

- 2) *Knowledge by a member of a public body* that the meeting is in violation of the Open Meeting Law. The opinion held that, when members of a public body rely on advice of counsel, they should not be held to know that a violation occurred.

While the Open Meeting Law does not require the attorney for the public body to be present at a meeting (AG File No. 00-013 (April 21, 2000)), the presence of the attorney may allow the member to receive advice upon which a member can rely as to whether the member knows that the meeting is in violation of the Open Meeting Law.

#### **§ 10.11 Public officers may be removed from office**

Under NRS 283.040(1)(d), a person's office becomes vacant upon a conviction of a violation of NRS 241.040, which is discussed in § 10.10 above.

#### **§ 10.12 Filing a complaint; procedure; Attorney General subpoena power; public records**

**FILING A COMPLAINT:** A person alleging that the OML has been violated by a public body or that his/her public comment right has been denied, may seek redress in the courts as explained above. That person also may complain to the Office of the Attorney General, but filing a complaint with the Office of the Attorney General does not toll the time periods for the person to take his own action

Under NRS 241.040(4), the Office of the Attorney General must investigate and prosecute alleged violations of the Open Meeting Law. The Office of the Attorney General believes that any person may file a complaint with the Office of the Attorney General even if that person is not aggrieved directly by the offense. See §10.07 above, for an explanation of the Attorney General's policy regarding enforcement of the OML.

All such complaints must be in writing, signed by the complaining person, and contain a full description of the facts known to the complainant. The Office of the Attorney General considers all such complaints to be public records and may release them accordingly. Complaints must be sent to:

Open Meeting Law Coordinator  
Office of the Attorney General  
100 North Carson Street  
Carson City, Nevada 89701-4717

Complaints may be sent by facsimile to (775) 684-1108.

**INVESTIGATION PROCESS:** Complaints which allege a cognizable violation of the OML will be investigated. The complaint is sent to the public body along with any supporting documents attached to the complaint. The public body is given time to respond to the allegation(s) by written statements, copies of the agenda, minutes, (even if in draft form), video or audio recordings of the meeting, and the Attorney General may subpoena additional relevant documents, records, or materials for purposes of the investigation. After review of the complaint

and the public body's response, the Attorney General may issue a written opinion that resolves the matter, or he/she may initiate a civil or criminal suit seeking compliance with the OML.

Considering the time limits for bringing lawsuits, it is important that complaints be promptly filed with the Office of the Attorney General to allow sufficient time for investigation and evaluation. Investigation of an OML complaint must occur within the 60/120 day limitations periods described in §11.07.

**SUBPOENA POWER:** The Legislature authorized the Attorney General to issue subpoenas when conducting an investigation. NRS 241.039(4) and (5) state: "In any investigation conducted pursuant to subsection 2, the Attorney General may issue subpoenas for the production of any relevant documents, records, or materials. A person who willfully fails or refuses to comply with a subpoena issued pursuant to this section is guilty of a misdemeanor."

Records, relevant documents, or other materials now subject to discovery may include e-mails among members of a public body; records of their phone calls; and other electronic communications made by a member of a public body while engaged in the public body's public business. NRS 241.039.

It is important to remind a public body of the Open Meeting Law's prohibition against "walking quorums" or "constructive quorums" that can be created through conversations with other members or through electronic communication shared among a quorum of a public body. NRS 241.015(3)(a)(2). Subpoena of relevant records may reveal e-mails or phone calls among members which could have to be explained or justified to avoid a violation of the Open Meeting Law.

**PUBLIC RECORDS:** While the complaints themselves are considered public records, investigative files will be held confidential until the investigation is complete, and then the file will become a public record. NRS 241.039(3). Records of closed sessions which are obtained as a part of the investigation will remain confidential until made a public record through the process in NRS 241.035(2)(a)-(c).

### **§ 10.13 Public notice of Attorney General Opinion finding violation by public body**

The 2011 Legislature amended the Open Meeting Law with a new requirement for public bodies designed to provide information and transparency to all members of the public.

NRS 241.0395(1) requires public notice of an Attorney General opinion 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 NRS 241. The public body must include an item on its next agenda which acknowledges the Attorney General's 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.

The inclusion of an item on the agenda for a meeting of a public body pursuant to subsection 1 is not an admission of wrongdoing for the purposes of a civil action, criminal prosecution, or injunctive relief. NRS 241.0395(2).

NRS 241.0395 serves the OML's central tenet—transparency. Public notice of the opinion simply is an acknowledgment of a finding by the Attorney General that the public body has taken an action in violation of the OML. The opinion of the Attorney General must be included in supporting materials for that agenda item. The item may be an informational item as there is no statutory requirement that any action be taken. The underlying reason for this change is to provide notice to the public of the Attorney General's opinion and to provide a forum for discussion, if any, between the public and the public body.

#### **§ 10.14 Monetary penalty for willful violation; one-year limitations period**

NRS 241.040(4) provides that each member of a public body is subject to a civil penalty not to exceed \$500.00 for participation in a willful violation of the OML. It states:

In addition to any criminal penalty imposed pursuant to this section, each member of a public body who attends a meeting of that public body where action is taken in violation of any provision of this chapter, and who participates in such action with knowledge of the violation, is subject to a civil penalty in an amount not to exceed \$500. The Attorney General may recover the penalty in a civil action brought in the name of the State of Nevada in any court of competent jurisdiction. . . .

Such an action must be commenced within one year after the date of the action taken in violation of this chapter. A civil penalty is applicable only when a member of a public body, who attends a meeting of that public body where action is taken in violation of any provision of the OML, participates in such action with knowledge of the violation.

The key to understanding how this penalty will be enforced depends on an understanding of the act of "**participation**," a requirement of the statute. Enforcement against a member of a public body based on "participation" only may occur when the member makes a commitment, promise, or casts an affirmative vote to take action on a matter under the public body's jurisdiction or control when the member knew his/her commitment, promise, or vote was taken in violation of the OML.

The civil penalty requires that a public body take action in order for the civil penalty to be potentially applicable. "Action" is defined in NRS 241.015(1) as an affirmative act; mere silence or inaction by members is not sufficient to rise to the level requiring enforcement.

This office would not seek to punish individual members who attempt to comply with the OML, only those who actually violate it. Even then, enforcement under NRS 241 requires discretion based on investigation and review of the facts. Evidence in the record that an individual attempted to comply and/or sought to avoid violating the OML would put them outside the scope of liability for the civil penalty, even if the other members of their public body proceeded to knowingly violate the OML.