

1 OFFICE OF THE ATTORNEY GENERAL
2 STATE OF NEVADA

3
4 In the matter of:
5 ELY CITY COUNCIL.
6

AG FILE NO.: 13897-218

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

7
8 BACKGROUND

9 Linda F. Burleigh filed six separate complaints (collectively "Complaint") with the
10 Office of the Attorney General ("OAG") alleging violations of the Nevada Open Meeting
11 Law ("OML") by the City Council of Ely ("Council"). The Complaint alleges that the Council
12 did not comply with the OML in the following respects:

13 **ALLEGATION NO. 1:** Council meetings were conducted in such a way that it was
14 impossible for the public to hear what the Councilmembers were saying. For example,
15 Councilmembers did not speak clearly into microphones.

16 **ALLEGATION NO. 2:** Council meeting agendas each listed generic "reports" from
17 different officials without giving a clear and complete statement of what would be
18 discussed.

19 **ALLEGATION NO. 3:** The agendas for the October 6, 2016, and December 8, 2016,
20 meetings did not adequately state what would be discussed under items B(5) and 11,
21 respectively.

22 **ALLEGATION NO. 4:** For the September 22, 2016, and October 27, 2016,
23 meetings, the agendas listed consideration of civil penalties for certain property owners
24 without listing those owners' names.

25 **ALLEGATION NO. 5:** The agenda for the October 27, 2016, meeting unlawfully
26 failed to list the names of candidates for the position of City Treasurer.
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1 **ALLEGATION NO. 6:** The Council failed to discuss certain information on
2 numerous agenda items during multiple meetings.¹

3 **ALLEGATION NO. 7:** For numerous agenda items on multiple agendas, the
4 Council did not provide supporting documents to the public.²

5 **ALLEGATION NO. 8:** Minutes from the September 22, 2016, meeting were not
6 made available within the 30 days required by NRS 241.035(2).

7 **ALLEGATION NO. 9:** The Council has held many confidential litigation sessions
8 with the City Attorney and the public has not been informed of the outcomes of such
9 sessions.³

10 The OAG has statutory enforcement powers under the OML and the authority to
11 investigate and prosecute violations of the OML. NRS 241.037; NRS 241.039; NRS
12 241.040. The investigation of the Complaint included OAG review of the agendas,
13 supporting material, minutes and recordings for meetings held on September 22, 2016,
14 October 6, 2016, October 27, 2016, November 10, 2016, and December 8, 2016, together
15 with written responses to the Complaint from Charles Odgers, City Attorney for the City
16 of Ely, Nevada.

17 After investigating this matter, the OAG determines that two OML violations
18 occurred. First, the Council discussed and/or took action regarding certain property owners
19

20 ¹ The Complaint specifically states that the Council failed to discuss certain information
21 with regard to items 7 and 10 on the September 22, 2016, meeting agenda; items 8 and 9
22 on the October 6, 2016, meeting agenda; item 9 on the October 27, 2016, meeting agenda;
23 item B(5) on the November 10, 2016, meeting agenda; and item B(6) on the December 8,
2016, meeting agenda.

24 ² The Complaint specifically states that the Council failed to provide supporting documents
25 for items 6, 7 and 10 on the September 22, 2016, meeting agenda; items 6, 7(1), 7(2), 8, 9,
26 B(2), and B(4) on the October 6, 2016, meeting agenda; the reports and items B(3) and B(13)
27 on the October 27, 2016, meeting agenda; item B(5) on the November 10, 2016, meeting
28 agenda; and item B(4) on the December 8, 2016, meeting agenda.

³ In addition, the Complaint makes other allegations that fail to state a claim under the
OML. Those allegations are not discussed herein.

1 at its September 22, 2016, and October 27, 2016, meetings without listing those property
2 owners' names on the agendas. The Council has acknowledged this violation and plans to
3 take corrective action under NRS 241.0365. Second, the Council failed to list candidate
4 names for the position of City Treasurer prior to taking action to appoint a candidate to
5 that position during its October 27, 2016, meeting.

6 **LEGAL STANDARD**

7 The legislative intent of the OML is that actions of public bodies "be taken openly,
8 and that their deliberations be conducted openly." NRS 241.010(1); *see also McKay v. Board*
9 *of Supervisors*, 102 Nev. 644, 651, 730 P.2d 438, 443 (1986) ("the spirit and policy behind
10 NRS chapter 241 favors open meetings"). Public bodies working on behalf of Nevada
11 citizens must conform to statutory requirements in open meetings under an agenda that
12 provides full notice and disclosure of discussion topics and any possible action. *Sandoval*
13 *v. Board of Regents*, 119 Nev. 148, 67 P.3d 902 (2003).

14 NRS 241.020(2)(d)(1) requires that an agenda must include a "clear and complete
15 statement of the topics scheduled to be considered during the meeting" while NRS
16 241.020(2)(d)(2) requires that an agenda must include a "list describing the items on which
17 action may be taken and clearly denoting that action may be taken on those items." *See*
18 *Sandoval*, 119 Nev. at 154. Incomplete and poorly written agendas deprive citizens of their
19 right to take part in government and interfere with the press' ability to report the actions
20 of government. *Id.*

21 In addition, if a public body intends to consider whether to take administrative
22 action regarding a person, the name of that person must be included in the agenda. NRS
23 241.020(5). The agenda must also include a notification that the public body may remove
24 an item from the agenda or delay discussion relating to an item on the agenda at any time.
25 NRS 241.020(2)(d)(6)(III).

1 To facilitate open government, NRS 241.020(6) requires that agendas and
2 supporting material for public meetings be made available to the public by providing in
3 pertinent part:

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

- 6 (a) An agenda for a public meeting;
7 (b) A proposed ordinance or regulation which will be discussed at the public meeting;
8 and
9 (c) Subject to the provisions of subsection 7 or 8, as applicable, any other supporting
10 material *provided to the members of the public body* for an item on the agenda, except
11 materials:
12 (1) Submitted to the public body pursuant to a nondisclosure or confidentiality
13 agreement which relates to proprietary information;
14 (2) Pertaining to the closed portion of such a meeting of the public body; or
15 (3) Declared confidential by law, unless otherwise agreed to by each person whose
16 interest is being protected under the order of confidentiality.

17 The public body shall make *at least* one copy of the documents described in paragraphs
18 (a), (b), and (c) available to the public at the meeting to which the documents pertain. As
19 used in this subsection, "proprietary information" has the meaning ascribed to it in NRS
20 332.025. (Emphasis supplied.)

21 At a minimum, supporting material must be made immediately available for pick up
22 at the office of the public body at the time sent to the members of the public body, and
23 copies should also be made available at the meeting. OMLO 98-01 (January 21, 1998).

24 The OML requires that public bodies keep written minutes of each of their meetings
25 and that those minutes "be made available for inspection by the public within 30 working
26 days after adjournment of the meeting." NRS 241.035.

27 The OML contains an exception to the definition of a meeting for a gathering of a
28 quorum of members of a public body to "receive information from the attorney employed or
retained by the public body regarding potential or existing litigation involving a matter
over which the public body has supervision, control, jurisdiction or advisory power and to
deliberate toward a decision on the matter, or both." NRS 241.015(3)(b)(2).

FINDINGS OF FACT

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2 1. The Council is a “public body” as defined in NRS 241.015(4) and is subject to
3 the OML.

4 2. There is no evidence that Council members have taken any action to prevent
5 the public from hearing what they are saying or circumvent the “open and public” mandate
6 of NRS 241.010. After review of the recordings of the public comments, no one has claimed
7 to be unable to hear the Council. Therefore, Allegation #1 is without merit.

8 3. The Council’s meeting agendas each list “reports” by various City officials
9 without details as to what the report will entail. After review of the minutes at issue, those
10 reports consist primarily of updates to the Council regarding City operations that do not
11 lead to discussion, deliberation or action.⁴ In addition, the Council meeting agendas list a
12 notification that items may be removed or discussion delayed as required by NRS
13 241.020(2)(d)(6)(III). Therefore, Allegation #2 is without merit.

14 4. Item B(5) of the October 6, 2016, meeting agenda states “Councilman
15 Setterstrom – Discussion/For Possible Action – Confirmation that all City Business must
16 be conducted between 8:00 a.m. and 5:00 p.m. Monday thru Friday at City Hall, except in
17 emergency situations.” The agenda item is clear and complete on its face. It identified “for
18 possible action” and accurately reflects the action taken: confirmation of City Hall hours of
19 business. The substance of public comment indicates that while the public may not have
20 agreed with the Council’s reasoning for its action, the public understood the potential action
21 to be taken.

22 5. Item 11 of the December 8, 2016, meeting agenda states “Councilman Hanson
23 – Discussion/For Possible Action – Consideration of character, alleged misconduct,
24 professional competence, or physical or mental health of City Building Official Brad
25

26 ⁴ The OAG cautions that agenda items such as “member comments” and “reports” are
27 problematic because they invite discussion and possible deliberation on topics not set forth
28 in the agenda. The OAG cautions the Council that any issues raised in the City official
reports should be included on a future agenda before any discussion ensues.

1 Christiansen. Possible action includes, but is not limited to, pay adjustment or 'no action.'"
2 The agenda item is clear and complete on its face. It identified "for possible action" and
3 accurately reflects the action deliberated: whether to adjust the pay of Brad Christiansen.
4 Therefore, Allegation #3 is without merit.

5 6. The public notice agenda for the September 22, 2016, Council meeting listed
6 four items for possible action all concerning enforcement of civil penalties against owners
7 of real property. The public notice agenda for the October 27, 2016, Council meeting listed
8 two items for possible action both concerning enforcement of civil penalties against owners
9 of real property. The addresses and parcel numbers of the properties were listed on both
10 agendas, but the names of the owners were not. Therefore, Allegation #4 has merit.

11 7. The public notice agenda for the October 27, 2016, Council meeting listed as
12 a discussion only item "Individual Interviews of Candidates for the position of City
13 Treasurer." The next item on the same agenda listed for possible action "Appointment by
14 Mayor and Confirmation by City Council of City Treasurer." Neither agenda item listed
15 names of potential candidates. During the October 27, 2016, meeting, the Council
16 interviewed two candidates for the position of City Treasurer. The Mayor subsequently
17 appointed one of them as City Treasurer and the Council confirmed the appointment.
18 Therefore, Allegation #5 has merit.

19 8. The Complainant appears to have unanswered questions regarding numerous
20 agenda items. The Complainant, however, did not ask about most of these agenda items
21 during the public comment periods. Furthermore, the OML does not require that the
22 Counsel answer each of the Complainant's questions during its deliberation. Therefore,
23 Allegation #6 is without merit.

24 9. The OML does not require that supporting materials be provided for an
25 agenda item. Rather, it only requires that supporting matters be made available to the
26 public *if* they are provided to the members of the public body. See NRS 241.020(6) and (7).
27 All supporting materials provided to the Council for review during or prior to a meeting
28 were included in packets available for pickup at the meeting to anyone who requested them.

1 There is no evidence that Complainant requested copies of any such supporting materials
2 prior to filing the Complaint.⁵ Therefore, Allegation #7 is without merit.

3 10. A draft of the minutes for the September 22, 2016, meeting were provided to
4 the public as supporting material for an agenda item to approve those minutes at the
5 October 27, 2016, meeting. October 27, 2016, is less than 30 working days after September
6 22, 2016. Therefore, Allegation #8 is without merit.

7 11. Under NRS 241.015(3)(b)(2), gatherings between the Council and its attorney
8 that are limited to discussion and deliberation on potential or existing litigation are not
9 meetings for purposes of the OML so long as no action is taken. There is no evidence to
10 support Complainant's allegation that the Council exceeded the scope of this statutory
11 exception. Therefore, Allegation #9 is without merit.

12 CONCLUSIONS OF LAW

13 1. Imposition of civil penalties against a real property owner constitutes
14 administrative action regarding that person under NRS 241.020(5). The Council's failure
15 to list the names of real property owners being considered for administrative action during
16 the September 22, 2016, and October 27, 2016, meetings on the subject agendas was a
17 violation of the OML.

18 2. Appointment of a person for the position of City Treasurer constitutes
19 administrative action regarding that person under NRS 241.020(5). The Council's failure
20 to list the names of potential appointees to the position on the agenda for the October 27,
21 2016, meeting was a violation of the OML.

22 23 24 SUMMARY

25 The Council acknowledged in its responsive materials violating the OML by failing
26 to list the names of real property owners being considered for administrative action. The

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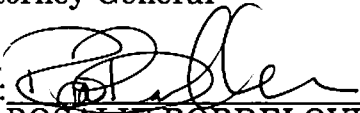
⁵ Not until after all of the meetings at issue did Complainant make a request to pick up a
copy of supporting materials for future City Council meetings.

1 Council plans to remedy this violation by placing the items on its March 9, 2017, meeting
2 agenda for corrective action.

3 Because the OAG finds that the Council has violated the OML, the Council must
4 place these Findings of Fact and Conclusions of Law on its next meeting agenda and include
5 them in the supporting material. The agenda item must acknowledge these Findings of
6 Fact and Conclusions of Law to be the result of the OAG investigation in the matter of the
7 Attorney General File No. 13897-218, and that they have been placed on the agenda as a
8 requirement of NRS 241.0395.

9 Dated: February 24, 2017.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on February 24, 2017, 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:

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/s/ Debra Turman
Debra Turman, an employee of the
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