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September 10, 2010

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Re: Open Meeting Law Complaint – AG File No. 10-024
Clark County School District Board of Trustees

Dear Mr. Small:

Open Meeting Law Complaint AG File No. 10-024 presented an unusual issue. The issue was whether the Open Meeting Law (OML) was violated when a quorum of the Clark County Board of School Trustees (CCBST) gathered at a publicly noticed meeting of the Bond Oversight Committee (BOC) – a CCBST standing committee.

CCBST's response to the complaint did not dispute the alleged fact that a quorum of the CCBST attended a BOC meeting on March 18, 2010. CCBST denied that the OML was violated even though a quorum attended the BOC meeting, because no "meeting" occurred within the meaning of NRS 241.015(2).¹

Our investigation of this complaint was based on statements from the individual trustees who attended the BOC's March 18, 2010 meeting and a response from CCBST counsel.

¹ NRS 241.015 Definitions. As used in this chapter, unless the context otherwise requires:

2. "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 to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.

FACTS

A regularly scheduled and properly noticed BOC meeting was held on March 18, 2010. At the beginning of the meeting, (11:40 a.m.), only Trustee Sheila Mouton, CCBST's liaison to the BOC, was present. She was there to report to the BOC in her capacity as liaison.

The meeting was called to order at 11:40 a.m. in the Administrative Center Conference Room, 5100 West Sahara Avenue, Las Vegas, Nevada. Shortly after the BOC meeting began, Trustee Terri Janison arrived at the meeting, and then Trustee Linda Young arrived shortly after noon. Mr. Ken Small, complainant, arrived at approximately 12:30 p.m. Shortly after Mr. Small arrived, he saw Vice President Carolyn Edwards enter the meeting room.

With the arrival of Trustee Edwards, a majority of the Board of Trustees was present at the BOC meeting. Around 1:00 p.m., Trustee Janison left the meeting reducing the number of trustees remaining to less than a numeric quorum. CCBST admitted that a majority of the trustees were simultaneously present at the BOC Meeting for something less than one-half of an hour. The meeting ended at 1:10 p.m.

Except for Sheila Moulton, none of the trustees in attendance spoke at the meeting. Trustee Moulton made a report to the BOC. Neither she nor the other Trustees communicated with members of the public or with each other. Each trustee stated that she attended the meeting to listen to discussions and presented materials. None of the trustees did more than observe the proceedings. While the trustees listened, they did not sit near each other, nor did they participate in BOC discussions. Signed statements of three trustees deny any later discussions about this BOC meeting with each other or any other trustee.

The minutes of the March 18, 2010 BOC meeting reflect that the BOC took official action only to approve the meeting's agenda and to approve the minutes of previous BOC meetings held on January 21, 2010 and February 18, 2010. There were other action/discussion items on the agenda, but the BOC only heard presentations under each item.

The Board of Trustees acknowledges that for less than 30 minutes a majority of its members were simultaneously present at the BOC Meeting.

ISSUE

Whether a violation of the OML occurred where a quorum of the CCBST attended a regularly scheduled public meeting of a CCBST standing committee, without prior notice and publication of an agenda, and where the Trustees only listened to the meeting but did not participate in it.

DISCUSSION AND ANALYSIS

Our departure point for analyzing this issue is the OML's definition of "meeting." The OML does not specifically prohibit members of a public body from attending a meeting of its own standing committee, so we have to determine if the facts indicate a meeting occurred.

The mere presence of a quorum of a public body at another meeting, even one over which the quorum may have supervision, control, jurisdiction or advisory power, does not automatically trigger the application of the OML. This office opined in 1997 that before the OML is triggered, there must have been a "meeting" within the meaning of NRS 241.015(2). In 1997, this office issued an opinion regarding how "meetings" may occur when members of public bodies assemble.

In part the opinion states:

When members of a public body merely attend a convention or seminar, the open meeting law is not automatically triggered, even when there is a quorum of the members attending. See Open Meeting Law Manual, Sixth Edition, and Question 11, page 15. [See OML Manual 10th ed. § 5.02] But if members of a public body show up at an event and a majority of them gathers around to deliberate toward a decision or take action on a matter over which their body has jurisdiction, control or advisory power, then that gathering becomes a meeting of the public body within the ambit of the Open Meeting Law. NRS 241.015(2). Since people cannot deliberate unless they communicate, the gathering must involve some form of intercommunicative exchange amongst the quorum of the members of the public body in order to constitute a covered meeting. Merely having members of a public body sit in a large room facing forward or talking to other people in unconnected conversations spread out over the far reaches of the room lacks the intercommunicative exchange and therefore does not constitute a meeting between the members of the public body.

Open Meeting Law Opinion: AG File No. 97-058 (1997).

However, in 2001 this office issued an opinion based on similar facts, which created an apparent conflict with the 1997 OML opinion – AG File No. 97-058.

In Op. Nev. Att’y Gen. No. 2001-05, March 14, 2001, (hereinafter AGO 2001-05) this office answered a question from a county district attorney. He asked this office to opine on the question of whether an OML violation occurred if a county commissioner attended and participated “in the decision making process of a board, commission, or other organization” if another county commissioner is a member of that body and the meeting is not publicly noticed as a meeting of the Board of County Commissioners.

Our opinion answering the D.A.’s question, concluded that: “...if two commissioners are in attendance at a gathering to deliberate, including the mere receipt of information, on a subject which is within the supervision, control, jurisdiction, or advisory power of the Board, then the gathering must be publicly noticed as a meeting of the Board.” Op. Nev. Att’y Gen. No. 2001-05, March 14, 2001, p.5. The opinion’s conclusion stated that “Whenever a quorum of a public body gathers, discusses, decides, gathers information, or otherwise deliberates on matters over which the commissioners [or any public body] have supervision, control, jurisdiction, or advisory power, a meeting of that [public body] Board within the meaning of NRS 241.015(2) takes place.” Op. Nev. Att’y Gen. No. 2001-05 (March 14, 2001), p.7. There was no mention of the 1997 opinion, AG File No. 97-058, in Op. Nev. Att’y Gen. No. 2001-05, March 14, 2001.

Since Op. Nev. Att’y Gen. No. 2001-05 (March 14, 2001) was published, the Nevada Supreme Court decided *Dewey v. Redevelopment Agency of the City of Reno*, 119 Nev. 87, 64 P.3d 1070 (2003). This case is important because the Supreme Court defined “deliberation” in some detail.

The *Dewey* court said that “deliberation” means “to examine, weigh, and reflect upon the reasons for or against a choice thus connoting not only **collective** discussion, but the **collective** acquisition or the exchange of facts preliminary to the ultimate decision.” (Emphasis added) *Dewey* 119 Nev. at 97. The *Dewey* court also stated that “. . . the Open Meeting Law is not intended to prohibit every private discussion of a public issue. Instead, the Open Meeting law only prohibits **collective** deliberation or actions where a quorum is present.” *Dewey* at 119 Nev. 94-95. [Emphasis added.]

It was AGO 2001-05’s interpretation of the definition of deliberation, one of two components of the statutory definition of “meeting,” which was the lynchpin of the opinion. AGO 2001-05 defined “deliberation” to mean “. . .to examine and consult to form an opinion and to weigh arguments for and against a proposed course of action” and it added that “In the context of the open meeting laws, deliberation includes the mere attendance at a meeting resulting in the receipt of information. (Citations omitted) These definitions were taken from case law in Tennessee, Wisconsin, and West Virginia.

Dewey negated AGO 2001-05's definition of "deliberation". The Court said that a public body engages in "deliberation" when a quorum of a public body engages in "collective discussion of an issue with the goal of reaching a decision. . . ." Thus, by definition, members of a public body, including a quorum, cannot deliberate if they attend the standing committee meeting merely as an observer. This definition of "deliberation" makes it clear that even if a quorum is present, merely sitting in a public meeting only as observers gathering information from the discussion, is not a "meeting" unless the quorum engages in **collective** discussion or action preliminary to reaching a decision. *Dewey*, 119 Nev. at 98. (Emphasis added)

Mere attendance at a standing committee meeting by a member of the parent legislative public body has been excepted from the application of California's Open Meeting Law. Both the Ralph M. Brown Act, an open meeting law act applicable to local agencies (county, city, town, school district, other political subdivisions including boards and commissions) and the Bagley Keene Open Meeting Law Act of 2004, applicable to all state entities (boards, commissions, committees, councils and panels, etc.) expressly except from the application of the Open Meeting law "the attendance of a majority of the members of a state body [public body] at an open and noticed meeting of a standing committee of the body, provided that the members of the [public body] who are not members of the standing committee attend only as observers." Bagley Keene Open Meeting Act, Government Code §11122.5(c)(6) Meeting defined; exceptions; Ralph M. Brown Act, Government Code §54952.2(4) and (6).

The quoted language, in the paragraph above, added to both California open meeting law acts, rejected the Opinion of the California Attorney General in No. 95-614 (June 10, 1996) which had opined that the mere presence of a majority of a legislative body of a local agency at its own subcommittee hearing violated the notice and agenda requirements applicable to the parent legislative body. Accord: Minnesota Open Meeting Law Opinion 63a-5; August 28, 1996, (mere attendance by additional council members at a meeting of council committee would not violate the OML unless such members participated in committee deliberations or discussions.)

The *Dewey* court also identified a practical reason for allowing public body members to attend standing committee meetings. The context of the *Dewey* decision was whether the OML should apply to less than a quorum. It stated that:

"[r]equiring members of [a] board to consider only information obtained through public comment and staff recommendations presented in formal sessions would cripple the board's ability to conduct business." [Quoting *Hispanic Educ. Com. V. Houston Ind. Such. Dist.*, 886 F. F.Supp. 606, 610 (S.D. Texas, 1995) aff'd, 68 F.3d 467 (5 Cir. 1995)]. This reasoning underscores the need for other action, such a polling or collective discussions designed to reach a decision, to create a constructive quorum between the briefings.

Dewey v. Redevelopment Agency of the City of Reno, 119 Nev. 87, 98–99, 64 P.3d 1070, 1078 (2003).

As an exclamation point to the discussion about the meaning of and use of the word “collective” in Supreme Court opinions, the following quote explicitly states that the OML only applies when a quorum of a public body acts **in its official capacity as a body**, thus nullifying any argument that a quorum of a public body attending a standing committee hearing in order to observe or gather information is at the same time deliberating as a public body. The Court was considering Board of Regent’s serial communications in which a quorum of the Board chose to take a position on whether to issue an advisory to the media, and actually voted, yea or nay, via a non public vote.

The Court said:

“Here, it is undisputed that a quorum of the members of the Board participated in the decision not to release the advisory. Thus, the Board's interaction was more than a simple public response to Price’s comments by one or more of the Regents. Such a response would not have implicated the Open Meeting Law regardless of whether a quorum of the Board was involved. **The constraints of the Open Meeting Law apply only where a quorum of a public body, in its official capacity as a body, deliberates toward a decision or makes a decision.**”

Att’y Gen. v. Bd. of Regents, 114 Nev. 388, 400, 956 P.2d 770, 778-779 (1998).
(emphasis added)

CONCLUSION

The attendance of a quorum of a public body at a public meeting of a standing committee, over which the public body has supervision, control, jurisdiction or advisory power, does not automatically trigger the application of the OML. Before the OML applies, there must have been a “meeting” within the meaning of NRS 241.015(2).

Where members of a public body, even a quorum, attend a standing committee’s public meeting as only observers, mere attendance does not constitute a “meeting” among the members of the public body.

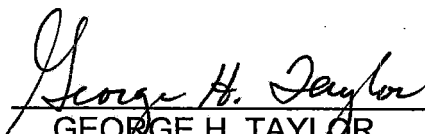
When a quorum of the CCBST attended the March 18, 2010 public meeting of the Bond Oversight Committee, a CCBST standing committee, a CCBST quorum did not participate in the BOC’s meeting, nor did they collectively discuss or take action on any matter within their jurisdiction or control.

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Based on these facts, there was no violation of the OML. To the extent Op. Nev. Att'y Gen. No. 2001-05, March 14, 2001, conflicts with this opinion, it is overruled.

Sincerely,

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GHT/cg

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