



Terry Goddard
Attorney General

STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL
EDUCATION & HEALTH SECTION

Robert J. Sorce
Education and Health Section
Direct Line: (602) 542-8896
Facsimile: (602) 364-0700
Robert.Sorce@azag.gov

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Lynne C. Adams
Lewis and Roca, LLP
40 N. Central
Phoenix, AZ 85004-4429

Re: Yavapai Community College District Governing Board Open Meeting Law Investigation Report, Findings, Conclusions and Recommendation.

Dear Ms. Adams,

This letter constitutes the Investigation Report, Findings, Conclusions and Recommendation of the Attorney General's Open Meeting Law Enforcement Team's ("OMLET") investigation of Mr. Terry Bowmaster's complaint ("Complaint") alleging the Yavapai Community College District Governing Board ("Board") violated Arizona's open meeting law, A.R.S. § 38-431 *et seq.* ("Open Meeting Law").

In summary, OMLET finds that Board members Herald Harrington, Edward Harris, Paul Madden and Donna Michaels violated the Open Meeting Law by communicating via email on Board business with a quorum of the members and by failing to create minutes of Board "work sessions." In lieu of filing an action in Superior Court to enforce the Open Meeting Law and obtain applicable penalties, the Attorney General has authorized OMLET to enter into a Consent Agreement with the Board. The Consent Agreement accompanies this letter.

Summary of the Complaint

On August 12, 2004, Mr. Bowmaster, then Yavapai Community College ("YCC") Vice President of Finance and Facilities, filed a Complaint with the Attorney General's Office in which he described three incidents where the Board allegedly violated the Open Meeting Law.

First, he alleged Board members met with staff outside of the public meetings to obtain and discuss information related to 1) the quarterly spending updates to the Master Plan ("spending report") and 2) the increased construction costs due to higher than expected steel prices. According to Mr. Bowmaster, the purpose of the individual meetings was to conceal information from the public. Second, he alleged Board members conducted Board business

outside of public meetings through e-mail communications. Third, he alleged Board members conducted an unauthorized meeting after an official meeting was concluded.

In addition, during the course of the investigation, a fourth issue was identified concerning Board Work Sessions and Work Session meeting minutes.

The Investigation Process

As part of the investigation, the following documents were provided and reviewed:

- Mr. Bowmaster's Complaint letter dated August 12, 2004 and his subsequent letter dated September 24, 2004;
- Copies of the Master Plan Spending Report and quarterly updates;
- Copies of all e-mail messages authored by one Board member and sent to another Board member from July 2003 through October 2004;
- Copies of all agendas, and meeting minutes for regular and special Board meetings from March 2003 through October 2004;
- Board materials and e-mail messages provided by former Board member James Holt;
- Open Meeting Law handouts given to Board members at training sessions in 2003 and 2004;
- The Yavapai College Policy Manual and the Yavapai College Governance Handbook;
- A letter dated March 1, 2005 and other documents from Yavapai Deputy County Attorney, Victoria Witt;
- Copies of Board packets and other materials provided by the Board; and
- A letter from the Board's counsel dated March 7, 2005 that describes remedial measures the Board enacted to ensure compliance with the Open Meeting Law.

In addition, the following persons were interviewed either in person or telephonically.

<u>Date of Interview</u>	<u>Name</u>	<u>YCC Position During the Time of the Complaint</u>
January 19, 2005	Rose Hurley	Director, Human Resources
January 24, 2005	Terry Walsh	Associate to the President, Special Projects
January 24, 2005	Sue Sammarco	Interim Director, Marketing
January 24, 2005	Peggy Marcum	Administrative Associate to the President
January 25, 2005	Robert Salmon	Vice-President of Instruction, District Provost
January 25, 2005 February 9, 2005	Terry Bowmaster	Vice-President, Finance and Facilities
February 1, 2005	Neil Goodell	Design Project Manager
February 5, 2005	James Holt	Board Member
February 5, 2005	Gail Armstrong	Executive Assistant to the President
February 22, 2005	Paul Madden	Board Member
February 24, 2005	Edward Harris	Board Member, Chair
February 28, 2005	Donna Michaels	Board Member
February 28, 2005	Herald Harrington	Board Member, Secretary

Investigation Findings re: Allegation Number 1, Board Member Meetings with Staff Outside of the Public Meeting

1. Mr. Bowmaster testified he prepared a spending report in July 2003 to analyze spending trends with respect to the general obligation bonds approved by the voters in 2000. In the fall of 2003, the Board began asking for information about spending related to the general obligation bonds. According to Mr. Bowmaster, YCC President, Dr. Doreen Dailey instructed him to meet individually with Board members to discuss information in the spending report and to keep that information confidential.

2. Mr. Bowmaster testified that in the fall of 2003 he met with each Board member individually for briefings on the spending report. Mr. Neil Goodell, Design Project Manager, also attended these meetings.
3. Mr. Bowmaster testified that prior to the April 13, 2004 Board meeting, he delivered the updated spending report to each Board member an envelope stamped “confidential.”
4. Mr. Bowmaster testified that the spending report was never the subject of a Board meeting agenda or revealed in a public meeting until October 2004.
5. Dr. Harris testified he did not remember having any meetings with Mr. Bowmaster and Mr. Goodell outside of the public meeting, nor did he remember receiving the spending report in an envelope stamped “confidential” prior to the April 13, 2004 Board meeting. Dr. Harris testified that the first time he saw the spending report is when Mr. Bowmaster gave him a copy at a Board meeting. At that Board meeting, Mr. Madden and Mr. Harrington stated the spending report was too complicated and the public would not be able to understand it because they (the Board members) could not understand it. Mr. Madden confirmed Dr. Harris’ recollection of the events at that Board meeting. Dr. Harris testified he did not remember meeting Mr. Bowmaster and Mr. Goodell outside of the public meeting to discuss the spending report.
6. The Board provided OMLET with copies of Board packets for the November 11, 2003, December 9, 2003 and April 13, 2004 meetings. The November 11 and December 9, 2003 packets contain substantial information about the Master Plan construction and Master Plan spending. The April 13, 2004 packet contains the Master Plan actual spending report (as of December 31, 2003) and the Master Plan projected spending report (as of September 16, 2003).
7. Dr. Harris testified the Board made information in Board packets public by providing copies of the packets to the public and the press at the Board meeting.
8. Mr. Bowmaster testified that in February 2004, staff became concerned over rising construction costs because the price of steel had doubled since December 2003. Mr. Bowmaster prepared a fact sheet with an analysis of the price increase. Dr. Dailey instructed Mr. Bowmaster and Mr. Goodell to meet individually with each Board member for briefings on steel price increases. The meetings took place in the spring of 2004 except no meeting occurred with Mr. James Holt. The fact sheet, which was shared with Board members, was not made available to the public at a public meeting.
9. Mr. Bowmaster testified it was his belief that Board members spoke with other Board members about Board business outside of the public meeting. Mr. Bowmaster was unable to present any first-hand knowledge or evidence to support this belief.

10. Mr. Goodell testified he attended the meetings along with Mr. Bowmaster with individual Board members related to briefings about the spending report and the steel price increases.
11. Dr. Harris testified he remembered one phone conversation with Mr. Bowmaster where they discussed steel price increases and that he never received a fact sheet or memo prepared by Mr. Bowmaster regarding steel price increases.
12. Mr. Madden testified he had a telephone conversation with Mr. Bowmaster regarding steel price increases. Mr. Bowmaster told Mr. Madden he was calling all Board members to discuss the steel price increases. Mr. Madden testified he never discussed the steel price increases with other Board members and did not receive any document marked as “confidential” except for a memo from Mr. Bowmaster regarding steel price increases.
13. Mr. Harrington testified the Board asked Dr. Dailey for a summary report of the Master Plan spending at a Board meeting in the summer of 2003. The purpose of the spending report was to communicate clearly to the public the status of the bond spending. Mr. Bowmaster’s initial spending report, which was provided at a Board meeting, was not understandable. Mr. Harrington wanted a less complicated spending report so that the Board could understand it and answer the public’s questions. Mr. Harrington stated the Board received a revised spending report within a meeting or two. Mr. Harrington testified he never met with Mr. Bowmaster and Mr. Goodell regarding the spending report, although he may have received a phone call.
14. Mr. Harrington testified he did not meet with Mr. Bowmaster to discuss steel price increases. He did see a memo regarding the steel price increases at a Board meeting and confirmed the Board received a briefing on steel price increases at the May 11, 2004 Regular Meeting. Mr. Harrington testified he does not recall meeting with Mr. Bowmaster and Mr. Goodell in the fall of 2003.
15. Dr. Michaels testified she met with Mr. Bowmaster and Mr. Goodell at the Sedona Center in the summer of 2003 where they discussed price increases in materials including steel. Dr. Michaels testified that Mr. Bowmaster and Mr. Goodell said they would be bringing that issue to the Board at an upcoming meeting. Dr. Michaels testified that she does not remember meeting with Mr. Bowmaster in the spring of 2004 to discuss steel price increases.
16. Dr. Michaels testified that at a Board meeting in the fall of 2003, Mr. Harrington said he could not understand the spending report and needed further clarification. Dr. Michaels testified Mr. Bowmaster came back within the next couple of Board meetings with a revised spending report. She never received a spending report or memo marked “confidential.”
17. Mr. Goodell testified he had no knowledge of three or more Board members meeting outside of a public meeting, but believes Board members engaged in discussions outside

of the public meeting; however, he was unable to present any first-hand knowledge or evidence to support this belief.

18. Mr. Bowmaster and Mr. Goodell testified that Dr. Harris frequently contacted them to obtain information.
19. Mr. Holt testified Board members met individually with Mr. Bowmaster for briefings and that he did receive the spending report update in an envelope stamped “confidential” prior to the April 2004 Board meeting.
20. Terry Walsh testified that it was her belief that all Board members, except for Mr. Holt, were having discussions with each other outside of the public meeting, including discussions about steel price increases. However, she was unable to present any first-hand knowledge or evidence to support this belief.
21. Peggy Marcum testified one or sometimes two Board members met with Dr. Dailey in her office. Dr. Dailey frequently received telephone calls from Dr. Harris and that Dr. Harris and Paul Madden spoke with each other regularly outside of the public meeting.
22. Robert Salmon testified he had no knowledge of meetings between Mr. Bowmaster, Mr. Goodell and individual Board members. The first time he learned of these meetings is when Mr. Bowmaster filed the Open Meeting Law complaint.
23. Numerous witnesses testified that it was their belief the Board was conducting business outside of the public meetings. When asked for tangible evidence to support this belief, the witnesses were able to describe suspicions and feelings, but could not provide any verifiable evidence of unauthorized Board meetings.

Investigation Findings re: Allegation Number 2, Board Members Conducted Board Business Outside Of the Public Meetings through E-mail Communication

24. The Yavapai County Attorney’s Office provided Open Meeting Law training for the Board at least once a year. Handouts explaining the Open Meeting Law were provided to the Board at the training sessions.
25. At the August 2003 training, the Board received a copy of Chapter 7 from the Arizona Agency Handbook, titled, *Open Meetings*. Section 7.5.1 provides the definition of a meeting from A.R.S. § 38-431(4) as “the gathering in person or through technological devices, or a quorum of members of a public body at which they discuss, propose or take legal action, including any deliberations by a quorum with respect to such action.” Later in Section 7.5.1, the reference to technological devices is explained: “The definition of meeting was modified by the Arizona Legislature in 2000 to prohibit a quorum of a public body from secretly communicating through technological devices, including facsimile machines, telephones and electronic mail.” (Attached as Exhibit 1).

26. At the August 10, 2004 Board Work Session, Deputy County Attorney Victoria Witt provided the Board with Open Meeting Law training at the request of Gail Armstrong. Ms. Armstrong explained that the College was adopting Policy Governance and asked Ms. Witt to address, among other topics, "E-mail guidelines between Board Members and between Board Members, College personnel, and/or (Policy Governance) training personnel. . ." and "guidelines on Board Members communicating with each other and/or others relating to College/Board issues on the phone or in person." (Attached as Exhibit 2).
27. Ms. Witt provided a letter dated March 1, 2005 that described the Open Meeting Law training. She also provided a copy of her personal notes used at the training. In her letter, she stated, "I believe I made the matter as to e-mailing documents and emailing without the public knowing what was being said (when more than two of the members were involved in the e-mail) pretty clearly was not a practice that could be justified under open meeting statutes." Ms. Witt's personal notes show that she discussed the Board's proposal to create a web site to share information. Her notes contain the following passage: "Basically it is impossible for more than two Board members to share information about anything remotely related to the college's business unless they are at a public meeting and whether a web site is secure, non-secure, open to the public or not such information or discussions would be subject to the open meetings act, so that the Board cannot really have use for a website. Since only two of them can talk, it is best to do it in person or by phone so that the information does not get shared with other Board members when it is not posted as a meeting." (Attached as Exhibit 3).
28. Ms. Witt also provided the Board with a handout prepared by the Arizona School Boards Association, titled, Arizona's Open Meeting Law: A Guide for School District Governing Board Members. Section 2.2.3 provides, "The quorum does not require physical proximity of members. Discussions by telephone or e-mail can constitute a gathering of members." Later in Section 2.3, the definition of "meeting" taken verbatim from A.R.S. § 38-431(4) is repeated. Ms. Witt highlighted Sections 2.3, 2.3.2 and 2.3.3 as topics she emphasized at the training. (Attached as Exhibit 4).
29. Dr. Harris testified the Open Meeting Law training provided by the Yavapai County Attorney's Office was a regularly scheduled annual event, usually scheduled in August. Dr. Harris testified Ms. Witt shocked the Board when she addressed the use of e-mails as a possible Open Meeting Law violation. As a result, Dr. Harris understood that using e-mails to communicate with other Board members could lead to an Open Meeting Law violation, although it was not entirely clear to him what was permissible and what was not. As a result, he stopped communicating to other Board members using e-mail any more than he had to except to "exchange information."
30. Mr. Madden testified that the e-mail issue discussed at the August 10, 2004 Open Meeting Law Training was a new area of the law. His understanding was that the Open Meeting Law prohibited three or more Board members from meeting, even socially, unless there was a notice and agenda posted. However, he believed it was permissible for

Board members to use e-mail to exchange information for informational or educational purposes, but impermissible for the Board to make any decisions using e-mail unless it was done at a public meeting. Mr. Madden also testified that the Open Meeting Law prohibited Board members from polling each other.

31. Mr. Harrington testified he attended the August 10, 2004 Open Meeting Law Training. He said Ms. Witt addressed the issue of e-mails and that the use of e-mails could possibly be a source of concern, but he was not clear how e-mail applied with respect to the Open Meeting Law.
32. Dr. Michaels testified that she participated in Open Meeting Law training annually. She does not remember if Ms. Witt discussed e-mail at the August 10, 2004 Open Meeting Law Training. She was unable to recall if she ever attended Open Meeting Law training in which e-mails were discussed.
33. On October 9, 2003, Mr. Harrington sent two e-mail messages to Mr. Madden, Dr. Harris and Dr. Michaels with an attachment concerning the swimming pool that was a draft titled "Proposed Resolution 2003-05". The first e-mail message contained the subject: "Updated resolution #2;" the second: "Resolution Version 3 or 4 or something like that." Mr. Harrington began the first e-mail message with "Hi all, Here is an updated resolution that we would like you to consider." In the second e-mail message, Mr. Harrington stated, "Hi everyone, Ed asked me to change the first paragraph to match the exact wording in the public documents." (Attached as Exhibit 5).
34. Dr. Harris testified that Mr. Harrington prepared Proposed Resolution 2003-05. Different versions were passed among Board members in an attempt to reach a final version. The final version was discussed at length at the October 9, 2003 Special Board Meeting where the Board made changes to the version Mr. Harrington brought to the meeting.
35. Mr. Harrington testified that as Board Secretary, he was asked by the Board at a public meeting to draft a Proposed Resolution 2003-05 to present at the next Board meeting. He shared it with Mr. Madden to get his feedback, primarily to wordsmith the document.
36. Dr. Michaels testified that the Board extensively discussed the drafts of the different resolutions at a public meeting and the circulated drafts were something to work with.
37. At a Special Board meeting on October 9, 2003, the Board discussed, deliberated and eventually took legal action in adopting an amended version of Proposed Resolution 2003-05.
38. On April 27, 2004, Mr. Madden sent an e-mail message to all Board members with the subject line: PERSONAL AND CONFIDENTIAL. Mr. Madden wrote, "Dear Ed, Jim, Donna & Herald" and described a phone call he received from attorney Chris Jensen in which Mr. Jensen questioned the legality of projects financed by general obligation bonds. In response to Mr. Jensen's proposal that the matter be raised at a Board meeting,

Mr. Madden wrote, "I then suggested to him that if he has the best interest of the college in mind that he could present the matter quietly to the board by a letter addressed to Board members. He ultimately agreed to do so and upon his asking about board member addresses I volunteered to send him a list of names and addresses for his use." Mr. Madden went on to state "I do not believe that any improper use of funds has occurred and it is best that upon receiving his letter that we keep the matter confidential at least until we have received an opinion of bond counsel." During the following two days, Dr. Harris and Mr. Harrington replied to Mr. Madden's e-mail. Dr. Harris described an interview with a local radio station reporter and indicated that Mr. Jensen had already gone "public." Mr. Harrington replied with "Hi Everybody" and stated, "It sounds to me like we need to have the public information folks put together an information piece explaining this issue to the community pretty soon." He added, "It might be a good time to start broaching the issue of the runaway steel costs we are facing and let people know how the remainder of the bond money will be allocated." Mr. Madden and Mr. Harrington continued to communicate and agreed that in addition to presenting a public relations concern, the Board should not respond until bond counsel rendered an opinion. (Attached as Exhibit 6).

39. Mr. Madden testified he sent the e-mail described in ¶ 38 to other Board members as a courtesy to provide information. Mr. Madden testified he told Mr. Jensen the bond spending issue could not be discussed in executive session, but should be addressed in a public meeting. Mr. Madden did not raise the issue Mr. Jensen complained about at a public meeting because Mr. Jensen never followed through with a letter to the Board. Therefore, there was no reason for the Board to take action or make a decision regarding the information communicated in the e-mail. Mr. Madden testified the Board did address the bond spending issue at a later Board meeting in an executive session.
40. Mr. Harrington testified that he was concerned about the legal issue Mr. Jensen raised, but did not believe the e-mail discussed Board business because there was nothing actionable. He stated Mr. Jensen never pursued his complaint and nothing ever happened.
41. Dr. Michaels testified that she did not pay a great deal of attention to Mr. Madden's e-mail because it was not Board business. The question posed by Mr. Jensen was never raised and therefore not discussed at a Board meeting.
42. The Board discussed the issue of bonds to finance construction projects at public meetings. For example, on May 13, 2003 the Board discussed and authorized the construction of a Library and Computer Commons on the Prescott campus and the sale of \$25 million in general obligation bonds to finance the project. In addition, as part its consent agenda, the Board often approved a standing Consent Agenda item that addressed bond spending titled "Acceptance of Report of Revenues and Expenditures." The Board also discussed steel price increases at the May 11, 2004 Regular Meeting.

43. On June 9, 2004, Mr. Harrington sent an e-mail message to all other Board members with the subject line: "Herald's executive limitations." Mr. Harrington stated, "Hi Everyone, Here is my current cut of the executive limitations. Please give me your feed back on them." A draft of a Board policy was attached to the e-mail. Mr. Madden responded to the e-mail with his suggested changes and stated, "If you have any questions, please give me a call." (Attached as Exhibit 7).
44. On June 30, 2004, Mr. Madden sent an e-mail message to all other Board members with the subject line: "Second Draft of Policy Revisions." Mr. Madden stated, "Dear Folks: Enclosed please find Second drafts of proposed Board Policies Ed assigned to me for writing or rewriting. The first draft was emailed to you on June 25, 2004." (Attached as Exhibit 8).
45. Mr. Madden testified that the e-mails described in ¶¶ 43 and 44 were part of a homework assignment given by Dr. Harris at a public meeting. Each Board member was assigned to draft specific sections of the Policy Governance Manual. Mr. Harrington was assigned to rewrite the executive limitation policy and Mr. Madden was assigned to draft financial policies. Mr. Madden testified the drafts were circulated in order to arrive at a final product to bring to a Board meeting for adoption and were available at a public meeting. Mr. Madden testified he never made a decision or voted on Board business using e-mail.
46. Mr. Harrington testified that the e-mails described in ¶¶ 43 and 44 were prepared as a result of assignment given at a public meeting to write policies re: policy governance. The drafts of the e-mails were discussed at Board meetings and the policies were written and re-written. Copies of the drafts were available to the public at the time the Board discussed them, but only the final draft was available in the Board packet at the regular meeting when the Board voted on the policies. Mr. Madden testified he never made a decision or voted on Board business using e-mail.
47. Dr. Michaels testified that e-mails described in ¶¶ 43 and 44 came from the policy governance training provided at the Board Work Sessions. Dr. Harris instructed Board members to wordsmith policies to conform to the policy governance model. Dr. Michaels testified that all material was available at a public meeting and any action taken by the Board on this issue would have been at a regular session.
48. At the May 11, 2004 Regular Board meeting, the Board discussed the agenda item titled "X. Announcements, 2. Homework for Board Members for June Meeting—Dr. Ed Harris." The meeting minutes show Dr. Harris requested Mr. Madden and Mr. Harrington to work through the Executive Limitations section of the Policy Governance Manual and e-mail their input to Terry Walsh. Input information was to be shared with Policy Governance Trainer, Sue Stratton, in the July Work Session.
49. At the June 8, 2004 Regular Board Meeting, as part of an agenda item titled "Announcements," Dr. Harris instructed Board members to continue with homework assignments to be shared with the Policy Governance Trainer at the July Work Session.

50. The July 13, 2004 Work Session Agenda contains the item “Policy Governance Training—Sue Stratton, ACCT” and a bullet point below titled “Policy Development.” A quorum was present for the July 13 meeting. Dr. Harris testified that meeting minutes were not recorded for the July 13 Work Session, because the Board never took legal action at a Work Session.
51. At the July 13, 2004 Regular Board Meeting, as part of the agenda item “Announcements,” Dr. Harris instructed Board members to continue homework on the Policy Governance Manual. At the August 10, 2004 Board meeting, the same issue appears on the Work Session Agenda and is addressed again in the regular meeting when the Board voted to approve the first reading of the YCC District Governing Board Policy Handbook.
52. On August 2, 2004, Dr. Michaels sent an e-mail message to all other Board members with the subject line: “ABOR Plan-Visit with Tom O’Halleran.” Dr. Michaels began the e-mail with “Hello Fellow Board Members” and described a meeting with State Representative Tom O’Halleran at which they discussed the Arizona Board of Regents proposal to restructure higher education. She further stated, “I believe that we must significantly increase our communication effectiveness with our elected officials before we consider composing an advisory group or ‘cabinet’ with whom we necessarily need to regularly communicate and ‘tend.’ This situation also suggests a need for policy in our executive limitations that would prevent lack of communication from occurring in the future. I spoke at length with our Chair, Dr. Harris, and I am available to speak to you individually concerning these issues.” Mr. Madden responded to this e-mail on August 3, 2004 to express his concerns and viewpoint with respect to creating an advisory board. (Attached as Exhibit 9).
53. On August 17, 2004, Dr. Michaels sent an e-mail message to all other Board members with the subject line: “AADGB Meeting August 18, 2004.” Dr. Michaels began the e-mail with “Hello Fellow Board Members” and described a meeting she was going to attend on the following day to obtain an analysis of fourteen alternative proposals submitted to the Arizona Board of Regents. She promised to forward the same to other Board members. Attached to the e-mail is a document titled “Request For Qualifications” from the Arizona Community College Association that solicits a consultant to author a white paper to frame the public policy debate for redesigning higher education in Arizona. Mr. Madden responded to this e-mail on the same day to express his thoughts on the “Request For Qualifications” and how to mobilize the public to lobby the Governor and the Legislature to oppose the Arizona Board of Regents’ plan. (Attached as Exhibit 10).
54. Dr. Michaels testified that the e-mail described in ¶ 52 was generated after a chance meeting with Rep. O’Halleran where he commented on a specific proposal to restructure higher education. When Dr. Michaels spoke with Dr. Harris, it was to address the restructuring of higher education issue in relation to policy governance ownership

linkage. Dr. Michaels did not meet individually with other Board members or speak with Mr. Madden. Dr. Michaels said the policy governance and ownership linkage issue was discussed at a public meeting.

55. Mr. Harrington testified the Board endlessly discussed the restructuring of higher education issue at Board meetings. Board meeting minutes reflect that restructuring of higher education was discussed at the June 8, July 13 August 10 and September 7, 2004 meetings.
56. On August 31, 2004, Dr. Harris sent two e-mail messages to Mr. Madden that described a cover letter and mediation contract. On September 1, 2004 Dr. Harris sent another e-mail message to Mr. Madden with the subject line: "FW: Changes in ACCT letter nd (sic) contract." Embedded in the e-mail is the original message Dr. Harris sent to Mr. Harrington and Dr. Michaels. Dr. Harris wrote, "The word 'mediation' has been removed from the letter and the whole sentence beginning with words 'in addition' has been deleted." On September 30, 2004 Mr. Harrington sent an e-mail message to Mr. Madden with the subject line: "ACCT Cover Letter." The body of the e-mail contains a cover letter from Narcisa Polonio accepting an agreement to perform Board and CEO leadership analysis and the development of a resolution/mediation process. Embedded in the e-mail is the original message from Dr. Harris to Mr. Harrington and Dr. Michaels. Also on September 30, 2004, a similar e-mail was sent to the same persons that contained a copy of the ACCT contract. (Attached as Exhibit 11).
57. Dr. Harris testified the e-mails described in ¶ 56 were authorized by the Board at the August 27, 2004 Special Meeting. The August 27, 2004 Special Meeting minutes show that the Board discussed possible action relating to Mr. Holt's concern regarding the effect of staff resignations on the College's mission. Subsequently, the Board voted to "direct the CEO to begin dialogue with the ACCT group to negotiate a contract with them to offer support services to the Board to help (the Board) analyze this situation and provide ideas for resolution." Dr. Harris stated the Board would ordinarily instruct the President to handle contract negotiations, but because the President was absent, the Board undertook this task.
58. Mr. Harrington testified that the e-mails described in ¶ 56 were to resolve an internal conflict within the College. He did not know if all of the documents were available to the public, but believed the ACCT contract was made public.
59. Dr. Michaels testified that the Board discussed the issues in the e-mails described in ¶ 56 at a public meeting and the documents were available to the public.
60. Mr. Madden testified that when the President was not available, Board members took a more active role in resolving issues such as writing meeting agendas and dealing with contracts.

61. The September 7, 2004 Board Work Session Agenda contained the item “III.A Overview of the mission and services of the ACCT by Narcisa Polonio.”
62. The Board briefly discussed the ACCT mediation contract at the October 1, 2004 Special Meeting when Mr. Harrington, in his welcoming remarks, commented that ACCT will be assisting with a process to move forward in resolving problems at the College.
63. The Board discussed the ACCT contract again at the October 22, 2004 Special Meeting. That meeting included an Executive Session Agenda item for discussion or consultation for legal advice, pursuant to A.R.S. § 38-431.03(A)(3), with the College’s attorneys regarding a prior and potential future consulting contract with ACCT. Upon convening from Executive Session, the Board voted to authorize the Interim President and Dr. Michaels to negotiate with ACCT regarding prior and future ACCT services and ACCT contract terms and to contract with the College.
64. On September 17, 2004, Mr. Harrington sent an e-mail to YCC’s media consultant, Mr. Jonathan Bernstein, Dr. Dailey and three other Board members with the subject line; “RE: Daily Courier 8-17-04.” The e-mail is a reply to Mr. Bernstein’s e-mail to the same persons commenting on a newspaper article that apparently was critical of the Board. In Mr. Harrington’s reply, he criticized Mr. Holt’s “unacceptable behavior” and expressed dissatisfaction with Mr. Holt’s allegations that the Board was “suppressing information” and conducting “secret meetings.” (Attached as Exhibit 12).
65. Mr. Harrington testified that the September 17, 2004 e-mail was intended to go to Mr. Bernstein only and he mistakenly hit the “reply to all” button and inadvertently included the rest of the Board. Mr. Harrington testified that he was frustrated at hearing allegations that the Board was suppressing information, especially given the fact that Mr. Holt voted with the four other Board members a majority of the time. Mr. Harrington responded to Mr. Holt’s concern about resignations of college staff by placing the matter on a meeting agenda and continued to pursue the matter even after Mr. Holt resigned from the Board. Mr. Harrington stated that he and the rest of the Board were working in a collaborative manner. He stated the article referenced in the e-mail was discussed at a Board meeting.
66. Mr. Madden testified the Board discussed their frustration with Mr. Holt at a public meeting. He further testified that on those occasions when Mr. Holt expressed dissatisfaction with the Board, Mr. Holt was unable to articulate any details that could explain his dissatisfaction.
67. When asked about a statement in Mr. Holt’s letter of resignation in which he accused the Board of suppressing information and not working collaboratively, Dr. Michaels testified she did not understand why Mr. Holt would accuse the Board of not being collaborative. She stated she has served on a number of boards and has never seen a harder working more collaborative board than this one, which has had to operate under very difficult circumstances. Dr. Michaels stated Mr. Holt was grossly misinformed or misinterpreting

data when he said the Board was presenting inaccurate information. Dr. Michaels testified that on one occasion, Mr. Holt called her to express his concerns. She encouraged him to attend policy governance training with ACCT.

68. The August 10, 2004 meeting minutes show that Mr. Holt expressed concern about the possible impact on the College mission of the potential resignations of executive staff. Mr. Holt's concerns were also addressed in meetings where the Board discussed ways to address problems at YCC (see ¶¶ 55, 59, and 60).
69. Dr. Harris testified he communicated with other Board members and the President outside of the public meeting by telephone and e-mail, but only on a one-to-one basis. The purpose of the communication was not to discuss substantive issues, but instead to obtain or exchange information; to create meeting agendas or to have as much information as possible when attending Board meetings.
70. Dr. Harris testified that he believed that the college e-mail system was part of the public domain and that anyone who had access to the college system could access e-mail.
71. Mr. Harrington testified he cannot understand the allegations that he intended to deceive the public. He represents the public and has no motivation to hide things and does the best job he can.
72. Dr. Michaels testified that she or other Board members never conducted Board business outside of a public meeting.
73. Dr. Michaels testified that she is absolutely convinced that there has never been a willful intent by any Board member to violate a state statute, including the Open Meeting Law. She is convinced that the Board is hard working, diligent and committed to the stewardship of achieving the YCC's mission.

Investigation Findings re: Allegation Number 3, Board Members Conducted an Unauthorized Meeting after the Regular Meeting

74. In the Complaint, Mr. Bowmaster described two incidents of alleged unauthorized meetings. The first occurred after a Work Session where three Board members were observed having a private conversation at the Board table. Mr. Bowmaster could not hear the conversation, but inferred it was about Board business. The second instance occurred after a regular meeting when Dr. Harris allegedly turned to Mr. Harrington and said, "I wonder where Paul stands on this." According to Mr. Bowmaster, the "this" referred to the resignations of college staff and the "Paul" is Board member Paul Madden. Mr. Bowmaster inferred that Dr. Harris intended to poll Mr. Madden outside of the public meeting.

75. Mr. Bowmaster testified that he did not personally overhear Mr. Harris make the alleged comment to Mr. Harrington. He heard about it from someone who was at the Board table.
76. No other witnesses corroborated Mr. Bowmaster's account of these alleged meetings or that three or more Board members met in person to discuss, deliberate or take legal action with respect to issues that were, or could be, brought before the Board.

Investigation Findings re: Allegation Number 4, Open Meeting Law Violations Related to Work Sessions and Work Session Meeting Minutes

77. Dr. Harris testified that Board Work Sessions, which preceded the regular meetings, had a proper notice and agenda and the public attended. He stated the Work Sessions were for information only and the Board did not take legal action or make decisions there. All decisions were made at the regular meeting. Consequently, meeting minutes were not usually recorded for Work Sessions. Whenever the Board took legal action, it was at a regular meeting and the legal action was recorded in the regular meeting minutes.
78. Dr. Harris testified that the public had access to newspaper articles the Board circulated to each other by either reading the newspaper or attending the Work Session prior to the regular Board meeting.
79. Dr. Harris testified that the Board conducted a "retreat" followed by a regular meeting in July 2003. The retreat was the same as a Work Session and no meeting minutes were recorded.
80. Mr. Harrington testified the Board received information and discussed information at the Work Sessions. The Board did not vote on Work Session Agenda items. The regular meeting was to vote on actionable items. For example, the Board would invite community groups to come to the Work Session for the purpose of providing information. He stated the Board intends to record Work Session meeting minutes in the future.
81. Mr. Harrington testified he communicated with Dr. Harris more than once a month. In his capacity as Board Secretary, he was primarily responsible to draft the meeting agendas. The communications with Dr. Harris were to prepare the meeting agenda and would not involve substantive discussions about any issues that could come up for a vote.

Conclusion re: Allegation Number 1, Board Member Meetings With Staff Outside of the Public Meeting

There is no credible evidence that a quorum of the Board violated the Open Meeting Law by meeting with staff outside of the public meeting. In order to qualify as a meeting under the Open Meeting Law, a quorum of the Board must be present. In other words, if less than a quorum of the Board meets or communicates, there is no "meeting" and no requirement to

comply with the Open Meeting Law. A.R.S. § 38-431(4). A quorum of the Board is at least three members. The evidence showed that the meetings alleged by Mr. Bowmaster, to the extent they occurred, were with less than a quorum of Board members.

There are occasions when meetings with less than a quorum of Board members can lead to violations of the Open Meeting Law. This practice, known as “splintering the quorum,” occurs when individual Board members engage in separate or serial discussions with a majority of the Board and communicate information received from each Board member to other members. There is no evidence to suggest that Board members were having separate or serial discussions with a majority of the Board with respect to steel prices or the spending report. The Board members, except for Mr. Holt, either do not recall meeting with Mr. Bowmaster and Mr. Goodell or remember having a brief meeting or telephone conversation. The Board members were consistent in describing a Board meeting where Mr. Bowmaster presented the spending report and was asked to come back to the Board with a simplified version at a future Board meeting. Moreover, the Board made copies of the Board packet available to the public at the Board meeting. In fact, the Board packets from the November and December 2003 and April 2004 meetings demonstrated that information related to Master Plan spending was available to the public including the Master Plan spending report.

Conclusion re: Allegation Number 2, Board Members Conducted Board Business Outside Of the Public Meetings Through e-mail Communications

There is credible evidence that the Board violated the Open Meeting Law by conducting meetings outside of a public meeting through e-mail communication. Any legal action taken by the Board must occur at a public meeting in which the public can attend and listen to deliberations and proceedings. A.R.S. § 38-431.01(A). “All meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings.” A.R.S. § 38-431.01(A). A meeting, as defined in A.R.S. § 38-431(4), contains the following elements:

1. The gathering in person *or through technological devices*;
2. Of a *quorum* of members;
3. At which they *discuss, propose, or take legal action, including any deliberations by a quorum with respect to such action.* (Emphasis added)

The Board’s discussions in the e-mails described in ¶¶ 33, 39, 43, 44, 52, 53, 56, and 64 contain all of the elements to qualify as a meeting under the Open Meeting Law; and therefore, the Board should have conducted those discussions at a public meeting.

Board members attempted to justify the e-mail discussions on several grounds. First, they believed e-mail communications were permissible because the Board took no legal action, did not vote and did not make an official decision. The Board’s interpretation of what constitutes

legal action is too narrow. The Arizona Agency Handbook, which the Board received in its 2003 Open Meeting Law training, defines the scope of what constitutes legal action.

All discussions, deliberations, considerations, or consultations among a majority of Board members regarding matters that may foreseeably require final action or a final decision are considered "legal action" and, therefore, must be conducted in a public meeting or executive session in accordance with the Open Meeting Law. Ariz. Att'y Gen. Ops. 75-8, I79-4. *See also* A.R.S. §§ 38-431.01(A),-431(3).

Arizona Agency Handbook at § 7.5.1.

While it is theoretically possible for a quorum of the Board to conduct discussions through e-mail communications that are beyond the scope of legal action, the e-mails in ¶¶ 33, 39, 43, 44, 52, 53, 56, and 64 do not fall into that category. The Board's e-mail deliberations concerned matters that had either come before the Board or could foreseeably come before the Board at future meetings. Indeed, the Attorney General has defined "deliberations" as any exchange of facts that relate to matters which foreseeably might come before the Board and includes discussions that *could* be construed as legal actions. Ariz. Att'y Gen. Ops. 75-8, I79-4. If the Board had questions about whether the e-mail discussions or deliberations were subject to the Open Meeting Law, those questions should have been resolved in favor of compliance with the Open Meeting Law. *See* A.R.S. § 38-431.09 (provisions of the Open Meeting Law shall be interpreted to favor open and public meetings).

Board members also justified the use of e-mail as a means to exchange material for informational or educational purposes in order to be well informed at the public meeting. According to some Board members, much of the information, for example, newspaper articles, was either available in the public domain or could have been obtained by attending Board Work Sessions. The Board's justification is not persuasive to excuse non-compliance with Open Meeting Law. While it may be arguably true that newspaper articles sent via e-mail can be for information only, the exchange of facts or issues that foreseeably could come before the Board constitute deliberations. The Open Meeting Law gives the public a right to attend and listen to the Board's deliberations. A.R.S. § 38-431.01(A). Whether the information is published in the public domain is irrelevant in determining compliance with the Open Meeting Law. A member of the public may not read or have access to a newspaper, and even if he or she did, there is no way for the public to know that a Board member has read and considered a particular article in formulating a decision.¹

Finally, several Board members stated they were unclear about exactly what the Open Meeting Law allowed or prohibited with respect to e-mails. Again, this reason is not persuasive to excuse non-compliance with the Open Meeting Law. In 2000, the Arizona Legislature amended the definition of "meeting" by adding the reference to a gathering through

¹Rather than secretly circulating news articles between board members, news articles could be included in board members' meeting packets and made available to the public as a public record prior to properly-noticed open meetings.

technological devices. The Board received Open Meeting Law training in 2003 and 2004 and received handouts that specifically addressed the use of e-mail as a potential method of conducting a meeting.

Moreover, at the August 10, 2004 Work Session, Yavapai Deputy County Attorney Victoria Witt provided the Board with Open Meeting Law training and addressed the risks involved in using e-mail. According to her March 1, 2005 letter and the notes from the training, she specifically admonished the Board that e-mail communication among Board members for any reason posed too great of a risk of noncompliance with the Open Meeting Law. Indeed, the e-mails described in ¶¶ 53, 56 and 64 were sent *after* the Board received Ms. Witt's admonition.

As Ms. Witt explained to the Board, the use of e-mail poses special risks that may not be present in other forms of communication. For example, e-mails can be forwarded and copied. Thus, even though an e-mail may be exchanged from one Board member to another Board member—a communication that does not result in a quorum—the e-mail could be printed and copied and showed to a third Board member—a communication that does result in a quorum. An even greater risk is posed when e-mails are forwarded to other Board members, sometimes by non-Board members who are also recipients of the e-mail. The common practice of imbedding original e-mail messages and forwarding messages to multiple persons presents an unusually high risk that the Board could create a quorum without intending to do so. Similarly, there is the risk of hitting the “wrong button” as Mr. Harrington did when he inadvertently replied to all Board members in response to Mr. Bernstein's September 17, 2004 e-mail. Finally, there is the risk of exchanging e-mail on a system where others may have access. Dr. Harris testified that he believed that the college e-mail system was part of the public domain and that anyone who had access to the college system could access e-mail. If that is accurate, then a quorum of the Board could be established simply by one Board member accessing two other Board members' e-mail.

Conclusion re: Allegation Number 3, Board Members Conducted an Unauthorized Meeting after the Regular Meeting

There is no credible evidence that the Board violated the Open Meeting Law by meeting after a regular meeting. The evidence that the Board met and discussed Board business after the conclusion of a public meeting was based entirely on speculation and hearsay. Even if the Board did meet and Dr. Harris had said, “I wonder where Paul stands on this,” that remark by itself is not persuasive to conclude that Dr. Harris or any other Board members were discussing or deliberating on matters that would require the Board to take legal action.

Conclusion re: Allegation Number 4, Open Meeting Law Violations Related to Work Sessions and Work Session Meeting Minutes

There is credible evidence to conclude that the Board violated the Open Meeting Law by failing to create minutes for Work Session meetings. During the course of the investigation,

Board members confirmed they did not record Work Session meeting minutes. As part of its monthly meeting, the Board scheduled a Work Session in the morning and a Regular Meeting in the afternoon. Work Sessions were designed to allow the Board to get information from staff or community groups, while Regular Meetings were designed to vote or make official decisions. Consequently, the Board believed that meeting minutes were not required for Work Sessions, but were required for Regular Meetings.

The Open Meeting Law requires the Board to take minutes of all meetings, regardless of what label is given to the meeting. A.R.S. § 38-431.01(B). Work sessions, Board retreats or study sessions, if they meet the definition of a meeting, require compliance with all provisions in the Open Meeting Law, including the requirement for minutes.

The Work Sessions clearly met the definition of a meeting, which is a gathering of a quorum to discuss deliberate or propose to take legal action. The Board's rationale that it did not vote or make decisions at the Work Sessions does not justify noncompliance with the Open Meeting Law. The Board's failure to take meeting minutes for Work Sessions prevents the public from getting a complete picture of the Board's discussions and deliberations that were a factor in making a final decision.

Recommendation Relating to Violations of the Open Meeting Law

Several factors were considered in making the following Recommendation. Factors that work in the Board's favor include the fact that, since the filing of the Complaint, the Board has recognized the need to be more vigilant in ensuring compliance with the Open Meeting Law. Both the Board and the Board's counsel have fully cooperated with this investigation and communicated to the Open Meeting Law Enforcement Team that they take the allegations of Open Meeting Law violations very seriously. To that end, the Board has been working closely with its counsel in initiating remedial measures to ensure compliance with the Open Meeting Law and provide the public with greater access to Board activities. (Attached as Exhibit 13).

The one factor that works against the Board is the continued use of e-mail communication after the Open Meeting Law training on August 10, 2004. Ms. Witt advised the Board that communicating through e-mail was extremely risky and likely to result in noncompliance with the Open Meeting Law. Despite this warning, four Board members continued to generate e-mail messages to other Board members.

Accordingly, in lieu of bringing a civil enforcement action in Superior Court against the board members, the Open Meeting Law Enforcement Team recommends that the Board enter into a Consent Agreement requiring compliance with all of the following:

1. All current YCC Board members² agree that they shall, at the next regularly scheduled Board meeting after execution of this Agreement, place on the Agenda the item “Yavapai Community College District Governing Board Open Meeting Law Investigation Report, Findings, Conclusions and Recommendation” (“Report”). At the meeting, the current YCC Board shall discuss the results of this investigation and invite the public during a Call to the Public segment to comment on the investigation or any other Open Meeting Law concerns. Any issues identified by the public that demonstrate an ongoing or unresolved Open Meeting Law matter shall be placed on a future Regular Meeting Agenda for discussion and resolution. Also at the next regularly scheduled meeting, the current YCC Board shall, as part of the same agenda item, inform the public of the Board’s current and future remedial measures enacted to ensure compliance with the Open Meeting Law. The YCC Board shall make a sufficient number of copies of the Report and all exhibits attached thereto available to the public prior to the meeting and at any time after the meeting.
2. YCC Board members Herald Harrington, Edward Harris, Paul Madden, and Donna Michaels shall each pay a penalty of five hundred dollars (\$500.00) from their personal funds, which shall be deposited into the general fund of the YCC within thirty (30) days from execution of this Agreement.
3. All current YCC Board members shall participate in Open Meeting Law training within ninety (90) days from the date of execution of this Agreement. The training shall be provided by an attorney who is knowledgeable of and has expertise with Open Meeting Law issues. The training shall cover all requirements of the Open Meeting Law with particular emphasis on conducting meetings through technological devices, recording meeting minutes and making them available to the public. Prior to the training, the YCC Board shall submit to the OMLET for approval, the name of the trainer, the trainer’s outline or syllabus and any materials the trainer intends to use as part of the training.
4. Before the training, all current YCC Board members, as part of an Agenda item at a public meeting, shall sign a written statement attesting that he or she shall not use e-mail or direct staff to use e-mail to communicate with any other YCC Board member for any reason. The Board Chairman, or his designee, shall perform random audits of the YCC e-mail system of no less than once per month to verify that YCC Board members are not using e-mail or directing staff to use e-mail to communicate with other YCC Board members for any reason. The Chairman, or his designee, shall provide a written report of audit findings to the YCC Board’s counsel who shall promptly notify the OMLET of any audit that reveals a YCC Board member communicated with another YCC Board member via e-mail or directed staff to communicate with YCC Board members via e-mail. The audits shall continue until the Board’s counsel certifies the completion of the e-mail policy described in ¶ 5 below.

² Current member Patricia McCarver replaced former member James Holt after his resignation in October 2004. Dr. McCarver did not participate in any of the violations discovered in the investigation. She will, however, participate in training and the other requirements set out in this Agreement so that all current members of the board have the same knowledge and understanding of the requirements of the Open Meeting Law.

5. Within six (6) months following completion of the Open Meeting Law training, the YCC Board, as part of an Agenda item at a public meeting, shall develop an e-mail policy that governs both YCC Board member e-mail communication and communication by the YCC Board's staff with Board members. The policy shall comply with the requirements of the Open Meeting Law. Prior to implementation, the policy shall be reviewed by the YCC Board's counsel who shall certify to OMLET that the policy conforms to all applicable requirements of the Open Meeting Law. The e-mail policy shall be incorporated into the YCC Board's current Policy Manual and shall be reviewed and discussed annually as part of the YCC Board's Open Meeting Law training.

Please submit the Consent Agreement to the board at its next regularly scheduled meeting. Please notify me no later than two (2) business days following the Board's next regularly scheduled open meeting whether the Board has accepted or rejected the Consent Agreement. If the Board chooses not to accept the Consent Agreement or fails to complete any agreed upon provisions as stated above, the Attorney General's Open Meeting Law Enforcement Team reserves the right to file a complaint in Superior Court and seek appropriate orders against the Board pursuant to A.R.S. § 38-431.07(A), including the imposition of monetary penalties and removal from office.

This letter and the attachments are a public record, which shall be disclosed to the public on request pursuant to A.R.S. § 39-121.

Very truly yours,

Robert J. Sorce
Assistant Attorney General
Member, Open Meeting Law Enforcement Team