

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

**Seventy-Seventh Session
February 7, 2013**

The Committee on Government Affairs was called to order by Chairwoman Teresa Benitez-Thompson at 8:01 a.m. on Thursday, February 7, 2013, in Room 3143 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, 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 nelis.leg.state.nv.us/77th2013. 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 Teresa Benitez-Thompson, Chairwoman
Assemblywoman Dina Neal, Vice Chairwoman
Assemblyman Elliot T. Anderson
Assemblywoman Irene Bustamante Adams
Assemblyman Skip Daly
Assemblyman John Ellison
Assemblyman James W. Healey
Assemblyman Pete Livermore
Assemblyman Harvey J. Munford
Assemblyman James Oscarson
Assemblywoman Peggy Pierce
Assemblyman Lynn D. Stewart
Assemblywoman Heidi Swank
Assemblywoman Melissa Woodbury

COMMITTEE MEMBERS ABSENT:

None



GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Jennifer Ruedy, Committee Policy Analyst
Jim Penrose, Committee Counsel
Bonnie Borda Hoffecker, Committee Manager
Lori McCleary, Committee Secretary
Maysha Watson, Committee Secretary
Cheryl Williams, Committee Assistant

OTHERS PRESENT:

Keith Munro, Assistant Attorney General, Office of the Attorney General
Brett Kandt, Special Deputy Attorney General, Office of the Attorney General
Keith Lee, representing Nevada Board of Medical Examiners and Nevada State Contractors' Board
Neena Laxalt, representing Nevada State Board of Massage Therapists, Nevada State Board of Veterinary Medical Examiners, State of Nevada Board of Dispensing Opticians, Nevada State Board of Psychological Examiners
James L. Wadhams, representing the State Board of Architecture, Interior Design, and Residential Design
Tonya Brown, Private Citizen, Carson City, Nevada
Jeffrey M. Kintop, State Archivist, Nevada State Library and Archives, Department of Administration
James R. Wells, Executive Officer, Public Employees' Benefits Program
Barry Smith, Executive Director, Nevada Press Association
Jennifer DiMarzio-Gaynor, representing the Nevada Press Association
Jack Mallory, representing Painters and Allied Trades, District Council 15, and the Southern Nevada Building and Construction Trades Council
Andrea Engleman, Private Citizen, Carson City, Nevada
Philip A. Olsen, representing Civil Rights for Seniors
Karen Gray, Education Researcher, Nevada Policy Research Institute
Marla McDade Williams, Deputy Administrator, Health Division, Department of Health and Human Services
P. Michael Murphy, representing Clark County
Garrett C. Weir, Assistant General Counsel, Public Utilities Commission of Nevada

Donald J. Lomoljo, Utilities Hearing Office, Public Utilities Commission of Nevada

Scott J. Kipper, Insurance Commissioner, Insurance Division, Department of Business and Industry

Cadence Matijevich, representing City of Reno

John Slaughter, representing Washoe County

Florence Jones, Member, Nevada-CURE (Citizens United for the Rehabilitation of Errants)

Chairwoman Benitez-Thompson:

[Roll was called. Rules and procedures were given.] We will begin today with a presentation by the Office of the Attorney General. We have Mr. Keith Munro with us and I invite him up to give us a presentation about the Attorney General's Office.

Keith Munro, Assistant Attorney General, Office of the Attorney General:

The Office of the Attorney General works to promote the stability, efficiency, and continued viability of our state. As the state's Chief Law Enforcement Officer, the Attorney General represents the people of Nevada before trial in appellate courts of Nevada and the United States in criminal and civil matters. She serves as legal counsel to the state officers, state departments, and most state boards and commissions. She assists the 17 district attorneys of the state.

Our office is divided into four major areas: The Bureau of Litigation; the Bureau of Governmental Affairs; the Bureau of Criminal Justice; and the Bureau of Consumer Protection.

The Bureau of Litigation contains the Personnel Division, the Public Safety Division, and the Appellate Division.

The Bureau of Governmental Affairs is our largest bureau and includes the Gaming Division, the Transportation Division, the Business and Taxation Division, the Government and Natural Resources Division, Boards and Licensing, and the Health and Human Services Division.

The Bureau of Governmental Affairs represents all constitutional offices and the Department of Administration. They are also still very much involved in bringing the Yucca Mountain issue to closure.

The Bureau of Criminal Justice includes the Fraud Unit, the Special Prosecutions Division and the Medicaid Fraud Control Unit. For the past biennium, the Medicaid Fraud Control Unit has successfully investigated and prosecuted

25 criminal cases involving fraudulent activities by companies scamming the Medicaid system. In addition, the Medicaid Fraud Control Unit has also participated in global settlements of false claim cases with numerous pharmaceutical companies.

The Workers' Compensation Fraud Unit and the Insurance Fraud Unit have also been very busy. In the Workers' Compensation Fraud Unit in 2011, we opened 142 cases. In 2012, we filed 119 cases. In the Insurance Fraud Unit in 2011, we filed 67 cases. In 2012, we had 84 cases.

The Bureau of Consumer Protection addresses mortgage fraud, consumer protection, multistate litigation, antitrust, and utilities. It has been busy in the last few years and we have had some multistate cases culminate in settlements in fiscal year 2013. We are proud to say that normally we bring in about \$2.2 million per year that reverts to the State General Fund. However, as of January 31, 2011, the office has already reverted \$7.3 million to the General Fund from cases related to multistate deceptive trade and antitrust.

The Mortgage Fraud Task Force addresses fraudulent loan and modification companies whom they are investigating and prosecuting. Our office joined a multistate national foreclosure fraud settlement, which went after five of the largest mortgage servicers for foreclosure abuses. In addition, our office received a separate settlement from Bank of America for its fraudulent practices in the state.

On August 23, 2012, the Interim Finance Committee, an interim committee of the Legislature, gave a one-year approval for the Attorney General's Office to implement the Home Again Homeowner Relief Program. The Home Again Program is a three-year proposal to spend up to \$33 million of the settlement proceeds from the national mortgage settlement to assist those Nevada residents impacted by the mortgage and foreclosure crisis.

In addition to the four major units, when asked, we provide legal opinions for local governments. Domestic violence has been an ongoing issue throughout the nation. As economic stresses increase, so do cases of violence in our homes. Our office has oversight of two committees addressing the issue, the Nevada Council for Prevention of Domestic Violence and the Committee on Domestic Violence, which oversees 28 batterer's treatment centers with state and local offices. During the 76th Session of the Nevada State Legislature, we introduced our intention to formulate fatality reviews in this state. The purpose was to investigate fatalities caused by domestic violence and assess where the available services may have failed. Two summits have been held in the past year, one in Reno and one in Las Vegas. We have instituted an automatic

Victim Information and Notification System, which is known as VIN, where crime victims and other concerned citizens have around-the-clock access to custody information about offenders held in jail and will be notified if the offender is transferred, released, or escapes. At present, we have been able to get 16 county jails, the Department of Corrections, and 1 city jail live through the statewide service. We are also working with Parole and Probation and the Parole Board, who will join the system soon, we hope.

Our office has been working on the issue of sex trafficking in Nevada for quite some time. To that end, we have brought together public and private sector leaders to raise awareness of this issue. On January 9, we held a statewide summit in Las Vegas to discuss how to advance enforcement responses and victim services. Additionally, our office is introducing an omnibus bill during this legislative session to protect victims and effectively combat sex trafficking. The issue is getting broad attention and the Attorney General was recently honored in January to be part of the U.S. Delegation to the United Nations on sex trafficking, and she was able to testify on the subject in Geneva, Switzerland.

During the past four years, the Attorney General has signed memorandums of understanding with three Mexican states that affirm crimes such as human trafficking, weapons trafficking, money laundering, and narcotics smuggling. The Attorney General was invited to make a presentation on money laundering, as part of the Conference of Western Attorneys General, to the Argentine government in Buenos Aires. The Attorney General was recently named chair for the Conference of Western Attorneys General for the 2012-2013 session and recently chaired a symposium on Transnational Crime for the Western Attorneys General and spoke to the Woodrow Wilson Institute on the rule of law reform in Mexico.

Since 2008, the Attorney General has worked against substance abuse. Through the Governor's Working Group on Methamphetamine Use, efforts to curtail meth abuse have been addressed through legislation, law enforcement, treatment, and prevention. Currently, the Attorney General chairs the Substance Abuse Working Group in a continued effort to address meth abuse, along with prescription and synthetic drug abuse. The results have been beneficial to Nevada. The working group's annual report was recently filed with the Legislative Counsel Bureau (LCB) on January 15, 2013.

In this session, Assembly Bill 39 will hopefully implement Nevada's National Precursor Log Exchange, a real-time tracking system used by pharmacies to prevent sale of nonprescription pseudoephedrine for use in the manufacture of methamphetamine. This session, this office will present Senate Bill 25, which

clarifies jurisdiction and authority and provides technological crime investigators to provide better enforcement of existing laws.

As provided in the *Nevada Constitution* and state law, the Attorney General is a member of several boards. These include the State Board of Examiners, Advisory Council for Protecting Attorneys, Board of Directors for the Department of Transportation, Board of State Prison Commissioners, Board of Pardons Commissioners, Domestic Violence Prevention Council, and the Advisory Board for Nevada Task Force for Technological Crime.

As is clear from the recitation of these duties, the breadth and depth of legal issues that the Office of the Attorney General addresses on a daily, weekly, and yearly basis is substantial. We have a proud staff, and we are committed to getting the job done and spending the time and effort necessary to fulfill our charter as an efficient and effective Office of the Attorney General.

Madam Chairwoman, I appreciate your giving me the opportunity to give this overview of the Attorney General's Office, and I would be happy to answer any questions, if there are any.

Chairwoman Benitez-Thompson:

Thank you so much, Mr. Munro. Very quickly, because we have the three relevant bills on the topics of Open Meeting Law, could you just cover right now the Attorney General's Office's obligations regarding the Open Meeting Law for the benefit of the Committee before we launch into these bills.

Keith Munro:

Our office is assigned by the Legislature to enforce the laws that this body passes with respect to the Open Meeting Law. We have one person in our office assigned to receiving complaints and working with state and local governments to ensure that the laws passed by this body are enforced and that we have open government in our state.

Chairwoman Benitez-Thompson:

Are there any questions for Mr. Munro, Committee members?

Assemblyman Munford:

I credit Mr. Munro with educating me on corrections back in 2005. It has been something that has made me committed to inmates' rights, prison reform, and things of that sort. I wanted to ask you a question in regards to the Open Meeting Law. Does that apply to Parole and Probation?

Keith Munro:

The Open Meeting Law applies to public bodies, so to the extent there are public bodies within the Division of Parole and Probation, it would apply. I cannot think off the top of my head that the Division of Parole and Probation has any public bodies, but they may.

Assemblyman Munford:

I thought since they were quasi-judicial they were exempt from it.

Keith Munro:

Usually quasi-judicial deals with boards created by the Legislature that act in a kind of "judge" role. The Division of Parole and Probation are more into the supervision of individuals who have been granted parole and who are out in the community.

Chairwoman Benitez-Thompson:

Are there any additional questions from Committee members? [There were none.] We will go ahead and open the hearing for Assembly Bill 16.

Assembly Bill 16: Provides for the adoption, compilation and publication of policies of operation for state agencies by the State Board of Examiners. (BDR 18-212)

Brett Kandt, Special Deputy Attorney General, Office of the Attorney General:

I am here today to present Assembly Bill 16 for your consideration. It codifies the process for the adoption, compilation, and publication of policies of operation for state agencies by the State Board of Examiners (BOE) ([Exhibit C](#)).

When we think about enabling documents that authorize and limit state government, we think about federal and state constitutions, federal and state statutes, and federal and state regulations. The process for enacting, amending, or repealing a constitutional provision, a statute, or a regulation, is very clearly established for everyone to understand. But in Nevada, we have another guiding document that is followed by state Executive Branch agencies, which is commonly known as the *State Administrative Manual*, sometimes referred to as the SAM. *Nevada Revised Statutes* (NRS) 353.040 provides, "The State Board of Examiners shall have authority to establish rules and regulations for its government not inconsistent with the law." This statutory provision has been interpreted to give the Board of Examiners the authority to approve the issuance and use of the SAM by Executive Branch agencies. The SAM section 0000 provides, "The *State Administrative Manual* is a compilation of policy statements concerning the internal operations of State government.

Policies are based on statute or other approved regulations. This manual is published for use as a guide in conducting the State's business."

The *State Administrative Manual* is a useful tool and a reference source. State Executive agencies are required to comply with the provisions of the manual to promote economy and efficiency in state government. The manual also promotes open government by providing disclosure to businesses and citizens about the processes being used by those agencies. Assembly Bill 16 simply codifies the existing interpretation of NRS 353.040 and sets forth, as a matter of law, the process for adopting and amending provisions that are set forth in the SAM.

We have submitted one minor amendment ([Exhibit D](#)) to delete a reference to the Nevada System of Higher Education, since the internal operations of the university system are not subject to the policies and procedures that are set forth in the SAM. That concludes my testimony. I would be happy to answer any questions.

Assemblyman Munford:

I would like to ask you about one of your administrative regulations. I think when I came up in 2005 or 2007, we, as elected officials, were without any restrictions to visit any of the correctional facilities without notifying them in advance. We would, perhaps, call in advance to say we were coming, but the privilege would be there for us. Now we have to call in advance and make all kinds of arrangements. I think that is protecting them, the facility itself, the personnel, and administrators, because they have time to clean it up and make us go where they want to take us. That is not good. I think we should be able to go and see how it is going day to day without any restrictions. We should be able to walk up there any time we want. I have visited every facility in this state, except Ely. I always have to get a pre-notice and telephone Director Cox to tell him I am coming. He has to approve it and he could deny me. He did tell me I could not bring a guest. I think I should have that privilege also, if I wanted to bring someone. How do I appeal that?

Keith Munro:

This is a piece of legislation involving the SAM and it deals with purchasing, travel, and things of that nature. The issue you are talking about revolves around the Board of State Prison Commissioners. If you would like to go to the Board of State Prison Commissioners, we could see to it you were placed on the agenda and you could discuss that issue. You have been to see all the prisons, and I remember you went to the women's facility in 2005. I applaud you for going to those facilities. However, the issue involving the safety and security of prisons is outside our expertise. That is more within the statutory authority of

the Director of the Department of Corrections. My suggestion would be for you to pursue that either through the Board of Prison Commissioners or through a piece of legislation so legislators are granted that authority.

Chairwoman Benitez-Thompson:

I trust you will touch base with Assemblyman Munford afterwards to address his concerns.

Assemblyman Livermore:

As I read the bill under section 7, subsection 1, "The State Board of Examiners may adopt, amend and repeal policies" What guidelines are you going to use to do this? How are the policies going to be broadcast to the public, about wanting to make comment or to convince the Board of Examiners that the policy does not fit certain criteria?

Brett Kandt:

If you look at the subsection 2 in section 7, it provides that process. It makes it clear that in addition to complying with the Open Meeting Law, the Board of Examiners has to go through an adoption process that provides for publication of the proposed policies and opportunity for members of the public to comment on the proposed policies before they undergo final adoption.

Assemblyman Livermore:

Will that eventually come back to the Legislative Commission or will that be a predetermined decision made by the Board of Examiners?

Brett Kandt:

The way the bill is drafted now, it does not provide for those policies to be approved by the Legislative Commission the way that regulations are.

Assemblyman Livermore:

Even though the Legislature adopts the law and makes the law through the process here, the Board of Examiners can modify, amend, or delete such law? Okay, I see Mr. Munro shaking his head no.

Brett Kandt:

No, Assemblyman, because the policies that are adopted by the Board of Examiners are all based in or founded upon an existing statutory provision or regulation that was adopted through the regulation adoption process, which does go to the Legislative Commission and cannot be inconsistent with any existing statute or regulation. That should address your concern. The Board of Examiners cannot adopt policies that are not based upon an existing statute or regulation.

Assemblyman Livermore:

I served on that Commission and the last meeting we had there was Senate Bill No. 75 of the 76th Session. When the rules were adopted, they called for prevailing wage and that never was the issue for the creation of the law. It was about creation of jobs. That is why I question the regulations that you may adopt. I just think it needs to come back to this body to be affirmed.

Chairwoman Benitez-Thompson:

Assemblyman Livermore, just for clarification of the record, when you mentioned that you sit on the committee, could you refer to the committee you sit on.

Assemblyman Livermore:

The Legislative Commission.

Assemblyman Elliot Anderson:

Thank you to both of you for clearing that up. I had the same question as Assemblyman Livermore had, vis-à-vis, are we talking policy or regulation. What exactly were we talking about? I was just wondering if you could expound a little bit more on the difference between the policies and regulations we are talking about in the bill. Dovetailing with that, if you do not need our authority, why do we have section 9, stating, "The Legislature hereby approves, confirms and ratifies the policies adopted by the State Board" That does not make any sense to me. If it is an internal operation and it is not a regulation, why are you seeking us to ratify stuff we have not seen?

Keith Munro:

The *State Administrative Manual* has been around for at least 30 years. It is essentially a document that falls underneath regulations. What Assemblyman Livermore was talking about was regulations. Regulations that fulfill a gap or an interpretation of laws passed by this body go through the regulation process that is established by this body and have the stamp of approval by the Legislature. One level below that is the SAM, which is intended to be essentially user-friendly and provide instruction on how to comply with regulations and the law for state agencies as they work through issues involving the Board of Examiners. Section 9 would be something that your staff, the Legislative Counsel Bureau (LCB), put in because what they are doing is ratifying the existing *State Administrative Manual*. If this bill passes, we presume that the Board of Examiners will simply ratify the existing SAM. After this hearing, if you talk to your Legislative Audit Committee, a lot of times they have audits that provide guidance for state agencies and it may be something they should put in the SAM, or they should comply with the existing SAM.

With this piece of legislation, we are trying to provide firmer legal guidance for the authority of the SAM to exist.

Getting to Assemblyman Livermore's questions, looking at page 5, section 7, subsection 1, it states, "The State Board of Examiners may adopt, amend and repeal policies, not inconsistent with applicable law, governing the internal operation of" That is what the SAM is. It guides state agencies on their internal operations, on how to comply with existing regulation and law.

Assemblyman Elliot Anderson:

Just to be clear, I am not looking to tell the Executive Branch what to do in its internal operations. I am just wondering, again, why section 9 is necessary if it is not regulations? It does not make any sense to me. I will get off-line and talk about it with you.

Keith Munro:

Fair enough.

Assemblyman Daly:

Along the same lines, I have a couple of concerns, as well. I guess you could chalk this up to being careful what you ask for. You are asking to be exempt from NRS Chapter 233B, which gives the implication that you are covered by it now. This means you have to go through the regulatory process and get confirmed by the Legislative Commission. Please fill me in on how you do it now, what was the oversight before, why are these changes needed, what is the problem you are trying to solve? Did someone come up and say, you cannot do that because you did not go through the regulatory process? We need clarification, et cetera. I know Mr. Kandt, when he was making his testimony, said there has been an interpretation made that this manual can proceed the way it has been. I would ask whose interpretation is that? Where did they get the authority? Did LCB make it, did the court make it, or did someone in the Executive Branch say we interpret it to be this? I know I have a lot of things here, so come back to them if you can. When I hear testimony on the other side, I might get more information. As Assemblyman Anderson was saying, we do not want to tell the Executive Branch how to run their internal processes. However, the policies, and then the agencies to enforce the policies and the regulations of those organizations, and then hopefully how they operate, all come from this body. We are not trying to tell them what to do; we just want to make sure they are doing what we tell them.

Keith Munro:

That is an excellent question because, as you said, where did this come from? Where did the interpretation come from? It came from the Office of the Attorney General in an opinion, I believe, in 1995. What is the problem we are trying to solve? The *State Administrative Manual*, Assemblyman Daly, as you know because you interact with state government all the time, has an impact on citizens and how they are going to comply with purchasing and things of that nature. Currently, the SAM can be amended by the Board of Examiners because the only thing guiding the Board of Examiners is the Open Meeting Law. They simply have to post an agenda with three-days' notice and the Board of Examiners can make a decision that affects citizens that are working with state agencies. The main thrust of our bill, if you look at section 7, is to provide some sunshine for citizens. It brings that up to 30 days and requires them to post so citizens have the opportunity to interact better with the Board of Examiners.

We have spoken to the other members of the Board of Examiners. They support bringing sunshine to this. What we are trying to accomplish is: (a) bring some more sunshine, and (b) bring some clear authority for the Board of Examiners to have a *State Administrative Manual*. Because the internal policies of state agencies affect citizens, we want to bring more sunshine to that and more opportunity for them to participate and firmer legal guidance.

Assemblyman Daly:

I am going to hear the testimony on this and I appreciate that, because it helps clarify things. You read things and wonder what they are trying to do. You are precisely right; I have dealt with a lot of government agencies. This also causes me the concern that people are going to be making rules that affect citizens without oversight of the Legislature. That is my concern, because I have seen good government and I have seen bad government.

Chairwoman Benitez-Thompson:

For clarity of the legislative record, I want Mr. Penrose to comment on the statement made about the bill making the department exempt from NRS 233B.039.

Jim Penrose, Committee Counsel:

The kinds of internal policies I believe the witnesses have alluded to are the kinds of internal policies that are embodied in the SAM currently which are, under existing law, exempt from the definition of regulation as appears in NRS Chapter 233B. There is a provision in the bill that makes the particular provisions of this bill that apply to the adoption of these policies applicable to

the exclusion of the provisions in NRS Chapter 233B that would otherwise apply. *Nevada Revised Statutes* Chapter 233B, which governs regulations, as you know, is a very involved process for adopting regulations and requires review by the Legislative Counsel Bureau and approval of the Legislative Commission. That is why there are the provisions in the bill that make the provisions in NRS Chapter 233B generally inapplicable to the process that is set forth here.

Chairwoman Benitez-Thompson:

I do have a couple of questions. Section 1, subsection 2, allows for the manual to be posted on the Internet website in conspicuous links. Is the status quo practice now that the manual is not available anywhere online and this would start that practice?

Brett Kandt:

The manual is available online. I would encourage any of the Committee members who have not had a chance to look at the manual to take a look at it. It might be helpful to understand how the manual reads, how it operates, and how it really does give instructions to state agencies predicated upon existing statutes, laws, and regulations that dictate how they conduct certain types of internal operations, such as purchasing, contracting, or something of that nature. I can email you the link to the online site so any of the Committee members who want to access it can do so.

Chairwoman Benitez-Thompson:

So the change with this legislation from status quo with this section is that somewhere in legislation there is permission to put it on the Internet or just confirming your current practice, correct?

Brett Kandt:

Correct, Madam Chairwoman. It confirms the current practice of making the SAM available on the website.

Chairwoman Benitez-Thompson:

Within section 7, subsection 2, where it talks about the 30-day notice and then that notice being posted to the Internet website, would that be the only form of notice for proposed changes?

Brett Kandt:

That would not be the only form of notice. Once again, the Board of Examiners follows the Open Meeting Law in conducting its meetings and taking action. Any proposed change to the SAM would also be noticed in accordance with the

Open Meeting Law and the postings that are made for meetings of the Board of Examiners.

Chairwoman Benitez-Thompson:

So there is a paper trail somewhere for the public. My last question is regarding section 7, subsection 3, where it talks about written comments being submitted to the Board of Examiners. Since we have the Internet posting, is there also a way for those comments to be uploaded through the Internet site, or is it only written and traditional mail?

Brett Kandt:

As the proposed subsection reads, it does not provide for the publication of the comments on the Internet. That is certainly something you have the prerogative to require, if you think that is appropriate. Just to clarify, we would certainly be amenable to that requirement, if that is your preference.

Assemblyman Stewart:

It seems like a lot of us are concerned that we are lacking authority. Am I correct in saying that if the Legislative Commission saw something in the regulation or in SAM that was not in accord with what they intended, that they would have the right, as the Legislative Commission, to change that regulation?

Brett Kandt:

You really had two parts to the question. You had the question concerning current authority. The current authority that serves as the basis for the SAM is NRS 353.040. It does state that the Board of Examiners shall have the authority to establish rules and regulations for its government not inconsistent with the law. Once again, to clarify, we think this legislation will clarify the current status of the authority of the Board of Examiners to promulgate policies through the SAM.

With regard to your second question about policies that may be adopted for the SAM that the Legislative Commission might have a concern with, the current legislation does not address Legislative Commission review of the SAM. That would be your prerogative if you wanted to put some sort of Legislative Commission review in the process. Typically, that is reserved for regulations. Once again, we have tried to make a distinction here between regulations that are adopted pursuant to NRS Chapter 233B, and policies and procedures that are adopted for inclusion in the SAM through this process.

Assemblyman Stewart:

So if a member of the Commission felt that a regulation was not being administered as the statute intended, then could he or she bring that to the Commission and the Commission vote to change the regulation?

Keith Munro:

The Board of Examiners is not promulgating regulations; it is promulgating internal policies. To the extent an internal policy of the Board of Examiners conflicted with a regulation passed by this body, the policy would be void. If anyone challenged that policy, it would be void. If you think about how the layers of our legal process works, we have the *United States Constitution*, the *Nevada Constitution*, state laws and state regulations. We are talking in that hierarchy. Below that, we have something that has existed for well over 30 years—the *State Administrative Manual*. Anything that conflicts with what is above it in the hierarchy is void as a matter of law and the court would have the ability to throw that out.

Assemblyman Stewart:

But it would be up to the court and not to the Commission?

Keith Munro:

It would be up to a court. We work with your Legislative Audit Committee and your LCB legal staff. I have worked in state government since 1993. I am not aware of any time that any member of this body or any member of legislative staff has come forward and said any existing SAM policy conflicts with the existing status of the law. To the extent it did, I believe the Board of Examiners would take the steps necessary to rectify that. They do not want to be in a position of promulgating policies that are in violation of regulations approved by this body, statutes approved by this body, the *Nevada Constitution*, or our *United States Constitution*.

Assemblywoman Woodbury:

Would you mind just briefly going back over the difference between internal policy and Executive Branch departmental regulations?

Keith Munro:

A regulation is something that is required to go through the Legislature that provides clarification on existing law. An internal policy is a little looser standard, but it provides guidance to members of the public and administrative agencies on how they are supposed to implement the regulations and statutes.

Chairwoman Benitez-Thompson:

Before we move forward with testimony, would you like to address the amendment you are bringing to the bill for clarification ([Exhibit D](#))?

Brett Kandt:

Yes. Just to reiterate, the original draft of the bill made reference to the Nevada System of Higher Education. We felt that any reference to the Nevada System of Higher Education was unnecessary because, under current practice, their internal operations do not follow the policies and procedures in the SAM.

Chairwoman Benitez-Thompson:

That amendment is uploaded to the Nevada Electronic Legislative Information System (NELIS) and is available to all Committee members. Any questions for the bill sponsor on the proposed amendment? [There were none.] Thank you so much for the introductory overview of the bill. At this time, I will go ahead and open testimony in support of this bill. Just to clarify the new Assembly and Committee rules, you support the bill as written with the sponsor's amendments in its entirety. Opposed means even if you support the bill in its spirit, if you have any amendments to it, any changes to it, or any opposition to a specific section, then you are opposed to the bill. Neutral means you are providing purely informational comments and no other type of amendments. You are only here to shed light or share your expertise on the subject. With that, I will take testimony in support of the bill.

Barry Smith, representing the Nevada Press Association:

I am speaking in support of the bill. I would like to draw attention, as Assemblyman Livermore did, to section 7. This is an important addition to the process because it does provide notice and review opportunity for the public well before changes to the SAM are being considered. That is what I wanted to draw attention to and point out to you this morning. I would be happy to answer any questions.

Chairwoman Benitez-Thompson:

Are there any questions for Mr. Smith? [There were none.] Would anyone else wish to come forward in support of the bill? [There was no one.] In that case, I will move to opposition. Is there anyone wishing to testify in opposition to this bill?

Keith Lee, representing Nevada Board of Medical Examiners and Nevada State Contractors Board:

I represent two Title 54 boards, the Nevada State Contractors' Board and the Board of Medical Examiners. We are here in opposition to certain provisions of

section 7. I have expressed our concerns to Mr. Munro. We have been discussing this for the last several days. Should it be the direction of you, Madam Chairwoman, and the Committee, we will continue to work with Mr. Munro to try to resolve some of the differences we have. I think some of the differences are more semantic than they are real, and we are dealing with those.

If I may, Madam Chairwoman, give some brief history about Title 54 boards and commissions. Title 54 is mentioned in section 7, subsection 1, paragraph (a), which will bring Title 54 boards and commissions under the *State Administrative Manual*. Currently under NRS 353.005, Title 54 boards and commissions are exempt from the *State Administrative Manual*. Again, backing up a little bit, Title 54 boards and commissions, particularly the Nevada State Contractors' Board and the State Board of Medical Examiners, are creatures of the Legislature. You all have created them over time. I believe the Nevada State Contractors' Board is probably one of the oldest boards, first adopted in the late '30s or early '40s. At any rate, all of these boards and commissions are non-General Fund agencies. The Nevada State Contractors' Board and the State Board of Medical Examiners do not receive one penny of General Fund money. They are funded entirely and completely by the people they regulate, the licensees. In the case of the Nevada State Contractors' Board, all the licensed contractors in the State of Nevada, all those who apply for a license in the State of Nevada, are the revenue sources for the operation of the Nevada State Contractors' Board. Likewise, with respect to the State Board of Medical Examiners, all the licensees, all the allopathic positions in the State of Nevada who are licensees and who seek licensure, pay an application fee, and then biennial license renewal fees for continuation of their license.

These boards and commissions are responsible for licensing, disciplining, and regulating their respective professions and have been exempt from the *State Administrative Manual* for a number of years. The reason for that is we have a separate kind of an operation from other general state agencies. For instance, if you look at the Table of Contents of the *State Administrative Manual*, it talks about a lot of things that simply are not applicable to the various boards and commissions. For example, the Nevada State Contractors' Board, which again is a creature of the Legislature, has its own separate personnel system. It is not part of the Public Employees' Retirement System, nor is it part of the Public Employees' Benefit System. They have their own retirement, their own benefit system, and a number of other matters.

To address a question that was initially raised by Assemblyman Livermore, we, of course, adopt regulations, but only pursuant to your authority. We can only adopt regulations if you empower us to adopt regulations to further provide for the enforcement of the statutory laws that you give us to work within. Those regulations, and I know Assemblyman Livermore knows because he served on that commission, are fully vetted through the public hearing process at the boards, and then finally come up for final review and approval by the State Legislative Commission.

With respect to policies and procedures, both boards, over time, have adopted policies and procedures regarding the internal operation. Everything from you shall work from 8 to 5 on business days unless you are otherwise exempt. For instance, investigators who are on call. Most often, particularly the Nevada State Contractors' Board, if we hear a complaint, we go out and investigate it, even on weekends. It also provides for other procedures with respect to the use of automobiles for the Nevada State Contractors' Board. We are not part of the motor pool. We have our own automobiles, so we provide for those operations.

I might say, Madam Chairwoman and members of the Committee, with respect to those internal operational policies and procedures, they are, again, vetted by staff through a public hearing and adopted after public hearing and public notice, adopted by the State Board of Medical Examiners for their internal policies and procedures, and by the Nevada State Contractors' Board for their internal policies and procedures. In the rare event where there are some discussions and objections, we deal with those. To my knowledge, and I have checked with both the Nevada State Contractors' Board and the State Board of Medical Examiners, we have received no adverse comments or complaints about the policies and procedures under which we operate. Generally, the policies and procedures under which we operate are internal to the operation of the respective boards that I represent.

Again, we are concerned with the way we read section 7, subsection 1, and perhaps it is an overly broad reading. However, as we read it, the ability to take the policies and procedures that we have adopted over time and that seem to be working, as we have received no complaints and the operation of both the boards are running smoothly, it gives the Board of Examiners the ability to repeal those and begin the process all over again. We think this is unnecessary. Again, reading paragraph (a) of subsection 1, it would appear to bring the boards and commissions under Title 54 under the supervision of the *State Administrative Manual*. We do not think that is necessary because of the unique nature of how we operate, where we receive our funding, and what our responsibilities are. At least as to my two boards, I can assure you that we,

over time, have adopted internal policies and procedures by which we operate and, as I said, they appear to be working. As I said at the beginning, I have expressed our concerns to Mr. Munro and the Attorney General's Office and, with your permission and direction, we will continue to work with Mr. Munro to see if we cannot resolve some of our differences. With that, I will stand for any questions you may have.

Assemblyman Ellison:

Are you going to introduce or submit an amendment to this bill to the Attorney General's Office?

Keith Lee:

We are going to talk about it. I suspect that, yes, we will come forward with an amendment. Hopefully, it will be an amendment to which the Attorney General's Office will agree. We feel we should continue some discussion here to see if we can resolve some of our differences so that we can all be together at this table presenting an amendment, rather than fighting about an amendment.

Assemblyman Daly:

You have state law, you are required to have regulations that go through the NRS Chapter 233B process, and then you conduct your meetings, hearings, and various other things under the Open Meeting Law now. What you are saying, if I understood your testimony correctly, is then you adopt policies and procedures so you can actually do your work and have some guidelines for the employees. You do that through your open meeting process adopted by the board?

Keith Lee:

That is correct. The policies and procedures are adopted in a duly noticed meeting of the Nevada State Contractors' Board and the State Board of Medical Examiners, and with an action item noted for adoption of policies and procedures.

Assemblyman Daly:

Just so I understand, on the Title 54, and I went through and I looked and saw those boards and commissions there, you are saying those are not covered by the *State Administrative Manual*. Maybe you can shed some light. I should have asked this question when the Attorney General's Office was up here. Is there a separate manual, or is there one manual that is uniform for everyone, or do they recognize differences between the Nevada State Contractors' Board, the State Board of Pharmacy, and several other boards, on how they operate and what their needs are for flexibility and work hours, et cetera?

Keith Lee:

I cannot speak as to the other boards and commissions, but as to the State Board of Medical Examiners and the Nevada State Contractors' Board, we have separate manuals of policies and procedures that are available to the public to view if they chose to do so. They are based on the unique nature of what each board and commission is statutorily required to do. To my knowledge, there is not an administrative manual or manual of policy and procedures that is uniformly adopted and applies to all Title 54 boards and commissions.

Assemblyman Oscarson:

As a former President of the Nevada State Board of Podiatry, I understand where you are coming from and what you are saying. Just for the edification of the board, there are different statutes and language that apply to each individual board. That is where that all comes from. It seems to be that the Executive Branch appoints the members of those boards and puts the trust in those members to make decisions based on those appointments. I am interested, too, as you are, as to why that needs to follow under the SAM as opposed to where it currently is and where it seems to be working. There is a rigorous process, open meeting laws, hearings, all those kinds of things, that need to come back to the Legislature, in a lot of instances to change regulations and statutes. We know the Legislature only meets every two years and sometimes that becomes a little more arduous than not, but I see this process right now, unless someone can tell me differently, as working, how the state boards function currently. If there are a lot of complaints somewhere or things that have happened that I am not aware of, I would certainly like them brought to light. I have never seen this SAM and had never heard of it as a board president until today in this meeting. It is interesting to me, and I am very interested in following this very closely.

Keith Lee:

Thank you, Assemblyman Oscarson, for those comments. I neglected to say earlier, and I apologize, NRS Chapter 624 is the chapter you have all developed over time that applies to the Nevada State Contractors' Board. Chapter 630 of the *Nevada Revised Statutes* is the chapter for the statutory scheme for the State Board of Medical Examiners. As Assemblyman Oscarson said, I would invite you to look at them, see the differences between what their responsibilities are and how they do it. I would certainly appreciate and echo Assemblyman Oscarson's comments about the fact it appears to work and appears to have been working for a number of years.

Assemblywoman Bustamante Adams:

Just to stay on that point, the question would actually be directed to Mr. Munro. I would want to know why you would want to include the Title 54

boards under this bill. Perhaps I missed it during your presentation and I am sorry, but if you could just circle back.

Keith Munro:

The Title 54 boards, as Mr. Lee indicated, are working well. This is not brought as a criticism of how the boards are working. We have a manual that has been in effect for decades. Mr. Lee confirmed that. We are trying to provide some legal authority for its continued efficacy. Mr. Lee, in his testimony, missed something pretty fundamental in how government works. The people of this state, in the *Nevada Constitution*, created the State Board of Examiners, and it gave that State Board of Examiners the authority to judge all claims against the state. The State Board of Examiners has constitutional authority. Mr. Lee would not be correct in saying that the State Board of Examiners does not have authority. Also, with the *Nevada Constitution*, the people of this state said the State Board of Examiners shall have jurisdiction on all other matters that the Legislature gives it authority. The State Board of Examiners does have authority with respect to issues as to Title 54. Now if Mr. Lee wants to try to amend Title 54 boards out of this bill, that would be fine. But they do interact with the Board of Examiners. What we are trying to do is provide some sunshine and clarification for citizens and some authority on how they are interacting with boards, agencies, departments, and citizens. That is our goal here. Mr. Lee was correct; we have known each other a long time. We want to work through this and get this right. We will work with your legal counsel to make it clear. The State Board of Examiners was created by the people of this state in the *Constitution*, so it does have authority with respect to Title 54 boards, and any other matters that the Legislature has brought to the authority of this board.

Keith Lee:

I do not believe I indicated, or certainly did not intend to indicate, that the Board of Examiners does not have jurisdiction over Title 54. I stated that under NRS 353.005, the boards and commissions are exempt from the State Financial Administrations Act. That is where, as I understand it, the *State Administrative Manual* comes from. Clearly, we respect and honor the fact that the Board of Examiners has jurisdiction over any state board or agency and do not deny that for a moment.

Assemblyman Oscarson:

Mr. Munro, thank you for your presentation earlier. Can you tell me how many times the Board of Examiners has had to investigate or interact with boards and commissions regarding issues they may have had throughout the years? I know you keep referring to this 30-year number.

Keith Munro:

As far as investigations, my understanding is zero. So the intent is not to give the Board of Examiners any investigative authority over boards. The Board of Examiners meets on a monthly basis. I think it would be fair to say that contracts, claims, and things of that nature, that regularly come before that board, are Title 54 matters.

Keith Lee:

I do not disagree with that statement at all.

Chairwoman Benitez-Thompson:

Ms. Laxalt, would you like to testify in opposition, as well?

Neena Laxalt, representing Nevada State Board of Massage Therapists, Nevada State Board of Veterinary Medical Examiners, State of Nevada Board of Dispensing Opticians, and Nevada State Board of Psychological Examiners:

I represent four boards and I think everything I would have to say I have marked off my list. There is a reason I let Mr. Lee go before me. I will just simply say that we have committed to the Attorney General's staff and Mr. Munro, and we will work with them. We also believe that the bill, as written, has more far-reaching consequences than what we are seeing as their intent. With that, I would be happy to answer any questions.

Assemblyman Daly:

What the bill is proposing is actually more stringent, longer periods for advertising, et cetera, than even the Open Meeting Law has for approval for the things you are doing, as I asked Mr. Lee earlier. Do you agree to do that, except under your normal procedure?

Neena Laxalt:

The boards all follow Open Meeting Law, so as far as bringing sunshine into this process, I have to say we go through the same process that all public boards or commissions or any public entity has to go through. We should not delay the process or have an extra step that is not required. As far as we are concerned, it is already an open process. Everything is vetted thoroughly through the public and then brought before the Legislature to again be brought into the open through another public process and vetted again. I hope that answers your question.

Assemblyman Livermore:

Two years ago, when the Governor was first elected, he formed a task force to review regulations and oversights. Would they preclude his authority to do

something like that? What regulations would the Governor have on day-to-day operations of state departments? I do not know if you can answer that or if that is a question Mr. Munro can answer?

Keith Munro:

I am not sure that I am following the question. However, this bill does not speak as to the Governor. We are not here today to speak on anything with respect to him. We are here today to speak about the Board of Examiners and how that operates. We have tried to work with legislative staff to provide some clarification on the *State Administrative Manual* and how it works. To the extent there may be some issues as it may be too stringent, we want to work through those. We want to have a process that works and works well.

Assemblyman Oscarson:

Can you tell me who sits on the Board of Examiners?

Keith Munro:

The Board of Examiners, by the *Nevada Constitution*, is the Governor, the Secretary of State, and the Attorney General.

Chairwoman Benitez-Thompson:

Is there anyone else wishing to testify in opposition to this bill?

James L. Wadhams, representing State Board of Architecture, Interior Design, and Residential Design:

I will simply add my support for the comments made by Mr. Lee and offer to work with the Attorney General to find the possibility of an amendment. I would be happy to answer any questions.

Tonja Brown, Private Citizen, Carson City, Nevada:

I am an advocate for the inmates and an advocate for the innocent. We oppose anything to do with the Open Meeting Law and any new bills they want to present. We believe they are going to try to circumvent this into other areas, including Assembly Bill 65 and one that will come up as Senate Bill 39, which is the homeland security bill. They all intertwine with one another and they are violating Open Meeting Law. The Board of Prison Commissioners is violating the Open Meeting Law by claiming confidentiality in court documents that expose things that were going on within the Nevada Department of Corrections (NDOC). This came out of a settlement agreement that I had reached with the State of Nevada last year. Anything dealing with the Open Meeting Law I oppose and I will bring more information under A.B. 65.

Assemblyman Munford:

In A.B. 65, where is the violation in terms of the Open Meeting Law?

Chairwoman Benitez-Thompson:

Will this be testimony specific to A.B. 65?

Tonja Brown:

Well it is to A.B. 65, but it is dealing with everything they are asking for. I went through and I have looked at some of these things in the NRS. They are going after any and all boards and committees. If you pass one, there is another one that is going to come along, so it really will not matter if you pass or kill one bill, it is going to come up in another bill.

Chairwoman Benitez-Thompson:

I just want to make sure we get the testimony in the right spot for the legislative record.

Tonja Brown:

During a wrongful death suit, newly discovered evidence came out of discovery. This would affect the Legislature. I do not know if you are aware of the computer glitch that came out. The Assembly Judiciary Committee is going to be receiving the audit from LCB. This was information that came out of a deposition and came out of prison records. It was hidden from 2007. It put false felony charges in the inmates' files. I tried to present this documentation at the Board of Prison Commissioners' meeting. It was a part of the settlement agreement that these documents were not confidential. However, the Board of Prison Commissioners is claiming confidentiality due to the settlement agreement, which it is not. If you go to the Board of Prison Commissioners' meeting, December 5, 2011, you will see they put a clause there claiming confidentiality. They are violating the Open Meeting Law, and they are also violating my free speech. I believe any and all of these Open Meeting Laws should be killed and not proceed forward because this is another avenue for the Attorney General's Office to circumvent laws. I think we need to just keep them the way they are and make no changes. I will get into this a little later on.

Chairwoman Benitez-Thompson:

Is there anyone else wishing to put testimony on the record in opposition? [There was no one.] We will move on to neutral. Seeing none, I will close the hearing on Assembly Bill 16 and open the hearing on Assembly Bill 31.

**Assembly Bill 31: Revises various provisions relating to public records.
(BDR 19-211)**

Keith Munro, Assistant Attorney General, Office of the Attorney General:

With me is Jeff Kintop from the Division of State Library and Archives. Mr. Kintop's office contacted our office to see whether they could join forces with us on this legislation. I believe they have a proposed friendly amendment to the legislation, as well.

This bill proposes changes to NRS Chapter 239, the Nevada Public Records Law ([Exhibit E](#)). The intent of this legislation is to provide procedures for members of the public seeking access to records and for agencies responding to public records requests in a timely, consistent, and efficient manner ([Exhibit F](#)).

There is a lot of confusion for both citizens and government agencies when dealing with the Public Records Act. Sometimes it has resulted in litigation, which can be costly and time-consuming, and defeats the purpose of the act. For example, recently in the Reno newspaper case against a former governor [*Reno Newspapers, Inc. v. Gibbons* 266 P.3d 623 (2011)], the litigation took four years. That was a substantial use of court time and state resources. Both public agencies and the public should have better clarity as to the process. Disagreements should not be left to expensive litigation.

Our office has brought this bill because there needs to be a process that everyone has a better understanding of. Coming to you, the Legislature, our state policy makers, is an available avenue to bring some clarity to the situation. We think there should be some dialogue on the Public Records Act. I will give you an example. There is not a definition as to what a "public record" actually is in the Public Records Act. Imagine that. We have a public records law, but not a definition as to what a "public record" is. I am here today with this bill because I think we need to start some dialogue.

Under existing law, all public books and records of a governmental entity, the contents of which are not otherwise declared to be confidential, are required to be open at all times during office hours for inspection and copying by the public. This bill, this proposed legislation, does nothing to change that, nor is it intending to change any of that. There should remain a presumption of openness and this legislation should not be read, construed, or interpreted to change any of that.

Section 1 requires the head of each agency, bureau, board, commission, department, division, or any other unit of the Executive Department of state government to designate one or more of its employees to act as a records

manager for the agency, who will be responsible to the public for handling a request for public records of that agency. We received a request from the Division of State Library and Archives saying that instead of using the term "records manager" that we use the words "records official." We offered that amendment ([Exhibit G](#)) and it seems to be pretty reasonable.

Section 1 requires the Office of the Attorney General to prescribe the form to be used for requesting a public record from an agency, the form to be used by an agency to respond to such a request, and the procedures to be followed by records managers to respond to requests. These forms and procedures will go through the traditional regulation process so that the Legislative Commission will have final approval as to the process. This will be a default procedure. An agency may choose to develop its own form or procedure. But an agency choosing to use the forms and procedures approved by the Legislature, will know they are handling a public records request in an appropriate manner. They will be in a safe harbor ([Exhibit G](#)).

Section 1 further requires that each agency must make the forms and procedures available on the agency's website, so the public knows how they are handling public records requests. The Division of State Library and Archives requested that they be included with the Office of the Attorney General in being charged with developing this form and a procedure. We offered that amendment as well ([Exhibit G](#)). It seems pretty reasonable. Some agencies should develop a form that can be used. I will be honest with you, our office would be fine if another agency were substituted for developing the form and procedure. But we are willing to step up and address the problem. We are glad that Library and Archives is stepping up with us.

Section 3 codifies with NRS 390.010 a list of all existing statutory exceptions to the Public Records Act, so that everyone in the public knows where they are and where to find them. There are a number of exceptions to the Public Records Act that appear throughout the *Nevada Revised Statutes* (NRS). We propose that legislative staff compile them in one place within the NRS so that it is clearly set forth which public records have been declared by the Legislature to be confidential. These exceptions should be listed in one place, rather than having them strewn throughout 700 chapters in the NRS. If you note, there are quite a lot of them. We thank Legislative Counsel Bureau (LCB) staff for its diligence in finding all the ones that they did. I had our staff print it out. It looks like a phone book.

When we were looking at this bill in the last couple of days, we noted a couple of omissions that we would like to be amended into the bill, that are existing law and should have been in this list. We did not intentionally leave any

existing out, and if we missed any, we are happy for anyone to identify them. A couple of them we found we missed are NRS 1A.110, NRS 287.0438, and NRS 286.110. We previously provided that to this Committee ([Exhibit H](#)).

The rest of section 3 and section 4 codifies a common law balancing test by which governmental entities determine whether to disclose certain books and records of the entity. It also codifies the requirements set forth by the Nevada Supreme Court as to what an agency should do when denying a request. We believe working with legislative staff that these are taken from existing precedent of the Nevada Supreme Court.

Prior to this session, our office met with Mr. Smith from the Nevada Press Association, who testified earlier, regarding improving the public records process. We have worked with Mr. Smith on this process, concept, and this legislation. He expressed some disagreement as to the Nevada Supreme Court holding set forth in section 3 and section 4. In light of this disagreement, we will propose the deletion of these portions of the legislation ([Exhibit F](#)). We want to tackle all the things we can agree upon and do not wish to defeat the opportunity for clarifying the exceptions, hopefully beginning to develop a process for handling these matters. We will continue to advise state executive officers and agencies in conformance with Nevada Supreme Court holdings.

That will conclude my presentation. I will be happy to answer any questions.

Chairwoman Benitez-Thompson:

You held up what you referenced was the bible of Open Meeting Law statute. That was just handed out to the Committee ([Exhibit E](#)). Thank you so much to Committee staff, especially Bonnie Hoffecker, who was back there working a copy machine for the past 30 to 40 minutes. I just want to make sure, as we walk through the legislation, we do not get sidelined about debates of the merits of each one of these NRS. They have been contemplated by the Legislature, passed by the Legislature, but certainly we will welcome the comments about whether or not they should be included or excluded. I just do not want to get into the merits of each one of these specific statutes cited.

With that, I am open for questions from the Committee.

Assemblywoman Neal:

I have three questions in section 4. Your amendment deletes the entire section. You stated it would be better to delete the section for clarity. I assume, in deleting this section, you now want everyone to read the Supreme Court Case, *Reno Newspapers v. Gibbons* 266 P.3d 623 (2011). In the original bill, you had

actually deleted one of the provisions that were in the case, which was a citation to the specific statute that must be in the form. So now we are going to read the case? Is that how we are going to work out issues now?

Keith Munro:

We are reading the case already. We have no process. We want to get a process and get that ball rolling. We think by coming to this body and asking agencies to identify who is going to handle this, will get the ball rolling. I noted there were some fiscal notes by agencies and I thought to myself, this is something you are already supposed to be doing. You are putting a fiscal note for something you are already supposed to be doing. What we want them to do is start getting a process together, because we are serving the public. Agencies develop a few people with some expertise. If someone is out or on sick leave, who is going to do these things for you so the public will know who to deal with it?

I had the privilege of talking with Assemblyman Daly before. I worked with Assemblyman Daly before he was an assemblyman, when he was just Skip Daly with the unions. He confided to me he will go to an agency now that he is an assemblyman and someone will say, who are you? What do you want this stuff for? No. We should not have that. We want to take some baby steps.

Assemblywoman Neal:

Okay. My second question is regarding your adding a section in NRS 378.290, which directly relates to the archivist duties under the Governor's records. We just had this bill yesterday, Assembly Bill 45, which said they now want access to things that are privileged and confidential. Now you just took a section of their area and you made it confidential.

Keith Munro:

I do not believe we did that. We are not trying to change, as the Chairwoman said, any existing confidential statutes that have been passed by this body. As I noted in my testimony, no one has stepped up and said we need to establish a process. We are stepping up because we do not have one. When Library and Archives, which deals with records, said we want to help you, we said come on into the rowboat.

Assemblywoman Neal:

Okay, maybe I was confused. I thought section 3 added exemptions of what was now going to be considered confidential so the public could be clear on what is now privileged and confidential.

Keith Munro:

I am looking at the section. Tell me exactly what you are looking at.

Assemblywoman Neal:

It is on page 4, line 27. It is the fifth NRS in that line, NRS 378.290

Keith Munro:

I will be honest with you. We relied upon your staff to identify all the existing confidential statutes. I did not go through and pull all these myself. To the extent there is a mistake about existing law in here, we are open to fixing that.

Assemblyman Elliot Anderson:

I just wanted to let the Committee know, when I was reviewing this bill on Sunday, I reached out to the Attorney General's Office and then to our own Legal staff. They provided me with a listing of all the statutes listed in section 3, and also a brief description, so we have a better idea of what all of those citations are. I did pull up a few of them. I was not clear as to exactly how they figured out all these things. They do not exactly say explicitly in each individual statute, that it is exempt from the open records law. They have different verbiage about confidentiality. That was sort of confusing. I took this document and sent it around, so now it is going to be on the Nevada Electronic Legislative Information System (NELIS) so the public and everyone else can see it so we have more of an idea of what is out there ([Exhibit I](#)). To look through that many citations is a lot of legwork. Since Legal had already done that legwork, they were kind enough to put that in a table for all of us to look at. I wanted to make the Committee aware of that for our deliberations, because I think it will help. It has helped me get a better handle on this bill.

Secondly, I just wanted to clarify that your amendment is to get rid of the balancing test. To be clear, that is already current case law, right? I did review the case law on the matter and the balancing test is nearly identical, if not exactly the same, to what you have now taken out. We are removing an amendment, but it is still law. Is that correct?

Keith Munro:

We tried to make it very clear based on the case. With all Supreme Court cases, there can always be quibbling as to what that really means. It proves the point on why we need to bring this bill. We need to have a dialogue about this issue. I was shocked at how many exceptions we have. One of the persons in the audience, Andrea Engleman, made the suggestion to put the title to each of those statutes. We would be fine with that. The answer to your question is yes, it is existing law, but it is Supreme Court law. That is difficult

to understand. What we want to do is start making the process of public records in the statute that the Legislature has approved.

As Assemblywoman Neal was indicating, or I think she may have been indicating, to go on one fell swoop. I am not sure we can get it done in one fell swoop. We think it is best to get the ball rolling and get it started.

Assemblyman Oscarson:

I also had the chance to review a little bit and talked to Mr. Kandt about it, and I made a phone call earlier this week. I see this as an opportunity, in respect to boards and commissions because that is where my experience is, to really clear up some things when it comes to records requests. That is one of the things that happens with boards and commissions, sometimes there is some ambiguity as to how that should happen and what should happen. I applaud the effort to have you appoint someone to do that. We also discussed the forms and how that would work. Your offer to put together a form for some of the smaller boards and commissions, I think, would be appreciated. When that is standardized, it would be blessed by you, so to speak, and would work for the public. I appreciated the opportunity to have visited with you about this and I think this is good stuff.

Assemblyman Livermore:

I have to say, gentlemen, after I read this it gives me the idea of putting the Office of the Attorney General in charge of public records. Maybe that is the right place, but I am not sure. I always assumed the Archives was the right place for it. As we develop this form, I am hoping that we have concern for the public's ability to pay for records that are available to them. I can imagine an individual trying to seek documents and being asked to pay \$4 a page. I would hope we have concerns for the public and have a reasonable ability to recover whatever your department costs might be. That is not part of the discussion, but I just want to put that on the record. I have concerns about how the public will pay and obtain these records.

Keith Munro:

Assemblyman Livermore, we view ourselves as problem-solvers and we have seen a problem here. To the extent you want to kick us out of the process, you can, because it is going to be a tough one. But someone had to step up. We are appreciative of Library and Archives saying they need to be in there too. If LCB wants to step up and develop the form, that would be good.

Jeffrey M. Kintop, State Archivist, Nevada State Library and Archives:

We inserted the State Library and Archives administrator in this proposed statute because it has the authority to create regulations regarding public

records and records management under NRS 378.255. That is why we are in this with the Attorney General, because we can say how records are managed and how long they need to be kept, but we have no enforcement or legal guidance in what records need to be released. We can help develop a methodology as to how these things are considered and how they are answered.

Keith Munro:

If we see some fiscal notes where people merely identify someone to handle the records, which is something they should already be doing, if we had put some other agency in there to do it, we would have seen a fiscal note this big and it would have killed our bill. So we put our name in there, but we think someone should step in.

Assemblyman Livermore:

If records could be obtained digitally and printed at home, that might relieve some of the fiscal note. Let me just say, I have had constituents who have contacted me about going down to the local recorder's office and having to pay \$2 per page for a Deed of Trust. That does not sit well when you have someone who is asked to pay perhaps hundreds of dollars.

Keith Munro:

As you know, the process goes through the Legislative Commission that you sit on. You may have a chance to put something in there on that.

Assemblyman Daly:

You are proposing to take out the parts that cause me the most concern. I have spoken with former Senator Terry Care and I asked him to give me the case because I would like to read about how we got to the balancing test anyway. I know my colleagues from southern Nevada say that is the current law under the Supreme Court. I want to read the case because I cannot, for the life of me, figure that out. The law is clear. Unless it is otherwise declared to be confidential, it is not confidential. A couple of other questions, and I would hope that we can clarify the law, because that court case would be rendered moot if we changed the law and made it more clear. Then that would not be the law anymore. I do not like it when the courts make law. That is my opinion.

Just to clarify one thing, too, if you will indulge, Madam Chairwoman, I am still just regular Skip Daly. For the record, I make it very clear when I am talking to someone as a legislator, in my regular working position, or just as a citizen. I always make that very clear.

Can you explain further why you add in the definition of what a state board is, et cetera, but you exclude the Nevada System of Higher Education? We do not want there to be any confusion that someone would claim they are not required to comply with NRS Chapter 239. Also, in NRS Chapter 239, we are trying to set up a person within each agency to be the record controller, take the requests, et cetera. I know from previous legislation about putting it in writing or you cannot ask for it. They have to respond within five days. If they deny it, they have to provide you with the law that denies it, et cetera. We also have another provision that I was just trying to look it up, but I did not get to it in time. I believe it is NRS 239.010 that says these records are open during business hours for public inspection and you do not have to make a written form. You do not have to do all this stuff. I would like you to shed a little light on the form, the process, and the regulations that you are going to try to propose to accomplish some of that. I do not want to make it a harder process. If you are there, the documents are there and it is open to the public. You should be able to go there, look at it, and have no charge because you do not want to make a copy of it. Is that still going to be in place and not changed by your deal? Of course, then we have to educate people that they have to do that, but that is another story.

Keith Munro:

That is explicitly why we put in here that the Legislative Commission will approve that procedure, so you will have the ability to ensure that your statutes continue to be enforced.

With respect to the Nevada System of Higher Education and local governments and why we did not include them in this bill, we were not looking for any fights or any more fiscal notes. We think if we start with Executive Branch agencies, that is a good start. We are hopeful that if this bill passes, in subsequent legislative sessions some of those entities may step forward and say, well we have identified a records officer; we have some forms. Hopefully, that form will be approved by the Legislative Commission.

As to the Supreme Court case and how those came into effect, the Legislature sets the law in this state. However, there has been a vacuum when the law is not clear and the Supreme Court has stepped in. This body has not stepped forward and said, we are putting forth our opinion as to what we meant in the Public Records Act. If you recall in my testimony, I said this Committee is an avenue for solving these problems without expensive litigation. That is why we brought this bill, to empower this Committee to put its thumbprint on the Public Records Act, to make sure it has more clarity, more openness, and that it works better. We are provided, at the end of the day, a big catcher's mitt, the Legislative Commission, to approve all that.

Assemblyman Daly:

I know. I am not arguing with you, Mr. Munro. I presume there was a public records request and someone used whatever discretion they thought they had, denied it, and then there was a case that came from that, and the court put in a balancing test. I guess we can restate it and I will work to do that. I do not know how much clearer you can be. Unless it is declared otherwise by statute to be confidential, it is not. I do not know how clear you can be. I do not know why the court came in and said they had any authority to make any determination, other than what we have already said. So how they did that is why I want to read the court case. I understand we are saying we just wanted it cleared up so that no one could say the Nevada System of Higher Education, because we did not define them as a state agency for the purposes of this, that they do not have to comply with NRS Chapter 239. I just wanted to make that clear.

Keith Munro:

We are not saying that, and I do not believe they would say that either.

Assemblyman Livermore:

If a record is denied for process of an individual, does that mean you need to hire an attorney and go to court to get the record, or is that process for review?

Keith Munro:

I believe the process now is if the record is denied, go to court.

Assemblyman Livermore:

That is my point. I am not sure the general public may understand that or have the means and the way to accomplish that. I would suggest perhaps you have an avenue of review.

Keith Munro:

The procedure is adopted in the Committee you sit on.

Assemblyman Livermore:

I will do that.

Chairwoman Benitez-Thompson:

Mr. Munro, did you cover all of your amendments? They are currently available on NELIS.

Keith Munro:

I believe I did. I want to thank the Chairwoman for the opportunity.

Chairwoman Benitez-Thompson:

We will open it up for testimony in support of the bill. Once again, for clarification, support is classified as supporting the bill with amendments from the bill's sponsors, as presented just now to the Committee.

James R. Wells, Executive Officer, Public Employees' Benefits Program:

I am here in support of this bill because I believe a standardized process for a public records request would be very beneficial to state agencies. Coming from several state agencies that have had to create their own process, it would be much easier if there were a standardized process that had already gone through the format and provided us with the necessary tools, without us having to recreate the wheel, so to speak. I am very appreciative of the Office of the Attorney General adding our public records exception in NRS 287.0438, which does exclude the files of our individual members from the public records documents. We wanted to make sure that was included in the list in section 3. I am pleased that the Attorney General has amended that. I would be happy to answer any questions.

Barry Smith, representing the Nevada Press Association:

I am in favor of A.B. 31 with the amendments proposed just now by the Office of the Attorney General. I very much appreciate working with Mr. Munro on some of these issues. Just in the discussion that I have heard so far, you get an inkling of some of the problems that we run into from the point of view of a reporter or the public in general. How do I make a records request? You can make it pretty much as simple as you want to, with an email, a written notice, or so on. From the other end, how does an agency respond to a records request? Either they have no established procedure or the procedures are all over the map. We thought it would be a good idea to try and bring some order to the process so people would know what to expect on either end. As it was pointed out, the recourse is to go to court. If we can solve some of these problems, I think the approach is to do it incrementally, do what we can agree on to get it accomplished, to improve the process without going to court. There are a lot of good ideas that have come up, intermediary steps, other offices being involved, and so on. We thought we would approach it with what we can get accomplished. Again, the section that lists all those exemptions, it is kind of frightening, but it was even more frightening to think, as Mr. Munro pointed out, that those were just scattered throughout the statutes. Anytime someone asks if that was an open record, my opinion was they should be gathered under the open records section so you could check. If there is an exemption right there, I can read it and find out.

The discussion over the balancing test and the Supreme Court's ruling is an excellent one. We could go on for hours because we have a different

interpretation than some of the state agencies do over what that ruling said and how it is interpreted. We are not going to get into that, but it is certainly a discussion that this Legislature needs to have and should address. It is one of the key issues with the records law.

I will conclude, because most of what I wanted to say has been covered. I would be glad to answer any questions.

Assemblyman Ellison:

Do you think the amendment with the caveat can help bring this bill together?

Barry Smith:

With the amendments, yes. I had some concerns with some of the language that was in there and how that might be interpreted. We are not going to argue over those.

Assemblyman Ellison:

I agree.

Assemblyman Elliot Anderson:

It is good to see you Mr. Smith. I wanted to get into your opposition to that balancing test. I am assuming you were opposed to that originally. I have not really quite understood the opposition because we are not putting our own spin on it. Literally, the Digest says, which I think is the best expression of legislative intent, we are just codifying the standard. We are not putting our own spin on it. Either way it is law and we are simply putting it in the statutes so it is more visible for your average person. It creates that standard that you do not have to be legally trained to understand. I am a little confused about the opposition because the case law that we are codifying is relatively favorable for open records advocates. We all know the story behind the latest case in the line of authority. I was just wondering why that was a stumbling block for you?

Barry Smith:

Quickly, what the disagreement is, is the court talks about a balancing test and applying a balancing test. I think the basic disagreement is over who applies that balancing test. In one reading of the court opinion, and there are two or three that mention it so I would encourage you to go ahead and study it, the court applied a balancing test. The disagreement that we have is that administrative agencies would apply a balancing test. That is a huge gulf in the interpretation of what that ruling said. That is why we are not going there.

Assemblyman Elliot Anderson:

I understand that the administrative agencies will always be the first to interpret it, because they are always going to be first requesting public records from an administrative agency. You are not going to be going to the court first. You are going to try to get the record and if you do not get the record, then you would file a suit, as was done in the previous string of cases. It is what it is. Because if you have agreed to take it out, then it is what it is. It just did not make any sense to me when I read the case law over the weekend. It appeared to be a pretty favorable standard. I will leave it at that.

Jennifer DiMarzio-Gaynor, representing the Nevada Press Association:

I would like to add an extra comment to Assemblyman Anderson's question. Not only is there disagreement over who is doing the balancing test, but I think Assemblyman Daly said it best. Right now, the law is fairly clear that unless there is a statute or legal authority that makes something confidential, it is a public record. I do not think it can get any clearer than that. To codify the Supreme Court decision would basically give the agencies statutory authority to do their own balancing test, and it adds a lot of gray area. We appreciate that the Office of the Attorney General has agreed with us to take this language out because we think it muddled the waters more than it added clarity. Thank you.

Chairwoman Benitez-Thompson:

Would you like to officially make your statement?

Jennifer DiMarzio-Gaynor:

As Barry Smith said, we support this bill with these amendments, in particular that amendment. It is very important to us.

Tonja Brown, Private Citizen, Carson City, Nevada:

I would actually like to see an amendment to this that has not been brought up. I would like to see all state and federal courts deem what is confidential and what is public record when it pertains to inmates and the public records. As an example, I have seen litigation over the years with Nevada Department of Corrections (NDOC) inmates in which they will successfully litigate and win against the state. The Office of the Attorney General will take those documents and keep them confidential. They are not confidential. If another inmate comes up with another similar lawsuit or they are not in compliance with that ruling, the inmates are not allowed to have any other information dealing with inmates. It is basically costing the taxpayers even more money to go with ongoing litigation that has already been decided because the inmates do not know. It needs to be public record.

Again, with the confidentiality thing, like I said, in this wrongful death suit that I have, the courts deemed what was public record and the majority of it was public record. I took it over to the Board of Prison Commissioners on December 5, 2011. It has been 14 months. They still have not placed those public records on the public website. However, I have taken those same exact documents to the Advisory Commission on the Administration of Justice. It was not a problem having them confidential. There are issues here. I think if we just outline what it is and get the courts, state and federal, because you have a case, whatever the case is, it says these are confidential then they will remain confidential. Do not leave it up to the boards to use that discretion because they will deem them fit, just like the Board of Prison Commissioners and the Office of the Attorney General are doing with my public records—claiming confidentiality when they are not, violating the Open Meeting Law, and violating my free speech.

Again, on behalf of the inmates, they should be a part of this because we, as taxpayers, are paying for this litigation. They are being totally excluded from any of this. I would like to state that years ago, there were members of our Legislature who asked the Attorney General's Office how much money we have spent in litigation against NDOC inmates. Millions and millions of dollars are spent in litigation and they cannot account for how much money is being spent. I think an audit of the Attorney General's Office should be conducted to find out how many millions of taxpayers' dollars we are spending to file the same type of suits. Religion is a prime example. They win, they win, and they do not conform with it. Thank you.

Chairwoman Benitez-Thompson:

Are there any questions? [There were none.] Is there anyone else wishing to testify in support of the bill as written and as amended by the bill's sponsor? [There was no one.] We will move to those who oppose the bill. Anyone who is bringing an amendment that is not supported by the bill's sponsor or who has any problem with any section of the bill, please come forward and state your name for the record.

Jack Mallory, representing International Union of Painters and Allied Trades, District Council 15, Southern Nevada Building and Construction Trades Council:

I will try to keep my comments brief because many of the comments have been made by members of the Committee, including Assemblyman Daly, Assemblywoman Neal, Assemblyman Livermore, and others, who I tend to agree with. As stated by Assemblyman Anderson, and particularly Assemblyman Daly, I think it is this body's opportunity to clarify the law, as far as how it is the governmental agency can actually state that a record is

confidential. By punting, if you will, and removing the originally proposed language, to which we were opposed to begin with, and relying on the standard that was established by the Supreme Court and the guidance that was given regarding this, I honestly think that going either way with it, you are going to create a more litigious situation. As has been stated, governmental agencies, whether they are at the executive level or the local government level, arbitrarily decide, on a regular basis, what they think is and is not confidential records and either choose to disclose or not disclose, accordingly. I view this, on behalf of those that I represent, as an opportunity for the Legislature to clearly delineate not only what records would potentially be deemed to be confidential, but also a process for determining prospectively what records could be deemed confidential moving forward.

Chairwoman Benitez-Thompson:

Are there any questions for Mr. Mallory? [There were none.] Just for clarification, you are standing in opposition to the amendment presented by the bill's sponsor?

Jack Mallory:

Correct, and that portion of section 3 of the bill as originally drafted.

Chairwoman Benitez-Thompson:

Section 3 as originally drafted and then the amendment?

Jack Mallory:

The amendment that has been offered by the Office of the Attorney General, which deleted that section that they had proposed to be inserted into statute.

Chairwoman Benitez-Thompson:

So opposition to how it was originally drafted and opposition to the amendment on that section as well?

Jack Mallory:

Correct.

Chairwoman Benitez-Thompson:

Are there any questions? [There were none.]

Andrea Engleman, Private Citizen, Carson City, Nevada:

If I might, Madam Chairwoman, give a little background. I have been at the Legislature every session since 1981. In 1983, I went to work for the Nevada Press Association as their Executive Director. I will be testifying on the open

meeting bill also. Many of these issues occurred while I was Executive Director of the Nevada Press Association.

The Donrey case, *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990) was one where the newspapers sued to get information which had previously been confidential. The court chastised us in a way, sort of slapping the hand of the press, by saying there is no definition of a public record and because there is no definition of a public record, here is what we are going to do. We are going to open up these records, but there is a balancing test that the courts should be doing. Evan Wallach, who was our attorney at the time, explained that only judges, only courts, were supposed to be doing the balancing test, not an executive branch agency, a local government, or anyone else.

I do support the amendments that were proposed by the Attorney General's Office. We think that is a movement forward.

One of the things you should know is that in 1991-92, there was an interim study done. Then Assembly Majority Leader Gene Porter brought that study and we studied public records. In 1993, we came back to the Legislature with a proposed definition of public records. The day we held the hearing, my attorney, myself, and Assemblyman Porter, walked into a room that had, we found later, 140 public employees objecting to the definition and the law did not pass in that session. I think the teachers' association was most concerned that personnel records would become open and so forth, under that definition. Assemblyman Porter said going after public records is really tough, because you have to balance the public's right to know, government's desire to keep some things confidential, and the public's right to privacy. It is a delicate balancing test and we need a definition. I am more than happy to sit and work with the Attorney General and with Barry Smith, who does a fantastic job now running the Nevada Press Association, and others to perhaps come up with a definition of a public record.

Yes, we need a process, but I am worried about these forms. Right now to do an Open Meeting Law complaint, they make you use a form and the form does not always fit the complaint. A lot of times, I will just write "see attached" at the top of the form. Not everyone has a computer, particularly senior citizens who are used to walking in and getting public records in some places. Suddenly, they are going to have to find a form that they have to fill out first in order to get access. Then, in some cases, if they cannot print it out, someone else will print it out and then charge them \$1 for providing a form to them. I am a little concerned about that process, and I am concerned about it being in the Executive Branch, because next we will have local governments come in

and say now we need to have some process for us. I am concerned about that. I am happy to work with them to see if we can come up with something else.

Chairwoman Benitez-Thompson:

Are there any questions? Is there any further testimony in opposition?

Tonja Brown:

Section 4, subsection 1, paragraph (d), subparagraph (2) of [Assembly Bill 31](#):

General factual description of the public book record . . . and a specific explanation for the denial of the request unless the government entity demonstrates that the person requesting the public book or record has sufficient information to meaningfully contest the claim of confidentiality of the public book or record by the governmental entity without such a description and explanation.

They will use this every single time that an inmate requests a case that another inmate has won, costing the taxpayers even more money. Personally, as far as the inmates would go, they would oppose this bill. Thank you.

Chairwoman Benitez-Thompson:

Are there any questions from Committee members? I know we have some folks in Las Vegas who want to testify. I just want to provide an opportunity for anyone in Las Vegas who wants to testify on this bill. I believe the person in Las Vegas is signed in as neutral for this bill. I have one more person in Carson City who would like to testify in opposition. After that, we will move to neutral and we will get your testimony.

Philip A. Olsen, representing Civil Rights for Seniors:

I am actually signed in as neutral for the bill, but now that I have heard the clarification, it is more appropriate for me to speak in opposition to the bill, since I am proposing an amendment ([Exhibit J](#)).

I represent Civil Rights for Seniors, a Nevada nonprofit corporation. As its name implies, my client advocates for civil rights for seniors. Civil Rights for Seniors proposes an amendment to A.B. 31 to clarify that the records of the Administrative Office of the Courts (AOC) come within the purview of the Public Records Act. As it currently reads, the Public Records Act applies to the books and records of all governmental entities, which is defined to include all units of government of the state. To me, it is crystal clear that the Public Records Act, as it reads, applies to the records of the AOC. Unfortunately, that fact is not crystal clear to the AOC. The AOC does not permit inspection of its records under the Public Records Act, contending that the Public Records Act has no

application to the Judicial Branch of the government of the State of Nevada. Nor is it clear to the District Court in Carson City that the Public Records Act applies to records of the AOC.

In a recent case in which my client, Civil Rights for Seniors, is the petitioner seeking access to records of the AOC, the District Court held that the Public Records Act has no application to the Judicial Branch of the government of the State of Nevada. This is important to my client, Civil Rights for Seniors, because the AOC is the mediation administrator, designated by the Nevada Supreme Court under the Foreclosure Mediation Law, adopted by the Legislature in 2009.

The mediation administrator has very important powers and, in fact, controls who can and who cannot proceed with a nonjudicial foreclosure in the State of Nevada since no such foreclosure can occur without a certificate issued by the mediation administrator. The mediation administrator issues such certificates based upon information provided to the administrator from foreclosure mediators. The practical effect of the secrecy policy of the mediation administrator is to insulate the AOC as mediation administrator from any public scrutiny with respect to its administration of the foreclosure mediation program, including the all-important decisions made by the AOC as to whether or not an individual or company, a bank, or a lender, can proceed with a nonjudicial foreclosure. This ability to scrutinize the governmental entities of the state is essential to open government in any democratic society. But because of what the AOC seems to think is a loophole in the Public Records Act, the public has no ability to scrutinize the decisions, policies, and actions of the AOC in its capacity as mediation administrator.

I welcomed the comments from Mr. Munro about holding dialogue about the Public Records Act. I would like the record to reflect that my client, Civil Rights for Seniors, wishes to be included in the dialogue.

I will briefly mention, in response to some of the comments made by Assemblyman Daly and Assemblyman Livermore earlier regarding the cost of obtaining public records, Civil Rights for Seniors requested to inspect the records of the mediation administrator. The mediation administrator, as I mentioned, took the position that the records were not subject to public inspection under the Public Records Act. They went on to state that if the court disagreed with us on that point and ordered the records to be subject to public inspection, in other words allowed us to look at the mediation administrator's files, we would be charged a fee of \$940,000 to inspect the records. This is an issue that needs to be addressed and should be part of the dialogue that Mr. Munro proposes.

With that, I will welcome any questions and also offer to meet informally with any members of the Committee at any time.

Assemblywoman Neal:

Did this incident happen before or after the case?

Philip Olsen:

Which incident?

Assemblywoman Neal:

The one with the \$940,000 charge.

Philip Olsen:

In the context of the case, the AOC filed documents with the District Court in Carson City as a Rule 16.1 Disclosure, which was essentially an estimated cost of making the records available, which was \$940,000. To explain a little bit more, the AOC takes the position that the names of those Nevada homeowners who are in foreclosure, whose names are a matter of public record because the Notice of Default and Election to Sell is recorded in the public records office, but who choose to participate in mediation, are confidential. Therefore, in order to allow us to look at the records of the Foreclosure Mediation Program, thousands and thousands of pages of documents would have to be photocopied, at a cost of \$1 per page, and then a clerical person would have to go through those records to cross out the name of everyone whose names were on the records. That would make the records useless to us, because it would be impossible to correlate any single mediator statement with any certificate issued in response to that mediator's statements, since the AOC does not have a case file or docket number system. The only way to correlate the two documents is by the name of the person. That is where the \$940,000 comes from. The AOC routinely charges \$1 per page for any records that they do provide. They did provide us with some of the records we requested and made them available to me in a conference room in the presence of an employee of the AOC. I brought along my own portable scanner to scan the documents that I was interested in. I was informed that under no circumstances might I use my scanner to make copies of those records. If I wished a copy of any record, I was to put a paperclip on it and allow the employee to make a copy. I would be charged \$1 per page. I suggested that perhaps the employee and I could walk downstairs to the Supreme Court Library and make the copies at ten cents per page, because that is what the Supreme Court Library charges for copies. Based on the advice of legal counsel, the employee informed me that under no circumstances would that be permitted.

Chairwoman Benitez-Thompson:

Are there any questions from the Committee? We do have the letter you submitted to us on NELIS. You said specifically that you were going to propose an amendment.

Philip Olsen:

The letter I sent contained a proposed amendment ([Exhibit J](#)). As I looked at the bill more carefully, I realized that there is possibly a better place in the bill to put the amendment. Rather, that would be an additional place to add language, which would amend section 2, subsection 5, paragraph (b), where "Governmental entity" is defined as an institution, board, et cetera, or other unit of government of this state. As it now reads, the bill would add, "including, without limitation, an agency of the Executive Department" I propose to add, and the Administrative Office of the Courts."

Chairwoman Benitez-Thompson:

I think we have that clear for the record now. Thank you so much for your testimony. Thank you for your patience in Las Vegas.

Karen Gray, Education Researcher, Nevada Policy Research Institute:

I am very encouraged by what I heard this morning. I, too, have spoken with Deputy Munro about some concerns with this bill. I believe they have all been removed. However, I do not have a copy of the amendments here with me to know for sure. If I could just read the testimony that I had intended to enter into the record today, in case something comes back as this bill moves forward, it is on the record.

Chairwoman Benitez-Thompson:

Yes, go ahead.

Karen Gray:

For the record, my name is Karen Gray and I am a reporter with *Nevada Journal*, which is published by the Nevada Policy Research Institute. [Ms. Gray continued to read from written text ([Exhibit K](#)).]

Thank you for letting me get that on the record as this bill moves forward.

Chairwoman Benitez-Thompson:

Are there questions from the Committee? [There were none.] Thank you very much. Is there anyone wishing to testify as neutral on this bill?

Marla McDade Williams, Deputy Administrator, Health Division, Department of Health and Human Services:

We are neutral on this bill. We submitted a fiscal note. In my discussion with Mr. Munro prior to the hearing, we understand that the intent was not to impose a new burden on state agencies to hire a staff person for this activity. It just clarifies our existing responsibility. At this time, the fiscal note that we submitted does not apply. I am happy to answer any questions.

Chairwoman Benitez-Thompson:

Are there any questions from the Committee? [There were none.] I thank you for coming and getting that on the record. I appreciate it. Is there anyone else who would like to submit testimony as neutral? Seeing none, I will close the hearing on Assembly Bill 31, and I will open the hearing on Assembly Bill 65.

Assembly Bill 65: Revises various provisions relating to open meetings.
(BDR 19-402)

Keith Munro, Assistant Attorney General, Office of the Attorney General:

With me is Senior Deputy Attorney General, George Taylor, who is our Open Meeting Law Deputy, and Special Deputy Attorney General, Brett Kandt.

Nevada has an Open Meeting Law to promote transparency in government ([Exhibit L](#)). The Legislature sets forth the parameters and guidelines for requiring that governmental meetings be open to the public. The Legislature has designated the Attorney General's Office to enforce the Open Meeting Law. The Office of the Nevada Attorney General enforces the rules that you establish.

I want to start by providing some background on the status of Open Meeting Law complaints. We have provided you our handouts ([Exhibit M](#)). As you can see from the handouts that were provided, since 2000 this office has handled 691 Open Meeting Law complaints, an average of 53 complaints a year—one a week. Between 2007 and 2009, we investigated an average of 49 complaints per year. Thirty-six percent of those complaints filed during each of the years between 2007 and 2009 resulted in a finding of a violation. During the last three years, beginning in January 2010, the Attorney General has investigated 131 complaints, an average of 44 complaints each year, with an average violation rate of 27 percent.

The Open Meeting Law evokes a lot of emotion. As you can tell by all the people in the meeting room, everyone wants open meetings; we are just not really clear on how we get there. It is the Attorney General's objective, with

this legislation, to make the operation of the Open Meeting Law clearer for both public bodies and the public.

I want to start with sections 5 and 6 together. What it means to be present at a meeting for a member of a public body, which has never been statutorily defined. A baseline of what it means to be present needs to be set forth because of emerging technology. Why? There are issues out there whether someone can appear by message board for meetings. We want to make it clear that if you are going to be a member of a public body, you are going to have to be available for the public body to see and hear you.

Section 6 clarifies that a quorum of members may be present in person or by means of electronic communication, such as teleconference or videoconference. Section 5 amends *Nevada Revised Statutes* (NRS) 241.010 to ensure that when a member of a public body participates in a meeting by teleconference or videoconference, the public can hear every member's remarks and follow the discussion in the meeting. Section 6 of this bill also codifies the definition of "deliberate."

The linchpin of the Open Meeting Law is whether a public body is deliberating the public's business. "Deliberate" has never been defined in statute. Section 6 is an effort to codify the definition of "deliberate," which has been set by the Nevada Supreme Court. We just chatted about those issues on Public Records.

I will explain a little bit about the need to define "deliberate." The Open Meeting Law is a criminal provision. You can be found guilty of a crime by not following it. That has been the public policy of this body for many years. "Deliberate" is not defined in the statutes. It would be a difficult, if not impossible, task convicting anyone of a crime when the crux of what a public body cannot do is not defined in the law. The Nevada Supreme Court took the time to provide a definition for "deliberate." We are proposing we work with your staff to take that definition from that court case and put it into statute.

We proposed an amendment ([Exhibit N](#)) to what was in the initial bill. On page 5, line 8, the word "or" should be deleted and substituted with the word "and." We think this correction is in accord with the definition of "deliberate" from *Dewey v. Redevelopment Agency of City of Reno* 119 Nev. 87, 98 (2003).

Once our bill dropped, we got a lot of contact from various governmental entities. We are happy about that. The reason we are happy about that, and there are a lot of differing opinions, is the reason why we need to be here today. We need to make sure the rules are clear. All the differing opinions

show that this body needs to step forward and act. We had Clark County government propose an amendment and I believe they submitted it. We think it is a pretty reasonable amendment. We would like to hear from some other governmental entities, but we think it is pretty reasonable.

Section 7 of the bill is intended to partially improve upon the transparency of an open meeting. Section 7 applies only to the governing body of a city or county whose population is 40,000 or more. Several years ago, the Attorney General began a comprehensive review of the Open Meeting Law, with the assistance of a task force she formed, comprised of members of the public, news media, elected local and state governmental officials, and interest groups. We had pretty lively discussions. Section 7 and 8 have been drafted based upon consensus within the task force. The application of the requirement to upload supporting material should begin with governing bodies of counties and cities greater than 40,000 in population. We are informed these political subdivisions already upload their governing body supporting materials to their website.

We are proposing this change to get the ball rolling. We need to start moving in the direction of having all entities upload their supporting materials before a meeting. Electronically, we are not there yet. With technological progress, we will get there. Other public bodies may voluntarily start uploading supporting materials, but are not required to do so by sections 7 and 8.

Sections 7 and 8 specifically amend NRS 241.020 to require that certain public bodies upload supporting materials to their website at the same time the supporting materials are provided to the members of the public body. There is no intent to require or mandate that once a public body uploads supporting materials, it must then electronically send them to anyone on request.

Subsection 7 does not require electronic transmission of supporting materials and subsection 8 only requires a public body, which is required to upload supporting materials under the amendment found in subsection 7 to inquire of the requestor if he or she would accept an electronic link to the public body's website, where the materials have been uploaded. Current law does not contain a mandatory requirement to send supporting materials to anyone who might request them, nor do we intend, with these amendments, to insert a mandate to do so. This proposed amendment also does not alter the current statutory requirement that a public body must make available, over the counter, before the meeting, a copy of supporting materials upon request to members of the public at no charge.

Section 4 is intended to provide clarity for public bodies and further the goal of ensuring for the public that public bodies take corrective action in full view of

the public. Sometimes, when an issue of an Open Meeting Law violation arises, a public body will want to take corrective action to prevent future entanglement with the Open Meeting Law. Section 4 allows them to do that, but the public body must say on its agenda that a corrective action is necessary so the public knows what has transpired and what is to be corrected under the Open Meeting Law requirements. Also, to encourage public bodies to comply with the Open Meeting Law, any corrective action cannot then be used against a public body in a civil or criminal case as an admission of guilt. It is an opportunity for them to correct a possible error.

Section 3 deals with the designees for members of public bodies. This issue has been interpreted and implemented very differently by public bodies. Legislative guidance is needed. It would be easiest for all involved to pass a law saying there can never be a designee. That would make it clear-cut. There would never be an issue involving designees. However, public bodies do important work, public bodies need quorums, everyone is busy, and people sit on multiple boards. If you do not have a quorum, the public body cannot take action. We understand that some public body members may need to appoint or designate another person to serve on a public body, sometimes temporarily or sometimes permanently. But the guidance is not really clear throughout the NRS as to who and when a member of a public body can appoint a designee to their place on that public body. Quite frankly, the rules are all over the map and that is why we have brought this here today. The statutes on this issue need to clarify and describe the parameters of an appointment and the designee's authority once seated on a public body.

Our proposal sets out five simple, but necessary, requirements. The designation or appointment may not be made unless the public body's creating authority expressly authorizes a designation. The designation has to be in writing. Whether the appointment designation is permanent or temporary must be specified. For any person so designated as a member of that public body for purposes of determining a quorum at a meeting, it must be stated whether that designee is entitled to vote, deliberate, and exercise the same powers as other members of the public body. If anyone has better suggestions for parameters regarding designees, we are all ears, but we need to have parameters.

Turning to section 2, this is similar to our Public Records. This section puts in one place current statutory exceptions for the Open Meeting Law. It is a list to make it easier for members of the public to know what is exempted from the Open Meeting Law. There are no new exceptions here that we are trying to create. We had section 2, subsection 2, paragraph (d) in our bill and we proposed an amendment and submitted it to the Committee ([Exhibit N](#)).

We wanted to try to help further clarify "deliberate," but we think we may have muddled the water by our effort to do that, so we took that out.

That will conclude my testimony. I will be happy to answer any questions.

Assemblyman Daly:

I want to go back to the last thing you just talked about on page 3, lines 10-15, paragraph (d), that you are proposing to take out. You say that it is already an existing exemption. Where does it continue to be exempt if you are taking it out? So you are saying paragraph (d) is already in the law somewhere, that those meetings are exempt?

Keith Munro:

Paragraph (d) is what we were recommending, but we took that out.

Assemblyman Daly:

Those proceedings are not currently exempt, and they will not be exempt with your amendment?

Keith Munro:

Correct.

Assemblyman Daly:

Paragraph (d) was a new proposal?

Keith Munro:

Yes.

Assemblyman Daly:

On the definition of "deliberate," I just want to clarify here, I looked at your definition and you said it is coming from a court case. I am going to read it here: "'Deliberate' means to examine, weigh and reflect upon the reasons for or against the action. The term includes, without limitation, collective discussion and the collective acquisition [of] and exchange of facts preliminary to the ultimate decision."

When I look at that, I think it should be an "or" instead of "and" after discussion. I think if you get together collectively and discuss it, but you do not exchange information, I think you are still violating the Open Meeting Law if you have a quorum. I would say you need to change that "and" to an "or." If you have a discussion without exchanging information, the way it is written, you are not violating the Open Meeting Law. However, once you exchange information

or documentation, then you are violating the Open Meeting Law. I think they are two separate things and it should be an "or."

Keith Munro:

There was a lot of discussion on this. Clark County will present an amendment that we think is pretty reasonable. We suspect we are going to come back with another amendment. We need to have a definition for this. We worked with your staff to get this out of the Supreme Court case and we think your staff did well. There are a lot of different opinions, but we have an Open Meeting Law based on, "you cannot deliberate outside the public," and we cannot even figure out what "deliberate" means. We are trying to do so. As the collective governmental entities talk about it, we will work with you or any member of this Committee, to make sure we have a definition that people have a comfort level with.

Assemblyman Livermore:

I want to congratulate you for at least taking an opportunity to further define the Open Meeting Law. I have served in local government for a number of years. I am thinking about the day-to-day process and how you deliberate, not just between individual board members, but those in charge; the city managers, assistants, and those types of people. How do they request deliberation facts from you? Is it verbal, "What do you think about the new snowplow we bought?" Or "What do you think about having new Christmas decorations?" That creates a matter of consideration. Well, we have a majority for that, and the majority, as innocent as it is, violates the Open Meeting Law. I just want to say that it occurs almost daily. I am aware and I know of those things. Technology still comes around, such as texting. I do not know about how you text and get information, if that is sharable or how the public body gets that. I am not sure. I have not seen in your bill that it speaks toward texting. It may, but I have not found it.

The other thing is that a public body may not designate a person to attend a meeting of a public body in the place of another unless such designation is expressly authorized by the legal authority. I like what you are saying and I like the sentence that says, "Any such designation must be made in writing," which is new. The people I see and represent, just because someone has a conversation with an elected official doesn't mean that body has deliberated to make a finding that they at all have supported this and the county commissioner, chairman, supervisors, mayors, council people, all of them or some of them, are somewhat in tune with the constituents. When they ask you a question such as, "What do you think the council will do on this or that?" and you make a comment, it is assumed to that public mind that there has been a discussion that has taken place. I do not know how you control that. I like

where you are heading with the "in writing." In fact, I had a meeting yesterday on a bill I am going to bring forth here for a constituent of mine. They wanted to inject in it that there was approval from several sitting bodies. I told them no, it is not going to be in the bill because there was no evidence that the conversation or authorization had been granted and it was making assumptions.

I definitely stand for further enforcement of the Open Meeting Law and the transparency that we need here. I compliment you. The devil is in the details and I think that is what we are going to line up here. There will be people who will not support this, probably, but I like where you are heading in this case.

I want to mention the phrase of texting and social media and whether you can draw a conclusion to that when you ask a question about the Christmas tree lights. Maybe it is on a Facebook page or on the website, but people draw conclusions as to where the vote of the body is going to be. The local government budgets and monies are placed in support of something that they thought had gathered the information or intelligence. That is my point.

Keith Munro:

Thank you for your comments.

Chairwoman Benitez-Thompson:

Are there any further questions from the Committee? For the benefit of our Committee secretaries and clarity of the legislative record, if you could refer to the section of the bill your question pertains to, that way we can all find it and they can properly reference it.

Assemblyman Ellison:

I do not know if I was understanding Assemblyman Livermore's question, but I would like to get clarification on page 3, section 3. Would you give us your interpretation of this? This could go into a broad scale in rural areas.

Keith Munro:

It might be good if we put a title on those, but, sir, those are laws that you and your predecessors have already passed. These are the existing laws. We are not adding anything there. I had my staff print out a copy for me ([Exhibit O](#)). It is not quite as big as what we were talking about with Public Records.

Chairwoman Benitez-Thompson:

For the record, I believe Committee members have that available on the Nevada Electronic Legislative Information System (NELIS). I think you may also have a hard copy as well.

Keith Munro:

Assemblyman Ellison, we are not trying to add or omit anyone. We are just trying to put in what is existing. For you and members of the public, you will know exactly who is exempt from the Open Meeting Law. You will not have to go look over 700 chapters of the *Nevada Revised Statutes* trying to figure out who it is.

Assemblyman Ellison:

We are talking about section 3, on page 3, line 34.

Keith Munro:

Oh, line 34. That is new. We have rules all over the place on designating replacements for public bodies. What we are coming forward and saying is we want to be clear about what those rules are. During my testimony, it would be easier if we had no designees and if you wanted to pass a law saying no designees for any member of a public body, that would be fine. However, we have some rules that apply to some and some that do not apply to others. What we are saying is we need some clear parameters as to who can be a designee and what they can do.

Chairwoman Benitez-Thompson:

I believe that is typically defined in the language by each statute whenever a designee is allowed. You are saying that refers to specific law for that statute and those provisions are within the statute?

Keith Munro:

Correct.

Assemblywoman Pierce:

When you say "electronic communication," and maybe this is already happening, do you mean teleconferencing over a phone? Is that okay?

Keith Munro:

That has been the status quo for a long time, but being present has never been defined. We are coming forward and saying here is what we think it means to be present. How we got here is we have had more than one board saying they would like to meet by message board. We have said no, we do not think you can. However, if someone really pressed the issue, because the Legislature has not defined what it means to be present, they might be able to push the issue. We want to set a baseline of what it means to be present. For example, the legislative body. Sometimes you have legislative members appear via teleconference. We are saying videoconference is okay. We have had the

question of phones and that has been established as okay. We believe message boards are not okay.

Assemblywoman Pierce:

I think you are going to have to explain to me what a message board is. Is that just email, essentially, like a chat room?

Keith Munro:

That could be like a chat room.

Assemblywoman Pierce:

I will have to think about that. Do we have boards where essentially no one is in the room and it is all just on the phone?

Keith Munro:

What we are trying to get to is what it means to be present so the public can participate and know what is going on. During the interim, we have had issues regarding chat rooms and message boards. This means, Peggy Pierce, Pete Livermore, and Lynn Stewart sit on a body and say they are going to have a meeting by message or chat room. We will all go to the chat room and we will chat about it. We do not know if that is Pete Livermore, or Peggy Pierce, or Lynn Stewart.

Assemblywoman Pierce:

I am just wondering how you know that over the phone. I am thinking maybe we should step back and say to be present there has to be both audio and visual. I may have to think about that. Thank you.

Keith Munro:

Fair enough.

Assemblywoman Neal:

I am trying to clarify something that was brought up to me in the interim, and it deals with the Nevada Unified Certification Program (UCP), which is the certification group for disadvantaged business through the Nevada Department of Transportation (NDOT). What they do is they sit on the phone and they have these meetings, but it is NDOT, Regional Transportation Commission (RTC) in Washoe, RTC in southern Nevada, McCarran, and Reno-Tahoe Airport. Then they certify whoever is going to be a disadvantaged business, but it is not open. It is a closed meeting. The question came up about whether or not it should be open because they are determining certifications of citizens who have no idea what the outcome is and they are not privy to that conversation at all. I know you deleted section 2, subsection 2, paragraph (d) because it was convoluted

and causing issues, but it seems paragraph (d) would speak to that issue. I am really trying to understand where UCP fits in. What are they classified as?

Keith Munro:

I am not familiar with that board. Is it a public body?

Assemblywoman Neal:

They appear to be quasi-public because it is an actual employee of each entity who then decides. They have a certified person who does the Disadvantaged Business Enterprise (DBE) certification, and they are the ones who actually participate in the meetings from each agency. What they do is have a monthly meeting on the phone, they go through the applications, and then they decide who is certified and who is not.

Keith Munro:

Is that a statutory certification process? Does it involve people's due process rights?

Assemblywoman Neal:

I think it is a mixture because it is something that comes from federal law and is implemented by the state. It is kind of weird for me because I do not understand it, but I know that came up over the summer because they wanted it to be open. No one knew why they were being denied certification and they had no ability ask or find out what the process was. Perhaps this is something for another moment.

Chairwoman Benitez-Thompson:

I think it is topical, but I think it involves a great deal of fact and detail. Perhaps the two of you could talk off-line with folks from the UCP about their actual designation.

Assemblywoman Swank:

I want to return to the issue of the phrase "electronic communication." I have some expertise in this area, and it seems to me electronic communication could encompass a wide range of forms of communication, including chat boards, texting, and all types. I am wondering if limiting that just to videoconferencing, or whatever type of communication you want, is going to leave you more with how you would like people to be communicating.

Keith Munro:

We are lawyers. We are not "techies." We tried to come in with the best definition we could. If there is a better definition on how someone participates electronically, please let us know. We were driving at no chat rooms.

Assemblywoman Swank:

I would be happy to talk with you off-line about that.

Chairwoman Benitez-Thompson:

I think it begs a good question. If we were writing this law ten years ago and had language in it that said "message, chat, text, board rooms," we would have no idea what it was. I think it is good conversation for the legislative record about what the intent means to be present because the question gets begged a lot. Are there any additional questions from the members? Seeing none, I will open testimony in support of this bill, which means support as written with amendments from the bill's sponsor. In your testimony, Mr. Munro, did you cover all of your amendments?

Keith Munro:

We have covered them all. If I could just add one quick thing for the record. We have had contact from local entities about sections 3, 4, 6 and 7. We want to be clear, we want to work with folks and reach a consensus.

Chairwoman Benitez-Thompson:

When we get to opposition for the bill, I will take everyone who has an amendment first so we can get those all into the record. If you are in support, please come forward and state your name for the record.

Barry Smith, representing the Nevada Press Association:

We are in support of this bill with the amendments proposed by the Attorney General's Office. It is important to try to keep up with the times and advance the law to cover the different situations. That is what this bill does. Again, it compiles in the statute the exceptions that have been carved out to the Open Meeting Law. I think that is important to have in this section.

I wanted to raise a couple of possibilities for the Committee to consider, whether in this bill or with other amendments. On page 3 at the very top, the exception for the Legislature of the State of Nevada, whether the words "while in session" should be added. I think that is an issue that has come up and may come up again before this Committee. I think that is a consideration. There has been some disagreement over whether that applies to committees and commissions of the Legislature when it is not actually in session.

Another one I would like to draw your attention to is on the same page, page 3, section 2, subsection 4. Because of the discussion that we have had, I think you are going to have another recommended amendment on trying to define "deliberate." Subsection 4 states, "The exceptions provided to this chapter. . . must not be used to circumvent the spirit or letter of this chapter to act, outside

of an open and public meeting" I think you should consider adding the words "to deliberate or act," depending on what definition you end up with on "deliberate." Certainly, the intention is not to be able to hold your deliberations in a secret meeting and then simply act in the open meeting. That would be my point on that one ([Exhibit P](#)).

I believe everything else has been covered. It is certainly worth discussing what electronic communication might entail and how that might change in the future. That is also certainly worth thinking about and having more discussion about. I would be glad to answer any questions you might have.

Chairwoman Benitez-Thompson:

For clarification, are you proposing amendments to the section you reference?

Barry Smith:

Yes.

Chairwoman Benitez-Thompson:

If you could please get those to the Committee secretary, it will be appreciated.

Jennifer DiMarzio-Gaynor, representing the Nevada Press Association:

I just want to reiterate that we do support this bill with the amendments. Of particular importance to us is Amendment 1, which deleted paragraph (d) that you see on page 3. The reason why we found this was important is because if you read it that way, it could be read to create a broad exception to the Open Meeting Law and it is really not necessary. The basic premise of the Open Meeting Law is to have open public meetings. If you look in the existing statute at NRS 241.015 subsection 2 (a)(1) they do define "meeting" there. It states, "The gathering of members of a public body at which a quorum is present to deliberate toward a decision or to take action" Therefore, this is not an exception, it is just something that is not included in the Open Meeting Law already. With the clarification of the definition of "deliberate," we think that is covered. Thank you.

Chairwoman Benitez-Thompson:

Are there any questions from the Committee? [There were none.] Is there anyone else who would like to submit testimony in support of the bill? [There was no one.] We will move to opposition. I would like those who are presenting amendments to come to the table first.

P. Michael Murphy, representing Clark County:

Under the further defined rules about how we are doing this, we are in opposition. I would like to be clear, we support the efforts of the

Attorney General's Office and their work in defining these issues and for bringing these issues forward. Having said that, we have submitted a proposed amendment ([Exhibit Q](#)). That amendment addresses specifically page 5, lines 6 through 9, a definition of what "deliberate" is. In the document you have before you, and which is also posted on NELIS, you will notice we have added the word "the" on line 8, where it says, "The term includes, without limitation," and then the word "the," "collective discussion . . ." striking the words "and the collective" and going on with "acquisition or exchange of facts . . ." adding the words "with a goal of reaching a decision" and going on with "preliminary to the ultimate decision."

We believe that the language we have submitted further clarifies what "deliberate" means. We have spoken to several other governmental agencies in southern Nevada and in the north and they are in agreement with us; not in totality, but they certainly believe we are headed in the right direction. Several of them have agreed with us, Washoe County in particular, who said they would like to define it a little bit further. We think there is a little bit more work to be done on this particular definition, but we do feel our amendment will further clarify what "deliberate" means. I am open to any questions.

Chairwoman Benitez-Thompson:

Are there any questions from the Committee members? Seeing none, we will hear from the gentleman to your right.

Garrett C. Weir, Assistant General Counsel, Public Utilities Commission of Nevada:

Joining me is Donald Lomoljo, Hearing Officer at the Public Utilities Commission (PUC). Just to clarify, we are technically opposed to the bill because we have submitted a proposed amendment ([Exhibit R](#)). It actually clarifies the original language included in the Attorney General's section 2, subsection 2, paragraph (d). It has now been proposed by the Attorney General's Office that it be withdrawn. We do not think it is necessary to withdraw that portion of the bill. We think it is possible to clarify the intent that the Attorney General's Office had in really trying to take away any unintended application of the Open Meeting Law right now to a very narrow, specific type of proceeding, which involves purely fact-finding by agencies. It would not be exempting any agency; it would merely be removing the requirement that the Open Meeting Law apply to a certain type of proceeding. With that, it would technically be an exemption, but we understand any time the words "exemption" and "open meeting law" are used in the same sentence, it stirs a lot of strong feelings. I will outline here for you shortly the reasons why it actually would create a more transparent process by including the exemption that we are proposing.

Just to give a quick background, the way the PUC generally handles a contested case is, it is assigned to a presiding officer, which is usually one of three commissioners that the PUC has, or a hearing officer. Mr. Lomoljo is the Hearing Officer of the Commission. Once the presiding officer gets the case, they hold a hearing. During that hearing process, they develop an evidentiary record by having witnesses give testimony and parties cross-examined. We actually notice those hearings under our own regulations and those are open to the public. At the conclusion of that hearing, the presiding officer, whether it is Mr. Lomoljo or a commissioner, then prepares an agenda, subject to the Open Meeting Law, for an open meeting of the PUC, at which all of the commissioners deliberate and take action on a recommendation from the presiding officer who developed the record on which to base that recommendation.

Currently, in an abundance of caution, we are applying the Open Meeting Law to those fact-finding hearings. Under the definition of "deliberation," which is proposed to be codified in this bill, but right now is the common law definition, "deliberate" includes the collective acquisition of information. We are construing this to include having multiple commissioners, or a quorum of commissioners, more than one, present at a hearing. Even just sitting there and asking a question of a witness, or even listening to the witness's response, could potentially be construed as the collective acquisition of information or facts and, therefore, constitute deliberation and require Open Meeting Law compliance.

As it is right now, we are limited to having one commissioner present to develop the record. We would love to have more than one commissioner present to help develop the record. The problem that arises sometimes is when an item is taken back by the one commissioner who was the presiding officer of the hearing, and he proposes a recommendation. Sometimes the other commissioners are not satisfied with the way the record was developed. They wish that they had been present to be able to ask certain questions. Either that results in making decisions where the rationale is not as clear to many members of the public, based on the record that is available, or, what has happened on multiple occasions in the last year at the Commission is, we have had to go back and re-hear items because the full Commission has not been satisfied with the questions that were asked and the record that was developed during a hearing. You are talking about going back, delaying a Commission decision that a lot of people are waiting several months for, in certain cases, and having to cause added expense for all parties involved and certainly delay an inefficiency for our agency in an effort to develop a record that they are satisfied with. If we could have more than one commissioner present at those proceedings, it would remedy that problem and we would not have to have that further delay.

To go to the reasons why it is impractical for going ahead and complying with the Open Meeting Law for those proceedings, I just want to outline a few of the requirements we have to follow for those hearings. First, we would have additional noticing requirements. Although we already do notice the hearings for the Commission, we would have to go through additional, more burdensome, notices that would comply with the Open Meeting Law.

We would also have to allow for audio recordings of those proceedings, committing our personnel to doing that, making those publicly available, and saving them. We would also have to take and post minutes for those proceedings. We would have to make materials provided available to members of the public when they request them. After some of these hearings, we are talking about thousands of pages of testimony and applications. Under the Open Meeting Law, if it is an open meeting subject to those requirements, we would have to provide members of the public with those documents upon request, which creates a lot of inefficiency and is pretty impractical.

Finally, it would require the public commenting requirements of the Open Meeting Law, which, in addition to the meeting times that the Commission already has for taking action when general public comment is allowed and a robust public comment is heard, would allow, during a hearing, issues unrelated to the items being addressed to be brought up by members of the public. Lately, our public comment periods have been very long. This could add hours and hours of delay to an already long process and, again, cost everyone involved money, ratepayers, and the costs of attorneys who are representing utility companies. That is passed on to ratepayers.

I apologize if I am being long-winded here, but I just wanted to give you an appreciation for the costs we are dealing with.

Finally, Mr. Lomoljo can chime in with any additional information.

Donald J. Lomoljo, Utilities Hearing Office, Public Utilities Commission of Nevada:

I have nothing to add at this point. I would be happy to answer any questions.

Chairwoman Benitez-Thompson:

Are there any questions from the Committee members?

Assemblyman Livermore:

The Public Utilities Commission is a very important commission to the residents and population of Nevada, who have most recently had a tremendous amount of debate and discussion about smart meters and the public's right to be informed.

I am sorry for the Public Utilities Commission costs, and I am sorry if your staff had to meet at times that may have been inconvenient for them to develop minutes and develop all the documents, but this is a big decision to this state. The population of this state needed to embrace this decision. The PUC is the body that made that decision. You almost act as a quasi-legislator over there because you make decisions that affect, I do not want to use the word survival, but it is a strong word, the expenses and how people live and how people pay for their utilities. I am disappointed to hear that you are in opposition to this. I would like to see you in support of this because I think the public's right to know the business of the Public Utilities Commission is important. That is my record.

Garrett Weir:

Assemblyman Livermore, our proposal would not in any way take away the opportunity for people, on that specific issue even, to vent any frustrations or concerns to the Commission. There are two times a month the Commission holds its meetings that are agendaized and noticed in accordance with Open Meeting Law. There is a comment period allowed during those times. Also, there are consumer sessions that the Commission holds annually for any general matter within the Commission's jurisdiction, as well as consumer sessions where the public can speak any time there is a rate increase involved. All this would do is limit public comment, say with regard to smart meters, to a proceeding involving smart meters. If we were dealing with another type of case in that hearing, the public would not be able to come and provide comment on smart meters during a case for something else.

Assemblyman Livermore:

Madam Chairwoman, may I respond?

Chairwoman Benitez-Thompson:

For the sake of time in getting the amendments on the record, I want to make sure we move forward. I think we have captured the spirit of what we are drilling down to.

Assemblyman Livermore:

I will delay my comments.

Chairwoman Benitez-Thompson:

Thank you so much. I appreciate that Assemblyman Livermore. Are there any other questions from the Committee? Seeing none, is there anyone else who would like to have their amendment entered for the record?

Scott J. Kipper, Insurance Commissioner, Insurance Division, Department of Business and Industry:

Very briefly, we are neutral on the bill. [Mr. Kipper provided comments in written form ([Exhibit S](#)).] We do have a technical amendment that we would like to request ([Exhibit T](#)). Section 2 of the bill addresses quasi-judicial meetings of public bodies that are subject to the Open Meeting Law, unless they are specifically exempted. Subsection 3 of section 2 lists those provisions in the code. We would respectfully ask that you include subsection 1 of NRS 679B.282, which deals with examinations. In our process of examinations, those are considered confidential until the Commissioner signs an order adopting those findings. Prior to the signing of the order, entities that we examine do have the ability to ask for a hearing. In those hearings, there may be confidential or proprietary information shared. If we had this as an open meeting, that would compromise the proprietaries and confidentiality, so we respectfully request that you include NRS 679B.282 in this section. With that, I will be able to answer any questions you might have.

Chairwoman Benitez-Thompson:

We have your amendment on NELIS for all of the Assembly Members to read, as well.

Cadence Matijevich, representing City of Reno:

We would just like to go on the record. In the interest of time, I will not get into all of the specifics, but will say the City of Reno is one of the local governments that Mr. Munro mentioned that does have some concerns with section 3, section 4, section 6 and section 7 of the bill. They have been very receptive to our concerns, and we look forward to continuing to work with them to draft language that works for everyone.

Chairwoman Benitez-Thompson:

Currently, you do not have an actual amendment; you are just working on the conversations with the Attorney General's Office, correct?

Cadence Matijevich:

That is correct, Madam Chairwoman.

John J. Slaughter, representing Washoe County:

I have similar comments, specifically to all the sections that Ms. Matijevich mentioned, but also in the Clark County amendment; we do have some concerns with that. We are working with them and will continue to do so.

Chairwoman Benitez-Thompson:

I believe we have all the amendments on the record that folks have proposed. Is there anyone else with an amendment? [There was no one.] Is there any testimony in opposition? I know we have someone in Las Vegas.

Florence Jones, Nevada-CURE (Citizens United for the Rehabilitation of Errants):

I do realize the time constraint and I will be brief. I represent Nevada-CURE. I am on the board and am the Legislative representative. I would like a clarification on page 3, lines 6-9, section 2, subsection 1, paragraph (c), regarding the meetings of the State Board of Parole Commissioners. It appears to me they list the entire area of their scope—grant, deny, continue, or revoke—have all been lumped together, when in fact, the revoke does fall under the due process rights because there is a right of liberty. It seems to me like there should be a definition separating those operations of the board so that we can see that deny, grant, continue would be under the Open Meeting Law and give us some purview to know what is going on. The revoke, of course, falls under a due process factor. To have them lumped together on this is rather confusing to me.

Chairwoman Benitez-Thompson:

Since you are seeking clarification on that, when we have the follow-up conversations with the Attorney General's Office on the amendment, I will make sure we get some clarification. Does anyone from the Attorney General's Office want to comment on that and give clarity for Ms. Jones?

Keith Munro:

I would be happy to. The existing exemptions that are listed are what have been passed by that body. To the extent that this Committee wants to open those up and look at them, we leave it to the discretion of the Committee.

Andrea Engleman, Private Citizen, Carson City, Nevada:

I put down neutral on this bill, but I guess I really am in opposition. Let me give you a little background. The Open Meeting Law was passed in 1960. It really came in to being when, in 1977, the Dairy Commission went behind closed doors with their attorney and raised the price of milk. There was much consternation all over the state, as you can well imagine, and the Legislature decided to toughen up the Open Meeting Law. A lot of what you see today in the law was passed in a hallway in the wee small hours of the morning and the only record of it was an article that my late husband, Lee Adler, wrote because they did not take minutes of conference committees at the time.

We move forward to when I went to work for the Press Association. My direct supervisor was Mike O'Callaghan and working with both houses,

Senator Raggio, Senator Ann O'Connell, Chairman of Government Affairs Danny Thompson, and Joe Dini, we crafted, bipartisan, a lot of the Open Meeting Law.

This is the manual from 1977 ([Exhibit U](#)); it was 16 pages. This is the manual from 1991 ([Exhibit V](#)). It was made available to the public and printed by the Attorney General's Office. The Press Association picked up half the cost. It went to 40 pages with an index. Today, we have 131 pages that the public has to print out, if they have a ream of paper, in order for them to read it. It is not very conducive to the public being educated. It is heavy for a lot of people to carry around. It is written simply and clearly, but it is very complicated to get through the whole thing.

I am unhappy with A.B. 65, mostly because a lot of what we are doing in this is backtracking on what you passed last time. A lot of this, where they were very strict about if you violate the law, this is what is going to happen, now we are saying well, yeah, if you put it in your agenda that you did violate the law last time, nobody can come back and sue you for it. I am not an attorney, so I do not know all the ramifications of that, but I am a little disturbed by that.

Let me tell you how it works in Carson City. We have a board of supervisors. It is a consolidated city/county. We have a mayor, but not a strong mayor, same as all the other supervisors. We have five of them. Here is how it works. The city manager sends out an email or a text that says he wants to spend \$60,000 on such and such. If you agree with that, do not respond. If you do not agree with it, write back that you want to have a meeting with me. So if you file an Open Meeting Law complaint and the Attorney General's Office goes in to look at the emails, they will come back and say, well, there was not a quorum that responded, therefore, it did not violate the Open Meeting Law. This board of supervisors comes into a meeting and there is no discussion, unless the public gets up and asks a question. The mayor takes a motion, it is seconded and it is passed unanimously, with no questions and no discussion. So you know, somewhere along the line, they have been informed of what is going on, out of the view of the public.

I worry about the definition of "deliberate," because it does not include the silences, it does not include the nod, the winks, the gestures, and so forth, that can be made within a group to signify assent or dissent.

I would like to see titles added, because the public does not understand statutes. Under the Open Meeting Law, you cannot reference just a statute number on an agenda because the public does not understand it and they do not have statute books at home. There are a lot of people who do not have

computers at home. You cannot assume that everyone is accessing all this information. I would like to see titles added on the other one also.

I do not think it is well known amongst you, but during the interim, you fall under the Open Meeting Law. You are no longer the Legislature, you are a public body. You are only the Legislature when you are in session. You guys do a great job of following it, better than some of the local governments I have seen. I have worked with Brenda Erdoes and Rick Combs during this last interim to be sure that information could be posted somewhere so that it was available to the public. Back when Lorne Malkiewich was running things, he used to hang a picture of me in the staff room that said, "Don't let this happen to you."

That about concludes it. I just wanted to give you some background on how some of these things came to be. I guess I am the institutional memory on open government.

Chairwoman Benitez-Thompson:

I was just going to say, I thank you for all that you have added to the record with the institutional knowledge and the booklets and such. If you have extra copies, I would love to have a copy.

Andrea Engleman:

I will see that you get them, Madam Chairwoman.

Tonja Brown, Private Citizen, Carson City, Nevada:

We ask that you do not pass Assembly Bill 65 as written. Assembly Bill 65 is another ongoing attempt, since the 2003 Legislative Session, to exempt the Parole Board from the sunshine of the Open Meeting Law. The Parole Board wants to be exempt and have no accountability to anyone, including you, the Legislature. The Parole Board is under the Open Meeting Law, but is not following it, as it claims to be.

In previous legislation they have labeled the Parole Board quasi-judicial, and under the Open Meeting Law, [*Witherow v. State*, 104 Nev.721,765 P.2d 1153 (1988) and *Stockmeier v. State*, 127 Nev.____, 255 P.3d 209 (2011)—(Adv.Op.19)], this is just another avenue for the Attorney General and the Parole Board to circumvent the laws by getting you to pass legislation that gives them the discretion without any transparency. They are attempting to get you to codify the procedures they are using that have no basis, that are not legal, specifically the Open Meeting Law. They are trying to get an exemption. This cannot happen. We need more transparency in government, not less.

It is apparent to us by the NRS raised in A.B. 65 that the Attorney General has decided that they are tired of giving everyone free speech. This is an attempt to exclude the executive agencies in the state government from the Open Meeting Law. In essence, this would exclude all three divisions of the state government from the sunshine of the Open Meeting Law. They want you to pass this.

I believe the Attorney General's Office wants to circumvent the Open Meeting Law to excuse what they have been doing during the Board of Prison Commissioner's meetings since December 2011. I believe this is one of the reasons that the Attorney General is asking for the changes in the Open Meeting Law.

During the wrongful death suit of my innocent brother, Nolan Klein, newly discovered evidence came to light. An example, the Attorney General's Office withheld exculpatory evidence from the federal court of the plaintiff, who was the inmate Nolan Klein.

In 2011, the document was discovered during the discovery process that was hidden from Mr. Klein and the court. This document became part of the settlement agreement. However, the Attorney General and the rest of the Board of Prison Commissioners were violating the Open Meeting Law, claiming confidentiality as part of the settlement agreement. You can go there and you can look. The Board of Prison Commissioners were informed of what Deputy Attorney General William Geddes and Janet Trout had done in two separate cases, in which exculpatory evidence was withheld from the plaintiffs and the courts in *Klein v. Helling* in the Michael Spencer case. Not only did the Attorney General's Office not turn over the exculpatory evidence in Klein's case, they continued to allow NDOC and themselves to disseminate slanderous statements pertaining to Mr. Klein and myself. They refused to put these public documents that exonerated Mr. Klein and myself on the public record, thereby violating the Open Meeting Law, my First Amendment rights, and the right to clear our names, that was a part of the settlement agreement.

Chairwoman Benitez-Thompson:

Ms. Brown, I see you have your written testimony there. I just want to make sure it is available to all the members on NELIS ([Exhibit W](#)).

Tonja Brown:

Basically, what this entailed was, during this discovery process, it came out there was a document. In a 2005 case, he had filed suit against NDOC for retaliation. In 2006, he had been deposed by Mr. Geddes. In 2007 Valerie Cooke, the United States Magistrate Judge, in her report and recommendation, was suspicious of this whole case, but she had no proof.

During the discovery process in the settlement, I found that document and I showed it to the Federal Judge. I said, Your Honor, is everything in this suit and the discovery turned over to be confidential? She said, no, it is a public record. I asked if I could take this document and present it to the Board of Prison Commissioners the next week. She said yes, I could. I went to the Board of Prison Commissioners' meeting the following week to put that on the record, what the Attorney General's Office had done, because not only did she withhold that document, she withheld it from him, Mr. Klein, and the same judge who was in the wrongful death suit. They have prevented this document and these things from being heard, claiming confidentiality which, if you go to sections 4, 1 and 2, as written, it is the Attorney General's Office who is overseeing the open meeting violations, but where is it? Who oversees the Attorney General's Office when it is they who are violating the Open Meeting Law?

I think there needs to be something added to this that they are not exempt from violation of the Open Meeting Law themselves. If that is the case, then I think the U.S. Justice Department should come in and investigate the Attorney General's Office for violations.

Chairwoman Benitez-Thompson:

Thank you so much for your testimony and for making sure we have it. Is there any further opposition or neutral testimony for the record? [There was none.] I will close the hearing on Assembly Bill 65. Is there any public comment? [There was none.] I will close this hearing of Assembly Government Affairs [at 11:41 a.m.].

RESPECTFULLY SUBMITTED:

Lori McCleary
Committee Secretary

APPROVED BY:

Assemblywoman Teresa Benitez-Thompson, Chair

DATE: _____

EXHIBITS

Committee Name: Committee on Government Affairs

Date: February 7, 2013

Time of Meeting: 8:01 a.m.

| Bill | Exhibit | Witness / Agency | Description |
|----------------|----------------|--|--|
| | A | | Agenda |
| | B | | Attendance Roster |
| <u>A.B. 16</u> | C | Keith Munro, Office of the Attorney General | Letter from Special Deputy Attorney General, Brett Kandt |
| <u>A.B. 16</u> | D | Keith Munro , Office of the Attorney General | Proposed Amendment to <u>A.B. 16</u> |
| <u>A.B. 31</u> | E | Keith Munro, Office of the Attorney General | Public Records, Section 3 |
| <u>A.B. 31</u> | F | Keith Munro, Office of the Attorney General | Letter from Special Deputy Attorney General, Brett Kandt |
| <u>A.B. 31</u> | G | Keith Munro, Office of the Attorney General | Proposed Amendment to <u>A.B. 31</u> |
| <u>A.B. 31</u> | H | Keith Munro, Office of the Attorney General | Proposed Amendment to <u>A.B. 31</u> |
| <u>A.B. 31</u> | I | Assemblyman Elliot Anderson | List of NRS listed in section 3 of A.B. 31 |
| <u>A.B. 31</u> | J | Philip A. Olsen | Proposed Amendment to <u>A.B. 31</u> |
| <u>A.B. 31</u> | K | Karen Gray | Testimony on <u>A.B. 31</u> |
| <u>A.B. 65</u> | L | Keith Munro, Office of the Attorney General | Letter from Special Deputy Attorney General, Brett Kandt |

| | | | |
|----------------|---|---|---------------------------------------|
| <u>A.B. 65</u> | M | Keith Munro, Office of the Attorney General | Charts regarding Open Meeting Law |
| <u>A.B. 65</u> | N | Keith Munro, Office of the Attorney General | Proposed Amendment to <u>A.B. 65</u> |
| <u>A.B. 65</u> | O | Keith Munro, Office of the Attorney General | NRS Chapter 91.270 |
| <u>A.B. 65</u> | P | Barry Smith, Nevada Press Association | Proposed Amendment to <u>A.B. 65</u> |
| <u>A.B. 65</u> | Q | P. Michael Murphy, Clark County | Proposed Amendment to <u>A.B. 65</u> |
| <u>A.B. 65</u> | R | Garrett Weir, Public Utilities Commission | Proposed Amendment to <u>A.B. 65</u> |
| <u>A.B. 65</u> | S | Scott Kipper, Department of Business and Industry | Written Comments |
| <u>A.B. 65</u> | T | Scott Kipper, Department of Business and Industry | Proposed Amendment to <u>A.B. 65</u> |
| <u>A.B. 65</u> | U | Andrea Engleman, Private Citizen | Nevada Open Meeting Law Manual (1977) |
| <u>A.B. 65</u> | V | Andrea Engleman, Private Citizen | Nevada Open Meeting Law Manual (1991) |
| <u>A.B. 65</u> | W | Tonja Brown, Private Citizen | Testimony |