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February 11, 2022

Via Certified Mail

Roger Tobler

[REDACTED]
[REDACTED]

Duncan McCoy

[REDACTED]
[REDACTED]

Mike Pacini

[REDACTED]
[REDACTED]

Peggy Leavitt

[REDACTED]
[REDACTED]

**Re: Open Meeting Law Complaint, OAG File No. 13897-382,
City of Boulder City Council**

Mr. Tobler, Mr. McCoy, Mr. Pacini, and Ms. Leavitt:

The Office of the Nevada Attorney General (“OAG”) has received your complaints alleging the City of Boulder City Council (“BCCC”), violated Nevada’s Open Meeting Law by engaging in “meetings” to deliberate toward a decision to retain legal counsel. Pursuant to Nevada statute, the OAG is authorized to investigate and prosecute violations of the Open Meeting Law (“OML”). *See Nevada Revised Statutes (“NRS”) 241.037, 241.039, and 241.040.*

Following review of your Complaint and attached documentation, the BCCC’s Response and attached documentation, pleadings and papers filed in Eighth Judicial District Court Case No. A-20-818973-C, and relevant legal authorities, the OAG

concludes the BCCC did not violate the OML.

FACTS

The City of Boulder City (“City”) is a municipal corporation governed by a City Council that consists of five members. On August 3, 2020, Steven Morris, formerly the City Attorney, and Alfonso Noyola, formerly the City Manager, filed a lawsuit against the City alleging an OML violation (the “Litigation”) related to a meeting of the BCCC scheduled to be held on August 6, 2020 (the “Special Meeting”). The purpose of the Special Meeting was to consider Mr. Morris and Mr. Noyola’s character, alleged misconduct, and possible termination.

Due to the conflict presented by Mr. Morris’ decision to file a lawsuit against the City, Mr. Morris designated Gary Booker, Esq., to serve as City counsel for the purposes of the Special Meeting. However, Mr. Booker is a criminal lawyer who was not comfortable advising the BCCC concerning the Special Meeting or the Litigation.

On or about August 4, 2020, Mayor Kiernan McManus (“Mayor McManus”) sent separate text messages to BCCC members James Adams, Janet Hoskins, and Tracy Folda, asking each person to contact him about an urgent matter. When the BCCC members responded to the message, Mayor McManus informed them a lawsuit had been filed against the City by its City Attorney and City Manager, and that the City needed to obtain representation from a private law firm. Mayor McManus further arranged for BCCC members to speak with attorneys from Bailey Kennedy, a Las Vegas law firm.

Also on August 4, 2020, Mr. Morris and Mr. Noyola submitted an *Ex Parte* Application for Temporary Restraining Order and Motion for Preliminary Injunction in the Eighth Judicial District Court, which sought to enjoin the BCCC from considering the termination of Mr. Morris and Mr. Noyola as City employees. The Court granted the *Ex Parte* Temporary Restraining Order, and the Special Meeting was cancelled.

On August 6, 2020, the City published an amended agenda for a regular BCCC meeting scheduled for August 11, 2020. The August 11th agenda listed “retention of the law firm of Bailey Kennedy to render legal services to the City (and City Council)” in connection with the lawsuit filed by Mr. Morris and Mr. Noyola. At the August 11th meeting, a majority of the BCCC voted to hire Bailey Kennedy.

On August 25, 2020, Mr. Morris and Mr. Noyola filed their First Amended Complaint, which alleged additional OML violations stemming from an August 6, 2020 email sent by Mayor McManus to other members of the BCCC, and from communications between BCCC members and Bailey Kennedy attorneys that

occurred prior to the August 11th meeting.

On September 29, 2020, the Court entered an order dissolving the Ex Parte Temporary Restraining Order.

On October 5, 2020, Boulder City filed a motion to dismiss the First Amended Complaint filed by Mr. Morris and Mr. Noyola.

On November 10, 2020, Complainants filed the instant OML Complaint. The allegations of the OML Complaint are substantially similar to the allegations raised in the First Amended Complaint filed by Mr. Morris and Mr. Noyola.

On November 19, 2020, the Court entertained oral argument on Boulder City's motion to dismiss the OML claims filed by Mr. Morris and Mr. Noyola. At the conclusion of the hearing, the Court dismissed the claims and issued a related order on December 17, 2020.

ANALYSIS

Your OML Complaint alleges the BCCC violated the OML when it engaged in “meetings” to deliberate toward a decision to hire legal counsel prior to the August 11, 2020 public meeting. You argue the BCCC's communications do not fall under the attorney-client conference exception to public meetings and that, even assuming the exception does apply, the BCCC violated the OML by privately committing funds to its litigation defense efforts prior to the August 11, 2020 public meeting.

The OML provides that “[e]xcept as otherwise provided by specific statutes, all meetings of public bodies must be open and public . . .” NRS 241.020. A “meeting” is “a gathering of members of a public body at which a quorum is present . . . to deliberate toward a decision or to take action on any matter over which the public body has supervision . . .” NRS 241.015(3)(a)(1). To “deliberate” means “collectively to examine, weigh and reflect upon the reasons for or against the action. The term includes, without limitation, the collective discussion or exchange of facts preliminary to the ultimate decision.” NRS 241.015(2).

Nothing about Mayor McManus' text messages to BCCC members asking them to contact him about an urgent matter and informing them of the City's need to hire private counsel are indicative of “deliberations” toward public action. Further, the information conveyed in the challenged communications is the same information that is provided in the August 11th agenda, and a discussion of whether to add or remove an agenda item is not a “meeting” for the purposes of the OML. *See Schmidt v. Washoe Cnty.*, 123 Nev. 128, 135, 159 P.3d 1099, 1104 (2007); 2001-09 Open Mtg. Law Op. No. 3 (Mar. 28, 2001).

Regarding the conference call between BCCC members and Bailey Kennedy attorneys, there is insufficient evidence regarding the content of the call to determine whether an OML violation occurred. Bailey Kennedy billing records are not evidence of what discussions took place, and the call would appear to be protected by the attorney-client privilege. Thus, the OAG concludes your related allegations are unsubstantiated. Because there is insufficient evidence of the content of the conference call, the OAG declines to address whether the call is encompassed by the legal consultation exception to the OML's definition of "meeting." *See* NRS 241.015(3)(b)(2).

CONCLUSION

The Office of the Attorney General determines that the City of Boulder City Council did not violate Nevada's Open Meeting Law.

Sincerely,

AARON D. FORD
Attorney General

By: /s/ Jared M. Frost
Jared M. Frost
Senior Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on February 11, 2022, I mailed foregoing document via Certified Mail, postage paid to the following:

Roger Tobler

[REDACTED]
[REDACTED]

Certified Mail No.: [REDACTED]

Duncan McCoy

[REDACTED]
[REDACTED]

Certified Mail No.: [REDACTED]

Mike Pacini

[REDACTED]
[REDACTED]

Certified Mail No.: [REDACTED]

Peggy Leavitt

[REDACTED]
[REDACTED]

Certified Mail No.: [REDACTED]

/s/ Debra Turman
An Employee of the Office of
The Attorney General