



STATE OF NEVADA  
OFFICE OF THE ATTORNEY GENERAL

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August 7, 2012

Marty Westland  
P.O. Box 151047  
Ely, Nevada 89315

Re: Open Meeting Law Complaint / Ely City Council  
A.G. File No. 12-012

Dear Mr. Westland:

This Office has completed its review of a complaint alleging violations of the Open Meeting Law (OML), NRS Chapter 241.020(5) and (6). The complaint was filed with this Office on May 9, 2012.

This Office has jurisdiction to investigate OML complaints and to seek civil remedies, including injunctive relief. Injunctive relief may require compliance with the OML, or may be utilized to prevent violations of the OML. A criminal misdemeanor penalty and a monetary penalty are also authorized relief in any court of competent jurisdiction. NRS 241.037; NRS 241.040.

BACKGROUND

The City of Ely (City) prepared a tentative budget for FY2012–2013 based in part on taxation estimates from the State of Nevada. (CTX revenue estimates). On April 3, 2012 Janette Trask, City Treasurer, sent a 2–page memo and the tentative budget along with 25 pages of supporting documentation to the Mayor, City of Ely Council members, Utility Board Members, and the City Clerk. The elected Council approved a final budget on May 15, 2012 for submission to the State of Nevada Department of Taxation pursuant to NRS 354.598.

This complaint alleges the City violated the OML during its budgeting process because it did not make the supporting documentation attached to its tentative budget available to the public at the same time it was released to the elected members of the City Council on April 3, 2012. It is alleged that 25 pages of supporting material

(including the 2–page memo) were not made available to the public prior to the Council's May 15, 2012 public meeting held for the purpose of approving a final version of the City's budget for FY2012–2013. It is alleged the 2–page memo and 25 pages of supporting material were not included in the Council's meeting packet for its May 15, 2012 Special Meeting.

Before the complaint was filed, this Office was made aware of the allegation that an April 3, 2012 inter-office memo, which included the 25 pages of supporting documentation and a tentative budget, had been distributed to the Council, the Utility Board, the Mayor, and the City Clerk and had been declared confidential and not public information, at least until the Council approved a final budget on May 15, 2012 following a public hearing. In the interim between April 3, 2012 and May 15, 2012 changes to the tentative budget could still be made.

Before the May 15, 2012 Council's public meeting, after discussion with this Office, the City determined that the contents of the April 3, 2012 Confidential Inter-Office Memo (Memo) was not confidential and that it was support material for an agenda item. In the meantime the OML complaint was filed with this Office.

### FACTS

The City responded to the complaint informing this Office it had determined that the April 3, 2012 Memo was supporting material for a public meeting and had made it available to anyone that requested it, although the requester may have had to fill out a public document request and pay a fee for copies. The City's redetermination happened prior to the May 15, 2012 Council meeting.

The City's Treasurer, who prepared the Memo believed it to be confidential as it was distributed almost six weeks before the Council meeting to vote on a final budget. Six weeks was considered too early to be a Council packet. Yet we are unconvinced that a document called an inter-office memo, which had been sent to all members of an elected public body who are not members of her office or even employees of the City or any department in the City, could be confidential as a matter of law. It clearly was not an inter-office memo. NRS 241.020(5) and (6) controls this issue. Materials provided to members of a public body must be made available to the public at the same time they are provided to members of the public body and at no cost to the requester.

We reviewed the City's April 3, 2012 Memo and conclude that it would have been reasonable if the recipients made the same conclusion we did that the Memo and its contents, 76 pages, were supporting materials for the City's May 15, 2012 special meeting. Its contents consisted of a proposed tentative budget,<sup>1</sup> and 25 pages of "worksheets," which were additional documents, but which were described in the

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<sup>1</sup> In fact, the tentative budget was again reproduced and included in the Council's packet about five days prior to the May 15, 2012 Council meeting. It was the only document in the packet for the Council's May 15, 2012 meeting.

Treasurer's introductory 2–page memo labeled as the Confidential Inter Office Memo as "supporting documentation."<sup>2</sup> The reasonable conclusion is that the memo, 25 pages of worksheets, and the tentative budget were supporting documentation for the Council's meeting on May 15, 2012 despite having been distributed almost six weeks before the meeting. The OML does not set timelines for distribution of supporting materials.

We did not find any evidence that the City refused to provide the Memo or the additional 25 pages to the public once the City agreed that the Memo was supporting material for the future Council meeting at which a final budget would be voted on.

The City Treasurer did disclose that she received a request from a member of the public for the April 3, 2012 Memo, but because the City at that time still considered the Memo to be confidential it was not provided to the requester. The City Treasurer states she invited the requester to make a public records request for the 25 pages of supporting documentation, but he left the office and did not return.

Another member of the public made an informal request for the budget, but because he did not make a formal record request plus pay copy costs he did not receive the requested materials.

The failure to provide the supporting documentation without cost to these two requesters prior to the meeting did not comport with the plain language of the statute. However, we are convinced that the City's designation of the 76-page Memo had been made in good faith. As will be discussed below, requests such as those described above must be fulfilled without copy cost until the documents become public records subject to NRS Chapter 239 after adjournment of the public meeting.

#### Public record request procedure for "supporting materials."

The City utilized a public record request procedure at the time it received the two requests for the supporting documentation, described above.

Public record requests and fees for copying documents as specified in NRS Chapter 239 do not apply to supporting materials for future agenda items. NRS 241.020(5) and (6). OPEN MEETING LAW MANUAL § 6.06 (11<sup>th</sup> ed. 2012).

The City's public records request form and associated copy costs do not apply to supporting materials prepared before or during public meetings. We will only caution

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<sup>2</sup> The City Treasurer's two page memo labeled as a Confidential Inter Office Memo listed five paragraphs describing an overview of the tentative budget including (1) estimated general fund revenues based on Department of Taxation projections, (2) general fund expenses for services and supplies, (3) changes to the Capital Improvement fund, (4) Changes in the fire protection/street improvement fund, and (5) increased fees applicable to the water fund and sewer fund. These paragraphs prepared in the Treasurer's office made it easier for recipients to target an examination of new changes in the proposed tentative budget.

the City about treating supporting materials for an item on a future agenda, which have been provided to members of a public body, as a public record under NRS 239. Until the adjournment of the public meeting for which the supporting materials have been prepared, legislative public record request requirements under NRS Chapter 239 to provide supporting materials are not applicable.

CONCLUSION

The failure to make available the entire 76-page Memo, supporting documentation and the tentative budget to the public, without cost, prior to the meeting did not comport with the plain language of the NRS 241.020(5) and (6). However, we are convinced that the City's designation of the 76-page memo had been made in good faith, and that it was not deliberate evasion of the OML, so we will only caution the City to ensure that for future public meetings its procedure complies with the OML.

When members of a public body receive supporting materials for an item on a future agenda, the public is entitled to them at the same time. NRS 241.020(6)(a). The fact that the April 3, 2012 Memo was six weeks early does not implicate or negate the clear legislative expression of transparency.

Sincerely,

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By:



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GHT/CG

cc: Kevin Briggs, Ely City Counsel  
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