

Public Body or Not? Case Study

AG File No. 10-10:

Complaint alleged that a quorum of the members of the Superintendent's Educational Opportunity Advisory Committee (Committee) were appointed by Clark County Board of School Trustees. If true, then under prevailing interpretation of the OML, the Committee became a public body at that time. If the Committee was a public body, then its failure to provide notice and agenda prior to two meetings in January 2010 was a violation of NRS 241.020(2).

Complainant's argument for application of the OML:

Complaint made two points: (1) any advisory body of the state or local government which advises or makes recommendations to any entity¹ which expends or disburses or is supported in whole or in part by tax revenue, is a public body. NRS 241.015(3). (2), § 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.

Issue: How to apply §3.04 from the A.G.'s Manual

Decision:

It was determined this **group was not a committee** subject to the OML

§3.04 Attorney General's manual states:

"...to the extent that 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 Open Meeting Law. See OMLO 2002-017 (April 18, 2002) and OMLO 2002-27 (June 11, 2002)."

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.

The decision was a factual determination based on affidavits from each Trustee:

Evidence provided by the District showed that the Committee was not formed by the BST, despite the existence of a document from the district stating that at least 9 members were “appointed.” Affidavits from each Trustee and the Superintendent, said the group was not formed for the purpose of reporting to the BST, but it was formed to assist only the Superintendent; therefore we concluded it was not subject to the OML.

Whether viewed from the vantage of “informality of appointment” or “formal appointment” the Trustee’s statements were that the group was formed to assist the Superintendent, not the Trustees. There was no evidence to suggest the group reported to the Trustees or that they had anything to do with the group after presenting names to the Superintendent.

Issues for Discussion by the Task Force:

(1) Should any tether to a public body result in a finding of committee? How tangential can a group be and be considered a public body.

(2) Consider this issue in the context of NRS 241.015: the definition of “public body”. The statute literally makes any group reporting to an “entity” subject to the OML. Should definition of entity be enlarged to include agency heads, the governor, and county and city managers? Etc.

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AG File No. 10-031:

Complaint alleged a “selection committee” whose task was to choose the developer for the Carson Nugget downtown project was a public body subject to the OML. It was alleged to be a public body because it was composed of some elected officials.

Complainant’s argument for application of the OML:

Argument was based solely on the fact that the “selection committee” was composed of elected officials.

Issue:

Does the OML apply to this committee because most of its members were elected officials.

Decision:

The OML did not apply.

The Carson City Board of Supervisors (Board) did not participate in the appointment of the selection committee; Secondly, the selection committee had no legal duty to report to the Carson Board of Supervisors.

Section 3.09 of the NEVADA OPEN MEETING LAW MANUAL (10th ed. 2005) states an organization is not a public body even though a few government officials serve on a board or other organization:

“The mere receipt of a grant of public money does not by itself transform a private, nonprofit civic organization into a “public body” for purposes of the Open Meeting Law, nor does the membership of a few government officials on the organization's board of directors, per se, make the organization a “public body.”

See OMLO 2004-03 (February 10, 2004) and
OMLO 2004-20 (May 18, 2004).”

Issues for Discussion by the Task Force:

Whether service on local committees or receipt of public funds or both require application of the OML.

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AG File No: 10-029

Two local governments negotiate a police/fire interlocal agreement biennially. Each government utilizes a “negotiation team” to hammer out the financial details. No formal appointment to this team is made, but each team (composed of 5 members) has two elected public body members, the balance being other elected officials or staff. The teams have met privately to conduct negotiations.

Complainant’s argument that OML does not apply:

The argue there was no formal appointment of committee; and each “team” expresses their need, if not right, to negotiate financial details in private just like they do when negotiating collective bargaining agreements under NRS 288.

Issue:

Does the OML apply? Why?

Decision:

The OML applies; once again §3.04 of the AG’s Manual plays a deciding role:

“...to the extent that 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 Open Meeting Law. See OMLO 2002-017 (April 18, 2002) and OMLO 2002-27 (June 11, 2002).”

In addition another section of §3.04 makes it clear that “appointment” is a flexible process:

“...The Office of the Attorney General opined that formality in appointment is not the sole dispositive factor in determining what constitutes a public body under the Open Meeting Law, and

informality in appointment should not be an escape from it; to hold otherwise would encourage circumvention of the Open Meeting Law through the use of unofficial committees.

The “negotiation teams” were tasked by their parent body’s to negotiate financial terms, and make recommendations to the parent body. It turns out the recommendation to the parent body was a mere formality as the parent body routinely approve the team’s recommendation without debate or discussion.

Issues for Discussion by the Task Force:

How to define committee: NRS 241.015(3)
Form or Function?

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AG File No: 07-025

Complaint alleged that a group known as the Walker Basin Project Stakeholders Group (hereinafter: WBPSG) was a public body and violated the OML by not recording meetings, by not generating minutes in a timely manner, and by not seeking approval of those minutes.

Our investigation showed that:

WBPSG is a product of the Walker Basin Project (WBP), a University of Nevada project, which in turn was created by federal law (Public Law 109-103, section 208). Public Law 109-103, section 208 authorizes funding to the University of Nevada for the Walker Basin Project in an amount up to \$70,000,000 for the preservation of Walker River and its watershed. Section 208 authorizes the University, among other objectives, to use the funds to acquire from willing sellers, land, water appurtenant to the land, and related interests in the Walker River Basin, Nevada.

WBPSG, the body at issue in this complaint, was formed at the invitation of the UNR staff executive steering committee created by Chancellor Klaich.² 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 Stakeholder committee. 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 Walker Basin Project at regular meetings.

² Stakeholders Committee members include: Mauricia Baca, member-at-large selected by U.S. Sen. Harry Reid, Alan Biaggi, representing the Nevada Department of Conservation and Natural Resources, David Fulstone, member-at-large selected by U.S. Sen. 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 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, Pam Wilcox, representing the Nevada Division of State Lands

Although an agenda is prepared by the Stakeholders Group, the meetings are informal. No recordings of the meetings have been made. The body does not take action on any matter; it is not funded by the University, nor does it spend or disburse any money³. Its meetings are open to the public and are held in public venues.

Complainant's argument was that this group is a public body.

Issue:

Decision: UNR's Walker Lake Stakeholder's group was deemed not to be a public body. Among the issues we considered was caselaw from other state courts that have considered this issue:

“[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, section 4.100 (2000)(citations omitted).

And our own definition in NRS 241.015:

WBPSG received no tax revenues, it was not an advisory body and did not have decision making power over any issue. So, there were 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.

The basis for this decision began with consideration of guidance from our Manual:

³ Travel expenses, meals and lodging and other expenses of Ms. 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.

“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, 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. (citing OPEN MEETING LAW MANUAL, § 3.01 (9th ed. 2001)). 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.

Issues for Discussion by the Task Force:

Is the definition of “public body” as applied in this case easy to apply, cumbersome, or does it miss the mark altogether.