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MINUTES

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 10:03 a.m., on Thursday, January 30, 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)
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)

Staff
George Taylor, SDAG,

Public Present:
Lee (Janet) Houts, Story County

Transcribing Secretary:
Silvia Gles

Keith Munro, chairman of the Open Meeting Law (OML) Task Force. Mr. Munro proceeded to open the floor for public comments.

Ms. Janet Houts, Story County, member of the public introduced herself and asked several questions. She inquired about the Open Meeting Law (OML) procedure and mentioned her previous experience with public bodies. She asked the Board if there should be OML training offered to educate the public on OML.

There were no other public comments.

Mr. Munro asked Mr. Taylor if a subpoena could be issued to obtain the minutes of the meetings Ms. Houts referred to in her comments.

Mr. Munro referred then to the June 21, 2012 Minutes asking if anyone had any suggestions, additions or corrections. There being no opposition, Mr. Smith motioned to approve the Minutes, and Mr. Fontaine supported the motion. Mr. Munro declared the minutes approved unanimously.

Mr. Munro welcomed everyone. He reviewed the items on the agenda to be discussed. He added that the open meeting law is very important to the people; it is their opportunity to understand how government works and participate in the process. He spoke of the Attorney General's 2013 legislative bill that was passed last legislative session with reasonable changes to the process, however, review is appropriate to see whether there still was work to be done or whether the OML is working as clearly as it should. He introduced Senior Deputy Attorney General George Taylor as the main person assigned in this office to handle interpretation and implementation of the open meeting laws.

Mr. Taylor informed the Board he had sent a memo to all local agencies regarding the legislative updates to AB 65 and AB 445, and public records bill SB 74. He clarified one of the main things the Legislative Counsel Bureau (LCB) did was to codify definitions of exemption and exceptions to the OML; the process for appointing a designee to the public body; the process to remedy an OML violation with corrective action; the difference between "deliberate" and taking "action;" and the definition of "present" was also clarified. He said AB65 makes it clear that "present" for a meeting of a public body means via teleconferences, videoconference, to be "present" does not apply to social media, chat rooms or other forms of social media. He also said another requirement added was every agenda must include a contact person from whom the public may request supporting materials for

an upcoming public meeting. Certain governing bodies of cities or counties with populations greater than 45,000 must upload supporting material to their webpage. There is currently no requirement to electronically send supporting materials to a requestor. Delivery may be by electronic mail if feasible and if the requestor agrees to receive it electronically. Mr. Taylor recognized the significance last session changes had made in the way he has handled some of his resent cases using the process to "cure."

Jeff Fontaine asked if he could get a copy of Mr. Taylor's memo. Mr. Taylor offered to email a copy to all board members.

Barry Smith inquired if the information was posted on our (AG's) website. Mr. Taylor replied he was not aware of it being posted online; nevertheless, he would confirm and/or make sure it was posted.

Mr. Fontaine inquired about a comprehensive listing of public body's subject to open meeting law. Mr. Munro replied there wasn't one; however, it would be one of the things the Board could address today.

Mr. Taylor offered that in past legislative history, perhaps as far as 1977, when a list had been compiled, there were almost 200 public bodies considered subject to the open meeting law.

Ms. Chase said that currently the City of Reno has created more than 50 subcommittees and boards and commissions.

Mr. Smith asked Mr. Taylor if he received back any responses, questions or concerns from his memo. Mr. Taylor indicated he had not.

Mr. Munro moved to item No. 15 of the agenda. He said in hopes to clarify the issue of a "working day" where some state and local offices and governmental agencies are closed for a day. He emphasized, in the notice provision of the OML it specifies "three working days." The issue that was brought to my attention is whether “working day” applies to an agency’s governing board when the agency is “closed” on a day that is otherwise a normal working day, and whether or not closure of the agency is applicable to the three day requirement for posting notice and agenda. If a member of the public is precluded from contacting that agency and getting information or speaking with staff about upcoming events. Traditionally it has been defined as Monday through Friday; however, with government changes and

budgets tightening, if a notice is posted giving three working days and one of those working days is between Monday through Friday, there is no clear statutory definition whether that counts as a "working day." This is an issue that potentially could result in litigation.

Mr. Taylor confirmed this has become an issue. He indicated section 6:05 of the A.G.'s OML Manual states that working days include every day of the week, except Saturday, Sunday and Holidays declared by law or proclamation by the President.

Mr. Smith concurred it needs to be clarified. He said the language that is in the Manual needs to be in the law. In a recent issue the notice was given and the office was closed, then when people tried to go there and find out information in advance to the meeting they found the agency closed. The agency decided to reissue the notice and postpone the meeting. A common sense definition would be Monday through Friday plus holidays. Mr. Munro agreed and asked if everyone would agree that if an agency was closed, but had the opportunity to allow the public to communicate with them through voicemail or email, it would be sufficient. Mr. Smith agreed it would.

Ms. Morgan suggested it be better to be cautious and provide the public with as much notice as possible, so if they are trying to reach the agency or public body, they are not robbed of a day or two. It would be more appropriate to define a normal working business day for that public body and give the public as much time as needed. Mr. Munro asked Ms. Morgan what a normal working day should be.

Ms. Morgan responded it would be a full working day as defined by the agency, a 9-5 day; however, it would differ by agency, it may not simply be Monday through Friday, but as long as the public is given enough time to contact the agency and get the information they need.

Mr. Fontaine agreed and acknowledged there are a lot of public bodies that do not have an office/location or dedicated staff. He stressed while it might work for some counties and cities, others may define it in a different way. He urged everyone to keep in mind not all public bodies follow the same model. Mr. Munro added, you can be a public body and not have an office or staff, or dedicated website. He asked Ms. Morgan if she would potentially work on drafting some language and present it at the next (Task

Force) meeting. Ms. Morgan accepted and offered to incorporate the bodies that may not have a typical working day. Ms. Chase suggested additional language for when the government has to close down for snow days or other events.

Mr. Munro moved to item No. 5 on the agenda, confidentiality. He said this office has traditionally considered open meeting complaints not to be confidential. This was discussed during last legislative session, because the OML is a criminal provision. He could not remember if there were ever criminal charges filed following the investigation of an OML complaint. He said the definition of "deliberation" last session was codified primarily because it helped with reviewing these matters and making determinations. Deliberation and/or action are elements of a misdemeanor violation of the OML. Mr. Munro introduced Mr. Scott Doyle as having worked for the Attorney General's Office as a civil chief a few years ago.

Mr. Doyle state complaints were considered in the late 1980's, but not filed against an entity down in southern Nevada. He vaguely recalled after he left the office in the early 1990's that there were criminal charges, at least considered if not filed, against officials within the White Pine County jurisdiction. He said there is limited use of criminal prosecutions, primarily because of the state of mind requirement.

Mr. Munro added that normally when a criminal complaint is filed against somebody, they are entitled to due process, but there is a difference between a civil and a criminal regulatory allegation. He wondered since the OML is criminal in nature, should confidentiality be required in statute as a matter of law, since liberties are potentially at stake.

Mr. Smith said no.

Mr. Munro asked why. Mr. Smith explained he would rather hear why it should be, because when a report is filed at a police station to make a complaint, it becomes public record.

Mr. Munro clarified that an OML complaint only becomes public record once the investigation is completed. Mr. Smith disagreed. He pointed out when a 911 call is made it is a public record. He also stated he would be much against making the (OML) complaint a closed record.

Terry Care agreed with Mr. Smith. He said it is a matter of policy. We are talking about the OML that goes thru transparency…I think you can argue as a matter of policy the importance of openness regarding OML complaints.

Mr. Paul Lipparelli provided his experience preparing cases for the Nevada Commission on Ethics. He explained there is a process in the Ethics statutes that governs the confidentiality of complaints made to the Ethics Commission. The initial complaint is not a public record until certain findings are made and certain hearings are scheduled, then the ultimate decision of the Ethics Commission is a published opinion about either the wrong doing or the lack of wrong doing. He said he views his experience with citizens who use OML complaints as a tool against the local government, which are commonly groundless complaints. However, the citizen enjoys broadcasting the fact that the complaint has been filed, and if the complaint is determined to be a meritless. It should not be permitted to "waive the complaint around and make a big deal out of it until there has been a finding of a violation." It would be an effort to keep the important aspect of enforcement of the OML from becoming some sort of political tool.

Mr. Fontaine concurred with Mr. Lipparelli. He questioned the circumstances under which a complaint about a violation of OML would rise to the level of criminal complaint. Mr. Munro replied, you would have to have a deliberate violation of the existing laws that sufficiently affected the process and to be criminal in nature. It is difficult to answer this type of question because we never had an action that rose to the level of criminal violation, so we do not have that “benchmark” to use. We cleaned up the definition of “deliberation” in AB 65 primarily because it helps to review those matters in making such a determination of whether a violation is criminal in nature or not.

Mr. Fontaine also inquired if a willful violation led to some personal gain that might rise to the criminal violation, and if there was a fine in place.

Mr. Taylor said yes.

Mr. Doyle explained there is a common law and a partial statutory provision of confidentiality for criminal complaints, both in published decisional law and that of Supreme Court. He further explained that by statute, both the

investigatory and the prosecutorial functions for OML violations are best in the Attorney General's Office. He said if the circumstance arose where the Attorney General felt there was a potential valid criminal complaint, that those existing statutory and common law provisions could be asserted to protect the confidentiality of an OML investigation until such time as it was completed, and a decision whether to press charges were to be made at that point, it would default into the ordinary criminal process. However, it would seem we are setting two types of criminal processes in this state, one for public officials on OML matters and another for everybody else on everything else. He recognized the policy distinctions and urged the Board to be aware of the broader picture and other considerations over and above the confines of this law that need to be considered.

Mr. Munro asked Mr. Doyle if he thought it would be helpful to define it one way or the other, and although it is currently in the OML manual, it is not clear. He added, it has been the interpretation of the Attorney General's Office that an Open Meeting Law complaint may be disclosed; however, if an investigation finds criminal activity, there are still statutory protections involved for the people, not for the agency, but for the people who are accused. Potentially we could be in a position where the pattern of practice could affect someone's due process rights.

Mr. Doyle acknowledged if the office decided to treat a future complaint as confidential because of potential criminal implications until such time as the investigation was complete, in other words applying the general criminal process law of the state, rights and ability may have to be litigated carving out that exemption as a matter of interpretation in order to succeed, because what would be running against the Attorney General's Office is the practice it has engaged in historically, and there could be some sort of weighing process in the court's treatment of the issue. He suggested other ways to clarify it: Publishing a new interpretation in the OML manual for complaints received on and after this date that are potentially criminal in nature as opposed to all other complaint that are treated as non-criminal matters. The other way to do it would be through legislation.

Mr. Munro asked Mr. Doyle if he thought there would be any impact on local governments if they wanted to review the "cure" provisions. Using an example, if you had a public body who simply wanted to carry out their duties clearly in effectuating the cure provisions, but if you do not have the cure provision, you potentially impede the operation of local government.

Mr. Doyle recognized the difficulties presented providing the example of other states that have been operating for a number of years without criminal penalties in their open meeting law; they rely strictly on civil enforcement and civil penalties. The real question becomes one of public and legislative policy. Is it good public policy to have a misdemeanor provision in the act so you can point to it and say we have one, but then when you look at it in terms of its actual use, it has probably been employed maybe once since its enactment in 1977.

Mr. Munro agreed those were good points to be considered.

Mr. Shipman (via phone, Reno City Attorney's Office) also agreed with Mr. Doyle. He offered the notion that criminal prosecution of OML complaints have always been a concern. He wondered if the Board was considering the wrong question about the confidentiality of OML complaints and investigations, whether the complaint should be considered a civil matter rather than a criminal matter because of the complexities of the criminal element, especially with the (state's) history. He added it is tough enough to get good people to serve on boards and commissions, and then turn around and prosecute them. He pointed out that up until now he has not seen a compelling case to continue with the criminal piece of it. There are people who are using these laws as reviewing policies; when the process is not working for them, they go to other means. He said he is a strong advocate to removing the criminal piece entirely, and if there are repeated or intentional violations: a) treat it as a civil matter, and/or b) they lose their office as opposed to going to jail.

Mr. Munro concurred once more, excellent points. He was not sure if perhaps the civil fine may provide a more realistic remedy than the criminal penalties. He said he was not sure and it would ultimately be the legislature's decision.

Mr. Care asked if there was another criminal statute other than the OML to charge a public body that clearly abuses the law. Mr. Munro was almost sure there is one.

Mr. Doyle replied there is a very open ended criminal misdemeanor and felony statute “Misconduct by a public official" NRS 197.110. He indicated if there were no criminal provision in the OML, a prosecutor could evaluate

a fact pattern against the misconduct of a public official statute; probably under misdemeanor, and if a person is convicted of a violation of that law, there is a bar from serving a public office. He could not specifically recall, but thought it was something like 5 years for a misdemeanor, but not sure what it was for a felony.

Mr. Munro remarked about the possibility of having existing criminal provisions that are more appropriate and more clearly defined which may have been used more recently.

Mr. Smith was not in favor of making it an either/or. He did not feel it has been an issue and it would be ridiculous for someone to ask that the complaint be sealed. The idea that someone would use a complaint about the OML politically would be far outweighed by the number of times boards and commissions attempt to conceal the meetings and what they are doing from the public.

Mr. Munro offered, “what if there are existing common laws statutory privileges that apply to someone who's been accused of a crime, and therefore, those laws would be applicable to OML complaints that are potentially criminal.”

Mr. Smith said it was worth considering. He realized the main issue being discussed is whether to close complaints (seal) or remove the criminal penalty from the statute because it could be prosecuted elsewhere. It seems to be a reasonable answer; if there was a pattern of facts, it could be prosecuted under a sovereign statute.

Mr. Munro pondered what would happen if open meeting law complaints were public record. Mr. Munro pointed out Mr. Doyle's previous comments stating there are statutes that could be construed; when you are accusing someone of a crime, that those people are entitled to some protection.

Ms. Chase offered that as public lawyers we do not defend our clients for criminal behavior. If there is a circumstance that comes up, we would have the duty to refer them to outside legal counsel.

Mr. Munro replied, since the OML is potentially criminal in nature, it could be [prosecuted], although it never has been. He also added the reason for today's discussions is to make sure "our laws are good." I won't ask

whether you defend your local government for open meeting complaints, but we know they do (commit violations), and they are out there.

Ms. Chase agreed. "Absolutely we do, it has never come close in my tenure where we ever thought it was criminal, but there is that possibility out there and there are duties that go with it."

Mr. Doyle reinforced some of the comments made. As Mr. Chair said, the ultimate goal is to make this law easier for the public to understand and comply with, and in the event there is an alleged violation, to allow the Attorney General's Office to effectively investigate and if need be, use the remedies in the law for the various violations. He said any of the things he said today were not demands for action on the part of everybody else, they are just thoughts triggered in my mind as a result of a subject matter that was posed by this particular agenda item.

Mr. Munro asked Mr. Lipparelli and Ms. Chase if they could do some research on what clearly are the protections of individuals who are accused of a crime from public disposure.

Mr. Lipparelli stated he would be glad to work with Ms. Chase. He also remarked that the balancing test we have in the public records law comes from a case where the media was seeking the release of information about an ongoing criminal investigation, and what the court said in the case, "when the public's interest in government records is outweighed by the need to be able to successfully and efficiently complete a criminal investigation, then the records are not available." Mr. Lipparelli emphasized it strikes the right balance. Investigatory agencies need to be able to investigate complaints in an environment free from distractions in a high profile investigation of a high profile person. He urged the Board to keep in mind what all the issues brought up today and to achieve a good balance for all pertaining parties.

Mr. Munro responded, if we ask the Legislature, they may want this office to prosecute people for crimes, or they prefer to have a law on the books that makes it sound tough but know it is not being utilized.

Mr. Fontaine wondered if there are already laws that address criminal activities or behavior by public officials for all other types of activities, taking money or bribes, etc., "are we suggesting that a violation of the OML is

somehow different than any other potential activity by a public official, and should we treat it differently?"

Mr. Munro said no, that is not the suggestion at all. The discussion is about a criminal provision that has not been used and a complaint structure that has been considered to be a public record. However, as pointed out earlier, there are protections for people accused of crimes that are not supposed to be public, kind of a conundrum, "the practice has been treated differently, but should that continue?" He acknowledged it should not, it should be clear. He agreed with Mr. Lipparelli's excellent remarks, except if an attorney representing a public entity is doing his/her best to comply with the OML, then finds out a complaint was filed, that attorney would want to know right away if the complaint has any merit whatsoever, and if it does, that attorney will be looking at the cure provision to correct it as quickly as possible. The ultimate goal of what the OML is supposed to be is to have the public involved in the process.

Mr. Lipparelli noted due process requirements. The Attorney General's Office always gives notice to the public agency of what it has been accused of doing and gives the public agency an opportunity to respond and provide the information necessary for the investigation. Just because the complaint itself may be treated as confidential, does not mean a public agency isn't going to get notice of what is in the complaint.

Mr. Smith reiterated, The public will make a complaint to the Attorney General's Office and the AG's Office would then notify the public agency, but the public would not be able to have record of any of that, is that what we are contemplating here?

Mr. Munro replied, no, that is what Mr. Lipparelli just said.

Mr. Lipparelli suggested considering the benefit to confidentiality during the pendency of the investigation, once findings are made, of course, it all has to be public and the public agency has to answer for wrongdoing. He also recommended to think about self-proclaimed citizen activists "inventing" OML violations and then using the fact that they filed a complaint as some sort of a tool against the agency; if that would be good or bad public policy.

Mr. Smith inquired if confidentiality applied to the person who filed the complaint and if they ask for a copy of the complaint they filed would they be able to get a copy.

Mr. Lipparelli offered an example of how it works when it comes to the Ethics Law. There is a balance between the interest of the public official who is being accused of the ethical violation and the interest of the complaining party. In this example the Legislature found that the confidentiality should apply until certain stages of the process had been completed.

Mr. Smith said, "For the record, I disagree with that as well."

Mr. Munro stated there were no decisions being made on this day. We are just trying to bring up different points of view; and I think by the nature of this discussion, we got some incongruity about the way things work which may bring some clarity to it.

Ms. Chase confirmed she has worked together with Paul and would be happy to collaborate with him to bring something back to the group.

Mr. Munro moved to agenda item number seven. He asked: Should the OML specify how a public body may approve minutes from a closed meeting without waiving privilege?

Mr. Lipparelli said to the best of his knowledge in closed meetings they use a separate recording from the public portion of the meeting, and they keep the audio recording of the closed meeting in a separate non-public storage. He did not recall whether they prepare written minutes for that portion of the meeting, or the clerk ever asking the board members to approve such minutes separately.

Mr. Doyle outlined the procedure of his former client Douglas County where the audio recording was kept and the clerk prepared separate written minutes of the closed session, and the minutes were also kept in a segregated confidential manner along with the audio recordings, basically for enforcement purposes that in the event a complaint was received by the Attorney General and had to open up an investigation; however, he did not recall the precise procedure for approval of minutes. He offered to find out what small rural areas in the county do and bring back the information.

Mr. Munro asked Mr. Doyle his opinion, if he thought there should be any requirement that the minutes be approved or closed.

Mr. Lipparelli pointed out it presents a bit of a dilemma, "if you are going to approve minutes from a closed session, you presumably have to have a closed session, but then you can't vote in a closed session."

Mr. Munro noted if a closed meeting is noticed and folks tape record what was said or take the minutes, in case there is any question of what happened during the process, one can assume those minutes are being reviewed. He inquired if there should be a simple formal process during an open meeting where the public body confirms reviewing the minutes of that closed session. Mr. Munro then concurred with Mr. Lipparelli that it would be difficult procedure under the OML if there were any suggestions, additions, or corrections to those minutes.

Ms. Chase expressed her concern about the minutes technically becoming supporting materials for that open session.

Mr. Munro referred to agenda item number eight regarding public entities forming nonprofits or private partnerships. He questioned if the definition of “public body” needs to be made clearer. The OML does not even define what a public agency is. He also questioned if it would be better for the public and government agencies to have a clear definition of whom the OML applies to and who it does not. Mr. Munro mentioned he was surprised to hear that there were up to 50 entities locally and possible 700-800 statewide. He also asked if anyone knew more accurately the total number of entities. Mr. Smith acknowledged it may be close to 800.

Mr. Munro asked if anyone thought there were 400 public bodies on the list guessing whether the OML applies to them or not.

Mr. Care inquired about the way public entities would handle a subject such as a public records request as opposed to the OML.

Mr. Munro noted without all of the circumstances it would be an estimate. He asked Mr. Taylor if he could elaborate about generalities of public private partnerships. Mr. Taylor stated he had done a lot of research recently about this issue. Both state and federal court across the country

have developed a totality of factors test to determine whether a nonprofit or another entity is functional equivalent of a public agency. He also stated he reviewed several of them from the east to the west costs, where state courts have developed a multi factor test, including a 1980 Supreme Court case from Connecticut.

Mr. Munro gave an example, if a state agency who has legislative authority to form a nonprofit, forms a nonprofit placing six state employees as governing members of that nonprofit for the purpose of conducting state business, essentially the members are performing during work hours on their state time carrying out a nonprofit operation. "They are not a public body, they are nonprofit, so would it be helping the people serving on that committee to clarify what the public body represents."

Mr. Taylor stated part of the problem with some of OML complaints regarding nonprofits he has worked with, is the Attorney General's office interpretation of the definition of a public body, primarily as to the meaning of the phrase "owes its existence to," and "have some relationship with the state or local government," which led me to the “totality of factors” test. Federal and state courts from around the country have wrestled with the essential factors that would determine whether a nonprofit is the functional equivalent of a public agency, thus subject to public access laws and the OML. For example, whether the entity performs a governmental function; the level of governmental funding; the extent of government involvement and/or regulation of the entity, and whether the entity was created by government. Mr. Taylor proposed the test as a clarification for the phrase "some relationship with state or local government” to determine whether an entity is a nonprofit or it is the functional equivalent of a public agency.

Mr. Fontaine inquired if there is a distinction between a public agency and a public body. Mr. Munro indicated he believed a public agency would be the subset of a public body, the statute is not very clear.

Mr. Taylor indicated he found that in 1960 when Nevada adopted the earliest version of the OML, the language in Nevada OML Statute applied to all meetings of “public agencies, commissions, bureaus, departments, public corporations, municipal corporations, quasi municipal corporations, and political subdivisions.” Then 17 years later this "definitional list" was removed from the statute, and in its place, the word "bodies" was substituted. He pointed out that in his research of the legislative history

from 1977, there was nothing indicating why they removed the "definitional list" and inserted the word "bodies." Based on his finding, Mr. Taylor said he concluded that a public body still encompasses the meetings of a public agency.

Mr. Fontaine declared, "but the federal test you just described pertains to public agencies, and open meeting law pertains to public bodies." Both Mr. Munro and Mr. Taylor agreed it does.

Mr. Lipparelli said "the government agencies should not be able to do that, which it could not do if it acted by itself by forming some other entity to do it." It is a complete gutting of the purpose of the OML. If there are problems in that area, it should be address with a broader definition that encompasses those kinds of things.

Mr. Munro asked Mr. Lipparelli if Tracy's list of 50 was exclusive of his list. Mr. Lipparelli replied it does not include what the county does, the list has not been updated in a long while, and what Tracy provided happens here too. He mentioned the Board of County Commissions just formed a subcommittee two week ago to screen applicants for an appointment to an office, and that subcommittee is going to post its agenda and have a meeting, they will do that agenda item and then that subcommittee will be gone. It is hard to keep track of every peculiar deal that only meets once or twice.

Mr. Munro asked Mr. Lipparelli if it would affect his operation or the way he provides legal advice if an attempt was made to provide greater clarity to what a “public body” is. Mr. Lipparelli replied he has not had any problem with the existing definition, he found it to be comprehensive, "any public body that is supported in whole or in part, by public money or makes recommendations to a body that is supported in whole or in part…." He suggested if the real target is the formation of private entities or quasi private entities, we should focus in on the potential area of abuse.

Mr. Smith agreed, you can go infinitely trying to narrow down these decisions but ultimately someone is going to have to interpret everything. He agreed the four standards should be added to the manual. This is the analysis that goes into it, especially if there is a problem area, because based on the current language in the statute, no action can be taken to circumvent the intent of the statute.

Mr. Doyle pointed out, in the case of a county government, possibly in Chapter 244 of NRS under the financial powers portion of the Chapter, there is one legislative provision which allows county commissions the power to expend money for any purpose but it stops just short of expending money for the general welfare. It is an extremely broad statute. He added, if at some point in the future a county commission, presented with the right circumstance, could make a very substantial grant of county funds to an existing nonprofit corporation with the purpose of the grant to perform something that perhaps historically county governments have been expected to perform. Unless the granting agency puts conditions on the grant that the recipient entity is required to comply with public records request and the OML, there is a very good argument right now, that that private entity would have no requirement to do so; they would operate as whatever they are, private, nonprofit, or profit entity and carrying out this arguably governmental function. He agreed with Mr. Smith it would be up to the Attorney General's Office to revise the text in the manual and add the four-part test. Some may think that the elements are too vague, but there are remedies. An agency can ask in advance for an opinion of the Attorney General to apply to their situation and you would issue an opinion letter on whether the proposed action would trigger additional coverage under the OML for a particular situation, or you would come in after the fact and response to a complaint filed and make a determination. Additional guidance in the manual is a good place to start. In the meantime, in addition to the case law, we perhaps could do some comparative law research on how other state define public agencies, public bodies, and what distinctions they draw with respect to OML.

Mr. Fontaine asked Mr. Doyle, "is it your suggestion that any time a nonprofit receives a grant for a specific service or a deliverable that that particular nonprofit would be subject to the OML requirement?"

Mr. Doyle said no. My suggestion is they would be subject to the four-part test and if you found that the function for which the grant was being awarded constituted a governmental function under one or more of the factor on in that test, then yes they could be required to comply with OML and public records request. Mr. Munro asked what everyone thought about adding the four-part test to the manual.

Mr. Shipman inquired how the four-part test would work using as an example the Washoe County Airport Authority, whether they are considered a public body for purposes of OML and whether or not this test would apply to them. Then Mr. Fontaine inquired the same for a 501(C)(3) nonprofit.

Mr. Munro confirmed it potentially could be. Essentially there is a manual where we try to provide guidance for folks to comply with the OML, and there are situations, hypothetically, as Mr. Doyle pointed out, which may exist where somebody files a complaint that could end up in district court but there isn't clear legislative guidance about "what controls" and so the case goes essentially before a local judge to make a determinations about OML violations, and the judge determines "you violated the OML," but the local entity says, "we are complying with the AG's OML manual," and if he ask the question, "am I bound by that," the answer is no, he is not.

Mr. Taylor stated there is nothing in Nevada law from the Supreme Court which adopts the four part test. The (four-part) test is a balancing test, no one part of this test if going to be determinative. Every court decision I reviewed used a balancing test, anywhere from a 4 to 9 factors test. For example: 1) whether the entity performs a governmental function, 2) the level of government funding, 3) the extent of government involvement or regulation, and 4) how the entity was created by the government.

Mr. Fontaine elaborated there is no easy answer. He wondered if an entity were to receive a grant for funding from a local agency for a deliverable of six months what would happen after the six months. Mr. Munro concurred that the current standards in the manual are not applicable to a court of law and could possibly be construed to be any level of funding.

Mr. Fontaine confirmed it is any government function. It is why governments grant money, for government functions. Mr. Munro reiterated if it would make sense to try to clarify the statute. Mr. Smith agreed it should. He also thought that “some connection” is wholly inadequate; it needs to be addressed at the legislative level and a record created.

Ms. Chase stated the language added last session "public body" has a creating component; if it is created by a charter, a law, or governing body, which Ms. Chase felt was a good addition. Mr. Munro agreed and asked her to elaborate as to why she thought it was helpful. Ms. Chase provided,

at a local level it was very helpful, especially when conducting internal staff meetings to deliberate on matters that are not necessarily reported back to the City Council such as how the city wants to do street cleaning. This type of deliberation really is not the work of a public body.

Mr. Munro recalled a nonprofit called "The Holocaust Remembrance Fund", a 501(C)(3) nonprofit created under federal law for a public purpose, currently in the base budget to the Executive Branch of State Government. It's a nonprofit which, if it meets the criteria, the State of Nevada could decide as a matter of public policy through a democratic process of legislature and governor's approval to support its next re-issuance of its 501(C)(3). He asked whether an entity like this one would be affected, and whether it would be subject to the OML, or would it be better to focus on the creation, or should we focus on when a body is created by a governmental entity for a purpose, or is the direction we should go be who the OML applies to and who it doesn't.

Mr. Chase stated those were very valuable points, but when at a local level the City Council may provide grant funding to the Art Town or other nonprofit that provide community services, "do we control all of those nonprofits, absolutely not."

Mr. Munro agreed, however the interest of the public would be carried out by the sheer legislative process of that governmental entity, because those budgets hearings are heard in a public setting, where there is voting and public comments; it falls under the open meeting laws. He declared, "I am not stating the position of the Attorney General's Office, I am just trying to lead the discussion on this issue, but we don't want to have a runaway train of 800 potential public bodies, with an estimate of maybe 400 of them wondering if the OML applies or not. He further recommended that it may be better to say "created by a public body" which is the primary trigger of when OML applies.

Mr. Doyle said, what if we have a situation where you have a multi-member body that is charged with administrating a public function: corrections, and they receive a very substantial appropriation to discharge that function, but instead of discharging it directly through appointed staff working directly under this body, they decide to contract with a private entity, so they basically turn over that entire budget to the private entity, profit or nonprofit, then this corporate entity is now going to run the corrections' services for

that particular public entity. There is a situation where the element of creation does not enter into it, and you have a huge transfer of public funds in a significant operation of what is traditionally been a public or governmental function. I know the four-factor test is not a paradigm of clarity, but it allows you to address a multitude of factors, because it seems like at this point, if anyone was to try and put a statutory definition in place, as soon as the legislature passes it, there will be a fact pattern that falls just outside of it, and it would be very disappointing in statutory draftsmanship. At this point I am wondering if it wouldn't be wise to take a small step, try this four-factor test as part of an interpretive manual, do the best job we can in interpreting it and recognizing that really what we are doing is some sort of long range study, for potential future legislation to clarify in this area. He spoke of an agency but did not recall the name or when he filed the lawsuit, only that it was during his employment with the Attorney General's Office, at which time there was an agency that was created by statute, and the purpose of the multi-member board that oversaw it was to determine the insolvency of certain insurance carriers that were doing business in the state and if necessary use a fund to make good on claims that the insolvent carrier failed to administer properly. He explained the Board was created by statute, and the money that they used was collected from premiums on the policies of the various carriers. They were not complying with the OML, I filed a civil suit using newly enacted civil remedies to see if we could convince them, but former District Court Judge Griffin said, "no, they are not a public body," and he focused on the fee that was collected on the premiums, holding it was not a tax, and therefore, without a tax they couldn't be a public body. Mr. Doyle continued, had we had this four-factor test, perhaps we would have had a more comprehensive weighing process in the context of litigation, because even if the manual is not binding, if it is a good test and it is supported by universal case authority around the country, the court will follow it because it is reasonable. In that sense, even though litigation is not completely certain, we lend some certainty to the scope of the law and its application if we do something like add this four-factor test into the manual; it is not perfect, but it is better than what we have right now. Mr. Doyle added, I was very disappointed in a professional basis in Judge Griffin's decision, but obviously this Board was extremely happy. At that time there was media interest in this issue, whether the law should be made applicable, and I believe the media was also disappointed in the Judge's decision, because we had an operation that was regulatory in nature that was now shielded from public scrutiny, because they did not have to notice and they did not have to operate publicly.

Ms. Morgan agreed, "Created by" is just far too narrow, and certain functions and duties could be assigned to organizations, whether it be profit or nonprofit; it leaves too much open for interpretation. She also agreed the four-part test could be very useful for the advisory opinions and a persuasive authority for the court.

Mr. Munro asked Mr. Taylor to make sure all Task Force members had a copy of the four-part test for review before next meeting.

Mr. Fontaine said he agreed but was still unclear about trying to reconcile a four-part test as it applies to public entity vs. public bodies. He asked if there is a difference.

Mr. Munro concurred no one is sure. He added, the consensus of the Task Force would be to find some sort of mechanism to make it clearer. He then asked Mr. Taylor if he thought the Office of the Attorney General has the ability to adopt regulations. Mr. Taylor replied, "it has come up in the past, but we all steered clear…my answer is I don't know."

Mr. Munro asked Mr. Doyle's opinion, whether a particular entity could govern by existing doctrine of law of non-delegation of public duties, where public entities don't have the authority to delegate governmental functions to private entities. Hypothetically, a correctional facility delegating authority to private entities, I have always had some concern about the ability to delegate to a private company the ability to arrest folks and detain them and keep them in facilities when they did not possess governmental powers."

Mr. Doyle concurred it was a valid observation. He said it is fact and circumstance specific; it was a test that may have evolved from case law. He added, we develop those types of rules in a serious of specific and discrete fact pattern. Certainly in the case of counties, the argument would be that unless the power to delegate was found strictly necessary, unless there was an expressive enumerated power allowing the county to do that, the county would have a terrible time proving that they have the power to delegate. I think municipal corporations are charter specific, because many of those are special charter where cities are incorporated by the general statutory process. He added: from a local government perspective I can't argue with your point without a specific fact pattern in front of me; however,

with respect to the state, it might be a different matter, the powers of the state are more extensive then its subdivisions.

Mr. Lipparelli said the issue he struggles with is the difference between hiring services of a vendor and delegating governmental power. We hire services all the time for paved roads and to build buildings, but at the same time we have county staff that can pave roads and build things. I think the key is try to determine when a governmental power is been delegated or when a service is been hired. Mr. Fontaine concurred that is not always clear either.

Mr. Doyle explained currently there is a significant financial incentive to have entities throughout the state look very serious at this issue, because if the function can be hired out or contracted lawfully, then one of the biggest challenges government faces - personnel cost due to benefits under the pension plan – may be reduced. The net result is, if there is a defined contribution plan on the side of the private contractor, the overall contract cost can be bid out at a lower cost, important since people are facing tight budgets, and government closing. As it is presently, it could become more of a problem in the future if current financial trends and current philosophy with respect of the size and the function of government continues.

Mr. Munro asked Mr. Doyle, "If we follow your suggestion, and follow the four-part test, are you also recommending to add a little clarity in those four parts of the test? You would agree that “some connection to government” is quite loose." Mr. Doyle replied it is very loose, but the four-part test is not as loose, then why not add to the manual text a paragraph that would be helpful for the public attorneys, such as a catalog listing of some of the case law fact patterns, things that could potentially direct the application to situations here in Nevada. Perhaps the lay person or a non-lawyer public officer reading that paragraph would not be entirely informed, but if it were part of the manual, it could also be helpful to the lawyers who are advising, because at least it would give them help them for their own research. He continued, you may have to revise that paragraph or section in the manual every two years after a legislative session and include or delete case decisions. Mr. Doyle recommended that in addition to articulating the four parts (of the test), it would be helpful to show how they been applied.

Mr. Doyle said it would be interesting to finding out how some of those fact patterns have fallen out in other states and federal decisions, or if the

Supreme Court of Connecticut's opinion is genesis for all of this. He added, a brief one sentence or even parenthetical behind the citations would be very helpful. He elaborated, as a former public lawyer, when you got 15 projects on your plate and time to do ten of them, rather than doing your own research out of the whole material, if some of this could be preserved, it is pretty quick for the advisor to the public body that they have a legal adviser making an intelligent determination of what their potential OML exposure is, and although not perfect, it would lend some certainty.

Mr. Munro asked Mr. Taylor to gather the material on this issue and send everybody the information on the four-factors, including some of the cases form his research. He further said it would be interesting to follow up on this issue and find out the effect it would have if our manual had more clarity, especially for those entities that merely provided a service and not a delegation of government.

Mr. Taylor explained that an independent contractor clearly fall outside the confines of the test, and there are definitions for an independent contractor in the Nevada Law.

Mr. Lipparelli added, when you are contracting out for a street or highway improvement, which would be a particular service, but part of that project may include traffic control, which is something that could be delegated to the contractor.

Mr. Munro acknowledged these are difficult issues. Mr. Fontaine agreed, this kind of reservations potentially raises more questions than answers, and the test could end up paralyzing or delaying decisions. There are small public entities that don't have legal counsel, and we do not want to be in a situation where a small local entity trying to perform a government function like a contract through a grant, and are faced with the issues and without the legal representation to advise them.

Mr. Munro moved to item No. 11 on the agenda and asked Mr. Taylor for some background. Mr. Taylor said since the 13th (legislative) Session, he had a lot of inquiries about AB65, the Open Meeting Law bill. He said the issue is determining whether public bodies have a duty to mail supporting material for its public meetings. AB65 requires support materials to be transmitted by electronic mail, if feasible and if the public body offers to transmit it by electronic mail. The public body must ask the person

requesting the notice, information or supporting material, if they will accept supporting material by electronic mail. Mr. Taylor pointed out that if a requestor is asked, "Will you accept the material by electronic mail," but the requestor says "no, send it to me by regular mail," we have interpreted the phrase “must be made available” to mean the public body only has a duty to provide the materials over the counter, but it is not required to send it by postal mail.

Mr. Munro stated he has not seeing anything in the statutes in that regard. He proposed finding the balance between cost and availability that may clarify the right way. This was part of the bill and part of the discussion at the legislature.

Mr. Taylor stated he has been advising public bodies that there is no requirement to make a hard copy to send by postal mail, unless the public body already does so. He pointed out it could become a substantial cost for small public bodies. Mr. Munro mentioned it would require a fiscal note, but some of the locals might in turn prevent the electronic transmission.

Mr. Fontaine requested clarification, "Are you saying that the public body is not required to mail it to that requestor, or do you mean they are not required to make it available to anybody?" Mr. Munro asked Mr. Taylor to explain the difference between "make available" and "mailing."

Mr. Taylor confirmed they are not required to mail supporting material to the requestor. Mr. Taylor urged the members to review the language and decide whether it needs to be clarified to say, "There is no duty to send it to someone who refuses to accept it by electronic mail."

Mr. Munro recalled the legislature was satisfied with emailing it to the requestor if it was available electronically because there is no cost. There were some local government who voiced their opinion, that if they were required to mail it, a fiscal note would have to be added, in which case the improvement on making it available electronically probably would have died.

Ms. Chase added, often times our electronic capabilities are limited. If someone can not access or print out the agenda from our website, we mail it to them. Our system does not have the capacity of sending large volumes of material electronically.

Mr. Smith inquired if the question was the cost and who pays for the mailing.

Mr. Munro said it is partially.

Mr. Smith asked if any language was removed (from the bill). Mr. Munro confirmed, "No, 'if you have an electronic copy, you shall provide' was added." The bill did not address changing anybody's practice.

Mr. Doyle agreed it would reduce the cost. He recalled prior discussions were centered on trying to make the information available to the widest number of people possible and in the most efficient and effective means possible. He said, I am troubled by the situation where if the government has made it available online, and has the ability to transmit it electronically to the recipient, that the recipient can disagree with either of the alternatives and insist on a bulk mailing. I believe that there is a parallel in the public's record act when the entity is to produce, because the cost recovered by government under the most recent public records' interpretation, you are allowed to recaptured the reproduction costs, but you are not allowed to recapture the staff time to pull those records and reproduce them, which is basically pennies on the dollar for the investment that the public entity makes in producing the hard copy record. He declared, I am not a big advocate in making this production more expensive, because now we are almost making it into a record's minuet. I am arguing against creating a duty on the part of the government to transmit electronically.

Mr. Lipparelli said, “I agree with Scott that it is a potential burden, but here is an even more practical reason why a duty to mail is burdensome. The duty to mail supporting material presumably would not arise until the posting requirement was triggered, and if mailing a two inch thick packet of materials for a meeting, the government would probably choose the least expensive way to mail it, and it probably wouldn't even arrive at the person's house until after the meeting was held." If a person is really serious about obtaining the supporting materials, 1) they are almost always available electronically, 2) they can be transmitted electronically, and 3) as a fall back they can always come to the office of the public body and review and copy the materials prior to the meeting. I think adding a mandate that it be mailed at the requestor's insistence is self-indulgent.

Mr. Smith said, I do recognize where people can abuse this, but there is a way to handle it; the standard essentially should be the same.

Mr. Munro added, any duty must have the right balance. Mr. Smith agreed.

Mr. Munro asked, "Are these meeting helpful, are there items or thoughts anyone would like to have considered for any upcoming meetings? Let me know if there are items that would be helpful to you in administering the public records act and also ensuring the public's access to government."

Mr. Lipparelli requested Mr. Munro, "Please pass along to General Attorney Masto our thanks for her offering us this opportunity for these discussions. It is tremendous to be able to get with representatives of community organizations and the media, and my fellow public lawyers to talk about these issues before legislative sessions happen; I think it is invaluable, and we really appreciate it." He offered a potential item for future a meeting, there is a requirement in NRS 241.020 that if a public body maintains a website, that it will post its agenda on the website. Several times recently the question has risen, is the supplemental requirement to post on the internet tied to the three working days or not? "It is my view the statute can be read in a way that is not, and I think it should be, and I have advised my clients that if they are prepared to take a thumb tack and a piece of paper out to a bulletin board, they ought to be able to press enter on their keyboard, at the same time, but I think the law doesn't really say that, and maybe it should."

Ms. Morgan offered an item for the next meeting. She said there was a conflict with some of the public bodies that fall under that 45,000 residential who are not required, or have the duty to, post minutes and supplemental materials, but for some strange reason they do for certain meetings, it's kind of misrepresenting what is essentially available.

Mr. Munro agreed that Tracy and Paul's concerns should be added to the next meeting agenda. He requested that anyone bring some sort of starting points for next discussions.

Mr. Care noted the possibility of some sort of a bill next session that would modify the OML, it will start as a BDR request. He suggested considering having that legislator come and tell us what he or she has in mind.

Mr. Munro agreed, and asked Mr. Care if he was aware of anybody to let him know. He mentioned Pat Hickey and Debra Smith have come before to talk about OML. Mr. Munro asked if there was any objection to discussing some items related to public records. It is not open meeting law, but it is open government. Mr. Smith and Mr. Doyle expressed no objection. Mr. Doyle suggested it would be helpful to have somebody like the state librarian who oversees the public record administrative code requirements be present at the meeting.

Mr. Munro recalled an open records bill last session that Mr. Smith and Mr. Care worked on and they had some pretty good achievements on clarifying that process and carved out some problem areas that make it easier for public bodies, and making it more accessible to the public. I suspect once that process gets going, it will then apply to state agencies, and then local government will fall in line with those requirements as well.

Mr. Munro opened the meeting for public comment.

Janet Houts spoke in public comment and made some remarks regarding the Story County Board of Commissioners as well as other comments.

Mr. Munro – meeting adjourned. 12:18 p.m.