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OFFICE OF THE ATTORNEY GENERAL

555 E. Washington Ave. Suite 3900
Las Vegas, Nevada 89101

December 8, 2020

Via Certified Mail

Joshua Zerbel
[REDACTED]
[REDACTED]

**Re: Open Meeting Law Complaint, OAG File No. 13897-380
In the matter of Nevada System of Higher Education Board of Regents**

Dear Mr. Zerbel:

The Office of the Attorney General (“OAG”) is in receipt of your complaint (“Complaint”) filed on October 26, 2020 alleging violations of the Open Meeting Law (“OML”) by the Nevada System of Higher Education (“NSHE”) Board of Regents (“Board”) related to their alleged failure to upload meeting minutes for their open public meetings from July 22, 2020 through September 29, 2020.

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 following:

1. The Complaint;
2. The written response by the Board to the Complaint and the supporting materials attached thereto;
3. The NSHE’s Meeting Archive: Agendas, Minutes Multimedia;¹ and
4. Prior OML decisions, and portions of the Nevada Revised Statutes relevant to the Complaint.

After investigating the Complaint, the OAG determines that the Board did not violate the OML, as alleged in the Complaint. However, the OAG finds that the Board may have delayed approval of its meeting minutes pursuant to NRS 241.035.

¹ <https://nshe.nevada.edu/leadership-policy/board-of-regents/board-meeting-archive/>.

FACTUAL BACKGROUND

Between July 22, 2020 and September 29, 2020, the Board held fourteen (14) various open and public meetings, including: special meetings; ad hoc UNLV President Search Committee meetings; Community College Committee meetings; Academic, Research and Student Affairs Committee meetings; Audit, Compliance and Title IX Committee meetings; Business, Finance and Facilities Committee meetings; Health Sciences System Committee meetings; Security Committee meetings; ad hoc UNR President Search Committee meetings; and Investment Committee meetings.

Within the July 22, 2020 ad hoc UNLV President Search Committee notice and agenda, the following notice was stated:

Some agenda items are noted as having accompanying reference material. Reference material may be accessed on the electronic version of the agenda by clicking the reference link associated with a particular item. The agenda and associated reference material may also be accessed on the Internet by visiting the Board of Regents' website at: <https://nshe.nevada.edu/leadership-policy/board-of-regents/meeting-agendas/>.

Many public libraries have publicly accessible computer terminals. Copies of the reference material and any additional support materials that are submitted to the Board of Regents' Office and then distributed to the members of the Board of Regents after the posting of this agenda but before the meeting, will be made available as follows: 1. Copies of any such materials are available at the Board of Regents' Office at 2601 Enterprise Road, Reno, Nevada and the Board of Regents' Office at 4300 South Maryland Parkway, Las Vegas, Nevada. A copy may be requested by calling Winter Lipson at (702) 889-8426; 2. Copies of any such materials will also be available at the meeting site.

Likewise, the following notice was made on the notices and agendas for the Board's meetings between July 23, 2020 and August 7, 2020:

Some agenda items are noted as having accompanying reference material. Reference material may be accessed on the electronic version of the agenda by clicking the reference link associated with a particular item. The agenda and associated reference material may also be accessed on the Internet by visiting the

Board of Regents' website at: <https://nshe.nevada.edu/leadership-policy/board-of-regents/meeting-agendas/>.

Pursuant to Section 5 of Directive 006, and extended by Directives 016, 018, 021, and 026, the requirement contained in NRS 241.020(3)(c) that physical locations be available for the public to receive supporting material for public meetings has been suspended. Pursuant to Section 6 of Directive 006, and extended by Directives 016, 018, 021, and 026m copies of the reference material and any additional support materials that are submitted to the Board of Regents' Office and then distributed to the members of the Board of Regents after the posting of this agenda but before the meeting, will be made available upon request by calling Keri Nikolajewski at (702) 889-8426.

Further, for the notices and agendas for the Board's meetings held between August 21, 2020 and September 29, 2020, the following notice was made:

Some agenda items are noticed as having accompanying reference material. Reference material may be accessed on the electronic version of the agenda by clicking the reference link associated with a particular item. The agenda and associated reference material may also be accessed on the Internet by visiting the Board of Regents' website at: <https://nshe.nevada.edu/leadership-policy/board-of-regents/meeting-agendas/>.

Pursuant to Section 5 of Directive 006, and extended by Directives 016, 018, 021, 026, and 029, the requirement contained in NRS 241.020(3)(c) that physical locations be available for the public to receive supporting material for public meetings has been suspended. Pursuant to Section 6 of Directive 006, and extended by Directives 016, 018, 021, 026 and 029, copies of the reference material and any additional supporting materials that are submitted to the Board of Regents' Office and then distributed to the members of the Board of Regents after the posting of this agenda but before the meeting, will be made available upon request by calling Winter Lipson at (702) 889-8426.

Upon review of the Board's website and accessing multiple notices and agendas posted by the Board for its meetings in 2020, the OAG notes that the notices and agendas do in fact have hyperlinks next to specific agenda items that if clicked, allow access to the supporting material to that agenda item.

For example, for its March 5, 2020 meeting, the Board agendaized as Agenda Item 2a a consent item for the approval of the December 5, 2019 meeting minutes. A hyperlink is located right next to the agenda item, denoted as “Ref. A-2a” that, if clicked, brings up the draft minutes of the December 5, 2019 meeting.²

LEGAL ANALYSIS

A. The OML does not require that a public body post its meeting minutes to its website.

The Nevada System of Higher Education Board of Regents is a “public body” as defined in NRS 241.015(4) and is subject to the OML. The OAG previously addressed a similar OML complaint that asserted a public body violated the OML by failing to post its meeting minutes to its website. *See In re: I Can Do Anything Charter School Board*, OAG File No. 13897-311 (January 18, 2019). There, the OAG opined that while the OML requires that public bodies keep written minutes of each of their meetings and that those minutes are public records pursuant to NRS 241.035(1)-(2), public bodies are not required to post copies of their minutes to the internet. *Id.* Specifically, while the OML requires that minutes or an audio recording of a meeting must be made available for inspection by the public within 30 working days after adjournment of the meeting, such provision does not require that public bodies post copies of their minutes to the internet. *See id.*

Further, the fourteen (14) meetings complained of in the Complaint have taken place after the Governor’s Declaration of Emergency resulting from the COVID-19 pandemic. As part of the response to the COVID-19 pandemic, on March 22, 2020 the Governor issued Declaration of Emergency Directive 006 which provides in part that if a public body holds a meeting and does not provide a physical location where supporting material is available to the public, the public body provide the name and contact information from whom a member of the public may request supporting material electronically and must also post supporting material to the public body’s website, if maintained. The OAG also has previously opined that drafts of minutes of previous meetings to be approved at an upcoming meeting are agenda supporting material under NRS 241.020(5) and must be provided upon request. *See In re: Humboldt County Commission*, OAG File No. 98-06 (2006); *see also* Nevada Open Meeting Law Manual, § 5.06 Providing copies of agenda and supporting

² See <https://nshe.nevada.edu/wp-content/uploads/file/BoardOfRegents/Agendas/2020/03-mar-mtgs/audit-refs/A-2a.pdf>.

material upon request, p. 48 (Twelfth Edition, January 2016, Updated March 26, 2019).

As noted above, the Board posts its notices and agendas to its website. Upon accessing the notices and agendas on its website, members of the public are able to access the supporting materials, including draft meeting minutes, by clicking the hyperlinks on the specific agenda items. Accordingly, the OAG finds no violation of the OML has occurred.

B. The OML requires a public body approve its meeting minutes within 45 days after the meeting or at the next meeting of the public body, whichever occurs later, unless good cause is shown.

Lastly, while the Complaint does not allege that the Board was delinquent in approving its meeting minutes, the OAG reminds the Board that meeting minutes must be approved within 45 days or at its next meeting, whichever is later per NRS 241.035(1), so as to avoid any potential OML violations. The OML provides one exception to this general rule, which is where “good cause is shown”. *Id.* “Good cause” is defined as “a ground for legal action” or “a legally sufficient reason”. *Black’s Law Dictionary* (11th ed. 2019).

The OAG previously found that good cause existed for a delay in accepting meeting minutes where a member of the public requested revisions to the minutes while the public body’s clerk was on vacation; where there was a power outage during the meeting that caused items to be moved to the next meeting; and where portions of the minutes were found to be missing. *See In re: Incline Village General Improvement District – Board of Trustees and Incline Village General Improvement District – Audit Committee* OAG File No. 13897-260 (2018).

In this case, it appears that there has been a delay for the Board in drafting, accepting, and posting its written meeting minutes for particular meetings, including its July 22, July 23, August 7, and August 21, 2020 Special Meetings. To that end, the Board asserts that the difficulties of performing public meetings in virtual format caused by the COVID-19 pandemic constitutes good cause for the delay. The OAG is hard-pressed to understand how conducting public meetings in a virtual format impacts the Board’s responsibility in accepting written minutes within the time period stated under NRS Chapter 241. Indeed, since March 2020 at the time the Governor issued the Declaration of Emergency for COVID-19, the Board, or its subcommittees, have been able to hold meetings on sixteen (16) separate dates from April 7, 2020 through September 29, 2020. Throughout such time, the

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Board was able to draft and approve meeting minutes, as well as prepare supplemental meeting materials for its agenda items.

Nevertheless, the Board has indicated that it has put as an agenda item on its November 13, 2020 Special Meeting agenda an item for consideration for approval of its July 22, July 23, August 7, and August 21, 2020 meeting minutes, and therefore, no further action by the OAG is necessary at this time.

CONCLUSION

Upon review of your Complaint and available evidence, the OAG has determined that no violation of the OML has occurred, as alleged. The OAG will close the file regarding this matter.

Sincerely,

AARON D. FORD
Attorney General

By: /s/ Justin R. Taruc
JUSTIN R. TARUC
Deputy Attorney General

CERTIFICATE OF SERVICE

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I hereby certify that on the 8th day of December, 2020, I served the foregoing by depositing a copy of the same in the United States mail, properly addressed, postage prepaid, CERTIFIED MAIL addressed as follows:

Joshua Zerbel

[REDACTED]
[REDACTED]

Certified Mail No.: _____ [REDACTED] _____

Nevada System of Higher Education
4300 S. Maryland Parkway
Las Vegas, Nevada 89119

Certified Mail No.: _____ **7020 0640 0000 7651 9968** _____

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