**STATE OF NEVADA**

**OFFICE OF THE ATTORNEY GENERAL**

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| In the Matter of:<br><br>LYON COUNTY BOARD OF COUNTY COMMISSIONERS | Attorney General File No. 07-011<br><br>OMLO 2007-01 |

## I.

## INTRODUCTION

On March 9, 2007, this Office received a complaint from Ms. Donna Kristaponis (Complainant) alleging that the Lyon County Commission (Commission) violated the State's Open Meeting Law (OML) when it dismissed her as the Lyon County Manager (Manager). Complainant alleged there must have been a series of communications among at least three of the Commissioners before the February 15, 2007 Commission meeting in which the decision to terminate her employment was voted on. Her allegation is based on the appearance on the Commission's February 15, 2007 agenda of an action item presenting the question of whether to remove the Manager and suspend her duties. She claims that the very next item on the agenda supports her view of improper communications because it was an item calling for the appointment of an interim county manager. Furthermore, she points to a quote made for the Nevada Appeal in an article published on February 13, 2007, in which Bob Milz, a Lyon County Commissioner, stated he knew who might be the interim manager and that in his opinion the County could not get a better one. Mr. Milz's quote appeared after the Commission's agenda was posted but before the meeting in which the Commission voted 3-2 to terminate Complainant's employment. Complainant claims her termination appears to be an odd juxtaposition of several events, so that her termination could only have occurred if the three Commissioners, who voted for her termination, had spoken with each other prior to the meeting and had agreed upon a course of action leading to her termination.

This Office has primary jurisdiction to investigate and prosecute violations of Nevada's Open Meeting Law, NRS Chapter 241. In our investigation, we interviewed or obtained statements from each of the five Lyon County Commissioners, the Lyon County District

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Attorney, interim manager Robert Hadfield, several Lyon County department heads and some County staff members. Commissioner Bob Milz gave both a statement and disclosed his correspondence records for the period February 6, 2007 through February 15, 2007, in response to the investigation.

## II.

## FACTS

This Office confirmed that the termination item placing Complainant's name on the February 15, 2007 agenda began with a breakfast meeting on February 6, 2007, between Robert Auer, Lyon County District Attorney (D.A. Auer) and two Commissioners–Bob Milz and Don Tibbals. D.A. Auer stated that the meeting was to review County issues since he was newly elected as the Lyon County District Attorney. Among the issues discussed was Commissioner Milz's request for help to put an agenda action item on the Commission's agenda to remove the Manager upon 90 days' notice pursuant to Lyon County Ordinance 1.07.03 and to suspend the Manager's duties during those 90 days. D.A. Auer agreed to draft the notice (NRS 241.033) of the agenda item for service on the Manager as well as the agenda items for the February 15, 2007 Commission meeting.

Commissioner Milz told D.A. Auer that the Manager's performance had been an issue before the Commission in 2006. Mediation of issues between the Manager and the Commission had been scheduled, but the Manager cancelled the mediation just before it was scheduled to begin. Commissioner Milz claimed matters between the Manager and the Commission had gotten worse since the mediation was cancelled.

Commissioner Tibbals stated he was not aware that termination would be discussed at the breakfast meeting until Commissioner Milz brought it up. He also stated he did not discuss the termination of the Manager with Commissioner Milz prior to the meeting with D.A. Auer on February 6, 2007.

D.A. Auer stated that the Commissioner's request to place the removal item and the hiring of an interim manager on the agenda was done under his supervision and authority.

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Commissioner Milz stated he did not discuss the removal/termination matter, agenda item #2, with any other Commissioner prior to the February 15, 2007 Commission meeting. He also told the Attorney General's (A.G.'s) investigator that he assumed Commissioner Tibbals would vote to terminate the Manager based on Commissioner Tibbals' comments made six months prior at a board meeting on the Manager's performance. Commissioner Milz did not directly ask Commissioner Tibbals how he would vote.

Commissioner Milz and D.A. Auer confirm that agenda item #3, the selection of an interim manager, was D.A. Auer's suggestion, not the suggestion of any Commissioner. Once the selection of an interim manager was placed on the agenda, Commissioner Milz spoke with Chairwoman Hunewill regarding the selection of an interim manager. Commissioner Milz had spoken with several people to gauge their interest in serving as interim manager.

Among those he spoke with was Edrie LaVoie, the Lyon County Director of Human Services. He asked her whether she would be interested in serving as interim manager since she had served in that capacity while the Manager was away during the past year. Director LaVoie suggested Commissioner Milz call Mr. Robert Hadfield.

Commissioner Milz called Robert Hadfield prior to the February 15, 2007 Commission meeting to gauge Mr. Hadfield's interest in serving as the interim manager. Mr. Hadfield said he would serve as interim manager if the Commission voted to remove the Manager. Commissioner Milz notified Chairwoman Hunewill that Mr. Hadfield had agreed to serve as interim manager should the vote to remove the Manager succeed. Chairwoman Hunewill stated to the A.G.'s investigator that she did not speak about the termination with any other Commissioner between February 6, 2007 and February 15, 2007. Commissioner Milz said that after this discussion with Chairwoman Hunewill, he did not speak to any other Commissioner about item # 3 (the selection of the interim manager) on the agenda.

Commissioner Hunewill said she learned of the agenda item to remove the Manager when she was contacted by a reporter for the Nevada Appeal. She also said that the previous day she had spoken with D.A. Auer who informed her of his meeting with Commissioners Milz and Tibbals and the drafting of paperwork to notice the Manager regarding possible

termination. She also said she later contacted D.A. Auer to speak with him about conducting the Commission meeting on February 15, 2007, since she had recently been elected chairwoman of the Commission.

Commissioner Hunewill stated when she saw the agenda she noticed the need for an interim manager, so she contacted staff to find out if anyone was interested in serving as interim manager. They were not, so she contacted Commissioner Milz to ask for the telephone number of an individual they had discussed during the fall of 2006 when they thought the Manager's position might become vacant. Commissioner Milz notified her that he had already contacted Robert Hadfield and believed he might agree to serve as interim manager should the Commission vote to terminate the current Manager.

Commissioners Milz, Hunewill, and Tibbals (the three Commissioners who voted for termination) all denied speaking with each other and with any other Commissioner about termination of the Manager, agenda item #2, prior to the February 15, 2007 Commission meeting.

## III.

## ISSUE

Whether three Lyon County Commissioners collectively engaged in serial communications which constituted a "meeting" in violation of NRS 241.015(2) to remove the Manager from her employment with the County, and with the intent to avoid the provisions of the Open Meeting Law.

## IV.

## CONCLUSIONS OF LAW

Resolution of the allegations in this complaint, that three members of the Lyon County Commission impermissibly engaged in serial communications which constituted a "meeting" under the OML and which resulted in Complainant's employment termination during a Commission meeting on February 15, 2007, must begin with examination of the statute that

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proscribes such conduct and with an understanding of the legislative purpose underlying the OML.[1]

The legislative purpose underlying the OML is established in the opening statute in NRS Chapter 241. In it the legislature declares that "all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010. The issue to be decided in this complaint requires determination of whether three members of the Lyon County Commission (a quorum) violated the legislative purpose and engaged in serial communications, which constituted a "meeting" under NRS 241.015. For a violation of the OML to be found, it would have to be shown that these three members deliberated and acted upon the removal of the Manager without the benefit of an open public meeting that had been duly noticed.

The Nevada Supreme Court reviewed the subject of the OML and serial communications in at least two recent cases. *Dewey v. Redevelopment Agency of the City of Reno*, 119 Nev. 87, 64 P.3d 1070 (2003), and *Del Papa v. Board of Regents of the University and Community College System of Nevada,* 114 Nev. 388, 956 P.2d 770 (1998). These two

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[1] "Meeting" is defined in NRS 241.015(2) as follows:

2. "Meeting":

(a) Except as otherwise provided in paragraph (b), means:

(1) The gathering of members of a public body at which a quorum is present to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.

(2) Any series of gatherings of members of a public body at which:

(I) Less than a quorum is present at any individual gathering;

(II) The members of the public body attending one or more of the gatherings collectively constitute a quorum; and

(III) The series of gatherings was held with the specific intent to avoid the provisions of this chapter.

(b) Does not include a gathering or series of gatherings of members of a public body, as described in paragraph (a), at which a quorum is actually or collectively present:

(1) Which occurs at a social function if the members do not deliberate toward a decision or take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.

(2) To receive information from the attorney employed or retained by the public body regarding potential or existing litigation involving a matter over which the public body has supervision, control, jurisdiction or advisory power and to deliberate toward a decision on the matter, or both.

cases are critical for a determination of whether the allegations of this complaint support finding a violation of the OML's prohibition of serial communications. In addition, in the past, this Office has considered this issue and issued opinions on the basis of factual allegations of improper serial communications involving members of a public body.[2] Our opinions have consistently applied the Nevada Supreme Court ruling, which states that mere back-to-back meetings of members of a public body (even if done electronically among themselves) with staff, or its attorney, without evidence of specific intent to avoid the OML and without evidence that these serial communications included deliberations and action on a matter over which the public body has supervision and control, is not a violation of the OML.

There is no dispute that the Commission took action to terminate the employment of the Manager in an open meeting. The question posed is whether three Commissioners engaged in serial communications, which collectively and impermissibly determined the outcome of the vote on the item to remove the Manager. The OML proscribes this conduct, which is called a "constructive quorum." *Dewey v. Redevelopment Agency of the City of Reno*, 119 Nev. 87, 98-99 64 P.3d 1070, 1077-78 (2003).

First, it is important to realize that Nevada law applies a "quorum" standard as the test for determining when the OML applies to gatherings of the members of a public body.

[2] OMLO 2004-11 — mayor contacted all members of his council individually regarding matter arguably within council's jurisdiction, but the evidence following investigation did not support finding that the Council was collectively making a decision or deliberating toward a decision; no violation of OML found, *citing Dewey v. Redevelopment Agency,* 119 Nev. 87, 98-99 64 P.3d 1070, 1077-78 (2003). AGO 2001-13 — no quorum present since mayor not member of public body, but public body cautioned that serially meeting with quorum of council members invites speculation that a quorum may be deliberating or taking action on a matter within their supervision or control. OMLO 99-06 — three members-elect of public body observed engaged in twenty minute conversation; however, complainant did not hear their conversation and in light of member's denial of discussion of Board business, no violation was found. AG Letter opinion August 18, 1998 — where quorum of public body attended a three member subcommittee meeting; some attended meeting in the audience yet also participated in asking questions of candidates for job; evidence showed that at no time did the six directors sit together or engage in collegial consensus building such as vote taking, motions, debate or significant dialog, there was no "meeting" and thus no violation. AGO 97-017 — member of public body made public remarks indicating she had had discussions with other members of the board; her statement warranted investigation; after investigation it was determined no quorum was achieved with other members of the board and furthermore it did not appear these conversations with other members of the board were for polling purposes or had sufficient connection with each other to constitute a gathering to deliberate. OMLO 2003-11 — it is not a meeting where two county commissioners (two commissioners were a quorum) met with attorney at different times, but did not discuss the same subject, although related to the same employment contract; no evidence that the meetings took place with specific intent to avoid the OML.

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*Dewey* 119 Nev. at 95, 64 P.3d at 1075. A quorum is necessary before the OML can be applied to a given situation. *Id*. This is made necessary because of the definition of "meeting" in NRS 241.015(2). A "meeting" within the OML is dependent on having a quorum present during which deliberations occur and a decision is made on matters under the public body's supervision and control.

Secondly, it is important to understand that the OML "is not intended to prohibit every private discussion of a public issue. Instead, the Open Meeting Law only prohibits collective deliberations or actions where a quorum is present. *Id*. at 94-95. The Nevada Supreme Court strictly applies the definition of "meeting" so that a physical quorum, or a constructive quorum achieved by electronic means or by serial communications, must be present before the OML is applicable. Furthermore, it is necessary, before the OML is applicable to a constructive quorum, that the quorum actually deliberate toward a decision and decide or take action on any matter over which the public body has supervision, control, or jurisdiction. *Del Papa v. Board of Regents of the University and Community College System of Nevada,* 114 Nev. 388, 400, 956 P.2d 770, 778 (1998) (the court found that when a quorum of the Regent's Board appearing by telephone actually voted to take action on a draft statement of university policy, the Board violated the OML).[3]

The Nevada Supreme Court has been consistent in holding that the OML does not prohibit all communications by and between members of a public body. The Court in *Del Papa* reiterated its opinion in its prior decision in *McKay v. Board of County Commissioners,* 103 Nev. 490, 746 P.2d 125 (1987), that, "members of a public body may ultimately make decisions on public matters based upon individual conversations with colleagues, . . .[but] the collective process of decision making, whether legal counsel is present or not, must be accomplished in public." *Del Papa,* 114 Nev. at 400, 956 P.2d at 778. The *Dewey* court in 2003 also reiterated the holding in *McKay* that members of a public body

[3] The Attorney General's Office adopted a definition of "deliberate" as "to examine, weigh and reflect upon the reasons for or against the choice. . . thus connot[ing] not only collective discussion, but the collective acquisition or the exchange of facts preliminary to the ultimate decision." *Nevada Open Meeting Law Manual* p. 30 (10th ed. 2005). *See Sacramento Newspaper Guild v. Sacramento Co. Bd. of Supervisors*, 263 Cal. App. 2d 41 (1968).

are not prohibited from discussing public matters with each other as long as there is not a quorum and as long as deliberations take place in a public meeting. *Dewey* 119 Nev. at 96. (In the absence of a quorum, members of a public body may privately discuss public issues or even lobby for votes.)

These cases teach that there are two important criteria to be applied before the OML may be invoked: (1) a quorum or constructive quorum, and (2) deliberation or actual vote on a matter.

The *Dewey* Court discussed the basis for its holding that the actions of the public body in which staff conducted two briefings each one with less than a quorum of the body, did not implicate the OML. Again, it is important to note that this is important direction from the Court about how to apply the OML to facts in which the presence of a quorum must be determined. It said:

> "[R]equiring members of [a] board to consider only information obtained through public comment and staff recommendations presented in formal sessions would cripple the board's ability to conduct business." [Quoting *Hispanic Educe. Com. V. Houston Ind. Such. Dist.,* 886 F. Supp. 606,610(S.D. Texas, 1995) off's, 68 F.3d 467 (5th Cir. 1995)] This reasoning underscores the need for other action, such as polling or collective discussions designed to reach a decision, to create a constructive quorum between the briefings. When less than a quorum is present, private discussions and information gathering do not violate the Open Meeting Law. *Id*. Here, absent serial communication of the discussions, there was no quorum and therefore no deliberations in violation of the Open Meeting Law."

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

The *Dewey* Court found that mere back-to-back briefings, without more, did not constitute a collective quorum. The *Dewey* Court decided there was not substantial evidence in the record showing that the public body met with staff for the purpose of taking action on, or collectively discussing, a matter of public business within the control of the public body. *Id.* at 100.

Based on the investigation into this matter by this Office, it is clear that there was no physical quorum present at any time after the termination item was placed on the agenda, so

unless a constructive quorum was achieved via electronic means or by serial communications, and unless there is evidence that the three Commissioners deliberated toward a decision on whether to terminate the Manager, the OML is inapplicable to the facts of this case.

Even if Commissioners Milz and Hunewill discussed the termination of the Manager between themselves at any time before or after the matter was agendized, the OML is not offended because NRS 241.015(2) sets the serial communication bar at "collective deliberations or actions" (exchange of facts that reflect upon reasons for or against the choice) involving a quorum of members of a public body. *Dewey v. Redevelopment Agency of the City of Reno,* 119 Nev. 87, 64 P.3d 1070. Two Commissioners do not constitute a quorum.

The investigation clearly shows that two Commissioners, Goodman and McPherson, both of whom voted to retain the Manager, did not engage in any communication with either Milz or Hunewill. That leaves only Commissioner Tibbals, whose involvement with discussions on item #2 regarding termination could implicate the OML and its prohibition against serial communications by a quorum of a public body. But, Commissioner Tibbals stated he attended the breakfast meeting on February 6, 2007 unaware of Milz's purpose to seek an agenda item for termination of the Manager until Commissioner Milz asked D.A. Auer to draft the agenda item and the five day notice letter. Commissioner Milz stated that he always assumed Commissioner Tibbals would vote to terminate the Manager based on Commissioner Tibbals' representations during a Commission meeting some six months before. Both Commissioners Milz and Hunewill deny speaking with any Commissioner about termination of the Manager prior to the February 15, 2007 meeting. The investigation did not disclose any evidence that these Commissioner statements were untrue.

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## V.

## CONCLUSION



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There is no evidence that Commissioners Milz, Hunewill, or Tibbals deliberated on reasons supporting the Manager's termination, nor is there evidence that they exchanged any facts supporting termination prior to the meeting. Also. There is no evidence they polled each other prior to the February 15, 2007 meeting. Therefore, there has been no violation of the OML's prohibition against serial communications.

DATED this 11th day of June, 2007.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/
GEORGE H. TAYLOR
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**CERTIFICATE OF MAILING**

I hereby certify that I am employed by the Office of the Attorney General of the State of Nevada, and that on this 11th day June, 2007, I mailed a copy of the Findings of Fact and Conclusions of Law, by mailing true copies by U.S. mail to:

Phyllis Hunewill, Chair
Lyon County Board of Commissioners
27 South Main Street
Yerington, NV 89447

Donna A. Kristaponis
690 Saint Andrews Drive
Dayton, NV 89403

/s/ Carole Brackley
An Employee of the Office of the Attorney General

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| In the Matter of:<br><br>TRUCKEE-CARSON IRRIGATION DISTRICT BOARD OF TRUSTEES | Attorney General File No. 07-019<br><br>OMLO 2007-02 |

**I.**

## INTRODUCTION

On April 25, 2007, this Office received a complaint from Christy Lattin (Complainant), reporter for the Lahontan Valley News, alleging that the Truckee-Carson Irrigation District (TCID) Board of Directors (Board) twice violated the Nevada Open Meeting Law (OML). Complainant first alleged the Board failed to take public comment following discussion of an item during a special meeting on April 24, 2007, and secondly, that the Board's stated agenda procedure for taking public comment at the end of each meeting "as time allows" is a violation of the public's right to speak to public bodies. Both issues are discussed below.

This opinion is issued pursuant to the Attorney General's statutory authority for enforcement of the requirements of the OML as applied to public bodies. The Attorney General has primary jurisdiction to investigate and prosecute violations of Nevada's OML (NRS Chapter 241). This opinion is based on review of recent Board agendas, minutes of the April 24, 2007 special Board session, correspondence from TCID's project manager, David Overvold, and discussions with TCID personnel and the Complainant.

**II.**

## FACTS

### Public Comment at the April 24, 2007 Special Meeting

TCID's Board[1] met in a special meeting on April 24, 2007 to consider, among other items, an item to rescind a prior Board decision to offer a real property lease to two individuals for the purpose of developing a motocross track on land controlled or owned by TCID in Lyon County. When the action item to rescind the approval of an offer to lease TCID property for

[1] There is no dispute among the parties that the Board is a public body subject to the OML.



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the purpose of development of a motocross track was discussed by the Board, no public comment was solicited by the chairman before the Board voted on the item. Previously, at the Board's regularly scheduled meeting on April 9, 2007, when the proposed lease was being considered and a vote was taken to approve the offer to lease property, the Board did take comments from the public.

In correspondence from Mr. David Overvold, TCID's project manager, he explained that no comment was solicited from the public on April 24, 2007, because the motion before the Board was to rescind the previously approved lease of real property for a motocross track. Mr. Overvold states in his correspondence that the public in attendance was not there to speak against the motion so no comment was taken. He stated that had the motion failed, public comment would have been taken under the next agenda item, which was for review of the approved proposed lease.

**The Board's Public Comment Policy**

Complainant sent the Attorney General a copy of the agenda for the Board special session on April 24, 2007. It clearly states in bold at the end of the agenda: "AS TIME PERMITS: ACTION WILL BE TAKEN ON ALL OF THE FOLLOWING AGENDA ITEMS." The list of items following this declaration included public comment.

**III.**

**ISSUES**

1. Whether the failure to call for public comment following the action item calling for a decision by the Board to rescind the previously approved offer to lease property for a motocross track was a violation of the OML?

2. Whether the Board's declaration that public comment will be taken as time permits fulfills the requirement of NRS 241.020(2)(c)(3) that every public body meeting provide a period for public comment?

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## IV.

## CONCLUSIONS OF LAW

### ISSUE NO. 1

Review of the detailed minutes of this special session did not reveal any public comment period, noted to have occurred, either during the Board's consideration of items on the agenda or at the end of the meeting. Complainant's complaint indicates that the public was afforded public comment, but it was at the end of the agenda and only after the Board had escorted Senator Ensign's representative on a tour of TCID facilities.[2] The minutes do not reflect that public comment was solicited at any time either on the tour or after the Board reassembled at its Harrigan Road offices, if in fact they reassembled there. There is nothing in the materials reviewed by the Attorney General that indicates whether the public in attendance at the meeting accompanied the tour and if there was any public comment at the conclusion of the tour at the dam or at the Harrigan Road district offices. The minutes of the meeting do reveal that before the tour, but after the vote on the motion to rescind, an attorney for "44 bench residents" (all presumably in opposition to the track) asked President Schank if the Board would like a comment from him for the record. He made his comment for the record. No other notation in the minutes suggests that the public was ever solicited for their comments about any item.

Although the law only requires one period for public comment, these facts don't clearly indicate compliance with that rule, despite Complainant's statement that public comment was taken. If the Board's policy is to allow public comment following each item, the agenda must clearly announce that policy and any reasonable restrictions to the public comment deemed necessary by the Board. Since the Board called for public comment on the agenda item related to the lease on April 9, 2007, the chairman should have called for comment during the Board's consideration of rescinding the approval of the lease. It matters not that the chairman believed no one in the audience was there to oppose the motion, he should have taken a few

[2] The meeting minutes state that a Board recess was taken at 3:10 p.m., the Board reconvened at 5:00 p.m., and the meeting was adjourned at 7:00 p.m. No mention of public comment was made in the minutes.



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minutes to call for public comment regardless of who was in the audience. It was error to fail to call for public comment.

**ISSUE NO. 2**

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 Attorney General believes that "reasonable restrictions, including time limits, can be imposed on speakers." *Nevada Open Meeting Law Manual*, § 8.04 (10th ed. 2005). It is the position 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 OML. *OMLO* 99-11 (forcing the public to sign up for public comment three hours before the meeting was a violation). The declaration found in the Board's agenda for April 24, 2007, that public comment would be allowed *time permitting*, suggests or implies that public comment was optional at the whim of the Board. This implication is a violation of the OML because the public comment rule appearing on the April 24, 2007 agenda could well have discouraged public comment in that anyone in attendance wishing to speak might feel that, even after waiting to speak until the end of the meeting, his/her opportunity might vanish because time might run out. The way the agenda was written appeared to give the Board discretion that the OML does not allow.

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After discussion of this matter with TCID staff, we understand the policy has been clarified. We have been provided with a revised agenda announcement, which we are assured will appear in each TCID Board agenda in the future, that clearly announces in bold letters: **"Public comment is permitted during each action item but may be limited to 5 minutes per person."** While this declaration clearly announces Board policy allowing public comment during each agenda item, the declaration must also allow for general public comment during the meeting as required by NRS 241.020(2)(c)(3) and it may also consider reasonable restrictions on any public comment offered during this period.[3]

Even if the public was given the opportunity during a public comment period as noted on the agenda, the minutes were clearly deficient in reporting it. It is a fundamental requirement of the OML to provide a period of public comment. The Attorney General expects that minutes of meetings reflect all periods of public comment, even those called for during discussion of individual agenda items. Even if there is nothing in the OML requiring a public comment period on specific agenda items if there is no public comment, the minutes must reflect the opportunity. The chairman's call for public comment can only take a few seconds. Although our investigation did not reveal that anyone was denied the opportunity to comment during the meeting, or that anyone was denied the opportunity to give comment on those specific agenda items where public comment was allowed, the purpose and intent of the OML was not served by this omission.

After discussion with TCID and reviewing its correspondence, we believe the Board generally recognizes and adheres to these principles. The Attorney General has discussed the allegations in the complaint with TCID and with the Complainant with the view to resolve the issues in a voluntary manner. The Board has been willing to carefully analyze past

[3] However, any public comment limitation, including when public comment will be allowed and whether public comment will be allowed on current items on the agenda, should be clearly articulated on the public body's agenda. OMLO 99-08 (July 8, 1999). Accordingly, if the Board adopts and clearly articulates a reasonable policy regarding when public comment will be taken, it will be recognized by the Attorney General. OMLO 99-12 (October 14, 1999); OMLO 99-08 (July 8, 1999). The following is an example of a public comment agenda item: "Public comment will be allowed on each action item on the agenda and will be limited to five minutes in duration. General public comments will be allowed during the meeting and are also limited to five minutes per speaker. No action may be taken during the public comment period."

practices and also to amend those practices, where necessary, in order to meet both the letter and spirit of the OML. The Attorney General appreciates the cooperativeness shown by the Board to resolve the allegations in the complaint. Therefore, this opinion will serve to memorialize the Board's intent to make clear on each agenda that it will provide the opportunity for public comment for each agenda item subject to reasonable restrictions. It is also important that the Board draft the agenda so that general public comment is allowed during the meeting subject only to reasonable restrictions. The public must be fairly apprised of any restriction applicable during comment periods on each agenda.

DATED this 17th day of July, 2007.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/
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**CERTIFICATE OF MAILING**

I hereby certify that I am employed by the Office of the Attorney General of the State of Nevada, and that on this 17th day of July, 2007, I mailed a copy of the Findings of Fact and Conclusions of Law, by mailing true copies by U.S. Mail to:

Ernest P. Shank, President
Board of Directors
Truckee-Carson Irrigation District
P.O. Box 1356
Fallon, NV 89407-1356

David P. Overvold
Project Manager
Truckee-Carson Irrigation District
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Christy Lattin
Reporter
Lahontan Valley News
562 North Maine Street
Fallon, NV 89406

/s/ Carole Brackley
An Employee of the Office of the Attorney General

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| In the Matter of:<br><br>WALKER BASIN PROJECT STAKEHOLDERS GROUP | Attorney General File No. 07-025<br><br>OMLO 2007-03 |

## I.

## INTRODUCTION

Several individuals with agricultural and domestic well interests in Mason Valley (Lyon County, Nevada), through which the Walker River flows, have collectively filed an Open Meeting Law (OML) complaint with this Office.[1] The complaint alleges that a group known as the Walker Basin Project Stakeholders Group (WBPSG) is a public body within the meaning of the OML, and has violated the OML by not recording meetings, by not generating minutes in a timely manner, and by not seeking approval of those minutes.

It is alleged in the complaint that WBPSG has held two meetings (December 13, 2006 and March 29, 2007) which were "substantive meetings" with detailed presentations by experts and detailed objections by members of the public. The complaint requested this Office to remedy the violations described above.

This Office has primary jurisdiction to investigate and prosecute violations of Nevada's OML (NRS Chapter 241). This opinion is based on review of the complaint as well as a detailed response to the allegations in the complaint by WBPSG's attorney.

## II.

## FINDINGS OF FACT

WBPSG is a product of the Walker Basin Project (WBP), a University of Nevada project, which was created by federal law (Pub. L. No. 109-103, § 208). Pub. L. No. 109-103, § 208 authorizes funding to the University of Nevada for the WBP in an amount up to $70,000,000 for the preservation of Walker River and its watershed. Section 208 authorizes

[1] The complaint was prepared and filed by and through their attorney, Bill Schaeffer, Esq., Battle Mountain, Nevada.



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the University of Nevada, among other objectives, to use the funds to acquire from willing sellers, land, and water appurtenant to the land, and related interests in the Walker River Basin.[2]

Following the passage of the Act, Chancellor James Rogers, Chief Executive Officer of the Nevada System of Higher Education (NSHE), directed University of Nevada Reno (University) Executive Vice Chancellor, Daniel Klaich (Vice Chancellor Klaich), to administer the Act's directives and take whatever action he deemed necessary to meet the objectives of Pub. L. 109-103. Day-to-day responsibility for the project was delegated to Vice Chancellor Klaich who provides updates on a regular basis to the Research and Economic Development Committee of the Nevada Board of Regents.

Vice Chancellor Klaich created a staff organization, the Walker Basin Executive Steering Committee (Steering Committee), to develop projects, proposals, and investigate the availability of water rights and other real property interests in the basin as targets for eventual acquisition. Any real property identified for acquisition by the University under the authority of the public law would eventually have to be approved by the full Board of Regents, otherwise all decisions and other day-to-day work is done under supervision of the Steering Committee and Vice Chancellor Klaich.

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2 "The overall objective of the WBP is to develop, test and implement a computer-based Decision Support Tool (DST) for the Walker River basin to evaluate the effectiveness of proposed water right acquisitions for increasing water deliveries to Walker Lake. The DST will capture important relationships among climate [sic], simulate the evaporation from open water surfaces such as streams and ditches and the transpiration from different vegetation sources, river flows, groundwater-surface water exchange along the river, irrigation practices, groundwater pumping, lake volume, and total dissolved solids levels in Walker Lake." Taken from WBP's website: nevada.edu/walker/research/index.html.

WBPSG, the body at issue in this complaint, was formed at the invitation of the staff Steering Committee.[3] Letters appointing stakeholders were sent by the Steering Committee in November of 2006 inviting members of the public and others with an interest in the Walker River to form the WBPSG. The letter inviting members of the public to join, informed them that their role would be advisory and that they would receive updates on the research and communications activities related to the WBP at regular meetings. WBP's web page FAQ's explains the role of the WBPSG:[4]

> What is the Stakeholders Committee? The NSHE Walker Working Group, which consists of representatives of the project partners, chose to create the Stakeholders Committee to provide for stakeholder input and involvement, and to become better informed about the interests and concerns that stakeholder groups may have in the project. Creation of the Stakeholders Committee was not required, but was intended to provide a way for interested Walker Basin residents to keep up-to-date on the project.

The meetings of WBPSG are designed to be an open forum for discussion of issues regarding the WBP. Although an agenda is prepared WBPSG, the meetings are informal. No recordings of the meetings have been made. The body does not take action on any matter, and it is not funded by the University, nor does it spend or disburse any money.[5] The WBPSG meetings are open to the public and are held in public venues. The project

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3 WBPSG members include: Mauricia Baca, member-at-large selected by U.S. Senator Harry Reid; AlLEN Biaggi, representing the Nevada Department of Conservation and Natural Resources; David Fulstone, member-at-large selected by U.S. Senator John Ensign; Steve Fulstone, member-at-large; Lisa Heki, representing U.S. Fish and Wildlife Service; County Commissioner Phyllis Hunewill, representing Lyon County; Dan Jacquet, representing the Bureau of Land Management; Jon McMasters, representing the Walker River Paiute Tribe; Willie Molini, representing the hunting and fishing community; County Supervisor Bill Reid, representing Mono County; John Sarna, representing the California Department of Water Resources; Loretta Singletary, representing University of Nevada Cooperative Extension; Lou Thompson, representing the Walker Lake Working Group; County Commissioner Jerrie Tipton, representing Mineral County; Ken Spooner, representing the Walker River Irrigation District; and Pam Wilcox, representing the Nevada Division of State Lands.

4 Nevada.edu/walker

5 Travel expenses, meals, lodging and other expenses of Project Coordinator Ms. Karen Grillo are paid for from federal funding of the project as released by the Bureau of Reclamation. No tax revenues are used to support the WBPSG.

coordinator, Karen Grillo, an independent contractor, will prepare a report regarding discussions held at meetings for distribution.[6]

**III.**

**ISSUE**

Whether the WBPSG is a public body subject to the Open Meeting Law.

**IV.**

**CONCLUSIONS OF LAW**

Consideration of whether the WBPSG is a public body begins with the statutory definition of "public body." NRS 241.015(3) defines 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 . . . .

Breaking the components down further, this statute requires two elements to be satisfied before an entity may be considered a public body. Op. Nev. Att'y Gen. No. 2002-19, at 2 (May 2, 2002). First, the entity must be an "administrative, advisory, executive or legislative body of the state or a local government." *Id.* (quoting NRS 241.015(3)). To satisfy this first element, "the entity 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." Id.; (*See* Open Meeting Law Manual, § 3.01 (10th ed. 2005). Second, the entity must "expend or disburse or be supported in whole or in part by tax revenue, or advise or make recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue." Id.

Under the three requirements for the first element, it is clear that the WBPSG does not meet two of the three. Even if it is an entity which owes its existence to and has some

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6 In an exchange of emails from Ms. Grillo to Mr. David Haight, attached to the complaint, Ms. Grillo referred to her report as "minutes." This office has not seen a copy of the so-called report. It was not provided by the WBPSG. Because of the determination made by this opinion, it will not be necessary to view the "minutes."

relationship with a state or local government, (i.e. NSHE and Vice Chancellor Klaich),[7] WBPSG is not organized to act in an administrative, advisory, executive or legislative capacity; meaning it does not perform a governmental function.[8]

The WBPSG is a private group invited by the University to convene in an informal setting to receive information about WBP's efforts to proceed under the congressional act that created the WBP. It is generally recognized in the case law from other state courts that have considered this issue that:

> [p]urely private entities are typically not within the scope of open meeting acts. Private entities that work for or with a government are not necessarily subject to the open meeting law by virtue of that relationship. . . . Special circumstances may arise, however, if the private entity is receiving public funds and acting as a governmental agency, or has been delegated decision making power by a public body.

[A. Schwing, *Open Meeting Laws*, 2nd, § 4.100 (2000) (citations omitted).]

Based on the facts developed in this case, the WBPSG receives no funds, is not an advisory body, and does not have decision making power over any issue. So, there are no special circumstances that would make the OML applicable. It is also clear that the WBPSG does not expend nor disburse tax revenue or advise or make recommendations to an entity that does, thereby dispelling any issue of applicability of the OML under the second element for determining whether a body is a public body under the OML.[9]

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7 UCCSN now called NSHE was determined to be a state entity in *Simonian v. UCCSN,* 122 Nev. 187, 128 P.3d 1057 (2006).

8 Nevada's Open Meeting Law manual describes in detail the characteristics of a public body. It must be collegial: the members must share voting power; its members are concerned with meetings, gatherings, decisions, and actions obtained through a collective consensus of all members. Open Meeting Law Manual § 3.01 (10th ed. 2005). None of these attributes characterize the WBPSG. Furthermore, the entity to be considered a public body, must exercise a governmental function which is defined in NRS 241.015(3) as "administrative, advisory, executive or legislative" functions such as: the power to tax, the regulation of the conduct of individuals, and/or the supervision of or control over public business or policy. This list is certainly not exclusive, only illustrative, of the governmental function attributes of a public body. WBPSG is a passive body that was invited to convene to receive information. According to the website, nevada.edu\walker, it does not have any advisory power, and it certainly does not have executive, legislative, or administrative power.

9 Although the WBPSG does not advise or make recommendations to anyone, Vice Chancellor Klaich, is in charge of the project. He is an individual who is not subject to the OML as he is not a collegial body. See Op. Nev. Att'y Gen. 2002-06 (a public body must be a multi-member entity, not an individual.)

## V.

## CONCLUSION

The WBPSG does not take action on any matter, it does not vote on any matter, and it is not organized as a collegial body to consider Walker Basin issues or advise or recommend any action to the Steering Committee or Vice Chancellor Klaich. The WBPSG is not funded by the University nor does it spend or disburse any tax money to support its activities. Its sole purpose, as described on its web page, is to "provide a way for interested Walker Basin residents to keep up-to-date on the project." We conclude that the WBPSG is not a public body within the meaning of NRS 241.015(3).

DATED this 17th day of July, 2007.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/
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**CERTIFICATE OF MAILING**

I hereby certify that I am employed by the Office of the Attorney General of the State of Nevada, and that on this 17th day of July, 2007, I mailed a copy of the Findings of Fact and Conclusions of Law, by mailing true copies by U.S. Mail to:

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**STATE OF NEVADA**

**OFFICE OF THE ATTORNEY GENERAL**

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| In the Matter of:<br>CITIZEN ADVISORY PANEL | Attorney General File No. 07-030<br>OMLO 2007-04 |

## I.

## INTRODUCTION

A complaint has been filed with this Office alleging that a violation of the Open Meeting Law (OML) was committed by the "Citizen Advisory Panel for a Financially Feasible Approach to Providing FIRE/EMS Services" (CAP) in the City of Las Vegas. The CAP is composed of citizens who were invited by the Las Vegas City Manager to serve on a panel to develop recommendations for the provision of fire services. It is alleged that the CAP held a telephonic meeting without complying with the notice or agenda provisions of the OML. As evidence of the meeting, the Complainant submitted a three-page document entitled "CAP Telephone Conversations."

This Office has primary jurisdiction to investigate and prosecute violations of Nevada's OML. NRS Chapter 241. This opinion is based on review of the complaint, as well as a detailed response to the allegations in the complaint by the assistant city attorney representing the City of Las Vegas (City). In addition, both the Complainant and the attorney for the CAP have been interviewed for this opinion.

## II.

## FINDINGS OF FACT

### Background

The City's response to the complaint states that the CAP is not a public body subject to the OML because it is advisory to the City Manager, who as an individual is not subject to the OML; therefore, the CAP is also not subject to the OML. Agendas and notices for the CAP meetings were prepared and posted because the City Manager wanted to "advertise" the meetings so as to avoid any charge from the public that these policies or recommendations

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were developed in secret. It is asserted by the City that agendas and notices were not prepared so as to be in compliance with the OML but only to advertise the meetings.

The complaint alleges that the CAP held a telephone conference in June of 2007 without notice or a posted agenda. The Complainant felt that the CAP was a public body which had violated the OML when it held a non-posted meeting. Neither the City nor the CAP had informed the public that the CAP was not a public body, but only an advisory body to the City Manager, and thus not subject to the OML.

The City points out that the CAP had no delegation of authority from the City Manager to act formally on behalf of the City, it never voted on any issue, and it never elected a chairman. The CAP listened to presentations on the City budget, City funding of fire services, and it listened to a briefing on how fire services are currently provided. All of these briefings were delivered by City staff. The CAP asked questions of staff, then it compiled a list of recommendations to each of the areas in which the City Manager was interested. That list became the Final Report. The CAP finished its assignment from the City Manager and issued the Final Report in June of 2007.

**CAP Formation and Meetings**

Beginning in 2006, City Manager Douglas Selby decided to study more cost effective or supplementary means of providing fire and emergency medical services in the City including the means of financing these services. The issues to be studied were known as "fire services issues" and seemed to involve an effort to create innovative methods of providing services and funding given the impact fire services have on the City's budget.[1]

After discussion with City staff, Mr. Selby determined that a committee of community members with expertise in fire services issues should be asked to conduct a study and recommend solutions. Early in 2007, Mr. Selby invited several individuals from the community

[1] The Final Report issued by the CAP stated that the "Las Vegas Fire & Rescue Department currently absorbs over One Hundred Million dollars per year of the City's general fund budget." The Final Report also states that "[b]ecause of the growth in the Las Vegas Valley, it is anticipated that the City will need to finance an additional five fire stations . . . over the next five years." Therefore the goal of the CAP was to determine and recommend to the City Manager a financially feasible approach to providing fire/EMS services to the residents of Las Vegas.

knowledgeable and experienced in several fire service areas to serve on a "Citizen Advisory Panel." The members' expertise included firefighting at the command level, experience in working with the firefighter's union, experience in providing ambulance services, experience in homebuilding, and experience in City affairs and public relations.

Early in March of 2007, before the first meeting of the CAP, Mr. Selby briefed the Las Vegas City Council about his decision "to empanel a committee of community members to study the long-term financing options for provision of the City's fire services." Thereafter, invitations were sent to designated community members asking them to serve on a CAP. Mr. Selby and the City's fire chief signed the invitations. There did not appear to be any involvement from the City Council with the formation or mission of the CAP.

The CAP's work was envisioned to take two months after the first meeting took place on April 23, 2007, with the help of a facilitator engaged by the City. The CAP prefaced each meeting with a Notice (published at three prominent places), an Agenda (identifying the meeting time, place, and items for discussion), and then minutes of meetings were prepared and distributed.[2]

**III.**

**ISSUE**

Whether the CAP violated the OML by holding a secret telephone conference meeting?

**IV.**

**CONCLUSIONS OF LAW**

As mentioned earlier in this opinion, it is obvious that the Complainant considered that the CAP was a public body. After all, it met with all or most of the requirements of a public body. It posted notice and an agenda for each of its meetings; it kept minutes which always indicated whether there was public comment, which is a fundamental signature of a public

[2] The agendas did not meet other lawful OML requirements for agendas including: the presence of an item allowing public comment, there was no segregation of items for action or discussion only, and there were no statements that the notice and agenda were legally published prior to the meetings. Roll was not taken, meetings were not recorded, and there were no action items for adjournment.



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body. Complainant was only concerned that the CAP held a secret telephone conference meeting.[3]

Because the City challenges the complaint's implicit assumption that the CAP was a public body, we will examine the attributes of "public body" and determine whether the CAP meets that definition. The determination of whether the CAP is a public body is a fundamental issue necessary for resolution of this complaint. There is no question that the City did not intend to conduct meetings in violation of the OML.

The purpose underlying the OML is succinctly expressed by the Nevada Legislature at NRS 241.010. It states that "public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly."[4]

Implicit in the Legislature's purpose as expressed in statute is the belief that the OML should apply to any body that has the right to decide and make choices on public business. This opinion examines this issue in the context of a CAP, which was only charged to make recommendations to the City Manager, but it never enjoyed any power to make decisions or other authority over public issues or policy.

Consideration of whether the CAP is a public body begins with the statutory definition of "public body."

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[3] The City's response to the complaint stated that because the June 4, 2007 meeting was cancelled, and because formulation of the Final Report was the next step, the City Manager asked Mr. Cameron, the facilitator, to make telephone contact with the panel's members to solicit their specific recommendations on key policy issues. Mr. Cameron called six of eight members individually; there was no conference call among the panel members. The City's response contained assurances that the facilitator was careful to avoid passing information from one member to the next so as to avoid any serial contact between each of the six panel members. The City's response also assures us that no deliberation, vote, or decision occurred in any of the telephone calls to the panel members.

[4] The purpose of open meetings is expressed differently by legislatures and courts, but the California legislature expressed the underlying importance of open meeting legislation very aptly when it said, "The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created." California Government Code § 54950 (2007).

NRS 241.015(3) defines 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 . . . .

Breaking the components down further, this statute requires two elements to be satisfied before an entity may be considered a public body. Op. Nev. Att'y Gen. No. 2002-19, at 2 (May 2, 2002). First, the entity must be an "administrative, advisory, executive or legislative body of the state or a local government." NRS 241.015(3). To satisfy this first element, "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." NEVADA'S OPEN MEETING LAW MANUAL, § 3.01 (10th ed. 2005). Second, the body must expend or disburse or be supported in whole or in part by tax revenue, or advise or make recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue. *Id*. The Nevada Open Meeting Law Manual states that the OML does not apply to individuals such as the Governor or the executive officer of a board or commission. NEVADA'S OPEN MEETING LAW MANUAL, § 3.02 (10th ed. 2005). It is clear that the OML does not apply to Douglas Selby, Las Vegas City Manager, when acting in his official capacity, nor does the OML apply to routine meetings between the City Manager and his staff. *Id*. at § 3.03. But the issue presented here is whether the OML applies to a citizen's advisory body appointed by Mr. Selby. Does it matter that the CAP was appointed by an individual not subject to the OML and does it matter that the CAP's recommendations will ultimately be presented to the Las Vegas City Council? Prior opinions issued by this Office state that generally the OML does not apply to internal staff groups or *committees reporting to an individual*. [Emphasis added.] OMLO 2002-02,

January 20, 2004 (finding that "interagency meetings of groups which have no independent legal authority, no independent budget, and no formal mission or purpose will not fall within the definition of a public body if these groups . . . do not advise or make recommendations to a public body."); Op. Nev. Att'y. Gen. No. 2002-06, February 8, 2002 (staff committee plus one deputy attorney general not subject to OML as it was advisory only to the Commissioner of Insurance); Op. Nev. Att'y. Gen. No. 2002-13, March 14, 2002 (stating that "[a] committee formed by an individual who is not subject to the Open Meeting Law is likewise not subject to the Open Meeting Law).

## IV.

## CONCLUSION

The CAP is not a public body subject to the OML. Therefore, the conference call initiated by the facilitator was not violative of the OML. This determination is due to the identity of the parent body–Douglas Selby, City Manager–who is an individual not subject to the OML. This Office has endorsed the long-standing exemption of committees and subordinate bodies appointed by or invited by an individual executive head of an agency. In this case, Mr. Selby, as City Manager for the City of Las Vegas, invited eight citizens to serve on a temporary advisory body charged with a limited task and without any policy making or delegated decision making authority. This body was a permissible exemption from the OML. [5]

In the future this Office encourages public bodies and those executive individuals in a similar position to Mr. Selby, to consider carefully whether an appointed or volunteer advisory body should comply with the OML. An advisory body should not act like a public body and then claim it is not subject to the OML. If it was important to "advertise" the meetings, the

[5] This Office issued OMLO 2002-50 (November 20, 2002) which found that a private citizen task force organized by request of a Clark County Commissioner (not the entire commission) to "evaluate all of the facts, issues, options and implications involved in the possible sale of the Indian Springs Sewer and Water Company" was a body subject to the OML. The task force's purpose was to make a non-binding recommendation to Commissioner Maxfield, the Clark County Commissioner who was instrumental in organizing the task force of private citizens. The task force did not have a chairman, secretary or other designated leader, nor did it have any governing or decision making power. It was purely an ad hoc committee, or in other words, a citizen's advisory panel much like the CAP at issue in reporting to the Clark County Manager. To the extent that OMLO-50 found the citizens advisory body it examined to be a public body based on its creation that is clearly attributable to an individual-Commissioner Maxfield-it is overruled.

OML is uniquely positioned to do just that. Compliance with the OML has the additional benefit of providing a defense to claims that the endeavor was secret.

DATED this 10th day September, 2007.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ George H. Taylor
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**CERTIFICATE OF MAILING**

I hereby certify that I am employed by the Office of the Attorney General of the State of Nevada, and that on this 10th day September, 2007, I mailed a copy of the Findings of Fact and Conclusions of Law, by mailing true copies by U.S. Mail to:

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/s/ Carole Brackley
An Employee of the Office of the Attorney General

STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

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|---|---|
| In the Matter of:<br><br>HUMBOLDT COUNTY SCHOOL BOARD | Attorney General File No. 07-015<br><br>OMLO 2007-05 |

## I.

## INTRODUCTION

Several resident citizens of Humboldt County drafted a letter dated March 23, 2007 addressed to the President of the Humboldt County School Board (HCSB) asking for an investigation into several substantive matters including alleged violations of the Open Meeting Law (OML).[1] Complainants, two members of the citizens group, forwarded the letter to this Office asking for an investigation into the alleged OML violations.

There are three charges in the complaint alleging OML violations. First, it is alleged two members of the HCSB attended a private meeting to discuss HCSB business along with HCSB's Superintendent and the Principal of Lowry High School. Secondly, it is alleged that Kris Stewart, an HCSB member, contacted all other HCSB members via e-mail concerning another member of HCSB in order to "solicit affirmative votes" from other HCSB members. Lastly, it is alleged that the Superintendent has violated the OML by meeting with HCSB members prior to the open meeting of the HCSB.

This Office has primary jurisdiction to investigate and prosecute violations of Nevada's OML. NRS Chapter 241. This opinion is issued as guidance to the HCSB and is based on review of the citizens' complaint as well as the detailed response to the allegations in the complaint by Dr. Del Jarman, Superintendent for the Humboldt County School District; a

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[1] The citizens group also asked for an investigation by HCSB into allegations of (1) misappropriation of school district funds to remodel district offices and the purchase of PERS benefits for the retiring Principal of Lowry High School, (2) misrepresentation by the Superintendent of facts concerning his employment history, and (3) Code of Ethics violations by a member of HCSB. These three substantive matters are addressed to HCSB and are not within the purview of the OML. Consequently, they are not addressed in this opinion.

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signed statement from Kris Stewart, HCSB member; and the minutes and audio copies of the March 13 and 15, 2007 HCSB meetings.

## II.

## FACTS

### The Meeting with two HCSB members, Principal Brower and Dr. Jarman to discuss the Principal's employment

HCSB Superintendent Dr. Del Jarman met with Lowry High School principal, Kirk Brower, and two members of HCSB, Kris Stewart and Shelley Noble, some time before the March 13, 2007 regularly scheduled HCSB meeting.[2] The purpose of the meeting was to discuss Principal Brower's commitment to continue to serve as Lowry High School Principal, which is certainly a matter within the supervision and control of HCSB.

Dr. Jarman states in his written response to the complaint that Mr. Brower had mentioned to him on more than one occasion his desire to "take his career in a different direction," but he needed an additional year and a half in the Public Employees Retirement System (PERS), so he could leave with ten years of time in PERS. During the meeting with Mr. Brower, with two HCSB members present, Dr. Jarman asked Mr. Brower if he would prefer a PERS buyout if the HCSB would be in agreement. Subsequently, Mr. Brower submitted a letter to HCSB tendering his resignation conditioned on approval of a buyout of enough time to leave Humboldt County employment with ten years in PERS.

Because there were only two members of HCSB present during the meeting with Mr. Brower, there was no quorum of HCSB. The complaint alleges Ms. Stewart promised or guaranteed four votes in favor of the buyout. Four votes would be a majority of the members of HCSB and would be sufficient to take favorable action on the buyout request. Ms. Stewart denied the allegation that she guaranteed Principal Brower at the meeting four votes from HCSB members toward an early PERS buyout in her written response to the complaint (which she first sent to the HCSB's attorney, John Doyle). She states that she never made any of the

[2] Dr. Del Jarman and Kris Stewart submitted written responses to the allegation in the complaint that it was a secret meeting held in violation of the OML. The findings of fact as to this allegation are based on their responses and the statements made by HCSB members during the March 13 and 15, 2007 HCSB meetings.



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guarantees or promises as alleged in the complaint. She also is emphatic that there were no decisions made during that meeting.[3]

The audiotape of the March 13, 2007 meeting at which HCSB heard an item listed as "Update on Administrative Position at Lowry High School"[4] reveals that Dr. Jarman asked Mr. Brower point blank to respond to allegations that his resignation had been solicited. Mr. Brower can be heard to say that he was in agreement with Dr. Jarman's characterization of the manner in which the buyout proposal and conditional resignation was worked out.

HCSB's discussion of Principal Brower's conditional resignation on March 13, 2007, was lively and lengthy which indicates to this Office there was no prearranged vote. Most members of HCSB were heard to comment. The audience was allowed to comment during HCSB's discussion of the matter.

The minutes of the meeting show that there was considerable discussion of whether the buyout was consistent with HCSB policy. There was discussion about other instances of action by HCSB and approval of early buyouts. The exact monetary figure to achieve buyout was discussed. In fact, one HCSB member explicitly alleged during the meeting that Mr. Brower's conditional letter of resignation was not voluntary, but instead the member asserted that Dr. Jarman and two members of the HCSB asked Mr. Brower to submit his resignation. HCSB members expressed opinions about the financial impact of early buyouts on the school district.

Finally, the HCSB voted four to two to approve the early buyout.

**Allegation of serial communications among HCSB members.**

Complainants allege that Kris Stewart e-mailed to her fellow HCSB members her own personal statement concerning fellow HCSB member Linda Schrempp's competency. It is

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[3] No minutes or recording of this private meeting with the Principal were made.

[4] This item does not give clear notice to the public of the topic to be discussed. No mention is made of the fact that Principal Brower would be submitting his conditional resignation to HCSB, which was clearly an item of important interest to the community. Use of the word "update" is misleading since it implies mere notice of a continuing issue and does not give the public notice that HCSB could take final action on the resignation of Principal Brower. The item is too generic as it could apply to many other administrative positions, perhaps none of which would be of as much interest to the community as the resignation of Principal Brower.

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alleged that this is a violation of the OML based on communication among public body members through the telephone, letters, personal conversations, or e-mails which concern future board issues.

In a written statement Ms. Stewart admitted to sending an e-mail to all other HCSB members as well as to members of the community, but she states that the purpose of the e-mail communication was as a statement of support for Dr. Jarman.[5] She further elaborated by stating that she was "looking for proactive ideas for responding to rumors and false information circulating throughout the district and the community." She stated the "information contained in the e-mail dealt with things covered in past board meetings and ideas as opposed to concrete decision or steps to be taken" and that as a result of the e-mail correspondence "[n]o decisions were made; no votes were counted, cast or sought." She states she does not believe that "mere discussion with other board members outside the boardroom constitutes a violation of OML" and that "[t]here must be intent to circumvent the law or spirit thereof."

The matter of Ms. Stewart's "Statement of Support" was agendized[6] for a special meeting on March 15, 2007, just two days after the regular meeting at which Principal Brower's conditional resignation was discussed. We have reviewed the minutes of the March 15, 2007 meeting and the audiotapes of the meeting,[7] but neither party submitted a

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[5] Dr. Jarman was under some public scrutiny at this time. His administration of the district had been criticized by the public and perhaps by some HCSB members. Some of the criticism related to his administration and some related to his former employment appeared in the local media. Dr. Jarman sent a copy of an article appearing in the local paper with his response to the complaint.

[6] This item is also not "clear and complete" for the same reasons as expressed earlier in this opinion in footnote 4. It is impossible for the public to understand what the "Statement of Support" referred to unless one had received the e-mail correspondence from Ms. Stewart.

[7] Both the audiotapes and the minutes are substandard. The minutes are incomplete based on the length of these meetings. The minutes for the March 15, 2007 meeting comprise only two pages for a meeting that lasted four hours. The minutes do not state whether there was action/vote on the Statement of Support even though it was listed as an action item. We learned that HCSB declined to issue a statement of support only because Ms. Stewart mentioned it in her written response. After listening to the audiotape (even though it is largely unintelligible) it is clear that many comments by HCSB members and the public were not included. The fidelity of the audiotape of the meetings suffers to the point of unintelligibility. We were unable to understand many voices and their comments. Only the voices of President Pharr and Dr. Jarman were satisfactorily audible. Other voices had to compete with a substantial amount of background noise and from being too distant from a microphone.

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copy of the disputed e-mail for our review. The fact that the March 15, 2007 meeting had as an item the "Statement of Support" leads to the conclusion that Ms. Stewart circulated her own personal statement of support for Dr. Jarman. Because this Office cannot take action against HCSB at this time, and because this opinion is being issued solely for guidance, it is not necessary to review the e-mail.

**Whether the Superintendent's private briefings with HCSB members violated the OML**

The complaint alleges that Dr. Jarman meets with members of the HCSB before open meetings to discuss agenda items and issue directions.

Dr. Jarman's written response acknowledges that he meets with members of HCSB individually and in small groups, although he assures us there is never a quorum present at these group meetings. Dr. Jarman states his role is to explain the pros and cons of the issues presented to HCSB on their agenda. He said he does not solicit votes by any member of HCSB since his role is advisory.

Ms. Stewart's written response also acknowledges routinely meeting privately with the Superintendent to discuss issues, sometimes just before open meetings.

The complainants do not allege Dr. Jarman has met with a quorum of HCSB in any private briefing. There is no indication in the written responses from Dr. Jarman and Ms. Stewart that a private briefing ever included a quorum of HCSB.

## III.

## ISSUES

A. Whether the private meeting with Principal Brower which was attended by two HCSB members was a violation of the OML?

B. Whether HCSB member Kris Stewart engaged in "serial communications" when she e-mailed the other HCSB members with a personal statement of support for the Superintendent?

C. Whether the Superintendent's "private briefings" with members of HCSB is a violation of the OML?

## IV.

## CONCLUSIONS OF LAW

**ISSUE NO. 1**

Whether the private meeting with Principal Brower which was attended by two HCSB members was a violation of the OML?

Nevada's OML applies only to a quorum of a public body. The Nevada Supreme Court explicitly stated that the OML only applies to a "gathering of members of a public body at which a quorum is present to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction or advisory power." *Dewey v. Redevelopment Agency of the City of Reno,* 119 Nev. 87, 95, 64 P.3d 1070, 1076 (2003) (quoting NRS 241.015(2) (1999)).

It is important to understand that the OML "is not intended to prohibit every private discussion of a public issue. Instead, the Open Meeting Law only prohibits collective deliberations or actions where a quorum is present." *Id.* at 94-95, 64 P.3d at 1075. The Nevada Supreme Court strictly applies the definition of "meeting"[8] so that a physical quorum,

[8] "Meeting" is defined in NRS 241.015(2) as follows:

> 2. "Meeting":
>
> (a) Except as otherwise provided in paragraph (b), means:
>
> (1) The gathering of members of a public body at which a quorum is present to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.
>
> (2) Any series of gatherings of members of a public body at which:
>
> (I) Less than a quorum is present at any individual gathering;
>
> (II) The members of the public body attending one or more of the gatherings collectively constitute a quorum; and
>
> (III) The series of gatherings was held with the specific intent to avoid the provisions of this chapter.
>
> (b) Does not include a gathering or series of gatherings of members of a public body, as described in paragraph (a), at which a quorum is actually or collectively present:
>
> (1) Which occurs at a social function if the members do not deliberate toward a decision or take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.
>
> (2) To receive information from the attorney employed or retained by the public body regarding potential or existing litigation involving a matter over which the public body has supervision, control, jurisdiction or advisory power and to deliberate toward a decision on the matter, or both.

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or a constructive quorum[9] achieved by electronic means or by serial communications, must be present before the OML is applicable. Furthermore, it is necessary before the OML is applicable to a constructive quorum that the quorum actually deliberate toward a decision and decide or take action on any matter over which the public body has supervision, control, or jurisdiction. *Del Papa v. Board of Regents of the University and Community College System of Nevada,* 114 Nev. 388, 400, 956 P.2d 770, 778 (1998). The court found that a quorum of the Regent's Board, responding by telephone at different times, constituted a "meeting." The court then found the Board had voted to take action on a draft statement of university policy, which violated the OML.[10]

The Nevada Supreme Court has been consistent in holding that the OML does not prohibit all communications by and between members of a public body. The Court in *Del Papa* reiterated its opinion in its prior decision in *McKay v. Board of County Commissioners,* 103 Nev. 490, 746 P.2d 125 (1987), that, "members of a public body may ultimately make decisions on public matters based upon individual conversations with colleagues, . . .[but] the collective process of decision making, whether legal counsel is present or not, must be accomplished in public." *Del Papa,* 114 Nev. at 400, 956 P.2d at 778. The *Dewey* court in 2003 also reiterated the holding in *McKay* that members of a public body are not prohibited from discussing public matters with each other as long as there is not a quorum and as long as deliberations take place in a public meeting. *Dewey,* 119 Nev. at 96,

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[9] The Nevada Supreme Court's holding in *Del Papa v. Board of Regents*, 114 Nev. 388, 400, 956 P.2d 770, 778 (1998) defines constructive quorum as the foundation for a possible violation of the OML:

> [W]e hold that a quorum of a public body using serial electronic communication to deliberate toward a decision or to make a decision on any matter over which the public body has supervision, control, jurisdiction or advisory power violates the Open Meeting Law. That is not to say that in the absence of a quorum, members of a public body cannot privately discuss public issues or even lobby for votes. However, if a quorum is present, or is gathered by serial electronic communications, the body must deliberate and actually vote on the matter in a public meeting.

[10] The Nevada Open Meeting Law Manual defines "deliberate" as: "to examine, weigh and reflect upon the reasons for or against the choice . . . thus connot[ing] not only collective discussion, but the collective acquisition or the exchange of facts preliminary to the ultimate decision." Open Meeting Law Manual § 5.01, at 27 (10th ed. 2005). See also *Dewey*, 119 Nev. at 97, 64 P.3d at 1077; *Sacramento Newspaper Guild v. Sacramento Co. Bd. of Supervisors*, 263 Cal. App. 2nd 41, 47 (1968).

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64 P.3d at 1076 (stating that in the absence of a quorum, members of a public body may privately discuss public issues or even lobby for votes).

These cases teach that there are two important criteria to be applied before the OML may be invoked: (1) a quorum or constructive quorum must be present, and (2) the quorum must deliberate or vote on a matter under the supervision of the public body.

*Dewey* is particularly appropriate to cite here, because the facts of that case involved private briefings by agency staff with members of the Reno Redevelopment Agency (the public body) concerning evaluation of six responses to the Agency's RFP concerning possible rehabilitation of the Mapes Hotel. There were two back-to-back private briefings given by agency staff to members; at each briefing the attending members of the agency did not comprise a quorum. Nevertheless, the complaint alleged that during the private briefings, agency members both deliberated and took action on the RFPs. It was alleged that action was achieved through the act of polling a quorum of members by agency staff as to how they would vote on the issue in an open meeting, which would be a violation of the OML.

The case went to trial in district court. Agency members testified that they did not provide their opinion or vote on the Mapes Hotel issue nor were they polled as to their opinion or vote. They also testified that their discussions were not intended to promote a decision or course of action at that time. Finally, they testified that they made their final decision regarding demolition of the Mapes Hotel at the public meeting.

The district court found that the public meeting following the private briefings was not a perfunctory acknowledgement of the private briefings. The court, in making this finding, examined the length and nature of the debate at the public meeting, the lack of unanimity among the members' final vote, and the fact that the public meeting substantially mirrored the information conveyed and discussed during the private briefings.

We believe that attendance by two HCSB members at the private meeting with Principal Brower and Dr. Jarman did not constitute a quorum of HCSB, unless either HCSB member or both of them communicated with and/or polled additional HCSB members (sufficient in number to collectively constitute a quorum) regarding the issue of the PERS

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buyout. There is no evidence that either Ms. Stewart or Ms. Noble polled other HCSB members regarding the proposed PERS buyout.

The evidence shows that there was no quorum present (a quorum of the HCSB is four members), there was no further communication with additional HCSB members so as to create a "constructive quorum" and no decisions were made in the private meeting that would be applicable to the whole HCSB (apparently, Principal Brower decided to submit a conditional resignation). Based on the foregoing, no violation of the OML occurred.

**ISSUE NO. 2**

Whether HCSB member Kris Stewart engaged in "serial communications" when she e-mailed all the other HCSB members with a personal statement of support for the Superintendent?

HCSB member Stewart's e-mail to other HCSB members may have been a violation of the OML if she had polled the other members to gauge their support of her Statement of Support or if she had openly asked them how they would vote. There is no evidence that she polled other members or asked how they would vote. Our review of the March 15, 2007 meeting at which the "Statement of Support" was thoroughly discussed, reveals a spirited and lengthy discussion which suggests that the open meeting discussion was not a result of a prearranged vote orchestrated via the distribution of Ms. Stewart's e-mail. The fact that HCSB did not take action on the agenda item and decided not to release a final statement of support adds further reinforcement to our conclusion that no violation based on improper serial communications occurred.

We remind the members of HCSB of the risks and pitfalls associated with private communications with other HCSB members. In a case decided by the Nevada Supreme Court, the Board of Regents of the University and Community College System (Regents) engaged in nonpublic communications with each other that were similar in nature to the e-mail distributed by Ms. Stewart, but unlike the e-mail communication at issue here, the Regents actually voted on a proposal to issue a "media advisory" to counter the criticism on a proposal to issue a "media advisory" to counter the criticism of the Board by one Board member. *Del Papa*, 114 Nev. at 401, 956 P.2d at 779. The Court in *Del Papa* determined that

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the Regents acted in their official capacity, utilized University resources and took action on the proposed media advisory via a non-public vote utilizing serial communications; therefore, the Regents violated the OML's prohibition against closed meetings, the meeting was without notice, and the Regents *used electronic communications to circumvent the spirit or letter of the OML. Id.* (Emphasis added).

Our review of the facts of Ms. Stewart's e-mailed letter of support for Dr. Jarman is similar to the facts in *Del Papa.* However, we are persuaded that no violation occurred after listening to the debate during the March 15, 2007 meeting at which the matter of the letter of support for Dr. Jarman was discussed. Even though HCSB chose not to issue the letter of support, just as the Regents did in the cited case, a violation could have occurred if HCSB had responded to the e-mail with expressions of support or potential vote or if there was evidence of deliberations among the members in the non-public forum of the e-mail correspondence. We do not find any evidence of deliberation or polling.

A quorum of members of a public body may not deliberate or take action in a non-public forum, whether they are physically gathered or gathered electronically. Members may privately discuss public issues with other members individually, but the risk is that the process of collective discussion may filter into communications with other members thus creating a quorum and then there is the potential for violation of the OML.

We urge the members of HCSB to refrain from communicating with a quorum of other members in non-public forums if public business is the topic of discussion. We do not find a violation here, but we hope HCSB will remember the Legislature's admonition that "all meetings of public bodies must be open and public, and all persons must be permitted to attend any meeting of these bodies." NRS 241.020(1). Communications among a quorum of HCSB creates the impression in the public that public business is being conducted in violation of the OML. This is an unnecessary risk. It might be true that board members may feel more comfortable discussing matters in depth when asked in private, or that decisions may be made more quickly and with certainty when done privately, but the Legislature has determined

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that public bodies must forego these types of aids to decision making and conduct public business in open meetings.

**ISSUE NO. 3**

Whether the Superintendent's "private briefings" with members of the HCSB is a violation of the OML?

Private briefings concerning public business between Dr. Jarman and less than a quorum of the HCSB is not a violation of the OML in the absence of a constructive quorum as described above. The *Dewey* Court stated that "[d]iscussions with less than a quorum are not deliberations within the meaning of the act." *Dewey,* 119 Nev. at 98, 64 P.3d at 1077.

The *Dewey* Court said the following in reference to the facts of the case:

> If a constructive quorum did not exist, there was no violation of the Open Meeting Law. This is because the quorum standard is a "brightline standard [in] legislative recognition of a demarcation between the public's right of access and the practical necessity that government must function on an orderly, but nonetheless legitimate, basis. . . . The public's right of access at later stages in the decision making process, and its accompanying right to question, is a strong safeguard that public servants remain accountable to the citizens.

*Dewey,* 119 Nev. at 98, 64 P.3d at 1078 (citing *Delaware Solid Waste Authority v. News-Journal,* 480 A.2d 628, 635 (Del. 1984)) (citations omitted).

Following our review of Dr. Jarman's written response and Ms. Stewart's written response, we do not believe the described private briefings violate the OML.

**V.**

**CONCLUSION**

All public bodies, in non-public forums, must be careful to avoid the collective discussion of a public issue that is within the public body's supervision or control with the goal of reaching a decision.

Our opinions have consistently applied the Nevada Supreme Court precedent, which states that mere back-to-back meetings of members of a public body (even if done electronically among themselves) with staff, or its attorney, without evidence of specific intent to avoid the OML, and without evidence that these serial communications included

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deliberations and action on a matter over which the public body has supervision and control, is not a violation of the OML.

We did not find any violation of the OML on the facts of this case; however, we urge HCSB to avoid non public communications among a quorum of HCSB which might be viewed by the public as an attempt to circumvent the OML. The OML allows considerable latitude to members of public bodies so as not to hamper the public body's ability to conduct business efficiently and yet insure the public's confidence that the public body's actual decision making is done in public meetings.

DATED this 10th day of September, 2007.

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**CERTIFICATE OF SERVICE**

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 10th day of September, 2007, I mailed a copy of the Findings of Fact and Conclusions of Law, by mailing a true copy to the following:

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