

**Carson City
Agenda Report**

Date Submitted: January 21, 2014

Agenda Date Requested: February 5, 2014

To: Charter Review Committee

From: Rob Joiner, Chairman

Subject Title: Review and discussion of the Nevada Open Meeting Law.

Summary: Brief discussion on how meetings must be conducted to comply with the Open Meeting Law.

Type of Action Requested: (check one)

Formal Action/Motion Other (Specify) Discussion only

Recommended Committee Action: N/A

Supporting Materials: Presentation materials.

Prepared By: Janet Busse, Office Supervisor

Committee Action Taken:

Motion: _____

1) _____

Aye/Nay

2) _____

(Vote Recorded By)

THE NEVADA OPEN MEETING LAW

Presented by
Randal R. Munn
Chief Deputy District Attorney
Carson City, Nevada

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Learning Objectives

- Introduce you to the Open Meeting Law
- Use the statutory provisions of the Open Meeting Law to recognize avoidable mistakes

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What is the Open Meeting Law

- NRS 241.010 sets forth a declaration from the legislature as follows:
 - The Legislature finds and declares that all public bodies exist to aid in the conduct of the people's business.
 - It is the intent of the law that their **actions** be taken openly and that their **deliberations** be conducted openly.

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Application of the Open Meeting Law

- The Open Meeting Law applies to “Public Bodies” as defined in NRS 241.015(3).

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Elements of the Definition of a “Public Body” in NRS 241.015(4)

- Any administrative, advisory, executive or legislative body (of 2 or more) of the state or local government
- which **expends** or **disburses** or is supported in whole or in part by **tax revenue**
- or which **advises** or **makes recommendations** to any entity which expends or disburses or is supported in whole or in part by tax revenue
- includes any board, commission, committee, subcommittee or other subsidiary thereof, IF ANY SUCH BODY IS CREATED BY: (continued)

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NRS 241.015(4)(a) – IF BODY CREATED BY:

- Nev. Const., NRS, City Charter, City Ordinance, NAC; or
- Any body thus created, further creates a body by “resolution or other formal designation.” NRS 241.015(4)(a)(5); or
- Any body created by Executive Order of Governor. see also NRS 241.015(4)(b); or
- Any body created by “resolution or an action” by a political subdivision governing body (BOS in Carson City). NRS 241.015(4)(a)(7).
- Local government executive officer exception (AG – OML Opinion 2009-02)

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Who is NOT a “Public Body”?



- NRS 241.015(3) clearly provides that a “public body” does not include the Legislature of the State of Nevada
- Most private non-profit corporations
- City executive staff

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What is a Meeting of a Public Body?

- NRS 241.015(3)(a)(1) Provides a Basic Definition for a Meeting
- (a) Except as otherwise provided in paragraph (b), means:
 - (1) The **gathering** of members of a public body at which a **quorum** is present to **deliberate toward a decision or to take action** on any matter over which the public body has supervision, control, jurisdiction or advisory power.

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Methods of Holding Meetings

- In addition to standard meetings and if properly noticed and open to the public:
 - Via telephone
 - Video conference



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**Definition of Meeting Continued ... NRS
241.015(3)(a) Also Provides**

- (2) Any **series** of gatherings of members of a public body at which:
 - (I) Less than a quorum is present at any individual gathering;
 - (II) The members of the public body attending one or more of the **gatherings collectively** constitute a quorum; and
 - (III) The **series** of gatherings was held with the **specific intent** to avoid the provisions of this chapter.

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Remember!

- Electronic communication must not be used to circumvent the spirit or letter of the Open Meeting Law



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CAUTION NEEDED

- The Nevada Supreme Court stated that in the absence of a quorum, members of a public body can **privately discuss** public issues or even **lobby** votes. However, if a quorum is present, or is gathered by a serial electronic communications, the body must deliberate and actually vote on the matter in public. *Del Papa v. Board of Regents*, 114 Nev. 388 (1998).
- If a member of a public body sends out an **email** to a **quorum** of the public body regarding an issue that the public body has supervision, control, jurisdiction or advisory power over, a potential violation may evolve.
- Use email BCC to other members (avoid quorum deliberation or decision).

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CAUTION NEEDED

- “Deliberate” means **collectively** to examine, weigh and reflect upon the reasons for or against the action. The term includes, without limitation, the **collective** discussion or exchange of facts preliminary to the ultimate decision.

NRS 241.015(2).

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What is a Quorum?

- A “Quorum” has been defined by NRS 241.015(5) as meaning:
 - a simple majority of the constituent membership of a public body or another proportion established by law
 - Or specific statute

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Social Function

- Not always a meeting
- At a social function if the members do not deliberate toward a decision or take action on any matter over which the public body has supervision, control, jurisdiction or advisory power. (NRS 241.015(3)(b)(1))

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Conferring With Counsel

- Non-meeting
- If purpose is to receive information from the attorney employed or retained by the public body regarding potential or existing litigation involving a matter over which the public body has supervision, control, jurisdiction or advisory power and to deliberate toward a decision on the matter, or both.
 - NRS 241.015(3)(b)(2)
 - Okay to deliberate
 - NOT okay to act

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What is “Action”?

- In short, action is:
 - Any decision or consensus
 - Any commitment or promise
- Includes serial communications that may also constitute meetings

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Action Also Includes

- If a public body has any member who is not an elected official, an affirmative vote taken by a **majority of the members present** during a meeting of the public body
 - NRS 241.015(1)(c)
- If all the members of a public body are elected officials, an affirmative vote taken by a **majority of all** the members of the public body
 - NRS 241.015(1)(d)

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Issues Involving Abstention

- Review:
 - NRS 241.0355
 - NRS 281.501(5) – Ethical considerations
- Abstention can effect the quorum to act and the number of votes necessary to act on a matter
- This issue is dependent on:
 - Whether the public body is comprised of all elected members
 - Whether the public body legal counsel renders a written opinion on the abstention in advance
 - Discuss abstention issues with public body legal counsel: NRS 241.0355(2) need for written Opinion by Counsel prior to abstention to preserve quorum

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Quorum - Calculation

- **NRS 281A.420(5):** Except as otherwise provided in NRS 241.0355, if a public officer declares to the body or committee in which the vote is to be taken that the public officer will abstain from voting because of the requirements of this section, the necessary quorum to act upon and the number of votes necessary to act upon the matter, as fixed by any statute, ordinance or rule, is reduced as though the member abstaining were not a member of the body or committee.

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Quorum - NRS 241.0355 Calculation

- **Carson City Charter Section 2.010:** The Board of Supervisors consists of five (5) members elected by the voters.
- Statutory “action” quorum is **3**
 - Statutory “2/3 action” quorum is **4** ($5 \times .6666 = 3.333$).
- If 1 **opinion abstention**: “action” quorum is still **3** (majority of $4=3$)
 - Statutory “2/3 action” quorum is **3** ($4 \times .6666 = 2.666$)
- If 2 **opinion abstentions**: “action” quorum is **2** (majority of $3=2$)
 - Statutory “2/3 action” quorum is **2** ($3 \times .6666 = 1.999$)

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Agenda

- An agenda is:
 - A list of items to discuss and act on ("For Possible Action")
 - Clear and complete
 - NOT vague
 - Actually gives notice to the general public
 - Obtain competent prior review of the agenda
- NRS 241.020



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Agenda Also Includes

- The time, place and location of the meeting
- A list of locations where the notice has been posted
- Must clearly indicate action items (“For Possible Action”)
- Should include a statement for additional assistance for physically handicapped
- Must have at least two public comment periods (one open to any subject). Any limitations must be expressed in the agenda.
- Should have an Agenda Management Notice
- Must include the name of the person being considered in a closed meeting or who the public body may consider taking administrative action against. NRS 241.020(2)(c)(4)-(5).

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Public Comment

- Public comment is *not required on every individual item* on the agenda. A public body can limit public comment to the statutory minimum, provided such limitation is *noticed* and applied equally to all members of the public. That NRS 241.020(2)(c)(3) minimum would be:
 - **After Roll Call Agenda Item (before any action item):** A general public comment period that is expressly limited to *any topic that is relevant to the public body's agenda items or authority* ... (optional as noticed on the agenda): 3 minute limitation per person on such public comment); and
 - **Last Agenda Item (before action to adjourn):** A general public comment period on *any matter that is or is not specifically included on the agenda as an action item and allowable under the Open Meeting Law* (optional as noticed in the agenda): 3 minute limitation per person on such public comment).

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Posting the Agenda - NRS 241.020(3)

- At office
- Three other public places
- On internet (if maintain a website). NRS 241.020(4)
- Three full working days before meeting
 - Example: For a Tuesday meeting, must post by 9:00am on the previous Thursday
- Agenda must be timely given to persons who request it
- Effective January 1st (but full compliance not later than July 1, 2014) (AB 445, 2013, sec. 5 & 6) (NRS 241.020(3)(b)): Local government public bodies must post agenda notices on State Dept. of Administration's website.

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Materials Available to the Public

- Agenda back-up Supporting Material
 - Before the meeting; over the counter at the office; agenda notice of who to contact
 - On the day of the meeting (at least one copy at the meeting)
 - Upon being available to the “public body” back-up supporting material must be made available to the public. NRS 241.020(6); also BOS must also post such on website at same time (other City boards website optional and not mandatory).
 - Confidential support material must relate to proprietary information under NRS 332.025, and does not need to be disclosed to the public. NRS 241.020(5).
- Can/must be made available by e-mail if the requester approves/requests. Just providing a [link](#) to website posting must be by permission only.

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Emergency Meeting or Emergency Agenda Item

- Must be an unforeseen circumstance
- Immediate action must be required
- NRS 241.020(2) and (9)
- Examples
 - Fire
 - Flood
 - Earthquake

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Closed Meetings – NRS 241.030

- A public body may hold a closed meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of a person. Conditioned upon prior timely notice to person considered. NRS 241.033.
- Must pass a motion to close the meeting stating the nature of the business and the statutory authority to close the meeting. NRS 242.030(3).
- The Open Meeting Law does not require a public body to conduct closed meetings. Can't close to consider government "role" of elected member or certain appointed public officers. NRS 241.031.
- **REMEMBER!**
 - Even closed meetings must be placed on the agenda

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Closed Meetings Cont'd.

- The person being considered may request the meeting be conducted in open and the public body must open the meeting unless a relevant person requests the meeting remain closed. NRS 241.030(2).
 - Relevant person is a different person being considered or a witness.
- It is within the Chair's discretion to determine who may attend a closed meeting or the public body may vote in open who may attend the closed. NRS 241.033(5).

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Closed Meetings Cont'd.

- DELIBERATION AND ACTION MAY NOT OCCUR IN A CLOSED MEETING!!!!!!!!!
- Cannot use closed meeting to circumvent Open Meeting Law and no action. NRS 241.030(5).

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Closed Meetings Cont'd.

- Remember DELIBERATION is defined
- “Deliberate” means **collectively** to examine, weigh and reflect upon the reasons for or against the action. The term includes, without limitation, the **collective** discussion or exchange of facts preliminary to the ultimate decision. NRS 241.015(2).

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Administer Examinations

- NRS 241.033(1):
- If the public body administers examinations, it may “prepare, revise, administer or grade examinations” in a closed meeting.
- An appeal of these examinations may also occur in a closed meeting.

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Restrictions on Closed Meetings

- A closed meeting cannot be held to consider the character, alleged misconduct, professional competence or physical or mental health of an **elected member** of a public body or
- “An **appointed public officer** or serves at the pleasure of a public body as a chief executive or administrative officer or in a comparable position.” (i.e. City Managers, County Managers president of university, and school superintendents). NRS 241.031.
- A closed meeting cannot be held for discussion of an appointment of any person to public office or as a member of a public body. NRS 241.030(4)(d).

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Notice for Closed Meetings – NRS 241.033

- Notice **must** include a statement that:
 - Lists the “general topics concerning the person who will be considered;”
 - The person may attend the closed meeting;
 - The person may have an attorney or representative present; and
 - The person may present evidence, either written or testimonial.

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Notice Continued

- A casual or tangential reference to a person does not require the public body to notice that person. NRS 241.033(7).
- If personal service of the notice on the person, then must be at least five (5) working days prior to the meeting.
- If sent by certified mail, must be sent at least twenty-one (21) working days prior to the meeting.

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Notice for Administrative Action or Condemnation – NRS 241.034

- Same as notice for closed meetings
- If a closed meeting will occur to consider a person's character, alleged misconduct, professional competence, or physical or mental health, AND at the same meeting, the public body may take administrative action against that person, the person must receive BOTH types of notices under NRS 241.033 and NRS 241.034.
- A notice pursuant to NRS 241.033 may state that administrative action may also occur at the same meeting, such a notice fulfills both notice requirements. NRS 241.034(3).

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Minutes of Public Meetings

- Minutes:
 - A meeting must be audio recorded, or transcribed by a certified court reporter
 - Must be available within 30 working days after the meeting. NRS 241.035(2). (Minutes must include "the substance of all matters proposed, discussed or decided. NRS 241.035(1)(c).
 - Must be retained for five (5) years (audio for one (1) year). NRS.035(2) and (4).
- Minutes of closed meetings may be released only with the consent of the person - NRS 241.035.

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Comments Made During a Meeting

- A statement “made by a member of the public body during the course of a public meeting is absolutely privileged and does not impose liability for defamation or constitute a ground for recovery in a civil action.”
- “A witness who is testifying before a public body is absolutely privileged to publish defamatory matter as part of a public meeting, except that it is unlawful to misrepresent any fact knowingly when testifying before a public body.”

NRS 241.0353

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Violations

- Action taken in violation of the Open Meeting Law is void - NRS 241.036.
- Attorney General's Office has primary jurisdiction to enforce NRS chapter 241.
- Attorney General's Office investigates complaints for allegations of violations of the Open Meeting Law.

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Enforcement

- Attorney General's Office may bring a legal proceeding to void an action allegedly taken in violation of the Open Meeting Law. 60-day statute of limitations. NRS 241.037. Tolled 30 days for corrective action. NRS 241.0365.
- Attorney General's Office may also bring a legal action to obtain an injunction to prevent violations of the Open Meeting Law. 120-day statute of limitations. NRS 241.037. Tolled 30 days for corrective action. NRS 241.0365.
- A private citizen may also bring a legal proceeding. NRS 241.037(2)

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Enforcement

- Attorney General's Office encourages self-corrective action for violations of the OML provided such is within 30-days of the alleged violation. NRS 241.0365 provides discretion to not prosecute such if "in the best interests of the public."
 - Must be during same meeting or on a future "For Possible Corrective Action" agenda item.
- The merits of the correction can only apply prospectively from the date of the corrective action. NRS 241.0365(5).
- Any findings of fact and conclusion of a violation found by AG must be agendized and "acknowledged" by the public body. NRS 241.0395.

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Criminal Penalties

- Attorney General's Office has primary criminal jurisdiction over violations of the Open Meeting Law.
- Violations of the Open Meeting Law can result in misdemeanor charges.
- If criminally convicted of an Open Meeting Law violation, a member of a public body vacates their seat – NRS 283.040(1)(d).

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Golden Rule of Open Meeting Law

- If the public body is not sure whether a certain act should be done in the open, it should ALWAYS perform that act at a properly noticed open meeting and there will not be an Open Meeting Law issue.

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Sources of Information

- Review the provisions of NRS Chapter 241 often.
- Don't assume that other public body members will be able to spot every issue.
- Rely on your knowledge and discuss issues with the public body legal counsel.

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Additional Sources of Information

- Case law in the annotations to NRS Chapter 241.
 - Available in your local law library
- Opinions relating to the Open Meeting Law published by the Attorney General's Office.
 - Available in your local law library or on line at <http://ag.nv.gov>

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But Wait! There's More...

- Letters issued by the Attorney General's Office to public bodies after investigation of Open Meeting Law complaints.
 - Available on line at <http://ag.nv.gov>
- Open Meeting Law Manual published by the Attorney General's Office.
 - Available on line at <http://ag.nv.gov>
- Consultation with public body counsel.

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Any Questions

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