



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

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REPORT OF ALLEGED VIOLATIONS OF THE IDAHO OPEN MEETINGS LAW BY THE BONNER COUNTY BOARD OF COMMISSIONERS

February 16, 2022

This report is the result of an investigation into an open meetings complaint referred to this office by the Bonner County Prosecutor. Complainant Daryl Wheeler, who serves as the Sheriff of Bonner County ("Sheriff Wheeler"), sent the Bonner County Prosecutor, Louis Marshall, an email on December 6, 2021, alleging the Bonner County Board of Commissioners ("Board") violated the Open Meetings Law ("OML"). Sheriff Wheeler asserts in his email that the Board violated the OML because an action item on the agenda for the Board's meeting dated October 26, 2021, was improperly noticed as the action item did not clearly identify the topic that was discussed and voted on by the Board. The Bonner County Prosecutor requested that this office investigate Sheriff Wheeler's allegations. This report constitutes this office's findings and recommendations in this matter.

I. AUTHORITY AND SCOPE

This office investigated this matter pursuant to a request made by the Bonner County Prosecutor. "[T]he prosecuting attorneys of the various counties shall have the duty to enforce this act [OML] in relation to local public agencies within their respective jurisdictions." Idaho Code § 74-208(5). Therefore, pursuant to the statutory authority above and the request to review

the complaint, the scope of the investigation and this report is limited to an analysis of the Board's agenda for its October 26, 2021 meeting and whether the agenda as written violates the OML.

This office reviewed Sherriff Wheeler's complaint dated December 6, 2021, along with the documents attached to the complaint, as follows:

- Agenda for the October 26, 2021 Board meeting
- Minutes from the Board's October 26, 2021 meeting
- Memorandum dated October 26, 2021 regarding the Bonner County and Sandpoint Community Center Corporation Lease Agreement, as well as the attached lease agreement between Bonner County and Sandpoint Community Center Corporation
- Email correspondence dated October 12, 2021 between Scott Bauer, Bonner County Prosecutor's Office; Dan McDonald, Commissioner; and Darcey Smith, Bonner County Fairgrounds and Facility Director
- Notice and Agenda of Board Special Meeting on March 22, 2021 dated March 19, 2021
- The Board's November 23, 2021 response to Sherriff Wheeler's public records request, which includes the following:
 - The Board's Motion and Order to Amend Agenda for May 27, 2014 meeting
 - Memorandum dated May 27, 2014 regarding the MOU for parking lot use of Bonner County-Owned Real Property

On January 6, 2022, Sheriff Wheeler sent an email to this office with the following additional documents:

- A document drafted by Sherriff Wheeler titled "Bonner County Justice Center Property Overview," which he read at the January 6, 2022 Board meeting
- Dan Rose's complaint to this office dated December 29, 2021¹

This office interviewed Sheriff Wheeler on January 6, 2022. This office also viewed the YouTube videos of the Board's October 26, 2021 and January 6, 2022 meetings.²

¹ On December 29, 2021, Dan Rose submitted a complaint directly to the Consumer Protection Division of the Idaho Attorney General's Office. Mr. Rose's complaint alleges similar OML violations to Sheriff Wheeler's complaint. Consequently, the findings and recommendations in this report also apply to Mr. Rose's complaint.

² During this office's interview with Sherriff Wheeler, and as outlined in the additional documents he submitted to this office on January 6, 2022 and January 31, 2022, Sherriff Wheeler expanded his complaint. He asserts that the Bonner County Fair Board ("Fair Board") is created by statute and consequently, also subject to the OML. In his

On January 31, 2022, Sheriff Wheeler sent an email to this office with the following additional documents:

- The Board's December 28, 2021 response to Sheriff Wheeler's public records request, which includes the following:
 - Fair Board minutes for February 10, 2020, March 9, 2020, April 13, 2020, May 11, 2020, June 8, 2020, July 20, 2020, August 14, 2020, September 14, 2020, October 19, 2020, December 14, 2020, February 8, 2021, March 8, 2021, April 12, 2021, May 10, 2021, June 14, 2021, July [no date]. 2021, August 9, 2021, September 13, 2021, October 18, 2021, and November 8, 2021
- Letter dated January 26, 2022 from former Bonner County Commissioner Todd Sudick to Sheriff Wheeler re: Use of Fairground Property for Ice Rink

This report summarizes the information obtained from the interview, videos, and materials received and details the factual findings concerning the allegations identified below. While Sheriff Wheeler also claims that the Board does not have legal authority to sign the lease agreement per the action item at the October 26, 2021 meeting, the legality of the lease agreement itself falls outside the scope of this report.

II. FACTS

The Board posted an agenda for its October 26, 2021 meeting that included the following:

FAIR – Darcey Smith

1) Action Item: Discussion/Decision Regarding Lease Agreement, Sandpoint Community Center Corporation

According to minutes from the Board's October 26, 2021 meeting, the following occurred in relation to the above action item:

FAIR – Darcey Smith

1) Action Item: Discussion/Decision Regarding Lease Agreement, Sandpoint Community Center Corporation

opinion, the Fair Board is violating the OML by not posting agendas or minutes. These assertions are beyond the scope of this investigation and will be provided to Prosecutor Marshall for his review and consideration.

Commissioner Bradshaw made a motion to approve the attached Lease Agreement between Bonner County and Sandpoint Community Center Corporation for the construction and use of an Ice Arena on parcel # RPS38350010020A and allow the Chairman to sign the contract. Commissioner Connelly seconded the motion. All in favor. The motion passed.

During this office's interview with Sheriff Wheeler, he asserted the above agenda item was improperly noticed and violates Idaho Code section 74-204(4). In his opinion, the agenda item was not sufficient to inform the public of what was actually discussed at the meeting. He felt that as written, the agenda item did not inform the public that the property being discussed was not fairgrounds property, but is County property. He stated the property is a parking lot behind the Bonner County Sheriff's Office (which is next to the fairgrounds). If he had known that the action item involved the Board voting as to whether to convert this parking lot into an ice rink, he would have attended the meeting and voiced his objection. He believes the Board should have requested input from other county officials, such as himself. He also believes if the agenda item had been clearer, other members of the public would have also attended the meeting.

Sheriff Wheeler also asserted that the Fair Board is created by statute and consequently, should be posting agendas and minutes. He claims if this had been done, then he would have been aware of the Fair Board's plan to convert the County parking lot into an ice rink. According to Idaho Code section 22-201, county fair boards are created by Idaho statute.³

III. ANALYSIS

Sheriff Wheeler alleges the Board violated the OML because the agenda item stated above was improperly noticed as it appeared to be about fairgrounds property when it was actually about

³ See footnote 2.

property behind the Bonner County Sheriff's Office (a parking lot) and converting the parking lot into an ice rink. Sheriff Wheeler cites to Idaho Code section 74-204(4) in his complaint.

The Idaho Legislature has declared that it is the policy of the State of Idaho "that the formation of public policy is public business and shall not be conducted in secret." Idaho Code section 74-201. Per Idaho Code section 74-202(4), a "public agency" includes county boards such as the Bonner County Board of Commissions. Consequently, the Board is required to notice its meetings and post agendas in accordance with the OML.

The question is whether "**FAIR** – Darcey Smith 1) Action Item: Discussion/Decision Regarding Lease Agreement, Sandpoint Community Center Corporation" provided adequate notice to the public of the topic to be discussed—namely converting a parking lot (that is not fairgrounds property) into an ice rink. The OML requires:

An agenda shall be required for each meeting. The agenda shall be posted in the same manner as the notice of the meeting. An agenda may be amended, provided that a good faith effort is made to include, in the original agenda notice, all items known to be probable items of discussion. An agenda item that requires a vote shall be identified on the agenda as an "action item" to provide notice that action may be taken on that item. Identifying an item as an action item on the agenda does not require a vote to be taken on that item.

Idaho Code § 74-204(4).

Arguably, the above action item does not put the public on notice that the discussion at the Board meeting was going to involve an ice rink that would be built on a parking lot behind the Sheriff's Office. As written, the agenda item appears to involve the "fair." There is no mention of "ice rink," "parking lot," or "property adjacent to the fairgrounds"—all terms that would have assisted the public in identifying the probable item of discussion. An ordinary citizen would be

unable to discern what the item of discussion was to be, and similarly would have no understanding of what the “action item” was to be voted on.

It is important to note that the OML does not require that the agenda describe each item of business with specificity. However, best practice is to view the agenda through the eyes of an ordinary citizen. In this case, the action item does not inform an ordinary citizen that an ice rink on a parking lot adjacent to fairgrounds property was the probable item of discussion.

The OML states that “[i]f an action, or any deliberation or decision-making that leads to an action, occurs at any meeting which fails to comply with the provisions of this chapter, such action shall be null and void.” Idaho Code § 74-208(1). Idaho Code section 74-208(7) outlines the process for curing an OML violation. It states that a violation may be cured upon the self-recognition of the violation, and following the acknowledgement, a declaration within 14 days that all actions taken at or resulting from the meeting are void. Idaho Code section 74-208(7)(a)–(b). As of the date of this report, there has been no self-recognition by the Board for any violations that appear to have occurred.

IV. CONCLUSION

The Board likely violated the OML during its October 26, 2021 meeting by failing to identify on its agenda all items of probable discussion. Thus, the action taken on “**FAIR – Darcey Smith 1) Action Item: Discussion/Decision Regarding Lease Agreement, Sandpoint Community Center Corporation**” could be declared null and void by a court. Idaho Code § 74-208(1), (6).⁴

⁴ The underlying complaint in this matter was received by this office on December 6, 2021, which is more than 30 days from the alleged violation of the OML. Under Idaho Code § 74-208(6): “Any suit brought for the purpose of having an action declared or determined to be null and void pursuant to subsection (1) of this section shall be commenced within thirty (30) days of the time of the decision or action that results, in whole or in part, from a meeting

The OML provides the Board with the opportunity to cure violations as set out in Idaho Code section 74-208(7). Upon notice of an alleged OML violation, the governing body shall have 14 days to respond publicly and either acknowledge the OML violation and state an intent to cure the violation, or state that the public agency has determined that no violation has occurred and that no cure is necessary. Failure to respond shall be treated as a denial of any violation for purposes of proceeding with any enforcement action.

The OML also allows for civil penalties. Idaho Code § 74-208(3). Any person affected by a violation of the OML can commence a civil action. Idaho Code § 74-208(6). A cure of the violation by the Board shall act as a bar to the imposition of civil penalties.

V. RECOMMENDATIONS

This office recommends the Board consult with its attorney and take steps to cure the OML violation as set out in this report. This office also recommends the Board schedule a training session on the OML, within 60 days, to be conducted by its legal counsel or another attorney familiar with this area of the law.⁵ The public and press should be invited to observe this training. This office also recommends the adoption of the following best practices to ensure future compliance:

- (1) Draft agenda items with sufficient specificity to ensure that the public has notice as to the item(s) to be discussed or voted upon;
- (2) Ensure agendas reflect discrete business items of probable discussion by the Board;

that failed to comply with the provisions of this act.” Since this office received the complaint beyond the time frame to set aside the decision, that is not an option for this office as a remedy.

⁵ The Attorney General’s Office may be able to provide this training if desired.

- (3) Draft agendas so that separate multiple action items are clearly annotated and identified for improved clarity and transparency;
- (4) Review open meetings procedures, including notices and agendas, with the Board attorney to ensure compliance; and
- (5) Institute a system of backups and checkups to ensure compliance and that multiple members of the Board and staff have the ability to post notices and agendas as well as take other corrective action as necessary.