MINUTES
(These minutes are subject to approval by the Task Force)

OPEN MEETING LAW TASK FORCE
Office of the Attorney General
100 North Carson Street
Carson City Nevada 89701

The Open Meeting Law Task Force meeting was initialed by Chairman Keith Munro, at 10:01 a.m., on Thursday, May 7, 2014. Roll call was taken and a quorum was confirmed.

Task Force Members Present:

Keith Munro, Chairperson, Assistant Attorney General

Barry Smith, Executive Director, Nevada Press Association
Jeff Fontaine, Executive Director, Nevada Association of Counties
Scott Doyle, Esq., Public member
Amanda Morgan, Esq., American Civil Liberties Union (via phone)
Mary Anne Miller, Esq. Clark County District Attorney's Office
Tracy Chase, Reno City Attorney (via phone)
Paul Lipparelli, Civil Chief District Attorney, Washoe County (via phone)
John Shipman, Esq., Reno City Attorney (via phone)
Terry Care, Esq., Public Member (via Videoconference)

Others Present:
George H. Taylor, Senior Deputy Attorney General

Public Present:
(None)

Keith Munro, Assistant Attorney General and chairman of the Open Meeting Law (OML) Task Force proceeded to open the floor for public comments, there being none he continued with his opening remarks, "These are open discussions to improve the Open Meeting Law."

Agenda Item No. 9
Mr. Munro: There was an addition to the OML in the last legislative session, and attorney Terry Care was involved in the process of adding the bold language. One of our clients came forward and said, "We believe the intent of that legislation was to allow a free copy of the minutes for thirty days, and then no free copy." I disagree, that is not what the law says. I just wanted to verify that and asked Mr. Care a question. Since we have an exception here, the ability to charge for records, do you think there should have been exception in the Public Records Act as well for governmental agencies to charge.

Mr. Care: I personally agree with the 30-working days. As to there being no charge, I would agree with a governmental agency being allowed to recover reasonable cost, but I don't know what the cost would be, such as for an audio recording, let along the time and staff. I guess you can make an exception where it would not cost anything, but I don't know when that would be.

Mr. Munro: The language says "up on request at no charge." The ability to charge is already an exception in the OML and the Public Records Chapter.

Mr. Care: Do you recall which session that language is from?

Mr. Munro: This last session.

George Taylor: S.B. 74 . . . .

Mr. Munro: Yes, S.B. 74. I am not racing any issue with it, just noting we have an exception to the ability of governmental agencies to charge in the OML Chapter. Do you think it was just a drafting oversight that they did not put it in the Public Records' Chapter as well?

Mr. Care: Possibly a drafting oversight. Although I sat in some of the committee hearings for this bill, I don't remember there was much discussion on this particular issue. Traditionally the state is allowed to charge for reasonable cost. I am not sure how many people, governmental agencies, or counties have run into this practical matter. It is a matter of law; I don't know that the Legislature would change it.

Jeff Fontaine: First time I see this; I don't know if it was an oversight or what the actual intent is, but it is like anything else, someone can always abuse this particular provision of law. Undoubtedly there is some cost associated with making the minutes available either in written format or audio recording. I am wondering if it is something we really need to make an issue of, on the other hand, I don't want to find out from one of our members that someone has made a request for multiple copies or audio recordings of minutes and they really take advantage of what may or may not be the intent.

Mr. Munro: From now going backwards for the last five years or as long as you have them. Ok. Anyone else have any thoughts about this?

Barry Smith: I was involved with this language and another piece of legislature regarding the Records' Statute. In both of them the idea was to reduce the cost to the public. I remember specifically the original language said, "Copies" in plural, "of the minutes or audio recording must be made available to a member." That was the only objection brought up in language change to "a copy" so that an individual is entitled to "a copy at no charge" of the minutes. There were parallel discussions with the Records' Bill, in trying to include similar language, "certain documents at no charge" . . . .

Mr. Munro: Barry do you think there should be an exemption put into the Public Records Chapter?

Mr. Smith: For clarity sake, yes.

Agenda Item No. 8

Mr. Munro: In our last meeting we discussed with Amanda Morgan about what a "working day" may represent, but today we have Todd Story. Amanda informed me she is still doing research on this issue. For governmental agencies who exercise working four-tens, it has raised an issue as to what is a working day. Part of the discussion is about possible litigation of what it means; however, I am not aware of any [litigation] at this time. My sense is there ought to be a line drawn as to what the rules are. We have had an Attorney General Opinion (AGO) that says, "working days include every day of the week, except Saturday, Sunday, and holidays declared by law or by proclamation of president." If this office has an OML bill, we ought to add a definition in the bill to allow folks to come forward and suggest changes as to what works best. I believe there have been four traditional changes added since 1996 from this office. I recommend it be a bright line in the statute, allowing people to make recommendations, because there is a pretty legitimate argument from the other side that if you don't work one day that was included in your notice provision, it would give citizens 33% plus time to get information or inquire about it; however, let the legislators decide what they think is appropriate.

Todd Story: Based on the conversation I had with Amanda, we were talking about how they look at the minutes issue in consideration to the four-day work week, which many have gone to now. It seems the "working day" is defined as a working day as per the AG Opinion, and if that agency is not open on a Friday, then it is not a working day. It needs to be inclusive which days the agency is open so the public can go for questions or consideration they may have of an agenda item or a meeting that has been posted publically.

Mr. Munro: When you chat with Amanda next time, you may want to look at AG Opinion, 2002-31, issued August 21, 2002. It kind of sets for the opinion our office has informally fallowed.

Mr. Fontaine: I am wondering about those public bodies that do not have offices, and how this could relate to those types of public bodies. There are possibly more of those than there are public bodies that actually maintain offices.

Mr. Munro: It is a fare point too. I guess where I am kind of driving the discussion is, there should be something in statute for courts to follow, because if someone sued claiming "you did not give us sufficient posting time," or "you did not give us sufficient notice, because you were not open for a working day." My guess is a court would probably say, "I don't know how I am going to rule on it, but I will do my best" and to me the better solution may be to present it to the legislature . . . agencies without an offices . . . some kind of ground to be reached, because I don't think it is good for public bodies

to have this question floating out there and be decided in litigation as oppose to legislation.

Mr. Fontaine: I represent counties, but there are plenty of public bodies that don't have representational legislature that would potentially be affected by this matter. I hear what you are saying, but I just think that if it is something that we could reach some agreement on in this Task Force, we would be better off.

Mr. Munro: We can have Todd and Jeff work on putting some language together as what you think works best.

Mr. Smith: If language is included in a bill and introduced, I would be in favor of the traditional definitions of Saturdays, Sundays, and Holidays just because you don't want it to become more confusing and people trying to figure out agency, situation by situation, or board by board as to what their deadline is and for the public to try and figure out "when should I expect to have this?" I understand the issue of possibly being closed, but I agree with Jeff, there are a lot more boards and commissions out there that would agree most days of the week they have nobody working.

Mr. Fontaine: Or if they do have somebody there, it might be a part-time staff person. There are a lot of variations on how these public bodies operate, how many staff members, or what their working hours are.

Mr. Story: Just to clarify, Jeff is referring to some of these public bodies that may not have physical office space. It is my understanding that someone will be responsible under the current Open Meeting Law to post the meeting and make it available for the public where public comment could be offered. Wouldn't it be the same individual responsible for follow up questions, whether they do or don't have physical office space? I think what we are looking for is for somebody who is available to answer questions, someone who would be responsible through the agency or the public body. Are they not?

Mr. Fontaine: I think that is a correct statement. Someone is ultimately responsible for posting a meeting, and eventually staffing that board, commission, or public body. But whether or not they are actually available on a particular day is really the question we are struggling with here today.

Mr. Munro: We will talk about this more.
Moving to Agenda Item No. 7, "Should the OML specify how a public body may approve minutes from closed meeting without waiving privilege?"

Scott Doyle: Mr. Chairman, I talked to Ted Thran, Douglas County Clerk Treasurer who indicated he understood the problem with this issue. He also informed me they have not had a closed meeting in possibly half a decade, so at least from their perspective; he did not see it would be an immediate pressing issue. I am also in the process of speaking with Allen Glover from Carson City, and as soon as I hear from him I will send

you an email summarizing the conversation. My guess is that most clerks deal with the problem by simply leaving the minutes in an unapproved format under the present law . . . as to not violate confidentiality, closed meeting style violations; whether you just simple see draft minutes, and that is the order of the day. If there is going to be a bill, if there is some limitation on the number of elements to be included, perhaps this item, although it is an issue, might be dispensable, because clerks can leave the minutes in an unapproved format, and keep the records available along with the audio tapes for investigative purposes.

Mr. Munro: I just realized as I review this, there is no requirement in the OML statutes indicating that minutes must be approved. The minutes are supposed to be the official record of a public body, and if they are not approved by the public body, they are put together by a staff person, but there is no official stamp. Should the first step ought to be the public body should be required to approve the minutes of their meeting so we have an official record approved by that body as to what happened?

Mr. Smith: An issue I occasionally run into in the context of how the meetings and records law interact is a public body saying that draft minutes are not a public document until they have been actually approved by the board. And since there is no requirement, it can go on for months; but they are still in draft form. That is actually part of the reason for the 30-day clause in S.B. 74, you can't just not produce minutes for long periods, claim they are in draft form, or they are not a public document.

Mr. Doyle: Historically I believe the Attorney General has had an interpretation in the OML Manual and in other opinions, where they have said exactly what you Barry have indicated, that until the statutory amendment was made, the audio tape had to be made available if there was a public meeting, or the minutes clearly labeled as draft had to be made available within a reasonable period of time. Initially the Attorney General suggestion was 30 days, which has now been codified. My thought is if you are going to eat this whale you better eat it one bite at a time, because if you are going to put a requirement in the law, that the minutes must be approved, and if you want to avoid the mess suggested by how do you approve minutes of a closed meeting, then the statutory requirement should be applicable to public meetings only.

Mr. Munro: You mean for the first bite?

Mr. Doyle: Yes, for the first bite. Then the next thing is if you decide on the closed meeting approval process, there is a policy issue that comes in. If you are going to protect the confidentiality of the content of the minutes, given the procedures that are already in place in the law, you are going to carve out an exception for action being taken in a non-public setting, because otherwise you got an agenda backup material that would take a confidential record and converted through procedural means to a public record for the people. In terms of policy, I am just wondering if we are sending the wrong signal, if we are putting that into an OML bill, "oh by the way, despite all the trouble with some of these other exceptions to transparency, we are going to put

another exception to transparency into the law to address a procedural issue." I don't know if that is the policy message we want to send with the bill.

Mr. Munro: That may be true. Terry what do you think? Put aside closed meetings, which are arguably none meetings; do you think we should have a requirement? Most boards already do, where boards and commissions approve their minutes so there is an official record as to what happened at that meeting.

Mr. Care: I do. I think it ought to be done within a reasonable time. I don't have in mind what that will do, but maybe different agencies would have different ideas of what that meant, but yes to your question.

Mr. Munro: What if there was something that said, "it has to be approved at the next meeting or there needs to be an agenda item and an explanation of why it wasn't able to be approved?"

Mr. Care: I would be fine with that too, except of course, the period between until the next meeting, may differ; depending of what governmental agency or political subdivision we are talking about.

Mr. Munro: Yes, because some boards meet once a year or bi-annually. I guess my sense is there should be no requirement. As Barry said, I hope that it is few and far between.

Mr. Story: I agree with Mr. Care. I think the question here is what is the time between meetings? If a board is only meeting once a year or every six months, is it really going prevent the public determining what was acted on at the previous meeting. I don't know if there is a way to alleviate it, but to maintain something in draft for six to twelve months, or until next meeting, just seem to preclude the purpose of the Public Records Act.

Mr. Munro: The 30 working days after adjournment may already be in statute. Could it be that maybe the draft minutes have to be available after 30 days and then the board shall take steps to approve it at the next meeting absent good cause shown?

Mr. Story: I would be ok with that.

Mr. Fontaine: I would be somewhat concern about a requirement to make draft minutes available within a certain time frame, only because, just in my experience, and this isn't necessarily related to counties, because counties have professional people that take minutes, but there are other public bodies where the minute taker is maybe not a professional minute taker, they are just a volunteer and there are lots of things that need to be corrected or amended, but the body that she is taking the minutes for is an official action.

Mr. Munro: Understandable. If you look at Agenda Item No. 9, it may already be up on us.

Mr. Smith: The reason for having the minutes approved is so you can make corrections and amendments. There needs to be a process for getting them approve and corrected, and made public in a timely manner.

Mr. Fontaine: However, in a situation where you have a volunteer board with a volunteer minute taker who takes minutes of the board that meets ones a year, and the minutes have lots of changes or corrections, but someone requests those minutes and a copy is provided with things that the board has not seen or approved, or that person has no access to it perhaps as long as six months to a year before the public body can then meet and make those corrections.

Mr. Munro: I understand, but shouldn't we have a process in place of the record and what the board did was made official?

Mr. Fontaine: Yes, I don't disagree.

Mr. Munro: Most large boards, most county commissions are doing this already.

Mr. Fontaine: I do not disagree, but like I said, I represent counties. I don't think this would be an issue for county governments that meet every two weeks. I am more concern about some others that are not professionally staffed.

Paul Lipparelli: The types of closed meeting that we typically have at the county level are closed meetings by the county commission to consider the character, misconduct, or competence of an individual; the other kinds of meetings are the meetings with management representatives for collective bargaining. In both of those settings it occurs to me that there are limited number of people to have the right to even review the minutes in the case of an individual whose character fitness is being evaluated, they would probably have a right to the minutes. In the case of the closed labor sessions it is the Attorney General who can review the minutes of those meetings to make sure that the OML is being followed. There aren't really a lot of other instances when folks are going to need the minutes. I have the same experiences as the earlier speaker, these meetings are sporadic, they are not held on a regular schedule, so it may be months between the time of a closed meeting on some subject until another closed meeting is held, at which time the minutes could be reviewed and potentially approved. It is a problem that kind of comes and goes throughout the cycles of our business, but it is not something we have to deal with regularly.

Mr. Munro: Paul, under Agenda Item No. 9, let's assume if somebody really wanted the minutes, and they wanted to go to court to force a board or commission to give them the minutes within 30 days that they could; so let's pretend that issue is off the table. Let's say it appears to say that a board or commission could be forced to present draft minutes within 30 days as somebody is requesting them; but if we have a requirement

for just open meetings, not closed meetings, or non-meetings; a requirement like, "it be approve at the next regularly scheduled meeting, absent good cause shown." Then a board or commission could make an explanation as to why it wasn't, due to somebody was on vacation or sick, something unexpected happened; and if somebody wanted to force it, they would have the ability to go to court and say, "that is not sufficient cause."

Mr. Lipparelli: I think it is reasonable to add that qualifying language in, and to also provide a remedy for a person who may have a specific reason for needing the written minutes. Although, I have to say that in the modern day with the availability of video and audio or digital records, most folks can pull up the archives of the meetings and look at the actual meeting itself, not somebody's interpretation of what happened. It would probably be rare case where someone would really be in dire need of written minutes. Mr. Chairman, I think you make a good point, if someone has a good reason, they can have the remedy to get them.

Mr. Munro: Yes, and it would solve the bigger issue where agencies would be adopting the official record of what happens at a meeting.

Mr. Lipparelli: It does happen to us at different time of the year, where our clerk's office gets behind, especially during the time frame when the Board of Equalization is meeting on a daily basis and they are having to stack those meeting, so the rest of their minute production for other boards and commissions suffers, they get behind, then throughout the year eventually they get caught up. Practically speaking we are not always sure those minutes would be available for approval by the next meeting.

Mr. Munro: So for the governmental agencies there would be the ability to have a legitimate explanation; but there would also be a process in place where they would be establishing an official record as to what happened.

Mr. Lipparelli: Makes sense to me.

Mr. Doyle: I believe the law does currently supply an alternative. You can either produce the minutes or you can produce the audio recordings; that is the mandatory. So if the minutes were not prepared, you could allow them to access the electronic or audio library, have a copy for their personal use, free of charge; it is the way I read the law. But I was not present in the 2013 hearings to know if that was discussed by the committee. I wonder if we have the flexibility there right now without inserting additional words.

Mr. Smith: I agree, and as far as I am concern, this language satisfies the problem that we were having.

Mr. Fontaine: So you are referring to the language in S.B. 74, where either a copy of the minutes or an audio recording has to be made available, right?

Mr. Doyle: Yes that is what I am reading. There are two alternative forms of production, which upon request must be made available.

Mr. Fontaine: Again, for the counties is probably not an issue, but I feel compel to represent those other public bodies that are out there that are not necessarily represented on this Task Force, and thinking about some districts in rural Nevada with volunteers, no paid staff. Under the existing statute they would have the option of providing a copy of the minutes or recording . . . my guess is they would probably elect to provide a copy of the minutes, because either they can't or don't have the ability to provide the copy of the audio recording, so that option may be limited for some of those folks.

Mr. Doyle: I agree with Jeff. I think in Rural Nevada you probably have either a very small or special General Improvement Districts created years ago under state law, which have limited resources. So the choice they face under current statutory text is to get the technology available to duplicate the tape, then produce a duplicate cassette tape or whatever format; in the alternative, produce a copy of the minutes, but since there has been no official approval taken, they are going to be clearly labeled "'DRAFT' subject to revision" as part of the approval process. If they either do one of those two things, they comply with the existing law. What I am concern about is if we go too much further than what we've already done, then we may be doing post-graduate work in a school of unintended consequences, because now you are going to have those small districts arguing over terms of art good cause shown. They may not have a lawyer available to them readily. Those are terms of art that are readily understood by larger cosmopolitan entities, who not only have professional minute takers and experience government officials, they also have lawyers readily available to them that can explain what the traditional meaning that has been associated with "for good cause shown". If you want to put in a statutory requirement where minutes must be approved either at the next regular meeting or within a reasonable time, or the public entity make a showing of good cause why those two obligations could not be accomplished, I can't help but wonder if we are not, in an effort to address a problem, creating another trap for the less sophisticated or unwary.

Mr. Munro: Let me take the opposite. We are the State of Nevada; we have a process for open government; it seems a little odd to me that we don't have a process for those entities with open public meetings or a requirement where they would say, "We are approving the minutes as what happened." It is kind of a bigger public policy that we look kind of like we may be winking at openness, because as Mr. Smith says, folks who want to play games, although it is very rare who would say, "No, that is not what happened, I don't agree with that," yet they are able to do it. It seems like if you indicating we are going to have open government; we are going to have a requirement for public bodies to meet and carry their business openly; but we have no proses . . . the public entity saying, "We got a draft of what happened," but we are saying, "that is not exactly what happened."

Mr. Care: I am inclined to agree with you, but I have some questions. What is the requirement as to how extensive minutes need to be anyway . . . I have seen minutes that say, "board member A spoke about the motion, board member B spoke about the motion, so and so made the motion, so and so second the motion, the motion passed." But I have seen minutes that indicating all what board member actually said, they seem to differ as to how extensive they are. So if there is no minimum requirement for minutes other then they need to be recording actions, I don't know how difficult it would be for those boards . . . even though there may be a burden for some boards, the reality is when people accept appointment, they do so out of the spirit of specific duties and they are just going to have to understand this burden just comes with the job.

Mr. Doyle: Mr. Chairman, if the law has not changed since the last time I looked at it, the requirement for minutes is that they merely reflect the substance of the matters discussed. My feeling is the law permits the spectrum of completeness that you currently see in written minutes. As a person that has dealt with both sides of OML complaints in the past, sure I have always gotten certified copy of the minutes from the clerk, whether they were certified copy of draft minutes or certified copy of the approved minutes, but the real corps of the investigation or the defense of the complaint was the audio or video tape recording; I mean, that is what actually occurred. It just seem to me that there are going to be clerical errors in minutes, but if the clerk is doing his or her job, they are taking the information from the audio tape recording and the paper record of the meeting. If somebody says or gets into an argument and says, "Well that is not what I said", the answer is, play the tape. We are not trying to produce a congressional record where we can insert anything in after the fact. I think that the tools are available for the public to be aware through audio recordings and minutes. If you want to put a provision in [the statute] for approval of the minutes, that is fine with me, but I think you going to continue to deal with the problem we have right now, which is the range of completeness and the written record, and what you need to fall back on for enforcement and transparency purposes; whether you are a regulatory authority or a member of the public, the audio recordings . . . or be at the meeting to listen in person.

Agenda Item No. 17

Mr. Munro: It relates to posting. We had a situation where a gentleman said, "I was standing at the post office, this was supposed to be posted and I am arguing it was not there." We had in our OML a requirement for a long time . . . whether agencies or boards should have a certificate of posting in their records. Do you think it would help public bodies to spell some of those situations that I just described, or if we should have and addition to the agenda where someone attested that arrangement were made to have posting at this locations; because arguably, if posting isn't made at the appropriate locations, the full meeting can be taken away or thrown out. As budgets get tight people don't have the ability to redo meetings, or if they do, it is with substantial problem. Would it be beneficial for public bodies where you would have a situation someone says, "I spoke to so and so, and I faxed it over there, and they were supposed to post it there, but she left early" for example, that might be a basis for someone to try to undo a whole meeting. The situation I gave you, it is happening, and if you look at agendas,

people are putting, "it was faxed to this location for posting." I am wondering if that is sufficient.

Mary Anne Miller: I don't think faxing or emailing is sufficient proof that there is inadequate posting. I am a little concern about additional requirement for something on our agendas, because right now under the law we have to add so much stuff on the agenda that I have heard complaints from members of the public that there almost so much information that they don't really see what they consider is important . . . I don't have any objection to there being a requirement in the law that upon request there is a certificate of some sort confirming the posting was actually done. I really rather not have it be a requirement of what is on the posted agenda.

Mr. Munro: So do you think if there was a form that when public bodies post agendas they fill out a certificate and keep it as a matter of public record, which they could utilize in the event they get sued? Because let's face it, lots of times when people that are doing the posting may be a student, a support staff person, investigator, someone may leave or go on to a new job . . . it would help protect the public body.

Ms. Miller: I think it is a good practice; any public body should do it, especially if you are relying on emailing it to somebody. There should be some requirement that if I email it to another person, then I would get confirmation that the person actually posted it. If got confirmation from X-person from a specific location, that she posted it on their board. There should be some type of paper trail to confirm it actually got posted.

Mr. Fontaine: It is probably a good idea, but I guess I would wonder about a specific form that someone would have to complete to certify as opposed to maybe just some guidance or some requirement that there be some documentation that actually was posted.

Mr. Munro: To establish a record?

Mr. Fontaine: Yes, establish a record.

Mr. Smith: We just need a definition of posting. What does that mean? And if that is defined, then you've done it. Shouldn't that be evident?

Mr. Munro: Well, I am not sure.

Mr. Smith: You are right, because I am thinking of the State Library where their posing consist of a binder up on the shelf that you flip through, and if anybody wanted to sabotage, it would be very easy to just rip that page out and there be no proof that it ever existed in that binder. Or take it off a bulletin board, rip that page out and there be no proof it ever existed in that binder.

. . . *GENERAL DISCUSSION*: *several members talking at the same time.*

Mr. Munro: I would think it would help to protect public bodies.

Mr. Smith: You are right, but there is also the question of what does "post at the office" mean?

Mr. Munro: Mary Anne, what if we had some requirement to create some type of record to confirm posting was completed that would act as *prima facie* evidence and the provision was complied with, so if there were any shenanigans going on, if you have that record, if somebody wanted to go to court, there would have to really make an effort to undo it.

Mr. Doyle: I had a question for Mr. Taylor. Does the Attorney General's Office have any rule making authority under the Administrative Procedures Act to prescribe a form or certificate and put it out on the OML website that entities could use in lieu of trying to create their own form?

Mr. Taylor: No, there is no rule making authority for that.

Mr. Doyle: I am just trying to balance the levels of sophistication we see all over the state, and for those people that don't have a lot of experience, they may not be able to create their own form to be *prima facie* evidence of what they have accomplished. If you had a suggested form and made those folks aware of it, they would use it. The larger jurisdictions could also use it or develop their own form. Like you say, keep it as an archival record so that if they do get sued or investigated on a notice issue, they can produce a record. Some of the postings are like made in ring-binders and others are made in what I would call secured traditional bulletin boards, tangible bulletin boards where there is a locking plate-face over it. However, where there is not secure bulletin board, and a person plans to attend a meeting and wants a copy of the agenda, they may just simply take the copy down off the bulletin board. You can't defend against that type of thing unless you have a record that it was made contemporaneously with the physical posting of the document; that would be my suggested approach to the problem. We offer an incentive to protect yourself rather than a statutory requirement.

Mr. Munro: What if we, as Jeff said, make a record of posting, and then if we came up with a form and made it available to folks. Any enforcement would be upon us, we would be arguing against our own form. Mary Ann, does it make sense to you?

Ms. Miller: If you placed the form on your OML Manual, I think the majority of people would adopt it as a matter of course.

Agenda Item No. 13

Mr. Munro: If you look up in our backup material referring to a bill from last session that was presented out of this group—A.B. 65, where we had a requirement regarding someone appointing a designee [to serve in their place] had to have expressed statutory authority. And Legislative Counsel Bureau (LCB) agreed there is something bigger missing with respect to the status of the OML . . . governmental entities seem to

have a little bit of a statutory authority . . . they can appoint folks to serve as designees. Since there is some open grown there in the OML as to designees, one of the things we were thinking is if you look on the first page of the LCB Opinion to [Senator] Mo Dennis, it has two provisions: 1) Relates to a member appointing the designee; 2) Sets some requirements as to subsection 1. What if we just look at the language from subsection 1 and tweak it a little to say, "a public body may not designate a person to attend a meeting of the public body in the place of a member unless its designation is expressly authorized by law."

Mr. Doyle: Clearly there seem to be some sort of a problem with the Clark County District Board of Health; otherwise the opinion would not have been crafted by the Legislative Counsel Bureau. What I found troubling with the opinion is the fact that this is a district board of health, which is really a species of local government. My concern is the Legislative Counsel Bureau's reliance on subsection 4 of Nevada Revised Statute (NRS) 439.364, which says the district board of health shall adopt written policies and procedures for administrating the board and maintaining its program, projects, and activities as being arguably that the statutory authorization for a board authority to designate proxies. Conspicuous by its absence from the opinion, is any discussion of the traditional frame work that Nevada local governments operate in, which is a Dillon's Rule type analysis. And that is if the ability to appoint proxies is not expressly stated in law, there is a strong legal presumption that they lack authority to do so. There is no discussion of that, and the exception to that type of general rule is that the entity wishing to exercise and imply power, must make a showing of strict necessity to justify it. The core problem at the District Board of Health in Clark County is that you have a statutory list of the elected representatives that are designated by the various local governments that seat as elective representatives on the District Board of Health; then you have a second statutory list, if you will, of people from the health industry that are designated to seat on the Board. Each of those people serve a term of two years . . . based on a statutory provision to fill vacancies, in other words when people leave before their 2-year term expires. There is nothing in the power section that says they can designate proxies. To me it seems a huge stretch to say that a general rule making authority includes designations of proxies. So I guess the opinion was written to try and address a problem, but I think it has managed to create another problem, and I don't know it is necessarily the fault of the OML. If you want to go in and tweak what was adopted last session, it is fine with me, and then the language Mr. Chairman you just proposed, is equally agreeable with me.

Mr. Munro: What you just said is not created by OML, but what they are essentially saying is. I want to clarify that this is not meant to be a discussion about the District Board of Health. It is really meant to be a discussion about a possible gap in the OML with respect to a board's ability to do this. What I suggested is if we had the same language for public bodies appointing designees as we do as for members of public bodies appointing designees, those entities that have language similar to this one, could come in and say, "we think this is 'express'" and to the extend it isn't, "please make it express." Because I get the LCB Opinion . . . essentially pursuant to their opinion, you

could point people out of the audience to come up and seat, and that would not be a good thing.

Mr. Doyle: I agree with something that another task force group member said earlier, when you accept an appointment to a public body, you assume an official duty, if you cannot make the meetings, basically then is the person's responsibility to resigned . . . remove a person from their appointment or their elective office through statutory means. I am troubled by the fact that we are even discussing proxies for a discharge of a public duty.

Mr. Munro: But isn't the way to resolve that by providing clear guidelines as to when you can have a proxy and when you can't?

Mr. Doyle: I don't know that necessarily you want to take a private corporate government's policy and bring it over to public operation. Either people fulfill their appointments or they don't, and if they are not willing to resigned, they should be removed. I just don't like the idea of creating, if you will, proxies for public service. You either are the appointee or the elected person or you are not.

Mr. Lipparelli: I don't know what any of this has to do with the OML. If the purpose of the OML is to make sure that the public has the opportunity to view and participate in public meetings and that the records of public bodies are available, posting, and minutes and all those things. It seems to me there is a lot of policy questions involved in whether some boards should be allowed to designate alternates or not; and maybe some boards should and some shouldn't. It seems to me it would be a question that is best addressed to the law that create the board or the law that authorizes the creation of the board rather than in the OML.

Mr. Doyle: I wasn't here at the meeting in the summer of 2012 when we put together this particular provision, but as I recall the minutes of the discussion, the reason we did this was because there was some problem with people attempting to do this and it was affecting quorum requirement under the OML and it was coming up in the context of the Attorney General's investigations of complaints received. What I would say is, while I agree with you that maybe we are running . . . it does come back to the OML, primarily through the quorum requirements to determine whether or not proper action has been taken, or if the meeting is valid in the first place. I also agree with something you said prior, if somebody in a way of an entity feel they absolutely have to have the ability to appoint alternates or proxies, then as far as I am concern, the approach that should be taken is on each piece of enabling legislation, agency by agency, rather than trying to do something in the OML that says anything other than public body does not have proxies unless it is specifically authorized and the enabling legislation creating that entity. That is about the only way I can think to deal with it.

Mr. Fontaine: So far the discussion seems to be centered on those members of these public bodies that are not fulfilling their duty as members and creating problems with being able to have a quorum and so forth. In my experience since this requirement

been put into place, there has been some others then unattended consequence, in my opinion, which is the member of the public body who on an occasion or two, has been unable to participate in that public body, for whatever reason; then the requirements were a prohibition of that a person to be able to have someone seat in the place. I will give you an example, in the 2013 session the Legislature enacted a task force to look at Public Lands in the State of Nevada, and it is comprised of a representative from every county in the state and it is pretty much all county commissioners. Well you know, county commissioners have lost of duties and responsibilities, and their representative has been very good about attending the meetings, but occasionally that particular representative from that county may not be able to attend that meeting, but that county still has an interest of having someone there to represent their county in that task force. I just want to point out there are many instances where it isn't about someone not being able to attend because they just don't want to do their duty and they are causing problems. It is about being able to have someone represent your entity on board that occasionally may not be able to attend that meeting.

Mr. Munro: Jeff do you have any concerns that if there is a requirement that if are you going to have a replacement, you have some authority to do so?

Mr. Fontaine: Yes, with caveat. Given what Mr. Doyle said about Dillon's Rule, there may be those instances where a public body may not have the ability or the authority to appoint a proxy, and won't have to go back and get a legislative approval to do so. And that could be just a huge mess quite frankly.

Mr. Doyle: Dillon's Rule applies generally to municipal corporations and political subdivisions of the state. This Public Lands Committee may be characterized as a state agency.

Mr. Fontaine: I don't believe it is.

Mr. Doyle: There is a corollary problem for state agencies as well, because when you create an administrative agency, there is case law of Nevada that says that these state administrative agencies have no imply powers, that they must find their jurisdiction and ability to act and perform official acts in their enabling legislation . . . . I just want to make the issue known that it is universal rather than just particular political subdivisions and municipal corporations.

Mr. Munro: Paul, we really wanted to discuss this issue because it really relates to the quorum and who gets to seat on the body and who can make the decisions that affect the public; if we don't have rules regarding things like this, we can have an opinion from a lawyer like from LCB who said, "Well, they have the ability to written policies for administrating the Board."

Mr. Fontaine: The by-laws.

Mr. Munro: And we consider the administrating the board being able to appoint people . . . . My sense is that is not a good process.

Mr. Lipparelli: I agree with prior comments from Mr. Doyle, which is if you have an individual problem of the board and bad behavior by members and their election of duty, then the solution is to address it at that level. I am just questioning whether this is something that needs to be contained in the OML, or whether it should just really be explicit to the laws that create these entities. I have seen examples of where the use of an alternate in a public body, allow them to go forward, which is to the benefit of the public and everything else. I have also seen members play games by avoiding coming to meetings so that quorum cannot be established, and because that person did not have an alternate designated, their absence prevented the meeting. I think the solution is to put language into the statute that create these public bodies and address whether or not alternates and proxies can be used, and leave it to the legislative bodies who decide whether alternates and proxies make sense or not.

Mr. Munro: Paul . . . if the Legislature were to consider a requirement to express authority to give a sunrise, like a couple of years, giving governmental entities the ability to clean up their rules with respect to this, and make a firm decision as to whether there will be alternates or not for governmental bodies?

Mr. Lipparelli: Yes, I just think there will be a variety of viewpoints about whether alternates make sense, body by body. Some bodies exercise very solemn responsibilities. The people who serve are selected because of the experience and judgment that they have. In some of those cases it might not serve the public well for some inexperienced person to come in at the last minute and participate in a decision. Other advisory boards and looser groups, if allowing alternates allows for the meetings to take place, there may be an argument to do it. I just don't know if we are going to be able to address every situation in an OML provision.

Mr. Doyle: To open this discussion, I believe you paraphrased some suggested language, and I have been thinking about that in light of the discussion that we've been having. If you look at the first page of the LCB, July 11, 2013 Opinion, in the bold language, Subsection No. 1, if you are going to look at a statutory change to this newly adopted law, it might read something like, "a member of a public body," then you insert, "for a public body," then going on with the text, "may not designate a person to attend a meeting of the public body in place of a member unless such designation is expressly authorized," and then using your verbiage, "by law," insert the word "law," and then put a period after that; you would delete the words, "the legal authority pursuant to which the public body was crated." I would leave the second sentence, "any such designation or designated attendee must be made in writing or made on the record at the public body." In other words, retain that second sentence of the subsection. It seems to me that we have two elements we need to address. We can't have individual members unilaterally doing a proxy, but by the same token and more importantly, this stresses part of what the Legislative Counsel Bureau's Opinion goes at, and that is, you can't have the public doing the same thing, unless they have expressed statutory authority to

do it; and by law it makes it very clear that it either has to be in a prevision of the NRS, or it has to be in something equivalent to NAC (Nevada Administrative Code). According to your office's opinion, those are the two sources of law that would govern a situation like this. I don't know that given your previous opinion, going back I guess 20 years now, that a municipal or county ordinance would be sufficient to . . . that power. That is the one issue that I would see out there on the table, but that would be the suggested statutory text if you want to give people time to do that, that particular provision in the Bill if were to be adopted by the Legislature. Put an effective date on it of July 1, 2017; give people (a couple of years) two legislative sessions to come in and clean up their enabling legislation if they feel the need to do this. Going back to the Clark County District Board of Health example, I think is a good one. When you look at the statutory menu of people that are to serve over and above the elective representatives from various political subdivisions, it reads like a good resume, cross section of the health services industry; and so there may be good reason to create designees with the ability to have a designee there, because you need the expertise of those health industry officials to compliment the political expertise if they are going to have a comprehensive addressing of issues of public health. Something that Paul said, there are going to be entities that are going to need to make their case to the Legislature to have this type of a proxy, and if they do make their case, is because the Legislature has found that they make a good public policy justification for having the ability to designate proxies; and we will let them handle it on a person by person, or entity by entity basis with the Legislature. However, I do think that retaining the type of language we suggested, and what appears here in subsection 1 of the OML, is important because otherwise you are going to be faced with regulation of OML compliance, and there is going to be an uncertainty in quorum issue related complaints if we don't have some kind of language like we have right now.

Mr. Story: I think that would work. Now we are talking about what appears to me to be a temporary appointment or a one-time meeting. My only concern is if the board or agency responsible has that authority destine with damage to a point. It seem to me there needs to be a conversation or a 2-way agreement between the person who theoretically would be absent from the meeting, notifying the agency of their absence rather than the board or agency itself; not only being able to appoint someone without there being some kind of agreement between the two.

Mr. Munro: Marie Ann, what do you think?

Ms. Miller: I like Scott's language for boards that are created by statute. I am a little concern about boards that are created by local governments that are made of staff people from various local governments, that to get things done sometimes you need alternates. I think the language that Scott's suggested is perfect for anything that is created by a specific statute, but I am afraid there are little communities that only meet maybe three or four months and their real purpose is to come back and bring advise or suggestions back to the crating body. I don't know that they have the same need for such trigger.

Mr. Munro – What if we took half of Scott's suggestion and said, "A member of a public body or a public body may not designate," and then left the last part, "authorized by the legal authority to pursuant to which the body was created," Would that take care of the non-statutory bodies that you are referring to?

Ms. Miller: I think it would.

Mr. Doyle: I agree.

Ms. Miller: I also agree with Scott's analysis of this opinion, I think they were trying to carve or justify the health district . . . traditionally they do have a problem getting a quorum. It should go back to the Legislature and get specific authority to have designees.

Mr. Munro: I think that too. I think if we gave them some time to get specific authority for the simple reason, I think the public gets to know who gets to make the decision, what the process is; it seems to make sense to me.

Mr. Fontaine: I think this is a great discussion. We are representing specific interest here, but I think in our last meeting someone brought up the numbers, somewhat between 600 and 800 public bodies out there . . . we all recognize that there are hundreds of public bodies. I guess I just wonder about the practicality and the policy of, and of course not all of those are statutory or created public bodies, but there are certainly a lot of them out there; and some pretty obscure ones that we don't even know about . . . but the practicality of asking those groups or requiring particular public bodies to go back and get legislative approval to allow them to appoint proxies.

Mr. Munro: However, the convert side of that is we have no rules.
(Both talking at same time)
Mr. Fontaine: I understand. I am just putting out on the table.

Mr. Munro: I mean if we take the Board of Health as an example, I am not trying to pick on them, but we are talking about a board that is important, who is making decisions to affect the health of the community. There should be some mechanism in place that if somebody different can be making the decision, we all know who that is.

Mr. Fontaine: As opposed to some frail rural district in a rural community where there could be any one of number of individual who really could step in on a case by case basis and participate.

Mr. Doyle: I used the example of the Weed Control District; they have created the Canada Thistle Advisory Committee to address one of the multiple . . . weeds that are defined in state law as being on agriculture. The Subcommittee was created by a board, motioned at some time in the past. If you put an effective date, this type of legislation, of two legislative sessions out, July 1, 2017, like that Weed Control District in effect has multiple calendar years to go back and amend the resolution or the motion,

allowing the appointment of proxies. In other words, they had plenty of time at all levels of government in the state. Like the Chairman said a moment ago, to see who makes the decision with respect to the ultimate responsibility of that board and the ability to take some actions that are very basic and organic nature to the existence and the functioning of that entity. I guess what I am saying in response to your concern, if you put a "sunrise provision" on this type of a law change and you put it out multiple calendar years, I think the problem can take care of itself through education and compliance. It is not to say there will not be a few hold outs, or people that operate out of blissful ignorance. But I think the problem can largely go away if you give people the lead time needed to take the action necessary, whether it is at the State Legislature, the County Commission, or from a general improvement district board of trustees, and in all levels.

Mr. Fontaine: I would generally agree with that, except for the part about legislative approval, because to try to get all that done perhaps in one or two sessions.

Mr. Munro: Well and if you read what is in A.B. 65, Subsection 3, it is not necessarily legislative approval, it is by the legal authority pursuant to which the body was created.

Mr. Fontaine: But if that body is created by the legislature then it would require legislative approval.

Mr. Munro: Then it would. But if it was created by a local town, the city, municipal ordinance, county; if it was created by county commissioner pursuant to an order or something, it would be that order.

Mr. Doyle: And in the case of legislative approval, Mr. Chairman, if you put July 1, 2017, the amendments we are discussing today would be considered, and hopefully passed and approved at the 2015 session; there is a certain amount of notoriety that goes with the processing of that type of a bill. Even if you don't choose to count the 2015 session as opportunity to get this expressed statutory authority, if you put a July 1, 2017 date under this underline OML legislation, then they have the 2017 session to get that done. If the Legislature feels that there is such a barrage of people seeking this authority that they cannot successfully process at all on the merits, in 2017 they can go back into this bill of the 2015 session and change the effected date of it to July 1, 2019. I don't think that would happen, but any piece of legislation is capable of amendment by subsequent session of the legislature . . . (*several members speaking at the same time*) to form a subcommittee or get rid of it. If this was obviously an initiative, it would be subject to the three-year no amendment rule, but that would be the only circumstance under which people could not have the very flexibility to get things done that you are advocating they need, which I agree with.

Mr. Munro: Terry, what do you think?

Mr. Care: Well, I haven't been in the Legislature, but it is rare the chair will see a bill enacted as an effective date two years or four years out; that is very difficult to deal

with. I like Scott's suggestions, but the one question that I have is where it says, "currently a member of public body," and as I understand, Scott's idea was to add a phrase, but I am uncomfortable with the notion of a public body determining the organizing of the public body itself.

Mr. Munro: And the reason we had is because we did have some members making that determination. We took a half step and took care of the "member." Now the question is do we go the full step and take care of the public body.

Mr. Care: Yes, I agree. It is just that I don't know of the effective date, 2017 may be the most, I can't see going beyond that. The legislature just normally does not have an appetite for something like that.

Mr. Munro: I understand. What Mr. Care is talking about is people who will say, "no we don't' think we can do anything to clean up our language; we are not sure." And say, "We are going to give you some time, and if we give you a reasonable amount of time, it is tougher to defeat the policy off; if you are going to have a change in who are casting votes that affect citizens, you better have a process or some authorization to do it."

Mr. Smith: Clearly there was a problem, it was addressed, but now the problem has moved . . . I think it is a good discussion that should be headed at the legislature, and then brought to whatever body created these other bodies.

Mr. Fontaine: Is the issue in this particular case with the Health District appointing a proxy for an individual that does not necessarily comply with the requirement for that representation? In other words . . . is the issue here that they may have appointed someone who doesn't have that qualification?

Mr. Munro: It isn't directed to anything that the Clark County Health Board is done, it is more of a pretty broad grant of authority.

Mr. Fontaine: Well, that is why I am asking the question. Is that what you believe it (the handout) says?

Mr. Munro: I believe essentially it says, "If a board had the ability to administer their proceedings, and if we want to adopt proceedings or regulations that we can appoint people as is basis regardless of qualification."

Mr. Fontaine: Yes, regardless of qualification.

Mr. Munro: Yes, we could do that; I think it is very unlikely, but within that scope there could be nuances people wanted to utilize to their advantage. Yes, and since what we are really talking about here is structure, should we have a structure, a process for how the OML works; if a board is going to appoint somebody, should they have authority from the legal authority which created it. LCB is essentially saying, "Yes, but it can be pretty thin." And it really revolves around the word "express".

Mr. Doyle: In addition to quorum problems in the OML, the other problem I see on the pages of the LCB Opinion is a legal title to office. Because the discussion we just had with Mr. Fontaine, it really isn't addressed explicitly in this opinion. For example, using what the Health District does as a templet, let's assume that the individual that the board wants to appoint, pursuant to its rule making authority, is part of the menu of people on the Health District Board that come from the list of health industry related people. So if they decide they don't want a doctor because that is the statutory list, "We are going to put a dentist on instead because it is a consensus builder." You know have possibly created an issue under Chapter 33, where the person may not have legal title of the office; they have a designation that purportedly is authorized by this LCB Opinion, but they may not have true legal authority. So in addition to OML enforcement, you could have an extraordinary writ proceeding or an uniform declaratory judgment action needing to be brought to test this person's ability to seat pursuant to that very broad grand of authority. Not only it affects that person's ability to serve, it also affects the integrity of the decisions that are made by the body, because now their decisions are capable of being attacked on the merits if the argument is made, "because you had an improper person seating." They have tainted the legality of the otherwise lawful determination made by the Health District Board. I will grant you, all of that has nothing to do with our function for being as the OML Task Force. What I am trying to say is there are more troubles with this issue than simply those that are set out on the pages of the LCB Opinion; and they go right to the heart of being able to govern or serve effectively

Mr. Munro: Are there any other comments on this subject?

Agenda Item No. 5

Mr. Munro: Tracy Chase called; she was not able to be here today. Then Paul called; he said he has thought about this issue but was not able to give anything for presentation, which is ok. As I said earlier, we can give them more time to bring back something by our next meeting. However, I wanted to open discussion on this subject because in our last meeting we agreed it is really a problem for the Attorney General's Office . . . it may be a problem Mr. Story may want to comment on. I have only ever seen it be civil, but there is potential criminal penalties, and due to this potential, there are certain right under existing statutes that protect those folks. The fact we have never gone criminal, does not mean those rights don't necessarily attach because there is a penalty. That probably need to be addressed and one of the options may be is don't make the OML a criminal proceeding, since it has never really been done; but that would be a decision for the legislature to make. I mention that simply because I thing if there were ever any crimes regarding meetings of the public body, there would be bigger crimes committed than OML violations; it could be fraud or something of that nature.

Mr. Lipparelli: This discussion last meeting focused on the fact that the OML has potential criminal penalties, and as such, should persons be afforded any additional protections. I started my research by looking at the Attorney General's OML Manual,

and as far as I could find, it does address the issue of the confidentiality of the complaint or investigation. So one suggestion may be, if this is a problem that lands in the Attorney General's lap, because she is the one who gets the request for a copy of the complaint, which may be a policy question for her office; however, if the Task Force wants to tackle it, and we want to talk about the larger issue of confidentiality, leave aside the criminal penalty for the moment and just talk about the merits of the confidentiality. There is a Nevada case which I will provide to this group or you can look it up. It is called *Shelby vs. Sixth Judicial District Court* it is a 1966 case, 414 P.2nd 942, it talks about the principal reasons for secrecy of the Grand Jury. I think they are sort of interesting to apply to this context, and think about whether a public official or a public body, who has been accuse of an OML violation, has any expectation of privacy or confidentiality about that complaint or the investigation. For example, No. 1, "To prevent escape of a person indicted," that does not apply; No. 2, "To ensure the upmost freedom to the Grand Jury and its deliberation is to prevent person subject to indictment from importuning the Grand Jurors; No. 3, "To prevent subordination of perjury or tampering with witnesses who may testify; No. 4, "To encourage free and untrammeled disclosure by persons who have information; No. 5 "To protect an innocent accused who is exonerated from disclosure of the fact he has been under investigation."
I think it is really the last one that strikes me in the context of the OML. Does the person or a public body who suffers a complaint by the public alleging they violated the OML deserve some measure of protection until there is at least a preliminary finding of merit to the complaint? And the other way of saying it is, should we arm citizens with the ability to go down to the Attorney General and file complaints and then brag about the fact that this public body, who may include people who are running for office, are under investigation by the Attorney General? The answer to that question in an Ethics Commission context is the investigatory file and the papers and complaints that are in the possession of Ethics Commission during the pendency of the investigation are confidential, and not until the Ethics Commission makes a preliminary finding of cause to further hold hearings on the complaint does the complaint become a public document. So the Legislature's answered to question in the Ethics context said a public employee or a public official who is the subject of an ethics investigation has an expectation of privacy. I think it relates back to Item No. 5 from the *Shelby* case, that an innocent accused, who is exonerated, does not have to suffer the embarrassment of been publically known that an investigation is taking place. My last point is I certainly understand the perspective of Mr. Smith who is frustrated, and certainly of any provision that covers public documents with confidentiality. I certainly think that after the Attorney General has investigated a complaint and found merit in it, that the person who has misbehaved should have to answer for it. There is no question in my mind about it. That is how it has been addressed with the Ethics Commission. Whether or not we go back and address the criminal penalty aspect of it, which may be a big subject all by itself, I really think there is a policy question, should these file be open records from the very moment they are turned in to the AG, or should there be some period of time where the AG is free to investigate quietly, and suing the rational of the *Donrey* case where investigatory files in criminal matter are confidential until the investigation is complete. I tend to think there is some merit to the idea that there should be period of time when it is not public record, but others may disagree. The law I was able to find

out on the main question of "Do criminal defendants have any right of expectation of privacy during these investigations?" It really doesn't come up in the ordinary criminal investigation setting, because the public doesn't necessarily know what the police agencies are looking at, and so defendants don't know they are being investigated until they get questioned or arrested. It really doesn't come up the same way it would in this setting, because the complaint that the Attorney General initially gets would be controlled by the third party who submits it instead of the investigating agency itself. I am not sure we are going to get very far by trying to analyze whether the potential criminal penalty means anything to the confidentiality. I am not sure that it is going to be of help to us in this citation.

Mr. Munro: Mr. Story, what do you think about the civil liberty aspects of what he (Paul) is talking about?

Mr. Story: I can understand what Mr. Lipparelli was sharing as far as the civil aspects. I think that the criminal, I would agree, is something completely different. Should there be a time period for investigation to determine whether or not the complaint has validity or if there is an actual cause of action that needs to occur. I have a couple of thoughts, one, openness in government would be my preference whenever possible, and certainly protecting those who may have complaints filed against them unnecessarily; I mean, does every time someone file a complaint against an elected official, staff, or otherwise; it could be a daily occurrence or even multiple times a day that someone could file that complaint, and should that information be available to the public every time, or is there some process to determine whether or not these complaint are simply frivolous, or do they actually have merit. So I don't have the quick answer right now, I am just trying to figure out if there is a balance there, and what that balance may be.

Mr. Munro: Do you think there should be a crime attached to the OML violation?

Mr. Story: Are you asking for every time there is a violation?

Mr. Munro: In general.

Mr. Story: I think that is something that would have to be determined in the course of the violation. If it is a simple violation like we were discussing earlier or someone faxes something and the other person at the receiving end never acknowledges receipt of it, doesn't get posted, then you file a criminal complaint against the individual who did not posted it? I think that is a little too much.

Mr. Care: I think when we talked about the last time, I asked the question, whether we have an egregious intentional violation of the OML, whether it might be some other statute that a member of a public body could be charged with. I don't remember where we came out with that, but maybe there is and that is what the Attorney General would want to look at.

Mr. Munro: My sense is there would be. I mean if there was something total egregious, whether there was some type of influence peddling, or fraud, or bribery; my sense is there would be. You are a former legislator, what do you sense the legislature reaction would be if they said, "We are going to keep our traditional civil penalties for OML violations, but we are not going to have a potential criminal penalty for the violations of the OML because we think we have another whole host of criminal penalties that are available and it would take away the whole issue whether it is a private complaint? Is it something that it has to be public? Because what Mr. Story is talking about, I am in favor of openness, but we are reviewing this, and if we said it is potentially criminal, then all of them are; that we are not going to disclose one way or the other until it is complete. What do you thing the legislator reaction would be if someone said, "no more criminal penalties . . . as long as we have had the OML," I think it was passed in 1958, I don't think anyone is aware of any criminal case that strived out of the OML chapter; but if we said, "we are going to let the prosecutors handle that in a separate proceeding."

Mr. Care: Frankly I don't know how comfortable the legislature would be in opening that discussion. It is touchy for them anyway because, they are not subject to the OML themselves, and so every time one of these bills comes up, the press always likes to point that out. The other thing is the legislators are not going to volunteer somehow to be soft on crime. When these bills come up, sometimes the legislators will say, "I don't even want to vote on this, but if I have to, I am going to come down as a tough guy." It is not going to set any policy driven. I wonder, on the confidentiality issue here, I think Jan Jones, when she was the mayor of Las Vegas she had something like seven of these complaints filed against her, which often times are politically motivated, and I am sure that is the same with OML as well. And what happens is, like Paul said, the person behind the complaint . . . is simply going to let the press know, either by press conference or calling the reporter; which means it is going to be out there to begin with. I do realize your office might be saying, "Well, can't confirm, can't deny". . . but then it is all out there. And the members of that public body, unless their counsel advises them otherwise, would want to respond publically, because the issues are already out there. I don't know that confidentiality to me is really that much of an issue. I am sensitive to it as a practical matter. I don't see how you can keep it confidential, it is almost like you got to reveal the complaint itself, just as part of the public discussion.

Mr. Munro: It has been in our OML Manual for a long time, that it is public record, but there is that counter veiling civil liberty protection people are entitled to, but they can choose to waive it. However, I think where Mr. Lipparelli is heading is an interesting suggestion, to adopt the existing process you have from ethics, that it is entitled to be kept confidential until the completion of the proceeding and then it becomes public.

Ms. Miller: I don't know that I agree, because ethic complains are by their nature personal to the person. Generally speaking, OML complaints are against a board or a public body. I don't know that there is a civil liberty in having a criminal investigations kept quiet. Under *Donrey vs. Bradshaw* it is to aid law enforcement and law enforcement efforts; they are allowed to the exception of the public records law. And if the Attorney General felt that the case was particularly egregious they could insert that

privilege during the pendency and not give everything out, but I don't think it will be well received if the Attorney General said, "We got an OML complaint about a public body, but we are not going to tell you anything about it until we decide."

Mr. Munro: You are right about *Donrey* in the way it is written; the police gets to say it is confidential to aid their investigation, but there is also some statute that we brought out of the last hearing where individuals are protected as well by statute for the simple reason if a law enforcement agency got a complaint to opened an investigation and went out there and said, "We just want to let you know we are investigating into this individual, but we are not going to tell you what it is about; we have a criminal investigation into . . . ." It is not necessarily fare to that individual.

Ms. Miller: If you arrested this individual, his arrest record could be public record; so there is a level of openness to almost any criminal investigation where certain actions are taken.

Mr. Munro: Well Mary Anne, what if we just went the opposite way and put a provision in there, "The records of an OML investigation are subject to the Public Records Law?"

Ms. Miller: Is that a different question in whether or not the complaint is subject to the OML?

Mr. Munro: It would be for the complaint as well.

Ms. Miller: I think the complaint should be subject to public records law. I think your office may want to insert the right pattern of privilege, depending on the investigation, whether or not you keep or make those records public as they go along. I have seen some investigation done by your office that are sensitive, and if your investigators needed some confidentiality to really get to the heart of the matter . . . .

Mr. Munro: So how would you word a statute like that?

Ms. Miller: If a statute was require, I would say the complaint would be a matter of public record, and maybe the ultimate disposition. Currently the complaint is made by a citizen, possibly filed at Metro (The Las Vegas Metropolitan Police Department), regardless of what Metro is doing to investigate it, that complaint in itself is a public record. I don't know that it really advances any public interest to hold that complaint confidential if it is read by a citizen.

Mr. Munro: What about investigative reports? Meaning in a close criminal case, at the end of a criminal case, those are all public.

Mr. Miller: I don't know that you would have a different rule for every open meeting law.

Mr. Doyle: In reflecting on *Donrey v.Bradshaw*, what the court created is a common law . . . to public record disclosure. Basically there are two elements that a law enforcement

agency must be able to establish to avail itself of the *Donrey* rational. They have to show that they have an ongoing investigation of a potentially criminal nature that would be impeded if the full details of that investigation were made public. The Court balances that claim against the public's right to know. In an open meeting law context, the Attorney General, I think, in order to avail herself of the *Donrey* rational would have to say, "we had an OML complaint referred to us, it is under investigation, and it is of such nature that if we disclose the particulars of it right now, it would impede our ability to complete that investigation successfully." Once the Attorney General makes a determination that the matter is no longer criminal, in other words a civil remedy may be applicable, and then the rational in the *Donrey* case disappears, because that is a common law criminal investigatory tool. Let's say it is determined that we cannot establish the elements of the crime that exist presently under Chapter 241 of the NRS, then it is Public [Records Law]. At that point, the record becomes public as you suggested. That is exactly the situation in *Bradshaw*, the law enforcement agency was forced to disgorge the now completed investigative results, once it was determined that no criminal proceedings were going to be taken. If I remember correctly, that is the fact pattern in the *Donrey* case. I believe that resolution would apply here. The other thing is if there is any residual investigatory technics that would need to be protected, but that would be a post investigation rational under *Donrey* that would allow you to keep some investigatory technic, or the result of the aspect of an investigation confidentially, even though you disclosed everything else.

Mr. Munro: In other words, an OML complaint and investigation shall be subject to the Public Records Act, unless the Attorney General makes a determination that the complaint warrants a criminal investigation.

Mr. Doyle: I don't know that you need to put that in the law, because I believe it is true right now. You have the opening section of Chapter 239, which basically says, "All records are public, except," which is another item on our agenda. Our Court recognizes both statutory exception, and apparently some common law exceptions. Maybe it is best . . . along, if you will, with the common law. I also think what Mary pointed out a moment ago, is very well taken, if a person comes to Metro and files a counter-report or counter-complaint, the four corners of that document, basically within 24 hours are disgorged. The Media can come in and go through the ring binder or the previous day's electronic manual of those counter-reports; those are public records. The key difference is what Metro does with respect to or in response to while the complaint is protected under *Bradshaw* or until one of the mile stones in the *Bradshaw* case is reached. A comment about Paul's suggestion that we adopt the Ethics Commission approach with respect to confidentiality until such time as the Ethics Commission makes a determination of preliminary merit, I don't know it would work for the very reason that was pointed out a moment ago. Many times the first thing a person does after they tender their written complaint to the Ethics Commission is contact a journalist or worse, hold a press conference about the fact that they filed a complaint. The Ethics Law confidentiality, really only applies to the operation of the commission itself in the processing of the complaint. I don't know it effectively muscles the person tendering the complaint. We have since read about this instances periodically where somebody

chooses to file an ethics complaint, and then the complaint becomes subject to the confidentiality associated with the commission procedures under law, but the person still goes out and reports the fact to the local journalist that they filed a complaint. I guess what I am saying, even if we were to engraft that type of an ethics commission rational onto OML investigatory matters, I don't know that it would serve the purpose we wanted to do, which is as Paul pointed out, protect the potentially innocent person or innocent public body, or group of persons that is the subject to the complainant. I am kind of at a loss. I don't know what the solution is, except maybe to have the Attorney General, in the OML Manual, set out her position on how she is going to treat these complaints. If the four corners of the complaint itself was . . . to a counter-report at a law enforcement agency . . . available. Our investigation is protected under *Donrey* until such time as a determination is made of whether it is a criminal or not, then that rational ends. Everything else is subject to a public records balancing test articulated by the Supreme Court. Perhaps add that in the OML manual and operate under it for a while, and see if it works.

Mr. Munro: One of the things we are trying to accomplish is to try and get the Attorney General's Office out of the process where we make and enforce the rules, and get the rules set out into statute and make them clearer for everyone. Due to a couple of case we have had, where public bodies have said, "We are relying upon the Attorney General's Opinion, which has been the opinion for the past 20 years," but if a district court judge come and says, "I don't really care what the Attorney General's Opinion says, it is the way I am ruling," and the public body says, "It doesn't really seem fare to us." Your comments (Mr. Doyle) as always are extremely well taken.

Mr. Doyle: Mr. Chairman, these are rules that a court has adopted, and you are saying, "These are how we are going to apply them." About the only thing the court can say, unless it chooses to disavow itself and its own rule, is, "No, I don't agree with your application of this rule for this circumstance." But, for example, under *Bradshaw Donrey*, by the simple fact, it is the Attorney General's Office investigatory and prosecutorial function embedded in the same office by law, a court is going to have a hard time saying, "Oh, *Donrey* was for police agencies and you are not a police agency." Well, yes you are.

Mr. Munro: We are.

Mr. Doyle: Yes you are. By statute you are a police agency and you are a prosecutor's office, and that is just the way the legislature and the state constitution says the function is going to be in this case, not divided. And so I think you have a right to avail yourself of the rule until the court . . . so you are not making a rule, you are simply saying, "This is the rule that was applicable to us."

Agenda Item No. 6

Mr. Munro: Duly noted. I wanted to discuss one more agenda item. Forgive me, but we have had two pretty good bills passed through the legislature in the last two legislative sessions; primarily because of discussions we've had in this Task Force. I

put Agenda Item No. 6 on the agenda, but it is really outside with the purview of the Open Meeting Law Task Force, it is really and Open Records question. We had an Open Records Bill last session where we lumped together all of the exceptions to the Public Records Act, and this is it, four hundred fifty-five (455) of them approximately. I was kind of surprised when I saw all of these; especially because I don't think anybody knows what the status of exceptions to the Public Records Act are, and if you have 455, I don't think it had been thought-out as well as it could have been. I attached in the backup material of Agenda Item No. 6. The way the federal government has kind of a simpler process. I am not an expert in FOIA (Freedom of Information Act), but my understanding on FOIA is they have nine (9) categories that are accepted pursuant to the Federal Public Records Act. One of those items, unless specifically delineated by statute . . . if you look at the backup material for Agenda Item No. 17, they have a list of approximately 50 federal statutes. I am not of the belief that we can solve the Public Records Act, but in reviewing it I found there is a requirement under federal law, page 8 of 40 under Agenda Item No. 6. They have a record gathering mechanism in federal law, where they look at exceptions, which ones are being utilized, and try to get an understanding of why governmental agencies are keeping records from citizens . . . . If we had a requirement for state government, such as, Library and Archives, for them to contact state agencies or review their Public Records request on what exceptions are being used, it might have an ability to maybe get a better understanding of the 455 exceptions to the Public Records Act, and which once could be better utilized.

Mr. Care: It would be a monumental task. I like the idea though of being able to recognize what exception is relied upon when we are told "no" or "yes." The one that I seem to hear about the most which stems from my time in the legislature and get calls today from reporters . . . the Clark County School District . . . the issue is the interpretation of the exception itself. The School District will need it one way and the requestor will need it another, but that is a different discussion. I do like the idea of the legislature having some, and I don't know if in the interim study or what, but some repository if you will, where they can at least start keeping a tabulation of what is relied upon and by who; and I don't know if that will require legislature to amend the laws such that any governmental agency . . . if there will be a reporting requirement.

Mr. Munro: There would be, and I am sure we will probably see a fiscal note. We should have an understanding if records are being kept from citizens, and there are legitimate reasons why records should not be made public, [because] they really are; and if that is the case, lest get an understanding of what is being utilized.

Mr. Smith: I agree with both of you. One, as Terry said, it is a monumental task and you can't even begin to solve it. The structure makes sense to me. You start with half a dozen, whatever reasons the federal government has brought to characterize these under, and then try to come up with some consistency, and that we do this because this is the rationale behind it, privacy or whatever; the very issue we were just discussing. Whether a complaint is a public record before there is some kind of preliminary investigation by the agency, which the complainant has filed and it is all over the map . . . some of them there aren't . . . some in statute . . . . We can have our discussion on

whether there should be, but there ought to be a kind of rational behind them, and there ought to be some kind of consistency of how we approach the adoption of those statutes.

Mr. Munro: I guess with 455 there has not been any towards consistency. Mr. Story, what do you think?

Mr. Story: 455 has far too many exceptions. I would agree there has to be a way to condense . . . other categories and reduce the number of exceptions. To me I don't know if whether that is the purpose of this committee. I don't know. I would start tackling it. Like Barry was suggesting is certainly an option. I would be willing to participate in that process, I just don't know that we can get through 455 by the next session.

Mr. Munro: No, we can't, we would kill ourselves trying to. But I do think if not for us for those who come after us maybe start a process where people are looking at the exception used and get that going. It may be an ongoing effort, but it should be something that governmental agencies should do.

Mr. Story: Is there some way to start categorizing these 455? I don't know if there is a staff person responsible for reviewing those exceptions. It seems like there's got to be some duplication there, to have 455 exceptions is far too many.

Mr. Munro: I agree, far too many. We are going to make an effort internally to check some. Do you think if we made a recommendation that if we had a requirement, at least on the state level, to start gathering that information and request at a legislative interim committee for them to initiate the categorization process, and possibly talk about policy considerations on exceptions to the Public Records Act?

Mr. Story: Sure.

Mr. Munro: I agree.

Mr. Smith: Look at it this way, two years ago we didn't even know how many there were or where they were in statute, so we are ahead.

Mr. Munro: Without discussed the Public Records Act, Terry, Barry and I had a public records bill and started to wonder how many exceptions there are, and decided to put them all together. I think Barry said about 50, I said maybe about 75. So we are starting down that road.

Mr. Fontaine: Just for clarification, the 455 exceptions are in statute.

Mr. Munro: Yes, in statute.

Mr. Fontaine: And who actually went through it?

Mr. Munro: One of our staff members.

Mr. Fontaine: I think I know the answer to this question, but those are dispersed throughout all the Chapters in NRS.

Mr. Munro: Correct, all chapters.

Mr. Taylor: Including Chapter 239.

Mr. Fontaine: And this isn't an issue of an agency interpretation as much as it is legislative intent?

Mr. Munro: I am not sure I understand your question. I think it was just done on a piece of mail paper and nobody was paying attention to it, and Barry and I decided to try and get them all in one spot, so we can get a sense of the world that we living with. Because it goes to a long-term discussion that Barry and I have had about public records act and we keep having litigation, but it seems like governmental agencies always loose and the press always wins. A discussion about balancing and who can balance; and one of the things that I thought is if we could clean up our exceptions and make them clear and have a good explanation for why we have exceptions, we don't have to keep having litigation about why we lose balance.

Mr. Fontaine: My question is, so there was discussion about having agencies report and those kinds of things, and right now we are talking about 455 exceptions to the public records law that are found in NRS. Is this discussion also includes how the agencies are interpreting and implementing these exceptions?

Mr. Munro: We are not that deep down.

Mr. Fontaine: Ok, I just wanted to clarify where we are.

Mr. Smith: But there are in fact exceptions in NAC (Nevada Administrative Code) that are not in statute, because over the years, the regulation has gone through and then adopted without anybody saying . . . .

Mr. Fontaine: But LCB approved those, so clearly they had statutory authority, right?

Mr. Smith: Exactly.

Mr. Doyle: And then you have case law exceptions which don't appear in either of the two places just mentioned. I know that as Mr. Care correctly pointed out, the Legislature does not like multi-year approaches, but at least extending it much beyond the current biennium. We have tried interim studies a number of times in the length of the time I have been practicing law, and to this point those studies have been unsuccessful in taking Nevada from one of the very, very small number of states, that has a mess for public records legislation to at least the jurisdiction that has a solution to

the problem like many other states. Again, this is an enormous project, but I like the idea of maybe solving it incrementally. The first step has already been taken because you have a listing of the statutory exemptions placed into NRS 239.010; as complete list as could be made in the 2013 Legislative Session.

Mr. Munro: We have a requirement for state agencies to designate someone to be their public records officer and develop procedures for reviewing public records requests. Those have to go through regulation and we are having a tough time getting them through the legislative commission, but we are confident we will.

Mr. Doyle: Here is my point; I like the idea of gathering data on how the exceptions are being used. Mr. Fontaine and Mary are probably going to hate me for saying this, but if you are going to get good data gathering, if you are going to have a reporting requirement placed on the state, I think you need to have a comparable reporting requirement in place on local government. With a quick look at the list, you can start just with the basic structure of the NRS and say, for example, umpteen lines down at section 244.264 and continuing on up to at least NRS Chapter 281 and 281a. I think you have provisions there that are uniquely applicable and discharged by a large part, by political subdivisions in the state. If you don't data-gather on those sections, I don't think you get the answer that you need. Here is my thought on this, despite the dislike for the multi-year approach, the first step has been taken, you got a universe of exceptions, and now there needs to be a period of time where the use of those exceptions is reported, and we get some handle on how they are being used by all levels of government, and then maybe it is appropriate . . . to try another interim study. Because maybe the data-gather will bring people . . . where the press and media outlets . . . said to the interim study and ultimately to the legislature, "no, we like our law the way it is, because everything is open." And now they are starting to find out that, "no, it really isn't [open]," or that the knowledge that is being reinforced really isn't because of the existence of all these sections. I think if we are going to gather data it has to be gathered across the board with the full universe exceptions. I say a great majority of them from a codification stand point are applicable to the state. I think we need to gather from local government as well, but we're just not going to have a complete universe on which to base a future interim study after data gathering is been done. We need to get out of the club of somewhere between three and six states that do not have an effective organize cogent public records law on the books. In order to do so, there are a number of steps we have to take before we propose somebody's model as being the one that fits us the best.

Mr. Liparrelli: The risk of being wrong about a public records inquiry, if they are a local government, can be severe up to and including criminal penalties for improperly releasing confidential records. I think there is a strong inclination for people to be worried about being wrong and turning loose of records they should not have; which makes me think if there was an efficient tribunal available to resolve public records questions, so that if local governments were ordered by a tribunal to turn loose of a record, that there wouldn't suffer such a potentially enormous penalty. I am thinking maybe authorization for district courts throughout the state to appoint public records

commissioners who would be available to, on very short notice, sort of mediate some of these issues. Because access to public records is one of the most important things that citizens have to know what their government is doing . . . the system we have right now is so inefficient because the law is deficient as Mr. Doyle points out; also because the proses of litigating it is so burdensome. I tend to think that my clients in the local governments would avid by an order from a public records commissioner to release something that may have otherwise been treated confidentially for fear of what might happen if you are wrong.

Mr. Munro: I understand. It is easy to say turn it over, but if you are the one that is going to get sued, you would be very careful. So, would this public records commissioner have any type of judicial discretion and protection that would protect the situation of the local officials, but also get a swift resolution to the situation?

Mr. Lipparelli: That is my thought.

Mr. Munro: What do you think Jeff?

Mr. Fontaine: I like that idea.

Mr. Lipparelli: Right now Mr. Smith and his Colleagues have to go get a district court judge to schedule a hearing and hold the hearing, and if the outcome is such, the other party does not like it, and then you find yourself in the Supreme Court as like what has happened with the PERS cases recently. It just seems to me like a lot of those questions may be resolved sooner by a professional commissioner who understands all those exceptions and rules, who may be of help to the citizens and the media folks who need access to records, and also the public officials who have the job to be careful about what is released.

Mr. Smith: I appreciate your suggestion, because that is where I think we are headed. I think that is what needs to happen, somewhere there needs to be a mediator step between the request and going to court. The distinction of what we bring up here is because the Attorney General has the authority to enforce the OML; there is a manual, opinions, a record, a great deal of discussion, and there is training that takes place. However, when it comes to records, there is very little of that happening, kind of everybody is out there on their own when it comes to records. So some kind of step, some kind of expertise that people can rely on and get some kind of opinion and decision before they go to court, I think is a necessary step.

Mr. Munro: Interesting. I like to ask Paul and Mary Anne a question. On page 7 of 40, on the back of our material for Agenda Item No. 6, down at the bottom, these are the federal exceptions: 1) is an executive order for national defense, I am not sure that would be necessarily applicable; 2) relates to personnel rules and agencies; 3) creates the broader exception by statute; 4) is about trade or commercial or financial information obtained from a person or is privileged or confidential; 5) is inner-agency, essentially the deliberative process of an agency; 6) is personnel medical files; 7) relating to criminal;

8) relates to financial institutions; 9) relates to wells, maps, things of that nature, which is not really applicable. Paul, Mary Anne, you are chief civil folks for large counties, do you think it would help in you evaluating public records requests, if you had some simpler ones that are utilized by the federal government, with all that federal case law to help interpret those, if we brought those into statute, into that list of 455? I hate to say "addition by subtraction, or subtraction by addition." Or essentially if you create . . . that counties and local governments could rely upon, and you had all that existing case law of how those are interpreted, that it may help to start to knock down some of the 455 that we have?

Mr. Lipparelli: I would want to study it. I am initially distrustful of anything from the federal government. I rather borrow something from another state. But I do see that the availability of the body of law that was interpreted, those rules may be helpful for those of us when trying to provide advice.

Mr. Munro: Because it wouldn't change the status of quo of what you have now, it would give you some other ones that you might decide to gravitate to. By adding some broad ones, it gives the ability to rely upon those, and it doesn't change your existing status quo, and if you did the multi-session approach or multi-step approach, you essentially be saying, "I got a recommendation not to change the status quo, but I got some established ones that are used under the federal FOIA act," that may be the right place or right direction to be headed to. Now if there are states that have ones as well, maybe that is better.

Mr. Lipparelli: I tell you what I would appreciate from either the feds or another state is the possibility of the public agency making the request on a recognizable request form; a form with boxes to check, one that would aid the citizen in making an intelligent record request. So often the problem we have in responding to a public records request is that the requestor is so unsophisticated and the way the request is made, we have to spend quite a bit of time just trying to understand what they are asking for and whether we can provide it.

Mr. Munro: There is one in the regulations.

Mr. Smith: It is not a required form, but it makes sense because there was no standardized process for requesting records, or for responding to a records request. The regulations do apply only to state agencies, but it is part of the process. Here is a standard form that you may use and that the agency may request more information more specificity because it is beneficial to both sides. However, while you may call a form X the requestor requests may be form Y, and so the respond is, "well, we don't have any form Y; therefore we are denying the request." It would be beneficial to both sides to clarify the language. I am not ready to say you have to fill out this specified form yet.

Mr. Munro: Would you be ready to say that what applies to the state applies to the ability of city and counties as well?

Mr. Smith: Possibly.

Ms. Miller: On your original question, I don't know that the FOIA really translates well to state law for governments. For the ones that do translate here, we already have state statutes that we cite right now. I agree with Paul that if we are going to copy, we go to another state. I do agree with Scott there will be a burden on local government to compile all this information, but no more than the burden that will be on the state I suppose. Just because I have been practicing a long time . . . I don't know how many time over this year I've had to compile data for the Legislature, only to go into a dark hole. If it is going to be a requirement, I would like to have some ending side, because it is a big administrative burden.

Mr. Doyle: Reinforcing something what Mary Anne and Paul just said, despite the dislike or the mistrust for multi-year plans, I think that having a public records commissioner, which I recommend ought to be part of our district court system. One, it is going to produce a fairly significant fiscal note, which counties will be responsible for paying through the administrative office of the court. Paul's point about the need for this is well taken, which demonstrates very clearly in my mind, that abysmal state that our public records legislation is in currently here in Nevada. For example, let's say you data gather for long biennium, two fiscal years, and your interim study is available for another two more year, now we are up to four. Let's put this public records commission authorization in place for six years. And the reason being is that this is going to keep the information and the action that is needed over a long period of time to resolve this issue from being shoved in to a dark hole and forgotten about, because the temporary band aid cure of a commissioner goes away in any event regardless whether we take action on the underline problem that commissioner has been designated to solve. If we put legislatively these types of time frame and mind then we would have engaged in sound management 101. Because we have recognized an enormous problem, we are going to gather the data about the magnitude and the perimeter of the problem, we are going to put together a study to recommend the solution to the underline problem, just poor structure in state law, but we are also going to put a bandage on the arterial hemorrhage for a fine-eyed period of time that the commissioner will be tasked with giving at least a preliminary determination of whether to disclose or not. And it is available for everybody, cities, counties, special district, state agencies; you put it in all of the judicial districts. The thing I am concern about is the expensive, because you are going to have to give this type of thing in front of that commissioner priority, and whenever you buy a priority in a judicial setting, it is expensive. To protect due process, I think you are going to have to have some sort of a petition for a judicial review from a decision of the commissioner.

Mr. Munro: So it would be a 233B process?

Mr. Doyle: Something like that, or maybe even a confirmation of an arbitrator's award type thing where you've limited the grounds for going to the judicial official in a judicial capacity; and then the other thing after recognizes that in exceptional cases there are

going to be appeals to the Nevada Supreme Court. So you can eliminate some of the cumbersome nature of this, but I don't think you can eliminate it all. Frankly the whole thing that I am proposing is just miserable enough that may we will be able to motivate everybody that is affected by it, the public, media representatives, people that advocate for transparent government, government officials themselves, judicial officials, legislators. They'll all say, "None of us like the system that we are operating under on a temporary basis," but if we don't put in some "end times" under the timeframe, we are going to go back or our children will be looking at this same issue x-number of years from now.

Mr. Munro: What if we created a public records commissioner with the ability to appoint deputies, and then apply that to state agencies and so you have a system, a place for disputes among public records in the state subject to 233B. It would allow counties the ability to contract with the state public commissioner to essentially opt-in and that way it is up to them to pay the state agency to hire additional folks to handle them maybe on a case-by-case basis.

Mr. Doyle: What type of immunity do you give your administrative law judges that adjudicate things right now?

Mr. Munro: The same you give a traditional [judge].

Mr. Doyle: I think you have to do the same for public records commissioner. There would have to be a model for that, maybe at less expense or maybe it could be finance on a per-case basis for local government. Like I said, from my reading of this, from a codification structure stand point, the lion share of the 455 exemptions is owned by and administer by state officials . . . .

Mr. Fontaine: I think that would be a better model, because I don't know how prevalent this issue is or how much of a concern it is in the rural counties. A model where you would make this part of the district court system would then require the counties that don't necessarily have an issue to have to pay to a participating program even if they don't need to. What you are suggesting I think is an opt-in option which is probably a better model.

Mr. Doyle: I did district court just for the purpose of well recognized immunity.

Mr. Fontaine: Sure, I understand. It is a good start, and I think that is right. Absolutely.

Mr. Lipparelli: Mr. Chairman, I am going to have to leave, I hope I don't affect the quorum.

Mr. Munro: Ok, thank you Paul.

Ms. Miller: I hear the concern of putting it all on a county, if it make it through the court, then the county has to follow its process, and the county isn't the only one with public

records problems, there are cities, school district, local districts. I think is a good idea to have a public records commissioner, but there should be a different mechanism of funding it.

Mr. Doyle: Mary, I agree. The chairman has proposed using a model comparable to their administrative law judges for a number of things and that the local agencies can opt-in on either for a fee for service basis or per case basis. And I agree that that was better approach. I suggested district court simply for immunity.

Ms. Miller: What do with agencies that don't want to opt-in and that kind of hurts members of the public, because members of the public would (*we lost audio*).

Mr. Smith: We lost her audio.

Mr. Munro: I think the essential answer is we probably have to let the political process weigh it on that.

Ms. Miller: Ok that makes sense.

Mr. Doyle: Rather than just creating something and then not putting a "sunset" on it, I think we really think about recommending seriously there be one on a public records commissioner program, because if people know that this – (*general discussion*).

Mr. Munro: Terry, please wait; I apologize, I don't mean to interrupt, but can we go to Agenda Item No. 3 please? Has everyone had a chance to review the minutes and have any suggestion, additions, or corrections?

Mr. Smith: I move to approve.

Mr. Doyle: Second.

Mr. Munro: All in favor? Unanimous approval. Now let's go back, I apologize for the interruption.

Mr. Doyle: I think what I am trying to recommend is very unpalatable to many people, but if we don't put some type of curtailment of the remedy in place, we don't really avoid the situation that Mary pointed out a moment ago, and that is that all this work goes into a dark hole; clearly that a legislative action in the future could be to renew the commissioner for another five years, or renew it perpetually. If we don't recommend doing something like that, this issue is not going to be solved. In other words, we have to force action, because otherwise the creation of new institutions is going too convenient, and if we don't go back and solve the underline problem, which is poor statutory structure.

Mr. Munro: I tend to agreed.

Mr. Smith: Even though you called it, it is an expensive proposition. I think there is an argument to be made in the long run to save a lot of money. I think the way it is handled now is so inefficient, (*general discussion*), agencies, administrations . . . the reports that is certainly and argument to be made . . . .

Mr. Munro: George Taylor, our legal counsel has done some research on this and found out there is a couple of states that have offices that do this; he has some information.

Mr. Taylor: There are three states I looked at, State of Washington, Connecticut, and Pennsylvania. The State of Washington has a public records exemptions accountability committee, which studies exemptions in their state. The State of Connecticut has an office of governmental accountability which handles appeal, notices, orders, and civil penalties; and it is set out in statute as a template. Then the state of Pennsylvania has a tribunal, a quasi-judicial tribunal in the office of open records. There are a lot of state programs out there in statutes that had already gone down this road that we are currently talking about.

Mr. Munro: It appears Mr. Care has left the meeting. We should probably adjourn, but go ahead first.

Mr. Doyle: Mr. Chairman, I was going to ask if at our next meeting Mr. Taylor's research could be placed as an agenda item. In the meantime, if someone could speak to the Attorney General or if you have the authority to add assignments to our reason for being regarding this group, it seems like a pretty good group of local, state, public people, and we work reasonable inexpressibly compare to an interim study or some of the other more formalistic groups. Maybe if we did some work on this, the Legislature would be interested in the advice. In other word, it goes back to Paul's initial concern that this maybe this is taking us away from our original mission, but perhaps our original mission can be modify.

Mr. Munro: I have conversed with the Attorney General and she is fine with it, because between public records and open meeting law we are talking about the open government task force; we do not need to change titles. I think there is a synergy there. We talked about openness, but we also talked about public bodies and how we can work to protect them better, they are the ones doing the work and carrying out government. Too often they get beat up because it is easy, and it shouldn't be. Yes, on the agenda item. Mary Anne, for the next meeting, we are thrilled that you are here; anything you would like to bring forward on behalf of Clark County that you think might help along with the process.

Ms. Miller: I don't know about next meeting. I am just wondering on Item No. 16 about County Deferred Committees, is Clark County is the only problem here? And if so, I think if the AG would kind of issue a letter telling us that for public policy reasons, we think we should be complying with the OML. I think we would be more than happy to do that.

Mr. Munro: Ok, we will talk to you off line about that.

Mr. Fontaine: I briefed my people on what has been happening with this Task Force and in our last meeting, and asked them if they had any particular issues they wanted me to ask you to put on the agenda. We had a great discussion about public comment. Particularly, it seems there isn't a clear understanding of what the Board of County Commissioners can do with regard to public comment or what they should do in terms of things like: How and when you can limit public comment, time; how you can and cannot respond or not during public comment; whether or not you can require people to sign in in order to provide the public comment. They are not necessarily interested in any statutory changes, but they wanted some more clarification and guidance in terms of how they can administer public comment effective in an open way.

Mr. Munro: I know it is the Attorney General's preference that we have statutory changes simply because then we got bright lines. Do you want to see if you can put something together on behalf of the counties and bring back some suggestions?

Mr. Fontaine: For statutory change?

Mr. Munro: Yes.

Mr. Fontaine: They made it pretty clear they are only looking more for guidance, best practices, if you will. There is a wide variation in terms of what happens when you got a lot of people that show for public comment, how do you manage that effectively and still make it open and fair, but effectively manage public comment; those kinds of questions.

Mr. Munro: Meeting was adjourned. 12:18 p.m.