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December 3, 2012

Karen M. Powell  
Rural Justice Courts of Clark County  
330 S. Third Street, #1020B  
Las Vegas, NV 89155

Re: Open Meeting Law Complaint / AG File No. 12-032  
Clark County Board of Commissioners

Dear Ms. Powell:

We have investigated your Open Meeting Law (OML) complaint against the Clark County Board of County Commissioners (BOCC). It alleges that during the BOCC's August 7, 2012 public meeting the BOCC took action in violation of the OML. It is alleged that the BOCC's approval of staff's recommended action included action on a topic that had not been noticed in the agenda item. We have investigated the allegation and conclude that no action was taken on a matter not on the agenda.

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

Item 70 on the BOCC's August 7, 2012 agenda stated: "Set the minimum compensation for the Clark County Justices of the Peace whose terms begin January 7, 2013. (For possible action)."

The BOCC approved staff's recommended compensation for six different justice court jurisdictions in Clark county; however, appended to the approval (as reported by BOCC to our request for discovery) was language denominated as an "understanding that the Board will not fill vacancies and will look at a rotational model while management staff checks with the District Attorney's (D.A.) civil office regarding Board's authority to adopt a rotational model or whether a legislative change is required." The vote was 7-0 to approve as recommended.

Jeff Wells, Assistant County Manager, explained during the meeting that he had advised the members of the BOCC in staff briefings that he would ask the D.A.'s office whether the BOCC had authority to institute a rotational model if a vacancy occurred, or whether a legislative change would be required. He had not received an answer from the D.A.'s office at the time he made these remarks to the BOCC during the August 7, 2012 meeting.

At the next BOCC meeting on August 21, 2012, a "rotational model" for covering court vacancies was proposed. The BOCC approved use of a bill draft request (BDR) to the 2013 Legislature that would propose a change in the law to create a "Justice Court travelling circuit" in Clark County. Use of one of its four BDR's to propose a travelling Justice Court circuit clearly indicates that the BOCC was advised it did not have the authority to leave vacancies unfilled, nor did it have the authority to create a rotational model absent legislative authority.

We reviewed the video record of BOCC's consideration of item 70. Councilman Tom Collins commented that he had previously requested staff provide a response or an administrative change so that certain court vacancies could be left unfilled based on his expressed view that the salary may be too high in certain townships for the work performed.

Before she made a motion to approve minimum compensation as presented in item 70, Commissioner Chris Giunchigliani sought advice from Assistant County Manager Jeff Wells whether the Board could approve a policy of leaving a court vacant and use a rotational model of available justices to keep all courts covered. Mr. Wells reminded them that he had requested an opinion from the D.A.'s office about the Board's authority to institute such a policy regarding keeping justice courts covered through use of a rotational model.

Counsel's response to this complaint, on behalf of the BOCC, characterizes Commissioner Chris Giunchigliani's motion as a suggestion with the "understanding" contingent on receipt of the D.A.'s opinion.

Even though it is clear no official action was taken in derogation of statute—NRS 4.150<sup>1</sup>, there is still the issue of whether a violation of the OML occurred.<sup>2</sup>

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<sup>1</sup> **NRS 4.150 Vacancy in office; duty of clerk of board of county commissioners.**

1. If any vacancy occurs in the office of justice of the peace, the board of county commissioners shall either:

(a) Appoint a person to fill the vacancy pursuant to NRS 245.170; or

(b) Provide by resolution for an election procedure to fill the vacancy for the remainder of the unexpired term.

2. The clerk of the board of county commissioners of each county shall, within 10 days after a vacancy has occurred in the office of justice of the peace by resignation or otherwise, certify the fact of such vacancy to the Secretary of State.

<sup>2</sup> NRS 241.020(2)(c)(1) requires that a public body's agenda must have a:

(1) A clear and complete statement of the topics scheduled to be considered during the meeting.

NRS 241.020(2)(c). Item 70 did not indicate a topic scheduled to be discussed among the members of the BOCC regarding leaving justice court vacancies unfilled and interim use of a rotational model to cover unfilled courts. Item 70 did not give notice to the public of the topic of vacancies, or that the BOCC would consider a rotational model to cover courts. This issue implicates the OML's "clear and complete" rule, NRS 241.020(2)(c)(1).

The Nevada Supreme Court decided a case brought by the Attorney General's office which alleged violations of the clear and complete rule. It was based on facts remarkably similar to the facts set out herein. In *Sandoval v. The Board of Regents of the University and Community College System of Nevada*, 119 Nev. 148, 67 P.3d 902 (2003), the Court found that the OML requires strict compliance with the plain language of NRS 241.020(2)(c)(1). The Court stated:

"The Legislature evidently enacted NRS 241.020(2)(c)(1) to ensure that the public is on notice regarding what will be discussed at public meetings. By not requiring strict compliance with agenda requirements, the "clear and complete" standard would be rendered meaningless because the discussion at a public meeting could easily exceed the scope of a stated agenda topic, thereby circumventing the notice requirement. Accordingly, we reject the "germane standard," as it is more lenient than the Legislature intended. Instead, we conclude that the plain language of NRS 241.020(2)(c)(1) requires that discussion at a public meeting cannot exceed the scope of a clearly and completely stated agenda topic."

119 Nev. at 154, 67 P.3d at 905.

However the Court left open the possibility that discussion in the abstract of a topic not on the agenda would not offend that OML. *Id.* at 154. In the *Sandoval* case, the Court said a Board of Regent's Committee "went too far when it discussed details of a (non-agendized report) and found the Committee continued discussion of other "germane" topics despite at least three warnings from counsel that the topics were not on the agenda."<sup>3</sup>

The Board of Regents was also accused of violation of the clear and complete rule. The Court found that the Regents violated the clear and complete standard because the agenda topic being discussed was simply too broad to alert the public that discussion of germane topics would occur and that the agenda item did not (as a matter of law) alert the public that the Board would engage in discussions that would lead to informal action. The Court said the question of whether the Board violated the clear and complete standard was very close.

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<sup>3</sup> Counsel did not warn the BOCC that they were straying from the agenda when the vacancy issue arose. This is another factor militating against a finding of a violation.

For several reasons we do not find a violation of the clear and complete rule. After careful review of the video of the short (four minute) consideration of item 70, we conclude that the discussion of court vacancies and the creation of a policy regarding a "rotational model" was at best very crudely discussed in the abstract. No details regarding either concept emerged in the short four minutes of discussion. As explained by counsel, the so-called contingent "understanding" was only a suggestion which had to be delayed until the D.A.'s opinion was received. It is also clear that no action was taken on any matter not on the agenda. Finally, following the meeting, the BOCC received advice from the D.A. that they did not have authority to create a rotational model or to leave any seat unfilled. NRS 4.150 requires exact compliance.

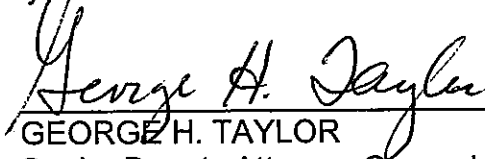
A Clark County BDR has been authorized to propose to the Legislature that a Justice Court travelling circuit be created in Clark County. This fact refutes any allegation that the BOCC took action in violation of the OML and it clears up any confusion about the effect of the action that was taken and the appended amendment based on an "understanding." Commissioner Chris Guinchigliani's motion suggested an interim policy, but it collapsed when the D.A. opined that only a change in the law could allow for unfilled vacancies and rotational model.

There is no need to pursue any action from this office regarding this allegation. We believe the reasons underlying this opinion militate in favor of issuance of this letter opinion only as a guide to future conduct so that consideration of topics not agendized must be strictly avoided.

We are closing our file on this matter.

Sincerely,

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Attorney General

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GHT/CG

cc: Mary Anne Miller, County Counsel  
Jeff Wells, Assistant County Counsel  
BOCC Members:  
Susan Brager, Chair; Steve Sisolak, Vice Chair  
Tom Collins; Larry Brown  
Lawrence Weekly; Chris Giunchigliani  
Mary Beth Scow