

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2003-01 PUBLIC RECORDS; OPEN MEETING LAW: The Open Meeting Law does not require the Community Development Corporation (CDC) to provide to the public, upon a request for agenda support material, financial information that has been given to the board members as agenda support material, if that financial information was submitted to the CDC pursuant to a nondisclosure or confidentiality agreement. However, that information may be subject to disclosure to the public upon a request pursuant to NRS chapter 239. The CDC board may not consider private financial information submitted to it pursuant to a nondisclosure or confidentiality agreement in a closed meeting. The CDC is a governmental entity for the purposes of the Public Records Law. The CDC will need to determine, on a case-by-case basis, whether particular financial information is considered confidential by a specific statute or regulation in order to determine whether the information is subject to public disclosure pursuant to NRS 239.010.

Carson City, April 17, 2003

Theodore Beutel, Eureka County District Attorney, 701 South Main Street,
Post Office Box 190, Eureka, Nevada 89316

Dear Mr. Beutel:

You have asked this office for an opinion on a number of questions regarding the application of the Open Meeting Law, NRS chapter 241, and the Public Records Law, NRS chapter 239, to the Community Development Corporation (CDC) in Eureka County.

QUESTION ONE

If the CDC, in accordance with its policies, receives an application for a loan from a private individual containing private financial information which is submitted pursuant to a nondisclosure or confidentiality agreement as described in NRS 241.020(5)(c)(1), may the board members consider the material without having to disclose the information contained in the material or provide the material to the public, either before or after a meeting involving the subject matter of the material?

BACKGROUND

The CDC was organized in 1997 as a private non-profit corporation. The articles of incorporation were originally filed with the Nevada Secretary of

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

State on October 1, 1997. According to the articles of incorporation filed with the Secretary of State, there were two original incorporators, Pete Goicoechea and Sandra Green, both of whom were Eureka County Commissioners. These two incorporators were also two of the three original directors.

The by-laws for CDC were adopted on October 20, 1998. The by-laws were signed by Michel Griswold, Sandra Green, and William Riggs, as directors of CDC. These by-laws provide for the Eureka County Commissioners to review all candidate lists for directors and to return a selection list to the current directors of CDC. These by-laws also provide that, if no quorum for electing a replacement director can be had, a replacement director shall be appointed by the Eureka County Commission (Commission). The by-laws also contain provisions that the audited budget of CDC must be submitted annually to the Commission; that the Commission may designate funds to CDC; that all amendments to CDC's by-laws have to be approved by a two-thirds (2/3) majority of county commissioners; and, that in the event of dissolution, all assets of CDC will revert to the county.

On May 6, 1999, the by-laws of CDC were ratified by the Commission and the Commission resolved to release monies to CDC. Two of the Commissioners voting for the resolution were Goicoechea and Green, the original incorporators of CDC. It appears that CDC did not make the required annual filings with the Secretary of State after filing the articles of incorporation. However, on September 28, 1999, the Secretary of State reinstated CDC after it filed the required list of officers and paid the appropriate fees and penalties. At that time, the list of officers and directors contained six names, none of whom appear to be county commissioners.

The purpose of CDC, as stated in its by-laws, is to further economic development in Eureka County, mainly by establishing one or more revolving loan funds on behalf of the corporation and making loans from those funds to further the development of the Eureka County economy. The by-laws declare that the corporation is not a local government or a public body and shall not be subject to the Open Meeting Law. In its 1999 operating budget, CDC received 100 percent of its revenue from a grant from Eureka County. In the request for this opinion, counsel for the CDC stated that the primary purpose of the CDC is to make loans from funds which it receives from Eureka County for the enhancement of the Eureka County economy by assisting Eureka County residents with business loans based on need and the anticipated positive economic impact on Eureka County.

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

The CDC requires loan applicants to provide certain financial information to CDC with their applications. The CDC requires a loan request worksheet, a business plan, letters of denial from conventional lenders, and letters of conditional commitment from other lenders or sources. The loan request worksheet requires an authorization to obtain the applicant's credit report. The outline for the business plan requires information concerning assets, projected income and expenses, sources and uses of funds, income statements, balance sheets, capital equipment lists, and start-up cost estimates.

On April 12, 2001, in response to an Open Meeting Law complaint, this office opined that the CDC was a public body within the meaning of the Open Meeting Law.

ANALYSIS

NRS 241.020(5) provides as follows:

Upon any request, a public body shall provide, at no charge, at least one copy of:

....

(c) Any other supporting material provided to the members of the body for an item on the agenda, except materials:

- (1) Submitted to the public body pursuant to a nondisclosure or confidentiality agreement;
- (2) Pertaining to the closed portion of such a meeting of the public body; or
- (3) Declared confidential by law.

Pursuant to NRS 241.020(5)(c), the public body must provide agenda support material to the public, upon request, unless that material fits within one of three exceptions. The Open Meeting Law does not require that agenda support material be provided to the public if that material was submitted to the public body pursuant to a nondisclosure or confidentiality agreement. NRS 24,020(5)(c)(1). Therefore, the Open Meeting Law does not require that the CDC provide to the public, in response to a request for agenda support material, financial information that has been given to the board members as agenda support material, if that financial information was submitted to the CDC pursuant to a nondisclosure or confidentiality agreement. However, as will be discussed herein, the Public Records Law may require release of that information upon a public request made pursuant to NRS chapter 239.

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

CONCLUSION TO QUESTION ONE

The Open Meeting Law does not require the Community Development Corporation (CDC) to provide to the public, upon a request for agenda support material, financial information that has been given to the board members as agenda support material, if that financial information was submitted to the CDC pursuant to a nondisclosure or confidentiality agreement. However, that information may be subject to disclosure to the public upon a request pursuant to NRS chapter 239.

QUESTION TWO

Is private financial information provided to CDC under NRS 241.020(5)(c)(1) also information which is deemed to be declared “confidential by law” as the same is described in NRS 241.020(5)(c)(3)?

ANALYSIS

The Open Meeting Law does not require the release of information to the public, upon a request for agenda support material, if that information is declared confidential by law. NRS 241.020(5)(c)(3). You have asked whether information which fits within NRS 241.020(5)(c)(1), information submitted pursuant to a nondisclosure or confidentiality agreement, is necessarily declared confidential by law, as that phrase is used in NRS 241.020(5)(c)(3). NRS 241.020(5) does not declare any information to be confidential. NRS 241.020(5)(c) simply excludes certain categories of information from the requirement that agenda support material be given to the public, free of charge, upon a request for agenda support material. Just because information fits within the exception for information submitted pursuant to a nondisclosure or confidentiality agreement for the purposes of providing agenda support material to the public does not necessarily mean that the information is declared confidential by law, as stated in NRS 241.020(5)(c)(3).

There is no provision in the Open Meeting Law providing that information submitted pursuant to a nondisclosure or confidentiality agreement is confidential for all purposes. The Open Meeting Law simply provides that information provided pursuant to a nondisclosure or confidentiality agreement need not be made available to the public upon a request for agenda support material. The fact that NRS 241.020(5)(c) separately excepts information declared confidential by law in NRS 241.020(5)(c)(3), and information submitted pursuant to a nondisclosure or confidentiality agreement in NRS 241.020(5)(c)(1), makes it clear this information is not necessarily deemed confidential by law.

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

We have previously considered what the phrase “declared by law to be confidential” means in the context of the Public Records Law. Op. Nev. Att’y Gen. No. 2002-32 (August 27, 2002). We determined that, in order for a record to be declared confidential by law, a duly enacted statute or regulation must provide that the record is confidential. An ordinance adopted by a local government cannot make a record confidential by law for the purposes of NRS 239.010. *Id.* We believe that the phrase “declared confidential by law” as used in NRS 241.020(5)(c)(3) similarly refers to a specific statute or regulation, and thus a public body cannot make information “confidential by law,” as that phrase is used in NRS 241.020(5)(c)(3), simply by entering into a nondisclosure or confidentiality agreement.

CONCLUSION TO QUESTION TWO

Private financial information provided to Community Development Corporation pursuant to a nondisclosure or confidentiality agreement is not deemed to be “declared confidential by law” as described in NRS 241.020(5)(c)(3).

QUESTION THREE

Can the CDC board consider, in a closed session, private financial information submitted to it pursuant to a nondisclosure or confidentiality agreement as described in NRS 241.020(5)(c)(1)?

ANALYSIS

NRS 241.020(1) requires all meetings of public bodies to be open and public, unless otherwise provided by a specific statute. Open meetings are the rule in Nevada, and exceptions to the Open Meeting Law are strictly construed. *McKay v. Bd. of Supervisors*, 102 Nev. 644, 651, 730 P.2d 438, 443 (1986).

The Open Meeting Law only authorizes closed meetings in limited circumstances. NRS 241.030(1) provides that the Open Meeting Law does not prevent a public body from holding a closed meeting “to consider the character, alleged misconduct, professional competence, or physical or mental health of a person.” This exception does not authorize a closed session to consider private financial information submitted to the CDC pursuant to a nondisclosure or confidentiality agreement.

NRS 241.015(2)(b)(2) provides an exception to the definition of a “meeting” for a gathering of members of the public body to “receive

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

information from the attorney employed or retained by the public body regarding potential or existing litigation involving a matter over which the public body has supervision, control, jurisdiction or advisory power and to deliberate toward a decision on the matter, or both.” This exception does not authorize a closed session to consider private financial information submitted pursuant to a nondisclosure or confidentiality agreement. Therefore, there are no exceptions to the Open Meeting Law which would allow the CDC board to hold a closed session to consider financial information that is submitted to it pursuant to a nondisclosure or confidentiality agreement.

CONCLUSION TO QUESTION THREE

The Community Development Corporation board may not consider private financial information submitted to it pursuant to a nondisclosure or confidentiality agreement in a closed meeting.

QUESTION FOUR

Is CDC a “governmental entity” under the Public Records Law, NRS chapter 239?

ANALYSIS

The Public Records Law applies to governmental entities. “Governmental entity” is defined in NRS 239.005(4) as follows:

“Governmental entity” means:

- (a) An elected or appointed officer of this state or of a political subdivision of this state;
- (b) An institution, board, commission, bureau, council, department, division, authority or other unit of government of this state or of a political subdivision of this state;
- (c) A university foundation, as defined in NRS 396.405; or
- (d) An educational foundation, as defined in NRS 388.750, to the extent that the foundation is dedicated to the assistance of public schools.

This office has already concluded that the CDC is a public body within the meaning of the Open Meeting Law. *See* letter dated April 12, 2001 from Norman J. Azevedo, Chief Deputy Attorney General, Civil Division, to Ted Vernes, Chairman, Eureka County Taxpayer’s League. In order to determine whether the CDC was a public body, we considered whether the CDC was an “administrative, advisory, executive or legislative body of the state or a local

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

government.” This required an analysis of whether the entity (1) owes its existence to and has some relationship with a state or local government, (2) is organized to act in an administrative, advisory, executive, or legislative capacity, and (3) performs a government function. *See Nevada Open Meeting Law Manual, Ninth Edition*, October 2001, § 3.01; *see also* OMLO 99-05 (January 12, 1999).

In determining that the CDC was an administrative, advisory, executive, or legislative body of a local government, we found as follows:

CDC is a private non-profit corporation. However, it was formed at the direction of the Commission, and incorporated by two of the three Commissioners. Where a government body or agency itself establishes a civic organization, even though it is composed of private citizens, it may well constitute a “public body” under the law. *Palm Beach v. Gradison*, 296 So. 2d 473, 476 (Fla. 1974). Even though a county commissioner may not sit on the current board of directors, the directors are selected by the Commission pursuant to CDC’s bylaws. The assets of CDC, in the event of dissolution, revert to the County. Furthermore, the CDC’s purpose is to grant loans to persons or entities coming before it, where the money for those loans comes directly from the County. The purpose of the loans is economic development, a goal and function of the County government. CDC clearly owes its existence to Eureka County, it was organized to act in an administrative capacity, as the entity granting loans of county funds for economic development, and it performs the government function of granting such loans. Thus, CDC meets the first element of being considered a public body, as it can be considered an “administrative, advisory, executive or legislative body” of “a local government.” CDC also clearly meets the second element of disbursing and being supported in whole or in part by tax revenue, as its funding comes directly from the County. Therefore, CDC is subject to the Open Meeting Law.

Letter dated April 12, 2001 from Norman J. Azevedo, Chief Deputy Attorney General, Civil Division to Ted Vernes, Chairman, Eureka County Taxpayer’s League (footnote omitted).

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

We also noted that, where a private, non-profit corporation had its board appointed by a county board of commissioners, it occupied premises owned and provided by the county under a lease, and in the event of dissolution the entity was obligated to transfer its assets to the county, the entity was found to be an agent of the county. *News and Observer Publishing Co. v. Wake County Hosp. Sys.*, 284 S.E.2d 542, 547 (N.C. 1981).

In this case, the conclusion that the CDC is a public body for the purposes of the Open Meeting Law is determinative of whether the CDC is a governmental entity for the purposes of the Public Records Law. Pursuant to NRS 239.005(4)(b), an entity is a governmental entity for the purposes of the Public Records Law if the entity is a unit of government of a political subdivision of this state. We have already determined that the CDC is an administrative, advisory, executive, or legislative body of the Eureka County Commission. Therefore, the CDC is a unit of government of Eureka County. We reiterate that, because CDC clearly owes its existence to Eureka County, it was organized to act in an administrative capacity as the entity granting loans of county funds for economic development, and it performs the government function of granting such loans, CDC is a unit of government of Eureka County for the purposes of the Public Records Law.

This conclusion furthers the purpose of the Public Records Law. NRS chapter 239 was enacted “to ensure the accountability of the government to the public by facilitating public access to vital information about governmental activities.” *City of Reno v. Reno Gazette-Journal*, 119 Nev. Adv. Op. 6, 63 P.3d 1147, (2003) (citation omitted). This intent would be frustrated if governmental entities were able to shield their activities from public scrutiny by delegating their public duties to another entity. *Memphis Publ’g Co. v. Cherokee Children & Family Servs.*, 87 S.W.3d 67, 78-79 (Tenn. 2002). Our conclusion is also supported by authority from other jurisdictions.

In Tennessee, all state, county, and municipal records are open to the public unless otherwise provided by state law. *Id.* at 75. The court in *Memphis Publishing Company* considered whether the records of a non-profit corporation were subject to the public records law. The entity in question contracted with the Tennessee Department of Human Services to serve as a brokering agency that screened applicants and assisted eligible applicants in locating approved childcare providers. *Id.* at 71. The entity was not involved in the payment of subsidies, but virtually all of its operating revenue came from government sources. *Id.* After reviewing authority from other jurisdictions, the Tennessee Supreme Court determined that a functional

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

equivalency approach provides the best method to determine whether an entity is subject to public records laws. *Id.* at 78. The Court noted that Connecticut, Maryland, North Carolina, Oregon, and Kansas all followed this type of approach. *Id.* We believe that the approach utilized by the Tennessee Supreme Court is instructive in Nevada because of the similarities between the Tennessee and Nevada public records laws.

[P]rivate entities that perform public services on behalf of a government often do so as independent contractors. Nonetheless, the public's fundamental right to scrutinize the performance of public services and the expenditure of public funds should not be subverted by government or by private entity merely because the public duties have been delegated to an independent contractor. *When a private entity's relationship with the government is so extensive that the entity serves as the functional equivalent of a governmental agency, the accountability created by public oversight should be preserved.*

Consequently, in light of our duty to construe the Tennessee Public Records Act liberally in favor of "the fullest possible public access to public records," we follow the Connecticut Supreme Court and interpret records "made or received . . . in connection with the transaction of official business by any government agency" to include those records in the hands of any private entity which operates as the functional equivalent of a governmental agency. In making this determination, we look to the totality of the circumstances in each given case, and no single factor will be dispositive. The cornerstone of this analysis, of course, is whether and to what extent the entity performs a governmental or public function, for we intend by our holding to ensure that a governmental agency cannot, intentionally or unintentionally, avoid its disclosure obligations under the Act by contractually delegating its responsibilities to a private entity. Beyond this consideration, additional factors relevant to the analysis include, but are not limited to, (1) the level of government funding of the entity; (2) the extent of government involvement with, regulation of, or control over the entity; and (3) whether the entity was created by an act of the

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

legislature or previously determined by law to be open to public access.

Id. at 78-79 (footnotes omitted) (emphasis added).

The Tennessee Supreme Court emphasized that its holding is not intended to allow public access to the records of each private entity that provides services to governmental agencies. *Id.* at 79. A private business does not open its records to public scrutiny simply by doing business with, or performing services on behalf of, a governmental agency. “But when an entity assumes responsibility for providing public functions to such an extent that it becomes the functional equivalent of a governmental agency, the Tennessee Public Records Act guarantees that the entity is held accountable to the public for its performance of those functions.” *Id.* This Court found that the private entity in question was the functional equivalent of a governmental agency, and therefore was subject to the public records law. *Id.* at 80. This holding supports our conclusion that the CDC is a governmental entity for the purposes of Nevada’s Public Records Law. *See id.* at 79-80.

The New York Court of Appeals considered whether a non-profit corporation created to lessen the burdens of government, to administer loan programs, and to encourage, through incentive loans, the development of small businesses was an agency within the definition of New York’s public records law. *Matter of Buffalo News v. Buffalo Enter. Dev. Corp.*, 644 N.E.2d 277 (N.Y. 1994). The entity’s board of directors, according to the by-laws, included both public officials and representatives of private companies. *Id.* at 278. The court found that the entity was created by and for the City of Buffalo to attract investment and stimulate growth, undeniably governmental purposes. *Id.* at 279. Therefore, the court concluded that the entity was a governmental entity subject to the public records law, even though there was not substantial governmental control over its daily operations. *Id.* at 279-280. The New York definition of “agency” is similar to the definition of “governmental entity” found in NRS 239.005(4). *See id.* at 279.

The Superior Court of Connecticut found that an economic development corporation, formed at the direction of a community action agency and based on the recommendations of private citizens, was subject to the public records law because the non-profit corporation was essentially the alter ego of the public agency. *Meri-Weather, Inc. v. Freedom of Info. Comm’n*, 778 A.2d 1038, 1043 (2000).

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

In reaching this conclusion, we emphasize that not all economic development corporations or non-profit corporations which perform services for governmental agencies are governmental entities for the purpose of the Public Records Law. This determination must be made on a case-by-case basis considering the factors enumerated above. We also note that, given the policy considerations behind the Public Records Law, our conclusion that the CDC is a governmental entity for the purposes of the Public Records Law has no bearing upon any other areas of the law involving governmental entities.

CONCLUSION TO QUESTION FOUR

The Community Development Corporation is a governmental entity for the purposes of the Public Records Law.

QUESTION FIVE

If the CDC is a “governmental entity” under the Public Records Law, is private financial information provided to the CDC pursuant to a nondisclosure or confidentiality agreement under NRS 241.020(4)(c)(1) information which may be declared confidential?

ANALYSIS

NRS 239.010 provides, in part, as follows:

All public books and public records of a governmental entity, the contents of which are not otherwise declared by law to be confidential, must be open at all times during office hours to inspection by any person, and may be fully copied or an abstract or memorandum may be prepared from those public books and public records.

As noted above, this office recently opined that, for the purposes of NRS 239.010, a record can only be declared by law to be confidential by a statute or regulation. Op. Nev. Att’y Gen. No. 2002-32 (Aug. 27, 2002). Therefore, a public body cannot make information confidential by entering into a nondisclosure or confidentiality agreement. *See id.*

The CDC will need to determine, on a case-by-case basis, whether individual documents are considered confidential by a statute or regulation. For instance, this office has opined that credit reports obtained in the course of a background investigation are not public information pursuant to federal law.

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

Op. Nev. Att’y Gen. No. 99-17 (May 19, 1999). In addition, depending on the type of information received from an individual applicant, the privilege for trade secrets might apply. *See* NRS 49.325; NRS chapter 600A.

In determining whether a governmental record is “public” for purposes of NRS 239.010, the Nevada Supreme Court has recognized a common law limitation on the provision of NRS 239.010. In *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990), the Court balanced the public interest in disclosure against the public interest served by nondisclosure to determine whether a police investigative report was a confidential record. This office has on several occasions applied the *Donrey* test to determine whether a record is public for purposes of NRS 239.010. Op. Nev. Att’y Gen. No. 90-15 (Oct. 1990) (file of licensee kept by the State Board of Nursing); Op. Nev. Att’y Gen. No. 94-06 (April 7, 1994) (bid packets generated by the State Purchasing Division); Op. Nev. Att’y Gen. No. 97-06 (Feb. 11, 1997) (information concerning permit holder contained on permit to carry concealed weapon); and Op. Nev. Att’y Gen. No. 99-33 (Oct. 12, 1999) (information in file of person licensed by the Nevada Board of Psychological Examiners). Under the *Donrey* balancing test, a governmental record will be deemed to be public unless the public interest in disclosure is outweighed by the public interest in nondisclosure. *Donrey*, 106 Nev. at 636.

Prior to the *Donrey* ruling, we used a similar balancing test when considering whether certain records were public records. Op. Nev. Att’y Gen. No. 89-18 (Nov. 30, 1989) (employment application submitted to Reno Housing Authority); Op. Nev. Att’y Gen. No. 87-5 (Jan. 26, 1987) (material submitted to State Department of Education as part of private school application). Therefore, the CDC will need to apply a balancing test to the information on a case-by-case basis to determine if the information is subject to disclosure. When making this determination, the CDC should be mindful of the policy considerations behind the Public Records Law. The agency bears the burden of establishing that a privilege based on confidentiality exists. *DR Partners v. Bd. of County Comm’rs*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000). Privileges, whether created by statute or by common law, are narrowly construed. *Id.* Where there is insufficient justification to maintain the confidentiality of the information, the balance must be struck in favor of public and open government. Op. Nev. Att’y Gen. No. 99-33 (Oct. 12, 1999).

In *San Gabriel Tribune v. Superior Court of Los Angeles County*, 192 Cal.Rptr. 415 (Cal. App. 1983), the court applied a balancing test to determine whether financial records obtained by a city in connection with a contract with

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

a private disposal company were public records. The financial information was submitted to the city by the disposal company to justify a rate increase. The court first looked at whether the records fit within the definition of public records and then determined whether any exemptions applied. When finding the records to be public records, the court stated:

We conclude that the financial data that the City relied on in granting the rate increase constitutes a public record subject to public disclosure. The City has a contractual relationship with the Disposal Company. The City delegated its duty of trash collection to the Disposal Company but still retained the power and duty to monitor the Disposal Company's performance of its delegated duties, under the express terms of the contract. . . . Assurances of confidentiality by the City to the Disposal Company that the date [sic] would remain private was not sufficient to convert what was a public record into a private record.

Id. at 422. When the court found that the balancing test did not justify keeping a document confidential, the court noted:

We are mindful that respondents may have legitimate privacy interests to protect, yet, the interests on the part of the City in not chilling future information-gathering abilities in business transactions, and on the part of the Disposal Company in jeopardizing competitive advantages, does not outweigh the public's need to be informed of the provision of governmental services contracted on behalf of the residents. *Id.* at 426.

The financial information submitted to the CDC, pursuant to a nondisclosure or confidentiality agreement, may be subject to public disclosure upon a request pursuant to NRS 239.010. This is true even if the Open Meeting Law does not require the public body to provide that information as agenda support material upon request. In order to determine if this information must be disclosed to the public, the CDC will need to review the information on a case-by-case basis to determine if the information is declared confidential by a specific statute or regulation or if the public interest in disclosure is outweighed by the public interest in nondisclosure.

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

CONCLUSION TO QUESTION FIVE

Community Development Corporation will need to determine, on a case-by-case basis, whether particular financial information is considered confidential by a specific statute or regulation in order to determine whether the information is subject to public disclosure pursuant to NRS 239.010. If the information is not deemed confidential by a specific statute or regulation, then the CDC will need to engage in the *Donrey* balancing test to determine whether the information must be disclosed upon a public request. The information may be subject to public disclosure pursuant to NRS 239.010 even though the information may be subject to a nondisclosure or confidentiality agreement and was not required to be provided pursuant to a request for agenda support material.

BRIAN SANDOVAL
Attorney General

By: TINA M. LEISS
Senior Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2003-02 FEES; PUBLIC ADMINISTRATORS; DISTRICT ATTORNEYS: The ex officio public administrator of White Pine County may not keep fees collected pursuant to NRS 253.050 for his personal use but must turn the fees over to the county treasury, without deduction, pursuant to the requirements of NRS 253.050(1) and NRS 245.043(2).

Carson City, July 28, 2003

Richard W. Sears, White Pine County District Attorney, 801 Clark Street,
Suite 3, Ely, Nevada 89301

Dear Mr. Sears:

You have requested an opinion from this office concerning the proper disposition of fees collected by you as ex officio public administrator for White Pine County.

QUESTION

May the ex officio public administrator of White Pine County keep fees collected pursuant to NRS 253.050 for his personal use, or must he pay the fees to the White Pine County treasury?

ANALYSIS

NRS 253.050 provides in relevant part:

1. For the administration of the estates of deceased persons, public administrators are entitled to be paid as other administrators or executors are paid, *subject to the provisions of NRS 245.043.*
2. The district attorneys of Lander, Lincoln and White Pine counties as ex officio public administrators and the clerk of Carson City serving as public administrator of Carson City *may retain all fees* provided by law received by them as public administrators. [Emphasis added.]

NRS 245.043 provides in relevant part:

2. Except as otherwise provided by any special law, the elected officers of the counties of this state are entitled to receive annual salaries in the base amounts specified in the

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

following table. The annual salaries are in full payment for all services required by law to be performed by such officers. Except as otherwise provided by law, *all fees* and commissions collected by such officers in the performance of their duties *must be paid into the county treasury each month without deduction* of any nature. [Emphasis added.]

The table referred to in NRS 245.043(2) is found at Act of July 5, 1995, ch. 650, §1, 1995 Nev. Stat. 2518. This was the last time the salaries of county officers had been raised, which was prior to the Nevada Legislature's consideration of salary increases for those officers during the 2003 Legislative Session.

NRS 253.050(1) provides that the ex officio public administrator is entitled to be paid as other administrators are paid, "subject to the provisions of NRS 245.043." NRS 245.043(2) then provides that all fees collected "must be paid into the county treasury." These provisions, read together, clearly require that fees collected as ex officio public administrator must be paid to the county treasury. However, NRS 253.050(2) provides that the district attorney of White Pine County, while serving as ex officio public administrator, may "retain all fees" that he collects when performing as ex officio public administrator, indicating that the fees may be kept by the ex officio public administrator and need not be sent to the county treasury. The subject statutes are in conflict and therefore susceptible to different interpretations as to the proper disposition of fees collected by you, as White Pine County's Public Administrator. When confronted with a statutory ambiguity, our duty is to attempt to ascertain the Legislature's intent. *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1056, 944 P.2d 835, 840 (1997).

A guiding principle in ascertaining legislative intent is that "when statutes are in conflict, the one more recent in time controls over the provisions of an earlier enactment." *Laird v. Nevada Pub. Employees Ret. Bd.*, 98 Nev. 42, 45, 639 P.2d 1171 (1982). We have reviewed the legislative history of the above-cited statutory provisions and have found that the "may retain all fees" language has existed since at least 1969. Act of April 29, 1969, ch. 672, § 24, 1969 Nev. Stat. 1466. However, in 1979 the Nevada Legislature amended NRS 253.050 and added NRS 245.043 in Senate Bill 556 (S.B. 556). Section 13 of S.B. 556 amended NRS 253.050 as follows, with deleted language in brackets and new language set out in italics:

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

1. For the administration of the estates of deceased persons, public administrators [shall] *are entitled to* be paid as other administrators or executors are paid [.] , *subject to the provisions of section 6 of this act.*

Act of May 26, 1979, ch. 515, § 13, 1979 Nev. Stat. 994.

S.B. 556 also added NRS 245.043 as section 6, providing in relevant part: “*All fees or compensation collected pursuant to NRS 253.050 . . . must be deposited, without deduction, with the county treasurer for credit to the general fund of the county.*” Act of May 26, 1979, ch. 515, § 6, 1979 Nev. Stat. 992.

Therefore, the requirement that fees collected by you, in your role as ex officio public administrator, be turned over to the county treasurer is a legislative enactment that post-dates the enactment of the “may retain all fees” provision of NRS 253.050(2). Under the principle announced in *Laird*, the later enactment controls. Accordingly, the ex officio public administrator of White Pine County may not keep fees collected pursuant to NRS 253.050 for his personal use but must instead turn the fees over to the county treasury, without deduction, pursuant to the requirements of NRS 253.050(1) and NRS 245.043(2). We understand that this comports with your current practice.

CONCLUSION

The ex officio public administrator of White Pine County may not keep fees collected pursuant to NRS 253.050 for his personal use but must turn the fees over to the county treasury, without deduction, pursuant to the requirements of NRS 253.050(1) and NRS 245.043(2).

BRIAN SANDOVAL
Attorney General

By: JAMES T. SPENCER
Senior Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2003-03 STATUTES; EMPLOYEES; ATTORNEYS: An agency may question possible witnesses and review documentary evidence to support or refute allegations against an employee suspected of misconduct before providing the written notice to the employee required by section 4. An agency may act to remove its employee from duty or from the workplace pursuant to NAC 284.656(2) or (3) without affording the employee the notice required under section 4. Once the two business days' notice requirement of section 4 has elapsed, the agency may schedule the questioning of the employee at any time, subject to any relevant payment due the employee for call back or overtime pay, if the questioning is not conducted during the employee's regularly scheduled work time.

Carson City, September 9, 2003

Jeanne Greene, Director, Department of Personnel, 209 E. Musser Street,
Room 101, Carson City, Nevada 89701-4204

Dear Ms. Greene:

You have requested an opinion from this office concerning the requirements of section 4 of Senate Bill 331 of the 2003 Session of the Nevada Legislature (section 4), a provision which adds a new section to chapter 284 of the Nevada Revised Statutes.

Section 4 provides as follows:

An employee who is the subject of an internal administrative investigation that could lead to disciplinary action against him pursuant to NRS 284.385 must be:

1. Provided notice in writing of the allegations against him before he is questioned regarding the allegations; and
2. Afforded the right to have a lawyer or other representative of his choosing present with him at any time that he is questioned regarding those allegations. The employee must be given not less than 2 business days to obtain such representation, unless he waives his right to be represented.

QUESTION ONE

May an agency question possible witnesses and review documentary evidence to support or refute allegations against an employee suspected of

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

misconduct before providing the required pre-questioning notice to the suspected employee?

ANALYSIS

Section 4 is straightforward: An agency that suspects one of its employees of misconduct that may lead to a dismissal, demotion, or suspension pursuant to NRS 284.385 must give the employee at least two business days' written notice of any allegations of misconduct and of his right to obtain representation before questioning the employee about the allegations. The two business days' notice is intended to allow the employee to find a person to accompany the employee during the questioning. The protection attaches only where the employee's agency intends to question the suspect employee about allegations of misconduct.

The provision does not address how the agency may deal with potential witnesses and documentary evidence that may support or refute suspected misconduct by the employee. However, completing that part of the investigation to the extent possible before approaching the employee for questioning would appear to be proper in most cases. Witness interviews and document review may clear the employee of suspicion of misconduct by demonstrating that the suspected employee did not engage in misconduct, or, if he did, the interviews and documents may allow the agency to narrow the allegations against the suspected employee. Therefore, questioning of percipient witnesses and review of relevant documents before approaching the suspect employee for questioning could benefit the employee by clearing the employee or by narrowing the scope of the questions at his subsequent and properly noticed interview, if one is conducted.

We note, however, that an agency need not in all cases question its suspected employee before initiating discipline pursuant to NRS 284.385. Where an agency possesses sufficient evidence of misconduct by one of its employees from sources other than the employee, the agency may simply serve the employee with a specificity of charges. Where an agency does not seek to question its suspected employee, the right to notice and representation under section 4 does not attach. In such a case, the employee would, however, still usually be entitled to the pre-disciplinary protections and right of representation currently provided in NAC 284.656(1)(1).

CONCLUSION TO QUESTION ONE

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

An agency may question possible witnesses and review documentary evidence to support or refute allegations against an employee suspected of misconduct before providing the written notice to the employee required by section 4.

QUESTION TWO

May an agency dismiss, suspend, or place an employee on administrative leave pursuant to NAC 284.656(2) and (3) prior to providing the employee section 4 rights?

ANALYSIS

NAC 284.656(1) provides the pre-disciplinary procedural requirements for suspending or dismissing an employee under usual circumstances. These requirements include setting a deadline for his agency to provide its employee written allegations of misconduct, setting a deadline for a pre-disciplinary hearing, providing certain administrative leave for an employee to prepare for his disciplinary hearings, and allowing an employee to select a person to accompany him to his pre-disciplinary hearing. NAC 284.656(2) and (3) are exceptions to the standard pre-disciplinary procedures under certain and extreme circumstances, providing:

2. The procedure specified in subsection 1 need not be followed before dismissing or suspending a permanent employee if the circumstances give the appointing authority a reasonable cause to believe that the retention of an employee on active duty poses a threat to life, limb or property or may be seriously detrimental to the interests of the state.

3. If the circumstances set forth in subsection 2 are present, the appointing authority may temporarily assign the employee to duties in which those circumstances do not exist or, if the temporary assignment is not feasible:

(a) Immediately place the employee on administrative leave with pay until the procedure set forth in subsection 1 has been followed; or

(b) Immediately suspend or dismiss the employee. In this case the appointing authority, his designated representative, or the employee's supervisor shall attempt to inform the employee before the action is taken of the charges against him and provide the employee with an opportunity to rebut the charges. The procedure set forth in subsection 1 must be

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

followed as soon as practicable after the immediate suspension or dismissal.

The requirement in NAC 284.656(2) that the agency have “reasonable cause to believe” that the presence of one of its employees in the workplace will pose certain serious threats indicates that the agency has independent knowledge of the risk of the employee’s presence. As discussed in the analysis to Question One, where the agency acquires sufficient evidence to support a conclusion that the employee engaged in misconduct (or here, evidence that the employee poses a certain kind of threat), there is no reason for the agency to question the employee before acting. Accordingly, the agency may act pursuant to NAC 284.656(2) or (3) without affording the employee section 4 rights. However, once the employee is removed from duty or from the workplace under one of these two provisions, the agency must provide the employee with the notice required by section 4 before questioning the employee about any allegations of misconduct as required by section 4.

CONCLUSION TO QUESTION TWO

An agency may act to remove its employee from duty or from the workplace pursuant to NAC 284.656(2) or (3) without affording the employee the notice required under section 4. However, once its employee is removed from duty or from the workplace pursuant to subsection 2 or 3, the agency must provide the employee with the notice required by section 4 before questioning the employee about any allegations of misconduct as required by that section.

QUESTION THREE

Does section 4 permit the agency performing an investigation into misconduct of an employee to set the time of the employee’s questioning at any time following the expiration of the two business days’ notice requirement?

ANALYSIS

Section 4’s limitation on the questioning by an agency of an employee suspected of misconduct is that the employee must be given at least two business days’ notice to obtain representation. Based on the limited and clear language of section 4, once the two business days’ notice has elapsed, the agency may then schedule the questioning of the employee at any time, subject to any relevant payment due the employee for call-back or overtime pay, if the

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

questioning is not conducted during the employee's regularly scheduled work time.

CONCLUSION TO QUESTION THREE

Once the two business days' notice requirement of section 4 has elapsed, the agency may schedule the questioning of the employee at any time, subject to any relevant payment due the employee for call back or overtime pay, if the questioning is not conducted during the employee's regularly scheduled work time.

BRIAN SANDOVAL
Attorney General

By: JAMES T. SPENCER
Senior Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2003-04 WITHDRAWN

AGO 2003-05 TERM LIMITATIONS; PUBLIC OFFICER; LIBRARIES:

The term limitation established in NRS 379.020 for library trustees is capable of more than one reasonable interpretation. Because the legislative history of the statute is silent on the issue, application of the well settled rules of statutory construction is appropriate. Based on the Legislature's failure to expressly limit a library trustee's length of service to eight years, appointment to a partial term does not affect the trustee's eligibility to serve two full, four-year terms.

Carson City, October 6, 2003

David Roger, District Attorney, Office of the District Attorney, 500 South Grand Central Parkway, P. O. Box 552215, Las Vegas, Nevada 89155-2215

Dear Mr. Roger:

You have asked for an opinion of the Office of the Attorney General regarding the following question:

QUESTION

Under NRS 379.020(1) and (2), is the appointment of an individual to fill the remainder of an unexpired term regarded as a "term" for the purposes of a term limitation?

ANALYSIS

Pursuant to NRS 379.020(2), no trustee of a county library may be appointed to hold office for more than two consecutive four-year terms. The statute is silent on whether appointment for a period of fewer than four years preceding the appointment to a four-year term would preclude a trustee from serving a second four-year term. Thus the true issue presented is whether the phrase "more than two consecutive 4-year terms" was meant to limit service to eight years or to two full terms in addition to any partial term a trustee may serve when appointed to fill a vacancy.

NRS 379.020(2) can be read to limit a trustee only with respect to full, four-year terms, making service of any partial term irrelevant with respect to term limitations. The same statute can also be read to limit a library trustee to a maximum of eight years of service. "Where a statute is capable of being understood in two or more senses by reasonably informed persons, the statute is ambiguous." *McKay v. Board of Supervisors*, 102 Nev. 644, 649, 730 P.2d

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

438, 442 (1986). Because the statute is ambiguous, a resort to the principles of statutory construction is appropriate. *Advanced Sports Information, Inc. v. Novotak*, 114 Nev. 336, 956 P.2d 806 (1998).

The legislative history of NRS 379.020 is silent with respect to the issue at hand. Therefore, the legislative intent must be construed in light of reason and public policy. *Polson v. State*, 108 Nev. 1044, 1047, 843 P.2d 825, 827 (1992).

According to the Nevada Supreme Court, there exists a presumption favoring the right to hold office. *Gilbert v. Breithaupt*, 60 Nev. 162, 104 P.2d 183 (1940). Though the right to hold office was not the ultimate issue decided in *Gilbert*, the Nevada Supreme Court did note “[t]he right to hold public office is one of the valuable rights of citizenship. The exercise of this right should not be declared prohibited or curtailed except by plain provisions of law. Ambiguities are to be resolved in favor of eligibility to office.” *Id.* at 165 (citation omitted).

However, a similarly compelling argument exists for the implementation of term limitations. The United States Supreme Court expressed the public policy behind term limits for elected officials in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). In that case the Court noted that the purpose of term limits is to (1) prevent extended control of an office by an individual; (2) provide for infusion of fresh ideas and new perspectives; and (3) decrease the likelihood that a representative will lose touch with his constituents. *Id.* at 837.

While both *U.S. Term Limits* and *Gilbert* deal with term limitations for elected officials, the reason and policy behind both decisions is equally valid when applied to appointed officials. Thus reference to reason and public policy are not particularly enlightening in this instance. Therefore, reliance on another method of statutory construction is warranted.

In a statute where certain things are enumerated, others are to be excluded. *State ex rel. Kendall v. Cole*, 38 Nev. 215, 220, 148 P. 551, 553 (1915). NRS 379.020 specifically states that four-year terms apply towards the term limitation set forth therein. Partial terms are not mentioned with respect to term limitations.

Moreover, a review of similar statutory provisions supports the argument against restricting service to a total of eight years. For example, NRS

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

706.8818, dealing with the appointment of members of the Taxicab Authority, specifically limits an appointee to service of not more than six years. Additionally, in NRS chapters 628, 630, 634, and 319, the Legislature specifically addresses the effect of service of a partial term on term limitations. The Legislature is presumed to have full knowledge of existing statutes and regulations relating to the same topic. *City of Boulder City v. General Sales Drivers*, 101 Nev. 117, 118-19, 694 P.2d 498 (1985). If the Legislature had wanted a specific term limitation in NRS 379.020, it was aware of the method by which to do so.

CONCLUSION

Based on well-settled rules of statutory construction, the term limitation set forth in NRS 379.020 was not meant to prevent a library trustee appointed to fill a vacancy for a period of less than a four-year term from serving two full, four-year terms following his initial appointment to a partial term.

BRIAN SANDOVAL
Attorney General

By: ANN C. ELWORTH
Senior Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2003-06 COUNTIES; JUSTICE COURTS; JURISDICTION: A justice of the peace has the same geographical authority whether acting as a justice of the peace in misdemeanor cases or as a magistrate in felony or gross misdemeanor preliminary hearings. Therefore, NRS 1.050(3), in conjunction with NRS 4.370(4) and 171.196, confers jurisdiction upon justices of the peace or magistrates to conduct preliminary hearings in felony or gross misdemeanor cases “to the limits of their respective counties.”

Carson City, October 17, 2003

Gary D. Woodbury, Elko County District Attorney, 575 Court Street, Elko, Nevada 89801

Dear Mr. Woodbury:

You have requested that the Office of the Attorney General provide an opinion regarding the jurisdiction of a justice of the peace in preliminary examinations in gross misdemeanor and felony cases.

QUESTION

Does Nevada Revised Statute 1.050(3) (NRS 1.050(3)), which requires proceedings in justice courts to be held within their respective townships, prohibit a district attorney from conducting felony or gross misdemeanor preliminary hearings in any other justice court within the county?

ANALYSIS

NRS 1.050(3) states that “Justices’ courts shall be held in their respective townships, precincts or cities, and municipal courts in their respective cities.” NRS 4.370(4) states: “Except as otherwise provided in subsections 5 and 6, in criminal cases the jurisdiction of justices of the peace extends to the limits of their respective counties.’ In some jurisdictions, NRS 4.370(4) has been interpreted not only to mean that a district attorney can try misdemeanor cases in any justice court within the county, but also can file felony and gross misdemeanor complaints and conduct preliminary examinations in any justice court within the county in which the offense was committed.

The issue raised in this opinion is whether NRS 4.370(4), in fact, applies equally to felony or gross misdemeanor preliminary hearings as it does to misdemeanor prosecutions. NRS 4.370(3) provides: “Justices’ courts have

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

jurisdiction of all misdemeanors and no other criminal offenses except as otherwise provided by specific statute.” Justices’ courts do not have jurisdiction to try felony or gross misdemeanor charges. *Woemer v. Justice Court of Reno Township, et al.*, 116 Nev. 518, 515, 1 P.3d 377, 381 (2000). However, it is axiomatic that justices’ courts may preside over preliminary examinations in felony and gross misdemeanor cases: “If an offense is not triable in the justice’s court, the defendant must not be called upon to plead. If the defendant waives preliminary examination, the magistrate shall immediately hold him to answer in the district court.” NRS 171.196(1). NRS 171.196 refers to the justice of the peace as a “magistrate” in defining the authority of a justice of the peace to hear preliminary hearings in felony and gross misdemeanor cases.

We can find no authority that the use of the term “magistrate” in NRS 171.196 is intended to limit the geographical jurisdictional authority of the justice of the peace with respect to NRS 4.370(4) in conducting preliminary examinations in gross misdemeanor or felony offenses.

NRS 169.085 provides the following:

“Magistrate” means an officer having power to issue a warrant for the arrest of a person charged with a public offense and includes:

1. Justices of the Supreme Court;
2. Judges of the district courts;
3. *Justices of the peace*;
4. Municipal judges; and
5. *Others upon whom are conferred by law the powers of a justice of the peace in criminal cases.* [Emphasis added.]

While it is clear that a justice of the peace has different legal authority over a misdemeanor than he or she has over a felony or gross misdemeanor preliminary hearing, we see no reason to conclude that the use of the term “magistrate” is intended to create a distinction in the geographical jurisdictional authority that a justice of the peace has over misdemeanor, gross misdemeanor, or felony proceedings. We have found no authority to indicate that the term “magistrate,” as used in NRS 171.196 or as defined in NRS 169.095, is intended to limit the geographical jurisdictional authority of the justice of the peace granted in NRS 4.370(4) in conducting preliminary hearings.

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

CONCLUSION

We conclude that a justice of the peace has the same geographical authority whether acting as a justice of the peace in misdemeanor cases or as a magistrate in felony or gross misdemeanor preliminary hearings. We therefore conclude that NRS 1.050(3), in conjunction with NRS 4.370(4) and 171.196, confers jurisdiction upon justices of the peace or magistrates to conduct preliminary hearings in felony or gross misdemeanor cases “to the limits of their respective counties.”

BRIAN SANDOVAL
Attorney General

By: GERALD J. GARDNER
Chief Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2003-07 INDIANS; CITATIONS; JURISDICTION: In NRS 171.1255, the Legislature expressly provided authority for tribal police to arrest non-Indian violators on reservations and colonies for prosecution in state courts, and this authority includes power to issue citations in lieu of full custodial arrest. This construction of NRS 171.1255 is consistent with the Legislature's intent to establish tribal law enforcement authority over non-Indians on reservations and colonies, as well as its understanding when enacting NRS 484.795 that a traffic citation is a form of arrest.

Carson City, October 23, 2003

Gary D. Woodbury, Elko County District Attorney, 575 Court Street, Elko, Nevada 89801

Dear Mr. Woodbury:

You have asked this office for an opinion concerning the authority of tribal police to issue citations to non-Indians for traffic violations on state or county roads passing through a reservation.

QUESTION

Do tribal and U.S. Bureau of Indian Affairs (BIA)¹ police possess authority to cite non-Indians into the Elko Justice or Municipal Court for traffic offenses taking place on a state, county, or city easement in the Elko Indian Colony?

ANALYSIS

You have supplied some factual description with your opinion request that indicates tribal police have issued traffic citations on city streets (Golf Course Road and Ruby Vista Drive) within the boundaries of the Elko Indian Colony.² Offenders are not cited into tribal courts, but instead into justice or municipal courts of the State.

This office has previously opined on the subject of tribal law enforcement authority over non-Indians in Indian country.³ In Op. Nev. Att'y Gen. No. 94-19 (June 6, 1994) addressed to Gerald Allen, Executive Director of the Nevada Indian Commission, this office concluded that "[t]ribal authorities are

¹ Although BIA officers are federal, not tribal, employees, they will be referred to herein collectively with tribal officers unless the context requires separate reference.

² The Colony was established March 23, 1918, by Executive Order No. 2824.

³ The term "Indian country" denotes land which is both (1) set aside for Indians, and (2) under federal superintendence. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). We take this opportunity to limit the effect of the previous opinion to more accurately reflect the express statutory language, giving authority to tribal police over crimes by non-Indians that occur only on colonies and reservations.

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

authorized by NRS 171.1255 to arrest certain non-Indians who violate state law in Indian country.” NRS 171.1255 provides:

1. Except as otherwise provided in subsection 2, an officer or agent of the Bureau of Indian Affairs or a person employed as a police officer by an Indian tribe may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

(a) For a public offense committed or attempted in his presence.

(b) When a person arrested has committed a felony or gross misdemeanor, although not in his presence.

(c) When a felony or gross misdemeanor has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

(d) On a charge made, upon a reasonable cause, of the commission of a felony or gross misdemeanor by the person arrested.

(e) When a warrant has in fact been issued in this state for the arrest of a named or described person for a public offense, and he has reasonable cause to believe that the person arrested is the person so named or described.

(f) When the peace officer has probable cause to believe that the person to be arrested has committed a battery upon that person’s spouse and the peace officer finds evidence of bodily harm to the spouse.

2. Such an officer or agent may make an arrest pursuant to subsection 1 only:

(a) Within the boundaries of an Indian reservation or Indian colony for an offense committed on that reservation or colony; or

(b) Outside the boundaries of an Indian reservation or Indian colony if he is in fresh pursuit of a person who is reasonably believed by him to have committed a felony within the boundaries of the reservation or colony or has committed, or attempted to commit, any criminal offense within those boundaries in the presence of the officer or agent.

For the purposes of this subsection, “fresh pursuit” has the meaning ascribed to it in NRS 171.156.

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

Additionally, it was concluded, “[t]here is no requirement for an agreement between the affected tribe and any other political entity before such authority may be exercised.” *Id.*⁴

The further question considered in this opinion is the authority of tribal police to issue citations in lieu of arrest. The answer to this question turns on the ultimate issue of whether the expressly granted authority to arrest includes the implied additional authority to issue a citation.

A citation is in actuality an arrest and release.⁵

The idea of issuing a citation is . . . to avoid the unceremonious removal, perhaps in the middle of the night, of the responsible citizen from the highway and his subsequent incarceration in a local jail in lieu of bail. . . . [A citation] in effect is a release of the defendant on his personal recognizance. A citation is not a warrant. An arrest has already occurred.

State v. Doolittle, 419 P.2d 1012, 1015 (Wash. 1966). See also *People of the State of Illinois v. Kinney*, 546 N.E.2d 238, 240 (Ill. App. 1989); *State of Arizona v. Box*, 2003 Ariz. App. LEXIS 118, *10 (2003); ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, COMMENTARY on § 130.3 (1975). Cf. *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1498 (9th Cir. 1996); *State v. Mahan*, 483 N.W.2d 1, 3 (Iowa 1992); *State v. Earl*, 970 S.W.2d 789, 792 (Ark. 1998).

The recognition of a citation constituting an arrest plainly motivated the Legislature when it enacted S.B. 438 in 1967, which became NRS 484.795.⁶ NRS 484.795 provides:

⁴ These conclusions concerning the effect of state law are unaffected by the subsequent decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), which addressed only federal law, and in any event recognized in dictum that tribes may “detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law,” 520 U.S. at 456 n.11, even in the absence of state statutory authority.

⁵ This rule is stated for the limited purpose of determining the extent of authority given to tribal police by the Nevada Legislature. It is not intended, nor should it be construed, to suggest that a citation is the equivalent of a full custodial arrest for purposes of determining the statutory or constitutional rights of an accused. Compare *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (noncoercive aspect of ordinary traffic stops prompts the conclusion that persons temporarily detained pursuant to such stops are not “in custody” for the purposes of *Miranda*) and *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (Fourth Amendment does not preclude arrest for violation of seatbelt law).

⁶ Reference to the legislative record is made based upon the ambiguity inherent in the statutory language employed in both NRS 171.1255 and NRS 484.795. *Polson v. State*, 108 Nev. 1044, 1047, 843 P.2d 825, 826 (1992) (when statute is capable of being understood in two or more senses by reasonably informed persons, statute is ambiguous).

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

Whenever any person is halted by a peace officer for any violation of this chapter and is not required to be taken before a magistrate, the person may, in the discretion of the peace officer, either be given a traffic citation, or be taken without unnecessary delay before the proper magistrate. He must be taken before the magistrate in any of the following cases:

1. When the person does not furnish satisfactory evidence of identity or when the peace officer has reasonable and probable grounds to believe the person will disregard a written promise to appear in court;
2. When the person is charged with a violation of NRS 484.701, relating to the refusal of a driver of a vehicle to submit the vehicle to an inspection and test;
3. When the person is charged with a violation of [NRS 484.755](#), relating to the failure or refusal of a driver of a vehicle to submit the vehicle and load to a weighing or to remove excess weight therefrom; or
4. When the person is charged with a violation of [NRS 484.379](#), unless he is incapacitated and is being treated for injuries at the time the peace officer would otherwise be taking him before the magistrate.

Mr. Don Brown, Director of the State Highway Patrol, testifying in favor of the bill, stated: “A citation has been considered as an arrest. Highway patrolmen could not do this unless the misdemeanor was committed in their presence. *We would like to have the citation form of arrest made legal.*” *Hearing on S.B. 438 Before the Assembly Comm. on Judiciary*, 1967 Leg., 54th Sess. 5 (April 3, 1967) (emphasis added). Thus the Legislature understood that it was authorizing a form of arrest when it enacted NRS 484.795.

The intent embodied in A.B. 76, which became NRS 171.1255, was to fill a void in law enforcement in Indian country. The Legislature was concerned that non-Indian violators on reservations and colonies would escape prosecution. *See Hearing on A.B. 76 Before the Assembly Comm. on Judiciary*, 1985 Leg., 63rd Sess. 11 (February 11, 1985). Traffic offenses were of specific concern. *Hearing on A.B. 76 Before the Senate Comm. on Judiciary*, 1985 Leg., 63rd Sess. 4-5, 6 (March 25, 1985). It does not further this legislative purpose to construe NRS 171.1255 in a manner which leaves tribal officers without authority over a class of non-Indian violations if they occur on certain streets or roads within reservations and colonies. Reading NRS 171.1255 *in pari materia* with NRS 484.795, this legislative intent translates into authority for tribal police to issue

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

citations for traffic offenses to non-Indians when the offense occurs within the borders⁷ of a reservation or colony.⁸

This construction of NRS 171.1255 is not inconsistent with the holding in *State v. Bayard*, 119 Nev. Adv. Op. 29 (June 26, 2003). The Court did not rule in *Bayard* that a citation is not an arrest, only that “full custodial arrest” for minor traffic violations is improper under Nevada law unless objectively identifiable reasons exist to support it. Moreover, the Court in *Bayard* expressly recognized that full custodial arrest is sometimes permitted, and is mandated in specified cases, under the authority in NRS 484.795. Therefore, even if *Bayard* and NRS 484.795 were read restrictively in connection with NRS 171.1255, tribal officers would still have arrest authority over some traffic violators. However, this would produce the anomalous result that tribal officers would have authority over some non-Indian offenders but not others. This cannot have been the Legislature’s intent. *SIIS v. Bokelman*, 113 Nev. 1116, 1122, 946 P.2d 179, 183 (1997) (Supreme Court will not construe statute to produce unreasonable result). Presented with the choice, courts generally construe statutes with the view of promoting, rather than defeating, the legislative policy behind them. *State Dep’t of Mtr. Vehicles v. Lovett*, 110 Nev. 473, 477, 874 P.2d 1247, 1250 (1994). Here, where the choice is to construe NRS 171.1255 to either extend tribal arrest authority to include issuance of citations or to preclude such extension and only leave authority for full custodial arrest, the first alternative is the more reasonable reading.

CONCLUSION

In NRS 171.1255, the Legislature expressly provided authority for tribal police to arrest non-Indian violators on reservations and colonies for prosecution in state courts, and this authority includes power to issue citations in lieu of full custodial arrest. This construction of NRS 171.1255 is consistent with the Legislature’s intent to establish tribal law enforcement authority over non-Indians on reservations and colonies, as well as its understanding when enacting NRS 484.795 that a traffic citation is a form of arrest.⁹

⁷ Although the state, county, or city may own the highway or road right of way, and therefore tribal officials lack jurisdiction thereon under federal Indian law principles, *see State v. A-1 Contractors*, tribal police have authority as a matter of State law. Other contexts may require different results, but the grant of authority in NRS 171.1255 for violations occurring “within a reservation” is sufficiently broad to include rights of way or easements traversing a reservation, *see, e.g., State of Wisconsin v. Environmental Protection Agency*, 266 F.3d 741, 746 (7th Cir. 2001), and 18 U.S.C. § 1151, since it remains within the Legislature’s power to alter this meaning if it deems it necessary.

⁸ Reservations and colonies are synonymous terms in all respects relevant to this analysis. *United States v. McGowan*, 302 U.S. 535, 538-39 (1938).

⁹ We reach this conclusion irrespective of tribal or BIA officers’ status as peace officers identified in NRS chapter 289. Authority created by NRS 171.1255 is not conditioned upon such status and, in fact, would be rendered redundant by such a construction. This special authority for tribal and BIA officers was deemed necessary precisely because such officers are not state peace officers and would therefore not otherwise have authority over non-Indians, which is given in NRS 171.1255.

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

BRIAN SANDOVAL
Attorney General

By: C. WAYNE HOWLE
Senior Deputy Attorney General
