IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

RAÚL R. LABRADOR, in his official capacity as attorney general of the State of Idaho, Plaintiff, vs. IDAHO STATE BOARD OF EDUCATION, an agency of the State of Idaho, in its capacity as the Board of Regents of the University of Idaho, Defendant.	Case No. CV01-23-9996 FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff Raúl R. Labrador, Idaho's Attorney General, seeks to nullify the approval given by Defendant Idaho State Board of Education, acting in its capacity as the Board of Regents of the University of Idaho, for the University of Idaho to acquire the University of Phoenix, a for-profit online university. Attorney General Labrador claims that the Board of Regents violated Idaho's Open Meetings Law, I.C. §§ 74-201 to -208, in considering and approving the proposed acquisition.

On summary judgment, the Board of Regents won a ruling narrowing Attorney General Labrador's case to a single theory: that the Board of Regents' approval for the proposed acquisition is null and void because the Board of Regents discussed the proposed acquisition during a meeting session on May 15, 2023, that unlawfully was closed to the public. That theory was tried to the Court from January 22–25, 2024. The matter was taken under advisement once the parties

submitted proposed findings of fact and conclusions of law on January 29, 2024. This case doesn't involve examining the proposed acquisition's wisdom or merits. The Court's only call is to determine whether Attorney General Labrador proved his theory that the Board of Regents violated Idaho's Open Meetings Law. For the reasons that follow, the Court determines that he did not.

I.

FINDINGS OF FACT

1. In early 2023, the Board of Regents' members were Dr. Linda Clark, William Gilbert, Kurt Liebich, Cally Roach, Debbie Critchfield, Dr. David Hill, Shawn Keough, and Cindy Siddoway, and its executive director was Matt Freeman.

2. On May 18, 2023, during a meeting open to the public, the Board of Regents unanimously voted to approve the execution of an asset purchase agreement under which the University of Idaho, through a newly formed nonprofit corporation, would acquire the University of Phoenix, a for-profit online university. (*E.g.*, Pl.'s Ex. 21.)

3. In late January 2023, the University of Idaho learned from Wells Fargo Bank that the University of Phoenix was seeking to be acquired. Interested in the potential acquisition, the University of Idaho was quickly put in contact with Tyton Partners, an investment bank working as the University of Phoenix's broker. Tyton Partners told the University of Idaho that the University of Phoenix wanted to execute a contract for its sale by May 19, 2023.

4. In early negotiations with Tyton Partners, University of Idaho President C. Scott Green and University of Idaho Special Counsel Kent Nelson were

told that the University of Phoenix preferred to be acquired by a public educational institution. (*E.g.*, Tyton Partners Dep. 138:7–139:21.) They also were told that the potential acquisition was highly competitive and the University of Idaho's competitors included other public institutions. (*E.g., id*. at 24:21–26:21.) Neither President Green nor Nelson ever asked Tyton Partners to name the University of Idaho's competitors, nor did Tyton Partners ever volunteer that information.[1]

5. Throughout the negotiation process, Tyton Partners was President Green's primary conduit of information concerning the University of Phoenix and the state of competition.

6. In early March, President Green included three members of the Board of Regents in discussions regarding the University of Phoenix transaction. Those board members were Dr. Hill, Gilbert, and Liebich.

7. On March 13, 2023, President Green sent an e-mail to Nelson, board member Dr. Hill, board member Gilbert, and board member Liebich to inform them that, according to Tyton Partners, "there are two others interested." (Pl.'s Ex. 2.) President Green did not specify who these two other competitors were. Based on

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[1] At trial, Attorney General Labrador suggested that President Green and Nelson shouldn't have believed that the University of Idaho's competitors for the acquisition included other public educational institutions, Tyton Partners not having named any. During its I.R.C.P. 30(b)(6) deposition, however, Tyton Partners explained that its "general practice" was to promote competition by letting an interested party know if it is competing with a peer, (*id*. at 26:7–21), corroborating President Green's and Nelson's testimony about what they were told. And, corroborating what they were told, media reports in January 2023 indicated that the University of Arkansas was pursuing the acquisition.

publicly available information, though, board member Liebich already knew that the University of Arkansas was interested in acquiring the University of Phoenix.

8. The Board of Regents discussed the proposed acquisition during executive sessions—sessions closed to the public—of meetings held on March 22, April 25, and May 15, 2023. The University of Idaho sought these executive sessions. Jenifer Marcus, a deputy attorney general working under Attorney General Labrador and assigned for many years to advise the Idaho State Board of Education, approved them in advance as compliant with Idaho's Open Meeting Law.

9. In determining that these executive sessions were permitted by Idaho's Open Meeting Law, Marcus relied mainly on Nelson's factual representations.[2] During a phone call before the March 22 executive session, Marcus and Nelson reviewed the Attorney General's Open Meetings Law handbook, (Def.'s Ex. 1049), and agreed that I.C. § 74-206(1)(e)—which allows executive sessions "[t]o consider preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations"—permitted the Board of Regents to discuss the potential acquisition of the University of Phoenix in an executive session. Marcus approved the March 22 executive session on the understanding that the University of Idaho was competing against other public educational institutions to acquire the University of Phoenix.

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[2] Marcus also received information from Freeman, who was aware of the University of Phoenix opportunity and had been involved in at least one early discussion of that subject in mid-March, before the March 22 executive session.

10. Though the University of Idaho had signed a nondisclosure agreement requiring it to keep information relevant to the potential University of Phoenix acquisition confidential, the nondisclosure agreement wasn't a factor in Marcus's approval of any of the three executive sessions, nor was it a factor in the Board of Regents' votes to enter into any of the executive sessions.

11. Before the March 22 executive session, most members of the Board of Regents were unaware of the University of Idaho's interest in acquiring the University of Phoenix. So, in voting to enter into executive session on March 22, most board members relied on the agenda for the March 22 meeting, (Pl.'s Ex. 8), which cited section 74-206(1)(e) as authority for the executive session. These board members knew from years of working with Marcus that, before a meeting, she evaluates whether a proposed executive session would be lawful and communicates her determination that it would be lawful by listing it on the meeting agenda.

12. During the March 22 executive session, President Green, Nelson, and other members of the University of Idaho's negotiating team gave the Board of Regents a broad introduction to the University of Phoenix acquisition opportunity. President Green explained that the University of Idaho was in fierce competition with both private and public institutions—and especially land-grant universities—to acquire the University of Phoenix.[3]

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[3] Only board member Siddoway recalls the University of Arkansas being mentioned by name on March 22. But both Nelson and board member Liebich were aware of competition from the University of Arkansas before March 22. So, the Board of Regents may have known University of Arkansas' interest at this early juncture.

13. As with the March 22 meeting, the agenda for the April 25 meeting set an executive session under section 74-206(1)(e). (Pl.'s Ex. 15.) By April 25, it had long been reported in the media that the University of Arkansas was interested in acquiring the University of Phoenix. (*E.g.*, Pl.'s Ex. 12.) On April 24, its board of trustees rejected the acquisition, however, in a five-to-four vote, with one trustee abstaining. The implications of that vote were discussed during the April 25 executive session, with Green explaining why, in his view, it didn't take the University of Arkansas out of the running for the University of Phoenix acquisition. As a result, at the end of the April 25 executive session, the board members continued to regard the University of Arkansas as a viable competitor.

14. During the April 25 executive session, someone asked President Green if the University of Idaho could obtain an exclusivity agreement with the University of Phoenix, enabling it to work toward the acquisition for a time without the risk of a competitor snatching away the opportunity. No one remembers who asked, and most board members don't recall any exclusivity discussion. President Green approached Tyton Partners about obtaining an exclusivity period but didn't get one and never reported back to the Board of Regents on the subject.[4]

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[4] Attorney General Labrador says the Board of Regents couldn't have reasonably believed that it was still in competitive environment as of the May 15 executive session, President Green not having reported back on the subject of an exclusivity period. But he had repeatedly told the board members that the environment was highly competitive, never told them otherwise, and never implied that getting an exclusivity period was likely. So, the limited discussion of a potential exclusivity period doesn't undermine the notion that the Board of Regents reasonably believed it remained in a competitive environment as of the May 15 executive session.

15. The University of Arkansas apparently was considering involving a non-profit entity called TES in the potential University of Phoenix acquisition as the direct acquirer. President Green never informed the Board of Regents of that fact.[5] It wasn't important in his mind; the University of Idaho was considering structuring the acquisition similarly, and public universities, in his experience, often have relationships with non-profit entities so close as to necessitate those entities' inclusion in their financial statements.

16. Similarly, President Green did not provide the Board of Regents with any information regarding PFM Advisors, a financial advising firm that apparently only agreed to assist the University of Idaho with its acquisition efforts after the University of Arkansas' board of trustees voted against acquiring the University of Phoenix. No board members were aware of PFM Advisors' role in the transaction.[6]

17. In addition to the information the Board of Regents received from President Green and his team about the University of Arkansas' interest in acquiring the University of Phoenix, at least five of the eight board members read news articles on that subject in the days shortly before or after the April 25

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[5] Attorney General Labrador suggests that TES's involvement meant that the University of Arkansas itself wasn't a competitor—or at least that the Board of Regents shouldn't have seen it as a competitor. But the vast majority of board members knew little or nothing about TES or its involvement in the University of Arkansas' pursuit of the acquisition. And, regardless, that the University of Arkansas was engaged with TES in pursuing the acquisition made it a competitor even if TES would've been the direct acquirer.

[6] PFM Advisors' involvement in the potential acquisition on the University of Idaho's behalf, not being known to the board members, couldn't have signaled to them that the University of Arkansas was out of the running.

executive session. Those who had read news articles regarded them as corroborating President Green's view that the University of Arkansas remained a viable competitor for the University of Phoenix acquisition.

18. As with the March 22 and April 25 meetings, the May 15 meeting agenda set an executive session under section 74-206(1)(e). (Pl.'s Ex. 18.)

19. Between the end of the April 25 executive session and the outset of the May 15 executive session, no board member asked Marcus, President Green, or anyone else whether the University of Idaho continued to be in competition with other public educational institutions to acquire the University of Phoenix. Nor did Marcus seek updates from Nelson regarding the state of competition before approving the agenda for the May 15 meeting.[7] Instead, Marcus and the individual board members all continued to believe that the University of Arkansas was, along with others, still in competition with the University of Idaho to acquire the University of Phoenix. Under the circumstances, the Court finds that this belief was reasonable.

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[7] Marcus testified that it is standard practice for attorneys representing the various entities under the Idaho State Board of Education's umbrella to request an executive session and to provide her with a cover sheet explaining the basis for that request. (*E.g.*, Pl.'s Exs. 5, 10.) She then speaks with the requesting attorney to confirm the factual basis for the session, just as she did in advance of the March 22 meeting. (*See* Finding of Fact ¶ 9, *supra*.) Before the May 15 executive session, however, she saw no need to speak with Nelson again, being well acquainted with the status of competition after having attended the previous two executive sessions. In addition, she was confident that Nelson would have notified her of any material change affecting section 74-206(1)(e)'s applicability.

20. Though board members rely on Marcus to determine whether an executive session is authorized by Idaho law in the first instance, they appreciate that an executive session must end if the substance of the conversation fails to satisfy or drifts away from the statutory criteria. For example, board member Dr. Hill credibly testified that he would've questioned the basis for the May 15 executive session if he ever doubted that the University of Idaho was still in competition with other public educational institutions. Similarly, Marcus credibly testified that she would've ended any executive session not aligned with the statutory criteria. But, rather than doubt the continued applicability of section 74-206(1)(e), the board members and Marcus left the May 15 session continuing to believe the University of Idaho faced stiff competition from the University of Arkansas and others. Again, the Court finds that belief reasonable under the circumstances.[8]

[8] Attorney General Labrador argues that because the University of Arkansas' board of trustees voted against acquiring the University of Phoenix on April 24, and because the University of Phoenix wanted to execute a sale contract by May 19, the Board of Regents should've understood the University of Arkansas to be out of the running as of the May 15 executive session. But the narrow no-vote didn't somehow foreclose the continued pursuit of the acquisition. Neither did the University of Phoenix's preference to sign a deal by May 19; at most, that preference gave the University of Idaho a competitive edge because it was in a position to sign a deal by May 19, whereas the University of Arkansas might not have been. Indeed, Attorney General Labrador presented no direct evidence that the University of Arkansas either had abandoned the notion of making a deal as of May 15 (and the Board of Regents knew as much) or wasn't in a position to make a deal by May 19 (and the Board of Regents knew as much).

II.

CONCLUSIONS OF LAW

1. In general, Idaho's Open Meetings Law requires governing bodies of public agencies to make their meetings open to the public. *See* I.C. § 74-203(1). The Board of Regents is the governing body of a public agency. So, in general, its meetings must be open to the public.

2. Sometimes, however, governing bodies of public agencies may meet in executive sessions, I.C. § 74-206(1), which are closed to the public, I.C. § 74-202(3).

3. A governing body of a public agency may hold an executive session "[t]o consider preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations." I.C. § 74-206(1)(e).

4. If section 74-206(1)(e) didn't permit the Board of Regents to discuss the University of Idaho's proposed acquisition of the University of Phoenix during an executive session on May 15, 2023, the approval it subsequently gave for the proposed acquisition during an open meeting on May 18, 2023, would be null and void. *See* I.C. § 74-208(1).

5. Determining whether the May 15 executive session was permitted by section 74-206(1)(e) requires the Court to interpret section 74-206(1)(e).

6. The aim of interpreting statutes is to "determine and give effect to the legislative intent"—an aim advanced by giving statutory language its "plain, usual, and ordinary meaning." *Kaseburg v. State Bd. of Land Comm'rs*, 154 Idaho 570, 577, 300 P.3d 1058, 1065 (2013) (first quoting *Idaho Cardiology Assocs., P.A. v.*

Idaho Physicians Network, Inc., 141 Idaho 223, 227, 108 P.3d 370, 374 (2005); and then quoting *Two Jinn, Inc. v. Idaho Dep't of Ins.*, 154 Idaho 1, 3, 293 P.3d 150, 152 (2013)). So, "[s]tatutory interpretation begins with an examination of the literal words of a statute." *St. Luke's Health Sys., Ltd. v. Bd. of Comm'rs of Gem Cnty.*, 168 Idaho 750, 756, 487 P.3d 342, 348 (2021). Statutes must be considered "as a whole," *e.g.*, *State v. Casper*, 169 Idaho 793, 797, 503 P.3d 1009, 1013 (2022), not as assemblages of "isolated provisions," *e.g.*, *State v. Burke*, 166 Idaho 621, 623, 462 P.3d 599, 601 (2020). A statute is ambiguous if its "meaning is so doubtful or obscure that reasonable minds might be uncertain or disagree as to its meaning." *Hamberlin v. Bradford*, 165 Idaho 947, 951, 454 P.3d 589, 593 (2019). If a statute is ambiguous, courts consider the "language used, the reasonableness of proposed interpretations, and the policy behind the statute" to determine legislative intent. *Kaseburg*, 154 Idaho at 577, 300 P.3d at 1065 (quoting *Ward v. Portneuf Med. Ctr., Inc.*, 150 Idaho 501, 504, 248 P.3d 1236, 1239 (2011)).

7. The provision now codified as section 74-206(1)(e) was enacted in 1977. *See* 1977 Idaho Sess. Laws ch. 173, § 3. Oregon's legislature had enacted an identical provision a few years earlier. 1973 Or. Laws ch. 172, § 6. Because no other state has quite the same provision, the Court presumes Oregon's inspired Idaho's. Regardless, in 1982, five years after Idaho followed Oregon's lead, Oregon's attorney general issued an opinion on the provision's interpretation, under which an executive session is allowed if the governing body "kn[e]w or had[] good reason to believe that it was in competition with other governing bodies in other states or

nations for the kind of investment under consideration," even if it did not know or have good reason to believe that "particular governmental bodies are actually interested." 42 Or. Op. Att'y Gen. 392, at *5 (1982).

8. In 2009, more than thirty years after enacting the provision now codified as section 74-206(1)(e), the Idaho legislature enacted a law requiring that all statutory provisions authorizing executive sessions be "narrowly construed." 2009 Idaho Sess. Laws ch. 161, § 3; I.C. § 72-206(2). Consequently, the Court is obligated to construe section 74-206(1)(e) narrowly, making the Oregon attorney general's construction of that section's Oregon counterpart an impermissible construction of section 74-206(1)(e). That construction might make good sense, but it is undeniably a broad construction, not a narrow one.

9. At the other end of the spectrum, however, the Court also rejects as unduly narrow a construction under which a governing body that holds an executive session based on a reasonable belief that it is in competition with at least one governing body in some other state or nation violated section 74-206(1)(e) if its reasonable belief turns out to have been mistaken. A mandate to construe a statute narrowly is not a mandate for a negating construction. In practice, governing bodies use the information available to them in deciding whether an executive session is lawful. The information available to them will not always be sound, even when it reasonably appears to be so. The Court is confident the legislature didn't intend a regime under which the lawfulness of an executive session is judged not by the information then known to the governing body, but instead by information that

comes to light later. A governing body could be deceived by an artful scheme into believing it is in competition for a transaction with governing bodies in other states or nations. The governing body could then hold an executive session to consider preliminary negotiations and eventually approve the transaction in an open meeting. But the approval for the transaction would be null and void if the executive session were unlawful for lack of actual competition, *see* I.C. § 74-208(1), regardless of the transaction's merits. This approach would not stop at checking the power of governing bodies to conduct public business out of the public eye; it would penalize good-faith decisions, to no desirable end.

10. An interpretation more moderate than either of these two extremes is that a subjective standard applies, under which section 74-206(1)(e) is satisfied if a governing body, based on the information it has at the time of an executive session, reasonably believes it is in competition with at least one governing body in some other state or nation.[9] Under this interpretation, a governing body's mere perception that a proposed transaction might be of interest to governing bodies in other states or nations isn't enough to justify holding an executive session, but the

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[9] Attorney General Labrador argues that whether the requisite reasonable belief existed in this case must be judged as of the moment the Board of Regents voted on May 15 to go into executive session, disregarding the discussion that occurred during the ensuing executive session. The Court disagrees. There is no good reason that information discussed during an executive session couldn't contribute to a reasonable belief that section 74-206(1)(e) was satisfied. Similarly, it could have the opposite effect, in which case the executive session would have to be ended. Regardless, given Findings of Fact 19–20, *supra*, Attorney General Labrador's case fails even if this particular argument is correct, as the Board of Regents had the requisite belief at the outset of the May 15 executive session.

governing body's reasonable belief that it is competition with at least one governing body in some other state or nation is enough, even if that belief turns out to be incorrect. This interpretation is practical. The Court believes the legislature intended it.

11. Because the Board of Regents reasonably believed at the time of the May 15 executive session that it was in competition with the governing bodies of one or more public agencies in other states to acquire the University of Phoenix, most notably the University of Arkansas, section 74-206(1)(e) permitted that executive session.

12. Consequently, Attorney General Labrador hasn't shown grounds for declaring null and void the approval given by the Board of Regents in open session on May 18 for the University of Idaho to acquire the University of Phoenix.

Accordingly,

IT IS ORDERED that Attorney General Labrador's remaining theory fails. A judgment of dismissal with prejudice will be entered along with this ruling.

Jason D. Scott 1/30/2024 4:53:46 PM

Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF SERVICE

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