name by anyone so that it is clear.
ACTION: Motion carried unanimously; Chair Carter absent.

B. January 9, 2001 Meeting

1. The agenda of the January 9, 2001 meeting reflects the following item:

9. ADVISORY BOARD COMMITTEE REPORTS: Action Item
BEAUTIFICATION
CANDY DANCE: Discussion/Possible Action: 2001 Food Application
Discussion/Possible Action: Outdoor Festival Permits
Discussion/Possible Action: Policy Questions
Discussion/Possible Action: Meeting Date for Genoa Businesses
Meeting Date for Operations Organizations [Emphasis Added]

2. The relevant portions of the minutes of the January 9, 2001 meeting provide as follows:

January 17, 2001

TO: DOUGLAS COUNTY BOARD OF COMMISSIONERS

FROM: GENOA TOWN ADVISORY BOARD

RE: OUTDOOR FESTIVAL PERMIT

At the January 9, 2001 Genoa Town Advisory Board meeting, a motion was made, seconded, and passed unanimously:

MOTION: Donohoe moved to contact the Board of Commissioners to rescind the Outdoor Festival Permit granted to Martha Williams at their December 7, 2000 meeting, and to grant an exclusive permit to the Town of Genoa for Candy Dance weekend.

SECOND: Carter

ACTION: Motion carried unanimously.

Comments made concerning this issue at the meeting were: Clerk Donohoe: The Board of Commissioners might issue more permits if the Martha Williams permit is not rescinded - the Board of Commissioners needs to be made aware that Candy Dance proceeds keep the Town afloat. Carter: The permittee is getting a free ride because the Town is paying all the expenses: Carter and Donohoe met with District Attorney Scott Doyle after the last Candy Dance and the Town of Genoa is attempting to comply with his suggestions. Bommarito: does that mean anyone can sell anything? Giovacchini: wants vendors. Brooks: GTAB has failed to communicate with the Board of Commissioners and needs to impart the dollar importance to them with a clear criteria.

The Genoa Town Advisory Board also requests that the Board of Commissioners place this item on their agenda for their February 1, 2001 meeting for discussion.

Enclosed is a letter dated September 18, 2000 from Scott Doyle, and a letter dated January 12, 1994 from the District Attorney's office.

In conclusion, the Genoa Town Advisory Board requests:

1. ***The Board of Commissioners place the Outdoor Festival Permit issued to Martha Williams on their February 1, 2001 agenda for discussion.***

2. Request rescinding that permit in favor of an exclusive permit for the Town of Genoa. [Emphasis Added]

CHAIRMAN: STEVE HOLLISTER _____

This office conducted an investigation of the allegations about violations of the Nevada Open Meeting Law, NRS 241.020 (c) (1) and (2). These alleged violations occurred on September 12, 2000, and January 9, 2001, at meetings of the Genoa Town Advisory Board (Board). Tapes of the meetings were reviewed by Alice J. Rogers (Rogers), an employee of the Board, whose summary of the tapes was accepted by the investigator. The substance of the tape for September 12, 2000, reflects that a discussion by Joe Vinci and Mr. Saunders about Martha Williams (Williams) occurred during public comment. The discussion resulted in a motion and vote affecting Williams business during the Candy Dance. The discussion, motion, and vote were not on the agenda indicating anything that would impact Williams. On January 9, 2001, the tape indicates when the Outdoor Festival permits came up, Williams was again discussed. A discussion, motion, and vote occurred which named Williams. Williams was not on the agenda. Williams has the Board Agendas mailed to her so she can "keep abreast of what's going on." She maintains she would be present if an issue concerned her.

The Douglas County Board of Commissioners, at a regularly scheduled meeting on February 1, 2001, discussed a motion to reconsider the issuance of an outdoor festival permit to Williams for Candy Dance Weekend. The County Commissioners heard Rogers who presented several letters. The County Commissioners heard from Bill Donohoe of the Board. Williams spoke, and called attention to the improper agenda of the January 9th meeting. After discussion, the County Commissioners took no action on the outdoor festival permit previously issued to Martha Williams.

Analysis and Conclusion

Pursuant to the agenda of the September 12, 2000 meeting, the Board was to hear committee reports on "Candy Dance". On January 9, 2001, the agenda reflects "CANDY DANCE: Discussion/Possible Action: 2001 Food Application" and "Discussion/Possible Action: Outdoor Festival Permits." The issue is whether the Board's agenda for the September 12, 2000, and for the January 9, 2001, meetings complied with the Nevada Open Meeting Law. This requires a look at "[what] decree of detail is required for a meeting agenda concerning the topic… at issue…" Op. Nev. Att'y Gen. No. 91-6 (May 23, 1991).

Pursuant to Nevada's Opening Meeting Law (OML) at NRS 241.020 (2)(c) a notice must include:

(c) An agenda consisting of:

(1) A clear and complete statement of the topics scheduled to be considered during the meeting.

> (2) A list describing the items on which action may be taken and clearly denoting that action may be taken on those items.

> "The agenda for a meeting of a public body must describe all scheduled items to be considered and voted upon with detail so that, in fact, the public will know what is to be discussed or acted upon at the meeting. " Op. Nev. Att'y Gen. No. 91-6 (May 23, 1991).

> A period devoted to comments by the general public, if any, and discussion of those comments. No action may be taken upon a matter raised under this item of the agenda until the matter itself has been specifically included on an agenda as an item upon which action may be taken pursuant to subparagraph (2). NRS 241.020 (3)

In Opinion No. 91-6 a public body listed the body's issuance of a business license by just "licensing board." This was considered unacceptable and described as a generic listing of the matter. It further stated general or vague language could be a mere subterfuge to avoid OML requirements. The agenda must be written in a manner to actually give notice to the public of what was occurring. The body was acting to issue a business license to a particularly identified business. Op. Nev. Att'y Gen. No. 91-6 (May 23, 1991).

The purpose of the agenda requirement is so interested parties will know what matters will be considered at a meeting. Public meetings are sparsely attended by the public unless their individual interests will be affected by the considerations and acts of the public body. Thus it is imperative an agenda description be done clearly and complete. OMOL 99-01 (January 5, 1999).

In applying the standards above, the agenda for the September 12, 2000 meeting reflects only a brief agenda item pertaining to the receipt of a Committee Report concerning the Candy Dance. This was not sufficient to alert Williams to a possible action that would impact her. It was a "generic listing" and did not describe the scheduled item with sufficient detail so she would know what would be considered and voted upon. Further the action occurred during "public comment" in violation of NRS 241.020 (3) wherein no action may be taken at this time until the action is specifically included in an agenda as an item upon which action may be taken. Williams's individual interests were affected and she would have been present if she had been sufficiently alerted to the possible action involving her interests. Williams as an ordinary person was unable to deduce from the agenda that her interests were involved. The agenda left room for uncertainty, misunderstanding, ambiguity, and confusion. The agenda of the September 12, 2000, meeting did not meet the standard required by the Open Meeting Law, and thus, violates the "clear and complete" standard delineated above.

The agenda of the January 9, 2001 meeting violates the Open Meeting Law, in that it merely states "discussion/possible action: outdoor festival permits." This is not sufficient notice of the topics scheduled to be considered by the Board, and as such, violated NRS 241.020(2). The minutes of the January 9, 2001 meeting are dated January 17, 2001 and are in the form of a memo to the Douglas County Board of Commissioners. The minutes of January 9, 2001, indicate a motion was made, seconded and carried to contact the Douglas County Board of Commissioners. The motion was to rescind a permit granted to Martha Williams at a December meeting of the County Commissioners, and to seek an exclusive permit of the town of Genoa for Candy Dance weekend. The same analysis as that of the September 12, 2000, meeting applies to the January 9, 2001 meeting, except the action did not occur during the public comment portion of the agenda. The agenda did not provide sufficient detail for Williams to be notified that her interests would be discussed and voted on at the meeting. Had she known, she would have been present. The foregoing are violations of the Open Meeting Law.

Despite the January 9, 2001 recommendation of the Board, the Douglas County Board of County Commissioners did not reverse their stance with regard to the outdoor festival permits issued to Martha Williams. The County Commissioners, at a meeting on February 1, 2001 let stand their prior decision. For this reason, the underlying matter is moot because the scope of the authority of the Board is advisory in nature.

Sanctions

The Board is hereby reprimanded for the above-referenced violations of the Open Meeting Law. Further violations of the Open Meeting Law may result in the sanctions provided in NRS 241.040.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
NORMAN AZEVEDO
Chief Deputy Attorney General
(775) 684-1122

cc Martha Williams
Nancy Miluck
Scott Doyle
Alice Rogers

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

May 10, 2001

Mr. Art Olson
Ely Municipal Utilities Board
City of Ely
Post Office Box 299
Ely, Nevada 89301

Re: *Open Meeting Law Complaint*
Ely Municipal Utilities Board
OMLO 2001-24/AG File No. 01-020

Dear Mr. Olson:

This is in response to Open Meeting Law complaint filed by Mr. Charles Basso with the Attorney General concerning the March 20, 2001 meeting of the Ely Municipal Utilities Board ("Board") of the City of Ely. Mr. Basso's complaint alleges that the Board held discussions regarding landfill rate questions during Agenda Item III of the March 20, 2001 meeting. Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigating and prosecuting complaints alleging violation of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes.

Facts

We have reviewed the agenda, the minutes, and audiotape of the public meeting of the Board held on March 20, 2001. The initial focus of our inquiry was Item III of the agenda as identified by Mr. Basso. The agenda Item III reflected "no discussion." In response to a request

from this office, Mr. Brent Hutchings, Ely City Clerk, has provided this office with a copy of the minutes of the meeting and audio tapes of the meeting.

The Agenda for the meeting provides in pertinent part as follows:

"III. ITEMS FOR DISCUSSION ONLY OF THE UTILITIES BORD (sic)

None.

IV. CITY DEPARTMENT REPORTS

. . . CITY TREASURER"

A review of the audiotape of the meeting reflects Mr. Basso's objection to the discussion did not relate to Item III, but to the discussion under Item IV entitled "City Department Reports." Specifically, Mr. Basso voiced his objection to the heated discussion of landfill rates that took place during the report of the City Treasurer. The discussion proceeded from the nature of the landfill, to beauty parlors, to law firms, to car lots, to identification of employees, to compulsory trash pickup, and equitable apportionment of costs. Mr. Basso requested that the Board return to the agenda, noting that the landfill rate question was not on the agenda. In response to Mr. Basso's objection, you responded that the Board was discussing reports of departments and that you were providing interpretation and consensus. You posed Mr. Basso's question to Mr. Richard Sears, Ely City Attorney concerning this item. He recommended that the Board place the topic of "landfill rates" on the next agenda.

Analysis and Conclusions

The Open Meeting Law was enacted by the Legislature for the following purpose: "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010.

In this meeting, the Board opened the meeting at 8:00 a.m. The Board reached Item IV entitled "City Department Reports." The Board began to discuss the City Treasurer's Report. The Board members discussed the methodology for rates to be charged for the landfill. When questioned by Mr. Basso, you asked the City Attorney about the practice, and he told you that Mr. Basso was probably right. The agenda for the meeting gave no notice that the Board would discuss the landfill or landfill rates or apportionment of the rates among the city residents. The Open Meeting Law requires the public body to clearly state the matter that will be discussed by the public body. NRS 241.020(2)(c) provides that a notice of a hearing must include an agenda consisting of: " (1) a clear and complete statement of the topics scheduled to be considered during the meeting…"

Mr. Hutchings, in his letter of April 24, 2001 states: "(T)he minutes and tape will show that Mr. Basso is in error, there was no discussion for item #3. Perhaps Mr. Basso was confused about the discussion. These was (sic) some discussion under Item IV City Reports where there (sic) was a discussion that was part of the City Treasurers report. All board members understand any action taken requires the item to be placed on the agenda and action taken in a public meeting. The attached information that Mr. Basso provided was not discussed at this meeting."

The Board's agenda did not have a clear and complete description of a topic to discuss landfill fees and therefore any discussion in this regard was a violation of the Open Meeting Law. The actual discussion was therefore a violation of the Open Meeting Law. The Board is held to the standard set forth in NRS 241.020(2)(c)(1). We direct the attention of the Board to the provisions of § 7.02 of the Nevada Open Meeting Law Manual (8th ed., 2000) for further discussion of the point. The following guidance appears on page 38 of the Manual: "Generic items such as 'reports' or 'general comments by board members' invite trouble because discussions spawned under them may be of great public interest and may lead to deliberations or actions without the benefit of public scrutiny or input. They should be used sparingly and carefully, and actual discussions should be tightly controlled. Matters of public interest should be rescheduled for further discussion at later meetings." The Board is required to stick to the agenda posted for a public meeting. Please see § 7.03 of the Manual.

Based upon the forgoing, it is the conclusion of this office that the Board violated the Open Meeting Law on March 20, 2001, by discussing the landfill rates during the discussion of the City Treasurer's report. The landfill rates were not clearly and completely identified on the agenda. The Board must re-notice the item and discuss it in a properly noticed meeting. Since no action was taken at this meeting, it is unnecessary for this office to seek a court order to declare the item void.

We thank Mr. Basso for bringing these matters to our attention. Please distribute this determination to the Board members.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
JAMES C. SMITH
Deputy Attorney General

cc: Charlie Basso
Richard Sears

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

May 10, 2001

Mr. Charles J. Basso
23 Connors Court
Ely, Nevada 89301

Re: *Open Meeting Law Complaint*
Ely City Council
OMLO 2001-25/AG File No. 01-011

Dear Mr. Basso:

This office has received an Open Meeting Law complaint dated January 31, 2001, regarding the November 23, 1999 and March 9, 2000 meetings of the Ely City Council. The letter contained two items that directly concern the Open Meeting Law pertaining to minutes and public comment. The letter also contained questions that are outside the jurisdiction of the Attorney General. We will address the Open Meeting Law items first and the other items at the end of this letter. You have complained that the agendas for the meetings were defective under the Open Meeting Law and that the minutes of the meetings are incomplete.

Facts

The City Council met and considered, in two meetings, the wastewater treatment plant Upgrades, Ordinance 543, by the City of Ely. We have reviewed the minutes of the November 23, 1999 and March 9, 2000 meetings that you included with your complaint.

Analysis and Conclusion

The jurisdiction of the Attorney General's Office to require compliance with the Open Meeting law is set forth in NRS 241.037. This statute provides as follows:

Action by attorney general or person denied right conferred by chapter; limitation on actions.

1. The attorney general may sue in any court of competent jurisdiction to have an action taken by a public body declared void or for an injunction against any public body or person to require compliance with or prevent violations of the provisions of this chapter. The injunction:

(a) May be issued without proof of actual damage or other irreparable harm sustained by any person.

(b) Does not relieve any person from criminal prosecution for the same violation.

2. Any person denied a right conferred by this chapter may sue in the district court of the district in which the public body ordinarily holds its meetings or in which the plaintiff resides. A suit may seek to have an action taken by the public body declared void, to require compliance with or prevent violations of this chapter or to determine the applicability of this chapter to discussions or decisions of the public body. The court may order payment of reasonable attorney's fees and court costs to a successful plaintiff in a suit brought under this subsection.

3. Any suit brought against a public body pursuant to subsection 1 or 2 to require compliance with the provisions of this chapter must be commenced within 120 days after the action objected to was taken by that public body in violation of this chapter. Any such suit brought to have an action declared void must be commenced within 60 days after the action objected to was taken. [Emphasis added.]

The above statute provides that a lawsuit to require compliance with the Open Meeting Law must be filed within 120 days of the action. Since the meetings you cite occurred beyond the 120-day limitation, we are unable to proceed with your complaint.

With regard to the federal wastewater requirements, and whether the construction will comply with the wastewater law, we ask that you contact the Division of Environmental Protection at 687-4270. These items are within the jurisdiction of that agency. The remaining contentions regarding the issuance of the note borrowing money for the sewer system, the resignation of public officers, and the adoption of municipal ordinances are also outside the jurisdiction of this office. I therefore request that these items be referred to the City Attorney or the District Attorney to determine whether a violation of the Ely City Code or any statute has been violated. Please note that you may retain an attorney and may take these matters to court for resolution.

Thank you for bringing these matters to the attention of the Attorney General's Office.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
JAMES C. SMITH
Deputy Attorney General

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

May 14, 2001

Frank J. Rucker, #15322
Ely State Prison
Post Office Box 1989
Ely, Nevada 89301-1989

Re: *Open Meeting Law Complaint*
Psychological Review Panel
OMLO 2001 26/AG File No. 01-021

Dear Mr. Rucker:

This is in response to the Open Meeting Law complaint you filed with this office concerning the Psychological Review Panel ("Panel"). Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigating and prosecuting complaints alleging violation of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes. You have complained that the Panel meeting of February 21, 2001, violated elements of the Open Meeting Law. You have specifically complained that the agenda was defective, that the posting was inadequate, that matters were considered that were not on the agenda, that the meeting began with a closed session and later went into an open session, that the panel members were not present throughout the meeting, that a panel member left the room during the meeting, and that you were not allowed to speak during the open session of the meeting. In support of your complaint, you have included several items, including a copy of a 2000 legislative audit of the Department of Prisons *Sex Offender Certification*.

Facts

This office has contacted the Department of Prisons seeking a copy of the agenda and minutes of the February 21, 2001, public meeting of the Panel. The Department of Prisons responded on April 30, 2001, with copies of four documents concerning the hearing:

1. The agenda of the hearing;
2. The proof of service;
3. The minutes of the open session of the meeting; and
4. The minutes of the closed session of the meeting.

Analysis

The Open Meeting Law was enacted by the Legislature for the following purpose: "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010.

You have alleged that the agenda was not properly posted. You have complained that the agenda was not posted at the place of the hearing, the "prison courthouse" at Ely State Prison in Ely, Nevada. The agenda reflects that it was posted in four places, all in Carson City, Nevada, as well as at the building in Ely where the meeting was to be held. The Open Meeting Law requires that the agenda be posted at the principal office of the public body and three other separate places within the jurisdiction of the public body. NRS 241.020(3). If the public body does not have a principal office, the agenda must be posted at the building in which the meeting is to be held. In this case, the agenda of the meeting was posted at four places, as well as at the building where the meeting was to be held, and there is no violation of the Open Meeting Law. We note that the agenda does not include a "certificate of posting" that shows that this requirement has been met. See Nevada Open Meeting Law Manual (8th ed. 2000), § 6.03.

You have complained that the agenda was not specific, and that it did not set forth the specific items to be considered with regard to your case. A review of the agenda, however, reveals that your certification under NRS 213.1214 was the subject of the meeting, and that the meeting concerned your fitness for parole. The description of the item on the agenda satisfies the clear and complete requirement of NRS 241.020. As such, no violation of the Open Meeting Law occurred.[1]

The Open Meeting Law requires personal service five days before the meeting, if the alleged misconduct or mental health of a person is concerned. NRS 241.033(1). In this case, with regard to notice, the records supplied by the Panel reflect that you were personally served with a notice of the meeting on January 31, 2001. Accordingly, no Open Meeting Law violation occurred in this regard.

You have complained that the meeting began with a closed session and then was opened and a vote was taken. The Nevada Open Meeting Law Manual, 8th ed., 2000, addresses the conduct of meetings involving closed sessions in § 9.06. This office recommends that the chair start the meeting with the open session, close the meeting, and reopen the meeting to take the vote. Please see § 9.06. The Open Meeting Law provides that the vote must be taken in an open meeting. In this case, the closed session considered various matters pertaining to accountability, antecedents, victim (crime) impact, consolidation and risk (actuarial) factors. The minutes of the

[1] This office's determination that the agenda item description is sufficient should not be construed to mean that reference to statutes in the Nevada Revised Statutes constitutes a clear and complete description in all instances. In fact, a reference to a statute or regulatory citation will clearly not satisfy the clear and complete standard in NRS 241.020.

open session consists of one page that summarizes the hearing and the vote of the members. The minutes of the open session complies with NRS 241.035(1). For the foregoing reasons, the open and closed meetings comply with the provisions of Chapter 241 of NRS.

You have complained that the items contained in Exhibit "D" to your complaint were not specifically listed on the agenda. You have complained that your prior certifications and AR 537 materials were not listed on the agenda. In response, it appears that meeting of the Panel was concerned with your suitability for parole, and that the issue of your suitability was set forth in the agenda. The items of evidence considered by the panel fell within the contents of the notice set forth in NRS 241.020(2).

You have complained that you were not allowed to speak at the open meeting of the Panel. The Open Meeting Law requires that persons be allowed to speak during a public comment section of the meeting. In this case, there was a public comment section listed on the agenda. The minutes of the meeting reflect your statements to the Panel. Thus, no violation of the Open Meeting Law occurred.

Your concern with the absence of Dr. Sohr, a panel member during part of the open session of the meeting, is outside the purview of this office in its review of the Open Meeting Law. You further raise issues pertaining to a bill of attainder, and ex post facto violations. Such matters are best addressed to the District Court.

Conclusions

Based upon a review of these documents, it is the conclusion of this office that the meeting of February 21, 2001, had several defects, including the failure to start the meeting with an open session. This office recommends that the Panel maintain a "certificate of posting" in the file, and that minutes reflect the substance of the open and closed sessions.

We thank you for bringing these matters to our attention.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
JAMES C. SMITH
Deputy Attorney General

cc: Adam Endel, Ely State Prison

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

May 15, 2001

Ms. Vicki Jones
Gateway to Success Charter School Board
1145 Rosewood Drive
Fallon, Nevada 89406

Re: *Open Meeting Law Complaint*
Churchill County School Board of Trustees
OMLO 2001-27/AG File No. 01-018

Dear Ms. Jones:

This is in response to the Open Meeting Law complaint you filed with this office concerning the Board of School Trustees of the Churchill County School District ("Board"). Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigating and prosecuting complaints alleging violation of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes. In the complaint, you have inquired whether the Board violated the Open Meeting Law when it met and discussed litigation filed against Gateway to Success Charter School ("Charter School") and its employee at two public meetings.

Facts

This office has contacted the Board seeking copies of agendas or minutes of the February 8 and March 8, 2001, public meetings of the Board. The Board responded by a letter from its counsel, Donald A. Lattin, on March 22, 2001. The letter contained the agendas and the minutes for the February 8 and March 8, 2001 Board meetings. As you are aware, the items pertaining to the litigation at these meetings are also involved in an Open Meeting Law complaint filed by Leroy Marx. The agendas and the minutes of the meetings reflect that the Board has discussed litigation filed against the Charter School. The Board has discussed the implications of the litigation, and requested information about the Charter School concerning legal questions arising from the litigation. You have written that the litigation should have been considered in a closed meeting, for the reason that the lawsuit addresses alleged misconduct. NRS 241.033. We have enclosed a copy of Mr. Lattin's letter of March 22, 2001 for your review.

The agenda for the meeting of February 5, 2001 provides in pertinent part:

"VIII. NEW BUSINESS, ACTION ITEMS

….

2. Discussion and Action Regarding Litigation Filed Against Gateways to Success Charter School and Possible Impact on Churchill County School District As Sponsoring District (District Goals 2 & 8)"

The minutes of the February 8, 2001 meeting reflect that the Board discussed the risk exposure of the Charter School and the potential impact of the litigation on the Board. Mr. Lattin further stated that he had been informed, in a conversation with plaintiff's counsel, that another claim of sexual harassment was pending.

The agenda for the meeting of March 5, 2001 provides in pertinent part:

"VII. OLD BUSINESS, ACTION ITEMS

1. Continuing Report by District's Legal Counsel on Matters Relating to Gateways to Success Charter School"

The minutes of the meeting reflect that several issues pertaining to the Charter School were discussed at the meeting of March 8, 2001. These matters included the litigation, the availability of insurance coverage, the need for an internal investigation, and matters pertaining to an audit. Neither the agendas nor the minutes of the meetings reflect that any person's name was mentioned.

Analysis and Conclusions

The Open Meeting Law was enacted by the Legislature for the following purpose: "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010. In this case, the agendas reflect that legal matters pertaining to the Board and to the Charter School would be discussed. The minutes reflect that the litigation was discussed.

You have requested that the Board be held in violation of the Open Meeting Law because it did not close the meeting to discuss the litigation, which involves claims of sexual harassment and wrongful termination. You have sought to have the Board found in violation of the Open Meeting Law because you view these claims as alleged misconduct, and therefore entitled to a closed meeting. These claims were part of the discussion of the above agenda items pertaining to the litigation. In response, we note that the ability to close a meeting for discussion of alleged misconduct is discretionary. NRS 241.030 (1) provides: "Except as otherwise provided in NRS 241.031 and 241.033, nothing contained in this chapter prevents a public body from holding a closed meeting to consider the character, alleged misconduct, professional competence, or

physical or mental health of a person." We direct your attention to § 9.04 of the Nevada Open Meeting Law Manual, (8th ed. 2000) where it states: **"Finally, it should be noted that while such closed sessions are permitted, they are not required under the Open Meeting Law."** Thus, the Board's failure to close the meeting does not constitute a violation of the Open Meeting Law.

Your complaint further concerns the provisions of NRS 241.033(1), which pertains to written notice of certain meetings under the Open Meeting Law. In that statute, the legislature requires that a public body not hold a meeting to consider the character, alleged misconduct, professional competence or physical or mental health of a person unless it has given notice as provided in NRS 241.033(1)(a) or (b). You have written that the Board considered claims of sexual harassment and wrongful termination that were not part of the litigation. You allege that this was a violation of the Open Meeting Law for the reason that the purpose of the meeting was to discuss alleged misconduct and you cite § 6.09 of the Nevada Open Meeting Law Manual (8th ed. 2000) in support of your contention.

NRS 241.033(1) requires written notice be given to a person of the time and place of a meeting. The question presented is whether the discussions of the litigation violated the Open Meeting Law because the Charter School was not given written notice of the time and place of meetings that would consider the alleged misconduct of the Charter School and of its employees. In response to this question, this office reviewed the agenda items to ascertain the purposes of the meetings. Since the Board was discussing litigation, then the meeting was required to be open. It does not appear that the Board was considering the misconduct of the Charter School, and therefore the notice required pursuant to NRS 241.033(1) was not required to have been given before the Board discussed the matter. In resolving the above issue, it was important to note that the purpose of the discussion was to assess the potential for litigation involving the Board arising from the litigation. For this reason, this office finds that the Board was not required to provide special notice to the Charter School, and that the discussion of the litigation did not violate the Open Meeting Law. Since the Board has held a public meeting to consider the matters on the agenda pertaining to litigation, this office finds no violation of the Open Meeting Law, Chapter 241 of the Nevada Revised Statutes.

We thank you for bringing these matters to our attention.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
JAMES C. SMITH
Deputy Attorney General

Enclosure

cc: Donald A. Lattin, Esq. (w/o encl.)

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

May 21, 2001

Patricia A. Lynch
Reno City Attorney
Post Office Box 1900
Reno, Nevada 89505

Re: *Open Meeting Law Complaint*
Reno City Council
OMLO 2001-28/AG File No. 01-012

Dear Ms. Lynch:

This is in response to Open Meeting Law complaint filed by Mr. Sam Dehne with the Attorney General concerning the February 13, 2001 meeting of the Reno City Council ("Council"). Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigating and prosecuting complaints alleging violation of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes.

Mr. Dehne's complaint alleges that he, as a member of the public, was excluded from speaking during the public hearing section on Item 17A of the February 13, 2001 Council agenda. He writes in his complaint that "Dehne was abruptly told by the Reno city clerk that Mister Griffin said that he was not going to allow Dehne to speak on the issue."

Facts

We have reviewed the agenda and the minutes of the public meeting of the Council held on February 13, 2001. The meeting on February 13, 2001 was a continuation of the agenda Item 13 that had been heard on January 23, 2001. To more fully develop the facts of this matter, we have also reviewed the agenda and minutes of the January 23, 2001 meeting.

The agenda for the meeting of January 23, 2001 provides, in pertinent part, as follows:

"**13. PUBLIC HEARINGS - 6:00 P.M.**

A. Staff Report: **LDC01-00018 (Airport Authority Street Abandonments)** - Request for:
(1) a zoning map amendment from SFR-15/MH (Single Family Residential-15,000 square feet/Mobile Home Overlay) and IC (Industrial Commercial) to AO (Airport Operations) on ±50.4 acres; and (2) abandonment of portions of Pamela Avenue, Glen Street, Rewana Way, Model Way, Karen Street, and Gayle Street on a site generally located east of Cathy Avenue, north of the southern portion of Karen Street, and west of the airport. **[Ward 3]**"

The minutes for the meeting of January 23, 2001 reflect that:

> Assistant Mayor Doyle asked if anyone was present this evening who would not be able to return to the February 13th Meeting at 6:00 p.m.
>
> Mr. Sam Dehne, Reno Citizen, spoke in opposition to the request by the Airport.
>
> * * *
>
> Mr. Michael Halley, Deputy City Attorney, indicated that since the vote resulted in a tie the matter would be continued to February 13, 2001.

At the January 23, 2001 meeting, Mr. Dehne noted that he would be unable to attend the meeting of February 13, 2001. He indicated that he understood that by testifying on January 23, 2001, he would not have the right to testify on February 13, 2001. He was thereafter recognized and testified for three minutes concerning the merits of the matter.

The issue was continued to the February 13, 2001 meeting of the Council. Item 17A on the agenda for the meeting of February 13, 2001, was substantially identical to the agenda Item 13 for the January 23, 2001 meeting. There is no reference in the minutes of Mayor Griffin's decision not to call upon Mr. Dehne for comment.

The City Attorney wrote, in a letter to this office dated March 29, 2001, the following:

> When a public hearing is going to be continued, the Council opens the public hearing and allows those persons who are not able to attend or present testimony on the new hearing date to present their testimony. The

> Council informs those persons that they will not be allowed to speak at the continued public hearing because they are electing to testify at the current hearing.
>
> The purpose of this policy is to allow the Council to retain control over the length of public hearings, while at the same time preserving the testimony of the speaker who had attended the previous meeting, but was not able to attend the continued hearing. The Council would also prefer to hear all of the public testimony at the time of the continued hearing as that is the time they are likely to make their decision on the matter.

Analysis and Conclusions

The Open Meeting Law was enacted by the Legislature for the following purpose: "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010.

A notice of a meeting must include an agenda consisting of: "A period devoted to comments by the general public, if any, and discussion of those comments. No action may be taken upon a matter raised under this item of the agenda until the matter itself has been specifically included on an agenda as an item upon which action may be taken …." NRS 241.020(2)(c)(3). The Council, once public comment is part of the agenda, is held to the standard set forth in NRS 241.020(2)(c)(3). We direct the attention of the Council to the provisions of §§ 7.04 and 8.04 of the Open Meeting Law Manual (8th ed. 2000), for further discussion of the point.

In this case, Mr. Dehne spoke during the public comment section of the January 23, 2001 meeting. The record reflects that Assistant Mayor Doyle informed him that the meeting would be continued, and persons speaking at the January 23, 2001 meeting would not be allowed to speak during the February 13, 2001 meeting. Mr. Dehne acknowledged the policy. Nevertheless, he requested the opportunity to speak at the January 23, 2001 meeting, and he spoke to the Council for 3 minutes in opposition to the agenda item.

At the February 13, 2001 meeting, Mr. Dehne was informed that, since he had spoken at the prior meeting, he would not be recognized during the February 13, 2001 meeting. As a consequence, Mr. Dehne filed a complaint with this office, contending that he should have been able to speak at the February 13, 2001 meeting. He seeks a finding that the Council violated his rights by not allowing him to speak at the second meeting, on February 13, 2001.

Mr. Dehne was allowed to speak during the public hearing on January 23, 2001. Apparently, when the time for public comment began on February 13, 2001, Mr. Dehne was not allowed to address the Council. The public comment period is provided by the Open Meeting Law to afford the public the right to engage in discussion with a public body at *each meeting* of the public body. While it is acknowledged that a public body can administer the public comment period provided such administration is both content and person neutral.

The restrictions imposed by the Reno City Council were both content and person neutral, however, the City Council cannot adopt rules and regulations that deny any member of the public the right to speak at a public meeting during the public comment period. There were two meetings at issue in this complaint. The Reno City Council informally adopted rules regarding the administration of the public meeting which in turn precluded members of the public from participating in the public comment process at the February 13, 2001 meeting if they spoke at the January 23, 2001 meeting. The Nevada Legislature has afforded the citizens the right to participate in the public meetings. Public bodies cannot adopt rules and regulations to preclude members of the public from participating in the public comment period of a meeting.

Since the Reno City Council understood that the rules and regulations that were imposed were both content and person neutral, no further action will be taken.

We thank Mr. Dehne for bringing these matters to our attention. Please distribute this determination to the council members.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
JAMES C. SMITH
Deputy Attorney General

cc: Mr. Sam Dehne

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

May 30, 2001

Mr. Dick Rhyno
290 Miller Lane
Fernley, Nevada 89408

Re: *Open Meeting Law Complaint*
Fernley Swimming Pool District
OMLO 2001-29/AG File No. 01-023

Dear Mr. Rhyno:

This is in response to the Open Meeting Law complaint you filed with this office concerning the April 11, 2001 meeting of the Board of the Fernley Swimming Pool District (the "Board").[1] Our review will be limited to the agenda, audiotapes and minutes of the budget session of the April 11, 2001 meeting, and to the agenda of the May 3, 2001 meeting. Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigating and prosecuting complaints alleging violation of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes. In the complaint, you have inquired whether the Board complied with the agenda and meeting requirements of the Open Meeting Law. You have included photocopies of the Open Meeting Law Manual (8th ed. 2000) ("Manual") to highlight the points that you raise.

Facts

This office has contacted the Board seeking copies of the agenda, audiotapes and minutes of the April 11, 2001 meeting of the Board. Christina Chapin, Fernley Swimming Pool Manager, responded to the complaint on May 9, 2001, by sending a copy of audiotapes, a copy of certain budget documents, and draft minutes of the budget workshop of the April 11, 2001 meeting. We have enclosed a copy of Ms. Chapin's response for your review. We note that four of five members of the Board were present at the April 11, 2001 meeting in Fernley.

[1] You later sent a letter dated May 7, 2001, requesting that this office review the agenda for the May 3, 2001 meeting of the Board. Since the agenda items of both meetings are related, the agenda of the May 3, 2001 meeting will be considered in this opinion.

The agenda for the meeting of April 11, 2001, with regard to the budget, provides as follows:

"6:30 p.m. - OPENING OF BUDGET HEARING

1. Budget Workshop for 2000-2001 Fiscal Year Budget
ACTION WILL BE TAKEN ON THIS ITEM"

The agenda for the meeting of April 11, 2001, provides in pertinent part:

"8. Discussion and Consideration of Pay Raises for Employees
ACTION WILL BE TAKEN ON THIS ITEM"

The agenda for the meeting of May 3, 2001, with regard to the budget, provides as follows:

"6:45 p.m. - Opening of Budget Hearing

1. Budget Workshop for 2001 - 2002 Fiscal Year Budget
ACTION WILL BE TAKEN ON THIS ITEM"

The agenda for the meeting of May 3, 2001, provides in pertinent part:

"3. Old Business, Discussion and Consideration of Pay Raises for Employees
ACTION WILL BE TAKEN ON THIS ITEM"

In our telephone discussions, you have indicated that the "Public Input" section of the agenda did not contain the language that no action may be taken. You have further indicated that you did speak to the Board during the "Public Input" section of both meetings. In response to my questions, both you and Ms. Chapin have stated that the Board provided the public with the documents that were referred to during the budget workshops of April 11, 2001, and May 3, 2001. Ms. Chapin has stated that the budget workshop was re-noticed on the May 3, 2001 agenda because the agenda for the April 11, 2001 meeting incorrectly identified the budget for fiscal year 2000-2001.

Analysis and Conclusions

The Open Meeting Law was enacted by the Legislature for the following purpose: "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010. Your complaint concerns the

adequacy of the notice of potential action in the agenda for the April 11, 2001 meeting. In this case, the Board has twice noticed a public meeting, on April 11 and May 3, 2001. On the agendas for these meetings are several items pertaining to the administration of the swimming pool.

The Board is a public body, and is subject to the provisions of NRS 241.010, the Open Meeting Law. You have specifically requested a review of the adequacy of the agenda with regard to the budget workshop, and the pay raises to employees. The Agenda for the April 11, 2001 meeting of the Board shows the following: that a budget workshop was noticed to discuss and take action on the 2000-2001 budget, and Item 8 of the regular meeting was noticed to take action on pay raises for employees. The jurisdiction of this office includes a review of the agenda of the actual meeting, and of the minutes to assure compliance with the requirements of the Nevada Open Meeting Law. NRS 241.020 sets the requirements for notice and the contents of the agenda for public meetings. The Open Meeting Law requires that an agenda meet the following standard:

> **NRS 241.020 Meetings to be open and public; notice of meetings; copy of materials; exceptions**
>
> 1. Except as otherwise provided by specific statute, all meetings of public bodies must be open and public, and all persons must be permitted to attend any meeting of these bodies. Public officers and employees responsible for these meetings shall make reasonable efforts to assist and accommodate physically handicapped persons desiring to attend.
>
> 2. Except in an emergency, written notice of all meetings must be given at least 3 working days before the meeting. The notice must include:
>
> (a) The time, place and location of the meeting.
>
> (b) A list of the locations where the notice has been posted.
>
> (c) An agenda consisting of:
>
> (1) A clear and complete statement of the topics scheduled to be considered during the meeting.
>
> (2) A list describing the items on which action may be taken and clearly denoting that action may be taken on those items.
>
> (3) A period devoted to comments by the general public, if any, and discussion of those comments. No action may be taken upon a matter raised under this item of the agenda until the matter itself has been specifically included on an agenda as an item upon which action may be taken pursuant to subparagraph (2).

3. Minimum public notice is:

(a) Posting a copy of the notice at the principal office of the public body, or if there is no principal office, at the building in which the meeting is to be held, and at not less than three other separate, prominent places within the jurisdiction of the public body not later than 9 a.m. of the third working day before the meeting; and

(b) Mailing a copy of the notice to any person who has requested notice of the meetings of the body in the same manner in which notice is required to be mailed to a member of the body. A request for notice lapses 6 months after it is made. The public body shall inform the requester of this fact by enclosure with or notation upon the first notice sent. The notice must be delivered to the postal service used by the body not later than 9 a.m. of the third working day before the meeting.

4. Upon any request, a public body shall provide, at no charge, at least one copy of:

(a) An agenda for a public meeting;

(b) A proposed ordinance or regulation which will be discussed at the public meeting; and

(c) Any other supporting material provided to the members of the body for an item on the agenda, except materials:

(1) Submitted to the public body pursuant to a nondisclosure or confidentiality agreement;

(2) Pertaining to the closed portion of such a meeting of the public body; or

(3) Declared confidential by law.

5. As used in this section, "emergency" means an unforeseen circumstance which requires immediate action and includes, but is not limited to:

(a) Disasters caused by fire, flood, earthquake or other natural causes; or

(b) Any impairment of the health and safety of the public.

(Added to NRS by 1960, 25; A 1977, 1099, 1109; 1979, 97; 1989, 570; 1991, 785; 1993, 1356, 2636; 1995, 562, 1608)

The Manual addresses this matter in § 6.02, on page 30. The clear and complete requirement requires the Board to describe agenda items so that the public will receive notice in fact of what is to be discussed by the public body. The provisions of § 7.02 of the Manual provide additional guidance for public bodies in arranging their agendas.

You have specifically requested a review of the agenda topic identified on the April 11, 2001, agenda as Number 8 "Discussion and Consideration of Pay Raises for Employees ACTION WILL BE TAKEN ON THIS ITEM." This agenda item provides notice to the public that the compensation of pool employees will be decided at the meeting. In the Manual, on page 62, this office offers the following advice: "If there are topics of known public interest upon which the public body may deliberate, it should be identified. If action might be taken (including approving of a report) this should be listed as an action item and must contain a description of the items on which action will be taken." Based upon the foregoing, it is the conclusion of this office that this agenda item provides adequate notice to the public of the item that will be discussed, and that action may be taken on the item.

You have complained about the use of the term "Old Business" with regard to agenda Item 3 on the May 3, 2001, agenda. You correctly note that the use of this term is often objectionable, if presented alone. In this case, however, the use is appropriate, since it signifies the fact that the issue (of pay raises) was considered in prior meeting. See page 39, § 7.03 of the Manual.

This office notes several defects in the agendas of the meetings of April 11, 2001, and May 3, 2001. For example, the Board must comply with the public comment section of NRS 241.020(4). The Open Meeting Law requires that public bodies place a public comment section on the agenda and comply with the additional requirements imposed in NRS 241.020(4). The agenda appears to provide for public comment under the agenda item, "Public Input." This office recommends, on page 62 of the Manual, that the following sentence be included in the public comment section: "No action may be taken on a matter raised under this item of the agenda until the matter itself has been specifically included on an agenda as an item upon which action will be taken." We note that you spoke during the "Public Input" section of both meetings.

Other defects are noted. The agendas reflect various other topics for the Board, including topics concerning pay raises for employees, a pool beautification project, a strategic planning committee, the revision of the employee handbook, and the re-seeding of the lawn. Of these topics, the "Strategic Planning Committee" is objectionable on the grounds that under this vague and generic item, the Board may move far afield from the agenda. Please see page 38, § 7.03 of the Manual, pertaining to generic items.

In this case, it appears that the Board has shown in the agenda the time, place and location of the meeting and has noted on the agenda the locations where notice was posted. In the body of the agenda itself, the Board has shown the topics to be considered and acted upon at the public meeting. Except as noted above, the agenda items reflect a clear and complete statement of the topics scheduled to be considered during the meeting. Except as noted above, based upon a review of the agenda, it appears that the Board complied with the Open Meeting Law.

In this case, the Board followed the agenda during the April 11, 2001, public meeting. The agenda items were identified by the Chair, and were then discussed and voted upon in an open, public meeting. The audiotapes reflect that the Board has met and considered the budget and the pay raises for employees and has stayed within the terms of the agenda. Since the Board has held a public meeting to consider the agenda items, and since the topics set forth in the agenda items are clear (except as previously voted), this office finds no violation of the Open Meeting Law, Chapter 241 of NRS.

We thank you for bringing these matters to our attention.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
JAMES C. SMITH
Deputy Attorney General

Enclosure
cc: Mr. Sean Ryan, Chairman (w/o encl.)

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

May 31, 2001

Ms. Maryanne Miller
Deputy District Attorney
Clark County Government Center
500 Grand Central Parkway
Las Vegas, Nevada 89106

Re: *Open Meeting Law Complaint*
Clark County Board of Commissioners
OMLO 2001-30/AG File No. 01-022

Dear Ms. Miller:

This is in response to the Open Meeting Law complaint filed by Mr. Robert Hall with the Attorney General concerning Item 113 of the April 17, 2001 meeting of the Clark County Board of Commissioners (the "Board"). Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigating and prosecuting complaints alleging violation of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes.

Mr. Hall's complaint alleges that he, as a member of the public, was improperly limited in his public comments to the Board by Chairman Dario Herrera during a public meeting. The incident occurred during the public hearing on "PM10 State Implementation Plan for Clark County" (the "Plan"). The Plan pertains to air quality. Mr. Hall further contends that as a result of the statements of the Chairman, he was unable to present his views for the record.

Facts

We have reviewed the Board's response to Mr. Hall's complaint. The response included a copy of the agenda, a copy of agenda Item 113, and an "Agenda Item Development Report" dated February 27, 2001, pertaining to Item 113. The Board also provided a copy of an audiotape, a videotape, and a copy of the draft of the minutes of the April 17, 2001, public hearing concerning Item 113 of the agenda of the Board. The Board further included in these materials a copy of the 32-page document filed with the Board by Mr. Hall on April 17, 2001 entitled "CLARK COUNTY /EPA COMMENTS AND EPA PETITION FOR ADMINISTRATIVE ACTION SUBMITTED ON BEHALF OF THE NEVADA ENVIRONMENTAL COALITION, INC. AND ROBERT W. HALL."

Agenda Item 113 is part "d" of Section 6, "Public Hearings." Agenda Item 113 is found on page 19 of the agenda. The agenda for the meeting provides in pertinent part as follows:

"SEC. 6. PUBLIC HEARINGS - **10 A.M.**
. . . d. Conduct a public hearing to solicit comments on the Draft PM10 State Implementation Plan for Clark County; and authorize staff to prepare responses to comments received at the public hearing, prior to submitting the plan to the Board of County Commissioners for approval."

The public hearing at issue in this opinion, is one step in a formal adoption process. The adoption process is set forth in a document identified as Agenda Item Development Report, dated February 27, 2001. For example, the public hearing of April 17, 2001, was but one step in the schedule of actions necessary to adopt the Plan. Further, the public was invited to provide written comments to the Plan and the County advertised the Notice of Hearing in the newspaper. The April 17, 2001 public hearing was scheduled to receive public comment concerning the Plan. No action was taken at the Public Hearing of April 17, 2001. The Board scheduled a hearing to adopt the Plan on May 15, 2001, then to forward the Plan to the Nevada Division of Environmental Protection on May 18, 2001, and finally, forward the Plan to the Environmental Protection Agency on May 25, 2001.

At the public hearing, Chairman Herrera opened the meeting. Carrie McDougall, an employee of Clark County, presented the Plan and an exhibit. At the conclusion of her presentation, a representative of the Sierra Club spoke. Mr. Hall began his comments concerning the agenda item. During his remarks, Chairman Herrera asked him to confine his comments to the agenda item. Mr. Hall objected to the statements of Chairman Herrera and replied that the adequacy of the staff of the County is an issue in his public comments on the Plan. Mr. Hall concluded with several statements concerning his intent to seek legal action concerning the lack of attainment of the air quality standards. At the conclusion of Mr. Hall's remarks, other members of the public commented on the Plan. One member of the public also drew attention to county staffing of the air quality function.

Analysis and Conclusions

The Open Meeting Law was enacted by the Legislature for the following purpose: "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010.

The Chair opened the public hearing and, in summary, heard comments from Clark County Employees and several members of the public. The Board received exhibits from both the county employees and the public. The Board heard testimony from a representative of the Sierra Club, and received written comments from Mr. Hall concerning the Plan. Mr. Hall began his testimony following the Sierra Club representative. He began discussing non-attainment of air quality standards, and made certain remarks directed toward county staff. Chairman Herrera requested that Mr. Hall confine his remarks to the agenda item. Mr. Hall responded that enforcement was part of why the Plan will not work. Mr. Hall thereafter continued to speak, and

notified the Board that he would seek legal action to compel the Board to meet air quality guidelines. He referred to his written comments. No action was taken on the Plan, and Mr. Schlegel, Director of the Clark County Department of Comprehensive Planning, stated to the Board that his office would prepare responses to written and oral comments.

The Chair has the duty to run the meeting and to comply with the Open Meeting Law. Since the public hearing was set to consider the Plan, the Chair had the authority to limit comments to the terms of the Plan. In this case, the Chair kept public comment directed to an agenda item. The remarks of Mr. Hall that were addressed by the Chair were directed toward enforcement and the competence of county employees.

NRS 241.020(1) provides that "Except as otherwise provided by specific statute, all meetings of public bodies must be open and public, and all persons must be permitted to attend any meeting of these bodies. NRS 241.020(2)c)(3) provides that: "c) An agenda consisting of …(3) A period devoted to comments by the general public, if any, and discussion of those comments. No action may be taken upon a matter raised under this item of the agenda until the matter itself has been specifically included on an agenda as an item upon which action may be taken pursuant to subparagraph (2)." We note that the Board provided an agenda item for "Comments By the General Public" on page 21 of the agenda. The scope of the public comment section is broader than that of Item 113. Mr. Hall had another opportunity to present his comments. Government as a whole and the deliberative process of public bodies in particular greatly benefits from public input and perspective. The Board is held to the standard set forth in NRS 241.020(2)c)(3). We direct the attention of the Board to the provisions of §§ 7.04 and 8.04 of the Nevada Open Meeting Law Manual (8th ed. 2000) for further discussion of the point.

Based upon the forgoing, it is the conclusion of this office that the Chairman Herrera did not violate the Open Meeting Law on April 17, 2001, by discussing the matter with Mr. Hall at the public hearing. The discussion was part of the give and take of a public hearing. The Chair merely limited Mr. Hall's remarks to the Plan. The statements of the Chair were content neutral, and did not improperly limit the comments of Mr. Hall. No action was taken at the meeting.

We thank Mr. Hall for bringing these matters to our attention. Please distribute this determination to the Board members.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
JAMES C. SMITH
Deputy Attorney General

cc: Robert W. Hall

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

May 31, 2001

Ms. Adell Panning
HC-66 Box 2
Beowawe, Nevada 89821

Re: *Open Meeting Law Complaint*
Eureka County Board of School Trustees
OMLO 2001-31/AG File No. 01-024

Dear Ms. Panning:

This is in response to the Open Meeting Law complaint you filed with this office concerning the April 24, 2001, public meeting of the Eureka County School District Board of Trustees (the "Board"). Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigating and prosecuting complaints alleging violation of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes. You have complained that the Board meeting of April 24, 2001, violated elements of the Open Meeting Law. You have specifically complained that the agenda did not provide parents with sufficient notice of the proposed budget cuts that the posting was inadequate, that agenda items were taken out of order, and that supporting material was not available at the Crescent Valley Site. In support of your complaint, you have included several items, including a copy of the agenda.

Facts

This office contacted the Board seeking a copy of the audiotapes, agenda, and minutes of the April 24, 2001, public meeting of the Board. The Board responded on May 21, 2001, with copies of the following documents concerning the hearing:

1. The certificates of posting;
2. The minutes of the meeting; and
3. Sign-in sheets for the Eureka and Crescent Valley sites.

The Board, in a letter from Robert Aumaugher, Superintendent of Schools, Eureka County School District, responded to your complaints in a letter to this office dated May 8, 2001. A copy of the agenda was attached to the letter. We have enclosed a copy of the above documents for your review.

It appears from a review of the above items, that this was a "Special Board Meeting" that was conduced in Eureka, with an "interactive video" transmission to Crescent Valley. The interactive video joined the Cooperative Extension Conference Room, Eureka Annex, with members of the public who were present at the Crescent Valley Elementary School. This system allowed persons present in Crescent Valley to observe the meeting and to make comments to the Board. The minutes and audiotape reflect that you made comments to the Board from the Crescent Valley site concerning the budget during the "Board Report" item of the agenda as reflected on page 2 of the minutes of the meeting. We note that other persons at the Crescent Valley site also made comments to the Board. Minutes, pp. 7-8.

The agenda item at issue in this opinion pertains to a presentation by Rob Smith. The agenda provides as follows:

"Guest Presentation Continued

Rob Smith: Site-Based Fiscal Committee Budget Recommendations"

The presentation by Rob Smith was listed on the agenda as part of the Regular Agenda, and was not listed as an action item. Action items were listed in a category following the Regular Agenda.

During the "Board Report" section of the meeting, President Carol Burnham announced that two items from the action agenda would be taken out of order. The agenda did not provide notice that agenda items would be taken out of order that was printed in the agenda. These two items were taken out of the scheduled action agenda of the meeting, and were heard during the regular meeting portion of the meeting. These items pertained to Agenda Item #3.4 pertaining to the FFA travel, and Agenda Item #3.5 pertaining to the FBLA travel. The presentation by Rob Smith followed these items on pages 6-8 of the minutes.

Analysis

The Open Meeting Law was enacted by the Legislature for the following purpose: "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010.

Your first question pertains to the adequacy of the agenda, that is, did the agenda provide clear and complete information concerning the meeting and of the topics to be discussed. You have asked whether a parent would be alerted to budget cuts in personnel and consolidation of the school bus routes between Crescent Valley and Battle Mountain. You have complained that the agenda did not set forth the specific topics or items to be considered with regard to layoffs and cuts in the school budget. Specifically, you have complained that proposed budget cuts were not listed on the agenda.

The Open Meeting Law requires an agenda must consist of "a clear and complete statement of the topics scheduled to be considered during the meeting." NRS 241.020(2)(c)(1). A review of the agenda item above reveals that the presentation of Rob Smith was for discussion only, and that it was not an action item. It did indicate that it was a "guest presentation" and that the topic was "Site-Based Fiscal Committee Budget Recommendations." We find that the agenda was not clear and complete with regard to this topic for the following reasons. The agenda should have identified that this was the first presentation of the Board's 2001-2002 budget. The items pertaining to the budget were not specifically listed on the agenda. The agenda did not notify persons that the Rob Smith presentation would contain a discussion of the budget, including changes from the present year that involved cuts in the budget. The agenda did not reflect that the bus to Battle Mountain would be affected or that personnel cuts would were contemplated. The documents reviewed by this office show that the agenda did not meet the requirements of the notice set forth in NRS 241.020(2)(c)(1). For the above reasons, it is the opinion of this office that the agenda item pertaining to Rob Smith should have contained greater specificity to meet the clear and complete standard of the Open Meeting Law.

You have written that a copy of the agenda was not available at the Crescent Valley site until you asked for a copy. This inquiry led to our review of the Board's compliance with the posting requirements of the Open Meeting Law. An agenda for a public meeting must be properly posted. The Open Meeting Law requires that the agenda be posted at the principal office of the public body and three other separate places within the jurisdiction of the public body. NRS 241.020(3)(a). If the public body doesn't have a principal office, the agenda must be posted at the building in which the meeting is to be held. The Board has provided certificates of posting that reflect that the agenda was posted in five places in Eureka and at two places in Crescent Valley, including the sites of the interactive video meeting, the Cooperative Extension Conference Room, Eureka Annex, and at the Crescent Valley Elementary School. In this case, the agenda of the meeting was posted at five places, as well as at the buildings where the meeting was to be held, and thus, there is no violation of the Open Meeting Law in this regard.

Your second question pertains to President Burnham's decision to take agenda items out of the order printed in the agenda. You have asked whether the President's action, to defer Rob Smith's presentation so that the FFA and FBLA action items could be discussed and acted upon was a violation of the Open Meeting Law. The Open Meeting Law requires that an agenda

contain a schedule of the items to be discussed and acted upon at a public meeting. You have complained that the President moved the FFA and FBLA action items to a place in the meeting that preceded the presentation by Rob Smith. This office has published the Nevada Open Meeting Law Manual (8th ed. 2000) ("Manual") to assist the members of the public and members of public bodies. The relationship between the agenda and the actual conduct of a meeting of a public body is addressed in § 6.02 of the Manual. This office recommends that if an item is to be taken out of order during a meeting, that the agenda should state that "If items may be taken out of order, it is recommended (but not required) to so state." The Manual on Page 60 recommends language that may be used to alert the public that an item may be taken out of order. We note that you were unable to be present at the conclusion of Rob Smith's budget presentation, as a consequence of the items that were taken out of order. The Board is warned that the agenda should contain the appropriate language if an agenda item will be taken out of order.

You further question whether taking the agenda items out of order, and moving the Rob Smith presentation at the meeting would convert Rob Smith's presentation to an action item. The answer to this point is no, as an action item must be clearly delineated on the agenda, and taking an item out of order will not convert it to an action item. The Board notes that Rob Smith's presentation was not an action item and that no action was taken on April 24, 2001. The eventual adoption of the budget for the school district anticipated that there would be additional meetings to consider the budget and that the budget would be adopted as an action item in a later meeting. The Board has written that the May 8, 2001, Board meeting was reserved for public comment and that the official budget meeting was scheduled to be held on May 16, 2001.

Your third question pertains to whether documents considered at the Board meeting were available to the public. The Open Meeting Law requires that "supporting materials provided to the members of the body for an item on the agenda" referred to at the meeting must be available for public inspection at the meeting. NRS 241.020(4)(c). A copy of documents referred to at the meeting must be provided to the public at no charge at the meeting. In this case, you have indicated that a copy of the Rob Smith presentation was faxed to you at the meeting. The Board's May 8, 2001, response also indicates that the Board's information packets were available at the Crescent Valley site.

Conclusion

Based upon a review of these documents, it is the conclusion of this office that the agenda did not meet the clear and complete requirement of the Open Meeting Law, and that it did not contain a statement that agenda items in the meeting would be taken out of order. The Board's decision to take items out of order was a violation of the Open Meeting Law since the Board did not provide notice to the public of this possibility. It appears that the agenda was properly posted. Copies of materials referred to at the meeting were made available to you at the

meeting, and this complied with the Open Meeting Law. We note that you spoke in opposition to the budget cuts at the April 24, 2001 meeting of the Board. The Open Meeting Law requires that persons be allowed to speak during a public comment section of the meeting. In this case, there was a public comment section listed on the agenda. This complies with NRS 241.020(3) of the Open Meeting Law.

We are sending a copy of this opinion to the Board, to assure its future compliance with the Open Meeting Law. We note that the Rob Smith presentation was listed on the agenda as discussion only, and the Board did not take action on this item at the April 24, 2001 meeting.

We thank you for bringing these matters to our attention.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
JAMES C. SMITH
Deputy Attorney General

Enclosures
cc: Robert Aumaugher

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

June 28, 2001

Silver Springs Advisory Board
Post Office Box 264
Silver Springs, Nevada 89429

Re: Open Meeting Law Complaint
Silver Springs Advisory Board
OMLO 2001-33/AG File No. 01-031

Dear Chairman and Members of the Board:

An open meeting law complaint was filed with this office on May 30, 2001. The complaint was in regards to a meeting of the Silver Springs Advisory Board ("Board") meeting held January 8, 2001. Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigating and prosecuting complaints alleging violation of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes (NRS). The complaint inquired whether the Board properly provided notice to the public of the various agenda items it addressed during the meeting.

FACTS

This office contacted the Board seeking a copy of the agenda and minutes of the January 8, 2001. The Board responded by the agenda and page 3 of the minutes of the meeting. In my review I also consulted NRS 241 and the Nevada Open Meeting Law Manual.

ANALYSIS

The Open Meeting Law was enacted by the Legislature for the following purpose: "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010

> NRS 241.020(2) provides in pertinent part:
>
> Except in an emergency, written notice of all meetings must be given at least three working days before the meeting. The notice must include:
> . . . .

(c) An agenda consisting of:

(1) A clear and complete statement of the topics scheduled to be considered during the meeting.

(2) A list describing the items on which action may be taken and clearly denoting that action may be taken on those items.

The agenda for the January 8, 2001, meeting of the Board has the following specified item:

4. PLANNING RECOMMENDATION & SPECIAL USE
ELENA TRIMBLE- CHANGE OF LAND
LAVANCHA DOWNING-STAGECOACH RESIDENT-WIDEN HWY 50.

The purpose of requiring that agenda items be described in clear and complete detail is to give notice to the public what topics the public body will consider. An agenda should give the public notice of what the public body is doing, has done, or may do. A member of the public should be able to review the agenda and identify if there are any items the public body will be dealing with that are of interest to them.

The agenda for the January 8, 2001, meeting of the Board is lacking in clear and complete statements of certain topics to be considered at the meeting. Item 4 never states what action is to be taken regarding Elena Trimble or Lavancha Downing. The minutes of the meeting[1] reveal that Elena Trimble had requested a "zone" change for her land at 5035 Lemon, Silver Springs. It is impossible to determine from the agenda that a zone change had been requested or what property it was requested for. Further, the minutes do not reveal what action was taken regarding Elena Trimble or her concerns regarding the Highway 50 widening.

The minutes of the meeting reveal that action was taken on several items that never appeared on the agenda. Page 3 of the agenda identifies action regarding Wallace A. Davis, Wallace & Lorraine Davis, Gopher Construction #1, Gopher Construction #2, Lyon County, Silver Springs Airport, and Alline Doty, none of which appeared on the agenda. While these entities may have known the Board was prepared to act regarding their items, at the January 8th meeting, this knowledge was not arrived at by reviewing the agenda. The failure of the Board to place these items on the agenda prior to taking action constitutes a violation of NRS 241.020.

While the Board engaged in behavior that violated NRS 241.020 this office received the complaint to late for action to be taken. NRS 241.037 permits the attorney general to sue in any court of competent jurisdiction to have an action taken by a public body declared void or to seek an injunction to require compliance or prevent violations of chapter 241. The deadlines the statute provides in which to commence a suit to require compliance with the chapter is 120 days and 60 days in which to declare the action void. These dates are calculated from the date the action objected to was taken. Since the public meeting was held on January 8, 2001, the deadline for commencing a suit to declare the Board's action void was March 9, 2001, and the deadline to

[1] Toni Anderson, Secretary to the Board provided only page 3 of the minutes. There may be other problems with the agenda in relation to how something was identified on the agenda and the action the Board took as recorded in the minutes but since pages 1 and 2 were not provided I offer no comment at this time.

require compliance with chapter 241 was May 8, 2001. This office received a complaint on May 30, 2001. While it is too late to take legal action regarding the Board's past behavior the Board is not relieved from its obligation to comply with its legal duties in the future.

CONCLUSION

Based on a review of these documents, it is the conclusion of this office that the meeting of January 8, 2001, had several defects, including the failure to properly provide notice to the public as to the items that would be discussed and acted upon at the meeting. This office recommends that the Board change the way items are described on the agenda so that the average person understands what the issues are and what actions are proposed. In addition the Board is not to take action on any item that is not expressly on the agenda.

Cordially,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
WILLIAM J. FREY
Deputy Attorney General
Civil Division
(775) 684-1229

WJF:sg
c: Leon Aberasturi, Lyon County District Attorney

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

July 2, 2001

Mr. Cecil Fredi
1736 East Charleston #240
Las Vegas, Nevada 89104

Re: *Open Meeting Law Complaint*
Clark County Animal Advisory Committee
OMLO 2001-34/AG File No. 01-027

Dear Mr. Fredi:

This is in response to an Open Meeting Law complaint you filed with this office concerning the Clark County Animal Advisory Committee ("Committee"). Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigating and prosecuting complaints alleging violation of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes. You have complained that the Committee meeting of May 14, 2001, violated elements of the Open Meeting Law. You have specifically complained that you were not allowed to fully comment on Agenda item 4 pertaining to exotic animals.

Facts

This office has contacted the Committee seeking a copy of the agenda and minutes of the May 14, 2001, public meeting of the Committee. The Committee responded on May 30, 2001, with a copy of the agenda of the meeting. We have enclosed a copy of the above document for your review.

The Committee has further provided a letter, on May 30, 2001, and a copy of the following documents concerning the meeting:

1. A draft of the minutes of the meeting;

2. The audiotape of the proceedings pertaining to item four and the public comment section of the meeting.

The Committee indicated in its letter of May 30, 2001, that this meeting was one of several that concerned exotic animals in Clark County. The letter further revealed that the first draft of the ordinance was considered at several meetings of the Committee, including three meetings in September 2000. Revisions to the draft were considered on February 21 and 23 of 2001 at informational meetings. The Committee considered the proposed ordinance on April 16, 2001, at a public meeting at which time public comment was taken on the ordinance. The Committee's letter indicates that "due to the extensive number of comments received and the late hour, the Advisory Committee deferred its discussion and action on the item until their next meeting." The meeting of May 14, 2001, considered a draft of the ordinance.

Agenda item 4, for the May 14, 2001 meeting, provided as follows:

"4. **Review of Draft Ordinance for the ownership and possession of restricted (exotic) animals"**

The Committee's May 30, 2001 letter, the draft written minutes, and the audiotape, reflect that the Committee originally intended to take action on the ordinance at the May 14, 2001 meeting without public comment during that specific agenda item. During the Committee's consideration of Agenda item 4, it altered its position and agreed to allow comment from persons who had not commented on past drafts of the ordinance at the prior meeting. The Committee also decided to consider questions from any member of the public on this agenda item.

The agenda for the May 14, 2001 meeting did include a public comment section in item 9 of the agenda. The Committee did have a public comment section and did receive public comment during the public comment section on the agenda, and there is no evidence anyone was denied the opportunity to make comments during this period.

Analysis

The Open Meeting Law was enacted by the Legislature for the following purpose: "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010.

In your letter of May 15, 2001, you have complained that you were not allowed to comment during the Committee's consideration of item 4 of the agenda. The agenda contains a notation that "It is the Committee's discretion to take public comment during times other than during the public comment period." The discretion of the Chair is more extensive with regard to public comment during an action item than during the statutory public comment period. The Open Meeting Law requires public bodies to provide for a public comment section during the meeting. NRS 241.020(2)(c)(3). The Open Meeting Law requires that persons be allowed to speak during a public comment section of the meeting. In this case, the agenda contained item 9, which provided as follows: "9. **Comments by the General Public**." Since there was a public comment section listed on the agenda, and since the public was able to comment on any matter,

including the draft ordinance during this segment of the meeting, the public's right to comment was not improperly limited when the Committee considered item 4 of the agenda.

You have complained that the Committee restricted the public to "pure questions" at the segment of the meeting pertaining to item 4, and did not allow sufficient public comment before the ordinance was approved. The agenda did not reflect whether public comment would be allowed during the consideration of item 4. This office has published a copy of the Open Meeting Law Manual (8th ed. 2000). The conduct of meetings involving public comment is addressed in § 8 of the Manual. This office notes that: "Except during the public comment period required by NRS 241.020(2)(c)(3), the Open Meeting Law does not mandate that members of the public be allowed to speak during meetings. Some public bodies choose to hear public comment during other agenda items, but that is not a requirement of the Open Meeting Law." Manual, § 8.04, page 41.

The audiotape and draft minutes evidence that the Committee did allow public comment on Agenda item 4, from anyone who had not previously commented on the proposed ordinance. No one spoke at that time. Then the Committee allowed questions and five (5) people spoke at that time. The Committee had the discretion to not allow any public comment on that specific agenda item. The fact that the Committee placed restrictions on comments on agenda item 4 during the time they considered the item is not a violation of the Open Meeting Law.

Conclusions

Based upon a review of these documents, it is the conclusion of this office that the Committee's meeting of May 14, 2001, complied with the Open Meeting Law with regard to item 4 of the agenda. Item 4 concerned a draft of an ordinance. The Committee considered item 4 as an action item and recommended the adoption of item 4 by the Board of County Commissioners. The Committee's limitation of public comment at the May 14, 2001 meeting was appropriate in light of the public comment received at prior meetings that considered the draft ordinance, and in light of the ability of the public to comment at a later point in the meeting, during agenda item 9, a public comment section.

We thank you for bringing these matters to our attention.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
JAMES C. SMITH
Deputy Attorney General

Enclosures
cc: Elizabeth A. Vibert, Deputy District Attorney (w/encl.)
J.M. Boteilho, Animal Control Manager (w/encl.)

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

July 10, 2001

Robert W. Hall
10720 Button Willow Drive
Las Vegas, Nevada 89134

Re: *Open Meeting Law Complaint*
Clark County District Board of Health
OMLO 2001-35/AG File No. 01-026

Dear Mr. Hall:

This is in response to the Open Meeting Law complaint you filed with this office concerning the April 26, 2001, meeting of the Clark County Health District Board of Health (the "Board"). Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigating and prosecuting complaints alleging violation of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes. In the complaint, you have inquired whether the failure of the Board to provide you a memorandum in your packet is a violation of the Open Meeting Law.

Facts

This office has contacted the Board seeking copies of agendas, audiotapes and minutes of the public meeting of April 26, 2001. A reply has been received from Mr. Steven R. Minagil, counsel to the Board. In his letter, he acknowledges that the Board "inadvertently left a memorandum out of a packet of materials that was sent to you." We have enclosed a copy of the May 21, 2001 letter and attachments for your review. The attachment includes a reference to a public meeting of the Board held on December 18, 2000. As you note in your complaint, the April 26, 2001 meeting was held to rectify the Open Meeting Law violation found by this office concerning the December 18, 2000 meeting.

Mr. Minagil indicates that a memorandum was left out of your packet, but you had the remaining documents and that the memorandum was present at the meeting.

Analysis

The Open Meeting Law was enacted by the Legislature for the following purpose: "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010.

NRS 241.020(4) provides:

> 4. Upon any request, a public body shall provide, at no charge, at least one copy of:
> (a) An agenda for a public meeting;
> (b) A proposed ordinance or regulation which will be discussed at the public meeting; and
> (c) Any other supporting material provided to the members of the body for an item on the agenda, except materials:
> (1) Submitted to the public body pursuant to a nondisclosure or confidentiality agreement;
> (2) Pertaining to the closed portion of such a meeting of the public body; or
> (3) Declared confidential by law.

The failure to provide Mr. Hall with all supporting materials that were provided to the members of the public body constitutes a violation of the Open Meeting Law.

Counsel for the Board has raised two reasons why the failure to provide all materials does not constitute a violation of the Open Meeting Law.

First, it is alleged that the failure to provide the memorandum was inadvertent and not intentional and thus no violation occurred. The determination that an Open Meeting Law violation occurred is not dependent on a finding of intent to violate the law or resulting prejudice. See *Zorc v. City of Vero Beach,* 722 So. 2d 891, 902 (Ala. App. 1998).

Second, it is alleged that even if a violation did occur, the violation was harmless or De Minimis because the complainant could have attended the April 26, 2001 meeting and obtained a copy of the memorandum at that time. We find this reasoning persuasive. The purpose of the Open Meeting Law is to assure that the "peoples business" is done in the open and to allow the people to participate in the "peoples business." The failure to provide a copy of the April 26, 2001 memorandum did not frustrate the purpose of the Open Meeting Law. Even though the failure to provide the complainant with a copy of the April 26, 2001 memorandum constitutes a violation of NRS 241.020(4), the violation of the Open Meeting Law did not result in any prejudice to you or the public.

Conclusion

Failure to provide the April 26, 2001 memorandum constitutes a violation of the Open Meeting Law. The factual circumstances presented in this opinion require this office to reach the conclusion that the violation resulted in no meaningful frustration of either the complainant's rights or the intent and purpose of the Open Meeting Law. Prospectively, we direct the Board to provide persons who request copies of the agenda support materials a complete copy of the same.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
JAMES C. SMITH
Deputy Attorney General

Enclosures
cc: Stephen R. Minagil, Esq. (w/o encl.)

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First Assistant Attorney General

July 11, 2001

C. Robert Cox, Esq.
Rick R. Hsu, Esq.
Walther, Key, Maupin, Oats, Cox & LeGoy
Lakeside Professional Plaza
3500 Lakeside Court
Reno, Nevada 89509

Re: Open Meeting Law Complaint
Douglas County School District Board of Trustees
OMLO 2001-36/AG File No. 01-029

Dear Mr. Cox and Mr. Hsu:

Pursuant to Nevada law, the office of the Attorney General has primary jurisdiction for investigating and prosecuting complaints alleging violation of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes.

As you know, this office received a complaint from Val Sonnemann dated May 23, 2001, alleging that the Douglas County School District Board of Trustees violated the Open Meeting Law on May 16, 2001. Thank you for your response and documentation dated June 15, 2001.

Facts

We have reviewed the agenda and minutes as well as all other documents provided in your correspondence. The main focus of our inquiry was regarding Consent Item 2(B) defined as "Personnel Report No. 01-05" and the notice provided in the agenda to the public regarding the selection of a Principal for Gardnerville Elementary School.

It is my understanding that the "Consent Items" to the agenda are a list of items and staff recommendations that are approved at the meeting without discussion unless there is a question pertaining to a particular item. It is further understood that the "Personnel Report" is listed

monthly to approve or ratify personnel changes including hiring, resignation, transfer or retirement of various employees. The selection process for hiring employees occurs prior to the meeting and the meeting is held for the purpose of approving the selection made by the Superintendent pursuant to Board Policy 302.

The relevant portions of the documents you provided are delineated below:

1. Agenda for the May 16, 2001 Meeting provides in pertinent part:

> **2. <u>CONSENT ITEMS:</u> Information concerning the following consent items has been forwarded to each Board member for study prior to this meeting. Unless a Trustee or member of the public has a question concerning a particular item and asks that it be withdrawn from the consent list, the items are approved at one time by the Board of Trustees.**
>
> **B. PERSONNEL REPORT NO. 01-05**

The actual Personnel Report and Addendum to the Personnel Report identifying the specific positions and persons recommended for each position were provided to the Board members prior to and during the meeting but were not posted within the agenda for the public.

2. The Addendum to the Personnel Report 01-05 provides in pertinent part:

> **PRINCIPAL APPOINTMENT**
>
> | | 2000-01 | 2001-2002 |
> |---|---|---|
> | **<u>Name</u>** | **<u>Position and Location</u>** | **<u>Position and Location</u>** |
> | **Cissy Tucker** | **Interim Principal-GES** | **Interim Principal-GES** |
>
> **On May 11, 2001, Assistant Superintendent for Personnel Services, John Soderman; Assistant Superintendent for Educational Services, Roy Casey; George Whittell High School (GWHS) Principal, Richard Brownfield; Teacher, Kim Haubursin; and parent, Julie Lundergreen, interviewed candidates from among a pool of 15 applicants. The vacancy occurred when Mr. Brownfield, former GES Principal, was reassigned to the Principalship at GWHS. Cissy Tucker was reassigned from the Vice-Principalship at SES to the Interim Principalship at GES for the 2000-2001 school year.**
>
> **The selection process included answering prepared questions, in-basket activities, a formal presentation on school improvement, a teacher conference and a group of problem-solving activities. The**
>
> **Selection Committee's recommendation was then followed by the**

Superintendent interviewing Ms. Tucker. Superintendent Clark is recommending that Cissy Tucker be appointed Principal at GES starting in the 2001-2002 school year.

Ms. Tucker earned her B.S. in elementary education from Otterbein College, Westerville, Ohio, in 1969, received her M. Ed., in Reading and Language Arts from the University of Hawaii in 1988, and finally received her administrative endorsement from the University of Nevada, Reno, in May 1998.

Ms. Tucker began her teaching career in 1974 for the Prince William County Schools in Manassas, Virginia, where she taught first grade. Prior to her appointment as Vice-Principal at Scarselli Elementary, August 7, 1998, Ms. Tucker taught third and second/third multi-age classes as Scarselli. In the past two years, she has proven to be an effective administrator and instructional leader at Scarselli Elementary as Vice-Principal (1998-2000) and as Interim Principal of GES (2000-2001).

<u>RECOMMENDATION</u>:

Accept the recommendation of the Superintendent and appoint Ms. Cissy Tucker to the Principalship at Gardnerville Elementary School for the 2001-2002 school year.

3. The Minutes of the May 16, 2001 meeting state in pertinent part:

2. <u>Consent Items</u>

… **A motion was made by George Echan, seconded by Dave Brady, that the following Consent Items be approved.**

B. Personnel Report No. 01-05 and Addendum (copies attached)

The specific names of the employees to be hired, including the Interim Principal and Principal for Gardnerville Elementary school were not specifically identified on the Agenda posted to notify the public of the personnel matters being addressed by the Board of Trustees.

Analysis

The issue herein is whether the agenda for the May 16, 2001, complied with the Nevada Open Meeting Laws, specifically NRS 241.020. The broader concern is that the generic term "Personnel Report" and other generic categories have been used and continue to be used by the Douglas County School District in violation of the Nevada Open Meeting Laws.

Pursuant to NRS 241.020(2)(c) of Nevada's Open Meeting Law (OML), a notice must include: "(c) An agenda consisting of: (1) A clear and complete statement of the topics scheduled to be considered during the meeting. (2) A list describing the items on which action may be taken and clearly denoting that action may be taken on those items."

The agenda must be written in a manner to actually give notice to the public of what is occurring and general or vague language with a generic listing has been considered to be unacceptable. Op. Nev. Att'y Gen. No. 91-6 (May 23, 1991). The purpose of the agenda requirement is so interested parties will know what matters will be considered at a meeting. Public meetings are sparsely attended by the public unless the individual interests will be affected by the considerations and acts of the public body. Therefore, it is imperative that an agenda provide a description that is clear and complete. Op. Nev. Att'y Gen. No. 99-01 (January 5, 1999).

Agenda items that use generic terms such as "president's report", "committee reports", "staff reports" do not provide a clear and complete statement of the topic scheduled to be considered at the meeting nor do they adequately describe an item on which action may be taken. The action cannot be taken on such an item and any action so taken may be void under NRS 241.036. Op. Nev. Att'y Gen. No. 99-03 (January 11,1999) (This opinion was rendered by the attorney general as a guideline for enforcing the open meeting law and not as a written opinion requested pursuant to NRS 228.150.)

Conclusion

In applying the standards set forth herein, the agenda for the May 16, 2001 meeting provides only a brief agenda item pertaining to Personnel Reports. This is a "generic listing" and did not describe the scheduled item with sufficient detail so the public would know what would be considered and voted upon, specifically regarding the Principal position for Gardnerville Elementary School as complained of herein but also regarding all specific personnel items not specifically identified within the agenda.

In this regard, the agenda item regarding "Personnel Reports" is uncertain, unclear, ambiguous and confusing to the public. The agenda for the May 16, 2001 meeting did not meet the standard required by the Open Meeting Law, and thus, violates the "clear and complete" standard delineated above.

NRS 241.036 provides that action of any public body taken in violation of any provision of this chapter is void. However, action may be taken at a subsequent meeting in which proper notice of each specific item has been provided to the public. OMLO 99-03 (March 19, 1999)

(This opinion was rendered by the attorney general as a guideline for enforcing the open meeting law and not as a written opinion requested pursuant to NRS 228.150.)

Recommendation

It is my understanding from your letter dated June 15, 2001, that the District is willing to put language on the agenda stating that "a more detailed agenda and all agenda supporting materials may be obtained by contacting the Superintendent's Office at 782-5134".

In order to be more clear and concise in defining what specifically will be discussed in the Personnel Report section, the language in the agenda should meet the requirements of NRS 241.020(2)c(2) which requires a "list describing the items on which action may be taken and clearly denoting that action may be taken on those items" as set forth above.

This requirement applies essentially to all "generic listing" categories and requires that the agenda contain such information. It is our opinion that the names of the individuals and the action being taken must be specifically identified in the agenda in accordance with NRS 241.020. Any other details pertaining to each item may be appropriately made available as you have suggested above.

Although the Board is hereby reprimanded for the above-referenced violation of the Open Meeting Law, it appears that the violation was unintentional. Accordingly, in lieu of other legal action we respectfully request that all future agenda items shall be identified consistent with the contents of this response. Your cooperation and willingness to resolve this matter is appreciated and we are hopeful that this issue will not occur in the future.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
GABRIELLE J. CARR
Deputy Attorney General
(775) 688-1958

cc: Val Sonnemann

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

August 17, 2001

Kristin A. McQueary
Chief Civil Deputy District Attorney
Elko County District Attorney
575 Court Street
Elko, Nevada 89801

Re: Open Meeting Law Complaint
Elko County Commission
OMLO 2001-37/AG File No. 01-030

Dear Ms. McQueary:

This office has received a letter dated May 31, 2001, from Mr. Dale Lotspeich, stating a complaint against the Elko County Commission (Commission). *See* Enclosure. Mr. Lotspeich has raised the possibility that the Commission violated the Nevada Open Meeting Law (OML), NRS chapter 241, at its May 9, 2001, budget meeting, conducted in the Elko County Courthouse (the meeting).

ISSUES PRESENTED

Mr. Lotspeich's description of the meeting and reference to the minutes appear to identify three potential violations. First, the agenda posted for the meeting omitted an item for public comment. This omission by itself appears to constitute a violation of the OML, as discussed below.

Secondly, in spite of the omission, the Commission recognized a period during which public comment was invited and received. Among those presenting items were the Commissioners themselves, one of whom addressed the potential annexation of Wendover, Utah, to the State of Nevada and County of Elko, and his planned travel to Washington, D.C., to attend a meeting on the subject. The discussion had on this item might constitute a second OML violation if it resulted in action being taken by the Commission.

Lastly, Commissioner items presented during the public comment period may represent a violation of the OML regardless of whether action was taken on them.

These three potential violations will be separately addressed.

INFORMATION CONSIDERED

We have compiled and studied the following items of relevant information: (1) the Commission agenda for the May 9 meeting; (2) the approved minutes for the May 9 meeting (Minutes); (3) audiotapes of the May 9 meeting. These three items were transmitted to us under cover of your letter dated June 12, 2001. We had also written to you and inquired on several additional points which we believed were important for a consideration of your complaint. You responded by letter dated June 25, 2001.

ANALYSIS

1. Did omission of a public comment period from the agenda constitute a violation of the Open Meeting Law?

The law plainly requires an agenda item for public comment.

> The notice [of a public meeting] must include . . . [a]n agenda consisting of . . . [a] period devoted to comments by the general public, if any, and discussion of those comments. No action may be taken upon a matter raised under this item of the agenda until the matter itself has been specifically included on an agenda as an item upon which action may be taken pursuant to subparagraph (2).

NRS 241.020(2)(c)(3).

Omission of the public comment item from the agenda is a *per se* violation of law. You have stated that "[i]t has always been my advice to the Commission that they should honor the intent of the law and still hold a public comment period even if it is not noted on the agenda" McQueary June 12 letter. We agree with and commend this advice, but surmise from the statement that omission of public comment from the agenda has previously occurred. The omission is not trivial. The requirement to include a public comment item is a simple one, and easily fulfilled. Every measure must be taken to prevent its violation. However, from the minutes and the audiotapes it is apparent that no one present was deprived of an opportunity to address the Commission, since a public comment period was in fact conducted. No action will therefore be taken on this occasion. *See* OMLO 99-10 (August 24, 1999) ("because there is no evidence that public comment was denied . . . , we believe the best course of action is to point out the violations to the Board and serve warning that future transgressions of this type may result in legal action"). The Commission is strongly cautioned, however, to avoid reiteration of the violation.

2. Did Commission discussion of the Annexation of Wendover, and Commissioner Russell's travel to Washington, D.C., constitute a violation of the Open Meeting Law?

Included during the public comment period were numerous informational items presented by individual commissioners. One item was the announcement by Commissioner Russell that he intended to travel to Washington, D.C., on May 17, 2001, to attend a meeting on the subject of the annexation of the City of Wendover, Utah, to the State of Nevada. The parties to, and purpose of, the meeting are not clear from the materials, although Commissioner Russell's attendance was reported to have been invited by the Mayor of West Wendover, Reese Melville. Minutes at 21.

Commissioner Russell indicated he was acting on his own behalf by planning the trip: "[h]e stated that he has kind of taken on the project." Minutes at 20. However, he tendered the matter to the Commission "to get a consensus of the Board as to whether he should be the one to take the trip." Chairman Lloyd then instructed Commissioner Russell to "look at the costs [of travel] and then, 'kind of by consensus' the county should be represented and they could kind of get an idea of the costs." Minutes at 21.

Development of "consensus" without voting can constitute a violation of the OML because it constitutes action taken on an item not marked for action. *See e.g.* OMLO 98-03 (July 7, 1998), where a violation was found after a school board provided "direction," "consensus," and "comfort level" to the chairman of a hiring subcommittee on several specific matters not identified in the agenda.

Similarly in this case, Commissioner Russell requested an indication of the Commission's consensus. In the ensuing brief discussion, Commissioner Russell "reiterated his feeling of it being important that Elko County is represented at the meeting" Minutes at 20; Commissioner Ellison "stated that he felt there should be [a] representative from Elko County at the Washington, D.C. meeting" Minutes at 21; and Commissioner Nannini stated "that he really thought they should have a Commissioner at the meeting if the county is going to take part." *Id.* Of the five Commissioners present, therefore, three expressed their view that a Commissioner should in fact attend the meeting. Although this was not entirely responsive to Commissioner Russell's request for consensus on his personal participation at the meeting, this nonetheless constituted a clear decision by a majority of the commissioners present on an item not marked for action, and is therefore a violation of NRS 241.020(2)(c)(2) (agenda to include "a list describing the items on which action may be taken and clearly denoting that action may be taken on those items").

We had inquired "whether Commission action is routinely required before an individual commissioner is authorized to incur reimbursable travel expense." You responded as follows:

> Normal practice is for a commissioner to get prior board approval. On short notice, the normal practice is for a commissioner to get approval from the chairman, with follow up action [at] a subsequent meeting.

McQueary June 25 letter. You further explained that the Commission "approved the claim for gas, meals, and lodging [submitted by Russell after the trip] at the June 20, 2001, meeting, which was held in Midas." *Id.*

It therefore appears that the Commission's unlawful action approving Commission attendance at the Washington meeting was unnecessary, and that the action was furthermore ratified at a subsequent meeting, where payment of Russell's travel claim was approved. These circumstances render legal action to invalidate the Commission's action unnecessary. *Cf. Hutchison v. Cartwright*, 692 P.2d 772, 774 (Utah 1984) ("no action by the county commissioners was necessary for the suspension or dismissal [of appellant] . . . . Therefore, . . . actions taken by the commissioners were irrelevant to the legality of appellant's suspension and subsequent dismissal. His suspension and dismissal gave rise to no claims for violations of the open meetings law.") Therefore we decline to take action on the violation, but instead strongly counsel again that strict adherence to OML requirements is expected by the public and by this office, and is required by the law. In view of the fact that this represents the second reported OML violation by the Commission in two years, additional infractions will be addressed by stronger measure.

3. Did Commissioners' presentation of their own items, unannounced on the agenda, and during the public comment period, constitute a violation of the Open Meeting Law?

In addition to Commissioner Russell's item on annexation of Wendover, Utah, other Commissioners also spoke during the public comment period on items which do not appear on the agenda: (1) Chairman Lloyd reported that he had received a telephone call from Jarbidge about garbage, and thought the Commission should hold a meeting in Jarbidge to listen to citizens' concerns; (2) Commissioner Roberts announced that he would be attending and speaking at a noxious weed symposium; (3) Commissioner Nannini said he and Chairman Lloyd had been meeting with people involved with the subject of the UNR Fire Academy, and that he would be attending an upcoming meeting in Reno; (4) Commissioner Ellison reported he would be at the Nevada Legislature on the next Monday and Tuesday; and (5) Commissioner Russell reported that he had presented a plaque to the 2000 Carlin Citizen of the Year.

We note that, except for Commissioner Russell's item on travel to Washington, there was neither action nor deliberation towards action involved with these items. Most were unilateral announcements of the speaking commissioner's recent activities or future plans. There is no prohibition of such announcements in the law, and they in fact materially advance the purposes of the OML by disclosing government officials' activities in an open forum.

In contrast, Commissioner Lloyd's item was not an announcement, but a suggestion for a future agenda item and meeting location. He reported that a citizen called him from Jarbidge on a particular matter, and he suggested this demonstrated a need for a future Commission meeting at that location to address the matter.

Commissioner Lloyd's comments were not a violation of law. The OML does not set forth specific procedures for establishing future agendas and for selection of specific items for inclusion. Common sense, however, dictates that public bodies must possess a modicum of inherent or implied authority to control their own housekeeping, and to set their own agendas by communicating recent events. This authority must exist even if these items are not specifically

set forth on an agenda, so long as the public body does not deliberate towards, or take, substantive action.

> To require such ministerial acts as scheduling or canceling meetings to be decided in open meetings not only would be impractical but also would put burdens on public servants not imposed by or within the purpose of the statute . . . . To mandate a public meeting for each procedural or housekeeping decision would severely hamper a board's ability to perform its duties.

Pearson v. Board of Selectmen of Longmeadow, 726 N.E.2d 980 (Mass. App. 2000), *review denied* 733 N.E.2d 1066 (2000).

We strongly advise against use of the public comment period for presentation of items such as these informational announcements and suggestions for future agendas. The public comment item denotes a time when members of the general public may bring matters not appearing on the agenda to the attention of the public body. *See generally* Open Meeting Law Manual § 7.04 (8th ed. 2000). Members of the public body are not properly considered, for purposes of this provision, to be members of the general public. The Commission is in control of its agenda, and thus cannot articulate a need analogous to the public for a period of general discussion on unannounced matters. The better practice would be to set a separate item for commissioner announcements. Clear delineation in this manner will serve to remind the members of the public body that they must not engage in discussion among themselves about non-agenda items which they present.

CONCLUSION

We find that the Commission committed two violations of the Open Meeting Law at its May 9, 2001, meeting, first by omission of a public comment period from the meeting agenda, and second by development of a consensus constituting action taken, under the auspices of an ad hoc public comment period conducted in spite of its omission from the agenda.

We decline to take legal action on these violations, because (1) the Commission opened the meeting for public comment even though it omitted public comment as an item on the agenda; and (2) the Commission's development of consensus approving Commissioner Russell's travel to Washington was both unnecessary and was subsequently ratified by proper Commission action.

This Office strongly cautions the Commission to give strict adherence to all OML requirements in the future.

Cordially,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
C. WAYNE HOWLE
Supervising Deputy Attorney General
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(775) 684-1227

CWH:sg
Enclosure
c: Dale Lotspeich (w/o enclosure)

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FRANKIE SUE DEL PAPA
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THOMAS M. PATTON
First Assistant Attorney General

August 20, 2001

David Alison, District Attorney
Humboldt County District Attorney's Office
P.O. Box 909
Winnemucca, Nevada 89446

Re: Open Meeting Law Complaint
Humboldt County Commissioners and Humboldt County District Attorney
OMLO 2001-38/AG File No. 01-039

Dear Mr. Alison:

I. Introduction

On July 11, 2001, David McLean, president of the Hi-Desert Economic Development Agency (HEDA), filed a complaint in this office against members of the Humboldt County Board of Commissioners (Board) and the Humboldt County District Attorney for a possible violation of Nevada's Open Meeting Law. The allegation was that an item was added to the June 4, 2001 agenda without sufficient notice, and that no emergency existed that would have justified adding the item without the notice required under the Open Meeting Law.

This office has primary jurisdiction to investigate violations of the Open Meeting Law, pursuant to NRS 241.037. As part of those duties, this office investigated the complaint by reviewing the agenda for the June 4, 2001 meeting of the Board, and the minutes from that meeting. The specific allegation was that the Board, at the direction of the Humboldt County District Attorney, considered, discussed and took action on an item that was not on the posted agenda. This item was the seizure of the records of the Hi-Desert Economic Development Agency (HEDA) and the accounting practices of HEDA.

II. Determination Regarding Complaint

Our investigation revealed that discussion and action on this item did occur at the June 4, 2001 meeting, and that the item was not on the posted agenda. The Open Meeting Law requires that all meetings of public bodies must be open and public, and all persons must be permitted to attend any meeting of these bodies. NRS 241.020(1). As part of that requirement, an agenda for

a meeting of a public body must consist of a clear and complete statement of the topics scheduled to be considered during the meeting. NRS 241.020(2)(c)(1). Furthermore, the public body is required to provide written notice of all meetings, which includes the agenda, at least 3 working days before the meeting. NRS 241.020(2). This requirement was violated when the Board considered the item not on the agenda, because no notice was given to the public of this item to be considered and acted upon by the Board.

The Open Meeting Law does provide an exception to providing written notice of the meeting 3 working days before the meeting in the case of an emergency. *See id.* However, it does not appear that an emergency existed in this situation that was sufficient to justify not provided the statutorily required notice. The failure to give the required notice is only proper when there are unforeseen circumstances requiring immediate action, such as disasters caused by fire, flood, earthquake, or other natural causes; or any impairment of the health and safety of the public. NRS 241.020(5).

This office believes that an item constitutes an emergency only when the need to discuss or act upon an item is truly unforeseen at the time the meeting agenda is posted and where an item is truly of such a nature that immediate action is required at the meeting. A true emergency must exist and the rule must not be invoked as a subterfuge by a public body to avoid giving notice of that agenda item to the public.

Other jurisdictions with open meeting law provisions similar to Nevada's have also taken the position that a true emergency must exist. *See Graziano v. Rhode Island State Lottery Comm.,* 2001 R.I. Super. LEXIS 23 (R.I. 2001) (where public body claimed emergency was based on fact that they had been sued the day before the public hearing and needed to meet with legal counsel concerning what action should be taken on the suit, the court found that was not a sufficient emergency to ignore notice requirements); *Markowski v. City of Marlin,* 940 S.W.2d 720 (Tx . App. 1997) (where public body claimed the need to remove an officer of the body was emergency, court found this was not an emergency under the contemplation of the open meeting law).

In this case it does not appear there was an imminent threat to the public health and safety or a reasonably unforeseen situation that required immediate action, sooner than the 3-day posting requirement. The minutes reflect that the District Attorney had requested HEDA's records previously, evidencing that the need for seizing HEDA's records was foreseeable if HEDA failed to turn them over. Moreover, under the Open Meeting Law, if a true emergency exists, it is the opinion of this office that the minutes of the meeting should reflect the nature of the emergency and why notice could not be timely given. While the minutes reflect a cursory explanation of the claimed "emergency," the minutes do not reflect why notice of this agenda item could not be timely given.

II. Curative Action

The violation of the Open Meeting Law noted in this letter needs curative action. This office respectfully requests the Humboldt Board of County Commissioners to schedule a properly noticed and agendized meeting to reconsider the item of the seizure of HEDA's records, as discussed and acted upon at the June 4, 2001 meeting of the Humboldt County Board of Commissioners. The notice must be posted within 5 working days of this letter and the meeting held within 10 working days of this letter. Until such time as the meeting has been held and action properly taken regarding this item, the Board is directed to not utilize HEDA's records for any purpose.

Upon receipt of this letter, please respond within 3 working days as to whether your Board intends to comply with this directive. If the Board chooses not to respond, or fails to respond, this office will pursue other legal resource to void or enjoin the item acted upon without proper notice at the June 4, 2001 meeting.

I look forward to hearing from you in this regard and look forward to your professional cooperation and courtesy.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
NORMAN J. AZEVEDO
Chief Deputy Attorney General
Civil Division
(775) 684-1222

NJA:jm

cc: Frankie Sue Del Papa, Attorney General

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

August 21, 2001

Tom and Leandra Carr
3280 Holly Avenue
Silver Springs, Nevada 89429

Re: Open Meeting Law Complaint
Lyon County Commissioners
OMLO 2001-39/AG File No. 01-033

Dear Mr. and Mrs. Carr:

This letter is in response to your question regarding application of the Open Meeting Law to meetings of the Board of County Commissioners of Lyon County (the Commission). Specifically, you asked whether the Open Meeting Law required that your nuisance complaint be placed on the Commission's public meeting agenda within a certain period after you had submitted the complaint to a county employee and asked when the Commission could hear the issue.

The Open Meeting Law requires public bodies to provide written notice of all meetings at least three (3) working days prior to the meeting. NRS 241.020. In addition to providing the time, place, and location of the meeting, the notice must include an agenda consisting of a clear and complete statement of the topics scheduled to be considered during the meeting and a list describing the items on which action may be taken. *Id.* Every meeting agenda must include a period devoted to comments by the general public, but no action may be taken on issues raised during public comment until the specific matter has been included on a future agenda and denoted as an action item. *Id.* In keeping with its intent that public bodies take actions and conduct deliberations in the open, the Open Meeting Law clearly requires that a public body must stick to its agenda and not drift off into other matters not listed, and prohibits action on matters raised in the public comment period until the matter is placed on a future agenda as an action item. *See also Open Meeting Law Manual, Eighth Edition* § 7.03. However, the Open Meeting Law itself does not include requirements addressing how items come to be placed on a public body's meeting agenda in the first place. Nevertheless, the answer to your specific question may be found in a different section of the Nevada Revised Statutes.

The procedure for filing and handling complaints of nuisances is set forth in NRS 244.360. The first step is to file a written complaint with the county clerk alleging the existence of a nuisance. NRS 244.360(1). The county clerk is required to notify the board of county

commissioners of the complaint, which in turn is required to "forthwith fix a date to hear the proof of the complainant and of the owner or occupant of the real property whereon the alleged nuisance is claimed to exist not less than 30 nor more than 40 days subsequent to the filing of the complaint." *Id.* Notice of the hearing must be made by publication in a newspaper having a general circulation in the county at least once a week for two weeks prior to the hearing. NRS 244.360(2). After the hearing, during which the board "receive[s] the proofs offered to establish or controvert the facts set forth in the complaint," the board "shall by resolution entered on its minutes determine whether or not a nuisance exists and, if one does exist, order the person or persons responsible for such nuisance to abate the same." NRS 244.360(3). If an order of abatement is made and not obeyed, the board "shall cause the abatement of the nuisance and make the cost of abatement a special assessment against the real property." *Id.*

There are two exceptions set forth in NRS 244.360 to the requirement that the board conduct a hearing on the complaint. Upon receipt from the county clerk that a nuisance complaint has been filed, the board of county commissioners may instead direct the district attorney to begin proceedings to abate the nuisance without conducting a hearing. NRS 244.360(5). Alternatively, the board may, by ordinance, empower the district attorney to file all necessary civil actions to enjoin any violation designated as a nuisance in the county ordinances, in which case a nuisance complaint presumably could be submitted directly to the district attorney in addition to the county clerk. NRS 244.360(6).

In conclusion, failure to place your written nuisance complaint on the agenda of a future Commission meeting does not constitute a violation of the Open Meeting Law, though it may implicate other provisions of Nevada law regarding county government. The Open Meeting Law does provide you, however, with the right to address the Commission during the public comment period and to raise the issues of your complaint and its handling.[1]

We hope this information is useful to you. Please do not hesitate to contact us if you have any questions or require additional information.

Cordially,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
RONDA L. MOORE
Deputy Attorney General
Civil Division
(775) 684-1228

RLM:sg

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[1] In OMLO 4/27/01, this office addressed the question as to whether the failure to place a topic on an agenda constitutes a violation of the Open Meeting Law. This OMLO reaffirms the conclusion reached in OMLO 4/27/01, that failure to agendize a topic does not constitute a violation of the Open Meeting Law.

STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

August 24, 2001

David Alison, District Attorney
Humboldt County District Attorney's Office
P.O. Box 909
Winnemucca, Nevada 89446

Re: Open Meeting Law Complaint
Hi-Desert Economic Development Authority
OMLO 2001-40/AG File No. 01-037

Dear Mr. Alison:

On July 20, 2001, this office received your written complaint regarding actions of the Hi-Desert Economic Development Authority (HEDA) that were possible violations of the Open Meeting Law. The allegations of the complaint were that HEDA had taken actions outside of a meeting open to the public and had also taken action at a public meeting on items that were outside the scope of the items listed on the agenda for that meeting.

This office has primary jurisdiction to investigate violations of the Open Meeting Law, pursuant to NRS 241.037. As part of those duties, this office investigated the complaint by reviewing the agenda for HEDA's June 27, 2001 meeting, a copy of HEDA's president's "Board Book" for Item 2.1 (financial/treasurer's report for March – June 2001) and Item 4.1 (accounts payable/accounts receivable) for the June 27, 2001 meeting agenda, and listening to a copy of the audio tape of the June 27, 2001 meeting. We also reviewed a copy of a letter from Dave McLean, HEDA President, to the Humboldt County Commissioners and Humboldt County District Attorney, dated July 18, 2001. Our investigation revealed the following.

I. AGENDA

The agenda posted showed the following items:

1.0 Roll Call
2.0 Financials/Treasurer's Report
    2.1 Approval March – June Financials
3.0 Discussion/Action

4.1 Accounts Payables/Accounts Receivables
4.2 Wells Fargo Operating account
4.0 Other Business Adjourn

II. OPEN MEETING LAW VIOLATIONS

This office finds that the Open Meeting Law was violated in three aspects. The Agenda did not contain clear and complete descriptions of the items to be discussed and on which action would be taken. Additionally, discussions and actions were taken on items outside the scope of the Agenda items listed. Finally, action was taken prior to the June 27, 2001 meeting and was not taken at a meeting open to the public and properly noticed.

A. Agenda Deficiencies

The first violation is that a few of the agenda item descriptions do not adhere to the clear and complete standard for agenda items as delineated in NRS 241.020(2)(c)(1). For example, the item 2.0 Financials/Treasurer's Report and the subitem 2.1 Approval March – June Financials, are both vague and overbroad. The audiotape and the Board Book reflect that over 150 payments were listed on these financials. The same problem is true of the item 4.1 Accounts Payables/Accounts Receivables and 4.2 Wells Fargo Operating Account items. By reading these agenda item descriptions, there is no way that a citizen reviewing this description could glean from the Agenda the variety and respective sums of expenditures to be approved and actions to be taken. Thus, the Agenda should have contained a listing of the items on the financials and the accounts payables and receivables, and more of a description of what was to be discussed and acted upon under Wells Fargo Operating account. *See* OMLO 99-03 (copy enclosed).

B. Action and Discussion Outside Scope of Agenda Items

The second violation was that the HEDA Board held discussions and took action on several items that went beyond what was listed on the Agenda. The items discussed outside the scope of the Agenda were:

1. Dissolution of HEDA and distribution of assets;
2. Announcement of hiring and payment of retainer to independent counsel;
3. Employment contract with Executive Director Terri Williams, a claim for breach of that contract by Terri Williams, and settlement of that claim; and
4. Humboldt County's authority to remove members, dissolve HEDA and obtain HEDA's assets.

Items outside the scope of the Agenda on which action was taken were:

1. Payment of retainer to independent counsel; and
2. Authorizing settlement agreement with Terri Williams and payment of $20,500 as

part of settlement.[1]

Additionally, you had alleged that the Board had also taken action to authorize the filing of an interpleader in District Court. Our review of the audiotape indicates that while this item was discussed, no action was taken.

C. Action Taken Outside Of An Open Public Meeting

Additionally, from the review of the audiotape, it appears that the HEDA Board also took action outside of an open public meeting to retain independent counsel, as the fact that such counsel was hired was announced at the June 27, 2001 meeting as having already been accomplished.

III. CONCLUSION

Enclosed with this letter is a letter to David McLean, president of HEDA. This letter advises Mr. McLean of this office's request that a meeting be scheduled to take curative action regarding these violations of the Open Meeting Law, and the action this office will take if that request is not timely met. If you feel that further clarification is necessary regarding how curative action should be effectuated, please feel free to contact this office.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
NORMAN J. AZEVEDO
Chief Deputy Attorney General
Civil Division
(775) 684-1222

NJA:jm

Enclosure

[1] The complaint stated that the amount was $22,500 as payment of the settlement, and so does Mr. McLean's letter of July 18, 2001. However, the audiotape and the listing of payments in the Board Book show an amount of $20,500.

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

August 28, 2001

Mr. Bingo G. Wesner
Wesner Ranch/Two Farmers Compost
280 Old Emigrant Road
Lovelock, NV 89419

Re: Open Meeting Law Complaint
Pershing County Board of Commissioners
OMLO 2001-41/AG file No. 01-035

Dear Mr. Wesner:

This letter is in response to your complaint against the Pershing County Board of Commissioners regarding an alleged violation of the Open Meeting Law, NRS Chapter 241. Your July 13, 2001 complaint alleges that during their meeting of July 5, 2001, the Pershing County Board of Commissioners refused to allow you enter into any dialog with the Commissioners regarding a complaint filed against your business.

This office has reviewed the agenda, the minutes, the audiotape of the meeting, and other documents submitted by you and the Pershing County District Attorney.

INTRODUCTION

The underlying contention between you and the Pershing County Board of Commissioners concerns a letter of complaint filed by Mark Lenz, Esq. on behalf of Shearer Ranch Development and Diamond S Ranch Estates against your compost business. Specifically, Mr. Lenz, on behalf of his clients, complained to the Pershing County Board of Commissioners that your compost business was in violation of Pershing County zoning code ordinances, in that, your compost business was within one-half mile of a residential dwelling. The letter of complaint requested that you be required to obtain a special land use permit. In response to this complaint, you hired an attorney and contested the allegations.

To resolve the dispute, the Pershing County District Attorney hired a surveyor to determine if any residential dwellings were within one-half mile of your compost business. The surveyor's report provided that no dwellings were within that distance.

On June 29, 2001, the District Attorney informed your attorney, by letter, that no special land use permit was required in the operation of your compost business. At that time, the Pershing County District Attorney considered the matter closed. At that time you did not consider the matter closed because you felt the survey was performed incorrectly and because you felt that finality was not achieved.

ANALYSIS

Your complaint alleges that you and Mr. Richard R. MacDougall requested an item to be placed on the July 5, 2001 agenda to discuss the complaint against the compost business and the actions of the District Attorney. Specific to the open meeting law, you allege that you were never allowed to enter into any dialog with the Pershing County Commissioners regarding Agenda Item number 19.

Specifically, the Agenda Item provides:

> 19. Richard MacDougall, Steve MacDougall, Bingo Wesner: Discussion and response regarding letter of complaint from Mark Lenz, Esq. on behalf of Shearer Ranch Development and Diamond S Ranch against Wesner/MacDougall compost business and other memo/letters regarding this issue. (July 5, 2001 Pershing County Board of Commissioners' Agenda).

Except during the public comment period required by NRS 241.020(2)(c)(3), the Open Meeting Law does not mandate that members of the public be allowed to speak during meetings.

Accordingly, the Pershing County Board of Commissioners was not required to give you or Mr. MacDougall the opportunity to speak during the agenda item. Yet, a review of the Commissioners meeting audiotape reveals that Mr. MacDougall was given an opportunity to speak. Indeed, the length of the discussion between Mr. MacDougall and the Commissioners lasted just over seven minutes.

It is noteworthy the Commissioners told Mr. MacDougall they understood the matter to have been resolved by the District Attorney. Further, the Commissioners tried several times to inform Mr. MacDougall the issues were legal in nature more properly discussed by their legal counsel, the District Attorney. Additionally, the Commissioners informed you that ethically the District Attorney could not discuss the matter with you personally because you were represented by an attorney. On the other hand, the audiotape reveals that Mr. MacDougall persisted in seeking a decision from the Commission regarding your property use and the Pershing County Code.

The provisions of NRS Chapter 241 never force a public body to take action on any

agenda topic. These provisions are merely designed to prohibit a public body from taking action on agenda topics if the public has failed to receive sufficient notice that on a particular date action may be taken by such body.

Your complaint does not allege insufficient notice of an agenda item. Rather, you complain of insufficient dialog with the Commissioners and seek, through Open Meeting Law review, to force the Commissioners to listen to your arguments and take action in rectifying their mistakes. As described above, the open meeting law does not require the Commissioners to let you speak on your agenda item. Further, the open meeting law is not designed to force the Commissioners into acting on an agenda item. Therefore, since the Commissioners were not required to let you speak, and since the Commissioners did not take action on the agenda item, no violation of the open meeting law occurred.

This analysis would not be complete without discussion regarding how Agenda Item number 19 came to be included in the July 5, 2001 Pershing County Board of Commissioner's Agenda. Specifically, the Chairman of the Pershing County Board of Commissioners provided that his job was to review the agenda before each meeting and he did not see Agenda Item number 19 on the draft of the July 5, 2001 agenda that he reviewed. Clearly, Agenda Item number 19 was placed on the Agenda by the administrative assistant Karen Wesner after the draft agenda had been reviewed.

Arguably, this is not a violation of the Pershing County Board of Commissioner's Code, because Pershing County does not have a guideline for scheduling agenda items (See, e.g. Washoe County Regional Transportation Commission). Indeed, in Pershing County, all a person has to do to place an item on the agenda is request the same. However, equity provides that if the Commissioners cannot act without noticing the public, the public cannot act without noticing the Commissioners. This is especially true in this case involving an ongoing legal dispute, parties represented by counsel and a prior resolution of the issue. Additionally, fair play suggests that a person should not be allowed to place an item on the agenda without notice to the other party and then complain when the other party will not take action on the item.

CONCLUSION

The Pershing County Board of Commissioners acted properly and in conformance with the Open Meeting Law by providing Mr. MacDougall with an opportunity to speak, and taking no action on Agenda Item number 19. This office finds no violation of the Open Meeting Law.

Based upon the foregoing, we will be closing our investigation on this matter. Thank you for providing our office with the opportunity to review your concerns.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By:_____
FREDERICK R. OLMSTEAD
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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

September 10, 2001

John E. Marvel, Esq.
Marvel & Kump, Ltd.
555 W. Silver Street, Suite 101
P.O. Box 2645
Elko, Nevada 89803

Re: Open Meeting Law Complaint
Lander County School Board
OMLO 2001-42/A.G. File No. 01-032

Dear Mr. Marvel:

This letter is in response to an Open Meeting Law complaint submitted by you on behalf of your clients, Jim and Val Anderson, against the Lander County School Board ("Board"). Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigating and prosecuting complaints alleging violations of the Nevada Open Meeting Law, chapter 241 of the Nevada Revised Statutes.

Mr. and Mrs. Anderson's complaint arises out of, and is in fact, a statement written by Joan Westover ("Westover"), a Board Member of the Lander County School Board. Essentially, Westover alleges that several meetings took place regarding the closure of the Austin Elementary School before the noticed closure hearing before the Board on June 12, 2001. Westover contends that the meetings took place on May 11, 2001 and June 1, 2001 between Lander County School Superintendent, E. Leon Hensley, Ed.D. ("Superintendent Hensley"), Principal Steve Larsgaard ("Principal Larsgaard"), Board Member Kristina Itza ("Itza"), and Westover and that the meetings were for the purpose of discussing the possible closure of the Austin Elementary School.

In addition, Westover's complaint alleges that Board Member Shawn Mariluch ("Mariluch") made an inappropriate comment at a public place on May 23, 2001, but that no discussions were held as a result of the statement.

Westover's complaint implies, but does not state, that these meetings represent possible serial communications. Serial communications or "walking quorums" are addressed in section 5.08 of the Open Meeting Law Manual published by the Attorney General's Office. Serial communications are essentially a series of non-quorum gatherings or "meetings." A quorum is defined under NRS 241.015(4) as a simple majority of the constitute membership of a public body or another proportion established by law. The Attorney General's Office has opined that while it may be possible to conduct serial gatherings or "meetings" of less than a quorum, "serial communications invite abuse to the Open Meeting Law if they are used to accumulate a secret consensus or vote of the members of a public body, or to setup what is sometimes referred to as a 'walking quorum.'" *Nevada Open Meeting Law*, Eighth Ed., § 5.08, p. 28.

The Attorney General's Office has also cautioned that "if a quorum is gathered by the use of serial communications, a violation of the Open Meeting Law may occur." Op. Nev. Att'y Gen. No. 2001-13 (June 1, 2001) citing *Del Papa v. Board of Regents*, 114 Nev. 338, 400, 956 P.2d 770, 778-779 (1998). If a non board member meets with two board members and then meets with one or more of the remaining board members, a quorum of the board may be deliberating or taking action on matters within the supervision, control, jurisdiction, or advisory power of the board outside of the public meeting and *may* be violating the Open Meeting Law. *Id*.

While some secret discussions of sensitive information *may* be permitted in non-quorum gatherings or "meetings," if serial communications are used to line up a walking quorum to take action, they *may* rise to a level of a "meeting" under NRS 241.015(2) and therefore violate the Open Meeting Law.[1] *Nevada Open Meeting Law*, Eighth Ed., § 5.08, p. 28; OMLO 98-07 (October 19, 1998). The term "'action' includes not only taking a vote, but also making a decision, or making a promise or commitment by a majority of public body members present during a meeting." *Nevada Open Meeting Law*, Eighth Ed., § 5.08, p. 28. However, "'the constraints of the Open Meeting Law apply only where a quorum of a public body, in its official

[1] AB 225, effective October 1, 2001, amends NRS 241.015 by further defining the definition of a meeting to include serial communications as follows:

> 2. Meeting: (a) Except as otherwise provided in paragraph (b), means: . . . (2) Any series of gatherings of members of a public body at which: (I) Less than a quorum is present at any individual gathering; (II) The members of the public body attending one or more of the gatherings collectively constitute a quorum; and (III) the series of gatherings was held with the specific intent to avoid the provision of this chapter.

capacity as a body, deliberates toward a decision or makes a decision.'" *Id.* citing *Del Papa v. Board of Regents*, 114 Nev. 388, 400, 956 P.2d 770, 778-779 (1998).

This office contacted the Lander County School District seeking documents and information relating to the meetings. By way of letter dated July 2, 2001, Superintendent Hensley's reply acknowledged that the two meetings took place. However, Superintendent Hensley explained that the meetings were administrative meetings for the purpose of determining the issues regarding the possible closure of the Austin Elementary School. Superintendent Hensley further explained that he invited Board Members Westover and Itza to participate in the meetings so that he could gain insight to opposite viewpoints in developing a report for the entire Board.

In addition, this office conducted an investigation regarding the "meetings" or discussions. The results of the investigation determined that the discussions were not mandatory and were set for the purpose of assuring that the report to the Board was accurate, that the report covered both sides of the issue, and that options could be offered to the Board. The investigation also determined that there was no evidence that polling took place during the discussions, and no evidence that voting was discussed. Further, there was no evidence that decisions were made or that promises or commitments by a majority of the public body members present were made. In addition, it is clear that a quorum of Board members were not present during the discussions.

Moreover, the investigation determined that no further discussions were held with other members of the Board in an effort to accumulate a secret consensus or vote of the Board. In addition, the investigation revealed that the non-present Board members were *not* contacted regarding the material or results of the discussions. Westover contacted Board Members Ray William and Denise Fortune by telephone for the purpose of asking them if they were invited to the meetings; however she did *not* poll them or present continuum of the discussions.

Based on the results of the investigation, it appears that no action was taken during the discussions between Westover, Itza, Superintendent Hensley, and Principal Larsgaard. There is no evidence that Westover or Itza discussed the content or results of their discussions with Superintendent Hensley and Principal Larsgaard with other Board members. Therefore, it appears that the Board did not collectively vote on the issue of the school closure, make decisions regarding the issue of the school closure, or make promises or commitments regarding the school closure in a gathering or "meeting" before the noticed closure hearing on June 12, 2001. It further appears there was no quorum of the Board, nor were Board members deliberating or taking action on matters within the supervision, control, jurisdiction, or advisory power of the Board. Accordingly, a serial quorum does not appear to have been established, and, consequently, there does not appear to have been a violation of the Open Meeting Law in this matter.

Moreover, the incidental comment by Mariluch at a public function amounted to nothing more than a comment made by a Board member at a public place without a response and no further discussion followed.

Accordingly, it is the conclusion of this office that there were no violations of the Open Meeting Law, NRS chapter 241, in this matter.

Thank you for bringing this matter to our attention.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
MARK J. KRUEGER
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FRANKIE SUE DEL PAPA
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THOMAS M. PATTON
First Assistant Attorney General

September 12, 2001

Sam Dehne
297 Smithridge
Reno, Nevada 89502

Re: *Open Meeting Law Complaint*
City of Reno/Washoe County
OMLO 2001-43/AG File No. 01-028

Dear Mr. Dehne:

This is in response to the Open Meeting Law complaint you filed with this office concerning the April 24, 2001 joint meeting of the Reno City Council and the Washoe County Commission (the "meeting"). Specifically, you have complained that you were denied the right to provide public comment when Agenda item 8 was on the table at the meeting.

The Office of the Attorney General has primary jurisdiction to enforce the provisions and investigate possible violations of Nevada's Open Meeting Law, NRS 241.010, *et seq.* Our investigation of your complaint consisted of a review of the videotape of the meeting, the materials submitted to us by the Reno City Attorney's office and interviews with Reno Mayor Jeff Griffin and Don Cook, City Clerk.

Our investigation has determined that Mayor Griffin violated Nevada's Open Meeting Law by denying your right to speak during the public comment portion related to Agenda item 8, and that this violation was not done with willful intent. The following is a discussion of our determination.

FACTS

On April 24, 2001, the Reno City Council and the Washoe County Commission met at Reno City Hall to discuss nine items including a report of the Justice Facilities Working Group, the potential use of the Pioneer site, citing options for the Reno Municipal Court and an interlocal agreement for the location of the Reno Municipal Court.

Your complaint alleges that you filled out a "Request to Speak Form," Your complaint continues:

> 4. I turned this Form into the city clerk just as Agenda item 8 was being introduced to the floor.
> 5. The city clerk placed my official Form in front of Jeff Griffin.
> 6. Griffin looked at my official Form and let it lay in front of him for approximately 15 minutes at the meeting; ignoring it.
> 7. I finally was forced to interject from the chambers that Griffin was breaking the law and was wrong to ignore official Requests to Speak.
> 8. Griffin lied and said that I had turned in my Request to Speak Form after a motion had been made, and that I was just too late.

A public comment section, item 4, was included on the agenda for this meeting. The public comment section contained the following language: "*4. Public Comments (three minute time limit per person and limited to items not listed on the agenda). Comments to be addressed to the Reno City Council and the Washoe County Commission as a whole." Thus, item 4 limited public comment to non-agenda items.

Reno City Council Rules and Regulations[1] regarding public comment provides:

> During the proper time on the agenda, citizens attending a regular meeting may address the Council on any matter concerning the City's business, or any matter over which the Council has control. Comments relating to a particular agenda item must be made when that item is heard by the Council. Other petitions, remonstrance, communications, comments or suggestions from citizens which are not related to an item included in the agenda elsewhere shall be heard by the Council under Public Comment.

You claim you submitted a blue public comment request form to the city clerk just as Agenda item 8 was being introduced on the floor. The videotape reflects that a motion had been resolved concerning Agenda items 6 and 7. Following this, a document was handed to the Mayor before Commissioner Bond made a motion. It is unclear from the videotape whether the document handed the Mayor was your Request to Speak Form. Later, Commissioner Sferrazza made a motion to continue the meeting. At this point, you called attention to your request to speak and addressed the meeting, seeking to voice your public comment. The Mayor refused your request based upon his decision that a motion was pending and that no public comment was appropriate.

[1] For the purposes of this analysis, this office recognizes that the Reno City Council Rules and Regulations applied to this joint meeting.

Our investigation of the event concludes that the Mayor denied you the right to speak during consideration of item 8 of the agenda. The Mayor admitted to our investigator that he erred by denying your request to provide public comment on this agenda topic, but that his actions were not intentional and that he had no motive not to call upon you. To his recollection he claims that he either did not see the request or perhaps thought it was for a previous request to comment. It is unclear from the videotape as to whether Mayor Griffin was aware of the Request to Speak Form, or aware that the form originated from you. There is no evidence that he intentionally delayed the public comment section of Agenda item 8.

Don Cook, Reno City Clerk, did not clearly recall the events of the April 24, 2001 meeting, but indicated that he typically hands the requests to the Mayor in a timely fashion. In Mr. Cook's opinion, the Mayor made a mistake and that it was not willful as the Mayor had historically always called on Mr. Dehne. Mr. Cook also stated that the Mayor had previous requests from Mr. Dehne and could have thought the request was on a resolved issue.

No action on the interlocal agreement was taken at this meeting. The matter was continued until a later meeting.

ANALYSIS

The Open Meeting Law was enacted by the Legislature for the following purpose: "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010.

The right to public comment is addressed in the Nevada Open Meeting Law Manual, Eighth Edition, 2000, section 8.04. The Open Meeting Law requires that persons be allowed to speak during a public comment section of the meeting. The Open Meeting Law requires public bodies to provide for a public comment section during the meeting. NRS 241.020(2)(c)(3). While the Open Meeting Law does not require that public comment be received outside the public comment section, the City Council has adopted a rule that allows public comment on each agenda. As in this case, the public comment was bifurcated; public comment was provided in item 4 for non-agendized items while public comment on agendized items was allowed during consideration of every item. This office finds that you were denied the right to provide public comment during consideration of Agenda item 8 in violation of the Open Meeting Law. We further find no evidence that Mayor Griffin acted with willful intent when he denied your request to speak.

CONCLUSION

Based upon a review of the videotape of the meeting, statements by the Reno City Attorney's Office and the statements of Mayor Griffin and Don Cook, Reno City Clerk, this office concludes that Mayor Griffin violated the Open Meeting Law by failing to allow you to speak at the time Agenda item 8 was being considered. The record is unclear whether the Mayor

was aware of the Request to Speak Form or whether the document handed the Mayor by Don Cook was your Request to Speak Form. When Mr. Griffin denied your comments, he based his decision upon the Reno City Council Rule that no public comment is allowed once a motion is pending. Therefore, there is no evidence that the Mayor's error was a deliberate or willful attempt to specifically deny your request to comment for any reason other than a perceived procedural duty. Nevertheless, this does not excuse Mr. Griffin's handling of the meeting. He has a duty to ascertain whether you properly followed the protocol of timely filing a request with the city clerk. He should not have abridged your right without properly reviewing the subject with his city clerk.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
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Cc: Randall K. Edwards
Chief Deputy, Civil Division

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

September 18, 2001

Ms. Judy Kroshus
1450 Dixie Drive
Fallon, Nevada 89406

Re: *Open Meeting Law Complaint*
Churchill County School Board of Trustees
(Gateways to Success Charter School Board of Directors)
OMLO 2001-44/AG File No. 01-036

Dear Ms. Kroshus:

You have asked this office to review a closed meeting conducted by the Board of Directors for the Gateways to Success Charter School (Board) on June 18, 2001, for possible Open Meeting Law violations. You have submitted two letters of complaint, one dated July 17, 2001, and the other August 13, 2001. The substance of your complaint is that you and others were discussed in closed session without notice pursuant to NRS 241.033. Your position with the school on June 18, 2001, was as the administrator of the school, and you reported to the Board. The June 18, 2001, agenda had an item to consider renewal of your contract and an item for the Board to go into closed session. The Board Chairperson has provided this office with the June 18, 2001, agenda, minutes, and a copy of the tape recording for the closed session.

This office has statutory authority for enforcing compliance and preventing violations of the provisions of the Open Meeting Law. NRS 241.037.

Notice of Closed Session Pursuant to NRS 241.033 to Discuss Character, Alleged Misconduct, Competence, or Health

Your complaint states you made three written requests for a tape recording of the June 18, 2001, closed personnel session for which you were noticed pursuant to NRS 241.033. At the time this office reviewed your complaint, following its submission on July 17, 2001, you

still had not received the tape recording. Upon speaking with the Board Chairperson, she acknowledged that indeed you were the subject of the closed session and also that you had remained in the closed session for the entire time the Board met. Another personnel matter (a grievance) that was to be heard by the Board during the closed session was not heard by the Board and the grievant was not allowed to appear before the Board, so essentially the entire closed session concerned you. NRS 241.033(3).

Under NRS 241.035(2) and (5) tapes from a closed session should have been provided to you no later than 30 days following adjournment of the meeting. A subsequent letter from you acknowledges that you have now received a complete tape recording from that closed session, although it was delivered to you following the 30-day period required in the statute. The Board's delay in providing you with a copy of the tape recording is in violation of the statutory requirements. The Board Chairperson has acknowledged that she attempted to provide you with an edited tape before the expiration of the 30 days, but she simply misunderstood the requirements of the statute to provide a complete record. The Board will be warned that NRS 241.033(3) requires it to provide a copy of any record of a meeting to the person whose character, alleged misconduct, professional competence, or health is discussed therein and who requests a copy.

The minutes for the June 18, 2001, meeting show that when the item for the renewal of your contract came before the Board, a member made a motion to table the matter until after the closed session. Once in the closed session, there was some discussion between you and the Chairperson and other members of the Board concerning the fact that you had received only four days' notice. At that time the Board knew or should have known that the notice to you was defective and no session should have occurred. NRS 241.033. The statute clearly prohibits a meeting to discuss the character, alleged misconduct, or competence of a person unless it has given five working days' notice of the meeting. The discussion at the start of the closed meeting does not indicate that you waived your statutory right to notice nor is the fact that you stayed in the meeting for the entire time dispositive of implied waiver or consent absent something more that would indicate your intention. Our review of the tape recording does not show that you were asked to waive the notice deficiency nor is there any other indication from other sources provided by the Board that you impliedly waived the right. Absent some indication of waiver, we conclude that none has occurred and the closed session should not have occurred.

Because the Board took no action on your contract following the closed session, and because you were present for the entire session, this office will only warn the Board that its failure to properly notice you is a serious matter that would warrant stronger sanctions except for the fact that no action was taken on the agenda item for renewal of your contract following the closed session. Later, in open session, the Board did vote to table the matter pending a determination of the development of a policy.

Your July 17, 2001, complaint letter states that you received another notice for a closed

session to be held on July 9, 2001. Our review of that notice and the agenda shows that this notice was timely and meets the requirements of the statute. Your complaint seems to be that the Board did not do an evaluation and contract proposal as a result of the June 18, 2001, meeting. Whether the Board did or did not follow through with such an evaluation and contract proposal is beyond the authority of this office under the Open Meeting Law. The legislative intent behind the Open Meeting Law is to insure that public bodies conducting the people's business deliberate and take their actions openly. Our review of the agendas and minutes of the July 9, 2001, and the July 16, 2001, meetings of the Board does not disclose any irregularity in the conduct of its business subject to the Open Meeting Law. Neither your July 17, 2001, letter nor your subsequent letter of August 13, 2001, reveals any violation of the Open Meeting Law with regard to these two meetings.

Other Allegations of Open Meeting Law Violations

Your letter of August 13, 2001, contains specific allegations of other violations of the Open Meeting Law from the June 18, 2001, meeting of the Board. Your alleged violations were provided to the Chairperson for the Board for response, and we have considered the Chairperson's written response to each item of your complaint.

These allegations are that Chairperson Vicki Jones and other Board members impermissibly discussed persons in the closed session without the required notice to them. You also allege that Ms. Rene Hill, a former teacher at Gateways School, was there to provide evidence as to your character during the closed session. After review of the tape recording, it is clear that the agenda does not adequately disclose that more than one person was scheduled to appear in the closed session. Ms. Hill, who had submitted a grievance regarding her termination which was also scheduled to be heard in the closed session, in addition to your contract item, was not heard nor was she allowed in the closed session to address the Board. The Board determined that it needed its attorney present to assist when hearing a grievance. The nature of Ms. Hill's grievance, termination of employment with Gateways School, is apparent in the tape recording, but whether she was there to provide evidence of your character does not appear in the record, notwithstanding your comment to the Board that you objected to her testimony before the Board concerning your character. Ms. Hill received notice that *her* character, professional competence, or alleged misconduct would be considered by the Board and Proof of Service to that effect is included in the documents provided to us by the Board.

The Board's decision not to hear the grievance, however, does not relieve it of a duty to ensure that the agenda adequately discloses the subject matter of the closed session. This office recommends that agenda items describing closed sessions, even where confidentiality is desired, include a general description of the subject matter, such as, "an employee," "an applicant," or some other description likely to apprise the public of the nature of the session and the number of issues before it. The subject matter of the agenda item for the closed session on June 18, 2001, is described as a discussion of "[n]oticed [p]ersonnel in accordance with NRS 241.030." This

description of the subject matter of the meeting does not indicate that more than one matter was scheduled to be heard nor does it indicate to the public that the character, competence, or alleged misconduct of an employee was to be discussed. While confidentiality is allowable in agendizing closed sessions, this office recommends that a general description of the persons to be discussed should be included.

Your other allegation that Ms. Jones impermissibly discussed persons in the closed session without noticing them pursuant to statute are without support in the record. You have alleged a student was discussed without notice to him. There was a discussion about a credit hour awarded to a student, which was not authorized by Ms. Jones, the student's instructor, because she determined he did not achieve a passing grade. The tape recording discloses that you left the closed session to retrieve the relevant record for this student. After listening to the tape, it is clear that the discussion of this student's grade took place in the context of a question about your administration of the school, not as a discussion of the character or competence or alleged misconduct of the student. The student's name was not audible on the tape even if it was repeated to the Board. This discussion of the student record was not a violation of the Open Meeting Law requirement for notice of persons under NRS 241.033.

Your remaining two alleged violations by Ms. Jones for failure to notice individuals under NRS 241.033 are also without merit. Their names may have been mentioned in the meeting, but there was no discussion of their character, competence, alleged misconduct, or physical or mental health.

Violations of Notice Provisions by Other Board Members

You also allege that Norman Frey, a Board member, violated the notice provisions of NRS 241.033 by discussing an 18-year-old student. From the tape it appears that Mr. Frey contributed to the discussion of a student, Sean Ridenour (after his father, a Board member, began the discussion), because Mr. Frey believed that your treatment of Sean was an example of bias and/or misconduct on your part toward the student. Once again the context of the remarks about the student did not center on the student's character, alleged misconduct, competence, or physical or mental health, but instead, Mr. Frey's point was that your reports about the boy's performance in a job at a nursery displayed your alleged bias toward this student. This kind of discussion is generally related to your character, alleged misconduct, and professional competence. Mr. Frey's mention of the student's job performance was not a violation of the notice provisions of NRS 241.033.

Your last charge of violation of the notice provisions of NRS 241.033 bears closer scrutiny. You have alleged that there was a "negative discussion" of the character and conduct of Leroy Marx, a teacher, at Gateways School. Review of Mr. Frey's remarks on the tape recording shows that he discussed Mr. Marx and used him as an example of your questionable hiring practices. Mr. Frey said if the position was advertised as a half time special education

teacher and half time auto repair teacher, then that would be structuring the job for a specific person which was objectionable to him. Thus far these remarks were still centered on your competence and alleged misconduct. However, Mr. Frey went on to remark that hiring Mr. Marx "with his past record and putting him in a school with young girls . . . [made him] ashamed as a Board member that he allowed that to continue." These last remarks about Mr. Marx seem to infringe on comments about Mr. Marx' character and/or competence or other personal traits as opposed to focusing on your questionable hiring practices. The remarks insinuate that Mr. Marx' past record, which is not identified on the recording, is incompatible with teaching in a school with young girls present. Although Mr. Frey continued to make remarks related to your administration of the school and professional competence, the offhand remarks about Mr. Marx appear to violate the notice provisions of NRS 241.033.

Other Allegations

Finally, your complaint alleges that Ms. Melanie Crossley, a deputy attorney general representing the Department of Education, gave Ms. Jones advice about how to fire you. The tape recording discloses that Ms. Jones explained to the Board that another administrator was fired and, as a result of the firing, she learned from Ms. Crossley that the Board ultimately has the final authority to hire and fire school employees. Your interpretation of these remarks is that Ms. Jones was seeking advice from Ms. Crossley about firing you; however, there is nothing said on the recording that supports your view. From the discussion on the tape recording, it does not appear that Ms. Crossley gave legal advice, nor was she taking sides in a personnel dispute.

Conclusion

The June 18, 2001, closed session for the Board should not have taken place since your required notice under NRS 241.033 was not timely and the tape recording of the session does not indicate that you waived the notice requirements. The Chairperson acknowledged on the tape that the notice sent to you was one day shy of the required five working days. Because there was no action taken following the closed meeting on the agendized item for renewal of your contract as administrator, and because the Chairperson has acknowledged the faulty service on you, this office will only warn the Board about the serious nature of defective service. NRS 241.033 clearly requires that a public body shall not hold a meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of any person unless it has given five working days' written notice.

The agenda item for the closed session for June 18, 2001, inadequately describes the nature of the session. The fact that two items were to be considered by the Board in the closed session is not evident by looking at the agenda. Even where confidentiality is desired, this office recommends that a general description of each item to be considered in the session be included in the item. This insures that anyone viewing the item will be on notice of the general nature of the session. The sample agenda published in the Nevada Open Meeting Law Manual shows a

sample item announcing a closed session.

Finally, Mr. Frey's offhand comments about Mr. Marx went beyond his discussion of your questionable hiring practices. His comments touched upon Mr. Marx' character and fitness to be a teacher in the school. This is a violation of the notice provisions of NRS 241.033.

After speaking with the Chairperson regarding these violations, this office has received assurances that in the future the Board will comply with the notice requirements of NRS 241.033 and the Chairperson understands the law's requirements that closed sessions be strictly controlled. The subject matter of the closed session must adhere to the agenda and not stray. It is the Chairperson's duty to insure that only the subject matter of the closed session is discussed. Stray commentary must be interrupted so that the public body can focus upon the issue at hand.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
GEORGE H. TAYLOR
Deputy Attorney General
Civil Division
(775) 684-1230

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

September 18, 2001

Mr. Leroy Marx
1450 Dixie Drive
Fallon, Nevada 89406

Re: *Open Meeting Law Complaint*
Gateways to Success Charter School
OMLO 2001-45/*AG File No. 01-042*

Dear Mr. Marx:

You have filed a complaint of an open meeting law violation alleging that the Gateways to Success Charter School Board (Board) improperly discussed you in an open meeting on August 7, 2001, without notice to you. You enclosed a copy of an article which appeared in the *Lahontan Valley News* following the meeting in which your name appeared in connection with the Board's vote to pay a voucher for automotive goods purchased by you, as an employee of the school, but charged to the Gateways School.

The Board is a public body within the purview of the Open Meeting Law, NRS 386.549, thus this office has jurisdiction to require compliance with or prevent violations of the Open Meeting Law found at NRS 241.010 through 241.040.

We have reviewed the Open Meeting Law to determine when a public body is required to give notice to persons to be discussed. NRS 241.033 prohibits a public body from holding a meeting to consider the character, alleged misconduct, professional competence, or health of a person unless that person has been given five working days' written notice of the time and place of the meeting. We could find no other statute which requires notice to particular persons. NRS 241.020 merely requires that meetings of public bodies be open and public. An agenda with a clear and complete statement of the topics to be considered must be posted at least three working days before the meeting.

We referred your complaint to the Board Chairwoman for comment and rebuttal. We also asked for the complete set of tape recordings for the August 7, 2001, meeting in order to review them in light of your allegations of non-notice. The Board Chairwoman sent me tape recordings of the meeting, along with the posted agenda and the minutes.

After review of the agenda, the minutes, and the tape recordings of the meeting, we do not find a violation of any statutory duty owed by the Board to you. Although the meeting was open, there was no requirement to notice you since your character, competence, health, or alleged misconduct was not at issue. You were not mentioned in the discussion of the agenda item for the payment of a voucher, based on two separate charges, for automotive paints and related materials. The Chairwoman informed the Board that the sole purpose for the agenda item was to get their authority to pay the voucher to the vendor for purchases by an employee of automotive goods for personal use. It was disclosed that the automotive goods were charged to the student purchase account and that it had been determined that the goods were not in the school's inventory.

The Board Chairwoman said in her letter to this office that the reporter for the local paper asked for the billing after the meeting but that the billing was not presented to the Board during the meeting.

Conclusion

We do not find a violation of any statutory duty by the public body to notify you. You were not discussed at all during the meeting, thus there was no violation of NRS 241.033 or any other provision of the Open Meeting Law.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
GEORGE H. TAYLOR
Deputy Attorney General
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October 11, 2001

Terrance P. Marren, City Attorney
City of Mesquite
10 East Mesquite Boulevard
Mesquite, Nevada 89027

Re: Open Meeting Law Opinion
Mesquite City Council
OMLO 2001-46/AG File No. 01-045

Dear Mr. Marren:

On August 27, 2001, you sent to this office a letter requesting an opinion regarding Nevada's Open Meeting Law. Specifically, you have asked the opinion of this office regarding the following questions:

QUESTIONS

1. Are the procedural rules known as the "STANDING RULES OF THE COUNCIL" adopted by the City of Mesquite for operation of its meetings consistent with the notice provisions of the Nevada Open Meeting Law?

2. To what extent may a mayor and less than a quorum of city council members (or less than a quorum or city council members without the mayor) communicate and discuss items of mutual interest which may or may not be the subject of a future City Council action?

ANALYSIS

QUESTION NUMBER 1

Your first question involves the STANDING RULES OF THE COUNCIL which were adopted by the City of Mesquite as procedural rules of operation for its meetings. You have asked whether these procedural rules are consistent with the notice provisions of the Nevada Open Meeting Law. The RULES themselves address and explain the mandates of the Open

Meeting Law and offer guidance to the Council and those citizens wishing to participate in Council meetings by providing specific procedures, including reasonable time limitations for presentations before the Council, guidelines for anyone wishing to speak in front of the Council, and a method for conducting orderly public meetings. In general, the RULES are a proper guide for conducting Council meetings. However, any rule that limits or restricts public comment in any manner must be clearly articulated on the agenda. See OMLO 99-08 (July 8, 1999). Thus, in an effort to comply with the Open Meeting Law, this office recommends that the STANDING RULES OF THE COUNCIL be posted and provided as part of each agenda pursuant to the notice requirements set forth in NRS 241.020.[1]

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[1] **NRS 241.020 Meetings to be open and public; notice of meetings; copy of materials; exceptions**

1. Except as otherwise provided by specific statute, all meetings of public bodies must be open and public, and all persons must be permitted to attend any meeting of these bodies. Public officers and employees responsible for these meetings shall make reasonable efforts to assist and accommodate physically handicapped persons desiring to attend.

2. Except in an emergency, written notice of all meetings must be given at least 3 working days before the meeting. The notice must include:

(a) The time, place and location of the meeting.

(b) A list of the locations where the notice has been posted.

(c) An agenda consisting of:

(1) A clear and complete statement of the topics scheduled to be considered during the meeting.

(2) A list describing the items on which action may be taken and clearly denoting that action may be taken on those items.

(3) A period devoted to comments by the general public, if any, and discussion of those comments. No action may be taken upon a matter raised under this item of the agenda until the matter itself has been specifically included on an agenda as an item upon which action may be taken pursuant to subparagraph (2).

3. Minimum public notice is:

(a) Posting a copy of the notice at the principal office of the public body, or if there is no principal office, at the building in which the meeting is to be held, and at not less than three other separate, prominent places within the jurisdiction of the public body not later than 9 a.m. of the third working day before the meeting; and

(b) Mailing a copy of the notice to any person who has requested notice of the meetings of the body in the same manner in which notice is required to be mailed to a member of the body. A request for notice lapses 6 months after it is made. The public body shall inform the requester of this fact by enclosure with or notation upon the first notice sent. The notice must be delivered to the postal service used by the body not later than 9 a.m. of the third working day before the meeting.

4. Upon any request, a public body shall provide, at no charge, at least one copy of:

(a) An agenda for a public meeting;

(b) A proposed ordinance or regulation which will be discussed at the public meeting; and

(c) Any other supporting material provided to the members of the body for an item on the agenda, except materials:

(1) Submitted to the public body pursuant to a nondisclosure or confidentiality agreement;

(2) Pertaining to the closed portion of such a meeting of the public body; or

(3) Declared confidential by law.

5. As used in this section, "emergency" means an unforeseen circumstance which requires immediate action and includes, but is not limited to:

(a) Disasters caused by fire, flood, earthquake or other natural causes; or

(b) Any impairment of the health and safety of the public.

Moreover, the essence of your question relates to STANDING RULE 16 which states: "If the presiding officer fails to act, any member of the city council may move to require enforcement of the rules, and the affirmative vote of a majority of the city council shall require the presiding officer to act." You have asked whether this Rule raises any notice requirement issues since action would occur without being noticed for action on the agenda upon which it arose. The Open Meeting Law requires a public body to provide the public with written notice of its meetings. NRS 241.020(2). The notice itself must include an agenda consisting of, in relevant part, a "list describing the items on which action may be taken and clearly denoting that action may be taken on those items." NRS 241.020(2)(c)(2). The agenda must also provide for a public comment period during which no action may be taken on any matters raised under that section of the agenda. NRS 241.020(2)(c)(3).

In view of NRS 241.020(2), STANDING RULE 16 becomes problematic in that action may not be taken unless that action is properly noticed on the agenda. And, action may not be taken on items delineated as discussion-only or during public comment. NRS 241.010(2)(c). Accordingly, this office suggests that STANDING RULE 16 be eliminated in order to avoid the potential for conflicts with the Open Meeting Law's notice requirements. STANDING RULE 16 appears to be unnecessary in that the Council has previously adopted its rules of procedure and the Mayor or Presiding Officer is already given the responsibility of enforcing those rules. Thus, the rules are in effect and it is the role of the Mayor or Presiding Officer to abide by and enforce those rules. RULE 16 is superfluous in that it seeks to require, by a motion and vote of the Council, that which is already an adopted matter of proper procedure.

You have suggested in your letter that STANDING RULE 16 is a procedural rule and is not required to be noticed in advance in order to be implemented. However, there is no authorization in Nevada law or exception in the Open Meeting Law for action taken to enforce procedural rules. Procedural matters are generally considered ancillary to substantive matters that have been properly noticed for discussion and action. If a procedural matter arose in connection with a discussion-only matter or during public comment, no action could be taken, including action to enforce procedural rules. Accordingly, pursuant to NRS 241.020, the action, if taken, must be properly noticed on the agenda of each meeting as a separate agenda item.

Thus, it is the opinion of this office that STANDING RULE 16 may conflict with the notice requirements of Nevada's Open Meeting Law in certain situations. However, if the Council wishes to retain RULE 16, it must comply with the Open Meeting Law's notice provisions and all items during which this Rule may be invoked must be designated as an action item on the public notice or somehow included on the agenda to ensure that the public is aware

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(Added to NRS by 1960, 25; A 1977, 1099, 1109; 1979, 97; 1989, 570; 1991, 785; 1993, 1356, 2636; 1995, 562, 1608)

that action may, in fact, be taken to enforce the STANDING RULES OF THE COUNCIL. QUESTION NUMBER 2

Your next inquiry relates to Nevada's newly adopted legislation involving "serial discussions" which becomes effective October 1, 2001. Specifically, you ask whether the Mayor and City Council members or City Council members without the Mayor may meet with less than a quorum of the City Council (three members) to discuss items of mutual interest or common concern.

At the time it adopted Nevada's Open Meeting Law, the Legislature stated that "[i]n enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010. Thus, the Open Meeting Law requires that, except as otherwise provided by specific statute, all meetings of public bodies must be open and public. NRS 241.020(1). A "meeting" is defined as a "gathering of members of a public body at which a quorum is present to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction or advisory power." NRS 241.015(2). The Legislature has added, in pertinent part, to the definition of "meeting" the following language:

> (2) Any series of gatherings of members of a public body at which:
>
> (I) Less than a quorum is present at any individual gathering;
> (II) The members of the public body attending one or more of the gatherings collectively constitute a quorum; and
> (III) The series of gatherings was held with the specific intent to avoid the provisions of this chapter.

NRS 241.015(2). Thus, when members of a public body meet with each other or other people, one at a time or in small groups of less than a quorum, and conduct a series of such nonquorum meetings, the "serial communications" issue arises. Serial communications could invite abuse to the Open Meeting Law, if they are used to accumulate a secret consensus or vote of the members of a public body. A violation of the Open Meeting Law will occur if those serial communications take place for the specific purpose of avoiding the "open and public" mandate set forth in NRS chapter 241.

In addition, another primary objective "of the Open Meeting Law is to allow members of the public to make their views known to their representatives on issues of general importance to the community." Nevada Open Meeting Law Manual § 6.01 (8th ed. 2000). This objective may only be met through open meetings which are properly noticed so that members of the public may attend and participate.

Accordingly, while the Mayor and City Council members may meet outside of an open meeting in less than a quorum, we must caution you that if a quorum is gathered by the use of serial communications, a violation of the Open Meeting Law may occur. NRS 241.015 and 241.020; *see also Del Papa v. Board of Regents*, 114 Nev. 388, 400, 956 P.2d 770, 778-779 (1998). If the Mayor meets with two City Council members or if two City Council members meet without the Mayor and then any one of them proceeds to meet with one or more of the remaining City Council members, a quorum of the City Council may be deliberating or taking action on matters within the supervision, control, jurisdiction, or advisory power of the City Council outside of a public meeting. *Id.* Such meetings would be in violation of the Open Meeting Law if the series of gatherings was found to be with the specific intent to avoid the requirements of open and public meetings set forth in NRS chapter 241. Thus, this office advises against such communications among the Mayor and the City Council members regarding issues of common concern which should, instead, take place at properly noticed public meetings.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
DARLENE BARRIER
Deputy Attorney General
Civil Division
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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

October 23, 2001

Brent Hutchings, City Clerk
City of Ely
P.O. Box 299
Ely, Nevada 89301

Re: ***Open Meeting Law Complaint***
Ely Municipal Utilities Board
OMLO 2001-47/AG File No. 01-034

Dear Mr. Hutchings:

On June 28, 2001, Margaret G. Nelson filed an Open Meeting Law complaint with our office, concerning the June 26, 2001 meeting of the Landfill Rate Committee, an ad hoc committee of the Ely Municipal Utilities Board (Utilities Board). Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigating and prosecuting complaints alleging violation of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes.

FACTS

Ms. Nelson's complaint alleged that the Landfill Rate Committee violated the Open Meeting Law because it failed to properly notice an agenda and minutes of this meeting have not been kept. Further, Ms. Nelson alleged that the Utilities Board has made the decision to recommend a rate increase in landfill rates with no public input or comment. On July 18, 2001, you also provided this office with a response letter to Ms. Nelson's complaint.

Our office conducted an investigation to determine whether or not the Landfill Rate Committee and/or the Utilities Board violated the Open Meeting Law, NRS Chapter 241.

ANALYSIS AND CONCLUSION

The Open Meeting Law was enacted by the Legislature for the following purpose: "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010. Further, NRS 241.020(1) states, "Except as otherwise provided by specific statute, all meetings of a public bodies must be open and public, and all persons must be permitted to attend any meeting of these bodies." Moreover, NRS 241.020(2)(c) provides that a notice of hearing must include an agenda consisting of: "(1) a clear and complete statement of the topics scheduled to be considered during the meeting . . ." I have enclosed a copy of that statute for you review.

The right of citizens to attend open public meetings is greatly diminished if they are not provided with an opportunity to know when the meeting will take place and what subject or subjects will be considered. One of the primary objectives of the Open Meeting Law is to allow members of the public to make their views known to their representatives on issues of general importance to the community. This type of communication would be impossible if the public were denied the opportunity to appear at the meeting through lack of knowledge that a meeting would be held. Thus, a public body's failure to adhere to notice and agenda requirements will result in an Open Meeting Law violation. *Thurston v. Phoenix*, 757 P.2d 619 (Ariz. Ct. App. 1988). Further, if a matter is acted upon which was not clearly denoted on the agenda, the action may be voided under NRS 241.036.

In Nevada, a public body is an "administrative, advisory, executive or legislative body of the state or a local government," which means that the body must (1) owe its existence to and have some relationship with a state or local government, (2) be organized to act in administrative, advisory, executive or legislative capacity, and (3) must perform a government function. In addition, a public body expends or disburses or is supported in whole or in part by tax revenue or which *advises or makes recommendations to any entity*, which expends or disburses or is supported in whole or in part by tax revenue.

In this case, the first question is whether the Landfill Rate Committee, an advisory committee to the Utilities Board, is a public body subject to the Open Meeting Law. NRS 241.015(3) specifically includes within the definition of a public body an "… *advisory* … body of the state or a local government which expends or disburses or is supported in whole or in part by tax revenue or *which advises or makes recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue* . . . ." (Emphasis added.) *See* enclosed.

In your July 18, 2001 letter, you alleged that the Landfill Rate Committee is not subject to the Open Meeting Law because it does not set policy, nor expend any tax funds. You went on to state, "The landfill is not a public utility, but an enterprise fund, which is administered by the Utilities Board by [Ely] City Ordinance 520." Finally, you concluded, "There has been no rate increase, the public hearings and business notification has not been started as required by NRS. This was a discussion only of the ad hoc committee."

On September 20, 2001, I sent you a request for additional information with respect to the relationship between the Utilities Board and the Landfill Rate Committee. To date, I have not received any additional information. However, after speaking with you on the telephone, you indicated that Utilities Board was subject to the requirements of the Open Meeting Law and that it implements and imposes landfill rates.

Based upon the following, it is the conclusion of this office that the Landfill Rate Committee is a "public body" subject to the Open Meeting Law. Since the Landfill Rate Committee advises the Utilities Board, which is subject to the Open Meeting Law and which implements and imposes landfill rates, the Landfill Rate Committee is a "public body" subject to the Open Meeting Law and must comply with its requirements. In this regard, the Landfill Rate Committee is subject to the Open Meeting Law, even though it does not directly set policy or expend any tax funds, because it advises the Utilities Board, which does. Further, whether the subject landfill is an "enterprise fund" is not relevant to this issue.

Since the Landfill Rate Committee failed to post an agenda and give proper notice concerning it's meeting held on June 26, 2001, the Landfill Rate Committee violated NRS 241.020(2)(c). Furthermore, since written minutes were not kept of the meeting, the Landfill Rate Committee violated NRS 241.035. However, since no action was taken at this meeting, it is unnecessary for this office to seek a court order declaring null and void any landfill rates increases. It is anticipated that the Landfill Rate Committee will prospectively comply with the open meeting law.

We thank Ms. Nelson for bringing these matters to our attention. Please distribute this determination to the Land Fill Rate Committee and Utilities Board members.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
CHARLES T. MEREDITH
Deputy Attorney General
(775) 684-1233

CTM/jm

Enclosures

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

October 23, 2001

Mr. Charles J. Basso
23 Connors Court
Ely, Nevada 89301-2036

Re: Open Meeting Law Complaint
Ely City Council Meeting of June 28, 2001
OMLO 2001-48/AG File No. 01-038

Dear Mr. Basso:

This is in response to the Open Meeting Law complaint you filed with the Attorney General concerning the June 28, 2001 meeting of the Ely City Council (hereinafter referred to as the Council) of the City of Ely. Your complaint alleges that the Ely City Council held a discussion regarding an ordinance concerning a sewer bond for the wastewater treatment plant that was not properly presented on the agenda, and that supplemental materials were present in the packet that was provided to the City Council and Mayor that were not present in the packets prepared for the public. Pursuant to Nevada law, the Office of the Attorney General has primary jurisdiction for investigating and prosecuting complaints alleging violations of Nevada's Open Meeting Law, Chapter 241 of the Nevada Revised Statutes.

FACTS

Your complaint has two parts. First, you call attention to a difference in amount of indebtedness in a proposed sewer bond ordinance on the agenda that was mailed to you and the agenda at the hearing. Second, you question whether the elected officials at the meeting received the same packet of supporting materials as that supplied to the public. In response to a request from this office, Mr. Brent Hutchings, Ely City Clerk, has provided, on August 1, 2001, a copy of the agenda, minutes and an audiotape of the June 28, 2001 meeting. We have reviewed the agenda, minutes and audiotape of the public meeting of the Ely City Council held on June 28, 2001.

The agenda provides as follows in Section VI (5):

> VI. ITEMS FOR DISCUSSION/ACTION ONLY OF THE ELY CITY COUNCIL.
>
> 5. Mayor Miller—Discussion/Action – First Reading of the 2001 Sewer Revenue Bond Ordinance.
>
> Authorizing the Issuance of A Sewer Revenue Bond in the Principal Amount of $1,900,000.00. To Pay in Part the Cost of the Acquisition, Improvement, Construction and Equipment of A Sewer Project Providing the Forms, Terms and Conditions of the Bond and other Matters in Connection Therewith; and Providing for an Effective Date.

The agenda reflects that a first reading of the 2001 sewer revenue bond ordinance would be discussed and acted upon by the Council. The ordinance is identified in the agenda as a discussion/action item. At the meeting, the Mayor did direct the Council to this item and approved a first reading. You have raised a factual question concerning two versions of the agenda. You have provided a copy of the agenda for the June 28, 2001 meeting that differs from that provided by Mr. Hutchings. In the agenda that you supplied to this office, the amount of the bond is listed as $1,900.00. By way of contrast, in the agenda provided by Mr. Hutchings, the amount is shown to be $1,900,000.00. (Emphasis added.) The newspaper story from the June 30, 2001 edition of The Ely Daily Times reflects that the amount approved on first reading at the meeting was $1,900,000.00. The audiotape of the meeting reflects that, at the outset of the discussion of the agenda item, Mayor Bob Miller noted that the amount listed was incorrect and attempted to correct the agenda item at the meeting. We have questioned Mr. Hutchings concerning this matter and it appears that the difference in amount was the result of a typographical error. This error in the agenda was corrected by a later vote of the Council. The second reading of the ordinance, with the correct amount of the bond, was set for the July 26, 2001 meeting of the Council. The Council did discuss the sewer bond, and took action approving Ordinance 2001-100 at that meeting.

The second aspect of your complaint focuses on the packet of materials prepared for the meeting and delivered to elected officials and to the public. You have alleged that the packet, including the agenda and supporting materials that was made available to the public, was different than that provided to the Mayor and Council. We have spoken to Mr. Hutchings, who has represented that the packet containing the agenda and supporting material provided to elected officials was identical to the packet prepared for public inspection at the meeting and to the packets that were mailed to persons who request a packet. As the City Clerk, Mr. Hutchings is the official responsible for the preparation of the agenda and the packets. You have provided

supplemental information, including an "Application for the Local Development Grant Program" dated May 30, 2001, to this office. These materials include items that you allege were given to the Mayor and Council and not given to the public before the June 28, 2001 meeting. We have spoken with Sandra Stout, of the City Clerk's office, who states that the above documents were distributed at the meeting, and were therefore not part of the initial packets prepared for the Council or the public.

ANALYSIS AND CONCLUSIONS

The Open Meeting Law was enacted by the Legislature for the following purpose: "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010. The Open Meeting Law requires the public body to clearly state the matter that will be discussed by the public body. NRS 241.020(2)(c) provides that a notice of a hearing must include an agenda consisting of: "(1) a clear and complete statement of the topics scheduled to be considered during the meeting . . .".

Mr. Hutchings' letter of August 1, 2001 contained a copy of an agenda that lists the amount of the bond as $1,900,000.00. Notice of the Council's discussion of the sewer bond did appear as an item on the agenda. The ordinance was properly noticed, the discussion kept within the terms of the agenda item, and the vote taken was directed to the item. The incorrect amount shown in the agenda that you supplied to this office appears to have been the result of a typographical error. The discrepancy between the agenda, as originally issued, and the corrected agenda was a technical violation of the clear and complete standard required for an agenda under the Open Meeting Law. The Council is held to the clear and complete standard provided in NRS 241.020(2)(c)(1). That statute requires accuracy in the agenda items. The amount listed in the original agenda sent to you is not the same magnitude as the corrected amount. Based upon the foregoing, it is the conclusion of this office that the Council violated the Open Meeting Law on June 28, 2001 because the agenda was inaccurate, and did not reflect the actual amount of the sewer bond that would be discussed at the meeting. The provisions of Section 7.02 of the Nevada Open Meeting Law Manual (Eighth Edition, February 2000) provide further clarification of this matter. In this instance, the Council and Mayor attempted to correct the typographical error at the meeting. In a later reading of the Ordinance, at the meeting of July 26, 2001, however, the amount of the bond was properly reflected in the agenda and in the minutes. Based upon the minutes of the July 26, 2001 meeting, it would be unnecessary to rehear the agenda item. It is apparent from the supplemental materials that you have provided to this office that you have raised the issue of the sewer bond with the Mayor and Council at several meetings.

With regard to the other item pertaining to an alleged difference in the contents of the packet supplied to the elected officials and to the public, Mr. Hutchings noted that he was not at the June 28, 2001 meeting. He has represented "there has not been a time when the information contained in a packet of an elected official is not the same information contained in a packet requested by a member of the public." He has further stated that: "sometimes the supporting information is not provided, by the individual who addresses the item until the City Council

Meeting." His representation was sufficient to find that the packet provided to the elected officials was the same as the packet that was issued to you and to the public packet provided at the meeting site. The provisions of NRS 241.020(4) govern this issue, and section 6.06 of the Manual discusses the rights of the public to supporting material. This office has drawn a distinction between the agenda that must be mailed upon request and supporting material that is connected to an agenda item in OMLO 98-01 (January 21, 1998). In that opinion, we found that agenda supporting material need not be mailed, but must be made available over the counter when the material is ready and has been distributed to members of the public body and at the meeting. We note that you have sent a copy of a newspaper article that reflects that Mr. Hutchings has resigned his position as Clerk. Based upon the representations from the City Clerk's office, we find no violation of the Open Meeting Law without further evidence of a violation of NRS 241.020(4)(a)(b) and (c).

We note, in passing that the City Council has committed to following the Open Meeting Law. An indication of this commitment occurred when a meeting was cancelled in the recent past because notice was not adequate. This is an important consideration in the review of the Council's compliance with the Open Meeting Law. Your constant attention to the public business of the City Council has raised the level of focus upon this body. We thank you for bringing these matters to our attention.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
JAMES C. SMITH
Deputy Attorney General
(775) 684-1217

JCS:srh
cc: Mr. Richard Sears

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
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October 23, 2001

Mr. George Chachas
570 Aultman
Ely, Nevada 89301

Re: Open Meeting Law Complaint
Ely City Council
OMLO 2001-49/AG File No. 01-041

Dear Mr. Chachas:

This letter is in response to your Open Meeting Law complaint dated August 24, 2001, against the Ely City Council (Council). As you know the Attorney General's Office is responsible for the enforcement of the Open Meeting Law. Your complaint focuses on the Council's meeting of June 28, 2001. We have reviewed the relevant portions of the agendas, the audiotape, and the minutes of the Council's meetings held on June 28, 2001, July 12, 2001, and July 26, 2001. The concerns you raise will be addressed in the order that they appear in your letter.

Meeting of the Nevada Northern Railroad Board of Trustees
Agenda Item V

Allegation That Chairman Barrett Refused to Allow Public Comment

Item Number V on the Council's agenda was the report of the Executive Director of the Nevada Northern Railroad Board of Trustees (Board) to the Board. Mayor Miller recessed the Council's meeting, and Board Chairman Barrett opened the meeting of the Board. Item V was not noticed as an action item, and no public comment was taken. You complain that you were not allowed to provide public comment on this item.

The Open Meeting Law Manual (8th ed. 2000), published by the Attorney General, provides in relevant part at § 8.04:

> Except during the public comment period required by NRS 241.020(2)(c)(3), the Open Meeting Law does not mandate that members of the public be allowed to speak during meetings. Some public bodies choose to hear public comment during other agenda items, but that is not a requirement of the Open Meeting Law.

Accordingly, Chairman Barrett was not required to allow public comment on Item V, and the Open Meeting Law was not violated by his failure to allow public comment. We note that a general public comment period was held at the start of the meeting and that you were allowed to comment at that time.

Allegation That the Board's Executive Director Received a Consensus From the Board on a Non-Action Item

You state that the Board's Executive Director sought and received a consensus of the Board to allow Engine 93 to be transported to Heber, Utah. During his report on Item V, the Executive Director indicated to the Board that he had been approached by the Heber City Historical Railroad to participate in the 2002 Olympics by transporting a locomotive and two coaches to Heber City. The Executive Director sought approval of the concept from the Council. The minutes reflect the following statement by Chairman Barrett: "Councilman Barrett stated to agenda this project with the engine and two coaches." The minutes of the June 28 meeting do not reflect that the Board voted on this item. Instead, at its next meeting on July 12, 2001, the Board set the matter as agenda Item V(2), an action item. Councilman Connors moved to approve the concept of sending the locomotive and two coaches to Heber, and the motion was approved unanimously.

We find that the Board's action concerning the locomotive and coaches at the June 28 meeting did not violate the Open Meeting Law. There was no "action" taken within the definition of the term set forth in NRS 242.051(1). However, even if the Board had improperly taken action on the non-action item, the Board's subsequent vote on the locomotive issue at its July 12 meeting would have cured the defect. The Open Meeting Law Manual (8th ed. 2000) provides in relevant part at § 11.02:

> [I]f a public body takes action on an item which is has not been identified on the agenda as an action item, the action is void but may be taken up again at a duly noticed meeting where the item is properly listed as an action item on the agenda.

Accordingly, the Executive Director's statement that he would like approval of the concept of moving the locomotive to Heber, Utah for participation in the 2002 Olympics, without a vote of the Board, did not constitute a violation of the Open Meeting Law.

2001 Sewer Revenue Bond Ordinance
Agenda Item VI(5)

The agenda reflects that a first reading of the 2001 sewer revenue bond ordinance would be discussed and acted upon by the Council. The ordinance is identified in the agenda as a discussion and action item. You provided a copy of the agenda for the June 28 meeting, which lists the amount of the bond as $1,900, whereas the actual amount of the bond was $1,900,000, a substantial difference and the result of a typographical error. A later version of the agenda shows the correct amount of the bond. The audiotape of the June 28 meeting indicates that Mayor Miller attempted to correct the agenda at the outset of the discussion.

NRS 241.020(2)(c)(1) requires accuracy in agendas. The amount listed in the earlier agenda is not nearly of the magnitude of the actual amount of the bond, and for that reason we believe that the Council violated the Open Meeting Law because the earlier agenda was inaccurate and did not reflect the actual amount of the bond that would be discussed at the meeting. However, we note that at the July 26 meeting the amount of the bond ordinance was properly reflected in the agenda and in the minutes. This being the case, it is not necessary for the Council to re-hear agenda item VI(5) of the June 28 meeting. *See*, Open Meeting Law Manual § 11.04.

Request for Copy of Business License of Attorney Sears
Agenda Item VI(16)

Your request for a copy of a business license issued to the Ely City Attorney was met, but certain information was redacted. We are advised that the information redacted was the City Attorney's social security number and his federal tax number. We are further advised that the City of Ely has an established practice of redacting this kind of information whenever a public records request is made for a copy of a business license based on the City's belief that the privacy interests of the licensee outweigh the interests of the public in gaining that information. In light of the fact that this Office previously opined that certain information contained in a licensee's file maintained by the Nevada State Board of Nursing is confidential, we cannot determine on these facts that the City is following an improper practice. Op. Nev. Att'y Gen. No. 90-15 (October 15, 1990). In any event, the determination as to what is confidential and what is public is properly left to the Council, with advice from the City Attorney. *Id.* If you disagree with the Council's determination, NRS 239.011 provides for an expedited review of the Council's decision by the district court, upon application for an order allowing or copying the subject

record. Accordingly, we do not find that the Council violated the Open Meeting Law with respect to agenda Item VI(16).

Alleged Failure of City to Provide List of First Time Billings for Landfill Fees Agenda Item VI(17)

The minutes of the June 28 Council meeting indicate that you demanded that the Council prepare for you a list of first time billings for landfill fees. The minutes further indicate that no such list existed as a public record and that it was necessary for the Council to have the list created, which was a time consuming process. You were advised that the list was being created at that time and that it would be provided to you when it was completed. We have been advised that the list was subsequently created and provided to you. NRS 241.020(4) requires generally that materials provided to members of a public body for a meeting must be provided to a member of the public upon request. However, until it was created, the list did not qualify as "material" provided to the Council. Accordingly, we find no violation of the Open Meeting Law because the list was provided to you as a public record once it was created.

Retroactive Approval of Liquor License for the American Curly Horse Convention Agenda Item IX(1)

The minutes of the June 28 Council meeting clearly show that the Council unanimously approved a 24-hour liquor license for the American Curly Horse Association. However, the convention had already been held on June 23 and 24, and the action was therefore a retroactive approval of the license. It is clear to this Office that this retroactive approval does violence to the notice requirements set forth in NRS 241.020, as well as to the overall purpose of NRS chapter 241 in allowing members of the public to participate in public business. This is clearly a violation of the Open Meeting Law. Under NRS 241.037, the Attorney General may file a lawsuit to have the action declared void. However, such an action must be filed within 60 days of the June 28 meeting. We note that your complaint is dated Friday, August 24, 2001, and was apparently received by this Office and assigned for investigation on Tuesday, August 28, 2001, or 61 days following the June 28 meeting. Accordingly, we are unable to file suit to have the Council's retroactive action declared void, and we note that, on the facts of this case, declaring the action void would be of little practical consequence. However, members of the Council are admonished to avoid this sort of violation in the future. Finally, we would encourage you,

Mr. Chachas, to promptly report suspected violations of the Open Meeting Law to this Office to allow us more options in our investigation and resolution of violations of the Open Meeting Law.

Thank you for bringing these matters to our attention.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
JAMES T. SPENCER
Senior Deputy Attorney General
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(775) 684-1200

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October 24, 2001

Sam Dehne
297 Smithridge
Reno, Nevada 89502

Re: *Open Meeting Law Complaint*
Reno-Sparks Convention and Visitors Authority (RSCVA)
OMLO 2001-50/AG File No. 01-040

Dear Mr. Dehne:

We have reviewed your complaint dated August 20, 2001, in the above-referenced matter. This office has primary jurisdiction over the investigation and resolution of complaints alleging violations of Nevada's Open Meeting Law, Chapter 241 of the Nevada Revised Statutes (NRS). Specifically, you have alleged (1) the Reno-Sparks Convention and Visitors Authority Board (RSCVA) does not take public comment until the "very tail end" of its meetings; (2) the RSCVA moved an agenda item from the end of the agenda to the beginning; (3) the TV disclaimer infringed upon a person's First and Fourteenth amendment rights; and (4) the RSCVA improperly worded/described the consent agenda.

We have completed our investigation, and conclude the RSCVA Board did not violate the Open Meeting Law. We reviewed the agenda and written minutes for the August 15, 2001 and August 16, 2001 meetings. In addition, we have reviewed the videotape for the August 16, 2001 meeting. The following is our determination.

The Open Meeting Law was enacted by the Legislature for the following purpose: "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010.

Pursuant to NRS 241.015, the Open Meeting Law applies to meetings of a public body at which a quorum is present to deliberate toward a decision or to take action on any matter, over which the public body has supervision, control, jurisdiction or advisory power.[1] A quorum is defined as a simple majority of the constituent membership of a public body or another proportion established by law. NRS 241.014(4). The RSCVA Board is comprised of thirteen (13) members. Hence a quorum of the Board consists of seven (7) members. Eleven (11) members were present at the August 16, 2001, RSCVA Board meeting, therefore the quorum requirement was met.

1. Public Comment

Your first question addresses the issue of whether designating a public comment period at the end of the meeting violates the spirit of the Open Meeting Law.

NRS 241.020(2)(c)(3) requires that public bodies include in their agendas a "period devoted to comments by the general public, if any, and discussion of those comments." Your complaint concerning public comment being reserved for the end of the meeting is not in violation of the Open Meeting Law, as the law simply requires a period devoted to comments by the general public. The evidence shows that the August 16, 2001, RSCVA agenda provided for a period devoted to public comment, and that you did in fact speak, twice, during the designated public comment period. Except during the public comment period required by NRS 241.020(2)(c)(3), the Open Meeting Law does not require that public comment be allowed during agenda items other than the public comment period.

The RSCVA acted properly and in conformance with the Open Meeting Law by providing a public comment period and allowing you to speak during this period. This office finds no violation of the Open Meeting Law.

2. Moving the Agenda Item

Your second question pertains to RSCVA's decision to move an agenda item from the end to the beginning of the meeting. You claim this is a violation of the Open Meeting Law.

The Open Meeting Law requires that an agenda contain a schedule of the items to be discussed and acted upon at a public meeting. You have complained that by moving the item to the beginning, RSCVA did not consider the public's reliance on this item being heard last. This

[1] "Action" is broadly defined to include a decision, commitment or promise. NRS 241.015(1). "Deliberate" is also broadly defined and includes "to examine, weigh and reflect upon the reasons for or against the choice." *See* § 5.01 of the Nevada Open Meeting Law Manual (8th Ed. 2000).

office has published the Nevada Open Meeting Law Manual (8th ed. 2000) ("Manual") to assist the members of the public and members of public bodies. The relationship between the agenda and the actual conduct of a meeting of a public body is addressed in § 6.02 of the Manual. This office recommends that if an item is to be taken out of order during a meeting, that the agenda should state the following: "If items may be taken out of order, it is recommended (but not required) to so state." The Manual, on page 60, recommends language that may be used to alert the public that an item may be taken out of order.

It appears from a review of the above items, the RSCVA did in fact move agenda item VIII K to the beginning of the agenda. We note that you were able to be present throughout the whole meeting. The RSCVA agenda contained the appropriate language pertaining to items taken out of order. At the beginning of the August 16, 2001 agenda, a statement reads, "Items will not necessarily be considered in the order listed." Therefore, taking items out of order do not constitute an Open Meeting Law violation.

3. Television Disclaimer

You suggest that the printed "disclaimer" on the TV screen over the "citizen's" chest stating the RSCVA has "no control over the offensiveness of his/her words" is violative of the "citizen's" First and Fourteenth Amendment rights.

Through the Open Meeting Law, the Nevada Legislature has given members of the public the right to address public bodies. NRS 241.020(2)(c)(3). Once a person is given a right to address a public body, that right may be limited only within constitutional parameters. *Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 829 (1995); *see White v. City of Norfolk,* 900 F.2d 1421, 1425-27 (9th Cir. 1990); *Leventhal v. Vista United School District,* 973 F. Supp. 951 (S.D. Cal. 1997); Tex. Op. Atty. Gen. 96-111 (Oct. 28, 1996) (in restricting public participation at an open meeting, public body must not discriminate on the basis of the particular views expressed).

A review of whether a restriction on speech passes constitutional muster typically begins with an analysis of the type of public forum at issue. Forums can be traditionally public forums, limited public forums, or private forums, and the level of constitutional scrutiny placed on a governmental restriction on speech lessens as the public nature of the forum lessens. *See generally Kindt v. Santa Monica Rent Control Board,* 67 F.3d 266, 270-71 (9th Cir. 1995). The United States Supreme Court has not specifically defined which type of forum is created when a State opens a public meeting to public comment. *See Cornelius v. NAACP Legal Defense & Educ. Fund,* 473 U.S. 788, 802 (1985).

The *Kindt* court reasoned that limitations on speech at a public meeting need only be "reasonable and viewpoint neutral." This concept is supported by Supreme Court precedent. To determine whether a public body's speech restriction is a legitimate effort "to preserve the limits of the forum," the Supreme Court has observed a distinction between content and viewpoint discrimination. *Rosenberger*, 515 U.S. at 829-30. Speech restrictions can legitimately be based on content/subject matter so long as distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. *Id.* at 829, *citing to Cornelius*, 473 U.S. at 804-06.

A public body may place limitations on caustic personal attacks made by members of the public during the public comment period. "When a person does initially engage in protected First Amendment speech on matters of a public concern, they may not use this protection, in the guise of public concern, to also level personal attacks." *Smith v. Cleburne County Hospital*, 870 F.2d 1375, 1383 (8th Cir. 1988); *see Dunn v. Carroll*, 40 F.3d 287, 293 (8th Cir. 1994). A rule against personal and slanderous remarks, like other rules of decorum, serves the important governmental interest of preventing disruptions to its meetings. *Scroggins v. City of Topeka*, 2 F.Supp. 2d 1362, 1373 (D. Kan. 1998). "Emotionally charged personal attacks could antagonize and even incite others and . . . a rule restricting such attacks is both rational and reasonable means" for achieving a public body's orderly, efficient, effective and dignified meetings. *Id.*

Accordingly, a disclaimer made by a public body in Nevada that indicates it does not have control over offensive words uttered during public comment, should be considered viewpoint neutral. The actual language contained in the disclaimer reads as follows: "The RSCVA cannot constitutionally restrict speech during public comment. We regret any offensive remarks." By simply stating the RSCVA does not have control over certain types of words, does not equate to limitation of speech. This is reasonable and viewpoint neutral. The RSCVA is not restricting any form of speech. It is actually providing this disclaimer to communicate to the public that it cannot restrict a specific type of speech and is, therefore, not responsible for what the speaker may say.

4. Consent Agenda

Finally, your fourth question alleges the RSCVA improperly worded and/or described the consent agenda.

The RSCVA Board meeting minutes and videotape for August 16, 2001, indicate that you appeared and provided public comment on all the consent items. After hearing your concerns, and referring to lengthy discussions of the consent items at the August 15, 2001, Facilities Committee meeting, the RSCVA Board approved the Consent Items.[2]

NRS 241.020(2)(c)(1) sets forth that a meeting agenda must include a clear and complete statement of the *topics* scheduled to be considered during the meeting. In Op. Nev. Att'y Gen. No. 91-6 (May 23, 1991), our office described the legislative intent concerning this provision. That intent included a desire to eliminate confusing meeting agendas. The purpose of the agenda detail requirement was to allow members of the public to know when issues were going to be heard by a public body and when action would be taken by a public body.

In § 7.02 of the Manual published by this office, we discussed the "clear and complete" requirement for agendas. Based on previously published Attorney General Opinions, we advised that agenda items must be described with clear and complete detail so that the public will receive notice in fact of what is to be discussed and acted upon by the public body. A standard of reasonableness should be used in preparing the agenda and the spirit and purpose of the Open Meeting Law must always be kept in mind.

NRS 241.036 provides that any action of any public body taken in violation of any provision of this chapter is void. However, action may be taken at a subsequent meeting in which proper notice of each specific item has been provided to the public. OMLO 99-03 (March 19, 1999. (This opinion was rendered by the Attorney General as a guideline for enforcing the Open Meeting Law and not as a written opinion requested pursuant to NRS 228.150.)

The agenda for the August 15, 2001, Facilities Committee meeting provided, in relevant part:

III. ITEMS FOR COMMITTEE DISCUSSION AND/OR ACTION
B. #01-0815-01 RSCC Expansion and Renovation Project Enhancements
C. #02-0815-01 RSCC Short Term Land Use Plan
D #03-0815-01 RSCC Long Term Land Use Plan
E. #04-0815-01 RSCC Expansion and Renovation Project Change Order Authority

[2] Our office was also able to review the agenda for the August 15, 2001 Facilities Committee meeting. The Facilities Committee is a subcommittee of the RSCVA Board. Since the agenda items of both meetings are related, the agenda of the August 15, 2001 meeting will be considered in this opinion.

The agenda for the August 16, 2001, Board meeting provided, in relevant part:

VII. ITEMS FOR BOARD CONSENT – (Matters agendized as "Items for Board Consent" may be considered by a single action of the Board rather than voted on individually. Items may be removed from the consent agenda for discussion purposes at the request of a Board member or at the request of a member of the general public.)

G. #01-0816-01 RSCC Expansion and Renovation Project Enhancements (8/15/01 Facilities Committee)

H. #02-0816-01 RSCC Short Term Land Use Plan (8/15/01 Facilities Committee)

I. #03-0816-01 RSCC Long Term Land Use Plan (8/15/01 Facilities Committee)

J. #04-0816-01 RSCC Expansion and Renovation Project Change Order Authority (8/15/01 Facilities Committee)

The minutes of the August 15, 2001, Board meeting provide in relevant part:

IV. B. Items for Committee Discussion and/or Action

#01-0815-01 - RSCC Expansion and Renovation Project Enhancements – Mr. Lynn Thompson, VP of Facilities and General Manager of RSCC, gave an overview of the RSCC Expansion and Renovation Project Enhancements. A short list of Capital Additions and Enhancements that can be performed by Clark & Sullivan as change orders, list of ff&e (furnishings, fixtures and equipment) and an additional list of Capital Additions and Enhancements outside of the Construction Project was provided to the Committee. Mr. Farahi suggested that staff determine the advisability of including the energy retrofit items for the older portion of the convention center as a possible capital item to be funded out of available funds rather than the previous method of funding from the energy savings.

#02-0815-01 - RSCC Short Term Land Use Plan – Mr. Thompson explained to the Committee that the RSCC Short Term Land Use Plan involved the approval to begin detailed planning for a permanent office building to be located on the parking lot located at the northwest corner of Kietzke and Peckham streets. This short term land use plan was outlined in Scheme #1. After a lengthy discussion, Mr. Carasali made MOTION TO APPROVE SCHEME #1.

#03-0815-01 - RSCC Long Term Land Use Plan – Mr. Thompson explained the Long Term Use Plan as one that contemplates the use of the entire north portion of the convention center property, including the former Supply One site, for ultimate convention center development purposes.

04-0815-01 RSCC Expansion and Renovation Project Change Order Authority – Mr. Greg Brower and Mr. Salerno gave the Committee a brief summary of Resolution 527 that was passed by the Board of Directors previously regarding the authorization to approve various change orders.

In the present case, the above-mentioned agenda items cannot be characterized as vague or generic. A review of the videotape of both meetings confirmed that the written minutes regarding agenda items VII (G-J) are sufficiently clear and complete to alert a person of reasonable prudence to attend the RSCVA meeting if they have a concern on a particular issue. Items VII (G-J) were discussed at length at the August 15, 2001, Facilities Committee meeting.[3] The public was given adequate notice of that meeting and its agenda contained adequate descriptions of the items to be discussed and/or acted upon.

Based upon the review of the documents, it is the conclusion of this office that RSCVA did not unreasonably or improperly discourage you from your right to speak during the public comment section of the meeting and there was no violation of the Open Meeting Law, as it requires that persons be allowed to speak during a public comment section of the meeting. In this case, there was a public comment section listed on the agenda and you were able to speak on two occasions at the August 16, 2001 meeting. This complies with NRS 241.020(2)(c)(3) of the Open Meeting Law. With regard to your contention that an agenda item was moved, this office finds the agenda contained a statement that agenda items in the meeting may be taken out of order. RSCVA's decision to take items out of order was not a violation of the Open Meeting Law since RSCVA provided notice to the public of this possibility. We further conclude the TV disclaimer was viewpoint neutral and did not restrict any form of speech, and therefore, it does not, in any way, implicate or violate the spirit of Nevada's Open Meeting Law. Finally, we find RSCVA's meeting agenda contained clear and complete statements of the topics scheduled to be considered during the meeting.

Because we find no violation by the RSCVA Board, we are closing our file on this matter.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
HENNA RASUL
Deputy Attorney General
Tax Section
(775) 684-1206

HR/ld
cc: Gregory A. Brower, Esq.

[3] Agenda items VII (G-J) were indicated as agenda items III (B-E) at the August 15, 2001, meeting.

STATE OF NEVADA

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

November 1, 2001

Karen Sage Rosenau, Chairperson
Washoe County District Health Department
Sewage, Wastewater & Sanitation Hearing Board
Post Office Box 11130
Reno, Nevada 89520

Re: Open Meeting Law Complaint
Washoe County Sewer,
Wastewater & Sanitation Hearing Board
OMLO 2001-51/AG File No. 01-048

Dear Chairperson Rosenau and Members of the Board:

An open meeting law complaint was filed with this office on July 25, 2001. Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigation and prosecuting complaints alleging violation of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes. The complaint alleged that the Sewage, Wastewater & Sanitation Hearing Board ("Board") of Washoe County, had violated the open meeting law by taking action on an item that was agendized as a no action item.

FACTS

This office contacted the Board seeking a copy of the agenda and minutes of the July 18, 2001, meeting. The Washoe County District Attorney's Office ("District Attorney") responded on behalf of the Board. As part of my review I also consulted NRS 241 and the Nevada Open Meeting Law Manual.

ANALYSIS

The Open Meeting Law was enacted by the Legislature for the following purpose: "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010.

NRS 241.015(3) defines a public body as:

> Except as otherwise provided in this subsection, "public body" means any administrative, advisory, executive or legislative body of the state or a local government which expends or disburses or is supported in whole or in part by tax revenue or which advises or 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 . . . .

Based on the definition of NRS 241.015(3) and the description supplied by the District Attorney, the Board is a "public body." It appears undisputed that the Board, at a minimum, "advises and makes recommendations" to the Washoe County District Board of Health. The Board as a public body is subject to the Open Meeting Law.

NRS 241.020(2) provides in pertinent part:

> Except in an emergency, written notice of all meetings must be given at least three working days before the meeting. The notice must include:
> . . . .
> (c) An agenda consisting of:
> (1) A clear and complete statement of the topics scheduled to be considered during the meeting.
> (2) A list describing the items on which action may be taken and clearly denoting that action may be taken on those items.

The purpose of requiring that agenda items be described in clear and complete detail is to give notice to the public of what topics the public body will consider at the meeting. An agenda should give the public notice of what the public body is doing, has done, or may do. A member of the public should be able to review the agenda and identify if there are any items the public body will be dealing with that are of interest to them.

The agenda for the July 18, 2001, meeting of the Board in relevant part states:

> Unless otherwise indicated by an (*), all items on the agenda are items upon which the SWS Hearing Board will take action.
> . . . .
> *3. Workshop. Proposed additions and revisions to the Washoe County District Board of Health Regulations Governing Sewage, Wastewater, and Sanitation.
> . . . .

Since item 3 had an asterisk the agenda described it as a no action item. However, at the meeting action was taken on item 3.

NRS 241.015(1) defines "Action" as:

> (a) A decision made by a majority of the members present during a meeting of a public body;
> (b) A commitment or promise made by a majority of the members present during a meeting of a public body; or
> (c) A vote taken by a majority of the members present during a meeting of a public body.

Even though the Board is an advisory board to the District Board of Health it is a public body and any action it takes, including voting, must be properly placed on the agenda. In this instance the Board notified the public that it would not take action but then at the meeting went ahead and took a vote. This constitutes a violation of the open meeting law.

While the Board engaged in behavior that violated NRS 241.020 this office does not believe commencing an action in district court is necessary or warranted based on the circumstances. NRS 241.037 permits the attorney general to sue in any court of competent jurisdiction to have an action taken by a public body declared void or to seek an injunction to require compliance or prevent violations of chapter 241. While a civil action will not be commenced the Board is warned of its obligation to strictly comply with the requirements of the Open Meeting Law in the future.

CONCLUSION

Based on a review of the documents, the statutes, and the Open Meeting Law Manual, it is the conclusion of this office that the meeting of July 18, 2001, was defective in that the agenda failed to properly provide notice to the public as to the items that would be acted on. This office recommends that the Board change the way action items are described on the agenda and/or refrain from acting on items improperly noticed.

Cordially,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
WILLIAM J. FREY
Deputy Attorney General
Conservation and Natural Resources
(775) 684-1229

WJF/sg
c: Kelly Probasco
Melanie Foster, Deputy District Attorney, Washoe County

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

November 1, 2001

White Pine County Board of Commissioners
801 Clark Street, Suite 4
Ely, Nevada 89301

Re: Open Meeting Law Complaint
White Pine County Commission
OMLO 2001-53/AG File No. 01-051

Dear Chairman and Members of the Commission:

An open meeting law complaint was filed with this office on October 4, 2001. Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigation and prosecuting complaints alleging violation of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes.

FACTS

The complaint alleged that the White Pine County Commission ("Commission") had violated the Open Meeting Law by reappointing Ione Jackman as the county Public Guardian. Ms. Jackman had initially been appointed to a four-year term as the Public Guardian 1995. Her term expired in 1999. However, the Commission failed to reappoint her at the end of her term. Ms. Jackman remained in office and continued to perform the duties as the Public Guardian *de jure*. When the Commission became aware of its failure to appoint a Public Guardian it placed the item on its agenda and voted to reappoint Ms. Jackman.

This office contacted the Commission seeking a copy of the agenda and minutes of the October 4, 2001, meeting. Donna Bath, White Pine County Clerk responded on behalf of the Commission. As part of my review I also consulted NRS 241 and the Nevada Open Meeting Law Manual.

It must be noted that the complaint contained various other allegations of wrong doing all of which are outside the scope of the Open Meeting Law and the jurisdiction of this office. Along with this letter I am forwarding the complaint to the White Pine County District Attorney for further investigation and analysis.

ANALYSIS

The Open Meeting Law was enacted by the Legislature for the following purpose: "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010.

NRS 241.015(3) defines a public body as:

> Except as otherwise provided in this subsection, "public body" means any administrative, advisory, executive or legislative body of the state or a local government which expends or disburses or is supported in whole or in part by tax revenue or which advises or 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 . . . .

Based on the definition of NRS 241.015(3) it is undisputed the Commission is a "public body." The Commission is a public body subject to the Open Meeting Law.

NRS 241.020(2) provides in pertinent part:

> Except in an emergency, written notice of all meetings must be given at least three working days before the meeting. The notice must include:
> . . . .
> (c) An agenda consisting of:
> (1) A clear and complete statement of the topics scheduled to be considered during the meeting.
> (2) A list describing the items on which action may be taken and clearly denoting that action may be taken on those items.

The purpose of requiring that agenda items be described in clear and complete detail is to give notice to the public of what topics the public body will consider at the meeting. An agenda should give the public notice of what the public body is doing, has done, or may do. A member of the public should be able to review the agenda and identify if there are any items the public body will be dealing with that are of interest to them.

The agenda for the August 8, 2001, meeting of the Commission, at page 3, in relevant part states:

> 11:25 County Commission * Discussion/Action/Approval of the Re-Appointment of Ione Jackman as WPC Public Guardian.

The asterisk as associated with this item identified it as an action item. Additionally, this item was expressly identified as Discussion/Action/Approval.

NRS 241.015(1) defines "Action" as:

> (a) A decision made by a majority of the members present during a meeting of a public body;
> (b) A commitment or promise made by a majority of the members present during a meeting of a public body; or
> (c) A vote taken by a majority of the members present during a meeting of a public body.

In this instance the Board notified the public that it would discuss, take action, and possibly approve the appointment of Ione Jackman as WPC Public Guardian. From my review of the minutes of the meeting as well as the tape of the meeting this is exactly what happened. One of the concerns raised in the complaint is the legality of the Public Guardian's actions during the two years she continued in office before being reappointed. This issue is more appropriately left to the Commission, the White Pine County District Attorney, and the White Pine County District Court.

CONCLUSION

Based on a review of the documents, tapes, statutes, and the Open Meeting Law Manual, it is the conclusion of this office that the meeting of August 8, 2001, was not defective in that the agenda properly provided notice to the public as to the items that would be acted on. The meeting proceeded in compliance with the law and no violation of Nevada's Open Meeting Law occurred.

Cordially,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
WILLIAM J. FREY
Deputy Attorney General
Conservation and Natural Resources
(775) 684-1229

WJF/sg
c: Janelle Dietrich
Sue Fahami, White Pine County District Attorney

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

November 8, 2001

Patricia A. Lynch
Reno City Attorney
P.O. Box 1900
Reno, Nevada 89505

Re: Open Meeting Law Complaint
Reno City Council
OMLO 2001-54/AG File No. 01-044

Dear Ms. Lynch:

This is in response to the Open Meeting Law complaint filed with the Attorney General by Mr. Sam Dehne concerning the August 28, 2001, meeting of the Reno City Council. Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction to investigate and resolve complaints regarding the Nevada Open Meeting Law.

We received a complaint from Mr. Dehne alleging that he was denied the opportunity to speak regarding Agenda Item 7C at the August 28, 2001, Reno City Council meeting. Mr. Dehne also alleges that the August 28, 2001, Reno City Council meeting was started four hours late without adequate notice to the public.

FACTS

We have reviewed the tapes, Agenda, and the Brief of Minutes of the meeting held on August 28, 2001. We have also reviewed the Reno City Council Agenda and Brief of Minutes for August 21, 2001.

At the August 21, 2001 meeting, numerous members of the public spoke on Agenda Item 13A ("Plumgate"). The public hearing was closed and a tie vote resulted. Plumgate was placed on the August 28, 2001, Agenda as Item 7.C. The public hearing had been closed at the prior meeting. No further public comment was allowed before the Council voted on the matter.

The August 28, 2001, meeting was delayed while the Council attended the funeral services for Police Officer John Bohach. According to the affidavit of the Agenda Coordinator for the City of Reno, Kristen Forest, an announcement was made at about 11:45 a.m. that the meeting would be delayed until about 4:00 p.m. Ms. Forest's affidavit also states that a Notice

of the Delay was posted on the door of the Council Chambers at about 11:45 a.m.

ANALYSIS AND CONCLUSION

Mr. Dehne has questioned whether the Open Meeting Law required that he have the opportunity to speak regarding Plumgate at the Reno City Council Meeting on August 28, 2001. When a vote on an Agenda Item results in a tie, the item is placed on the next Agenda. Therefore, on August 21, 2001, when the public hearing was closed and the vote on Plumgate resulted in a tie, Plumgate was placed on the next Agenda, scheduled for August 28, 2001. At the August 28, 2001 meeting, Plumgate was not opened as a public hearing. The public hearing regarding Plumgate was closed prior to the vote that occurred on August 21, 2001. Therefore, no subsequent public comment regarding Plumgate could be heard at the August 28, 2001 meeting. Also, the Open Meeting Law does not require a public body to allow public comment on specific agenda items. The Open Meeting Law requires the public body to provide a public comment period. There was no violation of the Open Meeting Law by the Council because of the lack of public comment at the August 28, 2001 meeting specifically for Plumgate.

Mr. Dehne also questioned whether the August 28, 2001, Reno City Council Meeting was illegal because it was delayed for four hours. The Open Meeting Law was enacted by the legislature for the following purpose per NRS 241.101: "In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." In this case, the Board started the meeting four hours late. The public was informed of the delay by a notice posted on the Chamber doors and an announcement made outside the Chamber about 11:45 a.m., August 28, 2001, per the Affidavit of Kristen Forest, the Agenda Coordinator for the City of Reno. The public was provided access to the meeting at the later time. Although the public was inconvenienced, the exceptional circumstance that caused the delay must be considered. The Reno City Council was attending the funeral of a Reno policeman who was killed in the line of duty. The public had and ample opportunity to attend the hearing at the later time. There was no harm in this isolated incident since the meeting did not occur earlier than noticed. The conclusion of this office is that the Council did not violate the Open Meeting Law by opening the meeting late on August 28, 2001.

We thank Mr. Dehne for bringing these matters to our attention. Please distribute this determination to the Council members.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
Darrell W. Faircloth
Deputy Attorney General
(775) 684-1224

DWF:dy
cc: Mr. Sam Dehne

c:files/faircloth/corres/oml-01-044 renocitycounsel.ltr

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

December 7, 2001

Cheryl Noriega, Chair
White Pine County
Board of County Commissioners
801 Clark Street, Suite No. 4
Ely, Nevada 89301

Re: *Open Meeting Law Complaint*
Meeting of the White Pine County Commission on September 24, 2001
OMLO 2001-55/AG File No. 01-050

Dear Ms. Noriega:

Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigating and prosecuting complaints alleging violations of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes (Open Meeting Law). This office received a complaint alleging that the White Pine County Board of County Commissioners (Board) held a meeting on September 24, 2001 in violation of the Open Meeting Law in that the meeting was not publicly noticed in accordance with NRS 241.020. This opinion addresses the action taken in the September 24, 2001 meeting only to the extent that the Open Meeting Law is at issue.

We have reviewed the draft minutes for the September 24, 2001 meeting of the Board as well as statements from the Commissioners present at the meeting. We have also reviewed documentation provided by the White Pine County Clerk. We have spoken to you, the White Pine County Clerk, and other witnesses regarding the circumstances which led to the September 24, 2001 meeting.

FACTS

On September 24, 2001, as chair of the Board, you called a special meeting of the Board. The Board did not prepare or publicly post an agenda for this meeting. At this meeting, you stated that the meeting was called as an emergency meeting pursuant to NRS 241.020(2) and (5) because the Board needed to retain legal counsel immediately to review, approve, and sign grant documents. The sole item that was discussed and acted upon at the meeting was the hiring of legal counsel to review the documents.

The Board had received grant documents from the Federal Aviation Administration (FAA) which needed to be returned to the FAA in San Francisco on September 24, 2001 in order for White Pine County (County) to receive a $200,000 grant for the Ely Airport. The grant documents needed to be reviewed, approved, and signed by the County's legal counsel and chair of the Board before they could be returned to the FAA. These grant documents were similar to grant documents which were received by the County sometime earlier in September and which had been reviewed, approved, and signed by a deputy in the White Pine County District Attorney's Office.

During August and September, the Board was having difficulty receiving its mail timely, partly due to a change of address of the Board. During August and September, the FAA sent two grant packages to the Board. The first grant package was mailed on or about August 23, 2001 but was not timely received by the Board. The FAA agreed to resend the first grant package by Federal Express. About that time, the FAA could not confirm whether or not the second grant package had been sent.

The Board received the first grant package and, at some point later, received what appeared to be the duplicate of the first grant package sent by the FAA. The Board sent back the fully executed first grant to the FAA. There is some confusion as to the date upon which the second package of grant documents was received. It appears that the documents for the second grant were received by Wednesday, September 19, 2001, or Thursday, September 20, 2001. However, it was assumed that this package was the duplicate of the first package. A representative of the Board later discovered that what was thought to be a duplicate of the first grant package was actually the second grant package. This discovery was made on Monday morning, September 24, 2001, the day that the fully executed documents needed to be sent back to the FAA. For the purposes of this opinion, we have accepted as true that the documents had to be returned to the FAA on September 24, 2001 and that alternative arrangements could not have been made with the FAA.

The Board convened a meeting at 12:12 in the afternoon of September 24. Four of the five Commissioners were present. You explained to the Board why the meeting had been called and that the meeting was being called as an emergency meeting. You explained the circumstances surrounding the receipt of the documents and your inability to have the documents reviewed by legal counsel. The Board voted to retain Gary Fairman as counsel for the Board for the purpose of reviewing, approving, and signing the documents as legal counsel. As a part of that motion, the Board voted to pay this expense out of the District Attorney's budget. The documents were fully executed and sent to the FAA that day. The Board agendized the emergency meeting at its October 24, 2001 meeting in order to ratify the action in a publicly noticed meeting.

During our investigation, you informed this office that the chair was authorized to execute the grant documents on behalf of the Board. Therefore, the Board did not meet to approve the grant documents prior to returning the documents to the FAA. Once you realized that the second grant had been received, you approached the White Pine County District Attorney to request that she review, approve, and execute the grant documents. She refused to do so on short notice. She stated that she did not have adequate time to review the documents that day. You were also informed that the deputy who had previously reviewed and approved substantially similar documents would not be reviewing the documents at the instruction of the District Attorney. You believed that the County would lose the $200,000 grant if the documents were not signed by legal counsel and returned to the FAA on September 24, 2001.

As part of our investigation, we were provided with many documents and statements pertaining to the strained relationship between the Board and its legal counsel, the District Attorney. Other than noting that there had been difficulties in this relationship for many months prior to September 24, 2001 and the Board believed that its legal needs were not being met, the specific details of the relationship are not pertinent to the resolution of this Open Meeting Law complaint.[1]

ANALYSIS

NRS 241.020(1) requires all meetings of "public bodies" to be open and public, unless otherwise provided by a specific statute. The Board is a public body subject to the Open Meeting Law. NRS 241.015(3). Except in the case of an emergency, NRS 241.020(2) requires a public body to post written notice of its meetings at least three working days before the meeting. The notice must include an agenda consisting of a clear and complete statement of the topics scheduled to be considered during the meeting, a list describing the items on which action may be taken and clearly denoting that action may be taken on those items, and a period for public comment. NRS 241.020(2). The notice must be posted in the principal office of the public body, or if there is no principal office, at the place in which the meeting will be held, and at not less than three other prominent places within the jurisdiction of the public body. NRS 241.020(3).

NRS 241.020 defines emergency as "an unforeseen circumstance which requires immediate action" including but not limited to "disasters caused by fire, flood, earthquake or other natural causes" or "any impairment of the health and safety of the public." This office is of the opinion that a true emergency must exist in order for a public body to hold a meeting without the notice required in NRS 241.020. OMLO 99-10 (August 24, 1999). Whether the situation justified failure to give the required public notice must be determined in light of the reality of the situation, not the mere appearance of an emergency. *Jenkins v. Newark Board of Education*, 399 A.2d 1034, 1038 (N.J.Super 1979). An emergency meeting must not be used as

[1] We also note that, since this meeting, the District Attorney resigned and a new District Attorney was appointed.

a subterfuge by a public body to avoid giving notice of the meeting to the public. AG file No. 01-039 (August 20, 2001).

We have previously opined that administrative error is not sufficient grounds upon which to hold an emergency meeting. OMLO 99-10 (August 24, 1999). This office believes that an item constitutes an emergency only if the need to discuss or act upon the item is truly unforeseen and when the item is of such a nature that immediate action is required. *See*, AG file No. 01-039 (August 20, 2001)(need to seize records of a development authority is foreseeable and, therefore, not an emergency). The word "emergency" does not mean expediency, convenience, or best interest and the promotion of the public welfare is not a criterion in determining whether or not an emergency exists. *Mead School District No. 354 v. Mead Education Association*, 530 P.2d 302 (Wash. 1975)(defining emergency as "an unforeseen combination of circumstances or the resulting state that calls for immediate action"); *see also, Piazza v. City of Granger*, 909 S.W.2d 529 (Tex.App. 1995)(lack of confidence in police officer does not identify an emergency).

Although this office has no doubt that a $200,000 grant for the Ely Airport is of great importance to the citizens of White Pine County, this was not a situation caused by a natural disaster or a situation involving an impairment to the public health or safety. Therefore, it is the opinion of this office that the circumstances leading up to the meeting of September 24, 2001 do not constitute an emergency within the meaning of NRS 241.020.

The emergency asserted by the Board at its September 24, 2001 meeting essentially had two causes: 1) the administrative error or oversight on the part of the Board in not realizing that the second grant had been received and/or lack of communication with the FAA regarding the second grant; and 2) the breakdown of the relationship between the Board and the District Attorney such that the Board believed that it did not have ready access to its legal counsel.

As noted above, this office has previously opined that administrative error does not constitute an emergency for the purposes of the Open Meeting Law. In this case, it was an administrative error or oversight that the Board did not realize that it had received the second grant package. Had the Board acted upon the grant on the day that it was received, it is likely that the District Attorney or a deputy would have had time to review, approve, and sign the documents and therefore no true emergency existed. In addition, it appears that the situation was in part caused by lack of effective communication with the FAA regarding the second grant and therefore this would not constitute an emergency within the meaning of NRS 241.020.

Even if the real reason that the District Attorney refused to review the documents was because of her relationship with the Board rather than the timing, as asserted by some witnesses, this was not an unforeseen circumstance in that the Board was aware of the strained relationship for many months prior to September 24, 2001. Therefore, the Board should have anticipated that the District Attorney may not be available to assist it with the FAA grant given the fact that the Board had previously been concerned about the District Attorney's accessibility to provide legal advice to the Board. Therefore, the relationship between the Board and the District Attorney did not create a true emergency with regard to the FAA grant.

The meeting held on September 24, 2001 violated the Open Meeting Law because the meeting was not properly noticed. No emergency existed to excuse the lack of public notice. However, curative action has already been taken because the matter was later considered at a noticed, public meeting. In addition, this office believes that the Board truly considered the situation to be an emergency and was unable to consult with legal counsel as to whether or not an emergency existed. Because of these mitigating factors, this office believes that no further action is necessary at this time. We caution you to strictly adhere to the Open Meeting Law in the future.

CONCLUSION

Although the Board did not comply with the Open Meeting Law for its September 24, 2001 meeting, legal action is not warranted at this time because of the curative action already taken by the Board and other mitigating factors. However, we caution you that any future violations of the Open Meeting Law by the Board may result in legal action filed by this office to ensure compliance with the Open Meeting Law.

Cordially,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
TINA M. LEISS
Senior Deputy Attorney General
Civil Division
(775) 684-1203

cc: White Pine County District Attorney

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

December 10, 2001

Patricia A. Lynch
Reno City Attorney
Post Office Box 1900
Reno, Nevada 89505

Re: ***Open Meeting Law Complaint***
Reno Animal Services Advisory Board
***OMLO2001-56*/AG File No. 01-053**

Dear Ms. Lynch:

On October 12, 2001, this office received a complaint from Charles E. Jarvi regarding an alleged violation of the Nevada Opening Meeting Law (OML) as it relates to Public Comment at the meetings of the Reno Animal Services Advisory Board (RASAB). A copy of the complaint is attached as Exhibit 1. This office has primary jurisdiction over the investigation and resolution of complaints alleging violations of Nevada's Open Meeting Law, Chapter 241 of the Nevada Revised Statutes (NRS). On October 30, 2001, a request was made for the agenda, notice, minutes, and any tape/video recording of the October 10, 2001 meeting. The agenda, cassette tape, and minutes of the meeting were provided. *See* Exhibit 2 (Agenda) and Exhibit 3 (Minutes). You responded with a letter dated November 9, 2001, advising this office of the curative action taken by you in response to Mr. Jarvi's allegations. *See* Exhibit 4. We have completed investigation of the complaint.

COMPLAINT

Mr. Jarvi alleges that the RASAB "[S]tate very factually that the Board is prevented by the Nevada Open Meeting law from responding to public comment in any way during the Board meeting in which comment or question was raised." He further states his belief that this behavior affects the public who "[L]eave the meeting saying it's obvious the Board is not interested in what they have to say, that it is obvious that the Board does not want them to be a part of the process, and that it's obvious there is no reason for them to be there, or to return for future meetings. And, rarely if ever do people who come to these meetings ever return." He states his belief is based on personally talking to "[M]embers of the public who have been treated this way as they leave the meetings." He maintains the RASAB lack of response has a chilling effect on public participation in the process violating the spirit of the Open Meeting Law and

discriminates against those individuals of the public who wish to contribute to the RASAB agenda and business.

ANALYSIS

The Nevada Open Meeting Law requires that any meeting subject to the OML provide a period for public comment and discussion. However, discussion is not required, nor is it prohibited.

NRS 241.020(2)(C)(3) of Nevada's Open Meeting Law provides:

> A period devoted to comments by the general public, if any, and discussion of those comments. No action may be taken upon a matter raised under this item of the agenda until the matter itself has been specifically included on an agenda as an item upon which action may be taken pursuant to subparagraph (2).

The Nevada Open Meeting Law Manuel (OMLM) at § 7.04 states:

> Pursuant to NRS 241.020(2)(C)(3), a period devoted to comments by the general public, if any, and a discussion of those comments must be included on each meeting agenda….

In regard to Mr. Jarvi's complaint that the Board states it cannot respond to public comment in any way, it appears pursuant to your November 9, 2001 letter that corrective measures have been taken to make a less restrictive interpretation of the OML. You will advise the RASAB that there is no absolute prohibition of discussion during Public Comment. However, it is not required by the OML that the RASAB respond to comments made during this time. It is only required that a period for public comment and discussion be included on the agenda.

As to the words "Board Members will not respond to comment," these will be taken off of the agenda.

CONCLUSION

The alleged violations of the OML within Mr. Jarvi's complaint have been cured. Although the OML may not have been directly violated, it is believed that the actions referenced above will more fully promote the Legislative intent of Nevada's Open Meeting Law: "It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010

Thank you for your professional cooperation and courtesy. Please distribute this determination to the RASAB members.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
DAWN NALA KEMP
Deputy Attorney General
Tax Section
(775) 684-1219

DNK:jm

cc: Charles E. Jarvi

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
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December 11, 2001

Claire J. Clift
2423 Scotch Pine Drive
Carson City, Nevada 89706

Re: Open Meeting Law Complaint
Carson River Advisory Committee
OMLO 2001-57/AG File No. 01-052

Dear Ms. Clift:

You have asked this office for an opinion regarding the open meeting law.

QUESTION

Does NRS chapter 241 pursuant to 2001 Senate Bill 329 Sections 1 and 2, effective July 1, 2001, effect the Carson River Advisory Committee's voting requirements?

STATEMENT OF FACTS

You have presented the following facts.

The Carson River Advisory Committee (CRAC or Committee) is composed of seven individuals, appointed by the Carson City Board of Supervisors. In its capacity as an advisory committee, the CRAC makes recommendations to the Board of Supervisors on issues that affect the Carson River as it passes through the boundaries of Carson City. The Board of Supervisors is free to accept or reject the committee's recommendations.

Your concern stems from a vote which took place at a regular meeting of the CRAC held on September 5, 2001. Present at that meeting were all seven commission members. During this meeting, among the agenda items was a discussion and action on a motion regarding three parcels of property for inclusion in a recommendation to the Board of Supervisors and the Bureau of Land Management for purchase through the Nevada-Federal Lands Act. The resulting vote on the motion was three affirmative, one against, and three abstaining. The committee then discussed the outcome of this vote and concluded that the motion had failed. As stated in your

letter, the committee interpreted its voting requirement to require an affirmative vote of a majority of the members present and since the seven member committee was present, that required four affirmative votes to pass the motion.

Following this meeting, the Carson City Parks and Recreation staff, in conjunction with staff of the Carson City District Attorney's Office, conducted their own analysis of the effect of the 3-1-3 vote and concluded that the motion did pass by a simple majority vote, in accordance with the CRAC's bylaws and Robert's Rules of Order. The city reasoned that since only four committee members voted, and a quorum was present, a majority of those present and voting had the power to pass the motion.

As stated in your letter, it is your understanding that two members abstained because they wanted the motion tabled and one member abstained due to a conflict of interest. It is your contention that the city has acted in violation of the state's Open Meeting Laws and that SB 329 applies to the September 5th vote.

ANALYSIS

The Open Meeting Law applies to the CRAC and their meeting held September 5, 2001. *See Del Papa v. Board of Regents*, 114 Nev. 388, 400, 956 P.2d 770, 778-779 (1998) ("The constraints of the Open Meeting Law apply only where a quorum of a public body, in its official capacity as a body, deliberates toward a decision or makes a decision."). NRS 241.015(3) specifically includes committees within the definition of a "public body." A committee or subcommittee is covered by the law whenever a quorum of the committee or subcommittee gathers to deliberate or make a decision. *Lewiston Daily Sun, Inc. v. City of Auburn*, 544 A.2d 335 (Me. 1988); *Arkansas Gazette Co. v. Pickens*, 522 S.W.2d 350 (Ark. 1975). The CRAC is a public body that advises the Carson City Board of Supervisors. The members of the CRAC are appointed to the committee by the Board of Supervisors. On September 5, 2001, the entire seven person committee met in order for discussion and action on certain agenda items. Clearly, this meeting falls within the purview of the Open Meeting Law.

There are two issues which require analysis in this matter. First, you have inquired as to the applicability of SB 329 on the voting requirement for this type of public body, thus an analysis of SB 329 will follow. The second issue is far more complex and regards the specific intent to be given to an abstention in the voting process – whether an abstention should be considered as a vote, and if so, whether it should be deemed to be a vote in favor or a particular proposition or one in the negative.

The starting point of our analysis is Senate Bill 329. The bill provides in pertinent part as follows:

> Section 1: Chapter 241 of NRS is hereby amended by adding thereto a new section to read as follows:
>
> A public body that is required to be composed of elected officials only may not take action by vote unless at least a majority of all the members of the public body vote in favor of the action. For

> purposes of this section, a public body may not count an abstention as a vote in factor of an action.
>
> Section 2: NRS 241.015 is hereby amended to read as follows:
>
> 241.015 As used in this chapter, unless the context otherwise requires:
>
> 1. "Action" means:
>
> (a) A decision made by a majority of the members present during a meeting of a public body;
>
> (b) A commitment or promise made by a majority of the members present during a meeting of a public body;
>
> (c) *If a public body may have a member who is not an elected official, an affirmative* vote taken by a majority of the members present during a meeting of *the* public body; *or*
>
> (d) *If all the members of a public body must be elected officials, an affirmative vote taken by a majority of all the members of the public body.* [Emphasis added.]

The amendments to NRS chapter 241, pursuant to SB 329 section 1, provides that "[a] public body that is required to be composed of elected officials only may not take action by vote unless at least a majority of all the members of the public body vote in favor of the action." This language is further clarified by language in section 2 of SB 329 which amends the term "action" to address the new voting requirement for a public body required to be composed solely of elected officials. Section 2 of SB 329 provides that "[a]ction means: . . . (c) If a public body *may have a member who is not an elected official*, an affirmative vote taken by a majority of the members present during a meeting of the public body; or (d) If *all* the members of a public body *must be elected officials*, an affirmative vote taken by a majority of all the members of the public body." [Emphasis added].

The CRAC is comprised of members who are not elected officials. The members are appointed by the Carson City Board of Supervisors. Therefore, it is apparent from the plain language of this statute that if a public body may have a member who is not an elected official, then action must be taken by a vote of a majority of *members present* during a meeting of that public body. However, it is important to note that the city attorney correctly informed you that SB 329 was intended to apply only to elected boards. This is consistent with the opinion of the Attorney General as well. *See* Op. Nev. Att'y Gen. No. 2001-25 (Sept. 2001). To clarify, the amendment in section 2 relating to the voting requirement for a public body with non-elected members is the same language as found in NRS 241.015, before the recent legislation. Therefore, the substantive amendments in SB 329 do not apply to appointed bodies. Further, the legislative history of the bill indicates that originally, appointed boards were included in the bill but later deleted. *Hearing on SB 329 Before the Assembly Committee on Government Affairs,* 2001 Legislative Session (April 30, 2001).

Because the amendments contained in SB 329 apply only to public bodies that are required to be composed solely of elected officials, the law remains unchanged as to a public body that may have an individual member who is not an elected official. Accordingly, since the CRAC may have a member serve, who is not an elected official, the voting requirement remains

unchanged and the committee may take action with an affirmative vote of the majority of the members present at a meeting of that body, provided a quorum is present, and the amendments in SB 329 are not applicable.

The more difficult question and the issue which complicates this matter is what effect abstentions have on the voting process. Unfortunately, there is relatively sparse law in Nevada, and other states, which addresses the issue of abstention. Abstention is addressed in NRS 281.501(4) in relation to a public officer who abstains from voting based upon ethical considerations:

> If a public officer declares to the body or committee in which the vote is to be taken that he will abstain from voting because of the requirements of this section, the necessary quorum to act upon and the number of votes necessary to act upon the matter, as fixed by statute, ordinance or rule, is reduced as though the member abstaining were not a member of the body or committee.

A "public officer" is defined as

> a person elected or appointed to a position which:
> (a) is established by the constitution or a statute of this state, or by a charter or ordinance of a political subdivision of this state;
> (b) and involves the continuous exercise, as part of the regular and permanent administration of the government, of a public power, trust or duty. NRS 281.005(1).

The individuals which comprise the CRAC are considered public officers pursuant to this definition therefore the provisions of NRS Title 23 are applicable. Accordingly, if the three members who abstained from voting did so due to a conflict of interest or other ethical considerations, as outlined in NRS 281.501, then it is clear that the quorum requirement and the number of votes necessary to act upon the matter is reduced as though the member abstaining was not a member of the committee. NRS 281.501(4). For example, had all three of the members abstaining from the September 5th vote done so on the basis of a conflict of interest, then the entire membership quorum requirement would be reduced by those three members and the necessary affirmative votes would have been a majority of the four members and the 3-1 vote would have been sufficient to pass the motion. In your letter, you indicate that to your knowledge, one member did abstain from voting due to a conflict of interest. Therefore, at least by that one member, the entire membership present and voting would be reduced and the number of votes necessary to pass that motion would be reduced accordingly. It may be that an abstention because of a conflict of interest or ethical considerations would reasonably call for a different rule than an abstention based upon other factors.

Under the common law, a majority of a body constitutes a quorum and the vote of a majority of those present is legally sufficient to constitute valid action by the body, and

abstention would generally be regarded as acquiescence with the majority of those who do vote.

See Babyak v. Alten, 106 Ohio App. 191, 154 N.E.2d 14, 19 (1958) (those who remain silent shall be deemed to assent to the act of those who do vote); *Young v. Yates*, 19 Mont. 239, 47 P. 1004, 1006 (1897); *Pierson-Trapp Company v. Knippenberg*, 387 S.W.2d 587, 588 (Ky. App. 1965). Nevada has recently amended its law in SB 329, section 1, to provide "[a] public body may not count an abstention as a vote in favor of an action." However, it appears that this amendment only applies to public bodies that are required to be composed of elected officials only, since the amendment is contained in section 1 which speaks only of elected boards and specifically states, "[f]or purposes of this section . . . ." The remaining questions regarding the effect of abstentions have not been addressed.

Further analysis of cases from other jurisdictions reveals that it is not uncommon for a statute to require the votes of a majority of the members "present and voting." In such cases, many jurisdictions have adopted the general rule that when a quorum of a body is present, those members who are present and do not vote will be considered as acquiescing with the majority. *Payne v. Petrie*, 419 S.W.2d 761 (Ky. 1967); *State ex rel. Osborn v McAllen*, 127 Tex. 63, 91 S.W.2d 688 (1936). In *Payne*, the court adhered to this view and went a step further by stating that the word majority did not mean a numerical majority of the entire membership, but meant instead a majority of those *present and voting*. *Id*. Although the difference may seem slight, the discrepancy in Nevada's statute is significant as it reads simply members *present*, rather than *present and voting*. NRS 241.051(c). The absence of the words – "and voting" – arguably requires inclusion of all members present, regardless of the casting of votes, as this would be the plain meaning of the language of the statute.

Because the few states that have addressed this issue have reached different conclusions and varying opinions, they provide little guidance. Examples of other jurisdictions' treatment of this issue include the following. Florida forbids members of public bodies from abstaining unless they have a conflict of interest that precludes them from voting. FLA. STAT. ANN. § 286.012 (West 1999); *Ruff v. School Board*, 426 So. 2d 1015 (Fla. App 1983); *City of Hallandale v. Rayel Corp*., 313 So. 2d 113 (Fla. App. 1975) *dismissed mem*., 322 So. 2d 915 (Fla. 1975); *Shaughnessy v. Metropolitan Dade County*, 238 So. 2d 466, 468 (Fla. App. 1970) (person who abstains counted to determined if quorum is present). Kansas follows the common law rule, absent a specific statute to the contrary, which requires counting an abstention as acquiescence in the measure unless the abstention arises from disqualification in which case the abstention is not counted. Op. Kan. Att'y Gen. No. 91-73 (July 1991), *citing City of Haven v. Gregg*, 244 Kan. 117, 120, 766 P.2d 143, 145 (1988), *and Anderson v. City of Parsons*, 496 P.2d 1333, 1337 (1972); *See also* KAN. STAT. ANN. § 72-8205(a)(1992) (any member of board of education who abstains from voting shall be counted as having voted against motion or resolution unless member announces conflict of interest and leaves meeting, in which case member is not counted as having voted). In Louisiana and New Jersey, abstentions are counted as negative votes. Op. La. Att'y Gen. No. 88-434 (Oct. 1988); *Patterson v. Cooper*, 294 N.J. Super. 6, 682 A.2d 266, 271 (1994).

A highly persuasive position is that found in jurisdictions employing a strict interpretation of the "majority of members present" provision. In such cases, the actual

affirmative votes of a majority of the attending members was found to be essential to action and the courts declined to view abstentions as acquiescence in the proposed action or as affirmative votes. *See State ex rel. Cole v Chapman*, 44 Conn. 595 (1878); *Livesey v. Secaucus*, 97 A. 950 (N.J. 1916) (finding that the rule as to the majority vote of those present meant exactly what it said, notwithstanding that some members might not participate); *Mann v. Key*, 345 So. 2d 293 (Ala. 1977) (majority vote of actual number of council members was required and abstentions did not act to lower number necessary to obtain majority).

Where a statute is plain and unambiguous, we are to deduce its meaning solely from the plain language of the statute. *Demosthenes v. Williams*, 97 Nev. 611, 614, 637 P.2d 1203 (1981); *In re Application of Filipini*, 66 Nev. 17, 24, 202 P.2d 535 (1949) (words given plain meaning unless it violates spirit of act); *Thompson v. Hancock*, 49 Nev. 336, 341, 245 P.941 (1926) (Legislature must be understood to mean what it plainly expressed). Adherence to the plain meaning of the statute is appropriate here.

NRS 241.015 requires that if a public body may have a member who is not an elected official, an affirmative vote taken by a majority of the members present shall be required to constitute action by that body. It is the opinion of this office that unless and until the statute is construed more broadly by the courts of this state or the legislature, board action may not be taken except by such a vote, and an abstention, except as provided in NRS 281.501, should not be counted as acquiescence in the will of the majority voting upon an item of business. Although the CRAC has adopted Robert's Rules of Order in its bylaws, such rules are subordinate to the extent of any inconsistency or conflict with Nevada's Open Meeting Laws.

CONCLUSION

The 2001 amendments to NRS chapter 241, contained in SB 329, apply only to elected officials and the voting requirements for public bodies such as the CRAC remain unchanged. Accordingly, the CRAC can take action with an affirmative vote taken by a majority of the members present during the meeting of the public body, provided a quorum is present. The only factor which would alter the plain meaning of this statute is where a member abstains from voting due to a conflict of interest, in which case the provisions of NRS 281.501 come into effect.

Based upon the facts presented in this matter, this office further opines that there has been no violation of the state's Open Meeting Laws. Clearly, there was a discrepancy as to how votes were to be calculated; however, what occurred was a difference in interpretation of the relevant statute and bylaws, not a violation of the Open Meeting Law.

The city staff members who participated in the CRAC meetings sought legal counsel and relied upon the opinion of the Carson City District Attorney's Office in determining that the vote

in question was effective to pass the motion, thus court action in this matter is not appropriate. Although it is the opinion of this office that the city's interpretation was incorrect, it was not a violation of the Open Meeting Law.

Cordially,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
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AEB/sg
c: Neil A. Rombardo, Deputy District Attorney
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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

January 17, 2001

Lyon County School Board
25 East Goldfield Avenue
Yerington, Nevada 89447

Attention: Superintendent Nat Lommori

Re: *Open Meeting Law Complaint/November 14, 2000 School Board Meeting/ Appointment of member and alternate to the Attendance Advisory Committee OMLO 2001-58/AG File No. 00-054*

Dear Mr. Lommori:

Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigating and prosecuting complaints alleging violations of the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes.

This office received a complaint from a citizen alleging that the school board violated the Open Meeting Law when it took action on the appointment of a member and alternate to the Attendance Advisory Board. The complaint alleges that the agenda topic was not listed as an action item on the meeting agenda, but was only listed under the "Reports" section of the agenda. The complainant has asked this office to void the action of the school board on this topic.

FACTS

We have reviewed the November 14, 2000, meeting agenda and minutes. We have enclosed a copy of the agenda for your convenience. The agenda for the November 14, 2000 meeting of the school board contains two main headings: "Preliminary Section" and "Action Section". Some of the agenda items under the heading "Preliminary Section" are denoted as action items in the description of the item.

Following the heading "Action Section", there are 21 separately numbered items, some of which contain subparts. Some of the separately numbered items are contained under sub-headings. The agenda item at issue is number 26. Agenda item number 26 is contained on the second page of the agenda under the sub-heading "Reports". The heading "Action Section" is

only contained on the middle of the first page. The heading "Action Section" is not repeated on any other page of the agenda.

Agenda item number 26 states: "Report of Membership to Attendance Advisory Committee". This agenda item does not contain the words "Discussion/Action" in the agenda description and does not contain the line "Move: ___ Second: ___ Vote: ____". All of the agenda items following the heading "Action Section" and before agenda item number 26 do contain these words. The agenda items contained under the sub-heading, "Paybill", which immediately follows the sub-heading "Reports", contain the words "Discussion/Action" and the line "Move: ___ Second: ___ Vote:____".

The minutes indicate that, under agenda item number 26, there was discussion concerning the applicants for positions on the Attendance Advisory Committee. The applications received for these positions were contained in the packets given to the trustees. The minutes also indicate that three motions were made and passed under agenda item 26. The first motion was to accept the report. The second motion was to nominate a parent member to the committee. The third motion was to nominate an alternate member to the committee.

ANALYSIS

NRS 241.020(2)(c)(1) provides that an agenda must contain a clear and complete statement of the topics scheduled to be considered during the meeting. NRS 241.020(2)(c)(2) states that an agenda must contain a list describing the items on which action may be taken and must clearly denote that action may be taken on those items.

In section 7.02 of the NEVADA OPEN MEETING LAW MANUAL (8th ed. 2000), published by this office, we discussed the "clear and complete" requirement for agendas. Drawing from previously published opinions of the Office of the Attorney General, we advised that, among other things, agenda items must be described with clear and complete detail so that the public will receive notice in fact of what is to be discussed and acted upon by the public body. A standard of reasonableness should be used in preparing the agenda and the spirit and purpose of the Open Meeting Law must always be kept in mind. An agenda must never be drafted with the intent of creating confusion or uncertainty as to the items to be considered. This office has also advised that public bodies should not approve or take action on administrative reports by staff unless the agenda clearly denotes the report as an action item and specifically sets out the matter to be acted on within the report.

Agenda item number 26 does not contain a clear and complete description of the matters to be considered. "Report of Membership to Attendance Advisory Committee" did not clearly and completely convey the intent of the school board to consider applications for membership on the committee. This description only conveys the intent of the Board to receive some type of report from the committee. This description does not alert the public to the subject matter of the report to be given to the school board and does not alert the public that the school board was

going to consider applications for membership on the committee. Thus, this agenda item did not contain a clear and complete description of the matters to be considered in violation of the Open Meeting Law.

Agenda item number 26 does not clearly denote that action may be taken on that item. Although this agenda item does appear in a list that follows the heading "Action Section", it does not appear on the same page as this heading and, in part because of the various sub-headings, it is not clear that it was intended to be contained within the "Action Section". The description of this agenda item does not contain the words "action" or "move". This suggests no action would be taken on this item. The fact that the items before and after the "Reports" section contain the phrase "Discussion/Action" and the line "Move: ___ Second: ___ Vote:____" further suggests that no action was intended under agenda item number 26. The public was not adequately put on notice that the school board intended to take action under this agenda item. Because agenda item number 26 is not clearly denoted as an action item, the school board should not have taken any action under this agenda topic, including acceptance of the report and appointing members to the committee. These actions were in violation of the Open Meeting Law.

CONCLUSION

As stated above, we have concluded that the school board violated the agenda requirements of the Open Meeting Law when it considered and acted upon the appointment of a member and alternate to the Attendance Advisory Board. In order to cure these violations, we recommend that the school board reschedule this matter on a future agenda with a clear description of the matters to be considered and clearly denoting the item as an action item. If you do not follow this recommendation, we may take further action against the school board on this matter. We also recommend that the school board ensure that on all future agendas, each item upon which action may be taken is clearly denoted as an action item and that each item, including administrative reports of staff, has a clear description of the matters to be considered.

Cordially,

FRANKIE SUE DEL PAPA
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By: _____
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cc: Lynda Nickeron
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March 12, 2001

Vernon Van Winkle
Executive Producer
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Pahrump, Nevada 89041

Re: ***Valley Electric Association, Inc.***
OMLO 2001-59/AG File No. 00-055

Dear Mr. Van Winkle:

This letter is in response to your inquiry regarding whether Valley Electric Association, Inc. (Valley Electric) is a "public body" required to comply with the Nevada Open Meeting Law, Chapter 241 of the Nevada Revised Statutes.

NRS 241.015(3) defines a "public body" as:

> [A]ny administrative, advisory, executive or legislative body of the state or a local government which expends or disburses or is supported in whole or in part by tax revenue or which advises or 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…

The definition in NRS 241.015(3) specifies that a "public body" is an "administrative, advisory, executive or legislative body of the state or a local government." As such, a "public body" must: (1) owe its existence to and have some relationship with a state or local government; (2) be organized to act in an administrative, advisory, executive or legislative capacity; and (3) must perform a government function. *See* Nevada Open Meeting Law Manual § 3.01 (8th Ed., February 2000). Additionally, a "public body" must expend or disburse or be supported in whole or in part by tax revenue, or advise or make recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue.

Courts construing the scope of various state open meeting laws have determined that private entities are generally not within the purview of these acts. *See Hallas v. Freedom of Information Comm'n*, 557 A.2d 568 (Conn. App. 1980), *appeal den'd*, 561 A.2d 945 (Conn. 1989) (holding that private law firm acting as bond counsel was not "public body" within the definition of Connecticut's open meeting law). Similarly, not-for-profit corporations assisting governmental entities have generally been regarded as falling outside the scope of the open meeting laws. *Kubick v. Child & Family Services, Inc*., 429 N.W.2d 881 (Mich. App. 1988) (holding nonprofit foster care corporation receiving less than half of its funding from government sources is not a "public body" for purposes of state or federal Freedom of Information Acts). Under certain circumstances, however, courts have found that not-for profit corporations that receive public funds and function as a governmental agency are "public bodies" and must comply with open meeting laws. *Rehabilitation Hospital Services Corp. v. Delta-Hills Health Systems Agency, Inc*., 687 S.W.2d 825 (Ark. 1985) (non-profit regional health planning corporation primarily funded by federal government is subject to the open meeting laws); *Cf, UNT v. Aerospace Corp*., 765 F.2d 1440,1447-48 (9th Cir. 1985) (holding private nonprofit corporation is not subject to federal Privacy Act merely because it receives some funding and is regulated by federal authority).

The Nevada Supreme Court has not had occasion to decide whether a not-for-profit private electric utility company comes within the purview of the definition of "public body" under Chapter 241. However, other jurisdictions have dealt with this issue. *Jean Hunerjager v. Dixie Electric Membership Corporation*, 434 So.2d 590 (La. App. 1983); *see also, Perlongo v. Iron River Cooperative TV Antenna Corp.*, 332 N.W.2d 502 (Mich. App. 1983) (holding that non-profit, non-stock utility company regulated by a local or state authority was not a "public body" for purposes of Michigan's Freedom of Information Act). In *Dixie Electric*, a Louisiana Appellate Court held that a not-for profit private electric utility corporation was not a "public body" and thus, not subject to the Louisiana Open Meeting laws. *Id*.at 592. In *Dixie Electric*, the Board of Directors closed its regular monthly meeting to the public to adopt rate increases and approve loans from the federal government. Member customers filed suit to declare the Board's actions void. However, the Court in *Dixie Electric* noted that although the not-for profit corporation set rates for electricity similar to an "authority," Dixie Electric was neither publicly funded, nor was it "directly involved with a governmental function," such as public education or anti-poverty programs. *Id*.

In this instance, Valley Electric's Articles of Incorporation provide that it is a not-for-profit corporation and does not offer stock to the public. The Articles of Incorporation further indicate Valley Electric is an association organized for the purpose of promoting and supporting electrical utility services to the citizens of Pahrump, Nevada. We have not been informed that any state or local authority created Valley Electric or that the Board of Directors is controlled by state or local officials. Furthermore, we have not been informed that Valley Electric is supported in whole or in part by public funding. Merely because Valley Electric provides utility service to the public does not alone make it subject to the Open Meeting Laws. Accordingly, Valley Electric is not a "public body" and, thus, is not subject to the Open Meeting Laws, Chapter 241

of the Nevada Revised Statutes. Therefore, Valley Electric may exclude KPVM-TV, Channel 41 and any other media organization from attending and/or video or audio taping Association meetings.

Based on the foregoing reasons, the Nevada Attorney General's Office concludes that Valley Electric is not a "public body" as defined pursuant to NRS 241.105(3) and, thus, is not required to comply with the Open Meeting Laws, Chapter 241 of the Nevada Revised Statutes. The Nevada Attorney General's Office thanks you for bringing this important matter to its attention.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: _____
PETER C. SIMEONI
Deputy Attorney General
Tax Section
(775) 684-1206

PCS:jm