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June 17, 2014

Via United States Mail

Donald R. Purinton
656 Pine Street
Ely, Nevada 89301

Re: Open Meeting Law Complaint, A.G. File No. 14-002, Ely City Council

Dear Mr. Purinton:

BACKGROUND

We have investigated your complaint. We reviewed the agenda and audio recording of the Nevada Northern Railway Management Board (Board) meeting of January 21, 2014. We also reviewed the discussion of the Board members and the public in attendance concerning two agenda items:

IV. New business

1. Discussion /For Possible Action consideration of Board of Trustees request to handle the financial management of the White Pine Historical Railroad Foundation d.b.a. the Nevada Northern Railway Museum.

2. Discussions /for Possible Action consideration of allowing the White Pine Historical Railroad Board of Trustees to create a payment schedule to pay off the White Pine Historical Railroad Foundation account 255, Note Payable to Mark and Joan Bassett in the amount of 72,399.22.

FACTS

Three members of the Ely City Council (City Council), a quorum, were present at this meeting although their attendance was not agendized as a meeting of the Ely City Council. The Ely City Council serves as Trustees for the Nevada Northern Railway's White Pine Historical Railroad Foundation (Foundation). The actually operates the railroad and and takes care of its finances including payroll for Railroad employees. On January 21, 2014, the Management Board met to consider new business items that would allow the City Council to handle the financial management of the Board, d.b.a., the Nevada Northern Railway Museum, and make plans to pay off a debt incurred by the Management Board.

Councilman Dale Derbidge was the only Trustee who spoke during the meeting. His early public comments were in the form of a complaint about the failure of the Management Board to provide supporting materials regarding the two agenda items. Later in the meeting he provided a longer statement in which he sought to clarify the role of the City Council in the Board's financial matters. He said it was not the City's intent to take over fundraising but only to assist the Board with paying bills on time and managing the Board's payroll. At the end of the Board's consideration of these two agenda items, Mr. Derbidge briefly suggested that a draft agreement in the Board's package did not have a signature line for the City Council's approval; it was an agreement would be considered by the City Council in two days. No other comments were made by Councilman Derbidge. Neither of the other two Ely City Councilmen spoke during the meeting. No action on the agenda item was taken. The Board and the Trustees agreed to allow staff to work on a solution.

The Management Board complies with the open meeting Law and provides notice and an agenda for all meetings.

ISSUE

The issue is whether attendance by a quorum of the Ely City Council also serving as Foundation Trustees, at a meeting of the Nevada Northern Railway Management Board on January 21, 2014 was a violation of the Nevada Open Meeting Law (OML), because one city Trustee/councilman spoke during the meeting. NRS 241.

ANALYSIS

This office published an Open Meeting Law Opinion (OMLO) in 2010 which opined that a quorum of the Clark County Board of School Trustees did not violate the OML when the quorum attended a meeting of its own standing subcommittee. The members, sitting in the audience, did not speak or sit together and arrived and left separately. OMLO 2010-06 (September 10, 2010).

The allegation in this complaint is that a quorum of the Ely City Council/Trustees attended a meeting of the Management Board and although two members were silent, one member did speak on several occasions.

This office opined in prior opinions that the mere presence of a quorum of a public body at another meeting, even one over which the quorum may have supervision, control, jurisdiction or advisory power, does not automatically trigger the application of the OML. In this matter, it is not clear that the Ely City Council acting as Foundation Trustees has any supervision, control jurisdiction or advisory power over the Management Board. The Mayor of the City of Ely appoints the Management Board, which is confirmed by the five person member City Council, but the Mayor is not a member of the Foundation Board of Trustees.

This office also opined in 1997 there must have been a "meeting" within the meaning of NRS 241.015(2), before application of the OML is triggered. In 1997, this office issued an opinion regarding how "meetings" may occur when members of public bodies assemble. In part, the opinion states:

When members of a public body merely attend a convention or seminar, the open meeting law is not automatically triggered, even when there is a quorum of the members attending. See Open Meeting Law Manual, Sixth Edition, and Question 11, page 15. [See OML Manual 10th ed. § 5.02] But if members of a public body show up at an event and a majority of them gathers around to deliberate toward a decision or take action on a matter over which their body has jurisdiction, control or advisory power, then that gathering becomes a meeting of the public body within the ambit of the Open Meeting Law. NRS 241.015(2). Since people cannot deliberate unless they communicate, the gathering must involve some form of intercommunicative exchange amongst the quorum of the members of the public body in order to constitute a covered meeting. Merely having members of a public body sit in a large room facing forward or talking to other people in unconnected conversations spread out over the far reaches of the room lacks the intercommunicative exchange and therefore does not constitute a meeting between the members of the public body.

Open Meeting Law Opinion: AG File No. 97-058 (1997).

The Nevada Supreme Court in *Dewey v. Redevelopment Agency of the City of Reno*, 119 Nev. 87, 64 P.3d 1070 (2003) held that a public body engages in “deliberation” when a quorum of a public body engages in “collective discussion of an issue with the goal of reaching a decision. Therefore, by definition, members of a public body, including a quorum, cannot deliberate if they attend the standing committee meeting merely as an observer. This definition of “deliberation” makes it clear that even if a quorum is present, merely sitting in a public meeting only as observers gathering information from the discussion is not a “meeting” unless the quorum engages in **collective** discussion or action preliminary to reaching a decision. *Dewey*, 119 Nev. at 98. (Emphasis added). Similarly, a quorum attending a meeting of a public body over which it has supervision, control, jurisdiction or advisory power does not violate the OML **unless the quorum engages in collective discussion or action preliminary to reaching a decision.**

The *Dewey* court also identified a practical reason for allowing public body members to attend standing committee meetings. The context of the *Dewey* decision was whether the OML should apply to less than a quorum.

The Court observed that:

[r]equiring members of [a] board to consider only information obtained through public comment and staff recommendations presented in formal sessions would cripple the board's ability to conduct business. [Quoting *Hispanic Educ. Com. V. Houston Ind. Such. Dist.*, 886 F. F.Supp. 606, 610 (S.D. Texas, 1995) aff'd, 68 F.3d 467 (5 Cir. 1995)]. This reasoning underscores the need for other action, such a polling or collective discussions designed to reach a decision, to create a constructive quorum between the briefings.

Dewey v. Redevelopment Agency of the City of Reno, 119 Nev. 87, 98–99, 64 P.3d 1070, 1078 (2003).

As an exclamation point to the discussion about the meaning of and use of the word “collective” in Supreme Court opinions, the following quote explicitly states that the OML only applies when a quorum of a public body **acts in its official capacity as a body**, thus nullifying any argument that a quorum of a public body attending a standing committee hearing in order to observe or gather information is at the same time deliberating as a public body. The Court was considering Board of Regent's serial communications in which a quorum of the Board of Regent's chose to take a position on whether to issue an advisory to the media, and actually voted, yea or nay, via a non-public vote.

The Court said:

Here, it is undisputed that a quorum of the members of the Board participated in the decision not to release the advisory. Thus, the Board's interaction was more than a simple public response to Price's comments by one or more of the Regents. Such a response would not have implicated the Open Meeting Law regardless of whether a quorum of the Board was involved. **The constraints of the Open Meeting Law apply only where a quorum of a public body, in its official capacity as a body, deliberates toward a decision or makes a decision.**

Att'y Gen. v. Bd. of Regents, 114 Nev. 388, 400, 956 P.2d 770, 778-779 (1998).
(emphasis added).

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CONCLUSION

The attendance of a quorum of a public body at a public meeting of a standing committee, **over which the public body has supervision, control, jurisdiction or advisory power** does not automatically trigger the application of the OML. Before the OML applies, there must have been a "meeting" within the meaning of NRS 241.015(2). Councilman Derbidge's speech during the meeting did not rise to the level of deliberation or action. He merely made comments, without the participation of the other two councilmen present. The quorum of the Council did not deliberate in the meeting or otherwise direct action by the Management Board in accordance with their wishes, nor did they make any commitment. Based on the foregoing authorities, the quorum attending the Management Board meeting did not deliberate or take action, which is necessary before meeting may take place. The attendance of a quorum at the Management Board meeting, without more, such as polling, or deliberation, did not constitute a violation of the OML.

Sincerely,

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