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July 20, 2020

*Via U.S. Mail*

Frank Wright  
[REDACTED]  
[REDACTED]

**Re: Open Meeting Law Complaint, O.A.G. File No. 13897-278**

Dear Mr. Wright:

The Office of the Attorney General (“OAG”) is in receipt of your complaint (“Complaint”) filed on April 9, 2018 alleging a violation of the Open Meeting Law (“OML”) by the Incline Village General Improvement District (“IVGID”) at an unspecified date and time.

The OAG has statutory enforcement powers under the OML, and the authority to investigate and prosecute violations of the OML. Nevada Revised Statutes (“NRS”) 241.037; NRS 241.039; and NRS 241.040. In response to the Complaint, the OAG reviewed the Complaint, response from IVGID (“Response”), prior open meeting law decisions, recorded video from the meeting in question, and portions of the Nevada Revised Statutes relevant to the Complaint.

**FACTUAL BACKGROUND**

Previously, Mr. Wright filed two separate complaints on February 16, 2017 and April 3, 2017 complaining of conduct at prior IVGID meetings.<sup>1</sup> In response to those complaints the Office of the Attorney General issued Findings of Fact and Conclusions of Law on October 19, 2017 (the “October 2017 Findings”). Amongst the various issues discussed in the October 2017 Findings was IVGID’s public comment advisory statement, which had been read into the record by IVGID’s counsel.<sup>2</sup> IVGID’s use of a

<sup>1</sup> OAG file Nos 13897–224 & 226.

<sup>2</sup> The present complaint contains specific allegations against Board counsel, who is alleged to have “made a mockery of [the Office of the Attorney General’s] instructions.” While Board counsel is

public comment advisory statement in that instance was not found to have constituted a violation of the OML.<sup>3</sup>

The Complaint now alleges that the public comment advisory statement issued by IVGID “is seriously flawed and discouraged public comment.” The Complaint also includes a copy of the advisory statement with separate allegations of impropriety.

### LEGAL ANALYSIS

The OAG has statutory enforcement powers under the OML, and the authority to investigate and prosecute violations of the OML. NRS 241.037; NRS 241.039; and NRS 241.040. The OML applies only to a “public body” as defined in NRS 241.015(4). Here the Complaint is alleged against IVGID, which is a General Improvement District organized and operating under Chapter 318 of the Nevada Revised Statutes.<sup>4</sup> As such it is a public body as defined in NRS 241.015(4).

The OAG’s investigation of the Complaint included a review of the agenda, the public comment advisory statement, and Complaint with attachments, the October 2017 Findings, complaints 13897–224 & 226, together with the written response to the Complaint and the supporting material provided by IVGID.<sup>5</sup>

The specific allegations of the Complaint can be broken down into two separate categories: 1) IVGID’s public comment advisory statement does not allow the Board to fully consider public comments and engage with the public; and 2) IVGID’s public comment advisory statement intimidates the public into refraining from comment. Each will be considered separately.

IVGID’s public comment advisory statement does not prevent the Board from fully

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not a public body within the meaning of NRS 241.020(4), a Board may violate the OML by allowing its counsel to take improper actions, thus actions of Board counsel taken in the name of the Board may be the basis of violations.

<sup>3</sup> The Office of the Attorney General advised IVGID to revise the statement consistent with those Findings but found no formal violation of the OML based on the content or use of the statement.

<sup>4</sup> <https://www.yourtahoeplace.com/ivgid/about-ivgid>

<sup>5</sup> IVGID presents an allegation that the Complaint was brought in bad faith and requests the OAG review an electronic video of Mr. Wrights’ various public comments to the Board at the IVGID meetings. That video was not reviewed and the OAG did not investigate IVGID’s allegation of bad faith against the Complainant. IVGID did not present any argument relating to the legal consequences of a finding of bad faith, thus it is unclear what legal effect a substantiated finding of bad faith would have. As such, the Complainant’s motivations, and IVGID’s bad faith allegation were not considered relevant to this investigation and are not reached by this analysis.

considering public comment or engaging with the public.

The Complaint alleges that several portions of IVGID's public comment advisory statement prevent consideration or engagement with the public. Specifically, the Complaint alleges the following about various portions of the public comment advisory statement:

**Allegation #1:** "This statement is a pre-condition to voiding a presentation by a member of the public."

**Allegation #2:** "It goes so far as to discredit any statement, it is an attempt to marginalize public comment."

There is no support for these allegations. The public comment advisory statement does not indicate that public comment will be voided, ignored or otherwise diminished except for several narrow restrictions consistent with Nevada law. The quotation simply explains legal requirements placed on the body regarding public comment and expresses a request for politeness and respect during the public comment period. Nevada law further establishes that any restrictions on public comment must be placed on the agenda.<sup>6</sup> There is no requirement for a public comment advisory statement, however, the public must be apprised of any restrictions on public comment. IVGID's decision to include such restrictions in its advisory statement are reasonable and consistent with the OML. Additionally, the public comment advisory statement specifically informs the public that their right to make negative or positive comments is protected and only indicates that willful disruption of the meeting will not be allowed while encouraging politeness and civil discourse. IVGID did not violate the Open Meeting Law by including lawful restrictions on public comment in its public comment advisory statement.

**Allegation #3:** "This statement takes the board out of the meeting, if a board member wants clarification or wants to add a comment he/she has been regulated [sic] to a mime. The chair giving the general manager the power to respond to public comment over an elected public official is just wrong, if not illegal."

Here IVGID's public advisory statement attempts to explain to the public the prohibition on engaging in Board deliberation of public comments which have not been properly agendized.<sup>7</sup> The difficulty for IVGID is that a public body's ability to engage

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<sup>6</sup> NRS 241.020(2)(d)(7)

<sup>7</sup> OMLO 10-07, AG File No. 10-037 (October 19, 2010)

in discussion with the public during public comment is specifically protected by statute.<sup>8</sup> However, this ability to discuss matters does not allow a public body to deliberate, as defined by NRS 241.015(2), on matters that have not been properly agendaized. This tension and the legislative history behind it has been previously addressed in OMLO 10–07. Here, the public comment advisory statement does not state that discussion of public comment is legally prohibited, just that public comment is not generally a question and answer period. The record does not show that the Board holds the mistaken impression that discussion of public comments is legally prohibited, nor that it has advised the public of such. Though they may engage in discussion of public comment if they choose to, “if members decide discussion with the public is not warranted, no OML violation occurs.”<sup>9</sup> The record does not demonstrate IVGID incorrectly advised the public that it was prohibited from discussing public comment with speakers. IVGID did not violate the Open Meeting Law by indicating that generally public comment is not a question and answer period in its public comment advisory statement.

IVGID’s public comment advisory statement does not violate the OML by intimidating the public into refraining from comment.

The Complaint further alleges that the public comment advisory statement intimidates the public into refraining from comment.

**Allegation #4:** “The statement infers public comment is “nonsense”, or “outrageous”, so a member of the community reading this pre-set condition will be intimidated and possibly refrain from speaking. It is just unnecessary to have such a comment in an advisory statement.”

**Allegation #5:** “This statement is also a pre-condition to intimidation. TOTALLY unnecessary. And equally a hidden restraint on free speech. The statement references a “LAW”, what law, Is the district legal counsel suggesting a Nevada Statutes [sic] on restraint on free speech? This is again a method to restrain public comment. The statement in the public comment advisory [sic] “thus **even nonsensical and outrageous statements can be made**”, it assumes public comments are or could be not worthy of consideration.”

The public comment statement informs the public that their right to make statements will not be restricted even if the statements are nonsensical. Contrary to

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<sup>8</sup> Discussion of Public comment is specifically allowed. NRS 241.020(2)(d)(3)

<sup>9</sup> OMLO 10–07, AG File No. 10-37 (October 19, 2010), quoting OMLO 2003–13 (March 21, 2003)

the Complaint's allegation that this implies that the public comment is nonsense, the statement actually confirms that even nonsensical and outrageous comments would be allowed. There is no evidence that this statement has the effect of intimidating the public to refrain from speaking. IVGID did not violate the Open Meeting Law by specifically including notice that outrageous and nonsensical statements can be made in its public comment advisory statement.

**Allegation #6:** "In this statement legal counsel has eliminated the board from doing their elected duties, but not engaging the public, and again tainted the public comments as being not worthy of consideration. "Staff **and the Board of Trustees are advised; not to respond to even the most ridiculous statements"**"

**Allegation #7:** "Here counsel has again taken the board out of the mix, by not responding! And having the board act like a "mime" and legal counsel goes as far as to identifying this conduct as "being professional." What is professional when a board member has a question and can't ask for clarification. Is sitting on your hands professional?"

The public comment advisory statement includes notice that counsel has advised the staff and the Board not to respond to comments. As discussed above and in previous decision OMLO 10-07, the Board is allowed to discuss public comments so long as they stop short of deliberation. The Board has been advised by its counsel to refrain from any responses to public comment. The Office of the Attorney General has previously recommended a different practice regarding public comment. Our prior recommendation was "that at the conclusion of the public comment period or after each individual public member's comments, the Chairperson ask the Board members whether they would like to address the comments made by the public."<sup>10</sup> This practice was again recommended to a board struggling with the natural tension between the preference toward public engagement and its inability to deliberate toward a decision of a non-agendized item.<sup>11</sup> Neither prior decision of this office recommending a public body adjust its public comment practice found an OML violation in the first instance, but left open the possibility that the continued practice could result in a future finding of violation. Thus, the inclusion of these statements in the public comment advisory statement do not constitute an OML violation in this instance, but could result in a future finding of violation.

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<sup>10</sup> OMLO 2005-17, AG File No. 05-033 (August 26, 2005) Footnote #2.

<sup>11</sup> OMLO 10-07, AG File No. 10-37 (October 19, 2010)

**CONCLUSION**

The Legislative intent behind the OML is for all actions of all public bodies to be taken openly and their deliberations be conducted openly. This creates a natural tension between the rights of those choosing to attend a public meeting desiring to interact with their public officers and the rights of those who would not be alerted to those discussion because of their absence on the posted agenda. The OML balances these competing interests by allowing Boards to discuss public comment but not to deliberate toward a decision on any item not properly agendized. IVGID is not the first Board to have been advised to refrain from discussions of public comment, and Complainant is not the first member of the public to feel aggrieved by that policy. Previously, this office has twice found a Board with an overly restrictive view of its own ability to discuss public comments was not in violation of the OML, but also recommended a policy of canvassing Board members to determine if anyone wished to discuss a comment. Having reviewed the available evidence, we again caution the Board from having an overly restrictive view of its ability to engage in discussion with its public. Having determined that no violations of the OML have occurred, the OAG will close the file regarding this matter.

Sincerely,

AARON D. FORD,  
Attorney General

By:           /s/ Gregory D. Ott            
GREGORY D. OTT  
Chief Deputy Attorney General

cc: Jason Guinasso, Board Counsel to IVGID

CERTIFICATE OF SERVICE

I certify that on the 19<sup>th</sup> day of August, 2020, I mailed the foregoing letter by depositing a copy of the same in the U.S. mail, properly addressed, postage prepaid, first class mail, to the following:

Frank Wright  
[REDACTED]  
[REDACTED]

Jason Guinasso, Board Counsel to IVGID  
Hutchison & Steffen  
500 Damonte Ranch Pkwy., Suite 980  
Reno, NV 89521

/s/ Debra Turman  
An employee of the State of Nevada  
Office of the Attorney General