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August 12, 2016

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RE: Open Meeting Law Complaint – Tucson Unified School District Governing Board

Dear Ms. Segal:

Thank you for the various letters and information packets you provided on behalf of the Tucson Unified School District Governing Board ("Board") in response to the various Open Meeting Law complaints made against the Board over the last year. I have received and reviewed your responses to all of the complaints, including your response to the most recent complaint, and seeing as no new complaints have come in, I am now ready to issue findings on behalf of the Arizona Attorney General's Office ("AGO").

Before, I address the findings I want to reiterate a point I made back in my August 11, 2015 letter. I only have authority to investigate alleged violations of the Open Meeting Laws. I did not investigate the following allegations, as I have no authority over them: 1) alleged improper bonus paid to a School District contractor; 2) alleged violations of campaign financing laws; 3) alleged conflicts of interest; 4) alleged violations of Board or School District policy. This letter makes no findings and takes no position regarding allegations made regarding those matters. I have no jurisdiction or authority over those allegations. Other attorneys in the AGO or other state and local government entities may or may not have reviewed those allegations. I was not a part of any such investigations or reviews if any occurred. I have only investigated the Open Meeting Law allegations.

FINDINGS

As I mentioned above, the AGO received a number of Open Meeting Law complaints over the last year against the Board. I have reviewed the various allegations and the various documents provided by the complainants and the responses and documents provided by you on behalf of the Board. The conclusions as to each of these complaints are listed below following a summary of the allegations. I have listed the complaints in what is, for the most part, chronological order from the time the complaints were received.

Allegation 1: That a quorum of the Board discussed a contract relating to the School District Superintendent outside the presence of the public prior to the Board meeting held on June 9, 2015.

Conclusion: No Violation Found

A party who asserts that a public body violated the open meeting laws has the burden of proving that assertion. *Tanque Verde Unified Sch. Dist. No. 13 of Pima County v. Bernini*, 206 Ariz. 200, 205, 76 P.3d 874, 879 (App. 2003). Before the AGO can find a violation there must be evidence sufficient to prove the violation by a preponderance of the evidence. In present case, the only evidence that indicates that a quorum of the Board discussed the new Superintendent contract outside of a publicly noticed meeting comes from a statement made by Board Member Cam Juarez at the Board's June 9, 2015 meeting. Mr. Juarez almost immediately retracted and corrected the statement, saying he had misspoken.

The evidence refuting this allegation greatly outweighs the evidence supporting the allegation. First of all, I requested, and you provided, sworn attestations from each of the Board members specifically addressing whether they had received copies of or discussed the new Superintendent contract with other Board members outside of a public meeting prior to the June 9, 2015 meeting. Each of them has avowed that they did not receive or discuss the contract prior to the June 9, 2015 meeting. While Dr. Stegeman's affidavit says he still has suspicions that such conversations took place, he avowed that other than Mr. Juarez's statement at the June 9, 2015 meeting, he has no information that any other Board member received a copy of the contract prior to that date.

Further corroboration of Mr. Juarez's claims comes in the form of the attestation provided by Mary Alice Wallace, the Board's Director of Staff Services. She states that there are no e-mails showing communications by the members regarding the new contract during May 2015 or June of 2015 prior to the meeting. There is one e-mail from Ms. Wallace to the Board members dated April 22, 2015, sending the Board members a copy of the April 21, 2015 Agenda Committee's minutes. That e-mail indicated that the Superintendent's contract was likely to be on the agenda for the May 19, 2015 or June 9, 2015 meetings. The e-mail from Ms. Wallace does not violate the open meeting laws as it was a notification by a staff member to the various Board members

without any subsequent communication or discussion of legal action by the Board members. *See, Ariz. Att'y Gen. Op*. I05-004.

The Board had also discussed the Superintendent's contract prior to the June 9, 2015 meeting at the Special Board Meeting held on April 28, 2015. All of the Board members were in attendance at the April 28, 2015 Special Meeting. That meeting and the discussion of the Superintendent's contract at that meeting were properly noticed and properly held. The agenda for that meeting clearly states that the Board would go into executive session for legal advice regarding the "Superintendent's Contract". While the Board did not have the contract itself at that time, the Board discussed issues it had related to the anticipated contract with its counsel.

Superintendent Heliodoro T. Sanchez stated in his attestation that he created the draft contract himself. He also avowed that no Board member received a copy before the June 9, 2015 executive session. He also avowed that he did not discuss the specific terms of the contract with any Board members prior to the June 9, 2015 executive session.

Mr. Juarez, the Board member who made the statement which aroused suspicions, avowed in his sworn attestation that he did not have a copy of the new contract and did not discuss the terms of the new contract prior to the June 9, 2015 meeting and that he simply misspoke at the meeting. His attestation is corroborated by the averments of the other Board members and staff as noted above. The evidence supports Mr. Juarez's claim that he simply misspoke at the June 9, 2015 meeting.

Based upon the above information and the lack of any other evidence supporting the allegation, I do not find that a violation occurred.

Allegation 2: That a quorum of the Board has had other discussions regarding Board business outside of publicly noticed meetings, including possibly at a National School Board Conference attended by a quorum of the Board members held in Tennessee.

Conclusion: No Violation Found

Once again, there must be proof by a preponderance of the evidence in order to find a violation of the Open Meeting Laws. In regards to this allegation, the only supporting fact provided by the complainant was that a quorum of three of the Board's members had gone to a National School Board Association conference together. However, the Open Meeting Law does not prohibit members of public bodies from socializing privately or from attending professional events together. It only prohibits them from discussing legal action when present together in a quorum.

As part of my investigation I required attestations of the Board members regarding this allegation. The attestations provided by Board Members Grijalva, Juarez and Foster, the three who went to the conference, each avow that they did not discuss Board business with each other

while at the conference. In fact, based upon their attestations, their contact with each other at the conference was rather limited. Their attestations also aver that they have not discussed Board business in a quorum outside of a Board meeting at other times or places either. In the absence of any evidence to the contrary, no violation of the Open Meeting Laws can be found. Mere attendance of a quorum of Board members at a public or private event is not in itself a violation of the Open Meeting Laws.

Allegation 3: That members of the Board have improperly disclosed confidential information regarding discussions held during the Board's executive sessions, specifically regarding discussions about the Superintendent contract discussed at the June 9, 2015 meeting. The improper disclosures are alleged to have occurred during the public discussion of the Superintendent's contract at the June 9, 2015 Board meeting and another on June 19, 2015 during a radio show interview of one of the Board members.

Conclusion: No Violation Found

The statements at issue from the public discussion of the Superintendent's contract during the June 9, 2015 Board meeting were made by Board members Grijalva and Juarez. Specifically those statements were:

> Ms. Grijalva: "We did have a fairly lengthy discussion in executive session, so I think that all of the highlights were reviewed."
>
> Mr. Juarez: "We had an opportunity in executive session to talk about this. Ms. Grijalva asked all of us if we had anything else to add."

The fact that the Superintendent's contract was going to be discussed in executive session was not confidential or secret. That fact had to be, and was, noticed on the agenda for the meeting as "Action Item (A)(1)(5)". So the public was fully aware that the Board was discussing the Superintendent's contract in the executive session meeting. The public was also aware of the reasons it was being done in executive session as the Board had to notice the specific statutory provisions under which it was claiming executive session confidentiality. In this case the agenda cited A.R.S. § 38-431.03(A)(1) – discussion of personnel issues; and, A.R.S. § 38-431.03(A)(3) and (A)(4) – legal advice and instruction to attorney.

The statements by Ms. Grijalva and Mr. Juarez did not reveal specific questions raised or statements made during the discussion that occurred during the executive session. Their statements did not disclose any attorney-client privileged information and they did not disclose any confidential personnel information. The statements simply address the fact that the Board members had a chance to fully discuss the matter and had the opportunity to raise any questions they had in the executive session. That information is not what the confidentiality provisions of

A.R.S. § 38-431.03 seek to protect. Therefore, the statements above did not violate the Open Meeting Law's executive session confidentiality provisions.

The Statements at issue from the radio show interview were made by Board member Grijalva. Specifically those statements were:

> "We actually all looked at the contract at the same time [in the Executive Session preceding the vote] . . . In the previous Executive Session Dr. Sanchez had indicated when it was going to be on the agenda … We all had an opportunity to weigh in on the contract in public and private . . . Whatever changes happened were suggested, changes were made, and then we went out and voted."

Again, these statements did not disclose any attorney-client privileged information and they did not disclose any confidential personnel information. The statement attributed to Dr. Sanchez about when the matter would be on the agenda also does not reveal confidential personnel related information or any attorney-client privileged information that was discussed during the executive session. The statements simply address the length of the discussion and the opportunity of the members to ask questions in the executive session. That information is not what the confidentiality provisions of A.R.S. § 38-431.03 seek to protect.

Although the Open Meeting Laws were not violated by the statements above, I want to strongly caution Board members against making statements that disclose, or that may even tend to disclose, confidential executive session discussions. Statements tend to breed responses and in the heat of the back and forth of a discussion, more information may get revealed than is intended. Making any statement about executive sessions poses risks. As a "best practice" the AGO recommends that Board members avoid making any statements about an executive session other than the fact that one was held and the basis for holding such an executive session, both of which are public knowledge as they have to be posted on an agenda.

Allegation 4: That during the November 18, 2014 Board meeting, the Board engaged in a discussion of teacher salaries even though the issue was not noticed on the agenda for that meeting.

Conclusion: No Violation Found

Based upon a review of the Board meeting minutes and video, there were two general occasions where teacher salaries were discussed. The first occurred during the "Call to Public" or "Call to the Audience" portion of the meeting as the agenda calls it. During the Call to the Public, members of the Tucson Education Association speaking as members of the public made statements concerning teacher salaries. Two Board members, Dr. Stegeman and Ms. Foster felt the need to respond to what they deemed were criticisms directed at the Board and its members regarding this topic. A.R.S. § 38-431.01(H) allows individual members of a public body to respond

to criticism at the end of the Call to the Public. The statements of Dr. Stegeman and Ms. Foster fell within the bounds of this exception.

The second occasion in which Teacher salaries were discussed was as part of Agenda Item twenty two. That Agenda Item stated: "Review and Consider revisions to the Comprehensive Boundary Plan, previously approved by the Board on August 12, 2014." The version of the agenda posted on the Board's website also contained a link entitled "Comprehensive Boundary Plan" containing e-mails related to the funding aspect of the plan.

An agenda must contain a listing of the specific matters to be discussed, considered or decided at a meeting. A.R.S. § 38-431.02(H). The public body may discuss, consider, or decide only those matters listed on the agenda and other matters related thereto. A.R.S. § 38-431.02(H). The "other matters" clause provides some flexibility to a public body but should be construed narrowly. The "other matters" must in some reasonable manner be "related" to an item specifically listed on the agenda. *Thurston v. City of Phoenix*, 157 Ariz. 343, 344, 757 P.2d 619, 620 (App. 1988).

As part of the consideration of the Comprehensive Boundary Plan, the board considered various means of paying for the possible revisions. Teacher salaries came up in the context of this discussion since using money from certain sources would affect the Board's ability to consider teacher raises at a later time. To this extent the discussion of the teacher salaries was related to the matter noticed on the agenda. The discussion of teacher salaries was ancillary to the central focus of the discussion which was revisions to the boundary plan. However, it did reasonably relate to it as the funding of one could have a distinct impact on the other. The Board did not engage in an in depth discussion of whether teachers should get raises. The Board was merely asking what impacts the changes to the boundary plan and the use of various funds for such changes might have on the ability of the Board to consider raises for teachers in the future. This limited discussion was appropriate and related to the Boundary Plan issue. The Board did not violate the Open Meeting Law.

Allegation 5: One complaint questioned whether the recordings the Board posts of its meetings sufficiently apprise the public of the events that occur at the meetings. The complainant stated that it is difficult to tell who is speaking or making motions or how the members are voting on the taped meetings. The complainant also noted that the Board was not posting a record of how specific Board members voted on specific motions or proposals. Without knowledge of these things the complainant alleged that the public is not sufficiently informed of the meeting events.

Conclusion: No Violation Found

A.R.S. § 38-431.01(D) requires that a public body post either minutes or a recording of the public body's meeting within 3 days of the meeting. The Board is in compliance with the statutory requirements. The Board posts audio and video recordings of the meetings within three days of

the meetings. The complaint itself acknowledges that these recordings are posted. The Board also posts a "time lapse" version of the meeting. Accordingly, there is no violation of the Open Meeting Laws.

While I cannot find a violation of the Open Meeting Laws, I appreciate the concerns raised by the complainant that it is hard to know who is speaking on the recordings. To the extent the Board can take steps to aid the public in discerning who is speaking, I urge it do so. You indicated in your letter that the Board has been advised to take more care to identify who is speaking. I think this is an excellent start. Hopefully being mindful of this concern and being careful to note who is speaking will resolve this issue for the future.

In regards to the complainant's concern that the Board does not post a record of how Board members voted on specific proposals, that is not required under the Open Meeting Law. A.R.S. 38-431.01(B) does not require that the name of each person who votes on a motion be indicated, but only that the member who proposed it be shown in the minutes. Although the law does not require posting such information many public bodies do include the names of the member who seconded and those who voted in favor of or against a motion in their meeting minutes. As a "best practice" our Office recommends that public bodies indicate how the body voted and the numerical breakdown of the vote in its meeting minutes or elsewhere. The complainant subsequently notified our Office that the Board has begun posting a notice of how members voted on specific motions in its "Board Actions" documents and has even updated its older records to reflect this information. I have also noted that the meeting minutes also include this information. Our Office encourages the Board to continue this practice in the future.

Allegation 6: That Board member Grijalva disclosed confidential executive session discussions during a news interview in October of 2015.

Conclusion: No Violation Found

This complaint is based upon an article that appeared in a Tucson newspaper. The article reported that 5 of 7 members of an independent School District committee had spouses employed by the district. The article called into question the independence of these committee members. At one point in the article it states:

> TUSD Governing Board President Adelita Grijalva declined to comment, saying the information that has been revealed regarding the relationships was discussed during executive session and it is illegal under state law to disclose that. Grijalva has requested that the executive session "leak" be reported to the State Attorney General's Office.

As in the previous discussion of executive session confidentiality, nothing Ms. Grijalva is purported to have said disclosed confidential executive session discussions. She was declining to

comment to the reporter because of the confidentiality of the executive session discussions. This is exactly what she should have done. There may have been a better or more succinct way for her to phrase her response, but she was trying to uphold the confidentiality of the executive session. There was no violation of the Open Meeting Laws.

Allegation 7: That the Board had hired an investigator in regards to a federal law suit without ever holding a meeting to vote on the issue.

Conclusion: No Violation Found.

This allegation was based upon a pleading filed by an attorney representing the Board in a federal desegregation lawsuit. In the federal lawsuit, the court had imposed a Unitary Status Plan, which included the Comprehensive Boundary Plan discussed in "Allegation 4" above, to address desegregation issues in the School District. Board member Hicks had sent a letter to the federal court stating that he believed the school district was not supporting the plan sufficiently and that certain people in the district were undermining the plan. The pleading at issue informed the federal court that "the Board" had hired an investigator to investigate the allegations that Board member Hicks had made to the court. However, the Board had not in fact voted or otherwise decided to hire an investigator. It was the school district administration, through its General Counsel, who hired the investigator, not the Board. The attorney in the federal suit has subsequently amended his pleading to reflect the correct facts. Since the Board did not in fact make the decision there was no violation of the Open Meeting Law.

Allegation 8: That one Board member and the Superintendent have been heard "conspiring" against other Board members.

Conclusion: No Violation Found.

The complaint in this instance was based upon a comment to a website article that the complainant had read. The comment to the article states that the commenter's "best friend" works for the school district and has told the commenter that she has heard Board member Foster and Superintendent Sanchez discuss how to "attack" Board members Hicks and Stegeman and plan out what each will say at Board meetings. Even assuming that everything alleged is true, which I am only doing for the sake of argument given the various layers of hearsay involved and the lack of identification of the source, there was no violation of the Open Meeting Laws.

The Superintendent is not a member of the Board. Discussions between one Board member and the Superintendent, who is not a Board member, do not violate the Open Meeting Laws. Any such discussions would not involve a discussion of legal action by a quorum of the Board. Therefore, even assuming that all of the facts alleged were true, they would not constitute a violation of the Open Meeting Laws.

Allegation 9: It is alleged that the Board improperly discussed the Superintendent's Goals in an executive session at the meeting held on November 10, 2014 and that no final "Superintendent Goals" document existed at the time the Board voted to approve the "Superintendent Goals."

Conclusion: Violation.

The agenda for the November 10, 2014 Board meeting listed an "executive session" under Action Item 1(B)(2) to discuss "Superintendent's Goals for 2015-2016". The statutory basis listed for holding the executive session was listed as:

> Personnel issues pursuant to A.R.S. § 38-431.03(A)(1); legal advice/instruction to attorney pursuant to A.R.S. § 38-431.03 (A)(3) and (A)(4).

The Superintendent's Goals were also listed as Action Item 12 in the public portion of the meeting so that the Board could vote to approve or disapprove of the goals.

All of the Board members, except Mr. Hicks, were present in the Executive Session, as well as Dr. Sanchez. During the executive session Dr. Sanchez passed out a document containing his proposed goals.[1] The goals document was then discussed by the Board members present and by Dr. Sanchez who notated changes requested by the Board members. When the Board reconvened in the public session, it voted to approve the goals.

The first issue to be addressed is the allegation that no formal or final goals document existed at the time of the vote. There was a document that existed at the time of the vote. It was the goal document that Dr. Sanchez presented to the Board members in executive session. The Executive session minutes indicate that Dr. Sanchez notated the changes requested on the document by the Board during the executive session. So the Board members were aware of what the goals actually were upon which they would be voting. None of the Board members raised any concern during the vote about not knowing what the goals were upon which they were voting. The complainant suggests that the goals could have been altered between the time of the vote and the publishing of the document. But had that occurred, there would have been witnesses to protest that it had occurred in the form of the Board members and staff who were present. This was not a case of approving a non-existent set of goals and making them up later. The Board members appear to have been aware of what the goals were that they were voting to approve or disapprove.

[1] While discussions held in executive sessions are confidential, certain factual matters related to executive sessions are not necessarily protected from disclosure under A.R.S. § 38-431.03. *See, Gipson v. Bean, 156 Ariz. 478, 482, 753 P.2d 168, 172 (App. 1987).*

The second issue, and the issue upon which a violation is found, is whether the Superintendent's Goals were properly discussed in an executive session. While the executive session at issue was noticed under the "personnel" exception of A.R.S. § 38-431.03(A)(1) and the legal advice" exceptions of A.R.S. § 38-431.03(A)(3) or (A)(4), the legal advice exceptions are not at issue in this instance. To the extent the Board had a legal question for its counsel, it would have been entirely appropriate for them to go into executive session and seek legal advice. But here we are focused on the discussion and deliberation between the Board members themselves and with Dr. Sanchez about what his goals should be, not about discussions between the Board members and their legal counsel. That leaves only the personnel issue exception of A.R.S. § 38-431.03(A)(1) to be addressed.

Your letter contends that the discussion was proper under A.R.S. § 38-431.03(A)(1) for one of two reasons. First, you argue that because the Superintendent's pay is based partially on performance, as required in his contract and by state statute, that a discussion of the goals upon which that performance pay is based is proper in executive session as a discussion pertaining to his "employment". You argue that as the term "employment" is used in A.R.S. § 38-431.03(A)(1) it means more than just hiring decisions, and includes discussing contract terms and evaluating an employee's performance. Your second argument is that because the goals "assign" duties and tasks to the superintendent, that the discussion was one pertaining to "assignment". You argue that since the term "assignment" is not defined in the statute, that as long as the Boards action relates to some definition of "assignment", then it was appropriate. You then focus on one of the definitions of "assignment" found in the dictionary - "a specified task or amount of work assigned or undertaken as if assigned by authority." However, analysis of whether a discussion is appropriate for executive session is not as simple as merely placing the activity under some broad definition of the words "employment" or "assignment".

Exceptions to the open meeting law should be narrowly construed in favor of requiring public meetings. *Tanque Verde Unified Sch. Dist. No. 13 of Pima County v. Bernini*, 206 Ariz. 200, 205, ¶ 13, 76 P.3d 874, 879 (App. 2003), as corrected (Nov. 6, 2003). Although normally, a party who asserts that a public body has violated the open meeting laws has the burden of proving that assertion, when a party claims a public body held an illegal executive session, the public body must prove that the session was properly conducted under one of the statutory exceptions. *Id.* Courts have construed exceptions to the OML very narrowly because of the official state policies that favor open and public meetings. *See, e.g., Fisher v. Maricopa County Stadium District,* 185 Ariz. 116, 912 P.2d 1345 (App. 1995). These policies are codified in A.R.S. § 38-431.09 which states that any person or entity charged with the interpretation of the Open Meeting Laws shall take into account the policy behind the laws and shall construe any provision of this article in favor of open and public meetings.

As our Office states in Section 7.9 of the Arizona Agency Handbook, "unless the proposed discussion plainly falls within one of the Open Meeting Law's executive session topics or is specifically authorized by the public body's enabling legislation, discussion should take place only

in a public meeting." In Section 7.9.3 of the Arizona Agency Handbook, our Office further states that the Open Meeting Law does not require that these discussions take place in executive session. If public disclosure of the public body's discussion is not prohibited by any other statutory provision and government interests are not threatened, a public body may choose to conduct all of its discussions in a public setting. *Id.*

Specifically, in regard to executive sessions for personnel discussions, our Office has stated in Section 7.9.4 of the Arizona Agency Handbook:

> Public bodies should take care to ensure that the scope of executive sessions for personnel discussions is limited to true personnel matters. The Attorney General has opined that the Open Meeting Law prohibits public bodies from conducting in executive sessions lengthy information gathering meetings that explore the operation of public programs under the guise of conducting a personnel evaluation. Only the actual evaluation - discussion or consideration of the performance of the employee - may take place in an executive session. *Ariz. Att'y Gen. Op*. I96-012.

In *Ariz. Op. Atty. Gen. No.* I96-012 (Oct. 3, 1996), our Office also stated the personnel exception in the Open Meeting Law depicts the tension between the public's right to information regarding the manner in which government conducts the public's business and the need for confidentiality in certain areas. In adopting the personnel exception to the OML, the Legislature recognized that personnel matters require confidential discussions. Because of the balancing required between the openness demanded by the OML and the legitimate necessity for privacy in exploring sensitive personnel issues, our Office cannot provide school districts and other public bodies with a bright-line rule that ensures compliance with the OML while respecting legitimate needs for confidential consideration of personnel issues that may not be appropriate for public disclosure. *Id.* Each case must be decided on its own facts. *Id.* Our Office has advised public bodies to favor openness unless public disclosure of confidential or sensitive personnel information would undermine the purpose of the executive session. *Id.*

Based upon the above, the specific facts of the case must be considered to determine if the discussion at issue was appropriate for an executive session and whether a violation of the Open Meeting Laws occurred. A review of the executive session minutes and of the goals that were ultimately made public do not, on their face, suggest that any sensitive personnel information was discussed in the executive session that would necessitate the confidentiality protections of the statute. Although the goals are the basis for calculating the Superintendent's performance pay, they are not created solely for that purpose. They are created as a means of guiding the Superintendent and ultimately the school district itself. The goals do not appear to relate to any discipline matters involving the Superintendent and do not appear to cast him in a negative light. The goals were also made public, and were always intended to be made public by the Board, which again suggests the goals themselves do not contain any sensitive personnel type information. It is possible that sensitive personnel type information might in some cases relate to a

specific goal and discussion of such sensitive information could potentially arise in the context of discussing a particular goal. However, the executive session minutes do not indicate that any such sensitive information was discussed in this case.

The Superintendent's contract must also be considered. The Superintendent's salary is set by his contract and includes an amount for performance pay as required by A.R.S. § 15-341(40). Section 4(C) of the contract sets the performance pay at 6 percent of the Superintendent's Annual Base Salary. Section 5 of the Superintendent's contract states that the Board will hold an executive session with the Superintendent in May or June each year to discuss the working relationship between the two. It further goes on to say that the Superintendent's job performance will be evaluated annually "based upon goals established by the Governing Board following consultation with the Superintendent."

The amount of performance pay the Superintendent is to receive is further set forth in the Performance-Based Compensation Plan which is attached as Addendum A of the contract. The Addendum states that the Board and the Superintendent will make good faith efforts to agree on the goals and the percentage weight to be assigned each goal, but if there is a conflict, the Board has final decision authority. It also goes on to say that "the Board shall, in an open meeting, adopt performance goals for the Superintendent and assign relative weights to each goal."

The Superintendent's contract and its addendum indicate that the goals are not the evaluation of the Superintendent itself, but merely the standard by which he is evaluated in terms of the performance pay. The evaluation of the Superintendent based upon these goals would be permissible in an executive session. But the creation of the goals themselves is not properly the subject of an executive session.

Again, the goals do not contain anything that has to be maintained as confidential as evidenced by the fact, noted previously, that they were made public after the vote. The executive session minutes do not indicate that any personal or confidential information was discussed during the executive session. Therefore, based on the facts of this case, and the overriding principle as set forth in A.R.S. § 38-431.09 of a preference for open and public meetings, as well as the burden falling on the public body to demonstrate that its executive session was properly held, the Superintendent's goals should have been discussed in a public session. Therefore, a violation of the Open Meeting Laws did occur.

In finding this violation, it must be re-emphasized, that there are no bright line rules to guide a public body in the correct application of the personnel exception. As the courts and our Office have said, each case must be considered on its own facts. Given this lack of clarity, the Board's conclusion that it was appropriate to discuss the Superintendent's goals in an executive session, though mistaken, is understandable. There is no evidence of any intent to circumvent the open meeting laws on the part of the Board. The evidence indicates that the Board honestly believed that it was complying with the requirements of the Open Meeting Laws.

Allegation 10: That the Superintendent discussed Board business with the Board members during his "one on one" sessions with the individual Board members. Specifically, a concern was raised about Superintendent Sanchez's decision to issue a Request for Proposals ("RFP") for Legal Counsel Services in the "Fisher-Mendoza" lawsuit.

Conclusion: No Violation Found.

This complaint was based upon information in a website article that the complainant had read. The article stated:

> Ah, but wait, Michael Hicks asked if Sanchez had been directed by the Board to change law firms. Sanchez responded that he had spoken to Board members during his "one on one" meetings. However, Sanchez should not be given directives by individual Board members, which means that HE simply TOLD Board members what he was doing and received NO direction during his "one on one" meetings; he gave it. (In other words, the tail dictated the action of the dog.) Or if HT did receive direction and followed the direction given, it is not how the Board and Superintendent should be making decision in the light of the sunshine law (open meeting law) and what is required under the law. Hicks insisted that these matters should be discussed during public Board meetings exposing the fact that all of what had occurred was done in secret.

As mentioned in the discussion of allegation 8 (supra), the Superintendent is not a Board member. He is free to discuss matters with Board members outside of a public meeting as long as he is not discussing matters with a quorum of the Board. But as you are aware, a quorum of the Board does not need to be present at the same place and time for a meeting to occur under the Open Meeting Laws. If a discussion effectively occurs through serial communications with a quorum of Board members outside of a public meeting, then there can be a violation of the Open Meeting Laws. This is known "splintering the quorum." As discussed in Section 5.2.7 of the Arizona Agency Handbook:

> Splintering a quorum may also occur when members of a public body share their positions and proposals with other public body members through staff members or other non-members. For example, a staff member who meets with each member individually regarding official business and then shares the comments made by other members would violate the Open Meeting Law. Although a staff member may provide information to members separately (*see* Ariz. Att'y Gen. Op. I05-004 at 9*)*, that person must be careful not to facilitate a discussion or deliberation by a quorum through sharing information with other members in subsequent meetings. Hence, staff members, representatives, citizens and others should take steps to ensure they are not acting in a manner to commit a violation or subject themselves to liability.

Superintendent Sanchez is free to discuss matters with individual members of the Board in his "one on one" meetings. What he cannot do is facilitate a discussion among a quorum of the Board by conveying to each the contents of individual communications he has had with the others.

In your response letter, you provided me with the attestations I requested from the various Board members and from Dr. Sanchez as to whether any serial discussions have occurred in the "one on one" meetings. Mr. Hicks did not provide an attestation as he does not participate in the "one on one" meetings, a fact he noted in the January 12, 2016 meeting, and which Dr. Sanchez confirmed. The attestations all indicate that no such serial discussions have occurred. Without any evidence to the contrary, no violation of the Open Meeting Law can be found.

With regard to the specific allegation about the Legal Counsel Services RFP, in your response letter, you also provided me with a copy of the Board's Policy Regulation entitled "Purchasing Procedures". Under that Policy Regulation, Board approval was not required prior to the *issuance* of the RFP for legal counsel services. This fact was discussed during the January 12, 2016. Board member Hicks expressed that, regardless of the policy requirements, he felt the question of whether to *issue* an RFP for new legal counsel services was of such importance that it should have been brought to the Board first. But again, the policy does not require that. While the Board was not required to approve the *issuance* of the RFP, because of the amounts involved in the RFP, the Policy Regulation did require Board approval of any *award* of the RFP. That is why approval of the *award* was put on the agenda for the meeting, and also discussed in executive session, so that the Board could decide whether to approve the *award*.

The Open Meeting Law did not prohibit Dr. Sanchez from discussing the RFP with the individual Board members in the "one on one" meetings as long as he did not convey the contents of those individual conversations to other Board members and facilitate a de facto discussion among a quorum. The attestations provided show that no serial discussions occurred. Since there is no evidence to the contrary, no violation of the Open Meeting Laws is found.

SETTLEMENT

As noted above, only one violation was found to have occurred. That violation related to an area of the Open Meeting Law where there is a lack of clear direction available. There is no evidence to suggest the violation was the result of intent to circumvent the Open Meeting Laws. The Board had an honest belief that the discussions held were appropriate in executive session. Accordingly, fining the Board or issuing some other sanction would not serve any valid deterrent purpose. It is clear from the review of this matter that the Board members disagree amongst themselves as to what the Open Meeting Law requires. Members of the school district community also seem to be lacking in an understanding of the Open Meeting Laws. Accordingly, as a remedy for the violation, the Board is to schedule a training on the Open Meeting Laws that the public can attend at an open public meeting. To insure that there are no attorney-client privilege issues regarding the training, the training should be conducted by a neutral third party entity. Specifically,

the training should be conducted by either the State Ombudsman's Office or the Arizona School Board Association. This training should be scheduled and held within the next 90 days. If additional time is needed to arrange for such training, please contact me.

The AGO also requires that this letter and the proposed settlement terms be appropriately noticed on the agenda of the next regular Board meeting. Because of the length of this letter, we will only require that the first page of the letter, the portion of the letter regarding Allegation 9, and the settlement section of the letter be read aloud and discussed. The Board is free to read and discuss any other portion of the letter it wishes to read and discuss, but is not required to do so. Copies of the letter shall be made available to members of the public. The letter shall also be approved and/or appropriately ratified at the next regular Board meeting. A copy of the notice and agenda for that Board meeting shall be sent to me at the Arizona Attorney General's Office.

If the proposed agreement is acceptable to your client, please so indicate by having the Board members sign page 16 of this letter and return a signed copy of the entire letter to me on or before September 16, 2016. If this agreement is not acceptable the Arizona Attorney General's Office will move forward to enforce the Open Meeting Law and seek any appropriate further remedies it deems necessary.

Should you have any further questions, please feel free to contact me at the address or phone number listed on this letter.

Sincerely,

Kevin R. Smith
Assistant Attorney General

Cc: Complainants

PHX-#4726740

The Tucson Unified School District Governing Board and its Members agree to the terms set forth in this letter, and are authorized to enter into this agreement.

By _____ _____
Chairman/President Date

_____ _____
Member Date

_____ _____
Member Date

_____ _____
Member Date

_____ _____
Member Date

1275 West Washington, Phoenix, Arizona 85007-2926 • Phone 602-542-9758 • Fax 602-542-9279