

**From:** Doug Flaherty <tahoebblue365@gmail.com>  
**Sent:** 4/23/2024 12:55:26 PM  
**To:** Public Comment <PublicComment@trpa.gov>; TRPA <trpa@trpa.gov>  
**Cc:** John Marshall <jmarshall@trpa.gov>; Julie Regan <jregan@trpa.gov>; John Hester <jhester@trpa.gov>; Hayley Williamson <hayley.a.williamson@gmail.com>; Shelly Aldean <shellyaldean@gmail.com>; fvaguilar@sos.nv.gov <fvaguilar@sos.nv.gov>; Ashley Conrad-Saydah <ashleyc@alumni.princeton.edu>; Jessica Diss <jdiss.trpa@gmail.com>; Belinda Faustinos <belindafastinos@gmail.com>; Meghan Hays <Meghan.hays9@gmail.com>; Alexis Hill <AHill@washoecounty.us>; Vince Hoenigman <vhoenigman@yahoo.com>; James Settlemeyer <JSettlemeyer@dcnr.nv.gov>; Sue Novasel TRPA GB <bosfive@edc.gov.us>; Wesley Rice <wrice@douglasnv.us>; Alexandra Leumer <TRPALeumer@yahoo.com>;  
**Subject:** Public Comment - TRPA Gov Board and Committee Mtngs 4-24-24 - TRPA OML Violations  
**Attachments:** [Attachment A - OML Complaint Against TRPA Gov Brd Meeting 2-28-24 - Flaherty.pdf](#) , [Attachment B - February-28-Governing-Board-Agenda.pdf](#) , [Attachment C - May 24 2023 TRPA Gov Board OML Presentation - Marshall.pdf](#) , [Attachment D - 2019-03-26\\_OML\\_12TH\\_AGOMANUAL.pdf](#)

Dear TRPA Executive Director, Leadership Staff and TRPA Governing Board and Committee Members:

Please make this email and its **Attachments A through D** part of the record and minutes in connection with the 4-24-24 TRPA Governing Board meeting and **each** of the TRPA Committee Meetings.

**OML** = Nevada Open Meeting Law  
**AG** - Nevada State Attorney General

This public comment explains:

1. My recent 4-21-24 AG OML Complaint against the TRPA.

2. My notice to the TRPA **today** that its Public Notice and various agenda items in connection with the TRPA Governing Board and Committee meetings scheduled for 4-24-24 appear to be in violation of the OML as described below.

The TRPA continues to violate various portions of the OML, which gives citizens no choice but to file OML complaints with the AG and/or to file court action.

As an example, please find attached my latest AG OML complaint against the TRPA filed on 4-21-24 (**Attachment A through D**).

**Additionally, this serves as notice to the TRPA of potential OML violations connected with the TRPA Governing Board and Committee Meetings scheduled on 4-24-24:**

Please comply with the OML in connection with the 4-24-24 TRPA Governing Board and all TRPA Committee Meetings including the TMPO related Item marked as Governing Board Agenda Item VII.A.

Currently, in connection with the following 4-24-24 TRPA Governing Board Agenda Item VII.A. description, and as required per NRS.241.020(3)(d)(1), and discussed in NV AG OML Manual § 6.02 (**Attachment D**), TRPA has failed to provide a clear and complete statement describing the agenda item as follows:

#### VII. PUBLIC HEARINGS - TMPO

##### A. 2024 Active Transportation Plan

Offered as further explanation as to why the agenda VII.A. description is not clear and complete under the OML, please refer to item C., Paragraph 3 of Page 63 of § 6.02 AG Open Meeting Law Manual (**Attachment D**), which states:

c. Agenda descriptions for resolutions, ordinances, regulations, statutes, rules, or other such items to be considered by public bodies, should describe to what the statute, ordinance, regulation, resolution, or rule relates, so that the public may determine if it is a subject in which they have an interest which might lead to their attendance at the public meeting. See OMLO 99-01 (January 5, 1999); OMLO 99-03 (January 11, 1999).

Additionally, as required per NRS.241.020(3)(d)(2), TRPA has failed to place the term "for possible action" next to each of the 4-24-24 TRPA Governing Board and Committee Agenda items as follows:

This includes failure to comply with the NRS.241.020(3)(d)(2) in connection with the TRPA Public Notice Agendas as follows:

- Operations and Governance Meeting - Agenda Items 1 through 5
- Legal Committee - Agenda Items 1,2,3,4 and 6
- Transportation Committee - Agenda Items 1 through 5
- Regional Planning Committee- Agenda Items 1 through 6
- TRPA Governing Board Agenda VII.A., VIII. A., and IX.A., B. and C., TRPA Consent Calendar Items 1 through 8, TMPO Consent Calendar 1. and 2.

Despite the NV OML requirements and despite the TRPA General Counsel OML presentation to the Governing Board on May 24, 2024 (**Attachment D**), the TRPA Staff and Board appear to continue, in many instances, to fall short of complying with the NV OML.

**Attachment A** - My complete 4-21-24 NV AG OML complaint.

**Attachment B** - A PDF of the Public Notice / Agenda in connection with the February 28, 2024 Tahoe Regional Planning Agency Governing Board and Committee Meetings.

**Attachment C** - A May 24, 2024 NV OML Power Point Presentation Delivered to the TRPA Governing Board by TRPA General Counsel John Marshall.

**Attachment D** - The NV AG OML Manual 12th Edition.

Doug Flaherty  
Incline Village, NV

April 21, 2024 – **Attachment A**

**Office of the Attorney General – OML Enforcement Unit**

100 North Carson Street  
Carson City, NV 89701

**Re:** Nevada Open Meeting Law (**OML**) complaint against the Tahoe Regional Planning Agency (**TRPA**) in connection with the February 28, 2024, TRPA Governing Board meeting and three TRPA Committee Meetings including 1) the TRPA Operations & Governance Committee, 2) the TRPA Legal Committee and 3) the TRPA Transportation Committee. These meetings were conducted 53 days ago. See **Attachment B** for a copy of the 1) February 28, 2024, TRPA meeting agendas, and 2) the electronic weblink for a copy of the February 28, 2024, TRPA meeting packet here: <https://www.trpa.gov/wp-content/uploads/February-28-Governing-Board-Agenda.pdf>

**Note:** This OML complaint was submitted utilizing the AG electronic complaint form which contained limited space. I will electronically forward additional PDF attachments in support of this complaint to the AG's Office upon the receipt of a NV AG complaint Reference Number, which will also include this complete AG OML Complaint Letter labeled as **Attachment A**.

**Dear Nevada Attorney General (AG),**

My name is Doug Flaherty. I am a resident of Incline Village, NV.

As connected with the February 28, 2024, TRPA Governing Board meeting and its three committee meetings, I am requesting the AG investigate the following alleged OML violations listed in items 1 through 3 below and additionally, determine whether item 4 below warrants an AG investigation in connection with a possible violation of NRS 241.040 - Criminal and civil penalties; members attending meeting in violation of chapter not accomplices; reliance on legal advice:

1. Failure, as required per NRS 241.020(5)(a) and (b), to document in writing that the public bodies complied with the minimum public notice for each of their meetings required by paragraph (a) of subsection 4. The documentation must be prepared by every person who posted a copy of the public notice and include, without limitation: (a) ***The date and time when the person posted the copy of the public notice*** (b) ***The address of the location where the person posted the copy of the public notice***;
2. Failure, as required per NRS.241.020(3)(d)(1), and as discussed in NV AG OML Manual § 6.02 (**Attachment D**), to provide a clear and complete statement describing TRPA Governing Board Agenda Item VII. A. Public Hearings, which broadly states: *VII.A. PUBLIC HEARINGS A. Economic sustainability and housing amendments to Placer County's Tahoe Basin Area Plan*. This Alleged NRS.241.020(3)(d)(1) violation is discussed further below.
3. Failure, as required per NRS.241.020(3)(d)(2) to place the term "**for possible action**" next to the TRPA Governing Board Agenda Item VII.A. This alleged NRS.241.020(3)(d)(2) violation is discussed further below. Additionally, this alleged violation extends to February 28, 2024, TRPA Operations and Governance Committee (agenda Item 4), the TRPA Legal Committee (agenda items 2 and 4), and the TRPA Transportation Committee (agenda Items 2, 3, 4, 5, and 6).
4. While a finding of an alleged violation of NRS 241.040 has significant ramifications, I request the AG investigate whether the TRPA Governing Board and Committee Members violated NRS 241.040 during each of its four Public Body meetings on February 28, 2024.

This, since evidence exists, that on May 24, 2024, TRPA General Counsel John Marshall made an OML slide presentation to the TRPA Governing Board (**Attachment C**). During the presentation, Mr. Marshall pointed out in Slides 8 and 9, the following OML requirements i.e. 1) provide a list of the locations where the (public) notice was posted, 2) that the agenda must consist of a clear and complete statement of the topics to be considered and 3) action items must be clearly denoted as "for possible action".

However, a review of all four TRPA February 28, 2024 meeting and committee agendas (**Attachment B**), which include separate meeting agendas for 1) the TRPA Governing Board, 2) the TRPA Operations & Governance Committee, 3) the TRPA Legal Committee and 4) the TRPA Transportation Committee, revealed

that each of the Public Body meeting Notice, as well as the Public Body members actions during each of the four Public Body meetings, appear to have failed to adhere to the information provided by Mr. Marshall during his May 24, 2024 OML slide presentation (**Attachment C**).

### **NRS.241.020(3)(d)(1) Alleged Violation Discussion**

I allege that agenda item VII.A.'s description "**Economic sustainability and housing amendments to Placer County's Tahoe Basin Area Plan**" is too broad, not clear and complete, thereby obfuscating the true intent of the public hearing item, which was to **adopt** amendments to the Placer County Area Plan, which is part of the TRPA Regional Plan, and to **approve** amending a current TRPA **Ordinance**.

Meeting agenda item VII.A. description is void of any reference whatsoever, indicating possible action on the part of the TRPA Governing Board would include, a **motion to adopt** the Placer County Area Plan Amendments, **approve** an important "finding of No Significant Effect" in order to **adopt** the amendments, nor did the agenda description mention that the required motions included the need to **approve** and amend an existing TRPA **Ordinance**. See page 99 excerpts from the February 28, 2024, meeting staff report as follows:

<https://www.trpa.gov/wp-content/uploads/February-28-Governing-Board-Agenda.pdf>

*"Staff seeks Governing Board discussion and asks the Governing Board to consider **approval** of the proposed area plan **amendment** with the TRPA-recommended text changes detailed in Exhibit A to this staff reports."*

*Required Motions:*

*To **adopt** the proposed amendments to the Tahoe Basin Area Plan, the Board must make the following motions:*

*1) A motion to **approve** the Required Findings, as described in Attachment D, including a Finding of No Significant Effect, for **adoption** of the Area Plan amendment as described in the staff summary; and*

*2) A motion to **adopt** Ordinance 2024-\_\_\_, **amending** Ordinance 2021-02, to **amend** the Tahoe Basin Area Plan as shown in Attachment C and including the changes detailed in Exhibit A to the staff report.*

Offered as further explanation as to why the agenda VII.A. description was not clear and complete under the OML, please refer to item C., Paragraph 3 of Page 63 of § 6.02 AG Open Meeting Law Manual (**Attachment D**), which states:

*c. Agenda descriptions for resolutions, **ordinances, regulations, statutes, rules, or other such items** to be considered by public bodies, should describe to what the statute, ordinance, regulation, resolution, or rule relates, so that the public may determine if it is a subject in which they have an interest which might lead to their attendance at the public meeting. See OMLO 99-01 (January 5, 1999); OMLO 99-03 (January 11, 1999).*

The verbs, "approve" and "adopt" were utilized on page 99 of the staff report, under "required motions" to assist the Governing Board with deciding on their actions. However, these verbs were not utilized within the Public Notice agenda description, which would have served to assist the public with a clear and complete understanding of possible TRPA Governing Board action(s). Therefore, the broadness of the agenda description denied the public an opportunity to determine if this would be a subject in which they have an interest, which might lead to their attendance at the public meeting.

### **TRPA Governing Board Adoption**

As evidence of the TRPA Governing Board adoption of actions in connection with the February 28, 2024, agenda item VII.A., please reference Page 49 and 50 of the March 28, TRPA Governing Board Meeting Packet reflecting the Governing Board motions and approvals as follows:

<https://www.trpa.gov/wp-content/uploads/March-27-Governing-Board-Packet.pdf>

*"Mr. Hoenigman made a motion to **approve** the Required Findings as described in Attachment D, including a Finding of No Significant Effect for **adoption** of the Area Plan Amendment as described in the staff summary."*

"Ayes: Ms. Aldean, Mr. Bass, Ms. Conrad-Saydah, Mr. DiChiara (for Mr. Aguilar), Ms. Faustinos, Ms. Gustafson, Ms. Hill, Mr. Hoenigman, Ms. Laine, Ms. Leumer, Mr. Settelmeyer.  
Members absent: Ms. Diss, Mr. Rice, Ms. Williamson. Motion carried."

"Mr. Hoenigman made a motion to **adopt Ordinance 2024-\_\_\_, amending Ordinance 2021-02, to amend** the Tahoe Basin Area Plan as shown in Attachment C and including the changes detailed in Exhibit A to the staff report and recommended changes by Ms. Aldean."

"Ayes: Ms. Aldean, Mr. Bass, Ms. Conrad-Saydah, Mr. DiChiara (for Mr. Aguilar), Ms. Faustinos, Ms. Gustafson, Ms. Hill, Mr. Hoenigman, Ms. Laine, Ms. Leumer, Mr. Settelmeyer. Members absent: Ms. Diss, Mr. Rice, Ms. Williamson. Motion carried."

#### **NRS.241.020(3)(d)(2) Alleged Violation Discussion**

While Agenda Item VII.A. did contain the word "ACTION" the agenda item did not contain the acceptable OML required wording, i.e. "**For Possible Action**" next to the agenda item description.

From the public's perspective, the word "Action" appears to describe the action as **absolute** and falls short of informing the public that the possible action on the part of the Governing Board is not **absolute**, but indeed a discretionary "possible action."

Only stating the word "ACTION" may lead the public to believe that "ACTION" on the agenda item decision has already been pre-determined, and such ACTION will take place, thereby leading the public to believe that the TRPA has already determined what action is going to take place, the TRPA Board Member minds have already been made up, and so, as a member of the public, why bother to attend? **VS** "For Possible Action," which may lead the public to consider that there is a possible chance that any outcome could be **discretionary** or possibly modified as a result of public comments, or other information received during the planned Public Body open meeting. This then serves as encouragement for the public to attend.

Since the agenda description "**Economic sustainability and housing amendments to Placer County's Tahoe Basin Area Plan,**" is not clear and complete, it is impossible for the public to understand precisely what "ACTION" is being undertaken.

#### **Witnesses, Meeting Location and TRPA Contact Person:**

The February 28, 2024, TRPA Governing Board meeting took place on Zoom at the North Tahoe Events Center, 8318 N. Lake Blvd., Kings Beach, CA.

#### **Witnesses to the February 28, 2024, TRPA Governing Board Meeting include:**

Governing Board Members:

Ms. Aldean, Ms. Bowman/Mr. Di Chiara (for Mr. Aguilar), Mr. Bass, Ms. Conrad-Saydah, Ms. Faustinos, Ms. Gustafson, Ms. Hays, Ms. Hill, Mr. Hoenigman, Ms. Laine, Ms. Leumer, Mr. Rice, Mr. Settelmeyer, Ms. Williamson

#### **The public notice concerning the meeting was signed by:**


#### **TRPA Executive Director Julie Regan**

Tahoe Regional Planning Agency  
128 Market Street  
Stateline, NV 89449

#### **Contact Telephone Number and Email:**

John Marshall, General Counsel for TRPA  
[JMarshall@TRPA.gov](mailto:JMarshall@TRPA.gov)  
[775\) 588-4547](tel:7755884547)

I declare under penalty of Perjury that to the best of my knowledge the foregoing is true and correct.

Doug Flaherty, Incline Village, NV 

TAHOE REGIONAL PLANNING AGENCY (TRPA)  
TAHOE METROPOLITAN PLANNING AGENCY  
(TMPO) AND TRPA COMMITTEE MEETINGS

NOTICE IS HEREBY GIVEN that on **Wednesday, February 28, 2024**, commencing **no earlier than 10:45 a.m.**, on both **Zoom** and at the **North Tahoe Events Center, 8318 N. Lake Blvd., Kings Beach, CA** the **Governing Board** of the Tahoe Regional Planning Agency will conduct its **regular business meeting**.

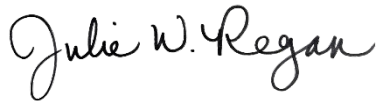
Pursuant to TRPA Rules of Procedure, 2.16 Teleconference/Video Conference Meetings and Participation, Board members may appear in person or on Zoom. Members of the public may observe the meeting and submit comments in person at the above location or on Zoom. Details will be posted on the day of the meeting with a link to Zoom.

To participate in any TRPA Governing Board or Committee meetings please go to the Calendar on the <https://www.trpa.gov/> homepage and select the link for the current meeting. Members of the public may also choose to listen to the meeting by dialing the phone number and access code posted on our website. For information on how to participate by phone, please see page 3 of this Agenda.

NOTICE IS FURTHER GIVEN that on **Wednesday, February 28, 2024**, commencing at **8:30 a.m.**, at the **North Tahoe Events Center**, and on **Zoom**, the **TRPA Operations & Governance Committee** will meet. The agenda will be as follows: **1)** Approval of Agenda (action); **2)** Approval of Minutes (action) (**Pages 7**); **3)** Recommend approval of January Financials (action) (**Page 27**) (*Staff: Chris Keillor*); **4)** Discussion and possible recommendation for adoption of 2024 Aquatic Invasive Species Watercraft Inspection Fee Schedule (action) (**Page 49**) (*Staff: Dennis Zabaglo*); **5)** Upcoming Topics (*Staff: Chris Keillor*); **6)** Committee Member Comments; Chair – Laine, Vice Chair – Diss, Aguilar, Bass, Gustafson, Hill; **7)** Public Interest Comments

NOTICE IS FURTHER GIVEN that on **Wednesday, February 28, 2024**, commencing **8:30 a.m.**, at the **North Tahoe Events Center**, and on **Zoom**, the **TRPA Legal Committee** will meet. The agenda will be as follows: **1)** Approval of Agenda (action); **2)** Approval of Minutes (action); (**Page 13**) **3)** Closed Session with Counsel to Discuss Existing and Potential Litigation; **4)** Potential Direction Regarding Agenda Item No. 3 (action); **5)** Committee Member Comments; Chair – Williamson, Vice Chair – Aldean, Faustinos, Leumer, Rice; **6)** Public Interest Comments

NOTICE IS FURTHER GIVEN that on **Wednesday, February 28, 2024**, commencing **no earlier than 9:15 a.m.**, at the **North Tahoe Events Center**, and on **Zoom**, the **TRPA Transportation Committee** will meet. The agenda will be as follows: **1)** Approval of Agenda (action); **2)** Approval of Minutes (action) (**Pages 17**); **3)** Election of Vice Chair (action) (*Staff: Julie Regan*); **4)** Discussion and possible recommendation for endorsement of the Vision Zero Strategy (action) (**Page 59**) (*Staff: Rachael Shaw*); **5)** Discussion and possible recommendation for adoption of the 2023 Federal Transportation Improvement Program Amendment No. 7 (action) (**Page 81**) (*Staff: Judy Weber*); **6)** Transportation Committee Strategy Session (action) (**Page 273**) (*Staff: Nick Haven & Michelle Glickert*) **7)** Committee Member Comments; – Chair Hill, Vice Chair – Open, Aguilar, Bass, Hays; Hoenigman; **8)** Public Interest Comments



Julie W. Regan,  
Executive Director

This agenda has been posted at the TRPA office and at the following locations and/or websites: Post Office, Stateline, NV, North Tahoe Event Center, Kings Beach, CA, IVGID Office, Incline Village, NV, North Lake Tahoe Chamber/Resort Association, Tahoe City, CA, and Lake Tahoe South Shore Chamber of Commerce, Stateline, NV

<b>TAHOE REGIONAL PLANNING AGENCY</b>	
GOVERNING BOARD	
North Tahoe Events Center	February 28, 2024
8318 N. Lake Blvd., Kings Beach, CA	No earlier than 10:45 a.m.

All items on this agenda are action items unless otherwise noted. Items on the agenda, unless designated for a specific time, may not necessarily be considered in the order in which they appear and may, for good cause, be continued until a later date.

**Written Public Comment:** Members of the public may email written public comments to ‘publiccomment@trpa.gov’. We encourage you to submit written comments (email, mail, or fax) in advance of the meeting date to give our staff adequate time to organize, post, and distribute your input to the appropriate staff and representatives. Written comments received by 4 p.m. the day before a scheduled public meeting will be distributed and posted to the TRPA website before the meeting begins. TRPA does not guarantee written comments received after 4 p.m. the day before a meeting will be distributed and posted in time for the meeting. Late comments may be distributed and posted after the meeting. Please include the meeting information and agenda item in the subject line. For general comments to representatives, include “General Comment” in the subject line.

**Verbal Public Comment:** Public comments at the meeting should be as brief and concise as possible so that all who wish to participate may do so; testimony should not be repeated. The Chair of the Board shall have the discretion to set appropriate time allotments for individual speakers (usually 3 minutes for individuals and group representatives as well as for the total time allotted to oral public comment for a specific agenda item). No extra time for participants will be permitted by the ceding of time to others. In the interest of efficient meeting management, the Chairperson reserves the right to limit the duration of each public comment period to a total of 1 hour. Public comment will be taken for each appropriate action item at the time the agenda item is heard and a general public comment period will be provided at the end of the meeting for all other comments including agendized informational items.

**Accommodation:** TRPA will make reasonable efforts to assist and accommodate physically handicapped persons that wish to participate in the meeting. Please contact Marja Ambler at (775) 589-5287 if you would like to participate in the meeting and are in need of assistance. The meeting agenda and staff reports will be posted at <https://www.trpa.gov/meeting-materials> no later than 7 days prior to the meeting date. For questions please contact TRPA admin staff at [virtualmeetinghelp@trpa.gov](mailto:virtualmeetinghelp@trpa.gov) or call (775) 588-4547.



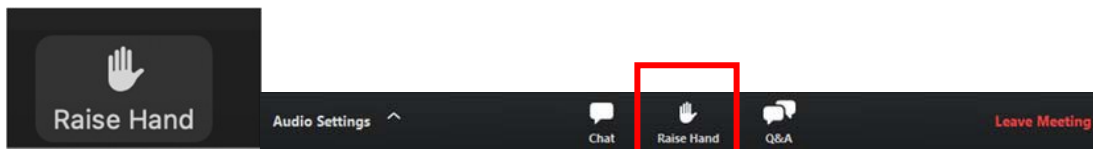
## Zoom Webinar - Public Participation

### To Participate Online:

1. Download the Zoom app on your computer, tablet, or smartphone.
  - The computer app can be downloaded here:  
<https://us02web.zoom.us/client/latest/ZoomInstaller.exe>
  - The tablet or smartphone app can be found in the app store on your device.
2. On the day of the meeting, join from the link or phone numbers posted under the appropriate meeting date and time on the TRPA website ([www.trpa.gov](http://www.trpa.gov)).
3. Ensure that you are **connected to audio** either through your computer (provided it has a microphone) or using your phone as a microphone/speaker. You can manage your audio settings in the tool bar at the bottom of the Zoom screen.



4. At the appropriate time for public comments, you will be able to “raise your hand” by clicking on the Hand icon located on the bottom of your Zoom screen **OR by dialing \*9 if you are on your phone**. With your hand raised, a TRPA staff member will unmute you and indicate that you can make your comment.



### To Participate on the phone:

1. Dial the call-in number posted at the calendar event for the appropriate meeting ([www.trpa.gov](http://www.trpa.gov)).
2. At the appropriate time for public comments, you will be able to “raise your hand” **by dialing \*9 if you are on your phone**. With your hand raised, a TRPA staff member will unmute you and indicate that you can make your comment.

If you do not have the ability or access to register for the webinar, please contact TRPA admin staff at [virtualmeetinghelp@trpa.org](mailto:virtualmeetinghelp@trpa.org) or (775) 588-4547.

### Additional Resources from Zoom:

- [Joining and Participating in a Zoom Webinar](#)
- [Joining a Zoom Webinar by Phone](#)
- [Raising Your Hand in a Webinar](#)

## AGENDA

- I. CALL TO ORDER AND DETERMINATION OF QUORUM
- II. PLEDGE OF ALLEGIANCE
- III. APPROVAL OF AGENDA
- IV. APPROVAL OF MINUTES (January 24, 2024 Governing Board Minutes will be in the March 27, 2024, Packet)
- V. TRPA CONSENT CALENDAR (see Consent Calendar agenda below for specific items)  
  
Adjourn as the TRPA and convene as the TMPO
- VI. TAHOE METROPOLITAN PLANNING ORGANIZATION CONSENT CALENDAR (see Consent Calendar agenda below for specific items)  
  
Adjourn as the TMPO and reconvene as the TRPA
- VII. PUBLIC HEARINGS
  - A. Economic sustainability and housing amendments to Placer County’s Tahoe Basin Area Plan  
*(Staff: Jacob Stock)* **Action** [Page 99](#)
- VIII. REPORTS
  - A. Executive Director Status Report **Informational Only**
    - 1) Annual Report **Informational Only** [Page 259](#)
    - 2) Update on Transportation and Sustainable Communities Threshold Standard 1 (and associated VMT Regional Plan policies) **Informational Only**
  - B. General Counsel Status Report **Informational Only**
- IX. GOVERNING BOARD MEMBER REPORTS
- X. COMMITTEE REPORTS
  - A. Local Government Committee **Report**
  - B. Legal Committee **Report**
  - C. Operations & Governance Committee **Report**
  - D. Environmental Improvement Program Committee **Report**



E. Transportation Committee **Report**

F. Regional Planning Committee **Report**

XI. PUBLIC INTEREST COMMENTS

Any member of the public wishing to address the Governing Board on any item listed or not listed on the agenda including items on the Consent Calendar may do so at this time. TRPA encourages public comment on items on the agenda to be presented at the time those agenda items are heard. Individuals or groups commenting on items listed on the agenda will be permitted to comment either at this time or when the matter is heard, but not both. The Governing Board is prohibited by law from taking immediate action on or discussing issues raised by the public that are not listed on this agenda.

XII. ADJOURNMENT

**TRPA CONSENT CALENDAR**

<b>Item</b>	<b>Action Requested</b>
1. January Financials (Staff: Chris Keillor)	<b>Action/Approval</b> <u>Page 27</u>
2. 2024 Aquatic Invasive Species Watercraft Inspection Fee Schedule (Staff: Dennis Zabaglo)	<b>Action/Approval</b> <u>Page 49</u>
3. Vision Zero Strategy (Staff: Rachael Shaw)	<b>Action/Approval</b> <u>Page 59</u>
4. Notice of Preparation for Joint Environmental Impact Report/ Environmental Impact Statement for Proposed Boatworks Redevelopment Project; 740, 760, and 790 North Lake Boulevard, Tahoe City, Placer County, California; APNs 094-090-001, -033, -036, - 042, and 065; TRPA File # ERSP2022-0953	<b>Action/Approval</b> <u>Page 67</u>

**TMPO CONSENT CALENDAR**

<b>Item</b>	<b>Action Requested</b>
1. 2023 Federal Transportation Improvement Program Amendment No. 7	<b>Action/Approval</b> <u>Page 81</u>

The consent calendar items are expected to be routine and non-controversial. They will be acted upon by the Board at one time without discussion. The special use determinations will be removed from the calendar at the request of any member of the public and taken up separately. If any Board member or noticed affected property owner requests that an item be removed from the calendar, it will be taken up separately in the appropriate agenda category. Four of the members of the governing body from each State constitute a quorum for the transaction of the business of the agency. The voting procedure shall be as follows: (1) For adopting, amending or repealing environmental threshold

carrying capacities, the regional plan, and ordinances, rules and regulations, and for granting variances from the ordinances, rules and regulations, the vote of at least four of the members of each State agreeing with the vote of at least four members of the other State shall be required to take action. If there is no vote of at least four of the members from one State agreeing with the vote of at least four of the members of the other State on the actions specified in this paragraph, an action of rejection shall be deemed to have been taken. (2) For approving a project, the affirmative vote of at least five members from the State in which the project is located and the affirmative vote of at least nine members of the governing body are required. If at least five members of the governing body from the State in which the project is located and at least nine members of the entire governing body do not vote in favor of the project, upon a motion for approval, an action of rejection shall be deemed to have been taken. A decision by the agency to approve a project shall be supported by a statement of findings, adopted by the agency, which indicates that the project complies with the regional plan and with applicable ordinances, rules and regulations of the agency. (3) For routine business and for directing the agency's staff on litigation and enforcement actions, at least eight members of the governing body must agree to take action. If at least eight votes in favor of such action are not cast, an action of rejection shall be deemed to have been taken.

Article III (g) Public Law 96-551 Tahoe Regional Planning Agency Governing Board Members: Chair, Cindy Gustafson, Placer County Supervisor Representative; Vice Chair, Hayley Williamson, Nevada At-Large Member; Francisco Aguilar, Nevada Secretary of State; Shelly Aldean, Carson City Supervisor Representative; Ashley Conrad-Saydah, California Governor's Appointee; Jessica Diss, Nevada Governor's Appointee; Belinda Faustinos, California Assembly Speaker's Appointee; Cody Bass, City of South Lake Tahoe Councilmember; Meghan Hays, Presidential Appointee; Alexis Hill, Washoe County Commissioner; Vince Hoenigman, California Governor's Appointee; Brooke Laine, El Dorado County Supervisor; Wesley Rice, Douglas County Commissioner; James Settelmeyer, Nevada Dept. of Conservation & Natural Resources Representative; Alexandra Leumer, California Senate Rules Committee Appointee.



# Governing Board Meeting

*May 24, 2023*

## **AGENDA ITEM VIII.B**

TRPA's Open Meeting Law, Ethics and  
Ex Parte Requirements

## Compact Article III(d)

The governing body of the agency shall meet at least monthly. **All meetings shall be open to the public to the extent required by the law of the State of California or the State of Nevada, whichever imposes the greater requirement, applicable to local governments at the time such meeting is held.**

# Nevada OML - NRS Chapter 241

- Legislature intent: public bodies take action openly and that their deliberations be conducted openly. NRS 241.010(1).
- "The spirit and policy behind the OML favors open meetings and any exceptions thereto should be strictly construed."  
*McKay v. Board of Supervisors*, 102 Nev. 644, 730 P.2d 438 (1986).

# Applicability of the Open Meeting Law

- The OML applies to meetings of public bodies. NRS 241.016(1).
- A “public body” is “[a]ny administrative, advisory, executive or legislative body of a State or a local government consisting of at least two persons ....” NRS 241.015(4).

# What is a "Meeting"?

- NRS 241.015(3) defines “meeting” as “[t]he gathering of members of a public body at which a quorum is present, . . . to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.”
  - **Quorum:** a simple majority of the membership of a public body or another proportion set by law. NRS 241.015(5).
  - **Deliberation:** collectively examine, weigh, and reflect upon the reasons for or against an action. NRS 241.015(2).
  - **Action:** a decision, commitment, or promise made by a majority of the members present during a meeting. NRS 241.015(1).



# Serial Communications

- A meeting also includes serial communications or “walking quorums”.
- What is serial communication?
  1. A series of gatherings of members of a public body;
  2. Less than a quorum is present at any individual gathering;
  3. The members of the public body attend one or more of the gatherings collectively constitute a quorum; and
  4. The series of gatherings was held with the specific intent to avoid the provisions of the OML
- Email pitfalls – “Reply all” email chains can constitute a quorum

# What is a Meeting?

## Exceptions (NRS 241.015(3)(b))

- The definition of a "meeting" does not include:
  - **Social Functions** where there is no deliberation or action taken on any matter over which the public body has supervision, control, jurisdiction, or advisory power
  - **Attorney-Client Litigation Sessions** to receive information from the body's attorney regarding potential or existing litigation matter over which the public body has supervision, control, jurisdiction, or advisory power.
  - **Training Regarding Legal Obligations of the Public Body**

# Meeting Notice and Agenda Requirements (NRS 241.020)

- Written notice must be given at least **3 working days [Compact 7 calendar days]** before the meeting, which requires:
  1. Time, place, and location of the meeting;
  2. List of the locations where the notice was posted;
  3. The name, contact information, and business address for the person from whom a member of the public may request supporting materials and a list of the locations where the supporting materials is available to the public or information about how to find supporting material on the Internet; and
  4. An agenda

# Meeting Notice and Agenda Requirements

- Agenda must consist of a **clear and complete statement** of the topics scheduled to be considered
- Action items must be clearly denoted as "for possible action"
- Public comment, to be taken at the beginning/end of meeting or before any action taken on an item
- If any portion of the meeting will be closed to consider the character, alleged misconduct, or professional competence of a person, the name of the person
- If the public body will consider whether to take administrative action regarding a person, the name of the person
- Notification that items on the agenda may be taken out of order, may be combined for consideration, and may be removed from the agenda or delayed for discussion at any time

# What Does it Mean to be "Clear and Complete"?

- Agenda items must be **clear and complete**. NRS 241.020(2)(d)(I).
- A **higher degree of specificity** is necessary for topics of **substantial public interest**. *Sandoval*, 119 Nev. at 154-55, 67 P.3d at 906. Factors to consider include:
  - Does the topic generate public comment?
  - Does the topic generate debate among the members of the body?
  - Does the topic generate media interest/coverage?

Does the notice provide enough information to the public of its government is doing, has done, or may do?

# Minimum Public Notice – NRS 241.020(4)

- Must post a copy of the notice at least the following:
  1. Principal office of the public body;
  2. If meeting is held using a remote technology system and no physical location, post on the public body's Internet website;
  3. Provide a copy to any person who has requested notice of the meetings
- Must be posted no later than 9 a.m. of the third working day before the meeting.
- Additional notice requirements for consideration of character, misconduct, competence, or physical or mental health: 5 days personal service or 21 days certified mail. NRS 241.033.

# Additional Requirements

- Must make reasonable efforts to assist and accommodate persons with physical disabilities desiring to attend. NRS 241.020(1).
- Must make reasonable efforts to ensure the facilities for the meeting are large enough to accommodate the anticipated number of attendees. NRS 2410.020(2).
- At least one copy of the notice, agenda, and supplemental materials must be made available to the public at the meeting. NRS 241.020(7).



# Closed Meetings – NRS 241.030

- Closed sessions may be held by any public body to:
  1. Consider character, alleged misconduct, professional competence, or the physical or mental health of a person, with some exceptions;
  2. Prepare, revise, administer, or grade examinations administered on behalf of the public body;
  3. Consider an appeal by a person of the results of an examination administered on behalf of the public body.

# Closed Meetings – NRS 241.030

- Closed sessions may not be held:
  - To discuss the appointment of any person to public office or as a member of a public body.
  - To consider the character, alleged misconduct, or professional competence of an elected member of a public body, or a person who is an appointed public officer or who serves at the pleasure of a public body as a chief executive or administrative officer or in a comparable position

# Public Comment

- Restrictions on public comment must be specified on the Notice
- Restrictions must be reasonable "time, place, and manner" restrictions. NRS 241.020(d)(7). This means NO:
  - Halting comment based on viewpoint of speaker;
  - Halting comment upon belief defamation is occurring; or
  - Halting comment critical of a public official.

# Public Comment

- A presiding officer may halt comments that become unduly repetitive or that stray from the scope of a specified agenda topic for which comment is offered, or halt conduct that is willfully disruptive. *See Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266 (9th Cir. 1995); *White v. City of Norwalk*, 900 F.2d 1421,1425-26 (9th Cir. 1990).
- The OML does not "[p]revent the removal of any person who willfully disrupts a meeting to the extent that its orderly conduct is made impractical." NRS 241.030(4)(a).

# TRPA Rules of Procedure 2.16 -

## TELECONFERENCE/VIDEOCONFERENCE MEETINGS AND PARTICIPATION

- Remote participation from any location
- Remote participation capped at 5 times per year
- Roll call votes for substantive items
- Public may participate remotely

# Violations

- Action taken in violation of the OML is void. NRS 241.036
- If a violation is found, the public body must include an item on its next agenda which acknowledges the OAG's findings, and the OAG's opinion must be treated as supporting material for the item. NRS 241.0395.

## Ethics -- Compact Article III(a)(5)

(5) Each member and employee of the agency shall disclose his economic interests in the region within 10 days after taking his seat on the governing board or being employed by the agency and shall thereafter disclose any further economic interest which he acquires, as soon as feasible after he acquires it. As used in this paragraph, “economic interests” means:

- (A) Any business entity operating in the region in which the member or employee has a direct or indirect investment worth more than \$1,000.
- (B) Any real property located in the region in which the member or employee has a direct or indirect interest worth more than \$1,000.
- (C) Any source of income attributable to activities in the region, other than loans by or deposits with a commercial lending institution in the regular course of business, aggregating \$250 or more in value received by or promised to the member within the preceding 12 months; or
- (D) Any business entity operating in the region which the member or employee is a director, officer, partner, trustee, employee or holds any position of management.



## Ex Parte Contacts

- Quasi-Legislative Matters: OK; Need Not Disclose
- Quasi-Adjudicative Matters: OK; Must Disclose

# Governing Board Meeting

*May 24, 2023*

Agenda Item No. VIII.B

Board Member

Questions/Comments

# NEVADA OPEN MEETING LAW MANUAL



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## FOREWORD

The Nevada Legislature enacted significant amendments to the Open Meeting Law (OML) in 2013 and 2015. This newly revised 2016 Open Meeting Law Manual incorporates those new amendments. Comments and suggestions are welcome regarding this revision or future revisions.

The full Nevada Revised Statutes (NRS) Chapter 241—Meetings of State and Local Agencies—can be found at: <https://www.leg.state.nv.us/nrs/NRS-241.html>.

We encourage the reader to visit the Attorney General’s web page at <http://ag.nv.gov>. There, you will find links to Open Meeting Law Opinions beginning in 1993, this Manual, the OML compliance checklist, and the OML complaint form.

Open Meeting Law Opinions are annotated in NRS Chapter 241 by the Legislative Counsel Bureau. Other opinions are labeled “AG File No.” and also are published on our webpage, which is searchable by the reader. Together, these opinions provide the reader with a multitude of factual scenarios and are a useful guide to this office’s interpretation and application of the OML.

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Reference is made throughout the manual to Open Meeting Law Opinions (OMLO), which are opinions rendered by the Office of the Attorney General as a guideline for enforcing the Open Meeting Law and not as a written opinion requested pursuant to NRS 228.150. OMLO Opinions can be found at: [ag.nv.gov/open government](http://ag.nv.gov/open-government). Additional references may be found at Attorney General Opinions (Op. Nev. Att’y Gen.), which are opinions rendered pursuant to NRS 228.150.

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**Part 1            COMPLIANCE CHECKLIST**

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**This is a checklist to reference when applying the Open Meeting Law. References in brackets are to the NRS and to sections of this manual.**

- \_\_\_\_\_ Does the Open Meeting Law apply?
- \_\_\_\_\_ Is the entity a public body? [NRS 241.015(4), §§ 3.01-3.10]
- \_\_\_\_\_ Is there an exemption or exception from the Open Meeting Law? [§§ 4.01-4.07]
- \_\_\_\_\_ Is a meeting going to occur? [NRS 241.015(3), §§ 5.01-5.13]
- \_\_\_\_\_ Will a quorum of the members of the public body be present? [§ 5.01]
- \_\_\_\_\_ Will a quorum deliberate toward a decision or take action on any matter over which the public body has supervision, control, jurisdiction, or advisory power? [§ 5.01]

**Agenda (see Sample Form 1)**

- \_\_\_\_\_ Has a clear and complete agenda of all topics to be considered been prepared? NRS 241.020(2)(d)(1) §§ 6.02, 7.02]
- \_\_\_\_\_ Does the agenda list all topics scheduled to be considered during the meeting? [§§ 6.02, 7.02]
- \_\_\_\_\_ Have all the topics been described clearly in the agenda in order to give the public adequate notice? [§§ 6.02, 7.02]
- \_\_\_\_\_ Does the agenda include designated periods for public comment?  
Does the agenda state that action may not be taken on the matters discussed during this period until specifically included on an agenda as an action item? [§§ 6.02, 7.04, 8.04]
- \_\_\_\_\_ Does the notice inform the public that (1) items may be taken out of the order listed on the agenda, and (2) agenda items may be combined for consideration, and (3) items may be delayed or removed at any time? [§ 6.02]
- \_\_\_\_\_ Does the agenda (1) describe the items on which action may be taken and (2) clearly denote that these items are for possible action? [§§ 6.02, 7.01, 7.02]

\_\_\_\_\_ Has each closed session been denoted, including the name of the person being considered in the closed session, and if action is to be taken in an open session after the closed session, was it indicated on the agenda? [§§ 7.02, 9.06, NRS 241.020(2)(d)(4)]

**Notice, posting, and mailing (see Sample Form 1)**

\_\_\_\_\_ Has written notice of the meeting been prepared? [NRS 241.020(2), § 6.01]

\_\_\_\_\_ Does the notice include:

\_\_\_\_\_ The time, place, and location of the meeting? [§ 6.02]

\_\_\_\_\_ An agenda of topics for discussion or possible action; for further information,,see Sample Form 1, this manual, or Index under “Agenda.”

\_\_\_\_\_ A list of places where the notice was posted? [§ 6.03]

\_\_\_\_\_ A statement regarding assistance and accommodations for physically handicapped people? [§ 6.02]

\_\_\_\_\_ Was the written notice [NRS 241.020(3)(a), § 6.03]:

\_\_\_\_\_ Posted at the principal office of the public body (or if there is no principal office, at the building in which the meeting is to be held)? [§ 6.03]

\_\_\_\_\_ Posted at not less than three other separate, prominent places within the jurisdiction of the public body? [§ 6.03]

\_\_\_\_\_ Posted on the official website of the State, <https://notice.nv.gov>? [§ 6.03]

\_\_\_\_\_ Posted on the public body’s website if the public body maintains a website? [§ 6.03]

\_\_\_\_\_ Posted no later than 9 a.m. of the third working day before the meeting? (Do not count day of meeting) [§§ 6.03, 6.05]

\_\_\_\_\_ In compliance with minimum public notice, is there written documentation for the public body’s record of meeting? [NRS 241.020(4)]

\_\_\_\_\_ Was the written notice mailed at no charge to those who requested a copy? [§§ 6.04, 6.07]

\_\_\_\_\_ Was it mailed in the same manner in which the notice is required to be mailed to a member of the body? [§ 6.04]

\_\_\_\_\_ Was it delivered to the postal service used by the body no later than 9 a.m. of the third working day before the meeting? [§ 6.04]

\_\_\_\_\_ Have persons who requested notices of the meeting been informed with the first notice sent to them that their request lapses after six months? [NRS 241.020(3)(c), § 6.04]

\_\_\_\_\_ If a person's character, alleged misconduct, professional competence, or physical or mental health is going to be considered at the meeting, has that person been given written notice of the time and place of the meeting? [NRS 241.033(1), § 6.09]

\_\_\_\_\_ Does the notice contain a list of the general topics concerning the person, inform the person that he/she may attend the closed session, bring a representative, present evidence, provide testimony, and present witnesses? [NRS §241.033(4)]

\_\_\_\_\_ Does the notice inform the person that the public body may take administrative action against the person? If so, then the requirements of NRS 241.034 have been met. [NRS §241.033(2)(b)]

\_\_\_\_\_ Was the notice personally delivered to the person at least five working days before the meeting or sent by certified mail to the last known address of that person at least 21 working days before the meeting? (Nevada Athletic Commission is exempt from these timing requirements.) [NRS 241.033(1)-(2)]

\_\_\_\_\_ Did the public body receive proof of service of the notice before holding the meeting? (Nevada Athletic Commission not exempt from this requirement.) [NRS 241.033(1) (a) and (b)]

**Agenda support material made available to public**

\_\_\_\_\_ Has at least one copy of an agenda, a proposed ordinance or regulation that will be discussed at the meeting, and any other supporting material (except confidential material as detailed in the statute) been provided at no charge to each person who so requests copies? [NRS 241.020(6) and (7) §§ 6.06, 6.07]

\_\_\_\_\_ Has the governing body of a city or county whose population is greater than 45,000 posted its supporting materials to its website no later than the time the material is provided to members of the governing body? Material provided to the governing body during its meeting must be uploaded to its website within 24 hours after conclusion of the meeting. [NRS 241.020(8)]

\_\_\_\_\_ Does each agenda list the contact information for the person(s) from whom a requester may obtain a copy of meeting supporting materials or the place where a copy may be obtained?

## Emergency Meeting

- \_\_\_\_\_ Is this an emergency meeting? [NRS 241.020(2) and (10), § 6.08]
- \_\_\_\_\_ Were the circumstances giving rise to the meeting unforeseen?
- \_\_\_\_\_ Is immediate action required?
- \_\_\_\_\_ Has the entity documented the emergency?
- \_\_\_\_\_ Has an agenda been prepared limiting the meeting to the emergency item?
- \_\_\_\_\_ Has an attempt been made to give public notice?
- \_\_\_\_\_ While the notice and agenda requirements may be relaxed in an emergency, are other provisions of the Open Meeting Law complied with (e.g., meeting open and public, minutes kept, etc.)?

## Closed Session (*see Sample Form 3*)

- \_\_\_\_\_ Is a closed session specifically authorized by statute? [NRS 241.020(1); NRS 241.030(1), §§ 9.01-9.07]
- \_\_\_\_\_ Have all the requirements of that statute been met?
- If a closed session is being conducted to consider character, misconduct, competence, or physical or mental health of a person or to consider an appeal by a person of the results of an examination, see NRS 241.033:
- \_\_\_\_\_ Is the subject person an elected member of a public body? If so, a closed session is not authorized. [NRS 241.031, § 9.04]
- \_\_\_\_\_ Is the closed session to consider the character, alleged misconduct, or professional competence of an appointed public officer or a chief executive or administrative officer in a comparable position of a public body (i.e., president of a university, state college or community college within NSHE system, county school superintendent, or city or county manager)? If so, a closed meeting is prohibited. [NRS 241.031(1)(b)]
- \_\_\_\_\_ Is the closed session to discuss the appointment of any person to public office or as a member of a public body? If so, a closed session is not authorized. [NRS 241.030(4)(d), § 9.03]
- \_\_\_\_\_ Has the subject been notified as provided above? Has proof of service been returned to the public body? NRS 241.033(1), [§ 6.09]

- \_\_\_\_\_ If a recording was made of the open session, was a recording also made of the closed session? [NRS 241.035(4), § 9.06]
- \_\_\_\_\_ Was the subject person given a copy of the recording of the closed session if requested? [NRS 241.035(6), NRS 241.033(6), § 9.06]
- \_\_\_\_\_ Have minutes been kept of the closed session? [NRS 241.035(2) § 10.02]
- \_\_\_\_\_ Have minutes and recordings of the closed session been retained and disposed of in accordance with NRS 241.035(2)? [§ 10.03]
- \_\_\_\_\_ Was a motion made to go into closed session which specifies the nature of the business to be considered and the statutory authority pursuant to which the public body is authorized to close the meeting?  
[NRS 241.030(3), § 9.06]
- \_\_\_\_\_ Was the discussion limited to specific matters specified in the motion?  
[§ 9.06]
- \_\_\_\_\_ Did the public body go back into open session to take action on the subject discussed? (This must be done unless otherwise provided in a specific statute) [§ 9.06]
- \_\_\_\_\_ Has the subject requested the meeting be open? If so, the public body must open the meeting unless another person appearing before the public body requests that the meeting remains closed.  
[NRS 241.030(2)(a) and (b)]

**Meeting open to public; accommodations**

- \_\_\_\_\_ Have all persons been permitted to attend? [NRS 241.020, § 8.01]
- \_\_\_\_\_ Was exclusion of witnesses at hearings during the testimony of other witnesses handled properly? [NRS 241.030(4)(b), 241.033(5), § 8.07]
- \_\_\_\_\_ Was exclusion of persons who willfully disrupted a meeting to the extent that its orderly conduct is made impractical handled properly?  
[NRS 241.030(4)(a), § 8.06]
- \_\_\_\_\_ Have members of the public been given an opportunity to speak during the public comment period? [NRS 241.020(2)(d)(3), § 8.04]
- \_\_\_\_\_ Are facilities adequate and open? [§ 8.02]
- \_\_\_\_\_ Have reasonable efforts been made to assist and accommodate physically handicapped persons desiring to attend? [NRS 241.020(1), § 8.03]



\_\_\_\_\_ If the meeting is by telephone or video conference, can the public hear each member of the body? [§ 5.05]

\_\_\_\_\_ Have members of the general public been allowed to record public meetings on audiotape or other means of sound reproduction as long as it in no way interferes with the conduct of the meeting? [NRS 241.035(3), § 8.08]

### **Stick to agenda; emergency agenda items**

\_\_\_\_\_ Have actual discussions and actions at the meeting been limited to only those items on the agenda? [§ 7.03]

\_\_\_\_\_ If an item has been added to the agenda as an emergency item:  
[NRS 241.020(2) and (10), § 6.08]

\_\_\_\_\_ Was it due to an unforeseen circumstance?

\_\_\_\_\_ Was immediate action required?

\_\_\_\_\_ Has the emergency been documented in the minutes?

\_\_\_\_\_ Did the body refrain from taking action on discussion items or public comment items? [NRS 241.020(2)(d)(3), § 7.04]

### **Recordings**

\_\_\_\_\_ The public body shall record its public meeting [NRS 241.035(4), § 10.04]:

\_\_\_\_\_ Have recordings been made of the closed session as well as open sessions?  
[NRS 241.035(4), § 9.06]

\_\_\_\_\_ Recordings of public meetings must be made available to the public within 30 working days after adjournment of the meeting. [NRS 241.035(2)]

\_\_\_\_\_ Recordings must be retained for at least one year after the adjournment of the meeting. [NRS 241.035(4)(a)]

\_\_\_\_\_ Recordings of public meetings must be treated as public records in accordance with public records statutes. [NRS 241.035(4)(b)]

\_\_\_\_\_ Have recordings of closed sessions been made available to the subjects of those sessions, if requested? [NRS 241.033(6)]

**Minutes (see Sample Form 2)**

- \_\_\_\_\_ Have minutes or an audio recording been made available for both open and closed sessions? [NRS 241.035(2), (4) and (6), § 10.02]
  
- \_\_\_\_\_ Do they include at a minimum the material required by NRS 241.035(1)? [§ 10.02]
  
- \_\_\_\_\_ Are minutes of open sessions kept as public records under the public record statutes and NRS 241.035(2)?
  
- \_\_\_\_\_ Have minutes of open sessions been made available for inspection by the public within 30 working days after the adjournment of the meeting, retained for at least five years, and otherwise treated as provided in NRS 241.035(2)?
  
- \_\_\_\_\_ Have minutes of closed sessions been made available to the subjects of those sessions if requested? [NRS 241.033(6)]

**Non-compliance**

- \_\_\_\_\_ Have any areas of noncompliance been corrected? [§§ 11.01, 11.02, 11.03, 11.04]
  
- \_\_\_\_\_ If litigation is brought to void an action or seek injunctive or declaratory relief, was it brought within the time periods in NRS 241.037(3)? [§ 11.07]

**§ 2.01 General: discussion of statutory definition of public body.**

The definition of “public body” was clarified and its scope expanded by the 2011 Legislature. A public body’s manner of creation rather than its function is the new touchstone of the definition.

NRS 241.015(4)(b) ensures that the actions and deliberations of certain multimember groups appointed by the Governor or a public officer and/or a public entity under his direction and control are subject to the OML, as long as at least two members of the appointed body are not employees of the Executive Department of State Government. The Legislature deemed this expansion of the scope of the OML appropriate given the growing role such groups play in the formulation of public policy.

NRS 241.015(4)(a) requires a public body to be connected to state or local government in order to be subject to the OML. Set out below is the definition of “public body.”

NRS 241.015(4) defines a public body as:

4. Except as otherwise provided NRS 241.016, “public body” means:

(a) Any administrative, advisory, executive or legislative body of the state or a local government which expends or disburses or is supported in whole or in part by tax revenue or which advises or makes recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue, including, but not limited to, any board, commission, committee, subcommittee or other subsidiary thereof and includes an educational foundation as defined in subsection 3 of NRS 388.750 and a university foundation as defined in subsection 3 of NRS 396.405, if the administrative, advisory, executive, or legislative body is created by:

- (1) The Constitution of this State;
- (2) Any statute of this State;
- (3) A city charter and any city ordinance which has been filed or recorded as required by the applicable law;
- (4) The Nevada Administrative Code;
- (5) A resolution or other formal designation by such a body created by a statute of this State or an ordinance of a local government;
- (6) An executive order issued by the Governor; or
- (7) A resolution or an action by the governing body political subdivision of this State;

(b) Any board, commission or committee consisting of at least two persons appointed by:

(1) The Governor or a public officer who is under the direction of the Governor, if the board, commission or committee has at least two members who are not employees of the Executive Department of the State Government;

(2) An entity in the Executive Department of the State government consisting of members appointed by the Governor, if the board, commission or committee otherwise meets the definition of a public body pursuant to this subsection; or

(3) A public officer who is under the direction of an agency or other entity in the Executive Department of the State Government consisting of members appointed by the Governor, if the board, commission or committee has at least two members who are not employed by the public officer or entity; and

(c) A limited-purpose association that is created for a rural agricultural residential common-interest community as defined in subsection 6 of NRS 116.1201.

5. “Quorum” means a simple majority of the membership of a public body or another proportion established bylaw.

The definition of “public body” is not a drastic change; rather it codifies prior Attorney General Opinions, so that the definition of public body is dependent explicitly on its manner of creation rather than its function. It always has been true that a public body must be collegial, that is, it must consist of more than two persons. NRS 241.015(4) requires at least two persons to comprise a public body. The Open Meeting Law concerns itself with meetings, gatherings, decisions, and actions obtained through the collective consensus of a quorum of the public body membership. *See also Dewey v. Redevelopment Agency*, 119 Nev. 87, 64 P.3d 1070 (2003) (collective process of decision making must be accomplished in public). The Court emphasized that public bodies may only **act** collectively. Similarly, in *Del Papa v. Board of Regents*, 114 Nev. 388, 400, 956 P.2d 770, 778–779 (1988) the Court said: “the constraints of the Open Meeting Law apply only where a quorum of a public body, in its official capacity as a body, deliberates toward a decision or makes a decision.”

In a letter opinion, the Office of the Attorney General opined that when determining if a body is supported by tax revenues, the term “tax revenues” should be construed in its broadest possible sense to include not only those items traditionally thought of as taxes but also the license fees paid to various professional licensing boards pursuant to state law. *See* Attorney General letter opinion addressed to Mr. Arne R. Purhonen, Nevada State Board of Architecture, dated September 1, 1977.

## **§ 2.02 Blue ribbon commissions; Governor appointed committees; executive agency boards, committees**

Following the principle that a “public body” must be a multi-member entity, the Office of the Attorney General opined that the Open Meeting Law does not apply to the Governor when

he/she is acting in his official executive capacity because the Governor is not a multi-member body. *See Op. Nev. Att'y Gen. No. 241 (August 24, 1961).*

As explained in § 3.01 above, any commission, committee, or board appointed by the Governor with at least two members who are not employees of the State Executive Department are now defined as a public body and subject to the Open Meeting Law. But all other bodies, regardless of composition, which are appointed by executive heads of local governments or agencies including, but not limited to, mayors and city and county managers, continue to be exempt from the Open Meeting Law.

An executive officer of a board or commission who carries out the directives, orders, and policies of a board or commission in day-to-day administration of an agency of government is not considered the alter ego of the board or commission so as to require him to comply with the Open Meeting Law. *Bennett v. Warden*, 333 So. 2d 97 (Fla. Dist. Ct. App. 1976) (meetings between college president and his advisors or staff personnel are not covered).

Along this line, the Office of the Attorney General held that staff meetings to advise a city manager who, in turn, arrives at his own decision and recommendation on an insurance claim were not within the ambit of the Open Meeting Law. *See Op. Nev. Att'y Gen. No. 79-5 (February 23, 1979).*

OMLO 2010-02 (April 7, 2010) (“committee, subcommittee or subsidiary thereof,” is not defined in statute, but the OML Manual interprets the statute to mean that to the extent a group is appointed by a public body and is given the task of making decisions for or recommendations to the public body, the group would be governed by the OML). For further treatment of this issue, *see* § 3.04 NEVADA OPEN MEETING LAW MANUAL (11<sup>th</sup> ed. 2011); OMLO 2002-017 (April 18, 2002) and OMLO 2002-27 (June 11, 2002). *See also* OMLO 2007-03 (July 17, 2007) (Walker Basin Project Stakeholder’s Group found not to be public body: it was created by UNR Vice-Chancellor’s steering committee, it was not advisory to any other body, and it was not created by statute). *See also* OMLO 2007-04 (September 10, 2007) (OML does not apply to Douglas Selby, Las Vegas City Manager, when acting in his official capacity, he appointed a citizens advisory body).

The Open Meeting Law applies only to public bodies; the Fernley City Council is a public body, but the citizens’ recruitment committee formed by the Mayor was not a public body. Council played no role in the initial interviews and screening of applications for appointment to City Manager position. Council did not deny a request for access to the initial candidate’s resumes. Once initial screening was accomplished by the Mayor and his citizen’s recruitment committee, and names were forwarded to the Council, then the OML applied. The Council complied with the OML; the finalists’ applications and resumes were made public before the meeting. AG File No. 09-026 (June 14, 2009)

### **§ 2.03 Agency staff**

The Open Meeting Law usually does not apply to the typical internal agency staff meetings where staff members make individual reports and recommendations to a superior,

where the technical requirements of a quorum do not apply, and where decisions are not reached by a vote or consensus. *See* OMLO 2004-02 (January 20, 2004) for a further discussion and analysis on this topic.

However, when a public body delegates *de facto* authority to a staff committee to act on its behalf in the formulation, preparation, and promulgation of plans or policies, the staff committee stands in the shoes of the public body and the Open Meeting Law may apply to the staff meetings. *See News-Press Publishing Co., Inc. v. Carlson*, 410 So.2d 546 (Fla. Dist. Ct. App. 1982) (When the governing authority of a hospital district delegated responsibility of preparation of a proposed budget to an internal budget committee, the open meeting law applied to the committee, even though it consisted of staff personnel.).

Following the above principles, the Office of the Attorney General opined that the Open Meeting Law did not apply to internal staff meetings of an executive agency or interagency staff meetings except where a public body delegates policy formulation or planning functions to a staff committee and these policies or plans are the subject of foreseeable action by the public body. *See* Letter Opinion to Mr. William A. Molini dated February 11, 1985.

#### **§ 2.04 Committees; subcommittees; advisory bodies**

NRS 241.015(4) specifically includes committees, subcommittees, or subsidiaries thereof within the definition of a “public body.” A committee or subcommittee is covered by the law whenever a quorum of the committee or subcommittee gathers to deliberate or make a decision including taking action to make a recommendation to the parent body. NRS 241.015; *Lewiston Daily Sun, Inc. v. City of Auburn*, 544 A.2d 335 (Me. 1988); *Arkansas Gazette Co. v. Pickens*, 522 S.W.2d 350 (Ar. 1975).

Legislative committees are exempt from the OML. In 1994, the Nevada Constitution was amended to exempt legislative committees from the OML. Nevada Constitution article 4, § 15.

The Open Meeting Law does not define “committee, subcommittee or subsidiary thereof,” so counsel for the public body should be consulted for a determination of whether the Open Meeting Law extends to a particular group of persons. Review of §§ 3.01–3.02 above, is recommended. Following the principles of the cases cited above and in § 3.03, to the extent that a group is appointed by a public body and is given the task of making decisions for or recommendations to the public body, the group would be governed by the Open Meeting Law. *See* OMLO 2002-017 (April 18, 2002) and OMLO 2002-27 (June 11, 2002). *But see* AG File No. 07-030 (September 10, 2007) (OML does not apply to the appointment of a citizen advisory panel to advise Las Vegas City Manager when acting in his official capacity (*see infra* at § 3.03).

If a subcommittee recommendation to a parent body is more than mere fact-finding because the subcommittee has to choose or accept options, or decide to accept certain facts while rejecting others, or if it has to make any type of choice in order to create a recommendation, then it has participated in the decision-making process and is subject to the OML. Negotiations with unions, private contractors, and others conducted by a subcommittee of a public body, which

result in a recommendation to the parent body, are subject to the OML, unless specifically exempted by statute.

Failure to notice on its agenda the break-up of an advisory body into study groups, and failure to provide the study groups with recorders or designate someone to keep minutes of the meeting was a violation of NRS 241.015(4)(a). The facilitator's strategy for dividing the committee into study groups coupled with that group's assignment should have been noticed on the agenda and real minutes should have been kept along with a tape recording. AG File No. 07-027 (August 15, 2007).

NRS 241.015(4) specifically includes within the definition of public body an "advisory body of the state or a local government which expends or disburses or is supported in whole or in part by tax revenue or which advises or makes recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue. . . ."

For additional guidance, *see* the following: § 3.07, *infra*; OMLO 98-03 (July 7, 1998), where the Office of the Attorney General opined that a subcommittee informally appointed by the president of a school board was a public body as defined in NRS 241.015(4) where, even though the subcommittee was not formally appointed, its members shared equal voting power, formed a consensus to speak to the school board with one voice, and the school board knew of its existence and treated it as a board subcommittee; and OMLO 98-04 (July 7, 1998) where the Office of the Attorney General opined that two school board members, while self-appointed and initially acting as individuals, became a public body as defined in NRS 241.015(4) when the school board began recognizing them as a subcommittee and encouraging them to meet with staff to formulate a school safety proposal to be presented to the board, after which they met as a collegial body with staff to form a proposal which was formally presented to the board in the name of the "School Safety Subcommittee." The Office of the Attorney General opined that formality in appointment is not the sole dispositive factor in determining what constitutes a public body under the Open Meeting Law, and informality in appointment should not be an escape from it; to hold otherwise would encourage circumvention of the Open Meeting Law through the use of unofficial committees.

An elected Public Body, subject to NRS 241.0355, which statute forbids action by the body unless a majority of all the members of the elected body vote affirmatively for the action, asserted that NRS 241.0355 does not apply to its committees because its bylaws do not require any committee to be composed of elected officials only. Bylaws do not rise to the level of statute and bylaws do not have the force and effect of law. Standing and Special committees of this public body were elected public bodies for purposes of the OML. AG File No. 09-017 (May 29, 2009); *see also* OMLO 2001-57 and AGO 2001-25 for further discussion of the two-tiered voting requirement found in NRS 241.0355.

The Legislature intended that "**committee, subcommittee, or any subsidiary thereof**" be applied to any gathering that makes a decision or recommendation to a parent body. The label given to the sub-group is immaterial and will not prevent the application of the OML to groups with other labels besides "committee" or "sub-committee." Even in the absence of a formal appointment process (*see* NRS 241.015(4)(a)(7)), the Open Meeting Law applies to a

staff committee with *de facto* authority from the parent public body to act on its behalf. The staff committee stands in the shoes of the public body. Legislative intent and explicit language mean the OML applies **whenever a quorum of committee, subcommittee, or any subsidiary thereof**, meets to deliberate or take action. AG File No. 08-014 (July 2, 2008).

### **§ 2.05 Commissions or committees appointed by the Legislature**

NRS 241.016(2)(a) exempts the Legislature from the requirements of the OML. Since the Legislature is not a public body, none of its various committees or subcommittees had been considered to be subject to the OML.

However, the Nevada Constitution was amended in 1994 after a vote by the people to ensure that meetings of all legislative committees must be open to the public, except meetings held to consider the character, alleged misconduct, professional competence, or physical or mental health of a person. NEV. CONST. ART. 4, §15.

### **§ 2.06 Members-elect of public bodies**

Although the literal language of the Open Meeting Law appears to limit its application to actual members of a public body, the Office of the Attorney General believes the better view is set forth in *Hough v. Stenbridge*, 278 So. 2d 288 (Fla. Dist. Ct. App. 1973), where the court held that members-elect of boards and commissions are within the scope of an open meeting law. Otherwise, members-elect could gather with impunity behind closed doors and make decisions on matters soon to come before them, in clear violation of the purpose, intent, and spirit of our Open Meeting Law. Application of the provisions of the statute to members-elect of public bodies is consistent with the liberal interpretation mandated for the Open Meeting Law. *See* OMLO 99-06 (March 19, 1999) and AG File Nos. 01-003, 01-008 (April 12, 2001).

### **§ 2.07 Appointment of designee to public body**

Under the Open Meeting Law, a member of a public body is prohibited from designating a person to attend a meeting of the public body in the place of the member unless the designation is expressly authorized by the legal authority pursuant to which the public body was created. *See* NRS 241.025.

Designation may occur only if the public body's creating authority specifically allows for designation. If there is no express authority authorizing a designee, then one cannot be appointed. However, if the legal authority creating the public body expressly authorizes a designee, then the process of designation of a person may occur either in a written document or on the record at a meeting of the public body.

Once a person is designated to attend a meeting in place of the member, that person is: (1) deemed to be a member of the body for the purpose of determining a quorum at the meeting; and (2) may exercise the same powers as the regular member of the body at that meeting.



There is nothing in NRS 241.025 which forbids designation of a person for multiple meetings as long as the process is followed and the term of the designation explicitly is set forth so there can be no confusion about the designee's term.

**§ 2.08 Specific examples of entities which have been deemed to be public bodies**

If a group or body was a public body under interpretation of the definition of “public body” prior to the 2011 legislative session, it only had to be connected to state or local government and it must expend or disburse tax. The 2011 Legislature clarified the scope of the definition of public body so that our prior interpretation of the definition still is true **if** the body was created by statute, constitution, ordinance, the NAC, resolution or other formal designation by a parent public body, Governor’s executive order, and resolution or action by the governing body of a political subdivision of this State.

Nevada Interscholastic Activities Association	Non-profit corporation authorized by NRS 386.420
Nevada Board of Architecture	Created by NRS 623.050: <i>see</i> Attorney General Letter Opinion dated September 1, 1977
Community Development Corporation and the Eureka County Economic Development Council	OMLO 2001-17 (April 12, 2001)
Storey County Cemetery Board	<i>See</i> OMLO 2002-27 (June 11, 2002)

**§ 2.09 Specific examples of entities which have been deemed not to be public bodies**

The following entities specifically have been deemed not to be public bodies under interpretation of “public body” prior to the 2011 legislative session. These bodies carefully should review the definition of “public body” to ensure continuing compliance:

Committee to prepare arguments advocating and opposing approval of ballot for a city.	<i>See</i> Op. Nev. Att’y Gen. No. 2000-18 (June 2, 2000).
A private, not-for-profit electric utility company.	<i>See</i> AG File No. 00-055 (March 12, 2001).
Non-profit community senior citizen’s center.	<i>See</i> OMLO 99-035 (April 3, 2000).
Economic Development Authority of Western Nevada	<i>See</i> OMLO 99-05 (January 12, 1999).

Faculty Senate at the Community College of Southern Nevada	<i>See</i> OMLO 2003-19 (April 21, 2003).
Clark County Civil Bench/Bar Committee: Eighth Judicial District Court.	<i>See</i> AG File No. 10-011 (April 12, 2010).
Nevada Department of Corrections Psychological Review Panel	<i>See</i> OMLO 2003-21 (May 21, 2003) and OMLO 2004-15 (May 5, 2004).
Nevada Discovery Museum	<i>See</i> OMLO 2008-01 (January 30, 2008).
Head Start of Northeastern Nevada	<i>See</i> OMLO 2004-20 (May 18, 2004).
Nevada State Board of Parole Commissioners	<i>See</i> 2011: NRS 241.030(4) (not a public body when acting to grant, deny, continue, or revoke parole of a prisoner).
Elko County Juvenile Probation Committee	<i>See</i> OMLO 2004-25 (June 29, 2004).
Nevada Humane Society (a non-profit corporation not created by ordinance or statute).	<i>See</i> AG File No. 10-051 (January 4, 2011).
Nevada Sheriffs and Chiefs Association: Domestic non-profit corporation. Its creation has no statutory connection to state or local government.	<i>See</i> AG File No. 09-038 (September 23, 2009).

## **§ 2.10 Private, nonprofit organizations**

Where a government body or agency itself establishes a civic organization, even though it is composed of private citizens, it may well constitute a “public body” under the law. *See* OMLO 2001-17, citing *Palm Beach v. Gradison*, 296 So.2d 473 (Fla. 1974). In Nevada, this would be true if the civic organization is intended to perform any administrative, advisory, executive, or legislative function of state or local government and it expends or disburses or is supported in whole or in part by tax revenue, or if it is intended to advise or make recommendations to any other Nevada governmental entity which expends or disburses or is supported in whole or in part by tax revenue. *See, e.g., Seghers v. Community Advancement, Inc.*, 357 So. 2d 626 (La. Ct. App. 1978); *Raton Public Service Co. v. Hobbes*, 417 P.2d 32 (N.M. 1966).

The mere receipt of a grant of public money does not by itself transform a private, nonprofit civic organization into a “public body” for purposes of the Open Meeting Law, nor

does the membership of a few government officials on the organization's board of directors, *per se*, make the organization a “public body.” See OMLO 2004-03 (February 10, 2004) and OMLO 2004-20 (May 18, 2004). A private, non-profit corporation is a public body if it is formed by a public body; acts in an administrative, advisory, and executive capacity in performing local governmental functions; and is supported in part by tax revenue from the public body. See OMLO 2001-17 (April 12, 2001); *but see* AG File No. 10-051 (January 4, 2011) (non-profit corporation did not act in administrative, advisory, or executive capacity nor was it supported in part by tax revenue).

## **§ 2.11 Quasi-judicial proceedings**

The 2011 Legislature subjected all public body meetings of a quasi-judicial nature to the OML. See NRS 241.016(1). Only meetings of the Parole Board of Commissioners are exempt, but only when acting to grant, deny, continue, or revoke parole of a prisoner, or when modifying the terms of the parole of a prisoner. See NRS 241.016(2)(c).

“Quasi-judicial proceedings are those proceedings having a judicial character that are performed by administrative agencies.” *Stockmeier v Nevada Dep’t of Corr. Psychological Review Panel*, 122 Nev. 385, 390, 135 P.3d 200, 224-25 (2006), *abrogated by*, *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008). The Court in *Stockmeier* stated that an administrative body acts in a quasi-judicial manner when it refers to a proceeding as a trial, takes evidence, weighs evidence, and makes findings of fact and conclusions of law from which a party may appeal an adverse decision to a higher authority. *Id.* at 391-92, 135 P.3d 224-25. The *Stockmeier* Court stated that “‘the taking of evidence only upon oath or affirmation, the calling and examining of witnesses on any relevant matter, impeachment of any witness, and the opportunity to rebut evidence presented against the employee’ was ‘consistent with quasi-judicial administrative proceedings.’” *Id.* at 390, 135 P.3d at 223 (citing *Knox v. Dick*, 99 Nev. 514, 518, 665 P.2d 267, 270 (1983)).

**Part 3                   WHAT ACTIVITIES ARE EXEMPT FROM THE  
OPEN MEETING LAW?**

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**§ 3.01 General**

The opening clause in NRS 241.020(1) provides that the Open Meeting Law applies “except as otherwise provided by specific statute.” The word “specific” is an important one. The Nevada Supreme Court is reluctant to imply exceptions to the rule of open meetings. *See McKay v. Board of County Comm’rs*, 103 Nev. 490, 746 P.2d 124 (1987). *See also* Op. Nev. Att’y Gen. No. 150 (November 8, 1973).

Some public body proceedings or hearings are exempt from the Open Meeting Law by specific statute, or it may have a limited statutory exception from the OML. A non-exclusive list of exempt entities is set out below in § 4.02.

Exemption means that certain public business may be conducted without regard to any requirement of the Open Meeting Law because the Legislature has weighed the benefits of secrecy with the OML’s policy of openness, while other statutes merely allow certain activities to be closed to the public. These statutes create exceptions to the OML, but a public body still must record and keep minutes of closed meetings under statutes allowing for exceptions. The distinction is important because openness still is the norm; openness strictly will be enforced, so a public body must ensure that its statute either creates an exemption or an exception, because the OML still applies to exceptions. Any action taken in violation of the Open Meeting Law is void. But even though some statutes permit or require “deliberations” of certain matters to be closed to the public, that statutory authority does not imply necessarily that action taken after deliberations is exempt from the Open Meeting Law.

The distinction sometimes is obfuscated by statutory language that is not as specific as contemplated by NRS 241.020(1). In those cases, interpretation of the statutes should be employed using the standards discussed in Part 12 of this manual.

Because the OML still applies to all public body activities outside its statutory exception, a government body advising the public body may not be estopped from performing its governmental function even where the public body wrongly had interpreted the exception for several years. The Nevada Supreme Court in *Chanos v Nevada Tax Comm’n.*, 124 Nev. 232, 238, 181 P.3d 675, 679 (2008), after review of legislative intent, decided that the Nevada Tax Commission’s statutory exception had not been applied correctly to taxpayer refund applications, despite earlier advice from the Attorney General’s office that its hearing procedure was in violation of the OML. The Attorney General brought suit against the Tax Commission. The Supreme Court held that the statutory exception (NRS 360.247) allowed the Tax Commission to close only the portion of its hearing at which it received confidential evidence, questioned parties, and heard argument concerning confidential information. The Court found an OML violation even after a lengthy period of misinterpretation resulting in closed meetings upon only a request by an affected taxpayer. The Court also held that estoppel does not apply to estop the Attorney General from enforcing an interpretation of the OML, which may have been

contradictory with past practices at the Nevada Tax Commission for two reasons: firstly, the Tax Commission and Edison (defendants) failed to prove that they were ignorant of the true state of the facts, and, secondly, a government body may not be estopped from performing its governmental function.

Below is a discussion of some governmental body proceedings, meetings, and other activities that are statutorily exempt from the Open Meeting Law, and some that are not.

### § 3.02 Statutory exemptions

The following public body proceedings, meetings, and hearings either are exempt from the Open Meeting Law or the public body has an exception under the statutes cited. Because the statutes may change after the printing of this manual, be sure to check the statutes and make sure all the conditions or requirements of the statutes are followed.

Should a body choose to conduct any of these proceedings as part of an open meeting, the Office of the Attorney General recommends the proceedings be included on the agenda as an exempt proceeding, citing the provision that provides the exemption; but the exemption from the open meeting requirements still applies to the proceeding whether or not the exemption was placed on the agenda.

Judicial Proceedings	<i>See</i> NRS 241.016(2)(b) and <i>Goldberg v. Eighth Judicial District Court</i> , 93 Nev. 614, 572 P.2d 521 (1977). The Open Meeting Law does not apply to proceedings before the Commission on Judicial Selection and, except as otherwise provided in NRS 1.4687, the Commission on Judicial Discipline.
Legislature	NRS 241.016(2)(a) excludes the Legislature from the definition of public body. <i>See</i> Article 4 § 15 of the Nevada Constitution. <i>See</i> discussion in § 3.05.
State Ethics Commission	Meetings or hearings to receive information or evidence concerning the propriety of the conduct of any public officer or employee under NRS Chapter 281 are exempt under NRS 281A.440(15).
Local Ethics	NRS 281A.350 provides a specific statutory exception to the Open Meeting Law that allows a local ethics committee to render a confidential opinion to an elected city councilperson. <i>See</i> Op. Nev. Att'y Gen. No. 94-10 (May 24, 1994).

A local ethics board may not meet in closed session to discuss the past conduct of a public official due to lack of a statutory exception to the open meeting requirements. *See* Op. Nev. Att'y Gen. No. 94-21 (July 29, 1994).

Hearings by public school boards to consider expulsion of pupils; hearings by charter school boards to consider expulsion of pupils

*See* NRS 392.467(3), *Davis v. Churchill County Sch. Bd.*, 616 F. Supp. 1310 (D. Nev. 1985), *remanded*, 823 F.2d 554 (9th Cir. 1987), and OMLO 99-04 (January 11, 1998); *see* NRS 386.585(2).

Certain labor negotiations proceedings

The following proceedings conducted under NRS Chapter 288 are exempt: (1) any negotiation or informal discussion between a local government employer and an employee organization or individual employees whether conducted by the governing body or through a representative or representatives; (2) any meeting of a mediator with either party or both parties to a negotiation; (3) any meeting or investigation conducted by a fact finder; (4) any meeting of the governing body of a local government employer with its management representative or representatives, and (5) deliberations of the board toward a decision on a complaint, appeal, or petition for declaratory relief. *See* NRS 288.220, *but see* AG File No. 10-020 (June 22, 2010). Even exempt meetings should be limited by statutory authority. The legislative intent underlying an exemption is to allow these meetings as long as the meetings confine discussion to negotiations between a local government employer and an employee organization and/or the defined exceptions in NRS 288.220. Exempt meetings cannot be used to circumvent the legislative intent expressed in NRS 241. Exempt meetings under NRS 288.220 cannot be used as a shield to improperly discuss persons or any other issue not within the scope of the exemption.

Nevada Commission  
on Homeland Security

NRS 239C.140(2) states:  
The Commission may hold a closed meeting to:

- (a) Receive security briefings;
- (b) Discuss procedures for responding to acts of terrorism and related emergencies; or
- (c) Discuss deficiencies in security with respect to public services, public facilities and infrastructure, if the Commission determines, upon a majority vote of its members, that the public disclosure of such matters would be likely to compromise, jeopardize or otherwise threaten the safety of the public.

Committee on  
Catastrophic Leave

A meeting or hearing held by the Committee to carry out the provisions of this section (an appeal of the appointing authority) and the Committee's deliberations on the information or evidence received are not subject to any provision of chapter 241 of NRS.  
*See* NRS 284.3629(7).

Committees formed to  
present arguments on  
ballot questions.

Committees created pursuant to NRS 295.121 to present the arguments on a ballot question are exempt from the Open Meeting Law.  
*See* NRS 295.121(12) and Op. Nev. Att'y Gen. 2000-18 (June 2, 2000).

Board of Medical  
Examiners

Any deliberations conducted or vote taken by the Board or any investigative committee of the Board regarding its ordering of a physician, physician assistant or practitioner of respiratory care to undergo a physical or mental examination or any other examination designated to assist the Board or committee in determining the fitness of a physician, physician assistant or practitioner of respiratory care are not subject to the requirements of NRS 241.020.  
*See* NRS 630.336(1).

**Nevada Tax**

NRS 360.247 states:  
1. Except as otherwise provided in this

## **Commission**

section, any appeal to the Nevada Tax Commission which is taken by a taxpayer concerning his/her liability for tax must be heard during a session of the Commission which is open to the public. Upon request by the taxpayer, a hearing on such an appeal must be closed to the public to receive proprietary or confidential information.

## Occupational Licensing Boards

NRS 622.320 states:

1. The provisions of NRS 241.020 do not apply to proceedings relating to an investigation conducted to determine whether to proceed with disciplinary action against a licensee, unless the licensee requests that the proceedings be conducted pursuant to those provisions.
2. If the regulatory body decides to proceed with disciplinary action against the licensee, all proceedings that are conducted after that decision and are related to that disciplinary action are subject to the provisions of NRS 241.020.

### **§ 3.03 Certain confidential investigative proceedings of the Gaming Control Board and Commission**

NRS 463.110(2) holds that all meetings of the Gaming Control Board are open to the public except for investigative hearings that may be conducted in private at the discretion of the board or hearing examiner. NRS 463.110(4) holds that investigative hearings of the board or hearing officer may be conducted without notice.

Also, the Office of the Attorney General opined in Op. Nev. Att'y Gen. No. 150 (November 8, 1973) that certain investigative proceedings involving the Gaming Commission receiving information that is confidential by law may be exempt from the Open Meeting Law up to the point where the proceeding moves into deliberations or taking action. *See* Op. Nev. Att'y Gen. No. 150 (November 8, 1973). *Cf. Marston v. Gainesville Sun Publishing Co., Inc.*, 341 So. 2d 783 (Fla. Dist. Ct. App. 1976).

### **§ 3.04 Quasi-judicial proceedings no longer exempt from OML**

The 2011 Legislature made all meetings of a public body that are quasi-judicial in nature subject to the OML. NRS 241.016(1). The Nevada Board of Parole Commissioners is exempt, but only when acting to grant, deny, continue, or revoke parole for a prisoner or to establish or modify the terms of the parole of a prisoner. NRS 241.016(2)(c).



### **§ 3.05 Attorney-client conference exception**

NRS 241.015(3)(b)(2) excepts from the definition of “Meeting,” for purposes of the Open Meeting Law, a meeting of a quorum of a public body “[t]o receive information from the attorney employed or retained by the public body regarding potential or existing litigation involving a matter over which the public body has supervision, control, jurisdiction or advisory power and to deliberate toward a decision on the matter, or both.”

A meeting held for the purpose of having an attorney-client discussion of potential and existing litigation pursuant to NRS 241.015(3)(b)(2) is not a meeting for purposes of the Open Meeting Law and does not have to be open to the public. In fact, no agenda is required to be posted and no notice is required to be provided to any member of the public. *See* OMLO 2002-21 (May 20, 2002). However, the Office of the Attorney General advises that if the public body interrupts its meeting to confer with its legal counsel pursuant to NRS 241.015(3)(b)(2), the public body should place this interruption of the open meeting on the agenda to avoid any confusion. *See* § 5.11 of this manual for more information regarding meetings to confer with counsel.

It is important to note that a public body may deliberate “collectively to examine, weigh and reflect upon the reasons for or against the action,” which connotes collective discussion in an attorney-client conference. *See* NRS 241.015(2); *Dewey v. Redevelopment Agency*, 119 Nev. 87, 97, 64 P.3d 1070, 1077 (2003), OMLO 2001-09 (March 28, 2001) and OMLO 2002-13 (March 22, 2003). However, NRS 241.015(3)(b)(2) does not permit a public body to take action in an attorney-client conference.

### **§ 3.06 Student governments**

NRS 241.017 requires the Board of Regents of the University of Nevada to establish requirements equivalent to the Open Meeting Law for student governments in the Nevada System of Higher Education and to provide for their enforcement. *See* OMLO 2004-09 (March 19, 2004) where the Office of the Attorney General opined that pursuant to NRS 241.038, it did not have jurisdiction to investigate or enforce an alleged violation by the UNLV Rebel Yell Advisory Board.

### **§ 3.07 Pre-meeting discussion to remove or delay discussion of items from agenda**

The Nevada Supreme Court decided that pre-meeting discussions by a public body to remove an item from its agenda did not violate the OML because a public body may remove or refuse to consider an agenda item at any time, therefore, pre-meeting discussions regarding whether to remove an agenda item do not implicate the OML. *Schmidt v. Washoe County*, 123 Nev. 128, 135, 159 P.3d 1099, 1104 (2007), *abrogated by*, *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008).

*See* NRS 241.020(2)(c)(6)(III)(public body may remove an item from its agenda at any time.)

**§ 4.01 General; statutory definitions**

NRS 241.015(3(a)(1) and (2) define “meeting” as:

- (1) The gathering of members of a public body at which a quorum is present, whether in person or by means of electronic communication, to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.
- (2) Any series of gatherings of members of a public body at which:
  - (I) Less than a quorum, whether in person or by means of electronic communication, is present at any individual gathering;
  - (II) The members of the public body attending one or more of the gatherings collectively constitute a quorum; and
  - (III) The series of gatherings was held with the specific intent to avoid the provisions of this chapter.

As discussed in §4.05, NRS 241.015(3)(b) excludes from the definition of meeting:

A gathering or series of gatherings of members of a public body, as described in paragraph (a), at which a quorum is actually or collectively present, whether in person or by means of electronic communication:

- (1) Which occurs at a social function if the members do not deliberate toward a decision or take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.
- (2) To receive information from the attorney employed or retained by the public body regarding potential or existing litigation involving a matter over which the public body has supervision, control, jurisdiction or advisory power and to deliberate toward a decision on the matter, or both.

Some of the key words in that definition are:

“Gathering” In Op. Nev. Att’y Gen. No. 85-19 (December 17, 1985), the Office of the Attorney General defined “gathering” to mean to bring together, collect, or accumulate and to place in readiness. Accordingly, a “gathering” of members of a public body within the conception of an open meeting would include any method of collecting or accumulating the deliberations, or decisions of a

quorum of these members.

- “Quorum” A “quorum” of a public body is defined in NRS 241.015(5) as “a simple majority of the membership of a public body or another proportion established by law.”
- “Present” NRS 241.010(2) states “[I]f any member of a public body is present by means of teleconference or videoconference at any meeting of the public body, the public body shall ensure that all the members of the public body and the members of the public who are present at the meeting can hear or observe and participate in the meeting.” A member of a public body may be present through video conference or teleconference, but not through social media, such as a chat room, or email. The public must be able to view and/or hear the public body and be able to participate in the public meeting.
- “Deliberate” Under NRS 241.015(2), “deliberate” means “collectively to examine, weigh and reflect upon the reasons for or against the action. The term includes, without limitation, the collective discussion or exchange of facts preliminary to the ultimate decision.” *See Dewey v. Redevelopment Agency*, 119 Nev. 87, 97, 64 P.3d 1070, 1077 (2003) and *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 69 Cal.Rptr. 480 (Cal. Ct. App. 1968) discussed in § 5.02 below. *See* OMLO 2010-06 (September 10, 2010) (collective deliberation is required to constitute a meeting of Board of school trustees).
- “Action” Under NRS 241.015(1), “action” means: “(a) a decision made by a majority of the members present, whether in person or by means of electronic communication, during a meeting of a public body; (b) a commitment or promise made by a majority of the members present, whether in person or by means of electronic communication, during a meeting of a public body; (c) if a public body may have a member who is *not* an elected official, an affirmative vote taken by a majority of the members present, whether in person or by means of electronic communication, during a meeting of the public body; or (d) if all the members of a public body *must* be elected officials, an affirmative vote taken by a majority of all the members of the public body.

Application of the definitions to common circumstances follows.

#### **§ 4.02 Informal gatherings and discussions that constitute deliberation**

The Nevada Supreme Court cited *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors* (see § 5.01 above, for citation) for clarification of the meaning of

“deliberation.” All five members of the Sacramento County Board of Supervisors went to a luncheon gathering with the county counsel, a county executive, the county director of welfare, and some AFL-CIO labor leaders to discuss a strike of the Social Workers Union against the county. Newspaper reporters were not allowed to sit in on the luncheon, and litigation resulted. The board of supervisors contended that the luncheon was informal and merely involved discussions that were neither deliberations nor actions in violation of California’s open meeting law.

The California Court of Appeals disagreed and upheld an injunction against the board, ruling that California’s open meeting law extended to informal sessions or conferences designed for discussion of public business. Among other things, the Court observed:

“Recognition of deliberation and action as dual components of the collective decision-making process brings awareness that the meeting concept cannot be split off and confined to one component only, rather it comprehends both and either.”

**“To deliberate is to examine, weigh and reflect upon the reasons for or against the choice. . . . Deliberation thus connotes not only collective discussion, but the collective acquisition or the exchange of facts preliminary to the ultimate decision.”**

“An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. **There is rarely any purpose to a nonpublic, pre-meeting conference except to conduct some part of the decisional process behind closed doors.** Only by embracing the collective inquiry in discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices. As operative criteria, formality and informality are alien to the law’s design, disposing it to the very evasions it was designed to prevent. Construed in light of the Brown Act’s objectives, **the term “meeting” extends to informal sessions or conferences of board members designed for the discussion of public business.** The Elks Club luncheon . . . was such a meeting.”

69 Cal.Rptr. at 485.

There are important objectives to be achieved from requiring the deliberations and actions of public agencies to be open and public. As stated in the article, Access to Government Information in California:

“The goal in requiring that deliberations take place at meetings that are open and public is that committee members make a conscientious effort to hear viewpoints on each issue so that the

community can understand on what their premises are based, add to those premises when necessary, and intelligently evaluate and participate in the process of government.”

54 Cal. L. Rev. 1650 (1966).

The Office of the Attorney General agrees with the foregoing and believes that if a majority of the members of a public body should gather, *even informally*, to discuss any matter over which the public body has supervision, control, jurisdiction, or advisory power, it must comply with the Open Meeting Law. *Cf.* Op. Nev. Att’y Gen. No. 241 (August 24, 1961) and Op. Nev. Att’y Gen. No. 380 (January 1, 1967), certain aspects of which were written before the statutory definition of “meeting” was established.

For an example of the foregoing discussion of informal meeting:

A quorum of the City Council discussed public business with a volunteer firefighter. Two members constituted a quorum of the City Council and these two were employed by the same employer. However, after an interview with the witness firefighter, no evidence was uncovered which indicated that a commitment or promise about a matter within the City Council’s supervision, control, jurisdiction, or advisory power had been made. Warning was issued to the Council. AG File No. 08-003 (April 7, 2008).

Under some city charters, the mayor is not a member of the city council, and the mayor’s powers usually are limited to a veto or casting a tie-breaking vote. In such cases, the presence of the mayor is not counted in determining the presence of a quorum of the council. *See* Op. Nev. Att’y Gen. No. 2001-13 (June 1, 2001).

#### **§ 4.03 Social gatherings**

Nothing in the Open Meeting Law purports to regulate or restrict the attendance of members of public bodies at purely social functions. A social function only would be reached under the law if it is scheduled or designed, at least in part, for the purpose of having a majority of the members of the public body deliberate toward a decision or take action on any matter over which the public body has supervision, control, jurisdiction, or advisory power. As described by the California Court of Appeals in *Sacramento Newspaper Guild*, 69 Cal.Rptr. at 487 n.8, *supra* at § 5.02:

There is a spectrum of gatherings of public agencies that can be called a meeting, ranging from formal convocations to transact business to chance encounters where business is discussed. However, neither of these two extremes is an acceptable definition of the statutory word “meeting.” Requiring all discussions between members to be open and public would preclude normal living and working by officials. On the other hand, permitting secrecy, unless there is a formal convocation of a body, invites evasion. Although one might hypothesize quasi-social occasions whose characterization as a meeting would be debatable, the difference between a

social occasion and one arranged for pursuit of the public's business usually will be quite apparent.

The definition of meeting now explicitly excludes a gathering or series of gatherings of members of a public body at which a quorum is actually or collectively present which occurs at a social function, if the members do not deliberate toward a decision or take action on any matter over which the public body has supervision, control, jurisdiction, or advisory power. *See* NRS 241.015(3)(b)(1).

#### **§ 4.04 Seminars, conferences, conventions**

When a majority of the members of a public body attend a state or national seminar, conference, or convention to hear speakers on general subjects of interest to public officials or to participate in workshops with their counterparts from around the state or nation, it usually may be assumed they are there for the purpose of general education and social interaction and not to conduct meetings to deliberate toward a decision or to take action on any matter over which their public body has supervision, control, jurisdiction, or advisory power, even if presentations at the seminar touch on subjects within the ambit of the public body's jurisdiction or advisory power. Thus, such seminars, conferences and conventions do not fall under the definition of "meeting" found in NRS 241.015(3). However, should the gathering have the purpose of or in fact exhibit the characteristics of a "meeting" as defined in NRS 241.015(3), then the provisions of the Open Meeting Law apply. *See* Op. Nev. Att'y Gen. 2001-05 (March 14, 2001).

#### **§ 4.05 Telephone conferences/video conferences**

Nothing in the Open Meeting Law prohibits a quorum of the members of a public body from deliberating toward a decision or taking action on public business via a telephone conference call or video conference in which they simultaneously are linked to one another telephonically. However, since this is a "meeting," the notice requirements of the Open Meeting Law must be complied with, and the public must have an opportunity to listen to the discussions and votes by all the members through a speaker phone or video conference equipment. This may be accomplished by including in the meeting notice the location and address of a place where members of the public may appear and listen to the meeting discussion over a telephone speaker device or other electronic media. *See Del Papa v. Board of Regents*, 114 Nev. 388, 956 P.2d 770 (1998) for a discussion regarding the applicability of the Open Meeting Law to a public body's use of telephones, fax machines, and other electronic devices to deliberate and/or take action.

Although a telephone conference may be a lawful method of conducting the public's business, it never should be used as a subterfuge to avoid compliance with the Open Meeting Law and its stated intent that the actions of public bodies are to be taken openly and their deliberations conducted openly. NRS 241.016(4).

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#### § 4.06 Electronic polling

NRS 241.016(4) specifically provides that electronic communications must not be used to circumvent the spirit or letter of the Open Meeting Law in order to discuss or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory powers.

This statute applies to telephone polls (unless done as a part of an open meeting as discussed above) and to polls by facsimile or e-mail.

In *Del Papa v. Board of Regents*, 114 Nev. 388, 956 P.2d 770 (1998), the Chairman of the Board of Regents of the University of Nevada sent by facsimile a draft advisory to all but one regent rebutting public statements made by that regent to the press. The draft advisory was accompanied by a memo requesting feedback on the advisory and sought advice from the other regents on whether to release the advisory to the press. The memo stated that no press release would occur without Board approval. Of the ten regents who received the fax, five responded in favor of releasing the advisory, one wanted it released under the chairman's name only, one was opposed, two had no opinion, and one did not respond. The regents who responded did so by telephone calls either to the chairman or the interim director of public information for the University. In finding that the Board violated the Open Meeting Law by deciding whether to release the draft advisory privately by "facsimile" and telephone rather than by public meeting, the Nevada Supreme Court stated:

[A] quorum of a public body using serial electronic communication to deliberate toward a decision or to make a decision on any matter over which the public body has supervision, control, jurisdiction or advisory power violates the Open Meeting Law. That is not to say that in the absence of a quorum, members of a public body cannot privately discuss public issues or even lobby for votes. However, if a quorum is present, or is gathered by serial electronic communications, the body must deliberate and actually vote on the matter in a public meeting.

*Id.* at 400, 956 P.2d at 778.

Where two county commissioners (three were a quorum) discussed the termination of the County Manager between themselves, the OML was not offended because no other commissioner acknowledged discussion about termination with them. The failure to create a constructive quorum barred application of the OML. AG File No. 07-011 (June 11, 2007); NRS 241.015(3) sets the serial communication bar at "collective deliberations or actions" (exchange of facts that reflect upon reasons for or against the choice) involving a quorum of members of a public body. *Dewey*, 119 Nev. at 87, 64 P.3d at 1070. *See also* AG File No. 07-015 (September 10, 2007) (allegation that Board of School Trustees created constructive quorum through emails and private meetings).

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#### **§ 4.07 Mail polls**

In view of the legislative declaration of intent that all actions of public bodies are to be taken openly, the making of a decision by a mail poll that is not subject to public attendance appears inconsistent with both the spirit and intent of the law. *See* Op. Nev. Att’y Gen. No. 85-19 (December 17, 1985).

#### **§ 4.08 Serial communications, or “walking quorums”**

The Open Meeting Law forbids “walking quorums” or constructive quorums. Serial communication invites abuse if it is used to accumulate a secret consensus or vote of the members of a public body. Any method of meeting where a quorum of a public body discusses public business, whether gathered physically or electronically, is a violation of the OML.

Nevada is a “quorum state,” which means that the gathering of less than a quorum of the members of a public body is not within the definition of a meeting under NRS 241.015(3). Where less than a quorum of a public body participates in a private briefing with counsel or staff prior to a public meeting, it may do so without violating the Open Meeting Law. *Dewey*, 119 Nev. at 99, 64 P.3d at 1078.

While the Nevada Supreme Court ruled that meetings between a quorum of a public body and its attorney are not exempt from the Open Meeting Law, it observed in *McKay v. Board of County Commissioners*, 103 Nev. 490, 746 P.2d 124 (1987) that:

Nothing whatever precludes an attorney for a public body from conveying sensitive information to the members of a public body by confidential memorandum; nor does anything prevent the attorney from discussing sensitive information in private with members of the body, singly or in groups less than a quorum. Any detriment suffered by the public body in this regard must be assumed to have been weighed by the Legislature in adopting this legislation. The Legislature has made a legitimate policy choice—one in which this court cannot and will not interfere.

*McKay*, 103 Nev. at 495–96, 746 P.2d at 127.

In another case, the Nevada Supreme Court observed that the OML did not forbid all discussion among public body members even when discussing public business:

[A] quorum of a public body using serial electronic communication to deliberate toward a decision or to make a decision on any matter over which the public body has supervision, control, jurisdiction or advisory power violates the Open Meeting Law. *That is not to say that in the absence of a quorum, members*



*of a public body cannot privately discuss public issues or even lobby for votes. (Emphasis added.)*

*Del Papa*, 114 Nev. at 400, 956 P.2d at 778.

Serial communication invites abuse of the Open Meeting Law if it is used to accumulate a secret consensus or vote of the members of a public body. In *McKay v. Board of County Commissioners*, 103 Nev. 490, 746 P.2d 124 (1987), the Court stated that sensitive information may be discussed in serial meetings where no quorum is present in any gathering. But there can be no *deliberation, action, commitment, or promise* made regarding a public matter in such a serial meeting.

In *Dewey v. Redevelopment Agency*, 119 Nev. 87, 64 P.3d 1070 (2003), the Court reaffirmed its position in *McKay* and provided a substantial discussion regarding “serial communications” and non-quorum private briefings by staff. Please note that NRS 241.015(3)(a)(2), which defines “serial communications” as a “meeting” for purposes of the Open Meeting Law, was enacted after the *Dewey* case was decided. However, the Office of the Attorney General believes the Court’s analysis in *Dewey* provides substantial insight into the facts the Supreme Court will analyze to determine if “serial communications” occurred.

In *Dewey*, the Redevelopment Agency for the City of Reno (Agency) owned the Mapes Hotel, an historic landmark listed on the National Trust for Historic Preservation. In 1999, the Agency adopted a resolution in which it would accept bids to rehabilitate the Mapes Hotel. The Agency’s staff put together a request for proposals (RFP), which was sent to more than 580 developers. In response to the RFP, the Agency received six proposals to rehabilitate the Mapes Hotel.

On August 31, 1999, the Agency’s staff conducted two private back-to-back briefings with a non-quorum of the Agency attending each briefing; three members attended one briefing and two members attended the other briefing. For the purposes of an Agency meeting, a quorum was four or more members.

The purpose of these meetings was to inform the Agency members of potential issues with the RFP responses. The testimony at trial was clear that the Agency members neither provided their opinions, voted on the issue, nor were they polled by staff as to their opinions or votes at the briefings. The purpose of the briefings was to provide Agency members with information regarding a complex public policy issue.

*Dewey*, as well as other plaintiffs, filed a lawsuit against the Agency alleging a violation of the Open Meeting Law. The trial court held that there was a violation of the Open Meeting Law because the meetings constituted a constructive quorum for purposes of the Open Meeting Law. However, the Court only issued an injunction and refused to void the Agency’s actions. In response, *Dewey* appealed the court’s final order in hopes of voiding the Agency’s actions, and the Agency cross-appealed alleging that the Court erred in finding an Open Meeting Law violation.

On appeal, the Nevada Supreme Court stated, “[W]e have . . . acknowledged that the Open Meeting Law is not intended to prohibit *every* private discussion of a public issue. Instead, the Open Meeting Law only prohibits collective *deliberations* or *actions* where a quorum is present.” (Emphasis added.) *Dewey*, 119 Nev. at 94–95, 64 P.3d at 1075. The Court stated, in part, that deliberations meant the collective discussion by a quorum. (See §5.01, *infra* for the full definition of deliberations.) Since a quorum of the Agency did not attend the back-to-back briefings, a collective discussion equaling deliberations could not have occurred. In order for a constructive quorum to exist, the Agency members or staff would have to participate in serial communications. The trial court shifted the burden to the Agency to prove that the Agency did not participate in serial communications. The Supreme Court held that shifting the burden was inappropriate because a quorum of the public body did not attend the briefings. Thus, the burden was on Dewey to provide substantial evidence that the Agency conducted serial communications.

The Court then reviewed the record to determine whether substantial evidence existed to prove serial communications occurred. The Court stated that the record did not provide substantial evidence that the Agency member’s thoughts, questions, or opinions from one briefing were shared with the members of the other briefing. There also was no evidence of polling by the Agency’s staff to determine the opinions or votes of the Agency’s members. Further, there was no evidence in the record that the briefings resulted in the Agency taking action or deliberating on the issue. Finally, the record indicated that the Agency’s staff intended to comply with the Open Meeting Law in conducting the briefings in the non-quorum back-to-back fashion. As a result, the Court held that substantial evidence did not exist to prove the briefings resulted in serial communications creating a constructive quorum, and that the Agency’s back-to-back briefings were not “meetings” for purposes of the Open Meeting Law.

Further citations illustrating the discussion above:

- The Office of the Attorney General accepts affidavits or written statements from members of a public body as evidence whether “serial communications” occurred. See OMLO 2004-16 (May 65, 2004).
- See OMLO 2004-26 (July 21, 2004) for an example of “serial communications” in violation of the Open Meeting Law, and see OMLO 2003-11 (March 6, 2003) for an analysis finding no “serial communication” consistent with *Dewey*.
- See OMLO 2008-010: A public body quorum met to discuss District business immediately following adjournment of a noticed meeting. The meeting had been arranged without notification to the public that a quorum would remain after adjournment of the regularly scheduled meeting. The fact that the meeting only concerned discussion of matters not appearing on a public body’s agenda did not exempt the discussion from the application of the OML. OML is applicable whenever a quorum of a public body deliberates or takes action on any matter over which the public body has supervision, control, jurisdiction, or advisory power. AG File No. 08-010 (July 23, 2008); AG File No. 08-035 (November 17, 2008) (two members of public body were mistaken in their belief that a quorum

can only be achieved by a physical gathering of a quorum at the same time and place.)

#### **§ 4.09 “Private Briefings” among staff of public body and non-quorum of members**

In *Dewey*, 119 Nev. at 94, 64 P.3d at 1075, the Nevada Supreme Court stated that private briefings among staff of a public body and a non-quorum of members of a public body are not meetings for purposes of the Open Meeting Law, and such a meeting is not prohibited by law. *See* §5.08 *supra* for a further discussion of *Dewey*.

#### **§ 4.10 Meetings held out-of-state or out of local jurisdiction**

The Open Meeting Law applies even if the meeting occurs outside of Nevada. For example, minutes must be kept, and a clear and complete agenda must be noticed properly.

Nothing in the Open Meeting Law limits its application only to meetings in Nevada, and any such interpretation would only invite evasion of the law by meeting across state lines. A county-based public body may lawfully meet outside the county. *See* AG File No. 00-040 (January 5, 2001).

*See also* § 4.05, Attorney-Client conferences.

While the Open Meeting Law does not prohibit out-of-jurisdiction meetings, other statutes might. *See*, for example, the limitations on county commission meetings in NRS 244.085.

#### **§ 4.11 Exception for conferring with counsel**

“Meeting” has been redefined to exclude a gathering or series of gatherings of members of a public body at which a quorum is present (1) to receive information from the attorney for the public body regarding potential or existing litigation involving a matter over which the public body has supervision, control, jurisdiction, or advisory power and (2) to deliberate toward a decision on the matter.

The law specifically allows the members of a public body to deliberate, but not act, information obtained from its counsel in an attorney-client conference. *See* § 4.05 *supra*. However, any action must be taken in an open meeting. The agenda *should note* that the public body may interrupt the open meeting and exclude the public for the purpose of having an attorney-client discussion of potential and existing litigation, pursuant to NRS 241.015(3)(b)(2).

Alternatively, the public body may gather to confer with legal counsel at times other than the time noticed for a normal meeting. In such instances, there is no notice or agenda required. However, the usual notice and agenda will be required in order to later convene an open meeting in order to take any action based on the attorney-client conference. A decision on whether to

settle a case or to make or accept an offer of judgment must be made in an open meeting. *See* OMLO 2002-21 (May 20, 2002).

However, a conference between counsel and a quorum of a public body that does not involve potential or existing litigation on a matter over which the public body has supervision, control, jurisdiction or advisory power, is *not* exempt from the OML. (*See* § 4.02 for examples of other statutory exemptions from the OML.) The Open Meeting Law bans closed meetings in all cases not specifically excepted by statute. *McKay*, 103 Nev. at 495–96, 746 P.2d at 127–28; NRS 241.020(1). “Any detriment suffered by the public body in this regard [limitations on the ability to meet privately with legal counsel] must be assumed to have been weighed by the Legislature in adopting this legislation. The Legislature has made a legitimate policy choice – one in which this court cannot and will not interfere.” *Id.*, 103 Nev. at 496, 746 P.2d at 127.

#### **§ 4.12 Meetings held with another public body**

Whenever a quorum of a public body gathers and collectively discusses, deliberates, or takes action on matters over which the body has supervision, control, jurisdiction, or advisory power, a meeting of that body takes place within the meaning of NRS 241.015(3) even if the public body is meeting with another public body at the same time and place. A meeting of two or more public bodies must be conducted in accordance with the Open Meeting Law and each public body must give notice of its meeting even if the meeting is also publicly noticed as a meeting of another public body. *See* Op. Nev. Att’y Gen. No. 2001-05 (March 14, 2001). Notice of a meeting of each public body may utilize one agenda, combined to indicate to the public that two or more public bodies are meeting and may take action separately.

However, even if a quorum of a parent public body attends a meeting of its own standing subcommittee, where the quorum of the parent body merely listens, does not participate, does not ask questions, does not deliberate, and does not take action or collectively discuss any matter within the parent’s jurisdiction or control, no meeting within the meaning of NRS 241.015(3) has occurred and no violation of the OML has occurred. OMLO 2010-06 (September 10, 2010).

#### **§ 4.13 Appointment of public officer**

NRS 241.031 prohibits a closed meeting for the purpose of appointing a public officer or a person to a position for which the person serves at the pleasure of a public body as a chief executive or administrative officer or in a comparable position. Public officer is defined in NRS 281.005 to mean a person elected or appointed to a position which: “(a) is established by the Constitution or a statute of this State, or by a charter or ordinance of a political subdivision of this State; and (b) involves the continuous exercise, as part of the regular and permanent administration of the government, of a public power, trust or duty.” *University and Community College System v. DR Partners*, 117 Nev. 195, 201, 18 P.3d 1042, 1046 (2001) (NRS 281.005 is in harmony with judicial definition of “public officer”). For further treatment of this issue, *see* § 9.05, *infra*: Appointment to public office; closed meeting prohibition. *See* NRS 281A.160, Ethics in Government, for a similar definition of public officer which also clarifies the scope of the phrase, “public power, trust or duty.”

The OML prohibits holding a closed meeting for the discussion of the appointment of any person to public office, or appointment as a member of a public body. If a public body participates in any part of the selection process for the position of public officer or for a person who serves at the pleasure of the public officer, or for the appointment of a person to a public body, then all discussion of the appointment process must occur in a public meeting. NRS 241.030(4)(d). In *City Council of City of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989) the Court stated that the phrase “discussion of appointment” in NRS 241.030(4)(d) [formerly NRS 241.030(3)(e)] means “all consideration, discussion, deliberation, and selection” of a public officer or one who serves at the pleasure of a public body.

The Nevada Supreme Court explicitly stated that the OML applies only to an appointment process conducted by a public body. The Fernley City Council is a public body, but the citizen recruitment committee formed by the Mayor was not a public body. The Open Meeting Law did not apply to it and consequently, complainant’s demand for access to all the original candidates’ applications and resumes is not supported by the OML. AG File No. 09-026 (June 14, 2009).

Where the remaining members of a public body selected the new member to fill a vacancy following the resignation of one member, no OML violation occurred where there was no discussion among the members of the public body before it voted on appointment of the new member. NRS 241.015 does not require verbal discussion, assessment, or verbal deliberation among the members of a public body before it takes action. NRS 241.015 states that a meeting occurs where a public body deliberates **or** takes action. The Legislature intended that deliberations be conducted openly, but it did go so far as to void action in the absence of verbal discussion or deliberation by members prior to action. AG File No. 09-029 (November 4, 2009).

**Part 5                   WHAT ARE THE NOTICE REQUIREMENTS UNDER  
THE OPEN MEETING LAW? (See Sample Forms 1 and 3)**

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**§ 5.01 General**

The right of citizens to attend open public meetings is diminished greatly if they are not provided with an opportunity to know when the meeting will take place and what subject or subjects will be considered. One of the primary objectives of the Open Meeting Law is to allow members of the public to make their views known to their representatives on issues of general importance to the community. This type of communication would be impossible if the public were denied the opportunity to appear at the meeting through lack of knowledge that a meeting would be held.

Except in an emergency, written notice of all meetings of all public bodies must be posted in at least four places within the jurisdiction of the public body and mailed at least three working days before the meeting is to occur, as specified below.

Details about how the notice is to be prepared, posted, and mailed are discussed below. A sample form of a notice is included as Sample Form 1. This sample is intended only as a sample, and public bodies may use whatever form or format they wish.

In *Sandoval v. Board of Regents*, 119 Nev. 148, 150, 67 P.3d 902, 903 (2003), the Supreme Court of Nevada stated that Nevada's Open Meeting Law "clearly includes stringent agenda requirements." See § 7.02.

Additionally, NRS 241.033 requires personal notice be given to individuals whose character, alleged misconduct, professional competence, or physical or mental health are to be considered at a meeting. See § 6.09.

NRS 241.034 requires personal notice must also be given to individuals against whom the public agency is going to take certain administrative actions or from whom real property will be taken by eminent domain. See § 6.10.

**§ 5.02 Contents of notice (see Sample Form 1)**

NRS 241.020 sets forth specific notice requirements that are mandatory and must appear on every agenda.

**I. Certain disclosures on how the meeting will be conducted**

NRS 241.020(2)(d)(6) and (7) require the following disclosures on the agenda:

Notice that:

- (1) Items may be taken out of order;

- (2) Items may be combined for consideration by the public body; and
- (3) Items may be pulled or removed from the agenda at any time.

Notice must be made to the public of reasonable restrictions on the time, place, and manner of public comment. Restriction must be reasonable and cannot restrict comment based on viewpoint.

## **II. Minimum requirements for public comment**

NRS 241.020(2)(d)(3) requires that public bodies adopt one of two alternative public comment agenda plans.

First, a public body may comply by agendizing one public comment period before any action items are heard by the public body and then provide for another period of public comment before adjournment.

The second alternative also involves multiple periods of public comment but only after discussion of each agenda action item and before the public body takes action on the item.

Finally, regardless of which alternative is selected, the public body must allow the public time to comment on any matter not specifically included on the agenda as an action item some time before adjournment.

A public body may combine these two public comment alternatives, or take portions of one to add to the requirements of the other. NRS 241.020(2)(d)(3) represents the minimum Legislative requirements regarding public comment.

## **III. Items the meeting notice must include**

The time, place, and location of the meeting. NRS 241.020(2)(a). *See* OMLO 2004-27 (July 13, 2004) where the Office of the Attorney General opined that starting a meeting late after staff took extraordinary measures to ensure that the public received notice that the meeting would start late was not a violation of the Open Meeting Law.

A list of locations where the notice has been posted. NRS 241.020(2)(b). *See, e.g.*, OMLO 99-06 (March 19, 1999).

The name and contact information for the person designated by the public body from whom a member of the public may request the supporting material for the meeting and a list of the locations where the supporting material is available to the public. NRS 241.020(2)(c).

An agenda consisting of:

- a) A clear and complete statement of the topics scheduled to be considered during the meeting. NRS.241.020(2)(d)(1) *See* § 7.02.

- b) A list describing the items on which action may be taken and clearly denoting that action may be taken on those items, by placing next to the agenda item, the phrase “for possible action”. It is not sufficient to place “action” next to the item or to place an asterisk next to the item to signify an action item. The phrase “for possible action” must be used. NRS 241.020(2)(d)(2), *see e.g.*, OMLO 2003-13 (March 21, 2003).
- c) Multiple periods of public comment: one before any action item and one before adjournment, and discussion of those comments, if any. NRS 241.020(2)(d)(3) alternatively allows the public body to hear comment prior to taking action on each and every agenda action item. No action may be taken upon a matter raised under this item of the agenda until the matter itself has been specifically included on an agenda as an item upon which action will be taken. NRS 241.020(2)(d)(3). *See, e.g.* OMLO 2003-13 (March 21, 2003).
- d) If any portion of the meeting will be closed to consider the character, alleged misconduct or professional competence of a person, the name of the person whose character, alleged misconduct or professional competence will be considered. NRS 241.020(2)(d)(4).
- e) If, during any portion of the meeting, the public body will consider whether to take administrative action regarding a person, the name of that person. NRS 241.020(2)(d)(5).

#### **IV. Accommodation for members of the public with physical disabilities**

In addition, an agenda must inform the public that the public body and employees responsible for the meeting shall make reasonable efforts to assist and accommodate persons with physical disabilities desiring to attend a meeting. *See* NRS 241.020(1). The notice should include the name and telephone number of a person who may be contacted so arrangements can be made in advance to avoid last minute problems. *See* § 7.02 of this manual for guidance in preparing the agenda.

#### **§ 5.03 Posting the notice**

NRS 241.020(3)(a) and (b) requires that a copy of the notice must be posted in at least four places not later than 9 a.m. of the third working day before the meeting.

The notice must be posted at the principal office of the public body, or if there is no such office, then at the building in which the meeting is to be held.

The notice must be posted on the official website of the State [<https://notice.nv.gov>] pursuant to NRS 232.2175.

The notice must be posted at a minimum of three other separate, prominent places within the jurisdiction of the public body. Thus, a state agency must post in at least three prominent



places within the state, and a local government must post in at least three prominent places within the jurisdiction of the local government (e.g., county, city, town, etc.).

The notice must be posted in “prominent” places. The statute does not define “prominent,” and whether a notice is properly posted must be judged on the individual circumstances existing at the time of the posting. As a general proposition, the Office of the Attorney General offers the following suggestions:

- Try to post the notices in places where they can be read or obtained by members of the public and media who seek them out.
- Unless required by the statute, avoid posting the notices in buildings that will be closed during the notice period.
- If the meeting concerns a regulated industry or profession, post additional notices at trade or professional associations for the industry.
- Community bulletin boards at city halls and county administration buildings may be used.

If the public body maintains an Internet website, posting on that website is also required. NRS 241.020(5). A public body is not required to create a website if it already does not have one. Inability to post notice of a meeting on its website as a result of a technical problem is not a violation of the law. Website notice is not a substitute for the minimum notice required by NRS 241.020(3). *See* OMLO 2004-16 (May 6, 2004) in which this office opined that a public body, which usually posted its agenda on the website of another government agency or public body, did not violate the Open Meeting Law when it failed to post its agenda on that website because it did not “maintain” the website.

Each public body must make and keep a record of compliance with the statutory requirement for posting the notice and agenda before 9 a.m. of the third working day before a public meeting. The record is to be made by the person who posted a copy of the public notice and it must include: (1) date and time of posting, (2) address of location of posting, and (3) name, title, and signature of person who posted the public notice. NRS 241.020(4).

#### **§ 5.04 Mailing the written notice; mailing list**

In addition to posting the notice, a public body must mail a copy of the notice to any person who has requested notice of meetings. NRS 241.020(3)(c). A public body should implement internal record keeping procedures to keep track of those who have requested notice.

The mailing requirement of the law does not require actual receipt of the notice by the person to whom the notice must be mailed; it only requires that the notice be postmarked before 9 a.m. on the third working day before the meeting. *See* AG File No. 00-015 (April 7, 2000).

The written notices must be mailed to the requestors “in the same manner in which notice is required to be mailed to a member of the body” and must be “delivered to the postal service used by the body not later than 9 a.m. of the third working day before the meeting.” NRS 241.020(3)(c)(1). A public body does not satisfy the requirements of the Open Meeting Law by sending an e-mail to an individual who has requested personal notice of public meetings, unless the individual waived his or her statutory right to personal notice by regular mail and instead elected to receive notice by e-mail. *See* NRS 241.020(3)(c)(2) and Op. Nev. Att’y Gen. No. 2001-01 (February 9, 2001).

NRS 241.020(3)(c) states that a request for mailed notice of meetings automatically lapses six months after it is made to the public body and that the public body must inform the requestor of this fact by enclosure or notation upon the *first* notice sent. (Emphasis added.) Members of the public do not have to make separate written request for notice of each meeting, but a request for both written and electronic notice lapses after six months unless the requestor renews the request.

### **§ 5.05 Calculating “three working days”**

“Working day” means every day of the week except Saturday, Sunday, and any day declared to be a legal holiday, pursuant to NRS 236.015. NRS 241.015(6). The actual day of a meeting is not to be considered as one of the three working days referenced in the statute. *See* OMLO 99-06 (March 19, 1999).

For example, a Thursday meeting should be noticed by 9 a.m. on Monday of the same week, while a Tuesday meeting must be noticed no later than 9 a.m. Thursday of the preceding week; if the Monday before a Tuesday meeting were a legal holiday, notice would be posted no later than 9 a.m. on Wednesday of the prior week.

### **§ 5.06 Providing copies of agenda and supporting material upon request**

NRS 241.020(6) states:

6. Upon any request, a public body shall provide, at no charge, at least one copy of:
  - (a) An agenda for a public meeting;
  - (b) A proposed ordinance or regulation which will be discussed at the public meeting; and
  - (c) Subject to the provisions of subsection 7 or 8, as applicable, any other supporting material provided to the members of the body, except materials:
    - (1) Submitted to the public body pursuant to a nondisclosure or confidentiality agreement which relates to proprietary information;
    - (2) Pertaining to the closed portion of such a meeting of the public body; or

(3) Declared confidential by law, unless otherwise agreed to by each person whose interest is being protected under the order of confidentiality.

As used in this subsection, “proprietary information” has the meaning ascribed to it in NRS 332.025.

NRS 241.020(7) states:

7. A copy of supporting material required to be provided upon request pursuant to paragraph (c) of subsection 6 must be:

(a) If the supporting material is provided to the members of the public body before the meeting, made available to the requester at the time the material is provided to the members of the public body; or

(b) If the supporting material is provided to the members of the public body at the meeting, made available at the meeting to the members of the public body.

If the requester has agreed to receive the information and material set forth in subsection 6 by electronic mail, the public body shall, if feasible, provide the information and material by electronic mail.

NRS 241.020(8) states:

8. The governing body of a county or city whose population is 45,000 or more shall post the supporting material described in paragraph (c) of subsection 6 to its website not later than the time the material is provided to the members of the governing body or, if the supporting material is provided to the members of the governing body at a meeting, not later than 24 hours after the conclusion of the meeting. Such posting is supplemental to the right of the public to request the supporting material pursuant to subsection 6. The inability of the governing body, as a result of technical problems with its website, to post supporting material pursuant to this subsection shall not be deemed to be a violation of the provisions of this chapter.

NRS 241.020(9) states:

9. A public body may provide the public notice, information or supporting material required by this section by electronic mail. Except as otherwise provided in this subsection, if a public body makes such notice, information or supporting material available by electronic mail, the public body shall inquire of a person who requests the notice, information or supporting material if the

person will accept receipt by electronic mail. If a public body is required to post the public notice, information or supporting material on its website pursuant to this section, the public body shall inquire of a person who requests the notice, information or supporting material if the person will accept by electronic mail a link to the posting on the website when the documents are made available. The inability of a public body, as a result of technical problems with its electronic mail system, to provide a public notice, information or supporting material or a link to a website required by this section to a person who has agreed to receive such notice, information, supporting material or link by electronic mail shall not be deemed to be a violation of the provisions of this chapter.

Note that while these provisions authorize a public body to provide the notice, agenda, and/or supporting material by electronic mail, *if* the requester agrees to accept receipt by electronic mail, these provisions do not mandate that a public body provide these documents by electronic mail. Electronic delivery is supplemental to the right of the public to obtain hard copies of materials under NRS 241.020(6) and (7).

**Other examples of how the requirement to make supporting materials available to the public has been applied:**

(1) In AG File No. 08-040 (May 8, 2009) an e-mail communication from a Superintendent to his staff and to the public body, the Board of School Trustees, was not included in supporting materials for the meeting nor was it released to a reporter prior to the meeting, even though it was relevant to a pending agenda item. The e-mail communication was determined to be privileged and shielded by “executive privilege” as it was both predecisional and deliberative under a common law doctrine recognized by the Nevada Supreme Court in *DR Partners v. Board of County Commissioners*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000).

(2) The Office of the Attorney General has opined that drafts of proposed orders of the Public Utilities Commission are agenda supporting material under NRS 241.020(6), formerly NRS 241.020(4), and copies must be furnished upon request at the time that they are made available to commission members. *See* OMLO 98-02 (March 16, 1998). Drafts of minutes of previous meeting to be approved at upcoming meeting are agenda supporting material under NRS 241.020(5) and must be provided upon request. *See* OMLO 98-06 (October 19, 1998); AG File No. 10-047 (November 8, 2010).

(3) Member of a public body independently distributed a proposed budget document to other members shortly before meeting. It should have been included in supporting material, but once distributed to the public body, members discovered it was not included in the agenda packet; it was treated as a fugitive document; the board did not consider it during the meeting. AG File No. 10-027 (July 20, 2010).

(4) Where the Chair of the public body independently obtains a document and discusses it during a public meeting, although it was not provided to any other member of the public body, or the public, the independent action of the Chair does not entangle the Commission with NRS 241.020. Unless the document had been provided to the Commission as support material, pursuant to NRS 241.020(6) and (7), complainant's request for its disclosure must be under NRS 239. AG File No. 10-028 (July 8, 2010).

(5) Inability to provide supporting material to the public because the public body's clerk, staff, or other custodian of materials does not have a copy, because the clerk, staff, or other custodian was not provided a copy, is a violation of NRS 241.020(6) and (7). It does not matter that the source of supporting material is a private person, the city manager, or any other person. If all members of the public body receive supporting material for a future agenda item, that material must be available to the public upon request. AG File No. 09-021 (August 21, 2009).

(6) Requests to provide agenda supporting material under NRS 241.020(7) are treated separately from standing requests to mail notices of meetings under NRS 241.020(3)(c). See OMLO 99-06 (March 19, 1999). Agenda supporting material need not be mailed but must be made available over the counter when the material is ready and has been distributed to members of the public body and at the meeting. See OMLO 98-01 (January 21, 1998) and OMLO 2003-06 (February 27, 2003).

(7) The OML does not require supporting materials, such as a settlement agreement, to be appended to or attached to the publication of the public body's meeting Notice and Agenda. Members of the public must request copies of supporting materials before or during the meeting; the public body has no duty to provide copies of supporting materials except when requested. AG File No. 10-008 (May 3, 2010).

(8) When a public body is interviewing candidates for a vacant position in an open session, a request for a copy of candidate resumes may not be refused by the public body because the resume of the chosen applicant would become part of the personnel file if hired, or on the grounds that refusal was necessary to accommodate an applicant's concern that he/she might suffer an adverse employment reaction from his/her current employer if the applicant's interest in the position became known to his/her current employer. *See* AG File No. 00-035 (August 31, 2000). *See also* Opinion in AG File No. 08-005 (March 7, 2008) (beginning with a presumption in favor of open government and public access, disclosure of applicants' names, application for employment, and proposed contracts of employment should be deemed public unless there is sufficient justification, such as an identifiable privacy or law enforcement interest, or other exigent circumstances, for keeping the record confidential).

(9) Agenda supporting materials are not required to be provided until after the appointment of a person if a separate statute or regulation declares the materials to be confidential during the selection and appointment process. *See* AG File No. 00-036 (September 25, 2000).

(10) In situations where a request for agenda supporting materials is made at the meeting, a public body does not have to stop or delay its meeting to provide the materials if the

supporting material requested had been available at the time the agenda was posted. In this circumstance, a public body can satisfy the Open Meeting Law requirement of providing supporting materials “upon any request” by having one “public” copy of the supporting materials available for review at the meeting. NRS 241.020(6).

(11) As to materials that were not available on the agenda posting date, a member of the public is justified in asking for such materials at the meeting, and the public body must interrupt its meeting to provide the requested copies. *See* NRS 241.020(7)(b) and AG File No. 00-025 (October 3, 2000).

(12) Unapproved draft minutes that are on the agenda for approval are agenda support material which must be provided upon request.

(13) A public body was advised that proposed revised bylaws were supporting materials for the meeting and a public copy should have been made available at the meeting and upon any request. AG File No. 09-010 (June 10, 2009).

(14) The Open Meeting Law does not require a public body to honor a blanket request for supporting materials for multiple meetings. *See* OMLO 2003-12 (March 11, 2003). The Legislature intended to treat requests for support material differently than requests for notice and agenda under NRS 241.020(6).

(15) When all subsections of NRS 241.020 are read together, it is clear that the legislative purpose behind the phrase “[U]pon any request” refers only to the period of time before or during a public meeting. Subsection 7 provides direct evidence of legislative purpose. Parts (a) and (b) explicitly state when the public body’s duty to provide a “no-charge” copy is applicable. Part (a) states that the public may request a copy before the meeting and part (b) states the circumstances under which the public body must provide it during the meeting. There is no subsection authorizing a “no-charge” copy after adjournment of a public meeting. It also is clear that in order to harmonize the OML and the public records act, the Legislature intended that supporting materials become a public record following adjournment of the public meeting. Supporting materials pass to the legal custodian (in this case the County Clerk) when it becomes subject to public record law—NRS Chapter 239. AG File No. 2011-01 (April 4, 2011); AG File No. 09-046 (February 11, 2010).

### **§ 5.07 Fees for providing notice of copies of supporting material**

Under NRS 241.020(6), a requested public notice, agenda, a proposed ordinance or regulation must be provided at no cost to the requester prior to the meeting for which the notice, agenda, and supporting material were prepared. *See* §6.06 above. Other requested supporting materials which are not confidential, or subject to a non-disclosure agreement, or which do not pertain to a closed portion of a meeting must be made available to the public at the time the materials are provided to the members of the public body.

No charge may be made for sending copies of a notice and agenda required by NRS 241.020(3)(c). *See* OMLO 99-07 (February 4, 1999). Generally, governmental bodies may

exercise only those powers that are conferred upon them by the Legislature. There is no grant of power to public bodies in the Open Meeting Law which authorizes them to legislate or charge a fee to a person who has requested individual notice of the meetings. Further, charging a fee under such circumstances could have the effect of chilling the right of all Nevada citizens to receive notice of public meetings. We note that mailing a copy of the meeting notice to anyone who requests such notices is deemed by the law to be a part of the “minimum public notice” requirements, which all public bodies must meet. The only restriction contemplated by the law is a six-month limitation on the request, unless it is renewed by the requestor.

Minutes and audio recordings of public meetings become public records once prepared following public meetings. All public bodies must make available, free of charge, a copy of the minutes or an audio recording to a member of the public upon request. Minutes or an audio recording of a meeting must be made available for inspection by the public within 30 working days after the adjournment of the meeting. NRS 241.035(2).

### **§ 5.08 Emergencies**

When emergencies occur, a public body may not be able to wait three days to call a meeting and post a notice and agenda in order to act, or the public body already may have sent out a notice and agenda and cannot amend the agenda and give three days’ notice of the emergency item before the meeting.

NRS 241.020(2) provides that *except in an emergency*, written notice of all meetings must be given at least three working days before the meeting. NRS 241.020(10) defines an emergency as: “an unforeseen circumstance which requires immediate action and includes, but is not limited to: (a) Disasters caused by fire, flood, earthquake or other natural causes; or (b) Any impairment of the health and safety of the public.”

An emergency meeting may be called or an item may be taken up on an emergency basis only:

- Where the need to discuss or act upon an item truly is unforeseen at the time the meeting agenda is posted and mailed, or before the meeting is called; and
- Where an item is truly of such a nature that immediate action is required at the meeting.

In an emergency:

- A meeting may be scheduled with less than three days’ notice if the meeting is limited only to the matter which qualifies as an emergency. The minutes of the meeting should reflect the nature of the emergency and why notice could not be timely given.
- If a meeting already has been scheduled, notice already has been posted and mailed, and less than three working days remain before the meeting, the emergency item may be added to the agenda at the meeting. The minutes should reflect the nature of the emergency and why notice could not be timely given.

- If a meeting has been scheduled, and it is possible to amend the notice and agenda and to post and mail the amended notice (or a notice of an emergency item to be added to the agenda) more than three working days before the meeting, the notice and agenda should be so amended.

In all cases, whenever a matter is taken up as an emergency, the Office of the Attorney General recommends that the public body provide as much supplementary notice to the public and the news media as is reasonably possible under the circumstances. Further, all other requirements of the Open Meeting Law must be observed.

The Office of the Attorney General cautions, however, that a true emergency must exist and the rule must not be invoked as a subterfuge by a public body to avoid giving notice of that agenda item to the public. Op. Nev. Att’y Gen. No. 81-A (February 23, 1981) gives an example of when an emergency did not exist. This opinion discusses a situation where, in a regularly-scheduled meeting of a public body, dissention quickly arose between the members so much so that the meeting became acutely tense and emotional. In an attempt to relieve the pressure, the board went into an unscheduled executive session to “discuss the professional competence and character of a person” (including some its members). Noting that the dissention on the board had been known for months, the Office of the Attorney General determined that a sufficient emergency did not exist to go into the unscheduled executive session because there was ample time to provide written public notice of the need for an executive session during a regularly scheduled meeting to discuss the matters.

*See* OMLO 99-10 (August 24, 1999), where the Office of the Attorney General opined that administrative error did not establish grounds to hold an emergency meeting without giving proper notice. A statutory deadline for action by a county commission to submit a ballot question is not an unforeseen circumstance. *See* AG File No. 00-029 (August 9, 2000). The need to seize records of a development authority is foreseeable and, therefore, not an emergency. *See* AG File No. 01-039 (August 20, 2001). *See* OMLO 2004-22 (June 15, 2004) where the unforeseen resignation of the General Manager of the sewer treatment plant created an emergency because, in order to protect public health, safety, and welfare, the public body needed to keep the plant operating, and thus, an emergency meeting to employ a new manager was appropriate.

Where the financial health of the School District was at stake and where there was threatened loss of revenue and apparent loss of revenue, the District’s characterization of the emergency as an “unforeseen” event was appropriate. The Board’s decision to hire a licensed administrator after a public meeting during which the Superintendent had been unexpectedly fired was an unforeseen event. AG File No. 07-028 (September 18, 2007).

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**§ 5.09 Providing individual notice to persons whose character, alleged misconduct, professional competence, physical or mental health are to be considered; waivers of notice (See Sample Form 3); exemption from OML for meetings held to consider individual applications for employment (NRS 241.034)**

NRS 241.033 prohibits a public body from holding a meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of any person unless it provided *written* notice to the person of the time and place of the meeting *and* received proof of service of the notice. *See* NRS 241.033(1)(a) and (b). This applies whether the meeting will be open or closed.

NRS 41.033(2)(c) requires a properly drafted notice to include a list of the general topics concerning the person who will be considered by the public body during the closed meeting; and a statement of the provisions of subsection 4, if applicable. Subsection 4 states:

That the person being considered by the public body must be permitted to attend the closed meeting;

That the person being considered may have an attorney or other representative of his/her choosing present during the closed meeting; and

That the person being considered may present written evidence, provide testimony, and present witnesses relating to his character, alleged misconduct, professional competence, or physical or mental health to the public body during the closed meeting.

NRS 241.033(2)(b) states that a public body may include an informational statement in the notice that administrative action may be taken against the person after the public body considers his/her character, alleged misconduct, professional competence, or physical or mental health. If the notice pursuant to NRS 241.033 includes this informational statement, no further notice is required pursuant to NRS 241.034.

The notice must be delivered either personally to that person at least five working days before the meeting or must be sent by certified mail to the last known address of that person at least 21 working days before the meeting. A similar notice is required by NRS 241.034 to persons against whom administrative action will be taken or whose real property will be acquired by eminent domain unless the public body includes an informational statement that administrative action may be taken against the person in the notice under NRS 241.033. *See* discussion above.

The public body must receive proof of service of the notice before the meeting may be held.

Notice provisions of NRS 241.033 do not apply to applicants for employment with a public body. NRS 241.033(7) exempted public meetings held to consider applicants for employment with the public body from the provisions of NRS 241.033.

OML complainant alleged that the public body member made comments during the public meeting to consider his appointment to an advisory body. It was alleged that the comments impugned complainant's character, effectively calling him a person "of less than truthful character." A public body member made comments about complainant not being a team player, which caused the public body to focus the discussion on the complainant's character. This was a violation of NRS 241.033. Public bodies must carefully consider the ramifications of a discussion of any person's character, even if it is unintentional and even if it suddenly arises during any agenda item. Remember to stick to the agenda. AG File No. 10-061 (March 29, 2011).

The Nevada Athletic Commission is exempt from the timing requirements (e.g., five working days for personal service or 21 days for certified mail) but still must give written notice of the time and place of the meeting and must receive proof of service before conducting the meeting. NRS 241.033(3).

"Casual or tangential references to a person or the name of a person during a closed meeting do not constitute consideration of the character, alleged misconduct, professional competence, or physical or mental health of the person." NRS 241.033(7)(b); *See also* OMLO 2004-14 (April 20, 2004); OMLO 2003-18 (April 21, 2003); and OMLO 2003-28 (November 14, 2005) where the public body violated the Open Meeting Law by considering an employee's character or alleged misconduct without providing notice, but the mere mention of other employees did not require notice to the other employees.

Notice requirements of NRS 241.033 only apply to natural persons because non-natural persons cannot have "physical or mental health." Thus, proper statutory construction dictates that the notice under NRS 241.033 only must be provided to natural persons. *See* OMLO 2004-13 (April 19, 2004).

If a public body discusses a pending lawsuit involving a particular person, a discussion of that lawsuit which mentions the name of that person does not require the public body to provide notice under NRS 241.033. *See* OMLO 2003-14 (March 21, 2003).

Notice requirements apply to applicants for professional licenses if their character, alleged misconduct, professional competence, or physical or mental health is to be considered at the meeting. *See* Attorney General Letter Opinion to Jerry Higgins, Nevada Board of Professional Engineers and Land Surveyors, dated October 28, 1993 (licensing board which will consider applicant's character and professional competence must properly notice each applicant in accordance with NRS 241.033).

There is no prohibition against waivers of the notice, and the courts consistently recognize that an individual may, by express or implied waiver, relinquish a known statutory right. However, a waiver carries legal consequences, and therefore must be a valid waiver. A

waiver of a statutory right is deemed valid if it is clear and unambiguous, given voluntarily, and intended to relinquish a known statutory right. *CBS, Inc. v. Merrick*, 716 F.2d 1292 (9th Cir. 1983); *State Board of Psychological Examiners v. Norman*, 100 Nev. 241, 679 P.2d 1263 (1984).

It is recommended that the waiver be obtained in writing expressing: (1) the voluntary nature of the waiver; (2) the applicant's knowledge about the statutory right; and (3) the applicant's intention to relinquish that right. *See* Attorney General Letter Opinion to Jerry Higgins, Nevada Board of Professional Engineers and Land Surveyors, dated October 28, 1993.

**Sample Form 3 satisfies NRS 241.033 notice requirement when a person's character or professional competence or alleged misconduct or physical or mental health is to be discussed by the public body.**

#### **§ 5.10 Meeting to consider administrative action against a person or acquisition of real property by eminent domain (NRS 241.034)**

Under NRS 241.034, a public body may not hold a meeting to take administrative actions against a person or to acquire real property by condemnation from a person unless the public body has given written notice to that person. The written notice either must be: (1) delivered personally to the person at least five working days before the meeting; or (2) sent by certified mail to the last known address of the person at least 21 working days before the meeting. Written notice to the person is required in addition to the notice of meeting required by NRS 241.020. *See* § 6.02.

A public body must receive proof of service of the written notice before the public body may consider the matter. Proof of receipt of the notice is not required.

The terms "take," "administrative action," and "person" are not defined by Chapter 241 or by NRS 241.034. With respect to the eminent domain provision, the terms "acquire," "owned," and "person" are not defined. The terms "administrative action" and "against a person," if interpreted and defined broadly, would encompass a myriad of actions performed by local governments and state agencies, which were not all intended to be covered.

In *Harris v. Washoe County Board of Equalization*, Case No. 42951, 120 Nev. 1246, 131 P.3d 606 (Nov. 2, 2004), which was an unpublished order of the Supreme Court of Nevada and not an opinion, the Supreme Court agreed with the above interpretation of the Office of the Nevada Attorney General. In that case, the petitioners challenged the assessor's valuation of their property. The County Board contacted the petitioners one working day before the meeting to consider their petition, but the County Board properly posted a public notice three working days before the meeting. The County Board did not provide a personal notice to the petitioners, pursuant to NRS 241.034. The petitioners filed for a preliminary injunction against the County Board for failing to provide notice pursuant to NRS 241.034. The District Court denied the injunction and the petitioners appealed to the Nevada Supreme Court.

The Court stated, "In this case, the language 'administrative action against a person,' which triggers the five-day personal notice requirement, is subject to more than one

interpretation.” The property owners argued that the language should be read broadly to “include all administrative actions directed at specific individuals,” and thus, the County Board’s land valuation hearings. The County Board asserted that the phrase should be tailored more narrowly “to include only those actions involving an individual’s characteristics or qualifications, not those of real property.”

The Court stated that the rules of statutory construction compel the Court to adopt the County Board’s more narrow approach. The broad view advocated by the property owners would render the notice requirement for eminent domain “nugatory” because any action with regard to a person’s realty would require notice. The Court determined that such an interpretation was not the appropriate construction of the statute. **The Court then defined the phrase “administrative action against a person” as “those actions involving an individual’s characteristics or qualifications, not those of real property.”** Therefore, the Court held that the County Board did not violate the Open Meeting Law.

For purposes of enforcement actions under NRS 241.037(1), this office will follow these guidelines:

- 1) Except as noted below, “person” includes natural persons and inanimate entities such as partnerships, corporations, trusts, and limited liability companies. “Person” includes, essentially, anything legally capable of holding an interest in property or legally capable of receiving a permit or license.
- 2) “Administrative action against a person” does not occur unless the matter being acted on is uniquely personal to the individual or entity. “Administrative action against a person” does not occur when the legal basis of the action is consideration of the inanimate characteristics of a facility or property and no consideration of the characteristics or qualifications of the individual or entity (the person) that has sought the governmental approval. *See* the discussion of *Harris* above.

For example, a decision against an applicant for a barber’s license for the individual practitioner is subject to NRS 241.034, but a decision against an applicant for a barbershop license is not.

Certain business and occupational licenses issued by state and local governments may depend on an analysis of a blend of personal factors as well as real and personal property. Some statutes, regulations, and ordinances grant, condition, or deny a particular license solely on the adequacy of the premises (sanitation, fire codes, square footage, and zoning) without reference to the personal aspects of the business person seeking the license. These types of business licenses are not subject to NRS 241.034. But if a business license is granted or denied in part by reference to the personal aspects of the applicant, then NRS 241.034 applies.

(a) “Action against a person” within the meaning of NRS 241.034 does not include adoption of ordinances or regulations; the granting or denying of petitions for declaratory orders or advisory opinions; action on zoning requests, building permits, most variances, and other land use decisions that do not depend on the identity, status, personal qualifications, or characteristics

of the person. These decisions are “against” the entire population, whole neighborhoods, industries, and other interest groups. Notice to such large numbers of persons is not required by NRS 241.034.

(b) An act is not subject to the additional notice requirements of NRS 241.034 if the action depends on the application of either objective or discretionary standards and criteria to land, water, air, or other inanimate matters unrelated to the personal qualities and characteristics of the owner of the property that is subject to the authority of the public body.

(c) Note that other statutes and ordinances typically have extensive notice provisions for the special subject matter covered. Those laws must be complied with, but failure to do so will not be a violation of chapter 241.

(d) Imposing discipline on a person is an “action against a person.” Most penalties (except for taxation) are uniquely personal because they are based on the misconduct of a person and, therefore, are “actions against a person.”

- 3) Decisions to accept gifts and to purchase, sell, encumber, or lease any interest in real or personal property are examples of non-personal, inanimate-subject decisions that are not within the meaning of “administrative action against a person,” even though each decision may be, in a very real sense, “against” someone, unless the purchase involves eminent domain, in which case the owner of the property must be notified.

**§ 6.01 General**

A public body’s failure to adhere to agenda requirements will result in an Open Meeting Law violation. *Sandoval v. Board of Regents*, 119 Nev. 148, 156, 67 P.3d 902, 906 (2003). If a matter is acted upon which was not described clearly and completely on the agenda, the action is void under NRS 241.036.

NRS 241.020(2)(c) requires public body agendas include the following at a minimum:

2. Except in an emergency, written notice of all meetings must be given at least three working days before the meeting. The notice must include:

- (a) The time, place and location of the meeting.
- (b) A list of the locations where the notice has been posted.
- (c) The name and contact information for the person designated by the public body from who a member of the public may request the supporting material for the meeting described in subsection 6 and a list of the locations where the supporting material is available to the public.

(d) An agenda consisting of:

(1) A clear and complete statement of the topics scheduled to be considered during the meeting.

(2) A list describing the items on which action may be taken and clearly denoting that action may be taken on those items by placing the term “for possible action” next to the appropriate item or, if the item is placed on the agenda pursuant to NRS 241.0365, by placing the term “for possible corrective action” next to the appropriate item.

(3) Periods devoted to comments by the general public, if any, and discussion of those comments. Comments by the general public must be taken:

(I) At the beginning of the meeting before any items on which action may be taken are heard by the public body and again before the adjournment of the meeting; or

(II) After each item on the agenda on which action may be taken is discussed by the public body, but before the public body takes action on the item.

The provisions of this subparagraph do not prohibit a public body from taking comments by the general public in addition to what is required pursuant to sub-subparagraph (I) or (II). Regardless of whether a public body takes comments from the general public pursuant to sub-subparagraph (I) or (II), the public

body must allow the general public to comment on any matter that is not specifically included on the agenda as an action item at some time before adjournment of the meeting. No action may be taken upon a matter raised during a period devoted to comments by the general public until the matter itself has been specifically included on an agenda as an item upon which action may be taken pursuant to subparagraph (2).

(4) If any portion of the meeting will be closed to consider the character, alleged misconduct or professional competence of a person, the name of the person whose character, alleged misconduct or professional competence will be considered.

(5) If, during any portion of the meeting, the public body will consider whether to take administrative action regarding a person, the name of that person.

(6) Notification that:

(I) Items on the agenda may be taken out of order;

(II) The public body may combine two or more agenda items for consideration; and

(III) The public body may remove an item from the agenda or delay discussion relating to an item on the agenda at any time.

(7) Any restrictions on comments by the general public. Any such restrictions must be reasonable and may restrict the time, place and manner of the comments, but may not restrict comments based upon viewpoint.

## **§ 6.02 Agenda must be clear and complete (See Sample Form 1)**

In *Sandoval v. Board of Regents*, 119 Nev. 148, 67 P.3d 902 (2003), the Nevada Supreme Court analyzed three related issues under Nevada's Open Meeting Law: (1) the "clear and complete" standard required for agenda statements by NRS 241.020(2)(d)(1), (2) discussion which exceeds the scope of a properly noticed agenda statement, and (3) whether the Open Meeting Law violates the First Amendment by improperly restricting members' right to free speech. The analysis of the "clear and complete" standard will be discussed in this section of the manual, the analysis regarding exceeding the scope of the agenda statement will be discussed in § 7.03 of this manual, and the analysis regarding the First Amendment will be discussed in § 13.03 of this manual.

In *Sandoval*, the Court considered the actions of two different public bodies related to the University and Community College System of Southern Nevada, the Campus Environment Committee (Committee) and the Board of Regents (Board). Since the analysis regarding the Board discussed the "clear and complete" standard under NRS 241.020(2)(d)(1), this section of the manual will discuss only the facts, circumstances, and analysis surrounding the Board. For a discussion regarding the facts, circumstances, and analysis regarding the Committee exceeding the agenda statement, *see* § 7.03 below.

In September of 2000, the Board held a public meeting and noticed an item that stated:

Committee Reports:

Campus Environment Committee

Chairman Tom Kilpatrick will present a report on the Campus Environment committee meeting held September 7, 2000 and requests Board action on the following recommendations of the committee:

Round Table Discussion of Actions and Schedule of Topics to be Discussed with Campus Representatives--The committee reviewed previous actions and unfinished business of the committee and compiled a schedule of topics for the remainder of the year.

119 Nev. at 152, 67 P.3d at 904.

Regent Kilpatrick properly reported the topics to be discussed for the remainder of the year, and he discussed the law governing the release of documents. He then informed the Board that a request was made for the University of Nevada, Las Vegas (UNLV), report regarding a dormitory raid, and a document regarding disarming the UNLV police department. After Regent Kilpatrick's presentation, Regent Aldean suggested that the Board make available a redacted version of the NDI report regarding the raid, and the Board agreed with this suggestion. As a result, the Office of the Attorney General filed suit alleging a violation of the "clear and complete" standard in NRS 241.020(2)(d)(1). The district court granted summary judgment for the Board holding that the "germane standard" should apply to Nevada's Open Meeting Law, and since the discussion by the Board of the NDI report was germane to the agenda statement, there was no violation of the Open Meeting Law. The Office of the Attorney General appealed this decision.

The Supreme Court's analysis immediately rejected the "germane standard" as too lenient a standard in Nevada. The Court stated, "[T]he legislative history of NRS 241.020(2)(c)(1) [now NRS 241.020(2)(d)(1)] illustrates that the Legislature enacted the statute because 'incomplete and poorly written agendas deprive citizens of their right to take part in government.'" 119 Nev. at 154, 67 P.3d at 905. The Court also stated, "Nevada's Open Meeting Law seeks to give the public clear notice of the topics to be discussed at public meetings so that the public can attend a meeting when an issue of interest will be discussed." 119 Nev. at 155, 67 P.3d at 906. As a result, the Court held that the Board violated the Open Meeting Law because the agenda statement was too broad to place the public on notice that the Board would take informal action to obtain a redacted NDI report and discuss an examination of disarming the UNLV police, both issues of public interest.

In 2007, following the *Sandoval* decision, the Nevada Supreme Court issued another decision impacting the "clear and complete" rule. In *Schmidt v. Washoe County*, 123 Nev. 128, 159 P.3d 1099 (2007), the Court decided an issue regarding whether an agenda item on the BOCC's agenda was clear and complete. The agenda item stated: "Legislative Update—this item may be discussed at Monday's Caucus Meeting and/or Tuesday's Board Meeting and may involve discussion by [WCBC] and direction to staff on various bill



draft requests (BDRs).” The agenda also instructed the public that a list of specific bills which staff would seek direction from the WCBC would be posted online on the County’s website after 6:00 p.m. on Friday before the Monday caucus meeting. Hard copies would be placed in the County Manager’s office by 9 a.m. on Monday. The *Schmidt* Court stated that this factual issue was a close question. However it determined the WCBC’s agenda item met the “clear and complete” standard, because the item noticed the public that WCBC and staff planned to discuss certain BDRs at its Caucus meeting or the following day’s regular meeting and the Court found the WCBC had provided a list of specific BDR’s on the County’s website three days before the Caucus.

In an Attorney General opinion, this office reviewed the agenda item to determine whether it was clear and complete. The disputed agenda item stated: “5(C) Discussion regarding election of CEO to receive contractual bonus based upon FY 08 positive evaluation.” The issue was whether it was legally sufficient to impart notice to the CEO that his character and professional competence would be considered by the Board. This office opined that the Board exceeded the scope of the agenda item. Among the matters impermissibly discussed and beyond the scope of the item were the person’s “ongoing communication skills,” discussion of an earlier professional evaluation, and discussion of his character traits for honesty and integrity. The person’s general reputation was denigrated before the Board in a significant and substantive fashion so as to constitute a violation of both the OML’s notice requirement and its “clear and complete” rule. *See* AG File No. 10-014 (February 25, 2010).

In another Attorney General Opinion, we reviewed a public body agenda “action” item which stated in part: “Consideration to Approve Advertisement of Irrigation Water Shares and to Set Time for Said Auction.” After investigation, it was determined to be incomplete. This item was not clear and complete so as to indicate to the public that the advertisement was for the lease of irrigation water shares. Similarly, another agenda item from another meeting of the same public body did not disclose to the public body that a provision for the lease-back of water was a condition of sale. Because the issue of fair market value of water rights was of significant interest to the public body and the public, the absence of disclosure of a lease-back provision from the agenda item was a violation of the OML’s requirement that agenda topics be expressed clearly and completely. NRS 241.020(2)(d)(1). AG File No. 09-014 (June 30, 2009); *see also* AG File No. 09-032 (December 3, 2009).

In AG File No. 09-044 (December 17, 2009), Complainant’s allegation was that the text of agenda item 31 was not clear and complete because it did not inform the public that (in Complainant’s view) it committed taxpayers to contingent liabilities beyond current taxing authority. The OML does not provide oversight to the decision-making process of public bodies. It does not allow this office to second guess decisions or actions by public bodies even if the decision might have been improvident. AG File No. 09-044 (December 17, 2009).

The Office of the Attorney General has written several opinions on agendas. *See* Op. Nev. Att’y Gen. No. 79-8 (March 26, 1979), and Op. Nev. Att’y Gen. No. 91-6 (May 23, 1991); OMLO 99-01 (January 5, 1999); OMLO 99-02 (January 15, 1999); OMLO 99-03 (January 11, 1999); OMLO 2003-09 (March 4, 2003); OMLO 2003-13 (March 21, 2003); and OMLO 2003-23 (June 24, 2003). AG File No. 08-007 (June 12, 2008).

The following guidelines are gleaned from these opinions regarding agenda items and the clear and complete rule:

- a. Merely indicating “Licensing Board” on an agenda without listing the names of the licensees who will be considered is not proper.
- b. An agenda item for consideration of business permits should include the name and, where appropriate, the address of the proposed business and/or applicants.
- c. Agenda items must be described with clear and complete detail so that the public will receive notice in fact of what is to be discussed by the public body.
- d. Use a standard of reasonableness in preparing the agenda and keep in mind the spirit and purpose of the Open Meeting Law.
- e. Always keep in mind that the purpose of the agenda is to give the public notice of what its government is doing, has done, or may do.
- f. The use of general or vague language as a mere subterfuge is to be avoided.
- g. Use of broad or unspecified categories in an agenda should be restricted only to those items in which it cannot be anticipated what specific matters will be considered.
- h. An agenda must never be drafted with the intent of creating confusion or uncertainty as to the items to be considered or for the purpose of concealing any matter from public notice.
- i. Agendas should be written in a manner that actually gives notice to the public of the items anticipated to be brought up at the meeting.
- j. Generic agenda items such as “President’s Report,” “Committee Reports,” “New Business,” and “Old Business” do not provide a clear and complete statement of the topics scheduled to be considered. Such items must not be listed as for possible action items as they do not adequately describe matters upon which action is to be taken. *See* OMLO 99-03 (January 11, 1999).
- k. Agendas for retreats should identify the event as a retreat, give the objectives to be accomplished, and include the specific topics for discussion. *See* OMLO 99-02 (January 15, 1999). *See* § 6.02 for items that must be included in the notice and agenda if not covered in the notice for the meeting.

Additionally, based on some of the complaints received by the Office of the Attorney General, the following suggestions are offered:

a. Public bodies should not “approve” or take action on administrative reports by staff unless the agenda clearly denotes that the report is an item for possible action and specifically sets out the matter to be acted on from the report.

b. Generic items such as “reports” or “general comments by board members” invite trouble because discussions spawned under them may be of great public interest and may lead to deliberations or actions without the benefit of public scrutiny or input. Generic items should be used sparingly and carefully, and actual discussions should be controlled tightly. Matters of public interest should be rescheduled for further discussion at later meetings.

c. Agenda descriptions for resolutions, ordinances, regulations, statutes, rules, or other such items to be considered by public bodies, should describe to what the statute, ordinance, regulation, resolution, or rule relates, so that the public may determine if it is a subject in which they have an interest which might lead to their attendance at the public meeting. See OMLO 99-01 (January 5, 1999); OMLO 99-03 (January 11, 1999).

Below are synopses of three recent Attorney General Opinions which applied the “clear and complete” rule:

- Public body’s use of phrase “and all matters related thereto” was a violation of the OML because use of the phrase allows the public body to stray into discussion on matters not specifically listed in the item. Use of the phrase “and all matters related thereto” does not comply with the statute’s requirement that every agenda item contain a clear and complete statement of topics to be considered. AG File No. 10-049 (December 17, 2010); AG File No. 10-052 (December 21, 2010).
- Public body must recognize that a “higher degree of specificity [for agenda items] is needed when the subject to be debated is of special or significant interest to the public,” *Sandoval*, 119 Nev. at 154-155, 67 P.3d at 906 (quoting *Gardner v. Herring*, 21 S.W.3d 767, 773 (Tex.App.2000)). Mandatory trash service and billing was and is an item of significance in the City of Fernley requiring greater agenda item specificity. A Council agenda item merely stated that “special provisions for inclusion of [sic] a new franchise agreement(s)” would be discussed at the meeting, but this generic description was too broad. The public was not alerted that mandatory billing and trash pickup was the special provision. AG File No. 09-003 (March 27, 2009).
- A public body rejected a staff recommendation for naming a new Las Vegas area Career and Technical Academy. Agenda item 7.01: “NAMING OF DISTRICT FACILITIES, VETERANS MEMORIAL CENTRAL CAREER AND TECHNICAL ACADEMY. Discussion and possible action on approval to name a school the Veterans Memorial Central Career and Technical Academy, is recommended.” Item 7.01 was not in violation of the “clear and complete” rule. Nothing in the OML prohibits a public body from rejecting or amending staff’s recommendation regarding a school name, or that requires the public body to vote up or down on exact wording of any proposal brought before it.

This is too narrow an interpretation of NRS 241.020(2)(d)(1)—the “clear and complete” rule. AG File No. 09-006 (February 2, 2009).

### § 6.03 Stick to the agenda

As discussed in § 7.02, *supra*, *Sandoval v. Board of Regents*, 119 Nev. 148, 67 P.3d 902 (2003) provided analysis of a public body’s failure to discuss only matters within the scope of its agenda. In that case, the Campus Environment Committee (Committee) held a meeting on September 7, 2000. The agenda item stated: “Review of UCCSN Policies on Reporting.” It further described the item’s scope as:

“Review UCCSN, state and federal statutes, regulations, case law, and policies that govern the release of materials, documents, and reports to the public.”

119 Nev. at 151, 67 P.3d at 903–904.

At this meeting, the Committee discussed a controversial NDI report regarding a dormitory raid by UNLV police. Regent Hill discussed the details of the raid, criticized the UNLV police department, and recommended that the police department be disarmed. This discussion occurred against the advice of legal counsel. The Office of the Attorney General sued the Regents for exceeding the scope of the agenda item. The district court granted summary judgment for the Committee after applying a “germane standard” to the discussion, concluding the discussion was germane to the agenda item. The Office of the Attorney General appealed.

The Supreme Court stated that the agenda statement was “clear and complete” under NRS 241.020(2)(d)(1), and, in the abstract, the Committee could have discussed the NDI report. However, the Court held, “[t]he plain language of NRS 241.020(2)(c)(1) [now NRS 241.020(2)(d)(1)] requires that discussion at a public meeting cannot exceed the scope of a clearly and completely stated agenda topic.” *Id.*, 119 Nev. at 154, 67 P.3d at 905. Here, the Committee violated the Open Meeting Law by exceeding the scope of the agenda statement “when it discussed the details of the report, criticized the UNLV police department, and commented on the impact of drug use on the campus.” The Court said the Committee’s agenda statement did not inform the public that these matters would be a topic of discussion. *Id.*, 119 Nev. at 155, 67 P.3d at 906.

Many other complaints received by the Office of the Attorney General have to do with public bodies wandering off their agendas. Discussions may start on an agenda item but then drift off into other matters. (*See* AG File No. 10-014 (February 25, 2010) for an example of a deliberate discussion of a person’s character without notice and beyond the scope of the agenda item.) The chair for a public meeting or its counsel should be vigilant to stop the discussion from drifting in order to prevent Open Meeting Law violations. *See* OMLO 98-03 (July 7, 1998) for an example of how a public body can violate the Open Meeting Law by wandering off its meeting agenda. *See also* OMLO 99-09 (July 28, 1999) for an example of how a budget workshop designated for discussion and review of a proposed budget resulted in several

violations of the Open Meeting Law, when members of the public body made decisions on various items within the proposed budget.

Deviating from the agenda by commencing a meeting prior to its noticed meeting time violates the spirit and intent of the Open Meeting Law and nullifies the purpose of the notice requirements set forth in NRS 241.020(2). *See* OMLO 99-13 (December 13, 1999).

In this Open Meeting law opinion, the public body's Chairman brought up new subjects unrelated to agenda item. A Commissioner interjected a call for a parliamentary point-of-order. Even though the Chair's remarks strayed beyond the agenda item, which was "review and discussion of written items sent or received by the Commission since the last regular meeting and to send correspondence copies for the exhibit file," the Chair ignored the point of order. His refusal to acknowledge the point-of-order and return to the subject matter of the agenda was a violation of the OML. The OML does not permit a public body to discuss a matter not on the agenda as long as no action is taken. The OML clearly states that each agenda item must be "clearly and completely" set forth. It is not conditional on whether it is an informational item or an action item. AG File No. 09-031 (October 22, 2009)

#### **§ 6.04 Matters brought up during public comment; meeting continued to another date**

The Open Meeting law requires multiple periods of public comment on each public body agenda. No action may be taken upon a matter raised in public comment or anywhere else on the agenda, until the matter itself has been included specifically on a future agenda as an item upon which action may be taken.

Restrictions on public comment must be reasonable and must be noticed on the agenda, i.e., time limitations. NRS 241.020(2)(d)(7), *see* § 8.04, *infra*. Restrictions must be viewpoint neutral. At least one of the multiple periods of public comment must allow the public to speak about any matter within the public body's jurisdiction, control, or advisory power. *See* § 8.04 for the requirements for conducting the public comment period. The Open Meeting Law does not limit a public body's discretion to refuse to place on the agenda an item requested by a member of the public. Any limits are a matter of general administrative law. *See* AG File No. 00-047 (April 27, 2001).

Where a meeting is continued to a future date, the reconvened meeting must have the same agenda or portion thereof at the later date. The new date is a second, separate meeting for purposes of notice and public comment, and a member of the public is entitled to make public comment on the same subject at both meetings. [For explanation of the public comment requirement, *see* AG File No. 01-012 (May 21, 2001).]

#### **§ 6.05 Meeting that must be continued to a future date**

A meeting which is continued to a future date where the continuation date does not appear on the original agenda must be re-noticed as a new meeting. The agenda must be posted according to NRS 241.020(2) (three working days before the noticed meeting) whether the new agenda carries over items from the prior agenda or whether it adds new items. The new date is a

second, separate meeting for purposes of notice and public comment, and a member of the public is entitled to make public comment on the same subject at both meetings.

A meeting may be recessed and reconvened on the same date it was noticed without violation of the notice provisions of the OML.

**Part 7            WHAT ARE THE REQUIREMENTS FOR CONDUCTING  
AN OPEN MEETING?**

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**§ 7.01 General**

In conducting meetings, one always should remember the message in NRS 241.010: “In enacting this chapter, the Legislature finds and declares that all public bodies exist to aid in the conduct of the people’s business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.” In interpreting a similar provision in California’s open meeting law, the court of appeals delivered a humbling message when it said:

“The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over instruments they have created.”

*Stockton Newspapers, Inc. v. Redevelopment Agency*, 214 Cal.Rptr. 561, 63 (Ct. App. 1985) (quoting Cal. Gov’t Code § 54950 (West 1985)).

Accordingly, NRS 241.020 requires that, except as otherwise provided by statute, all meetings of public bodies must be open and public, and all persons must be permitted to attend any meeting of these bodies; NRS 241.040 makes the wrongful exclusion of any person from a meeting a misdemeanor.

**§ 7.02 Facilities**

Public meetings should be held in facilities that are reasonably large enough to accommodate anticipated attendance by members of the public.

Sometimes controversial public issues generate a larger-than-expected crowd and a change of location or other methods (e.g., video transmission in adjoining rooms or areas) may have to be employed in order to accommodate those persons seeking to attend a particular meeting. But even if reasonable efforts like these prove inadequate to accommodate everyone, the meeting still would qualify as a public meeting for purposes of the Open Meeting Law. *Gutierrez v. City of Albuquerque*, 631 P.2d 304 (N.M. 1981).

Public bodies should avoid holding public meetings in places to which the general public does not feel free to enter, such as a restaurant, private home, or club. While perhaps not in violation of the letter of the Open Meeting Law, a meeting in such a location may be in violation of the law’s spirit and intent. *Cf. Crist v. True*, 314 N.E.2d 186 (Ohio Ct. App. 1973). It is unlawful to start a meeting before the public is allowed into the room. The public body must wait until the public has been admitted to the meeting facility before commencing the meeting. *See* AG File No. 01-002 (April 5, 2001).

### § 7.03 Accommodations for physically handicapped persons

NRS 241.020(1) provides that public officers and employees must make “reasonable efforts to assist and accommodate physically handicapped persons desiring to attend” meetings of a public body. In order to comply with this statute, it is required that public meetings be held, whenever possible, only in buildings that are reasonably accessible to the physically handicapped, i.e., those having a wheelchair ramp, elevators, etc., as may be appropriate. *See Fenton v. Randolph*, 400 N.Y.S.2d 987 (N.Y. Sup. Ct. 1977).

### § 7.04 Public comment: multiple periods of public comment

NRS 241.020(2)(d)(3) requires that public bodies adopt one of two alternative public comment agenda procedures:

- **First**, a public body may comply by agendizing one public comment period before any action items are heard by the public body and later it must hear another period of public comment before adjournment.
- The **second** alternative also involves multiple periods of public comment which must be heard after discussion of each agenda action item, but before the public body takes action on the item.
- **Finally**, regardless of which alternative is selected, the public body must allow the public some time, before adjournment, to comment on any matter within the public body’s jurisdiction, control, or advisory power. This would include items not specifically included on the agenda as an action item.

Discussion of public comment is specifically allowed under NRS 241.020(2)(d)(3). This statute was amended in 1991. Now, it allows discussion of public comment with the public body.

NRS 241.020(2)(d)(3) provides that the public body must allow periods devoted to comments by the general public, if any, and **discussion of those comments**, if the public body chooses to engage the public in discussion. The statute does not mandate discussion with the public, but it does allow discussion.

A public body may not inform the public that it legally is prohibited from discussing public comments, either among themselves, or with speakers from the public. NRS 241.020(2)(d)(3) clearly allows discussion with members of the public. Of course, no matter raised in public comment may be the subject of either deliberation or action. AG File No. 10-037 (October 19, 2010); *see* § 5.01 for definition of “deliberation.”

### § 7.05 Reasonable time, place, and manner restrictions apply to public meetings

Except during the public comment period required by NRS 241.020(2)(d)(3), the Open Meeting Law does not mandate that members of the public be allowed to speak during meetings;



however, once the right to speak has been granted by the Legislature (NRS 241.020(2)(3)), the full panoply of First Amendment rights attaches to the public's right to speak. The public's freedom of speech during public meetings vigorously is protected by both the U.S. Constitution and the Nevada Constitution. Freedom of expression upon public questions is secured by the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). This constitutional safeguard was fashioned to assure an unfettered interchange of ideas for bringing about political and social changes desired by the people.

The *New York Times* Court said that: “[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions and to do so on pain of libel judgment . . . leads to . . . self-censorship and would deter protected speech.” See AG File No. 11-024 (November 21, 2011) (chairman of public body may not forbid public comment based on his disagreement with the speaker about the truthfulness of his comment).

Both California and Nevada constitutional provisions (Nevada Constitution Article 1, section 9) regarding freedom of speech are identical. The California Supreme Court expressed the strength of these constitutional provisions, when in 1896, it observed that “Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right . . .” In *Dailey v. Superior Court*, 112 Cal. 94, 97, 44 P. 458 (1896), the court continued and said that “the wording of this section is terse and vigorous, and its meaning so plain that construction is not needed. It is patent that these rights to speak, write, and publish, cannot be abused until it is exercised, and before it is exercised there can be no responsibility.”

It also is settled law that reasonable rules and regulations during public meetings ensure orderly conduct of a public meeting and ensure orderly behavior on the part of those persons attending the meeting. Public bodies may adopt reasonable restrictions, including time limits on individual comment, but NRS 241.020(2)(d)(7) requires all restrictions on public comment to be expressed clearly on each agenda.

See AG File No. 10-021 (July 6, 2010). The OML allows considerable discretion to the public body as to length of time allowed to speakers. There is no statutory or constitutional requirement that each speaker's time be correlated mathematically. However, any public comment limitation, including when public comment will be allowed and whether public comment will be allowed on current items on the agenda, clearly must be articulated on the public body's agenda. See § 8.03 above. OMLO 99-08 (July 8, 1999); see also AG File No. 07-019 (July 17, 2007) (Board put an “as time allows” restriction on the public's right to speak, this restriction was unreasonable); see also AG File No. 07-020 (October 25, 2007) (public body was advised that the absence of any statement of policy regarding public comment was a violation).

See OMLO 99-08 (July 8, 1999). Requiring prior approval of the use of electronic devices during public comment is reasonable and not in violation of the Open Meeting Law. See AG File No. 00-046 (December 11, 2000).

See OMLO 99-11 (August 26, 1999). The Office of the Attorney General believes that any practice or policy that discourages or prevents public comment, even if technically in compliance with the law, may violate the spirit of the Open Meeting Law, such as where a public body required members of the public to sign up three and one-half hours in advance to speak at a

public meeting. This practice can have the effect of unnecessarily restricting public comment and therefore does not comport with the spirit and intent of the Open Meeting Law.

A public body's restrictions must be neutral as to the viewpoint expressed, but the public body may prohibit comment if the content of the comments is a topic that is not relevant to, or within the authority of, the public body, or if the content of the comments is willfully disruptive of the meeting by being irrelevant, repetitious, slanderous, offensive, inflammatory, irrational, or amounting to personal attacks or interfering with the rights of other speakers. *See* AG File No. 00-047 (April 27, 2001).

*See* AG File No 11-035 (December 23, 2011). In fact, the Ninth Circuit has long recognized that First Amendment rights of expression are more limited during a meeting than in a public forum, such as, for example, a street corner. *See Norse v. City of Santa Cruz*, 586 F.3d 697, 699 (9th Cir. 2009), *rev'd on other grounds*, 629 F.3d 966 (9th Cir. 2010), *cert. denied*, *City of Santa Cruz, Cal. v. Norse*, 132 S.Ct. 112 (2011). Moreover, government officials performing discretionary functions are entitled to qualified immunity where they reasonably believe their actions to be lawful. *Id.* (citing *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). The interpretation and the enforcement of rules during public meetings are highly discretionary functions. *Id.* (citing *White v. City of Norwalk*, 900 F.2d 1421, 1426 (9th Cir.1990) (“[T]he point at which speech becomes unduly repetitious or largely irrelevant is not mathematically determinable. The role of a moderator involves a great deal of discretion.”)).

There is no First Amendment right to remain in a public meeting. “Citizens are not entitled to exercise their First Amendment rights whenever and wherever they wish.” *Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266, 269 (9th Cir. 1995) (upholding a rent control board's action in ejecting a speaker several times because his conduct disrupted the orderly processes of meetings). The Court of Appeals for the Ninth Circuit has held that “limitations on speech at [city council and city board] meetings must be reasonable and viewpoint neutral, but that is all they need to be.” *Id.* at 271. A public body may not, in effect, close an open meeting by declaring that the public has no First Amendment right whatsoever once the public comment period has closed. *Norse v. City of Santa Cruz*, 629 F.3d 966, 975 (9th Cir. 2010). As the court previously had explained in *White v. City of Norwalk*, 900 F.2d 1421, 1426 (9th Cir. 1990), the entire meeting held in public is a limited public forum, from beginning to the end, not just portions of it. The fact that a city may impose reasonable time, place, and manner limitations on speech does not mean that by doing so it can transform the nature of the forum, much less extinguish all First Amendment rights. In *Santa Cruz*, a provocative gesture that was made after the public comment period closed still was subject to a determination of whether it enjoyed First Amendment viewpoint protection.

Right to public comment was denied when the Chair made the individual choose between public comment at the meeting or possibly lose her promised chance to have a future agenda topic devoted to her issue. This choice meant the individual could speak only once about a matter within the body's jurisdiction and control. Public comment during a public meeting has been bestowed by statute but once bestowed only may be restricted or limited in a constitutional manner. An individual's right to comment is subject to reasonable time, place, and manner

restrictions, but the Chair's offer of a choice to this speaker was not based on constitutionally valid time, place, or manner restrictions. *See* AG File No. 10-012 (May 18, 2010).

A member of the public may not be excluded from a tour taken by a public body during a meeting, for example, where a jail advisory committee scheduled a tour of the county jail. While the sheriff may have authority to exclude persons, if persons are excluded, the public body violates the Open Meeting Law if the tour is taken without the excluded member of the public. *See* AG File No. 00-013 (March 30, 2001).

When public comment is allowed during the consideration of a specific topic, the chairperson may require public comment to be relevant to the topic, provided the restriction is viewpoint neutral. When public comment is not allowed during the consideration of a specific topic on the agenda, the public body must allow at least one general period of public comment during that meeting where the public may speak on any subject within the jurisdiction, control, or advisory authority of the public body. *See* AG File No. 01-022 (May 31, 2001) and AG File No. 00-047 (April 27, 2001).

#### **§ 7.06 Excluding people who are disruptive**

If a person willfully disrupts a meeting, to the extent that its orderly conduct is made impractical, the person may be removed from the meeting. NRS 241.030(4)(a). *See* AG File No. 10-006 (April 13, 2010). Complainant's removal from the room by security was justified based on an intentional disturbance generated by the volume of comments which were audible to the Board and which prevented orderly conduct of the meeting. The chair of the public body may, without a vote of the body, declare a recess to remove a person who is disrupting the meeting. *See* AG File No. 00-046 (December 11, 2000). *See* § 8.04 above, for further detailed discussion of reasonable restrictions during a public meeting.

#### **§ 7.07 Excluding witnesses from testimony of other witnesses**

Under NRS 241.030(4)(b), a witness may be removed from a public or private meeting during the testimony of other witnesses. This applies even if the witness is an employee of the state agency that is prosecuting the case. Unless otherwise stipulated, the witness may continue to be excluded after he/she testifies. *See* Op. Nev. Att'y Gen. No. 93 (November 21, 1963). The witness should be allowed entrance after all other witnesses have testified. Aside from these witness exclusion rules, remember that NRS 241.033(4) prohibits the public body from excluding the person being considered under NRS 241.030 at any time during the closed meeting, as well as his/her representative or attorney.

#### **§ 7.08 Votes by secret ballot forbidden; voting requirements for elected public bodies voting requirements for appointed public bodies (NRS 241.0355)**

Since a secret ballot defeats the accountability of public servants, vote by secret ballot is not permitted under the Open Meeting Law. *Cf. News & Observer Publ'g Co. v. Interim Bd. of Educ.*, 223 S.E.2d 580 (N.C. Ct. App. 1976); *Olathe Hosp. Found., Inc. v. Extendicare, Inc.*, 539

P.2d 1 (Kan. 1975); *State ex rel. Wineholt v. Laporte Super. Ct. No. 2*, 230 N.E.2d 92 (Ind. 1967).

But that does not mean all votes must be by roll call. The Open Meeting Law is satisfied if a vote is by roll call, show of hands, or any other method so that the vote of a public official is made known to the public at the time the vote is cast. *Esperance v. Chesterfield Twp. of Macomb County*, 280 N.W.2d 559 (Mich. Ct. App. 1979).

A public body that is required to be composed only of elected officials may not take action by vote unless at least a majority of all members of the public body vote in favor of the action. A public body may not count an abstention as a vote in favor of an action. NRS 241.0355(1).

In a letter opinion construing public body voting requirements set out in NRS 241.0355, this office determined that the Regional Transportation Commission of Southern Nevada (RTC) was composed of elected officials from statutorily designated public bodies in Clark County; therefore, it is an elected public body subject to the voting requirements of NRS 241.0355. Before action can be taken by RTC, NRS 241.0355 requires a majority of the RTC members to vote affirmatively. There can be no reduction in quorum due to the absence of one or more commissioners where the public body is required to be composed of elected officials, even if they are appointed to the RTC by the membership of another elected public body. Letter opinion to Chairman Larry Brown, Regional Transportation Commission of Southern Nevada, July 8, 2011.

**“Action”** means:

- (a) If a public body has a member who is not an elected official, an affirmative vote taken by a majority of the members present, whether in person or by means of electronic communication, during a meeting of the public body, but;
- (b) If all the members of a public body must be elected officials, an affirmative vote taken by a majority of all the members of the public body. *See* NRS 241.015(1).

For example, if only three members of a five person county commission (elected body) are present at a meeting, the three cannot take action by a 2-to-1 vote; the vote must be 3 to 0, since a majority (3) must be in favor of the action.

The Open Meeting Law never can force a public body to take action on any agenda topic. *See* AG File No. 00-018 (June 8, 2000). NRS 241.020(2)(d)(6)(III) (public body may remove an item from the agenda at any time or delay its discussion at any time).

The Legislature encourages appointed or elected members of public bodies to vote—not abstain. NRS 281A.420(4)(b) states: “Because abstention by a public officer disrupts the normal course of representative government and **deprives the public and the public officer’s constituents of a voice in governmental affairs**, the provisions of NRS 281A.420 are intended to require abstention only in clear cases where the independence of

judgment of a reasonable person in the public officer's situation would be materially affected by the public officer's acceptance of a gift or loan, significant pecuniary interest, or commitment in a private capacity to the interests of another person."

**§ 7.09 Audio and/or video recordings of public meetings by members of the public**

Under NRS 241.035(3), members of the public may be allowed to record on audio tape or any other means of sound or video reproduction if it is a public meeting and the recording in no way interferes with the conduct of the meeting.

**§ 7.10 Telephone conferences**

*See § 5.05 for a discussion of the proper way to conduct telephone conferences.*

**§ 8.01 General**

This part discusses when closed meetings (sometimes referred to as “executive sessions” or “personnel sessions”) may be held and how they should be conducted.

The opening clause in NRS 241.020(1) provides that all meetings must be open and public “except as otherwise provided by specific statute.” The words “specific statute” are important ones. The Nevada Supreme Court is reluctant to imply exceptions to the rule of open meetings and looks for a specific statute mandating the exception or exemption. *See McKay v. Board of County Commissioners*, 103 Nev. 490, 746 P.2d 124 (1987). *See also* Op. Nev. Att’y Gen. No. 150 (November 8, 1973). In 2015, the Legislature amended NRS 241.016(3). Any provision of law, including NRS 91.270, 239C.140, 281A.350, 281A.440, 281A.550, 284.3629, 286.150, 287.0415, 288.220, 289.387, 295.121, 360.247, 385.555, 386.585, 392.147, 392.467, 392.656, 392A.105, 394.1699, 396.3295, 433.534, 435.610, 463.110, 622.320, 622.340, 630.311, 630.336, 639.050, 642.518, 642.557, 686B.170, 696B.550, 703.196, and 706.1725, which provides that any meeting, hearing, or other proceeding is not subject to the OML or otherwise authorizes or requires a closed meeting, hearing, or proceeding, prevails over the OML.

NRS 241.020(1) was amended in 2009 with additional clarifying language. The 2009 amendment not only emphasized the importance of statutory authority before a meeting may be closed, but it also requires strict adherence to the statutory limits imposed on scope of the meeting. The Open Meeting Law is entitled to a broad interpretation to promote openness in government and any exceptions thereto should be construed strictly. *McKay v. Board of Supervisors*, 102 Nev. 644, 730 P.2d 438 (1986). Thus, closed sessions should be allowed only when specifically authorized and their scope must be tightly controlled.

**§ 8.02 When closed sessions may be held**

Closed sessions may be held:

(1) By any public body to consider character, alleged misconduct, professional competence, or the physical or mental health of a person, with some exceptions, or to prepare, revise, administer, or grade examinations administered on behalf of the public body, or to consider an appeal by a person of the results of an examination administered on behalf of the public body. *See* NRS 241.030 and § 9.04.

(2) By the Public Employees Retirement Board: (1) to meet with investment counsel, provided the closed session is limited to planning future investments or the establishment of investment objectives and policies, and (2) to meet with legal counsel provided the closed session is limited to advice on claims or suits by or against the system. NRS 286.150(2).

(3) By the State Board of Pharmacy to deliberate on the decision in an administrative action (subsequent to a public evidentiary hearing) or to prepare, grade, or administer examinations. *See* NRS 639.050(3) and Op. Nev. Att’y Gen. No. 81-C (June 25, 1981).

(4) By any public body to take up matters or conduct activities that are exempt under the Open Meeting Law. See Part 4 of this manual. If the public body has other matters that must be considered in an open meeting, the Office of the Attorney General believes that a public body may take up an exempt matter during the open meeting if it desires. However, by virtue of the exemption, none of the open meeting requirements will apply to the exempt activity, although it is recommended that a motion or announcement be made identifying the activity as an exempt activity to avoid confusion between an exempt activity and a closed session to which certain open meeting requirements may otherwise apply.

(5) By public housing authorities when negotiating the sale and purchase of property, but the formal acceptance of the negotiated settlement should be made in an open meeting. *See* Op. Nev. Att’y Gen. No. 372 (December 29, 1966).

(6) As authorized by a specific statute. NRS 241.020(1).

### **§ 8.03 When closed sessions may not be held**

Closed sessions may not be held:

(1) To discuss the appointment of any person to public office or as a member of a public body. NRS 241.030(4)(d). *See* discussion in § 9.04.

(2) To consider the character, alleged misconduct, or professional competence of an elected member of a public body, or a person who is an appointed public officer or who serves at the pleasure of a public body as a chief executive or administrative officer or in a comparable position, including, without limitation, a president of a university, state college, or community college within the Nevada System of Higher Education, a superintendent of a county school district, a county manager, and a city manager. *See* NRS 241.031(1)(a) and (1)(b) and *cf.* Op. Nev. Att’y Gen. 81-A (February 23, 1981), written before NRS 241.031 was enacted.

[Note: The above prohibition does not apply if the consideration of the character, alleged misconduct, or professional competence of the person does not pertain to his or her role as an elected member of a public body or an appointed public officer or other officer described above. NRS 241.031(2).]

(3) When a request to open the meeting is made by the person whose character, alleged misconduct or professional competence, or physical or mental health is being considered, the public body must open the meeting at that time unless the consideration of the character, alleged misconduct, professional competence, or physical or mental health of

the requester involves the appearance before the public body of another person who does not desire that the meeting or relevant portion thereof be open to the public. The request to open the meeting may be made at any time during the hearing. NRS 241.030(2). If a necessary witness requests that the meeting remain closed, the public body must close that portion of the meeting, and open subsequent portions at the request of the person being considered. NRS 241.030.

(4) To conduct attorney-client communications, unless the communications fall under the exemption in NRS 241.015(3)(b)(2). *See* discussion in § 4.05 of this manual.

(5) To select possible recipients for awards. To the extent that a public body is considering the character, alleged misconduct, professional competence, or physical or mental health of a person under consideration for receipt of a public award, a public body may meet in closed session to discuss such matters. However, any vote taken with respect to granting the award must be in a public meeting. NRS 241.030.

(6) To consider indebtedness of individuals to a hospital. The Office of the Attorney General has determined that county hospital board meetings that relate to indebtedness of individuals to the hospital are required to be open and public. *See* Op. Nev. Att’y Gen. No. 148 (October 2, 1973).

(7) By a local ethics board to discuss past conduct of a public official. *See* Op. Nev. Att’y Gen. No. 94-21 (July 29, 1994).

(8) Where not authorized by law.

#### **§ 8.04 Closed meeting; definition of “character” and “competence”; employment interviews and performance evaluations; notice requirements**

NRS 241.030(1) states: “Except as otherwise provided in this section and NRS 241.031 and 241.033, a public body may hold a closed meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of a person.” The Open Meeting Law does not *require* a public body to close a meeting to the public. *See* NRS 241.030(4)(c).

It is important to remember that NRS 241.033 requires personal notice be provided to the person being considered before closing a meeting, pursuant to NRS 241.030, and as a practical matter, a notice pursuant to NRS 241.033 should contain the informational statement regarding administrative action under NRS 241.033(2)(b). *See* § 6.09 and § 6.10 *supra*.

A public body must start its public meeting in the open and then it may close the meeting after passing a motion specifying the nature of the business to be considered in closed session *and* the statutory authority pursuant to which the public body is authorized to close the meeting. In 2009, the Legislature added an important emphasis to the scope of a closed meeting, putting parameters on the business that can be considered in closed session. NRS 241.020(1) was



amended emphasizing that a meeting must not exceed the scope of the statutory authorization for closure. A public body may not stray from the statutory authorization to close a meeting. A public body may not set the parameters of the meeting; it must follow and obey statutory parameters.

The exceptions to closed meetings under NRS 241.030 are discussed *supra* in § 9.03.

The word “**character**” was defined in *Miglionico v. Birmingham News. Co.*, 378 So. 2d 677 (Ala. 1979) to include one’s general reputation. It also might include such personal traits as honesty, loyalty, integrity, reliability, and such other characteristics, good or bad, which make up one’s individual personality.

In Op. Nev. Att’y Gen. No. 81-A (February 23, 1981), the Office of the Attorney General, citing Black’s Law Dictionary, opined that *character* encompassed “[t]hat moral predisposition or habit or aggregate of ethical qualities, which is believed to attach to a person on the strength of the common opinion and report concerning him. A person’s fixed disposition or tendency, as evidenced to others by his habits of life, through the manifestation of which his general reputation for the possession of a character, good or otherwise, is obtained.” Op. Nev. Att’y Gen. No. 81-A further opined that the word *competence* included being “[d]uly qualified; answering all requirements; having sufficient ability or authority; possessing the natural or legal qualifications; able; adequate; suitable; sufficient; capable; legally fit.

Closed sessions may be held only to *consider* the character, alleged misconduct, professional competence, or physical or mental health of a person. The Open Meeting Law does not permit taking *action* in closed session on such matters. This distinction was drawn in *McKay v. Bd. of Supervisors*, 102 Nev. 644, 730 P.2d 438 (1986), where it was held the board did not violate the Open Meeting Law when it went into closed session to discuss the character, alleged misconduct, and professional competence of the city manager, but terminating the city manager in closed session violated the law. *See also* Op. Nev. Att’y Gen. No. 81-A (February 23, 1981) and Op. Nev. Att’y Gen. No. 81-C (June 25, 1981).

The *McKay* decision has important implications for employment interviews and performance evaluations. (*See* § 4.05, *infra*). While the delineated attributes of individual employment candidates may be discussed in closed session, the public body may not use the closed session to narrow down candidates or begin the selection process. *See Brown v. East Baton Rouge Parish School Bd.*, 405 So. 2d 1148 (La. Ct. App. 1981). Similarly, while the delineated attributes of existing employees may be discussed in closed session, evaluation forms may not be filled out during the closed session, nor may the public body form recommendations or decisions about a rating or an action to take. Those tasks must be done in an open meeting or delegated to a member to handle. The closed session must be limited to specific discussions about the specific person. General discussions about general policies or practices may not be held during a closed session. *See Hudson v. Sch. Dist. of Kansas City*, 578 S.W.2d 301 (Mo. Ct. App. 1979).

While it can be difficult to properly describe an action item relating to a closed personnel session, because one cannot anticipate the outcome of the closed session, one can describe, on the agenda, the parameters of allowable action by stating “possible action including, but not limited to, termination, suspension, demotion, reduction in pay, reprimand, promotion, endorsement, engagement, retention, or ‘no action’.” *See* AG File No. 00-007 (June 1, 2000).

The statutes do not authorize closure for general “personnel sessions.” Closed sessions are authorized only for discussion of the matters specifically listed in NRS 241.030 or in another specific statute elsewhere in the NRS. *See* § 4.02, Statutory exemptions *infra*; *see* AG File No. 00-043 (January 24, 2001). It is not adequate to vaguely state that the closed session is regarding an individual (such as a manager). The agenda description must specifically state the nature of the business to be considered and the statutory authority authorizing the closed session. If a person’s character, professional competence, alleged misconduct, or physical or mental health is the topic of the discussion, the person’s name must appear on the agenda. NRS 241.020(2)(d)(4); *see* AG File No. 00-050 (March 28, 2001).

*See* AG File No. 08-037 (February 26, 2009). Board members and the public engaged in a discussion of a county employee’s character and professional competence without providing the employee notice as required under NRS 241.033.

*See* OMLO 2004-01 (January 13, 2004) where the Office of the Nevada Attorney General opined that *deliberations* as defined in §5.01 *supra*, are not allowed in a closed meeting pursuant to NRS 241.030.

### **§ 8.05 The appointment to “public office” closed meeting prohibition**

Under NRS 241.030(4)(d), closed sessions may not be held “for the discussion of the appointment of any person to public office or as a member of a public body.” This prohibition was discussed in *City Council of City of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 784 P.2d 974 (1989). In that case, the city council conducted employment interviews for the city clerk position in the open and then held a brief, closed meeting to discuss the character and professional competence of candidates. The council went back into open session to make the selection, but it was held that the closed session was still a violation of the Open Meeting Law. The Nevada Supreme Court construed the prohibited “discussion of the appointment” to include “all consideration, discussion, deliberation and selection done by a public body in the appointment of a public officer.” The ruling seems to cover all aspects of the appointment process.

The Open Meeting Law does not define “public officer,” but the Nevada Supreme Court (*see* below) has approved the use of the definition of public officer found in NRS 281.005. NRS 281A.160 also provides a definition of public officer and it also construes the meaning of “the exercise of a public power, trust or duty.” In *Op. Nev. Att’y Gen. No. 193* (September 3, 1975), the Office of the Attorney General opined that NRS 241.030(4)(d) [formerly NRS 241.030(3)(e)] encompasses: (1) all elected public officers, and (2) all persons appointed to positions created by law whose duties are specifically set forth in law and who are made responsible by law for the direction, supervision, and control of their agencies. *See also* OMLO

2004-01 (January 14, 2004). In *City Council v. Reno Newspapers, Inc.*, 105 Nev. 886, 784 P.2d 974 (1989), NRS 281.005 was used by stipulation of the parties to define public officer.

**§ 8.06 How to handle closed sessions to consider character, allegations of misconduct, professional competence, or physical and mental health of a person**

For closed sessions under NRS 241.030(1), the following procedures are required or recommended:

Start with a duly noticed open meeting. Closed meetings are still “meetings” within the definition and ambit of the Open Meeting Law.

To assure compliance with the spirit of NRS 241.020(2)(d)(1), it is recommended the matter be indicated on the agenda as a closed session under NRS 241.030(1), and the person’s name being considered must be included on the agenda pursuant to NRS 241.020(c)(4). An agenda item of “Executive Session” does not adequately describe a closed session. *See* AG File No. 00-021 (September 7, 2000).

The closed session should not be listed as an “action” item on the agenda because action cannot be taken during the closed session. *See* discussion in § 9.04.

If action might be taken on the matter, be sure to include a separate item on the agenda for action to be taken during open session. *See* discussion in § 9.04.

Give notice to the subject person as required by NRS 241.033(1). *See* § 6.09.

At the meeting, a motion must be made to go into closed session, and the motion must specify the business to be considered during the closed session and the statutory authority pursuant to which the public body is authorized to close the meeting. NRS 241.030(3). *See* AG File No. 01-021 (May 14, 2001), which was drafted prior to the 2005 Legislative Session. Only the business identified in the motion may be discussed. As stated in Op. Nev. Att’y Gen. No. 81-A (February 23, 1981), the purpose of the motion is two-fold: (1) so members of the public body understand the parameters of what can be discussed in closed session so as not to deviate from the strict requirements of the law, and (2) to assure that notice is given to the person being discussed so he/she can obtain a copy of the minutes.

The public body must permit the person being considered and his/her representative to attend the closed meeting. NRS 241.033(4). It is up to the chairperson to decide who else shall be included in the closed session, or the chairperson can determine who may attend through a majority vote of the public body, which occurs in an open meeting. NRS 241.033(5).

Before proceeding with the discussion, make sure that proof of service of the notice to the person has been received. If not, the closed session may not proceed, absent waiver. *See* NRS 241.033(1) and § 6.09.

The closed session must be tape-recorded. NRS 241.035(4). As the recordings of closed sessions are treated differently than those of open sessions, NRS 241.035(2), it is recommended the closed session be recorded on a separate tape.

The person being considered must be permitted to present written evidence, testimony and present witnesses relating to his character, alleged misconduct, professional competence or physical or mental health to the public body. NRS 241.033(4).

If the subject desires to record the closed session, the Office of the Attorney General recommends that he or she be permitted to do so. NRS 241.035(3).

Minutes must be kept of the closed session, and they must be prepared with the same detail as minutes of the open session. NRS 241.035(2).

Op. Nev. Att'y Gen. No. 81-A (February 23, 1981) contains a lengthy discussion about the improper use and conduct of an executive session, and the possible remedy.

**WHAT RECORDS MUST BE KEPT AND MADE AVAILABLE  
TO THE PUBLIC? (See Sample Form 2)**

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**§ 9.01 General**

This part discusses the requirements for preparing, preserving, and disclosing minutes of meetings.

**§ 9.02 Requirement for and content of written minutes (See Sample Form 2)**

NRS 241.035 requires that written minutes be kept by all public bodies of each meeting they hold regardless of whether the meeting was open or closed to the public. The minutes must include:

- a. The date, time, and place of the meeting;
- b. The names of the members of the public body who were present, whether in person or by means of electronic communication, and those who were absent;
- c. The substance of all matters proposed, discussed, or decided and, at the request of any member, a record of each member's vote on any matter decided by vote;
- d. The substance of remarks made by any member of the general public who addresses the body if he/she requests that the minutes reflect his or her remarks, or if he/she has prepared written remarks, a copy of his/her written remarks if he/she submits a copy for inclusion; and
- e. Any other information that any member of the body requests be included or reflected in the minutes.

*See OMLO 98-03 (July 7, 1998) for an example of how a public body may violate the Open Meeting Law by failing to reflect, in its meeting minutes, the substance of the discussion by the members of the public body of certain relevant matters.*

Verbatim minutes are not required by OML. There is no requirement in NRS 241.035(1) that verbatim remarks be included in the minutes at the request of any person. NRS 241.035(1) use of the phrase "any other information" does not include the right to have the public body insert verbatim remarks in the text of the minutes. Appending prepared written remarks to the minutes is an accommodation which serves the public interest just as efficiently as the insertion of verbatim remarks into the text of the public body's minutes and it also furthers the goal of openness in government. OMLO 2008-03; *see* AG File No. 08-011 (June 9, 2008)

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### § 9.03 Retention and disclosure of minutes

Minutes or audio recordings of public meetings are declared by the Open Meeting Law to be public records and must be available for inspection by the public within 30 working days after the meeting is adjourned. *See* NRS 241.035(2) and OMLO 99-06 (March 19, 1999).

In the case of a public body that meets infrequently, formal approval of the minutes of a previous meeting may be delayed several months. **NRS 241.035(1) states that unless good cause is shown, a public body shall approve the minutes of a meeting within 45 days after the meeting or at the next meeting of the public body, whichever occurs later.** The unapproved minutes must be made available within the time specified in NRS 241.035(2) to any person who requests them, together with a written statement that such minutes have not yet been approved and are subject to revision at the next meeting.

The minutes are deemed to have permanent value and must be retained by the public body for at least five years (NRS 241.035(2)), after which they may be transferred for archival preservation in accordance with NRS 239.080-239.125.

Minutes of meetings closed pursuant to NRS 241.030(1)(a) and (1)(c) become public records whenever the public body determines that the matters discussed no longer require confidentiality *and* the person whose character, conduct, competence, or health was discussed has consented to their disclosure. NRS 241.035(2)(a)-(c).

Under NRS 241.033(6), the subject person always is entitled to a copy of the minutes of the closed session upon request, whether or not they ever become public records. In *Davis v. Churchill County Sch. Bd.*, 616 F. Supp. 1310, 1314 (D. Nev. 1985), *remanded*, 823 F.2d 554 (9th Cir. 1987), the court suggested that a student who was the subject of closed hearings may release “any information he or she chooses,” which presumably includes minutes or tapes of closed sessions.

### § 9.04 Making and retaining audiotapes or video recordings of meetings

It is a requirement of the Open Meeting Law that each public meeting is audio- or videotaped or transcribed by a reporter who is certified pursuant to Chapter 656 of NRS. NRS 241.035(4). A public body must make a good faith effort to comply with this provision, and if the public body makes a good faith effort to comply, but, for some reason beyond the control of the public body fails to comply, the public body’s failure to comply with the provision does not result in a violation of the Open Meeting Law. NRS 241.035(7).

*See* OMLO 99-09 (July 28, 1999) for an example of the pitfalls associated with using a tape recorder as the sole source for the record of the meeting.

Recordings of closed sessions made by public bodies also must be retained for at least one year but are given the same protection from public disclosure as minutes of closed sessions set out in NRS 241.035(2). The tapes must be made available to the subject of the closed session,

and under NRS 241.035(6), also must be made available to the Office of the Attorney General upon request.

#### **§ 9.05 Fees for inspecting or copying minutes and tapes**

The Open Meeting Law requires that minutes and tapes be made available “for inspection” once prepared following a public meeting and does not authorize charging a fee for inspection, since fees for inspection are not authorized by statute. In 2013, the Legislature amended NRS 241.035 to require that a copy of the minutes or audio recording must be made available to a member of the public upon request at no charge. NRS 241.035(2). Court reporters, who report meetings or transcribe recordings of meetings, are exempt from the requirement to provide a copy of the transcription he/she prepares to a member of the public at no charge; court reporters also are not prohibited from charging a fee to the public body for any services relating to the transcription of a meeting. NRS 241.035(5).

**§ 10.01 General**

When a violation of the Open Meeting Law occurs or is alleged, the Office of the Attorney General recommends that the public body make every effort to immediately correct the apparent violation. Although it may not completely eliminate a violation, corrective action can mitigate the severity of the violation and further ensure that the business of government is accomplished in the open.

The following sections discuss the possible remedies available to the public body for apparent violations of the Open Meeting Law, and a requirement that public bodies include any Attorney General opinion finding an OML violation by the public body on the public body's next agenda. NRS 241.0395.

**§ 10.02 Correcting a violation**

Some examples of ways to stop, contain, and take corrective action for apparent violations follow. Of course, as circumstances vary, so may the remedies.

- a. Improper notice given for meeting.

If proper notice has not been given for a meeting, the meeting must be stopped. *See* OMLO 99-06 (March 19, 1999). To remedy the violation, the Office of the Attorney General believes that the meeting may be convened or continued solely for the purpose of rescheduling a meeting and adjourning. To otherwise continue a meeting after it is discovered that the meeting was not properly noticed could be viewed as evidence of a willful violation of the Open Meeting Law. Discussions of any public significance which were held before the discovery of the improper notice should be repeated at a later meeting. All actions taken before adjournment are void, but may be taken again at a subsequent meeting as discussed below.

- b. Discussion of items not stated clearly on agenda.

If a public body begins discussion on an item that is not stated clearly on the agenda, it is recommended that the public body stop the discussion and schedule it for a future meeting under a more comprehensive agenda. At the subsequent meeting, it would be advisable to summarize or repeat the conversations that occurred at the previous meeting.

- c. Taking action on items listed as discussion items only.

Remembering the expanded definition of "action" in NRS 241.015(1), if a public body takes action on an item which has not been identified on the agenda as an action item, the action is void but may be taken up again at a future duly-noticed meeting,



where the former action may be rescinded to indicate that the public body understands that the prior action was void. At the subsequent meeting, the rationale for the action should be discussed again or at least the record of the previous meeting be made available.

- d. No proof of service on the subject of a meeting to consider character, alleged misconduct, competence, or health.

If there is no proof of service of notice on a person whose misconduct, character, professional competence, or mental or physical health is being considered, and the person is not present, the item must be postponed to another meeting, and the subject must be notified again about the new meeting. If the person is present, he/she may be asked if he or she would be willing to waive the notice requirements. The right to notice must be explained thoroughly to the person, and the person should be given the opportunity, free of threat or pressure, to postpone consideration of the matter or to waive the right to notice. As explained in § 6.09 of this manual, any waiver of the right to notice must be knowing and voluntary. A complete record should be made to resolve allegations that may arise later.

- e. Public body voted to rescind earlier votes on items that had not been agendized. Multiple matters were rescinded in a public vote.

Since any action taken on an item that is not properly agendized is void as a matter of law, a public body may vote to rescind the prior vote on an illegal action during the same meeting or in another future public meeting. Otherwise, the public may be confused about the legal status of the prior illegal action. *See* § 11.03 below. Following rescission items that were the subject of illegal action then may be placed on a future agenda for lawful consideration and possible action. AG File No. 08-002 (May 12, 2008).

- f. Effective corrective action can be taken at a meeting even when a serious but inadvertent violation occurs.

Our opinion in OMLO 2008-02: AG File No. 07-051 (February 7, 2008) is an example of how a public body may correct even a serious violation. The Douglas County Board of County Commissioners quickly corrected a violation of the OML during its public meeting. A quorum of the Board had gathered in an unscheduled non-noticed meeting during the Board's recess while Counsel was absent researching a legal issue. A member of the public brought the violation to the attention of the Board at the end of the recess. There had been no recording or minutes taken of this gathering. Board Counsel immediately asked members to explain what had occurred during the recess. In response to questions from counsel, it became clear that the gathering of a quorum to discuss a matter on the agenda was inadvertent. No promises or decisions had been given or made during the recess. To the extent there was deliberation among the quorum, it was corrected by immediate disclosure of what had been discussed during the inadvertent meeting. When the Board reconvened

and disclosure had been made, the Chairman reopened public comment to allow anyone to comment about the violation or anything else. Public comment was not restricted. This prompt action satisfied the legislative mandate found in NRS 241.010. The Douglas County Planning Commission took effective remedial action to correct an acknowledged violation.

In 2013, the Nevada Legislature enacted NRS 241.0365 that allows corrective action by the public body when violations of the OML occur or are alleged. Voluntary corrective action may be taken prior to adjournment of the meeting at which the apparent violation occurs. Otherwise, corrective action of an apparent violation may be taken at a future meeting if the following steps are taken:

1. Notice of corrective action must be included as an agenda item for a subsequent meeting at which the public body intends to take correction action; and

2. The public body must take corrective action within 30 days of the apparent violation.

If the public body takes corrective action within 30 days after posting notice of the intent to take corrective action on its agenda, the Attorney General may forego prosecution of the alleged violation if it appears that forbearance is in the best interests of the public.

If the public body takes corrective action within 30 days of the alleged violation, the statutory limitations' period applicable to the time for bring suit by the Attorney General or a private party, pursuant to NRS 241.037, is tolled for 30 days.

Any corrective action taken by the public body to correct an alleged violation is effective only prospectively.

Efforts to correct a violation can mitigate the severity of the violation and may reduce the degree of culpability of the violators. However, even though a violation may have been mitigated by corrective action, the violation still may be the subject of the sanctions detailed below. *See* OMLO 2015-01: AG File No. 13897-141 (January 12, 2016) for an example of how a public body that voluntarily and unanimously takes prompt corrective action as soon as an alleged violation becomes apparent can effectively mitigate the severity of the earlier violation.

### **§ 10.03 Actions taken in violation are void**

The action of any public body taken in violation of any provision of the Open Meeting Law is void, i.e., the action has no legal force or binding effect. NRS 241.036.

However, lawsuits to obtain a judicial declaration that an action is void must be commenced within 60 days after the offending action occurred. NRS 241.037(3).

It appears that only those actions defined in NRS 241.015(1) (decisions, commitments, or affirmative votes by a majority of the members) are voided by NRS 241.036.

#### § 10.04 Reconsidering an action that is void

A public body that takes action in violation of the Open Meeting Law, which action is null and void, is not forever precluded from taking the same action at another legally called meeting. *Valencia v. Cota*, 617 P.2d 63 (Ariz. Ct. App. 1980); *Cooper v. Arizona W. Coll. Dist. Governing Bd.*, 610 P.2d 465 (Ariz. Ct. App. 1980); *Spokane Education Ass'n v. Barnes*, 517 P.2d 1362 (Wash. 1974). However, mere perfunctory approval at an open meeting of a decision made in an illegally closed meeting does not cure any defect of the earlier meeting or relieve any person from criminal prosecution for the same violation. *Scott v. Town of Bloomfield*, 229 A.2d 667 (N.J. Super. Ct. Law Div. 1967). The matter should be put on an agenda for an open meeting, and reheard.

The following examples illustrate a few methods used by public bodies to correct OML violations:

- A public body corrected a violation almost two months following the violation. The trustee subcommittee had met in private without notice or agenda to summarize the superintendent's evaluation and backup materials for formal presentation to the trustees at a later meeting. At the later meeting, trustees voted to approve the superintendent's evaluation. Complainant said that the earlier private non-noticed meeting had constituted a subcommittee under the OML and should have been subject to public oversight. Corrective action (despite denial by the chair that a violation had occurred) was taken 55 days later when the subcommittee met for a special meeting prior to the trustee's regular meeting, during which the subcommittee formally approved the evaluation materials and compilation process in a publicly noticed meeting, and it again voted on the superintendent's evaluation, so as to remove any conflict with the OML. AG File No. 09-024 (October 13, 2009).
- A private attorney filed a petition on behalf of a public body. The petition had not been approved or voted on by the public body in open session before it was filed. The public body then agendized the petition for public meeting and voted to ratify the earlier filing of the petition. Even if the complainant's charge that the filing of the petition was an illegal act on behalf of the public body, the OML does not forbid corrective action to either ratify the action complained of, or to reject the action. AG File No. 10-038 (August 24, 2010).
- A public body took immediate corrective action prior to an OML complaint when it redrafted and revised possibly defective agenda items and re-agendized them to a future meeting agenda. AG File No. 10-045 (November 2, 2010).
- An allegation was made that a city council's process to fill a vacancy within its own membership kept the public in the dark as to its deliberations and assessments of the various candidates and that it violated the letter and spirit of the Open Meeting Law. The Henderson City Council took corrective action after this office contacted the city attorney. It released to the public recertified ballots cast by the Council members, each with the signature of the corresponding voting member. The Council's selection process

had been defective because it failed to make known the identity of each member's ballot at the time it was cast or at some time during the meeting. But, failure to verbally deliberate and/or assess the candidates before each ballot was cast was not a violation of the OML. AG File No. 09-029 (November 4, 2009).

**§ 10.05 Any person denied a right under the law may bring a civil suit**

Under NRS 241.037(2), any person denied a right conferred by the Open Meeting Law may bring a civil suit:

- a. To have an action taken by the public body declared void;
- b. To require compliance with or prevent violations of the Open Meeting Law; or
- c. To determine the applicability of the law to discussions or decisions of the public body.

Additionally, it may be possible for an aggrieved person to seek injunctive relief, as explained in *City Council of City of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 784 P.2d 974, 976 (1989).

If the plaintiff prevails, the court may award him/her reasonable attorney's fees and court costs. NRS 241.037(2).

**§ 10.06 The Office of the Attorney General may bring a civil suit**

The Office of the Attorney General also may bring suit:

- a. To have an action taken by a public body declared void, or
- b. To seek injunctive relief against a public body or person to require compliance with or prevent violations of the Open Meeting Law. The injunction may issue without proof of actual damage or other irreparable harm sustained by any person. NRS 241.037(1).
- c. To seek a monetary civil fine not to exceed \$500.00 in a court of competent jurisdiction for a violation of the OML where the person(s) participated (took affirmative action) in a knowing violation of the OML. NRS 241.040.

If an injunction is obtained, it does not relieve any person from criminal prosecution for the same violation. NRS 241.037(1). See §11.07 for further discussion of the A.G.'s policy of enforcement of the OML.

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**§ 10.07 Time limits for filing lawsuit; policy for enforcement of complaints**

Any suit which seeks to void an action, and/or to require compliance with the provisions of the Open Meeting Law, and/or to seek injunctive relief must be brought within the statutory 60/120 day limitations' periods after the action objected to, is taken. NRS 241.037(3). There are two limitations periods—60 days and 120 days. They run concurrently from the date of an alleged OML violation. If the Attorney General has not brought a suit to void a public body's action within 60 days of the alleged violation, thereafter, the Attorney General is barred from seeking to void the action. But the Attorney General still has jurisdiction under the 120-day limitations' period which continues to run for 60 more days. Should a suit be brought during this period of time, the Attorney General may seek injunctive relief to force compliance with the OML.

Any suit brought to have an action declared void must be commenced within 60 days after the action objected to, is taken by the public body. NRS 241.037(3). In *Kennedy v. Powell*, 401 So. 2d 453 (La. Ct. App. 1981), the court observed that the legislature limited suits to challenge actions of public bodies for violation of the open meeting law to a short period of 60 days to ensure a degree of certainty in the actions of public bodies. The 60-day limitation is absolute and is in no way dependent upon knowledge of a violation. According to the court, running of the 60-day time period destroys the cause of action completely. A complaint brought in a court of competent jurisdiction beyond the running of the OML's concurrent 60/120 day limitations' periods, as expressed in NRS 241.037, is subject to dismissal. NRS 11.010.

A suit by the Attorney General seeking monetary civil penalties (NRS 241.040(4)) is subject to a one-year limitations' period following the date of the action taken in violation of this chapter.

The Attorney General's policy for enforcement of Open Meeting Law complaints is:

- The Attorney General may proceed with an appropriate legal action, issue an Open Meeting Law Opinion pursuant to its prosecutorial discretion, or choose not to prosecute an Open Meeting issue prior to the running of the 120-day statute of limitations.
- The Attorney General will not investigate or act upon a complaint alleging an Open Meeting Law violation received after the 120-day statute of limitations unless it is relevant to an existing action or the attorney is commencing a criminal prosecution pursuant to NRS 241.040.
- The Attorney General will not issue an Open Meeting Law Opinion pursuant to his/her prosecutorial discretion after the 120-day statute of limitations.

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## **§ 10.08 Jurisdiction and venue for suits**

A suit may be brought by an aggrieved citizen in the district court in the district in which the public body ordinarily holds its meetings or in which the plaintiff resides. NRS 241.037(2).

A suit brought by the Office of the Attorney General may be brought “in any court of competent jurisdiction.” NRS 241.037(1).

However, even though a court has jurisdiction, a defendant may raise objections as to proper venue. *Board of County Comm'rs v. Del Papa*, 108 Nev. 170, 825 P.2d 1231 (1992).

## **§ 10.09 Standards for injunctions and enforcing injunctions**

For a discussion of the standards for imposing injunctions and enforcing them, *see City Council v. Reno Newspapers, Inc.*, 105 Nev. 886, 784 P.2d 974 (1989).

## **§ 10.10 Criminal sanctions**

Each member of a public body who attends a meeting of that body where action is taken in violation of any provision of the Open Meeting Law, with knowledge of the fact that the meeting is in violation thereof, is guilty of a misdemeanor. NRS 241.040(1).

Further, wrongful exclusion of any person or persons from a meeting is a misdemeanor. NRS 241.040(2).

However, a member of a public body who attends a meeting of that public body at which action is taken in violation of the Open Meeting Law is not the accomplice of any other member so attending. NRS 241.040(3).

Upon conviction, punishment may include a jail term of up to six months, a fine not to exceed \$1,000, or both.

In Op. Nev. Att’y Gen. No. 81-A (February 23, 1981), the Office of the Attorney General opined there are two requirements before a criminal prosecution may be commenced under the Open Meeting Law. Those requirements are:

- 1) Attendance of a member of a public body at a meeting of that public body *where action is taken* in violation of any provision of the Open Meeting Law. The opinion recognized the distinction in the Open Meeting Law between actions and deliberations and concluded that criminal sanctions may be appropriate when actions are taken in violation of the Open Meeting Law, but where procedural violations occur involving a meeting where no action is taken, civil remedies are made available to compel compliance or prevent such violations in the future.

- 2) *Knowledge by a member of a public body* that the meeting is in violation of the Open Meeting Law. The opinion held that, when members of a public body rely on advice of counsel, they should not be held to know that a violation occurred.

While the Open Meeting Law does not require the attorney for the public body to be present at a meeting (AG File No. 00-013 (April 21, 2000)), the presence of the attorney may allow the member to receive advice upon which a member can rely as to whether the member knows that the meeting is in violation of the Open Meeting Law.

### **§ 10.11 Public officers may be removed from office**

Under NRS 283.040(1)(d), a person's office becomes vacant upon a conviction of a violation of NRS 241.040, which is discussed in § 10.10 above.

### **§ 10.12 Filing a complaint; procedure; Attorney General subpoena power; public records**

**FILING A COMPLAINT:** A person alleging that the OML has been violated by a public body or that his/her public comment right has been denied, may seek redress in the courts as explained above. That person also may complain to the Office of the Attorney General, but filing a complaint with the Office of the Attorney General does not toll the time periods for the person to take his own action

Under NRS 241.040(4), the Office of the Attorney General must investigate and prosecute alleged violations of the Open Meeting Law. The Office of the Attorney General believes that any person may file a complaint with the Office of the Attorney General even if that person is not aggrieved directly by the offense. *See* §10.07 above, for an explanation of the Attorney General's policy regarding enforcement of the OML.

All such complaints must be in writing, signed by the complaining person, and contain a full description of the facts known to the complainant. The Office of the Attorney General considers all such complaints to be public records and may release them accordingly. Complaints must be sent to:

Open Meeting Law Coordinator  
Office of the Attorney General  
100 North Carson Street  
Carson City, Nevada 89701-4717

Complaints may be sent by facsimile to (775) 684-1108.

**INVESTIGATION PROCESS:** Complaints which allege a cognizable violation of the OML will be investigated. The complaint is sent to the public body along with any supporting documents attached to the complaint. The public body is given time to respond to the allegation(s) by written statements, copies of the agenda, minutes, (even if in draft form), video or audio recordings of the meeting, and the Attorney General may subpoena additional relevant documents, records, or materials for purposes of the investigation. After review of the complaint

and the public body's response, the Attorney General may issue a written opinion that resolves the matter, or he/she may initiate a civil or criminal suit seeking compliance with the OML.

Considering the time limits for bringing lawsuits, it is important that complaints be promptly filed with the Office of the Attorney General to allow sufficient time for investigation and evaluation. Investigation of an OML complaint must occur within the 60/120 day limitations periods described in §11.07.

**SUBPOENA POWER:** The Legislature authorized the Attorney General to issue subpoenas when conducting an investigation. NRS 241.039(4) and (5) state: "In any investigation conducted pursuant to subsection 2, the Attorney General may issue subpoenas for the production of any relevant documents, records, or materials. A person who willfully fails or refuses to comply with a subpoena issued pursuant to this section is guilty of a misdemeanor."

Records, relevant documents, or other materials now subject to discovery may include e-mails among members of a public body; records of their phone calls; and other electronic communications made by a member of a public body while engaged in the public body's public business. NRS 241.039.

It is important to remind a public body of the Open Meeting Law's prohibition against "walking quorums" or "constructive quorums" that can be created through conversations with other members or through electronic communication shared among a quorum of a public body. NRS 241.015(3)(a)(2). Subpoena of relevant records may reveal e-mails or phone calls among members which could have to be explained or justified to avoid a violation of the Open Meeting Law.

**PUBLIC RECORDS:** While the complaints themselves are considered public records, investigative files will be held confidential until the investigation is complete, and then the file will become a public record. NRS 241.039(3). Records of closed sessions which are obtained as a part of the investigation will remain confidential until made a public record through the process in NRS 241.035(2)(a)-(c).

### **§ 10.13 Public notice of Attorney General Opinion finding violation by public body**

The 2011 Legislature amended the Open Meeting Law with a new requirement for public bodies designed to provide information and transparency to all members of the public.

NRS 241.0395(1) requires public notice of an Attorney General opinion if the Attorney General makes findings of fact and conclusions of law that a public body has taken action in violation of any provision of NRS 241. The public body must include an item on its next agenda which acknowledges the Attorney General's findings of fact and conclusions of law. The opinion of the Attorney General must be treated as supporting material for the item on the agenda for the purposes of NRS 241.020.

The inclusion of an item on the agenda for a meeting of a public body pursuant to subsection 1 is not an admission of wrongdoing for the purposes of a civil action, criminal prosecution, or injunctive relief. NRS 241.0395(2).



NRS 241.0395 serves the OML’s central tenet—transparency. Public notice of the opinion simply is an acknowledgment of a finding by the Attorney General that the public body has taken an action in violation of the OML. The opinion of the Attorney General must be included in supporting materials for that agenda item. The item may be an informational item as there is no statutory requirement that any action be taken. The underlying reason for this change is to provide notice to the public of the Attorney General’s opinion and to provide a forum for discussion, if any, between the public and the public body.

**§ 10.14 Monetary penalty for willful violation; one-year limitations period**

NRS 241.040(4) provides that each member of a public body is subject to a civil penalty not to exceed \$500.00 for participation in a willful violation of the OML. It states:

In addition to any criminal penalty imposed pursuant to this section, each member of a public body who attends a meeting of that public body where action is taken in violation of any provision of this chapter, and who participates in such action with knowledge of the violation, is subject to a civil penalty in an amount not to exceed \$500. The Attorney General may recover the penalty in a civil action brought in the name of the State of Nevada in any court of competent jurisdiction. . . .

Such an action must be commenced within one year after the date of the action taken in violation of this chapter. A civil penalty is applicable only when a member of a public body, who attends a meeting of that public body where action is taken in violation of any provision of the OML, participates in such action with knowledge of the violation.

The key to understanding how this penalty will be enforced depends on an understanding of the act of “**participation**,” a requirement of the statute. Enforcement against a member of a public body based on “participation” only may occur when the member makes a commitment, promise, or casts an affirmative vote to take action on a matter under the public body’s jurisdiction or control when the member knew his/her commitment, promise, or vote was taken in violation of the OML.

The civil penalty requires that a public body take action in order for the civil penalty to be potentially applicable. “Action” is defined in NRS 241.015(1) as an affirmative act; mere silence or inaction by members is not sufficient to rise to the level requiring enforcement.

This office would not seek to punish individual members who attempt to comply with the OML, only those who actually violate it. Even then, enforcement under NRS 241 requires discretion based on investigation and review of the facts. Evidence in the record that an individual attempted to comply and/or sought to avoid violating the OML would put them outside the scope of liability for the civil penalty, even if the other members of their public body proceeded to knowingly violate the OML.

**§ 11.01 General**

As with any statute, courts use many principles of statutory construction to construe the Open Meeting Law and apply it to circumstances before them. Discussion of those principles is beyond the scope of this manual, but the Office of the Attorney General has some observations that may be useful in determining how to comply with the Open Meeting Law.

**§ 11.02 Legislative declaration and intent**

The Legislature declared in NRS 241.010, “In enacting this chapter, the legislature finds and declares that all public bodies exist to aid in the conduct of the people’s business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.” This spirit was a guiding consideration in several cases. *See McKay v. Board of Supervisors*, 102 Nev. 644, 647, 730 P.2d 438, 441 (1986); *McKay v. Board of County Comm’rs*, 103 Nev. 490, 493, 746 P.2d 124, 125 (1987); *Del Papa v. Board of Regents*, 114 Nev. 388, 393, 956 P.2d 770, 774 (1998); *Sandoval v. Board of Regents*, 119 Nev. 148, 67 P.3d 902 (2003); *Dewey v. Redevelopment Agency*, 119 Nev. 87, 94, 64 P.3d 1070, 1075 (2003).

**§ 11.03 Standards of interpretation**

A statute enacted for the public benefit, such as a sunshine or public meeting law, should be construed liberally in favor of the public, even though it contains a penal provision. *Wolfson v. State*, 344 So. 2d 611 (Fla. Dist. Ct. App. 1977); *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971); *Laman v. McCord*, 432 S.W.2d 753 (Ark. 1968). The Open Meeting Law is entitled to a broad interpretation to promote openness in government, while any exceptions thereto should be construed strictly. *McKay v. Bd. of Supervisors*, 102 Nev. 644, 730 P.2d 438 (1986); *Wexford County Prosecuting Attorney v. Pranger*, 268 N.W.2d 344 (Mich. Ct. App. 1978). A construction which frustrates all evasive devices is preferred for an open meeting law. *Florida Parole & Prob. Comm’n v. Thomas*, 364 So. 2d 480 (Fla. Dist. Ct. App. 1978). *See also* Op. Nev. Att’y Gen. No. 85-19 (December 17, 1985).

**§ 11.04 Use of standard of reasonableness**

In circumstances where the Open Meeting Law provides no clear standards or guidelines, public bodies must consider themselves as being governed by a standard of reasonableness. *See* Op. Nev. Att’y Gen. No. 79-8 (March 26, 1979).

**§ 11.05 Attorney General Opinions**

While Attorney General Opinions are intended to be helpful in fashioning compliance with the Open Meeting Law, they are not binding on the courts even though the Office of the Attorney General is given the duty of investigating and prosecuting Open Meeting Law complaints. *See Tahoe Reg’l Planning Agency v. McKay*, 590 F. Supp. 1071, 1074 (D. Nev.

1984), *aff'd*, *Tahoe Reg'l Planning Agency v. McKay*, 769 F.2d 534, 539 (9th Cir. 1985). However, the Nevada Supreme Court in *Del Papa v. Board of Regents*, 114 Nev. 388, 956 P.2d 770 (1998), stated that the opinions of the Office of the Attorney General will receive the same deference as an administrative body interpreting a law that it is responsible for enforcing. Thus, where the Legislature has had reasonable time to amend the law to reverse the opinion of the Attorney General, but does not do so, it is presumed the Legislature has acquiesced to the opinion of the Attorney General. *Hughes Properties, Inc. v. State*, 100 Nev. 295, 298, 680 P.2d 970, 972 (1984).

In addition, the Office of the Attorney General has a long-standing policy of reserving opinions regarding Open Meeting Law complaints that are in litigation, even though NRS 241.040(4) gives the Office of the Attorney General investigative and prosecutorial powers. *See* OMLO 98-05 (September 21, 1998).

**§ 12.01 General**

This part covers special questions or topics not discussed elsewhere in this manual.

**§ 12.02 Relationship of Open Meeting Law to Administrative Procedure Act,  
NRS Chapter 233B**

The 2009 Legislature made changes to the method of adopting regulations by agencies that are subject to Nevada's Administrative Procedures Act (APA). Each workshop and public hearing must be conducted in accordance with NRS 241. NRS 233B.061(5). In addition, workshops or hearings may be held only after the Legislative Counsel has returned the proposed regulation to the agency. NRS 233B.060.

All workshops and public hearings must be conducted in accordance with the OML. NRS 233B.061 now applies the OML to **all** executive branch agencies subject to the APA, whether the agencies adopt regulations by board, commission, or other public body, or by an individual. Agencies headed by a single person, such as the Insurance Commissioner, are included.

The notice requirements for both NRS 233B and NRS 241.020 may be met in the same notice document so that duplication of notices at different times may be avoided. The OML's minimum notice requirement is before 9:00 a.m., three working days before the meeting.

The Nevada Administrative Procedure Act (APA), Chapter 233B of NRS, requires some agencies to give notice and conduct public hearings before adopting rules and regulations. The 2011 Legislature amended the rules of conduct of some bodies which meet or operate under NRS 233B. NRS 241.016(1) subjects all meetings of public bodies, when meeting as a quasi-judicial body, to the OML. *See* § 3.10 above.

If the agency is a "public body" (*see* Part 3 of this manual), both the Open Meeting Law and the APA will apply, and it will be necessary to coordinate the proceedings. The Office of the Attorney General recommends that the APA notice be prepared and distributed as required by the APA, that a meeting of the public body be noticed and put on the agenda under the Open Meeting Law, and that the hearings be included as an action item on the agenda.

The APA also governs the hearings of "contested cases" before administrative agencies and, again, if the agency is a "public body," the Open Meeting Law also will apply to the hearings. Public comment must be conducted to satisfy both the OML and the requirement in NRS 233B. Prior to the commencement and conclusion of a contested case or a quasi-judicial proceeding that may affect the due process rights of an individual, the public body may refuse to consider public comment. *See* NRS 233B.126. Once the board or commission has rendered a

decision on the contested case, it may entertain public comment on the proceeding at that time. The specific statute governing the activities of the agency may have to be considered as well.

If the Open Meeting Law applies to a contested case hearing, a question arises whether a closed session may be held. Absent a specific statute to the contrary, the contested case must be heard in an open meeting context, and the public body may go into closed session under NRS 241.030 only to consider the character, alleged misconduct, professional competence, or mental or physical health of a person, as discussed in Part 9 of this manual. *See Op. Nev. Att'y Gen. No. 81-C (June 25, 1981)*. If the public body is going to conduct a closed session under NRS 241.030(1), the notice requirements of NRS 241.033(1) must be met. If the notice of hearing prepared under NRS Chapter 233B or other relevant statute provides for timing and notice requirements equivalent to NRS 241.033(1), the notices may be coordinated.

### **§ 12.03 Relationship of Open Meeting Law to the First Amendment to the Constitution of the United States**

The full panoply of First Amendment rights attaches to the public's right to speak at a meeting pursuant to NRS 241.020(2)(d)(3). The public's freedom of speech during public meetings is vigorously protected by both the U.S. Constitution and the Nevada Constitution. Freedom of expression upon public questions is secured by the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). This constitutional safeguard was fashioned to assure an unfettered interchange of ideas for bringing about political and social changes desired by the people. *See* §§ 8.04 and 8.05 above, for a detailed discussion of the scope of public comment.

In *Sandoval*, 119 Nev. at 156, 67 P. 3d at 906-07 (2003), the Board of Regents alleged that limiting the discussion of the Regents to the topics on the agenda unlawfully limited the Regents' right to free speech. The Supreme Court denied this argument and stated that the Open Meeting Law was not overly burdensome on the Regents' right to free speech because the Regents could discuss what they wanted, whenever they wanted, just not at a meeting governed by the Open Meeting Law at which the issue for discussion was not agendaized.

### **§ 12.04 Relationship of Open Meeting Law and defamation**

In 2005, the Legislature amended the OML to provide immunity from an action alleging defamation to members of a public body for statements made during the meeting and the Legislature also provided immunity to witnesses testifying before a public body. NRS 241.0353 states:

1. Any statement which is made by a member of a public body during the course of a public meeting is absolutely privileged and does not impose liability for defamation or constitute a ground for recovery in any civil action.
2. A witness who is testifying before a public body is absolutely privileged to publish defamatory matter as part of a public

meeting, except that it is unlawful to misrepresent any fact knowingly when testifying before a public body.

**SAMPLE FORM 1: Notice and Agenda of Public Meeting (With Comments)**

<b>Comments</b> <i>See Parts 6 and 7</i> of the NEVADA OPEN MEETING LAW MANUAL, Twelfth Edition, 2015, for details.	<b>Sample Form</b> (This only is a sample. Other formats may be used.)
<b>NOTICE OF PUBLIC MEETING of the COMMISSION FOR OPEN GOVERNMENT</b>	
Name of public body	
Must state the time, place, and location of meeting.	The Commission for Open Government will conduct a public meeting on November 14, 1997, beginning at 9 a.m. at the following locations:  at its principal office at 1801 North Carson Street, Suite 104, Carson City, Nevada, and  at its Las Vegas office in the Grant Sawyer Building, 2501 Washington Street, Suite 401, Las Vegas, Nevada.
This shows how a meeting, to be held at multiple locations, may be noticed. Sites should be connected by speaker phone or other device where all persons at all locations may hear all persons at all other locations.	The sites will be connected by speaker telephones. The public is invited to attend at either location.
Notification pursuant to NRS 241.020(2)(d)(6) and (7)	<b>NOTICE</b> 1. Items may be taken out of order; 2. Two or more items may be combined; 3. Items may be removed from agenda or delayed at any time; 4. Any restrictions on public comment must be set out and this notice must state that comment can't be restricted based on viewpoint.
<i>See</i> NRS 241.020(1). Giving the name and telephone number of a contact person is not required, but may avoid time delays or embarrassment.	Reasonable efforts will be made to assist and accommodate physically handicapped persons desiring to attend the meeting. Please call number listed in advance so that arrangements for attendance may be made.
Reasonable restrictions on public comment must be set out in notice form on the agenda.	Public comment is limited to (set out the allowed time) minutes per person.

## AGENDA

Agenda must consist of a clear and complete statement of the topics scheduled to be considered during the meeting.

Agenda must include a list describing the items on which action may be taken and clearly denote “for possible action” on those items.

See Part 9 of the Nevada Open Meeting Law Manual for discussion of when closed sessions are authorized and how they are to be handled.

No action may be taken in a closed session. These are examples of how to notice an item where the public body may go into closed session. Okay to list only the attributes before taking action in open session (i.e., character, professional competence, health, etc.) that will be considered.

Action may be taken only on those items denoted “For possible action.”

1. Call to Order and Roll Call.
2. Public comment and discussion. (Discussion)  
No action may be taken on a matter raised under this item of the agenda until the matter itself has been included specifically on an agenda as an item upon which action will be taken.
3. Approval of minutes of previous meeting.  
(For possible action)
4. Report by Committee on Abuse of Open Meeting Laws. (Discussion)
5. Closed session to consider the character, alleged misconduct, or professional competence of John Doe, a staff employee of the Commission. (Discussion).  
Before closing a meeting, the public body must approve a member’s motion to close the meeting which specifies the nature of the business to be considered and the statutory authority on which the meeting will be closed. If closure is pursuant to NRS 241.030(3) the name of the person to be considered must appear on the agenda.
6. Performance Evaluation of Sue Smith including, but not limited to, termination, suspension, demotion, reduction in pay, reprimand, promotion, endorsement, engagement, retention, or “no action.” (For possible action) (Closed session may be held to consider character, alleged misconduct, professional competence, and physical or mental health pursuant to NRS 241.030.)  
*But see § 6.09:* Notice provisions of NRS 241.033 do not apply to applicants for employment with a public body. NRS 241.033(7)(a) exempts public meetings held to consider applicants for employment from the provisions of NRS 241.033.



If action is to be taken, it must be in an open session, and the names of the subject persons should be listed.

If there are topics of known public interest upon which the public body may deliberate, it should be identified. If action might be taken (including approval of a report), this should be listed as “for possible action” and must contain a description of the items on which action will be taken.

Multiple periods of public comment are mandatory. There are now two alternatives for public comment available to a public body. The alternatives may be combined for even more transparency.  
NRS 41.020(2)(d)(3).

Notice and agenda must be posted not later than 9 a.m. on the third working day before the meeting. Do not count the day of the meeting as one of the three working days.

Notice and Agenda must be posted at the principal office of

7. Disciplinary Hearings (For possible action)  
Public Body may take administrative action against the following persons which might include employment termination, suspension, demotion, reduction in pay, reprimand, promotion, retention, or no action.

- a. Sam Smith
- b. Harry Brown

8. Report by Executive Officer (Discussion) including: (formal approval of Report: for possible action; all other matters in this item are informational only)

- a. Salary of executive director
- b. Legislative audit of Division

9. Public comment and discussion. (Discussion) No action may be taken on a matter raised under this item of the agenda until the matter itself has been specifically included on an agenda as an item upon which action will be taken.

10. Adjournment. (Action)

Supporting material is available from [name] at [physical address]. Anyone desiring supporting documentation or additional information is invited to call [phone number] or email [address].

This notice and agenda has been posted on or before 9 a.m. on the third working day before the meeting at [website] and at the following locations:

- (1) The Commission’s principal office at 1801 North Carson Street, Suite 104, Carson City, Nevada

the public body, or if it has no principal office, then at the building where the meeting will be held, and at least three other separate, prominent places within the jurisdiction of the public body. Notice also must be posted on (1) the State's official website, <https://notice.nv.gov> and (2) the public body's website, if it maintains a website.

- (2) Grant Sawyer Building, 2501 Washington Street,  
Las Vegas, Nevada
- (3) Las Vegas City Hall, 1401 Main Street,  
Las Vegas, Nevada
- (4) Reno City Hall, 490 South Center Street, Reno,  
Nevada

**SAMPLE FORM 2: MINUTES**

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Other formats or styles may be used. This is not intended to be a complete set of minutes, only to show how certain matters listed on Sample Form 1 might be handled in the minutes in order to comply with the Open Meeting Law. The public body must take into account other statutory, procedural, or record keeping requirements.

MINUTES

of the meeting of the

COMMISSION FOR OPEN GOVERNMENT

(Date of the Meeting)

The Commission for Open Government held a public meeting on (date), beginning at (time) a.m. at the following locations:

at its principal office at 1801 North Carson Street, Suite 104, Carson City, Nevada, and at its Las Vegas office in the Grant Sawyer Building, 2501 Washington Street, Suite 401, Las Vegas, Nevada.

The sites were connected by speaker telephones.<sup>1</sup>

**1. Call to order, roll call**

The meeting was called to order by Chairman Shirley Brown. Present were commissioners Harry Smith, Peter Knowitall, Roger Dodger, Mike Brown, and Sue Doe. Absent was Commissioner Henry.

Also present were Executive Director Sue Smith and various staff members of the commission. Members of the public were asked to sign in, and the sign-in-sheet is attached to the original minutes as Exhibit A.

**2. Public comment (1<sup>st</sup> period)**

However, if the public body chooses the second alternative set forth in NRS 241.020 and if it allows public comment for each “for possible action” agenda item, it still must allow a period of general public comment before adjournment for any and all matters within the jurisdiction or control of the public body, i.e., non-agenda items.

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<sup>1</sup> The date, time, and place of meeting, as well as the members of the public body who were present and absent, is required. NRS 241.035(1). Listing others present is not required by the Open Meeting Law but may be helpful in resolving Open Meeting Law and other complaints regarding the proceeding.

## **2. Approval of minutes of previous meeting**

The minutes of the October 10 meeting were approved with changes.<sup>2</sup>

## **3. Report by the Committee on Abuse of Open Meeting Laws**

Mr. Rodgers reported that the Committee had completed its report on abuse of Open Meeting Laws. A copy of the report is attached to the original minutes as Exhibit B.

Commissioner Dodger asked about the incident involving Mayor Smith in Little Town on August 17 and wanted the Commission to file litigation. He was reminded that the report was listed on the agenda as a discussion item, and action may not be taken. Further, Mayor Smith would have to be notified if the Commission was going to discuss his misconduct.

Commissioner Knowitall thanked the Committee for its fine work.<sup>3</sup>

## **4. Closed session to discuss the character, alleged misconduct, and professional competence of a staff employee of the Commission**

On motion by Commissioner Dodger, seconded by Commissioner Brown, and approved with a unanimous vote, a closed session was conducted to discuss the character, alleged misconduct, and professional competence of a staff employee of the Commission. The Commission received proof that the employee was notified as required by law. Separate minutes of the session have been prepared.<sup>4</sup> No action was taken.

## **5. Performance Evaluation of Sue Smith**

The Commission received proof that Mrs. Smith was notified as required by law.<sup>5</sup>

Mrs. Smith objected to comments regarding her professional competence, indicating that she was new on the job and shouldn't be held to the standards of an experienced employee.

A member of the public addressed the Commission and asked that her remarks be included in the record. A copy of her remarks is attached to the original of these minutes as Exhibit C.<sup>6</sup>

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<sup>2</sup> If requested by a member, the minutes must record each member's vote. NRS 241.035(1)(c). Otherwise, for Open Meeting Law purposes, a matter like this may be handled this way. For other purposes, it may be advisable to give details about who made and seconded motions and how votes were cast. Consult with counsel.

<sup>3</sup> The substance of the discussion must be reported. NRS 241.035(1)(c).

<sup>4</sup> The minutes should reflect that all the procedural requirements and limitations of a closed session have been followed. *See* § 9 for a discussion.

<sup>5</sup> The agenda suggested that the Commission may go into closed session, but in this instance, it handled the whole matter in an open session. Even if it does so in an open meeting, the Commission still must receive proof of service required by NRS 241.033(1).

On motion by Commissioner Dodger, seconded by Commissioner Brown, and approved with a unanimous vote, the evaluation attached to the original of these minutes as Exhibit D was approved.

## **6. Disciplinary Hearing re: Harry Brown**

A disciplinary hearing was held regarding alleged misconduct by Harry Brown. Opening remarks were made by Deputy Attorney General Joe Smith and by counsel for Mr. Brown, Gerry Spence.

Six witnesses testified and were cross-examined. Fifteen exhibits were received into evidence. A record of the proceeding was made by a court reporter and a transcript is available.<sup>7</sup>

On motion by Commissioner Dodger, seconded by Commissioner Brown, and approved with a unanimous vote, a closed session was conducted to discuss the character, alleged misconduct, and professional competence of Mr. Brown. The Commission received proof that the employee was notified as required by law. Separate minutes of the session have been prepared.

Following the closed session, the Commission went back into open session to take action. On motion by Commissioner Dodger, seconded by Commissioner Doe, and upon a vote of 4-2, the Commission found that Mr. Brown had violated various provisions of the Open Meeting Law as alleged in the complaint. Mr. Brown was ordered to pay a \$1,000 fine. Counsel for the Commission was instructed to prepare Findings of Fact, Conclusions of Law, and Order to be approved and signed by Chairman Brown, and it will be filed with the original of these minutes.

## **7. 2<sup>nd</sup> period of Public Comment and Discussion**

Mrs. Henrietta Cobb addressed the Commission, indicating there is a serious flaw in the Open Meeting Law regarding serial communications and asked the Commission to propose legislation to plug up the gap. She gave an example of Brown County, where the County Manager approved a contract with Henry's Construction Company after discussing it with each Commissioner, one at a time. At the meeting, the County Commission voted to ratify the contract without any discussion or input from the community. Commissioner Brown said he would consider having the matter put on an agenda for a future meeting, and Mrs. Cobb would be invited to participate.

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<sup>6</sup> See NRS 241.035(1)(d). If the commentator does not have written remarks, then his/her oral remarks must be reflected.

<sup>7</sup> More detail may be required by the law that governs hearings by the body. For Open Meeting Law purposes, this shows what happened in the open and closed sessions and that a separate record has been made.

Commissioner Dodge presented to the Commission a report by the Greenpeace organization regarding the massacre of thousands of people in Uganda. He commented that something should be done about it and asked that the report and his remarks be included in the record of this meeting. The report is attached to these minutes but was not read by other Commissioners, and there was no discussion about his remarks.<sup>8</sup>

**8. Adjournment was unanimously approved at nine p.m.**

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<sup>8</sup> Any other information that is requested to be included or reflected in the minutes by any member of the body must be included, even if not relevant or discussed. NRS 241.035(1)(e).

**SAMPLE FORM 3: NOTICE OF INTENT TO CONSIDER, CHARACTER,  
MISCONDUCT, COMPETENCE OR HEALTH OF A PERSON.  
NRS 241.033**

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COMMISSION FOR OPEN GOVERNMENT  
1801 North Carson Street, Suite 104  
Carson City, Nevada 89701

December 10, 2005

Ms. Sue Smith  
1102 Center Street  
Reno, Nevada 89504

Re: Notice of meeting of the Commission to consider your character,  
alleged misconduct, professional competence, or health.

Dear Ms. Smith:

In connection with your performance evaluation, the Commission may consider your character, alleged misconduct, professional competence or health at its meeting on January 14, 2005.<sup>1</sup> The meeting will begin at 9 a.m. at 1801 North Carson Street, Suite 104, in Carson City, Nevada. The meeting is a public meeting, and you are welcome to attend. The Commission may go into closed session to consider the following general topics: your performance as administrative assistant to the executive director, your job description, your job duties, and matters properly related thereto.<sup>2</sup> You are welcome to attend the closed session, have an attorney or other representative of your choosing present during the closed meeting, present written evidence, provide testimony, and present witnesses relating to your character, alleged misconduct, professional competence, or physical or mental health.<sup>3</sup>

If the Commission determines it necessary after considering your character, alleged misconduct, professional competence, or physical or mental health whether in a closed meeting

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<sup>1</sup> If requested by a member, the minutes must record each member's vote. NRS 241.035(1)(c). Otherwise, for Open Meeting Law purposes, a matter like this may be handled this way. For other purposes, it may be advisable to give details about who made and seconded motions and how votes were cast. Consult with counsel.

<sup>2</sup> The list of general topics should be as inclusive as possible. NRS 241.033(2)(c).

<sup>3</sup> The substance of the discussion must be reported. NRS 241.035(1)(c). The minutes should reflect that all the procedural requirements and limitations of a closed session have been followed. See §§ 6.09 and 9 for a discussion. This sentence meets the requirements of NRS 241.033(4).

or open meeting, it may also take administrative action against you at this meeting.<sup>4</sup> This informational statement is in lieu of any notice that may be required pursuant to NRS 241.034.<sup>5</sup>

This notice is provided to you under NRS 241.033.<sup>6</sup>

Very truly yours,

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Commission Secretary

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<sup>4</sup> NRS 241.020 requires agenda statement both for the closed meeting consideration and the administrative action item, which must occur in an open meeting. *See* NRS 241.010. For informational statement, see NRS 241.033(2)(b).

<sup>5</sup> *See* NRS 241.034(3).

<sup>6</sup> *See* NRS 241.035(1)(d). If the commentator does not have written remarks, then his or her oral remarks must be reflected.





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providing copy to subjects of closed sessions

retention

who may record sessions

Removal from office for violating Open Meeting Law

Requests for public notice

Requests for agenda, ordinances, regulations or support materials

**-S-**

**Sample Form 1**

**Sample Form 2**

**Sample Form 3**

Sanctions

Secret ballots

Seminars

Serial communications

Social gatherings

Standards of interpretation

Staff meetings

State Ethics Commission

Statute of limitations

Strict construction of exceptions to open meeting requirements

Student governments

Subcommittees

Support material, providing on request



**-T-**

Tape recordings of meetings  
  fees for copying  
  of closed sessions  
  retention of tapes  
Tax revenues, broadly interpreted  
Telephonic meeting  
Telephonic voting  
Time periods  
  3 working days  
  30 days for minutes, tapes  
  60 days to void actions  
  120 days for injunctive relief

**-U-**

University foundations are public bodies  
University and Community College System, student governments

**-V-**

Venue of actions  
Video tapes, *see* Tape recordings of meetings  
Video conferences  
Violations  
  actions taken in violation are void  
  attorney general to investigate and prosecute  
  containing and curing violations  
  criminal sanctions  
  rescheduling void actions  
  right of citizens to bring lawsuits for  
  time limits for bringing suit  
  what happens if one occurs  
Void actions  
Voting  
  agenda to reflect action items  
  action items must be denoted on items on agenda  
  by mail  
  majority voting requirements  
  polling  
  prohibited in closed session  
  reflected in minutes  
  secret ballot  
  telephonic

**-W-**

Walking quorums

Waiver of personal notice requirements

Witness exclusion

Working days

Wrongful exclusion of person from meeting