TECHNOLOGICAL CRIME ADVISORY BOARD
Technical Privacy Subcommittee

MINUTES OF THE MEETING
May 30, 2014 at 1:30 PM

The meeting took place at the following locations:
Office of the Attorney General, Mock Courtroom
100 N. Carson Street, Carson City, NV 89701-4717
and
Office of the Attorney General, Grant Sawyer Building
555 East Washington Avenue, Suite 3315, Las Vegas, NV 89101

1. **Call to Order and Roll Call.**
   Present: Hal Berghel, Chair; James Earl; James Elste; Allen Lichtenstein; Ira Victor. Stephen Bates arrived during agenda item 5.
   Not Present: Dennis Cobb
   A quorum was established.

2. **Public Comment. (Discussion Only) Action may not be taken on any matter brought up under this agenda item until scheduled on an agenda for action at a later meeting.**

   In the South, A.J Delap from Las Vegas Metro Police Department is sitting in on this meeting.

   Mr. Kandt: In the North, a representative of the Nevada Press Association is attending and hopes the Subcommittee will take an agenda item out of order which would be Item 9, regarding the news shield privilege. I don't know if you would entertain taking that item early.

   Mr. Berghel: Let's consider that right after we can assure ourselves that AJ has no public comment to make.

   Mr. Berghel: Hearing no public comment, we will move to Agenda Item 9.

   Mr. Lichtenstein: Can I make one suggestion? That we do it early but since it's really Stephen Bates who has been integrally involved with this and he said he would be a few minutes late. I don't want to detain anyone but it might be a good idea to wait just a little longer for that item because I'm not sure we really are going to have as productive a discussion without him as I imagine we would if he were here.

   Mr. Berghel: A good point there.

   Mr. Victor: The member of the public that is here is cooperative to waiting until Mr. Bates arrives.

   Mr. Berghel: Perfect. So, Agenda Item No. 3.

3. **Chair's Welcome. (Chair)**

   Mr. Berghel:
   This is our fourth meeting and I'm pleased to see this level of participation. I think that we are much further along than I thought we would be in just these five months. With that, I welcome you to our fourth meeting and I hope this meeting will be as productive as in the past.

4. **Discussion and possible action on approval of April 17, 2014, meeting minutes.**

   Mr. Berghel: We have to skip Number 4 because I did not have time to read these and I've discussed that with Brett that these Minutes need some work. Could I ask all of you to try to identify sections of the Minutes where all the blanks are that correspond to things that you may have said and send your reconstruction of those sentences to Brett directly and maybe we can make one more go around and approve the Minutes next time. Is that ok with everyone?

   Mr. Elste:
   I just thought these Minutes were heavily redacted.

   Mr. Kandt:
   I don't know what happened. My assistant was trying to transcribe them and she struggled mightily. I don't know if there is something in the recorder; this stand, I did not use last time and that may have affected the quality of the recording so I will ensure that we utilize that stand and hopefully, the comments will be picked up and I'll do my best, based upon your input to reconstruct those minutes so they are as accurate as possible. Once again, it probably would be helpful, it's hard to remember sometimes when you are engaged in a dialogue but if you could try to identify yourself for the record when you speak, that will also make it easier when we are transcribing the minutes.

   Mr. Elste:
   The Minutes you are producing are over the top; they are far more elaborate than any Minutes you see in most organizational meetings so commendations for that.

   Mr. Kandt:
   That's my assistant. The Chair and my assistant do 98% of that work. Thank you.

5. **Report from Allen Lichtenstein on project to identify all Nevada Revised Statutes that affect privacy rights. (Discussion Only) Action may not be taken on any matter brought up under this agenda item until scheduled on an agenda for action at a later meeting.**

   Mr. Lichtenstein:
   There really are not very many which are a surprise to me. I think the biggest sections probably and our best shot are 603A which really talks about private information that has been gathered and should not be disseminated. Specifically, dealing with things such as social security number; driver's license number or identification card number; account number; credit card number; debit card number; security code; material that has been gathered usually, electronically that is not to be disseminated in general circumstances. Because that kind of mirrors federal law, even in legal pleadings enough to certify that none of this information is out there. There are a few other things that are scattered around that talk about privacy such as NRS 200.604. We've been over that several sessions ago having to do with hidden cameras looking up skirts and that would be a privacy violation. Others, such as NRS 200.677, disclosing information about victims of sexual assaults and things like that. At the next meeting, I will be distributing a memo that will not only go through what is in the statutes but also relevant precedence from the Nevada Supreme Court in terms of privacy that may be in the area of tort or even criminal violations so you should have that by next meeting.

   Mr. Berghel:
   Please note we have been joined by Stephen Bates.

Mr. Elste:
Just a comment on the list of statutes and Supreme Court decisions – the attorney general's office in California recently published a similar type of compendium of California statutes, decisions and made that available publicly on their website. We may well want to consider trying to take the work that Allen has done and see if we can assist in developing something similar because it's great that we've been able to identify certain statutes that are relevant, it would be even better to socialize those broadly to the public at large.

Mr. Berghel:
Good point. Any other comments? Brett, I would like two action items to come out of this – one, that as time permits, Allen will get to me the report in advance of our next meeting which I will then send to Brett for distribution; and secondly, since Jim Elste has already seen the California document, if you could kindly send me the URL, I will put it in my little notebook which of course, is available to all of you online.

Mr. Lichtenstein:
Just as an aside, as an attorney who also is licensed in and does practice in California, I think it's fairly safe to say that California has a much more detailed statutory scheme for things like this which tends to have a much shorter list of statutes.

Mr. Berghel:
I think that would be a useful point of departure for us when we take up this topic at that next meeting that is what the difference is between what we hear from Allen concerning the Nevada statutes and what Jim is telling us about the California statutes. We might be able to extract from the difference some areas that need direction for us. I'd like to see us discuss that at the next meeting.

9. Discussion and possible action on proposed legislation to expand the news shield privilege under NRS 49.275 to address gaps created by technology.

Mr. Berghel:
As per the request of our guest, we will take Item 9 next. Discussion and possible action on the proposed legislation to expand the Nevada Shield Law. It's my understanding that you have taken the lead on this Stephen, so please do so.

Mr. Bates:
As mentioned at the last meeting we are recommending a functional approach so that we talk about a person that does journalism rather than an employment-based approach. I have some statutes and I would think the strongest argument for a penalty is the third party provision. If a subpoena is issued to you, you file a motion to quash that's the end but you find a subpoena is issued for your telephone records, as a reporter, and they didn't give you the requisite notice and the chance to object, then I wonder if should be penalty of some sort.

Mr. Lichtenstein:
I'm trying to get a vision of how that would work in a practical sense. I just can't sit here and issue a subpoena, there needs to be a party and I guess you would talk about a third party subpoena; it would be up to the court to provide that notice. Certainly, we are going to run into a particular problem in terms of any penalty is that there is a court involved. You don't get to penalize the court. This is something that we were talking about before we came in. That doesn't prevent filing anti-SLAPP suit in terms of abuse of process and the like.

Mr. Berghel:

Stephen is referring to the conversation I had with him and then later with Allen about my digital security patent that I am putting on now. I wouldn't make a distinction between de facto and de jure penalties. The de jure penalties are the ones that our lawyer colleagues are familiar with. The de facto penalties are the ones that accrue by what Allen refers to as nuisance actions on the part of attorneys that have the effect, in the case of journalists, primarily, potentially forcing them into bankruptcy trying to defend themselves. I had an example in mind, the journalist that this happened to but I can't think of the name right now, however, I can come up with the name and that is the prosecution of Drake who was accused of leaking classified information to a newspaper and that prosecution went on for 6 years and bankrupted Drake. At the end of 6 years, the judge said I don't understand why we are dealing with this. There's no substance here, dismissed. From the government's point of view, according to Drake, there's some argument for that. The government got what they wanted. He's in terrible financial shape and anybody that saw that case is well aware of the fact that they don't need to find you guilty in a court of law to silence you. They can simply ruin you. Now, the thing is which was where I was headed with this, Drake, as I understand, has no recourse.

Mr. Lichtenstein:
I'm not familiar with the case. Is this a criminal prosecution?

Mr. Berghel:
Under the 1917 Espionage Act.

Mr. Lichtenstein:
Unfortunately, criminal prosecutions from places like the NSA are very hard to fight. NSA, itself, if very hard to fight because they don't want to disclose much of anything
In a civil matter, however, one might say if a defendant can always pursue under a civil rights violation where you can get attorneys' fees.

Mr. Berghel:
We've got a few attorneys on our committee. Are we trying to take an action on this, Brett, so we can give this to the Attorney General as a recommendation?

Mr. Kandt:
Timing is somewhat key here. You've got a number of items listed as action items. I have actually listed all of these as potential action items on the agenda for the Tech Crime Advisory Board when it meets next Thursday and that is I realize you may not take action on all of these items but to the extent you did, I wanted the Tech Crime Advisory Board to be able to consider them next week because time is of the essence in terms of any proposal for legislation is going to have to find a sponsor. That process is already taking place right now and is already in full swing. For legislators, they have to submit their bill draft requests, they start in August, they have a timeframe between August and December 10th, I think. The Attorney General's bill draft package has to be submitted by September 2nd. Executive Branch state agencies are already submitting their requests to the governor's office because they have to have theirs submitted by August 1st so that process is already in full swing so to the extent you wanted to get anything before the Tech Crime Advisory Board, I put it all here and put it all on their agenda so that could take place.

Mr. Berghel:
We are all thinking about whether this shield law is potentially ready for prime time. Could we ask our guest to identify himself and chime in with whatever comment he might care to make.

Mr. Smith:
I'm Director of the Nevada Press Association. I think I didn't really have a lot to comment on because I do think this is a good approach. This is the right approach, the way this ought to be addressed. I would just

reiterate that I expect that it still will make members of my association and others nervous to be touching the Shield Law at all. I'm contradicting myself and I would advise them that this is way we ought to be going but I'm just telling you that that I won't have a unanimous response to that.

Mr. Berghel:
Barry, what might this committee do to assuage their fears? We are, after all, trying to do this for the journalists in the state.

Mr. Smith:
Exactly, I think it's a good policy discussion that ought to be taking place in front of the legislature so I would discourage you from presenting this or similar language to try to this approach and have that discussion. I just would say that I can envision not only members of my association but others not being in unanimous support of it and being nervous about opening that up at all. I would discourage you from preparing what you think is the best approach because I do think it is beneficial in the long run.

Mr. Bates:
I wonder if members of your association might be not as keenly interested in the definition

Mr. Smith:
I think that's beneficial, yes. And, again, I don't have, as you say, for the most part, my members are protected because they are defined under the law. They work for an organization where this is headed is this definition of the practice instead of the job. I don't have a few of my member who aren't covered by the current shield law. That's why I say, it's the right approach, in my opinion, and that it's a good policy discussion to place before the legislature.

Mr. Berghel:
Barry, are you more nervous about touching the statute than you are about the substance of the draft.

Mr. Smith:
Yes, definitely.

Mr. Berghel:
OK, that's an important consideration because once the legislature decides to deal with something, they can decide that don't believe in shield laws and just revoke the whole thing. Certainly, it's a legitimate point. Brett, Jim Earl, you know about how the legislative process works. Is the way to deal with this to try to enfranchise some senators and assembly persons to prepare them to support this, is that the way this is done?

Mr. Kandt:
In terms of my approach to a bill, building consensus but then you stakeholders beforehand, there's a process whereby the bill gets assigned to a committee and then reaching out to the committee chair and those members to explain the purpose of the bill and answer any questions even before it gets heard in a committee, is an important step. Reaching out to leadership so the speaker, the majority leader, and even the leadership in the minority parties would also be a part of the process as well. It differs depending upon whether it's a bill that's being carried by a legislator versus a bill that's coming out of the executive branch but that's generally the approach I take.

Mr. Earl:
Let me add to that in terms of trying to address some of the practicalities that face us as a subcommittee. The way which this might work is the following, or at least the way I would envision it:

If we were to recommend this for consideration by the Tech Crime Advisory Board, assuming that there is complete board membership at that next meeting next week, then you would have the following potential sponsors exposed to the text. You would have the Attorney General, and you would have the senator and assemblyperson who are members of the Tech Crime Advisory Board exposed to the text. The way which I would approach this, given the discussion that has taken place so far, and I can certainly understand the reason why any constituent who or any constituency that feels it has been favored in some way by existing legislation, is very reluctant to that legislation opened for what might be to them, a marginal benefit given that the risks of some type of renegade legislative response. I think that there is a different way to cast this in terms of economic development and that is there's a growing blogging community if you are a successful blogger, you don't have to be located in New York of San Francisco or Los Angeles, you might as well be located in Las Vegas or Douglas County or Incline Village. If you somewhat attracted to any of those areas anywhere, the existence of a shield law that would cover you might, in fact, be sufficient to get you to come to Nevada and write from here. In addition to those legislators who we would normally think of having some type of interest and membership of the Tech Crime Advisory Board, there may be others that other members of this particular body may know who would see this from an economic development perspective. I'd just as soon have as many smart writers in the state as we can possibly get, frankly.

Mr. Victor:
I think that's an outstanding idea by Mr. Earl. Now, full disclosure, I am somewhat involved in blogs and podcasts so I am biased but those biases acknowledged, I think it's a great idea and to that end, the comments that you made, Mr. Chairman, about requiring payments of attorney fees for harassing subpoenas and also penalty for anyone who issues a third party subpoena without the requisite five days, I think some language that helps shield independent bloggers and podcasters and such from that sort of litigation would also encourage them to come here. I'm thinking about subpoenas that require voluminous electronic information can be a burden to an independent writer who may have data on cloud systems, on servers in an office, may have data backup or located in other places and backup tapes and subpoenas that require that are often written to say ALL information are a huge burden to third parties that receive those subpoenas. By carving out some safe harbor and some provisions to protect bloggers and independent journalists would again go to Mr. Earl's point that this becomes a great place to be a writer entrepreneur and build it up. And, I would remind for the record, some very successful what are considered now as establishment news sites were started as blogs, Tech Crunch, for example, Huffington Post, these were independent bloggers basically that then became so popular that we now consider them the media but they really were the seedlings, they were bloggers. This is a significant area of public good because it disseminates more and more information and a source of economic growth to those communities where these once bloggers but now real legitimate larger businesses locate.

Mr. Elste:
Two thoughts: one just to build on this question of protecting against legal costs – I would advocate against putting that into the shield law. This is a law that is directed at fundamentally First Amendment privileges. Let's not muddy the waters by trying to solve the problem of the cost of litigation. That is a completely separate issue that is something that should probably be handled as a separate piece of statutory language and keep the focus of the shield law on what we define as journalism; what sort of protections we're going to afford those people that are journalists or by practicing journalism. We need to try to keep this as focused as possible on the act of providing that shield.
The second observation I had was for Barry which is I can certainly understand the concerns of even touching the existing language; however, would it be helpful if the members of your organization have the opportunity to have discussions with folks on our committee or otherwise have some dialogue around this to see both the rationale behind the language that's been put together and some of the genesis of that in terms of conversations with EFF and try to conquer their support. I think this is a piece of potential legislation that really does advance the cause for protecting journalists and journalism in affording those

First Amendment Rights. It would be a shame not to have the press association shoulder to shoulder with us at the table.

Mr. Smith:
I absolutely agree that the dilemma I'm in is very well summarized. My constituency is 90% protected by the existing but my future constituency is not so that's what I am trying to balance myself and that's why I say, it's the right approach, it's the right thing to do and I absolutely agree. I think intellectually, they would agree with me that this would be groundbreaking in some respects. It's absolute, again, that it is the correct approach and the right way to do things; it doesn't mean they wouldn't be nervous about it.
Mr. Elste:
One other thought, a lot of the sources of information for your 90% that are covered as professional journalists are the bloggers, are the people that are out there gathering this information, . There's an economic incentive for your protected members or professional journalist members.

Mr. Smith:
If I might, when you talk about legislation and you talk about how its approach to be brought into the legislature and you start talking about anything that kind of expands the scope, you start to bring in other potential parties that have an interest in it, stakeholders, that will for one reason or another, object to anything else you put in there. Just to bring that up from my experience and pretty obvious but I thought I'd throw that out. Thank you.

Mr. Berghel:
Do I sense that we are in agreement that we'll go with what we have, we're not going to try to embellish it? It's my sense of the discussion that this is a winning proposition for the journalists if legislators see this as an opportunity to strengthen our already strong shield law. I think we should assume that the legislators will see the benefit, think of the big picture and be inclined to support it. We should proceed on that basis.
As a practical consideration, this subcommittee is going to have to decide whether to recommend it to the TCAB and secondly, we should know from Barry what we can do to help his constituency recognize the value of enlarging the statute.
Let's take the latter first: Barry, what can we do to help get the word out with your constituency?

Mr. Smith:
It's kind of up to me to get it out to them but to certainly be open to the questions and provide the information and I think if they had been at this meeting today and heard what was said in the discussion that would be far more comfortable if this same discussion was what happened before a legislative committee, I'd have no problem but again, you never know what's going to happen so It will be up to me to explain to them and any help I can get as far as to what the language is from Stephen he certainly has lots of contacts in the south. We have some time to make to make them comfortable. I appreciate any help we can get.

Mr. Earl:
At an appropriate time, I'm prepared to move that we recommend the current text to the Tech Crime Advisory Board for consideration and possible adoption by either the Attorney General or one of the participating legislators into a BDR. Part of the reason that I say that in addition to what you've already heard me say is that I think that there needs to be something around which to distill and discuss, and I don't want to speak for Barry, but if I were in his position, it would be easier for me to gather my constituents and say, look, there's something you really need to pay attention to because this potential piece of legislation took a baby step on the last day of May when the subcommittee of the Tech Crime Advisory Board voted to recommend it. I don't know who that could be, to put before the EFF or for the blogger communities in addition to what the various positions are. At the appropriate time, I'd be willing to make that motion.

Mr. Berghel:

I think that it's quite the appropriate time. Do I hear a second?

Mr. Bates:
Second.

Mr. Berghel:
All in favor, say Aye. Opposed? Failing to hear any opposition, we will report that the unanimous recommendation of the quorum to recommend this to the TCAB.

Mr. Kandt:
Just for clarification, since there are the current, we've got a couple of different drafts, and some discussion at the bottom about some definitions under the functional approach, could I ask Mr. Bates just to maybe over the weekend, could you clean it up into the final and email it to me and I will make sure that is what the board has so they don't get confused as to what you recommended and what they are looking at. Thank you.

Mr. Bates:
I will assume we are talking about the May 2014 draft and not the April or any other functional approach definitions, correct?

Mr. Kandt:
I don't want to give them this. I don't want to give them these two pages because it won't be clear to them and I don't feel it's my place to cut and paste them. I think it's appropriate for you, if you just send me what you want presented to the board, I'll make sure it gets to them.

Mr. Berghel:
Barry, thank you for participating and would it be possible for you and select members of your organization to come to the next TCAB meeting?

Mr. Smith:
I plan to be there. I'll probably get the word out tomorrow morning that this is some recommended language and we'll see what kind of reaction I get. I will let them know that meeting is going to happen and they won't have any excuse for not paying attention. Thank you, again, for letting me interrupt your agenda.

6. **Report from James Elste on request for assistance from Electronic Frontier Foundation to develop legislation to expand online privacy rights. (Discussion Only) Action may not be taken on any matter brought up under this agenda item until scheduled on an agenda for action at a later meeting.**

Mr. Elste:
I don't have very much to report other than after our last meeting's discussion on the engagement of the EFF, I did pass along both Allen and Stephen's contact information and, if I'm judging correctly, you, gentleman, has a subsequent conversation with EFF and it was fruitful and helped influence the language in the Shield Law. I would say, in many respects, we've opened up the dialogue with EFF and they are strong supporters of work we are doing here. I hope we will continue to move forward on that.

Mr. Berghel:
Thank you. Any discussion on Item 6? Brett, I think we can take that off the next agenda.

7. **Discussion and possible action on proposed amendment to the Nevada Constitution establishing a right to privacy.**

Mr. Berghel:
Before we get into that, Jim Earl wrote a draft for our consideration. I am most appreciative of this committee. When I first brought this to the attention of the committee members at our first meeting, I had no idea that an idea of a constitutional amendment would take legs as it has. I think the way that Jim has proceeded is just the right way to do it. I think this calls for minimalism and so, Jim, would you like to comment on your proposal for a constitutional amendment?

Mr. Earl:
My proposal is so minimal that I really don't have that much to say other than what's on the one page. The only thing I would point out is to repeat what's there and that is, one can make these types of resolutions as lengthy as one wants and I did consider putting in a number of *whereases* but the more I thought about doing that, the less desirable it seemed to me because I would be drawing possible criticism from sources that I didn't want to draw criticism from. If you just add the work "privacy", generally speaking, that's very difficult to object to regardless of where you might lie on the political spectrum and if you just put that one word forward, essentially, it doesn't carry a lot of baggage and it allows the reader to infer whatever the reader wants to infer.

Mr. Kandt:
I just wanted to point out that obviously if this is passed out of the Tech Crime Advisory Board and carried by one or more of the legislators, LCB will get their hands on it and there's a chance that they may throw in a whole lot of *whereases.* That's why Mr. Earl and I would not make good LCB attorneys because we believe that brevity is soul of wit. I just wanted to point out that it might not be as simple when it comes out of LCB, but nevertheless, it certainly would be sufficient for the purposes discussed and the goals that have been stated.

Mr. Earl:
Although that may be at its heart because I only have experience from the executive branch side, that may be one reason why it would be best, in an ideal world, if this were picked up by one of the legislators to sponsor because it's much easier for a legislator to call up LCB General Counsel's office and speak to Brenda Erdoes and say, you know, Brenda, I really don't think there need to be any *whereases* in this and probably, there won't be any whereas provisions in it.

Mr. Lichtenstein:
When this was first proposed to Senator Segerblom who was favorably disposed and said "you write it, I'll submit it". So we certainly can do it through a legislator. What I'm wondering though, reading back to the wording. In one way, it may be simpler just to add the word "privacy"; on the other, we might want to be a bit more ambitious and have something that may have a little more teeth to it. What I provided here was 10 states that do have privacy in their constitution. Some are not useful and moderate in my belief because they tie it in with search and seizure. I really like Montana. I'll explain why. The right of the individual privacy is essential to the well-being of a free society and shall not be infringed without a showing of a compelling government interest. Compelling interest is a term of art within the law which is the highest level of interest which sort of puts this under anything that would invade privacy would be reviewed under strict scrutiny which is about as powerful as one can get. There may be a question of is it grasping for too much in a political climate but I would say at least, like to consider, giving as strong of a protection as possible.

Mr. Berghel:
I have no problem at all with that. The reason I suggested that we follow California when we first discussed this last December was that it seemed to me to be as Jim Earl just mentioned very difficult to imagine anyone who would oppose it. We are making the statement and it is on the record and if passed, would become part of the constitution that this state respects privacy and other details could follow. This is slightly

more ambitious and certainly faithful to what I think the state needs to do. However, I wonder if it may not be ambitious enough to bring some opposing forces out of the woodwork. I'd be interested in Jim Earl's comment on this along with the rest of you.

Mr. Earl:
Obviously, I am not at all opposed to the sentence that is contained in the Montana state constitution. For me, it really turns on whether that prolongs any legislative debate. My recommendation at this stage would be that I presume the Tech Crime Advisory Board if you don't introduce this, as being the chair of the subcommittee, you at least would have the opportunity to speak on the agenda item at the Tech Crime Advisory Board meeting. If we were to move forward with the one word additional recommendation, I think it would be entirely appropriate for you to say something along the lines, if this is in fact the sense of the subcommittee, that we considered other language and in particular, considered this particular sentence contained in the Montana constitution, that the subcommittee generally felt that that was an appropriate expression of our combined understanding of where the state should move in terms of the establishment of the right of privacy. We thought that is was inappropriate in the present context for us to include that in our recommendation. Although we would draw attention to it to the members of the Tech Crime Advisory Board and any other legislators who might be interested. We essentially move forward with the one word proposal but nevertheless bring to the attention of the Tech Crime Advisory Board members and perhaps, others, the existence of this additional language which someone else might choose to incorporate. From a constitutional and drafting standpoint, the first question that I had would be if we wanted to include that additional text, where would we put it. Would we put it as an additional sentence that follows what presently would exist in Article 1, Section 1, and if so, that seems to give the right of privacy increased weight compared to the other call outs in the existing sentence. Yet, I'm not sure that it's worth it to have a debate as to whether that should become Section 2 of Article 1 which would involve re-numbering different sections so that the one of the advantages to a single word addition is that it doesn't ask legislators to get involved in adding and additional section or adding words that would seem to provide disproportionate emphasis on privacy when you look at the way in which Inalienable Rights, Section 1 reads at present.

Mr. Elste:
I would second Jim's concerns and auger in favor of winning the day with a single word change to an existing portion of the constitution and not having to engage in a debate about things like the compelling state interest or the well-being of a free society. It's kind of hard to argue with a single word change to the existing language because it does introduce the term "privacy" in a very sort of favorable spot. Just to add a little color to our discussion, within the last several weeks, there was a case in California that essentially turned on California's use of the term "privacy" in their constitution. I think we can advance the interests of privacy without necessarily stirring up the other interest groups that might be more concerned about something more elaborate. I was going to suggest that perhaps instead of saying "and privacy" at the end of this, we inserted "privacy " before "and happiness"? That way, safety and privacy and other inalienable rights all lend themselves to this notion of achieving happiness.

Mr. Berghel:
I guess the point that I would make is that from the point of view of rhetorical and stylistic parsimony, there's just something so clean and neat about tacking on a conjunction with that additional word. Semantically, it doesn't matter; you can sit "privacy" up at the front and I think many of us would think that's a great idea but stylistically, I think it's easier to swallow if it's just a simple addition. When the constitution was drafted originally, that should have been in there. If we can get that kind of reaction from the legislature, I think it's going to be a lot easier sailing. It's just my personal spin. Do any of you have any strong thoughts about this before we pass judgment on the location of the word "privacy"?

Mr. Lichtenstein:

I guess I'll be redundant. It certainly easier to just add that and put it in there and then it puts it on the level of obtaining safety and happiness. I tried to, as a litigator, I look for what actual, practical effect it's going to have and so that's why it may be more difficult to get through and the legislature may do whatever they want with it once it gets in there. I would having that language in there that strengthens it really does and really will affect how courts will make decisions on whether there is a privacy invasion or not a privacy invasion with a regulation or an ordinance or whatever. I just wanted to reiterate that it's not just a question of wordsmithing. It is a question of substantive affect.

Mr. Earl:
As the drafter of the particular document, I want to say on the record that it is my intent as the drafter of the additional word "and privacy", that when I drafted that, I included, had in mind and as part of my consideration, was that the right of individual privacy is essential to the well-being of a free society and shall not be infringed absent a compelling state interest.

Mr. Berghel:
We do have the option of the sense of the subcommittee being reported to TCAB so we still haven't abandoned this yet.

Mr. Victor:
I'd like to ask Mr. Lichtenstein a question regarding the language - how do you retort the challenge of people getting their head wrapped, the voters and the legislators getting their head wrapped around the more complex words. I understand the faking about the terms of art that are included in that phrase. How do you think the voters will understand that and if that language was adopted as a proposal to go to the voters, how do you think it would be best to express the intent of this body so that they fully understand the strength that you are trying to convey with that kind of language.

Mr. Lichtenstein:
If I understand your question correctly, I think that by emphasizing the importance and the strength of people's individual privacy which I think does and will resonate with the voters considerably that we will view Nevada as a leader even though we are taking language from Montana in terms of taking this big notion of privacy. It doesn't appear in the federal constitution. It's cobbled together on a case by case basis for a lot of different things. I think Nevada in its independent minded voter tradition would resonate with this "leave me alone, I have a right of privacy" and it doesn't really deal with any specific issue but it really does put the onus on government to justify an invasion of the privacy law as opposed to something weaker where the onus is on someone who is claiming that privacy is being diminished by some law or ordinance so I think that's really the way to look at it. That it is forcing the government to justify what the government does as opposed to something weaker.

Mr. Victor:
I just wanted to ask a question for those of you who understand the politics, it seems to me no one could oppose the addition of one word and there are groups who might oppose the adoption and the language. Is that a correct assumption?

Mr. Victor:
I think that that is where my question is going was can we get a sense of this body so that If that language were to be adopted that that could be communicated to the voters. I had some concern that a lay person says "compelling state interest" and instead of understanding that's a very high burden, that a lay person might think that that is a low burden. If a member of law enforcement says, "I think it's of compelling state interest to violate this person's privacy, I'm going to walk right through their door" that the lay person might think that that is what is meant by a compelling reason. If that language were to be recommended that we

add to it some additional sense so that the average every day person could understand the weight and the burden upon the state to that term “compelling state interest”.

Mr. Kandt:
I was curious – I looked through these other states that have a constitutional provision regarding privacy and it was apparent, based upon the notes that the Hawaiian provisions were enacted in 1978, but I was wondering if anybody knows whether these other 9 states – are their provisions in their original constitution or were they the result of a subsequent constitutional amendment as is being proposed here?

Mr. Lichtenstein:
Let me find out; it wasn’t a question I really looked for since we have the laws that were pretty easy to determine when they enacted but I didn’t really give it any thought.

Mr. Kandt:
The reason I bring that up is obviously, there’s a significant body of case law for our state; interpreting our state constitution; other states; and federal constitutional case law that delineates the issue of a compelling state interest and strict scrutiny and all that. If you propose to amend the Nevada Constitution and add some additional language about that, there may be some, well I know there will be , it will generate a great deal of debate about what this means whether it’s some sort of a paradigm shift in constitutional law and going to have effects on existing case law. I just wanted to raise that issue and that’s why I was curious whether any of the other states had recently amended their constitution to put that type of language in there as you would be proposing to do here.

Mr. Berghel:
California did, as I explained in our first meeting, did add “in privacy” to Article 1, Section 1 and I think they probably had the same kind of discussion that we are having here. My hunch is that they pretty much agreed with the way that we are looking at it. I would point out that the proposed statute, the Right to Know law which is on my website was proposed just a few years ago and brought out lobbyists of every sundry stripe to oppose it and the very natural sense you can say if citizen of California has the right to privacy then eo ipso that citizen should have the right to know when private information about them is being revealed. It seems to be a natural step and yet, it brought intense opposition and the legislature couldn’t pass it and get enough votes to pass the Right to Know law. I think that supports Ira’s concern. The ways these are handled, there will be a request in the ballot preparation for someone to write a reason or rationale for and someone to write a rationale against and to go back to first session we had although it was many months ago, it’s kind of hard to imagine a political ___. It’s kind of hard for me to imagine how anyone could write against adding these two words to Article 1 Section 1. I’ve been surprised before.

Mr. Elste:
I would just advocate for winning the day on the simple, single word addition but it opens up the door for doing the work that this subcommittee is going to focus on moving forward which is writing the legislation, helping to craft the legislation that can embellish and otherwise extrapolate on what we mean by privacy. If it’s a simple thing to insert a word and something palatable for the legislators to get their heads wrapped around; if it’s something that the citizens of the state can understand, that to me, has infinitely more value than more precision, more language or embellishment on the concept of privacy in the constitution for the state because once we have that constitutional reference to privacy, the gates are thrown wide open for writing legislation that reinforces and embellishes that. We can cover all of the things that we just discussed about compelling state interest, etc., in some very specific legislation that is directed at those particular types of issues. I want to see us win the day with a very simple one or two word addition.

Mr. Victor:

I'm wondering if we can actually do both. Propose a constitutional amendment which takes time and then propose to the legislature, a bill draft that has language that is similar to Montana which would then help clarify what the intent of the legislature is with the constitutional amendment.

Mr. Lichtenstein:
I don't know about the question of the statutory generalized statement; going back to the previous comment, there's a chance to work legislatively to strengthen it. Also, there a possibility of it being watered down legislatively to not really provide the strength or protection that having certain language in the constitution – it's a double edged sword. In some way or another, send both proposals up the ladder. That may resolve it anyway and once it gets to the legislature, they resolve it anyway. We're assuming an opposition which may not be as strong as we're presuming.

Mr. Berghel:
That's part of what Jim Earl's recommendation, as I understand it, to be that we are considering recommending the middle aspersion but adding the additional information with Jim Earl, in particular, one has to read between the lines and what he meant was Montana and that's certainly something we can do and that discussion would be taken up at TCAB.
Are there any last minute comments about this? Are we in a position where we can entertain a motion on recommending the minimalist version to TCAB. Do I have such a motion?

Mr. Elste:
I would like to make a friendly amendment to the language as stated to place "privacy" before "and" and have "happiness" be the last word in the inalienable rights section. I believe "safety and privacy", "and happiness" is the more compelling way to phrase this.

Mr. Victor:
I would make a motion consistent with Jim Elste's recommendation.

Mr. Elste:
Second.

Mr. Berghel:
Discussion on Jim's friendly amendment to the other Jim's minimalist proposed amendment.

Mr. Earl:
I support the friendly amendment reason being that it probably for Nevada legislator to take the position. California was on the right track but they didn't get it quite right.

Mr. Victor:
I'm not sure how I do this in my motion that the motion also includes the sentiment that Mr. Earl said regarding his frame of mind when he wrote that. Do we put that in the motion?

Mr. Earl:
You don't have to do that because that appears in the record as the intent of the original draft.

Mr. Victor:
It was my intent, in making the motion and what was on my mind.

Mr. Earl:
Then that strengthens the sentiment on a subcommittee wide basis, Ira.

Mr. Victor:
That is on my mind as I make this motion.

Mr. Elste:
I will second that motion with the same sentiment.

Mr. Berghel:
Jim Earl was in a Montana state of mind when he came up with his original draft so we can certainly do that before TCAB. Do I hear a second for the friendly, amended motion?

Mr. Elste:
Second.

Mr. Berghel:
Let's take a vote, all in favor of the friendly, amended revision of Article 1, Section 1 being recommended to TCAB say Aye, all opposed? None. Then Brett, we will work together to include the Montana state of mind of Jim Earl in our presentation of this to TCAB.
Discussion between Mr. Kandt and Mr. Earl regarding the proposal. Mr. Earl to send it to Mr. Kandt to give to TCAB.

Mr. Berghel:
Any further discussion? The Montana constitutional provision will be mentioned at TCAB. Brett, do we need to take an official recommendation, do we need to take an action on the sense of the subcommittee with regard to Montana's treatment of privacy? Is that important? It's reflected in the minutes so I'm not sure we need anything more.

Mr. Kandt:
I think you can as Chair, relate to the Board, in making this proposal, the committee was aware of and concurred with and that is reflected on the record.

Mr. Earl:
And, meant to include the Montana language as one of our sentiments in the way in which this language needs to be interpreted.

8. Discussion and possible action on proposed revisions to the State of Nevada Online Privacy Policy (http://nv.gov/privacy-policy/). (Discussion Only) Action

Mr. Berghel:
We will have to defer because Dennis is not here.

10. Discussion and possible action on proposed amendments to NRS 205.473-.513, *inclusive*, "Unlawful Acts Regarding Computers and Information Services.

Mr. Berghel:
We will have to defer Item 10. I had some correspondence with Jim Earl and I need more time because I need some attorneys to look over the language that resulted from the additions so we'll roll that over until the next meeting.

11. Discussion and possible action on request for Nevada Legislature to pass joint resolution calling on Nevada congressional delegation to expand online privacy rights under federal law.

Mr. Earl:
Once again, I think that the issues are pretty much laid out on the one pager that you have as a background document. I wanted to draft as short whereas provision as I could. I'm not at all sure that the text of this is appropriate because I am not a member of any of the national or international groups that focus on privacy as an issue. This overlaps some of my present spheres of interest and responsibility but I don't feel I have an intimate knowledge of the best available language as that may have evolved in various outside my kin of knowledge.

Mr. Kandt:
My opinion is that if you feel strongly about the concept of having our state legislature call upon Nevada's Congressional Delegation to enact stronger protections for individual privacy in the digital age, you just convey that and the language and how that gets drafted is going to come from LCB once again. If you find a legislator who concurs with that sentiment, they'll direct the appropriate resolution to be drafted by LCB and it will go from there.

Mr. Elste:
I'll offer a thought or two – I did provide some feedback to Mr. Earl and as always, his drafting of these sorts of things is fantastic. He has captured what is probably the core concern in privacy today which is the notion of informed consent. The fact that when individuals are providing information, that they are knowledgeable and informed about how that information will be used and that their consent is acquired in the process. I think the language in this is really good. I think the only word that I might suggest changing is rather than where it says "continuing consent" is to use the term "informed consent" which has certain meanings in privacy circles. If you read the Consumer Privacy Bill of Rights that was put out by the White House not too long ago, you can read the Fair Information Protection Practices documents. They both refer to the notions of transparency and informed consent to with that one change, I think you might have what is essentially, a very effective proposal to put forward and since time is of the essence, I would say we might be able to make that one change and move this forward. It does capture to a large extent, the sentiments, once again, of what we are trying to accomplish in a privacy perspective which is to make sure people are informed and make sure information is used based on the purposes they are informed on and that they are consenting to the use of that information.

Mr. Berghel:
It is my understanding that you are talking about the last sentence and you want to substitute "informed" for "continuing". And that is with respect to the third paragraph?

Mr. Elste:
That is correct.

Mr. Berghel:
So noted. Anyone else, any further discussion? As Brett has pointed out, we need to decide do we want to bring this to TCAB as the proposed resolution or do we want to just tell TCAB the sense of this subcommittee? I, personally, lean to using Jim Earl's original language and just presenting it to TCAB as it is with the Elste amendment and then let TCAB decide what they want to do with it. If there's no one in TCAB that wants to take further action on it, I think that will take care of itself.
Anyone opposed to taking that strategy?

Mr. Earl:
I'm not opposed. Let me just explain why I used the word "continuing" which is potentially fraught with difficulty but it you use the word "continuing" , there is an implication that consent once given, can't be withdrawn. I think most of us would agree that, in principle, that's probably a pretty good principle. The

difficulty comes in practice because it's easy to identify consent once given, it's much harder to document and trace with withdrawal of consent. I purposely used the term "continuing" in there because I wanted to be as provocative as I could. "Continuing" does that and the issue of "informed", I intended to pick up on the next line where such consent is given openly, knowledgeably, and explicitly. Those are three adjectives designed to elucidate even beyond what informed means. In any discussion you have with TCAB or any consideration that a member of the subcommittee wants to give it, I made a conscious decision to use "continuing" recognizing that it was potentially problematic in practice.

Mr. Elste:
The only reason I suggested changing it is the concern that that will invoke some of the forces out that who object to informed consent of privacy practices of this nature. I have no issue with withdrawing my friendly amendment.

Mr. Berghel:
Further discussion? How about the lawyers down south? Any strong feelings about this? None. Given that, do I hear a motion to recommend the original Elste version of the resolution to TCAB for consideration to recommend to the Attorney General or the legislature?

Mr. Elste:
For the avoidance of any doubt, I will make such a motion to recommend this to TCAB unamended.

Mr. Victor:
I will second that motion.

Mr. Berghel:
All in favor say Aye; opposed? We have a unanimous recommendation.

12. Discussion and possible action on proposed amendments to NRS 179.045 to authorize the application for and issuance of search warrants by electronic transmission.

Mr. Berghel:
On the issue of search warrants, Brett, that was your agenda item.

Mr. Kandt:
Mr. Elste and I discussed it at length and dialoged about some of the issues at play and I think there are a couple of things. What I am trying to gain is support in concept for the notion that search warrants can be obtained utilizing modern technology and electronic communication provided there are adequate provisions for, as they typically use in electronic transactions, authentication that it came from who you thought it came from; integrity that the message received if the message that was sent. Then, of course, there's usually nonrepudiation which is typically why you swear on the attestations made. In terms of wanting any electronic transaction that provides for the application and issuance of a search warrant have those three elements in place, authentication, integrity and non-repudiation, that I'm looking for that this committee and ultimately, the board would be supportive of allowing for that under this statute. The specifics about how that's addressed in the language of the statute, I think probably still need to be worked out. We talked about how an electronic signature versus a digital signature, there's been discussion about how both the chapters that talk about electronic signatures and digital signatures in the NRS are somewhat out dated. There's talk about the protection of PII and the transmission which actually, create greater protections than there are in the current search warrant application and issuance process. How to specify that when I think there is some agreement that NRS 603A is in some ways, outdated. There's talk of the NIS standards so in terms of the actual language that probably still has to be worked out. I would like if possible, for the

subcommittee to pass a resolution that would be supportive of expanding this statute to allow for electronic transmissions provided that once again, that the whole process has those elements of authentication. Integrity and non-repudiation.

Mr. Earl:
At an appropriate time, Mr. Chairman, I'm willing to move that the committee recommend that NRS 179.045 be amended to include a provision dealing with submission by secure electronic transmission with the text that we have before us being used as a basis for further drafting activities by the Tech Crime Advisory Board or an individual sponsor.

Mr. Berghel:
I would like to add to that so long as the subcommittee can be assured that appropriate privacy protections are assured.

Mr. Lichtenstein?
I would turn that around and say that the subcommittee is that we are not opposed to the concept of using these things as long as those protections are in place. So that way, we're not supporting anything like different language just stating that the concept is not one we are involved with.

Mr. Victor:
I don't know whether it comes out of the purview about this is more about security although many make the argument that you cannot have good privacy without security often, that whether we want Allen's recommendation about we don't oppose this but just to add some stronger language to Brett's point about strong authentication that is an important term of __ and information security, strong authentication. Strong nonrepudiation, we've seen quite often someone putting up a token gesture toward authentication and nonrepudiation that doesn't meet the strong standards.

Mr. Elste:
I'm going to make a distinction between authentication and digital signatures because authentication is not the true concern with the digital electronic search warrant. It is the digital signing, the ability to validate the authenticity of the document which is the verification component that comes with digital signatures. I do support the notion of us developing language around digital electronic search warrants. I think it's a very timely sort of discussion. I do have concerns that the languages we discussed the last time around electronic or digital signatures isn't clear there is some guidance or some elements in statute currently that could be used but as long as we are highlighting that that digital signature and that nonrepudiation component and that ability to verify the authenticity of the document are made very clear that those areas need to be revised and refined in this type of legislative proposal. I'm fine with sending forward the agreement of this subcommittee that we believe that this something that should be taken under consideration. I don't think, necessarily, the inverse approach that Allen is proposing conveys the message correctly. I think it would be misinterpreted as we're actually opposed to providing some provisions and refinement to 179.045. I think we are interested in providing revisions to that as long as they meet certain standards.

Mr. Victor:
I think that I am in agreement. I should have used authenticity instead of authentication so I am in agreement with Mr. Elste and I'm wondering whether we can look to NIST (National Institute of Standards and Technology) does issue regular updates about what is a generally considered strength in these matters.

Mr. Elste:

I think that the difference here is we let NIST and the industry define levels of strength; we need to identify and clarify specifically what we mean by digital signature so that there's no ambiguity, no misinterpretation of what the function of a digital signature is. If we get that right, it may include revising specifically what we mean by digital signature so that there is no ambiguity, no misinterpretation of what the function of a digital signature is. If we get that right, it may include revising 730.130 or otherwise embellishing that. Once we've really crystalized those concepts in statute, they are useful for a variety of things. Digital signatures are something we need in the Secretary of State's office so that we can do electronic transactions in a business context effectively. They are probably pretty handy in a variety of legal applications for filing court documents and what not electronically. Those are fundamental building blocks that we have to get into place. What I would counsel against, not to disagree with my colleague, Ira, but I think what the mechanics of that are reside outside of statute because you don't want to try to bake what is currently state of the art into statutory language and then find that next week we've got new state of the art that's even better. Given those fundamental constructs into legal language that can be used referentially for a variety of other sorts of application that I think is key. It's fundamental to the search warrant component because of the nature of that particular activity.

Mr. Berghel:
Is it the sense of the subcommittee that we could make a provisional endorsement something like this - the sense of the subcommittee is that a revision of 179.045 would be appropriate so long as the appropriate so long as appropriate safe guards according to industry best practices be included. Brett, for your consideration, there's not really much we can in the way of recommendation because we don't have anything that we can approve. Until we see a draft, there's nothing to discuss. I'm somewhat in a quandary as how we can give much more of a stronger endorsement than the conditional remark that I just made.

Mr. Kandt:
There is a draft in the documents in the materials. I acknowledge that it may not be perfect but it's trying to reflect the importance of those safeguards once again.

Mr. Berghel:
Brett, I'm not sure that's correct. I haven't looked over this. I assume it's the draft that we had last time.

Mr. Kandt:
No, this is revised. This is revised in a couple of ways. One, I noted that when ___ our court system – now everything is done electronic filing so when you are litigating a matter, everything is submitted electronically. In order to accommodate that process which also requires some of these same elements of authentication, reliability, integrity, nonrepudiation, it was provided that the Nevada Supreme Court could adopt rules for that process as they adopt rules for a variety of things governing the administration of justice. So, I threw in a line that I thought maybe that was appropriate. I talked to the AOC (Administrative Office of the Courts) so I threw a line in there that our state supreme court could adopt rules for this process. Since this is another form of submitting something to the courts. The other changes, once again, I tried to use some frankly, plain English to reflect the goals that you want to send a message from one computer to another that only the intended recipient receives the message and the message received is identical to the message sent. Digital signature, I think before I'd use the term "electronic signature" and we agreed that that could mean an "X" or something and you don't have the safeguards we're talking about but we also talked about how digital signatures defined in NRS 720 that that's somewhat outdated, that's a 15 year old statute and so, I once again just went with the plain English that we're talking about a signature that authenticates the identity of the sender and insures that the message received, once again, is identical to the message sent. Reflecting those values, I have found this type of language utilized in other states that are enacting laws to provide for the electronic application and issuance of search warrants.

Mr. Elste:

I think the challenge I have with that approach is the common man argument when it comes to things like security practices, digital signatures, etc., is not an effective way to go. People are going to misinterpret what it means to send an authentic message between two computers. They are not going to recognize that the statute requires them to adhere to a certain level of practice technically to insure that. They are going to interpret it very liberally. I sent you a message in a Word document and you got it, that must be sufficient. The same thing with electronic signatures is a digital signature that allows you to verify the identity of an individual, in a technical sense, means something completely different than what that common man argument would be for a digital signature. I think this is where we have to make sure that this particular statute, because it deals with such an important subject matter, search warrants, has to be explicit about the technical thresholds for digital signatures and for secure electronic transmission. The one draft you sent me where you referenced NRS 720.060, 720.060 is a little bit out of date. It's a reasonably good explanation of (let me check; I sent back what I thought was an alternative to that) so it's 720.130, Message Integrity. It speaks to verifying the digital signature as defined there. It has references to whether a message is altered in transmission. At least those references are closer to what that sort of technical expectation are for these things. If it means that 720.130 needs to be refined to bring it up to date because it's 15 years old, then we should also reference that. What I really fear is that people are going to take the transmission of this draft out of this body as an endorsement for this language.

Mr. Kandt:
No, I think this body can say we are not endorsing this draft. However, we would support, which is kind of what Mr. Earl, I think, originally proposed. I was never under the impression that you were endorsing this draft.

Mr. Elste:
This would be transmitted with that endorsement concept.

Mr. Kandt:
Not if you don't want it transmitted. We don't have to transmit this document at all.

Mr. Elste:
As long as our endorsement or recommendation of pursuing electronic or digital search warrants includes some specific language about digital signatures and verification of the transmission, I think I'd be comfortable suggesting that we want to pursue legislation around this area but those specific items are extremely important to that type of legislation going forward with or without regard to the current draft language.

Mr. Berghel:
I think that Jim Elste has gone one step farther than I'm willing to go in saying as long as acceptable language was in there. It's as if we trying to swallow something that isn't in our mouth. I would rather just leave it at we're not opposed to looking at this statute, assuming that there could be some agreement that appropriate safeguards are included. That's about as strong as I'm willing to go.

Mr. Earl:
I support the language you just articulated. Let me mention a couple of things, just as observations. First, my understanding is that NRS 720 is not specific to Nevada; that's the uniform act and was passed by Nevada as a uniform act so what we have for us doesn't mess with that language and I would recommend that we not do that. Because it's a uniform act, modifications of uniform acts generally go through a national process so that states are presented with changes to uniform acts on a universal basis. Secondly, if I understand the text of Brett's redraft, the real implementation of this statutory language comes when the Supreme Court adopts rules providing for the submission of an application and affidavit required and the rest of what is contained in the statute is direction to the court as to how they are supposed to do that. One

of the things that we might want to consider in addition to the language that you articulated before I began to speak was express our willingness to assist the Supreme Court in understanding the existing technologies and to provide expertise to them, should they wish it, in developing these rules. The one change that I think we want to consider is the language where Brett says "not inconsistent with laws of this state". I would take that out because that suggests that we may remain bound by some of the definitions contained in 720 to the extent that those definitions are broader or different than the definition of secure electronic transmission defined here and digital signature defined here. If Brett were amenable to deleting "not inconsistent with the laws of this state" which gives the Supreme Court, at least in my view, the potential to craft something which is consistent with the definitions here may not be totally consistent with the wording of 720. We use the language which you provided to support the thrust of this and then, essentially volunteer to provide technical assistance to the Supreme Court, should they want it in their rule making process.

Mr. Kandt:
So you understand that language, "the Supreme Court may adopt rules not inconsistent with the laws of this state to provide for" is the language that's used anywhere where the legislature has provided that the Nevada Supreme Court can adopt rules. I just mirrored the language that's always been used.

Mr. Berghel:
Let me suggest because in the interest of time, I'm not sure how much more attention this deserves. I would recommend that we say something simple like, "the Subcommittee on Privacy is not opposed (and this follows Allen's strategy here) to reconsideration of this statute assuming that appropriate security and privacy safeguards can be addressed". And, we stand willing, as a Subcommittee to work with whatever legislative group or Supreme Court or however you think that should be worded to help in that regard.

Mr. Earl:
That's fine – don't change that Hal, let's go with that. I am withdrawing the motion that I made and to incorporate Hal's last suggestion as a new motion that we move forward with a recommendation to the Tech Crime Advisory Board on that basis.

Mr. Elste:
I'll second that. That addresses my concerns.

Mr. Berghel:
All in favor, Aye; any opposed? Hearing none; motion carried. Brett, I mentioned this earlier and there's going to be a problem here for those of us that have day jobs. Normally, what I do when prepare a recommendation in TCAB, is I pull the wording out of our Minutes. Out TCAB meeting is next Friday, is it not? Thursday. Absent having the Minutes in my hand by Tuesday, I'm not sure how I could do this unless you've taken meticulous notes.

Mr. Kandt:
The way I wrote it down was that the committee supports the concept of amending NRS 179.045 to allow for electronic transmissions with appropriate safeguards for security and privacy and the subcommittee is ready to advise on implementation. Those were my notes.

Mr. Berghel:
Let me do a little wordsmithing here because I think we're close. Supposed to support the concept and I think my wording was something like "on the condition that appropriate privacy and security safeguards could be…"

Mr. Earl:

I think that's right. I think that was the, if not the original wording you proposed but very close to it.

Mr. Victor:
I just think that also the mention that not just advising the legislature but also advising the Supreme Court as needed.

Mr. Elste:
I would agree to add that implementation, broaden that out as to who we are going to help.
Mr. Victor:
Just to make that clear – the Nevada Supreme Court.

Mr. Berghel:
Brett, can you read that back to us one more time?

Mr. Kandt:
The Subcommittee supports the concept of amending NRS 179.045 to allow for electronic transmissions on the condition that appropriate safeguards for security and privacy be incorporated and the Subcommittee is ready to advise the Nevada Supreme Court on implementation.

Mr. Earl:
Or, implementation in its rulemaking process because this calls for the Supreme Court…

Mr. Elste:
That's in this language, maybe it's the legislature or other bodies in its implementation. It's a blanket offer to help anyone who wants the advice of this committee in the construction or implementation of that language.

Mr. Earl:
I think we need to call out both the legislature and the Nevada Supreme Court.

Mr. Berghel:
Do we have a motion and a second?

Mr. Earl:
So moved.

Mr. Elste:
Seconded

Mr. Berghel:

All in favor "Aye"; opposed: none. OK, I will make that recommendation to the TCAB.

13. Discussion and possible action on possible revisions to the statutory definition of "personal information" in NRS 603A.040.

Mr. Berghel:
I have no backup. Whose agenda item was this?

Mr. Kandt:

It has been discussed in past meetings; reference was made, once again, to the NIST standards on their guide to protecting the confidentiality of personally identifiable information. Because this brought up in a past meeting, one of the LCB attorneys contacted me and has been on the mailing list for our meeting agendas and minutes and so forth because she wanted to know if you were coming up with something to revise in that chapter, she was going to be the one responsible for drafting it. The only thing I indicated to her was that, and it's reflected in the minutes, there was a reference to these NIST standards, this special publication, and she got it and I forwarded it to her and of course, it's pretty lengthy. She thought she was going to be redrafting 603 (A) to put this in there and I said this committee had never discussed that. The committee indicated that these standards existed and related to what had been the intention in enacting NRS 603 (A). That was it.

Mr. Earl:
I can recall at one of our last meetings, and I'm not sure whether it was the one which immediately preceded this or not, I know that I mentioned an evolving definition of personal information. I think I also called out that there had been multiple definitions proposed in multiple bills before the national Senate and House of Representatives. To my knowledge, there has been no redefinition of PI or PII at the federal level. Since that redefinition remains in abeyance, and since MIST's language whatever it is at this time, can change and would be modified or could be modified for certain uses by any future federal legislation. I recommend that we take no further action on this particular agenda item until such time as there is a need that I do not currently foresee to do so. I don't want to close this off forever; it's just that for the foreseeable future, I see no reason to proceed on redefinition of this term in Nevada State law given the existence of multiple proposals at the federal level.

Mr. Berghel:
Any discussion?

Mr. Elste:
I would agree with that. I think the problem we have with PI and PII is conflation of terms and misunderstanding of what they are applied to. When you look at the misguidance, it applies to a significantly broader set of data than is currently incorporated in 603(A). Rather than us undertake an effort to either try or reconcile 603(A) with misguidance or otherwise change that, I agree with Jim. We ought to wait until the dust settles in the federal level and some of these definitions are clarified because it is important for us to understand what we are talking about when we say "personally identifiable information". There are very specific legal constructs in 603(A) but they are much broader and much more meaningful from a privacy perspective descriptions in the NIST guide. I think we'll get there but I agree with Jim. Let's wait till the federal level gets it worked out.

Mr. Berghel:
The sense is that to do anything now would be premature. At the Chair's prerogative, we'll just defer this to later discussion.

[Discussion of length of meeting and how Open Meeting Law affects the meeting running longer and if committee members leave, how it affects the quorum.]

Mr. Victor:
I have another commitment but I believe you would still have a quorum if leave. I would like to know if we can accelerate Item 16. I think if we could accelerate that, I could then depart.

16. Discussion and possible action on proposed telematics black box legislation.

Mr. Berghel:

We'll just ahead to Item 16. My concern about this is that we be thinking about requiring that full disclosure be made. That was the reason I suggested this agenda item be added. There are a lot of implications behind this. I know that some of the attorneys that I'm working with, the first thing they do when they're involved in accident defenses is they go after the black box data. I know that the law enforcement agencies try to get their hands on it immediately as well. I don't have a problem for the attorneys getting access to it or law enforcement getting access to it as long as the people that own the vehicles are informed that this can happen to them. That's the reason I brought the black box item before us.

Mr. Victor:
While there are probably some members of this community and specifically, members of the public, that are very concerned about these black box event recorders on automobiles. I think we have to be realistic that the tsunami has already swollen and heading to wash over a lot of people. NITSA and other federal government agencies are mandating these black boxes and at this point, virtually all new automobiles contain them. To your point, Mr. Chairman, we can't do anything in state law to stop it but I think a disclosure goes to my colleague, Mr. Elste's informed consent. That certainly, if there was a disclosure to members of the public that these black boxes existed, there may be a market that would be developed where people could buy hardware or software that would opt them out as it were for the even recorder from recording events.

Mr. Kandt:
So, required disclosure to potential purchasers.

Mr. Victor:
Yes, to potential purchasers. A little bit of speculation, I also wonder just like on an automobile title how there's a disclosure that the automobile has been in an accident and reconstructed, that we could add to the title whether the vehicle was manufactured with a black box. As the vehicle ages, people who are purchasing that vehicle on the used market would see that it contains an event data recorder. Salvage title.

Mr. Berghel:
Good point. At no point, when I brought the agenda item before us was I suggesting that there's anything the state could do to remove these telematics capabilities. That's simply not an option. I worked in one area in the past that has to do with the GPS boxes and there's a real problem in even removing those as some of you may well know because the implications of taking that box out go to some of the security features that are built into other parts of the telematics. For example, the car manufacturer's warranty has a second consideration; they don't guarantee that the car computer will work. If you ever looked at the assembly language for the car computer, it's got commands in there like, "lock up front left brake". You don't want to be monkeying around with the car computer and have the front left brake be locked up at speed on the interstate. There are some implications there. To return to the point that I made and then Ira made, we can, I believe, require that if you are going to sell the car in this state, if there's one of these things installed, you have to tell the person that buys it. That's where I was headed. Ira, I think that's what you are saying as well.

Mr. Victor:
Yes, I'm agreeing with you, Mr. Chairman.

Mr. Lichtenstein:
In terms of a private sale of a used vehicle. How is one to know whether they've got one of these in their car or not because I couldn't tell myself?

Mr. Berghel:

I was suggesting that maybe this ought to be noted on the title. That's certainly something that the state can do. The state issues the title.

Mr. Lichtenstein:
I would like more information on this. If I buy a car in New York, they don't have this and I come here and get a title from Nevada, would the State of Nevada go get that information from a state that doesn't have that information in its title.

Mr. Berghel:
I would imagine that the state would be held harmless if they can't find out the answer to that question. Would it be incumbent upon the dealer or the selling agent to determine this before sale? I think that would be a necessary restraint.

Mr. Lichtenstein:
Also, with the private sale.

Mr. Berghel:
Yes, Ira, I encourage you to follow up with this. What we are really saying is you can't sanitize these titles. Once that information is recorded, it stays through subsequent transfers of ownership. Is that the sense of what you are saying?

Mr. Victor:
I am and the reason I thought about the title was that there is a provision already in Nevada law that if some reason, you sell a vehicle and you've removed the odometer, you've done something to the odometer, there's a way for you to disclose that. This was in the same spirit as that although I will acknowledge my colleague, Mr. Lichtenstein, I did not anticipate the issue with cross state sales. I have to ponder that but that's where I was going so that if it was always, always on there, then it would just keep rolling over to the next person unless someone did something to remove and then they would have to be able to say no, I enabled a technology that, to your point, Mr. Chairman, safely removed the event data recorder. That will be disclosed as well.

Mr. Berghel:
I think that all we can do at this point is hold this over for our next meeting. We'll have an opportunity to add a little more detail to what we expect out of this.

Mr. Elste:
The problem with the black boxes is that they are not going just to wind up in cars; you roll forward a little bit, we're going to have smart meters on our homes; we're going to have smart refrigerators; every device that you buy will likely developing and communicating some form of telemetry. I would suggest that we think about this issue not in the specifics of the black box in the car but in the more general question of how we administer privacy in a world that is essentially collecting telemetry from every single device we own. That way, we start to address the Meta problems associate with this, not just a particular use case in the form of black boxes in cars.

Mr. Berghel:
Brett, I would like you to hold this item over with the additional entry that we want to look at this generically. In terms of all the Meta systems not just vehicle telematics.

14. Discussion and possible action on proposed legislation to prohibit Automatic License Plate Reader Systems in Nevada.

Mr. Bates:
I've been in touch with the ACLU. I've had a talk with the EFF about this. I was in touch with attorney who filed a suit seeking a preliminary injunction against this statute in Utah. The Utah legislature evidently backed down and said, ok, we'll exempt private entities from this. He told me about a week ago that he didn't know of any other law suits pending; within the last hour, his associate emailed me a copy of the lawsuit they filed today in Arkansas seeking an injunction there. Basically, there are two provisions in these laws – one is a restriction of some sort on the dissemination of information obtained. They argue that that is a First Amendment violation. The other provision is a restriction on gathering information to start with by using this technology. They are trying to argue that that, too, is protected by the First Amendment. That seems to be a bit more of a distraction. If it's not a moot point, I would love to try to draft something.

Mr. Berghel:
That's to be encouraged. Any discussion?

Mr. Elste:
License plate readers and the distribution of license plate information or dissemination of the license plate information under the description you just gave us sound like they may well be protected. I'm curious about the combination of the that license plate data with other forms of data such as DMV records and that may be where you have the opportunity for some sort of legislation or other restriction because if I'm a private citizen taking pictures of your license plate or I've collected a list of license plates, they aren't particularly useful to me unless I'm able to attach that to your name, your address, other information about you. As far as I know, the only place you can do that is through the DMV systems. Is that correct and is there a way for us to identify what the obligations of DMV are with regards to connecting their systems to these private systems and maybe restricting or otherwise providing some sort of control over that?

Mr. Berghel:
I remember when I was working on a project with Metro, an issue arose on whether or not access to the internal police records data base could be shared with private investigators. This also came up with the reporter that works with Ralston, Dana Gentry case. It turns out that there are restrictions on the use of internal LVMPD records and the sharing of them beyond the department. The question I would have is are there similar restrictions on the DMV and if not, why couldn't we suggest that we put them there. That deals with one half of the license plate problem which Jim Elste brought before us and that is, you can't disseminate all this Meta data if you don't have it to begin with.

Mr. Lichtenstein:
I don't know this but I think that it would be pretty strong argument that would say that license plate data from the DMV, who has which car and license plate, is probably not confidential information and probably is obtainable by the public, by the press, under the Nevada Open Records Law.

Mr. Bates:
This is language in addressing that from the motion which suggests that at least, in some states, it's not available. All that combined with other government data that was improperly obtained and used to track and identify vehicles. The implication there is that there's something wrongful about getting the data.

Mr. Lichtenstein:
The implication may be that it's only wrongful if something else is wrongful and I heard the term "improper" not being about getting the data but somehow using it improperly or using it with other data that were improperly obtained.

Mr. Bates:
I don't know if the DMV releases that sort of information; I don't know if it's publicly available. It seems to me in any event, worth a short at researching this in a simple fashion that comports with the First Amendment or at least doesn't raise First Amendment problems that Utah and Arkansas seem to raise.

Mr. Elste:
It certainly would be a step forward on the license reader problem. I think the other problem we will find is the use of license plate readers in concert to track movement. It's nice to know who somebody is driving the car and get those records from the DMV but if you start to aggregate license plate reader data across multiple points in a geographic area, I can now develop profiles on where that car goes and when. Those seem to be the two big issues we have to address here. I don't think you can eliminate the readers. People are going to claim First Amendment Rights with regards to taking photographs of public objects in public space. You drive by on a public street; I can take a picture of your car. If I do collect information about your license plate, probably disseminating that data is not a problem. Collecting that and aggregating that with other license plate data in a geographic area seem to me to represent two of the onerous parts of this. You are starting now to turn license plate readers into a very sophisticated surveillance tool and that's where the problems really lie. Perhaps, what we can do is we look at this issue is take up what we can do to restrict the combination of data and then, on top of that, what we can do to restrict the use in concert of multiple license plate reader devices or points of presence. Hopefully, eliminate some of the surveillance sort of risk of license plate reader systems that are part of an unsanctioned surveillance network. If law enforcement wants to do that for law enforcement purposes and they do it under certain constraints, I think that's probably a different issue but if Joe Parking lot attendant is starting to put license plate readers in their parking lot because they can join a mesh network of license plate readers to do surveillance on people, that starts to really make me freak out. It seems like very Orwellian potential for this type of technology.

Mr. Berghel:
Point well taken. I think that there are two data points, one is the Supreme Court has weighed in on fixing GPS monitoring devices to cars without a court order. I think that (talking over each other, can't understand either person).

Mr. Bates:
In the Supreme Court because there are different opinions, the court defined it very narrowly under trespass theory whether you actually physically put an object, some justices suggested that even without physical trespass, just the surveillance itself might be problematic but that wasn't before them. Certain other justices seem to only limit it to trespass so the answer is we don't know where they can go with that one because there does seem to be some significant ideological difference, so they split along that particular notion.

Mr. Berghel:
That's right, in the geek world, we call that transaction friction. If you lower the transaction friction, it becomes convenient to abuse all kinds of civil liberties.
We don't have time to do much more on this right now but I think this is something we need to take up again at the next meeting. And, fortunately, Stephen has volunteered to do some of the heavy lifting here. You'll have a draft of something and maybe talk with me or Jim Elste or somebody else about this.

Mr. Bates:
One of the things is very easy to find out in Nevada what is the privacy status of license plate information.

Mr. Berghel:
Fantastic so we have that agenda item for next meeting.

15. Discussion and possible action on proposed legislation to require full disclosure when metadata is captured and retained by government entities in Nevada.

Mr. Berghel:
If I remember correctly, it was Jim Elste that brought this up.

Mr. Kandt:
It was Ira Victor.

Mr. Berghel:
Let's carry that over to the next meeting.

17. Committee comments. (Discussion Only) Action may not be taken on any matter brought up under this agenda item until scheduled on an agenda for action at a later meeting.

Mr. Elste:
I'd like to make one comment. I think we should note kind of a milestone in evolution of this committee. We've passed several pieces of material out of this committee to the TCAB and I think it represents to a large extent, a rather major milestone given what we've done in the last three meetings. Four meetings in, we're passing out a constitutional amendment; we're passing out a joint resolution; we're passing out a shield law; we're passing out a commendation around the search warrant. I think we've done a fantastic bit of work. I think it's rather a nice milestone for us.

No further comments.

18. Discussion and possible action on time and location of future agenda items.

Mr. Berghel:
We're facing the busy summer holiday season and my feeling is that given what Brett said about the pressing need to get these whatever statutes that we have recommendations for to the TCAB to advance to the legislature. I guess we should be driven on whether we can get another TCAB this summer because they won't meet again before the bills are due to the legislature, we don't have anything to do, is that correct? Even if we were to make a recommendation, they wouldn't see it until it's too late.

Mr. Kandt:
Not with regard to proposals that can be carried by a legislator. As I indicated, legislators have a window during the fall. It depends upon whether you are a committee chair because committee's get bills and whether you are in leadership. The general window for legislators to submit their bill draft requests falls from August to December 10th. I think they have another window for a bill or two after the new year. To the extent you have other recommendations that you develop and a subsequent meeting or meetings that you want to submit to the TCAB, they can still entertain those and they still could be potentially picked up and carried by a legislator in the fall.

Mr. Berghel:
It's my understanding that we've got three possible candidates, NRS 205.473 and the black box legislation we're considering and also the license plate reader. Those three might reach gestation by the end of the summer if we have another meeting. Am I correct about that?

Mr. Kandt:

That really is up to the committee what it decides to accomplish and where it wants to go. If you looked at having a meeting in August, that would be in advance of a TCAB meeting in September which would be the next quarterly time frame for TCAB to meet. That would allow for an opportunity to have one or more proposals possibly carried by a legislator.

Mr. Elste:
I'm not sure that the other three areas we have draft proposals far along for us to dispatch them in a single meeting in the summer. My guess is that if there was anything on the list, it might be trying to continue with the 205 adjustments that you proposed in trying to get those on the table. My sense is everything else will probably fall into a discussion and proposal development going forward for the next few meetings.

Mr. Berghel:
Given that uncertainty, how does the subcommittee feel about an August meeting? Is that doable?

[Discussion of dates for the next meeting.]

Mr. Kandt:
We're looking at the dates, based upon your parameters, of August 21st, 22nd or 28th or 29th. I'll identify the availability of the meeting space and the video conferencing facilities and we'll try to target one of those four dates.

Mr. Berghel:
Also the first week of September to give you more flexibility.

On future agenda items, I guess they are taken care of. We're going to deal with three topics that agenda items that we roll over and will take them up as possible.

19. Public comment.
None in the north. None in the south.

20. Discussion and possible action on adjournment.

Motion for adjournment. Adjourned.