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IN THE STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

In the Matter of:

Attorney General File No. 13-021

OMLO No. 2014-01

Mesquite Regional Business, Inc.
_____ /

BACKGROUND

This Open Meeting Law (OML) Complaint alleges that the Board of Directors for Mesquite Regional Business, Inc. (MRBI), a non-profit corporation holding 501(c)(6) status under Internal Revenue Code, has not complied with the OML. On October 23, 2012, MRBI contracted with the City of Mesquite (City) to provide professional economic development services. It is alleged the Board of Directors of MRBI does not post a public meeting notice and agenda in conformance with the OML. The issue is whether MRBI is a public body.

FACTS

The Mesquite City Council's (Council) consideration of privatization of economic development began in December 2011. At that time, the City employed a Director of Economic Development to guide the City's economic development, but when the position of the Director of Economic Development became vacant in 2011, the City Council considered privatizing its economic development office.¹ During its December 13, 2011 public meeting, the Council approved the creation of a technical steering committee to review privatization of the City's office. A private group of five citizens was appointed by the City Council from a list provided by city staff.

In late February 2012, the Technical Steering Committee (Committee) was informally organized. The Committee's function was to recommend future structure of economic

¹ Mesquite City Council's December 13, 2011 agenda item #15: "Discussion and possible action of privatizing the [City's] Economic Development Department" presented by Mesquite interim city manager Kurt Sawyer.

1 development, recommend funding sources, and develop a mission statement. Keeping
2 economic development within the City government was one of the ideas to be considered. All
3 meetings of the Committee were public and noticed under the OML.

4 In June of 2012, the Committee recommended that the economic development
5 structure be organized as a public/private partnership and that funding sources be both public
6 and private. It was recommended that the new organizational structure should be a private
7 IRC 501(c)(6) nonprofit corporation. Following the presentation by the Committee, the Council
8 approved a motion to receive the report from the Committee, and to provide possible direction
9 to the Committee regarding implementation of its recommendations by moving forward in
10 selection of a board of directors, and application for 501(c)(6) status. Upon approval of this
11 motion the Committee was dissolved as a subcommittee of the Council. After approval of the
12 motion to dissolve the Committee, Councilman Kraig Hafen asked the Committee who would
13 carry forward the duties once the Committee was dissolved. Mr. George Gault, a Committee
14 member, said that the former Committee members would move forward as a private group.
15 Exhibit 1, Council Minutes, June 12, 2012, p.15.

16 Mesquite Regional Business Inc. (MRBI) was incorporated following the Council's June
17 12th meeting as a nonprofit corporation under the Internal Revenue Code 501(c)(6). After the
18 incorporation, MRBI drafted a proposed agreement in which MRBI would contract with the City
19 of Mesquite as an independent contractor for the purpose of assisting and attracting regional
20 economic development. Exhibit 2, the Agreement.

21 The agreement was approved during the Council's public meeting on October 23,
22 2012, but not until the Council engaged in a lengthy discussion of the pros and cons of the
23 proposed agreement including the subject of loss of control based on the new corporate
24 structure because economic development would no longer be a government function.

25 Councilman Geno Withelder questioned the interim Director for Development and
26 Redevelopment, Aaron Baker, regarding loss of a government organization. Councilman
27 Withelder said, "Just because it would not be a city organization and it would be more of a
28 quasi-private organization we would not have the fundamental right to control it as a

1 government entity." Mr. Baker responded saying that MRBI is a private organization, but that
2 the City can control it through financing. Exhibit 3, Council Minutes, October 23, 2012, p. 37.

3 The terms of the agreement require the City of Mesquite to underwrite and fund MRBI
4 as a startup nonprofit corporation. The City is paying for MRBI operations costs (including
5 personnel and office space) and other eligible expenses that are defined in the agreement.
6 The parties described the agreement's purpose as a public/private partnership meant to
7 "reenergize regional economic development." The agreement also provides that MRBI will
8 serve as the primary local contact for public and private sector entities in economic
9 development matters and it will serve as the primary recommending agency to the City for
10 programs and projects worthy of consideration and financial participation. MRBI will advise
11 the Council about projects that the City may wish to participate in financially.

12 The Agreement indicates that public dollars are being committed based on "expected
13 deliverables" or activities, not performance.² In response to a question from Councilman Allan
14 "Al" Litman, Mr. Baker explained that "expected deliverables" meant assisting startup
15 businesses and existing businesses, and providing business leads. MRBI will identify
16 qualified business prospects, make site visits, and assist with relocation of businesses
17 recruited to the area. Other MRBI activities, to be reported to the City Council on a semi-
18 annual basis, include financing assistance through location of grants assisting businesses with
19 research projects, import/export issues soliciting foreign direct investment and assisting
20 businesses with rural development agency referrals and redevelopment.

21 Interim Director Aaron Baker told the Council that MRBI's activities or expected
22 deliverables are standards, which are the same reporting standards utilized by the Las Vegas
23 Regional Economic Development Council, and the same presently used by City of Mesquite.

24
25 ² Councilman Allan "Al" Litman questioned Director Aaron Baker's description of the proposed
26 agreement as "performance based." He elaborated by rejecting Mr. Baker's characterization of the proposed
27 agreement based on the definition, from federal sources (which he read into the record), of the term
28 "performance based." He concluded by stating that the proposed agreement was not performance based,
instead it was solely based on "expected deliverables," a term that describes activities, not output quality or
outcomes. Interim Director for Development and Redevelopment Aaron Baker quickly agreed and apologized for
incorrectly using the term "performance based." He stated that there are "expected deliverables" which will be
reported to the Council on a semi-annual basis. Minutes of Mesquite City Council meeting, October 23, 2012,
p. 34.

1 Mr. Baker explained to the Council that MRBI's goal was to recruit "value added" businesses
2 to City of Mesquite which means "businesses that bring in outside money that can then go
3 back into the region."

4 Discussion of the cost of privatizing of economic development efforts revealed that the
5 City had historically spent an average of \$245,000 annually through its economic development
6 office, whereas the agreement with MRBI proposed an average of \$160,000 annually for the
7 same standards based work currently utilized by the City. The Council approved a motion to
8 enter into the agreement with MRBI and directed the City Manager to work with MRBI to
9 implement it. Exhibit 3, Council Minutes, October 23, 2012, p.40.

10 The Agreement requires MRBI to assume sole responsibility for any debts or liabilities it
11 incurred. The agreement does not authorize MRBI to act as its agent or representative, or to
12 incur any obligation on behalf of the City, but the agreement does require that MRBI act as the
13 City's primary recommending agency for programs or projects worthy of consideration and
14 financial participation. In return for economic development assistance, the City agreed to
15 provide \$190,000 per year for 4 years and \$140,000 during the final year subject to the City's
16 annual budgeting process and appropriation of funds by the Council. It was expected that
17 private funds would supplant the City's support over time. The agreement expires in 2017.
18 The agreement could be terminated with one-year notice to the other party. The City could
19 alter MRBI's annual appropriation during its annual budgeting process.

20 MRBI physical property would remain with MRBI should it dissolve, but its intellectual
21 property would go back to the City. MRBI agreed to indemnify the City for all causes of action
22 or claims arising out of MRBI's performance of the agreement.

23 Prior to July 1st of each year, MRBI must provide to the City a work plan identifying its
24 goals, objectives, and activities that it expects to accomplish during the contract period.
25 Progress and performance reports are to be presented to the City Council semi-annually.
26 MRBI's first progress report and work plan was presented to the Mesquite City Council on
27 June 11, 2013.

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1 In its response to the complaint, MRBI asserts that because it is a nonprofit private
2 corporation MRBI is not a public body and therefore should not be subject to the Open
3 Meeting laws.³

4 **ISSUE**

5 Whether MRBI is not subject to the OML because it is a nonprofit corporation, or
6 whether considering the totality of factors it is the functional equivalent of a public agency that
7 is subject to the Open Meeting Law?

8 **DISCUSSION**

9 For more than ten years prior to 2012, regional economic development had been
10 pursued by the City of Mesquite in its own Office of Economic Development and
11 Redevelopment. In 2011, City of Mesquite decided to consider privatizing regional economic
12 development. In 2012, it entered into an agreement with newly formed MRBI, a nonprofit
13 corporation, to provide regional economic development assistance and services.

14 MRBI is a private nonstock nonprofit corporation, but it performs essentially the same
15 activities that the City of Mesquite formerly did when economic development was within city
16 government, and city employees directed the activities. MRBI's argument that it is not subject
17 to the OML solely because it is a private non-profit corporation is a formalistic interpretation of
18 the OML. However, other factors must be considered before determining whether public
19 access and public disclosure laws apply to MRBI.

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25 ³ The minutes of the City of Mesquite's public meeting on September 24, 2013, reflect that Dave
26 Ballweg, an MRBI Board member said that MRBI was a private company formed with his own money. Ballweg
27 said, "We [MRBI] are a private company, we are not public. We have no requirement to publish. We are not
28 traded. We are funded. We have other funding. This [City of Mesquite] isn't the only funding. We have a
\$50,000 grant for operations from USDA that has allowed us to have a revolving fund for business growth in this
town"

1 **A. What is a Public Body and what is the Attorney General's test for**
2 **determining whether an entity is a public body?**

3 Nevada's statutory definition of "public body" is an administrative, advisory, executive,
4 or legislative body of the state or a local government.⁴ This office has interpreted the
5 statutory definition to mean it must be a collegial body that: (1) owes its existence to and has
6 **some relationship** with a state or local government; (2) be organized to act in an
7 administrative, advisory, executive or legislative capacity; and (3) performs a governmental
8 function. A public body must also expend or disburse, or be supported in whole or in part by,
9 tax revenue, or advise or make recommendations to any entity which expends or disburses, or
10 is supported in whole or in part by, tax revenue. OMLO 99-05 (January 12, 1999).

11 This opinion seeks to clarify this office's longstanding interpretation of the definition of
12 public body and the phrase "...owe[s] its existence to and have some relationship with a state
13 or local government." OMLO 99-05. This opinion seeks to clarify what is meant by this

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15 ⁴ NRS 241.015(4):

16 Except as otherwise provided in NRS 241.016, "public body" means:

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

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

28 (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; and

 (c) A limited-purpose association that is created for a rural agricultural residential common-interest
 community as defined in subsection 6 of NRS 116.1201.

1 phrase and especially the meaning of "some relationship" within that phrase. The issue is the
2 "public's fundamental right to scrutinize the performance of public services and the
3 expenditure of public funds which must not be subverted by government or by private entity
4 merely because the public duties have been delegated to a private contractor."
5 OMLO 2003-01, April 17, 2003, quoting *Memphis Publishing Co. v. Cherokee Children &*
6 *Family Services*, 87 S.W.3d 67, 78-79 (Tenn. 2002).

7 We believe that the solution developed and in current use by other jurisdictions – the
8 functional equivalency test – is the superior means for determining whether a corporate entity
9 is subject to public access laws. This test ensures that the public's right to scrutinize the
10 expenditure of public funds and the performance of public duties is not subverted. It is the
11 totality of factors in each context that should determine whether a corporate entity is the
12 functional equivalent of a public agency subject to the Open Meeting Law.⁵

13 **B. City of Mesquite created MRBI**

14 In 2011, the Nevada Legislature amended the OML definition of public body. As a
15 result a public body must be created by one of seven methods pursuant to
16 NRS 241.015(4)(a)(1-7), it must have been created by the Governor, or a public entity, or
17 public officer under the Governor's direction. NRS 241.015(4)(b). NRS 241.015(4)(a)(7) allows
18 the governing body of a political subdivision of this State to create a public body by "[a]
19 resolution or an action by the governing body of a political subdivision of this State." The
20 Council took action within the meaning of NRS 241.015(a)(7) when it approved a motion that
21 directed the City Manager to provide possible direction to the Committee regarding
22 implementation of its recommendations by moving forward in selection of a board of directors,
23 and application for 501(c)(6) status. We believe that even though no Council resolution was
24 used to create MRBI, Council's direction to the City Manager on October 23, 2012 to
25 implement the Committee's recommendation was more than sufficient to constitute action by
26 the Council.

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28 ⁵ Washington, Op. Atty. Gen., 1991 No. 5 (The Washington Attorney General adopted the functional
equivalency test to determine whether a particular organization constitutes an "agency" for purposes of Open
Public Meetings Act and the public records provisions of Washington's Public Disclosure Act.)

1 **C. Nonprofit can be the functional equivalent of public agency**

2 The definition of "public body" does not specifically address whether private nonprofit
3 corporations are exempt or included, but we believe that in the appropriate context, and based
4 on the totality of factors, a meeting of the Board of Directors of a nonprofit corporation may
5 constitute an administrative, executive or advisory body of state or local government if the
6 other statutory criteria is met.⁶

7 Formalistic dependence on private corporate structure as an exemption from public
8 access laws has been rejected by federal and state courts. *News Journal Corporation v.*
9 *Memorial Hospital-West Volusia, Inc.*, 695 So.2d 418 (Fla. Dist. Ct. App. 1997) (based on
10 totality of factors, private non-profit corporation acting on behalf of governmental entity was
11 subject to sunshine law); *Board of Trustees of Woodstock Academy v. Freedom of Information*
12 *Commission*, 436 A.2d 266, 270 (Conn. 1980) (Court rejected formalistic argument resting on
13 nominal status as private non-stock corporation as exemption from public access laws).

14 The Supreme Court of Connecticut expressed practical reasons for examining each
15 case in light of its context. The Court, quoting federal authority, said:

16 '[A]ny general definition [of any agency] can be of only limited
17 utility to a court confronted with one of the myriad organizational
18 arrangements for getting the business of the government done....
19 The unavoidable fact is that each new arrangement must be
20 examined anew and in its own context.' *Washington Research*
Project, Inc. v. Dept. of Health, Education & Welfare, [(504 F.2d
238, 245-46 (D.C.Cir. 1974), cert. denied 421 U.S. 963, 95 S.Ct.
1951, 44 L.Ed.2d 450 (1975).].

21 *Woodstock Academy*, 436 A.2d at 270.⁷

22 ⁶ The absence of specific reference to a corporation in the definition of public body does not necessarily
23 mean that it cannot be subject to the law. Op.Atty.Gen.2003-01 (April 1, 2003) citing OMLO 2001-17, (April 12,
24 2001) (corporate instrumentalities charged with performing public functions and exercising decision making
25 authority bring the corporation within the ambit of the OML); See Op.Tenn.Atty.Gen. 03-063 (May 14, 2003)
(meetings of nonprofit corporation. are subject to OML where nonprofit was created pursuant to some action by
the County Commission and the corporation members are authorized to make decisions or recommendations on
policy or administration affecting public business).

26 ⁷ Nevada's earliest version of the OML, enacted in 1960, applied the OML to "all meetings of public
27 'agencies,' commissions, bureaus, departments, public corporations, municipal corporations and quasi-municipal
28 corporations and political subdivisions." In 1977 the Legislature amended NRS chapter 241 deleting the
definitional list to which the OML applied. "[A]gencies", commissions, bureaus, departments, public
corporations, municipal corporations and quasi-municipal corporations and political subdivisions" was deleted
from statutory definition. In place of the list the Legislature substituted "bodies," apparently to enlarge the scope
of application of the statute. The legislative history of AB 437 (1977) does not explain why the former list was

1 The definition of "agency" depends on the context in which it is used. For example, the
2 en banc Supreme Court of Washington determined that the meaning of "agency" is dependent
3 on the context of its use. *Graham v. Washington State Bar Association*, 86 Wash.2d 624, 548
4 P.2d 310 (Wash.1976). Nevada statutes also define "agency" based on the context.
5 NRS 233B.010 (definition of "agency" is limited to application to NRS 233B)⁸. And,
6 California's Open Meeting Law, *The Ralph M. Brown Act*, includes within the ambit of its Open
7 meeting law, a city, whether general law or chartered, or any "agency" thereof, or other local
8 public agency. California Gov. Code, §54950 et seq.⁹

9 **D. Private nonprofits are subject to public access and public disclosure laws**

10 Whether private entities are subject to state public access and disclosure laws is an
11 issue that courts have considered and continue to face because privatization of governmental
12 functions is a feature of modern government. These decisions are based on the totality of
13 factors and the individual context. No one factor is determinative, which is why a formalistic
14 argument asserting that the OML is not applicable solely because of an entity's nonprofit
15 corporate status is not dispositive. The City of Mesquite government had an Office of
16 Economic Development for more than ten years; as a result it has become a function of local
17 government. See *infra*. n. 15.

18 "Public agency" is not defined in the public records statutes, but "governmental entity"
19 is defined and it includes an agency of a political subdivision of this State.¹⁰ The Legislature's

20 deleted and simplified as "public bodies." Nevertheless, it is clear that "public body" still encompasses meetings
21 of a public agency.

22 ⁸ **NRS 232B.010 "Agency" defined.** As used in NRS 232B.010 to 232B.100, inclusive, unless the
23 context otherwise requires, "agency" means any public agency which the Legislature has designated to be the
24 subject of a review by the Legislative Commission.
(Added to NRS by 1979, 1838; A 2011, 2996)

25 ⁹ West's Ann.Cal.Gov.Code § 54951. The Brown Act defines "local agency" as a county, city, whether
26 general law or chartered, city and county, town, school district, municipal corporation, district, political
27 subdivision, or any board, commission or agency thereof, or other local public agency.

28 ¹⁰ **NRS 239.005 Definitions.**

5. "Governmental entity" means:
(a) An elected or appointed officer of this State or of a political subdivision of this State;
(b) An institution, board, commission, bureau, council, department, division, authority or other unit of
government of this State, including, without limitation, an agency of the Executive Department, or of a political
subdivision of this State;
(c) A university foundation, as defined in NRS 396.405; or

1 findings and declaration which preface the Public Records Chapter clearly indicate intent that
2 records of public/private entities cannot be shielded from public scrutiny. NRS 239.001(4).¹¹

3 The Legislature stated in NRS Chapter 239 that public records law must be liberally
4 construed and any exemption be narrowly construed. This legislative statement is similar to
5 the Nevada Supreme Court's view in *Dewey v. Redevelopment Agency of the City of Reno*,
6 119 Nev. 87, 94, 64 P.3d 1070, 1075 (2003), that the Open Meeting Law be liberally
7 construed and broadly interpreted.

8 The Open Meeting Law also does not define "public agency." But, NRS 239.005(6)
9 and NRS 239.0103¹² provide recent evidence of Legislative intent that the public may access
10 public records regardless of whether the entity holding the records is a private nonprofit
11 corporation. The Open Meeting Law and Public Records Law may be construed *in pari*
12 *materia* because both serve the same purpose of maintaining a record of the proceedings of
13 public bodies and making those proceedings available to the public. *State ex rel. American*
14 *Civil Liberties Union of Ohio, Inc. v. Cuyahoga County Board of Commissioners*, 128 Ohio
15 St.3d 256, 264, 943 N.E.2d 553, 562 (Ohio, 2011). Although the Nevada Supreme Court has

16 (d) An educational foundation, as defined in NRS 388.750, to the extent that the foundation is dedicated to the
17 assistance of public schools.

18 6. "Privatization contract" means a contract executed by or on behalf of a governmental entity which
19 authorizes a private entity to provide public services that are:

- 20 (a) Substantially similar to the services provided by the public employees of the governmental entity; and
21 (b) In lieu of the services otherwise authorized or required to be provided by the governmental entity.

22 ¹¹ NRS 239.001 Legislative findings and declaration. The Legislature hereby finds and declares
23 that:

- 24 1. The purpose of this chapter is to foster democratic principles by providing members of the public with
25 access to inspect and copy public books and records to the extent permitted by law;
26 2. The provisions of this chapter must be construed liberally to carry out this important purpose;
27 3. Any exemption, exception or balancing of interests which limits or restricts access to public books and
28 records by members of the public must be construed narrowly; and
29 4. The use of private entities in the provision of public services must not deprive members of the public
access to inspect and copy books and records relating to the provision of those services.

(Added to NRS by 2007, 2061; A 2011, 2723)

¹² NRS 239.005(6). "Privatization contract" means a contract executed by or on behalf of a
governmental entity which authorizes a private entity to provide public services that are: (a) Substantially similar
to the services provided by the public employees of the governmental entity; and (b) In lieu of the services
otherwise authorized or required to be provided by the governmental entity.

NRS 239.0103 Privatization contracts open to inspection. Any privatization contract executed by
or on behalf of a governmental entity is a public record and must be open to public inspection during the regular
business hours of the governmental entity.

(Added to NRS by 2011, 2723)

1 not construed the Public Records Act and the Open Meeting Law to be *in pari materia*, it has
2 defined the context in which such use is appropriate. This is appropriate statutory
3 construction when statutes involve the same class of persons or things, or seek to accomplish
4 the same purpose or object.¹³ When construed *in pari materia* the requirement of open and
5 public meetings has the same purpose as the public records law – public access. In our view,
6 based upon this authority, a non-profit corporation may be subject to both the OML and the
7 State's Public Records Law if the totality of factors indicates it is the functional equivalent of a
8 public agency.

9 **E. Totality of Factors test determines whether a private nonprofit is subject to**
10 **public access and public disclosure laws**

11 The totality of factors test is widely followed by courts in other jurisdictions. The
12 Connecticut Supreme Court, in a decision widely followed by other jurisdictions, adopted a
13 four-factor test culled from federal case law to determine whether an entity is the functional
14 equivalent of a public body. The factors are: (1) whether the entity performs a governmental
15 function; (2) the level of government funding; (3) the extent of government involvement or
16 regulation; and (4) whether the entity was created by government. *Woodstock Academy*,
17 436 A.2d at 270-271. The *Woodstock* Court considered each factor, balancing the factors by
18 giving appropriate weight to each one based on the context, a procedure followed by most
19 states that have adopted the functional equivalency test. See *Domestic Violence Services. v.*
20 *Freedom of Info. Commission*, 704 A.2d 827, 834 (Conn. 1998).

21 We believe the dispositive issue to resolve this complaint is whether, after considering
22 the totality of factors, MRBI is the "functional equivalent of a public agency" (or public body)
23 despite its corporate structure. This test more accurately accesses the factors that determine
24 to what degree the nonprofit has a connection with state or local government. Resting the
25 decision on whether the nonprofit has "some connection" with state or local government needs
26 further clarification.

27
28 ¹³ *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 294, 995 P.2d 482, 485 (2000)
("Statutes are said to be '*in pari materia*' when they involve the same classes of persons or things or seek to
accomplish the same purpose or object.")

1 We have not found a reported decision in Nevada that decided whether a private
2 nonprofit corporation is the functional equivalent of a public agency so that the State's public
3 access laws apply.

4 In 1999, this Office opined that the Economic Development Authority of Western
5 Nevada (EDAWN), a non-profit corporation, was not subject to the OML. See OMLO 99-05
6 (January 12, 1999). In that Opinion, this Office found that the receipt of money from a public
7 body does not by itself transform a private corporation into a public body. The Opinion states
8 that to hold otherwise would mean that every charity that receives grants, every government
9 contractor that receives payment for services or products, and every trade group or common
10 interest organization to which a government body belongs, would automatically become a
11 public body under the OML.

12 EDAWN was organized as a private non-profit corporation; its organizers were seven
13 private citizens. The Opinion did not find evidence that EDAWN was created by the order of
14 or otherwise owed its existence to any state or local government public body, and there was
15 no evidence that EDAWN was organized to act in an administrative, advisory, executive, or
16 legislative capacity. Therefore, this Office's Opinion was that EDAWN was not subject to the
17 OML.¹⁴

18 We did find decisions from other jurisdictions and a Nevada Attorney General's Opinion
19 that have applied a totality of factors test, to determine whether a private non-profit
20 corporation is subject to public access laws. See OMLO 2003-01 (April 17, 2003) (applying
21 functional equivalent test to public records law); *News and Sun-Sentinel Co. v. Schwab, Twitty*
22 *& Hanser Architectural Gr., Inc.*, 596 So.2d 1029 (Fla.1992) (the term "agency" was defined
23 broadly to include any private entity acting on behalf of any public agency); *State of New*
24 *Mexico v. City of Truth or Consequences*, 287 P.3d 364, 370 (N.M. Ct. App. 2012) (totality of
25 factors test used to determine when private entity is subject to public disclosure laws);
26

27
28 ¹⁴ The EDAWN opinion was issued years before the 2011 Legislative amendment to NRS Chapter 241
that made the manner of creation of the entity of equal importance to the definition of public body used in the
EDAWN opinion.

1 *Memorial Hospital-West Volusia*, 695 So.2d at 421 (high level of public funding was an
2 important factor that convinced the court that the entity, a hospital lessee, was subject to
3 public disclosure laws); *Raton Public Service Co. v. Hobbes*, 417 P.2d 32, 35 (N.M.1966)
4 (corporate instrumentalities for accomplishing public ends, whether governmental or
5 proprietary, must be considered governmental agencies); and *Telford v. Thurston County*
6 *Board of Commissioners*, 974 P.2d 886, 893-894 (Wash App. 1999) (four factor balancing test
7 applies in determining whether entity is a public agency).

8 This office opined in OMLO 2003-01 (April 13, 2003) that the best way to determine if a
9 nonprofit was the functional equivalent of a public agency was to apply a totality of factors
10 test. Our opinion cited the Tennessee Supreme Court's adoption of a multiple part test for
11 public records access. *Memphis Publishing Co. v. Cherokee Children & Family Services*, 87
12 S.W.3d 67 (Tenn. 2002). The Tennessee Court explained why a multiple part totality of
13 factors test was necessary to ensure transparency.

14 Our review of authority from other jurisdictions persuades us that
15 the functional equivalency approach described above provides a
16 superior means for applying public records laws to private entities
17 which perform "contracted out" governmental services. As the facts
18 of these cases demonstrate, private entities that perform public
19 services on behalf of a government often do so as independent
20 contractors. Nonetheless, the public's fundamental right to
21 scrutinize the performance of public services and the expenditure
22 of public funds should not be subverted by government or by
23 private entity merely because public duties have been delegated to
24 an independent contractor. When a private entity's relationship
25 with the government is so extensive that the entity serves as the
26 functional equivalent of a governmental agency, the accountability
27 created by public oversight should be preserved.

28 *Id.* at 78-79.

Therefore, the totality of factors test is used to determine just how extensive the
Council's relationship with MRBI is, and whether the State's Open Meeting Law applies to
its meetings.

Federal Courts have held that the key to determining whether a corporate nonprofit is a
government agency or merely a contractor with the government is whether the government is
really involved in the core planning or execution of the program, or whether by contrast the

1 entity retains its private character in bona fide fashion. *Forsham v. Califano*, 587 F.2d 1128,
2 1138-1139 and n.19, (D.C.Cir. 1978), aff'd, 445 U.S. 169, (1980); *Domestic Violence Services*
3 *of Greater New Haven v. FOIC*, 704 A.2d 827, 832 (Conn. App. Ct. 1988). We think that
4 MRBI has not retained its bona fide private character because the City of Mesquite was
5 instrumental in the execution of the nonprofit and is almost entirely responsible for its funding.
6 In our view, these facts represent an extensive involvement with MRBI.

7 The action taken by Mesquite City Council on October 23, 2012, which approved the
8 independent contractor agreement with MRBI and gave explicit direction to the City Manager
9 to move to implement the Committee's recommendation to privatize regional economic
10 development in a corporate structure, removing it from city government structure, indicated
11 that the Council created a public body within the meaning of NRS 241.015(4)(7). Liberally
12 construing and broadly interpreting the action, giving due consideration to NRS 241.015(4)(7)
13 as the Nevada Supreme Court requires, the Council's action on October 23, 2013, created a
14 public body.

15 MRBI performs a governmental function¹⁵ and it serves an advisory role to the Council.
16 Section Three of the Agreement between the City of Mesquite and MRBI describes the
17 services to be provided under the agreement. MRBI will serve as the primary local contact for
18 public and private sector entities in economic development matters and it will serve as the
19 primary recommending agency for programs and projects worthy of consideration and
20 financial participation by the City.

21 MRBI's Board of Directors are local business leaders, some of whom may have served
22 on the Committee that recommended MRBI's private corporate structure. The City of
23 Mesquite did not seek privatization proposals from the private sector. MRBI did not exist until
24 the Council decided to accept the recommendation of the Technical Steering Committee to
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¹⁵ Economic development and redevelopment had been carried on within city government until it was
decided to privatize them. See also *Domestic Violence Services of Greater New Haven, Inc. v. Freedom of*
Information Commission et al., 704 A.2d 827, 832 (Conn. App.Ct.1998) (where government provided services to
victims of domestic violence, a recent phenomenon with no historical antecedent, it constituted evolution into a
government function).

1 privatize efforts to create regional economic development. We learned during our investigation
2 that the Council did not seek requests for proposals from the private sector, because it wanted
3 local business leaders to be responsible for regional economic development. The Committee
4 submitted its recommendation to the Council and the Council voted to approve it. Not until
5 then did Dave Ballweg, a member of the Committee, incorporate MRBI with his own money.

6 CONCLUSION

7 The Open Meeting Law is broadly interpreted by the Nevada Supreme Court so that
8 citizens are not deprived of the opportunity to witness their government in action.
9 Our Supreme Court in *Dewey v. The Redevelopment Agency of the City of Reno*,
10 119 Nev. 87, 94, 64 P.3d 1070, 1075 (2003), citing an Attorney General's Opinion, said that "a
11 statute promulgated for the public benefit such as a public meeting law, should be liberally
12 construed and broadly interpreted to promote openness in government."¹⁶

13 Determination of whether MRBI is a public body or a pure corporate body not subject to
14 the OML, is made more difficult because of commingling of both public and private
15 characteristics. The totality of factors test is the best method to determine if public access
16 laws like the Open Meeting Law should apply.

17 MRBI is a non-profit corporation, but after balancing the totality of factors we believe
18 MRBI is the functional equivalent of a public agency. MRBI performs an advisory function to
19 the Mesquite Council because it is the primary recommending agency for programs and
20 projects worthy of consideration and financial participation by the City. It performs a
21 governmental function previously carried out within city government by city employees. It was
22 created by the action of the City of Mesquite's Council on October 23, 2012 when the Council
23 approved an agreement that removed economic development from city government and
24 directed the City Manager to implement the Committee's recommendation that a nonprofit
25 corporation be formed to pursue regional economic development. MRBI's Board of Directors
26 must annually submit MRBI's budget and business plan to the City Council. Council reserved
27

28 ¹⁶ Op. Nev. Att'y Gen. No. 85-19 (Dec. 17, 1985)

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1 a contractual right to revise appropriated funding dollars. The Council's power to alter each
2 year's financial appropriation, without any restriction, is strong evidence of Council's extensive
3 control and relationship with MRBI. Furthermore, Council's level of funding for MRBI is almost
4 total, which is used to support MRBI's operating costs.

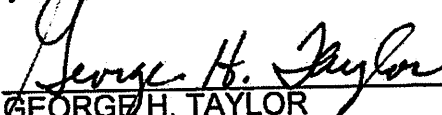
5 The totality of factors test is necessary to unravel MRBI's commingling of public and
6 private characteristics. The right of the public to analyze the expenditure of public funds and
7 to protect public's right to scrutinize the manner in which MRBI conducts public business is at
8 stake.

9 MRBI is subject to the Open Meeting Law.

10 DATE this 13th day of February 2014.

11 Sincerely,

12 CATHERINE CORTEZ MASTO
13 Attorney General

14 By: 
15 GEORGE H. TAYLOR
16 Senior Deputy Attorney General
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CERTIFICATE OF SERVICE

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I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 13th day of February 2014, I deposited for mailing at Carson City, Nevada, a true and correct copy of the foregoing Open Meeting Law Opinion, Attorney General File No. 13-021, via United States Mail addressed as follows:

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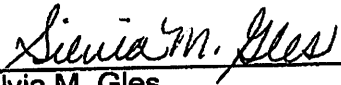
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