

OPEN GOVERNMENT LAW TASK FORCE

Meeting Minutes

Date of Meeting: June 30, 2016
Time of Meeting: 10:00 a.m.
Location: Video Conferenced between the Attorney General's Offices at 100 N. Carson Street, Moot Court Room, Carson City, Nevada 89701, and the Grand Sawyer Building, 555 W. Washington Ave., Las Vegas, Nevada 89101.

Attending in Carson City:

Chairman Brett Kandt, Chief Deputy Attorney General
Barry Smith, Executive Director, Nevada Press Association
Doug Ritchie, Chief Deputy District Attorney, Douglas County
Scott Doyle, Public Member, Douglas County
Garrett Weir, Esq., Public Utilities Commission

Attending in Las Vegas:

Tod Story, Executive Director, ACLU
Esmeralda Rojas, DETR
Carole Peterson, DETR
Dean Gould, NSHE

Attending by phone:

David Watts, Deputy District Attorney, Washoe County
John Shipman, Assistant City Attorney, City of Reno

Others Present in Carson City:

George H. Taylor, Senior Deputy Attorney General

Members of the Public:

None in the North
None in the South

Agenda Item No. 1: Call to order and roll call of task force members.

Chairman Kandt called the meeting of the Open Government Law Task Force to order at 10:00 a.m. Introductions: Scott Doyle, Barry Smith, Doug Ritchie, George Taylor, Garret Weir, Carole Petersen, Esmeralda Rojas, Dean Gould, Tod Story, John Shipman, and Dave Watts.

Agenda Item No. 2: Public comment, (Discussion Only) Action may not be taken on any matter brought up under public comment until scheduled on an agenda for action at a later meeting.

Chairman Kandt: The floor is open for public comments.

Carson City: No public comment.

Las Vegas: No public comment.

Agenda Item No. 9: (Item taken out of order)

Discussion and possible action on statutory clarification of applicability of Nevada Open Meeting Law (NRS Chapter 241) to proceedings of the Public Utilities Commission of Nevada. **(For possible action)**

Chairman Kandt: In the materials we provided, there is an email from former General Counsel of the Public Utilities Commission (PUC), Carolyn “Lina” Tanner, sent to Barry Smith regarding the applicability of the Open Meeting Law (OML). I think Ms. Tanner attempted to distinguish between meetings of the commission and those instances where a commissioner sits as a presiding officer over a contested docket.

Garrett Weir (Mr. Weir): There might have been a bit of confusion when the General Counsel described or emphasized the judicial process. In some of the statements it gave the impression that because the commission serves in a quasi-judicial function, that there was some sort of exemption from the OML. This is not the case at all. The PUC has always believed that the OML applies fully to the PUC. The issue is whether this particular proceeding is defined in the OML and therefore subject to those high standards. I noticed you discussed in your past meeting possible workshop and proceedings. Those two would have statutorily required noticing and other requirements that would be subject to the Administrative Procedures’ Act.

Chairman Kandt: You are correct. Certainly under NRS 233B, a workshop or a hearing in conjunction with administrative rulemaking has to be noticed and conducted in conformance with the OML. We made the distinction that you can have something other than a public body engaged in rulemaking and then we would follow the OML. That may be distinguishable from your commissioners individually conducting a contested hearing.

Mr. Weir: When you have contested proceedings where half of the room is full of attorneys that are charging by the hour, those hearings often last a day with thousands of pages of testimony being reviewed, to gather evidence, it is generally presided by one commissioner so there would not be a quorum. No deliberation occurs or any action is taken. In those instances to afford the public comment period and other things that are required under the OML, it would become unwieldy to conduct day to day business at the agency. It would interfere with the agency to conduct business.

Chairman Kandt: I know there had been some confusion. The OML indicates it does apply to quasi-judicial proceedings.

Barry Smith (Mr. Smith): I do believe the OML does apply to those hearings. There are deliberations that take place by the commissioner that conducts them, because he or she hears testimony and makes recommendations on an action that should be taken

by the full Board. When the statute was passed, the intention was to include those kinds of hearings.

Chairman Kandt: Which statute are you referring to?

George Taylor (Mr. Taylor): NRS 241.016. It reads, “The meetings of a public body that are quasi-judicial are subject to the provisions of this chapter.”

Chairman Kandt: That is different from what Lina said in her email, she said agencies. As George noted, it says meetings of public bodies that are quasi-judicial in nature. Barry is talking about the fact that the law envisions that when an advisory group makes recommendations to a public body or makes a decision for a public body, that the advisory group should follow the OML.

Mr. Smith: The bill applies to NRS 233B, and was intended to cover workshops. The argument was that this was not a meeting under the definition of the OML.

Chairman Kandt: NRS 233B is of specific application to a workshop or a hearing held in conjunction with regulation making in terms of adopting something that is going to be codified in the NAC (Nevada Administrative Code).

Mr. Weir: The terminology for that type of proceeding would be the term “rulemaking.” All of the commission’s proceedings, including hearing for a contested case that isn’t under NRS 233B proceedings or a meeting, they are all open to the public and are noticed. I don’t believe that NRS 233B requires the same standards of the OML as it does for meetings of a public body. Mr. Smith discussed that one presiding officer might be deliberating because ultimately the evidence he gathers would be presented as a basis for decision of the full commission. That deliberation or collective examination of the evidence would occur in an open meeting; it would be noticed and when that decision making process occurs, that deliberation is what is subject to the OML provisions.

Mr. Smith: I think that would be an issue for the Legislature to determine. I don’t think they intended to leave out the PUC in those contested case hearings.

Mr. Weir: Are you proposing to broadly change the law to require for all agencies that a non-quorum individual of a public body be subject to the heightened requirements of the OML?

Mr. Smith: Yes, I believe that is what the Legislature intended.

Chairman Kandt: From the perspective of our Title 54 boards, which license and regulate certain professions in our state, many of those boards pursuant to their respective practice acts, when they receive a complaint against a licensee, they may assign the investigation to a disciplinary screening officer, who then would determine whether the licensee violated the practice act, but that initial process is not subject to

the OML. However, when the entire board meets, their public body acting in a quasi-judicial capacity would be subject to the OML. I am trying to understand what you are proposing and how would the public benefit from requiring the OML compliance through their entire process. The law is very clear that any settlement agreement between a Title 54 board and a licensee has to be approved by the board in a public meeting.

Mr. Smith: How are those hearings noticed, are they open to the public?

Chairman Kandt: The hearing with the disciplinary screening officer would not be. There is due process for the licensee, they get proper notice and the opportunity to be heard, but it is not conducted in conformance with the OML. I think what you are proposing would require legislative action to specifically mandate that the proceedings of an individual commissioner be conducted openly, which they already do.

Mr. Smith: The fact that a woman was arrested is a serious incident. The excuse was, "We are not subject to the OML." That needed to be addressed. The danger is if one of these committees/boards were to meet, convene, and make a decision, without giving the public notice or the opportunity to observe what happens in those meetings.

Tod Story (Mr. Story): I agree on the interpretation of NRS 241. Let me point out that the general provisions of NRS 703.110 for the PUC says, "Hearings and meetings open to public, except as otherwise provided in this chapter, all hearings and meetings conducted by the commission must be open to the public."

Mr. Weir: All of the proceedings of the PUC are open to the public. In certain instances when a member of the public will not cease to be disruptive, they can be asked to leave. The refusal to leave is what prompted the arrest of this individual. This person has a history with the commission, posting videos and making personal attacks online about individual commissioners and agency staff. This person was advised in advance that no video recording would be permitted. The presiding officer was concerned that witnesses and staff, who had been targeted by this individual, would affect their ability to perform as witnesses. The presiding officer was exercising his discretion. The OML does prohibit disallowing folks from these recordings, and that is why you were told the OML does not apply to this particular kind of proceeding. If it were a meeting as defined by the OML, that individual would have been free to use a video recorder.

Chairman Kandt: Tod, on the reference you made to NRS 703.110, you indicated it says shall be open, but it does not say those proceedings shall be subject to the OML. I guess that is the distinction, open versus subject to all the provisions in NRS Chapter 241. Barry is saying that he prefers they be subject to all the provisions of Chapter 241. I think that would be a policy decision for the Legislature.

Mr. Story: In my opinion it would be. Any time a commissioner is acting individually in a capacity for the PUC, they should be subject to the OML.

Mr. Smith: The example demonstrates exactly why these kinds of bodies need to guarantee public access. The woman was not present in the room but the camera was seated in the room. The conclusion that she was disruptive was based on her disrupting a meeting in the past where she criticized the members of this committee, and for that reason they wanted to exclude her from the meeting. The reason we have an OML is to protect people's presence in a meeting.

Mr. Weir: This was a unique situation. She was excluded because a rule was provided in advance and she refused to cease breaking that rule. The rules are applicable to everyone, not just her specifically; she was not being singled out for her conduct in the past. Her conduct likely influenced the decision of the presiding officer to institute that rule. When she refused to comply, it was well within the rights of that commissioner to ask her to leave. I fear that there would be unintended consequences in applying this. I recognize that this situation could have been handled better, but the agency was very careful to comply with the OML. You will not find those kinds of fact finding proceedings of another agency more transparent and open than those at the PUC.

Mr. Smith: I still think it needs to be clarified at the Legislature; whether this office intends to suggest some revision of an amendment in a bill. My preference would be that the language be structured to "The PUC contested case hearings are subject to the OML."

Mr. Weir: A couple of sessions ago the definition of "deliberate" was amended by the Legislature. There was discussion at great length regarding the type of proceedings that would be subject to the OML. I would advise you to look at the Legislative History; it is pretty clear the legislators did not want to capture instances where a single individual is acquiring information or where there is no collective discussion occurring. If you start to try to apply those standards, it gets a little strange, because that opens up the opportunity for people to circumvent the requirements. At great lengths people discussed these issues, and we arrived at the language that is in the statute today; it is intended to draw a line precisely where it does, the collective examination weighing of evidence.

Mr. Smith: Yes, the Legislature amended NRS 233B so that a single person or commissioner could conduct a workshop or hearing to gather information.

Chairman Kandt: It is specifically limited, it is not a workshop or a hearing in a broad sense; it is done pursuant to the Administrative Procedure Act in the regulation adoption process.

Mr. Smith: The question is not whether deliberation is by a single person, because the Legislature clearly said, "Yes that can be covered by the OML." The question is the procedure that occurs under the NRS 233B in an administrative hearing.

Mr. Weir: Actually, NRS 233B has certain noticing requirements and other things for rule making, but it does not include those same protections for video recording.

Mr. Smith: It says, “All proceedings under NRS 233B are subject to the OML.”

Chairman Kandt: The question is whether a single commissioner conducting a contested hearing under Chapter 703, that is not administrative rulemaking under Chapter 233B.

Mr. Smith: Yes, that is the real question, not deliberation. The Legislature would not exempt a single public utilities’ commissioner, because they can’t deliberate by themselves, but they did include that kind of a process which applies to an administrative hearing.

Mr. Weir: The requirements of the Administrative Procedure Act, even if that were a rulemaking proceeding, which it wasn’t, the noticing requirements and those things would have been satisfied. The issue is whether there is in the OML, which has even harsher or vigorous attempt to provide transparency and openness; there is more of an entitlement for public to attend, and that is where action is occurring that affects the public.

Agenda Item No. 3: Discussion and possible action on approval of May 24, 2016, meeting minutes. **(For possible action)**

Chairman Kandt: Motion to approve minutes by Douglas Ritchie (Mr. Ritchie), seconded by Tod Story. Minutes were approved. Scott Doyle abstained.

Agenda Item No. 4: Review and discussion of recent federal and state court case law on open meeting law.

Chairman Kandt: We had extensive discussion on case law, there does not seem to be any follow up on it.

Agenda Item No. 5: Review and discussion of recent Attorney General Open Meeting Law opinions.

Chairman Kandt: On days we issue an opinion, whether it is a formal or a findings of fact and conclusions of law determining that a violation has occurred, we try to post them on our website within 24 hours.

Agenda Item No. 6: Discussion and possible action on statutory clarification of “clear and complete” standard set for the in NRS 241.020(2)(d)(1). **(For possible action)**

Chairman Kandt: We discussed this before. Some members felt we could have a more objective definition as opposed to the guidance that the Nevada Supreme Court (NSC) provides in *Sandoval vs. The Board of Regents*. George, what is the standard in other states in terms of a clear and complete or sufficiently detailed agenda item?

Mr. Taylor: I don't have any information on that subject. Although clear and complete is not a phrase that other states may use, I think we are all going down the same road. And the courts in other jurisdictions, or even the statutes, require that an agenda item give reasonable notice of what it is going to be discussed.

Chairman Kandt: What is reasonable depends upon the context and whether the topic is a matter of substantial interest to the public.

Agenda Item No. 7: Discussion and possible action on revision of public notice posting requirements set forth in NRS 241.020(3)(a). **(For possible action)**

Chairman Kandt: We talked about the different examples of posting, including the thumbtack page on the bulletin board in three separate prominent places, and whether that is outdated. George was going to do some research to determine if other states have a similar three prominent places requirement.

Mr. Taylor: I found some examples, ranging from California, Michigan, Arizona, and Florida. They all require a certain amount of notice that has to be posted at the place of the meeting and on their website if they have one. Some states have a department of administration website, as we do in Nevada, where all public bodies have to notice their meetings. Some of the time limits are different. Florida says, "The board or commission must provide reasonable notice of all such meetings." Michigan says, "At least 18 hours before the meeting in a prominent and conspicuous place at both the public body's principal office." Then Massachusetts says they have alternative posting methods but it has to be in a conspicuous visible place for the public to see.

Chairman Kandt: Did any of them have other comparable requirements for the three separate prominent places or a certain number of additional prominent or physical postings?

Mr. Taylor: No, none of these. The Brown Act of California says regular meetings "Must be noticed through the posting of an agenda at least 72 hours before the meeting." You can request copies; the agency may charge a fee. Illinois posting, "At least 48 hours on a public body's website and shall remain posted until the recorded meeting is included. Oklahoma 48 hours; notice of the day, time, and place must be given either in writing, in person, or by telephone to the record keeping official. Most of these states require that the county clerk or some designated record keeping official receive it, but it does not say anything about the thumbtack on the wall. Washington, "Agendas must be made available on the agency's website at least 24 hours in advance," and personal notice for special meetings, "Written notice must be delivered personally, by mail, fax, or e-mail at least 24 hours before the meeting."

Mr. Smith: My understanding from history, we basically evolved from three prominent postings to five. Are we saying three physical postings, such as the agencies website, if they operate one, and then the state's website?

Chairman Kandt: Technically the physical posting is four, because it is either at the agency's office or where the meeting is going to be, plus three separate prominent places. I am trying to distinguish it from the website posting, which is two requirements, one on the state website and the other on the agency's or public body's website. Everyone agrees that the internet posting is necessary and optimal and probably the primary way by which the public gains notice of a meeting. We know in the rural areas a very common place for people to go to is their local county court house. We also talked about the different posting requirements for the state versus local government levels.

Mr. Smith: I am still in favor of a physical posting.

Chairman Kandt: Would you be comfortable if it was amended to say one other prominent place? So then the state and the agency's website could count or qualify?

Mr. Smith: That seems reasonable.

Mr. Story: It seems reasonable, but if the agency is holding the meeting somewhere else, how would you go about that?

Chairman Kandt: I guess the question then is if the public body maintains multiple offices. Do you mean just one of those offices? And then, if the meeting is going to be in a separate location, also required to be posted there?

Mr. Story: Yes. If the agency that is going to conduct the public meeting, whether it is at the town hall or another place like the school district headquarters, it gets posted at the school district headquarters, but then if they hold the meeting at a different location, how would the public body get the information out in the community? Because not everyone may go to the school district headquarters, but if there is a natural location for the meeting to take place or some way to include that verification.

Mr. Ritchie: The idea is to let the public know about a meeting, it makes no sense to post it at a special location to let them know that it is going to be held at a special location. I would suggest physically posting it at a place where people normally go to conduct business or the regular place where the meeting is held. Most people today access it through the internet. The clerk's office or the regular place of business, even if the meeting is not going to be held there, but people would know to look for it in the meeting location. (*Incomprehensible—General discussion*)

Mr. Taylor: Florida uses the following requirement: "The board or commission, whether state or local, must provide reasonable notice of all such meetings." In Nevada it would differ from Las Vegas and the rurals. This should include the thumbtack notice on the wall. It would depend on the content. We have 17 rural counties in Nevada; reasonable notice would be different for many smaller counties.

Chairman Kandt: My concern is since our office enforces the law, “reasonable notice” could generate a lot of litigation over what that means. Whereas the three separate prominent places is a more objective standard. It seems like there was some interest in reducing the number of physical postings, but if you reduce it, where would the optimal location be for physically posting. We talked about the offices of the public body, and there was general consensus it was a reasonable posting place. The question is, if a state public body have offices in Las Vegas and up north, so would both or one of those suffice? The second issue is whether there is value to the public in posting the notice at the location where the meeting takes place.

Mr. Weir: Regarding this separate posting, it would be interesting to see if other agencies have had a similar issue. Some sort of formalized process would provide good guidance. Most people go to the internet. The location of the meeting, any agencies with headquarters and the state’s website would seem more common places.

Chairman Kandt: We have addressed in the law, that agencies are expected to document who posted and when, then if we get a complaint we have that documentation available. It was already in practice, but then it was essentially codified. We know that if we would propose to remove the three separate prominent place requirement we would have to give some compelling reasons for the Legislature why it is no longer necessary. We have some state agencies that still post it in every single county, which is fine if that ensures transparency in public awareness of their activities.

Mr. Watts: Your earlier point about posting it in the North and South would potentially have value. It seems most people are going to go to where the actual meeting is going to be held to find the notice, and the vast majority will go online.

Chairman Kandt: This is the law’s broad application. I believe we are going to have one more meeting before the BDR (Bill Draft Request) deadline at the end of August. I will put a proposal together in writing for your consideration.

Agenda Item No. 8: Discussion and possible action on statutory clarification of applicability of Nevada Open Meeting Law (NRS Chapter 241) to subcommittees and advisory bodies. **(For possible action)**

Chairman Kandt: Our office has always taken the perspective that when you get a group together to make decisions for or recommendations to a public body, that group should follow the OML.

Mr. Weir: How do you envision applying it if you already have a body that would be subject to the OML in its decision making process, except that body delegates a particular fact finding process to another group, but ultimately that group does not have any authority to make a decision, merely a recommendation. If you have that protection in the form of the applicability of the OML to the body who delegated the recommendation task, would there be the need for redundancy of the application of the OML?

Chairman Kandt: The public body delegates an advisory group for fact finding and recommendations; the group conducts its business, then goes back to the public body with its recommendations, and then the public body without further deliberation, simply accepts or endorses those recommendations. The concern is that there is no opportunity for public input and transparency.

Mr. Weir: Couldn't you theoretically have that with a hearing officer?

Chairman Kandt: That is where the distinction is made, between groups versus an individual. This is a law of general application and there is a variety of areas in which it applies. The question is if there is further statutory guidance or clarification needed, or whether the law as written and interpreted by our office in its numerous opinions over the years is sufficient to provide guidance to public bodies on this issue.

Mrs. Smith: Yes, I think it is sufficient.

Mr. Ritchie: I will agree.

(Item No. 9 taken out of order and discussed at the beginning of the meeting).

Agenda Item No. 10: Discussion and possible action on expansion of statutory requirements for public access to meetings conducted by teleconference or videoconference that are subject to the Nevada Open Meeting Law (NRS Chapter 241).
(For possible action)

Chairman Kandt: The OML has been amended to account for technology to make it clear that electronic communication should not be used to circumvent the requirements of the OML. The public needs to be able to follow the entire discussion as if all the members of the public body were present in one location. The question is to what extent, if any, the public should be given statutory rights of access to public meetings through technology. In our last discussion, it seemed there was no interest in creating some sort of a statutory right of access for the public to attend meetings via video or teleconference. Examples were presented that might create unintended consequences, such as, if one commission member calls in on their cell phone, does that mean the public should be there wherever that commission member is. I don't think that is what the law requires. If the commissioner was in the hospital or at their home, that creates an entire host of concerns. The statute enacted two sessions ago specifies that if one or more members of the public body were appearing via technology, the public had to be able to follow the conversation. This has been misconstrued by some members of the public to imply that they have a right to appear by way of technology.

Mr. Weir: For our agency, we would not have the technological capabilities to be able to provide telecommunications access or streaming video service to hundreds of commenters.

Chairman Kandt: If a public body indicates to the public this is the physical location of the meeting and you will have access there, but if a member of the public wants to call in to participate, and then the telephone access does not function properly, does that public body then have to stop the meeting? Based on the way my office interprets the current law, the answer would be no. We certainly consider reasonable efforts to try to restore or maintain telephone access, but they are not precluded from continuing the meeting, deliberating, and taking action. The policy question for you to consider would be if you want to amend the law to indicate that if the public body offers a telephonic access and if a problem with technology occurs that the public body would have to stop and could not continue with their meeting. Last time we wondered whether it would be a disincentive to public bodies to offer telephonic or video access to their meetings.

Mr. Watts: What the OML requires is for people to be able to attend. If they can't be at the meeting location and you have to stop the meeting because the sound or the telephone is not working, that would create a lot of problems, and it would be very difficult for government to conduct its public business.

Chairman Kandt: If there are no other comments, then I take it the consensus is the current law is sufficient.

Agenda Item No. 11: Discussion and possible action on repeal of criminal penalties for action taken in violation with knowledge of violation set forth in NRS 241.040(1). **(For possible action)**

Chairman Kandt: I put together a list of approximately 20 states that provide a similar misdemeanor criminal penalty for OML violations. I would like to point out that under NRS 297.220, there is a misdemeanor provision that arguably would also apply where the members of a public body knowingly took action in violation of the OML. In the past I have stated my office's position, we think the misdemeanor criminal penalty, while never used by our office, should be available. We would not want to see it repealed.

Scott Doyle (Mr. Doyle): From a legislative stand point, if this group was to give a recommendation to the Attorney General, that we modify the rule of the three prominent places of physical posting. Then one of the things we do not want to do is to fool around with the penalties provision at the same time. With some legislators that type of dual proposal would be seen as watering down this law by an excessive amount. In the past, national media organizations have rated the OML in Nevada as being at least one of the top ten. In the area of notice, the more concrete and comprehensive the notice requirements are the higher rating of the law. The idea is to encourage compliance and to notify people of what their public bodies are doing. If you were going to amend the physical notice requirement, I would say vote for leaving penalties provisions alone in this legislative cycle

Agenda Item No. 12: Discussion and possible action on creation of an intermediate statutory appeal process for denial of a request made pursuant to the Nevada Public Records Act (NRS Chapter 239). **(For possible action)**

Chairman Kandt: In your materials is a comprehensive list of those Attorney General Opinions that have been issued over the past 36 years, interpreting and applying the Nevada Public Records Act. Our opinions are short of case law and the only guidance for agencies. I have an idea that may not be ideal, but it is a start. There is a committee created pursuant to NRS 239.077 to approve schedules for the retention and disposition of official state records. The committee has a representative from our office, the Secretary of State, public records experts, and officials from the Nevada Division of Records and Archives. Because they are public records experts, I thought we could accord them some ability to issue advisory opinions if someone is denied a public records request. If someone were denied a public records request, they could apply to this committee for a non-binding advisory opinion. The committee, at its discretion, may issue an opinion as to whether the request was properly denied, which may help to resolve the matter before litigation. Because of the way it would be structured, as discretionary and non-binding, I don't think it would have a fiscal impact.

Mr. Smith: I think this is a good approach. I am not sure that the records committee will agree that there would not be a fiscal note.

Chairman Kandt: It would be at their discretion if they issue an opinion, but if the party still wanted to litigate the matter, they can still make their argument before a judge.

Mr. Watts: Who would be on the committee?

Chairman Kandt: The committee is established by statute. It already exists. I believe there are five or seven members.

Mr. Watts: I can see some of the advantages, especially if it is non-binding. If someone went to court, would they be able to use the opinion of the advisory committee?

Chairman Kandt: If the opinion says it was improperly denied, they would want to use that as a basis for legal action.

Mr. Shipman: I would be concerned that at the end of the day it would just be more process and would not get what the state's purpose is; it may create more of a delay. The real issue is the balancing test, because it makes sense when you reading it in case law, but when you try to actually apply it, there is a lot of judgment and concerns about releasing information. The way to get rid of the balancing test is to say it has to be statutorily covered by a privilege. That would speed the process.

Chairman Kandt: John has made the argument it just delays the process. Barry has said he wishes there were some intermediate step before having to resort to litigation. This could be something that would apply to any denial at local or state level. It could also be limited to just denials from state agencies.

Mr. Doyle: The State Records Committee also prescribes the minimum retention schedules in the Nevada Administrative Code for local governments. My thought is if you wanted to use existing administrative structure, put one local official on it and have this committee make a decision or proceed to district court. I am not sure how you would do with general and special districts. Make the advisory opinion issue by the committee admissible as part of the district court record and their proceedings. If this opinion came before a district court judge he would recognize it as coming from people with a larger background and expertise in the subject. Yes, it would be adding a layer, but it may be a good layer to expedite the decision making.

Mr. Weir: Speaking for my own agency, only in an instance where the law completely supported a denial of a request, would we deny a request.

Chairman Kandt: We are all aware that different agencies have different levels of expertise and competence in complying with the Public Records Law. There are instances where public records requests are wrongly denied out of the lack of comprehension from the agency and staff responding to the request as to what is required of them. As I said, we are dealing with a law of general application.

Mr. Shipman: I am not so concerned about the denial piece, I am more concerned about the volume of information and the undetected information hiding within. The problem with local government is there is too much information and all of it has to be combed through to make sure there are not social security numbers or someone's date of birth.

Chairman Kandt: We have that same challenge at the state level. My office also is subject to the public records law. Due to the increasing proliferation of information by technology, requests are becoming increasingly labor-intensive and time-consuming to respond to, and the main concern is if we inadvertently release something that should not have been subject to disclosure. We are also challenged with requestors wanting us to do research projects for them, which is not required under the law.

Mr. Smith: I understand the danger of releasing too much, the problem is those agencies or public bodies who don't want to take on that process. When you ask why did you deny it? They say, "*Donrey, Bradshaw* balancing test, take us to court." That alone is a barrier.

Chairman Kandt: Yes, that is kind of what I was envisioning with this committee doing an advisory opinion. I see them looking at instances where the responding agency clearly did not comply with the requirements of the law.

Mr. Smith: Can we simply ask the records committee what they think?

Chairman Kandt: Yes, I can ask if there is any interest in pursuing this further. I will leave this item on the agenda for now.

Dean Gould (Mr. Gould): Is this particular committee a group of lawyers who are familiar with the legal interpretation of this law?

Chairman Kandt: The representative from our office on this committee, Sarah Bradley is very well versed in the Nevada Public Records Act. I would consider her our in-house expert on the law; she may be the only attorney on the entire committee.

Mr. Gould: This becomes a legal decision, particularly if a denial is based on statutory privilege. My concern would be if this becomes admissible in the district court because now you have a body with very little knowledge making a decision.

Chairman Kandt: I had envisioned that this committee would only weigh in when the agency denies a request. I am not speaking for the agencies here, which have a higher level of expertise in how to appropriately respond, but when they say, "Take us to court, we don't have to disclose under *Donrey*," that would not be a sufficiently articulated basis for disclosure. I will put together some language for all of you to consider and discuss further by our next and possibly final meeting on this issue

Agenda Item No. 13: Discussion and possible action on restructured statutory exemptions to the Nevada Public Records Act (NRS Chapter 239) modeled on the exemption categories set forth in the Federal Freedom of Information Act. (**For possible action**)

Mr. Doyle: Currently the Public Records Act has a general proviso about everything being open or subject to inspection, which contains several hundred statutory citations. The only order is in the chapter order assigned to the various laws by the Legislative Counsel Bureau (LCB). Previous discussion from this group was to perhaps break up the several hundred provisions into recognizable topics. The suggestion made by the group was to use the Federal Freedom of Information Act (FOIA). I understand there was some concern about inserting federal law. There are several information practices that are applicable to state and local governments with the general rule and the exceptions. This is just to see if this group is interested in making a recommendation into a bill draft request to improve the codification of the law.

Mr. Smith: One advantage would be to have structure and clarification on why these exemptions and exceptions exist, or where they fit, and what is their justification. Is it privacy, privilege, or security?

Mr. Doyle: For example, if an agency at a future legislative session would ask for a public records exception for a particular aspect and conduct of business, that the Legislature would make a two part determination. First, if they decide the request was well founded, then not only would they produce that statutory text, they could also fit it in the Public Records Act to make sure that people understand the statutory balance that has been structured by the Legislature.

Mr. Weir: One concern with memorializing explicit statutes or the requirements for not disclosing something. Under the currently language, I believe it is confidential by law. There are a lot of recent court decisions that include privilege and other things we would rely upon. My concern would be just making sure that anything that identifies specific statutory confidentiality not limit the applicability of confidentiality through case law.

Mr. Doyle: In the judicial title we have a statutory provision in NRS that explicitly recognizes the common law. You can make a new section that would basically say that “nothing here eliminates those records production exceptions recognized in common law,” then let the lawyers argue about the applicability and the scope of that provision.

Mr. Smith: It would help in structure and clarity for our records, especially in exceptions and exemptions.

Mr. Doyle: I took nine statutory categories in the FOIA to prepare my memorandum. I used each one of the statutory exceptions in the federal act as the classifier for the particular state provisions and then made a preliminary cut based on my reading of the state statutes to see which ones could be pigeon-holed into one of these federal categories to lend structure. In my memo I indicate that as in any legislative process, there would be people weighing in on this issue in addition to LCB and lawyers representing many of the agencies that have a need to use these particular statutes. An interim study process may be something that would be offered by LCB to make sure that this type of classification is done in a way that satisfies the greatest numbers.

Mr. Story: I think that is a good idea.

Mr. Watts: I think it would be useful not just for the public but for everybody else to use the FOIA citations. But their subject matter has to be useful.

Mr. Gould: I have not studied it enough to provide my input, but as long as we are not using this as a vehicle to reduce the existing exemptions, rather used as an organizational tool.

Chairman Kandt: The goal is to address the possibility of organizing those exceptions, create more rhyme and reason to how they are classified and categorized to make the entire process a little more understandable because the current approach is very unwieldy. Two sessions ago, when the Legislature attempted to list each and every statutory exemption in Chapter 239, it ran a page and a half from the bill. At that point and time, there was a big movement to revisit them, but they didn’t establish an interim committee to study it.

Mr. Doyle: If you wanted to do it through a BDR, I would suggest that part of the legislative record before the committee be some type of report or document coupled with verbal testimony addressing these concerns and explain that the purpose of this bill is not to expand or diminish existing statutory exceptions, but merely reorganize the existing law in a more understandable fashion, because any time the Legislature

changes the law there is an intent to somehow change the scope or the applicability of the law. You would want a very clear legislative record. Another concern is that a bill like this would draw the attention of the members in the Assembly and the Senate, who may start looking at some of the specific citations, and then one or more Legislators may want to delete or expand some of them and your bill get watered down in the process. This represents a very small step in trying to rectify that problem.

Chairman Kandt: There seems to be a lot of interest in this, so we will include it in our last and final meeting with the idea that this will be part of the public records BDR. We can't control what they decide to do in the interim study. We would have to frame this proposal in the same regard, which is trying to make the process more efficient and user-friendly.

Agenda Item No. 14: Public Comment, (Discussion Only) Action may not be taken on any matter brought up under public comments until scheduled on an agenda for possible action at a later meeting.

Chairman Kandt opened the floor for public comment.

Carson City: No public comment.

Las Vegas: No public comment.

Chairman Kandt: I will be drafting some proposed legislation for your consideration. First is the posting requirement in NRS 241.020; second is this notion that the state records committee might have some sort of an authority to issue non-binding advisory opinions on the denial of public records requests; and third review Scott's memo in detail regarding the proposal to move towards something closer to FOIA.

Meeting adjourned at 12:09 p.m.