

OPEN MEETING LAW TASK FORCE

Meeting Minutes

Date of Meeting: March 9, 2016
Time of Meeting: 10:00 a.m.
Location: Video Conferenced between the Attorney General's Offices at 100 N. Carson Street, Moot Court Room, Carson City, Nevada 89701, and the Grand Sawyer Building, 555 W. Washington Ave., Las Vegas, Nevada 89101.

Attending in Carson City:

Chairman Brett Kandt, Chief Deputy Attorney General
Barry Smith, Executive Director, Nevada Press Association
Scott Doyle, Esq., Citizen, Douglas County

Attending in Las Vegas:

Adam Paul Laxalt, Nevada Attorney General
Tod Story, Executive Director of ACLU Nevada
Mary Anne Miller, Assistant District Attorney, Clark County
Cameron Stuart, Citizen/Public Member

Attending by phone from Reno:

Paul Lipparelli, Chief Deputy District Attorney, Washoe County
John Shipman, Assistant City Attorney, City of Reno

Others – Carson City:

George H. Taylor, Senior Deputy Attorney General

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

Chairman Brett Kandt (Chairman Kandt) initiated introductions welcoming the Open Meeting Law Task Force members on behalf of the Attorney General's Office (AGO). He said he was asked to chair the Open Meeting Law Task Force in an effort to work in collaboration to improve the Open Meeting Law (OML) as former Assistant Attorney General Keith Munro had done in the past. He stated he will also be handling legislative affairs for the AGO including any bills resulting from this task force. After other members introduced themselves, Chairman Kandt pointed out there were other members who could not be present for this meeting, but wished to continue participating as the group moves forward.

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

Chairman Kandt opened the floor for public comments:

Carson City: No public comment.

Las Vegas: One member of the public presented his remarks.

Cameron Stuart (Mr. Stuart) requested to speak. He read his comments from a letter he submitted to the Chairman prior to the meeting (see attachment). He asked the Task Force “to recognize the importance of getting the best collaborative performance from our Clark County School District Board of Trustees.” Lastly he added, “It is past time to make constructive changes to the Nevada’s Open Meeting Law adding constructive and compelling benefits to public education.” Chairman Kandt agreed to include Mr. Stuart’s letter in the records of this meeting.

Agenda Item No. 3: Discussion and possible action on approval of May 7, 2014, meeting minutes. (For possible action)

Chairman Kandt asked for a motion to approve the minutes of the last OML Task Force meeting held on May 7, 2014. Mr. Smith requested more time to make some changes to the language because he felt they do not reflect exactly what was said. Chairman Kandt agreed to postpone approval of the minutes.

Agenda Item No. 4: Review and discussion of any legislation from the 78th (2015) Nevada Legislative Session amending the Nevada Open Meeting Law, NRS Chapter 241. (<http://www.leg.state.nv.us/Session/78th2015/>)

Chairman Kandt informed the members that in the last legislative session, the AGO proposed some changes to the OML in Senate Bill (SB) 70 based on recommendations from this task force, which consequently were enacted into law after a few legislative modifications. The amendments included: 1) a statutory definition of “working day”; 2) changing “taking action against a person” to “regarding a person” for purposes of identifying the person on the agenda; 3) documenting agenda posting with a record showing the name of the person posting the agenda and the time it was posted; 4) clarification of who is authorized to designate a person to attend a meeting in place of a member for purpose of obtaining a quorum and take action; 5) requiring the approval of minutes within 45 days after the meeting or at the next meeting, whichever occurs later; 5) draft minutes and audio recording of a meeting available within 30 working days after adjournment of the meeting; 6) clarified that complaints alleging violations of the OML can be filed with the Attorney General’s Office; 7) OML complaints and AGO findings of fact and conclusions of law issued in an opinion are public records.

Chairman Kandt talked about Assembly Bill (AB) 40 making certain exceptions in the OML for the Gaming Control Board and noted no one from the AGO had testified on the bill.

Agenda Item No. 5: Review and discussion of recent federal and state court cases law on open meeting laws and/or Attorney General Open Meeting Law opinions.

Chairman Kandt indicated he was not aware of any recent significant case law, but notified the members that the OML manual published by the AGO was recently updated to include all the changes made during the last two legislative sessions, and the current version is available on the AGO's Website. Due to regular updates the manual has greatly expanded but he would be working along with Mr. Taylor to shorten it and make it more user-friendly. Mr. Smith offered to help with the project. Chairman Kandt added that the AGO training on Open Government, including OML, public records and ethics, provided to public bodies, state and local government entities, had been well received.

Chairman Kandt briefly talked about a couple of specific OML opinions issued by the AGO in the last couple of months. He explained that in both instances the AGO found that action taken by the public body was not clearly and completely identified the action on the meeting agenda. The second component in both cases had to do with the public body's attempt to take corrective action in a subsequent meeting after the OML violation. He explained that in both instances the AGO found that corrective action did not occur because in order to take appropriate corrective action the public body must go back and revisit, reconsider, and redeliberate on the subject in full public view. He emphasized that corrective action properly taken can mitigate the severity of the violation, which would be taken into account by the AGO as a mitigating factor when considering prosecution.

Chairman Kandt cautioned public bodies to be mindful of the NRS published online by the Legislative Counsel Bureau (LCB) because it has not been updated to incorporate the changes that were made to the OML during the 2015 Session.

Agenda Item No. 6: Discussion and identification of topics for future meetings, including possible proposed amendments to the Nevada Open Meeting Law, NRS Chapter 241.

Chairman Kandt reminded there is a short time frame to the next legislative session. The AGO is given 20 bill draft requests (BDRs) and one would be reserved for this task force if necessary; however, in order to meet the deadlines, the bill draft request along with any proposed language would have to be finalized and submitted to LCB by September 1, 2016. He urged the members to submit any relevant topics or issues they think should be considered.

George Taylor (Mr. Taylor) stated he has come across the same clear and complete issue numerous times before during his OML investigations, and urged the members to consider reexamining the rule in an effort to help public bodies to understand it. He spoke of another issue relevant to committees and subcommittees, whether the OML applies to them. He said it is not clear under the current OML Manual and recommended further dialogues to clarify who is or not subject to the OML.

Paul Lipparelli (Mr. Lipparelli) suggested they talk more about the agenda posting requirement and pointed out that the original language of “the three prominent places” goes back to 1977. He said the requirement to send someone out to “tack” a piece of paper on a bulletin Board was somewhat extraneous, because most people now get their access to meeting information through the Internet and other media sources. He gave an example of how Washoe County had to cancel two meetings in the past several months because the person posting their agenda was not able to accomplish it by 9:00 a.m. in all three locations due to the very basic language in statute—if it is not posted by 9:00 a.m., you are not complying with the notice requirement. He suggested the members recommend modifying the posting requirement.

Chairman Kandt acknowledged the language reads “at least three prominent places.” He also acknowledged that the idea of what a “place is” has completely evolved with Facebook and Instagram, and that in current times it may be more effective to have it posted in social media then on a physical bulletin board.

Mr. Taylor inquired about government websites and public bodies who are required to post it on their URL (Uniform Resource Locator). He asked Mr. Lipparelli and Mr. Shipman how this system was working out for their clients. Mr. Lipparelli said their automated system was very effective and easy to transmit their agendas directly to the State’s Website. Mr. Shipman agreed the online posting was fine, but the hardest part was the physical posting. He said he was concerned that if someone, who is unhappy with an item on the agenda, may try to manipulate or push for the item not be heard.

Tod Story (Mr. Story) agreed that the number of places the agenda is posted publically needs to be modified; however, keeping in mind that not every individual has access to a computer or the Internet. Both Mr. Smith and Ms. Miller proposed all these issues should be brought back for further discussion.

Mr. Taylor then inquired if there was any feedback from the public regarding the difference in posting.

Ms. Miller stated the only complaints they receive are usually about their website or something else, but not that the agenda was posted in the wrong place.

Barry Smith (Mr. Smith) reminded the members to also think about small communities like Esmeralda County, where people do expect to find notices posted in physical places.

Chairman Kandt asked Mr. Shipman if someone could automatically receive the posted agenda through the City of Reno’s App on their phone. Mr. Shipman responded he was not sure if the App works with regard to posted agenda.

Mr. Smith inquired if the public records statutes were something that would fall under the authority of this task force, or if the task force or limited to the OML issues.

Chairman Kandt indicated he wants to focus on the broader issues of open government, especially with the development of technology. He recognized the OML and the Public Records Law cross paths in many different ways and forms, and it would be something that this group may have to examine.

Mr. Smith recalled prior discussion of a possible intermediary process in the public records statute, and felt that further discussion would be beneficial to clarify the process—there are regulations and a public records manual that State Archives publishes with significant steps to try and help everyone understand the process. He talked about the concerning issue of a woman arrested for trespassing at a Public Utilities' Commission (PUC) meeting around November 2015. He said there is a difference of opinion with the PUC over whether they fall under the OML. He wondered if this task force would consider looking into this matter. He added there was a bill in 2009 that tried to address the issue of public hearings in workshops not being covered by the OML, but then the Administrative Procedure Act was amended to say that hearings in workshops do fall under the OML, but under the amendments of NRS 241 it might not necessarily apply. He reiterated there is a difference of opinion, whether the PUC's contested case hearings with a single commissioner conducting the hearing, falls under the OML.

Mr. Taylor stated that in 2011, NRS 241.016 was amended to bring back quasi-judicial matters into the OML—perhaps it should be reviewed for clarification.

Chairman Kandt stated he was under the impression the amendment had clarified it. He said in the incident where the woman was removed, the PUC's general counsel represented it was a quasi-judicial meeting, and that the OML did not apply, which is directly contrary to the language of NRS 241.016(1); it may need to be reviewed for further clarification.

Mr. Smith commented that the PUC counsel refined her argument in a conversation they had, claiming that in her situation the PUC meeting was with a single commissioner; therefore, it did not meet the definition of a meeting based on the language in NRS 239B and 241.

Chairman Kandt added, certainly NRS 233B specifies that in workshops and adoption hearings have to be conducted in compliance with the OML. However, there can still be other parties as unique as the PUC, where they hold a hearing, take testimony, and no one else is there but the chairperson.

Mr. Smith spoke about videoconferencing meetings. He said he noticed there are other states also struggling with conducting their meetings in multiple locations by either videoconference or teleconference. He wondered what guarantee was there for the public to access meetings with multiple locations, and the public's right to be present at either all or some of those locations.

Attorney General Paul Laxalt (General Laxalt) explained that in all the statewide boards he sits on with the Governor and the Secretary of State normally bounce back and forth through video or teleconference. The boards make an effort to give the public the right to access the meeting in both locations, and make it clear there is staff in both locations for the public to attend.

Mary Anne Miller (Ms. Miller) asked if the AGO has reflected on what happens when the technology breaks down. Chairman Kandt and Mr. Taylor disclosed there is a similar issue currently going on.

Chairman Kandt identified three issues that would have to be addressed: 1) If the technology breaks down, and the public body members are split among different locations which were connected by the technology, it becomes clear that once the quorum is lost, the meeting cannot continue; 2) The type of public access in those locations that may be linked in order to bring the public bodies members together to obtain a quorum; 3) If one of the locations is just for the public to follow along and the connection is lost, then how does that implicate the OML compliance. He said it was already clarified in the law that to extend the use of technology to conduct the meeting and bring the members together, the public has to be able to follow the meeting, they need to be able to hear everything that is being said among all the public body members.

John Shipman (Mr. Shipman) expressed his concern for governing bodies potentially becoming subject to criminal sanctions for violating the OML when the public is excluded. He questioned if this part of the law should be reformed or updated. He pointed out it becomes difficult when an attorney has to advise their client on an OML violation and that they could potentially be prosecuted criminally.

Chairman Kandt concurred that this is a sanction that the AGO has not had to use since violations are normally unintentional or through negligence, and there is a high level of culpability required under “knowing or intentional efforts.” He emphasized that from an enforcement stand point this is a tool the AGO wants in the toolbox in the event there is sufficient evidence that a public body was intentionally attempting to evade the OML, or if the AGO was ever presented with an intentional violation so egregious the circumstances might warrant the AGO seeking criminal sanctions.

General Laxalt indicated he was not in support of removing the criminal sanctions option because we live in times now where more and more people think government officials are above the law. General Laxalt said he believes the average public would assume that if there were an intentional or malicious violation of the public meeting law, that a public official would be prosecuted. He stressed this tool would only be implemented under certain circumstances, but removing it would not be wise.

Chairman Kandt offered to Mr. Shipman to dialog on this issue further. He indicated he wanted the public bodies to understand the notion of an egregious conduct, where

the evidence would fully support the findings if the members were conspiring to evade the OML.

Mr. Shipman proposed if the public body members violate the law and they do it knowingly they should be removed from office, which is a different from a criminal sanction; they would go to jail or they would lose their official position.

Mr. Story asked if it was possible to get a report in advance of these meetings listing the OML complaints filed and investigated and/or which have been resolved. Mainly to view what is actually being submitted to the AGO and what issues are being raised by the public.

Chairman Kandt agreed to provide the members the statistics of OML complaints. He explained there was one positive trend noted in the last several years, perhaps in part because of the efforts of this group and the AGO's proactive training efforts. The number of complaints filed and actual violations have gone down consistently based on the testimony on S.B. 70 and numbers presented in last legislative session. He asked Mr. Taylor to compile the data outlining the type of complaints and violations for the last 12 months and to present it at the next task force meeting.

Chairman Kandt returned to the clear and complete issue and the ability to take corrective action appropriately and effectively. He asked if there were any further comments.

Mr. Smith recalled prior discussions relevant to the Public Records Act particularly on the type of exceptions and exemptions. He speculated whether some are redundant or still relevant, or if they are even suitable for certain categories. He also wondered whether state agencies who deny a record might be in part because of the current 455 exceptions.

Chairman Kandt said that in the Legislature of 2013, possibly as a result of discussion from this group, the AGO brought forward a bill that was enacted in Chapter 239, the Public Records Act, where all those statutory exceptions and statutory confidentiality provisions were added to the Public Records Law. When the bill was heard, the legislators were astonished because the list of exemption was a page and a half long; at that point they were reminded that they created those exemptions. He acknowledged another helpful enhancement in the bill was to require each state agency to designate a records manager to standardize the process and the forms by which members of the public could seek public records. He said he hoped it has had some positive impact on the access to government and public records. He also said the Legislators suggested the agencies be ready to defend their ongoing necessity for those statutory exceptions and questioned whether some of those exceptions to the Public Records Law could or should be removed. Chairman Kandt revealed he had anticipated there would be some sort of interim legislative committee created to review all of the exceptions for justification or perhaps reduce the number, but that it has never happened.

Agenda Item No. 7: Public comment, (Discussion Only) Action may not be taken on any matter brought up under public comment until scheduled on an agenda for possible action at a later meeting.

Carson City: No public comment.

Las Vegas: No public comment.

Agenda Item No. 8: Adjournment.

Chairman Kandt recapped on several items to be reviewed by the task force for next meeting. He requested if anyone had any new topic to discuss in future meetings, to email the information to his assistant Karen Rutledge, KRutledge@ag.nv.gov.

The Open Meeting Law Task Force meeting was adjourned at 12:18 p.m.