

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

**Seventy-fourth Session
April 9, 2007**

The subcommittee of the Senate Committee on Government Affairs was called to order by Chair Terry Care at 12:53 p.m. on Monday, April 9, 2007, in Room 2149 of the Legislative Building, Carson City, 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:

Barry Smith, Executive Director, Nevada Press Association
Frederick Schlottman, Administrator, Offender Management Division,
Carson City, Department of Corrections
Scott Anderson, Deputy for Commercial Recordings, Office of the Secretary of
State
Trevor Hayes, Nevada Press Association
Wayne Carlson, Nevada Public Agency Insurance Pool
Morgan Baumgartner, Medic West
Richard Yeoman, Administrative Services Officer III, Nevada Department of
Transportation
David Emme, Chief, Administrative Services, Division of Environmental
Protection, State Department of Conservation and Natural Resources
Maud Naroll, Chief Planner, Budget Division, Department of Administration

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CHAIR CARE:

We open the subcommittee meeting for Senate Bill (S.B.) 123.

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

CHAIR CARE:

There is a mock-up of S.B. 123 ([Exhibit C](#)) that covers most of the issues we discussed in the last subcommittee hearing. The language in section 4 was changed to have a response to the request by the seventh business day as opposed to the second. There was testimony about what happens when you have an agency in Carson City but the request is submitted in Hawthorne. The seven days is to allow time to forward the request to the person who has custody or control. That is the intent of the new language.

Reading further in section 4, it says if the government agency is unable to make the public record available by the seventh business day, the person who has custody or control will notify the requestor of that fact and provide a date and time after which the record will be available for the requestor to inspect their copy. We have deleted the language about the tenth business day and added language, "If the public book or record is not available ..., the person may inquire regarding the status of the request." There is no final date when the request has to be resolved. It allows the requestor, if he or she feels they are being ignored, to inquire of the entity, and the entity will have to respond at the risk of facing suit.

There were some issues with line 39. My thought was in all cases, there would have to be statutory authority. I am told that is not necessarily true, and that is the reason it now reads "statute or other legal authority." Does anyone want to address what we have done in section 4?

BARRY SMITH (Executive Director, Nevada Press Association):

I would like to see five business days or seven calendar days as a compromise on the time period issue.

CHAIR CARE:

The testimony was for five or seven days. I met with staff this morning and told them to put seven days to see what happens.

MR. SMITH:

These are good changes. We still have to deal with the issue of the clock starting on a written request. That is a good and fair idea.

FREDERICK SCHLOTTMAN (Administrator, Offender Management Division, Carson City, Department of Corrections):

I have an inquiry as to how this legislation would work. Presumably, a member of the public or an inmate would make a records request with no limitations on the broadness of the request. It would be upon the Department to provide those records within seven business days. If they could not provide those records within seven days, at what point would those records become declassified or would the Department have to produce those records?

CHAIR CARE:

I do not know what you mean by declassified.

MR. SCHLOTTMAN:

The Department of Corrections has information that is classified from the Federal Bureau of Investigation. The information is retrieved from the National Crime Information Center computer system. The Department Director does not have the authority to declassify that information, and that information is not available to the public.

CHAIR CARE:

If it is not a public record, it would not fall under this statute.

MR. SCHLOTTMAN:

That would be a question of litigation. An inmate could say they would want to see the records because they pertain to their criminal history and might have an effect on their standing in the Department.

CHAIR CARE:

We have a separate statute that talks about who may request records from the criminal repository. What do you do presently?

MR. SCHLOTTMAN:

We turn down the request because that information is not available to the inmate.

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CHAIR CARE:

This is not intended to change anything that is currently not a public record.

MR. SCHLOTTMAN:

At what point would the Department have to comply with a records request if it could not meet that request within seven business days?

CHAIR CARE:

If it is a public record, they have to let the requestor know within seven days that they are working on it. The theory here is that the governmental entity will be attempting to comply in good faith. If a requestor does not think so, a judge can make that determination.

We added "custody or control" in section 5 to clarify language. We did not change the burden language. We talked about the point at which a confidential document becomes public. The 10-year time limit is replaced with 30 years. Somebody talked about a trade secret being confidential beyond 30 years. There is a presumption that after 30 years, the need is no longer there for it to be confidential, but it is a rebuttable presumption. Guy Louis Rocha, Acting Administrator, Division of State Library and Archives, Department of Cultural Affairs, talked about the policy of the Division of State Library and Archives where it is 30 years or the death of an individual, whichever comes later. Is 30 years problematic for anyone so long as you would have an opportunity to say the information should not be public and why?

SCOTT ANDERSON (Deputy for Commercial Recordings, Office of the Secretary of State):

In dealing with agencies with regard to records retention schedules, we come across a lot of confidential information. The rebuttable language helps, but there could be a number of agencies affected by this. There could be information that retains its confidential nature well after the 30-year period. For example, a document regarding minors or an incident that happens early in someone's life could have a need to remain confidential after 30 years.

CHAIR CARE:

You are talking about records that deal with an individual. You say the rebuttal presumption helps, but I do not know what else to do with it. If someone makes the request, the entity could appear in court and explain to the judge why the information needs to be confidential.

MR. ANDERSON:

The 30 years or upon the death of the individual, whichever comes later, is a good standard.

CHAIR CARE:

I will see if we can get that language in the bill. Section 8 is the redaction provision. Can Committee Counsel address where we have the deletion in section 8, subsection 2?

EILEEN O'GRADY (Committee Counsel):

That was to address the same issue as it might not be declared confidential by law, but it might be confidential under a balancing test.

CHAIR CARE:

Section 9 is deleted. That was the section about liability. There is no waiver of the confidential status of the document if the government fails a timely response. There is no original language about written requests. Trevor Hayes has ideas about what to do concerning oral versus written requests. I can see both sides of the issue.

TREVOR HAYES (Nevada Press Association):

I have looked at the laws in this area and in all 50 states. A number of states that have time provisions and other mechanisms to enforce an open records law allow oral requests. We do not want language to preclude oral requests because the Nevada Press Association uses this method often and most entities respond. A good compromise would be to allow oral requests, but the mechanisms that are created by this law would not go into place until a written request was submitted. The time frame would not start until a written request, including e-mail and fax, is submitted.

CHAIR CARE:

Would that mean that after five or seven days of submitting an oral request, if you have received no response, your next step is to submit a written request?

MR. HAYES:

Yes. If you have a voluminous request, you might want to start from a written standpoint, but most requests are handled by calling an agency and asking for records.

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SENATOR BEERS:

Would the redaction provision pose a fiscal impact?

CHAIR CARE:

We can have Committee Counsel and Research Division look at that.

MR. HAYES:

With regard to time frames, I researched other states. Nine states have 3 days or less response time, and 17 states have 5 days or less. There are 33 states that have a time limit. In previous testimony, people were fearful of litigation, but current law has no time limit. There is no provision stopping litigation from commencing immediately. This bill gives the governmental entity time to work. Litigation is expensive and no one wants to deal with it.

WAYNE CARLSON (Nevada Public Agency Insurance Pool):

I have written testimony ([Exhibit D](#)). It was written before I saw the modified version so some of it can be disregarded, but some of it still applies. I have trouble with the language in section 3 pertaining to the private organization maintaining records that are public. There are records that are private business records, and I cited examples in [Exhibit D](#). It is unclear which records are public and which are private business records. The language does not narrow it down, and it affects section 7 because the definition subjects a "person" to these issues. A person is an individual or an organization of legal structure. Therefore, it is possible an individual's personal records could become public because that individual administers a program on behalf of a public entity under a private contract.

CHAIR CARE:

I am only talking about those documents generated by the private entity that would be comparable to documents generated by the government had it done that function. This would not include personnel or proprietary information. We cannot address every situation, but I will ask Committee Counsel to craft language that might give you more comfort.

MR. CARLSON:

We ask our vendors to maintain records they create on behalf of our program as if they were government records. Perhaps something saying "created for the purpose of being a public record" would narrow that definition.

MORGAN BAUMGARTNER (Medic West):

I support what Mr. Carlson said. My company has a franchise agreement. I am not sure if a franchise agreement reaches the level of contracting or works like a business license, but we provide certain records to the government entity with which we have the franchise agreement. Those are public records, but we have the same concerns. With the way the bill is drafted, it seems like you could reach into our personnel and financial records. That is not your intent, but we would like to see language that addresses that specific concern.

CHAIR CARE:

I am trying to let taxpayers have the opportunity to know what their tax dollars are doing.

MS. BAUMGARTNER:

Our franchise agreement would have standards—such as ambulance call times—we have to submit to the public entity with which we contract. Maybe you can craft something that states those are the public records or something narrowly tailored along those lines.

RICHARD YEOMAN (Administrative Services Officer III, Nevada Department of Transportation):

We get requests all the time and have a lot of complex records. There is a necessity to put those requests in writing. There needs to be some sort of specificity addressed. I just finished a request that took 52.5 staff hours to fill. It was a "give me everything you have from here to here" request that was difficult to sort through. We had to ask them to specify their needs so we could fill the request. On the redaction point, it would take two copies to get the redacted copy to the individual. You have to make a copy of the original document, use a black marker which can be read through and make another copy to obliterate the words behind the marker. There is a minor fiscal impact but a bigger impact on time.

DAVID EMME (Chief, Administrative Services, Division of Environmental Protection, State Department of Conservation and Natural Resources):

From a practical standpoint, you have addressed our concerns. I would ask you to consider an explicit exception for the trade secret or confidential business information at the beginning of section 6.

MR. SCHLOTTMAN:

The Department of Corrections does not have any in-house legal staff to do redactions and limited staff to handle records. I would anticipate a substantial fiscal impact given the number of vexatious litigators within the Department.

CHAIR CARE:

In the case of litigation, it will be different. If they are going to sue, they will sue. This statute aside, they will be entitled to certain documents.

MR. SCHLOTTMAN:

Given the organized nature of some inmate groups, they would attempt to overwhelm the Department with information requests. For us to show good faith effort to honor those requests would be a substantial undertaking.

CHAIR CARE:

Do we have a vexatious litigator statute in Nevada?

MR. SCHLOTTMAN:

Yes, we do. It is not used very often.

SENATOR BEERS:

Can we exempt inmates from utilizing the statute?

CHAIR CARE:

I would hate to get into that today.

MR. SCHLOTTMAN:

That would be an interesting way to pursue this. How would inmates keep these documents in a small cell? There are logistical problems involved.

MAUD NAROLL (Chief Planner, Budget Division, Department of Administration):

The custody or control language in section 4 is an issue. If that could be changed to "legal custody," that would be better. The records center has physical custody of many agency records but not legal custody. We would appreciate that the request be in writing in order for the statute to apply.

CHAIR CARE:

I would like to recommend to the Committee that we move to amend and do pass except in section 3, the language needs to be amended to give more

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comfort to the private agencies. We also need to clarify the language of custody or control to "legal custody or control." Do the Subcommittee members have a preference for five or seven days? My preference is five business days.

SENATOR BEERS:
Five days is fine with me.

SENATOR TOWNSEND:
I am fine with five days.

CHAIR CARE:
We will also clarify the 30-years provision to "30 years or the death of the individual, whichever comes later" on records pertaining to an individual. The language suggested by Mr. Hayes that the requests may be oral but written requests will start the time frame should also be added. These will be my recommendations to the full Committee. This meeting is adjourned at 1:30 p.m.

RESPECTFULLY SUBMITTED:

Erin Miller,
Committee Secretary

APPROVED BY:

Senator Terry Care, Chair

DATE: _____