

MEMORANDUM

TO: Board of Trustees

FROM: Tim Callicrate
Chairman, Board of Trustees

REVIEWED BY: Indra S. Winquest
District General Manager

Josh Nelson
General Counsel

SUBJECT: Review, discuss and possibly approve a method for handling Board correspondence

DATE: April 14, 2021

I. RECOMMENDATION

That the Board of Trustees provide direction on how to handle Board correspondence. The initial recommendation is to post Board correspondence through a separate website link for each meeting. This will provide transparency in the received correspondence and allow Trustees (on their own or through requests by the public) to request items raised in those communications be placed on a future agenda for consideration. Based on the Board's direction, a formal policy could be developed for Board approval at a future meeting.

II. BACKGROUND

The Board of Trustees previously included an item on agendas for "Correspondence Received by the District." This included any correspondence received by the Board on matters not on the agenda and determined not to be defamatory. A member of the community filed an Open Meeting Law (OML) complaint alleging that this practice violated the OML. The Attorney General disagreed in its review of the complaint (OAG File No. 13897-287). However, in doing so, the Attorney General encouraged IVGID to provide greater specificity regarding the scope and substance of the "Board Correspondence" agenda item to help avoid confusion by the public.

In response, IVGID has removed this item from its agendas until the Board and Staff had the opportunity to review the issue and determine the most appropriate

response. To help facilitate the Board's discussion, below are a number of options the Board could consider:

1. Place Board Correspondence on the Agenda: The Board could place a standing item on its agenda and include correspondence in the packet. This would require including more specificity in the agenda item to address the concerns raised by the Attorney General.
2. Post Board Correspondence on the Website: The Board could post all Board correspondence on the website. As an example, a link could be posted near each agenda packet with the correspondence received since the last agenda. If any Trustee (on his/her own or through a request by a member of the public) wished, items raised in correspondence could be placed on the agenda through the long range agenda item or separately through a request to Staff.
3. Continue the Current Practice: The Board could continue the current practice of receiving Board correspondence but not posting it publicly. Any Trustee can request items raised in correspondence be added to a future agenda.

The recommendation is for the Board to consider Option #2. This practice provides transparency by publicly posting correspondence while avoiding the OML concerns raised by the Attorney General. Correspondence will not be included as an item on the agenda or included in the official agenda packet. This avoids the potential for confusion about the scope and substance of the agenda item. As noted above, while items raised in Board correspondence cannot be discussed in detail during the Board meeting, Trustees could request that items raised in correspondence be added to a future agenda.

Options #1 and #3 are not recommended at this time. Option #1 does not address the OML concerns. If Board correspondence is included as an agenda item, the item will need to include sufficient detail to explain that this is simply a placeholder on the agenda for the Board to acknowledge receipt of previous Board correspondence. It further needs to note any limits on the types of correspondence that will be included. This seems impractical. Option #3 does not provide the transparency that the Board previously indicated it wished to provide.

Importantly, one issue that has been raised previously is IVGID's potential liability for defamation/libel for posting correspondence. While this is a serious issue, Staff is confident it can create a policy that would mitigate this risk. The bar for defamation against public officials is relatively high, and unpleasant or distasteful

remarks are generally not sufficient to be actionable. A policy could be developed that clarified that Board correspondence is intended to be a limited public forum for members of the public to provide written comments outside of a meeting to the Board. This will help clarify that IVGID is not the speaker and not responsible for the content of the message. A policy could be developed to clarify this and to allow the removal of letters deemed truly outside the scope of the First Amendment. This would be similar to social media policies adopted by many public agencies.

III. FINANCIAL IMPACT AND BUDGET

There is little financial impact to this item. Posting of Board correspondence would require minimal Staff time.

IV. ALTERNATIVES

The Board can (1) include Board correspondence on the agenda, (2) post correspondence separately on the website, (3) continue its current practice, or (4) consider an alternative not discussed in this report.

V. BUSINESS IMPACT

This item is not a "rule" within the meaning of Nevada Revised Statutes, Chapter 237, and does not require a Business Impact Statement.

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October 2, 2018

Via U.S. Mail and Electronic Mail

Frank Wright
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Re: Incline Village General Improvement District Board of Trustees (IVGID) – Open Meeting Law Complaint, OAG File No. 13897-287

Dear Mr. Wright:

The Office of the Attorney General (OAG) is in receipt of your Complaint (Complaint) alleging violations of the Open Meeting Law (OML) by IVGID. Your Complaint alleges first that IVGID violated the OML by failing to provide in its May 9, 2018 meeting (Meeting) "Board Packet¹," correspondence received by IVGID. Your Complaint's second allegation is that IVGID is unlawfully censoring from its meeting minutes remarks made in public comment.

The OAG has statutory enforcement powers under the OML, and the authority to investigate and prosecute violations of the OML. NRS 241.037; NRS 241.039; NRS 241.040. In response to the Complaint, the OAG reviewed the Complaint and attachments, the agenda and support materials for the Meeting, the video recording for the Meeting, the approved Meeting minutes, and the response to the Complaint from IVGID.

FACTUAL BACKGROUND

IVGID is a "public body" as defined in Nevada Revised Statute (NRS) 241.015(4), subject to the OML.

The Complaint's first allegation concerns Meeting agenda item "J" which IVGID listed as "CORRESPONDENCE RECEIVED BY THE DISTRICT." The support material for the Meeting did not include any documents identified as correspondence received by IVGID. It is stated in the

¹ A review of the "Board Packet" for the May 9, 2018 meeting shows that the "Board Packet" consists of the agenda and support materials for the meeting.

Meeting video recording that the absence of the correspondence from the board packet was because IVGID's practice² was to only include correspondence that was not previously communicated to the Board and which was not determined to be defamatory. This policy is not stated in the Meeting agenda. The approved Meeting minutes for agenda item "J" lists the authors of the correspondence received by IVGID but said correspondence is not attached to the approved Meeting minutes.

The Complaint's second alleged violation of the OML relates to improper censoring of IVGID meeting minutes. The Complaint specifically provides:

Public comments at Board Meetings and correspondence to the Board have been critical of Board Chair Wong, Vice Chair Horan (who is also Chair of the Audit committee), General Manager Pinkerton, Director of Finance Eick, Public Records Officer Herron and Legal Counsel Guinasso. There have been citations of these individuals violating Nevada Revised Statutes and Board Policies and Practices. Public Comments addressing the above named individuals and their actions, conduct or decisions have been sanitized in the recorded Meeting Minutes. Trustees and citizens requesting corrections in the interest of accuracy have been for the most part ignored.

The complaint does not provide any specificity as to what part of the Meeting minutes is being "sanitized." Furthermore, the Complaint does not make clear that the allegation is even referring to the IVGID May 9, 2018 meeting.

DISCUSSION AND LEGAL ANALYSIS

Allegation #1: IVGID violated the OML by failing to produce in its support material "correspondence received by the District."

The complaint alleges that IVGID violated the OML by failing to include in its board packet "correspondence received by the district." The OML is found in NRS chapter 241. There is no statutory provision in NRS chapter 241 requiring a public body to produce correspondence it has received. If the subject correspondence constitutes public records, the issue of whether they are subject to dissemination would be governed by NRS chapter 239³. Thus,

² This practice was explained in the Meeting by General Manager Steve Pinkerton, IVGID General Counsel Jason Guinasso, and Chairman Kendra Wong.

³ The Nevada Public Records Act (PRA), embodied in NRS 239.010, provides all public books and records of a governmental entity, the contents of which are not otherwise declared by law to be confidential, must be open at all times during office hours to inspection by any person. NRS 239B.010.

the proper remedy for a public record violation would be provided in NRS chapter 239 and not an OML complaint.

However, NRS 241.020(2)(d)(1) requires a public body to post an agenda consisting of a "clear and complete statement of the topics scheduled to be considered during the meeting." In *Sandoval v. Board of Regents*, 119 Nev. 148, 67 P.3d 902 (2003), the Nevada Supreme Court interpreted the "clear and complete" requirement to mean that it must provide the public with "clear notice of the topics to be discussed at public meetings, so that the public can attend a meeting when an issue of interest will be discussed. *Id.* at 155. The Meeting's agenda item "J" simply stated "CORRESPONDENCE RECEIVED BY THE DISTRICT." There is nothing in this description explaining the limited scope of correspondence that would be made public under this agenda item. Agenda item "J" can be interpreted to say that all of IVGID's correspondence is a "topic scheduled to be considered during the meeting." NRS 241.020. While this did not constitute an OML violation, a more "clear and complete" description of what is contemplated under this agenda item may avoid further confusion for the public⁴.

Allegation #2: IVGID is improperly censoring remarks made in public comment from meeting minutes.

The Complaint alleges that IVGID is censoring from its meeting minutes remarks made in public comment that have been critical of certain members of the board. Nevada Revised Statute ("NRS") 241.035 governs public meeting minutes and it provides that each public body shall keep written minutes of each of its meetings, including the following:

1. Each public body shall keep written minutes of each of its meetings, including:
 - (a) The date, time and place of the meeting.
 - (b) Those members of the public body who were present, whether in person or by means of electronic communication, and those who were absent.

The PRA presumes that all records are to be open to the public unless deemed confidential by law. The purpose of the PRA is to ensure the accountability of the government to the public by facilitating public access to vital information about governmental activities. *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 59, 63 P.3d 1147, 1149 (2003), citing *DR Partners v. Board of County Commissioners of Clark County*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000).

⁴ "There is no statutory provision requiring public bodies to discuss, or take action on, all agenda items." *Schmidt v. Washoe County*, 123 Nev. 128, 135, 159 P3d 1099, 1104 (2007) (abrogated on other grounds by *Buzz Stew LLC v. City of Las Vegas*, 124 Nev. 224, 181.3d 670 (2008)). However, notice of the meeting must notify the public that the public body may remove an item from the agenda or delay discussion relating to an item on the agenda at any time. NRS 241.020(2)(d)(6)(iii). The Meeting agenda had such a disclaimer and IVGID had the option to remove this item from the Meeting agenda.

(c) The substance of all matters proposed, discussed or decided and, at the request of any member, a record of each member's vote on any matter decided by vote.

(d) The substance of remarks made by any member of the general public who addresses the public body if the member of the general public requests that the minutes reflect those remarks or, if the member of the general public has prepared written remarks, a copy of the prepared remarks if the member of the general public submits a copy for inclusion.

(e) Any other information which any member of the public body requests to be included or reflected in the minutes.

As provided above, NRS 241.035 does not require verbatim memorialization of public comment in meeting minutes. Rather, NRS 241.035 requires only the substance of the public comment in the minutes, or a copy of the remarks be included in the minutes, if the speaker requests it.

The allegation does not articulate that a speaker requested that his/her remarks be reflected in the meeting minutes. Furthermore, the allegation does not indicate which meeting minutes lack "the substance of remarks made by any member of the general public." *Id.* Instead, the allegation is merely a conclusory statement that fails to identify a specific instance in which an OML violation may have occurred. Thus, IVGID cannot be found in violation of the OML for failing to adhere to the mandates set forth in NRS 241.035.

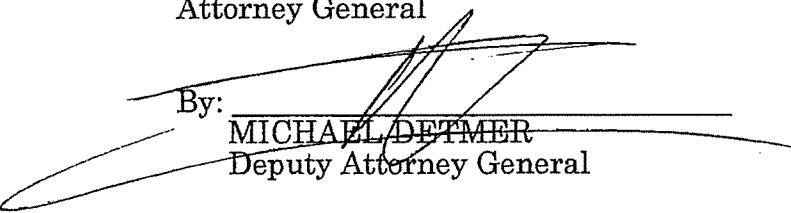
CONCLUSION

The OAG has reviewed the available evidence and determined that no violation of the OML has occurred.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By:


MICHAEL DETMER
Deputy Attorney General

MDD/dt

C: Jason D. Guinasso, Esq., Incline Village General
Improvement District