

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

Draft Minutes of Meeting
(Subject to revision and correction by the
Open Meeting Law Task Force)

Thursday, June 10, 2010 at 9:00 a.m.

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

Committee Members Present in Carson City

Scott Doyle
Paul Lipparelli
Arthur Mallory
Barry Smith

Committee Members Present by Phone

Attorney General Catherine Cortez Masto, Chair
Trevor Hayes
Maggie McLetchie
Terry Care, Senator
Mary Miller

Committee Members Absent

Debbie Smith, Assemblywoman
Judy Caron
David Fraser
Mark Hinueber
Thomas Mitchell
Brad Jerbic
John Kadlic
Mark Lundahl

Public Present

Maud Narroll
Karen Gray

Attorney General's Office staff present

George Taylor, Senior Deputy Attorney General

Keith Marcher, Senior Deputy Attorney General

Jim Spencer, Chief of Staff

Edie Cartwright, PIO

1. Call to order, roll call of members, and introduction.

Attorney General Catherine Cortez Masto called the meeting to order at 9:00 a.m. Roll call was taken and it was determined that a quorum was present.

2. Introduction and welcome to new members and discussion of the Task Force mission.

Attorney General Masto welcomed the new members. Attorney Masto requested that a complete list of members be provided to everyone.

3. Review and Approval of Minutes from the April 29, 2010 meeting.

General Masto asked if anyone had any changes or corrections to the minutes. George Taylor explained that the new recording system we had for this meeting was not adequate and did not pick up voices well and therefore some of the comments/discussion may be missing. Maggie McLetchie stated she did not recall the paragraph on page 9 that reads, "Discussion from the members about this issue was reluctance to pursue it" to be a correct statement. No other changes were requested. Maggie McLetchie made a motion to approve the minutes with the one correction; it was seconded. All ayes, no nays - motion was approved.

4. Discussion/review of AG's Exhibits for new members.

General Masto asked the new members if they had been provided with all previous exhibits. She explained the map and that it represents each public body since 2007 where there has been an open meeting law complaint.

George Taylor stated that the exhibits had not been changed since the last meeting. He reminded everyone of the website address: <http://oml.ag.nv.us>. He stated that the address is on page 16 of the April 29 meeting minutes.

5. Staff reports requested by Task Force.

George Taylor thanked Barry Smith for providing him with the Open Government Guide. He explained it is a 2006 edition and is a compilation of state laws on open meeting law and public records. Stated it is published by the Reporter's Committee for Freedom of the Press. Mr. Taylor stated he went through and picked out seven states based on the Task Force's request to discuss penalties, remedies, standards, and burdens of proof. Stated he tried to pull out from the Reporter's notes in the Open Government Guide, the kind of information the Task Force was asking for. Mr. Taylor explained the OML enforcement in each of the seven states beginning with the least amount of enforcement to the most enforcement.

ALASKA: Mr. Taylor stated that in his view Alaska has the least amount of enforcement. Alaska represents less enforcement for a couple of reasons. A court may "void" an action compared to Nevada where an action is void ab initio. In Nevada you have to go court to void the action. Alaska has a public interest component. There are nine factors specified by the Alaska Legislature to be met before a court can void an action by a public body. There is nothing in Nevada statutes that says the public body shall "cure" or that there won't be any penalty if there is cure, but Alaska has something in their statute regarding cure. Alaska statutes allow a governmental body that violates or is alleged to have violated the OML to cure the violation. The only judicial remedy is a voidable remedy. Then finally - fees and costs. Like most states in litigation, a reasonable fee request under rules of civil procedure is available. However, the difference in Alaska is that public interest litigants and/or private attorneys general may be entitled to the full amount of a reasonable request of attorney fees based on a review of relevant factors. The court was quick to point out that most fee requests are on a sliding scale and most requests do not get the full amount. However, if a litigant in this kind of situation in Alaska qualifies, they may get the full amount. That is an incentive for someone to bring an action.

CALIFORNIA: I went to California because in 1960 Nevada's OML was based on California law. California is also a state with a lesser amount of enforcement. The only sanction for noncompliance of the OML is conviction of a misdemeanor. There is no fee schedule. For a misdemeanor the burden of proof is intent to deprive the public of information. There is a penalty for unlawful meeting and it is also the same standard. The wrinkle here is under cost and attorney's fees. There are two parts to this: 1) costs and fees shall

be paid by the local agency and shall not become a personal liability; 2) however, a defendant in a case in which the court determines that the suit was frivolous or totally lacking in merit may be awarded the fees and costs.

HAWAII: This also represents a state with less enforcement. Hawaii has a “removal from office provision.” However, removal from office is based on willful action and Hawaii law says, *upon conviction (member) may be summarily removed from the board unless otherwise provided by law*. So this is not a mandatory removal but is a discretionary removal by the court.

General Masto asked if anyone can bring an action in Hawaii circuit court? It doesn't necessarily have to be the AG?

Barry Smith indicated that the handout stated that suits may be filed by any person in the corresponding Circuit Court of Hawaii. Mr. Taylor stated that yes anyone can bring an action in Hawaii circuit court.

FLORIDA: Mr. Taylor stated this state represents moderate enforcement. There are sanctions for noncompliance in Florida and Florida has a fee schedule. Violations are statutorily called a noncriminal infraction and the penalty is less than \$500 for a noncriminal infraction. Then the statute goes on to say, *public officials who knowingly violate the open meeting law by attending a meeting are guilty of a misdemeanor*. That is similar to Nevada. It is the same standard that Nevada uses.

Maggie McLetchie asked if in Nevada the statute applies to any member of the public body and not just public officials?

George Taylor stated that is correct. A plaintiff in Florida may recover attorney's fees against the public body. Subjectively viewed, Florida is an example of moderate OML enforcement.

IDAHO: Idaho OML enforcement is moderate enforcement. Enforcement is based on a fee schedule. There is a “knowing” standard for violation that could subject the violator to a fine, but the violation has to be “knowing.” The fine is from \$150 for the first violation then \$300, and \$300 for subsequent violations. There are no criminal penalties in Idaho. These are civil penalties.

ARIZONA: This state represents a little more enforcement. They have a provision for “civil infraction.” It is a simple violation and I presume that we are talking preponderance of the evidence. A civil

penalty not to exceed \$500 may be imposed against a person who violates the OML. The same penalty may be assessed against a person who knowingly aids or agrees to aid or attempts to aid another person in violating their open meeting act. The State or local government may have to pay fees or attorney's fees and costs should there be a violation found in court. However if the court determines that a public officer intended to deprive the public of information or a person knowingly aided the violation, then the court may order that person to pay fees. The fees may be awarded to the plaintiff from that person. In my view these kinds of requirements and enforcement penalties are going up the spectrum and up the line of enforcement from less to more.

General Masto stated that Nevada law is based on a "knowingly and intentional" standard to violate the OML. It is a little different than Arizona. Arizona's standard is intent to deprive the public of information. It is a different standard.

George Taylor stated that most states did have a different spin on the standard for proving violations. It is hard to categorize and to equate these different standards. I am not sure what Arizona would require as far as proof in a court. I have not reviewed their case law. They do have a removal from office provision. Here again they require intent to deprive the public of information, the court may remove the public officer from office and assess him or a person who knowingly aided him with all the costs and attorney's fees. It seems like several states do have removal from office provisions. They are based either on a prior violation or in the discretion of the court.

IOWA: This to me represented the most enforcement. Iowa defines the fee schedule as "damages," but the fee schedule is not more than \$500 or less than \$100. The burden of proof is a preponderance of the evidence that a governmental body has violated the provisions of the chapter. Then the court shall assess damages. Any damages are paid by the court to the state of Iowa. However in Iowa Code, *the costs and fees shall be paid by those members of the governmental body who are assessed damages. . .* This is a little more stringent in my view, a provision with a little more enforcement. That is certainly incentive to a member of a public body to refrain from violating the open meeting act if there is any possibility they may be liable for damages. Iowa has a removal from office provision of a public body member upon proof of a prior violation for which damages were assessed. This takes it out of the realm of the discretion of the court or an argument by the litigants in court and it is almost a per se violation. The second

violation then would require removal from office. The court may issue mandatory injunctions. That is another step above. Courts generally are reluctant to issue mandatory injunctions regardless of what area of the law you are discussing, but this is a specific example of one state's effort to enforce their open meeting act. Then Iowa statute states that ignorance of the legal requirements of this chapter shall be no defense to an enforcement proceeding. That too is a different wrinkle that I haven't seen in any of the other states that I looked at.

General Masto reminded everyone that last time the Task Force met the members talked about potentially imposing a civil penalty that we do not now have, making it nominal against the individual person, but we had questions about standard of proof and we wanted to see from other states what we were looking at. She asked George if based on the cases that we have had for the last three years if 1) is there anything that was so egregious that there was a knowing and intentional violation, and 2) how many of those cases did we deal with where you found that there was that knowing violation?

Mr. Taylor answered by first describing how we investigate a case. Generally, I ask for statements and affidavits, so based on that it is hard for me to say that I have ever found a smoking gun or anything that would indicate there has been a knowing violation. We have not filed suit criminally against anyone based on our knowing standard for the misdemeanor violation, so that is really hard for me to answer. Most of the affidavits and statements that I get makes me think that people just simply forgot about the OML or thought they were doing the right thing.

General Masto said so based on the previous cases we have had, if there were civil penalties imposed, do you think that would be more of a deterrent or a way to stop them?

Mr. Taylor stated yes. He stated that a lot of the statements and affidavits he has looked at and a lot of the investigations he has done, it seems that a lot of the members of the public body are just a little lax. Stated he is not sure that any prior violation we have investigated rises to the level of a knowing or willful violation, but I think that even a small penalty would be an incentive. Stated in his experience in three years, he feels that would be an additional incentive to get people's attention, get training, and ask questions of me and our office.

General Masto opened the floor for discussion/questions by board members.

Senator Care asked Mr. Taylor if we were to take that stand would we have available civil penalties in addition to criminal sanctions. George indicated "yes." Senator Care stated looking at what you just handed out, how many states do you know off hand that actually does that? I thought going through this that in most cases it was one or the other.

Mr. Taylor stated that of the seven or eight states he looked at, there were three or four that have a fee schedule and none of them exceeded \$500. One of them said *not to exceed*, the other said *between \$150 and \$500*. They were all consistent with the fee schedule.

General Masto stated the question was how many have both a civil penalty and criminal penalty?

Mr. Taylor stated he does not readily have that information.

General Masto asked Mr. Taylor to go through Barry Smith's handout [Open Meeting Enforcement Provisions] and give an idea of how many. He stated there are four out 50 states (Florida, Michigan, Connecticut and North Dakota) that have both.

General Masto asked if this document is on the website.

Mr. Taylor indicated it is not but he will make a PDF and place it on the website.

Senator Care said there was no agenda with my question, it was more for informational purposes but I gather George the approach is that well it is clearly a violation of the OML, it does not rise to the level of being criminal however we are not going to let you off the hook so we will let the court apply some sort of civil penalty statute whatever that might be. I guess this is the approach then.

Mr. Taylor elaborated a little bit on his experience with some of the public bodies. I have heard public bodies and watched them in action and some of them brush the OML off with the attitude of - oh well you know the AG said this and I'm not sure that's right and oh well we will get another slap on the wrist. It is not very frequent but there is an underlying sentiment with public bodies that they are only here to do their job. I do encourage them to do their job, I don't want to get in front of them, I don't want to be the 800 lb.

gorilla in the room, but on the other hand the sentiment is that an OML violation is not a serious matter.

General Masto stated there is also the ability to cure so there are no penalties, so they just redo the meeting and take care of the problem – right?

Mr. Taylor stated that's correct and this is a policy issue for policy makers. "Cure" works effectively and most public bodies will cure readily and quickly and that benefits the public because after all it is the public that wants to know what the public bodies are doing. If we protract some kind of litigation or some kind of conflict over a period of time or months then the public body doesn't get to do its job, so there has got to be a balance.

Maggie McLetchie stated her concern is that this almost sounds like some public bodies are doing it [violations] more than once. It almost sounds like they are knowingly violating the OML. So I don't know why there would not be criminal penalties if they know they are in violation. But what I am trying to figure out is balancing the idea that there might be citizens on these committees and I don't want them to face criminal penalties because they thought they were just taking care of something. So I am wondering if the situation we are trying to address is governmental bodies that have repeatedly violated the OML?

Mr. Taylor stated no it is not that kind of case. What I was referring to and maybe I didn't explain it very well, is I think that sometimes public bodies have been involved in a discussion among themselves that could be contentious and heated and then a member says, "have we strayed from the agenda?" Or they ask each other "where are we on the agenda item"? It is that sort of thing. Then they are not sure, but there is certainly no intent there. I have never seen a meeting or a person say no matter what, let's just go on, with one exception, in my three years, but that was the only time that someone actually said that in a public meeting. One man said "I don't care about the open meeting law." But that was out of 148 cases. I have to give most public bodies a lot of credit, they try hard and they want to do the right thing and that's why when we investigate and find there has been a violation, I contact their attorney and to try to quickly get violations handled and cured. Cure has been a very effective tool. The last time the Task Force met there was a discussion about "acknowledgement," an acknowledgment by the public body that there has been a violation and an explanation of what they did. Acknowledgement is the first step on the road to a fee schedule. I don't know if a civil infraction

is necessary, maybe just a simple acknowledgment would be punitive enough.

Maggie McLetchie stated she thinks the acknowledgment is a great idea. That her concern for civil penalties is meetings like this where you have citizens or nongovernment employees that are on the committee and I'm wondering for example if someone is a nongovernment employee and they are assessed a fine, does their employer pay it and the citizen who is serving on a committee like the Blue Ribbon Education Task Force – I would hate to see them faced with a fine.

General Masto stated that just to kind of put this in perspective, as I understand it George over the last three years of the cases that came before us there were 49 cases and out of those 49 cases there were only 21 one of them that had violated, at least based on the statistics you have given. So out of those 21 it looks like most of them were cured, meaning they had a subsequent meeting, they said sorry it won't happen again and moved on. Mr. Taylor agreed.

Senator Care asked Mr. Taylor if what you are suggesting here is, let's say Nevada has civil sanctions and criminal sanctions. There wouldn't be civil sanctions as I understand it until after the board [public body] has had an opportunity to cure. My question is then if the board is put on notice with an AG opinion that it has violated the OML and then refuses to take corrective action, what would be the sense of having a civil penalty. Isn't that an indication right there that this is intent to violate? The opinion of the AG notwithstanding it is difficult for me to imagine a local deputy attorney, not in this county, saying the AG was wrong and so you all are free to do what you did the first time; we don't have to cure anything.

General Masto said we do have one case where the district attorney thinks we are interpreting the statute wrong and so then the question would be is that a knowing violation or is that something that now needs to go to court and have the judge make that determination?

Trevor Hayes stated he was thinking about it differently than Senator Care, and that it wasn't necessarily a civil infraction only if a public body doesn't cure. I think in this \$100 to \$500 range the penalty is small enough that it is not going to kill anybody but it is enough that it is going to push people like Iowa has done. It seems like Iowa's goal is to push people to ask their counsel. I mean a lot of these people are not out there saying I want to break the law, some are just saying, ah it is not that big of a deal if we do it, or

they think, so what is the penalty. So if someone in the meeting room happens to hear that we violated it then they will go to the AG's office and a couple months later they will tell us we messed up and we will just have to revote on the same thing we did, so it doesn't put us out any and chances are that someone in the meeting will never notice. If they have the potential of a small fine, it might make them say, hey wait it could cost me a couple hundred bucks; let's hold off on this and make sure we agendize it properly at our next meeting.

Paul Lipparelli stated that brings up the question of the type of violation. I don't view all OML violations in the same way. There are little ones and there are big ones. For example, we are a member of a committee today and we are relying on staff to have posted this agenda in five places. If they only posted it in four places it is a violation of the OML. Should each of us pay a fine because a staff member failed to post the fifth copy of the agenda? I think before we talk about what makes sense in modeling behavior, you have to differentiate between minor incidental, accidental violations and the egregious cases where someone is trying to do business outside the public view. To me it makes a big difference what you are aiming the reforms at. So maybe in discussing the possibility of civil penalties, we ought to acknowledge like we do in the criminal context that there are misdemeanors, gross misdemeanors, and felonies.

General Masto – say for instance for that type of violation you just described, would the penalty be that you have to cure it and you have to acknowledge the fact that you did so in the next couple of meetings?

Paul Lipparelli said that made sense to him. We had an example in Washoe County where George Taylor wrote us a letter and explained his analysis of the situation. The County had a meeting that was scheduled for a room in Building A on a campus of interconnected buildings and the meeting had to be moved to a room in Building B because Building A had already been scheduled. We posted a sign on the door of the one room and said the meeting has been moved to a different building on the same campus connected by hallways and we drew an OML complaint from a person who said since we moved the meeting it hadn't been properly posted, so in that situation all we wanted to do was conduct the meeting, get the committee to do its work and used our best efforts to make sure that anybody who came to the place to participate in the meeting would have as great a chance as possible to know where the meeting was. Now if that would have

been found to be a violation, would it have been the fault of the members of the body who participated in the meeting in the second room. I am just suggesting, that as the AG's question indicates, maybe some things can be cured by an acknowledgment of best practices; maybe other things where it appears that someone was trying to hide the ball, there will be an escalating array of measures that can be used to reform people's conduct.

Barry Smith agreed. What is key to me is the record in recording of these incidences, the acknowledgment of them that you build these best practices, the information is readily available, people are aware of it and the boards themselves acknowledge that this is what happened, this is what we are doing, this is the cure and remedy. In the instance you (Paul Lipparelli) described, these are minor violations until they do it month after month after month, then you say okay the trigger to me is a repeat violation. A willful violation is very difficult to prove on a one time basis, but by the time they have done it the second or third time, that is a trigger for me.

Arthur Mallory agreed with what Barry Smith and Paul Lipparelli said. I think there is one more trigger we should have here and George has already alluded to it. When someone says we don't care about the OML, or we will violate it anyway, I think that gives rise to a serious offense. That is indicating the criminal intent. I do not think you would need to repeat the violation if you have that on the record. Those are the people whose attention we need to get. Who would make the determination whether it would be a civil or criminal violation? Would that be the AG's office?

General Masto felt that was a good question because that is what we would have to consider, who has that discretion and it also gets back to what the Senator was saying and I noticed Idaho does this for their civil penalties. There is that "knowing" component in it which would then address some of the concerns that we just talked about. Why give somebody a civil penalty for maybe a staff mistake or something like that. Should there be a "knowing" component for civil penalties when we are looking at \$100, \$200, or a \$500 penalty or whatever that is and it may not be necessarily criminal in nature, but we can show that it is strong enough to say you need to fine them, instead of an acknowledgment cure, you [member of public body] need to be fined based on your statement, i.e. I do not care about the OML, which again shows the "knowing" component. I guess you would have to prove some kind of criminal intent here. I don't know how you would distinguish the two.

George Taylor stated a knowing violation of any provision of the chapter is a misdemeanor. So before the action is taken we have to be able to show that the person(s) who violated the statute knew that it was a violation. So I guess they go hand in hand. I am not a criminal lawyer so I'm going to have to defer to the DAs here or those who have more experience in criminal law.

Arthur Mallory stated it is a slam dunk if they say I know I violated the law or I'm going to do it anyway, then you have evidence they violated it and you don't need a whole lot more. This is the kind of conduct we are trying to curb and control, that lack of respect for the OML. I think if you have one or two cases where you really go after someone who says that, that you will get tremendous respect throughout the state.

George Taylor read a very short sentence from the statute at 241.040: *"Each member of the public body who attends a meeting of that public body where action is taken in violation of any provision of this chapter with knowledge of the fact that the meeting is in violation thereof is guilty of a misdemeanor."* That is the sole sentence in the OML regarding the criminal part of the OML.

Arthur Mallory stated if they are a member of the open meeting and someone says this is a violation but we will do it anyway and they participate, then they are a member of the criminal conduct and you say it is just a misdemeanor but the misdemeanor will give rise to their immediate removal from office if they are convicted and a public official. But most people don't want this to be a violation of their public office.

General Masto asked if in that particular instance, is that person, that board member, going to reach out to their attorney and say is this a violation, or are they going to ignore what the attorney says?

Scott Doyle stated that in the late 1980s we had a meeting of the Clark County School Board which was tape recorded. They were in closed session. Their attorney was Tom Moore at the time. The tape recording reflected that on several occasions during the board meeting Tom advised the board to refrain from certain discussions and activities because they exceeded the scope of a closed meeting. The tape recording also showed that six out of seven of the board members chose to disregard the attorney's advice and continue the discussion. The decision from the AG's office at that point was to decide whether to institute misdemeanor proceedings against six out of the seven people. We had the matter reviewed by several lawyers in the office with extensive civil and criminal

backgrounds as well as the AG himself. The decision not to prosecute the misdemeanor, was made not so much because we didn't feel we could prove the case because we felt it was a very strong misdemeanor case but the consideration that weighed most heavily on it was the fact that if we succeeded in convicting six out of the seven board members of a misdemeanor, they are subject to removal under Chapter 283 of the NRS and we didn't feel it was good public policy to truncate at that time the fifth largest policy making school board in the United States through that action. We exercised our discretion and instead entered into a consent decree with the Clark County School Board and part of the law at that time was a provision in the law that we receive the agendas and materials of the meetings for a period of 180 days after the request and we exercised that prerogative under the statute for two successive 180 day periods to monitor their compliance with the consent decree. So I guess the story here is a "yes" there are people who are part of the public bodies that disregard the advice of their attorneys. I don't believe it happens frequently and rarely it ever happens where there is an audio or a video tape recording where there is formal proof of it. To my knowledge there has only been one misdemeanor prosecution under the Nevada OML statute and that took place some time in the 1990s regarding some officials in White Pine County. My feeling is that if you put a knowing requirement into your monetary penalty provision, you are going to get the same type of lack of use perhaps that you do with the criminal penalty now and that defeats the enforcement mechanism. The one thing that does worry me is that if you set a very low state of mind requirement for a monetary penalty and then use cumulative impositions of those penalties to remove a person from office, I think we start to cheapen the policy of office holding being an important right not to be abridged lightly and so I am concerned that if we go with the monetary penalty, if we simply use a cumulative number as a basis for removal that we may be doing violence that that value be attached to the concept of office holding. Iowa I think has an interesting approach on this if I understand the materials correctly. There you have to have two or three monetary penalties imposed during the public body member's current term, so there is a fairly short time frame in which you aggregate the monetary penalties and remove the person from office, so I guess what I would say is 1) if we are going to have monetary penalties, and 2) we want them to be used, something other than the "knowing" standard probably has to be attached to them, or they are not going to be used, just like the misdemeanor current penalty, 3) that if you are going to aggregate penalties both for increase in the money which is not a problem, but if you are going to use it as a basis for removal, we put a very short time frame on the period of

time when we measure for aggregation of the monetary penalty for purposes of removal, otherwise you have to be removing too many people.

Trevor Hayes liked that idea. Stated he was thinking that if you have a certain number of penalties they may be removed but I kind of like the idea of the shortened time frame to cure that. The only thing I want to say is we are spending a lot of time talking about the extreme case but I think what we really need to worry about is some sort of lesser standard rather than "knowing." Obviously if this meeting was only posted in four places by a staff member, then there should be some sort of reasonable standard of intent.

General Masto stated that to her it gets back to the discretion of the OML attorney to make that discretion. If you want to set in statute you could but you are going to have to identify every single instance where you have just an acknowledgment or cure versus some civil fine or penalty. That is the challenge. I notice in Iowa their standard is preponderance of the evidence, either way it is still the same question for us. Is this issue of a civil penalty enough that everybody can agree that yes we want this in here because we think it is going to have some effect, a stronger hammer on an individual to prevent them from violating in future? I do not know so let me just throw that out there.

Senator Care felt that he and Trevor Hayes are looking at it differently than from what George Taylor was proposing and that is that the civil sanctions kick in before or after the opportunity to cure. Maybe we could do something and maybe not everyone would agree with this, but maybe you could do something where for a violation of the OML the board could be liable to some sort of a civil infraction prior to the opportunity to cure. Here, I would give the court broad discretion because I do think there are violations that are more extreme than others even where there is no intent necessarily but where the court could say, alright you are in violation of the law of the OML, you have an opportunity to cure but before you even do that I am or I am not going to impose, strictly monetary sanctions, then if they refuse to cure, obviously there is an intent issue after that. It is just a suggestion.

General Masto felt it was a good suggestion except right now we don't go to court. Are you suggesting that any time there is a violation and there is a potential civil penalty that we could assess, we have to go to court?

Senator Care – yeah I think so and again I think it is going to just have to be discretionary. Many times when I have been up in Carson City we hear stories about violations of the OML and in the interest of full disclosure before I went through a career change, sometimes you read about an OML violation and you think how stupid was that. Other times you read it and you get angry. It is like what the hell do they think they are doing, and I think there ought to be some discretion if we are going to do something like that, that your office would have.

General Masto – and not take it to court or have to go to court?

Senator Care – you could but I'm talking about just a civil penalty. You [public body] messed up and this is what we are going to do about it, or this is what we could do about it, depending on the circumstances, but they would still have to cure.

Scott Doyle stated the need for monetary sanctions in his way of thinking and the way we need to analyze it is using the numbers from your last three years of experience. There were 49 total complaints, 21 violations, and of those 20 cured voluntarily. Right now under the law we have the unused misdemeanor provision and then you have the civil remedies of declaratory relief and injunctive relief that have existed since 1983. The enforcement model now in a noncriminal context is the threat of filing those actions and if they are filed and adjudicated, then you have the forum of public opinion either approving or disapproving of the conduct of the people that comprise that public body depending on the outcome of the civil litigation, so you'd have the threat of the litigation and then you have the actual result of the litigation itself, but the people are sanctioned if you will in the form of public opinion. The statistics you have right now would seem to suggest based on the widespread willingness to cure that the existing threat of civil litigation may be enough. You are not having to use that remedy all that often or at least in the past three years if I understand the statistics correctly. So it would seem to me that one of the questions of the Task Force we need address is the need for monetary sanctions in light of use and experience. This is an inartful way of saying it but if the existing noncriminal remedy does not have to be used very often, what is a need for a second type of noncriminal remedy to enforce the law in the form of a civil monetary fine. I think if we wrestle with that issue and answer that, then whatever we decide to do we can do at the Legislature and say there is a need for the addition of this type of remedy, if we as a Task Force are recommending that this be the course of action that is taken.

General Masto suggested for the next meeting — George of those 21 cases where there was a violation, let's find out what the violation is and that will give us hopefully a range of just a staff error versus something else with respect to the civil and we could look at those to see if this is where a civil penalty might have helped or not or if this is where we need more of a hammer. Does that make sense?

George Taylor answered "yes," however, I have a question too. After reading that Alaska for example has a statutorily mandated cure provision, I wanted to remind everyone that here in Nevada this is part of our OML manual but it is not part of our statute. Would anyone have any appetite for putting something like a cure provision in statute coupled with an acknowledgment provision? This would be more of a smaller step up the enforcement ladder, either in addition to or instead of the civil infraction and the fee schedule.

General Masto commented that Mr. Taylor had a great point. As we all know the OML statutes are slim, there is just very few of them and most of the work that we do with respect to the OML comes from the manual that was created after the fact. So the discussion should always be just what George said. Should we take something like this that is in the manual and codify it to make it permanent or so that others are aware of it as well when they look at the statutes? That is a great point George.

Trevor Hayes stated he just wanted to go back to where we were talking about the fact that almost all of these were readily cured, but I don't think that is a good way of looking at the problem. If the penalty for a kid stealing candy bars is if you got caught you had to pay when you got caught then you could steal all the time except for the one out of ten times you got caught, of course he is going to pay for that one candy bar. I think we need some sort of deterrent before this happens. I think that right now the only way that these ever come to light is if some citizen sitting in the room or a reporter notices there is a problem and then reports it up the chain. I mean how many of these go on without something happening and if they get caught their only penalty is okay we will just revote at the next meeting. I think the civil penalty is small and I'm not looking to break anybody, but I think we do need something like that. Just because everybody cures doesn't mean there is no problem.

Senator Care agreed. He felt there is something else to it depending, if you couple that with the public acknowledgment

mandate. If it is an elected body that is great campaign material by an incumbent the next time around that this person violated the OML. It is a matter of record, it has been acknowledged, and I wouldn't want that, so there is a political aspect of this.

Maggie McLetchie said that in the civil statute where you can go to court and get action it provides for attorney's fee but it doesn't provide for attorney's fees for the AG's office. Is that a deterrent for your office for doing civil cases and if so does this need to be amended?

General Masto stated that no, that is not a deterrent. Would it help, yes. I don't want that to be something that kills the deal for everyone. That is not our focus. Would it be helpful to have it added on, yes ultimately, but that is not really our main priority focus. But no, it definitely is not a deterrent.

Scott Doyle – As one Task Force member I would be in favor of codifying the cure provision, maybe using the Alaskan language as some kind of a template and add a dimension to it, so that when a violation has been found by your office by way of an opinion, the public body acknowledge receipt of the opinion. Frankly, when the board or their attorney disagrees with your opinion, they can also notice an item to proceed to litigate, under Chapter 30 the Uniform Declaratory Judgment chapter, the correctness of the opinion. There is a whole remedy, a check and balance there if you will for that one instance.

General Masto suggested let's do this, I think what we are all kind of boiling it down to is looking at the civil penalty provision and seeing if we want to recommend that some of it be codified. And that civil penalty provision is very broad; it includes anything from an acknowledgment, to a fine, to a cure. I think we need to codify some of those, maybe at least the acknowledgment and the cure, but let's have further discussion on the fine itself. She asked George Taylor to bring those cases that we found violations to the next meeting so we can look and say is this an instance or is there is a group of cases here where that civil penalty would really have a positive impact? So at the very least let me ask you this, is there anybody who disagrees about codifying the acknowledgment and the cure?

Paul Lipparelli commented he thinks requiring the acknowledgment is sensible, but the Alaska language, the cure is to have another meeting and that is not always going to be possible. If there is a minor violation of the kind we discussed and the AG determines

that it is a technical violation and admonishes the board to be more careful next time that may be enough as opposed to having to hold another whole meeting to cure the problem. We may be dealing with statutory deadlines to conduct meetings within certain time frames that would put a lot of people's rights and duties in peril. So the acknowledgment would be fine. The Alaska language may not be the best approach but we could certainly tinker with it once we see it in draft.

General Masto thought that was a good point and asked if anyone else had comments.

Maggie McLetchie stated that with the cure, are we talking about just changing the current position that says that an action being in violation of the chapter is void? I don't want to weaken that provision. It is already in NRS 241.036 and I understand the time frame concerns that were just expressed. I firmly believe that the void statute actually is a deterrent. For example if you are trying to get votes on something and then you have to retake a vote you may not get what you tried to get through the second time and that is part of the incentive in not complying with the OML because you didn't want opposition to come and speak out against whatever you are trying to get through. I think NRS 241 is actually a great provision and I certainly would not be in favor of weakening that by any stretch.

General Masto asked George Taylor to address that. She stated she didn't think it weakens it but that it is void and that is why we say you have to have the second meeting to cure it so that it is no longer void.

(inaudible. . .)

Mary Miller commented that every violation doesn't involve an action under the open meeting law. Not every violation is susceptible to curing. If you have an item involving discussion only and no action (inaudible) cure may not be the best remedy (inaudible).

General Masto commented that there are the civil penalties and you figure out based on the violation whether it will be acknowledgment, fine, or cure.

Mary Ann Miller added ". . .at the discretion of the AG"?

That is what I am thinking this is going to look like. Now how we craft it, and I don't want to weaken the void provision, the civil penalty is going to look something like that, but that's the extreme where we have the acknowledgment, fine, and cure based on the violation. That is why I want everyone to look at the violations [found by this office in 2009] and have everyone have a sense of what they look like.

Mr. Taylor introduced Maud Narroll and asked if the Task Force would mind moving forward to agenda item 5.f. to allow Ms. Narroll to give her presentation concerning the Broadband Task Force so she could get back to her office.

5. f. Maud Narroll began her presentation by explaining that her main job is Chief Planner with the State Budget Office and her current special project is as staff to the Governor's Broadband Task Force. She stated George Taylor has been immensely patient and helpful with her questions. Stated her question is if we [her Broadband Task Force] have trouble getting everyone or a quorum together at one time, could we meet on an electronic space on some kind of an electronic bulletin board. The other reason that prompted the question was a lobbyist who contacted me and said one of our members is in Chicago and they would be interested if they could see the meeting, or be in on the meeting from Chicago but we didn't have a phone bridge, so I said well we have five locations in Nevada and I asked George could we meet on an electronic space. What I had in mind is similar to reading the newspaper online [she referred to a projected image in the Carson City meeting room]. Pointing, she said there is a piece out of this morning's Las Vegas Sun and then down here is discussion with 14 different comments. People will sign in either with their real name or a name they feel suitable for this online discussion. There is a little tab for suggested removal. It shows when they posted. I was thinking well there could be a column of this for the public and then there could be another password column where access would have to be password protected for the Task Force members or members of the public body where their input to the meeting would be, again time stamped. There might be a separate section for when a member makes a motion and someone seconds it, there are amendments, and then the vote. The whole thing could be open for whatever time period was suggested, say posted for several days or a week or an afternoon and the public could have access to see the meeting materials, the agenda, and all the meeting materials. At the end of the time after discussion, the meeting would be closed; anything that would have been voted on and passed would have been passed. Clearly current law does not allow that, but I

wondered now whether this is a possible way to have a meeting and a way to have people access the meeting without having to have room in their schedule at a particular time [to physically meet], a way to have people access the meeting who are not necessarily even in Nevada. I was wondering if that was something the Task Force might want to consider.

General Masto asked George Taylor if the statutes would have to be changed to address an electronic bulletin board or how would it be different than what we have now.

Mr. Taylor indicated "yes," I think there would have to be some changes here because number one the statute says that all meetings must be open and public and all persons must be permitted to attend any meeting of these public bodies, so I think there is a technical issue here and a practical issue for people who might want to join but maybe don't have the technical expertise or the facilities to do this.

Ms. Narroll stated that a number of years ago we went through that sort of question on publications and whether a requirement to publish a document could be fulfilled doing it on line and what has happened is that the decision from the AG's office, I don't know if it was a formal opinion, was that "yes," publishing on line is acceptable. Of course there are public libraries all over the state with computer access. I know that we made that transition in our office, when someone called me and said how can I get the latest copy of. . . , and I told them it is as close as your computer, they were ecstatic. They had it in front of them before we hung up.

General Masto thanked Ms. Narroll for her presentation and stated that another potential issue is with the public who may not have access to a computer to be able to participate, so they would be prevented from participating. Is that right or is there a way we could include them?

Ms. Narroll stated that anybody in the public has access to a computer at this point because there are public computer centers. Every public library has banks of computers now and there are classes on how to use computers which often times are free, so I think in some ways we are making access easier rather than harder for most of the public.

Mr. Taylor asked if the presentation on the board with the blogs and the article, is basically the scheme or the background or the

framework for an onboard bulletin board meeting, is this what you are showing us?

Ms. Narroll said this is just a hint of what it could be where the material is on top. In this case it would probably be two columns worth of discussion underneath in chronological order and then someone would need to moderate it from the public body so that if someone from the public said something not appropriate, there would need to be a process or person to save it as part of the record, but it would not necessarily be displayed.

Barry Smith stated he thinks it is possible or he would like to at least consider how this might work and not just reject it but there are some problems and issues and that is one of them. I presume if I heard you right Maud there is the official discussion going on with members of this committee who have a password and a login, then somewhere there has to be an opportunity for public comment that anybody can access the site and that somehow there is an opportunity for public comment. Well as you can see and speaking for newspapers and then the internet in general there is a real problem with false identity. A lot of places that do accept comments on stories do not require any kind of verification, a password or a login. As soon as you require something like that you have raised the question of well who are you excluding from that. It is different when you have to show up in person, it is kind of informal, you are asked to identify yourself and somehow that happens when you are standing up at a public meeting, but when you are commenting online it is difficult to verify and depending on how you ask people to verify themselves, you get into the question of, am I excluding some people somewhere. A couple other problems I see potentially are along the same line. A committee member and this is going on presumably it is open, it is an ongoing discussion for say a day, a week, a month so that this kind of process continues. You don't have a way to verify that even though the committee member has a password to log in that they are actually the person who did log in and if that committee member didn't say to someone oh here is my password, and give it to someone who is a lot smarter than I am or something, would you mind logging in and putting my comments down there under my password.

Ms. Narroll noted that we have that issue always in systems with passwords. How many passwords did we all use this morning just logging into our computers? We also have the issue when a member of the public comes up. You ask the member to use their real name, but we have the same issue, someone gets up in a

public meeting and says, hi my name is Susie Smith, and actually her name is Josephine Jones, or whatever.

General Masto asked Ms. Narroll to give her an idea of when this would be utilized. Would it be something that is used more often than not because it is a board that can't meet in public, or what are your thoughts of who would be using the bulletin board, which boards?

Ms. Narroll stated that in cases where there is a lot of interest by the public, a lot of the public have day jobs and members of the public have day jobs and their day jobs are not connected with the meeting but they are interested for personal reasons, it is hard to take off from their day job to go to a public meeting during the day. They could login in at home at 10:00 at night and see what is going on with the meeting and add their comments. I see this as something that would be a big help for the public.

General Masto asked Ms. Narroll if what she is saying is that this would be an additional tool that a board who is meeting in public can utilize to include additional members of the public who may want to comment that can't get to that board meeting and that specific timeframe so they would have a dual role of meeting in public at a public place, having their meeting but also having this online ability for people to hear what is going on and have a discussion. Or, are you saying this meeting is exclusively on the bulletin board?

Ms. Narroll indicated that she actually hadn't thought of it being an adjunct to a meeting that occurs in real time. I was actually thinking of it as the meeting occurs on the bulletin board.

Barry Smith wanted to raise one more concern and that is if it is the meeting itself, it kind of opens up endless possibilities for discussions outside the bulletin board, especially if you are going to have a vote or something like that that may not take place all at the same time, here is the motion, here is the second, okay we need the members to vote on this. I vote no and immediately my cell phone rings – why did you just vote no? I think that is something else that might need to be addressed, how are you going to deal with that, what might be the possibilities there since you are all in the same room watching each other?

Ms. Narroll said that is a good point and I think people like George would need to have another thing on their checklist when they are talking to a new board or public body that is being formed that any

discussion of any kind about this meeting has to be on the board and if a member wants to ask another member why did you vote no, it has to be done on the board and not on a cell phone.

Barry Smith agreed that it raises some great possibilities for adding public access to a meeting, but there are some potential downsides too.

Mary Miller said she could see where it could be very valuable where the statute or ordinances require a public hearing and something like this could be utilized at the time the meeting is noticed for the three days up to the public hearing people could log on and that could be part of the official record and people wouldn't have to go down to the actual meeting to be heard.

General Masto said they could use that information then when they have the meeting they would get that comment. I agree there are definitely possibilities. She asked Ms. Narroll if she is actively working on the Governor's Task Force to address this issue, is that part of the Broadband Task Force.

Ms. Narroll indicated that this just came up and I working with the Task Force to try to solve the question of how could someone from Chicago come participate in the meeting or how could the Task Force meet if we had trouble getting a quorum all at the same time and so it was just an idea to help those two issues. The Task Force has its own jobs dealing with things in the [A.R.R.A.] recovery act and that's what they are working on.

General Masto made the recommendation that we explore it a little bit more. She asked Barry Smith and George Taylor to work with Ms. Narroll in further exploring the possibilities for this bulletin board in conjunction with complying with the OML and then bring it back to our next meeting and let's see what it looks like, that potential proposal.

General Masto again thanked Ms. Narroll for her presentation and asked if there was anything else on this subject.

Ms. Narroll indicated no and thank you very much for putting this on the agenda. I think Nevada could be out in front here.

General Masto stated okay now I am going to open this up. I normally only try to keep everyone a couple of hours, we only have 10 minutes of our meeting time left. Item 6 is Old Business, so if you are inclined to do so I would like to move on to 5.b which is the

clarification or reformulation of the definition of committee/subcommittee and tackle that one and then that will be the last item for this meeting and the others will be put forward to the next meeting and we can tackle as we go. This was an item we talked about last time that we wanted to include a staff report on case studies of recent AG OML cases.

I prepared the report entitled Public Body or Not? It is a case study. I realized that just recently I have had at least three issues this year concerning the definition of "public bodies." The very first one is AG File 10-010. This case was a Clark County issue. The Superintendent of Schools allegedly appointed an Educational Opportunity Advisory Committee (EOAC). The complaint alleged that a published report from the school district said that the trustees appointed the EOAC, so the argument was that if that was so, then the committee became a public body at that time because a public body appointed the committee and then if it was a public body then there was a violation because they did not provide notice or agenda prior to two meetings in January. That was basically the complainant's argument. Section 3.04 from the OML manual was applied and it was determined the group was not a committee for the following reasons. I received affidavits from each trustee, from the Superintendent, and from members of the staff and after reviewing the affidavits and the legal explanation of counsel, we determined that it was a factual issue, that in fact the superintendent did appoint these people, he did appoint the members of this education subcommittee, that the committee did not report back to the board of school trustees and in fact there was no further involvement of the Board of School Trustees after they supplied possible names for nominees to the superintendent. It appears it was an unfortunate use of the word "appointed" by a member of the school district staff who also submitted his affidavit saying that he was aware the superintendent had in fact appointed these people and had just requested several names, as many as three, from each trustee, so the issue here and the issue for us is the discussion of the meaning of, or how to determine what a public body is. Section 3.04 of the OML manual states that *". . .to the extent that a group is appointed by a public body and is given the task of making recommendations to it, then they are governed by the OML."* There is also another way of determining what a public body is and I am going to ask you now to turn to that portion of this handout, it is AG File 07-025 and this case was in 2007. The question was whether this group was a public body or not, it was the Walker Basin Project Stakeholders Group. It was formed by Chancellor Klaich at UNR, they had a lot of federal money and their object was to spend up to 70 million for the preservation of Walker

River and its watershed. Chancellor Klaich formed this group called the Staff Executive Steering Committee and then this group appointed stakeholders. Whether WBPSG was a public body was the issue. The decision was based on prior AG opinions. The OML manual interprets the statutory requirements defining public body, found at NRS 241.015(3) into elements. The manual at 33.01 states: the entity must: *(1) owes its existence to and has some relationship with a state or local government; (2) be organized to act in an administrative, advisory capacity; and (3) must perform a governmental function.* I guess my point here with this is that besides the statute we have had to interpret, at least our manual over the years has had to interpret the statutory requirements for defining a public body and break it out a little further. I want to point out that in three of the manual's statutory requirements, there is mention of "governmental function." Well, these words are not in the statute, it's our interpretation of what a public body is required to do. I have shown you two case studies, once again this is a continuum, a spectrum, we use § 3.04 and then sometimes we use this statutory definition as interpreted by the OML manual. These are commonly used in all the decisions going back for years and years.

General Masto asked for any comments?

Senator Care asked Mr. Taylor what does "to the extent" mean? A group is appointed or it isn't appointed and it is given a task or it isn't.

Mr. Taylor indicated that he doesn't know. That he would have to look at the legislative history but that is right out of our manual and it has been in the manual for a long time but I don't know its derivation.

Senator Care stated that how this one strikes him is that he doesn't think there is any doubt if the School Board of Trustees had made the appointment that the body would have been subject to the OML. Just speaking for myself it sure seems to me the superintendent was just an instrumentality of the public body and I would have had difficulty myself and I have no idea what language you would come up to do this, to say that this Task Force should come under a number, if you will, of the OML. The second case is much more complicated however.

Maggie McLetchie commented that she may actually agree about the first case. The superintendent is making decisions in order to avoid the OML and so I think to the extent that we can avoid

gamesmanship to prevent the public from [inaudible] and knowing what is going on with things like this that are clearly of public concern, I think we should take steps to do so.

General Masto said let's jump back to that first one, so if I am not mistaken George the reasoning here was that the superintendent who did the appointment and who was creating this Task Force for information back to the superintendent is not a public body.

Mr. Taylor stated that is correct. The superintendent is not an entity within the meaning of the OML.

General Masto asked so it is because he is not a public body that he is not subject to the OML.

Mr. Taylor indicated that is correct.

General Masto commented, and so there is the distinction between a county manager and city managers [inaudible] administratively doing their job versus their board providing the public policy, so there is a distinction between the two and I don't want to blur those. With that said I think that goes back to our definition of public body because if you are saying that the superintendent as an instrumentality of the board is a public body then the superintendent is going to be hindered from doing his/her job administratively, so you have to be careful about how we define it.

Senator Care asked where do you draw the line here? What about an associate superintendent, what about a deputy associate superintendent? They can't all rise to that level I don't think.

Mary Ann Miller – Senator was your concern that the school board members all submitted names? Does that make it a little more akin to a committee that would come under the OML because they were involved in the process?

The Senator responded affirmatively [inaudible].

General Masto asked Mr. Taylor, based on that, after you did your investigation, how did you address that particular issue because the school board members did submit names?

Mr. Taylor explained that he asked each school board member to explain why they submitted the name. All of them said they were asked to supply a minimum of three names to the superintendent,

three names from their district, so that is the only explanation I got from them. The superintendent then picked the stakeholder.

General Masto asked if when the superintendent picked the people they were all out of the list he was given by the trustees. In essence then isn't the superintendent doing the appointing of the stakeholders?

Mr. Taylor indicated that is what he concluded. However, I think this does illustrate this question and at the very end in my issues I said, "*should any tether to a public body result in a finding of a committee, how tangential can a group be and be considered public body?*" I think that was what the Senator was asking just a minute ago or alluding to and that is the issue. The issue is over the years we have had to determine the identity of public bodies sometimes by creating more interpretation. So the issue here is, well this was tangential but should it have been all encompassing, should it [the OML] require this body to be a public body simply for the fact that the trustees submitted names.

Senator Care left the meeting.

Scott Doyle stated this situation sounded to him like the people that were appointed by the superintendent were just constituents, they didn't fit the traditional definition of staff. Is that correct?

Mr. Taylor "yes," they were just constituents.

Scott Doyle stated the next thing we have is that once the committee met they had to do something and I would assume again that it was related to some sort of Clark County School business, is that correct?

Mr. Taylor replied that it was an advisory committee educational opportunity, it was under a federal grant so they [school district] were administering this grant and they needed constituents to provide some on the ground experiences or something like that, it wasn't truly school business.

Scott Doyle stated okay, the school district applied for the grant and then a committee was created to satisfy presumably one of the conditions of the grant.

Mr. Taylor clarified that it was part of the Race to the Top and No Child Left Behind, all those federal requirements.

Scott Doyle explained that where I am going with my questioning is that 1) you have got a composition issue, and 2) you have a business or governmental function issue because if the school board had the authority to apply for the grant and the staff pushing this committee was one of the conditions of the proper discharge of the grant, then the tracing of the function and work product of this committee becomes critical if they are reporting to the superintendent. Yes, that is one thing that indicates they are reporting back to a single person who is not subject to the OML, but if in turn the superintendent is acting like a conduit to pass this group's work product through to the Board of Trustees as part of his responsibility of saying yes we are complying with the terms of the grant that you Board of Trustees approved us applying for and receiving earlier, then we have got a more muddled fact pattern. I hate to sound like a broken record but I am going to go back to my suggestion that I made in my April letter and that is we have always had the one person exception of the OML contained in the manual, we have always had the staff committee exception contained in the manual, and now we are seeing the formation of groups who are outside citizens, not part of staff, and yet they are performing a governmental function in some way shape or form and somehow you trace this information. Maryland seemed to be one state that had a fairly good approach to this problem, its statute states, "if you put together a group as a superintendent of schools or a county or city manager. . . ."

Lost contact with Las Vegas for a few minutes.

Scott Doyle continues - my point is that Maryland had at least a jumping off point which addresses these types of complicated issues where the single administrative authority is bringing in a group of citizens that are not properly characterized as staff and asking them to discharge some type of, in this case school district related function, that group would have to comply with the OML if the Maryland provision was part of our law and it would give you a brighter line in situations like this because these types of groups seem to be cropping up more and more as functionaries in government and it is unfortunate the Senator had to leave, but the way the Maryland law as I understand the way it is structured, it doesn't make any difference whether it is the superintendent or an assistant superintendent or the deputy superintendent as long as you can establish that they are in the chain of command reporting back to the board and they constitute people that are not on the payroll of the entity, then the resulting group must comply with the requirements of the OML. That's basically the way the Maryland law operates.

General Masto interrupted Mr. Doyle and explained for the benefit of the new members that at our last meeting Scott Doyle wasn't able to attend but he provided a written statement and it is on page 3 where he talked about this.

Mr. Doyle continued, anyway to me if we do something like that, it gives the AG's office and more importantly the public a real bright line test in this area to administer and to understand and comply with. I understand your difficulty in producing manual interpretations and then putting OMLOs and AGOs on top of that. It places you in a very difficult position because then you are criticized or potentially open to criticism from all quarters about the administration of the act and if there were some type of rather strict or bright line rule to address this area that would complement your existing

interpretations dealing with single person entities as well as the staff committee exception, to me that would be something that would be worthwhile for the Task Force to consider.

Paul Liparelli stated he has a suggestion on that issue. I think the intent of the OML is that the deliberations of a public body be done in public and I don't think committees or blue ribbon committees or Task Force, whatever you want to call them should be used by anyone to subvert the purposes of the OML, the deliberations of a public body take place in public, but I think the bright line is at the definition of a public body. If a public body has to do its business in the public then any committee that it creates to advise should also do its business in the public. However, if a person is not a public entity, like an administrator or county manager, then a body that she forms to advise her should not be a public body. The reason I think it needs to be a bright line is I can see any number of permutations of constellations of people, staff, public, stakeholders, all sorts of people whose input you want the executive to have being much more difficult to get if we are going to treat those folks like public bodies. Here is an example – if our county manager wanted to get the presidents of the associations that represent the labor groups together to talk about a budget issue and she wanted them to come in and provide their input on something that she is working on, is that going to be a public body? Well maybe not because they are county employees but what if they wanted to bring their local representative or their national union representative, somebody that is not. You can see how the permutations of this get to be infinitely complex and so what we do in Washoe County to comply with the spirit of the OML is we say, if the work product of the committee is going to end up stopping at

the county manager level and she is going to use it to do her job, then it is not a public body. But if it is going to be just packaged up and taken to the board and the board is just going to endorse it, then the public hasn't had the chance to participate in the deliberative process and I think it is really important that we keep the line at whether someone is a public body or not. Just my two cents.

General Masto stated she thought they were great comments and asked if anyone else had comments.

Scott Doyle agreed with everything Paul said but here comes the difficulty and that is that it becomes a matter of impossibility in policing. Now you are talking about tracing the development of information. How do you determine whether the information by this group that Paul describes stops at the county manager or is just simply passed on without attributing to a source and now you are left up to the integrity of individual public officials and I know that as a public official, you are all entitled to the presumption that you are doing your jobs properly, but the reason you have laws like this and you have the statistics of enforcement activity here is that the presumption does not always carry the day, people deviate from the presumption and so while I agree with Paul's philosophical comments, my concern is a difficulty in policing the very issue and rationalities explaining it and to me it would be impossible because basically we are saying, trust me, that works about 90+ percent of the time but there is that other 10 percent that we have to deal with through legislation like Chapter 241.

Mary Ann Miller commented she would be concerned. I think the analysis should be on who appoints that body because I would not want to have a chilling impact on a local governmental official who wants to see input from outside the organization. I think that is a healthy process. I think the concern that is addressed by George's first case study is the potential for a subterfuge around the OML, but I think we need to keep it as it is, for information for governmental officials open.

Paul Lipparelli stated here is another example of what happens in Washoe County. Our commissioners like to go out in the public and have coffee with the commissioner time, they set aside a place and a time where they invite people to come in and talk to them about issues. If that individual member of the public body wants to go out into the public and gather information, I don't think the law should provide a disincentive to that by treating it as a public meeting of some kind. However, when three members of the five

member commission want to go out and do that you clearly have a meeting and for me that is the difference, do you have a public assembling the group to the information or don't you? And that is the only way I can make sense out of it. I need to have it clear so that I can give advice to my client whether she needs to post it and get a secretary and keep minutes and do all that stuff or not.

General Masto stated to her this is a bigger issue to kind of address and really further define the issue here and I'm open to how you want to tackle this. Do we want to start by looking at Scott's suggestion, the Maryland law?

Scott Doyle stated the citation to the law is in the letter but the text of the statute is not.

General Masto asked Scott Doyle if he would provide or get us that information and maybe we can get the text to everybody to take a look at.

Scott Doyle indicated he will get the text to George to post on the website.

General Masto asked that everyone take a look at that and particularly those that have other issues or ways to tackle this to give us a better definition so that we can further define this for not just our purposes but for everybody else who has to comply with this. That would be helpful and we will then get that information and bring it back to the next meeting.

General Masto asked George if was there anything else under this agenda item that he wanted to bring to the Task Force's attention?

George Taylor indicated no and that the other two case studies are just similar, based on the same thing. That the two case studies he did use show the bookends if you will to the continuum so that was important.

General Masto moved on to agenda item 5.c. She asked Mr. Taylor if 5.c. is part of our discussion with 5.a. Mr. Taylor indicated Yes. The other discussions we had were regarding training and complaint disposition. What I would like to do is put agenda items sections 5.d. and e. and 6 to the next agenda. Unless there is something on this agenda that people want to tackle today. So we will move those to our next meeting agenda. That would be agenda items 5.d.e. and agenda item 6.

General Masto then moved on to agenda item 7. This is again throwing out there any other further suggestions from members regarding priorities or further discussion and future meetings that you would want to talk about OML issues. Not that we have time to talk about what we already have on our plate.

Paul Lipparelli stated there is one I would like to throw out there and see if it catches on at all. There have been a couple of times when Washoe County has been presented with an opportunity to either get or save a lot of money through acting on a contract or a grant or something like that which we lost because the opportunity came up between the time the meeting was posted and the time of the meeting and we have always been compliant as the AG has been very strict in interpreting the emergency exceptions to the OML. It literally only permits earthquake, flood, riot, those kinds of things as exceptions to being able to act and I have looked at laws in other states that do seem to recognize that once in awhile these things come up and you don't want to lose the chance to act on them, so here is a suggestion of how it might work. At the beginning of a meeting it could be announced that the board has been presented with an opportunity to accept a grant award for a 100,000 dollars for playground equipment that expires the next day if you don't act on it. At the beginning of the meeting it could be announced that the board is going to act on that matter at the latest opportunity at that same public meeting. So if our meeting starts at 10:00, the board could say at 2:00, we are going to take up the issue of this grant award and thereby give the public, the press, and everyone else the greatest opportunity to see that this is the only chance the board has to do this. I recognize there is mischief potential here and that you could have games being played with dropping these opportunities at the last minute and not giving the three days that are usually required, but the other side of the coin is that the taxpayers and the public are missing out on chances and so I would like to explore the possibility that we could draw a very narrow exception to the emergency exception to the meeting to allow governments to take advantage of these opportunities.

General Masto thanked Paul and asked for any comments on his suggestion from the Task Force members.

Arthur Mallory stated that we would probably need specific language in there saying this opportunity was not presented in time to go on the agenda and assert that because you don't want to use it every time some secretary forgets to put something on there. That is not the purpose of the exception.

General Masto asked Paul Lipparelli if he would be willing to draft something and bring it back to the next meeting as an exception to the emergency provision.

Mr. Lipparelli indicated he would.

Catherine – moving on to agenda item 8. Any there any other items the members are interested in discussing? There were none.

Agenda item 9. Any comments from the public.

Karen Gray from the NPRI spoke. One of the things that Maggie McLetchie raised was the issue of having fees or cures and does that weaken the law [void statute]. That has such a strong incentive that something will be void and then if you add cure or you allow discretion as to whether there is going to be a fee or a cure or a void and the AG has discretion in that it takes away the strength of that actual language if it is void and along those lines of discretion, in allowing the AG discretion, is the discretion going to be whether to enforce the law, or is the discretion what classification a violation falls under, whether it falls under a fee, a cure, or criminal, or a void. The reason I say this is that in having discretion, let me use the City of Henderson as an example. The City of Henderson was found to have violated the OML when they passed a dance hall ordinance. The AG did not go to court and void that action but there was an opinion saying, well actually in the decision there was no direction to change it. It was done formally and actually the ordinance did not come off the books from the City until January, which was six or seven months after the AG's decision, which was four months after the actual violation occurred and that ordinance was removed only after citizens came to the meetings asking when are you [Henderson Council] taking this off the books, you have been found in violation. So having discretion there are some concerns there that it lessens the enforcement, so we need to know, I guess in the statute, clarify where is the discretion. Is that discretion and whether it is enforced or what level of penalty be assessed and to maybe look at that issue in assessing those penalties, how much discretion the AG actually has. Do we need language that says, if an action is taken it is void and there is no question? There just needs to be a legal action to have it void.

General Masto – so what it sounds like is if there is a violation it is void, correct. George indicated that's right. So what you are wanting is affirmation from our office to say, you are in violation of the OML whatever action you took is void. That is automatic so that has nothing to do with our discretion. We do not have discretion to

say it is void or not void. As soon as we say there is an OML violation, it is void. The question then after that we are looking at imposing civil penalties for that violation is void, maybe that is where the discretion comes in, is what level, is it a fine, an acknowledgment, or a cure, or however we look at that.

Karen Gray – I think it would be important to say it is void because I know what is happening in Henderson in the next decision, the Debra March decision in speaking with attorneys is the fact that the AG did not go to court and actually void the action on the appointment where the cure took place. In that instance the City of Henderson did an appointment to the city council by secret ballot which was found to be a violation and the city went in and cured that violation during the complaint process. What happened is that the actual cure came after the deadline for appointing a seat under the city's charter so the question now is whether that appointment is legal because the actual cure occurred after the 30 day deadline. The issues in discussing with attorneys is that the AG did not actually go to court and void the action.

General Masto asked Ms. Gray to stop and asked George Taylor, are we required every time there is a violation and it is void do we have to go to court for that affirmation? Mr. Taylor stated "no."

Karen Gray – then I think maybe something then that clarifies that.

General Masto – so in our orders when we find a violation under the statute that means this is void. There is no further action taken, it is void.

Karen Gray stated it is void and then there could be the penalties that come along after that and that a cure is then known to actually take effect because on the date the cure happened as opposed to the day the initial action happened because the void is not questionable at that point.

General Masto asked for discussion, when they cure it, is it retroactive, or is it from the date they cure it or is it retroactive to the date that it became void?

George Taylor said that is a great question. There is nothing in the statute or the manual that I am aware of and I am not aware of any opinions but, in my view, once it is cured then the voidness is absolved at the point of cure, but it is void up until then. Would you agree with that or disagree?

Paul Lipparelli said he has never had to deal with that issue, but the example that was given by Ms. Gray is an example of how voiding action can be a problem. In the planning commission context there are tight timeframes for approval of applications so in some instances the failure to act on it deems the application to be approved so by default you could end up having a wildly unpopular subdivision project be deemed approved. If something happened during the meeting that was a violation of the open meeting law, voids the action, you can't relate back, you can't recreate the timeframe so the subdivision gets to happen without the approval of the public body. So it may be worth considering some language that would allow the reopening of the timeframes or to avoid those kinds of harsh results falling upon the public.

Karen Gray stated in doing that you do weaken the point of the penalty if you are allowing exceptions or then you weaken the incentive to actually follow the law if you can get out there and see there is no consequence to not following the law, it then weakens the law. When you were talking about fees, having an acknowledgement is a good deterrent especially on the minor infractions but then again it goes back to the whole discretion and I would say one AGs opinion on what is minor and another AGs opinion on what is minor is maybe different and so somehow you would have to write it so there would be some consistency in that discretion on what the interpretation of minor, misdemeanor, criminal means.

Ms. Gray commented on the bulletin board proposal. Most of the concerns I had were discussed and I would just like to say we discussed about the bulletin board meetings could be online and there are libraries and computers. However if my understanding is correct this is a meeting that would take place over days, so libraries have limited hours, they have limited numbers of computers so they could be full, you have sign up requirements if you want to use a computer so if you wanted to go in real time and watch the meeting you may not have access to a computer if you have to use a public computer system. There are also time restriction on how long you can stay on a computer so if a library has a one hour use and it is a two hour meeting you wouldn't be able to attend that online meeting past the one hour, and I agree with a lot said about how do you identify the person, how do you prevent deliberations that are not going onto the computer that are had through the cell phone, but one of the things is the definition of meeting. If this is open and one of the members is going on at 2:00 in the morning, there is not a quorum there to have this discussion

so you are not having a quorum actually in attendance and so I just think that is an additional issue to be considered.

Ms. Gray commented on the definition of a public body. In the first example on the paperwork, the superintendent of the school district. I agree there is a way to circumvent the OML by delegating a committee to a single person and in fact in the instance example that is on this paper, that committee prior to being put together by the superintendent had been discussed in other meetings among the trustees and a consensus was had that they needed to get some of this feedback from the superintendent and by consensus was going to create a committee and the purpose of this committee was to generate a report back to the trustees which they did, they agreed the report and the report was presented to the board so the purpose of this committee while it was formed by the superintendent was formed out of discussion that the board had and its desire for more information, as well there may have been a secondary or that might have been the primary to serve the function of the grant, there was also a secondary or primary reason for this committee and the report that was generated back to the public body you know addressing issues such as educational programming, how they were going to be using monies and fines and things of that nature and so I think that there does need to be some sort of language to prevent this type of delegation from happening because it is very easy to just say, oh we want it and then the administrator creates this public body and then comes back and address things that are under the board's jurisdiction.

Ms. Gray had a question about the OML manual. She stated that what she noticed is a lot of the interpretations in a lot of the enforcement is going on is from the manual but it is not something that was set in statute, so how much authority, that is almost legislative authority, to the AG if the interpretations and I'm not sure if our statute is an interpretation from the AG if someone didn't agree could appeal to court as you would in an administrative process in order to make those interpretations sort of finding which seems to have that effect. Is there an appeal process for a complainant that files and doesn't agree with an AG opinion? If it is going to go in the manual and becomes sort of law, then do we need to look at that process and how that affects the decision making when those decisions are not in statute?

Ms. Gray stated that as part of the administrative process in investigations she thinks it is imperative that the investigating officer actually call and talk to the complainant. I personally as a citizen have filed OML complaints under two different AGs and under the

current one I have never received phone calls. I have picked up the phone and called Mr. Taylor and asked questions but have not had the office pick up the phone and call me and get clarification. I will just my very first ever OML complaint was filed under the former AG and Mr. Rombardo called me and we actually found another violation that I wasn't aware was an actual OML violation and Mr. Rombardo addressed that violation with the public body and that fixed it, so I think it is imperative that in the investigation the complainant be contacted and in addition to that I just noticed in reading OML decisions that there have been comments or statement in there where the complainant didn't say they wanted a certain directive or didn't say that they wanted any type of enforcement so it wasn't done and I think that either the complaint form has to say what do you want as a cure for this or something along those lines or there has to be a phone call to address that because as a citizen and you are going in and filing a complaint, you don't know the law, you don't the manual, you don't know the case law, you don't know that you can get a cure or that you can void, or that once we have fees that there is a fee, you don't know these things, and so when you are just filing the complaint I think it is important administratively to get a phone call. That's all I have.

Catherine – Thank you. Any other members of the public.

No further comments. Meeting adjourned.