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July 11, 2022

Via Certified Mail

Warren Lowman
Governor's Finance Office, Division of Internal Audits
209 E. Musser St., Suite 302
Carson City, Nevada 89701

**Re: Open Meeting Law Complaint, OAG File No. 13897-391
In the matter of Nevada Board of Pharmacy**

Dear Mr. Lowman:

The Office of the Attorney General ("OAG") is in receipt of your complaint ("Complaint") filed on February 10, 2021 alleging violations of the Open Meeting Law ("OML") by the Nevada Board of Pharmacy ("Board") related to decisions made regarding deferred compensation matching that have occurred since June 2019.

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; NRS 241.040. The OAG's investigation of the Complaint included a review of the following:

1. The Complaint and all attachments thereto;
2. The response filed on behalf of the Board and all attachments thereto, which included an audio recording of the Board's June 5, 2019 meeting relative to Agenda Item No. 14;
3. The State of Nevada Governor's Finance Office Division of Internal Audits, DIA Report No. 21-05, dated January 28, 2021;¹

¹ The OAG reviewed a copy of the Report at: <https://budget.nv.gov/uploadedFiles/budgetnvgov/content/IAudits/About/AuditRpts/DIA%2021-05%20DofA%20and%20GFO%20%20Deferred%20Comp.pdf>.

4. The meeting minutes of the Board's June 5, 2019 meeting;²
and
5. Prior OML decisions, case law, 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.

FACTUAL BACKGROUND

The Nevada Board of Pharmacy is comprised of seven (7) members and is a "public body" as defined in NRS 241.015(4); therefore, the Board is subject to the OML.

On January 28, 2021, the Governor's Finance Office, Division of Internal Audits ("DIA") issued Audit Report DIA Report No. 21-05 related to the Board's Deferred Compensation Match ("Report"). Therein, the DIA recommended that the Governor's Finance Office refer facts to the OAG to determine if open meeting law violations by the Board on deferred compensation match decisions occurred since June 2019, as the Board's approval on matching contribution increases may not have been transparent.

According to the Report, the Board first initiated an employer-match in about 2001 at the rate of \$.10 for every \$1 (10%) contributed by the employee. The employer contribution match rate was increased from 10% to 30% after the June 5, 2019 Board meeting as part of the fiscal year 2020 budget discussion, effective July 1, 2019. Another employer contribution match rate increase from 30% to 50% became effective January 1, 2020. The Report also noted that the Board's June 5, 2019 meeting agenda did not itemize employer contribution match rate increases; that the Board's meeting minutes reference only the Board's approval to modify deferred compensation benefits; that the Board did not mention increases to the employer-contribution match rate; and that the budget documentation did not provide any details of employer contributions to employee deferred compensation accounts nor did it reference an increase in the contribution rate.

The Board held an open public meeting on June 5 and 6, 2019. As part of the June 5, 2019 meeting, the Board agendaed the following item:

² The OAG obtained and reviewed a copy of the Board's June 5, 2019 meeting minutes at:
https://bop.nv.gov/uploadedFiles/bop.nv.gov/content/board/ALL/2018_Meetings/7.19.19.June.2019.Minutes.final.pdf.

14. Discussion and possible action on approval of Nevada State Board of Pharmacy budget for FY19, including cost of living increase for Board employees based upon Consumer Price Index for All Urban Consumers (CPI-U) for the West Region.

According to the minutes of the June 5, 2019 meeting, the Board's Executive Secretary, David Wuest, presented the proposed budget for the Board's consideration. The minutes reflect that Mr. Wuest also reviewed and answered questions regarding each line item of the budget. Ultimately, after discussion, the Board authorized the Executive Secretary to determine a cost-of-living increase for Board employees and to modify deferred compensation benefits.

LEGAL ANALYSIS

1. The Board's June 5, 2019 agenda met the clear and complete standard.

An agenda for a meeting of a public body must include a "clear and complete statement of the topics to be considered during the meeting." NRS 241.020(2)(d)(1). The "clear and complete statement requirement of the OML stems from the Legislature's belief that "incomplete and poorly written agendas deprive citizens of their right to take part in government' and interferes with the 'press' ability to report the actions of government." *Sandoval v. Bd. Of Regents of Univ.*, 119 Nev. 148, 154 (2003). Strict adherence with the "clear and complete" standard for agenda items is required for compliance under the OML. *Id.* The OML "seeks to give the public clear notice of the topics to be discussed at public meetings so that the public can attend a meeting when an issue of interest will be discussed." *Id.* At 155. The OAG has previously guided that public bodies should use a standard of reasonableness in preparing the agenda and to keep in mind the spirit and purpose of the OML. Nevada Open Meeting Law Manual, § 6.02 (12 Ed., January 2016, Updated March 26, 2019).

Our review of the minutes and recording of the Board's June 5, 2019 meeting shows that the Board did not stray from the agenda item's statement of topics to be considered. Specifically, as agendized, Agenda Item No. 14 was slated as discussion and possible action to approve the Board's FY19 budget, including a cost-of-living increase for Board employees. Additionally, the supplemental Board materials for Agenda Item No. 14 included a document that reflected the budget ultimately approved by the Board. Therein, the

Board delineated line items for expenses including salaries and employee benefits/deferred compensation.

At the meeting, Executive Secretary Wuest made his presentation related to salary increases and deferred compensation. Specifically, Executive Secretary Wuest requested that the Board approve the budget wherein Board employees would receive a wage increase. Executive Secretary Wuest also noted that the Board already had a program with a match for deferred compensation and for this particular budget, he asked the Board for flexibility – either front load the deferred compensation to have the match up higher or increase the percentage in matching. Ultimately, the Board voted to approve the budget as presented, which inherently included Executive Secretary Wuest’s request for flexibility in allocating the budget funds for salaries and deferred compensation. Thus, the OAG does not find a violation of the OML with respect to Agenda Item No. 14 of the Board’s June 5, 2019 meeting.

2. Agenda Item No. 14 was not subject to the heightened standard for matters of significant public interest.

A public body must recognize that a “higher degree of specificity [for agenda items is needed when the subject to be debated is of special or significant interest to the public,” *Sandoval*, 119 Nev. at 154-155, 67 P.3d at 906 (quoting *Gardner v. Herring*, 21 S.W.3d 767, 773 (Tex. App. 2000)).

Here, the Board agendized approval of its budget without specifically calling attention to the potential increases in deferred compensation for Board staff. The OAG’s investigation into this matter did not reveal facts or circumstances supporting the conclusion that the Board should have known that the increased deferred compensation contributions would be of special interest to the public. Those increases were subsequently the subject of a significant DIA audit and public findings, both of which may increase public interest in any future similar modifications. This opinion does not reach the question of whether the Board’s general budget item would meet the clear and complete standard if evidence of significant interest in a specific budgetary item existed.

3. The Board complied with the meeting minutes requirements of the OML.

The OML requires that written minutes be kept by all public bodies of each meeting they hold. NRS 241.035. The information required to be reflected in the minutes include “[t]he substance of all matters proposed, discussed or decided and, at the request of any member, a record of each

member's vote on any matter decided by vote." NRS 241.035(1)(c). The OAG has previously indicated that verbatim minutes are not required by the OML. Nevada Open Meeting Law Manual, §9.02 (12th Ed., January 2016, Updated March 26, 2019).

The Board's June 5, 2019 meeting minutes reflected that under Agenda Item No. 14, the Board received a presentation of the proposed budget for their consideration, that the Board's Executive Secretary answered the Board members' questions, and that the Board voted and authorized the Executive Secretary to determine a cost-of-living increase for Board employees and to modify deferred compensation benefits. The minutes meet the minimum requirements of NRS 241.035; accordingly, the OAG finds no violation of the OML occurred.

4. The OML is not implicated where allegations of improvident decision making by public bodies are made.

Lastly, one of the conclusions stated in the Report indicates an ancillary allegation that the Board may not have been fully informed prior to making its decisions. The OAG has previously stated that the OML does not allow the OAG to second guess decisions or actions by public bodies even if the decision might have been improvident. Nevada Open Meeting Law Manual, §6.02 (12th Ed., January 2016, Updated March 26, 2019); AG File No. 09-044 (December 17, 2009).

CONCLUSION

The OAG has reviewed the available evidence and determined that no violation of the OML has occurred on which formal findings should be made. The OAG will close the file regarding this matter.³

Sincerely,

AARON D. FORD
Attorney General

By: /s/ Greg D. Ott
GREG D. OTT
Chief Deputy Attorney General

³ This OAG Opinion should not be construed as providing an opinion whether the Board satisfied any applicable requirements enumerated in NRS Chapter 287.250 *et seq.* or Section 457(b) of the Internal Revenue Code.

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of July, 2022, 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:

Warren Lowman
Governor's Finance Office, Division of Internal Audits
209 E. Musser St., Suite 302
Carson City, Nevada 89701

Certified Mail No.: 7020 0640 0000 7651 9265

Nevada State Board of Pharmacy
985 Damonte Ranch Parkway, Suite 206
Reno, Nevada 89521

Certified Mail No.: 7020 0640 0000 7651 8879

/s/ Debra Turman

An employee of the Office of the
Nevada Attorney General