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Tempe City Attorney

OFFICE OF THE ARIZONA ATTORNEY GENERAL

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ATTORNEY GENERAL

SOLICITOR GENERAL'S OFFICE
OPEN MEETING LAW ENFORCEMENT TEAM

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October 9, 2024

VIA EMAIL & U.S. MAIL

Tempe City Council
c/o Eric C. Anderson, City Attorney
City Attorney's Office
21-E. Sixth St., Suite 201
Tempe, Arizona 85280
Eric.Anderson@tempe.gov

Re: Disposition of Open Meeting Law Investigation
Investigation No: OML:2023-0121

Dear Mr. Anderson:

As you know, the Office of the Attorney General received a complaint alleging Open Meeting Law ("OML") violations by the Tempe City Council ("Council"). The complaint arises from the Council's consideration and November 29, 2022 approval of the proposed development of City-owned property known as the Tempe Entertainment District, a project which was ultimately rejected by Tempe voters in the City's May 16, 2023 Special Election. Complainants contend that the Council violated the Open Meeting Law by (1) improperly approving a contract with consultants Policy Development Group, Inc. d/b/a/ Strategy Forty-Eight ("Strategy Forty-Eight") to perform "social media tracking" related to the Tempe Entertainment District proposal and (2) permitting representatives of Strategy Forty-Eight to attend and participate in one or more of the Council's executive sessions.

The Office has reviewed the events discussed below and the City's November 2, 2023 response to our Inquiry Letter ("Response"). We conclude that the Council did not violate the Open Meeting Law with respect to the City's contract with Strategy Forty-Eight, which was not (and was not required to be) approved by the Council at a public meeting.

However, we find that the Council violated Open Meeting Law when it permitted representatives of Strategy Forty-Eight to give reports during Council executive sessions on November 3, November 22, and December 15, 2022 because the reports did not fall within any of the specifically enumerated exceptions set forth in A.R.S. § 38-431.03(A) and, therefore, were not a permissible topic for executive session.

The facts recited in this letter serve as a basis for these conclusions, but are not administrative findings of fact and are not made for purposes other than those set forth in A.R.S. §§ 38-431 *et seq.*

Facts

On October 15, 2022, the City of Tempe entered into a consulting agreement with Policy Development Group, In. d/b/a/ Strategy Forty-Eight (the “Contract”). Pursuant to the Contract, Strategy Forty-Eight was to “render advisory services for issues related to the development project proposed on City owned property along Tempe Town Lake, off Rio Salado Parkway and Priest Drive[.]” Contract, Sec. 2.

The Contract contemplated that Strategy Forty-Eight would “conduct [a] digital community assessment, digital monitoring and develop messaging” in a series of phases. In Phase One, Strategy Forty-Eight would (1) “Identify social media pages and groups that could provide a platform for project opposition to publicize their concerns” and “[a]nalyze critical stakeholders that are active on social media channels and categorize each by stakeholder group; (2) “Analyze individuals who posted and commented about the project, determine where they live, and categorize individuals by stakeholder group;” and (3) “Analyze digital media stories and posts to better understand potential opposition messaging strategy.” Contract, Exhibit A. After approximately 45 days, Strategy Forty-Eight would shift into Phase Two, which included providing a weekly social media report and developing a social media calendar. *Id.*

Though not specifically contemplated by the Contract, representatives of Strategy Forty-Eight attended four Council executive sessions during the course of their engagement, on November 3, November 22, November 29, and December 15, 2022. Response, p. 4. Of those, Strategy Forty-Eight presented at all but the November 29 executive session. The City terminated the Contract prior to its six-month term, on December 23, 2022.

Analysis

A. Approval of the Strategy Forty-Eight Contract

First, complainants contend that, because the Contract was not discussed or approved by the Council in a public meeting, it must have been improperly approved in an executive session, in violation of Open Meeting Law. In fact, the Contract was not approved by the Council at all because it was below the \$100,000 threshold for which Council approval is required. *See* Tempe City Code Sec. 26A-5(b) (“The City Council shall award contracts with a value equal to or exceeding one hundred thousand dollars (\$100,000).”). The maximum value of the Contract was \$60,000 (\$10,000 per month for a six-month term). Contract, Sec. 4, 5. Accordingly, we do not find any Open Meeting Law violation with respect to the City’s procurement of the Contract.

B. Executive Sessions

Second, complainants allege that the Council violated Open Meeting Law by receiving reports from Strategy Forty-Eight during executive session. The Council concedes that it retained

various consultants, including Strategy Forty-Eight, “throughout the process of reviewing” the Tempe Entertainment District proposal and relied on them to assist the Council “in understanding and evaluating this very complicated project” in executive session, pursuant to A.R.S. § 38-431.03(7). Response, p. 4.

A.R.S. § 38-431.03(A)(7) permits a public body to hold an executive session for the purpose of conducting “discussions or consultations with designated representatives of the public body in order to consider its position and instruct its representatives regarding negotiations for the purchase, sale or lease of real property.”

The declared public policy of the open meeting laws is that all legal action of public bodies take place in a public meeting. A.R.S. § 38-431.01(A). “Exceptions to the open meeting law should be narrowly construed in favor of requiring public meetings.” *Johnson v. Tempe Elem. Sch. Dist. No. 3 Governing Bd.*, 199 Ariz. 567, ¶ 14 (App. 2001) (internal quotations omitted).

By its plain language, A.R.S. § 38-431.03(A)(7) does not permit a public body to hold an executive session for the purpose of “understanding and evaluating” a “complicated project.” Rather, this exception is limited to discussions and consultations with representatives of the Council in order for the Council to (1) consider its position or (2) instruct its representatives regarding negotiations for the purchase, sale or lease of property by the Council. A.R.S. § 38-431.03(A)(7).

Arizona courts have specifically rejected the propositions that “negotiations” (1) must be broadly interpreted “with an eye to common sense and realities of real estate transactions” or (2) could include “any subject—be it value, location, biology, hydrology, topography or relative humidity—[that] is germane to a discussion” about a public body’s position on the purchase, sale, or lease of any parcel of real property. *Tanque Verde Unified Sch. Dist. v. Bernini*, 206 Ariz. 200, 205 ¶ 16 (App. 2003). And while “negotiations” do include more than just a discussion of price terms, “negotiations” cannot include the discussions over what action the public body should ultimately take. *Bernini*, 206 Ariz. at 205, 208. “It is the debate over what action to take, including the pros and cons and policy implications, of competing alternative courses of action, that must take place in public.” *Id.* at 208 ¶ 25 (citing *Fisher v. Maricopa Cty. Stadium Dist.*, 185 Ariz. 116, 124 (App. 1995)).

For purposes of our analysis, then, we must consider whether Strategy Forty-Eight’s report at each of the relevant executive sessions bears more on the form of the Tempe Entertainment District proposal or on the Council’s consideration of whether to approve of the proposal, *i.e.*, the Council’s course of action.

1. Executive Sessions prior to November 29, 2022

Representatives of Strategy Forty-Eight presented at the Council’s November 3 and November 22, 2022 executive sessions. The nature of these two presentations was largely the same and pertained generally to the origin and tone of social media activity regarding the Tempe Entertainment District. For example, Strategy Forty-Eight explained which key words they were

tracking, gave their assessment of the “tone and position” of the social media reception, and provided more specific data, such as what percentage of related social media activity had come from Tempe residents.¹

By way of comparison, the Council also heard from other consultants who provided the results of a financial analysis of the current deal terms and an explanation of how negotiated indemnification language would be incorporated into the development agreement. These were permissible topics of discussion for a designated representative participating in executive session pursuant to A.R.S. § 38-431.03(A)(7). But, when it comes to Strategy Forty-Eight’s report, there was no clear link between the information provided and the Council’s development of any specific deal point relevant to the negotiations for the sale of City-owned property.

Because § 38-431.03(A)(7) only permits an executive session for the purposes of having discussions or consultations “regarding negotiations for the purchase, sale or lease of real property,” the Council’s November 3 and November 22, 2022 executive sessions violated open meeting law.

2. December 15, 2022 Executive Session

Strategy Forty-Eight also gave a report at the Council’s December 15, 2022 executive session. Importantly, and contrary to the Council’s Response (at 4), the agenda for the December 15 executive session contained no reference to A.R.S. § 38-431.03(A)(7). Rather, Strategy Forty-Eight presented during item 2D (“Referendum Election Process”), which was designated for executive session under A.R.S. § 38-431.03(A)(3) (Consultation/Discussion with Attorney for Legal Advice). Our review of the executive session recording confirms that Strategy Forty-Eight’s report was unrelated to any legal advice otherwise received by the Council during that session. Indeed, the City Attorney’s Office had already delivered its advice by the time Strategy Forty-Eight gave its report. As such, we conclude that the Council violated Open Meeting Law by permitting Strategy Forty-Eight to give a report during a portion of the executive session agenda itemized for legal advice under § 38-431.03(A)(3).

Nor would Strategy Forty-Eight’s presentation have been permissible under § 38-431.03(A)(7)’s exception for negotiations for the purchase sale, or lease of real property, as the Response claimed it was. By the December 15, 2022 executive session, the Council had already approved the Tempe Entertainment District development agreement. Because the Council had taken the legal action for which it received information from a designated representative in an executive session (*i.e.*, approved the development agreement which included the sale of City property), after November 29, 2022, there are no more “negotiations” which would have permitted additional executive sessions under A.R.S. § 38-431.03(A)(7).

¹ The November 3 and November 22 executive sessions were not recorded. Response, p. 2. Our analysis is, therefore, based upon our review of the confidential executive session minutes provided the Council provided with its Response, and not an independent review of the full discussion.

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We therefore conclude that the Council violated Open Meeting Law by receiving reports from representatives of Strategy Forty-Eight in its November 3, November 22, and December 15, 2022 executive sessions, and those portions of the executive session records should be made public. The remaining portions of those executive sessions (including reports from other consultants) should be redacted to maintain confidentiality.

Remedy

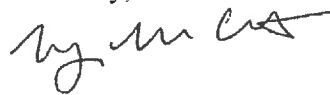
As a remedy for the violation described above, we require the Council to receive training on the Open Meeting Law within 60 days of the date of this letter, by December 9, 2024. Training materials must specifically address the requirements of A.R.S. § 38-431.03 and must be pre-approved by this Office. In addition, the Council must prominently display this letter (with the appropriate redactions described herein) on the City of Tempe's website for six months from the date of this letter, until April 9, 2025.

Finally, no later than seven months from the date of this letter, the Council must provide this Office with documentation demonstrating its compliance with the training and posting requirements noted above.

Conclusion

This letter relates solely to the disposition of the aforementioned Open Meeting Law complaint, and does not relate to any non-OML matters. The facts recited in this letter are not administrative findings of fact and are not made for purposes other than those set forth in A.R.S. §§ 38-431 *et seq.* This is not a formal opinion of the Attorney General's Office and should not be cited as authority in other matters.

Sincerely,



Mary M. Curtin
Senior Litigation Counsel