

OMLO 99-01 Open Meeting Law: Under NRS 241.020(2)(c)(1), an agenda must include a clear and complete statement of the topics scheduled to be considered during the meeting. To meet that requirement, agenda descriptions for resolutions, ordinances, regulations, statutes, rules or the like to be considered by public bodies should describe what the statute, ordinance, regulation, resolution or rule relates to so that taxpayers and citizens may determine if it is a subject in which they have an interest.

(This opinion was rendered by the Office of the Attorney General as a guideline for enforcing the Open Meeting Law and not as a written opinion requested pursuant to NRS 228.150).

Carson City, January 5, 1999

Mrs. Judy Herman, Post Office Box 2687, Reno, Nevada 89505

Dear Ms. Herman:

This office has primary jurisdiction to investigate and resolve allegations of violations of the Open Meeting Law, NRS chapter 241. In October, you sent to this office a copy of an agenda for a special meeting of the Reno City Council held on September 29, 1998, and asked us whether the agenda complied with the Open Meeting Law with respect to the description of a resolution to be considered regarding a proposed project to depress the railroad tracks through the center of Reno.

In looking into the matter, we conversed with the Reno City Attorney's office, reviewed the agenda as well as the proposed resolution in question, the staff memorandum regarding that resolution, and the draft minutes for that meeting, and we watched the tape of the whole meeting. We also researched our previous opinions regarding the content of agendas, as well as the legislative history regarding agendas and some significant case decisions in other states.

For the reasons stated below, we believe that the agenda was deficient in its description of the resolution, and we take this opportunity to expand our interpretations about meeting agenda requirements and provide advisory guidance for all public bodies. However, given that the nature of the resolution was merely to start a public hearing process which would assure ample citizen participation in the decisions to be made about the project, and given that the City Council immediately recognized the problem when a citizen brought it up and ordered future agendas to be changed, we believe that no enforcement action against the City Council is warranted. *Bay Ridge Utility District v. 4M Laundry*, 717 S.W.2d 92 (Tex. App. 1986) (agenda was technically deficient,

but court held that the entire record revealed that few would have been misled in light of other agendas).

FACTS

The agenda for the September 29, 1998, special meeting of the Reno City Council included the following item:

IV. Staff Report: Resolution No. __ Resolution making a Provisional Order regarding the acquisition and improvement of an overpass project, street project and transportation project—combined with the proposed City of Reno, Nevada 1999 Special Assessment District No. 2.

At the meeting, after spending approximately 26 minutes discussing the subject (approximately ten minutes of which were devoted to dealing with a citizen complaint about the agenda and other matters), the Council unanimously passed Resolution Number 5532, introduced by Council member Hascheff, which was entitled: *A RESOLUTION MAKING A PROVISIONAL ORDER TO THE EFFECT THAT THE WORK OF ACQUISITION AND IMPROVEMENT OF AN OVERPASS PROJECT, STREET PROJECT AND TRANSPORTATION PROJECT, COMBINED, WITHIN THE PROPOSED CITY OF RENO NEVADA 1999 SPECIAL ASSESSMENT DISTRICT NO. 2 SHALL BE DONE; TOGETHER WITH OTHER MATTERS PROPERLY RELATING THERETO.*

The resolution was 15 pages long. It described the "overpass project" as:

An Overpass Project, including, without limitation, bridges, viaducts, or other structures or facilities for the transportation of pedestrians, motor and other vehicles and utility lines, over any street, stream, railroad tracks, and other way or place, approaches, ramps, structures, crosswalks, sidewalks, driveways, culverts, drains, sewers, manholes, inlets, outlets, retaining walls, artificial lights, pumping equipment, ventilating equipment, and all appurtenances and incidentals necessary, useful or desirable for any such overpass (or any combination thereof), including all real and other property therefor.

The resolution described the "Street Project" as:

A Street Project, including, without limitation, grading, graveling, oiling, paving, concrete paving, sealing, sidewalks, driveway approaches, alley approaches, saw cuts, curbs, gutters, valley gutters, handicapped pedestrian ramps,

culverts, drains, sewers, manholes, sewer service laterals, inlets, outlets, retaining walls, off-site adjustments, and all appurtenances and incidentals (or any combination thereof), including all real and other property therefor, with intersections.

The resolution described the Transportation Project as:

A Transportation Project, including, without limitation, any project to provide local transportation for public use, and includes works, systems and facilities for transporting persons, rolling stock, equipment, terminals, stations, platforms and other facilities necessary, useful or desirable for such a project, and all property, easements, rights of way and other rights or interest incidental to the project.

But it wasn't until page 8 that the resolution gave a hint about where these projects were to be and, hence, what the resolution was all about. Buried in the "form of notice" text and obscured by pages of generic officialese words, lies the following sentence:

The said combined project will serve to improve the area surrounding the Union Pacific Company's railway facilities within and through downtown Reno, Nevada (between Keystone Avenue and Wells Avenue), as well as the area currently occupied by the existing railroad tracks, and will specially benefit all parcels and tracts of land located within the following described boundaries, to wit (giving a two page legal description).

That sentence reveals (at least to those in the know) that the resolution was about a proposed project to lower the railroad tracks through the center of Reno, which is of colossal importance to the city and expense to the taxpayers and has been the subject of controversy for decades. The current version of the project has been labeled the "Depressed Railway Project," and the staff memorandum to the Council explaining the resolution used those words in its headline. But those words did not appear in the headline of the resolution or on the agenda. As a result, by reading the agenda, most citizens would not have a clue that their council would be taking action on such a monumental issue that night.

At the meeting, two citizens complained that from reading the agenda they could not tell that the resolution was about the Depressed Railway Project

(although they were, notably, there to testify about the project). Councilwoman Pearce agreed that the agenda said nothing about the railroad, and that only a council member would know what the resolution was really about.

Mayor Griffin pointed out that the resolution was the first step under chapter 271 of the Nevada Revised Statutes (Local Improvements) to start the public hearing process for the proposed project. Staff members provided details about the public meetings which have already occurred and the public hearing process that was already in progress to educate the public about the project and get the public involved in the approval process. The resolution itself stated that detailed plans and drawings of the proposed project had already been filed with the City Clerk for public viewing and that a hearing (with elaborate notice requirements) was to be held on October 27, 1998, to start the approval process.

Councilman Hascheff asked that future agenda descriptions for the project include the words "Depressed Railway Project" so there would be no further question what the hearings and meetings were all about.

The resolution was approved.

ANALYSIS

NRS 241.020(2)(c)(1) requires that written notices for all meetings covered by the Open Meeting Law must include an agenda consisting of a "clear and complete statement of the topics scheduled to be considered during the meeting," and a list "describing the items on which action may be taken. . . ."

In § 7.02 of the NEVADA OPEN MEETING LAW MANUAL (7th ed. 1998), published by this office, we discussed the "clear and complete" requirement for agendas. Drawing from two previously published opinions of the Office of the Attorney General, we observed and advised that, among other things,

1. Agenda items must be described with clear and complete detail so that the public will receive notice in fact of what is to be discussed by the public body.
2. Use a standard of reasonableness in preparing the agenda and keep in mind the spirit and purpose of the Open Meeting Law.
3. Always keep in mind that the purpose of the agenda is to give the public notice of what its government is doing, has done, or may do.

4. The use of general or vague language as a mere subterfuge is to be avoided.

5. An agenda must never be drafted with the intent of creating confusion or uncertainty as to the items to be considered or for the purpose of concealing any matter from receiving public notice.

The "clear and complete" agenda requirement was added to the Open Meeting Law in 1989, and a review of the legislative history of the amending bill (S.B. 140) affords some guidance which is helpful to our analysis of the Reno City Council agenda.¹

S.B. 140 was introduced in 1989 by Senator Ann O'Connell. After her bill cleared the Senate with the "clear and complete" agenda language, Senator O'Connell testified before the Assembly Committee on Government Affairs, and when asked about the intended breadth of that language, she gave an example of what her bill was intending to correct. She observed that some public body agendas merely cite to a particular NRS to be considered at a meeting without telling what the statute "*relates to.*" She said the bill would address that concern so that the public would know whether attending the meeting was going to be worth their time, whether it is a subject that they are interested in, and whether they need more information on the subject. *See Hearing on S.B. 140 Before the Assembly Committee on Government Affairs, 1989 Legislative Session, 4 (May 10, 1989).* The Assembly approved the language as it was explained and the "clear and complete" agenda requirement became a part of the Open Meeting Law.

From that legislative history, we can add a further interpretation of what "clear and complete" means with respect to public meeting agendas: When listing a statute (or ordinance, regulation, resolution, rule or the like) on an agenda for consideration or action by a public body, describe what the statute, ordinance, regulation, resolution, or rule relates to.

The Attorney General of Utah has similarly interpreted Utah's Open Meeting Law to require that references to regulations on agendas include an indication as to the nature of the regulations and whether the regulations to be

¹ *See Haworth Board of Education v. Havens*, 637 P.2d 902 (Okla. 1981) (when construing the statute which requires advance posting of agendas by public bodies, it is the court's duty to ascertain the legislative intent of the act as a whole in light of its general purpose and object), *Graybill v. Oklahoma State Board of Education*, 585 P.2d 1358 (Okla. 1978).

discussed are the current or proposed regulations. *See* Utah Op. Atty. Gen. No. 79-107 (April 25, 1979).

Our interpretation is consistent with the following cases: *Pokorny v. City of Schuyler*, 275 N.W. 2d 281 (Neb. 1979), (the purpose of the Open Meeting Law agenda requirement is to give some notice of the matter to be considered so that persons who are interested will know which matters will be for consideration at the meeting. Where city council held several meetings to discuss the purchase of land for a sewer plant, agenda items entitled "Discussion of terms of land acquisition contract" and "Lad (sic) appraisals discussion" did not furnish adequate notice, and the actions at those meetings were held invalid. But the decision to purchase the sewer plant property was made at a later meeting under the agenda item entitled ". . . approval of contract with Langemeier-Wagner Company requested by EPA" did provide adequate notice, and inasmuch as the city council corrected itself, the action taken at the later meeting was not held to be invalidated by the defects in the agenda for the former meetings.) *Haworth Board of Education v. Havens*, 637 P.2d 902 (Okla. 1981) (agenda items that said "Interview a new administrator," and "Hire principals" were held to be deceptively vague and ambiguous and misleading when the purpose of the meeting was to approve a contract for a new superintendent); *Carlson v. Paradise Unified School Dist.*, 18 Cal. App. 3d 196 (Cal. App. 1971) (it is a well known fact that public meetings of local governing bodies are sparsely attended by the public at large unless an issue vitally affecting their interests is to be heard. To alert the general public to such issues, adequate notice is a requisite. Thus it is imperative that the agenda of the Board's business be made public and in some detail so that the general public can ascertain the nature of such business. Closing a school under an agenda item "Continuation school site change" was held to be inadequate notice; the agenda should have included at least the location of the school); *Hayes v. Jackson Parish School Bd.*, 603 So. 2d 274 (La. App. 1992) (agenda item "Consider request from Pine Belt Multi Purpose Agency for additional space for the Head Start Program" did not provide adequate notice for a restructuring plan that included closing a school and sending students, faculty and staff to another school.)

The key deficiency pointed out in all the above cases was that while the agendas may have provided partially accurate names for the topics to be considered, they did not describe the nature of the topics (or what they related to), and as a result we concur with the holdings and believe that the agendas also would not have complied with Nevada's Open Meeting Law.

CONCLUSION

While item IV of the agenda for the September 29, 1998, meeting of the Reno City Council accurately and completely *identified* the resolution to be considered by the City Council and repeated most of the leadline for the resolution, (and therefore was not deceptive or misleading), we believe that the agenda fell a little short of providing the notice contemplated by "clear and complete" language in NRS 241.020(2)(c)(1). In the future, agenda descriptions for resolutions, ordinances, regulations, statutes, rules or the like to be considered by public bodies should describe what the statute, ordinance, regulation, resolution, or rule relates to so that taxpayers and citizens may determine if it is a subject in which they have an interest. We agree with Councilwoman Pearce and Councilman Hascheff that adding the words "Depressed Railway Project" would have sufficed in this case (because of all the publicity about being afforded to the project), and commend the Council for promptly responding to citizens' comments to make that improvement to its agendas.

Your bringing this to our attention is appreciated because it provided a good example to use in expanding our guidance about how to comply with the Open Meeting Law.

FRANKIE SUE DEL PAPA
Attorney General

By: GREGORY A. SALTER
Deputy Attorney General

OMLO 99-02 Open Meeting Law: NRS 241.020(2)(c)(1) requires agendas for public meetings to include a "*clear and complete* statement of the topics *scheduled* to be considered during the meeting." An agenda for a retreat should identify the event as a retreat, give the objectives to be accomplished, and include the specific topics scheduled by retreat organizers.

(This opinion was rendered by the Office of the Attorney General as a guideline for enforcing the Open Meeting Law and not as a written opinion requested pursuant to NRS 228.150).

Carson City, January 15, 1999

Robert H. Ulrich, Esq., Airport Authority of Washoe County, Post Office Box 12490, Reno, Nevada 89510

Dear Mr. Ulrich:

Yesterday, you faxed me a draft of an agenda for the upcoming retreat of the Airport Authority Board of Trustees, and asked for comments regarding the specificity of the topics.

As we discussed, retreats pose special problems for agenda writers because so much of what actually happens at retreats may be spontaneous. Successful retreats depend on the ability of participants to engage in open and free discourse and explore for consensus wherever the discussions may wander. But the agenda requirement for the Open Meeting Law contemplates that citizens should be told what is going to happen at meetings so they can decide if their government is going to discuss or take action on anything of interest to them and whether attending the meeting is worth their while. These two concepts need to be reconciled, and this office believes that citizens understand the nature of retreats and that discussions must necessarily be a little open ended, but that citizens will not tolerate the use of retreats to circumvent the Open Meeting Law by sneaking into discussion and action on specific items.

NRS 241.020(2)(c)(1) requires agendas for public meetings to include a "*clear and complete* statement of the topics *scheduled* to be considered during the meeting." In writing agendas for retreats, we believe that the statute requires that the agenda identify the event as a retreat and then give the objectives to be accomplished (e.g., discuss legislative packages, discuss relations with other groups or amongst the members of the public body, improve communications, build teamwork, set goals, adopt comprehensive plans or the like). Further, we think that specific topics *scheduled* by retreat

organizers to be discussed should be included. For sure, if the retreat organizer, the Board Chair or the Executive Director has (at the time the agenda is being prepared) formed an intention to bring up a specific topic and ask the group to discuss or take action on it, then the specific topic must be listed. This information may be gleaned from agenda support materials, slides, charts, group discussion lists, workshop agendas and handouts being prepared for the retreat.

Looking at your draft agenda, the agenda topic "Board and Management Issues" seems somewhat vague unless retreat organizers truly have no objectives or discussion topics in mind. It would seem that at least some general topics are being scheduled for discussion (i.e., staff salaries, organizational charts, relations between staff and the Board, general job duties or job descriptions, review of rules or policies or the like) but if not, then there isn't much that can be done with that agenda topic.

Under "Reinvent the Future," if the retreat organizer or meeting leader plans for the session to include objectives such as goal setting, establishment of priorities, providing direction to staff, resolutions to call for studies, or the like, then these objectives should be generally described on the agenda so that members of the public would know what may be coming out of the meeting and, again, if the meeting leader is scheduling a specific topic (such as taking up items of "old business" from a previous meeting) the specific topic should be listed.

Recognizing that the momentum of conversations started under agenda items such as "reinvent the future," "set goals," "evaluate priorities," "discuss issues," often lead to the development of a consensus or the making of promises or commitments as well as outright votes (all of which are within the definition of "action" in NRS 241.015(1)), we recommend that such items be indicated as possible action items.

This office believes that the rule of reason should be applied to the interpretation of the Open Meeting Law, and that the rule of reason allows for some slack in agendas for true retreats, but the rule of reason does not permit public bodies to enact specific legislation or make specific administrative determinations regarding topics of public interest under general agenda topics. It is reasonable to set general priorities, goals, and principles of conduct under general agenda topics, but specific legislation or administrative determinations to implement them should be scheduled for discussion or action on later agendas. Thus it is important for the retreat leaders to monitor the discussions to assure that participants do not abuse the agenda.

I hope this letter is helpful. Please see also § 7 of the *Nevada Open Meeting Law Manual*, (7th ed. 1998) for additional discussion of agendas. If you have any further questions, please call me.

FRANKIE SUE DEL PAPA
Attorney General

By: GREGORY A. SALTER
Deputy Attorney General

AGO\OML 99-03 Open Meeting Law: Under NRS 241.020(2)(c)(1)—(2), generic agenda items such as "Old Business" and "Presidents Report" should not be indicated as action items. If action is going to be taken on a rule, the agenda should describe what the rule relates to.

(This opinion was rendered by the Office of the Attorney General as a guideline for enforcing the Open Meeting Law and not as a written opinion requested pursuant to NRS 228.150).

Carson City, January 11, 1999

J. Phillip Keene, President and CEO, Reno Sparks Convention and Visitor's Authority, 4590 South Virginia Street, Reno, Nevada 89502

Dear Mr. Keene:

This office has primary jurisdiction for investigating and prosecuting complaints of violations of the Nevada Open Meeting Law, NRS chapter 241. We have received the enclosed complaint regarding an item on your agenda for the October 22, 1998, meeting of the RSCVA Board of Directors. The complaint alleges that the agenda topic "Discussion/Approval of Amendments to Board Meeting Rules 8.2 and 8.3" does not meet the requirement in the Open Meeting Law (NRS 241.020(2)(c)(1)) that agendas contain a "clear and complete statement of the topics scheduled to be considered during the meeting."

We agree with the complainant and are of the opinion that your agenda for October 22 was defective, and that your general format for agendas is defective for the following reasons:

1. Item 4A of the October 22 agenda is defective because it does not describe what Rules 8.2 and 8.3 relate to or the nature of the rules.

2. The generic terms "President's Report," "Committee Reports," "Staff Reports," "New Business," and "Old Business" do not provide clear and complete statements of the topics scheduled to be considered, nor do they adequately describe items upon which action is to be taken at the meeting as required by NRS 241.020(2)(c)(1)—(2). We note that those generic items are indicated as action items on your agenda, and warn you that action cannot be taken on items which are not clearly and completely described on the agenda. Any action taken under those generic terms would be void under NRS 241.036.

We invite your attention to § 7 of the NEVADA OPEN MEETING LAW MANUAL (7th ed. 1998) which explains the requirements for preparing and following agendas of public meetings. If you or your counsel have any questions about the application of the Open Meeting Law to your agendas, please call me to discuss them.

We hereby warn your agency that future violations of the Open Meeting Law as to your agendas will be progressively prosecuted by this office. With that said, if your Board of Directors places rules 8.2 and 8.3 on a future agenda (with a description of what the rules relate to) to review or ratify the amendments made on October 22, 1998, this office will close its file on the complaint with the above warning. Please indicate to me by January 22, 1998, whether the rules will be scheduled on a future agenda for review or ratification so that we can determine our next course of action.

And, again, if you have any questions, please call me.

FRANKIE SUE DEL PAPA
Attorney General

By: GREGORY A. SALTER
Deputy Attorney General

OMLO 99-04 Open Meeting Law: Hearing to consider student expulsion is exempt from the requirements of the Open Meeting Law. NRS 392.467(3) specifically says that "[T]he provisions of Chapter 241 of NRS do not apply to any hearing conducted pursuant to this section. Such hearings must be closed to the public."

(This opinion was rendered by the Office of the Attorney General as a guideline for enforcing the Open Meeting Law and not as a written opinion requested pursuant to NRS 228.150).

Carson City, January 11, 1999

Ann Bersi, Esq., Deputy District Attorney, Office of the District Attorney of Clark County, Post Office Box 552215, Las Vegas, Nevada 89155-2215

Dear Ms. Bersi:

This letter confirms our conversations in the past that it is the opinion of this office that when a school board is holding a hearing to consider a student expulsion under NRS 392.467, it is not necessary for the board to comply with the Open Meeting Law.

NRS 392.467(3) specifically says that "[T]he provisions of Chapter 241 of NRS do not apply to any hearing conducted pursuant to this section. Such hearings must be closed to the public." We interpret that to be a complete exemption from the Open Meeting Law. Therefore, it is not necessary to prepare notices and agendas for the hearings to comply with the Open Meeting Law with respect to the conduct of the hearings, or to keep minutes or records of the hearings under the Open Meeting Law.

I hope this letter is helpful to you. If you have any further questions, please call me.

FRANKIE SUE DEL PAPA
Attorney General

By: GREGORY A. SALTER
Deputy Attorney General

OMLO 99-05 Open Meeting Law: Economic Development Authority of Western Nevada (EDAWN) is not a public body as defined in NRS 241.015(3), and therefore is not covered by the Open Meeting Law.

(This opinion was rendered by the Office of the Attorney General as a guideline for enforcing the Open Meeting Law and not as a written opinion requested pursuant to NRS 228.150).

Carson City, January 12, 1999

Mr. Sam Dehne, 297 Smithridge Drive, Reno, Nevada 89502

Dear Mr. Dehne:

This office has primary jurisdiction for the investigation and resolution of complaints regarding violations of the Nevada Open Meeting Law, NRS chapter 241. In October you filed a complaint with this office alleging that the EDAWN does not comply with the Open Meeting Law when conducting meetings of its Board of Trustees or committees.

We have investigated your complaint by interviewing officials of EDAWN and reviewing records and information given to us by those officials as well as a review of relevant statutes and regulations. We conclude that EDAWN is not a "public body" as defined in NRS 241.015(3), and therefore is not covered by the Open Meeting Law.

The Open Meeting Law applies to public bodies and NRS 241.015(3) defines a "public body" as:

[A]ny administrative, advisory, executive or legislative body of the state or a local government 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

In § 3.01 of the NEVADA OPEN MEETING LAW MANUAL (7th ed. 1998), after discussing what is a "body" under the statute, this office observed that the definition indicates that a *public* body:

1. Is an "administrative, advisory, executive or legislative body of the state or a local government" which means that the body must (1) owe its existence to and have some relationship with a state or local government, (2) be organized to act in an administrative, advisory, executive or legislative capacity, and (3) must perform a government function; and

2. 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.

Applying that analysis to EDAWN, we observe the following facts.

1. According to its Articles of Incorporation, EDAWN was organized in August 1982 as a private nonprofit corporation. Its organizers were seven private citizens. We can find no evidence that EDAWN was created by the order of or otherwise owes its existence to any state or local government body.

2. The Articles of Incorporation provide that the City of Reno, City of Sparks, and Washoe County each may appoint an *ex-officio* nonvoting trustee to the Board of Trustees, regardless of whether they contribute financially to the corporation. Currently, the Board of Trustees consists of 29 persons, including the nonvoting representatives from Reno, Sparks, and Washoe County. There are approximately 300 paying members of EDAWN. It would not appear that any government agency controls EDAWN.

3. EDAWN is given no authority to act on behalf of any government body. It administers no government programs, passes no legislation or regulations, has no governmental jurisdiction to regulate any activity or impose any taxes.¹ EDAWN has no power to waive or make any promises to waive any governmental fees or taxes. It cannot make or promise to make any grants, loans, incentives, or any contracts that would be binding on any government. No government body has appointed or asked EDAWN to provide advice on any governmental matter. When EDAWN speaks to any government agencies, it is doing so of its own accord, not because it has any advisory power. We can therefore find no evidence that EDAWN was organized to act in an administrative, advisory, executive or legislative capacity.

¹ EDAWN is the grantee of two Foreign Trade Zones from the U.S. Foreign Trade Zone Board. We evaluated whether that designation implies government powers or can be given only to government agencies. Both federal regulations (15 C.F.R. 400.22) and Nevada law (NRS 237A.020) clearly state that private nonprofit and for-profit corporations can be grantees of Federal Trade Zones, and there is no requirement that grantees have special governmental designations or regulatory powers. We cannot therefore conclude that, by itself, being a grantee of a Federal Trade Zone makes a corporation a public body.

4. The Articles of Incorporation state that the purpose of the organization is to promote, develop, implement, and manage all aspects of an economic diversification program to include business retention, the expansion or existing industry, and the acquisition of new industry. The goals of EDAWN, as set out in its 1997 Economic Development Report, include (1) attracting quality business, (2) retaining and expanding quality business, (3) promoting economic health of Reno/Sparks/Tahoe, and (4) enhancing membership value. To accomplish those goals, the organization: conducts market research to identify and target desirable businesses, develops information promoting the area, conducts site visits to private businesses, hosts company visits to area, provides relocation assistance if asked, introduces executives to local professionals, and assists in the development of education programs to improve workforce skills to meet the needs of incoming or upgrading businesses. According to interviews with Mr. Alvey and Mr. Howard, EDAWN promotes the area and assists businesses in obtaining information and making contacts. EDAWN does not subsidize or provide any financial incentives for any relocations. It does not speak for any government. We conclude that these functions are within the dominion of free enterprise, and are not government functions.

5. In its 1999 operating budget, EDAWN is expecting 37 percent of its revenues to include grants from the State of Nevada, City of Reno, Sparks, and Washoe County, although no government is obligated to make any grants or payments. The remaining 63 percent of the expected revenues comes from private business memberships, donations, and revenues from sales of publications or other activities. Certainly, one can argue that EDAWN enjoys financial support from public bodies.

We conclude that EDAWN does not meet the first test of being a public body. It is a privately formed corporation that was not organized by and does not owe its existence to any government body, was not organized to perform any administrative, executive, advisory or legislative function, and does not perform a government function. While we note that EDAWN is supported in part by grants from public bodies, to meet the second part of the public body test requires more than just financial support. To hold that any entity which receives money from a public body becomes a public body would mean that every charity that receives grants, every government contractor that receives payment for services or products, and every organization to which a government body belongs becomes a public body under the Open Meeting Law. Statutes must be interpreted to avoid absurd results, *Alsensz v. Clark Co. School Dist.*, 109 Nev. 1062, 1065, 864 P.2d 285 (1993), and we think that it would be absurd to bring all those private organizations within the ambit of the Open Meeting Law just because they receive money from public bodies. A better approach would be to evaluate the connection between the money

received and the function being performed by the recipient. If the recipient is receiving the money to perform a government function, as set out in the first test, then a public body would be indicated. In the case of EDawn, since the grants are not to finance a government function, we do not believe that EDawn meets the second test of being a public body.

Therefore, it is the conclusion of this office that EDawn is not a public body as defined in NRS 241.015(3), and therefore is not required to comply with the Open Meeting Law. With this conclusion, we must close our file as having no jurisdiction over EDawn under the Open Meeting Law.

We appreciate your bringing this question to us because it is a question that needed examination and resolution.

FRANKIE SUE DEL PAPA
Attorney General

By: GREGORY A. SALTER
Deputy Attorney General

OMLO 99-06 Open Meeting Law: (1) Open Meeting Law applies to members elect of public bodies. (2) Under NRS 241.020(2)(b), agendas must indicate where posted. (3) Under NRS 241.020(3)(a)(b), notices of meetings must be mailed and posted no later than 9 a.m. on the third working day before (and not counting the day of) the meeting. Improperly noticed meetings may be rescheduled, but must be stopped after that point. (4) Under NRS 241.035(2), minutes of meetings must be made available for inspection. (5) Notice of meetings mailed under NRS 241.020(3)(b) need not include agenda support material required to be provided under NRS 241.020(4).

(This opinion was rendered by the Office of the Attorney General as a guideline for enforcing the Open Meeting Law and not as a written opinion requested pursuant to NRS 228.150).

Carson City, March 19, 1999

Topaz Ranch Estates General Improvement District, c/o Law Offices of
Michael Smiley Rowe, Post Office Box 2080, Minden, Nevada 89423

Dear Ladies and Gentlemen:

This office has primary jurisdiction to investigate and prosecute allegations of violations of the Nevada Open Meeting Law, chapter 241 of Nevada Revised Statutes. NRS 241.040(4). On January 29, 1999, Mr. Fritz Rubins filed a complaint with this office alleging several violations of the Open Meeting Law by the Topaz Ranch Estates General Improvement District Board of Trustees (Board). On February 1, this office sent a letter to the Board informing it of the complaint, asking for a response as well as copies of tapes and other information, and also informing the Board of some obvious deficiencies in its agendas. On February 16, 1999, we received a response from the Board as well as the tapes and information we requested. Based on a review of the complaint, the response, and the tapes and information submitted, we conclude that the Board did violate the Open Meeting Law in several respects, but did not violate the Open Meeting Law in other respects all as indicated below.

Under the circumstances, this office believes that the appropriate remedy is to warn the Board and advise that it educate itself regarding the Open Meeting Law.

ANALYSIS AND CONCLUSIONS

A. The gathering of members elect on December 28, 1998.

On the morning of December 28, 1998, the complainant observed three members of the Board (a quorum of the Board) "engaged in a twenty minute conversation" outside of the South County Sheriff's substation, and concluded that it was "difficult to believe that District matters were not discussed." In response, the board admitted to the conversation, but pointed out that two of the persons engaged in that conversation (Messrs. Steve Sanders and Dick Fossee) had not yet been sworn in as members of the Board and further emphatically denied that the conversation included Board business.

As pointed out in § 3.06 of the NEVADA OPEN MEETING LAW MANUAL, (7th ed. 1998), this office believes that the Open Meeting Law applies to gatherings of members-elect of public bodies. Thus if a quorum of the members of the Board, including members-elect, had gathered to deliberate toward a decision or to take action on a matter over which the Board had supervision, control, jurisdiction or advisory power, then that gathering would be a "meeting" under NRS 241.015(2) and would be subject to the Open Meeting Law.

But the complainant did not hear the conversation and could only speculate as to what was discussed, and in light of the fact that the participants deny discussing any Board business, there is insufficient evidence to form a conclusion that a violation of the Open Meeting Law occurred that morning.

B. Defective agendas

The complainant contends that agendas for Board meetings to be held on January 6, 13, and 21, 1999, were defective because (a) they did not indicate who had originated and approved them, (b) they did not indicate where they had been posted, and (c) one of them used the word "Hiral" to denote the possible hiring of an attorney for the Board.

NRS 241.020(2) sets out the requirements for written notices and agendas for meetings. It contains no requirement that the notices or agendas reflect who originated or approved them. Therefore, we conclude that the absence of that information is not a violation of the Open Meeting Law.

However, NRS 241.020(2)(b) specifies that notices of meetings must include "[a] list of the locations where the notice has been posted." The agendas for January 6, 13, and 21 do not have that information, and therefore are defective. We inquired as to the actual posting of the notices and received a written statement by Mr. Ron Carter, secretary to the Board, indicating that

the notices were, in fact, posted in four places, so we conclude that since the notice requirements (with one exception, discussed below) for the meetings were actually met, the appropriate remedy in this case would be to educate and warn the board against future violations.

The agenda for the January 6 meeting included an item stated as "Hiral of Board Attorney." While the use of the word "hiral" may be grammatically suspect, we feel that a reasonable person could deduce that the Board was going to consider hiring an attorney, and therefore conclude that the agenda imparted sufficient notice to comply with the Open Meeting Law.

While they were not a part of the complaint, upon review of the agendas for January 6 and 13, we noted some other areas of needed improvement, and mentioned those in our letter to the Board on February 1. In response, the Board assured us that improvements would be made, and we are satisfied with that assurance.

C. Defective notice and conduct of January 13 meeting.

The complaint indicated that logs of the Sheriff's substation indicated that the notice and agenda for the January 13 meeting had not been posted at that location until 11:05 a.m. on January 8, 1999. The written statement by Mr. Carter indicated that the notice and agenda for the January 13 meeting was posted in four places (including the substation) at 10:30 a.m. on January 8. We need not resolve the dispute as to the time that the notice was posted at the substation because we conclude that all four notices were not timely posted.

NRS 241.020(3)(a) requires that written notice of meetings must be posted not later than 9 a.m. of the third working day before the meeting. In § 6.05 of the NEVADA OPEN MEETING LAW MANUAL, *supra*, we advised that in calculating the three working days, the day of the meeting should not be included. The meeting was scheduled for Wednesday, January 13. Not counting January 13 and calculating three working days back we conclude that the notices should have been posted by 9 a.m. on Friday, January 8, 1999. Mr. Carter indicates that they were posted at 10:30 a.m. on that date. The postings are therefore defective, and notice of the meeting was not accomplished as mandated in NRS 241.020(3)(a).

A review of the tape of the meeting on January 13 indicates that the defect was pointed out, and the Board (correctly) decided to reschedule the meeting for January 21. However, the chairman of the Board noted that there were some citizens there to make public comment and felt that they should be accommodated. The chairman was careful to see that no action was taken on

January 13, but proceeded through the agenda, item by item, allowing citizens to speak and allowing Board members to engage in some discussion on the items. We note that much of the discussion included questions and answers between citizens and the Board, but believe that some comments between Board members amounted to the beginning of deliberations toward a decision on some matters. We also note that all of the items listed on the January 13 agenda were also listed on the January 21 meeting.

In § 11.02 of the NEVADA OPEN MEETING LAW MANUAL (7th ed. 1998), this office advises:

If proper notice has not been given for a meeting, the meeting must be stopped. To remedy the violation, the Office of the Attorney General believes that the meeting may be convened or continued solely for the purpose of rescheduling a meeting and adjourning. To otherwise continue a meeting after it is discovered that the meeting was not properly noticed could be viewed as evidence of a willful violation of the Open Meeting Law. Discussions of any public significance which were held before the discovery of the improper notice should be repeated at a later meeting. All actions taken before adjournment are void but may be taken again at a subsequent meeting. . . .

We think the Board should have followed that advice. Continuing with a meeting with the knowledge that proper statutory notice was not given is a significant violation of the Open Meeting Law. But in listening to the tape, we cannot conclude that the Board knowingly violated the law. The mistake was acknowledged and the meeting rescheduled as it should have been, and it appears that the misinterpretation of the law was made in good faith in an effort to accommodate citizens there to speak to the Board. No action was taken at the meeting. Thus neither NRS 241.036 (actions taken at meetings in violation of the Open Meeting Law are void), nor NRS 241.040(1) (attending a meeting where action is taken in violation of the Open Meeting Law with knowledge that the meeting was in violation is a misdemeanor) apply to this meeting. Since the discussions were mostly innocuous, and the matters discussed were taken up again at the January 21 meeting, we believe that the appropriate remedy for this violation is to educate and warn against future violations.

D. Refusal to provide minutes; defective minutes.

The complaint alleges that on January 12, 1999, the complainant went to the district office and asked to review copies of (1) the minutes of Board

meetings, (2) the by-laws, (3) the standing rules, and (4) the book of all approved motions and resolutions, but he was permitted only to review the standing rules book which was incomplete. Written statements by two district employees confirm that the complainant did not get to see all the documents he requested to see that day, due in part to a lack of knowledge as to where some of the documents were, and in part to a lack of instructions to the employees about what information should be made available upon request. One written statement indicates that on February 1, the complainant returned to the office and was assisted by a Board member in locating the information he wanted. It would appear that the complainant had been given adequate access to the minutes because his complaint contains several allegations about deficiencies in them.

NRS 241.035 requires that written minutes be kept of Board meetings and that those minutes are public records and must be made available for inspection within 30 working days of the meetings. Under that standard, minutes for all meetings held on or before November 25, 1998, should have been made available to the complainant on January 12, 1999. That was not done in violation of the Open Meeting Law. We have been assured that the employees have been properly instructed with respect to providing copies of minutes for inspection upon request. Since the violation has been corrected, we will take no further action other than warn the Board against future violations.

As mentioned above, the complaint alleges several deficiencies in the minutes for the January 6 meeting. NRS 241.035(1) sets the minimum standards for what must be included in minutes of public meetings. Upon review of the complaint, none of the allegations articulate that something required by NRS 241.035(1) is missing. Rather, the allegations deal primarily with processes and procedures used by the Board and disputes as to the clarity and accuracy of the minutes. We have no jurisdiction to enter that dispute and suggest that counsel for the Board review the allegations and provide advice to the Board.

The Open Meeting Law deals only with Board minutes. Thus we have no jurisdiction to make comments on the allegations in the complaint regarding the other documents such as the by-laws or standing rules.

E. Failure to provide notice and agenda support items.

The complaint indicates that on January 1, 1999, the complainant requested, in writing, "to be placed on distribution for all GID agendas and other material described in NRS 241.020(3)—(4)," but that the notice and agenda for the January 6 meeting mailed to him was not postmarked until January 6, and did

not include agenda support material described in NRS 241.020(4). The complaint raises two issues. First, did the Board adequately respond to his request to be put on the mailing list for notices of meetings pursuant to NRS 241.020(3)(b), and second, must the Board include agenda supporting materials described in NRS 241.020(4) with the notices so mailed?

With respect to the first issue, the complaint does not state when the written request was actually delivered to the Board. We observe that January 1 was a holiday, and January 2 and 3 were weekend days. That would mean that the first working day upon which the Board had to respond to the written request was Monday, January 4. We also note that the notices for the January 6 meeting had already been mailed on December 30, 1998. As stated in § 12.04 of the NEVADA OPEN MEETING MANUAL, *supra*, this office believes that a standard of reasonableness should be used in interpreting the Open Meeting Law. We think that two working days is a reasonable time for the Board to react in these circumstances and therefore conclude that it did not violate the Open Meeting Law in mailing the notice of meeting on January 6.

With respect to the second issue, it has long been the position of this office that only the notice and agenda for a meeting need be mailed to persons who are on the mailing list established under NRS 241.020(3)(b). NRS 241.020(3)-(4) are distinct statutes enacted at different times for different purposes. NRS 241.020(3)(b) contemplates standing requests which are good for six months and specifically requires that notices of meetings be *mailed* pursuant to those requests. NRS 241.020(4), enacted several years later, does not contemplate standing requests, and only requires that agenda supporting material be *provided* upon any request. We interpret the word "provided" to mean make available for requestors to pick up. We note that agenda supporting materials described under NRS 241.020(4) are frequently not ready for distribution when the notices and agendas are posted and mailed three working days before a meeting, and we believe that the Legislature was aware of that when it used the distinct wording in NRS 241.020(4). Reading the two statutes in harmony, we believe that the Legislature intended for notices and agendas of meetings to be mailed three working days before the meeting and if a citizen has an interest in any particular item on an agenda, the citizen may specifically request a copy of the supporting material for that item and it must be provided to the citizen when the material becomes available. Thus the failure of the Board to include all agenda support materials in the mail with the notice and agenda did not, in our opinion, violate the minimum requirements of the Open Meeting Law. Public bodies are free to voluntarily honor standing requests for the mailing of agenda supporting material, but are not required by law to do so.

E. Other matters raised by the Board's response.

The complainant was apparently a member of the Board up until December 28, 1998, or thereabouts. In the Board's detailed response to his complaint, counsel also sent agendas and minutes of meetings when the complainant was on the Board, which contain some of the same errors we noted in our letter to the Board on February 1. Also included was a written statement from a person who saw the complainant conferring privately with two other Board members (one of whom is no longer on the Board) and an attorney on December 28, 1998.

We also received a letter from Mrs. Patricia Crick alleging that some of the problems indicated in the complaint existed while the complainant was on the District Board and questioning his motives for filing a complaint with this office.

These responses indicate that the Board has long needed education about several points of the Open Meeting Law. We note that the new counsel for the Board indicated in his letter that on March 3, 1999, he was going to meet with the Board and provide education on the Open Meeting Law as well as other statutes. Counsel has experience in these matters and we are confident he will provide the Board with appropriate advice.

WARNING

Based on the above discussions and conclusions, this office hereby warns the Board:

1. That it must include in its notice of meetings a list of the locations where the notice is posted as required by NRS 241.020(2)(b).
2. That it must post its notices of meetings and place them in the mail to those who have requested copies not later than 9 a.m. of the third working day before the meeting (not counting the day of the meeting as one of the three working days) as required by NRS 241.020(3).
3. That if notice for a meeting has not been properly mailed and posted as above, the meeting may be rescheduled, but must otherwise be stopped and no further deliberations or action may be taken.
4. That minutes of meetings are public documents and must be made available for public inspection within 30 working days in accordance with NRS 241.035(2).

Further violations of the above may result in this office pursuing its remedies under NRS 241.037 and NRS 241.040.

We also caution the Board to review the definition of a "meeting" under NRS 241.015(2), and to avoid gatherings of a quorum of Board members which meet that definition without first complying with the Open Meeting Law. We provide some guidance in that respect in § 5 of the NEVADA OPEN MEETING MANUAL (7th ed. 1998). We also encourage the Board to review § 7 of the manual as well as the guidance in our circular dated April 17, 1998, regarding the preparation of notices and agendas for meetings.

A copy of that manual and guidance letter was sent to the Board with our February 1 letter. We encourage the Board to make and distribute copies to each member, and to consult with counsel if questions arise. As always, we are available to consult with counsel.

If the Board acknowledges receipt of the above warnings, this office will close its file on the complaint.

FRANKIE SUE DEL PAPA
Attorney General

By: GREGORY A. SALTER
Deputy Attorney General

OMLO 99-07 Open Meeting Law: NRS 241.020(4)(a). Notices of public meetings must be provided upon any request at no charge.

(This opinion was rendered by the Office of the Attorney General as a guideline for enforcing the Open Meeting Law and not as a written opinion requested pursuant to NRS 228.150).

Carson City, February 4, 1999

To: All Attorneys who advise public bodies:

Re: Charging fees for mailing notices and agendas for meetings of public bodies.

As you know, this office has primary jurisdiction over the investigation and resolution of complaints regarding violations of the Nevada Open Meeting Law, NRS chapter 241. Over the past year, we have received four complaints from citizens that they are being charged a "subscription" fee to be placed on mailing lists for notices of public meetings. In one case, the full annual subscription fee was being charged even if the citizen only wanted one notice mailed to him.

This office believes that charging fees for mailing notices and agendas of meetings violates the Open Meeting Law. NRS 241.020(3)(b) requires that notices of public meetings (which must include an agenda for the meeting) must be mailed to any person who has requested notice of meetings of the public body, and NRS 241.020(4)(a) requires that agendas must be provided upon *any request at no charge*. We are aware that as of July 1, 1999, public bodies will generally be allowed to charge fees for providing copies of public records under NRS 239.052, but hasten to point out that the new statute says "[a] governmental entity shall not charge a fee for providing a copy of a public record if a specific statute or regulation requires the governmental entity to provide a copy without charge." NRS 241.020(4)(a) is such a specific statute, and since agendas must be provided as part of the notice of meeting, it follows that the notice of meeting must be provided without charge.

Thank you for your time and consideration in this matter.

FRANKIE SUE DEL PAPA
Attorney General

OMLO 99-08 Open Meeting Law: Any reasonable rule or regulation a public body desires to impose that in any manner limits or restricts a period devoted to public comment under NRS 241.020(2)(c)(3) must be clearly articulated on the agenda.

(This opinion was rendered by the Office of the Attorney General as a guideline for enforcing the Open Meeting Law and not as a written opinion requested pursuant to NRS 228.150).

Carson City, July 8, 1999

Michael A.T. Pagni, Esq., Jones Vargas, Post Office Box 281, Reno, Nevada
89504

Dear Mr. Pagni:

This office has primary jurisdiction to enforce the provisions of Nevada's Open Meeting Law, NRS 241.010 *et seq.* We received a complaint from Mr. Dehne alleging that on March 25, 1999, the Reno Sparks Conventions & Visitors Authority (RSCVA) Board of Directors violated the Open Meeting Law when Mr. Dehne was not allowed to speak on Agenda item 4C entitled "Amendment to RSCVA Travel Policy", and that on April 14, 1999, the Board violated the Open Meeting Law when it allegedly refused Mr. Dehne an opportunity to speak on Agenda item 4F entitled "Reconsideration of RSCVA Travel Policy."

The following is our determination based upon our review of the tapes of the meetings, and the materials submitted to us by the RSCVA and Mr. Dehne.

A. April 14, 1999 Complaint

Facts

Mr. Dehne complains that during the April 14, 1999 meeting of the RSCVA Board of Directors, he was prohibited from speaking on action item 4F, identified as *Agenda Item #07-0414-99- Discussion/Action: Reconsideration of RSCVA travel policy at the request of the Chairman (item 4F). The agenda for the April 14, 1999 meeting provided, in relevant part:

1. Public Comments - Public comment is limited to three minutes. The public is encouraged to provide information on issues not on the posted agenda during the Public comment period. The public may sign up to speak during the public

comment by completing a "Request to Speak" form and returning it to the RSCVA clerk at the meeting.

Mr. Dehne claims he submitted a Request to Speak form on item 4F that was ignored. We have no evidence Mr. Dehne submitted a Request to Speak form on item 4F. Accordingly, we find no violation of the Open Meeting Law in that regard. However, the agenda for the April 14, 1999, meeting is problematic, as it expressly invites public comment on nonagenda items, and thus implicitly discourages the public from commenting on agenda items during the public comment period. Further, the agenda does not provide for a comment period on agenda items as they are being discussed. A public body cannot restrict public comment to nonagenda items unless the public is allowed to speak to agenda items as they are being discussed. We note the Chairman allowed for public comment on agenda items as they were being discussed during the April 14, 1999, meeting. Accordingly, we believe the appropriate remedy is to point out the problem and caution the Board to ensure that the public comment period designated by the Board does not violate the spirit and intent of the Open Meeting Law.

B. March 25, 1999 Complaint

Facts

Mr. Dehne complains that during the March 25, 1999 meeting of the RSCVA Board of Directors, he was prohibited from speaking on action item 4C, identified as **Agenda Item #04-0325-99 - Amendment to RSCVA Travel Policy relating to staff and Board travel* (item 4C). The agenda for the March 25, 1999, meeting provided, in relevant part:

1. Public Comments - Public comment is limited to three minutes. The public is encouraged to provide information on issues not on the posted agenda during the Public comment period. The public may sign up to speak during the public comment period or on a specific agenda item by completing a "Request to Speak" form and returning it to the RSCVA clerk at the meeting.

During the meeting, the Chairman of the Board, Mayor Jeff Griffin, while not formally announcing that item 4C was on the floor for consideration, initiated discussion on the item by making introductory remarks in support of its approval. Thereafter, an unidentified Board member made a motion to approve the item, and lengthy discussion ensued. After the item was thoroughly discussed by the Board, the same Board member restated his motion

to approve the item and a second to the motion to approve was made. Discussion continued until the Chairman interrupted the discussion and called for a vote, at which time a vote was taken and the item was approved. Sometime between the initial motion and the final vote, Mr. Dehne submitted a Request to Speak form on the item. Immediately after the vote was taken, the Chairman acknowledged "I did have a request to address the Board from Mr. Dehne on this subject but Mr.—I did not receive the request until ah, there was already a motion on the table so, I didn't think it was appropriate once there was a motion to entertain a comment on that."

ANALYSIS AND CONCLUSION

NRS 241.020(2)(c)(3) requires that public bodies include in their agendas a "period devoted to comments by the general public, if any, and discussion of those comments." The RSCVA agenda for the March 25, 1999, meeting provided for a public comment period on nonagenda items and public comment on a specific agenda item by completing a "Request to Speak" form and returning it to the RSCVA clerk at the meeting.¹ Since the agenda, on its face, complied with the law, the issue before us is whether the Board adhered to the public comment period established for item 4C.

The law clearly mandates that citizens be able to speak during the designated public comment period. In § 8.04 of the NEVADA OPEN MEETING LAW MANUAL (7th ed. 1998), we opined that reasonable rules and regulation could be imposed on speaking.

The RSCVA argues it was reasonable for the Chairman to ignore Mr. Dehne's Request to Speak because a motion to approve the item "was on the table." The RSCVA cites to ROBERT'S RULES OF ORDER, § 3-4, Newly Revised, 9th Ed., for the proposition that when a motion is pending before a public body, only members of the body entitled to vote on the motion may proceed to debate the merits of the motion. The RSCVA argues that permitting public comment on specific agenda items only before formal motions are made is a reasonable measure to ensure orderly conduct of meetings. Assuming, *arguendo*, such a rule would be reasonably imposed during the public comment period for agenda items, the RSCVA failed to notify the public of such a rule, and instead imposed it *ad hoc* after item 4C had been discussed and decided. Any rule or regulation a public body desires to impose that in any manner limits or restricts the public comment period must be clearly articulated on the

¹ As aforementioned, a public body cannot restrict public comment to nonagenda items unless the public is allowed to speak to agenda items as they are being discussed. We note that during the March 25, 1999 meeting, public comment was taken on agenda items as they were being discussed.

agenda. Otherwise, a member who wishes to speak on a particular item may inadvertently miss his opportunity to do so. This is particularly true when agenda items are taken out of order with no prior notice.

Here, there was no clearly articulated rule in place limiting or restricting the time period during which public comment on agenda items would take place, nor was there notice to the public that the comment period on item 4C had closed. Discussion of item 4C took place among the RSCVA Board members long after the initial motion to approve the item was made. Under these circumstances, it was error to disallow Mr. Dehne an opportunity to comment on item 4C because he submitted his Request to Speak form after the initial motion was made, but before a second to the motion was made and a vote taken.² However, because approval of item 4C was rescinded at the RSCVA's April 14, 1999, Board meeting, we believe the appropriate remedy is to point out the error and caution the Board that if its agenda limits or restricts the public comment period, it must do so only through reasonable, clearly articulated rules and regulations.

It is critical that a public body provide for a meaningful public comment period. The RSCVA has failed to adopt clearly articulated reasonable rules and regulations governing the public comment period, and by doing so, has violated the spirit and intent of the Open Meeting Law. This office previously found the RSCVA violated the Open Meeting Law on October 28, 1998, and again on January 28, 1999. We again warn the RSCVA that future violations of the letter, spirit, or intent of the Open Meeting Law may result in prosecution by this office pursuant to NRS 241.037. Please circulate this letter to the RSCVA Board members, and we will close our file on the matter.

FRANKIE SUE DEL PAPA
Attorney General

By: VICTORIA M. THIMMESCH
Deputy Attorney General

² Notwithstanding, a citizen should submit his Request to Speak form in a timely manner whenever possible.

OMLO 99-09 Open Meeting Law (1) NRS 241.020; Open Meeting Law violated when public body took action on budget items when meeting agendized as “budget workshop” for “review and discussion” of budget; (2) NRS 241.035; Open Meeting Law violated when public body used tape recorder as only record of meeting and basis for written minutes and turned tape recorder off periodically throughout meeting.

(This opinion was rendered by the Office of the Attorney General as a guideline for enforcing the Open Meeting Law and not as a written opinion requested pursuant to NRS 228.150).

Carson City, July 28, 1999

Kristin A. McQueary, Chief Civil Deputy District Attorney, Elko County
District Attorney, 575 Court Street, Elko, Nevada 89801

Dear Ms. McQueary:

Pursuant to Nevada law, the Attorney General's office has primary jurisdiction for investigating and prosecuting complaints alleging violations of Nevada's Open Meeting Law, chapter 241 of the Nevada Revised Statutes. This letter is in response to your inquiry of April 7, 1999, based upon a report you received of potential Open Meeting Law violations by the Elko County Board of County Commissioners (Commission) during a budget workshop held in Wells, Nevada, on April 1, 1999.

With the cooperation of the District Attorney's Office, the Elko County Commissioners, and Elko County personnel, we have completed our investigation. Our investigation consisted of interviews with Commissioners Tony Lesperance, Mike Nannini, Roberta Skelton, Brad Roberts, and Nolan Lloyd, Assistant County Comptroller Debbie Armuth, County Comptroller Cash Minor, County Clerk Karen Dredge, and County Manager George Boucher, review of the tape recordings and transcribed minutes of the April 1, 1999, meeting, review of agenda minutes and agenda support material relative to the 1999/2000 Elko County budget for Commission meetings held on April 13, 1999; May 12, 1999; and May 17, 1999, review of the affidavits of Cash Minor and George Boucher, and review of selected Commission documents and correspondence. The following is a summary of our factual findings and determination regarding violations of the Open Meeting Law by the Commission.

FACTUAL FINDINGS

On March 26, 1999, a public meeting notice was posted at the Commissioners' Office, Elko County Courthouse, Elko County Library, Elko General Hospital, and Elko City Hall, with an attached agenda, noticing a special meeting of the Commission to be held on April 1, 1999, in the Wells Rural Electric Board Meeting Room, beginning at 9:00 a.m. The April 1 agenda, in relevant part, states:

III. BUDGET WORKSHOP:

- A.-- Review and discussion of final revenue projections prepared by the Department of Taxation and other matters related thereto.
- B.-- Review and discussion of 1999/2000 budget and other matters related thereto.

On the Agenda, the following notation is made:

**Identifies an action item subject to a vote of the Commission. Action taken may include a response to the matters contained in or considered during the action item.*

There is no asterisk by item III, indicating that no action would be taken on the 1999/2000 budget or other matters relating thereto.

The meeting commenced at approximately 9:15 a.m., lasting until approximately 6:30 p.m., approximately 9.25 hours. Present at the meeting were Commissioners Tony Lesperance, Mike Nannini, Roberta Skelton, Brad Roberts, and Nolan Lloyd, Assistant County Comptroller Debbie Armuth, County Comptroller Cash Minor, and County Manager George Boucher. Hence, a quorum of the Commission was present.¹ As a general rule, the Elko County deputy clerk takes both written minutes and tape-records Commission meetings. In the past, if the deputy clerk has been unable to attend a meeting, a county administration staff person has operated the tape machine and the Clerk's Office has prepared the minutes solely off the tape. At the April 1, 1999, meeting, the deputy clerk was absent and County Comptroller Cash Minor operated the machine. The Commission did not take written minutes during the meeting, but rather relied upon the tape recording as its sole record

¹ NRS 241.015(4) defines a "Quorum" to mean a simple majority of the constituent membership of a public body. All members of the Commission were present.

of the meeting. This office was provided with five tapes representing the record of the meeting, consisting of a total of 375 recorded minutes (6.25 hours). This office was also provided with an accurate transcript of the tapes. Hence, the minutes of the meeting consisted of the tapes and the transcript.

The record reveals that the tape recorder shut off 18 times, exclusive of those times the recorder was shut off to change the tape. The record shows that three of those times were for breaks; a lunch and dinner break, each lasting an estimated 45 minutes, and one other break, lasting an undetermined amount of time. This leaves 15 other times the recorder was shut off. Satisfactory explanations were offered by those interviewed for only five of those times: (1) the recorder was intentionally shut off for an undetermined amount of time at the instruction of Commissioner Lesperance when Commissioner Nannini initiated a discussion of the State Water Plan, *transcript* at 7, (2) the tape recorder was intentionally shut off, for an undetermined amount of time at the instruction of Commissioner Lesperance, when Commissioner Lesperance initiated a discussion of the County Clerk's Office relative to issues the County Clerk had raised regarding staffing, *transcript* at 87, (3) the tape recorder was intentionally shut off, for an undetermined amount of time, when Assistant County Comptroller Debbie Armuth made a phone call to a Jeri Underwood regarding the definition of "call back" in the context of Sheriff overtime, *transcript* at 169, (4) the tape recorder was intentionally shut off, for an undetermined amount of time, when Debbie Armuth made a phone call to Jeri Underwood regarding prisoner meals, *transcript* at 216, and (5) the tape recorder was intentionally shut off, for an undetermined amount of time, when discussing the District Attorney's bargaining unit, *transcript* at 247.

In addition, it appears the recorder was shut off to reach a decision concerning the creation of a new economic development authority to be under the umbrella of Elko County. In a letter dated April 9, 1999, from Chairman Lesperance to Elko Mayor Mike Franzoia, Chairman Lesperance states:

Thank you for your support of the plan to place the current North East Nevada Development Authority (NENDA) underneath the umbrella of Elko County in order to increase our efforts in economic development. *On April 1, 1999, the Elko County Commission reviewed the proposal during a budget session and agreed to put \$110,000 in the new department's budget if all the Elko County cities agree to revise the interlocal agreement that establishes our joint efforts in this arena.* (Emphasis added.)

Since this decision by the Commission is nowhere reflected in the minutes, it is reasonable to infer the decision was reached during one of the times the recorder was shut off. At a July 12, 1999, meeting of the newly-created Elko County Economic Diversification Authority Board of Directors, it was acknowledged that the Commission discussed the economic development fund at the April 1, 1999, meeting. *See* Minutes of July 12, 1999 meeting of the Elko County Economic Diversification Authority Board of Directors.

As to the remaining ten times the recorder was shut off, explanations offered by those interviewed were not helpful, and were contradictory and speculative.² Some theorized the recorder shut off due to power fluctuations that day, others thought perhaps the recorder was shut off due to breaks being taken. No one present could recall what was discussed during those times. There is no direct evidence as to why the recorder was shut off the remaining ten times, at whose direction the recorder was shut off, and the substance of discussion during those times.

At the April 1, 1999 meeting, the Commissioners were presented with a tentative budget governing various county departments. The evidence reveals that a quorum of the Commission admittedly made decisions to change line items in proposed budgets for the Commissioners', County Manager, Comptroller, Assessor, Recorder, Treasurer, Planning Commission, Engineering, Building Inspection, Public Works, Data Processing, Buildings/Grounds, Sheriff, Nevada Fire Protection, Library, Juvenile Probation, and Family Court department budgets. The changes to the proposed budgets made by the Commission resulted in approximately \$330,000 cut from the 1999/2000 tentative budget.³ The Commission also made changes to the Capital Improvement Plan.

² The recorder was shut off ten other times for an undetermined period of time: (1) during an apparent discussion of the County Clerk's budget, *transcript* at 88; (2) during an apparent discussion of the Sheriff's budget and overtime, *transcript* at 174; (3) during an apparent discussion of the Sheriff's budget and the Juvenile Task Force, *transcript* at 181; (4) when taking a "vote", described by certain members interviewed as "polling" or a "straw vote," on how much to cut the Sheriff's building repair budget, *transcript* at 221, (5) during an apparent discussion of the Sheriff budget and the cost of physicals, *transcript* at 222, (6) during an apparent discussion of cuts to the 1999/2000 budget in general, *transcript* at 223, (7) during an apparent discussion of the Public Defender budget, *transcript* at 244, (8) during an apparent discussion of Home Health, *transcript* at 252, (9) during an apparent discussion of the Library budget, *transcript* at 258, and (10) during an apparent discussion of the Family Court budget, *transcript* at 267.

³ *See* Minutes of April 13, 1999, Elko County Commission meeting, statement of Commissioner Nannini.

As a result of the April 1, 1999, meeting, a revised tentative budget was prepared reflecting the changes made to the budget at the April 1, 1999, meeting. The revised tentative budget was presented and approved in a properly noticed public meeting held on April 13, 1999, in Elko, Nevada. The revised tentative budget was again presented in a properly noticed public meeting held on May 12, 1999, in Elko, Nevada. At the May 12, 1999 meeting, several changes were made to the tentative budget. In addition, at its May 12, 1999, meeting the Commission, by Resolution, approved its April 1, 1999, decision to place \$110,000 into a newly created Elko County Business and Industry Diversification Fund. The tentative budget, including the revisions made at the May 12, 1999, hearing, and the final Capital Improvement Plan, were presented and approved in a properly noticed public meeting held on May 17, 1999. Additional changes were made to the tentative budget, and it was approved as the final budget on May 17, 1999. The Final Budget was submitted to the State of Nevada Department of Taxation on May 28, 1999.

CONCLUSION

I. The Commission violated the open meeting law on April 1, 1999, by considering and taking action on matters which were not listed on the agenda for the meeting.

NRS 241.020(2) provides that an agenda must consist of a clear and complete statement of the topics scheduled to be considered during the meeting, and a list describing the items on which action may be taken and clearly denoting that action may be taken on those items. NRS 241.015(1) defines "action" to include a decision, commitment, or promise made by a majority of the members. Here, the decisions made by a majority of the Commission at the April 1, 1999, budget workshop to make cuts in the tentative budget, to modify the Capital Improvement Plan, and to commit to fund a new economic development authority, were "actions" defined by NRS 241.015(1), even though such decisions stopped short of a formal vote. None of the matters upon which the Commission took action were listed on the agenda for the meeting as action items. Accordingly, each decision made was done in violation of the Open Meeting Law.

Notwithstanding the above violations, it became clear during interviews with the Commissioners that such violations were not intentional. The Commissioners honestly believed that because the meeting was designated a "workshop," and because no formal votes concerning the decisions were taken, they could make such decisions without violating the Open Meeting Law. Such

a conclusion is grossly incorrect; an action is a decision, commitment, or promise made by a majority of the members of a public body. The Open Meeting Law does not speak to the manner in which the decision, commitment, or promise is made, nor does it distinguish between a decision made at a “workshop” versus a decision made at a regularly scheduled meeting of the public body. Any decision made by a majority of the members is an action under the Open Meeting Law. The evidence is clear that the Commissioners acted as a collective body in making decisions on April 1, 1999.

Based upon the foregoing, it is our conclusion the Commission violated the Open Meeting Law by discussing, deliberating, and making decisions on matters that were not on the agenda. Under NRS 241.036, the decisions made that day would be void, and under NRS 241.037 this office would be authorized to pursue injunctive relief to correct violations and prevent them from occurring again. However, the decisions made at the April 1, 1999 meeting were later ratified in subsequent open meetings occurring on April 3, 1999; May 12, 1999; and May 17, 1999. Thus while violations occurred, their severity is somewhat mitigated by the fact that the Commission dealt with the matters in subsequent public meetings during which the public had an opportunity to comment on the decisions, and certain decisions were modified after public comment. Accordingly, considering all of the circumstances, including the fact the Commission has never been charged with violating the Open Meeting Law in this respect, this office believes that a better approach and use of resources is to provide guidance and serve warning that future transgressions of this nature may result in avoidance of actions taken as well as possible legal action to enjoin further violations.

II. The Commission violated the Open Meeting Law on April 1, 1999, because the minutes of the meeting do not reflect all matters discussed or decided at the meeting.

NRS 241.035(1) requires each public body to keep written minutes of each of its meetings, including “the substance of all matters proposed, *discussed or decided.*” (Emphasis added.) The Commission spent an undetermined amount of time off the record apparently discussing specific budget items and related personnel and labor issues, yet the minutes are completely silent about the substance of the discussion.⁴

While the Open Meeting Law does not require that meetings be taped, if a public body is going to rely solely on tape recordings as a record of an open

⁴ There is no evidence that the Commission went into an improperly closed meeting under NRS 241.033.

meeting, the recorder should be kept on at all times, with the exception of breaks. If the tape recorder is shut off for a break, the record must clearly note that the recorder is being shut off for a break, and when turned back on, the record must be clear that the meeting is back in session.

Here, the evidence indicates the recorder was turned off during discussion of the State Water Plan and discussion of issues the county clerk had raised concerning staffing because such discussions were considered by Commissioner Lesperance to be "sensitive" and "confidential." Commissioner Lesperance erred in his belief that such discussions should not be reflected in the minutes of the meeting. As aforementioned, minutes must reflect the substance of all matters proposed, discussed or decided. The evidence further indicates the tape recorder was shut off during discussion of the District Attorney's bargaining unit due to the belief that discussion of such matters were exempted from the Open Meeting Law. However, because no Commissioner can recall the substance of the discussion, it is unclear whether the discussion involved a statutory exemption to the Open Meeting Law. Notwithstanding, if a public body is going to close an open meeting for such a discussion such intention to do so must be clearly stated on the agenda.

As to the two times the recorder was shut off during phone calls made by Assistant County Comptroller Debbie Armuth, we again note that if it is necessary for a staff person to take a break to gather information for the public body, then taking a break and resumption of the meeting must be clearly noted in the record. As to the remaining ten times the recorder shut off, one can only speculate as to what occurred. What is known is that those ten times contribute to a record laden with gaps.

Under NRS 241.037(1), this office would be justified in seeking injunctive relief to correct the violation by asking for a court order that the minutes be amended. However, considering all of the circumstances, including the fact that the Deputy Clerk was not present to take written minutes as is generally the procedure, and the fact that subsequent to the April 1, 1999, meeting the Commission had consistently taken accurate minutes of its meetings and has never been charged with violating the Open Meeting Law in this respect, this office believes that a better approach and use of resources is to provide guidance and serve warning in order to avoid any future transgressions of this nature.

Although cumbersome at times, compliance with the Open Meeting Law fosters credible democracy, and that is something which must never be compromised. We trust the Commission will seriously adhere to this warning and in the future will consider or take action only on items that are clearly

listed on its meeting agendas, and assure that its minutes reflect the substance of all matters discussed or decided.

This office would be pleased to provide training to the Commission and its staff on the Open Meeting Law. Please contact me to schedule such training.

FRANKIE SUE DEL PAPA
Attorney General

By: VICTORIA T. OLDENBURG
Deputy Attorney General

OMLO 99-10 Open Meeting Law: NRS 241.020(2). Administrative error does not establish grounds to hold an “emergency meeting” without giving proper notice.

(This opinion was rendered by the Office of the Attorney General as a guideline for enforcing the Open Meeting Law and not as a written opinion requested pursuant to NRS 228.150).

Carson City, August 24, 1999

Mr. Todd A. Plimpton, Belanger & Plimpton, 1135 Central Avenue, Post Office Box 59, Lovelock, Nevada 89419

Dear Mr. Plimpton:

Pursuant to Nevada law, the Attorney General's office has primary jurisdiction for investigating and prosecuting complaints alleging violations of Nevada's Open Meeting Law, chapter 241 of the Nevada Revised Statutes. This letter is in response to a report we received that the Pershing County Fair and Recreation Board (Board) held a meeting in violation of the Open Meeting Law on May 25, 1999, at the law offices of Belanger & Plimpton, regarding the Board's budget for the fiscal year 1999-2000. For the reasons set forth below, we conclude the Board violated the Open Meeting Law in deeming its May 25, 1999, meeting an “emergency meeting,” thereby circumventing the notice requirement of NRS 241.020. We further find that the Board violated the Open Meeting Law by failing to include in its February 2 and March 4, 1999, agendas a period devoted to public comment, and by taking action on matters not on the agenda on February 2, 1999.

FACTS

By way of background, on January 26, 1999, the Board held a special public meeting at the Pershing County Community Center (Center) on its budget for the fiscal year 1999-2000.¹ On February 2, 1999, the Board held a second special public meeting at the Center on the 1999-2000 year budget. The agenda for this meeting read, in relevant part:

II. Discussion/Action on items of Business and other reports (Action may be taken on any item in this

¹ It does not appear from the written minutes that any action was taken relative to the budget at this meeting. However, the agenda denoted the 1999-2000 budget as an action item.

section/Agenda items may be taken in any order unless the Board Secretary specifies a time.)

1. Approval of budget for 1999-2000.

The written minutes reflect that the Board made three decisions under this action item, specifically:

Mr. Plimpton recommended to have (2) other Boardmembers [sic] go with him and pay a visit with Sharon Montez over the Budget. Boardmember [sic] Bloyed made a motion seconded by Board Member Mancebo. Motion Carried Unanimously.

Motion to take (PCFRB) off the deferred revenue program & have those Funds calculated as end fund balance. Boardmember [sic] Mancebo made the motion, seconded by Member Patterson. Motion carried Unanimously.

Resolution to transfer all the deferred Fund balance into our 1998-99 estimated reserve for future use fund in the amount of 33,000.00 and 5,711 into the 2,000 improved budget. Boardmember [sic] Bloyed made the motion and seconded by Boardmember [sic] Mancebo. Motion carried Unanimously.

See Minutes, Pershing County Fair and Recreation Board, February 2, 1999. The Board then approved the tentative budget, with adjustments. The agenda for the meeting did not provide for a public comment period.²

On February 10, 1999, the Board held a regular public meeting at the Center. The agenda provided, in relevant part:

V. DISCUSSION/ACTION ON ITEMS OF BUSINESS & OTHER REPORTS (Action may be taken on any item in this section. . . .)

-
- 11) Budget Adjustments/and Approval. The minutes reflect that the Board made one adjustment to the tentative budget under this agenda item.

² However, there is no complaint before this office that public comment was denied during this meeting.

On March 4, 1999, the Board held a third special public meeting at the Center on the 1999-2000 year budget. The agenda for this meeting read, in relevant part:

II. Discussion/Action on items of Business and other reports (Action may be taken on any item in this section/Agenda items may be taken in any order unless the Board Secretary specifies a time.) 1. Review changes in final draft of Budget 1999-2000.

The written minutes reflect that no action was taken at this meeting; however, the agenda for the meeting did not provide for a public comment period.³

Thereafter, the Board published notice in the Lovelock Review-Miner newspaper to approve the tentative budget as the final budget at a public hearing to be held on May 20, 1999. Apparently, because there was no agenda prepared or posted for the May 20, 1999, the meeting was cancelled. However, because the final budget had to be submitted to the State of Nevada on or before June 1, 1999, on or about May 25, 1999, the Board held an emergency meeting to approve the tentative budget as the Board's final budget. The May 25, 1999, meeting was not noticed in accordance with the Open Meeting Law. In addition, the meeting was not held at a public place, but rather held at the private law offices of Belanger & Plimpton.

ANALYSIS AND FINDINGS

- A. The Board violated the Open Meeting Law when it deemed its May 25, 1999 meeting an "emergency meeting" under the Open Meeting Law, thereby circumventing the notice requirements of NRS 241.020.

Pursuant to NRS 241.020(2), *except in an emergency*, written notice of all meetings must be given at least three working days before the meeting. NRS 241.020(5) defines an emergency as: “. . . an unforeseen circumstance which requires immediate action and includes, but is not limited to: (a) Disasters caused by fire, flood, earthquake or other natural causes; or (b) Any impairment of the health and safety of the public.”

It has long been the opinion of this office that a true emergency must exist in order for a public body to hold a meeting without proper notice. Failure to

³ There is no complaint before this office that public comment was denied during this meeting.

hold a meeting due to an administrative error does not establish grounds to hold an "emergency meeting" as defined by the Open Meeting Law. Moreover, because failure to hold the previously scheduled budget hearing was discovered on May 25, 1999, there was ample time to schedule and provide written public notice of a special meeting to approve the tentative budget as the final budget for submittal to the State of Nevada on June 1, 1999.⁴

Based upon the foregoing, it is our conclusion the Board violated the Open Meeting Law when it deemed its May 25, 1999, meeting an "emergency meeting" pursuant to NRS 241.020. Under NRS 241.036, the decisions made that day would be void, and under NRS 241.037, this office would be authorized to pursue injunctive relief to correct the violation and prevent it from occurring again. However, while a violation occurred, its severity is somewhat mitigated by the fact that the tentative budget approved as the final budget on May 25, 1999, was previously presented in three public meetings, and had not changed in substance since its last presentation at the public meeting on March 4, 1999. Accordingly, considering all the circumstances, including the fact the Board has never been charged with violating the Open Meeting Law in this respect, this office believes that a better approach and use of resources is to provide guidance and serve warning that future transgressions of this nature may result in a avoidance of actions taken as well as possible legal action to enjoin further violations.

B. The Board violated the Open Meeting Law when it failed to include on its February 2 and March 4, 1999, agendas a period devoted to public comment.

Pursuant to NRS 241.020(2)(c), notice of a meeting must include an agenda that consists of, *inter alia*, a period devoted to comments by the general public, if any, and discussion of those comments. Both the February 2 and March 4, 1999, agendas failed to include a period devoted to public comment. However, because there is no evidence that public comment was denied during these meetings, we believe the best course of action is to point out the violations to the Board and serve warning that future transgressions of this type may result in legal action.

C. The Board violated the Open Meeting Law on February 2, 1999, by taking action on matters which were not listed on the agenda for the meeting.

⁴ We give no opinion as to whether such a special meeting would be proper under Nevada laws governing budget hearings in general, as opposed to Nevada's open meeting laws.

NRS 241.020(2)(c)(1)(2) provides that an agenda must consist of a clear and complete statement of the topics scheduled to be considered during the meeting, and a list describing the items on which action may be taken and clearly denoting that action may be taken on those items. NRS 241.015(1) defines "action" to include a decision, commitment, or promise made by a majority of the members.

The agenda for the February 2, 1999, meeting provided for only one action item: approval of the 1999-2000 year budget. However, the Board took action on three separate items not listed on the agenda for the meeting as action items. Accordingly, each decision made was done in violation of the Open Meeting Law, notwithstanding that such actions *related* to the 1999-2000 year budget. Under NRS 241.036, the decisions made that day would be void, and under NRS 241.037, this office would be authorized to pursue injunctive relief to correct violations and prevent them from occurring again. However, because the Board has never been charged with violating the Open Meeting Law in this respect, and because the budget was the subject of other public meetings, this office believes that a better approach and use of resources is to provide guidance and serve warning that future transgressions of this nature may result in avoidance of actions taken as well as possible legal action to enjoin further violations.

In the future, when listing the budget as an agenda item, rather than merely denote it as an action item and list it as "approval of budget," perhaps a better approach is to denote it as an action item and agendize it as "discussion, deliberation, and possible action on any line item of the 1999-2000 budget." Such an approach puts the public on notice that the Board may take action on any portion of the budget.

Please do not hesitate to contact me if you would like our office to provide training to the Board on the Open Meeting Law.

FRANKIE SUE DEL PAPA
Attorney General

By: VICTORIA T. OLDENBURG
Deputy Attorney General

OMLO 99-11 Open Meeting Law: NRS 241.020(2)(c)(3). Any practice or policy that discourages or prevents public comment, even if technically in compliance with the law, may violate the spirit of the Open Meeting Law. In its practical application, the practice of requiring persons to sign up three and one-half hours in advance to speak at a public meeting can have the effect of unnecessarily restricting public comment, and therefore does not comport with the spirit and intent of the Open Meeting Law.

(This opinion was rendered by the Office of the Attorney General as a guideline for enforcing the Open Meeting Law and not as a written opinion requested pursuant to NRS 228.150).

Carson City, August 26, 1999

Ann Bersi, Esq., Deputy District Attorney, Clark County District Attorney's Office, Post Office Box 552215, Las Vegas, Nevada 89155-2215

Dear Ms. Bersi:

You have requested advice from this office regarding the Clark County School District's policy of requiring persons who wish to speak at board meetings to sign up by calling at least three and one-half hours in advance of the meeting. You indicated you believe this is a reasonable requirement consistent with Nevada's Open Meeting Law, and have provided us with your legal analysis to support that position.

The Open Meeting Law requires an agenda for a public meeting to include "a period devoted to comments by the general public." NRS 241.020(2)(c)(3). The statute provides no guidance as to the length, conduct, or structure of the public comment period. The Office of the Attorney General has taken the position that "reasonable rules and regulations that ensure orderly conduct of a public meeting and ensure orderly behavior on the part of those attending the meeting may be adopted by a public body," and the Office of the Attorney General believes that "reasonable restrictions including time limits, can be imposed on speaking." NEVADA OPEN MEETING LAW, § 8.04 (7th ed. 1998).

The broad language of the statute has allowed a myriad of practices to develop. Some public bodies allow public comment at the time of each agenda item; others on only certain agenda topics. Some public bodies permit public comment only during the specified public comment period. Most public bodies schedule the public comment period at the end of their agendas, others at the beginning, and some in the middle. Some public bodies restrict the overall

length of the public comment period; some the length of individual comment. Some public bodies require persons to sign in if they wish to speak, others do not.

All of these practices on their face would appear to be in technical compliance with the law. However, a violation of the Open Meeting Law might occur where the application of the practice served to unreasonably restrict public comment, e.g., a time limit restriction that prevented meaningful comment or a sign-up requirement that was unnecessarily burdensome.

We recognize that public comment can be both time-consuming and potentially disruptive, particularly if the subject matter is controversial or of broad public interest. We also understand the need for public bodies to control their agendas and effectively use the time available to them. At the same time, we strongly believe that the intent of the Open Meeting Law is to require meaningful public comment. Government as a whole, and the deliberative process of public bodies in particular, greatly benefits from public input and perspective. It is the position of the Office of the Attorney General that any practice or policy that discourages or prevents public comment, even if technically in compliance with the law, may violate the spirit of the Open Meeting Law.

We recommend that public bodies considering rules and regulations governing public comment develop the least restrictive procedures possible. The more restrictive a policy, the more likely it might be applied in a manner which would constitute a violation of the Open Meeting Law. The greater the opportunity for public input, the greater the chance for informed, effective government.

Under the Clark County School District's proposed policy, a person could hear about a board meeting through the news media, attend the meeting with the intention to speak, and then be barred from speaking for not having signed up in advance. We thus conclude that, in its practical application, the practice of requiring persons to sign up three and one-half hours in advance to speak at a public meeting can have the effect of unnecessarily restricting public comment, and therefore does not comport with the spirit and intent of the Open Meeting Law. Consequently, we cannot approve of such a practice.

FRANKIE SUE DEL PAPA
Attorney General

By: VICTORIA T. OLDENBURG
Deputy Attorney General

OMLO 99-12 Open Meeting Law: Designated public comment period required by NRS 241.020(2)(c)(3) should be content neutral, and not restricted to nonagenda items unless the public is permitted to comment on agenda items as they are heard.

(This opinion was rendered by the Office of the Attorney General as a guideline for enforcing the Open Meeting Law and not as a written opinion requested pursuant to NRS 228.150).

Carson City, October 14, 1999

Honorable Patricia A. Lynch, Reno City Attorney, 490 South Center Street,
Room 204, Post Office Box 1900, Reno, Nevada 89505

Dear Ms. Lynch:

This office has primary jurisdiction to enforce the provisions of Nevada's Open Meeting Law, NRS 241.010 *et seq.* As you know, we received three complaints from Mr. Dehne alleging violations of the Open Meeting Law by the Reno City Council (RCC). The first complaint alleges the RCC violated the Open Meeting Law on June 8, 1999, when Mr. Dehne was not allowed to speak on agenda item 11A2, and was excluded from the meeting. The second complaint alleges the RCC violated the Open Meeting Law on June 22, 1999, when Mr. Dehne was not allowed to speak on Agenda item 14D, and was excluded from the meeting. The third complaint alleges the RCC violated the Open Meeting Law on July 13, 1999, by taking action on an item not clearly denoted as an action item on the agenda, and by limiting Mr. Dehne's comments to three minutes during the public comment period while allowing another citizen four minutes.

Our investigation of Mr. Dehne's complaint consisted of a review of the video and audio tapes of the meetings, the materials submitted to us by your office and Mr. Dehne, and my discussions with you and Mr. Dehne. The following is our determination.

FACTS

Our investigation revealed that the current practice of the RCC, and at each meeting relevant to this complaint, is to agendize a designated public comment period as "*Public Comment - Limited to No More Than three (3) Minutes And Limited to Items That Do Not Appear on The Agenda. Comments to Be Addressed to The Council as a Whole.*" [Emphasis added.]

If a citizen wishes to speak on an agenda item, the citizen is required to fill out a Reno City Council Attendance Card (Request to Speak), indicating, *inter alia*, the agenda item they wish to speak on. The citizen is required to submit the Request to Speak to the city clerk, who in turn hands the forms to the chairman of the meeting.¹ The city attorney advises that the practice of the chairman is to recognize those who have submitted forms as the respective agenda item is called.²

I. June 8, 1999

Mr. Dehne complains that during the June 8, 1999, meeting of the RCC, he was prohibited from speaking on Agenda Item 11A2, *City Clerk, Boards and Commissions Appointments, Airport Authority of Washoe County (AAWC)*.³ Mr. Dehne submitted a form requesting to speak on item 11A2. The Chairman, Councilperson Newberg, called the item and made a motion to reappoint Phil Miller to the AAWC. Discussion among the RCC ensued. Mr. Dehne interrupted the discussion by shouting from the audience that the Council was violating its policy, and demanded to speak on the item. The Chairman responded that this was not something Mr. Dehne “could comment from the audience on,” and, in any event, Mr. Dehne was prohibited from speaking on the item because he was one of the applicants for appointment. Mr. Dehne became argumentative, and was warned that if he continued to interrupt he would be removed from the meeting. Mr. Dehne continued to be disruptive, and was removed from the meeting.

II. June 22, 1999

Mr. Dehne complains that during the June 22, 1999, meeting of the RCC, he was prohibited from speaking on Agenda item 14D, *Mayor and City Council, Request by City Council to the Airport Authority of Washoe County*

¹ In some instances, persons who had neglected to submit a Request to Speak form were still permitted to speak.

² Based upon the representations of the city attorney, and with no direct evidence to the contrary, we believe the chairman recognizes requests to speak regardless of the subject matter. Albeit, there is no direct proof of this because the RCC has a practice of disposing the Request to Speak forms after each meeting. We believe it prudent to retain such forms as part of the record of the meeting.

³ Note that Mr. Dehne was allowed to speak during the public comment period limited to non-agenda items (Agenda item 5). In addition, the RCC agenda provided for a second public comment period limited to nonagenda items, item 14, and had two items that were agendized as public hearings (items 13 and 15).

*to Televised Meetings.*⁴ When the item was up for discussion, the Chairman, Mayor Griffin, stated he had a Request to Speak from Mr. Dehne, noting that Mr. Dehne stated on the form he was in favor of the item. The Chairman inquired as to whether the Council wanted to hear comment from Mr. Dehne, opining that if it were up to him the answer would be no. The Council recognized that Mr. Dehne was in favor of the item, and discussion by the Council regarding the item ensued. The Chairman then requested that the item be continued to the evening agenda; Mr. Dehne interrupted the Chairman and disrupted the meeting by shouting from the audience, demanding the right to speak on the item, and accusing the Chairman of violating the law by participating in a discussion with Council concerning the AAWC.⁵ Mr. Dehne's outburst continued until he was removed from the meeting by order of the Chairman.

III. July 13, 1999

Mr. Dehne first complains that the RCC improperly took action on Agenda item 13A, *Liaison Reports*. Upon reviewing the evidence, we conclude that while substantive discussion took place, no action was taken on the item pursuant to NRS 241.015.⁶ Mr. Dehne next complains that his constitutional rights were violated because he was limited to three minutes during the public comment period (Agenda item 5), while another citizen was allowed four.

CONCLUSION

NRS 241.020(2)(c)(3) requires that public bodies include in their agendas a "period devoted to comments by the general public, if any, and discussion of those comments." The statute provides no guidance as to the length, conduct, or structure of the public comment period. However, when the government

⁴ Note that Mr. Dehne was allowed to speak during the public comment period limited to nonagenda items (Agenda item 5). In addition, the RCC agenda provided for a second public comment period limited to non-agenda items, item 16, and had two items that were agendaized as public hearings (items 15 and 17).

⁵ It is noted Mr. Dehne's comments were considered by the Mayor, as the Mayor later acknowledged it was inappropriate for him to have engaged in discussion on item 14D, and he left the meeting when the item was eventually heard.

⁶ We note, however, that the RCC agendas could be confusing to the lay public as to when action will be taken on an item. While the top of the agenda notes "All items are for City Council action unless otherwise noted", none of the items on the three agendas we reviewed were noted as nonaction items, including item 13A. Clearly, none of the reports listed under Item 13A were action items as they were not clearly described as required by NRS 241.020(2)(c)(2). We recommend the RCC indicate by asterisk items to which action will be taken, and ensure that such items are agendaized pursuant to NRS 241.020(2)(c)(2).

intentionally creates a public forum, it is bound by the same constitutional standards that apply in a traditional public forum. *Perry Education Assn. V. Perry Local Educators' Assn., et al.*, 460 U.S. 37, 46 103 S. Ct. 948, 955 (1983). Accordingly, reasonable time, place, and manner restrictions must be content neutral. *Id.*

With regard to the June 8 meeting, we conclude that Mr. Dehne was properly removed from the meeting pursuant to NRS 241.030(3)(b) due to his disruptive behavior. We further conclude it was reasonable for the RCC to rule that Mr. Dehne could not speak on Item 11A due to his status as an applicant.⁷ With regard to the June 22 meeting, we conclude that Mr. Dehne was properly removed from the meeting pursuant to NRS 241.030(3)(b) due to his disruptive behavior.⁸ However, due to the fact Item 14D was continued, and Mr. Dehne was removed from the meeting, it is impossible for us to conclude that the Chairman would have excluded Mr. Dehne from speaking on item 14D based on the anticipated content of his speech. Under the circumstances, the potential for doing so existed. An agenda that expressly limited public comment to nonagenda items is not helpful.⁹

With regard to the July 13 meeting, we conclude that no action was taken on item 13A in violation of the Open Meeting Law. We further conclude that Mr. Dehne's rights were not violated because he was limited to three minutes while another citizen was given four minutes. The Chairman has discretion to allow a citizen to go beyond the three-minute limit, and we note such discretion is used with caution by the Council. In viewing the tapes of the meetings, we observed that citizens adhered to the three-minute limit in the majority of cases. It is Mr. Dehne's responsibility to ensure that he presents his comments in an orderly fashion and within the three minutes allowed.

We recognize that public comment can be both time-consuming and potentially disruptive, particularly if the subject matter is controversial or of broad public interest. We also understand the need for public bodies to control their agendas and effectively use the time available to them. At the same time, we strongly believe that the intent of the Open Meeting Law is to require

⁷ We caution the RCC to ensure its Chairman applies the rules and regulations governing public meetings even-handedly.

⁸ Although Mr. Dehne has a right to comment at public meetings, that right is subject to his obligation to behave according to reasonable rules of decorum. His behavior on June 8 and 22 violates such rules.

⁹ Section 7.04 of the OPEN MEETING LAW MANUAL (7th ed. 1998) was not intended to be restrictive, and will be clarified in the next edition.

meaningful public comment. Government as a whole, and the deliberative process of public bodies in particular, greatly benefits from public input and perspective. We believe the RCC generally recognizes and adheres to these principles. However, we are compelled to recommend that the RCC discontinue its practice of expressly restricting the designated public comment period to nonagenda items unless it expresses to the public that it will hear public comment on agenda items pursuant to citizen requests.¹⁰ Such a practice will ensure that the RCC is not regulating speech based on content.

Public bodies that desire to hear public comment on agenda items as they are heard may properly designate their public comment period on the agenda as *“Public Comment - limited to no more than three (3) minutes and limited to items that do not appear on the agenda. The public may comment on agenda items by submitting a Request to Speak form to the City Clerk. Comment on agenda items is limited to no more than three (3) minutes.”*

We hope this information is useful to you. Please do not hesitate to contact us should you have any questions, or require additional information.

FRANKIE SUE DEL PAPA
Attorney General

By: VICTORIA T. OLDENBURG
Deputy Attorney General

¹⁰ We do recognize that some rules regulating the content of public comment may be acceptable, such as precluding a citizen who has filed a lawsuit against the City from speaking to the Council on the subject matter of the lawsuit, or, as in the case of Mr. Dehne on June 8, precluding an applicant from speaking on the merits of his application.

OMLO 99-13 Open Meeting Law NRS 241.020(2). Commencing a meeting prior to its noticed meeting time violates the spirit and intent of the Open Meeting Law and nullifies the purpose of the notice requirement set forth in NRS 241.020(2).

(This opinion was rendered by the Office of the Attorney General as a guideline for enforcing the Open Meeting Law and not as a written opinion requested pursuant to NRS 228.150).

Carson City, December 13, 1999

Mr. Robert H. Ulrich, General Counsel, Airport Authority of Washoe County
Reno/Tahoe International Airport, Post Office Box 12490, Reno, Nevada
89510-2490

Dear Mr. Ulrich:

This office has primary jurisdiction to enforce the provisions of Nevada's Open Meeting Law, NRS 241.010 *et seq.* As you know, we received two complaints from Mr. Sam Dehne alleging violations of the Open Meeting Law by the Airport Authority of Washoe County Board of Trustees (Board). The first complaint, our file No. 99-027, alleges the Board violated the Open Meeting Law on August 10 and August 12, 1999, when Mr. Dehne was not allowed to speak on agenda items as they were heard, violated the Open Meeting Law on August 12 when Mr. Dehne was removed from the meeting, and violated the Open Meeting Law on August 10 by commencing a public meeting one hour prior to the noticed time. The second complaint, our file No. 99-031, alleges the Board violated the Open Meeting Law on September 7 and 9, 1999, by deciding as each agenda item was heard whether the Board wanted to hear public comment.

Our investigation of Mr. Dehne's complaint consisted of a review of the audiotapes and minutes of the meetings, the materials submitted to us by your office and Mr. Dehne, and my discussions with you and Mr. Dehne. The following is our determination.

ANALYSIS AND CONCLUSION

I. Public Comment

The gravamen of Mr. Dehne's complaint concerns the Board's implementation of a new policy on August 10 governing the public comment period required by NRS 241.020(2)(c)(3). The new policy provided for one

designated public comment period at the beginning of the meeting, and allowed public comment throughout the meeting at the discretion of the Board. Prior to that time, public comment was heard during a designated public comment period at the end of the meeting, and throughout the meeting as each agenda item was heard pursuant to citizen requests to speak. The new policy was rescinded on October 12, and the Board renewed their prior policy governing the public comment period.

NRS 241.020(2)(c)(3) requires that public bodies include in their agendas a "period devoted to comments by the general public, if any, and discussion of those comments." Notwithstanding that Mr. Dehne's complaint concerning the new policy is essentially mooted by the rescission of that policy on October 12, the new policy was not in violation of the Open Meeting Law, as the law simply requires a period devoted to comments by the general public. The evidence shows that the August 10, August 12, September 7, and September 9 Board agendas provided for a period devoted to public comment, and that Mr. Dehne did in fact speak during each designated public comment period.¹ Mr. Dehne had no additional right to be heard under the Open Meeting Law. However, we commend the Board for rescinding the policy, as we believe the public process greatly benefits from public input and perspective.²

II. Mr. Dehne's removal from the August 12, 1999 Board meeting.

During the final agenda item being heard at the August 12 Board meeting, Mr. Dehne stood up while Trustee Griffin was speaking. Chairman Menchetti requested that Mr. Dehne take his seat at least three times. Mr. Dehne refused and Chairman Menchetti called for a two minute recess. Mr. Dehne was then excluded from the short remainder of the meeting. Pursuant to NRS 241.030(3)(b), a person may be removed from a meeting if he willfully disrupts a meeting to the extent that its orderly conduct is made impracticable. Mr. Dehne is aware that he must comply with reasonable rules of decorum imposed

¹ Mr. Dehne spoke during the designated public comment period on August 10, during the designated public comment period on August 12, and again on Agenda item VIII(B), during the designated public comment period on September 7, and during the designated comment period on September 9, and again on Agenda items IX(D) and (E).

² We are also pleased the Board removed the following language from the public comment section of its agenda: "The public is encouraged to provide new relevant information specific to the subject under consideration by the Board of Trustees. In deference to the public, the Board of Trustees, and staff, only new information or input of material value not previously brought forth should be provided to assist the Board." Such language could easily have the effect of discouraging public comment.

during public meetings. It is certainly reasonable to require the public to remain seated whenever possible during a meeting, as it provides for more orderly assembly. Mr. Dehne offered no explanation as to why he refused to sit down when requested, and it was not unreasonable for the Chairman to view such refusal as disruptive. Accordingly, Mr. Dehne was properly removed from the meeting.

III. Commencing August 10, 1999, Board retreat one hour prior to the noticed meeting time.

The notice and agenda for the August 10 Board retreat provided that the retreat would commence at 1:00 p.m. Notwithstanding, the Chairman called the meeting to order at approximately 12:05 p.m., stating that due to a clerical error, the agenda was incorrect and the retreat was scheduled to begin at 12:00 noon. From 12:05 p.m. to 1:00 p.m., the Board heard a presentation on financial trends of the Airport. No action was taken during that time. At 1 p.m. the Chairman stated to those present that the meeting had been started 55 minutes early, that the presentation on financial trends had begun, that there were handouts available to the public on the presentation, that no decisions had been made, and that an audiotape of what was discussed during the last 55 minutes was available for review.

"The right of citizens to attend open public meetings is greatly diminished if they are not provided with an opportunity to know when the meeting will take place. . . ." NEVADA OPEN MEETING LAW MANUAL, § 6.01, (7th ed. 1998). The fact that the Chairman deviated from the noticed time by starting the meeting 55 minutes early could have resulted in members of the public being deprived of the right to observe the workings of government so protected by the Open Meeting Law. Commencing a meeting prior to its noticed meeting time nullifies the purpose of the notice requirement set forth in NRS 241.020(2). While the Chairman violated the intent and spirit of the Open Meeting Law in commencing the meeting prior to the noticed time, based upon the informative comments made by the Chairman set forth above, we do not believe this violation warrants enforcement action. However, this letter serves as warning that future transgressions of this nature may be prosecuted by this office.

Please circulate this determination to the Board and we will close our file on this matter. Please feel free to contact me should you have any questions or concerns.

FRANKIE SUE DEL PAPA
Attorney General

By: VICTORIA T. OLDENBURG
Deputy Attorney General



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FRANKIE SUE DEL PAPA
Attorney General

November 15, 1999

THOMAS M. PATTON
First Assistant Attorney General

Ms. Faith Bremner
Reno Gazette-Journal
Post Office Box 22000
Reno, Nevada 89520

Re: *Complaint against the State Board of Psychological Examiners*
Our File No. 99-030

Dear Ms. Bremner:

Pursuant to Nevada law, the Attorney General's Office has primary jurisdiction for investigating and prosecuting complaints alleging violations of the Nevada open meeting law, Chapter 241 of the Nevada Revised Statutes.

This determination is in response to a complaint you lodged with our office on August 31, 1999. You allege the State Board of Psychological Examiners (Board) violated the open meeting law with regard to a closed session held on August 28, 1999 by the Board. We have completed our investigation of the complaint, which consisted of reviewing the agenda, written minutes and audiotape of the August 28, 1999 closed session, and conducting individual interviews with those present during the closed session; Louis Mortillaro, Cheryl Purdue, Norma Abi-Karam, and Deputy Attorney General Nancy Wenzel.¹ Based upon the foregoing, we conclude that the Board did not violate the open meeting law with regard to the closed session.

¹ Drs. Hinitz and Graybar recused themselves from the item in its entirety.

ANALYSIS AND CONCLUSION

The August 28, 1999 meeting agenda for the Board had on the agenda as an action item:

6. Review of Complaints, Disciplinary Actions, and Litigation Pending.

A. Discussion and possible approval of settlement of complaint #96-1112 with Jerry Nims, Ph.D. Portions may be closed pursuant to NRS 241.030 to consider character, alleged misconduct and professional competence of the licensee, but no vote will be taken in closed session.²

When the agenda item was called, the Board moved to go into closed session to consider Dr. Nim's character, alleged misconduct, and professional competence. Board members Louis Mortillaro, Cheryl Purdue, and Norma Abi-Karam, and Deputy Attorney General Nancy Wenzel then proceeded into closed session pursuant to NRS 241.030.³ The closed session was properly recorded and written minutes produced as required by NRS 241.035(2) and (5). The agenda support material provided to the Board members at the closed session, specifically the proposed settlement agreement, was a document provided to the body pursuant to a confidentiality provision contained within the proposed settlement agreement, and not a part of the public record pursuant to NRS 241.020(4)(c).⁴

To discuss with particularity the substance of the closed session in this determination would be a violation of the open meeting law provisions which provide for confidentiality of the minutes and agenda support material relative to the closed session, specifically NRS 241.035(2) and NRS 241.020(4)(c). However, it is appropriate for us to generally discuss the results of our investigation.

² By way of background, a consumer complaint was filed against Dr. Nims in 1996. The Complaint is a matter of public record.

³ NRS 241.030 provides, in pertinent part:

1. Except as otherwise provided in NRS 241.031 and 241.033, nothing contained in this chapter prevents a public body from holding a closed meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of a person.

⁴ NRS 241.020(4) provides, in relevant part:

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

...

(c) Any other supporting material provided to the members of the body for an item on the agenda, except materials:

- (1) Submitted to the public body pursuant to a nondisclosure or confidentiality agreement;
- (2) Pertaining to the closed portion of such a meeting of the public body; or
- (3) Declared confidential by law.

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Our investigation revealed the Board members discussed Dr. Nim's alleged misconduct and matters relating thereto which necessarily included the proposed settlement agreement which is confidential by law. In the closed session, the Board was advised by the Deputy Attorney General not to deliberate or reach a decision regarding whether to accept the proposed settlement agreement, and our investigation concludes the Board members followed that directive. The Board explained they did not discuss the specifics of the proposed settlement when they went back into open session because it was confidential pursuant to its express terms and NRS 241.020(4)(c).

We conclude that the closed session to discuss Dr. Nim's alleged misconduct and to discuss confidential agenda support material directly relating to the substance of the closed session was proper pursuant to NRS 241.030(1) and NRS 241.020(4)(c). To find otherwise would nullify the provisions of NRS 241.020 and NRS 241.030. In addition, our investigation revealed that no action relative to the proposed settlement agreement occurred in violation of the open meeting law during or at any time prior to the closed session.

Thank you for bringing this matter to our attention.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By:

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Deputy Attorney General
Commerce Section
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bcc: Nancy Wenzel

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