

**MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON GOVERNMENT AFFAIRS**

**Seventy-Fourth Session
June 2, 2007**

The Committee on Government Affairs was called to order by Chair Marilyn K. Kirkpatrick at 3:33 p.m., on Saturday, June 2, 2007, in Room 3143 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. Copies of the minutes, including the Agenda ([Exhibit A](#)), the Attendance Roster ([Exhibit B](#)), and other substantive exhibits are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/74th/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblywoman Marilyn K. Kirkpatrick, Chair
Assemblywoman Peggy Pierce, Vice Chair
Assemblyman Kelvin Atkinson
Assemblyman Bob Beers
Assemblyman David Bobzien
Assemblyman Chad Christensen
Assemblyman Jerry D. Claborn
Assemblyman Pete Goicoechea
Assemblyman Ruben Kihuen
Assemblyman Harvey J. Munford
Assemblywoman Bonnie Parnell
Assemblyman James Settlemeyer
Assemblyman Lynn D. Stewart

COMMITTEE MEMBERS ABSENT:

Assemblywoman RoseMary Womack

GUEST LEGISLATORS PRESENT:

Senator Terry Care, Clark County Senatorial District No. 7



STAFF MEMBERS PRESENT:

Amber Joiner, Committee Policy Analyst
Scott McKenna, Committee Counsel
Cheryl Williams, Committee Secretary
Olivia Lloyd, Committee Assistant

OTHERS PRESENT:

Barry Smith, Executive Director, Nevada Press Association, Inc.

[Quorum present.] [Roll call.]

Chair Kirkpatrick:

Welcome Senator Care, and thank you for doing this on the quick rebound.

Senate Bill 123 (2nd Reprint): Makes various changes to provisions relating to public records. (BDR 19-462)

Senator Terry Care, Clark County Senatorial District No. 7:

The bill was introduced on the 20th of February and was amended in the second reading on the 20th of April, was rereferred to the Senate Finance Committee and stayed there until recently. We just got it out of the Senate yesterday [June 1, 2007]. We had a subcommittee appointed by Chairman Hardy in Government Affairs. We had not only the original hearing on the bill, but we had two hearings through the subcommittee, then the work session, then the bill went to the Floor, and then to Finance. I testified on the bill twice before the Senate Finance Committee.

I am not going to say that everybody is agreeable to all of the language in the bill, but I will tell you the bill got a thorough work over. We solicited testimony from everyone we could think of who seemed to express an interest in the bill. That would largely be cities, counties, and governments that would be the source for any request for a public record.

This bill does not change the status of any document that is already confidential or nonconfidential. I want to emphasize that we are not changing anything, except arguably 30 years down the road, and I will explain that when I get to that section of the bill.

As most of you know, I was a journalist in my prior career, and I had made requests to governmental agencies and had not received quick responses. The law says if you make a request for a public document that is nonconfidential, as

a matter of law, then you are entitled to get it; but there is no mechanism in the law that goes beyond that, except if you think you are being "jacked" around. Then you can seek redress. However, there is nothing in the law that says if you do make the request, how soon the government has to respond. What if the government needs some time to respond, what about an oral request as opposed to a written request, and what about redaction of a document? Currently, if the document contains confidential information then the document does not have to be produced. Per the Freedom of Information Act (FOIA), if you request a document that contains confidential information, the federal government will redact the confidential information, but you are still entitled to the remainder of the document. These are the reasons I brought this bill forward.

Section 2 is more or less a declaration that the provisions of Chapter 239 in the *Nevada Revised Statutes* (NRS) must be construed liberally; and then in subsection 3, any exemption, exception, or balancing of interests which limits or restricts access to public books and records by a member of the public must be construed narrowly. There is a presumption here that if someone requests a document, and there is some doubt as to whether it is a public document or not, the presumption is that it should be public. We are emphasizing with this language that the public has an interest in their right to see those documents which they are entitled to see.

Section 3 pertains to a nongovernmental entity. We worked this over quite a bit. Sometimes you may find a situation where a city contracts with a private company to perform a governmental service, such as operating an ambulance service or running a jail. This language is intended to say if a nongovernmental entity is conducting a governmental function, then the documents that it generates in the course of performing those governmental affairs would also be considered public documents. Note the language in subsection 2 of Section 3. This section does not apply to the financial or other proprietary records of a non-governmental entity. In other words, I do not think a reporter has the right to see personnel files, your financials, and that sort of thing. Maybe you would like to know about the number of runs that an ambulance company has made in the course of a month, or maybe there has been an incident in the jail. The government should not be able to say, "We cannot give you that information; we would love to, but we have a company over here that is running the jail for us, so you will have to go talk to them." The private company says, "We are not the government, you cannot request a document from us." Section 3 is intended to capture those circumstances where you may have a private party performing a governmental function.

Section 4 describes the procedural way this bill would work. You will note that it says, ". . . if a governmental entity receives a written request to inspect or copy a public book or record, the governmental entity must, within 5 business days after the date on which the person who has legal custody or control of the book or record". It was a legitimate objection. Suppose someone in Hawthorne goes to a state office in Hawthorne and makes the request for a public document. We do not want the person to say, "I am entitled to a response within five business days," because it may very well be that the office in Hawthorne has a clerk who must submit the request to the proper supervisory person in Carson City, who makes the decision on whether that document should be produced. That is what we mean when we say "fifth business day"; you get some kind of response, but the clock does not start ticking until the proper supervisory person who can make that decision has the request in hand.

In Section 4 it says, "(a) Allow the person to inspect or copy the public book or record. ". . . (b) If the governmental entity does not have legal custody or control of the public book or record," The government may say that it cannot fully respond within five days, but will tell you it is still trying to decide; or has decided to give you the document or documents, but is going to make some redactions; or is going to give you the documents, but some of the documents are in boxes in Las Vegas, and some are in Carson City, and it needs some additional time to gather those documents. This subsection says if the entity cannot or will not produce the document in five days, the entity has to let the requester know what he has run into. Then the governmental entity has to provide a time when they think they can respond to the request.

Subsection (d) says if the governmental entity has decided it is not going to produce the documents, then it must cite a specific statute or legal authority upon which it is basing its denial. There is no provision like that in the law today. In other words, they are not going to give the document to you because it is confidential and here is why it is confidential. It is confidential pursuant to statute, or it is confidential pursuant to case law, and then they must cite the case. They must give a reason why they are telling you that legally you are not entitled to see the document. Also, Section 4, subsection 2 allows for an oral request. This is because sometimes a reporter has a relationship with a governmental entity, such that the reporter is going to know the person from the government office and ask to see a copy of "such and such." Because there is a relationship, the entity can say you made an oral request, but we still do not understand what it is that you are asking for. Could you put it in writing and specify exactly what it is that you are looking for?

Section 5 of the bill says if there is any question about the production of the document the burden is on the governmental entity to demonstrate that the

document is a confidential document, and the standard is preponderance of the evidence. The governmental entity would have to demonstrate, more likely than not, that the document is confidential.

Section 6 would be new to Nevada law. Basically, it says if a document is confidential and that document has been confidential for 30 years, or if a document pertains to a natural person and that person has been dead for 30 years, then the document may be made public. Whichever event occurs later in the case of a natural person, 30 years or 30 years after the person's death, prevails. When I testified about that on the Senate side, the example I used was Howard Hughes. Howard Hughes is no longer going to apply to this bill, but you get the point. There may be some historian or professor or writer who has an interest in events that happened decades ago. The way the law is now the government can say those documents are confidential. This, however, says that after a 30-year period they are not, but the bill contains a refutable presumption. The government can say that if somebody makes that request after 30 years, the entity holding the document can go before a judge, and argue that although 30 years have passed, this document should still be confidential and here is the reason why. Again, there is nothing like that in existing law.

There are two exemptions to that provision. I mentioned Howard Hughes because of the numerous hearings that we had on the Senate side before we came to a consensus. The exemptions would be all documents declared confidential pursuant to subsection 4 of NRS 463.120. Those are gaming files and files that pertain to applicants and current licensees for gaming licenses, so you would never get a Howard Hughes or a Frank Sinatra. The argument for exemption was that when people apply for a gaming license, those license applications are extensive and may include all manner of hearsay and potentially damaging information that may or may not be true.

The second exemption is contained in subsection 3(b). You will note that it says, "Containing personal information pertaining to a victim of crime that has been declared by law to be confidential." That is at the request of the Board of Parole Commissioners, and is intended to mean statements made by victims either before the Parole Commission or other such entities. The theory here is that those statements can be so gut-wrenching that it has a deep personal effect. So, if the person who made those statements is still living after 30 years, it could still have an impact on that person's well-being. These are the two exemptions to the 30-year rule.

Only Section 7 includes the definition of governmental entity as used in Section 8 of the bill, and that is "any other person or nongovernmental entity

that administers, manages, or regulates an activity" That gets back to the private entity that is performing the governmental function.

Section 8, subsection 2 is new language that does not exist in Nevada Law. This is what I discussed earlier, that if the document has confidential information in it, the governmental entity has to redact the confidential information, but provide or allow for inspection of the remainder of the document. The reason that the bill is so thick is because you have all these statutes that pertain to confidential information, so naturally they all have to be amended because of the language in Section 6 of the bill, which is the 30-year rule.

I do have the Press Association with me to testify in support of the bill.

Assemblyman Settlemeyer:

Have you amended this bill in any way that would remove any of the fiscal notes as of yet?

Senator Care:

That is the reason this bill was hung up in the Senate Finance Committee. The bill was amended and I am not sure what the fiscal note would be today. I recall a gentleman from the Nevada Department of Transportation (NDOT) testified that NDOT would have to hire two people to respond to requests for public documents. If the government is already responding to requests for public documents, I do not know why the new positions would be needed.

There came a time when the Senate Finance Committee thought it was okay for this bill to come out.

Assemblyman Settlemeyer:

What I was trying to get at, the Department of Training and Rehabilitation said the bill, as drafted, conflicts with federal law and regulations governing confidentiality of information, which will result in the loss of federal funds amounting to \$34 million a year. The Health and Human Services budget will be a billion dollars for fiscal year 2007-2008. I was just wondering if there are any amendments to help correct that.

Senator Care:

I cannot speak for Senator Raggio, but with a fiscal note like that, this bill would have never received a hearing.

Chair Kirkpatrick:

I have to agree with the Senator.

Assemblyman Christensen:

You had mentioned a federal standard early in your explanation of the bill, and I was curious how this is similar or dissimilar to whatever the federal standard may be.

Senator Care:

What I meant was that under the FOIA, if you request documents from the Department of Justice, Federal Bureau of Investigation (FBI) records, you are entitled to those records except for those certain documents that may, under federal law, contain confidential information. On the federal level they have the practice of redacting that information, but allowing you to see the remainder of the document. In many cases, when you can get that document, so much has been redacted that you cannot really determine its purpose. It is a practice currently used by the federal government.

Assemblyman Christensen:

So, you are saying that this would follow along those same lines of confidentiality, and that confidential information could be pulled out of the documents being requested. In regard to Section 4, subsection 1 of the bill, "no later than the end of the fifth business day," do other states follow this time frame? Does the federal guideline follow the end of the fifth day rule?

Senator Care:

The federal government can actually take a lengthy period of time before you hear back from them. The bill originally came back with "two days," which I agreed was unacceptable. We looked at the seventh business day, and as it turned out, both Washoe County and the City of Reno have similar policies, but not ordinances. One of them used three days and the other used five days, but we all agreed that there must be a response of some sort, so the fifth business day was a compromise.

Assemblyman Christensen:

That helps me understand the relation to the fiscal notes and how this all comes together. Is there a model that has been successful elsewhere? You mentioned your journalism background, and I am always curious whenever we hear the genesis of certain bills and bill drafts, where it came from. What was the genesis here? Was it your experience and things you were hearing out there, a bill by request, or did the press approach you to ask for this to be put in place?

Senator Care:

No, the press did not request this bill. I have always been interested in this discussion, and I am big on transparency. That is what led three years ago to the revision of the Open Meeting Law. I was not the only one concerned with

the contentious abuse of the Open Meeting Law. A lot of people thought with the Board of Regents and matters relating to the community college that this law was not being followed. I know there were a lot of reporters frustrated with that, as well. I have been out of journalism now for 20 years, but I have always followed this issue with some interest.

Chair Kirkpatrick:

This bill did pass out of the Senate 21-0.

Assemblyman Bobzien:

Following along with how this interfaces with different federal laws related to privacy, I am thinking in terms of a scenario that I am familiar with, which is the Family Education Rights and Privacy Act (FERPA), and also in Section 8, subsection 2, the discussion of the public book or record. I think more and more we are not talking about a book containing these records, but more along the lines of electronic files, databases, and spreadsheets. Would such a file be consistent with what you are getting at with a record? Is that more or less the definition of a record, a computer file?

Senator Care:

I think so. When I read "public book or record," I think in terms of documents or information for that subject matter.

Assemblyman Bobzien:

I guess along with that, I am wondering if there was any discussion on the federal side. This would be one scenario in which the federal law would trump what you are proposing here: the FERPA says I cannot release these educational records, I cannot release the enrollment database of all my students, all their information, and all their grades. There is no redacting about it. I just simply cannot release the records. I do not know if that is something that has been discussed before, or if it has come up.

Senator Care:

I would agree with that and I will put that on the record. Federal law would trump whatever we may have in place.

Assemblyman Bobzien:

I guess that explains some of these fiscal notes that were attached. They are talking about a loss of revenue when federal law trumps it and those practices.

Chair Kirkpatrick:

Are there any other questions? [There were none.]

Barry Smith, Executive Director, Nevada Press Association:

We are in support of this bill. We have followed it through the process. There have been quite a few changes. It clarifies a lot about how agencies handle record requests. I polled a number of newspapers after the bill was introduced to see what problems there were. Generally, there are not a lot of problems. Record requests are handled promptly and well. It is the requests that disappear forever that are the problem; there is just no response. There was nothing in the law that said how you handle that. So, this bill does cover that.

If I could comment on the fiscal notes, I checked to see if there were any updates, because all of those were written when the bill was introduced and it had a two-day deadline. There was quite a bit of consternation over the two-day deadline, so that was one of the compromises—to give the agencies more time.

Also, originally the language said if you do not comply by the deadline, it automatically becomes a public record. That led to some of those concerns regarding coming into conflict with federal law or having other laws overrule. That language and the bill has changed, but the fiscal notes have not.

Chair Kirkpatrick:

Are there any questions for Mr. Smith? [There were none.] Is there anyone else who would like to testify in favor of S.B. 123 (R2)? [There were none.] Is there anyone who is neutral on S. B. 123 (R2)? [There were none.] Is there anyone who is in opposition to S.B. 123 (R2)? [There were none.]

Assemblyman Christensen:

Mr. Smith mentioned that he followed some of the changes. What were some of the changes that you saw from the original bill to where it is now?

Senator Care:

I got the bill draft back and, as we all like to do, we reviewed the bill draft before we introduced the bill. There was a feeling early on in the Session that we were not introducing the bills quickly enough. On the evening that United States Senator Harry Reid spoke to the Joint Session, I came back to the Senate Chamber and there was a note stating that we already had a motion to introduce the bill, and because we had been told that we had to get these bills introduced, I went ahead and introduced it. I made the disclaimer when I introduced it that I did not necessarily agree with the language contained in the bill draft, and a lot of people did not pick up on that. Once the bill was introduced I was immediately flooded with all kinds of calls, but what Mr. Smith just said is correct. There was language stating the document would

automatically become public after two days. I believe there was language in there about the liability of government worker who does not comply with the requirements of the bill. In the two hearings that we had before the subcommittee, there were a lot of people there—mostly the counties, cities, and the State—to voice their concerns about this bill. We have gotten it down now to where it is workable.

Assemblyman Christensen:

That helps a lot. That is why I asked the question. I want to be sensitive to governmental entities' concerns such as those expressed by NDOT. Is the bill too far-reaching? Some entities are very effective and efficient and can respond to requests really fast, while other entities may struggle with that a little bit more.

Chair Kirkpatrick:

Does anyone else have any other questions? [There were none.] I will close the public hearing on Senate Bill 123 (2nd Reprint).

ASSEMBLYMAN ATKINSON MOVED TO DO PASS
SENATE BILL 123 (2ND REPRINT).

ASSEMBLYMAN BOBZIEN SECONDED THE MOTION.

Chair Kirkpatrick:

Is there any other discussion?

Assemblyman Settlemeyer:

I will vote yes, but I reserve my right to change my vote on the Floor. I would like to follow up on these fiscal notes.

[Assemblyman Beers stated that he also would like to reserve the right to change his vote on the Floor.]

Chair Kirkpatrick:

So noted and I will try to get with Senator McGinness, as well.

THE MOTION PASSED. (ASSEMBLYWOMAN WOMACK WAS
ABSENT FOR THE VOTE.)

The meeting is adjourned [at 4:02 p.m.].

RESPECTFULLY SUBMITTED:

Cheryl Williams
Committee Secretary

Rachelle Myrick
Transcribing Secretary

APPROVED BY:

Assemblywoman Marilyn K. Kirkpatrick, Chair

DATE: _____

EXHIBITS

Committee Name: Committee on Government Affairs

Date: June 2, 2007

Time of Meeting: 3:30 p.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster