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STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

In the Matter of)
)
PERSHING GENERAL HOSPITAL AND)
NURSING HOME BOARD OF TRUSTEES)

Attorney General File No. 10-014
OMLO 2010-01

I.

BACKGROUND

Matt Rees, alleged in his Open Meeting Law complaint received in this office on February 3, 2010, that agenda item 5(C) on the October 28, 2009 meeting of the Pershing General Hospital Board of Trustees (Board), was legally insufficient to impart notice to him that his character and professional competence would be considered by the Board during its discussion of Item 5(C).

The Office of the Nevada Attorney General has primary jurisdiction to investigate and prosecute alleged violations of the Open Meeting Law (OML). This office reviewed the complaint, agenda, and audio recording of the October 28, 2009 Board meeting in drafting this opinion. Furthermore, we interviewed member Steve Evenson by telephone and solicited his view of the Board's discussion of item 5(C) and his role in that discussion. Our letter to the Board also solicited a response from the Board's legal counsel to the allegations in the complaint.

It is alleged that agenda item 5(C) on the October 28, 2009 meeting of the Board was legally insufficient to impart notice that Matt Rees' character and professional competence would be considered by the Board during its discussion of item 5(C).

II.

FACTS

Our investigation of the facts underlying this complaint begins with the Board's agenda item 5(C). Item 5(C) is set forth here as it appeared on the agenda:

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1 5. New Business

2 (C) Discussion regarding election of CEO to receive contractual

3 bonus based upon FY 08 positive evaluation. *Id.*

4 The minutes for the October 28, 2009 meeting show that discussion of this item was very short. The minutes only report that "Discussion regarding whether the CEO taking his bonus was either appropriate or inappropriate ensued." This was the only sentence summarizing what became a 35-minute discussion/argument.

8 Review of the audio recording revealed that the first few minutes of the Board's discussion of item 5(C), CEO Matt Rees' election to receive his contractual bonus, was led by Mr. Rees as an introduction. Mr. Rees began by stating that he had had talks with Roger Mancebo, Chair of the Board, informing Mr. Mancebo that there was some bonus due under Mr. Rees' professional contract with the Hospital, but the amount due was unclear. Mr. Rees continued speaking. He said he and Mr. Mancebo were recommending creation of a committee of Board members to review the terms of the professional contract, to go over the time period of the professional evaluation[1] and then bring a final bonus recommendation back to the Board at another meeting for action.

17 At this point on the audio, after only two minutes, Mr. Evenson moved the tone and the subject matter of the discussion into new and different issues. The next 35 minutes of discussion seemed as though Mr. Rees' evaluation was being conducted or reopened.

20 Mr. Evenson began by acknowledging agenda item 5(C) and that the scope of the discussion was what Mr. Rees did (performance?) to decide to elect to take his contractual bonus, but then ominously, he said:

> "We're not there yet. We haven't discussed that yet. I want to know where it began, who was contacted, what happened, who gave approval and what process was undertaken to get us to the point to where he has already received money without coming to us first. Now maybe that will lead us into yet again another discussion of why things are being done of a financial nature of this magnitude without being brought to us first. . . . I have some ideas. I have

23 24 25 26 27 28

[1] We learn later in this discussion that Mr. Rees' bonus is contractually tied to his professional evaluation. We also learn that Mr. Rees had elected to take two $500.00 bonus payments and indeed had received them prior to putting this matter on the October 28, 2009 agenda. At least some members of the Board were aware of the election and receipt of bonus.

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some information that he already received money, but it's amazing that when I get an anonymous letter in the mail and I call [Matt Rees] he doesn't call me back. Once again."

Mr. Mancebo quickly advised Mr. Evenson not to discuss the letter, but to keep that separate from the discussion at hand. Nevertheless the Board never did come back to the topic at hand which was to discuss the election to receive the bonus. Instead Mr. Evenson led the Board into a discussion of Mr. Rees' professional problem communicating with the Board.

Mr. Evenson admonished the Board and Mr. Rees by asserting Mr. Rees frequently has been told by the Board to do one thing, or not to do something, yet he does the opposite, or as in this case, he does things without informing the Board. Then Mr. Evenson discussed a "mutiny" going on in Mr. Rees' own administrative staff, which Mr. Evenson said he heard about on a confidential basis from staff. It is alleged by Mr. Evenson that the "mutiny" or border-line mutiny, was because of "actions [Mr. Rees] continues to take by himself.

Another Trustee, unidentified, spoke up and said that as a county commissioner and businessman, he has not heard any complaints about Mr. Rees nor should an anonymous letter be given any credence.

The 35-minute audio recording of discussion on item 5(C) also reveals that certain members became concerned as the discussion/argument wore on that they were exceeding the scope of the agenda item.

Chairman Roger Mancebo was openly concerned about the legality of the discussion and asked Member Steve Evenson, an attorney and former counsel to the Trustees, whether the discussion was "going beyond where we should be going?"

Mr. Evenson replied:

"I don't know. I don't know. How many times have we had to ask that question?"

Jack Riehm, another Trustee, then said to Mr. Evenson:

"You have a lot of opinions here and then you answer, 'I don't know.'"

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Mr. Evenson heatedly replied:

> "Jack [Riehm] I guess my point is this, I'm tired of having to have these discussions. I don't know if we are violating the Open Meeting Law or not and frankly, for the record, I don't care. My point in saying this is, I'm tired of having. . .my point is, why do we have to keep having this discussion."

Roger Mancebo then said:

> "I do care about the Open Meeting Law and if we're getting into an area where we're not supposed to be, I don't want to be there."

Mr. Evenson concluded this portion of the Trustee's verbal exchange with each other:

> "Well, ok fine. Let's not be there and the next time that Matt [Rees] does something without telling us, and that he informed us previously that he wasn't going to do, we'll just pat him on the head again, and say it's okay Matt, don't worry about that. Don't worry about morale at the hospital, don't worry about anything else, it's ok we'll take care of it later. We'll just keep doing that, over and over again until we [are] just considered patsies by everyone in the facility, and the county for Matt Rees."

This exchange among members was an open acknowledgment of their fear that the discussion was in violation of the OML. Their fear was that the OML had been breached. At least Mr. Mancebo was reminding the others to ratchet the discussion back to the agenda item.

Mr. Evenson was still heated and seemed to be warning the other Trustees that this matter should be dealt with firmly and immediately; however, later in the meeting he blamed an earlier remark about the OML on frustration, but he never acknowledged the fact that the Trustee's discussion had strayed far from the agenda topic. In fact, he openly stated for the record that he did not care if the discussions were in violation of the OML.

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The Board continued discussion of item 5(C) for another 12 minutes and revisited issues beyond the agenda item's scope as well as new ones which were also clearly outside the scope of item 5(C). They revisited Mr. Rees' evaluation and the fact that the Trustees may have unwittingly put a positive spin on an otherwise neutral evaluation, which would have negated the award of a bonus. They discussed the creation of a committee to review Mr. Rees' professional contract. They then asked him why he went to the head of the line (for his bonus) when the Hospital had $650,000 outstanding in accounts receivable. Mr. Evenson was critical of Mr. Rees because he is the highest paid employee in the county, yet he gets a bonus without bringing it to the Board first and in spite of "continuing communications issue" reflected in his professional evaluation.

Toward the end of the audio on this item, Mr. Evenson revisits the OML and reminds everyone that when he said earlier that he didn't care if the OML was being violated he only meant that he was "sick of having these discussions." After a little more discussion, he said that ultimately the Board must deal with "continuing communication issues" referring to his frustration that the communication issue was continuing. CEO Rees last evaluation had identified a communication issue between the Board and Mr. Rees which Mr. Evenson felt was not being corrected by Mr. Rees or addressed by the Board.

Just before the Board left this item, the Hospital's Director of Nursing addressed the Board openly sobbing about the severe financial problems her employees were suffering every day because of pay cuts and reduced hours. Mr. Rees was openly chastised and accused of putting himself first in face of poor morale caused by pay cuts and reduced hours and job sharing.

The anonymous letter was again mentioned. Mr. Evenson said he had knowledge that item 5(C) appeared on the agenda only because the anonymous letter had surfaced. Mr. Evenson's implication was that the bonus money taken by Mr. Rees would have remained secret except for the anonymous letter which apparently disclosed Mr. Rees' election to take a bonus at all.

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III.

ISSUES

1. Whether the Pershing General Hospital Board's discussion of agenda item 5(c) exceeded the scope of the topic so that no notice to the public was given of the discussion.

2. Whether the Pershing General Hospital Board and each Trustee violated the OML's requirement to give notice to each person whose character, professional competence, and alleged misconduct will be considered by the Board.

IV.

DISCUSSION

Clear and Complete Rule

The issues we examine are closely related. Exceeding the scope of an agenda item[2] may have led the Board into another violation of the OML – the notice provision in NRS 241.033[3]

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[2] NRS 241.020(2): Notice must consist of: (c): An agenda consisting of:
(1) A clear and complete statement of the topics scheduled to be considered during the meeting.

[3] NRS 241.033 Meeting to consider character, misconduct, competence or health of person or to consider appeal of results of examination: Written notice to person required; exception; public body required to allow person whose character, misconduct, competence or health is to be considered to attend with representative and **to present evidence; attendance of additional persons; copy of record.**

1. A public body shall not hold a meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of any person or to consider an appeal by a person of the results of an examination conducted by or on behalf of the public body unless it has:
(a) Given written notice to that person of the time and place of the meeting; and
(b) Received proof of service of the notice.

2. The written notice required pursuant to subsection 1:
(a) Except as otherwise provided in subsection 3, must be:
(1) Delivered personally to that person at least 5 working days before the meeting; or
(2) Sent by certified mail to the last known address of that person at least 21 working days before the meeting.
(b) May, with respect to a meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of a person, include an informational statement setting forth that the public body may, without further notice, take administrative action against the person if the public body determines that such administrative action is warranted after considering the character, alleged misconduct, professional competence, or physical or mental health of the person.
(c) Must include:
(1) A list of the general topics concerning the person that will be considered by the public body during the closed meeting; and
(2) A statement of the provisions of subsection 4, if applicable.

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In 2003, the Nevada Supreme Court in *Sandoval v. Board of Regents*, 119 Nev. 148, 67 P.3d 902 (2003) strictly construed NRS 241.020(2)(c)(1) rejecting a common practice in which public body members discussed matters in detail, matters which deliberately deviated from the agenda topic into related and germane areas.

The *Sandoval* Court held that UCCSN's[4] Board and Campus Environment Committee's detailed discussion of extraneous matters greatly exceeded the scope of the published agenda topic[5]. The Committee discussed details of a Nevada Division of Investigation investigative report, it discussed public criticism of the UNLV police, and it discussed drug use on the UNLV campus. The agenda topic under which these discussions occurred only noticed the public that a review of state and federal law and policies affecting UCCSN's release of materials would be discussed.

The Court made it clear that mere mention of related matters in the abstract will not implicate the OML, but that detailed discussion leads to violation:

> [A]lthough discussion of the NDI report in the abstract may not have violated the Open Meeting Law, the Committee went too far when it discussed details of the report, criticized the UNLV police department, and commented on the impact of drug use on the UNLV campus. Accordingly, we conclude that, as a matter of law, the Committee violated the Open Meeting Law.

Sandoval 119 Nev at 155.

The Court stated that NRS 241.020(2)(c)(1) was enacted by the Legislature "to ensure that the public is on notice regarding what will be discussed at public meetings." The court said that no longer could a public body stray into discussion of related or germane topics, instead the law was now interpreted to require strict compliance with legislative intent. The *Sandoval* Court said:

> [T]he Legislature evidently enacted NRS 241.020(2)(c)(1) to ensure that the public is on notice regarding what will be discussed at public meetings. By not requiring strict compliance with agenda

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[4] University and Community College System of Nevada.

[5] "**Review of UCCSN Policies on Reporting**, [described in the agenda as:] Review UCCSN [University and Community College System of Nevada], state and federal statutes, regulations, case law, and policies that govern the release of materials, documents, and reports to the public."

> requirements, the "clear and complete" standard would be rendered meaningless because the discussion at a public meeting could easily exceed the scope of a stated agenda topic, thereby circumventing the notice requirement. Accordingly, we reject the "germane standard," as it is more lenient than the Legislature intended. Instead, we conclude that the plain language of NRS 241.020(2)(c)(1) requires that discussion at a public meeting cannot exceed the scope of a clearly and completely stated agenda topic.

Sandoval 119 Nev. at 155.

Relying upon case law from Texas and Nebraska, the Court emphasized the purpose of Nevada's Law: "Similarly, Nevada's Open Meeting Law seeks to give the public clear notice of the topics to be discussed so that the public can attend a meeting when an issue of interest will be discussed." *Id.* at 155.

The Office of the Attorney General has written several opinions on "clear and complete" agenda requirements. *See* Op. Nev. Att'y Gen. No. 79-8 (March 26, 1979), and Op. Nev. Att'y Gen. No. 91-6 (May 23, 1991); OMLO 99-01 (January 5, 1999); OMLO 99-02 (January 15, 1999); OMLO 99-03 (January 11, 1999); OMLO 2003-09 (March 4, 2003); OMLO 2003-13 (March 21, 2003); and OMLO 2003-23 (June 24, 2003).

Notice to a Person under NRS 241.033

Written personal notice must be provided to the person whose character, alleged misconduct, professional competence, or physical or mental health will be considered. NRS 241.033. Personal notice and return of service is required regardless of whether the public body meets in closed session or in open session. In addition, a notice of a meeting to consider a person pursuant to NRS 241.033 should contain the informational statement regarding administrative action under NRS 241.034. *See* NEVADA OPEN MEETING LAW MANUAL § 6.09 (10th ed. 2005).

Mr. Rees complains that the Board discussed his character and/or his professional competence during the discussion of item 5(C) on October 28, 2009, without complying with the OML's notice requirement in NRS 241.033. We agree.

The OML manual has adopted a definition of "character" to assist us in evaluating complaints. Character is a broad term consisting of many personal attributes, but it certainly includes one's general reputation. It might also include such personal traits as honesty,

1 loyalty, integrity, reliability, and such other characteristics, good or bad, which make up one's
2 individual personality. *See* NEVADA OPEN MEETING LAW MANUAL § 9.04 (10th ed. 2005).
3 In Op. Nev. Att'y Gen. No. 81-A (February 23, 1981), the Office of the Attorney General
4 opined that "character" encompassed that moral predisposition or habit or aggregate of ethical
5 qualities, which is believed to attach to a person on the strength of the common opinion and
6 report concerning him . . . a person's fixed disposition or tendency, as evidenced to others by
7 his habits of life, through the manifestation of which his general reputation for the possession
8 of a character, good or otherwise is obtained.
9 The Office of the Attorney General also construed the word "competence" to include: . .
10 duly qualified . . . answering all requirements . . . having sufficient ability or authority. .
11 .possessing the natural or legal qualifications . . . able . . . adequate . . . suitable . . . sufficient
12 . . . capable . . . legally fit. *Also see* OMLO 2004-28 (September 9, 2005).
13 Applying the law and definitions set forth herein to the facts underlying this complaint,
14 we believe both Mr. Rees' character and competence were impermissibly discussed because
15 he had not received notice. Notice is a bright line rule. There can be no exception to this
16 requirement or the public body will have to postpone any discussion of a person's character
17 and/or competence.
18 Mr. Rees' competence was clearly discussed and even at times heatedly discussed.
19 Among the matters impermissibly discussed were Mr. Rees' "ongoing communication skills"
20 with the Board, Mr. Rees last professional evaluation and its neutral or face value designation
21 by the Board. Mr. Evenson's pointed question about whether the manner Mr. Rees elected to
22 take his bonus was "below board" in contravention to Mr. Rees statement that he wished to
23 have the matter examined by a committee to insure the bonus was "above board" seems to us
24 to call into question Mr. Rees' character trait for honesty and integrity.
25 Other character issues impermissibly discussed included the insinuation he went to the
26 "head of the line" to take his bonus while his staff suffered financial hardship, reduced hours of
27 employment, and job sharing, more pointed references to Mr. Rees' integrity. Then there was
28 the thinly veiled insinuation that item 5(C) found its way onto the agenda only because an

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anonymous letter[6] "got out," which apparently disclosed Mr. Rees' election to take his bonus. The insinuation was that Mr. Rees was hiding the election from the Board but the anonymous letter forced him to pursue a cover-up by belatedly putting the matter on the Board's agenda. Clearly, this insinuation refers to Mr. Rees integrity, his ethical duty to the Board and the Hospital. It also refers to and denigrates his general reputation before the Board and anyone else who was present at the meeting or who might listen to the audio.

Any discussion of these matters, whether alone or together, is significant and substantive so as to constitute a violation of both the OML's notice requirement and its "clear and complete" rule.

V.

CONCLUSION

The Pershing General Hospital Board of Trustees violated two important requirements of the OML. First, their discussion of item 5(C) greatly exceed the scope of the topic, and secondly, the extraneous discussion of matters beyond the scope of the item constituted a discussion of Mr. Rees character and professional competence as described herein.

DATED this 25th day of February, 2010.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ George H. Taylor

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[6] The anonymous letter was never discussed in detail, and we are left to wonder about its content, purpose, and impact on the entire Board.

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CERTIFICATE OF MAILING

2 I hereby certify that I am employed by the Office of the Attorney General of the State of
3 Nevada, and that on this 25th day of February, 2010, I mailed a copy of the Findings of Fact
4 and Conclusions of Law, by mailing true copies by U.S. Mail to:

5 Matt Rees, Chief Executive Officer
Pershing General Hospital
6 & Nursing Home
P.O. Box 661
7 Lovelock, Nevada 89419

8 Roger Mancebo, Chair
Board of Trustees
9 Pershing General Hospital
& Nursing Home
10 P.O. Box 661
Lovelock, Nevada 89419

11
Todd A. Plimpton, Esq.
12 BELANGER & PLIMPTON
P.O. Box 59
13 Lovelock, Nevada 89419

14 Nicole M. Harvey, Esq.
HARVEY LAW FIRM
15 458 Court Street
Reno, Nevada 89501

16

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18
/s/ Carole Gourley
19 An Employee of the Office of
the Attorney General

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STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

In the Matter of CLARK COUNTY SCHOOL DISTRICT BOARD OF SCHOOL TRUSTEES	))))	Attorney General File No. 10-010 OMLO 2010-02

I.

BACKGROUND

This office reviewed the Open Meeting Law (OML) complaint submitted by Thomas Mitchell, Editor of the Las Vegas Review-Journal (LVRJ) against the Clark County Board of School Trustees (BST). It is alleged that a quorum of the members of the Superintendent's Educational Opportunity Advisory Committee (Committee) were appointed by Trustees. Under prevailing interpretation of the OML, the Committee became a public body. If the Committee was a public body, then its failure to provide notice and agenda prior to two meetings in January 2010 is a violation of NRS 241.020(2).

The Clark County School District (District) provided this office with an initial response to the allegation. Superintendent Rulffes provided several documents describing the "Prime 6 Program Review" and steps the District had taken to initiate the Prime 6 program culminating in the creation of the Committee. The District held nine Prime 6 school parent input meetings from early December 2009 through January 12, 2010. We reviewed the Committee's proposed meeting schedule, three agendas and two "meeting summaries" for Committee meetings in January 2010.

After review of the District's initial response, we asked for an additional response including a request for an affidavit from each member of the BST to explain his or her involvement in the appointment of community members to the Committee. In addition, if the Committee was the Superintendent's committee and each member was appointed by the Superintendent, we asked for and received an explanation for the apparent discrepancy indicated on the Committee membership list (a copy had been provided in the District's initial

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response), which indicated nine members were "appointed" by Trustees. Finally, we reviewed legal counsel's response to the allegation.

II.

FACTS

An October 6, 2009 memorandum from Superintendent Rulffes to the BST was the first communication about his intention to create a Committee to analyze Prime 6 issues. In it he asked each Trustee to provide him with names of two or three individuals capable of serving on the Committee. He said he would select one representative for each Trustee from among the names submitted to ensure broad representation on the Committee.

The Superintendent concluded his October 6, 2009 memorandum by stating the Committee would review the information and data it gathered and would "develop long and short term recommendations" to be submitted to the Superintendent in a report no later than February 18, 2010. The Superintendent would review the Committee's report and submit his recommendations to the BST no later than March 31, 2010.

We reviewed a document provided by the District entitled: "Superintendent's Education Opportunities Advisory Committee; Facilitator: Dr. Robert McCord, UNLV." This document is a membership list of the Committee. It contains a column indicating each member's "Affiliation." The column entries indicate that 9 of the 13 members were appointed by BST Trustees. We asked for additional discovery from the District to explain why this document plainly states that nine members were appointed by Trustees if in fact the Superintendent actually appointed them.

The District sent an affidavit from Dale Erquiaga, the Executive Director of Government Affairs, Public Policy, and Strategic Planning for the Clark County School District, which sheds light on the origin and meaning of the "affiliation" column on the Committee membership document.

Mr. Erquiaga's Government Affairs office created the Committee membership list as well as the Committee meeting schedule and Committee topics of discussion. Mr. Erquiaga's

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affidavit states he was aware the Superintendent actually made the appointment of each individual on the Committee. He said:

> Although the phrase "appointed by Trustee" is used in the listing, I am aware that the Superintendent had actually made the appointment of each individual to the committee. The term "appointed" on the committee membership list, was used simply to enable interested parties to understand the source of the names on the committee list, and was not intended to state the method by which the committee membership was established.

Dale Erquiaga, Affidavit, February 26, 2010.

The District sent Trustee affidavits for our review. Each affidavit explained the Trustee's role and his or her understanding of the appointment process and whether the Committee was understood by the Trustees to be a BST committee. Each Trustee stated that he or she received the Superintendent's October 6, 2009 memorandum informing the Trustee that the Superintendent intended to create a committee to analyze issues raised in the Prime 6 report. He informed the Trustees that he wanted to have a representative from each of the Trustee districts because solutions could have implications for schools in every Trustee district.

Each affidavit also stated that the Trustee identified one or more nominees and provided those names to the Superintendent. Each affidavit generally states that only later did the Trustee learn who had been appointed (if the Trustee submitted more than one name), or if only one name had been submitted, the Trustee's affidavit avows it was only because it had been challenging to identify potential candidates who were able to make the time commitment. One Trustee was unable to identify potential candidates in her district; we assume the Superintendent made a selection for her.

III.

ISSUES

1. Whether the Clark County School District Superintendent's Educational Opportunity Advisory Committee is a public body subject to the OML.

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IV.

DISCUSSION

Resolution of the issue depends in part on how the Committee was formed, its purpose and who appointed the members.

The complaint emphasizes several sections from the OML to suggest how the Committee could be a public body. First, it is noted that any advisory body of the state or local government which advises or makes recommendations to any entity[1] which expends or disburses or is supported in whole or in part by tax revenue, is a public body. NRS 241.015(3). Secondly, § 3.04 of the OML Manual states that formality in appointment is not the sole dispositive factor in what constitutes a public body. Citing OMLO 98-04.

This office considered these opinions taken from the OML Manual; however, the evidence provided by the District supports our conclusion that the Committee was not formed by the BST, it was not formed for the purpose of reporting to the BST, but it was formed to assist only the Superintendent; therefore it is not subject to the OML.

The OML does not define "committee, subcommittee or subsidiary thereof," but the OML Manual interprets the statute to mean that to the extent a group is appointed by a public body and is given the task of making decisions for or recommendations to the public body, the group would be governed by the OML. *See* § 3.04 NEVADA OPEN MEETING LAW MANUAL (10th ed. 2005); *See* OMLO 2002-017 (April 18, 2002) and OMLO 2002-27 (June 11, 2002). NRS 241.015(3). Based on the District's own document which identifies nine members as having been appointed by Trustees, it seemed reasonable to conclude the Committee may have been formed by the Trustees, but the Trustees' affidavits, Superintendent Rulffes' affidavit and Mr. Erquiaga's explanation of the "affiliation" column on the membership list convinced this office that the Committee was not a BST committee.

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[1] The NEVADA OPEN MEETING LAW MANUAL at § 3.02 interprets the statutory use of the word "entity" to mean a multi-member entity. An entity must be collegial so the OML does not apply to the Governor, or to any other person acting as the sole head of an agency of state or local government. In this case the Superintendent is the sole head of the Clark County School District. He is not an entity subject to the OML.

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V.

CONCLUSION

The Superintendent's Educational Opportunity Advisory Committee is not a public body as defined in statute and as interpreted by this office. However, resolution of this question was made more difficult because of the membership document which plainly stated that nine members were "appointed" by the BST. When committees are created, public officers and members of public bodies should exercise more caution to ensure the public is not confused about the creation of committees or subcommittees.

Finally, we had difficulty understanding the District's explanation that the use of the word "appointed" in the Committee's membership document may have been an unintentional use. There was no explanation as to why it was important to connect each Trustee with a name on the Committee, since the Superintendent appointed the Committee and all Trustee districts compose the Superintendent's authority.

Mr. Erquiaga stated in his affidavit that he was aware the Superintendent appointed all the members; the Superintendent in his affidavit states he reserved the right to make the final selection, and in fact, the Trustees all indicate they only provided names to the Superintendent. Trustees only nominated individuals, but did not appoint anyone to a BST committee that would report to the BST.

Based on these facts we must conclude the Committee is not subject to the OML.

DATED this 7th day of April, 2010.

CATHERINE CORTEZ MASTO
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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 7th day of April, 2010, I mailed a copy of the Findings of Fact and Conclusions of Law, by mailing true copies by U.S. Mail to:

Mr. Thomas Mitchell
Editor, Las Vegas Review-Journal
P.O. Box 70
Las Vegas, Nevada 89125-0070

Dr. Walt Rulffes
Superintendent of Schools
Clark County School District
5100 West Sahara Avenue
Las Vegas, Nevada 89146

C.W. Hoffman, Jr., Esq.
General Counsel
Clark County School District
5100 West Sahara Avenue
Las Vegas, Nevada 89146

/s/ Carole A. Gourley
An Employee of the Office of
the Attorney General

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STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

In the Matter of CIVIL BENCH/BAR COMMITTEE (EIGHTH JUDICIAL DISTRICT)	)))))	Attorney General File No. 10-011 OMLO 2010-03

I.

BACKGROUND

This office has reviewed the Open Meeting Law (OML) complaint submitted by KLAS-TV on January 26, 2010 which alleged that the Civil Bench/Bar Committee (Committee), meeting within the Eighth Judicial District, violated the OML when presiding Judge, Elizabeth Gonzales, denied complainant's request to video record the meeting. No one was barred from attending the meeting.

The complaint alleges that "an advisory committee formed by elected officials is subject to the Open Meeting Law." This allegation raises fundamental OML issues. First, there is a factual issue about the origin of the Committee and whether it was formed by elected public officials, and secondly, even if it was formed by elected public officials, did those elected public officials constitute a public body thereby conferring the same status on its committees.

Investigation of Origin of the Bench/Bar Committee

We investigated the origin of the Committee. The only reference we found is the same reference noted in the complaint—Eighth Judicial District Court Local Rule 1.31. Local Rule 1.31 requires presiding Judges to attend every Committee meeting. Local Rule 1.31 recognition of the Committee seems to impart a formal status to the Committee, suggesting that its formation was a formal act. We asked Court staff counsel to investigate the origin of the Committee, how members are appointed and under whose authority.

We could not find a statute or ordinance creating the Committee. When questioned about the origin of the Committee, the Court, through its staff attorney, explained that the Committee is simply an ad hoc open forum for communication between the bench and bar. The committee is not formally appointed or created by any group of elected officials or any

one Judge. The staff attorney this office spoke with maintains all Administrative Orders for the Clark County Courts. Her review of administrative orders in her possession did not uncover an Administrative Order creating a Bench/Bar Committee or an order guiding meetings thereof.

Further, we understand the Committee's purpose is an exchange of information and discussion about issues between bench and bar within the Court. For example, issues such as e-filing, the opening of the Self-Help Center, and discussions/recommendations regarding the time it takes to go through security, etc., are current issues within the Court.

Judges do not make appointments to a formal committee, but any member of the civil bar may attend. The Committee does not have advisory, legislative, or executive power; it does not vote or take action on matters discussed. It is simply an open forum between the bench and civil bar.

II.

ISSUE

1. Whether the Bench/Bar Committee is a public body.

III.

DISCUSSION

Any "advisory committee formed by elected officials" regardless of whether the elected officials are Judges or any other state or county elected official, is not subject to the OML, unless the appointing body of elected officials is itself a public body.

Our prior OML opinions and the NEVADA OPEN MEETING LAW MANUAL defines "public body" and has consistently reiterated that a committee is a public body only when the committee is formed by a parent public body for the purpose of giving the parent public body advice or recommendations. AGO 2000-18 (June 2, 2000).

Furthermore, the OML Manual emphasizes that a public body must be a collegial body, all members of which have equal voting power. Most importantly for this opinion, a public body is ". . .any administrative, advisory, executive or legislative body of the state or a local government which expends or disburses. . . tax revenue. . . ." NRS 241.015(3).

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This office has always interpreted the requirement that a public body "of the State or a local government" to mean the public body must be created by statute or local ordinance,[1] or if the body was organized to perform a governmental function, then even without formal creation by State or local ordinance, it might be considered a public body under the OML as long as the body is supported in part or whole by tax revenue. *Compare* Op. Nev. Att'y Gen. No. 2000-18 (June 2, 2000) (committee appointed by the Las Vegas City Clerk to prepare ballot questions was not a public body where it did not expend tax revenue or make any recommendation to a public body), *with* OMLO 2001-17 (April 12, 2001) (a private non-profit corporation formed at the direction of the County Commission, incorporated by two of the three Commissioners, and which loaned county money, and where the corporation assets reverted to the County in the event of dissolution, was deemed to be public body).

For example, in OMLO 99-05, an opinion which carefully examined the nature of a public body in light of the Legislature's definition, this office examined whether a private non-profit corporation was a public body:

> [W]e can find no evidence that EDAWN[2] was created by the order of or otherwise owes its existence to any state or local government body. 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. . . .No government body has appointed or asked EDAWN to provide advice on any governmental matter. . . .We can therefore find no evidence that EDAWN was organized to act in an administrative, advisory, executive or legislative capacity. We conclude that [EDAWN corporate functions] are within the dominion of free enterprise, and are not government functions. OMLO 99-05 (January 12, 1999).

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[1] The definition in NRS 241.015(3) indicates that a public body 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. In addition, it must expend or disburse or be supported in whole or in part by tax revenue, or it advises or makes recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue. NEVADA OPEN MEETING LAW MANUAL, § 3.01 (10th ed. 2005)

[2] EDAWN: Economic Development Authority of Western Nevada.

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IV.

CONCLUSION

Just because the Committee appears to have been formed by elected officials, even though we could not find any evidence of such formation in the distant past, does not convert it into a public body subject to the OML. Whether one Judge or several Judges appointed a group to advise them on a matter, the resulting group has not been created as a committee that simply meets the definition of a public body simply by virtue of appointment by a Judge.

There is no administrative order, ordinance or statute creating this Committee. Hence there is no definition of any committee duties whether advisory or otherwise. Statutory creation or creation by ordinance is the touchstone to defining a "public body." The Committee is an open forum between the local bar and the Judges for the purpose of exchanging information about court programs or current issues. The Committee does not maintain an organization. Meeting dates are spread by announcement in the local Clark County Bar Association website of a meeting.

There has been no appointment by the Judges or members of the bar to serve on a committee, but even if there had been, the resulting committee would not be subject to the OML because the Judge or Judges are not themselves a public body subject to the OML and that is a requirement for defining which committees are in fact subject to the OML.

The Bench/Bar Committee is not subject to the OML.

DATED this 12th day of April, 2010.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ George H. Taylor
GEORGE H. TAYLOR
Senior Deputy Attorney General
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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 12th day of April, 2010, I mailed a copy of the Findings of Fact and Conclusions of Law, by mailing true copies by U.S. Mail to:

Colleen McCarty, Reporter
KLAS-TV
322 Channel 8 Drive
Las Vegas, Nevada 89109

Steve Grierson, Executive Officer
Family Court Division
8th Judicial District Court
601 North Pecos Road
Las Vegas, NV 89101

Ms. Jilian Prieto
Family Court Division
8th Judicial District Court
601 North Pecos Road
Las Vegas, NV 89101

/s/ Carole A. Gourley
An Employee of the Office of
the Attorney General

STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

In the Matter of FERNLEY CITY COUNCIL	Attorney General File No. 10-012 OMLO 2010-04

I.

BACKGROUND

This opinion responds to the Open Meeting Law (OML) complaint filed by Ms. Debbie Skinner on January 27, 2010. Ms. Skinner at a public meeting of the Fernley City Council (Council) tried to comment on recently enacted Fernley City ordinances concerning the transient lodging tax. She asked to read a letter during public comment she had recently sent to the City. Fernley Mayor LeRoy Goodman acknowledged receipt of Ms. Skinner's Agenda Item Request form for a future meeting and Ms. Skinner's letter, but he asked Ms. Skinner to choose to either read her letter during public comment, or risk not having the matter appear on a future Council agenda. The last sentence of Ms. Skinner's complaint asserts she should have been allowed to express her concerns.

This office investigated the allegations in Ms. Skinner's OML complaint. We required the Fernley City Council (Council) to submit affidavits from each member and a response to the complaint. NRS 241.037

The Council sent us the January 20, 2010 notice and agenda. We were given the Council agenda request form on which Ms. Skinner requested that an agenda item be placed on a future Council agenda. We were also provided with a letter from City Manager Greg Evangelatos addressed to Ms. Skinner dated January 20, 2010; the audio recording of the January 20, 2010 meeting; and verbatim minutes of Ms. Skinner's public comment under item 19. The Council also provided affidavits from Mayor LeRoy Goodman, City Manager Greg Evangelatos, City Clerk Lena Shumway, and selected item verbatim minutes from six additional meetings beginning in July of 2009. Finally, the Council provided proof of publication and the text of Bills 138 and 142 (transient lodging tax ordinances).

II.

FACTS

A. January 20, 2010 FCC meeting

On January 15, 2010, Ms. Skinner submitted a Council Agenda Item Request Form along with a letter dated January 14, 2010 (two pages) in which Ms. Skinner requested action by the Council to amend or clarify the procedural application of two recently enacted transient lodging tax ordinances to local businesses.

The Council's response to the complaint provided evidence that submission of the Agenda Item Request form was untimely. City Manager Evangelatos' Affidavit states the request was untimely because the agenda for the January 20, 2010 meeting had already been finalized and published. (Affidavit of Greg Evangelatos dated February 18, 2010).

Mr. Evangelatos wrote Ms. Skinner on January 20, 2010 acknowledging receipt of the Agenda Item Request form, but he also asked her to meet with him and the City Clerk to "possibly resolve [Ms. Skinner's concerns] before adding an item to a future City Council agenda." She was asked to contact Lena Shumway, the City Clerk to set up a meeting.

On January 20, 2010, Ms. Skinner attended the Council meeting and rose to speak during public comment (item #19 on the agenda). Ms. Skinner asked to read a letter about the recently enacted transient room tax ordinances. At this point Mayor Goodman interrupted her. He said that Mr. Evangelatos had a copy of Ms. Skinner's Agenda Item Request form and her letter. He said Mr. Evangelatos would be meeting with Ms. Skinner to address her concerns.[1] Then he said ". . . and if we want to put it [Ms. Skinner's Agenda Item Request] on as an agenda item, we will." When she asked whether he had the option to put it on the agenda, Mayor Goodman said "yeah, we have the option to put it on the agenda."

Ms. Skinner returned to her original purpose for rising during public comment and asked if she could encourage the Council to revisit the two recently enacted transient lodging tax ordinances. She said she thought she could speak on it because it was not on the agenda and she was rising during public comment.

[1] Apparently, anyone can request that an issue or matter be placed on the Council's agenda, but ultimately the Mayor, Council and/or the City Manager decides whether to agendize it.

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Mayor Goodman then reminded her that she asked to agendize her concerns and they would be on the next agenda. His next comment offered Ms. Skinner a choice — "Now, if you [Ms. Skinner] want to drop that request [to agendize her concerns for a future Council meeting] then go ahead . . . and read it [her January 14th letter]."

Ms. Skinner replied, "I'm not going to drop the request."

Mayor Goodman responded, "Ok, well, then, that's when it will be discussed. Otherwise. . . ."

Ms. Skinner, recognizing that Mayor Goodman had given her a choice, pointedly asked him, ". . . when do we as business owners have a right to express our concern?"

Mayor Goodman's reply is very confusing, even in the context of this dialog. He said, "Where do you want me to answer that, do you?" He then explained that the ordinances were properly adopted by the Council under applicable OML statutes.

In fact, the validity of the ordinances was never in doubt. Ms. Skinner's letter merely asks for reconsideration and action on ordinance procedural application to her as a business owner.

B. Council's Response to the Complaint

Council responded to the complaint with affidavits from both Mayor Goodman and Mr. Evangelatos. After the January 20, 2010 public meeting, both men met with Ms. Skinner at separate times to discuss her concerns about the transient lodging tax ordinances. Both affidavits state that Ms. Skinner did not indicate she desired to have her concerns placed on a future agenda, as requested in her written request of January 15, 2010. However, neither affidavit avers that she was offered a place on a future agenda, or that she turned the request down. Council's response does not indicate whether Ms. Skinner's request was denied, whether she released them from her request, or some other disposition.

Mayor Goodman's affidavit in response to the complaint did not explain the reason for the choice Ms. Skinner had to make. He stated Ms. Skinner did not comment about the proposed ordinances during the Council's lawful consideration of them beginning in July of 2009. He also stated he did not refuse to allow her to speak during public comment on

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January 20, 2010, he only "clarified" that the information she wished to present to the Council was the "same information" she had requested be placed on the Council's agenda. He did not discuss or explain the choice given to her.

III.

ISSUES

1. Whether Debbie Skinner's right to public comment was denied when Mayor Goodman made her choose between public comment or the chance of a future agenda topic.

IV.

DISCUSSION

Courts recognize a governmental interest in conducting orderly, efficient, effective, and dignified public meetings. *Kindt v. Santa Monica Rent Control Bd.*, 67 P.3d 266, 271 (9th Cir. 1995); OMLO 2001-22, December 17, 2002. Through the OML, the Nevada Legislature has given the public the right to address public bodies. NRS 241.020(2)(c)(3). Once a person is given the right to address a public body, the right may be limited only within constitutional parameters. OMLO 2001-22 citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); see *White v. City of Norfolk*, 900 F.2d. 1421, 1425-27 (9th Cir. 1990); *Leventhal v. Vista United School Dist.*, 973 F. Supp. 951 (S.D. Cal. 1997).

We are mindful that a public body "does not violate the first amendment when it restricts public speakers to the subject at hand," and that a chair of a meeting may stop a speaker "if his speech becomes irrelevant or repetitious." *Kindt,* 67 F.3d at 270 quoting *White v. City of Norwalk,* 900 F.2d 1421, 1425 (9th Cir. 1990). However, our review of the record of the dialog between Mayor Goodman and Ms. Skinner does not implicate either concern as expressed in *Kindt* or *White* decisions. In the context, Ms. Skinner's request for public comment was not irrelevant or repetitious especially since a future agenda item was only contingent.

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Further insight regarding public comment is found in OMLO 2001-22, p.5:

> "The most important purpose of the public comment period is to allow members of the public to comment on action items under consideration by a public body or on topics within the scope of the public body's authority. See NRS 241.020. Further, public comment is necessary to allow citizens to present grievances or concerns to their government so they may receive redress or influence their government's decision-making process."

After review of the Council's response, the affidavits, and careful review of the audio recording of Ms. Skinner's public comment, Ms. Skinner was subjected to an improper choice that effectively prevented her public comment. She did not read her letter because much of her five minutes was taken when the Mayor confronted her with the "choice." She was not able to effectively comment on the concerns expressed in her letter.

We reviewed the Council's notice governing public comment, set forth under Public Input, (item #19), to determine if it supported Mayor Goodman's "either/or" proposition.[2] It does not. The Mayor's action does not fall within any lawful restriction on public comment mentioned in the Council's notice. There was nothing repetitive or irrelevant about Ms. Skinner's attempt to read her letter in public comment, despite her existing request for a future agenda item. The Mayor did not guarantee a future agenda item. In fact he said it was optional. We cannot find any legal basis to justify his action and therefore conclude his action unnecessarily restricted Ms. Skinner's right to comment.

Essentially, Mayor Goodman offered her a choice to either read the letter during her five minutes of public comment, or risk denial of her request for an agenda item on a future agenda. Review of the audio of the colloquy between Mayor Goodman and Ms. Skinner did not reveal an explanation, factual or legal, for the Mayor's action.

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[2] PUBLIC INPUT. Public comment is limited to five (5) minutes per person. Items not agendized for this meeting cannot be acted upon other that to place them on future agendas. Public input is prohibited regarding comments, which are not relevant to or within the authority of, the pubic body, or if the content of the comments is willfully disruptive of the meeting by being irrelevant, repetitious, slanderous, offensive, inflammatory, irrational or amounting to personal attacks or interfering with the rights of other speakers.

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V.

CONCLUSION

The Council's response did not identify a legal reason for the Mayor's choice offered to Ms. Skinner as she sought to comment on recently adopted ordinances. Nothing in the Mayor's dialog with Ms. Skinner suggests a legitimate basis for denial of her right to comment nor did the Mayor explain his action in his affidavit sent to us in response to the complaint.

Expediency cannot trump the public's right to comment.

The choice given to her, while at the podium during public comment, was an unnecessary restriction on public comment which does not comport with either the letter or spirit of the OML. NEVADA OPEN MEETING LAW MANUAL § 8.04 (10th ed. 2005).

This office issues a warning to the Mayor to avoid unnecessarily burdening the public's right to comment by imposing a restriction that does not comport with constitutional review. The Mayor must understand the importance and breadth of the public's right to comment on matters within the Council's jurisdiction and control. Public comment during a public meeting has been bestowed by statute and once bestowed may only be restricted or limited in a constitutional manner. Under current law, Ms. Skinner's right to comment is only subject to time, place, and manner restrictions. Nothing in the record we reviewed suggested that the Mayor's action was based on constitutionally valid time, place, or manner restrictions.

DATED this 18th day of May, 2010.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ George H. Taylor
GEORGE H. TAYLOR
Senior Deputy Attorney General
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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 18th day of May, 2010, I mailed a copy of the Findings of Fact and Conclusions of Law, by mailing true copies by U.S. Mail to:

Debbie Skinner
1445 Whipple Tree
Fernley, NV 89408

LeRoy Goodman, Mayor
City of Fernley
595 Silver Lace Boulevard
Fernley, NV 89408

Greg Evangelatos
Fernley City Manager
595 Silver Lace Boulevard
Fernley, NV 89408

Brandi Jensen, Esq.
Fernley City Attorney
City of Fernley
595 Silver Lace Boulevard
Fernley, NV 89408

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108 North Minnesota Street
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Kelly Malloy, Ward 1
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Robert Chase, Ward 3
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/s/ Carole Gourley
An Employee of the Office of
the Attorney General

STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

In the Matter of

NYE COUNTY BOARD OF COUNTY COMMISSIONERS

Attorney General File No. 10-038

OMLO No. 2010-05

This office investigated two Open Meeting Law (OML) complaints from Mr. Leslie Stovall, Esq.; each alleged the Nye County Board of County Commissioners (BOCC) violated NRS 241.020 because it may have privately taken action by authorizing the filing of a legal document on its behalf.

During the investigation of these complaints, we received and reviewed affidavits and/or statements from each member of the BOCC, attorney Keith Loomis, and Rick Osborne, Nye County Manager. We reviewed an audio record of the June 1, 2010 BOCC meeting and the June 9, 2010 meeting, and we reviewed all the correspondence sent to us by Mr. Leslie Stovall.

FACTS

On or about May 27, 2010, private attorney Keith Loomis caused an Amended Petition for a Hearing to Consider the Appointment of Special Prosecutor to be filed in the 5th Judicial District Court of the State of Nevada on behalf of the BOCC.[1] It was captioned: *In Re: the Matter of Robert Beckett and the Nye County District Attorney's Office* (Petition). Mr. Stovall alleged it was the filing of this document that violated the OML because it appeared the BOCC had not authorized its filing in a public meeting.

Mr. Loomis' statement to us dated June 11, 2010 and his affidavit attached to his Opposition to a Motion to Dismiss and for Sanctions, filed June 7, 2010 in the same matter, explained why he filed the Amended Petition for a Hearing to Consider the Appointment of Special Prosecutor. He stated he was approached by County Manager, Rick Osborne and Gary Hollis, Chairman of the BOCC, about how to secure appointment of a special prosecutor.

[1] Mr. Loomis stated to the BOCC on June 9 that because Nye County District Attorney Bob Beckett had been arrested, other Assistant District Attorney's were unable to proceed with the prosecution of the criminal case because of conflict. Therefore, it was necessary to secure a special prosecutor to proceed with the case.

He stated he filed the Petition based on "the approval I had from County Manager Richard Osborne and Chairman of the Board, Gary Hollis." His June 12, 2010 statement to us explains that he did not poll the other members of the BOCC nor did he ask that they be polled on his behalf with regard to authorization to file the Petition. Mr. Loomis also stated he requested the matter be placed on the next available agenda for ratification and/or approval of the filing of the Petition. He stated this was done at the June 9, 2010 BOCC meeting.

On June 8, 2010, this office received an OML complaint from Leslie Mark Stovall, Esq., which alleged the BOCC violated the Open Meeting Law, specifically NRS 241.020, thus rendering the *Amended Petition* void pursuant to NRS 241.036.

On June 18, 2010, this office received another OML complaint from Mr. Stovall which added additional allegations to the June 8, 2010 complaint. This complaint alleged the BOCC had filed an opposition to "a motion to dismiss in case CV 30243" captioned: *In Re the Matter of Robert Beckett and the Nye County District Attorney's office*, which had been filed in the 5th Judicial District Court of the State of Nevada on or about June 7, 2010. It was alleged the act of filing this document on behalf of BOCC was another violation of NRS 241.020.[2]

Following the filing of the BOCC's Amended Petition for Appointment of Special Prosecutor, Mr. Stovall filed a Motion to Dismiss and for Sanctions in the 5th Judicial District Court of the State of Nevada on June 2, 2010. It alleged that the filing of the *Amended Petition* by attorney Keith Loomis was a void act under the OML because Mr. Loomis appeared to have no authority to file the BOCC's Petition prior to a public meeting. In a letter to Mr. Loomis dated May 28, 2010, Mr. Stovall stated he had been informed that the BOCC had not approved the Petition, "unless this [the approval of the Petition] was done in violation of the open meetings law."

On May 28, 2010, Mr. Stovall received an Order to Show Cause from Judge John P. Davis, 5th Judicial District Court, to answer why a special prosecutor should not be appointed in the matter of *In Re Robert Beckett and the Nye County District Attorney's Office.*

[2] Because the subject matter and the allegations of both complaints are related to the same matter, we consolidated them for purposes of this opinion.

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1 Mr. Stovall also received a copy of the BOCC's agenda for June 1, 2010 wherein item 20(d)
2 appeared to seek authority to petition the District Court to appoint a special prosecutor, but it
3 did not seek to ratify the hiring of Mr. Loomis, or authorize Mr. Loomis' filing of the Petition in
4 the 5th Judicial District Court.[3]

5 On May 30, 2010, Mr. Stovall notified Nye County Deputy District Attorney, Marla
6 Zlotek that the filing of the BOCC's Petition prior to a "public meeting" violated NRS 241.020.
7 On June 1, 2010, the BOCC met in a regular commission meeting in Tonopah, Nevada, to
8 consider agenda Item 20(d).

9 During the BOCC's June 1, 2010 meeting, Gary Hollis, Commission Chair, called Item
10 20(d) for consideration by the Board. Almost immediately, BOCC counsel, Nye County
11 Deputy District Attorney Marla Zlotek, asked to speak. She quickly informed the BOCC that a
12 Petition to appoint a special prosecutor had been filed in the 5th Judicial District Court on the
13 BOCC's behalf on or about May 27, 2010. Next, she informed them that the June 1, 2010
14 agenda needed corrective action. The corrective action she spoke about was the immediate
15 necessity to properly agendize the matter of the filing of the Petition by outside counsel (Keith
16 Loomis, who had filed the Petition to appoint a special prosecutor on or about May 27th). She
17 informed the BOCC that in order to discuss the matter and/or take any action, including
18 ratification of Mr. Loomis' act of filing the Petition on behalf of the BOCC, the matter must be
19 properly agendized on another agenda.

20 Ms. Zlotek warned the BOCC that if it took action then, based on the wording of item
21 20(d), to approve the filing of the Petition in the 5th Judicial District Court by Mr. Loomis, that
22 action would be void because the matter had not been properly agendized. During Ms.
23 Zlotek's counsel to the BOCC she read portions of §11.02 from NEVADA'S OPEN MEETING LAW
24 MANUAL in support of her position that corrective action was necessary and allowable under
25 the OML Manual.

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27 [3] Item 20(d.) from the agenda for the June 1, 2010 BOCC meeting:
<u>Action</u> – Discussion, deliberation, possible decision and possible direction to staff 1) to petition the
28 District Court to appoint a Special Prosecutor; 2) to ratify any appointment already made by the District Court; 3) to authorize the payment for services; and 4) to authorize the execution of the contract which can be funded from Fund 492 Settlement Agreement; in the matter of the Bob Beckett Bad Check Program case.

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Following Ms. Zlotek's counsel, Item 20(d.) was removed from consideration by the BOCC's June 1, 2010 agenda and no further action was taken on any part of it.

ISSUES

1. Whether the BOCC privately authorized the filing of the Petition for a Hearing to Consider the Appointment of a Special Prosecutor.

2. Whether the BOCC's June 9 Special Meeting ratified or "cured" the alleged violation of NRS 241.020(2)(a)(b) & (c).

DISCUSSION AND ANALYSIS

Since it is alleged the BOCC may have privately met to authorize Mr. Loomis to file the Petition, we asked each Board member, and Mr. Osborne, the County Manager, to respond with affidavits explaining each member's knowledge of the matter and whether they participated in authorizing the filing of the Petition.

Mr. Loomis' assertion that he did not poll the other BOCC members nor did he ask that they be polled is supported by the affidavits of the other BOCC members. Chairman Gary Hollis stated in his affidavit that he recalled a telephone conference on May 18, 2010 in which he gave "what authority he had" to Mr. Loomis to file the Petition and that Mr. Loomis then asked the matter be placed on the next BOCC agenda for approval and ratification. Mr. Hollis recalled a subsequent phone conference with Mr. Loomis, but he stated he never had communications with the other BOCC members to obtain their consent for the filing of the Petition for a Hearing to Consider the Appointment of Special Prosecutor.

Review of the affidavits of the other Commissioners confirms the fact that no communications between Chairman Hollis and the other Commissioners regarding the authorization to file the petition on behalf of the BOCC occurred between May 18, 2010 and June 1, 2010 when the matter was first put on a BOCC agenda. The matter was finally agendized for a special BOCC meeting on June 9, 2010. At this meeting the Board took

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action to ratify the act of the filing of the Petition and it also authorized the hiring of attorney Keith Loomis to represent the BOCC.[4]

Mr. Hollis' individual act authorizing Mr. Loomis to file the Petition was not an action by the BOCC, which would have implicated NRS 241.020. Both Mr. Hollis and Mr. Loomis explicitly acknowledged the BOCC could either ratify the filing of the Petition or reject it.

Because deputies in the District Attorney's office stated they were conflicted, preventing anyone from the District Attorney's office from prosecuting the criminal case against District Attorney Beckett, there was a void in county government regarding prosecution of this matter and there were impending criminal procedure deadlines.[5]

While Mr. Hollis, as Chair of the BOCC, might have called an emergency meeting to handle the matter immediately, his decision to authorize the filing of the Petition cannot now be challenged under the OML since the BOCC ratified his choice on June 9, 2010. Even if the OML was implicated with Mr. Hollis' initial choice, ratification of that choice cured any OML violation.

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[4] Item No. 3, Special BOCC meeting, June 9, 2010:

3. Action – Discussion, deliberation, possible decision and action to direct staff in the matter of the Robert Beckett Bad Check Division case and David Boruchowitz prosecution:

a. To retain Keith Loomis as attorney representing the Board of County Commissioners of Nye County for the filing of a petition to appoint a special prosecutor;

b. Ratify the filing and/or authorize the filing of a petition for the appointment of a special prosecutor to review and possibly prosecute criminal charges against Nye County District Attorney Robert Beckett and/or against Nye County Sheriff's Deputy David Boruchowitz;

c. To authorize the payment for services for a Special Prosecutor which are not budgeted but can be funded from Fund 492 Settlement Agreement;

d. To authorize the execution of a contract with Keith Loomis which is not budgeted but can be funded from Fund 492 Settlement Agreement;

e. To fund the deductible for a civil attorney through PoolPact to represent the Nye County Sheriff's Office in the civil suit filed by Robert Beckett against Sheriff Anthony DeMeo and the Nye County Sheriff's Office, which is not budgeted but can be funded from Fund 492 Settlement Agreement; and

f. To authorize the filing of a petition for the appointment of a special prosecutor to review and determine prosecution on past, present and future criminal cases that have not been adjudicated wherein David Boruchowitz is the assigned investigator.

[5] NRS 244.165 gives Boards of County Commissioners the jurisdiction and power to control the prosecution of all suits in which it is a party, but because prosecution of criminal cases within the county directly affects the county, county commissioners have the authority to employ additional counsel to prosecute criminal cases. Op. Nev. Att'y Gen. No. 42 (December 5, 1915).

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The BOCC properly agendized the matter of the filing of the Petition and the hiring of outside counsel on the agenda for a special meeting on June 9, 2010. It then took appropriate action on June 9 when it voted to ratify the filing of the Petition and authorized funds enabling the County to contract with Mr. Loomis to represent the BOCC in this matter. The BOCC's ratification of Chairman Hollis' decision to hire private attorney Keith Loomis for the limited purpose of filing a Petition in court, complied with the OML.

Even assuming a potential OML violation, a public body may take corrective action to rectify a violation of the OML. The NEVADA OPEN MEETING LAW MANUAL, §§ 11.01–11.04 (10th ed. 2005) specifically allows public bodies to "cure" or take corrective action: "A public body that takes action in violation of the Open Meeting Law, which action is null and void, is not forever precluded from taking the same action at another legally called meeting. *Valencia v. Cota*, 617 P.2d 63 (Ariz. Ct. App. 1980); *Cooper v. Arizona; Western College District Governing Board*, 610 P.2d 465 (Ariz. Ct. App. 1980); *Spokane Education Ass'n v. Barnes*, 517 P.2d 1362 (Wash. 1974)." OML Manual, § 11.04.

CONCLUSION

The issues presented in the complaint asserted the BOCC took illegal action when the Petition was filed because it was filed in the name of the BOCC. But, our investigation showed no illegal or serial communications among the BOCC members. Mr. Osborne and Chairman Hollis chose to give the full BOCC the choice to ratify or reject their initial authorization for private attorney Keith Loomis to file the Petition.

Even if we accept the complaint's charge that the filing of the Petition was an illegal act on behalf of the BOCC, the OML does not forbid corrective action to either ratify the action complained of, or to reject the action. In either scenario the BOCC acted properly under the OML when it ratified Mr. Hollis' and Mr. Osborne's earlier decision to authorize Mr. Loomis to file the Petition. It makes no sense to forbid public bodies from correcting what could be construed as illegal actions on matters within its jurisdiction, control, or power as that view is antithetical to the best interest and conduct of the public's business. The OML Manual states that: "Although it may not obliterate the violation, corrective action should be taken so that the

business of government is accomplished in the open. NEVADA OPEN MEETING LAW MANUAL, §11.01 (10th ed. 2005)

DATED this 24th day of August, 2010.

CATHERINE CORTEZ MASTO
Attorney General

By: [signature]
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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 24th day of August, 2010, 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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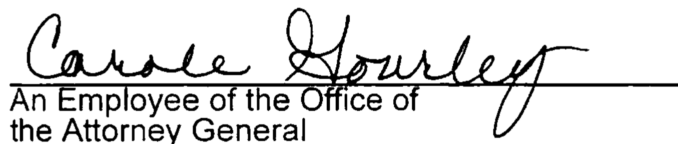

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September 10, 2010

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Re: Open Meeting Law Complaint
AG File No. 10-024 / OMLO 2010-06
Clark County School District Board of Trustees

Dear Mr. Small:

Open Meeting Law Complaint AG File No. 10-024 presented an unusual issue. The issue was whether the Open Meeting Law (OML) was violated when a quorum of the Clark County Board of School Trustees (CCBST) gathered at a publicly noticed meeting of the Bond Oversight Committee (BOC) – a CCBST standing committee.

CCBST's response to the complaint did not dispute the alleged fact that a quorum of the CCBST attended a BOC meeting on March 18, 2010. CCBST denied that the OML was violated even though a quorum attended the BOC meeting, because no "meeting" occurred within the meaning of NRS 241.015(2).[1]

Our investigation of this complaint was based on statements from the individual trustees who attended the BOC's March 18, 2010 meeting and a response from CCBST counsel.

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[1] NRS 241.015 Definitions. As used in this chapter, unless the context otherwise requires:
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.

FACTS

A regularly scheduled and properly noticed BOC meeting was held on March 18, 2010. At the beginning of the meeting, (11:40 a.m.), only Trustee Sheila Mouton, CCBST's liaison to the BOC, was present. She was there to report to the BOC in her capacity as liaison.

The meeting was called to order at 11:40 a.m. in the Administrative Center Conference Room, 5100 West Sahara Avenue, Las Vegas, Nevada. Shortly after the BOC meeting began, Trustee Terri Janison arrived at the meeting, and then Trustee Linda Young arrived shortly after noon. Mr. Ken Small, complainant, arrived at approximately 12:30 p.m. Shortly after Mr. Small arrived, he saw Vice President Carolyn Edwards enter the meeting room.

With the arrival of Trustee Edwards, a majority of the Board of Trustees was present at the BOC meeting. Around 1:00 p.m., Trustee Janison left the meeting reducing the number of trustees remaining to less than a numeric quorum. CCBST admitted that a majority of the trustees were simultaneously present at the BOC Meeting for something less than one-half of an hour. The meeting ended at 1:10 p.m.

Except for Sheila Moulton, none of the trustees in attendance spoke at the meeting. Trustee Moulton made a report to the BOC. Neither she nor the other Trustees communicated with members of the public or with each other. Each trustee stated that she attended the meeting to listen to discussions and presented materials. None of the trustees did more than observe the proceedings. While the trustees listened, they did not sit near each other, nor did they participate in BOC discussions. Signed statements of three trustees deny any later discussions about this BOC meeting with each other or any other trustee.

The minutes of the March 18, 2010 BOC meeting reflect that the BOC took official action only to approve the meeting's agenda and to approve the minutes of previous BOC meetings held on January 21, 2010 and February 18, 2010. There were other action/discussion items on the agenda, but the BOC only heard presentations under each item.

The Board of Trustees acknowledges that for less than 30 minutes a majority of its members were simultaneously present at the BOC Meeting.

ISSUE

Whether a violation of the OML occurred where a quorum of the CCBST attended a regularly scheduled public meeting of a CCBST standing committee, without prior notice and publication of an agenda, and where the Trustees only listened to the meeting but did not participate in it.

DISCUSSION AND ANALYSIS

Our departure point for analyzing this issue is the OML's definition of "meeting." The OML does not specifically prohibit members of a public body from attending a meeting of its own standing committee, so we have to determine if the facts indicate a meeting occurred.

The mere presence of a quorum of a public body at another meeting, even one over which the quorum may have supervision, control, jurisdiction or advisory power, does not automatically trigger the application of the OML. This office opined in 1997 that before the OML is triggered, there must have been a "meeting" within the meaning of NRS 241.015(2). In 1997, this office issued an opinion regarding how "meetings" may occur when members of public bodies assemble.

In part the opinion states:

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

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

However, in 2001 this office issued an opinion based on similar facts, which created an apparent conflict with the 1997 OML opinion – AG File No. 97-058.

In Op. Nev. Att'y Gen. No. 2001-05, March 14, 2001, (hereinafter AGO 2001-05) this office answered a question from a county district attorney. He asked this office to opine on the question of whether an OML violation occurred if a county commissioner attended and participated "in the decision making process of a board, commission, or other organization" if another county commissioner is a member of that body and the meeting is not publicly noticed as a meeting of the Board of County Commissioners.

Our opinion answering the D.A.'s question, concluded that: "...if two commissioners are in attendance at a gathering to deliberate, including the mere receipt of information, on a subject which is within the supervision, control, jurisdiction, or advisory power of the Board, then the gathering must be publicly noticed as a meeting of the Board." Op. Nev. Att'y Gen. No. 2001-05, March 14, 2001, p.5. The opinion's conclusion stated that "Whenever a quorum of a public body gathers, discusses, decides, gathers information, or otherwise deliberates on matters over which the commissioners [or any public body] have supervision, control, jurisdiction, or advisory power, a meeting of that [public body] Board within the meaning of NRS 241.015(2) takes place." *Op. Nev. Att'y Gen. No. 2001-05* (March 14, 2001), p.7. There was no mention of the 1997 opinion, AG File No. 97-058, in Op. Nev. Att'y Gen. No. 2001-05, March 14, 2001.

Since *Op. Nev. Att'y Gen. No. 2001-05* (March 14, 2001) was published, the Nevada Supreme Court decided *Dewey v. Redevelopment Agency of the City of Reno*, 119 Nev. 87, 64 P.3d 1070 (2003). This case is important because the Supreme Court defined "deliberation" in some detail.

The *Dewey* court said that "deliberation" means "to examine, weigh, and reflect upon the reasons for or against a choice thus connoting not only **collective** discussion, but the **collective** acquisition or the exchange of facts preliminary to the ultimate decision." (Emphasis added) *Dewey* 119 Nev. at 97. The *Dewey* court also stated that ". . . the Open Meeting Law is not intended to prohibit every private discussion of a pubic issue. Instead, the Open Meeting law only prohibits **collective** deliberation or actions where a quorum is present." *Dewey* at 119 Nev. 94-95. [Emphasis added.]

It was AGO 2001-05's interpretation of the definition of deliberation, one of two components of the statutory definition of "meeting," which was the lynchpin of the opinion. AGO 2001-05 defined "deliberation" to mean ". . .to examine and consult to form an opinion and to weigh arguments for and against a proposed course of action" and it added that "In the context of the open meeting laws, deliberation includes the mere attendance at a meeting resulting in the receipt of information. (Citations omitted) These definitions were taken from case law in Tennessee, Wisconsin, and West Virginia.

Dewey negated AGO 2001-05's definition of "deliberation". The Court said that a public body engages in "deliberation" when a quorum of a public body engages in "collective discussion of an issue with the goal of reaching a decision. . . " Thus, by definition, members of a public body, including a quorum, cannot deliberate if they attend the standing committee meeting merely as an observer. This definition of "deliberation" makes it clear that even if a quorum is present, merely sitting in a public meeting only as observers gathering information from the discussion, is not a "meeting" unless the quorum engages in **collective** discussion or action preliminary to reaching a decision. *Dewey,* 119 Nev. at 98. (Emphasis added)

Mere attendance at a standing committee meeting by a member of the parent legislative public body has been excepted from the application of California's Open Meeting Law. Both the Ralph M. Brown Act, an open meeting law act applicable to local agencies (county, city, town, school district, other political subdivisions including boards and commissions) and the Bagley Keene Open Meeting Law Act of 2004, applicable to all state entities (boards, commissions, committees, councils and panels, etc.) expressly except from the application of the Open Meeting law "the attendance of a majority of the members of a state body [public body] at an open and noticed meeting of a standing committee of the body, provided that the members of the [public body] who are not members of the standing committee attend only as observers." Bagley Keene Open Meeting Act, Government Code §11122.5(c)(6) Meeting defined; exceptions; Ralph M. Brown Act, Government Code §54952.2(4) and (6).

The quoted language, in the paragraph above, added to both California open meeting law acts, rejected the Opinion of the California Attorney General in No. 95-614 (June 10, 1996) which had opined that the mere presence of a majority of a legislative body of a local agency at its own subcommittee hearing violated the notice and agenda requirements applicable to the parent legislative body. Accord: Minnesota Open Meeting Law Opinion 63a-5; August 28, 1996, (mere attendance by additional council members at a meeting of council committee would not violate the OML unless such members participated in committee deliberations or discussions.)

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

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

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

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

The Court said:

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

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

CONCLUSION

The attendance of a quorum of a public body at a public meeting of a standing committee, over which the public body has supervision, control, jurisdiction or advisory power, does not automatically trigger the application of the OML. Before the OML applies, there must have been a "meeting" within the meaning of NRS 241.015(2).

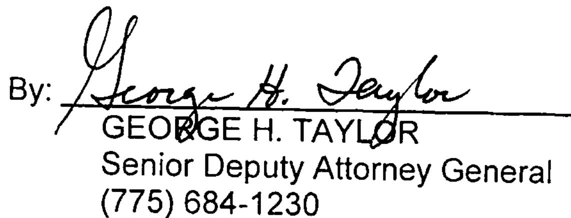
Where members of a public body, even a quorum, attend a standing committee's public meeting as only observers, mere attendance does not constitute a "meeting" among the members of the public body.

When a quorum of the CCBST attended the March 18, 2010 public meeting of the Bond Oversight Committee, a CCBST standing committee, a CCBST quorum did not participate in the BOC's meeting, nor did they collectively discuss or take action on any matter within their jurisdiction or control.

Based on these facts, there was no violation of the OML. To the extent Op. Nev. Att'y Gen. No. 2001-05, March 14, 2001, conflicts with this opinion, it is overruled.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: 
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Carolyn Edwards, Vice-President
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Chris Garvey, Member
Larry P. Mason, Member
Sheila Moulton, Member
Deanna L. Wright, Member