



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

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February 28, 2013

Scott K. Sisco, Chairman
Nevada Public Employees Deferred
Compensation Program
100 North Stewart Street, Suite 210
Carson City, Nevada 89701

Re: Open Meeting Law Complaint / AG File No. 12-037
Nevada Public Employees' Deferred Compensation Program

Dear Mr. Sisco:

This Office has investigated an Open Meeting Law (OML) complaint that alleged the Committee that administers the Nevada Public Employees Deferred Compensation Program¹ (Committee) violated the OML requirement to make available minutes of meetings within 30 working days of the meeting. It is also alleged that supporting material was not provided upon request following the Committee's November 2, 2012 open public meeting. Finally, the complaint alleged that the minutes of certain meetings, closed because of confidentiality regarding the discussion, were redacted more extensively than required by the confidentiality statutes.

The Committee's response to the complaint stated that the Committee does not meet the technical requirements of a public body. Furthermore, the response stated that even though the Committee "makes a practice of operating within the requirements of [OML] statute[s]" the Program does not meet the definition of public body within the statute. At most, it is argued, the Committee's duty to comply with the OML is voluntary, primarily because it "does not expend, disburse, nor is it supported by tax revenue." See, NRS 241.015(3)(a)(public body must expend, disburse, or be supported in whole or in part by tax revenue).

¹ The Committee was created in statute NRS 287.325.

This Office has jurisdiction to investigate OML complaints and seek civil remedies against public bodies, including injunctive relief, to require compliance with the OML, or to prevent violations of the OML. A criminal misdemeanor penalty and a monetary penalty are also authorized relief against individuals in any court of competent jurisdiction. NRS 241.037; NRS 241.040.

FACTS

On March 5, 2012 the Committee which administers the Nevada Public Employees' Deferred Compensation Program authorized by NRS 287.250 to 287.370, distributed a Request for Proposals (RFP) for Administrator services for the 457(b) (Internal Revenue Code) Program. The proposal informed those interested in submitting a proposal that the proposals would be evaluated and scored in accordance with NRS 333.335(3) based on enumerated criteria set out in the RFP. One of the terms and conditions of the procurement process was that it would be conducted in accordance with NRS Chapter 333 and NAC Chapter 333. The RFP also informed the reader that "proposals shall be kept confidential until a contract is awarded." NRS 333.335(6).

Responses to the RFPs were received and reviewed during the summer of 2012, but contracts with the vendors (record keepers) were not awarded; instead, in November 2012, two existing administrator services contracts between the State of Nevada acting by and through the Committee and Hartford Financial Services Group, Inc. (Hartford) and ING Life Insurance and Annuity Company (ING) were extended for a period of two years.

During this RFP process beginning in March 2012, the Committee and staff experienced almost a complete turnover of personnel. From June 22, 2012 until October 8, 2012, the Committee's only full-time employee position was vacant. The Committee's part-time administrative assistant position was vacant twice during the same period. Without clerical support, Committee meeting minutes for June 21, July 12, July 18, August 16, August 24, and September 20 were not made available within 30 working days of the adjournment of the meeting.

Minutes from the August 16, 2012 Committee meeting indicate that at least one Committee member was concerned about the backlog of unpublished meeting minutes. (Item I.F., i.e. discussion and possible action relating to transcripts for bringing minutes [of prior meetings] up to date). Discussion of Item I.F. was brief. One member suggested the cost estimate was expensive. The item was deferred pending further discussion with the administrative assistant, but no further discussion of the backlog of minutes appeared on subsequent meeting agendas. Despite lack of public discussion of the backlog, all of the backlogs of minutes of Committee meetings were made available by December 17, 2012.²

² We are also unaware of any request for Committee meeting minutes until October 6, 2010 when the complainant made an email request to the new Program Coordinator.

Meeting minutes for June 21, July 12, July 18, August 16, August 24, and September 20 meetings were posted by early December 2012. Minutes of the closed portion of the Committee's June 21, 2012 meeting, alleged to represent confidential discussions, were redacted, but were made available to the public (posted online on the Committee's website) by December 17, 2012. Complainant acknowledged having received, by December 17, 2012, minutes of all the meetings he requested, once they were posted online.

On June 22, 2012, the Program's executive director resigned. The Committee needed to hire a full-time employee. The Committee relied on the Division of Human Resource Management (DHRM) to pursue the recruitment of a full-time employee. The Committee conducted interviews for the full-time position in public session. A full-time Program Coordinator was hired during its September 20, 2012 meeting. The Program Coordinator began work on October 8, 2012.

Department of Human Resource Management (DHRM) provided recruitment services for the position of Program Coordinator. Services were provided, without charge to the Committee, by two DHRM employees, both of whom attended Committee meetings to discuss the recruitment process with the members. Other services provided included posting the job announcement, review of all job applications, the administration of a written examination, creation of an eligible list of applicants, performance of reference checks of the eligible applicants and facilitation of the interview process during public meetings. Our review of the Governor's Line item Budget Account 1017 (Committee) for the 2013–2015 biennium does not show any charges (cost allocation) to recoup the cost of services provided by DHRM related to recruitment services.

Similarly, the Committee's RFP process to select a vendor for administrator services (record keeper) also utilized limited services of an employee of the Division of State Purchasing. These services included meetings with staff, and review and advice regarding the RFP, such as whether the Committee was required to comply with NRS Chapter 333 State purchasing statutes. Purchasing's employee attended Committee meetings where she answered questions about responses to the Committee's RFP. She also answered questions from the Committee about Hartford's ability to meet mandatory requirements set out in the RFP. The employee attended the public meeting at which vendor responses to the RFP were determined. Her attendance was at the request of the Committee. Other services included numerous telephone conversations with the Chair and other members of the Committee. Purchasing did not bill the Committee for services related to the RFP process.

Direct support from the State was also given to the Committee in 2012 when the Program's executive officer's lease of office space terminated at the end of March 2012. The executive officer moved to office space in the State Library. For four months no rent was paid. Division of Buildings and Ground confirmed that the Program enjoyed rent abatement until July 1, 2012.

The Committee's statutory authority provides continuing indirect support. NRS 287.370 provides an exception to the prohibition against use of appropriated funds by the Program's members and staff. NRS 287.370 prohibits use of appropriated money of the State in connection with the administration of the Program except as compensation for employees who participate in the administration as part of their regular duties. In other words, the Legislature encourages service on the Committee by allowing its members and staff to receive their regular pay, which is appropriated funds from State revenues, while serving on the Committee.

There is other indirect support for the Program and the Committee regardless of whether the support is denominated as tax revenue, public money, or appropriated funds. The Program's full-time employee is a state employee who participates in PERS, PEBC, and receives liability coverage through the State's tort claims fund.

The Committee has always complied with the OML until the response to this complaint alleged it was not subject to the OML. The Program's Administrative Manual (amended and effective August 18, 2011) Article VII, section 2 requires that each Committee meeting agenda be posted in accordance with the OML. Article IX, section 1, states that members of the Committee must comply with the OML as well as the Attorney General's Boards and Commission Manual. On May 15, 2012 at the request of the Committee, this Office provided OML training for Committee members.

The State agencies mentioned herein, which have provided personnel time and other services to the Committee, are all part of the Executive Department which expend, disburse, or are supported in whole or in part by tax revenue.

ISSUES

I. WHETHER THE COMMITTEE WHICH ADMINISTERS THE NEVADA PUBLIC EMPLOYEES' DEFERRED COMPENSATION PROGRAM IS A PUBLIC BODY SUBJECT TO NRS CHAPTER 241.

II. WHETHER COMMITTEE'S REDACTION OF THE MINUTES OF ITS JUNE 21, 2012 CLOSED MEETING COMPLIED WITH THE OML.

III. WHETHER A LETTER DATED OCTOBER 4, 2012 FROM THE HARTFORD TO THE COMMITTEE SHOULD HAVE BEEN PART OF SUPPORTING MATERIAL FOR THE NOVEMBER 2, 2012 MEETING.

DISCUSSION

I. WHETHER THE COMMITTEE WHICH ADMINISTERS THE NEVADA PUBLIC EMPLOYEES' DEFERRED COMPENSATION PROGRAM IS A PUBLIC BODY SUBJECT TO NRS CHAPTER 241.

Central to the resolution of the Committee's declaration that the Committee is not subject to the OML is determination of the meaning of the term public body and in

particular with reference to the language in NRS 241.015(3) which defines public body.³ The Committee's defense to the allegation it was in violation of the OML is that it is not subject to the OML. Committee asserts that it does not "expend or disburse" tax revenue, a requirement in NRS 241.015(3). However, "expending" tax revenue is not the only path to becoming a public body. The relevant language in NRS 241.015(3) states that a public body is also created if it is "supported in whole or in part by tax revenue." This phrase is a distinct separate criterion; it is not part of the requirement that the public body expend or disburse tax revenue. These two criteria are distinct because they are stated in the disjunctive in the statute. A public body may be created if it "expends or disburses" tax revenue, or it may be created if it is "supported in whole or in part by tax revenue."

The OML was enacted for the benefit of the public because all public bodies exist to aid in the conduct of the people's business. NRS 241.010. The OML should be interpreted broadly to promote openness in government; exceptions to the OML are to be strictly construed. *McKay v. Board of Supervisors*, 102 Nev. 644, 647, 730, P.2d. 438, 441 (1986). As well, this Office has previously opined that the term "tax revenues" should be construed in its broadest possible sense to include not only those terms traditionally thought of as taxes but also license fees. OPEN MEETING LAW MANUAL, § 3.01 (11th ed. 2012), citing Letter Opinion to the Nevada State Board of Architecture (September 1, 1977).

³ 3. Except as otherwise provided in this subsection, "public body" means:

(a) Any administrative, advisory, executive or legislative body of the State or a local government consisting of at least two persons which expends or disburses or is supported in whole or in part by tax revenue or which advises or makes recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue, including, but not limited to, any board, commission, committee, subcommittee or other subsidiary thereof and includes an educational foundation as defined in subsection 3 of NRS 388.750 and a university foundation as defined in subsection 3 of NRS 396.405, if the administrative, advisory, executive or legislative body is created by:

(1) The Constitution of this State;
(2) Any statute of this State;
(3) A city charter and any city ordinance which has been filed or recorded as required by the applicable law;

(4) The Nevada Administrative Code
(5) A resolution or other formal designation by such a body created by a statute of this State or an ordinance of a local government;

(6) An executive order issued by the Governor; or
(7) A resolution or an action by the governing body of a political subdivision of this State;

(b) Any board, commission or committee consisting of at least two persons appointed by:
(1) The Governor or a public officer who is under the direction of the Governor, if the board, commission or committee has at least two members who are not employees of the Executive Department of the State Government;

(2) An entity in the Executive Department of the State Government consisting of members appointed by the Governor, if the board, commission or committee otherwise meets the definition of a public body pursuant to this subsection; or

(3) A public officer who is under the direction of an agency or other entity in the Executive Department of the State Government consisting of members appointed by the Governor, if the board, commission or committee has at least two members who are not employed by the public officer or entity.

This Office opined in 2002 that administrative support from other agencies was sufficient to come within the meaning of support by tax revenue. Our opinion said that the fact that support is given through another agency in property and services funded by tax revenue, rather than direct money, does not change the nature of the entity as being supported by tax revenue. OMLO 2002-19 (May 7, 2002).

We conclude, therefore, that Committee is a public body subject to the OML.

II. WHETHER COMMITTEE'S REDACTION OF THE MINUTES OF ITS JUNE 21, 2012 CLOSED MEETING COMPLIED WITH THE OML.

The complaint alleges that redaction of the closed portion of the Committee's June 21, 2012 minutes based on confidentiality included matters that could not be considered confidential, such as each member's scoring of the RFP as disclosed later in the open portion of the same meeting. State Purchasing statutes (NRS 333.335(6) and NRS 239.0115) provide statutory confidentiality to these records. NRS 333.335(6) states: "Except as otherwise provided in NRS 239.0115, each proposal evaluated pursuant to the provisions of this section is confidential and may not be disclosed until the contract is awarded."

Contracts were not awarded based on the responses submitted by both Hartford and ING, but the existing contracts were extended for two years. Our review of the RFP disclosed a specific attachment requiring an affirmation signature from any firm before submitting its response. The attached document is entitled "Certification of Indemnification and Compliance with Terms and Conditions of RFP." It repeats verbatim NRS 333.335(6), but subsequent sentences provide some insight into the intent of the statute. The Certification states that "following contract award, in accordance with NRS 333.333,⁴ only specific parts of the proposal may be labeled 'trade secret' as defined in NRS 600A.030(5)."⁵ As disclosed in the Certification, failure to execute the document constitutes a complete waiver of the protection provided for proprietary information and trade secrets.

⁴ **NRS 333.333 Proprietary information regarding trade secret: Confidentiality; disclosure.**

1. Except as otherwise provided in subsection 2 and NRS 239.0115, proprietary information regarding a trade secret does not constitute public information and is confidential.

2. A person shall not disclose proprietary information regarding a trade secret unless the disclosure is made for the purpose of a civil, administrative or criminal investigation or proceeding, and the person receiving the information represents in writing that protections exist under applicable law to preserve the integrity, confidentiality and security of the information.

(Added to NRS by 1995, 1732; A 2007, 2088)

⁵ **NRS 600A.030(5). Definitions.** "Trade secret" means information, including, without limitation, a formula, pattern, compilation, program, device, method, technique, product, system, process, design, prototype, procedure, computer programming instruction or code that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other persons who can obtain commercial or economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

NRS 600A.030, coupled with the language in the Certification each vendor was required to make in order to provide protection for its trade secrets, seems to provide sufficient protection from disclosure in the absence of an award.

III. WHETHER A LETTER DATED OCTOBER 9, 2012 FROM THE HARTFORD TO THE COMMITTEE SHOULD HAVE BEEN PART OF SUPPORTING MATERIAL FOR THE NOVEMBER 2, 2012 MEETING.

Finally, complainant alleged that the Committee failed to make a letter from the Hartford to the Committee part of supporting material for the November 2, 2012 meeting. By letter to the Program Coordinator, complainant requested the letter be made public on the Committee's website. This letter dated October 9, 2012 was requested from the Committee subsequent to the November 2, 2012 meeting pursuant to the public records act (NRS 239).

The OML does not determine which documents to include in supporting materials; however, when information is discussed in an open meeting and it is information from material not included in supporting material, then a public information request may be utilized. Complainant requested the Committee make the letter available on its website shortly after the November 2, 2012 meeting. Committee responded that the letter was confidential under NRS 333.335(6). As stated in the previous section, the public body requesting responses to an RFP is required to keep confidential proprietary information related to trade secrets. Discussion of the document may have waived protection for the information disclosed in public, but further waiver is not implied.

The public body must determine what material to include in supporting material for any meeting. Despite the Committee's discussion of its contents, it is the Committees responsibility to determine whether to make it a part of supporting materials.

CONCLUSION

The Committee to administer the Nevada Public Employees Deferred Compensation Program is a public body within the meaning of NRS 241.015(3). Failure to make the June 21, July 12, July 18, August 16, August 24, and September 20 meeting minutes or an audio copy of the individual meetings available within 30 working days was a violation of the OML. NRS 241.035(2).

The 30 working day period during which a public body must make available either the minutes (even in draft form with notation that the Committee may revise them in a future meeting) or an audio copy, is a bright line rule from which there can be no deviation. But, because the Committee's lack of staff during the summer of 2012 was clearly a hardship, we will only issue a warning to the Committee to correct this problem in the future.

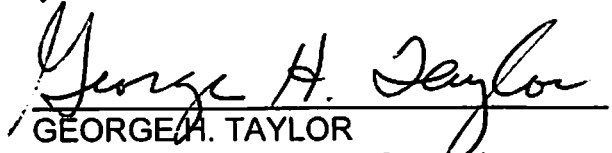
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NOTE: NRS 241.0395 requires that when this Office issues an opinion finding OML violation(s), the public body must place the matter on its next agenda for discussion and make this Office's opinion a part of supporting material to be made available to the public body and the public at the same time.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:


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GHT/CG

cc: Kent M. Ervin, Complainant
Nevada Deferred Compensation Program Members:
Carlos Romo, Vice Chair
Karen Oliver, Member
Brian Davie, Member
Steve Woodbury, Member
Shane S. Chesney, Program Counsel