



STATE OF NEVADA  
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January 10, 2013

Barbara J. Ellestad  
1431 Pinehurst Drive  
Mesquite, Nevada 89027

Re: Open Meeting Law Complaint – A.G. File No. 12-035  
Overton Power District No. 5

Dear Ms. Ellestad

This Office reviewed your Open Meeting Law (OML) complaint and we have investigated your allegations against the Overton Power District #5 (OPD). We required OPD to respond to the complaint with a statement from counsel and asked for copies of recordings of prior Trustee meetings. Additionally, we reviewed OPD's statutory authority, NRS Chapter 318, and the record of OPD's creation in 1935 by the Public Service Commission—records held in the Nevada Secretary of State's office.

OPD asserts it is not subject to the OML because, although created by the State of Nevada, it does not meet the other criterion in NRS 241.015 that defines a public body to include only those that expend tax revenue or which are supported in whole or in part by tax revenue. Further, OPD argues that nowhere in Chapter 318 is there a requirement that entities such as OPD are subject to the OML, and OPD argues that it can only be subject to the OML "if so required under NRS 241."

After a thorough review and consideration of the complaint, its exhibits and OPD's response, we do not have to determine whether OPD is a public body subject to the OML as recent amendments to Chapter 318 explicitly set out statutory duties with significant open meeting requirements regarding record keeping and public access to those records. The statutes under NRS Chapter 318 are applicable to all governing bodies of Chapter 318 entities.

This Office has jurisdiction and enforcement authority over allegations of violation(s) of the OML. NRS Chapter 241.037.

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The complaint alleges several OML violations. First it is alleged that OPD did not provide supporting materials to the complainant in a timely manner; secondly, it is alleged that OPD did not upload past Board meeting minutes to its website until September of 2012; thirdly, it is alleged that OPD has not made audio recordings of meetings available—a violation of NRS Chapter 241 and Chapter 318; and lastly, it is alleged that past Board meeting minutes show a lack of public discussion/deliberation before public vote. Your complaint also alleged violation of the public records law (NRS 239); however, this Office does not have enforcement jurisdiction over those allegations. We informed the complainant of this Office's lack of enforcement jurisdiction over the public records allegations soon after receiving the complaint and that we would not be investigating these allegations.

### BACKGROUND

OPD was created in 1935 by the Public Service Commission of the State of Nevada pursuant to Chapter 72, Laws of 1935.<sup>1</sup> In 1941 the Nevada Supreme Court determined OPD to be a non-profit municipal corporation.<sup>2</sup> *State v. Lincoln County Power District #1*, 60 Nev. 401, 111 P.2d 528, 530 (1941). The *Lincoln County Court*, also said,

[A] corporation, therefore, created for municipal purposes, is a corporation created for public or governmental purposes, with political powers to be exercised for the public good in the administration of civil government, whose members are citizens, not stockholders; an instrument of the government, with certain delegated powers, subject to the control of the legislature and its members, officers, or agents of the government for the administration or discharge of public duties. *Id* at 532.

A municipal corporation, such as OPD, is a creature of the Legislature. Nev. Const. art. 8, § 1. It derives all its powers, rights, and franchises from legislative enactment or statutory implication. *State ex rel. Rosenstock v. Swift*, 11 Nev. 128 (1876).

In 1967 the Legislature reorganized the governing body of OPD and required OPD to operate under and exercise only the powers set forth in NRS Chapter 318, Nevada's general improvement district law.<sup>3</sup>

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<sup>1</sup> Opinion and Order of the Public Service Commission, Case No. 1064, October 28, 1935; amended September 14, 1937 by the Public Service Commission to more particularly describe the boundary of the Power District #5.

<sup>2</sup> After easily determining that Chapter 72, Laws of 1935 was constitutional, the Court said "Power districts created pursuant to the provisions of Chapter 72, Laws of 1935, are municipal corporations." *State v. Lincoln County Power District #1*, 60 Nev. 401, 111 P.2d 528,530 (1941);

<sup>3</sup> See generally NRS 318.525.

Power districts, authorized by Chapter 72, Laws of 1935, were created for the sole purpose of assisting the State in the performance of its governmental function of distributing heat, light, and power, without profit. *State v. Lincoln County Power District #1*, 60 Nev. 401, 111 P.2d 528, 532 (1941) citing *Buffalo Rapids Irr. Dist. v. Colleran*, 85 Mont. 466, 279 P. 369; *Holbrook Irr. Dist. v. First State Bank*, 84 268 P. 523 (Colo. 928); *City of Nampa v. Nampa & Meridian Irr. Dist.*, 115 P. 979 (Idaho 1911); *State v. Hunt*, 57 P.2d 793 (Wyo. 1936).

In 2009, the Legislature amended NRS 318 by adding several new sections, one of which expanded OPD Board of Trustees to seven members.<sup>4</sup> The Clark County Board of County Commissioners has statutory authority to determine OPD's corporate surety amount and also the bonding amount for certain OPD officers who may receive or disburse money of the district. NRS 318.085(4). The Clark County BOCC does not serve as the ex-officio Board of Trustees for OPD. Other sections were added in 2009 primarily to describe the process for the election of trustees.

In 2005 the Legislature amended NRS 318.085 to require the keeping of audio recordings or transcripts of *all* meetings of the Board of Trustees. Act of June 13, 2005, Ch. 373, § 14, 2005 Nev. Stat. 1410. In addition, § 14 of the Act also requires records be kept in a well-bound book, and that "except as otherwise provided in NRS 241.035 the book, audio recordings, transcripts and records must be open to inspection of all owners of real property in the district as well as to other interested persons." Official records for the District must be kept at a designated location and must be open to public inspection as provided in NRS 230.010.<sup>5</sup>

We have reviewed recent OPD agendas and minutes from Trustee meetings. These records reflect open public meetings, in which the agenda was posted in several places, video-conferencing was available, and two public comment periods appear on the agenda. Other information on the agenda indicated compliance with OML requirements regarding access for the handicapped and a notice informing the public about how agenda items could be pulled, taken out of order or combined. Despite OPD's denial of public body status, it appears that it seeks to comply with the OML.

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<sup>4</sup> See NRS 318.083:

1. Notwithstanding any provision of law to the contrary, the board of trustees of a district organized or reorganized pursuant to this chapter that exists on July 1, 2009, that is authorized only to exercise the basic power of furnishing electric light and power pursuant to NRS 318.117 in a county whose population is 400,000 or more, and for which the board of county commissioners of the county is not ex officio the board of trustees, shall consist of seven trustees.

<sup>5</sup> NRS 318.090 reads in part as follows:

318.090 Except as otherwise provided in NRS 318.0953 and 318.09533:

1. The board shall, by resolution, designate the place where the office or principal place of the district is to be located, which must be within the corporate limits of the district and which may be changed by resolution of the board. Copies of all those resolutions must be filed with the county clerk or clerks of the county or counties wherein the district is located within 5 days after their adoption. *The official records and files of the district must be kept at that office and must be open to public inspection as provided in NRS 239.010.* [Emphasis added.]

## DISCUSSION

Only the third allegation in the complaint states a claim under the OML, but it also states a claim under NRS 318.085. The first and second allegations fail to state an OML claim. Allegation number 1 contains facts indicating that supporting materials were provided to the Trustees even as they walked into the Board room. There is no OML requirement that public body members receive supporting material at any time prior to the meeting. In allegation number 2, complainant admits that OPD did post minutes at its website upon request, but the allegation does not state an OML claim because there is no OML requirement that requested financial information be posted to OPD's website. Allegation number 4 fails to state an OML claim because there is no requirement that any public body deliberate on each agenda item.

Only allegation number 3 states a cognizable claim; however we believe that NRS 318.035, which is a specific statute applicable to general improvement districts that requires a district to make and keep audio recordings of its Trustee's meetings governs and prevails over NRS 241.035, a general statute applicable to all public bodies. *In re: Resort at Summerlin Litigation*, 122 Nev. 177, 185, 127 P.3d 1076, 1081 (2006) citing *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 989 P.2d 870, (1999) (where a general statutory provision and a specific one cover the same subject matter, the specific provision controls).

## FACTS

On September 26, 2012, complainant made a request to OPD to listen to audio recordings of Board of Trustee meetings for the prior year. A few days later complainant received notice from Terry Romero, OPD's manager of Finance and Administration that there were no audio recordings of OPD Board of Trustee meetings available. OPD's response to this Office's subpoena for 12 months of audio recordings prior to October 3, 2012 stated that "OPD has not kept audio recordings of its Board meetings in the past." Clearly, OPD has been in violation of the explicit audio recording requirement of NRS 318.085(3).<sup>6</sup>

## CONCLUSION

Resolution of this complaint does not require this Office to determine whether OPD is a public body. The Legislature has provided specific statutory direction regarding record keeping, not only of Trustee meetings, but also other business records, so that OPD's operations and Trustee meetings are open and transparent to the owners of property and other interested parties. Failure to keep audio recordings and to keep them open for inspection is a violation of NRS 318.085, a statute which by

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<sup>6</sup> OPD's response to this Office's subpoena of one year of audio recordings prior to October 3, 2012 admitted OPD has not kept audio recordings in the past; however, the response stated that "Board members have unanimously agreed that, prospectively, OPD will maintain audio recordings of every board meeting for a period of one year after the meeting."

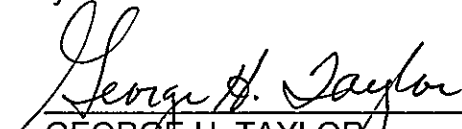
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reference incorporates an OML statute, NRS 241.035, into OPD's duty to make records, audio recordings, and transcripts open to inspection by the public.

This Office does not have enforcement authority over NRS 318, but because the OML requirements for making and keeping audio recordings are related to and identical to the duty in NRS 318.085, we urge OPD to comply with the public meeting law requirements found in NRS 241.

Sincerely,

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Attorney General

By:   
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GHT/CG

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David Anderson, Trustee  
Doug Waite, Trustee  
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