

**STATE OF NEVADA
OPEN MEETING LAW TASK FORCE**

Minutes of Meeting

Thursday, June 21, 2012 @ 3:00 p.m.

**Office of the Attorney General
100 North Carson Street
Carson City, NV 89701**

1. Call to order and roll call of members

Committee Members Present

Gene Brockman
Terry Care (LV)
Dane Claussen (LV)
Jeff Fontaine
Paul Lipparelli (Phone)
Barry Smith
Keith Munro
George Taylor

Public Present

None.

Chairman Munro called the meeting to order at 3:00 p.m. Roll call was taken and it was determined a quorum was present.

2. Comments from the public – please limit comments to 5 minutes.

None.

3. Discussion, possible revision and correction of March 28, 2012 meeting minutes. For possible action.

Chairman Munro asked if everyone had reviewed the minutes and asked if there were any additions or corrections.

Mr. Fontaine – I have two revisions – on page 20 agenda item 9, **change the word attacked to “tagged.”** On page 25 where it reads, I would be happy to but I just want to make clear that this is a NACO initiative; it should state **“this is not a NACO initiative.”** Also **Mr. Fontaine stated he does not recall making the statements on the bottom of page 24, last paragraph where his name is noted with question marks.** **Chairman Munro** stated to note that it is not clear that Mr. Fontaine made the comments at the bottom of page 24. **Mr. Smith** stated that **on page 14 where there is a blank it should be filled in with “open meeting law.”** Motion was made to approve with aforementioned corrections. Approved unanimously.

- 4. Assemblyman Pat Hickey has been invited to discuss his requested BDR for the 2013 session to amend the OML to limit the Legislature’s exemption from the OML only when it is in session and to require the OML to apply to interim committees. Other topics for possible discussion include the OML and interim committees, and notice requirements for committees. For possible action.**

Chairman Munro – Assemblyman Pat Hickey wanted to come today so we scheduled this meeting for 3:00 p.m. because we were sure the IFC Committee meeting from the Legislature would be done by now and apparently it is quite stacked. He may come walking in later, but we are going to move on to item 5.

Mr. Lipparelli – Before moving on I would like to pose a question for consideration either later today or maybe at a future meeting and that is, whether this provision is meant to apply to the Legislative Commission?

Chairman Munro – Mr. Hickey has put forth a BDR and my belief is that he wants to make a short change to the exemption that the Legislature currently has to the OML and have the words “while in session.” My guess would be that it would be “while in either annual or special session.” That would require that it apply to other committees that are statutorily created, i.e. the IFC, the Legislative Commission, and the other statutory committees.

Mr. Lipparelli – I just noted that and contemplated the possibility that the Legislative Commission may meet during the regular session of the Legislature and wondered whether that would mean it wasn’t subject to the OML during that time.

Chairman Munro – The words in Mr. Hickey’s bill as proposed I will put my stamp on what he has intended with his bill, but since the Legislative Commission is not the full Legislature, it would apply to the Legislative Commission, even though they may be meeting during a regular session.

- 5. Discussion topic: Non-Meeting: NRS 241.015(20)(b)(2). Does the statute need to be amended to provide additional procedure to provide guidance and to ensure that legislative purpose is not circumvented? Should notice of a non-meeting appear on an agenda or otherwise be provided to the**

public? Who determines who besides the attorney(s) and public body may attend to listen to the attorney's presentation? Does the statute forbid anyone else besides the attorney and the members of the public body to speak? Should a non-meeting procedure be analogous to the statutory procedure specified in NRS 241.033(4) and (5)?

Chairman Munro – This is really kind of a housecleaning item but it is something that we noted. Did everyone get a copy of the statutes provided? I am going to let Mr. Taylor describe this but it really has to do with what we think is maybe an oversight in the statutory language with regard to what is allowed in a closed meeting as opposed to what is allowed in a non-meeting.

Mr. Taylor – The reason for this appearance on the agenda has to do with an issue that came up recently and so we are presenting this much as a hypothetical but with those two statutes in hand if you would look at them together, 241.015 subsection 2(a)(2) is the definition of “non-meeting” and it begins where it says “To receive information from the attorney employed or retained by the public body regarding potential or existing litigation. . .” Compare that with the other page on 241.033, paragraph 5, where there is a description of the procedure that public bodies employ when they close a meeting. Paragraph 5 says, “With the regard to the attendance of persons other than members of the public body, the chair may at any time during the meeting, and then there is (a) and (b), determine who may attend.” Let me go back to the hypothetical. It has happened recently and maybe it has happened in other public bodies, but the issue is who can remain in a non-meeting, whether they can talk, what are the procedures in a non-meeting. Basically all we have to go by is the legislative definition in 241.015, so it is one of those perhaps as Chairman Munro described, a housekeeping matter, but it is kind of important when you have a non-meeting to determine who can be in there, who can speak, and even though they can deliberate among themselves but there may other people, i.e. the chair of a public body, so that's the jest of the issue.

Chairman Munro – Essentially what we are looking for is the Legislature to provide some clarification for public bodies on how they can conduct those meetings and should we have some procedures so lawyers like Mr. Lipparelli know how to advise their clients.

Mr. Fontaine – Isn't there an OML manual or guide that has been put together that sort of compiles many or most of those issues. I have referred to that manual, and it's a good guide.

Chairman Munro – It's a guide but I don't believe this is set forth in there and so we see this as a gap in our OML Manual and we want to fill that gap. Rather than getting to the particulars of what should specifically be allowed, it is more of a general question of “would it be helpful for public bodies to have an idea of what their parameters are during a non-meeting?”

Mr. Smith – It is interesting because I really thought about this because it is in the wrong place, it shouldn't be a non-meeting, it should be procedures for closing a meeting for a specific purpose and how to go about doing that, that would be my opinion.

Chairman Munro – I think that's a separate issue and that might be an issue to take up at a separate meeting – procedure for how to close a meeting.

Mr. Lipparelli – I think we might end up with quite a robust debate over this subject because traditionally gatherings of public bodies to discuss matters with their attorneys have not been considered a meeting at all and that means that we can have one whenever it's necessary, we don't have to post, we don't have to act to close it, we don't have to keep minutes, and we don't have to have an agenda, and my view is that is really necessary given the nature of the communications between lawyers and clients concerning litigation. I would not object to an improvement of the OML that describes procedures for closing meetings as Mr. Smith alluded to a moment ago, but I would be very concerned about putting conferences with lawyers in the closed meeting category.

Chairman Munro – I don't think this suggestion was for putting it in the closed meeting category but Mr. Lipparelli when you have attorney-client privileges essentially that's the purpose of having a non-meeting. Who are the people that can be there and if you have someone who isn't a party to the particular litigation, do you run the risk of waiving that privilege?

Mr. Lipparelli – I understand the point I just don't know if that is a question to be resolved in OML statutes. Maybe that is a question to be addressed to lawyers and our ethical obligations and the rules of professional conduct.

Mr. Fontaine – Just so I am clear, are we specifically talking about subsection (2) under NRS 241.015?

Chairman Munro – Yes. To receive information from the attorney who is employed or retained by the public body. Let's say that the attorney brings an employee to describe a certain set of facts who is not a party to the litigation. Do you run the risk of having the attorney-client privilege waived?

Mr. Fontaine – It seems to me that is something the attorney has to decide for the public body, but not something you would necessarily put under the OML definition, right?

Chairman Munro – Potentially.

Mr. Claussen - A couple things, one is, instead of using this bizarre term "non-meeting," why didn't it get called in the executive session like it is in most other states, that's typically where elected officials meet with their attorneys on legal matters. My second point is that I am not a lawyer but I recently sort of got the seed on where things

stand right now in our region of the country and the Ninth Circuit did issue a decision last year . . . limited the . . . and now seems to apply in the Ninth Circuit only to clients and people under the direct supervision of the lawyer, and with this we are not seeing a . . . definition.

Chairman Munro - I wouldn't disagree with you, I think that is part of the reason we are having this discussion and maybe Mr. Lipparelli is right, it is a discussion for maybe a district attorney's association to review.

Mr. Lipparelli – I think we are talking about two potentially different legal interests; one involving the privilege of the communication between an attorney and a client, the traditional basis for recognizing privileges to encourage free flowing communication between the attorney and the client and be secure in the knowledge that it is not necessarily going to be publicized, but in addition to that there is another interest which is the recognition of the fact that it is contrary to the interests of a public body to force a public body to discuss its legal strategy in a case in a public setting and that is not necessarily the same thing as privilege, that's more concerned with the idea that you can't litigate against another party if they have your play book and you don't have theirs. There may be a lot of reasons why the law needs to recognize the need for attorney's to be able to confer with public bodies about legal pending and threatened legal matters in a non-public setting, and that may complicate our discussion about who else can be in the room.

Chairman Munro – Duly noted. Any other comments? Discussion closed.

6. **Review and discussion of recent Nevada Supreme Court case law and Attorney General Open Meeting Law opinions where resolution of issues of law suitable for incorporation/codification into the NRS were discussed or decided. See *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*, 69 Cal. Rptr. 480 (Cal. Ct. App. 1968); *Dewey v. Redevelopment Agency of the City of Reno*, 119 Nev. 87, 97 (2003); *Del Papa v. board of Regents*, 114 Nev. 388, 393 (1988). (The following subsections are “for possible action.”)**

 - a. **Codify the definition of “deliberation” as set forth in *Dewey*.**
 - b. **Amend and clarify the definition of “meeting” to except from its ambit pre-meeting discussions among the members of a public body to either remove or add an agenda item (as long as the three day notice period is still applicable). *Schmidt v. Washoe County*, 123 Nev. 128, 135 (2007).**
 - c. **Amend or clarify definition of “meeting” to exclude public body “fact finding” trips, site inspections or other similar activities where deliberation and action cannot be taken.**
 - d. **Amend or clarify the definition of “meeting” to exclude Retreats sponsored by the public body where no action, promises, or commitments are made and provided that such retreats occur no more frequently than quarterly.**

- e. **Codify the definition of “present” (see OML Manual § 5.01; 85-19 Op. Att’y Gen. 90, 92 (1985); *Del Papa v. Board of Regents*, 114 Nev. 388, 393 (1998) (the term “present” as used in OML, determined to be ambiguous).**
- f. **Codify a definition of “working days”; NRS 241.020(2).
For possible action.**

Chairman Munro - I want to start off Item No. 6 and I want to see if I can get Mr. Claussen’s point of view. There are six items and it goes more toward this in respect to the OML. Sometimes we treat the OML like it is a body of law for lawyers and I think maybe the OML should be a body of law not for just the lawyers but for the public as well and we have had discussions before in these meetings about bringing Attorney General opinions into statute and I would use some language and I don’t mean it to be pejorative of shouldn’t the OML be more paint by the numbers, shouldn’t all the items governing it be right out there in statute so everybody understands? For example, starting with the definition of “deliberation,” that is what public bodies do; they deliberate. We have never pushed it before the Legislature to give us a definition of what deliberation means. Some simple ones with technology changing, what does it mean to be present at a meeting? For simple things like posting agendas, we don’t have a definition in there of what three working days means. Mr. Claussen, can I start with you?

Mr. Claussen – Again, I am not a lawyer and I don’t pretend to be one but I think with regard to these questions on defining “deliberation, present, or meeting that those are certainly good ideas. You certainly have three possible outcomes. One is the terms of a) have a lot of litigation under them, and secondly, it is to define the term and go on and fix it later which is at least some progress, and the third goal is putting in a definition and getting it right. I certainly advocate putting in definitions on terms like “deliberation, meetings, or present” that might lead to litigation.

Chairman Munro – Mr. Care what do you think, do you think the Legislature would have any appetite or any background in being a former senator as to why some of these things aren’t in statute.

Mr. Care – I think Mr. Chairman, was it 2005 or 2007, I can’t remember, we had this discussion and I have had it in other forums as well and I can tell you there is nothing wrong with this in my judgment. We have state agencies, boards, bodies that take them treats and essentially they do that to get to know each other, sometimes you have a newly composed body, they do that sometimes out of state even, but do they deliberate. I don’t know that word to some people can be so expansive that just talking about the role of a, whatever the board is, that sort of thing, that you might need to deliberate. I think we have to look at language in other jurisdictions, and ask somebody else for definitions but I think we need it. Your question was is there an appetite in the Legislature. I could never predict anything when I was in the Legislature and I darn well cannot do it now. I do think that’s something that we need to approach the Legislature with.

Mr. Claussen - I have background as a journalist and a professor and in terms of deliberating in open meetings laws, there is just sort of a continuum. A council member mentions to another council member an item on the agenda and they say . . . off the record and that is not deliberating but at some point a serious discussion of an issue ahead time moves over to deliberating and I think certain people have contemplated around that in terms of the OML . . . was that members of the elected bodies would not be counting votes in advance or deciding in advance how they would vote. Unfortunately I am not stupid; I know that this is . . . abiding by the letter of the law but not the spirit. I've witnessed so many public meetings all over the United States where there is very little debating in public

Chairman Munro – I agree with your thoughts and it just seems odd to me that here in Nevada we have had an OML for probably about 40 years and for the sole purpose of doing what you said and we have never had the Legislature weigh in and say, “here is what you can do and here is what you can’t do.”

Mr. Claussen – I think that needs to be fixed, don't you.

Chairman Munro – That is why I put it on the agenda for today. What do you think Mr. Smith?

Mr. Smith – I don't necessarily agree with you that the Legislature hasn't weighed in. I think there has been a considerable amount of discussion and I think it has been as with a lot of things, what is the problem we are trying to fix, and if there has been a problem/situation that needs to be addressed, it has been treated situation by situation. Yes something came up, we didn't like the resolution and so we need to address that in the statute and make sure it is clear. As with many other things the Legislature said if there hasn't been a problem, we have other things to do, but with that said, some of these items I think clearly could be and should be better defined. I think as you say that definition of deliberation, there is a definition, it's commonly used that could be in the law. It would be helpful. Other things that are in here I think might not be so helpful but in general if we can clarify and make it better and have that discussion in front of the Legislature that is a good thing.

Chairman Munro – I will have Mr. Taylor go over a couple of these cases. I wasn't trying to say all or none to items (a) through (f). It's more of a general discussion. It seems to be that what a public body can and can't do, ought to be clear in the statutes rather than have the public have to go look in case law and try to guess what that is.

Mr. Brockman – I can see that trying to define the word “present” at a meeting is urgent because people are calling in or somehow or other being in a meeting other than present in the room all the time and I think that is an urgent thing that needs to be clarified.

Chairman Munro – And the new aspect of that which is coming is – can you all sign into a message board and appear not telephonically or not by videoconference but by teching in, is that being present? To me that probably would not be.

Mr. Fontaine – Personally of all these items that have been listed here, I think that is probably the most pressing in my world. There are so many chat rooms and blogs and for legitimate purposes and most of what I deal with on a sort of a national level and even a statewide level is for information sharing, it is not for purposes of deliberating or reaching a decision but it is for information sharing but we are scared to death because we don't know what the ground rules are and so we have shied away from having those kinds of forums which we would like to have, but without clear ground rules we are not doing it.

Chairman Munro – Mr. Brockman, any other thoughts?

Mr. Brockman – Not at this point; I thought I knew the meaning of words but I'm not sure I do now.

Chairman Munro – Well words sometimes change meanings.

Mr. Fontaine – If I could just offer one more comment on the word deliberation. Is there really a clear definition for deliberation, or is it really a preponderance of evidence that would lead one to conclude that there was a deliberation and not necessarily a fine line definition? I am asking the question because I don't know.

Chairman Munro – The Supreme Court has given a definition and I think it would be fair to say the definition provides more guidelines and whether those guidelines are bent is probably determined by the totality of the circumstances. So it is not always clear judging all the circumstances that are present if those guidelines were met.

Mr. Taylor – Because of the discussion of the definition of "present," I think it is a good time to explain just how the Nevada Supreme Court has struggled with this issue and how the Legislature has struggled with this issue over many sessions. I am referring now and it is on your agenda with regard to present, *Del Papa v. Board of Regents*, a 1998 Nevada Supreme Court case. The Supreme Court went through many years of discussions and looked at many things. The Supreme Court determined that the word "present" is ambiguous so then they were entitled to go to legislative history which they did. There's like ten pages of issues here, they went to other states, California, Kansas and various things. They ended up deciding that "present" constitutes a quorum gathered physically or by serial electronic communications and the body must deliberate and actually vote, but this is a lengthy opinion and they have struggled with the definition of "present" so I can understand Mr. Fontaine's comment about it being a pressing issue.

Chairman Munro – Mr. Liparelli, any thoughts on fact finding trips and trying to clear up any of that language?

Mr. Lipparelli – I think we can probably knock a few of these down in a few minutes and have consensus. I mean, why shouldn't there be a definition of "working day" if that is causing confusion, let's fix it. Deliberation is going to be harder. The California Supreme Court's definition in *Dewey* was sort of embraced by the Nevada Supreme Court but I think it has some flaws in it. The collective acquisition of facts raises questions in my mind so we might have some trouble with some of these and some of the others may be easy.

Chairman Munro – It sounds like what you are saying Mr. Lipparelli is that the current definition being used set forth in case law might need some tweaking so on a bigger picture it might be a good thing to put something before the Legislature to clean that up or get a better definition.

Mr. Lipparelli – Sure, it is against my interest to clarify the law because people pay me to tell them what it means but I certainly understand the sentiment that the citizens should be able to understand their own OML and if we can help do that we should.

Chairman Munro – Mr. Taylor would you tell us a little bit about Items B, C, and D.

Mr. Taylor – **Item B**, *amend and clarification the definition of "meeting."* This is an issue that I have had some confusion with in the complaints that I have looked at and people asking me this kind of question. *Schmidt v. Washoe County* was a Nevada Supreme Court case and *Schmidt* held that a public body may at any time with or without notice of a meeting and a pre-meeting discussion just decide to remove an item from the agenda. They can do it in pre-meeting discussions whether there is a quorum or not. The court said it does not implicate the OML. What I did here is I added, you can see I bolded the phrase "**to add**" not that I am proposing this, but it is an analogue to if a public body can remove an item at any time during a pre-meeting discussion regarding the agenda, why can't they add an agenda item during a pre-meeting discussion, that is all the purpose of Item b was. It has generated some questions for me from the public bodies and others. **Item C**, *amend or clarify the definition of "meeting" to exclude fact finding trips, site inspections or other similar activities where deliberation and action cannot be taken.* This is an even more frequent kind of question. This is the nuts of bolts for public bodies who are trying to get their job done and they are very concerned they are going to violate the OML if they go on a fact finding trip, or if they just designate two people to bring matters back from fact finding. I don't know whether that is something you want to put in a legislative packet or not, but it is something that I encounter on almost a weekly basis. **Item D** is very similar, *amend or clarify the definition of :meeting: to exclude Retreats where no action, promises, or commitments are made and provided that such retreats occur no more frequently than quarterly.* That is very similar to the other issue of fact finding retreats. I had to write an

opinion two weeks ago regarding a public body that held a retreat but they actually took some action during it, even though they did not intend to, it wasn't intentional, it just came out that way. That is how confusing it is.

Mr. Brockman – That was an error on the part of the Chair.

Mr. Taylor – In fact it was. You are absolutely right Mr. Brockman.

Mr. Claussen – I don't have a problem an exemption with fact finding trips and retreats as long as those things are defined and there is some criteria and a restriction on any action. I am concerned about the addition of add to the three day notice because this is the way you get corrupt public bodies sandbagging people by putting something on the agenda at the last minute and hoping the citizens won't find out about it, at the meeting they will find out about it, or that if the media and public do find out about it, they won't have ample time to prepare for it. I would definitely object to a three day window on everything at the last minute. There is just too much room for abuse there.

Mr. Care – I don't like the idea of a body meeting prior to a meeting for the purpose of removing something from the agenda. In my mind what should happen is the body meets publicly and a member of the body simply says, I am not ready to move on the item yet, I'm not comfortable, or they need more information or whatever. I think at that point you take it off the agenda. An addition is certainly troubling. Can't the public bodies now so long as they meet the three day business day notice, simply issue an amended agenda?

Mr. Taylor – First of all, the *Schmidt* court decision said that public bodies are free to remove agenda items at any time and it also said that this public body did not violate the OML by holding pre-meeting discussions on whether to remove this lobbying contract from its agenda, *Schmidt* is a 2007 case, so I have read that and just for purposes of this meeting, wondered if there is an analogue to adding a meeting not within three days before the meeting but they could meet in a pre-meeting discussion and decide to add something, but they have to meet the 3-day notice requirement for the public as required by the statute so this is not a window just before the meeting but they have to actually meet 3-days before the meeting if they are going to add something.

Mr. Fontaine – I am not entirely clear as to the process or what this particular case involved but are you saying that a majority or quorum of a governing body meets prior to a meeting without complying with the OML and for the purposes of adjusting the agenda?

Mr. Taylor – Yes, that is right here in *Schmidt*, which is exactly what the Nevada Supreme Court said.

Mr. Fontaine – So if they do are they required to repost for removal?

Mr. Taylor – No, and that is currently in our statutes. A public body can remove an item during the meeting, or just decide to table it, or not say anything. I have been asked this before about pre-meeting discussions to add something to an agenda. However, they have to meet all the other requirements of the OML, including the three day notice requirement.

Mr. Fontaine – Why can't they do that today?

Mr. Taylor – That is what I am asking. This is a very gray area and public bodies are very concerned about doing that. They do meet, I guess they meet, I don't know I have not had any complaints about this issue and so I don't want to part the curtains too widely to see how they are putting their agendas together.

Mr. Fontaine – An agenda item can be removed at any time, but I don't understand why the same can't be said for adding an item, unless I am missing something here.

Mr. Brockman – It has been my experience that the agenda is not finalized until the required posting date of three business days, which is assumed to be Monday through Friday unless there is a holiday, now whether those are working days or not I don't know, but that perhaps needs to be clarified. It has never been my experience that the public body met prior to the posting date in order to prepare the agenda, that is done by either the chair or a staff person servicing the chair. I am not sure how the Washoe County Commission operates in this regard meeting prior to set the agenda and I don't really care because the agenda isn't finalized until the day it is to be posted.

Chairman Munro – It gets to the general nature of these things ought to be laid out. What's in and what's out.

Chairman Munro – Mr. Taylor, please make sure Mr. Brockman gets a copy of the *Schmidt* case.

Mr. Lipparelli – I agree with the comment made by a gentleman in Las Vegas that we cannot condone pre-meeting decisions about what should be done at the actual meeting. There is no way to look at that other than it's a meeting, and it's not been posted and that is completely contrary to the whole purpose of the OML. However, whatever we do in deciding how to address that problem, I don't think we should interfere with the authority that exists in the law currently to allow a public body to remove an item from an agenda without meeting to have a complete debate and hearing on the matter because it commonly happens that we think an item is ready for a hearing, it gets on the agenda, something comes up between the time it's posted and the time the meeting is to take place; maybe it is an applicant who has decided he is not ready yet and the item needs to be removed. It would be silly and wasteful and I think it would breed contempt for the OML process to require a public body to conduct a hearing on whether it can remove an item. As a practical matter for people to get

business done, taking an item off should be easy, adding an item should require all the same things that putting an item on the agenda in the first place requires.

Chairman Munro – This is the second year of our task force and we had the last session and there were things we put forth and we are fact finding here getting ideas, getting an understanding of what our problems are and we had issues that Mr. Fontaine I believe we agreed with. I think NACO came in and opposed some things in our bill and that's fine and I think Mr. Lipparelli did too and we had people from the Press Association come add things to our bill. I'm pretty sure we are comfortable with the bill, but the fact that we talk about the bills in the interim, I think is helpful.

Mr. Claussen – I want to repeat my concern about short notice on agenda items, whether it is three days or five days or whatever it works out to be because this is how . . . put these on the agenda at the last minute and we all know that most matters that governments are dealing with are in the works for weeks, months, even years, so that makes me think that in terms of having a short notice on adding something that perhaps there should be some contingency for emergency additions so that . . . major, because the public and media frequently need more notice than that. Bodies who put things on the agenda at the last minute that are not emergencies are generally either corrupt or incompetent, or both.

Mr. Brockman – I can't agree with the expression just discussed that agenda items generally are that long term. They are much closer to that at local government level and frankly from a local government level standpoint, three working days is not very far in advance, neither is it very close.

Mr. Care – What we are having now is a discussion about whether three working days is even adequate and I don't know what other state's say in that. I think the cutoff is usually 9:00 in the morning if you are going to have meeting on Tuesday, the agenda has to get posted I think by 9:00 in the morning Thursday. So you have got Thursday, Friday and Monday. Those are your three working days for a meeting to take place on Tuesday . . . much diligence is to be expected of the press and the public. Three days, I have never had a problem with it, but obviously others have. I guess maybe we ought to look at what is done in other states, what the period is.

Chairman Munro – Mr. Care what do you think about looking at the process for who gets to select the agenda?

Mr. Care – I just went through an experience where the agenda, I think it even said on the agenda, that items on the agenda, we are talking about a properly noticed meeting, it actually said on there at the request of so and so and so and so, one of the members of the public body. The chairman . . . that's his prerogative and that is probably done in cases where a member has requested it, or the chairman or the chairman does it, or maybe that's . . . items like . . . the staff requested that the chair leave that on the agenda. That is not always done and you may have instances where a . . . member goes to the chair and the chair says, no, I don't want to hear that. That

could to some dicey discussions in a meeting as well. I am just assuming for the most part that it currently works and if someone wants something on the agenda I think it is going to get there, the issue is proper notice.

Chairman Munro – Any other thoughts on Agenda Item #6?

Mr. Claussen – I think some of the other states have successfully handled some of the potential problems of the OML by assuring that two members of a public body talking about something did not constitute a meeting unless it is only a three person body, if there are 30 people on an LA city council or whatever, 2 members is not a meeting.

7. **Discussion Topic: (continued discussion from March 28th meeting) Whether the OML be amended to require all or only some public bodies, i.e. local governments, cities, towns, and state government to expand technical capabilities and resources to upload to a website, its agendas, minutes of previous meetings and supporting materials used for public meeting agendas. Discussion of the applicability of this concept to public bodies based on population distinctions. Currently supporting materials need only be made available over the counter (Fontaine, Brockman and Lipparelli). For possible action.**

Chairman Munro – I am glad to have Mr. Fontaine, Mr. Brockman, and Mr. Lipparelli all present. Who wants to kick off?

Mr. Fontaine – I thought we had a pretty good conversation about this at our last meeting and the meeting before that. At our last meeting we were able to report on behalf of some of our members with respect to what impact a requirement like that might have and I think that was pretty well documented in the minutes from the last meeting so I think from my perspective we would still have concerns primarily for the rural counties and even perhaps in some of the larger counties that have smaller advisory boards or things of that nature where they don't have the capability, staff, or resources to do a lot of this. I if this is something this group wants to pursue, I really do think we would have to do that in consideration of both the technical and fiscal resources of the various types of governing bodies in the state that would be required to do something like this.

Mr. Smith – I can't disagree. As I have said before it has still got to be practical to work and I think there are some minimum items that should be up prior to the meeting.

Mr. Brockman – Is there any way to write into the statute from a practical standpoint, that if a local government has the necessary equipment, technology, etc. to have a website that they must post things on it, but if they don't have that then they only have to make it available as a paper copy across the counter. I don't know whether from a practical standpoint, you can write a law like that to accomplish that concept.

Mr. Smith – I think that's the way the bill was worded, if the entity operates a website, then it shall post these things.

Mr. Brockman – If that's the way the bill reads, let's leave it alone.

Mr. Fontaine – You are required to post your agenda on your website if you have a website, but we are talking about a lot more information now and so just having a website which two of the rural counties in our state recently just acquired and put up, so they were able to do that, but then the next question is can they now upload their budgets on the website and the answer is, I doubt it very much. I understand the concept but I don't think it is quite that simple.

Mr. Smith – I argue both sides of this because that's part on the assessment roles and on the quarterly financial statements and so on, I think I am consistent in saying let's make it as widely available as possible.

Mr. Brockman and Mr. Fontaine – Agreed. I think we can agree on that concept. Absolutely, it is like deliberation.

Chairman Munro – But we have a definition of that. It may need some tweaks according to Mr. Lipparelli but now we have nothing. We have no guidelines. In the days of high speed scanners and all that stuff, are there things that we could put on to facilitate the open meetings that the public can participate?

Mr. Brockman – In our last meeting I cited the Palomino GID with one part-time clerk, one part-time employee, who is a road grader, and a three person board. The only thing they do is to take care of the roads in this very rural small GID. To require them to have a website and to post everything on it is ridiculous. On the other hand, any other sizeable organization is already doing it.

Chairman Munro – What about incorporated towns?

Mr. Brockman – I don't know. I suspect if they have a website they are putting a lot of their info on it already.

Mr. Fontaine – It varies by county, it varies by document, and it takes somebody to do it.

Mr. Smith – Frankly, in the state government you can find agencies and departments, things where you click on meetings and agendas and the last agenda is like 2009. It is a personnel capability.

Mr. Lipparelli – The notion is certainly laudable and in a lot of examples, Washoe County government that I am familiar have found that using websites and posting information electronically is actually more efficient and cheaper for the citizens

than having the old paper systems, but it is true that it is probably not a one size fits all situation. I think I have used this example before but our Board of Equalization which meets during the month of February, will process thousands of property tax appeals involving tens of thousands of pages of information and if the requirement is made to apply to all public bodies, there are going to be some bodies that are terribly burdened by the idea of having to have these materials on line and available a certain number of days before their meetings. It is something that warrants discussion and maybe we can set some aspirational goals here, maybe governments that do a good job can get lunch with the Attorney General or something. It is going to be hard to find language that is going to be fair to all the governments across the state because they have such a variety of resources and capabilities.

Chairman Munro – It is difficult because some of these things as Mr. Lipparelli said are laudable we should be doing. It is the diversity of capability that is tough and it is tough to craft rules that apply to all. We will have to think about that when we think about things like population caps that have been held to be legitimate distinctions. Mr. Lipparelli what would you think about if there were population caps and only certain types of bodies such as county commissions?

Mr. Lipparelli – Speaking for Washoe County it wouldn't be a burden because we are already doing it. There are some technological challenges that we have experienced, for example – we would need to find a way to memorialize the moment at which materials were made available electronically so that we could ensure that we've complied and we'd also need to try to find some way to assure citizens that once they are posted they remained available. Sometimes our website goes down or a link is a dead end or something and we have had citizens call and say hey I got on the website to get some materials and I couldn't get them, what is going on, and we have to put our IT people on it. We probably could come up with language that has some reference to the resources of the public body and also make some allowances for technical difficulties but it is achievable.

Mr. Fontaine – I am wondering if another approach, instead of a population cap, might be the actual things that we want uploaded. Right now up until now the discussion has been about if it is going to be presented as part of the public body, it needs to be uploaded to the website. Well maybe that is just a little bit too much for now in terms of everybody's capability but maybe we can think about what exactly is it that we should be uploading because inasmuch as we are concerned about the capabilities of some of the smaller public entities, do we really want to say that if you live in rural Nevada and you are served by some GID that you don't deserve the same level of OML equity as you would if you lived in Washoe County?

Chairman Munro – But that is what we are doing now.

Mr. Fontaine – Yes and no, we are because It is based on resources and technical capability but maybe there are some common denominators here that we could look at. The agenda is the example. Everybody is required to post the agenda if

you have a website, well maybe what is the next logical thing that we might add to that list?

Chairman Munro – Mr. Smith do you think the Press could come up with a short and simple list.

Mr. Smith – Actually I thought we were already working on that. I remember the discussion that it is not very practical when a developer comes into a planning commission meeting with a 200 page proposal and a power point to show the development. Are we actually going to require Lyon County or Eureka to upload that? I think there are some minimum things and one of those might be a list of all the items that will be available at the meeting or are available upon request.

Chairman Munro – I am fine with that because the Attorney General's office prosecutes these OML cases but we also represent a lot of boards, more than any other, and Mr. Lipparelli touched on technical difficulties. If your website crashes, does that negate the meeting? That gives me a little bit of pause.

Mr. Claussen – I have started working on such a list from our last meeting and I would be glad to work with other members of the task force on that going forward for the next meeting. I am really concerned about the population distinctions idea and/or either budgetary. There are certain government bodies that affect a large number of people within a jurisdiction, so I'm certainly inclined to say that there are certain things that every county commission, city council, and school board has to do regardless of size. But then because of their broad jurisdictions, large budgets, large staffs, and so on makes the distinctions for other types of bodies.

Chairman Munro – Okay, it could be that Mr. Fontaine has tapped into something here.

Mr. Smith – The reason I say I argue both sides is because there is a distinction between a rural and urban area. It is very much the same distinction what that local government is capable of doing as far as what the residents are capable of accessing. If the GID cannot put up a website for one reason or another, it is quite possible that residents aren't expected to get their information on the GID. They may all go by and look at the bulletin board every Monday to see what the agenda is.

Chairman Munro – It might be a good idea that when we start creating a list, that we create an avenue as people come up with ideas or over the upcoming sessions, if they think it should be made available, they have got an avenue to be made part of the list. We will close unless someone has anything further on Item No. 7 and move onto Item No. 8.

8. Discussion of “performance review” for appointed public officers. Is there any room or need for any shield for this process from the public eye and

the OML. (Trevor Hayes). For possible action. (Items 7 and 8 may be considered together).

Chairman Munro – Mr. Hayes is not here, so we will move to Item No. 9.

- 9. Discussion of proposed exemption from OML's prohibition from holding closed meetings for the process of appointing or hiring county CEO/county manager as well as any appointed public officer appointed or a person who serves at the pleasure of a public body. NRS 241.031. (Paul Lipparelli, Jeff Fontaine); discussion of proposal to exempt county commissions from the OML only when a quorum negotiates public land/access issues with federal agencies. (Jeff Fontaine). For possible action.**

Chairman Munro – This is one that we talked about quite a bit last time. I am not sure that I agree with the county officials with respect to this one, but I kind of believe that if we have a bill maybe this one should be in there for this purpose. I think they have made their case well enough that I think it is an item that should be considered. One of the things that we talk so much about the OML and public records and things of that nature, but sometimes we forget the operation of government and we have got the public's right to know which is paramount, but we also have the public's interest in having an effective government and making it work the best it can. It could be that some of the items about performance review is some of the local officials are touching on something that is affecting how well they can operate and the public has the right to know or wants to know but at the same time they have an interest in having government work the best it can.

Mr. Fontaine – Again, this isn't something that we are necessarily proposing but the discussion did come up and we did discuss the fact that back in 2009 NACO did submit a BDR, it was eventually SB 32 to address this issue. The bill itself in my opinion wasn't really written the way we had hoped it would be written, but I think the bottom line is back in 2009 and now there are concerns about the effectiveness of those performance reviews with the chief executive officers of those counties, the county managers in our case, and really the ability to have those open and frank discussions and balancing that with the public's right to know. It is probably worth having the discussion and if there are other's here that feel it is something they want to pursue then I can certainly bring that back to my board to see how they feel about it, but I do know from discussing this with some individual counties that it is an issue, so I appreciate your comments and the other thing related to this is, while we were focusing on the performance reviews I think the interviewing process for perspective CEO's of counties and cities is also something you may want to fold into this and have as part of the discussion because again we all want to attract the most talented best people here to our state and if individuals who are concerned about their present standing with their incumbent employer or concerned about having their name out in public for fear of losing their job or having a problem that way, they are not going to be applying for these positions. I just think it is worth having this discussion.

Mr. Brockman – I support strongly what Jeff just said. I think there is an urgent need for the public to understand and know what is going on, but in both of these cases whether you are trying to hire somebody new or rate the performance of an existing individual, there is a part of that that needs to be shielded from the public as soon as that session is over, the public is made aware of what happened. If a procedure could be drafted that as an example could call a meeting for a specific purpose of either performance review or hiring, announce the subject, take public comment and then go into a closed session for the body to do its deliberation, make a recommendation, come back into open session, either pass or reject the recommendation in public, I think both of the objectives could be accomplished. You can shield the public from those things that are important to get good people, or to keep them or to get rid of them if they are not and also the public gets its information.

Chairman Munro – If you think about a state employee's personnel records, those are confidential, and the public doesn't get to know. It seems like what they are saying with this law is if you reach a certain status, no more confidential, and why the difference, is it status based only, is it pay only?

Mr. Care – I will try to explain this as best I can, forgetting for a moment that I am a lawyer. This goes back to, Jeff Fontaine and Barry Smith will remember this. I don't recall if it was 2005 or 2007 but it was my bill that was responsible for this and a little bit of history. We had a public body which was the Regents and I don't know that there is anybody even on the Regents today that was on it at that time. They basically did hold a performance review behind closed doors without any notice to the person who was evaluated; clearly a violation of the law and this all came out publicly later. There was a pretty nasty discussion on the subject and the cure up for this was okay can't trust you to not do this sort of thing behind closed doors we are going to put it out there so the public can see it. You are right, it had to do with those folks who are public employees and certain city managers, University presidents, school superintendents and that is why the . . . is what it is, and I am sure we had some discussion. That's where it came from. Now since that time and I'm perfectly willing to entertain any discussion. I am aware of public evaluations that were the body issued glowing evaluations and maybe that wasn't quite accurate and these elected people just didn't want to say what they really wanted to say but nonetheless it was done. I am also aware of what I think, two instances, one fairly recently, where a public employee resigned rather than face a public evaluation. I think because in both instances, the person knew it was not going to be a very flattering evaluation, but we will never know. There is some fear I know that that members of an elected body have an absolute verbiage, they can say anything they want to, inflammatory or not and it is not actionable, but nonetheless that is what we have. I get both sides of the argument, but if it will help, that is where it came from. I still think the public has a right to know what goes on. That's the background.

Mr. Smith – The logic to me is simply the chain of command. A public elected body chief administrator employee elected body does not generally direct departments, agencies; it hires and fires that chief executive. That is the most important thing that body does. For me my argument then and still is to say that that important decision,

those discussions should go on out of the view of the public and that there are things that should be said in private that can't be said in public, goes against my concept of what the OML stands for.

Chairman Munro – So for you is it a weighing process because you know you might have a county manager that does a really good job but people don't want to in a public meeting provide them suggestions for improving their performance, so they give him a glowing one, so do you weigh the public's right to know in something like that higher than maybe the public's interest in having a more efficient evaluation?

Mr. Smith – Why wouldn't they say in a public meeting on how they think that county manager ought to improve. Isn't that the crux of the issue?

Chairman Munro – But the fact is they don't.

Mr. Smith – And that may be my whole stumbling block of why an elected public official leader of the community whose job is to supervise the chief administrator can't say honestly in public what that administrator is doing.

Chairman Munro – So in weighing it, what you would say is if the elected official isn't going to come forward and make those suggestions then he will stand for a choice at the ballot box.

Mr. Lipparelli – Mr. Chairman, if I leave the meeting, will you be okay quorum wise?

Chairman Munro – We won't be but Mr. Fontaine has got to go as well and we are at the very end. We are just really going to have public comment and so Mr. Lipparelli we appreciate you being here and so if you have got to drop off, that's okay.

Mr. Brockman – Can I make one final comment. I agree with your thinking but as a matter of practical every day happening, it does not happen for the elected official to say in public anything derogatorily about their chief executive, and what happens is that you prolong the tenure of a marginal employee and the performance review section has deteriorated so that it is nothing more than a simple contract review and contract extension period. It has practically nothing to do with his performance and that is what we are trying to get around but still maintain the right of the public to know what happens.

Mr. Smith – I understand that that is going on and I appreciate what you are trying to do which is to improve the process. I am open to listen to what kind of a process would ensure that the public has input, transparency on what happened and yet results in an accurate evaluation.

Mr. Brockman – I totally agree.

Chairman Munro – It is a tough issue. It is tough because as Mr. Care pointed out we had somebody get a glowing evaluation and I don't know who he is referring to, but maybe they shouldn't have. Then we have somebody that could have gotten some instruction and said forget it, I'm not going there.

Mr. Fontaine – Well you know you can say what you want about the responsibility of elected officials and I don't disagree with that one bit but human nature being what it is I just think that people are still more apt to praise in public and punish in private. As long as human nature is the way it is, I think that is going to continue, so the question is . . . is that important enough for us to consider working out some sort of procedure whereby we all accomplish what we need to accomplish. It sounds like you might be willing to consider that and I know we have been asked to come up with some language, we can take a look at what we did with SB 32. Like I said that wasn't in my mind particularly well-written and I am not going to criticize LCB, but it didn't really capture what we thought we wanted to do but now with this discussion if you wanted to take a look at maybe doing something like this, adding a public input part to it, typing up some of the reporting requirements, we can take a look at that.

Chairman Munro – I accept your offer.

Agenda Item 9 (second part). Discussion of proposal to exempt County Commission from the OML only when a quorum negotiates public land/access issues with federal agencies (Jeff Fontaine).

Mr. Fontaine – This is an issue that was raised by a couple of our rural counties and some of our rural counties are having some pretty difficult negotiations in issues with some federal agencies, particularly the Forest Service and BLM, regarding things like travel management plans and various other access and use issues. What they feel like is that they are under a really distinct disadvantage when they have to work with those agencies to develop those plans that would restrict access in certain areas of their county on public lands and things of that nature because they have to negotiate their strategies, the counties' strategies, in a public setting whereas the federal agencies don't. The federal agencies attend the public meetings, listen to what the counties are saying as far as how they want to approach working with and negotiating with these federal agencies, the federal agencies then go back and take the information they have learned from the public discussions and then post information on federal agencies websites and sort of use those strategies against the counties. So they just really feel like they are at a disadvantage, and in one county where they only had three commissioners, they are especially conflicted because they are required to sign a clause that when they are a federal cooperating agency, they are required to sign a clause that says, "these agreements require the discussions with the federal agency to be kept non-public until such time as the work product is released for public comment." When you have a county with three commissioners, it is one commissioner that perhaps is doing all this work on behalf of the county. The second commissioner cannot get involved, and in those small rural counties they don't really have a county manager or

staff so it is really up to the county commission to do the work. They find it really difficult for them and so I brought this up on their behalf, again this isn't anything that I have discussed with the NACO board, this is not NACO bringing this forward, it is a couple of rural counties that have asked us to consider this and I said I would bring this up to the committee.

Chairman Munro – Do they have any suggested language on where they could tweak that, would it be for lack of a better term – extending a non-meeting to negotiations with a federal agency?

Mr. Fontaine – I have not heard specific recommendations for any language tweaks, but that might be possible.

Chairman Munro – I get what you are saying, I'm just not sure where you would go for it and I'm not sure what the remedy would be. Some words on a page would help with this one.

Mr. Fontaine – So are you suggesting that we perhaps ask these folks to bring it back.

Chairman Munro – Yes.

Mr. Fontaine – I think it would be pretty specific circumstances under which they would request this type of relief.

Mr. Care – Mr. Fontaine what would happen if say the county with three commissioners, the three commissioners showed up at a BLM office to negotiate, wouldn't BLM have something to say about that? Is it federal law that addresses this?

Mr. Fontaine – I don't know that it is the BLM that is concerned about this. I think the issue here is that it is the commissions that feel they can't do that because in a lot of these rural counties the commissioners are very well versed in and have an interest in on behalf of their constituents, federal land issues, and so I think they feel like they all need to participate in the negotiations and not leave it up to one individual or their county manage if they happen to have one. So I don't think it is really the BLM that's concerned that a quorum of county commissioners would show up in their office, I think it is really the OML that has prevented the counties from doing that.

Mr. Care – I don't know if I understood. I guess I was thinking what would happen if three commissioners showed in the BLM office and the press and the public also showed up. I didn't know if under a circumstance like that, if the BLM would even care.

Mr. Fontaine – No, I don't think they would. I think they would if the press showed up.

Mr. Smith – I am very curious about that clause you read and what is the authority for it, I don't know, that's my problem with it.

Mr. Fontaine – That is just one example in one county. The issue I think is bigger than that it is just that in a lot of these rural counties as I indicated, it is usually more than one. Well, the rural counties typically have three commissioners or no more than five and in a rural county like Eureka or Pershing or Esmeralda, it is usually all the commissioners that are very interested in what is going on since it involves 85 to 95 percent of their land, and so it is a paramount interest to the commission and yet they have to negotiate all these issues in a public forum.

Chairman Munro – It kind of creates an unequal playing field.

Mr. Fontaine – That's exactly how they feel.

Mr. Smith – You mean the federal government is not just there to help.

10. COMMENTS FROM THE PUBLIC – PLEASE LIMIT COMMENTS TO FIVE MINUTES.

Chairman Munro – Anyone from the public in Carson City or Las Vegas.

No one from the public present.

11. ADJOURN. For possible action.

Meeting adjourned at 4:45 p.m.