

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

**Eighty-First Session
March 23, 2021**

The Committee on Government Affairs was called to order by Chair Edgar Flores at 9:02 a.m. on Tuesday, March 23, 2021, Online. Copies of the minutes, including the Agenda ([Exhibit A](#)), the Attendance Roster ([Exhibit B](#)), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/App/NELIS/REL/81st2021.

COMMITTEE MEMBERS PRESENT:

Assemblyman Edgar Flores, Chair
Assemblywoman Selena Torres, Vice Chair
Assemblywoman Natha C. Anderson
Assemblywoman Annie Black
Assemblywoman Tracy Brown-May
Assemblywoman Venicia Considine
Assemblywoman Jill Dickman
Assemblywoman Bea Duran
Assemblyman John Ellison
Assemblywoman Susie Martinez
Assemblyman Andy Matthews
Assemblyman Richard McArthur
Assemblywoman Clara Thomas

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Jered McDonald, Committee Policy Analyst
Erin Sturdivant, Committee Counsel
Judith Bishop, Committee Manager
Kyla Beecher, Committee Secretary
Cheryl Williams, Committee Assistant



OTHERS PRESENT:

Kevin D. Doty, Division Administrator, Purchasing Division, Department of Administration
Holly Welborn, Policy Director, American Civil Liberties Union of Nevada
Robert Fellner, Vice President, Director of Policy, Nevada Policy Research Institute
Annemarie Grant, Private Citizen, Quincy, Massachusetts
Richard Karpel, Executive Director, Nevada Press Association; and representing Nevada Open Government Coalition
David Gibbs, Private Citizen, Las Vegas, Nevada
Janine Hansen, State President, Nevada Families for Freedom
Lisa Rasmussen, representing Nevada Attorneys for Criminal Justice
David Cherry, Government Affairs Manager, City of Henderson; and representing Urban Consortium
Matthew Christian, Assistant General Counsel, Las Vegas Metropolitan Police Department
Jamie Rodriguez, Government Affairs Manager, Washoe County
Kelly Crompton, Government Affairs Manager, City of Las Vegas
Wesley Harper, Executive Director, Nevada League of Cities and Municipalities
Vinson Guthreau, Deputy Director, Nevada Association of Counties
Mary Pierczynski, representing Nevada Association of School Superintendents
John T. Jones, Jr., representing Nevada District Attorneys Association
Eric Spratley, Executive Director, Nevada Sheriffs' and Chiefs' Association
Michael Hillerby, representing City of Sparks; and Regional Transportation Commission of Washoe County
Kathy Flanagan, Senior Management Analyst, Las Vegas Valley Water District
Calli Wilsey, Senior Management Analyst, Intergovernmental Relations, City of Reno
Jared Luke, Director of Government Affairs, City of North Las Vegas

Chair Flores:

[Roll was called. Committee rules and video protocol were explained.] First on the agenda we have Assembly Bill 28. We will open the hearing on Assembly Bill 28. Good morning and welcome.

Assembly Bill 28: Imposes an inverse preference on certain bidders for state purchasing contracts. (BDR 27-238)

Kevin D. Doty, Division Administrator, Purchasing Division, Department of Administration:

Good morning, Mr. Chairman, and members of the Committee. Two years ago, Governor Sisolak asked the Division of Internal Audits of the Office of Finance of the Office of the Governor to come up with ways to try to award more contracts to Nevada-based vendors. One of the recommendations was to restore the inverse preference to Nevada's law. As explained in the memo I submitted [[Exhibit C](#)], an inverse preference is essentially a way

of penalizing out-of-state vendors if they receive home-state preferences. If a California-based business receives a 5 percent preference when they go to get a contract in California, they are penalized 5 percent in Nevada.

It is a restoration of the law. The inverse preference law was on the books in Nevada from 2003-2009. It was removed in 2009 when the Legislature enacted the preference for a business owned by a veteran with a disability. It is not clear in the legislative history why that was done. I think there may have been some confusion as to how an inverse preference works with a positive preference, giving points to a business based here in Nevada. It was done kind of late in the session when things do get chaotic. That may have been one of the reasons behind it. We do not see any problems in the Purchasing Division, mathematically or otherwise, applying both the inverse preference and our other preferences, including the Nevada preference which was enacted by the 2017 Legislature.

That is basically how it works. I think that the memo I submitted [[Exhibit C](#)] explains that if you have an out-of-state vendor and they get a preference in their home state, they are penalized by the same amount. A Nevada-based vendor would be boosted by our 5 percent preference. A vendor in a state that does not receive a preference would not have their score or the amount they bid changed. We would award based upon the final result after applying the preference and any effect of the reciprocal preference. I would be happy to answer any questions.

Chair Flores:

Thank you for that quick walk-through. I know a lot of the members did have an opportunity previously to review those documents that you sent ahead of time. With that, we will open it up for questions.

Assemblyman Ellison:

I remember in 2015, we worked on the 5 percent veteran preference. I was kind of shocked when I read this bill. Somehow or another, that has been taken out since 2015. That shocked me to see because I always thought it was still in there. Are you saying it was removed in 2010?

Kevin Doty:

In 2009, when we originally enacted a preference for businesses owned by veterans with disabilities, the Nevada Legislature decided to remove the existing inverse preference law. I think there was just some confusion as to how the interplay would be, about giving a 5 percent boost to a Nevada-based business owned by a disabled veteran while simultaneously penalizing out-of-state vendors 5 percent or 10 percent. Conceptually and logically, we can do that. I am not clear as to why the Nevada Legislature removed the reciprocal preference in 2009.

Chair Flores:

Mr. Doty, sorry to interrupt. Just for the sake of clarity, I went back to the 2009 hearing. It was Assembly Bill 223 of the 75th Session. At the time, I believe it was Chair

Marilyn Kirkpatrick who engaged in this conversation. It is my understanding from the 2009 hearing, that because we had the 5 percent preference for Nevada vendors, the reasoning or logic was that we no longer needed to then engage in this specific conversation. I think you are right, Mr. Doty, that the logic was because we are now giving a 5 percent preference to Nevada-based vendors, we no longer have to apply this option. Are there other states that do this now?

Kevin Doty:

You are correct, Mr. Chairman. There are approximately 35 states that have this inverse or reciprocal preference, it is called either, depending on the state. In state procurement, it is a generally accepted way of trying to benefit home-state vendors without violating any laws.

Assemblyman Ellison:

You and I were on the committee when the Department of Veterans Services brought in a list of stuff that needed to be in the bidder preference; disabled veterans were at the top of that list. I am glad this is in there. I am glad it is clarifying. I have just never seen where it was ever removed after that. Anyway, we will move forward and look to get it fixed. I hope we can make it work.

Chair Flores:

Unbeknownst to you, Mr. Doty, Assembly Ellison is the inverse preference champion here.

Assemblywoman Brown-May:

First, out of an abundance of caution, I need to disclose that my private employer contracts with the State of Nevada in a number of different ways under special provisions for nonprofit organizations that employ people with disabilities. That is outside of this regulation, but I just wanted to make sure that there is no conflict of interest and it is openly disclosed. With this type of inverse provision, which I completely understand, are there any types of contracting opportunities that would also give preferential treatment to other types of industries or organizations that are not mentioned in this bill? To go back to that, it would be relative to my experience with Nevada's Preferred Purchase Program, which helps people in certain industries have access to contracting opportunities. Are there others?

Kevin Doty:

Yes, I love our Preferred Purchase Program. When we did our presentation at the start of the session, I mentioned that we spend about \$2.3 million a year with Opportunity Village, through that program getting great work in janitorial and other things. It is some of the smartest money that the State of Nevada spends. I am really proud of that.

As far as opportunities for other businesses in Nevada, the effect of the inverse preference law would be to statistically increase the likelihood that we award contracts to Nevada-based vendors by penalizing out-of-state vendors in certain situations. There would not be any special provision in this law to help certain Nevada vendors and not others. It would be a general boost to the chances of Nevada vendors by penalizing out-of-state vendors.

Chair Flores:

Members, for the sake of clarity, it appears that maybe not everyone received that email from Mr. Doty and/or somebody from his office. As the hearing proceeds, we will get that email distributed to all of the members. I am not sure who got it and who did not. We will just send it out again. I will give you a heads-up as soon as you get it in your inbox in the next couple of minutes.

Assemblywoman Torres:

I am hoping that you could provide us with a little bit of clarity on why this preference only applies to state government and does not apply to local or county governments.

Kevin Doty:

This preference is in *Nevada Revised Statutes* (NRS) Chapter 333, which governs state procurement. In order to apply to local government purchasing, it would have to be in NRS Chapter 332. I do not think the previous inverse preference was part of NRS 332, it was only in NRS 333. That is obviously a policy decision for the Nevada Legislature as to how they want this to apply. I can only guess that one of the reasons why it has never been applied at the local level is that it does impose a certain administrative burden in its application. The state has more resources to apply. Perhaps, at the local level, it would be too burdensome for them to apply. That is just speculation on my part.

Assemblywoman Torres:

I appreciate that response. I think it is definitely worth looking into to continue to promote Nevada businesses. I understand that it might have an administrative burden, but if we can keep money here in Nevada, that is definitely a win for us.

Chair Flores:

Members, does anybody have any additional questions? [There were none.]

At this time, I would like to go to those wishing to speak in support of Assembly Bill 28. [There was no one.] Could we go to those wishing to testify in opposition to A. B. 28? [There was no one.] At this time, we will move to those wishing to testify in the neutral position for Assembly Bill 28. [There was no one.]

Mr. Doty, could we have you come back for any closing remarks you may have.

Kevin Doty:

Thank you, Mr. Chairman, for giving us the opportunity to present this bill. I am happy to answer any questions that members may have to follow up when they look at the memo I submitted [[Exhibit C](#)] or any other questions.

Chair Flores:

Mr. Doty, just out of curiosity, in 2009, do you recall or are you aware anecdotally of any issues that may have been raised regarding this conversation? I understand and I have had an opportunity to go through the minutes for the 2009 legislation, but I just wanted to know,

anecdotally, if you knew of any situation or scenario that arose where local Nevada companies were being unfairly treated in surrounding states because of the current Nevada law. In the minutes, I saw that there was a conversation about that, should Nevada engage in this, there was a concern that other states would act to the detriment of local Nevada businesses. Again, it was just a conversation that went on. It does not necessarily mean that was the case. Could you provide some insight to that?

Kevin Doty:

When Nevada enacted its 5 percent preference for Nevada-based companies in 2017, that meant that we started giving an extra 5 percent when scoring an RFP [request for proposal] or reduced the scoring on the bid by 5 percent. At that point, every state in the nation that has this same bill, the inverse preference, would then penalize Nevada-based businesses by 5 percent. They do that based upon the legislation that was enacted in 2017. Enacting our own inverse preference law would not change how Nevada vendors are treated in other states. Basically, it would be treating out-of-state vendors the same way that those states treat our vendors as an out-of-state vendor, which is penalize them according to whatever preference they receive in state.

Chair Flores:

Thank you for clarifying that, Mr. Doty. Just for the sake of being abundantly clear, ten years from now when somebody is going back through our minutes, they understand why we are doing this.

Assemblyman Ellison:

I remember this. I think it was 2015; it was passed in 2017. One of the problems was that they kept saying it was the brick-and-mortar businesses in our state versus their not having to supply in the state of Nevada. They kept bringing it up. We have to have the businesses; we have to have the warehouses and the brick-and-mortar buildings. They can ship from all over the country and they did not have that investment in Nevada. I am just putting that on the record; I remember it being said several times.

Chair Flores:

Mr. Doty, I am sure that members may be interested in engaging in the NRS Chapter 332 conversation as to whether or not we would like to see this applying in that particular section of the NRS as well. That is for a conversation to continue. Members, make sure that you give yourself an opportunity to continue open dialogue with Mr. Doty.

With that, I would like to go ahead and close out the hearing on Assembly Bill 28. Next, we have Assembly Bill 276 and it is being presented by our very own member, Assemblyman Matthews. With that, we will go ahead and open the hearing on Assembly Bill 276.

**Assembly Bill 276: Makes changes to provisions governing public records.
(BDR 19-884)**

Assemblyman Andy Matthews, Assembly District No. 37:

It is my honor and pleasure today to present Assembly Bill 276. This is important and, I would argue, necessary in order to uphold and advance the cause of open and accountable government here in the state of Nevada. Government transparency has long been a real passion of mine. It is a cause that deserves strong support under any circumstances; it is especially the case during times of severe and even historic challenges, such as the situation we find ourselves in today. Assembly Bill 276 would indeed serve and advance that cause.

I would now like to briefly talk about how it would do so. I have two copresenters here with me who will each offer some remarks of their own. In short, A.B. 276 would incentivize and foster greater government transparency by strengthening the penalties assessed against those who unreasonably delay public records or charge excessive fees for the requested documents. It is important to remember that these fees are only assessed if a court determines that the government entity did, in fact, violate the law. Under current law, if a public records request is denied, or unreasonably delayed, or the requester of the record believes that the fee charged by the governmental entity for the record is excessive or improper, the requester can file a lawsuit seeking access to the record or relief relating to the amount of the fee.

Also under current law, if the requester prevails in that lawsuit, he or she is entitled to recover from that government entity his or her reasonable attorney's fees in that proceeding. Under Assembly Bill 276, in the event a requester prevails, the requester would still be entitled to those attorney's fees. They would also receive an additional amount that is equal to double those costs for himself or herself. This bill would help address the ongoing problem of noncompliance with public records requests on the part of government entities here in our state which, of course, undermines the cause of government transparency and unfairly denies Nevadans information to which they are legally entitled regarding the operations of their government.

I want to stress something here; the underlying goal is not to see an increase in the amount of money paid out in the form of penalties. The goal is to avoid penalties and even lawsuits to begin with, by ensuring stricter compliance with public records requests. Assembly Bill 276 is needed in order to ensure such compliance. I again want to thank you for considering it today. If I may, Mr. Chair, I would like to turn things over to the first of my two copresenters, Holly Welborn, who serves as the Policy Director for the American Civil Liberties Union (ACLU) of Nevada.

Holly Welborn, Policy Director, American Civil Liberties Union of Nevada:

Many of you are aware of our organization's work. You are no strangers to the ACLU. I do want to talk a little about our mission because I think it is relevant to the conversation we are having today. We are a nonpartisan organization that works to defend and advance the civil liberties and civil rights of all Nevadans. We are grounded in the principles of liberty, justice, democracy, and equality. We expose government overreach through public

education, advocacy, and litigation. The Nevada Public Records Act (NPRA) is an essential tool for fulfilling our mission to protect Nevada residents, your constituents, against egregious government abuses. We applaud Assemblyman Matthews for pushing forward in the quest to put real teeth in the public records law to make it as impactful and effective as possible.

Through public records requests, the ACLU of Nevada is able to gather needed data to address civil liberties violations and expose rights violations by a number of government agencies including school districts, the Department of Corrections, law enforcement agencies, and more. We have a strong public records law, but without enhanced penalties and an enhanced incentive, government agencies continue to postpone responding to requests or they fail to respond to requests at all.

I have a few examples for you. Back in 2013, we did a public records request to all 17 school districts because we had information that the sex education curriculum was discriminatory on a number of fronts. Although most school districts did comply, there were two that took 18 months and two that just never responded. We have not received those responses to this day, despite sending new requests and trying to gather that information. In both 2018 and 2020, after we made changes to the Nevada Public Records Act, we submitted requests to the Department of Corrections to gather information on solitary confinement, which is a program and campaign that we have been actively engaged in to end that practice in the Department of Corrections. Those requests remain unfulfilled despite efforts to work with the Department of Corrections to fulfill them. We also recently filed requests with every law enforcement agency in the state on no-knock warrants to see whether or not those have been issued and how many. We had a good response from some of the larger agencies, but there were others that were unable to provide a meaningful response to those requests.

We were not in a position to file a lawsuit under the Nevada Public Records Act. These are expensive lawsuits. Despite popular belief, we are not resource-rich at the ACLU of Nevada. Currently, we only have three attorneys on staff. I am one of them, and I handle all of the policy work. It takes a lot. We have to consider a lot before we decide to file a lawsuit: how long that lawsuit will take and how resource-intense that lawsuit will be, before we decide to proceed with actually filing under the NPRA.

Even though we know we would have a strong likelihood of success on most of these requests, we have to consider how quickly we can get a resolution through the courts. One case where we were successful was the Scott Dozier case. Scott Dozier was an inmate on death row who had volunteered for execution. We filed an emergency lawsuit under the Nevada Public Records Act to compel the Department of Corrections execution protocol; they refused. They said it would take 60 days to respond to that request, so we filed an emergency motion fighting to compel that protocol. Without our lawsuit, an execution would have occurred in the state of Nevada after almost a decade and a half. It is hugely in the public's interest to understand how the Department of Corrections intended to proceed with their execution protocol. Through that request we discovered that the Department intended to use pharmaceutical medications for an unintended purpose, which led to more

executions and ultimately stopped the execution of Scott Dozier in Nevada. There are issues that are important to you as lawmakers, to us as a civil rights organization, and to the public at large. Our compensation for that lawsuit, the attorney's fees and the time we put into that, was \$12,000.

We are not receiving these large awards nor are we seeking these incredibly large awards. What we are seeking and what we want, through this bill, through the strength of the Nevada Public Records Act, is to strengthen the law to compel the record. We really want to avoid going to court in the first place, but we are not going to. Right now, the incentive for not complying is these very small awards that do not compensate organizations like ours that facilitate an incredibly important public function to the people you all serve as well. The incentive just does not exist in the law. The more incentive we can provide in the law for people to respond and for government entities to respond to public records requests, the stronger that law will be, and it will greatly benefit the public.

I am here for any questions you might have. I will turn it back to Assemblyman Matthews.

Assemblyman Matthews:

Thank you so much, Ms. Welborn. Our next copresenter this morning is Robert Fellner.

Robert Fellner, Vice President, Director of Policy, Nevada Policy Research Institute:

Good morning. We advocate for free market solutions and have been a strong advocate for government transparency since our inception over 30 years ago. We run a program called Transparent Nevada, which entails our making public records requests to every agency in the state for over 10 years. Personally, I have made hundreds, if not thousands, of requests. I can tell you, especially because we have seen kind of the development of government agencies, most do a really good job. I do not think that is our problem here. They have gotten better over the years and we appreciate that. As Ms. Welborn was talking about, the problem is what we have seen in the crises over the past few years, that when it matters most, in things like the 1 October shooting, in the current COVID-19 crisis, and in the child abuse case in Clark County where they needed the autopsies, in those hypersensitive events, unfortunately the government has underperformed.

There is a simple reason. It is what Ms. Welborn alluded to. You have a very broken power imbalance in terms of enforcing the law. There is no mechanism to enforce the law other than requiring the citizen, at their own cost and expense, to initiate litigation. While you can recoup fees if you prevail, that is not guaranteed. As Ms. Welborn was saying, we have the same issue and the *Las Vegas Review-Journal* has the same issue. We are fairly large organizations. We certainly have more resources than the average citizen. In many cases, we cannot afford to file a lawsuit because of that gamble.

I want to highlight one specific case that really drives this home. The *Las Vegas Review-Journal* (RJ) had to sue for the autopsies of children that were in the care of Child Protective Services (CPS) related to seeing if they were being abused and how CPS handled that. The *Review-Journal* won. The judge slammed the coroner, saying, "It is

so clear that you have been stonewalling; you are defying at every turn." They did endless appeals. They finally won in four years. The *Review-Journal* was penalized \$47,000. They incurred \$210,000 in legal fees over the course of that four years. Not only did the court and the Supreme Court on appeal find that the coroner broke the law, but the district court also found that they willfully did it and were in bad faith. When the *Review-Journal* submitted the request for fees, just to be made whole—no one is profiting here—the court knocked that down from the \$210,000 they actually incurred to \$163,000. It actually cost them \$47,000 to enforce the Nevada Public Records Act.

Is it any wonder that governments aware of this fact can delay records and deny, knowing that the average citizen is never going to take that gamble, saying I think I really am entitled to this record, I am going to risk tens and tens of thousands of dollars of my own money just to try and get that back? That is the broken incentive structure that this bill would fix. By increasing the fee award, you have two fixes occurring there. The first, as Assemblyman Matthews was saying, is just for governments now to realize that they cannot delay. Again, most of the time they do a very good job. In those rare circumstances that they, for whatever reason, want to delay or do not want to release records, they realize that it is going to cost them. We just want to force compliance. The second instance is to empower citizens—whom we have seen over the years, and it is honestly heartbreaking because they want to be engaged, they want to know what is going on, they are being turned away, and they eventually just give up—empowering those citizens to be able to get a lawyer who likely would take this on a contingency basis if this penalty structure were in place. That is the problem. That is what this fixes. It really is clear that until this is fixed, it is not going to get better.

The *Review-Journal* just had an article about the stonewalling that was happening to them for data related to COVID-19. That is really telling because Governor Sisolak, who is now in charge, is a champion of transparency. When he got elected that was one of the things we thought we would probably get good public records law improvements; he has always been good on that. He is still good on that. He has put in the time; he is clearly in favor of transparency. For example, they asked for a copy of the Governor's work calendar from last March. It took seven months to produce that. That is illegal; that is an unlawful delay. I only mention that to demonstrate that there is clearly a systemic, structural problem at play. It is what I talked about. The incentives are so powerful to ignore, and in this case, even the *Review-Journal* with all of their resources, could not afford to risk suing. They had to wait the full seven months, which is obviously excessive and improper.

This fix is really necessary to make the law applicable to the average citizen. Right now, again not all the time, but in rare circumstances, when they get denied or get a lawyer letter from the government saying you are not entitled, they just give up and eventually go away. We do not want that. The citizens who are interested and engaged with their government, we want to encourage that. I think this would really fix it. I can tell you, especially in the rurals, I did a request to a public hospital district and they said, "We are not a government entity, we are not even complying with the Nevada Public Records Act." There are real issues that still need to be addressed. That structural power imbalance is the root of the problem. It is what

this bill fixes. As far as I am concerned, if you do not fix that, you are really never going to address this problem. We strongly support it, and I am definitely happy to answer any questions you have.

Assemblyman Matthews:

Thank you, Mr. Fellner. Mr. Chairman, I will have some closing remarks, if I may. For now, that concludes our presentation. We are happy to answer any questions.

Assemblywoman Anderson:

I really appreciated the discussion and the comments that were being made by both Ms. Welborn and Mr. Fellner. I have two questions. One is about the new language. One is about the records themselves.

I will start off with the records themselves. Would this also include video and/or police footage from the bodycams? That is not clearly defined under public book or record. I just wanted to get that clarification. I realize that is not the language that is being brought forward, but it is part of the *Nevada Revised Statutes*.

Assemblyman Matthews:

As you said, this bill does not make or propose any changes substantively to what constitutes a public record. I would defer to Mr. Fellner and Ms. Welborn perhaps for more information there. Anything that is currently under the law that is considered a public record would remain as such.

Assemblywoman Anderson:

Could we ask legal or Ms. Welborn or Mr. Fellner if they believe it should also include the bodycam and the videos?

Holly Welborn:

Yes, the bodycam footage and negotiations on bodycam footage, under the bodycam law, are public records. You can request them at a certain time and if there is a failure to compel those records, you can file suit under the NPRA.

Assemblywoman Anderson:

Thank you for that clarification. My other question is about the language that is being brought forward, and that is the amount. Is it just automatically double? Reading it, I feel like there is a possibility of allowing it to be up to double. The language currently is that automatically it would be double the cost. Am I understanding that correctly? Is there any sort of wiggle room where a judge can make a decision otherwise?

Assemblyman Matthews:

You are right, the language is that it would automatically double. It would be the existing attorney's fees plus an additional penalty worth double those reasonable attorney's fees.

Assemblywoman Considine:

I think that it is really important that we have access and transparency to public records. Reading this bill, my worry is about balancing the taxpayer money. If there are treble damages, and just looking at the example that Mr. Fellner said, \$410,000. That was \$410,000 and then \$820,000 on top of that, that is taxpayer money.

I went back and looked at the bill from 2019 [Senate Bill 287 of the 80th Session]. I think there was a Nevada public records bill back in 2019. In the 2019 bill, they set up a structure in section 1, subsection 1, that states "if a court determines that a governmental entity willfully failed to comply with the provisions of this chapter concerning a request to inspect, copy or receive a copy of a public book or record, the court must impose on the governmental entity a civil penalty." There are three levels of penalties. They range from \$1,000, \$5,000, and \$10,000. Section 1, subsection 2, states that "The money in the account may be used only by the Division of State Library, Archives and Public Records of the Department of Administration to improve access to public records." My question is about trying to balance the need for the enhanced penalties in order to get access to those records with the responsible use of taxpayer money. Was there any reason why, or was it discussed in this one that those penalties go into the Archives? Or make those 2019 enhancements bigger to have that sort of leverage over it? That taxpayer money is shifted from one area of taxpayers to another thing that benefits public records, but it is still used for the government as opposed to going to a private entity. That is my tension here with this bill.

Assemblyman Matthews:

There are a couple of points to respond to you. The first point, as I noted in my initial remarks, the goal here is really not to see any money transferring from any one entity to another. The goal is to simply ensure compliance with the law regarding public records. That gets to the second point: it is really a matter of incentives. Even strengthening penalties along the lines of what you might suggest still does not change the fact that bringing these lawsuits is often cost-prohibitive to the requester of the records. Simply strengthening those penalties would do nothing to change that balance of power that both Mr. Fellner and Ms. Welborn spoke to.

The purpose of this bill is to recognize that and send the message to government entities that may be tempted not to comply with these requests to know that the incentive now for the requester is much stronger. The likelihood for a legal action is increased significantly, in the event that there is noncompliance. I am happy to allow Mr. Fellner or Ms. Welborn to flesh that out further as they see fit. It really is aimed at changing the incentive structure that, I think, is at the root of the problem of the public records law in the state today.

Robert Fellner:

That is a great question and a great concern. We are a free market. We are in favor of lower taxes, so that really hits home to us. The last thing we want to do is have the government spend more money because, as you said, the burden falls on the taxpayer. To Assemblyman Matthews' point, what this really does is save money, for two reasons. The first is that it allows the citizen to have the ability to use the law as it is intended, because

they have access to legal representation, which is currently not the case because it is too risky. The second is that it makes it much harder and I think it will discourage government from these extraordinary and, quite frankly, ridiculous appeals that they know they have no shot at winning, it is just a free roll. I think that will help. That \$400,000 is over four years.

Now when a citizen is denied a record, they can get a lawyer to work for them on a contingency basis. The lawyer will write a letter saying, Hey I represent my client. I would strongly suspect, knowing that this real penalty is there, when the government attorneys review this, they say, Yeah we have a 1 percent shot at prevailing over a four-year appeal. The bill will be so high, this is really public, let us just disclose the record. At that point, the legal fees would be \$2,000 or something very small, just for that initial stage. That is really where you are actually saving money because you are not going down this whole road of lengthy appeals unnecessarily.

Assemblywoman Considine:

I think, at least for me, that tension is reading through this bill, the attached letters [[Exhibit D](#) and [Exhibit E](#)], and your example before, over a quarter of a million dollars of taxpayer money. With the public records and all of that, I completely believe that there needs to be transparency. There needs to be some sort of penalties in order to make sure that those records are made public when they are requested. The loss of over three-quarters of a million dollars of taxpayer money, in your example, just makes me a little bit worried. I just wanted to bring up if there were any other ways to do this. I do believe that attorney's fees and all of those costs should be returned, but that treble idea is just something that I think maybe you and I can talk about offline further.

Assemblywoman Thomas:

I appreciate your time and effort. I do have a couple of questions here. One big concern of mine is the attorney fees. We do not have a remedy for, as Mr. Fellner said, the structural problem within the law for public records. There is no remedy in that law or no concise time period that they have to give you public records. Is there anything in the law saying that they can take seven months, a year, or that they can go to court and appeal? Is there anything in the law preventing them or an agency from doing this?

Assemblyman Matthews:

To get straight to your point, and I will let others expand on this, under the public records law, there are time restraints during which a response is required. Part of what these lawsuits arise from is noncompliance with those time requirements. Again, in case that does happen, we still see abuse and noncompliance under the current law. As I said, this is really designed to change that power dynamic and provide those stronger incentives for compliance with the law.

Assemblywoman Thomas:

Referencing the attorney fees, what is preventing an attorney who normally charges \$1,000 to write a letter to charge ten times that amount knowing that this bill is in effect?

Assemblyman Matthews:

The attorney's fees are actually already in place to be awarded under current law. This does not change that; presumably what you are describing could happen under current circumstances. The point of this bill does not change the attorney fee structure at all; it is already in place and is left in place. This merely adds, in addition to that, a penalty that would be paid to the bringer of the lawsuit. Mr. Fellner, I think you may have something to add.

Robert Fellner:

That is currently prohibited under existing law. The law only entitles the prevailing requester to reasonable fees. The example you posited, a judge would just strike that down. I mentioned earlier that when the *Review-Journal* won, even in a case where the judge was really unhappy with the government and the *Review-Journal* submitted their invoices where it ended up totaling \$210,000, the judge reduced that to \$167,000. That provision of the law, the reasonable fees, is in place where the judge has complete discretion. As you said, if the attorney was charging \$1,000 an hour, that is excessive; he is not getting that. The reasonable fee is the bedrock for everything else. That is entirely up to the judge's discretion. Even in cases where you would have thought the requester would get the full fees, the judges have still not [unintelligible].

Assemblywoman Thomas:

Mr. Fellner, when you mentioned the *Review-Journal*, and I have the letter here, we all do, you mentioned something about profit and that the *Review-Journal* lost. Will this bill create a profit for news agencies and/or private citizens to ask for a public record? If they do not get what they want in the time that they feel it is necessary, then they can sue and possibly win. Are you saying that it should be doubled so that they can gain a profit at the taxpayers' expense?

Robert Fellner:

You are correct that, yes, if the double award is approved, you would recoup your fees and keep the damages. Nobody profits if the government complies with the law. The whole goal here is not to have anyone profit. The goal is to make sure Nevadans receive the transparent and open government that they are promised under state law that they are not receiving right now because of the broken incentive structure, which is so weak. That is the scenario.

Again, it is really important to remember, even if this bill is approved exactly as written and this is the new law, there is still a risk. Let us say I make a request and it is taking what I think is too long. I file a lawsuit, at my expense, and it turns out that no, whatever the length of time, let us say it is a month, at court it was shown that they were actually spending that time to research and review the records. The judge says, All right, that was a legitimate delay. Now I am out \$50,000.

Yes, it is conceivable that if a government breaks the law and the person who took that risk to sue them demonstrates they broke the law, they will receive their costs and the damage awarded. Again, the goal is not for anyone to profit. The goal is just for the government to

comply with the law so there are no fees at all. If you err on the side of the current structure we have, the harms that are being realized every day are that ordinary Nevadans are just shut out of this process because they cannot afford the litigation in court.

Assemblyman Matthews:

As Mr. Fellner said, I think it is worth really reinforcing every one of these cases that would arise would have to be reviewed in the court. It is only in cases where a judge was to determine that the government entity did in fact violate the law that these penalties would be assessed at all. I think that is worth really stressing here.

Assemblywoman Dickman:

I was going to ask a different question. I am going to go off of Assemblywoman Thomas' question. With this current damages structure, I am wondering if the determination is up to the judge. Does he have discretion in awarding? This would double and pay the attorney's fees. Would this be different in that way?

Assemblyman Matthews:

Under this bill, as it is written, those fees would be automatic at that double the amount of the attorney's fees. That would set at that amount. I do not know if Ms. Welborn or Mr. Fellner want to expand on that at all.

Robert Fellner:

The base determination is always up to the judge as to what those reasonable attorney's fees are. That is up to the judge's discretion. The prevailing requester will submit their invoice, the judge then has the discretion to modify that in any way he sees fit because the law just says reasonable. Then from there, under this bill, whatever that number he determines is reasonable, the amount that is doubled is set.

Assemblywoman Dickman:

Does he still have discretion?

Robert Fellner:

Yes.

Assemblywoman Dickman:

My other concern is that a lot of times public employees are not so concerned about public funds as they would be of their own private funds. Is there any type of penalty you could come up with that would make them be more apt to comply?

Assemblyman Matthews:

There are a variety of ways to come at this. I know that different states do things a little bit differently. Perhaps we can get into that a little deeper into the hearing. The determination in looking at this bill was that structuring it this way is the best way to compel compliance. That is really what this is about. I will say it again, the goal here is not to shift resources from one to another. It is to make sure that there is compliance with the law. I think it is

worth reminding everyone, this is a law passed by this Legislature. We put this law on the books. I was not serving at the time, but this is something that our state lawmakers decided needed to be part of law. This is a law we often see is violated. What we need to do is do all we can to incentivize compliance. That is what this bill would do.

Assemblywoman Dickman:

Based on the many examples that we have heard today, the 2019 law is not working. We need to do something to enhance it. Thank you so much for this bill.

Assemblywoman Duran:

I think most of my questions were answered. I do have one that just came up. For example, is it going to be up to the judge if I request a public record and there is an ongoing investigation that I keep going through? Am I entitled to that? Do I have to wait until the investigation is finished? Is this up to a judge?

Assemblyman Matthews:

If I understand your question correctly, I will take a stab at answering it. This is something that would be awarded after a lawsuit is brought. And in the event that the judge determines that government entity did, in fact, violate the law in not coming forward with public records, the judge would then determine, as Mr. Fellner said, what the reasonable attorney's fees amount would be. That would be awarded. The additional penalty of double that amount would go to the one who brought the lawsuit. This would all kick in, in the event that the bringer of the suit prevails in the lawsuit. Of course, that would be as determined by the court.

Assemblywoman Duran:

From my understanding, if I wanted to request information and the entity or whomever I am requesting the information through gives me partial information and not the complete packet, will I still have the opportunity to sue them?

Assemblyman Matthews:

You would be able to bring that lawsuit if there was something that you requested, to which you are entitled under the law, that you were not given. Presumably, you could bring the lawsuit as long as you feel that way. If you believe that something to which you are entitled was not supplied, the fees to get those documents or records are excessive, or it is your determination that the law has been violated, you are allowed to bring that lawsuit. Then we have the legal process by which the court would determine the merits of your case and whether or not the government entity did, in fact, violate the law. In which case, the provisions of this bill would kick in.

Assemblywoman Black:

There is a lot of talk about penalties, which I think is a fair topic. To put it into context, how are these penalties compared to other states?

Assemblyman Matthews:

I know that different states do it differently. I also know that Mr. Fellner, by the nature of his position, is quite familiar with what is done in places across the country. I am going to let him speak to that.

Robert Fellner:

There are about 23 states that I have identified that have some version of this. To be honest, most of those I would consider to be a bit harsher. They include things like allowing the court, in certain circumstances, to hold the individual government employee liable for the fees or fining that individual employee who withheld records up to \$5,000. There are also states that have penalties of your attorney's fees plus \$100 per day, which I think is a pretty interesting approach. It also probably discourages unnecessary appeals because that fee award is increasing over time. There are even states that have it if the court determines the willful violation by the government employee, it is a criminal penalty and you could even go to jail. I think it was up to 30 days in jail in Arkansas. There are some which I would consider to be even stronger penalties. Interestingly, the California Democrats have just put forward a bill that is almost identical to this. It doubles your fees and also has up to \$100 per day on top of that. Right now, that is working its way through the various committees in the California legislature. I would say we are pretty much in line. It is not as severe as some of these, especially when you talk about the criminal aspects. It is fairly in line with a lot of other states.

Assemblywoman Black:

This is a follow-up for Mr. Fellner. I have had my own issues getting public records. I know earlier you mentioned the *Review-Journal* and public records issues for large entities like that. Have you heard from a lot of individual citizens that are having trouble getting public records?

Robert Fellner:

Yes. The most common complaint that we receive from citizens all across the state and all across the political spectrum is frustration with transparency. I remember one individual who was from the rural area, he was surprised there was even a public records law because every time he asked for something he was denied. That kind of broke my heart a little bit. It was consistent.

It is interesting that you mentioned that you have trouble yourself. We have seen that with other elected officials. There was a case down in Incline Village where the board treasurer of the Incline Village General Improvement District was denied access to financial records; I believe it was the chart of accounts. That could be the wrong term. I know it was an important financial record. It came up at a board meeting. The reason given to the board treasurer for denying him access to the district's financial records was if they turn this over to you, then it is a public record for everyone to see. Well yeah, you are a public agency. It is shocking and consistent how many people have had issues accessing public records.

Holly Welborn:

We face a lot of those same complaints. One of our most common complaints at the ACLU of Nevada is the inability for individuals to access public records. We have hundreds of complaints that come in that people put in a request, they ask us to review what that request looks like. We have a form letter that we send out to tell people how they can make those requests a little bit more impactful and effective.

I think that this bill really gets at that, incentivizing and compelling those government agencies to produce those records for the general public. These are people that do not have the legal skills, knowledge, and expertise we do at either the National Policy Research Institute (NPRI) or the ACLU of Nevada, so that the public can get the information that they are seeking.

Assemblywoman Black:

I think that it is just too easy for government agencies to ignore requests. I have been on the receiving end of that. I have seen it in my own life. I support this bill. I think it is a great bill and I hope it passes.

Assemblywoman Brown-May:

I just would like to say that I appreciate your efforts. I have a Freedom of Information Act request in at the United States Department of Labor that has been long delayed. I completely understand how difficult it can be to access public information as a citizen and an advocate. I appreciate that we are talking about this issue today.

I have two questions and I think I am going to follow up on Assemblywoman Dickman's thought process. Is there a way to incentivize individual employees in governmental agencies to actually deliver the information? If there is a budget account that covers legal fees somewhere within the government, then that may not be a reason to make me want to move quickly if the administration says we will just slow down and let us look at this information request. Is there a way to incentivize those employees to actually follow through on that request? That would be question number one.

My second question is, I am going to believe that it is probably the judge, who determines what reasonable costs or reasonable times are for the delivery of that information. We have talked in the Committee for a long time about body camera footage for police officers. What is the time frame expected to turn around public information? Especially if we are talking about detailed reports. Would it be the judge then who determines what reasonable is, relative to that?

Assemblyman Matthews:

I think I touched on it earlier that under current law, I will let Mr. Fellner and Ms. Welborn correct me, but there is a requirement governing the initial response time for a response to a request. To your other question in terms of the reasonable costs, yes, it is my understanding that is something that would be determined by the judge in a particular case.

Going back to your first question, in terms of the incentives, that really is the goal of this legislation, to strengthen those incentives to comply. As you alluded to, right now it is much easier for someone within government to simply delay or ignore the request, adopting sort of the mindset of "What are they going to do, sue us? Good luck, it is going to be pretty cost prohibitive to do this." Knowing that the incentive is now much stronger to bring a lawsuit is what I would anticipate would help increase the likelihood of that compliance, which, as I said, is the underlying goal of this bill. As always, I will defer to Mr. Fellner and Ms. Welborn if they would like to build on that at all.

Assemblywoman Considine:

I want to make sure that if I spoke incorrectly, that I have it correct on the record. In one of the letters [\[Exhibit E\]](#) we got, it does say treble damages, three times the cost of the suit, but in section 1, subsection 2, of the bill it says "an amount that is equal to double the costs of the suit, including, without limitation, costs and reasonable attorney's fees, and his or her reasonable attorney's fees in the proceeding." Can you clear up whether this bill means that you are entitled to all the fees and costs plus that doubled? Does this mean you are entitled to the fees and costs plus twice that amount, which would be treble damages? I just want to be clear on which way because I think I have paperwork that says both.

Assemblyman Matthews:

Thank you for the opportunity to clarify that because I know it can get a little confusing. I will try to walk through it the best I can. The way the bill is written, if the bringer of the suit prevails, they would get, still as they do under current law, their attorney's fees. Then they would get an additional amount worth double those attorney's fees. The end result of that is that it is a triple penalty that is assessed. Just to give a simple example, if you owe me \$5 and you are ordered to pay me the \$5 and you are also ordered to pay an amount worth twice that, it is an additional \$10. It is \$10 plus the \$5 which gives us \$15, which is of course triple the \$5. The penalty ends up being triple the amount. That is why one of the letters spoke to tripling of the penalties [\[Exhibit E\]](#). One part is going to the attorney in the form of attorney's fees as is the case under current law. The other two parts, double that amount, are going to the one who brings the suit. I know it can get a little confusing depending on the perspective from which you look at it. Hopefully, that clears that up for you and others on the Committee as well.

Assemblywoman Considine:

Thank you, Assemblyman Matthews, it does. I just wanted to make sure since I talked about double the amount. Using the *Review-Journal* article, that is a lot of money. I just wanted to make sure I was correct on that. I did not want to put anything incorrect on the record.

Chair Flores:

Thank you, members, for your questions this morning. I do not believe we have any additional questions at this time. With that, I am going to go ahead and invite those wishing to testify in support of [Assembly Bill 276](#).

Annemarie Grant, Private Citizen, Quincy, Massachusetts:

My brother was killed by Reno Police and the Washoe County Sheriff's Office during a mental health crisis. I sincerely appreciate the sponsor of this bill. There has to be a way for the public to hold these agencies accountable when public records requests are not fulfilled. I can attest that the current methods are not working.

After my brother's death, I actively became engaged in public records requests in Nevada. In 2018, when I requested eight officer-involved shooting reports, I was quoted \$1,800-plus. I could not afford \$1,800. It took them an extended period of time to even respond to me to begin with. I have extensive documentation of the public records requests I have made, the extended length of time they took to even respond, and then most due to the crazy fee I could not then afford.

When I came to Nevada last summer, I held a banner many days outside the Washoe County Jail demanding justice for my brother. My family was surrounded by multiple deputies.

I put in a public records request for the footage on February 17, 2021, and carbon-copied Washoe County Sheriff Darin Balaam. I received confirmation on February 18, 2021; they had received my request and acknowledged receipt of it. I then heard nothing from the Washoe County Sheriff's Office regarding my public records request. On March 4, 2021, I emailed requesting per *Nevada Revised Statutes* (NRS) 239.0107, the date I could expect my request to be fulfilled. On March 9, 2021, I received a reply stating "Your request is being processed. I am hopeful that we will be able to complete your request within the next two weeks, but I am not able to provide an exact date. Requests are handled in the order received and it is often necessary for us to contact other departments for the information requested." As of today, I have yet to receive an expected date or have my request fulfilled. A follow-up email has been sent by me for an update. I realize the current NRS allows me to file suit in the district court to compel a release; however, financial constraints have always been the barrier.

Access to public records is so important. It was through public records requests that I was able to obtain the video footage of my brother being asphyxiated at the jail. The current public records NRS has not been a detractor to government entities to not comply. This bill would incentivize the average citizen to hold government agencies accountable and discourage the agencies from not complying with the NRS and the requests. Please support this bill.

Richard Karpel, Executive Director, Nevada Press Association; and representing Nevada Open Government Coalition:

Thank you, Chairman Flores and members of the Committee. I am also testifying on behalf of the Nevada Open Government Coalition, of which Mr. Fellner and Ms. Welborn are members. Under the Nevada Public Records Act, government agencies are required to construe the provisions of the act liberally. They are required to construe exceptions to the act narrowly. In other words, they are required to err on the side of releasing information to the public. We believe that increasing the costs of the reimbursement the

government agencies may be required to pay when a court rules they have unlawfully withheld records—and again, it requires a court ruling they have unlawfully withheld the records—we believe for that reason that A.B. 276 will be a strong incentive for government agencies to begin construing the provisions of the Nevada Public Records Act liberally.

David Gibbs, Private Citizen, Las Vegas, Nevada:
[Unintelligible] records request is a good use of a bill.

Basically, it is ditto. Anything that prevents the government and deters the government from stonewalling a public records request is a good thing. Please support this bill.

Janine Hansen, State President, Nevada Families for Freedom:

We just want to encourage you to pass this bill. We have long stood for open and transparent government. Oftentimes, government can be a little stubborn. They do not want to respond to individual citizens. We really like the concept of this bill and the fact that it provides a means by which ordinary people can get the information from the government which they have requested. We support Holly Welborn's testimony from the ACLU as well as Robert Fellner's from NPRI. Thank you very much for hearing this bill and for Assemblyman Matthews in bringing it.

Lisa Rasmussen, representing Nevada Attorneys for Criminal Justice:

Nevada Attorneys for Criminal Justice supports this bill and thinks it is a really important bill because it gives teeth, so to speak, to the public records requests scheme. There are many instances when our attorneys file public records requests to various government agencies. For example, most recently records requests were made to the Department of Corrections regarding COVID-19 and COVID-19-related issues on behalf of our clients. There has been a lack of transparency. We believe that with the additional measures that the bill proposes, it would help strengthen our ability to obtain records that are necessary to pursue litigation on behalf of our clients. We strongly support the bill and request that the members of the Committee do the same. Thank you so much for hearing me this morning.

Chair Flores:

We will continue with those wishing to testify in support of Assembly Bill 276. [There were no more callers.] At this time, we will go to those wishing to speak in opposition to Assembly Bill 276.

I know that we have Mr. David Cherry joining us virtually. We still start off with you. Good morning and welcome.

David Cherry, Government Affairs Manager, City of Henderson; and representing Urban Consortium:

The Urban Consortium includes the Cities of Las Vegas, Reno, Sparks, and Henderson. In 2019, Chairman Flores and the esteemed Committee spent considerable time and gave careful thought to making changes in the Nevada Public Records Act. That bill, Senate Bill 287 of the 80th Session, was supported by many of the same organizations you

have heard from here today. Senate Bill 287 of the 80th Session was passed, signed, and took effect in October 2019. Following this bill's passage, Richard Karpel, President of the Nevada Press Association, who just testified in support of this bill, was quoted in the *Reno Gazette-Journal* in an article published on June 18, 2019: "It's a very big deal for transparency and accountability. State agencies and local governments can no longer defy the public records law with impunity. The best part(s) are the civil penalties adding teeth to the public records law." Yet, here we are again, having the same debate. As Yogi Berra said, "It is like déjà vu all over again." We were told the law needed a penalty, which was added in 2019; and now that is simply not enough. Eighteen months later, we still have not even given the chance for the new law to really be tried but are here again having this debate over whether or not we need to ratchet up the penalty. The law already allows for the recovery of costs and court fees by someone who brings a lawsuit. Why do we really need the bill being proposed today? In fact, while the benefits of A.B. 276 are questionable, in my opinion, the potential negative consequences must be carefully weighed if this goal is to be reached. If the goal is to avoid litigation, why does this bill not just only invite but literally reward those who file lawsuits by turning this into a money-making enterprise?

I would also ask you to remember that compliance rates are already extremely high when it comes to fulfilling public records requests. At the City of Henderson, we processed more than 15,000 records requests in 2018; more than 17,000 in 2019; and nearly 19,000 in 2020. The average response time was less than one day. The average time it took for requesters to receive their records was less than two days. As governments, we have the duty to protect sensitive information entrusted to us by the public. This can require, at times, defending matters of privacy in court. We are talking social security numbers, Health Insurance Portability and Accountability Act of 1996-protected health care information, names and information regarding victims of harassment, and many other sensitive records.

Assembly Bill 276 also creates a bounty system that incentivizes court cases to be filed. It is literally an invitation to litigation. Some requesters may see the potential for a large payday and will look to make difficult requests with hopes of collecting generous penalties. This approach was rejected in 2019. Instead, as you heard, civil penalties assessed for noncompliance are given to the Nevada State Library Archives to further public access to records and most importantly remove any financial reward for abusive requesters. If passed, a majority of payouts under this bill will be rewards for those bringing lawsuits. That is because no willful finding is needed in A.B. 276 for punitive damages to be assessed, as is required in the existing law, for a fine to be levied by a judge for failure to comply.

This bill only increases the time it will take to fulfill records requests because government entities would require even the most routine requests to receive a greater level of scrutiny due to potential litigation costs compounded by the punitive damages included in A.B. 276. It would add no clarity to existing public records law, which also results in litigation due to the vagueness of existing provisions. Changes in the act, as I mentioned, just went into effect in October 2019 with the addition of fines up to \$10,000.

We have not really heard sufficient evidence today to say that is not able to address the need that we have that has been identified. We have seen a few anecdotal instances referred to. I would have you compare that to the extreme number of cases that we have fulfilled at the City of Henderson in a very short time with very little cost to the individual who is receiving records that they have requested in less than two days on average. With that, I would also like to thank the Committee for the time today and turn it over to Matthew Christian with the Las Vegas Metropolitan Police Department (LVMPD).

Matthew Christian, Assistant General Counsel, Las Vegas Metropolitan Police Department:

Good morning, Chair Flores and members of the Committee. In my role as assistant general counsel, I do provide advice with regard to public records, among other things. I will try to keep my comments short because I know there are others waiting on the line. To start, I really wanted to make sure that it is clear exactly how the NPRA currently works when it comes to attorney's fees and costs. Under current law, if a dispute arises, the requester can file a lawsuit. The court will hear from both sides. If the court agrees with the requester that records should be provided, then under the current system the requester can ask for attorney's fees right there and then. The requester does not need to wait for an appeal. Right there and then, they can ask for attorney's fees. Also, the requester does not need to demonstrate that the public entity is acting in bad faith.

I think there is a misperception about that. It could very well be, in fact, that the public entity is acting in good faith, but the court will still have to order fees as long as the requester prevails. There is no discretion with regard to awarding fees if the requester prevails. The only thing the court can do is limit the fees to what is reasonable and what is actually incurred. That is why, sometimes, you will see that courts do have to cut an attorney bill because if the fees were not actually incurred in a reasonable way, then that is the only discretion the court has. Now, on the flip side of that, if a public entity is the party that prevails, there is no parallel provision in the NPRA that allows the public entity to recover its fees from the non-prevailing requester. Frankly, that is a little bit of an unusual system in the law, where only one side is able to seek attorney's fees. The effect of that system is that under existing law, public entities are already highly incentivized to provide public records and to stay out of disputes. Public entities do not want to engage in litigation because there is always going to be a cost to the public entity. Win or lose, there will be a cost. Again, I think there might be misperceptions about that. Again, the law already has teeth; they are very sharp teeth. As Mr. Cherry explained, those teeth became sharper after 2019 and the penalty provisions that were introduced two years ago.

That leaves me to address another couple of misperceptions that I think may exist. Despite the impression that has been created here today, there really are not a lot of disputes. In my experience, there is certainly not a lot of litigation over public records. Even when there is litigation, I think the impression has been created that the requester is always the prevailing party. That simply is not true. Sometimes, in fact often, public entities are the prevailing party. I think, in part, the reason that there are not a lot of disputes is because of the changes that were made in 2019. After the penalty provisions were introduced, a lot of public entities

redoubled their efforts to make sure that requests were being responded to timely and responded to appropriately.

I will give you the example of what we did in the LVMPD (Metro) two years ago. We stood up a whole new unit to respond to records requests. Currently, we have 13 full-time employees who do nothing other than respond to records requests. That includes some commissioned law enforcement officers. We have made it very easy for folks to request public records through our website. We have ensured that a system is in place, including training, to make sure that we respond to requests very quickly and that we understand the areas of the law that govern records requests. With this new system, we can tell you that in 2020, Metro responded to over 5,000 records requests. Some were very easy to answer. Some were more complex. Some asked for a very voluminous number of records. These records requests do include body-worn camera; I think there was a question about that earlier. Importantly, a vast majority of those requests were fulfilled with no problems and no controversies whatsoever. I think one only needs to watch the television or open the newspaper to know that law enforcement agencies provide records on a daily basis.

So why does Metro need such a large unit? We have records that contain very sensitive information. Generally speaking, when people encounter the police, whether it is a suspect, a victim of crime, or a witness to crime, they are having one of the worst days of their lives. Our records contain things like criminal history information, details about allegations and accusations that are being made, admissions that could be embarrassing to people. Our body-worn camera shows the inside of people's houses, which we have to protect; our body-worn cameras also show graphic images. We possess records that contain the identities of confidential informants; we have information that, in some cases, if released could cause a person to face retribution from a criminal suspect, including violence. Some of our records are intended to be used in criminal prosecutions. Sometimes, we get requests before those criminal prosecutions even take off. For all of those reasons, we have to be constantly vigilant that we do not do certain things like impair a defendant's right to a fair trial. The premature release of information could do that and, of course, we recognize that. We also have to be cognizant of individuals' rights to privacy. There are various statutes that simply make certain records absolutely confidential. We have to be vigilant. Of course, the public has a right to public records. The law recognizes that, as a public entity, we are obligated to balance the public's right to records and transparency with other individual rights like privacy, victim, and witness rights. We are also obligated to redact records. For instance, maybe only part of a video is confidential, but the other part is not. Maybe part of a record is confidential, but the other part is not. When we balance out all of these interests, if redactions are required, that is a complex process and it is time-consuming.

We are very proud of this new unit that we stood up. Of the 5,000 requests that we received in 2020, a vast majority were no problem. When disputes begin to arise, we try to work them out, always keeping in mind the Nevada Supreme Court's balancing test that we are obligated to implement. To demonstrate our success, I can tell you that LVMPD has been sued just three times in 2020 out of those 5,000 requests. I was able to work out one of those without any problem, to the satisfaction of the requester. With regard to the other two, they were

both filed by the media; in both cases Metro prevailed. The judge agreed with us that we were asserting legitimate privacy and law enforcement interests that required maintaining the files as confidential. Incidentally, in 2020, Metro also prevailed in a pending appeal with the adverse party being the media. It is not just in district court; it is in the appellate courts as well that courts recognize there are legitimate interests to be protected. You do not hear about those cases in the news. The reason that Metro prevailed is courts do recognize that there are these interests that have to be protected, not only privacy, but law enforcement interests—especially when we have records about a pending case and the case has not even gone to a criminal trial.

I am here to say that responding to public records requests is important. We take it very seriously. Most of the time, there are no issues whatsoever. We do everything possible to avoid disputes, but sometimes the issues are complex. In those rare cases when disputes arise and cannot be resolved between the parties, then yes, ultimately, it is up to the courts to resolve. If the parties cannot resolve it, that is why we have courts. We are opposed to this bill because increasing the amount of attorney's fees and costs that can be awarded is not going to make some of these requests any less complex. It is not going to eliminate the need for courts. It is just not going to be effective. Frankly, it is just not fair to penalize the public taxpayer when public entities are acting in good faith, asserting privileges that they are entitled to assert under the law. With that said, Mr. Chair and members of the Committee, that concludes my testimony. I am more than happy to take any questions that anyone might have.

Chair Flores:

Thank you for your testimony this morning. Members, do we have any questions? [There were none.] We will continue with those wishing to testify in opposition to Assembly Bill 276.

Jamie Rodriguez, Government Affairs Manager, Washoe County:

Good morning, Chair and Committee. I do not want to be repetitive of what has already been said. We do have strong concerns with the bill as drafted. What has been discussed already this morning that I do want to highlight again is that there was a pretty substantial overhaul of the public records law that was done last session with great help from this Committee and Chair Flores. We support those measures and those changes that helped clarify some of the law and, as the proponents of the bill now state, give that law some more teeth.

We feel it is very important to be good stewards of all information in public records that we do, in fact, possess as a local government. However, we have to weigh what the request is against whether it is really appropriate to release to the public. We get requests for gruesome crime scenes and pictures of victims. We have to weigh their privacy and their rights as to whether those should really be released. We have had cases that have gone to court because we redacted portions of those pictures. While we have been successful in those cases, these are examples of public records requests that we get and some of the information that we do not automatically provide, because we have to weigh that.

It is hard to feel that measures like this are not trying to force us to just release the data. However, just releasing that data can make us, as governments, liable for improperly releasing people's personal information. While we do submit, respond, and provide 99 percent of the public records requests that we receive, I want to clarify that the 1 percent are not outright denied. It is that certain portions of those requests are withheld or redacted to protect public and individual information. We feel that the bill last session gave teeth to this law and that these types of measures that would be substantial hits to public funds are not appropriate to move forward.

Kelly Crompton, Government Affairs Manager, City of Las Vegas:

The City of Las Vegas is in opposition to A.B. 276 as written and echoes the comments of my colleagues that have spoken before me. The current public records laws work. The overhauls done last session have helped to make the laws better. The City of Las Vegas takes seriously its duty to provide these records and has dedicated staff that are assigned to respond to public records requests. Almost every time a request is filled quickly and without charge to the requester.

Although supporters of the bill have stated that obtaining records can be complicated, our process is simple and user-friendly. You can type "records request" in the search bar on the front page of our website at lasvegasnevada.gov/recordsrequest. That prompt gives you step-by-step instructions on how to submit a request. You can also check the status of your request and search frequently asked questions on records requests.

Most complications usually come from an individual who does not know the agency to request a record from. For example, high percentages of our records requests at the City of Las Vegas are actually meant for Clark County, the Clark County School District, and most recently, for the Department of Employment, Training and Rehabilitation. The City of Las Vegas spends the time to direct individuals to proper agencies and provides contact information to those agencies just to ensure that requesters get the information they are actually looking for.

In fact, supporters of this bill have publicly acknowledged the City for our efforts to provide transparency. On January 30, 2020, in his email to his readers, the editor of the *Las Vegas Review-Journal* praised the City for its efficiency in providing public records: "our coverage of the Alpine Fire has relied heavily on public records and I am happy to report that the City of Las Vegas has worked with us to make sure we have the access to those records that you pay for." Thank you for your time and, as I said, we are in opposition of this bill.

Wesley Harper, Executive Director, Nevada League of Cities and Municipalities:

Thank you for allowing my statement of opposition. The League is respectfully but resolutely in opposition to A.B. 276. We do appreciate the discussion, the work of the sponsor to bring this bill forward, and the distinguished members of the Assembly Committee on Government Affairs for hearing it. It is the information of the League, that with few exceptions, public records requests are routinely and overwhelmingly processed and granted. This bill, while seeking a laudable outcome, is constructed to create wide-ranging negative consequences. A proposed statutorily mandated penalty such as this is typically intended to punish willful and pernicious conduct. We assert that this type of penalty is best determined by the court, based upon specific facts and demonstrated conduct in each case. It is a blind and blunt mechanism for the Legislature to predetermine that bad faith was the cause for the denial or the delay of a public records requests.

Each public request sets in motion a balancing test for local government to weigh the public interest of disclosure versus the privacy interests of those whose information is disclosed. The decision to disclose is not always clear. Therefore, litigation becomes the path for resolution. It seems to be inconsistent with the intent of the bill to impose a harsh financial penalty in cases where the courts' determination is necessary to resolve a bona fide and legitimate dispute.

To further complicate matters, a clear definition of public records has not been provided by NRS. This shifts the burden of interpreting what a public record actually is to a local government. It is certainly not clear that every and all documents and information in the purview of a local government should be disclosed at the request of any resident or private entity for any reason whatsoever. This bill seemingly requires perfection in interpretation on the part of local governments without providing the raw materials to achieve it. If this bill also included a definitive and clear definition of a public record, it would significantly improve its construction.

Lastly, establishing a strong financial incentive in the event of a finding for the plaintiff also creates a strong incentive to file nonmeritorious lawsuits and with it an increased demand on local government resources to process and defend these claims. This increase in demand for resources comes at the expense of services that could otherwise be provided to residents. Again, thank you very much, Mr. Chair, for your attention and allowing my statement of opposition.

Vinson Guthreau, Deputy Director, Nevada Association of Counties:

The Nevada Association of Counties' members are all 17 of Nevada's counties. I do not want to be redundant for the Committee. You have heard great reasons already of why we are testifying in opposition to A.B. 276. We do appreciate the sponsor's reaching out to local governments to help us understand his intent and the goal of this legislation. A more than doubling of fines could incentivize outrageous public records. Counties are entrusted with the public's right to know along with the public's trust. We must balance those public records requests against this standard with every request.

We believe that the existing penalties in statute are sufficient to address those cases where there may be a bad actor. We believe that the bipartisan bill, Senate Bill 287 of the 80th Session, struck a balance between fines and those governments that are acting in good faith to individuals. I am echoing the comments of some of the previous opposition testimony. I just want to make it short. Thank you, Mr. Chair, for the opportunity to provide testimony today.

Mary Pierczynski, representing Nevada Association of School Superintendents:

The school districts appreciate that providing public record information is important, and school districts try to comply even when requests are made in smaller districts with limited staff to provide the information. We believe that the current statute is sufficient, and no new legislation needs to be added at this time. We do agree with all the other comments that have been made prior to my testimony.

John T. Jones, Jr., representing Nevada District Attorneys Association:

We are in opposition to A.B. 276. We join in the arguments made by Mr. Cherry with the Urban Consortium, and Mr. Christian with the Las Vegas Metropolitan Police Department. Assembly Bill 276 is strictly punitive and does not allow for any argument that litigating the public records issues was legally justified. The bill allows for a windfall without justification. As Mr. Christian artfully put it, governmental entities have an obligation to protect sensitive personal information in our possession. If an agency just releases this type of information, they would risk damages and privacy claims asserted by those whose information is released.

In the coroner's case specifically cited by the proponents of the bill, the Nevada Supreme Court found that the coroner established a privacy interest in certain medical and health information. Based on an Attorney General's opinion, NRS Chapter 432B, and other legal arguments, the coroner had no choice but to assert confidentiality with respect to these records. In the analysis, the Nevada Supreme Court validated that position. I encourage you to go read the case. It is *Clark County Office of the Coroner/Medical Examiner v. Las Vegas Review-Journal*. That is 136 Nev., Advance Opinion 5, filed February 27, 2020. There are changes that need to be made to our public records law, including better definition of a public record and more clarity of when exceptions apply. We encourage the Legislature to work with us on these changes instead of increasing the punitive aspect of the statute.

Eric Spratley, Executive Director, Nevada Sheriffs' and Chiefs' Association:

It is incredible to me that during this time we are in—in the middle of a pandemic and the financial crisis everyone is in or facing—the staff and personnel of our governmental agencies have been trying to keep employees safe and yet still provide governmental services the best they can. The scale and scope of which some of these onerous requests come in to the wide variety of governmental agencies, which require people who are just trying to make it through the crisis still, to try and manually sift through documents, redact videos, or the myriad of other things needed to meet the deadline of public records requests—it is just crazy.

This kind of ambulance-chaser legislation is diametrically opposed to the testimony we have heard this session and the direction this legislative body is headed regarding the use of fines and fees as a matter of punishment. Why on earth would this body consider punishing governmental agencies that might still be running on modified operations in the middle of this crisis and doing the best they can in the safest manner they can? The proponents are claiming there were recent requests unfulfilled to their satisfaction, but has everyone forgotten that this past year was unprecedented, that we are still in the crisis, and that there is no promise that it will not spool back up or get worse again? The flood of onerous public records requests that this can trigger simply due to the potential for monetary payout is ludicrous.

The suggestion you have heard here today to move the penalty to the individual employee is absurd and an offensive suggestion against the outstanding public servants in the state of Nevada. Yes, I would not support this legislation in a normal year. The timing for this proposed money grab is embarrassing, irresponsible, and should not be considered.

Chair Flores:

Thank you for joining us this morning. I just wanted to let the opposition know that we have hit 27 minutes and 51 seconds, we have right above two minutes left. If there is a whole host of other folks still wishing to testify, it may be in your best interest simply to put your name on the record, say ditto, and give an opportunity to everybody else. That is up to you. I am just letting you know you have about two minutes left before we close out the opposition.

Michael Hillerby, representing City of Sparks; and Regional Transportation Commission of Washoe County:

We would like to echo the comments of the previous opposition speakers. We thank you for your time and you and your Committee for your work on behalf of the people of Nevada.

Kathy Flanagan, Senior Management Analyst, Las Vegas Valley Water District:

We say ditto.

Calli Wilsey, Senior Management Analyst, Intergovernmental Relations, City of Reno:

Thanks for the opportunity to weigh in. For the sake of time, we will also say ditto and appreciate the other comments already put on the record by those in opposition.

Jared Luke, Director of Government Affairs, City of North Las Vegas:

To your point Chairman, we would like to echo everything that has been said in opposition.

Chair Flores:

Next caller wishing to testify in opposition of Assembly Bill 276. [There were no more callers.] At this time, I would like to go to those wishing to speak in the neutral position for Assembly Bill 276. [There were no more callers.]

At this time, we will come back to Assemblyman Matthews for any closing remarks you may have.

Assemblyman Matthews:

Thank you to all members of this Committee for hearing this bill today. I also want to thank all of those who called in to testify. I especially appreciate today's copresenters, Ms. Welborn and Mr. Fellner.

I want to close by stressing what I think is a critical point in that government transparency should not be, and indeed is not, a partisan issue. I have introduced this bill today and I happen to be a Republican. I think it is interesting to note, as Mr. Fellner did, that next door in California, legislative Democrats have proposed a bill that is nearly identical to this one. The reasoning for this is simple. We can debate all day and oftentimes we do, even right here in this Committee, over the philosophical question of bigger government versus smaller government. Wherever we may come down on that question, we should all be able to unite and support this principle of open government. It has become clear, and has been testified to in detail this morning, that current public records law, while certainly well-intentioned and even effective in many instances, is insufficient to compel compliance from potential bad actors and to uphold the public's right to know. The current incentive structure encourages noncompliance. It is not surprising in the least the instinct of those within government would be to shield the government from greater scrutiny. To submit to that instinct does not serve the public good, particularly during times of enormous challenges to our state when results of governmental actions and decision are especially consequential. Just this morning, the *Las Vegas Review-Journal* called A.B. 276 "the transparency bill Nevada needs." I agree wholeheartedly. I respectfully ask for your support of this bill. Thank you.

Chair Flores:

Thank you, Assemblyman Matthews. At this time, I am going to go ahead and close out the hearing on Assembly Bill 276. Thank you, members, for your participation, questions, and everybody who called in. Thank you to your copresenters as well.

Next on the agenda, we have public comment. Could we please go to the first caller wishing to speak for public comment? [There was no one.] At this time, we will close out public comment.

Again, thank you, members, for your work this morning. I want to remind you that for tomorrow, March 24, 2021, we have two bill hearings: Assembly Bill 270 and Assembly Bill 307. Please give yourself an opportunity to review those ahead of time. We will also be doing a work session document. Please make sure that you review the items on the work session document: Assembly Bill 2, Assembly Bill 21, Assembly Bill 111, Assembly Bill 153, and Assembly Bill 184. With that, members, thank you for the work. I will see you tomorrow morning at 9 a.m. This meeting is adjourned [at 11:06 a.m.].

RESPECTFULLY SUBMITTED:

Kyla Beecher
Committee Secretary

APPROVED BY:

Assemblyman Edgar Flores, Chair

DATE: _____

EXHIBITS

[Exhibit A](#) is the Agenda.

[Exhibit B](#) is the Attendance Roster.

[Exhibit C](#) is a memorandum dated March 22, 2021, submitted by Kevin D. Doty, Division Administrator, Purchasing Division, Department of Administration, regarding Assembly Bill 28.

[Exhibit D](#) is a letter dated March 22, 2021, submitted by Maggie McLetchie, representing Nevada Open Government Coalition, in support of Assembly Bill 276.

[Exhibit E](#) is a letter dated March 19, 2021, submitted by Richard Karpel, Executive Director, Nevada Press Association, in support of Assembly Bill 276.