IN THE STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

In the Matter of:

BOARD OF EXAMINERS FOR MARRIAGE AND FAMILY THERAPISTS AND CLINICAL PROFESSIONAL COUNSELORS.

AG FILE No. 13897-198
FINDINGS OF FACT AND CONCLUSIONS OF LAW

BACKGROUND

Jacob Wiskerchen filed a complaint (Complaint) with the Office of the Attorney General (OAG) alleging violations of the Nevada Open Meeting Law (OML) by the Board of Examiners for Marriage and Family Therapists and Clinical Professional Counselors (the “Board”) regarding the Board’s April 29, 2016, meeting. The Complaint makes three allegations. First, that the Board failed to post minutes of its April 29, 2016, meeting within the required time frame. Second, that the minutes from this meeting are incomplete or inaccurate because (1) item 3 of the meeting minutes refer the reader to another set of minutes which were not posted; (2) items 25-30 are listed as tabled but were ignored before the meeting was adjourned; and (3) the chair did not request public comment prior to adjournment of the meeting. The third and final allegation is that the minutes do not contain complete reports of all discussion.

Although the Board violated the OML by failing to timely post minutes of its April 29, 2016, meeting, the Board did not violate the OML regarding the other allegations.

MATERIALS REVIEWED

In the course of investigating the Complaint, the OAG reviewed (1) the public notice and agenda, (2) the minutes and the audio recordings of both the April 29, 2016, Board meeting and the April 29, 2016, hearing on the adoption of regulations pertaining to chapter 641A of the Nevada Administrative Code, and (3) the responses to the Complaint from the Board’s counsel and several of the Board members.
LEGAL STANDARD

The OAG has statutory enforcement powers under the OML and the authority to investigate and prosecute violations of the OML. NRS 241.037; NRS 241.039; NRS 241.040. "Public bodies exist to aid in the conduct of the people’s business” and must do so in compliance with the statutory requirements of Nevada’s Open Meeting Law. Sandoval v. Board of Regents, 119 Nev. 148, 154, 67 P.3d 902, 905 (2003); NRS 241.010. An action taken in violation of the OML is void. NRS 241.036. The gravamen of the Complaint concerns the OML’s requirement that a public body keep written minutes of its meetings. NRS 241.035. Specifically, the statute requires that the minutes include the substance of all matters proposed, discussed or decided. NRS 241.035(1). Minutes or an audio recording of the meeting must be available to the public within 30 days after adjournment of the meeting. NRS 241.035(2). Unless good cause is shown a public body is required to approve the minutes of a meeting within 45 days after the meeting or at the next meeting of the public body. NRS 241.035(1)(e).

"There is no statutory provision requiring public bodies to discuss, or take action on, all agenda items.” Schmidt v. Washoe County, 123 Nev. 128, 135, 159 P.3d 1099, 1104 (2007) (abrogated on other grounds by Buzz Stew LLC v. City of Las Vegas, 124 Nev. 224, 181 P.3d 670 (2008)). However, notice of the meeting must notify the public that the public body may remove an item from the agenda or delay discussion relating to an item on the agenda at any time. NRS 241.020(2)(d)(6)(III). Public meetings must also have periods devoted to comments by the general public. NRS 241.020(2)(d)(3). Such comments must be taken at the beginning of the meeting and again before adjournment, or immediately after the public body discusses any item on the agenda on which action may be taken. Id.

FINDINGS OF FACT

1. The Board was created by NRS 641A.090.

2. The Board is a “public body” as defined in NRS 241.015(4), and subject to the OML.
3. After discharging its previous Executive Director on August 28, 2015, the Board did not have an Executive Director until January 25, 2016, when a new Executive Director began. That Executive Director quit without notice on June 20, 2016.

4. While this matter was pending, two Board members were replaced and the term of another Board member ended, leaving a vacancy.

5. The Board met on April 29, 2016, by videoconference. Members of the public were allowed to attend in person at locations on the campuses of the University of Nevada in Las Vegas and in Reno.

6. The agenda for this meeting was sent to all persons on the Board’s mailing list, posted on the Board’s website as well as the State’s website, and posted at various locations in Las Vegas, Reno, and Carson City.

7. On April 29, 2016, the Board also held a public hearing for the adoption and amendment of certain regulations contained in Chapter 641A of the Nevada Administrative Code and known as LCB File No. R091-14.

8. The Notice of Intent to Act Upon a Regulation was posted at the Board’s office and at various libraries within the State of Nevada.

9. The minutes for both of the meetings held on April 29, 2016, were approved at the Board’s meeting on June 24, 2016. The minutes from both April 29, 2016, meetings are now posted on the Board’s website.¹

10. Between the April 29 and June 24, 2016, meetings the Board also held meetings on May 6 and May 12, 2016.

¹ A draft of the minutes of the meeting on June 24, 2016, is posted on the Board’s website, with a notation that the minutes are subject to revision until approved at a Board meeting, http://marriage.nv.gov/Board/Meetings/2016/Meetings/. According to the draft minutes of that meeting, the Board also approved the minutes of its December 4, 2015, and February 12, 2016, meetings. However, these minutes were not posted until sometime after this investigation commenced. Additionally, minutes from the Board’s meetings on August 28, 2015, September 11, 2015, September 25, 2015, October 23, 2015, December 9, 2015, December 18, 2015, January 22, 2016, February 5, 2016, April 7, 2016, May 12, 2016, and July 20, 2016, were posted in draft form during the pendency of this investigation. Although the minutes were not posted in a timely manner, the Board meetings were recorded and audio recordings of the meetings are available to the public upon request.
11. The Minutes of the April 29, 2016, Board meeting describe item 3 as follows:
   "Adoption hearing by the Board of Examiners for Marriage and Family Therapists and
   Clinical Professional Counselors to receive comments regarding proposed regulations in
   NAC 641A-LCB File No. R091-14. The Board hearing began at 10:30 a.m. See Hearing
   Minutes for details."

12. The Public Hearing Minutes from the April 29, 2016, hearing on the
   proposed regulations known as LCB File No. R091-14 consist of seven pages and contain
   a summary of the public comments and Board discussion.

13. Both of the April 29, 2016, meetings were recorded, and according to Board
   counsel and various Board members, an audio recording of both meetings is available to
   the public upon request.

14. Board members began leaving the April 29, 2016, meeting at approximately
   4:00 p.m. The Board was forced to conclude the meeting at approximately 4:15 p.m.
   because a quorum was no longer present.

15. The Board was unable to consider items 25-30 at the April 29, 2016, meeting
   before adjourning. The minutes of the meeting state that these items were tabled.

16. The minutes of the April 29, 2016, Board meeting contain the substance of
   the matters that were proposed, discussed, or decided at the meeting and also the
   substance of remarks made by members of the general public.

17. On the audio recording of the April 29, 2016, meeting, the President of the
   Board can be heard asking for public comment at the beginning of the meeting and again
   before adjournment of the meeting.

CONCLUSIONS OF LAW

1. By failing to approve the minutes of the April 29, 2016, meeting within 45
   days after the meeting or at the next Board meeting, the Board violated NRS 241.035.

2. While the Board's loss of Executive Directors has presented administrative
   challenges, those challenges do not constitute good cause sufficient to excuse the Board's
   failure to approve and post minutes.
3. The Board's failure to address all items on the agenda for the April 29, 2016, meeting did not violate the OML because "[t]here is no statutory provision requiring public bodies to discuss, or take action on, all agenda items." *Schmidt*, 123 Nev. at 135, 159 P.3d at 1104.

4. The Board did not violate the requirements of the OML with respect to public comment at the April 29, 2016, meeting because the President of the Board asked for public comment both at the beginning and end of the meeting.

5. The minutes of the April 29, 2016, Board meeting are in compliance with the requirements of NRS 241.035.

**SUMMARY**

Although the loss of Executive Directors and turnover in Board members presented difficulties, the Board is ultimately responsible for ensuring compliance with the OML and is not excused from the duty by staffing issues. As a result, no good cause was found for the Board's violations of the OML. The Attorney General, however, will not seek civil penalties in this matter.

Because the OAG finds that the Board violated the OML, the Board must place on its next meeting agenda these Findings of Fact and Conclusions of Law and include them in the supporting materials for the meeting. The agenda must acknowledge that these Findings of Fact and Conclusions of Law resulted from the OAG investigation in the matter of Attorney General File No. 13897-198, and that they have been placed there as a requirement of NRS 241.0395.
Furthermore, the OAG strongly recommends that the Board members and staff receive training in the OML. The OAG is available to provide OML training upon request.

DATED this 21st day of September, 2016.

ADAM PAUL LAXALT
Attorney General

By:

ANDREA NICHOLS
Senior Deputy Attorney General
Business & Taxation Division
5420 Kietzke Lane, Suite 202
Reno, NV 89511
Telephone (775) 687-2100
anichols@ag.nv.gov
CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 28th day of September, 2016, I caused to be deposited for mailing a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW, to the following:

Board of Examiners for Marriage and Family Therapists and Clinical Professional Counselors
9436 W. Lake Mead Blvd., Suite #11-J
P.O. Box 370130
Las Vegas, NV 89137-0130

Via email:

Rose Marie Reynolds
Senior Deputy Attorney General
555 East Washington Ave, Suite 3900
Las Vegas, NV 89101
RReynolds@ag.nv.gov

Rhonda Collins
An Employee of the Office of the Attorney General
AMENDED CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 23rd day of September, 2016, I caused to be deposited for mailing a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW, to the following:

Board of Examiners for Marriage and Family Therapists and Clinical Professional Counselors
9436 W. Lake Mead Blvd., Suite #11-J
P.O. Box 370130
Las Vegas, NV 89137-0130

Mr. Jacob Wiskerchen
Zephyr Wellness
418 Cheney Street
Reno, NV 89502

Via email:

Rose Marie Reynolds
Senior Deputy Attorney General
555 East Washington Ave, Suite 3900
Las Vegas, NV 89101
RReynolds@ag.nv.gov

Rhonda Allison
An Employee of the Office of the Attorney General