



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

GREGORY M. SMITH
Chief of Staff

October 22, 2013

Dylan Frehner
P. O. Box 195
Pioche, Nevada 89043

Re: Open Meeting Law Complaint / AG File No. 13-025
Caliente City Council (City Council)

Dear Mr. Frehner:

BACKGROUND

On June 20, 2013, the City of Caliente City Council (five members including the Mayor), publicly met in a properly noticed meeting. Six items on the agenda were proposed individual employment contracts for city staff, a consultant, and a proposed renewal of the City Attorney's contract. The term of four of the proposed contracts was five years; these four contracts included severance packages. All six contracts were approved with little discussion, but no public comment was allowed on each item. Councilman Aklin provided an oral explanation for his view of the need for approval of the proposed contracts. Just ten days later, a new Mayor and two new councilpersons were sworn in and seated.

Following the public meeting of the Council, an Open Meeting Law complaint was filed alleging several violations of the Open Meeting Law (OML). Those issues are set out below. We opened an investigation of the matters alleged in the Complaint. During our investigation, we asked for and received statements from the three councilmembers who voted to approve employment contracts, before the new City councilmembers were seated. We reviewed the June 20th meeting agenda, minutes, and the response from the City Attorney.

The Attorney General has jurisdiction to investigate allegations of violations of NRS Chapter 241, the Open Meeting Law (OML). This Office may 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 for violations of the OML are also authorized relief against individuals in any court of competent jurisdiction. NRS 241.037; NRS 241.040.

FACTS

The Complaint alleges four OML violations. It is alleged that: (1) six proposed contract items¹ on the City of Caliente's June 20, 2013, were not "clear and complete" as required by NRS 241.020(2)(d)(1); (2) the City failed to provide supporting documentation for the June 20th meeting when requested; (3) the Mayor failed to allow public comment² during the six agenda items in question; and (4) a quorum of the City Council "pre-decided" approval of the six contracts before the June 20th meeting.

ISSUES

- I. Whether six (6) contract agenda items were "clear and complete" within the meaning of NRS 241.020(2)(d)(2).
- II. Whether the public body failed to provide supporting documentation for the June 20th meeting when requested.
- III. Whether the Mayor failed to allow public comment during the Council's consideration of the six agenda item employment contracts.
- IV. Whether a quorum of the Council engaged in serial communications that pre-approved individual votes on the contracts prior to the meeting.

¹ Each proposed contract agenda item was similar to the others except for the name of the employee or consultant. For example, item viii read: "Approval of contract for Jerry Carter – Councilman Aklin."

² The City of Caliente's published agenda "Public Comment" notice read:

NOTE 2: Public comment may be made on any issue and any discussion of those items related to the City of Caliente; provided that comment will be limited to areas relevant to and within the authority of the Council. **No action will be taken on any items raised in the Public Comment period.** *At the discretion of the Chairman*, public comment may be received prior to action on individual agenda items. Public comment may not be limited based on viewpoint. Prior to the commencement and conclusion of a contested case or a quasi-judicial proceeding that may affect the due process rights of an individual the committee may refuse to consider public comment. NRS 233B.126.

DISCUSSION

I. Whether Six Contract Agenda Items were "Clear and Complete" Within the Meaning of NRS 241.020(2)(d)(2)3.

The legislative scope of the "clear and complete" standard is simple. It requires that any agenda contain a statement of the topics to be discussed. NRS 241.020(2)(d)(1). Attorney General OML Manual, §§ 7.02–7.03 provides direction for the drafting of agenda items. Agenda items must be described with clear and complete detail so that the public will receive notice in fact, of topics to be discussed by the public body. Agendas should be written in a manner that actually gives notice to the

³ NRS 241.020(2) and (3) state:

2. Except in an emergency, written notice of all meetings must be given at least 3 working days before the meeting. The notice must include:

- (a) The time, place and location of the meeting.
- (b) A list of the locations where the notice has been posted.
- (c) The name and contact information for the person designated by the public body from whom a member of the public may request the supporting material for the meeting described in subsection 5 and a list of the locations where the supporting material is available to the public.

(d) An agenda consisting of:

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

(2) A list describing the items on which action may be taken and clearly denoting that action may be taken on those items by placing the term "for possible action" next to the appropriate item or, if the item is placed on the agenda pursuant to section 4 of this act, by placing the term "for possible corrective action" next to the appropriate item.

(3) Periods devoted to comments by the general public, if any, and discussion of those comments. Comments by the general public must be taken:

(I) At the beginning of the meeting before any items on which action may be taken are heard by the public body and again before the adjournment of the meeting; or

(II) After each item on the agenda on which action may be taken is discussed by the public body, but before the public body takes action on the item.

↪ The provisions of this subparagraph do not prohibit a public body from taking comments by the general public in addition to what is required pursuant to sub-subparagraph (I) or (II). Regardless of whether a public body takes comments from the general public pursuant to sub-subparagraph (I) or (II), the public body must allow the general public to comment on any matter that is not specifically included on the agenda as an action item at some time before adjournment of the meeting. No action may be taken upon a matter raised during a period devoted to comments by the general public until the matter itself has been specifically included on an agenda as an item upon which action may be taken pursuant to subparagraph (2).

public of the items anticipated to be brought up at the meeting. Agenda items must never be drafted to conceal from the public any matter to be discussed or that creates confusion for the public. The Nevada Supreme Court stated that an agenda item must "give the public clear notice of the topics to be discussed at a public meeting so that the public may attend a meeting when an issue of interest will be discussed." *Sandoval v. Bd. of Regents*, 119 Nev. 148,155, 67 P.3d 902, 906 (2003).

Application of these guiding principles to each agenda item at issue persuades us that the simple wording of the items complies with the guidance provided in case law and in the Attorney General's OML Manual. The topics contained adequate detail of the topic so that anyone interested in the local government employment contracts could have attended. The topic to be discussed in each instance was a proposed employment contract for individuals whose names were identified in each item. Additional detail such as the use of severance package or the length of the term of the contract could have been included but was unnecessary for as described below. The items, as written, were adequate to meet the OML's minimum requirement.

These employment contract items were topics that gave adequate notice even considering their brevity and simplicity because many members of the public who attended the meeting made known their displeasure with the Council in two public comment periods. The Complaint alleges the contract items were not clear and complete because they were items of significant interest to the public, therefore more specificity and detail, than what was provided in the items, was required. *Sandoval*, 119 Nev. at 154-155, 67 P.3d at 906.

Issues raised by the proposed contracts and the fact that the Council proposed and voted to approve them just ten days before a new City Council was sworn in, were certainly matters of significant public interest, but additional details such as the length of the term of the contract or that three proposed contracts contained "generous" severance packages, would not have added any more weight to the item's significance.

According to the minutes of the meeting and to the account of the City Attorney, the meeting room was filled to capacity with members of the public, who were mostly opposed to the proposed contracts. That fact, coupled with the Council's refusal to table consideration of the items until the newly elected Council could be seated, suggests that the significance of these proposed contracts was not found in their terms, but in the fact that the "old" council was taking action on proposed future employment contracts just days before a "new" Council would be sworn in, thereby preventing the "new" Council from deciding on the merits of the proposed contracts – a matter relevant to their terms in office.

Motions to table the proposed contracts were made by two members of the "old" Council until the future Council could be seated. The significance of the proposed contracts rested more on refusal to table them than the terms of the contracts. There was no issue implicating the clear and complete rule.

II. Whether the Public Body Failed to Provide Supporting Documentation for the June 20, 2013, Meeting When Requested.

Supporting materials must be made available to the public, *upon request*, before the public meeting or as soon as members of the public body have received their copies. NRS 241.020(5) and (6). "Upon request" means that a member of the public must ask for a copy. AG File No. 10-008 (May 3, 2010). Supporting materials are not treated like agendas, which must be mailed or emailed. NRS 241.020(6).

Complainant requested a copy of the supporting materials just hours before the June 20th Council meeting. He states he had asked for the materials at about 1:30 PM from the Caliente Deputy City Clerk. He left the Clerk's office, but returned just minutes before the City Council meeting began at 6:00 PM. He again asked for copies of the employment agreements. The Deputy City Clerk had forgotten to copy and email them to him as previously agreed upon earlier in the afternoon. She provided the copies to the Complainant just minutes before the meeting.

In her statement, Deputy City Clerk admitted that just after 2:30 PM of June 20th, she was left alone in the office, which is normally staffed by three people, and forgot to email the contracts to the Complainant. She reiterated that this was only because she had been left alone, all afternoon, to attend to the public's payments of utility bills.

Draft contracts had been available for a few days before the meeting on June 20th, so these documents should have been provided to the public upon request. While there is no specific time period during which a "request," must be fulfilled we think that a 3-hour wait, even factoring in the crush of business, did not comply with the letter or spirit of the OML requirement to provide materials "upon request."

III. Whether the Mayor Failed to Allow Public Comment During the Council's Consideration of the Six Agenda Item Employment Contracts.

The Mayor did not call for public comment during consideration of any of the items at issue in this Complaint. But the Council's choice to provide for two periods of public comment during the meeting means the Council was not required to allow public comment on each agenda item.

NRS 241.020(2)(d)(3) requires all public bodies to make a choice when providing periods of public comment. Because Council provided two periods of general public comment, in compliance with subsection (2)(c)(3)(II) of NRS 241.020, further comment by the public during agenda items was at the discretion of the Chairman. (See footnote 2 herein) The Council's published notice of public comment clearly states that the Chairman has discretion to allow public comment during individual items.

Council provided two periods of public comment – one before any action items and one before adjournment. This meets the minimum requirement of the OML. The Mayor did not have to allow public comment during the individual agenda items.

IV. Whether a Quorum of the Council Engaged in Serial Communications that Pre-approved Individual Votes Prior to the Meeting.

NRS 241.015(3)(a) forbids serial meetings among a quorum of members of a public body where a consensus, vote, or other decision is made.⁴ Serial communications such as these constitute private meetings, they are not noticed to the public since less than a quorum is gathered at each meeting. These are also called “walking quorums” that can be used to form a secret consensus or vote out of sight of the public. The OML prohibits this as a violation of the letter and spirit of the OML.

When less than a quorum of the members of a public body gather to privately discuss public issues or even lobby for votes, the OML is not implicated. *Del Papa v. Bd. of Regents*, 114 Nev. 388, 400, 956 P.2d 770, 778 (1998); OML Manual, § 5.08 (11th ed. 2012). The OML is not intended to prohibit every private discussion of a public issue; it only prohibits collective deliberations or actions where a quorum is involved. *Dewey v. Redev. Agency of the City of Reno*, 119 Nev. 87, 94–95, 64 P.3d 1070, 1075 (2003).

Statements from the Councilman Acklin, Councilwoman Cardinal, and Mayor Moore denied they met to deliberate, take action on the proposed contracts, or secretly agree upon a vote prior to the meeting. Council Acklin’s statement said, “there had been no collusion between myself and any other member of the Council in regards to their vote on the contracts.” Councilwoman Cardinal said in her statement that she “had no idea how any of the council would vote.” Mayor Moore stated that no one asked her for information with regard to the proposed contracts.

⁴ NRS 241.015(3)(a) states:

3. “Meeting”:
 - (a) Except as otherwise provided in paragraph (b), means:
 - (1) The gathering of members of a public body at which a quorum is present, whether in person or by means of electronic communication, to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.
 - (2) Any series of gatherings of members of a public body at which:
 - (I) Less than a quorum is present, whether in person or by means of electronic communication, at any individual gathering;
 - (II) The members of the public body attending one or more of the gatherings collectively constitute a quorum; and
 - (III) The series of gatherings was held with the specific intent to avoid the provisions of this chapter.

The Complaint alleges that lack of discussion among council members indicated serial communications, but this Office previously opined that lack of discussion or minimal discussion is not evidence of serial meetings in violation of the OML. AG File No. 13-010; AG File No. 09-029. (The Legislature intended that deliberations be conducted openly, but it did go so far as to void an action in the absence of verbal discussion or deliberation by members prior to action). The amount of discussion, standing alone, is not a litmus test that determines whether serial communications had occurred.

Some members of the public may have felt that certain members of the Council intended to block review of the proposed employment agreements by the newly elected Council, but the members' votes (three votes were 3-2; three votes were 4-1; all in favor of the contracts) were done in the open meeting. The votes were accompanied by public comment at the beginning and end of the meeting, for which there did not appear to be any restriction. No OML issue is raised based on these facts.

The Complainant, members of the public, and the two councilmen who were in the minority, may have thought it improper that the proposed contract items were not tabled, but even if the Complaint's allegation is that three members took unpopular action to approve each proposed contract, no OML violation occurred.⁵

CONCLUSION

Of the four issues investigated by this office, three issues did not establish, by evidence, an OML violation.

However, the failure to provide supporting material "upon request" was a violation. The determining issue in finding a violation was simply the length of time between the request and its fulfillment in light of the circumstances. We understand the Deputy Clerk's explanation that she had been shorthanded on a very busy day, but more than three hours was simply too long a wait for supporting materials, especially

⁵ The OML is not an instrument designed to outlaw partisan voting or petty political bickering.

A legislative body does not violate the First Amendment when some members cast their votes in opposition to other members out of political spite or for partisan, political or ideological reasons. Legislators across the country cast their votes every day for or against the position of another legislator because of what the other members say on or off the floor or because of what the newspapers, television commentators, polls, letter writers, and members of the general public say. We may not invalidate such legislative action based on improper motives of legislators.

Zilich v. Longo, 34 F.3d 359, 363 (6th Cir. 1994).

since the public meeting was scheduled to begin later that day. But, no further action is necessary primarily because the Deputy Clerk acknowledged and understood the importance of providing supporting materials upon request.

NRS 241.0395 requires that when this office issues an opinion finding OML violation(s) the public body must place the matter on its next agenda for discussion and make this Office's opinion a part of supporting material to be made available to the Board and the public at the same time. NRS 241.0395:

1. If the Attorney General makes findings of fact and conclusions of law that a public body has taken action in violation of any provision of this chapter, the public body must include an item on the next agenda posted for a meeting of the public body which acknowledges the findings of fact and conclusions of law. The opinion of the Attorney General must be treated as supporting material for the item on the agenda for the purposes of NRS 241.020.

We are closing our file on this matter.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:


GEORGE H. TAYLOR
Senior Deputy Attorney General
Open Meeting Law
Tele: (775) 684-1230

GHT/rmh

cc: John C. Brown, Esq., counsel to Caliente City Council
Caliente City Council Board of Commissioners
Stana Hurlburt, Mayor
Cody Christensen, Councilman
Steve Rowe, Councilman
JoLynn Cardinal, Councilwoman