



## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

### **REPORT OF ALLEGED VIOLATIONS OF THE IDAHO OPEN MEETINGS LAW**

**August 3, 2020**

This report is the result of an investigation into an open meetings complaint referred to this office by the Ada County Prosecutor. The Idaho Freedom Foundation (“Foundation”) sent the Ada County Prosecutor a letter on June 29, 2020, alleging that the Central District Health Board of Health (“Board”) violated the Open Meeting Law (“OML”) on June 20, 2020, and June 26, 2020. The Ada County Prosecutor requested that this office investigate the Foundation’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 Ada 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 whether the Board’s conduct regarding its June 20 and 26 meetings violated the OML. Based on intervening activity by the Board between the complaint and this investigation, this report will also evaluate whether any violations were subsequently cured. This office in its review was mindful of the fact that the Board was attempting to address rapidly worsening conditions related to the COVID-19 pandemic. Although this does not excuse non-compliance with the OML, it may explain why

certain steps were missed, or incomplete within the Board's OML compliance over the course of the reviewed meetings.

Between July 1, 2020, and July 8, 2020, this office interviewed the Foundation's President and counsel representing the Board. The meeting notices, agendas, and approved meeting minutes for the June 18, June 20, June 26, and July 7 meetings were reviewed, as well as email correspondence between the Foundation and the Board, and the Foundation's letter to the Ada County Prosecutor. The July 7 meeting recording was also viewed. This report summarizes the information obtained from the interviews and materials reviewed and details the factual findings concerning the allegations identified below.

## **II. FACTS**

On June 18, 2020, the Board met to consider a closure order for Ada County. As a result of the meeting, Board staff was directed to monitor nightclub and bar activities and reported COVID-19 cases related to nightclubs and bars and to collect related data points. On Friday June 19, 2020, the Board received information from several sources including Primary Health Medical Group ("PHMG") stating concerns, and providing supporting information, about the increase in COVID-19 infections in Ada County. PHMG's information indicated a significant increase in COVID-19 admissions in hospitals and projected that at the current rate of increase the hospitals could become overwhelmed with COVID-19 cases within weeks. In sum, the Board was presented with specific information identifying rapidly deteriorating conditions related to COVID-19 within its jurisdiction.

In response, Board staff drafted an agenda on the morning of Saturday June 20, 2020, for an emergency special meeting to be held that afternoon. Board staff attempted to contact its public information officer, who posts the meeting agendas and notices to the Board's website; however,

the public information officer could not be reached due to the short notice and it being a weekend outside of ordinary working hours. Based upon this office’s understanding, the Board did not have a backup plan for posting notice in this circumstance. As a result, the Board’s June 20 meeting notice and agenda were not properly posted.

On June 20, 2020, the Board held a public meeting. The Board considered this meeting an emergency meeting, requiring less than 24 hours meeting and agenda notice. The Board voted to approve a closure order to move Ada County into Stage 3,<sup>1</sup> though no meeting or agenda notice had been posted in advance. The subsequently posted agenda included the following items:

- 2:00 I Call Board of Health Meeting to Order
- 2:02 I/A Uptick in COVID Cases
- 3:00 I Adjournment

On June 25, 2020, the Foundation sent the Board an email stating the Board violated the OML by failing to post an agenda for the June 20 meeting. On June 26, 2020, the Board posted a meeting and agenda notice for a Board meeting to cure the violation. The Board considered this meeting an emergency meeting. The meeting and agenda notice were posted prior to the meeting on June 26, 2020—the same day as the meeting.

The June 26 Board meeting agenda included the following items:

- 4:00 I Call Emergency Board of Health Meeting to Order
- 4:02 I Approve Minutes for June 18 & 20, 2020
- 4:05 A COVID-19 Response
- 4:15 I Adjournment

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<sup>1</sup> The approved meeting minutes for June 20, 2020, posted to the Board website state: “Motion: Dr. Ted Epperly made a motion recommending that Ada County move into Stage 3 for the control of COVID-19 outbreak of significance as quickly as possible including bars and nightclubs. We use syndromic, epidemiology, and clinical numbers to determine when these restrictions can be lifted. CDH will develop a messaging campaign that includes multiple healthcare leaders to help amplify this message across all of Ada County. Seconded by Commissioner Ryan Stirm, Motion unanimously carried by voice vote.”

The applicable agenda item noted, “COVID-19 Response.” Under that item, the Board voted to acknowledge the previous OML violation and declare those actions void,<sup>2</sup> and the Board also voted to reinstate the closure order originally approved on June 20, 2020.<sup>3</sup>

On June 29, 2020, the Foundation sent a letter to the Ada County Prosecutor stating the Board’s June 26 meeting violated the OML because the agenda item did not properly identify the items to be discussed or voted on. The Foundation’s letter also identified that two votes were taken on the same action item.

The Board scheduled a meeting for July 7, 2020, in order to cure the June 26 OML violations. The agenda was amended a second<sup>4</sup> and third<sup>5</sup> time prior to the meeting. The third amended agenda, posted more than 24 hours prior to the meeting, included the following items:

- I. CALL TO ORDER
- II. ROLL CALL

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<sup>2</sup> The approved meeting minutes for June 26, 2020, posted to the Board website state: “Mike Kane, attorney for CDH’s Board of Health, stated the purpose of this emergency meeting was to correct a violation of the Open Meeting law for not posting the emergency Board of Health meeting on Saturday, June 20, 2020, on the District’s website or District’s building due to the extenuating circumstances and employees working from home. As a result, under Idaho law, the public health order authorized by the Board at the Saturday, June 20, 2020 meeting is void. To cure the violation, the Board had to declare the original order as void and had to decide to adopt a new order. Chair Nettleton asked for a motion to declare the previous order authorized by the Board on June 20, 2020, regarding quarantine and restriction be declared void, as the open meeting law was not fully complied with. Dr. Ted Epperly, member of the board, stated the motion, “I move that the Board declare the Order entered by the Board on June 20 regarding quarantine and restriction be declared void as the open meeting law was not fully complied with, as it was on Saturday and things were not posted as noted.” Seconded by Commissioner Elt Hasbrouck. Motion called by roll call vote: Jane Young, aye; Dr. Ted Epperly, aye; Commissioner Elt Hasbrouck, aye; Commissioner Diana Lachiondo, aye; Commissioner Ryan Stirm, aye indicated in chat box.”

<sup>3</sup> The approved meeting minutes for June 26, 2020, posted to the Board website state: “Dr. Ted Epperly stated the motion, “I move the following to be made into a legally worded order. That I recommend that Ada County move back into Stage 3 for the control of COVID-19 outbreak of significance immediately to include bars and nightclubs. The restriction would apply to employers, business, and individuals in Ada County, Idaho. That we use syndromic, epidemiology, and clinical numbers to determine when these restrictions can be lifted; and that Central District Health will develop a messaging campaign that includes multiple healthcare leaders to help amplify this message across all of Ada County.” Seconded by Commissioner Diana Lachiondo. Motion called by roll call vote: Jane Young, aye; Dr. Ted Epperly, aye; Commissioner Elt Hasbrouck, aye; Commissioner Diana Lachiondo, aye; Commissioner Ryan Stirm, aye indicated in chat box.”

<sup>4</sup> The second amended agenda appears to correct a typo in the dates of meeting minutes being approved, removing the approval of the “May 15, 2020 Regular Board Meeting” minutes. It was posted on July 4, 2020.

<sup>5</sup> The third amended agenda included an additional item “to include COVID 19 status update from Saint Alphonsus and St. Luke’s Health Systems.” The agenda was posted on July 6, 2020, at 2:20 p.m. The change to the agenda was voted on and approved by the Board during the July 7 meeting, which started at 4:00 p.m. No vote was taken on this additional item.

**ACTION ITEMS:**

**III. CHANGES TO THE AGENDA**

1. Discussion and Vote on approving the Amended Agenda (Third) to include COVID 19 status update from Saint Alphonsus and St. Luke's Health Systems.

**IV. NEW BUSINESS**

1. COVID 19 status update from Saint Alphonsus and St. Luke's Health Systems
2. Approve Minutes June 26, 2020 Emergency Board Meeting
3. Executive Session

Idaho Statute 74-206 (f) Communicate with Legal Counsel: "To communicate with legal counsel for the public agency to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated."

4. Discussion and Vote regarding curing of possible open meeting violation.
5. Discussion and Vote regarding potential actions to protect life, health, and safety within the District as to the COVID 19 Pandemic, to include potential amendments to current public health orders for Ada County and consideration of orders for other counties or communities.

**V. ADJOURNMENT**

During the July 7 meeting, the Board voted to recognize the OML violation at the June 26 meeting and declare those actions void, and subsequently voted to reinstate the closure order.

**III. ANALYSIS**

The Foundation alleges that the Board violated the OML on June 20, 2020, by voting to approve the closure order without a posted agenda and meeting notice, and on June 26, 2020, by declaring the June 20 order void and voting to approve the original closure order without an agenda item that sufficiently described the actions.<sup>6</sup> The Foundation's allegations also point out that two votes were taken on a single action item at the June 26 meeting.

June 20, 2020 Meeting

During the June 20 meeting, the Board voted to approve a closure order to move Ada County into Stage 3. The Board characterized this meeting as an emergency meeting under Idaho

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<sup>6</sup> Though not directly addressed in the complaint, it should be noted that on the June 20 and June 26 agenda items, each was properly identified as an "action item," though the June 20 agenda was posted after the meeting. Idaho Code § 74-204(5) requires: "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." The agenda notes that that "I" represents information items while the "A" represents "Action Required." Thus, the items were properly designed as an action item.

Code § 74-204(2); however, it did not post a meeting or agenda notice until after the meeting occurred.

The first question is whether the June 20 meeting complied with the requirements for special or emergency meetings found in Idaho Code § 74-204(2), which requires at least 24 hours meeting and agenda notice, unless the meeting is an emergency.<sup>7</sup> “An emergency is a situation involving injury or damage to persons or property, or immediate financial loss, or the likelihood of such injury, damage or loss, when the notice requirements of this section would make such notice impracticable or increase the likelihood or severity of such injury, damage or loss, and the reason for the emergency is stated at the outset of the meeting.” *Id.* The Board received information from PHMG about their growing concerns regarding the increase in coronavirus infections in Ada County. PHMG’s information indicated a significant increase in COVID-19 admissions and projected that at the current rate of increase hospitals could become overwhelmed within weeks. Based on this information, the Board indicated at the outset of the meeting that it believed that an emergency existed because there was a situation involving potential injury to a high number of people. Under the circumstances, the Board had a reasonable belief that an emergency existed that may allow for an emergency meeting.

While there may be less than 24 hours meeting and agenda notice for an emergency, this exception does not erase all meeting and agenda notice requirements. “The notice required under this section shall include at a minimum the meeting date, time, place and name of the public agency calling for the meeting.” *Id.* Board staff drafted an agenda on Saturday, June 20, 2020. Board staff attempted to contact the Board public information officer, who posts the agendas and meeting notices to the website, however, the individual was not reached and the meeting notice and agenda

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<sup>7</sup> “No special meeting shall be held without at least a twenty-four (24) hour meeting and agenda notice, unless an emergency exists.” Idaho Code § 74-204(2).

were not posted. Though Board staff made an attempt to post the meeting notice and agenda, ultimately, the meeting and agenda notice were not posted, which violated the OML.

Additionally, “[t]he secretary or other designee of each public agency shall maintain a list of the news media requesting notification of meetings and shall make a good faith effort to provide advance notification to them of the time and place of each meeting.” *Id.* This did not occur. The Board indicated that no news outlets have requested notification of meetings so it did not provide notice to any. This does not constitute a violation of the OML if no news outlets have requested notification.

In conclusion, the Board violated the OML by failing to post the meeting and agenda notice as required by Idaho Code § 74-204 prior to the June 20 meeting.

The second question is whether “Uptick in COVID Cases,” provided adequate notice to the public on the topic to be discussed—namely the closure order. Typically agenda items must be listed with specificity to address whether a closure order is a probable outcome from the “Uptick in COVID Cases” agenda item. The law requires that all items of probable discussion be listed on the agenda and that action items be clearly identified. Arguably, the item, “Uptick in COVID cases,” places the public on notice that the Board would be addressing the current COVID Pandemic and responses to it. Further, the designation of I/A appears to indicate that it is both an [I]nformational and an [A]ction item showing that action may be taken by the Board as required by Idaho Code § 74-204(4). Although the agenda item did not describe the item of business with specificity, the law only requires identification of probable items of discussion. Although the heading was broad, it does not appear that this violated the law, which is equally broad in its interpretation. This office recommends that agenda items be listed with additional specificity to avoid situations such as this. Although, the vote on the closure order at the June 20 meeting would

not have violated the OML even if the agenda had been posted, this office recommends that Board agendas be prepared with more specificity to assure compliance with both the letter and the spirit of Idaho’s Open Meetings Law.<sup>8</sup>

The next question is whether the violations were cured. Idaho Code § 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 fourteen days that all actions taken at or resulting from the meeting are void. Idaho Code § 74-208(7)(a)–(b). During the June 26 meeting, the Board acknowledged that an OML violation occurred and voted to declare the actions taken at the June 20 meeting void. As such, the Board followed the cure requirements of the OML for the June 20 violation, although as examined below, the June 26, 2020 agenda may have also been incomplete.

#### June 26, 2020 Meeting

During the June 26 meeting, the Board voted to approve a closure order to move Ada County into Stage 3 under the agenda item labeled “COVID-19 Response.” However, nothing on the June 26 agenda indicated that the Board would be considering an open meeting violation and cure—only COVID-19 Response.

The first question is whether the meeting met the requirements discussed above for an emergency meeting under the OML. The Board stated that the same dangers that existed on June 20 existed on June 26, necessitating an emergency meeting with less than 24 hours meeting and agenda notice. Though the Board was notified of the potential OML violation on June 25, there

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<sup>8</sup> “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) (emphasis added).



exists the question of why a meeting could not be held with at least 24 hours meeting and agenda notice. The Board identified the rising trend of positive COVID-19 cases and the need to ensure that the closure order was re-approved. Under the circumstances, the Board likely had a reasonable belief that an emergency existed that may allow for an emergency open meeting. Thus the meeting and agenda notice were properly posted.

The second question is whether “COVID-19 Response,” provided adequate notice to the public that the Board was going to acknowledge the June 20 OML violation or to vote to consider approving the closure order. As recognized by the Board during the July 7 meeting, the June 26 agenda did not provide adequate notice that it was going to consider whether its June 20 notice and agenda were sufficient because it did not list an open meeting violation and potential cure as a “probable item of discussion.” Thus, the consideration and vote to cure the June 20 meeting at the June 26 meeting violated the OML. Although the Board corrected its notice posting violation, it created a new incomplete agenda violation on June 26, 2020.

The next question is whether this violation was cured. Idaho Code § 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 fourteen days that all actions taken at or resulting from the meeting are void. Idaho Code § 74-208(7)(a)–(b). During the July 7 meeting, the Board acknowledged that an OML violation occurred and voted to declare the actions taken at the June 26 meeting void. As such, the Board followed the cure requirements of the OML for the June 26 violation.

An additional question raised by the Foundation is whether it was proper for two votes to occur on a single agenda item. There exists no bright-line prohibition on the number of votes to be taken per agenda item as long as the agenda item specifically provided notice as to the item(s)

of business being considered and all items relate to the notice provided. Here, the June 26 agenda may have provided adequate notice as to the closure order, but the cure procedure was not properly noticed on the agenda.

### Conclusion

In sum, the Board violated the OML during its June 20 meeting for failing to post a meeting and agenda notice, which was properly cured at the June 26 meeting. The Board committed a second OML violation during its June 26 meeting for failing to identify agenda items with sufficient specificity, which was also properly cured at the July 7 meeting. Recognizing the OML law provides boards with the discretion to cure violations, “A violation may be cured by a public agency...;” this office does not recommend that a civil penalty under Idaho Code § 74-208(2) or (4) be pursued at this time. As outlined further in the recommendations below, this office does recommend that the Board complete a training session on the OML to be conducted by the Idaho Office of Attorney General to insure that this Board and its staff are familiar with the requirements of the law.

## **IV. RECOMMENDATIONS**

This office recommends that the Board schedule a training session on the OML, within 60 days, to be conducted by a representative of the Idaho Office of the Attorney General. 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 items to be discussed or voted upon;

(2) Ensure the agenda reflects discrete business items of probable discussion by the Board;

(3) Draft agendas so that separate multiple action items are clearly annotated and identified for improved clarity and transparency;

(4) Post agenda and meeting notices for emergency meetings prior to the meeting as provided by the OML and institute a check system to insure notice has been properly posted prior to the start of any meeting;

(5) If requested by the press, maintain a list of interested news outlets and interested parties in order to provide meeting notice in advance;

(6) Review open meetings procedures including notices and agendas with the Board attorney to insure compliance; and

(7) Institute a system of backups and checkups to insure 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.