

**MINUTES OF THE SUBCOMMITTEE OF THE
SENATE COMMITTEE ON GOVERNMENT AFFAIRS**

**Seventy-fourth Session
April 4, 2007**

The subcommittee of the Senate Committee on Government Affairs was called to order by Chair Terry Care at 12:36 p.m. on Wednesday, April 4, 2007, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412, 555 East Washington Avenue, Las Vegas, Nevada. [Exhibit A](#) is the Agenda. [Exhibit B](#) is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

SUBCOMMITTEE MEMBERS PRESENT:

Senator Terry Care, Chair
Senator Bob Beers
Senator Randolph J. Townsend

STAFF MEMBERS PRESENT:

Candice Nye, Assistant to Committee Manager
Eileen O'Grady, Committee Counsel
Michael J. Stewart, Committee Policy Analyst
Erin Miller, Committee Secretary

OTHERS PRESENT:

Stephen Dahl, Nevada Judges Association
Nancy K. Ford, Administrator, Division of Welfare and Supportive Services,
Department of Health and Human Services
Brian O'Callaghan, Las Vegas Metropolitan Police Department
Sabra Smith-Newby, Director, Intergovernmental Relations, Clark County
Nicholas C. Anthony, Legislative Relations Administration, City of Reno
Kimberly McDonald, City of North Las Vegas
Dan Musgrove, University Medical Center of Southern Nevada
Mendy K. Elliott, Director, Department of Business and Industry
Paul Lipparelli, Washoe County District Attorney's Office; Washoe County
Guy Louis Rocha, Acting Administrator, Division of State Library and Archives,
Department of Cultural Affairs
Fred L. Hillerby, Regional Transportation Commission of Washoe County
Richard Daly, Laborers International Union of North America Local 169

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CHAIR CARE:

I call the subcommittee on Senate Bill (S.B.) 123 to order and present Karen Gray and John Redlein's testimony for the record ([Exhibit C](#) and [Exhibit D](#)).

SENATE BILL 123: Makes various changes to provisions relating to public records. (BDR 19-462)

CHAIR CARE:

On the night United States Senator Harry Reid spoke to the Legislative Joint Session, the Senate conducted business before we adjourned. I was told to introduce S.B. 123. I moved for the introduction of the bill and commented that S.B. 123 as drafted did not meet my satisfaction, and I would seek amendments. I have made changes to the bill ([Exhibit E](#)); because there has been no action on the bill, it has not been formally amended. I have received many comments directed toward language not in the modified S.B. 123.

No one stated there should not be a response period, but everyone who commented on the bill stated the two-day response period is unworkable. If it is a voluminous request, it cannot be done in two days. I agree with that. I would like to hear suggestions. Someone stated it is not clear from the bill if the two- or five-day response means the production has to take place within that period. It seems to me that on a certain date, a governmental entity has to notify the requestor they have the request and it is in work. Then the agency can say they will get back to the person within a certain number of days. We need to work out the mechanics.

There was discussion about requiring excessive notices to individuals who come before that department and concern that section 2 of the bill damages the *Donrey* balancing test set by *Donrey of Nevada, Incorporated v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990). I will have Committee Counsel look into that issue.

This bill does not make a current, confidential document nonconfidential. The bill does not change that. Statutes and regulations cover trade secrets and other proprietary information. This bill is not intended to change the status of any document a governmental entity may hold. There was some concern about the language "documents generated by a private entity performing a governmental

service" in that this provision might discourage private entities from entering into contracts with political subdivisions, counties and cities.

There was a comment made about the Nevada Administrative Procedure Act and the abuse of discretion standard if a court were to examine what a hearing officer might rule on a denied request. In the amended S.B. 123, I took out any language dealing with the Administrative Procedure Act. My intent is to say if the requestor is denied, the requestor may petition the court.

There was some confusion over what records would be made public. You never know until the situation arises. For example, a governmental entity contracts with a private ambulance service. If a reporter goes to the ambulance service wanting to know how many responses you answered last month, the government could say we do not have that information and you cannot get it from the private company because that is not a public document. That is fair. I am not interested in personnel records or proprietary information. I am concerned about information normally made public if the government were running the service contracted out to a private party.

CHAIR CARE:

Someone used the example of jail blueprints in the hearing. What happens if there is a request for a document not confidential by existing statute? Could the court still use the *Donrey* balancing test and say, "It is not in statute, but we are going to say it is confidential because it would be bad public policy to turn the document over"? I cannot see that happening. The Legislature promulgates the statutes, and there are statutes to determine what is confidential.

There were responses about a confidential document becoming nonconfidential after ten years. Somebody could petition the court, and the court could determine whether that document remains confidential beyond the ten years. The burden is on the governmental entity to demonstrate the document should remain confidential. In looking at laws and other jurisdictions, ten years is unrealistic. I would like to hear thoughts on whether there should be some expiration period. During testimony on the bill, I used the example of the Howard Hughes file and the State Gaming Control Board. I cannot imagine why those documents should not be public.

One objection to the redaction provision was that it might be meaningless when applied in certain circumstances, but the information could still be discerned by

reading between the lines. Other than the one objection, no one said there should not be a redaction provision. In the law, there is no provision for this. If you have a document that is confidential or has confidential language, it does not get produced.

There was discussion about implications of federal law. Some people suggested the bill is not clear on how to make documents public. Would the requestor be allowed to stand over the copy machine and make copies or does the governmental entity make copies? Is there a difference between obtaining, making and producing documents? We need clarifying language.

Another comment on language concerned the definition of "extraordinary circumstance." We need to clarify that definition does not apply to copyrighted material. There needs to be some discussion about verbal requests versus written requests.

I have touched on the primary objections. I would like to flush out some of the issues today by calling out a particular issue, and you can come up and share your thoughts. We will look at the two-day response period first.

STEPHEN DAHL (Nevada Judges Association):

Part of our concern is the preamble and the noble purposes the bill intends, but we deal with things not so noble. I have had requests from the *Judge Judy* show and other judge-type television shows to look at all our open, small claims cases to find someone for their shows. We get record and background check requests, sometimes up to 100 per day. We cannot respond to those requests within 48 hours. We have followed the policy of many state courts throughout the country and adopted policies that require specific requests in writing. We let them know in advance how many of their requests we will process. We respond within a day or two with how long the process will take.

One size fits all will not work with the courts. There are large courts in Las Vegas and Washoe, medium courts in North Las Vegas and small rural courts. They need to adopt policies that let them continue as courts and without being swamped with requests. The liability section also concerns me. If you deemed to have waived the time period, you could be held liable for releasing documents.

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CHAIR CARE:

The liability section is out of the bill.

MR. DAHL:

That is good. I suggest you let individual agencies adopt reasonable policies and procedures that are responsive but let them conduct business. Our choice is to let people line up in the lobby for an hour or take care of all these requests within a day. We need a balance.

CHAIR CARE:

What do you tell the people from *Judge Judy*?

MR. DAHL:

I tell them the same as I tell everyone else. We need a case number and name, and you can look at the case. We post our calendars on the Website, and they can find the names and case numbers. If they bring those in, we tell them we will give them five a day. With legislation passed last session about Social Security numbers, we have to go through every page of every file and make sure no Social Security numbers appear on any of the files requested.

CHAIR CARE:

We heard testimony from former State Senator Alan Glover who said he got a request from an organization in Kansas wanting a copy of every public document in the Carson City Clerk/Recorder's office.

MR. DAHL:

We do not have anything that big, but some requests would entail pulling thousands of cases and tossing them to somebody if we did not have to comply with any policy and procedure.

CHAIR CARE:

Do you see a problem with a two- or three-day period where a clerk says to the requestor "we have your request, this is what we are going to do with it"?

MR. DAHL:

I should let the bigger agencies respond to that because my turnaround on responses is one or two days, but we are a smaller court. We do not get the volume of requests the bigger agencies get.

NANCY K. FORD (Administrator, Division of Welfare and Supportive Services, Department of Health and Human Services):

The two-day turnaround time frame is too restrictive. We have many offices around the state that accept requests. Those offices send requests to the central office; it takes more than two days to get there, and we may need legal support to determine whether the record is confidential. We have programs within the Department of Health and Human Services that have to comply with federal regulations that mandate these records be kept confidential. If I miss the two-day time frame, I will not be able to send those records out without jeopardizing our federal funding. I would put in a billion-dollar fiscal note if I had to comply with the original bill. I have presented written testimony and amendments for the record ([Exhibit F](#)).

CHAIR CARE:

Are two days unrealistic to produce the documents or let the requestor know you received the request and it is under review?

MS. FORD:

It is still unreasonable because the request could come to my office in Hawthorne, and it would take two days to get the request to the main office. It is my understanding that even with subpoenas, the response time is 15 days. You have to pick something that gives us a reasonable time to get the request to the central office. Nothing in the statute states where requests have to go to be considered, they just have to go to a public agency. We have numerous public agencies.

CHAIR CARE:

When is the last time you received a request?

MS. FORD:

It has been a while. The last request we received was for public records, which we give out. It took some time because it was a voluminous request.

CHAIR CARE:

How long did it take?

MS. FORD:

It took about two weeks.

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CHAIR CARE:

How soon after you received the request did you realize it would take two weeks?

MS. FORD:

We let the requestor know right away it would take some time to pull it together because the information was not in one location.

SENATOR BEERS:

Did that request start with your office?

MS. FORD:

Yes. The request came in through the central office. Generally, we pick up the phone and call the requestor to talk to them about what their request is, what we can provide and how long it will take.

SENATOR BEERS:

An agency that did not acknowledge receipt spawned this legislation. The Chair wants to have a period in which you acknowledge receipt of the request and say, "We will do this with your request." If we could somehow craft legislation to direct requests for documents to the director of an agency, then once the director receives it, they have a certain time period to acknowledge receipt of the request and broadly outline what is going to happen. We are looking for language that does not impinge on your life but control someone who is not doing it right.

MS. FORD:

One suggestion is to provide in *Nevada Revised Statute* (NRS) 239 that agencies have regulatory authority to adopt regulations regarding where records requests have to be submitted before deemed received. That way, we could adopt a regulation stating it has to come to my office, not Hawthorne or Yerington. Two days is pretty short, especially if we have to consult with the Attorney General's Office. Seven calendar days is enough time.

CHAIR CARE:

Let us say that within five days, the requestor is told we have your request and a requirement that the governmental entity inform you after five calendar days that it is still in working. The requestor knows he or she has not been forgotten. Does that seem reasonable to you?

MS. FORD:

That is reasonable, but I would need a designated staff person to track these things so nothing unintentionally falls through the cracks.

BRIAN O'CALLAGHAN (Las Vegas Metropolitan Police Department):

Our concern is the two-day limit. We try to get things out by seven days, but that does not always work. We would like the time frame to be ten days. If the request takes longer than seven days, letters are sent out to notify the requestor. If a request comes in by mail and it goes to the wrong desk and other people, it takes a few days to get it to the right person.

SENATOR BEERS:

It sounds better for the Las Vegas Metropolitan Police Department if the period we are talking about was not to comply but acknowledge the receipt of the request as well as the ability to designate the office of receipt. Is that more workable?

MR. O'CALLAGHAN:

That does sound workable.

SENATOR BEERS:

It gives you the ability to describe a process for the agency to officially receive a request by going to this individual at this address and phone.

MR. O'CALLAGHAN:

Once the designated person receives the request, the time period starts. Two days is still too short of a time period.

SENATOR BEERS:

What about a five-calendar day time period as Senator Care suggested?

MR. O'CALLAGHAN:

That sounds reasonable, but I have to ask other people.

SABRA SMITH-NEWBY (Director, Intergovernmental Relations, Clark County):

Clark County would be alright with a five-to-seven day window to respond to the request. We want to start the clock when the person who has the record receives the request. Someone might go to one department thinking they have the document when, in fact, another department has it. Working its way

through may take some time. We also ask that when they request a document, it be in writing so we all know the date of submission and who to contact about the record. We like the time period to stop when we send out the notice, not when they receive it in their mailbox.

NICHOLAS C. ANTHONY (Legislative Relations Administration, City of Reno):
The *Reno Municipal Code* provides five working days to either produce the documents or to prepare an estimate of costs. That allows us time on the voluminous requests.

KIMBERLY McDONALD (City of North Las Vegas):
We would like you to consider an eight-to-ten day response time.

CHAIR CARE:
Let us go to the issue of redaction. It comes into play because it can delay the process of producing the documents.

DAN MUSGROVE (University Medical Center of Southern Nevada):
The redaction point is excellent, and we would appreciate that going forward. With the records we have, there is old patient information. As long as we can redact it to produce the information, we would agree to go forward.

MR. DAHL:
Our concern on redaction is with criminal records. If it is Social Security numbers we worry about redacting, that is not too onerous. However, if the Assembly bill passes that turns Social Security numbers into personal information, that could become burdensome for staff to search through and find every bit of information that falls under the new statute. Our concern for this bill is if the Assembly bill passes.

Mendy K. Elliott (Director, Department of Business and Industry):
As long as I acknowledge that it will take me ten days at the end of five days, I am in compliance with the statute. At the end of ten days if I see it takes longer, do I have the opportunity to send a secondary acknowledgement to say I have it, but I need another ten days to redact the information?

CHAIR CARE:
That is our struggle. At the end of ten days if the issue is not resolved within the agency, the requestor is told something. A point comes where, if the

requestor feels he or she is strung along after two or three months, the matter is ripe for a judicial petition. I am looking for a way in which a requested agency continues to work to produce the document or reach the conclusion they cannot turn the document over under state law.

MS. ELLIOTT:

I concur with that. That is an excellent direction to go.

MR. MUSGROVE;

That is where we need to go. Perhaps the first five-day time period goes in statute, but we are legislated to cooperate and keep in tune with those deadlines that we set. Then, there is a link of communication between the requesting agency and the person who is working to provide those documents. If after a certain length of time the requestor feels we are dodging it, they have the ability to another step. That is a doable method of achieving and producing these documents.

SENATOR BEERS:

The more testimony we hear, the more it sounds like one size will not fit all. We may be unable to prescribe a statute that works. If we prescribe a statute directing agencies to develop their own customized solution to this problem, this bill is reduced to a vague set of directions that are potentially unenforceable and may not resolve the problem you seek to fix.

CHAIR CARE:

We need statutory language about good faith duty to produce or determine whether the documents can be produced.

PAUL LIPPARELLI (Washoe County District Attorney's Office; Washoe County):

On the issue of redaction, I urge the Committee to consider the idea that the existence of the record at all is confidential. If we had an inventory of people in our health district under treatment for an infectious disease, when you request that record, the whole thing would be redacted. I suggest an exception for records which by their nature are entirely confidential. Somebody has to employ discretion in determining what information is confidential, and we would do that in good faith. However, if the government entity redacts a document, I suggest discretion be used to decide the confidential not be the basis for a penalty provision in a later court petition. We are sensitive to the goal.

CHAIR CARE:

If you have a document where everything needs redaction, your response might be "we have the document, but they are confidential by nature and we cannot turn them over." A provision in the bill says if an agency says no, it has to cite the "legal authority." The modified version says "legal statute" because the confidentiality rests upon a statute somewhere.

MR. LIPPARELLI:

Confidentiality rests on the construction of statutes, but the notion of whether a record is a public record at all sometimes depends upon the common law. The broader term "legal authority" is better.

CHAIR CARE:

Let us jump to the issue of whether there comes a time where the justification of keeping a document confidential pales in comparison to the public interest. Mr. Rocha, what happens with those documents that come to the Division of State Library and Archives?

GUY LOUIS ROCHA (Acting Administrator, Division of State Library and Archives, Department of Cultural Affairs):

Nevada Revised Statute 378.300 is a statute I pursued in 1983 and amended in 1995. We found records transferred to the State Archives deemed confidential, but they were in the Archives which is a research institution. For them to be closed in perpetuity defeats the purpose of research. The statute reads 30 years or death of the individual, whichever comes later. There is a point when sensitivity of records diminishes over time. States, in their public policy, define that point. Our concern is with third-party instances where there are psychiatric evaluations or correctional officer statements. We want to protect people who are still alive.

CHAIR CARE:

Would anyone like to talk about moving the 10-year time frame for keeping records confidential to 30 years or the death of the subject?

MR. ROCHA:

When we talk about the 30-year time frame, we are talking about a natural person. I do not deal with corporation records or records dealing in trade secrets.

CHAIR CARE:

When should a request be in writing as opposed to a phone call? Someone suggests the request in writing because the agency is not always clear what the request concerns.

MR. LIPPARELLI:

Our voluntary records policy in Washoe County urges the record request be in writing as good public policy. It protects the requestor because the request is articulated and ensures no later arguments about the request. It protects the responding government agency by defining the request and marking the point in time of receipt. If the Committee agrees to requests in writing, those requests should be declared confidential because the mere asking of public records can be something not everyone wants. Most people comply with our voluntary written requests. We counsel our clients to document the request and send that documentation to the requestor to ensure understanding of the request.

CHAIR CARE:

In the case of the reporter who has a working relationship with an agency and makes a phone call, would you suggest a request like that in writing? Are there circumstances where the request can be oral?

MR. LIPPARELLI:

Perhaps we can have the agency do the documentation and add a cover sheet to capture the time frames and message. We have offices in different places in Washoe County. It would help coordinate a response from outlying departments to have those requests in writing.

MR. O'CALLAGHAN:

It would be a good idea to have written requests.

MS. FORD:

If we trigger the provisions in this statute for requests writing, it does not preclude us from responding to oral requests.

CHAIR CARE:

If you do not understand an oral request, you could ask for a written request.

Ms. FORD:

Correct. If someone called and verbally asked for the information and we verbally respond, that is fine. However, for us to respond in writing when they can ask orally, you do not know when the time frames start. In order to trigger the statute and time limits, we would like a written request.

SENATOR BEERS:

A requestor could trigger the provisions of the statute by making a request in writing, but they could also make an oral request?

CHAIR CARE:

That is the way it works in other jurisdictions. Language elsewhere provides for that.

FRED L. HILLERBY (Regional Transportation Commission of Washoe County):

With the request in writing, you can measure compliance. If it is not in writing, how do you measure whether an agency complied with the request?

SENATOR BEERS:

If the requestor has problems getting the request fulfilled by oral agreement, they can submit a request in writing and start the more formal structured process. However, there are many routine requests filled in the normal course of business that I would hate to see bound up in a paper trail.

RICHARD DALY (Laborers International Union of North America Local 169):

If you look at federal Freedom of Information Act (FOIA) requests, they have a FOIA officer and address for each agency and redaction provisions. All those things have been used as tools by those agencies to not give you information. All the time frames and written requests are done federally. Our law is more open. I like our law under NRS 239.010 where I can walk into whatever agency and request to look at a public record during business hours. That seems the best way. We do not want to alter current law too much.

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CHAIR CARE:

This bill is a work in progress. Our Committee Policy Analyst and Committee Counsel will take the comments from today and put them into a mock-up of the bill. We have another subcommittee meeting about this bill so we can come up with a comprehensive amendment to S.B. 123. This Subcommittee meeting is adjourned at 1:32 p.m.

RESPECTFULLY SUBMITTED:

Erin Miller,
Committee Secretary

APPROVED BY:

Senator Terry Care, Chair

DATE: _____