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**STATE OF NEVADA**  
**OFFICE OF THE ATTORNEY GENERAL**

In the Matter of:

NEVADA SYSTEM OF HIGHER  
EDUCATION BOARD OF REGENTS

Attorney General File No. 09-017  
OMLO 2009-01

This office reviewed the Nevada System of Higher Education Board of Regents' (NSHE) question about Open Meeting Law (OML) voting requirements for its standing committees. NSHE asked the following OML question – a question of first impression:

I.

**QUESTION**

Whether NRS 241.0355(1)<sup>1</sup> applies to the Nevada System of Higher Education (NSHE) Board of Regents (Regents) standing committees, and special committees, both of which are created pursuant to NSHE Code or Board of Regents' Bylaws.<sup>2</sup>

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<sup>1</sup> **NRS 241.0355 Majority of all members of public body composed solely of elected officials required to take action by vote; abstention not affirmative vote; reduction of quorum.**

1. 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 subsection, a public body may not count an abstention as a vote in favor of an action.

2. In a county whose population is 40,000 or more, the provisions of subsection 5 of NRS 281A.420 do not apply to a public body that is required to be composed of elected officials only, unless before abstaining from the vote, the member of the public body receives and discloses the opinion of the legal counsel authorized by law to provide legal advice to the public body that the abstention is required pursuant to NRS 281A.420. The opinion of counsel must be in writing and set forth with specificity the factual circumstances and analysis leading to that conclusion.

(Added to NRS by 2001, 1123; A 2003, 818)

<sup>2</sup> <http://system.nevada.edu/Board-of-R/Handbook/>; Title 1: *Bylaws of the Board of Regents*, Title VI, §§ 1, 2, 3, and 4 (2008); Title II: *Nevada System of Higher Education Code*.

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II.

ANALYSIS

Regents submitted their own analysis of whether NRS 241.0355(1),<sup>3</sup> a statutory mandate requiring majority vote of an elected public body's membership before it may take action, is applicable to committees created or established under authority of Regents' Bylaws or its Code. Regents assert that the statute does not apply to its committees because its bylaws do not require any committee to be composed of elected officials only.<sup>4</sup>

Regents suggest the legislative history of S.B. 329 (Act of May 30, 2001, Ch. 255, §§ 1 and 2, 2001 Nev.Stat.1123), created a different voting requirement for public bodies, so that the Regents' standing committees are subject to NRS 241.015(1)(c), the voting requirement for appointed public bodies, despite the fact that any of Regents' standing committees might be composed solely of elected officials. Regents point out that S.B. 329's

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<sup>3</sup> Nevada's Open Meeting Law was amended in 2001 by S.B. 329. It created a new section in the OML, NRS 241.0355(1), and it also amended the definition of "action" in NRS 241.015(1)(c) & (d):

**NRS 241.015 Definitions.** 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.

<sup>4</sup> <http://system.nevada.edu/Board-of-R/Handbook/>: Title 1: *Bylaws of the Board of Regents*, Article VI – *Committees of the Board*, §2 *Appointment*:

[E]xcept as specifically provided otherwise in Section 3 below, the appointment and composition of standing committees and the powers of their members are set forth in this section. The members of a standing committee, its chairman and vice-chairman shall be appointed by the Chairman of the Board from among the members of the Board. A standing committee shall consist of no fewer than three and no more than six persons, except for the Investment Committee which shall consist of no fewer than four and no more than six persons. Notwithstanding the composition of a standing committee as noted herein, the Board from time to time may elect to make any of its standing committees a committee of the whole.

**Upon the recommendation of a standing committee, the Board may additionally appoint a public member to the standing committee. The public member shall be advisory to the standing committee and shall have no vote.** The Chairman of the Board may be eligible as a member of the standing committee, but may not serve as its chairman. The members of the standing committee shall serve terms of one year or until the first organizational meeting of the Board following the committee member's appointment. (B/R 3/04). [Emphasis added.]

1 voting requirement was intended to apply only to those public bodies whose members must  
2 be elected to that public body, because early in the 2001 session, an amendment to S.B. 329  
3 removed an early provision that would have applied the voting requirement to "appointed  
4 public officials." S.B. 329 as introduced applied to all public bodies regardless of whether the  
5 public body was elected or appointed. See S.B. 329 as introduced, March 13, 2001, § 1, Ins  
6 3-6. A list of more than 100 public bodies was offered by the Bill's sponsor to represent  
7 affected public bodies. All bodies on the list were elected public bodies.<sup>5</sup>

8 Regents argue that the appointed public body rule, NRS 241.015(1)(c), applies to its  
9 standing committees, because committee composition is not required to be solely elected  
10 Regents, but it may have a member appointed who is a non-elected member of the public. It  
11 is this discretionary power provided in its bylaws, to appoint a non-voting, non-regent to any of  
12 its standing committees, which Regents believe requires the appointed public body voting  
13 requirement to apply to its standing committees.

#### 14 **Regents' Standing Committees are** 15 **Elected Public Bodies**

16 Because of S.B. 329, two rules regarding voting requirements of public bodies were  
17 created. There is now one rule for elected public bodies and one rule for appointed public  
18 bodies. *Infra*, notes 1 and 3.

19 Because all Regents are elected, "action" by the Board requires a majority vote of the  
20 membership.<sup>6</sup> However, Regents' position that NRS 241.0355(1) does not apply to its  
21 committees, solely because Regents' bylaws do not require them to be composed of elected  
22 officials only, is a position without any legal support or authority and moreover is a position

23  
24 <sup>5</sup> Ironically, NSHE Board of Regents was left off the list. Further consideration of the Bill had to await  
25 LCB's determination that not only the Board of Regents, but also county Board of School Trustees were also  
26 covered by the scope of S.B. 329. (Legis. history, May 11, 2001, comments by Committee Policy Analyst Dave  
Ziegler to the committee that the Board of Regents was a public body covered by S.B. 329.)

27 <sup>6</sup> Title 1: *Bylaws of the Board of Regents*, Article VI – *Committees of the Board*, § 1: **Section 1.**  
28 **Authority:** To facilitate consideration of the business and management of the University, standing and special  
committees shall be established as provided herein. Unless otherwise specifically delegated and except as  
otherwise provided herein, authority to act on all matters is reserved to the Board, and the duty of each  
committee shall be only to consider and make recommendations to the Board upon matters referred to it.

1 contrary to Legislative purpose. Reliance on authority from their bylaws to blunt the clear  
2 legislative voting requirement is a self-serving artifice capable of repetition by any public body  
3 seeking to avoid the more stringent legislative voting requirement represented by S.B. 329.

4 The meaning of the phrase "required to be composed of elected officials only . . ." was  
5 not discussed during consideration of S.B. 329, nor was the application of either voting rule to  
6 subcommittees and committees of public bodies discussed, but we are confident the phrase is  
7 inapplicable to public body bylaws. There was a great deal of testimony before legislative  
8 committees which clarified the intent of the Bill. Bill sponsors testified S.B. 329 was intended  
9 to ensure final decisions of elected public bodies are always based on majority vote of the  
10 members of the body.

11 Regents are an elected public body, but the addition to a standing committee, through  
12 authority found in its bylaws, of a non-voting member of the public does not alter Regents'  
13 legal duty to only take action based on a majority vote of the elected members of the body. A  
14 non-voting member of any elected public body simply does not alter the legislative purpose so  
15 as to avoid the majority vote requirement in NRS 241.0355(1).

16 The addition of a non-voting member through its bylaws is fine as far as it affects the  
17 Board's internal governance or that of the system, but Regents' bylaws are not created by  
18 statute and do not have the force and effect of law.<sup>7</sup> Regents' bylaws apply to internal  
19 governance and to the system, but bylaws may not prescribe the rules for making

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24 <sup>7</sup> The Court in *University and Community College System of Nevada v. DR Partners*, 117 Nev. 195, 203,  
25 18 P.3d 1042, 1047 (2001) stated: "The Newspaper's new argument that the position [community college  
26 president] was created by the equivalent of a state statute, because the Board's [Board of Regents] rules and  
27 regulations have the force and effect of statute or law, lacks merit. The cases cited by the Newspaper as support  
28 for this new argument, *State ex rel. Richardson v. Board of Regents*, and *Board of Regents v. Oakley*, do not  
support it. They make it clear that the Board is bound by the regulations it adopts under a statutory delegation of  
authority, but *Oakley* expressly rejects an intimation that the Board's own regulations are equal in status and  
dignity to legislative enactments (in other words, statutes). See *Board of Regents v. Oakley*, 97 Nev. 605, 608,  
637 P.2d 1199, 1201 (1981); *State ex rel. Richardson v. Board of Regents*, 70 Nev. 144, 150, 261 P.2d 515, 518  
(1953)."

1 decisions under the OML.<sup>8</sup> Regents' standing and special committees are elected public  
2 bodies for purposes of the OML.

3 The OML's definition of public body includes "committees, subcommittees or other  
4 subsidiary thereof . . . ." NRS 241.015(3). "Committee" and "sub-committee" are not defined  
5 in the OML; however, Regents' standing committees are public bodies within the meaning of  
6 the OML and in our view these standing committees stand on their own as an elected public  
7 body, since committees are singled out separately in the statutory definition of public body.  
8 NRS 241.015(3). Statutory authority requires the Board of Regents to be composed of  
9 elected members, but there is no statutory authority to alter its OML voting requirement  
10 through its bylaws. The argument that the Regents' Bylaws have the standing equivalent to  
11 state statute was soundly rejected by the Nevada Supreme Court.

### 12 **Prior Attorney General Opinions**

13 It is clear that S.B. 329 applied only to elected public bodies, but in two opinions this  
14 office has issued since S.B. 329 became law, we applied the new statutory voting  
15 requirements to appointed public bodies, not elected bodies similar to Regents' committees.

16 In OMLO 2001-57 (December 11, 2001) we were asked to determine whether the  
17 Carson River Advisory Committee (CRAC), a seven member body appointed by the Carson  
18 City Board of Supervisors, violated the OML because three members were able to speak for  
19 the seven member board in a vote in which three members abstained.

20 CRAC is an advisory body created by power vested in Carson City's Board of  
21 Supervisors by legislative charter which consolidated city and county and incorporated Carson  
22 City.<sup>9</sup> It "may be comprised of both elected and appointed officers and representatives of the

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25 <sup>8</sup> NRS 396.110 Rules of Board.

26 1. The Board of Regents may prescribe rules for:

27 (a) Its own government; and  
(b) The government of the System.

28 2. The Board of Regents shall prescribe rules for the granting of permission to carry or possess a  
weapon pursuant to NRS 202.265.

<sup>9</sup> Carson City Charter, Article 2, section 2.320. Added - Chapter 690, Stats 1979 p.1857; A-Ch 72,  
Stats. 2001 p. 520.

1 people of Carson City . . . .” There is no statutory requirement that CRAC be composed on  
2 elected members only.

3 OMLO 2001-57 reviewed CRAC’s vote in light of S.B. 329’s newly enacted action item  
4 voting requirements, and concluded that S.B. 329 did not apply to appointed public bodies,  
5 instead it applied only to elected public bodies. *Citing* Op. Nev. Att’y Gen. No. 2001–25  
6 (September 2001).

7 AGO 2001-25, another opinion which reviewed S.B. 329, clarified that S.B. 329 created  
8 two voting requirements for public bodies but that the law remained unchanged for a public  
9 body that could have an unelected member:

10 [I]t is clear that the amendment to NRS chapter 241 by section 1  
11 of S.B. 329 applies only to public bodies that are required to be  
12 composed solely of elected officials. Additionally, section 2 of S.B.  
13 329 makes it clear that the more stringent voting requirement  
14 provided for in the bill applies only to public bodies whose  
15 members must all be elected officials. **The law remains**  
16 **unchanged as to a public body that may have an individual**  
17 **member who is not an elected official. Accordingly, if a public**  
18 **body may have a member who is not an elected official, then**  
19 **action may be taken by a vote of a majority of the members**  
20 **present at a meeting, provided a quorum attended the**  
21 **meeting.** S.B. 329 section 2(1)(c). However, with regard to a  
22 public body required to be solely comprised of elected officials, the  
23 law has been amended and action by such a public body may only  
24 be taken by affirmative vote of a majority of all members of the  
25 public body.

18 Op. Nev. Att’y Gen. No. 2001–25 (September 6, 2001)

19 AGO 2001-25 construed S.B. 329’s requirements in the context of another appointed  
20 public body. Truckee Meadows Regional Planning Governing Board (TMRPGB), created  
21 pursuant to NRS 278.0264, was not required to be composed of any elected public officials,  
22 although the Board in 2001 was composed entirely of elected officials. In this respect,  
23 TMRPGB was similar to the CRAC considered in OMLO 2001-57.

24 Regents’ standing committees are unlike CRAC and TMRPGB, because Regents’  
25 standing committees are required to be composed of elected Regents, except that each  
26 standing committee may have appointed one non-voting member of the public under authority  
27 of its bylaws. However, both the CRAC and TMRPGB public bodies’ authority to appoint a  
28 non-elected member is based on either statute (TMRPGB) or on legislatively enacted charter

1 in the other case (CRAC). Regents' authority is based on its bylaws which may be altered or  
2 amended at its will. All members of CRAC and TMRPGB, whether appointed or elected are  
3 voting members, unlike the Regents' appointment of a non-voting public member to its  
4 standing committees. The meaning of the phrase, "required to be composed of elected  
5 officials only. . ." refers to statutory law or to county ordinance, both of which have legislative  
6 authority derived from the people. Bylaws do not have the force or effect of statute.

7 The more stringent public body voting requirement, NRS 241.0355(1), applies to  
8 Regents' standing committees. S.B. 329's legislative history clearly describes the  
9 Legislature's purpose for the Bill. Op. Nev. Att'y Gen. No. 2001-25 (September 2001)  
10 reviewed the comments of S.B. 329's sponsors which revealed that the Bill's primary purpose  
11 was to prevent a minority of the members of an elected body from taking "action" because of  
12 abstentions or absences from public meetings. Assemblyman David Parks, in testimony  
13 before the Assembly Committee on Government Affairs stated the Bill's purpose was to  
14 ensure that a "true majority" vote prevailed. He and Senator Care described instances where  
15 action was taken by minority of an elected public body. Assemblyman Parks explained that  
16 when a board minority can speak for the entire body, it "promotes skepticism and negativity  
17 toward elected officials." Hearing on S.B. 329 Before the Assembly Committee on  
18 Government Affairs, 2001 Leg. Sess. (April 30, 2001).

19 **IV.**

20 **CONCLUSION**

21 NRS 241.0355(1) applies to Regents' standing committees and special committees,  
22 because the statute is applicable to elected bodies created by statute or ordinance, not the  
23 public body's bylaws. Standing committees are public bodies under the OML; there is no  
24 statutory authority that allows either the Regents or its standing committees to avoid the  
25 OML's voting requirement in NRS 241.0355(1). Regents' Bylaws govern its internal  
26 organization; they do not have the force or effect of statutory law. Consequently, they may  
27 not contradict the plain language of the OML.

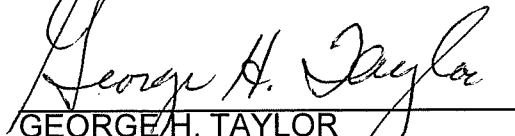
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1 S.B. 329 represents a clear signal to each elected public body to ensure that only a  
2 majority of an elected public body may take action on any matter under its jurisdiction or  
3 control.

4 DATED this 29<sup>th</sup> day May, 2009.

5 CATHERINE CORTEZ MASTO  
6 Attorney General

7  
8 By:

  
9 GEORGE H. TAYLOR  
10 Senior Deputy Attorney General  
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12 100 North Carson Street  
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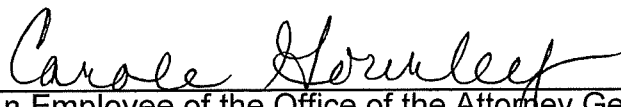
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**CERTIFICATE OF MAILING**

I hereby certify that I am employed by the Office of the Attorney General of the State of Nevada, and that on this 29<sup>th</sup> day of May, 2009, I mailed a copy of the foregoing Open Meeting Law Opinion, by mailing true copies by U.S. Mail to:

Brooke A. Nielsen, Special Counsel  
Nevada System of Higher Education  
2601 Enterprise Road  
Reno, Nevada 89512

Scott Wasserman, Chief Executive Officer  
Board of Regents  
2601 Enterprise Road  
Reno, Nevada 89512

  
An Employee of the Office of the Attorney General

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**STATE OF NEVADA**  
**OFFICE OF THE ATTORNEY GENERAL**

In the Matter of:

WHITE PINE COUNTY BOARD OF  
COUNTY COMMISSIONERS

Attorney General File No. 09-019  
OMLO 2009-04

I.

**INTRODUCTION**

Ms. Beverly Cornutt, White Pine County Treasurer, filed a complaint with this office against the White Pine County Board of County Commissioners (BOCC) alleging a violation of the Open Meeting Law (OML). The Office of the Attorney General (Office) has jurisdiction to investigate alleged violations of the OML and may sue in any Nevada Court to enforce its provisions. NRS 241.037(1).

II.

**BACKGROUND**

We reviewed statements from each County Commissioner, and we reviewed an e-mail document sent to each member of the BOCC prior to its April 30, 2009 Special Meeting from Commissioner and Vice Chair, RaLeene Makley. We reviewed the audio tape of the April 30, 2009 BOCC Special Budget hearing when the sole item on the agenda was "Discussion/ White Pine County Final Budget."<sup>1</sup>

There are two alleged OML violations in this complaint, both of which originate from BOCC's Special Budget Hearing on April 30, 2009.

First, it is alleged that a quorum of BOCC engaged in serial communications and deliberated toward a decision to reject complainant's County office budget staffing request to add another full time position in the Treasurer's office. Serial communications creating a constructive quorum, which then engages in action or deliberation or both is conduct specifically proscribed by OML statute. NRS 241.015(2)(a)(2).

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<sup>1</sup> We also reviewed a verbatim transcript of the Special Budget Hearing, April 30, 2009, provided to this office by BOCC concurrently with the audio tape.

1 The second allegation is that the BOCC discussed complainant's character and/or  
2 competence without giving her written notice during the April 30, 2009 special budget  
3 meeting.

4 III.

5 FINDINGS OF FACT

6 **Special Budget Hearing, April 30, 2009**

7 Discussion of White Pine County Treasurer Beverly Cornutt occurred following an  
8 informational presentation by Commissioner RaLeene Makley on staffing levels from other  
9 rural Nevada counties that have a combined clerk/treasurer's office and from rural counties  
10 with separate clerk and treasurer's offices. This information had been gathered and compiled  
11 by Commissioner Makley in a three page document which she e-mailed to all the members of  
12 BOCC on April 28, 2009 under the heading, "Information for budget meetings." The third  
13 page of her document was a narrative and personal recommendation to reject the Treasurer's  
14 additional staffing request.

15 Commissioner Makley also interviewed two former employees in the Treasurer's office  
16 regarding workload and staffing and included their comments in her document. Her  
17 recommendation to the other Commissioners included the former Treasurer's office  
18 employee's subjective view that the present staffing level in the Treasurer's office was  
19 adequate in spite of the recommendation by State Taxation to add more accounts to the  
20 Treasurer's workload. Commissioner Makley's recommendation indicated that the two former  
21 employees thought present staffing was adequate as long as the Treasurer stayed in the  
22 office. Finally, the recommendation noted a letter written in 2005 by a former employee who  
23 worked less than two weeks in the Treasurer's office before resigning. That letter stated that  
24 the Treasurer was out of the office during the 70 hours she was paid by the County. This  
25 former employee stated she resigned for lack of work.

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IV.

ISSUES

1. Whether Commissioner Makley's e-mailed information and recommendation violated the OML's notice and agenda requirements for meetings.

2. Whether BOCC's discussion of the complainant Treasurer's absence from her office was a violation of the notice provisions of NRS 241.033.

V.

ANALYSIS AND DISCUSSION

1. Whether Commissioner Makley's e-mailed information and recommendation violated the OML's notice and agenda requirements for meetings. NRS 241.015.

After review of written statements from each Commissioner, it is clear there was no serial communication regarding Vice Chair Makley's e-mailed document. Each Commissioner stated he or she did not respond to Commissioner Makley's information and recommendation concerning the Treasurer's proposed staffing request, nor did they discuss the e-mail with each other prior to the April 30, 2009 meeting. However, Commissioner Makley's e-mailed document was sent to each Commissioner, so a quorum was involved.

The Nevada Supreme Court has provided the frame work for analyzing this issue. In *Del Papa v. Board of Regents of the University and Community College System of Nevada*, 114 Nev. 388, 956 P.2d 770 (1998), the Court reviewed a public body's electronic communications among a quorum of its members and concluded that impermissible deliberation and action had taken place when the members actually voted in private about a matter under their jurisdiction. The court stated that ". . .because the Board took action on the draft [media advisory in private], we hold that the Board acted in its official capacity as a public body." *Id.* 114 Nev. at 401, 956 P.2d at 779.

However, the Court also clarified that in the absence of a quorum public bodies are not foreclosed from lobbying each other for votes or privately discussing public issues, but the public body must deliberate and vote in a public meeting. *Id.* 114 Nev. at 400, 956 P.2d at 778.

1 Commissioner Makley's conclusion that an additional staff person in the Treasurer's  
2 office was not needed was clearly a form of lobbying the other Commissioners to her point of  
3 view. The OML does not prohibit lobbying except when a quorum of a public body is  
4 implicated. She concluded the Treasurer's office had enough staff based on her view of  
5 current and anticipated workload and after comparing other rural counties staffing for similar  
6 offices. She concluded there was no reason to hire more staff, but there were training issues  
7 to be addressed in the Treasurer's office. Clearly, she was lobbying the other Commissioners  
8 to vote to reject the Treasurer's staffing request. Her communication with the other  
9 Commissioners violated the Supreme Court's warning that serial communications involving a  
10 quorum whether lobbying for votes or privately discussing public issues is a violation of the  
11 OML. Had she sent the e-mail to less than a quorum of Commissioners, the OML would not  
12 be implicated, but she shared her views and recommendation with each Commissioner,  
13 thereby violating the OML.

14 2. Whether BOCC's discussion of the Treasurer's absence from her office was a  
15 violation of the notice provisions of NRS 241.033.

16 The second allegation of OML violation in this complaint involves notice. NRS 241.033  
17 requires a public body to give a person notice before considering the person's character,  
18 alleged misconduct, professional competence or physical or mental health. Complainant  
19 alleges that she was not noticed before BOCC discussed her in one or more of the foregoing  
20 contexts.<sup>2</sup>

21 Complainant alleged five reasons her right to notice was violated. First, she alleged  
22 she was accused of not being in her office during office hours; second, she was blamed  
23 because the completion of an ongoing county financial audit was held up because her office  
24 failed to complete bank reconciliations on time; third, Commissioner Makley's narrative  
25 insinuated, in reported interviews included in her e-mail to all the Commissioners, that former  
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27 <sup>2</sup> Complainant does not point to any one or more of the criteria in the statute as a violation of her right to  
28 notice, so we reviewed the audio recording of this portion of the meeting to try to ascertain if any discussion by  
BOCC violated her right to notice under NRS 241.033.

1 employees said staffing was adequate as long as complainant was in her office; fourth, a  
2 letter written by another former employee in 2005 was published at the meeting which stated  
3 that the complainant was not in her office during this former employee's brief tenure with the  
4 county; and finally, she alleged Commissioner Makley's comment regarding "figurehead" was  
5 directed toward her because she was never in her office.

6 Because there is no support in the record for these allegations, we find no violation of  
7 the notice provision of NRS 241.033.

8 The NEVADA OPEN MEETING LAW MANUAL defines character and competence as:

9 [T]he word "character" was defined in *Miglionico v. Birmingham*  
10 *News. Co.*, 378 So. 2d 677 (Ala. 1979) to include one's general  
11 reputation. It might also include such personal traits as honesty,  
loyalty, integrity, reliability, and such other characteristics, good or  
bad, which make up one's individual personality.

12 In Op. Nev. Att'y Gen. No. 81-A (February 23, 1981), the Office of  
13 the Attorney General opined that the word encompassed that moral  
14 predisposition or habit or aggregate of ethical qualities, which is  
15 believed to attach to a person on the strength of the common  
16 opinion and report concerning him . . . a person's fixed disposition  
17 or tendency, as evidenced to others by his habits of life, through  
18 the manifestation of which his general reputation for the possession  
of a character, good or otherwise is obtained. The Office of the  
Attorney General also construed the word "competence" to include:  
. . . . duly qualified . . . answering all requirements . . . having  
sufficient ability or authority . . . possessing the natural or legal  
qualifications . . . able . . . adequate . . . suitable . . . sufficient . . .  
capable. . . legally fit. Also see OMLO 2004-28 (September 9,  
2005).

19 NEVADA OPEN MEETING LAW MANUAL § 9.04, (10th ed. 2005).

20 Review of BOCC's audio of the budget meeting does not support complainant's  
21 allegations. The audio reveals a dispute between complainant and Chairwoman Carson and  
22 Commissioner Makley about what had been said in the past concerning complainant's  
23 presence in her office. Both Chairwoman Carson and Commissioner Makley vigorously  
24 denied saying complainant was never in her office, only that they had been to her office to  
25 see her, but she had been away.

26 Commissioner Makley's e-mailed document contained a narrative portion in which she  
27 stated that two former employees interviewed by her opined that current staffing was  
28 adequate "as long as the Treasurer stays in the office. . ." . This errant and anonymous

1 remark along with the letter written in 2005 by a former employee in the Treasurer's office for  
2 all of 10 days, simply does not rise to the level of a discussion of one's character or  
3 competence in light of the definitions used in the OML Manual. We have already opined that  
4 the distribution of Commissioner Makley's entire document to all the other Commissioners  
5 was a violation of the OML, not because of the information or inferences and innuendo in her  
6 narrative, but because she was lobbying the entire Commission regarding the  
7 recommendation on the budget.

8 The inferences and innuendo in the narrative portion of the e-mailed document does  
9 not support a violation of the notice provisions of NRS 241.033. Commissioner Makley's  
10 remark during the meeting that the public expects elected officials to work the same hours as  
11 the rest of their staff because they are not "figureheads," is simply yet another random remark  
12 that does not implicate complainant's character or competence. However veiled this  
13 reference is to the complainant's allegations, it simply does not rise to the level of a  
14 discussion of character or competence.

15 Similarly, the discussion of the Treasurer's bank reconciliation process being the  
16 reason the county audit was uncompleted is also irrelevant to the complainant's allegations.  
17 An inference that the Treasurer was to blame for the unfinished county audit is belied by the  
18 fact that a private contractor had been hired to reconcile the bank accounts a year earlier.

19 VI.

20 CONCLUSION

21 Commissioner Makley's distribution of information coupled with a recommendation was  
22 a serial communication to the entire Board. There was no evidence of a response from any  
23 other member to her volunteer information distributed on the eve of the April 30, 2009 special  
24 budgetary meeting. Commissioner Makley's recommendation went beyond mere information  
25 gathering and directly informed the other members of her position. This action is considered  
26 as lobbying a quorum of other Commissioners. There was no evidence of deliberation or  
27 action in response to the information by the other members, but Commissioner Makley's

28 ///

1 direct distribution of not only information but an explicit recommendation was a unilateral  
2 contact with a quorum of BOCC members which is a violation of the OML.

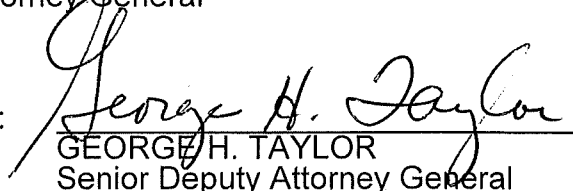
3 There was no evidence that the BOCC violated the notice provisions of NRS 241.033.  
4 The discussion by the BOCC with the Treasurer was not a discussion of her character or  
5 competence.

6 This opinion is issued as guidance to the Board. No action was taken during this  
7 meeting by the BOCC, therefore no action is required by this office. We remind the BOCC to  
8 be more cognizant of the fundamental requirements of the OML – transparency and public  
9 notice.

10 DATED this 18th day of August, 2009.

11 CATHERINE CORTEZ MASTO  
12 Attorney General

13  
14 By:

  
15 GEORGE H. TAYLOR  
16 Senior Deputy Attorney General  
17 Nevada State Bar No. 3615  
18 100 North Carson Street  
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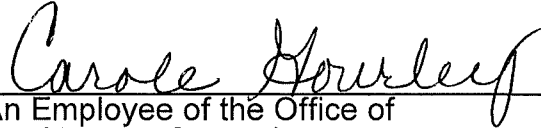
**CERTIFICATE OF MAILING**

I hereby certify that I am employed by the Office of the Attorney General of the State of Nevada, and that on this 18th day of August, 2009, I mailed a copy of the Findings of Fact and Conclusions of Law, by mailing true copies by U.S. Mail to:

Laurie Carson, Chair  
White Pine County Board  
of County Commissioners  
801 Clark Street, Suite 4  
Ely, Nevada 89301

Richard Sears, District Attorney  
White Pine County  
801 Clark Street, Suite 3  
Ely, Nevada 89301

Beverly J. Cornutt, Treasurer  
White Pine County  
801 Clark Street, Suite 2  
Ely, Nevada 89301

  
An Employee of the Office of  
the Attorney General

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STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

In the Matter of  
FERNLEY CITY COUNCIL

} Attorney General File No. 09-021  
} OMLO 2009-05

I.

**BACKGROUND**

An Open Meeting Law (OML) complaint was filed by Ms. Susan Seidl with this office alleging a violation of NRS 241.020. Ms. Seidl alleges that the Fernley City Council (Council) failed to provide supporting documentation for its May 19, 2009 meeting when members of the public requested copies at the City Clerk's office.

The Office of the Attorney General (Office) has jurisdiction to investigate alleged violations of the OML and may sue in any Nevada Court to enforce its provisions. NRS 241.037(1).

II.

**FACTS**

On April 30, 2009, Council offered the position of City Manager to acting Fernley City Manager Greg Evangelatos. On or about May 17, 2009, Mr. Evangelatos submitted a written counteroffer, to each Council member, to the Council's published terms for employment of a city manager. The counteroffer was not submitted to the City Clerk nor was it included in Council's packet of supporting documentation for the May 19, 2009 agenda item #10: "ADDRESS CONTRACT WITH GREG EVANGELATOS FOR THE CITY MANAGER POSITION."

During consideration of agenda item #10, counsel for Mr. Evangelatos remarked that each councilmember should have received a counteroffer from Mr. Evangelatos. Council members discussed the counteroffer but at the end of discussion they voted to form a negotiating committee to negotiate terms and conditions of a contract for professional services with Mr. Evangelatos.

1 There is no evidence that members of the public asked for a copy of the counteroffer  
2 during the May 19, 2009 meeting. However on the following day, May 20, 2009, three  
3 members of the public submitted written requests for a copy of the counteroffer to Lena  
4 Shumway, Fernley's City Clerk and records custodian. Ms. Shumway's affidavit states she  
5 did not have a copy on May 20, 2009, nor had she received any staff report or other  
6 documentation when the Council's packet was prepared prior to the meeting.

7 III.

8 ISSUE

9 Whether Council's inability to make supporting material for an agenda item available  
10 upon request by the public is a violation of NRS 241.020(5) and (6).

11 IV.

12 ANALYSIS

13 Supporting material must be immediately available for pick up upon any request as  
14 long as the supporting materials being requested have been provided to members of the  
15 public body.<sup>1</sup> NRS 241.020(5) and (6).<sup>2</sup>

16  
17 <sup>1</sup> NEVADA'S OPEN MEETING LAW MANUAL, § 6.06 at 44-45; (Tenth ed. 2005); OMLO 98-01 (January 21,  
18 1998)(at a minimum a public body must make agenda supporting material immediately available for pickup at the  
19 time it is sent to Board members); OMLO 99-06 (March 19, 1999) ("provided" as used in statute means public  
20 body is required to make a copy available for pickup); OMLO 2000-36 (October 3, 2000) (materials must be  
21 provided immediately whether requested at the public body's office or at the meeting); OMLO 2000-38 (October  
22 3, 2000) (public body must provide supporting materials upon request even during a meeting and even if it  
23 results in delay).

24 <sup>2</sup> NRS 241.020(5) and (6):

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

26 (a) An agenda for a public meeting;

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

28 (c) Subject to the provisions of subsection 6, any other supporting material provided to the members of  
the public body for an item on the agenda, except materials:

(1) Submitted to the public body pursuant to a nondisclosure or confidentiality agreement which  
relates to proprietary information;

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

(3) Declared confidential by law, unless otherwise agreed to by each person whose interest is being  
protected under the order of confidentiality.

As used in this subsection, "proprietary information" has the meaning ascribed to it in NRS 332.025.

6. A copy of supporting material required to be provided upon request pursuant to paragraph (c) of  
subsection 5 must be:

(a) If the supporting material is provided to the members of the public body before the meeting, made  
available to the requester at the time the material is provided to the members of the public body; or

(b) If the supporting material is provided to the members of the public body at the meeting, made  
available at the meeting to the requester at the same time the material is provided to the members of the public

1 We have reviewed the counteroffer. It was clearly supporting documentation for  
2 agenda item #10 for the May 19, 2009 Council meeting. In fact it was the principal subject of  
3 the agenda item.

4 Council members received Mr. Evangelatos' counteroffer privately. Mr. Evangelatos's  
5 affidavit states he prepared the counteroffer on May 18, 2009, the day before the Council  
6 meeting, for submission to the Council members. It was the only document in support of the  
7 item as there was no staff report. In other words, the counteroffer was not in the Council's  
8 meeting packet. Even on the day following the meeting, Fernley's City Clerk did not have a  
9 copy of the counteroffer and could not make copies available for the three public requestors.

10 Council argues that copies of supporting materials for the public need only be made *if*  
11 *available*; therefore, the counteroffer was *not available* because the Clerk did not have a copy  
12 at the time the requests were made, so there was no violation.

13 We reviewed NRS 241.020 and our prior opinions on the requirement to make  
14 supporting materials available to the public, but we find no support for Council's argument.  
15 There is no exception to the requirement to make supporting materials available to the public  
16 as soon as members of the public body are provided their copies of supporting materials.  
17 There is no excuse for failing to provide the counteroffer to the requestors on the day following  
18 the meeting.

19 It is also no excuse or exception to NRS 241.020 if supporting materials are provided  
20 privately to members of the public body rather than through the public board or council packet.  
21 The Legislature's intent is clearly expressed in NRS 241.020(5)(c): "a public body shall  
22 provide, . . . any other supporting material provided to members of the public body for an item  
23 on the agenda, . . . ." No matter what the source of the supporting material, whether from the  
24 Clerk, staff, or from a private person, if all members of the public body are provided supporting  
25 material for an agenda item, then the OML requires that it also be provided immediately to  
26 members of the public upon their request.

27  
28 body. If the requester has agreed to receive the information and material set forth in subsection 5 by electronic  
mail, the public body shall, if feasible, provide the information and material by electronic mail.

1 It is important to differentiate between supporting material for an agenda item and all  
2 other forms of information and documents that could be submitted to members of a public  
3 body from their constituents or their own staff. Not every written document related to the  
4 public body's jurisdiction or control is supporting material unless it is necessary for the  
5 members to use or consult when considering an agenda item. NRS 241.020 does not define  
6 "supporting material," but from the context we believe that the Legislature intended  
7 "supporting material" to mean only written material that is directly related to and necessary for  
8 members of the public body to consider an agenda item.

9 V.

10 CONCLUSION

11 The counteroffer was supporting material because it was necessary for contract  
12 negotiations. Inability to provide supporting material to the public because the public body's  
13 clerk, staff, or other custodian of materials does not have a copy, because the clerk, staff, or  
14 other custodian was not provided a copy, is a violation of NRS 241.020(5) and (6). It does not  
15 matter that the source of supporting material is a private person, the city manager, or any  
16 other person. If all members of the public body receive supporting material for a future  
17 agenda item, that material must be available to the public upon request.

18 Council provided the counteroffer on May 20, 2009 to the three requestors. It appears  
19 that ongoing negotiations between the Council and Mr. Evangelatos were conducted in  
20 accordance with the OML; therefore, we will only ask the Council to be cognizant of OML  
21 requirements when materials that are relevant to future agenda items are received, not  
22 through the Clerk's packet, but from private sources or even from individual city staff.

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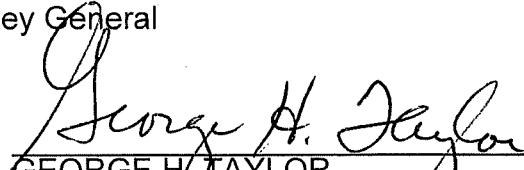
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1 Members of the Council, and any other public body, must shoulder some responsibility to  
2 ensure that supporting materials are available to the public even if the source was not the  
3 Clerk's packet.

4 DATED this 18th day of August, 2009.

5 CATHERINE CORTEZ MASTO  
6 Attorney General

7  
8 By:

  
9 GEORGE H. TAYLOR  
10 Senior Deputy Attorney General  
11 Nevada State Bar No. 3615  
12 100 North Carson Street  
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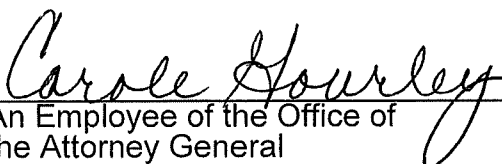
CERTIFICATE OF MAILING

I hereby certify that I am employed by the Office of the Attorney General of the State of Nevada, and that on this 18th day of August, 2009, I mailed a copy of the Findings of Fact and Conclusions of Law, by mailing true copies by U.S. Mail to:

Susan Seidl  
102 Diamond Way  
Fernley, NV 89408

Fernley City Council  
City of Fernley  
595 Silver Lace Boulevard  
Fernley, NV 89408

Jeff McGowan Esq  
Fernley City Counsel  
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the Attorney General

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**STATE OF NEVADA**

**OFFICE OF THE ATTORNEY GENERAL**

In the Matter of:

WHITE PINE COUNTY BOARD OF  
COUNTY COMMISSIONERS

} Attorney General File No. 09-025  
OMLO 2009-03

**I.**

**INTRODUCTION**

Ms. Beverly J. Cornutt, White Pine County Treasurer, filed a complaint with this Office against the White Pine County Board of County Commissioners (BOCC) alleging a violation of the Open Meeting Law (OML). The Office of the Attorney General (Office) has jurisdiction to investigate alleged violations of the OML and may sue in any Nevada Court to enforce its provisions. NRS 241.037(1).

**II.**

**FINDINGS OF FACT**

The complaint alleges that BOCC unexpectedly recessed its April 22, 2009 meeting to call in to a teleconferenced meeting of the Committee on Local Government Finance (CLGF), Nevada State Department of Taxation, in Carson City, Nevada. BOCC's call in to the teleconferenced CLGF meeting was not on the agenda.<sup>1</sup> The Commissioners desired to listen to an agenda item "White Pine County Financial Status Review" and also another item, a discussion of AB 415, a bill of importance to the County, since it would enable White Pine County to combine its clerk and treasurer's offices into one office. At approximately 10:15 a.m., Vice Chair RaLeene Makley recessed the BOCC meeting to call in to the teleconferenced CLGF meeting in Carson City, to listen to the discussion.<sup>2</sup>

<sup>1</sup> The evidence shows that CLGF sent notice of its April 22, 2009 meeting to each of the White Pine County Commissioners via e-mail at 7:39 a.m., Friday, April 17, 2009. This notice was just slightly more than one hour prior to BOCC's minimum time to post its own Notice and Agenda for its Wednesday, April 22, 2009 meeting. This early morning e-mail to BOCC did not indicate that AB 415 would be discussed by the Committee in an item entitled, "Other issues." On Tuesday, April 21, 2009, BOCC received a requested meeting packet for the CLGF meeting and learned that AB 415 would be discussed in addition to the discussion of White Pine County's Financial Status.

<sup>2</sup> At the same time, the Chair of BOCC, Laurie Carson, was traveling to Carson City to attend a Senate Governmental Affairs Committee meeting, which would consider AB 415 on its agenda at 1:30 p.m.



1 At about 10:45 a.m., Vice Chair Makley learned that the White Pine County District  
2 Attorney thought the recess to attend the teleconference was in violation of the OML. Vice  
3 Chair Makley then disconnected from the teleconference and reconvened the BOCC meeting.

4 **III.**

5 **ISSUE**

6 1. Whether BOCC's recess and call in to another public body's meeting without  
7 notice on its agenda constitutes a meeting in violation of NRS 241.015.

8 **IV.**

9 **CONCLUSIONS OF LAW**

10 The facts of this allegation are not in dispute. Vice Chair Makley temporarily recessed  
11 a BOCC meeting between 10:15 and 10:30 a.m. on April 22, 2009 to call in to and participate  
12 in a teleconferenced meeting of the Committee on Local Government Finance, a committee of  
13 the Nevada Department of Taxation. There were two matters on the CLGF agenda which  
14 were of concern to the BOCC. These matters and the possibility that the BOCC would  
15 participate in the teleconferenced CLGF meeting were not noticed on the agenda.

16 We reviewed written statements from each Commissioner and from Karen Rajala and  
17 Joanne Malone. Ms. Rajala and Ms Malone's written statements were particularly helpful.  
18 Both recalled that two Commissioners, Richard Carney and Gary Lane, left the room after  
19 Vice Chair Makley called the recess to call in to the CLGF. It is unclear whether they returned  
20 during the call in or whether they stayed away. It does seem clear that only Vice Chair Makley  
21 and Commissioner Perea listened in and participated.

22 If only two members of the Commission attended the teleconferenced CLGF meeting,  
23 no OML violation occurred as the OML applies only to a quorum of a public body.  
24 NRS 241.015(2)(a). If either Commissioner Lane or Carney rejoined Commissioner Gary  
25 Perea and Vice Chair Makley, the OML is implicated. If three Commissioners (a quorum)  
26 listened in or participated in the meeting there would be a violation only if there were  
27 deliberation or action taken on a matter over which the BOCC has jurisdiction or control. The  
28 record contained in the written statements is brief, but Commissioner Perea stated there were

1 no decisions or action taken during this brief period. On these facts, the meeting does not  
2 appear to be in violation of the OML.

3 The unannounced recess was not a violation despite the agenda's announcement that  
4 each agenda item would be considered at a time certain. The OML does not require public  
5 bodies to conduct meetings according to a timed agenda. It is the presence of a quorum in a  
6 formal setting that is of concern. The call in to the teleconference was not on the agenda, so  
7 the public would not have known that BOCC planned to do this.

8 There is no evidence in the record of deliberation or action during the call in  
9 teleconference so there was no "meeting" within the meaning of NRS 241.015, but we believe  
10 the better course of action would have been to notice the public on its agenda that the BOCC  
11 would recess and call in to a teleconferenced meeting of the CLGF. We understand that  
12 CLGF gave notice of the meeting only one hour before the minimum three working day notice  
13 requirement of NRS 241.020(3), but the BOCC must know and understand the gravity of  
14 gathering a quorum without notice to the public. If members of the public had been given  
15 notice of the teleconference call, they might have elected to attend the BOCC meeting to  
16 listen to a discussion of important issues concerning White Pine County.

17 **CONCLUSION**

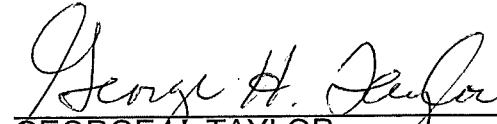
18 The gravity of the gathering of a quorum of BOCC without public notice should be  
19 apparent. Even though there was little or no time to publish an amended notice and agenda,  
20 BOCC should have elected to not attend the teleconferenced CLGF meeting. Instead, the  
21 duty to listen to the meeting could have been delegated to one member or to a member of  
22 staff. Later the individual members of the Board could have been briefed by staff or they  
23 could have listened to a recording in groups less than a quorum.

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1 We issue this opinion as guidance to BOCC to avoid gatherings of a quorum when no  
2 public notice, in accordance with the OML, has been issued.

3 DATED this 17<sup>th</sup> day August, 2009.

4 CATHERINE CORTEZ MASTO  
5 Attorney General

6 By: 

7 GEORGE H. TAYLOR  
8 Senior Deputy Attorney General  
9 Nevada State Bar No. 3615  
10 100 North Carson Street  
11 Carson City, Nevada 89701-4717  
12 (775) 684-1230

CERTIFICATE OF MAILING

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of County Commissioners  
801 Clark Street, Suite 4  
Ely, Nevada 89301

Richard Sears, District Attorney  
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**STATE OF NEVADA**  
**OFFICE OF THE ATTORNEY GENERAL**

In the Matter of  
FERNLEY CITY COUNCIL

Attorney General File No. 09-026  
OMLO 2009-02

I.

**BACKGROUND**

Two Fernley residents have filed an Open Meeting Law (OML) complaint against the Fernley City Council (Council). The complaint alleges that the Council's process to appoint a new city manager was in violation of the OML. Specifically, it is alleged that the Council's failure to allow access to all candidates' applications and resumes violated the OML. The process to appoint a new city manager began on January 7, 2009. A new city manager, Greg Evangelatos, was appointed by the Council on April 30, 2009.

The Office of the Attorney General (Office) has investigated the facts underlying the complaint. Council supplied this Office with audio recordings of relevant meetings, minutes of those meetings, and a written response to the complaint. The Office of the Attorney General has statutory authority to enforce compliance with the OML. NRS 241.037.

II.

**ISSUE**

Whether the Fernley City Council's denial of a request for access and review of all initial city manager candidate's applications and resumes was a violation of the OML.

III.

**FINDINGS OF FACT**

When the process to select a new city manager, a public officer,<sup>1</sup> began in January

---

<sup>1</sup> NRS 281A.160 "Public officer" defined.  
1. "Public officer" means a person elected or appointed to a position which is established by the Constitution of the State of Nevada, a statute of this State or an ordinance of any of its counties or incorporated cities and which involves the exercise of a public power, trust or duty. As used in this section, "the exercise of a public power, trust or duty" means:  
(a) Actions taken in an official capacity which involve a substantial and material exercise of administrative discretion in the formulation of public policy;

1 2009, the Mayor of Fernley formed a citizen committee to assist him in the initial review and  
2 screening of candidate applications. During the January 7, 2009 Council meeting Mayor  
3 Cutler asked that he be placed in charge of the recruitment process. He then presented a  
4 proposed timeline for the recruitment process that included advertisement for applications in  
5 publications and newspapers, review of applications by the citizens recruitment committee,  
6 and selection of finalists for the Council's review.

7 The Fernley Council authorized him to form a committee to select three to five  
8 candidates to be presented to the Council for interview and final selection. After discussion  
9 among the Council, some of whom thought they should have the right to approve committee  
10 members, the Council voted to give Mayor Cutler final authority to select the Committee  
11 members. There is no evidence that the Council had anything to do with initial screening of  
12 candidates or the selection of the citizens recruitment committee.

13 Mayor Cutler briefed the Council on March 4, 2009 regarding the recruitment process.  
14 The Mayor's recruitment committee had been formed and would review and grade the 15-20  
15 applications already received. There were still a few days before the deadline for applications.  
16 He reminded the Council that 3-5 finalists would be presented to them following citizen  
17 committee interviews.

18 One Councilmember's concern about the fairness of the recruitment process resulted in  
19 consideration of agenda item #12 during the April 15, 2009 meeting: "Address request for  
20 review of all original city manager applications from initial application process." Mayor Cutler  
21 responded to the concern expressed and to the request for review of all applications by

- 
- (b) The expenditure of public money; and
  - (c) The administration of laws and rules of the State, a county or a city.

24 NRS 281.005 "Public officer" and "special use vehicle" defined. As used in this chapter:

25 1. Except as limited for the purposes of NRS 281.411 to 281.581, inclusive, "public officer"  
means a person elected or appointed to a position which:

26 (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; and

27 (b) Involves the continuous exercise, as part of the regular and permanent administration of the  
government, of a public power, trust or duty. (emphasis added)

28 2. "Special use vehicle" means any vehicle designed or used for the transportation of persons  
or property off paved highways.

(Added to NRS by 1967, 1471; A 1971, 593; 1977, 1109)

1 describing the initial screening process. Thirty-one applications had been received. Six had  
2 been eliminated because they did not meet minimum qualifications. Twenty-five remaining  
3 applications had been reviewed by Mayor Cutler then forwarded to the citizens review  
4 committee. Following review by the committee, four applications were designated by the  
5 committee and the Mayor to be forwarded to the Council.

6 During discussion of agenda item #12 on April 15, 2009, the Council learned from city  
7 staff that the initial recruitment process did not require that the Council review or even have  
8 access to initial candidates applications or resumes. Administrative specialist Leslieanne  
9 Hayden informed the Council that implied confidentiality of the applications applied to the  
10 initial screening process; however, staff informed the Council that complete applications and  
11 resumes of the four finalists selected to go to the Council for final selection, would be provided  
12 to the Council in their packets before the meeting.

13 It is clear that at no point in the appointment process did the Council deny any request  
14 for access to all candidates' applications and resumes. The Council did not have access to  
15 the applications nor did it take part in the initial screening of the candidates.

16 Council took no action following discussion of the request for access to all initial  
17 candidates' resumes.

18 The finalists for the city manager position, selected by the Mayor and citizens  
19 recruitment committee, were scheduled to appear before the Council for interviews on April  
20 29, 2009. Each finalist's application and resume was included in a Council packet of  
21 supporting documentation which was also available to the public prior to the meeting. The  
22 Council provided this office with a copy of the Council packet for the scheduled April 29, 2009  
23 interviews. It contained the resumes and applications for four finalists to be interviewed by the  
24 public body.

25 ///

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1 IV.

2 ANALYSIS

3 The OML applies only to public bodies; the Fernley City Council is a public body, but  
4 the citizens recruitment committee formed by the Mayor was not a public body.<sup>2</sup> The OML did  
5 not apply to the citizens recruitment committee and consequently complainant's demand for  
6 access all the original candidate's applications and resumes is not supported by the OML.

7 The citizens recruitment committee was formed by the Mayor, not by the City Council.  
8 The Council did not have final approval over its composition. The citizens recruitment  
9 committee reported to and worked with the Mayor, not the City Council. Until the four finalists  
10 selected by the Mayor and the citizens recruitment committee were sent to the Council for  
11 interviews, the Council had no part in the selection process. Once the finalist's names  
12 appeared on the April 29, 2009 agenda, then the OML's transparency and disclosure  
13 provisions applied.<sup>3</sup>

14 The Nevada Supreme Court explicitly stated that the OML applies only to an  
15 appointment process conducted by a public body. In *City Council of the City of Reno v. Reno*  
16 *Newspapers, Inc.*, 105 Nev. 886 891, 784 P.2d 974 977 (1989) the Court made clear that the  
17 clause in NRS 241.030(3)(e) - "discussion of appointment" of any person to public office or as  
18 a member of a public body - means ". . .all consideration, discussion, deliberation and  
19 selection done by a public body in the appointment of a public officer."

20 In *Reno Newspapers*, the Reno City Council was engaged in an appointment process  
21 for city clerk. The City Council conducted initial interviews in public session, but then went

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22 <sup>2</sup> Prior opinions issued by this Office state that generally the OML does not apply to internal staff groups  
23 or committees reporting to an individual. [Emphasis added.] OMLO 2007-04, September 10, 2007 (finding that a  
24 citizens advisory panel (CAP) was not subject to the OML because it was appointed by and advised only the Las  
25 Vegas city manager, not a public body); OMLO 2002-02, January 20, 2004 (finding that "interagency meetings of  
26 groups which have no independent legal authority, no independent budget, and no formal mission or purpose will  
27 not fall within the definition of a public body if these groups . . . do not advise or make recommendations to a  
28 public body."); Op. Nev. Att'y. Gen. No. 2002-06, February 8, 2002 (staff committee plus one deputy attorney  
general not subject to OML as it was advisory only to the Commissioner of Insurance); Op. Nev. Att'y. Gen. No.  
2002-13, March 14, 2002 (stating that "[a] committee formed by an individual who is not subject to the Open  
Meeting Law is likewise not subject to the Open Meeting Law).

<sup>3</sup> NRS 241.020(6)(supporting materials must be made available to the requestor at time the members of  
the public body receive them); NRS 241.031 (appointment process for appointed public officers may not be held  
in closed meeting.



1 into closed session to discuss the applicants. It reconvened in public session to nominate two  
2 candidates, then it voted to appoint one of the two finalists.

3 The Court held that even though the "appointment" was done in public, the statute went  
4 further by prohibiting the "discussion of appointment" in closed session. NRS 241.030(4)(e).  
5 The Reno City Council's closed meeting violated the statutory prohibition against closed  
6 meetings for the discussion of appointment of any person to public office.

7 Based on the foregoing, the OML did not apply to the citizens review committee  
8 because it was not a public body. Because it was not a public body it was free to review and  
9 screen initial applicants for the city manager's position in private and without disclosure of the  
10 initial applicants' resumes.

11 The NEVADA OPEN MEETING LAW MANUAL supports the duty of a public body to provide  
12 copies of applicants' resumes when interviewing candidates in open session. OMLO 2000-36  
13 (August 31, 2000); NEVADA OPEN MEETING LAW MANUAL § 6.06 (10th ed. 2005). OMLO  
14 2000-36 was written before the 2005 Nevada Legislature prohibited closed sessions to  
15 consider a person for appointment to public office. Act of June 17, 2005, Ch. 466, § 2005  
16 Nev. Stat. 2245. Nevertheless, it is clear from both the NEVADA OPEN MEETING LAW MANUAL  
17 and *Reno Newspaper* case that supporting materials including a candidate's resume in  
18 support of an application for appointed public office must be provided to the public in  
19 accordance with NRS 241.020(5) and (6) whenever a public body conducts the appointment.

20 The NEVADA OPEN MEETING LAW MANUAL states that:

21 [W]hen a public body is interviewing candidates for a vacant  
22 position in an open session of the meeting, [request for] copies of  
23 the [applicants] resumes may not be refused by the public body on  
24 the grounds that the resume of the chosen applicant would become  
25 part of the personnel file when hired or on the grounds that refusal  
26 was necessary to accommodate an applicant's concern that they  
27 might suffer ramifications related to their current employment if their  
28 resumes and presumably their interest in the position became  
29 known to their current employer. See OMLO 2000-36 (August 31,  
30 2000).

NEVADA OPEN MEETING LAW MANUAL § 6.06, (10th ed. 2005).

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V.

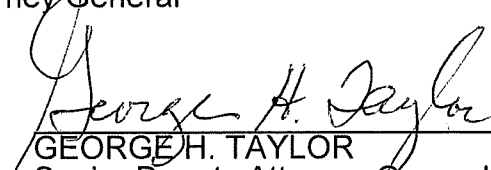
**CONCLUSION OF LAW**

The Council did not violate the OML regarding complainant's demand for access to all initial candidate's applications and resumes because the Council played no role in the initial interviews and screening of applications nor did it deny a request for access to the initial candidates resumes. Once initial screening was accomplished by the Mayor and his citizen's recruitment committee, and names were forwarded to the Council, then the OML applied. The Council complied with the OML; the finalist's applications and resumes were made public before the meeting.

Because we do not find a violation in this instance, we are issuing this advisory opinion to clarify the application of the OML in the appointment of a public officer. NRS 241.031.

DATED this 12<sup>th</sup> day of August, 2009.

CATHERINE CORTEZ MASTO  
Attorney General

By:   
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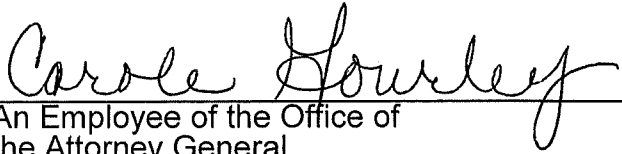
CERTIFICATE OF MAILING

I hereby certify that I am employed by the Office of the Attorney General of the State of Nevada, and that on this 12th day August, 2009, I mailed a copy of the Findings of Fact and Conclusions of Law, by mailing true copies by U.S. Mail to:

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An Employee of the Office of  
the Attorney General

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STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

In the Matter of  
HENDERSON CITY COUNCIL

Attorney General File No. 09-029

I.

COMPLAINT

Mr. Thomas Mitchell, Editor of the Las Vegas Review-Journal filed an Open Meeting Law (OML) complaint against the Henderson City Council (Council) alleging the process to fill a Henderson City Council seat was essentially a secret ballot, even though the Council's selection process occurred in an open meeting. It is alleged the process the City adopted to fill the vacancy "kept the public in the dark as to deliberations of the Council members as to their assessment of the various candidates and violates the letter and spirit of the Open Meeting Law." It is also alleged that because Council election ballots were unsigned there was no record of the July 8, 2009 vote to fill a Council vacancy.

II.

BACKGROUND

The City of Henderson (City) provided this office with agenda materials for Council meetings on June 16, June 21, and July 8, 2009. We reviewed an audio copy of the special meeting held on July 8, 2009, as well as minutes and a verbatim transcript of the meeting. We were also provided with copies of the election ballots for the vacant Council position as they appeared on July 8, 2009, the final City Clerk's tabulation of the votes and the points each vote accumulated.

The City also provided us with the Council's July 21, 2009 agenda and the minutes for agenda item UB-038, which was the item during which Council members affixed their signatures to ballots cast on July 8, 2009, during the process to select a new council person. We were also provided with member signed ballots that had been "recertified" with the

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1 July 21, 2009 date. We were provided a copy of the City Council Ward II Appointment Final  
2 Election Ballot Scoring Results certified by Monica Martinez Simmons, MMC, City Clerk.

3 The Attorney General has jurisdiction to investigate complaints of OML violations by  
4 public bodies. The Attorney General may seek to void actions of public bodies in court and  
5 may enforce the provisions of the OML against both individuals and public bodies.  
6 NRS 241.037; NRS 241.040.

7 III.

8 **FACTS**

9 On July 8, 2009, in a specially called meeting, the Council adopted a two-step process  
10 to select a person to represent the City of Henderson, Ward II, following the vacation of that  
11 seat by Andy Hafen, who had been elected Mayor on June 2, 2009. Prior to this special  
12 meeting to select Mr. Hafen's replacement, the Mayor and members of the Council met  
13 individually with every candidate who requested a meeting. Fourteen individuals applied.

14 The Council's adopted selection process was in two steps. First, each of the four  
15 remaining Council members nominated two applicants from the list of 14 applicants. Their  
16 nomination ballots were submitted to the City Clerk who read the names aloud in open  
17 session on July 8, 2009, but the Clerk did not indicate the name of the Council person who  
18 submitted the ballot. This process winnowed 14 applicants to 6.

19 Next, the Council ranked the six remaining applicants on a so-called "election ballot"  
20 prepared by the City Clerk. This step was a preferential ranking of the six finalists. A  
21 candidate receiving preference "1" on an individual member's ballot received 5 points under  
22 the adopted process and so on until a candidate receiving preference "0" received 1 point.  
23 The Clerk tabulated the results and announced that Debra March, had received 16 points, two  
24 other candidates received 11 points each, the last three candidates received 9, 7, and 6  
25 respectively. Mayor Hafen confirmed the ranking of each finalist.

26 Council member Kirk then moved to appoint Debra March to fill the unexpired term for  
27 Ward II. The motion passed unanimously. Following the vote, Mayor Hafen announced that  
28 Ms. March would be sworn into office on July 21, 2009, the next regular City Council meeting.

1 The agenda item for public comment followed Mayor Hafen's announcement, but there  
2 was no public comment. City points out that no one objected to the process of selection of  
3 Ms. March nor did anyone ask for a tally of how each member voted. According to the City's  
4 response, Council chambers were almost filled to capacity with citizens and representatives of  
5 the media.

6 Prior to the July 21, 2009 regular meeting to swear in Ms. March, each voting Council  
7 member was contacted by the Review Journal to find out how they voted to winnow the 14  
8 candidates. According to the City's response each Council person disclosed their votes.

9 On July 21, 2009, prior to the swearing in of Ms. March, the Council was asked by the  
10 City Attorney to consider the selection process again under unfinished business item UB-038.  
11 She informed the Council that the process utilized during the July 8, 2009 special meeting was  
12 articulated in Robert's Rule of Orders, a parliamentary book of procedure. She informed the  
13 Council that an OML complaint had been lodged against the Council's adopted process of  
14 selection. She then stated that if the Attorney General were to sustain the complaint, any  
15 votes cast by incoming Councilwoman March, "could be in doubt."

16 Following her recommendation, the Council affixed their names to copies of the  
17 nominating ballots that had been cast on July 8, 2009. The City Clerk then read each ballot  
18 along with the signature of the Council person into the record. The ballots were recertified  
19 using a new date—July 21, 2009.

#### 20 IV.

#### 21 ISSUES

22 1. Whether the Council's balloting process to select a new Council member to fill  
23 an unexpired term was a secret vote.

24 2. Whether the selection process interfered with the public's right to hear Council's  
25 deliberation and/or assessment of various candidates for the vacant Council position.

26 3. Whether the unsigned ballots resulted in non-recordation of each member's  
27 vote.

28 ///

1 V.

2 **ANALYSIS**

3 ***Voting***

4 The complaint alleges the Council member's ballots were unsigned and the selection  
5 process did not specifically require disclosure of the identity of the member who cast a ballot.  
6 The ballots were cast in open session before a packed house, but the identity of the member  
7 casting a ballot was not disclosed. Following the voting and the appointment process, no  
8 member, and no one in the public comment period, asked for disclosure of each member's  
9 vote.

10 The OML requires public disclosure of each member's vote so that the public will know  
11 how each member voted. Selection ballots should have been signed and the identity of the  
12 Council member made known. The fact that the entire balloting process was in open session  
13 still did not adequately inform the public about each member's vote.

14 The OML Manual states that the OML is satisfied if a public body's vote is made known  
15 by a show of hands, roll call, or any other method so that the vote of each public official is  
16 known. OPEN MEETING LAW MANUAL § 8.07 (10th ed. 2005).<sup>1</sup> The fact that the adopted  
17 process from Robert's Rules of Order, did not account for the OML requirement does not  
18 mean disclosure of the member's vote can be overridden.

19 ***Deliberation or Assessment of the Candidates***

20 The Complaint also alleges Council's process as not being within the letter or spirit of  
21 the OML because deliberations of the Council members, as to their assessment of the various  
22 candidates, were not disclosed during the balloting process. NRS 241.010, the Legislature's  
23 lodestar for members of public bodies, states that all the actions and deliberations of all public  
24 bodies be conducted openly.

25 The record we reviewed shows that the entire process occurred in the open. There's  
26 no complaint that any action or deliberation took place in secret meetings among the council  
27 members. The record also shows that there was no public assessment or public discussion of

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<sup>1</sup> "The Open Meeting Law is satisfied if a vote is by roll call, show of hands, or any other method so that the vote of a public official is made known to the public." (Citation omitted).

1 the 14 candidates by the members at any time before balloting. The issue raised by this  
2 question is whether NRS 241.010 requires deliberation and whether the absence of  
3 deliberation in this context is a violation of the legislative declaration.

4 NRS 241.015 does not require verbal discussion, assessment, or verbal deliberation  
5 among the members of a public body before it takes action. The Legislature intended that  
6 deliberations be conducted openly, but it did go so far as to void action in the absence of  
7 verbal discussion or deliberation by members prior to action.

8 During the Council's selection process on July 8, 2009 all 14 candidates appeared and  
9 made brief statements or other presentations prior to balloting. At the conclusion of the last  
10 presentation, the Council marked its first ballot to reduce the candidate pool from 14 to 6.  
11 There was no deliberation or other assessment before the first ballot. We assume each  
12 member kept his own counsel during the presentations, mentally "deliberating" the attributes  
13 and/or capabilities of each candidate.

14 Next, the City Clerk prepared an "election ballot" containing the names of the six  
15 remaining candidates. Prior to marking this ballot members did not assess, deliberate or  
16 discuss the candidates. The selection procedure had been laid out for them when they  
17 adopted it from the Robert's Rules of Order and that procedure did not require verbal  
18 discussion before balloting.

19 The OML does not require verbal discussion or assessment of candidates under this  
20 selection process. The absence of deliberation before an action vote would normally cause  
21 concern that the public body's vote was pre-arranged out of public earshot. However, this  
22 selection process was conducted entirely in the open. No doubt, each Council member kept  
23 his own deliberations to himself and quite capably marked his ballot. The absence of  
24 deliberation during this phase of the selection process was not a violation of the OML.

### 25 ***Recordation of the Ballots***

26 Each member's individual vote must be recorded in the minutes of the meeting if  
27 another member makes a public request for recordation. NRS 241.035(1)(c). The minutes of  
28 the July 8, 2009 meeting faithfully records the vote appointing Ms. March to the Ward II seat



1 as a 4-0 unanimous vote, despite the absence of a request from any member to record the  
2 individual votes.

3 The unsigned ballots were submitted to the clerk during the meeting as part of  
4 collective action by the public body. Unsigned ballots cannot be recorded into the minutes of  
5 the meeting as votes by any member. As stated elsewhere in this opinion, the ballots should  
6 have been signed or at least each member's vote should have been made public in some  
7 fashion.

8 The Council has taken corrective action to publish each member's vote on July 8, 2009.

9 **VI.**

10 **CONCLUSION**

11 Corrective action occurred prior to the swearing in of Ms. March on July 21, 2009.  
12 Section 11.01 of the OML Manual encourages public bodies to take corrective action when a  
13 violation occurs. It states, "When a violation of the Open Meeting Law occurs, the Office of  
14 the Attorney General recommends that the public body immediately cure the violation.  
15 Although it may not obliterate the violation, corrective action should be taken so that the  
16 business of government is accomplished in the open."

17 The Henderson City Council quickly took corrective action. It released recertified July 8,  
18 2009 ballots with the signature of the corresponding member to the public.

19 The Council's selection process was defective in one respect because it failed to make  
20 known the identity of each member's ballot at the time it was cast or at some time during the  
21 meeting.

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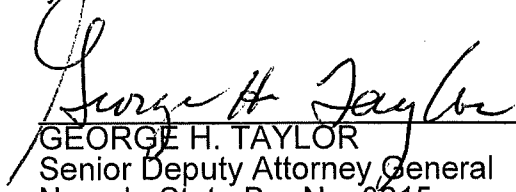
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Failure to verbally deliberate and/or assess the candidates before each ballot was not a violation of the OML.

DATED this 4<sup>th</sup> day of November, 2009.

CATHERINE CORTEZ MASTO  
Attorney General

By:   
\_\_\_\_\_  
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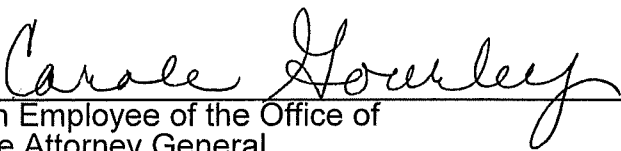
**CERTIFICATE OF MAILING**

I hereby certify that I am employed by the Office of the Attorney General of the State of Nevada, and that on this 4<sup>th</sup> day of November, 2009, I mailed a copy of the Findings of Fact and Conclusions of Law, by mailing true copies by U.S. Mail to:

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