NEW CHANGES IN NEVADA'S OPEN MEETING LAW: PROMOTING TRANSPARENT GOVERNMENT

BY BRETT KANDT, ESQ.

"Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. … If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself…."[1] These words from U.S. Supreme Court Justice Louis Brandeis bear as much importance today as when they were written in 1928.

Transparency in government is essential to a free society because it enables citizens to scrutinize the conduct of government officials in order to protect the public interest. Laws that grant citizens the right to access the proceedings of their government, and to engage in public discourse on the actions of their government, promote accountability. Thus, the opportunities for government to become the lawbreaker are greatly diminished and the efficiency of government can be enhanced.

The Nevada Open Meeting Law (OML), NRS chapter 241, in tandem with the Nevada Public Records Law, NRS 239, is the foundation of transparent government in our state. As the legislative intent establishes:

> "In enacting this chapter, 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."[2]

During the 2011 Nevada Legislative Session several important changes were made to the OML. Many of the changes were the result of the efforts of a task force formed by the Attorney General in March of 2010 to study the OML as part of a comprehensive effort to ensure transparent government by clarifying certain language to simplify compliance, and by strengthening the Attorney General's enforcement authority in the event of noncompliance.

The task force included members of the public, representatives of the news media and government officials; several of their recommendations were included in Assembly Bill 59, which was requested by the Attorney General and became effective July 1, 2011.[3]

Public Bodies Acting in a Quasi-judicial Capacity

Section 1.5 of the bill, codified as NRS 241.030(4), specifies that meetings of a public body that are quasi-judicial in nature are subject to the provisions of the OML as of January 1, 2012. An exception to this requirement is made for meetings of the State Board of Parole Commissioners when acting to grant, deny, continue or revoke parole of a prisoner, or to establish or modify the terms of the parole of a prisoner. These new provisions clarify the applicability of the OML to public bodies acting as administrative tribunals in a quasi-judicial capacity in light of recent Nevada Supreme Court case law on the subject.[4]

Disclosure of Attorney General Determinations of OML Violations

Section 2 of the bill, codified as NRS 241.0395, requires that, if the attorney general makes findings of fact and conclusions of law that a public body has taken an action in violation of the OML, the offending public body must include an item on the next meeting agenda acknowledging the attorney general's determination of a violation and the opinion of the attorney general must be included in supporting materials for the agenda item. This section also provides that disclosure of

the attorney general's determination of an OML violation is not an admission of wrongdoing on the part of the offending public body for the purposes of a civil action, criminal prosecution or injunctive relief. This promotes transparency by ensuring that the public is made aware of OML violations.

Administrative Subpoena Power for the Attorney General

Section 3 of the bill, codified as NRS 241.039, authorizes the attorney general to issue subpoenas for the production of relevant documents, records or materials in the course of investigating any potential violation of the OML and makes the willful failure or refusal to comply with a subpoena a misdemeanor. This administrative subpoena process promotes efficiency by allowing investigations to be completed within the applicable limitations periods and OML complaints to be timely resolved.

Revised Definition of "Public Body"

Section 4 of the bill revises the definition of "public body" in NRS 241.015(3) based upon how the body was created rather than on its function. The revised definition also clarifies that a public body must be a multi-member entity consisting of at least two persons.

The new definition includes "any administrative, advisory, executive or legislative body … 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," if that body is created by the Nevada Constitution; by state statute or regulation; by city charter or ordinance; by resolution or formal designation by a body created by statute or ordinance; by executive order of the governor; or by resolution or an action by the governing body of a political subdivision.[5] Also included within the new definition is any board, commission or committee created by:

1. the governor or an executive branch officer that includes two or more members from outside the executive branch;
2. an executive branch entity consisting of members appointed by the governor; or
3. an officer of an executive branch agency or other entity appointed by the governor, if the board, committee or commission includes two or more members from outside that agency.[6]

Under the prior definition of "public body" many multi-member entities with authority to make policy determinations or recommendations on behalf of the public were left to operate out of the public's view. This revised definition is premised in part on the belief that the public should be able to see these bodies discharge their responsibilities to the maximum extent, which is appropriate given the growing role such groups play in the formulation of public policy. Furthermore, the new definition should provide more clarity in the application of the OML.

Required Notifications on Every Agenda

Section 5 of the bill amends NRS 241.020(2)(c) to require certain notifications on every meeting agenda, including important information for the public describing how items on the agenda may be considered and specifying any restrictions on public comment. Specifically, every agenda must clearly denote those items on which action may be taken by placing the term "for possible action" next to the appropriate item.[7] In addition, every agenda must include notification that:

1. Items on the agenda may be taken out of order;
2. The public body may combine two or more agenda items for consideration; and
3. The public body may remove an item from the agenda or delay discussion relating to an item on the agenda

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at any time.[8] Finally, any specific restrictions on public comment must be reasonable and may restrict the time, place and manner of the comments, but may not restrict comments based upon viewpoint.[9]

Meeting to Consider an Applicant for Employment

If a public body holds a meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of a person, NRS 241.033 requires prior written notice to the person being considered. Section 6 of AB 59 amends NRS 241.033(7) to remove the notice requirement for a meeting of a public body to consider an applicant for employment, and prior notice to the applicant is not required.

Civil Penalties for OML Violations

Section 7 of the bill amends NRS 241.040(4) to authorize the attorney general to seek a civil penalty, not to exceed $500, against any member of a public body who attends a meeting where action is taken in violation of the OML, if the member participates in the action with knowledge of the violation. Since "action" is defined in NRS 241.015 (1) in the affirmative, a member of a public body cannot be exposed to liability for a civil penalty through mere silence or inaction. While the statute already provides for a criminal misdemeanor penalty for OML violations, the potential for a civil monetary penalty will provide a greater incentive for public body members to focus on compliance.

Public Comment Requirements

In addition to the changes made by AB 59, another important change to the OML was made by AB 257. This bill, which became effective July 1, 2011, amended the existing provisions of NRS 241.020(2)(c)(3) regarding public comment. Public bodies are now required, at a minimum, to provide multiple periods devoted to public comment under one of two alternative formats. The public body may provide one public comment period at the beginning of the meeting before any items on which action may be taken are heard by the public body, together with another public comment period before the adjournment of the meeting. Alternatively, the public body may provide a public comment period after each item on the agenda, on which action may be taken, is discussed by the public body, but before the public body takes action on the item. However, regardless of which alternative is selected, the public body must allow the general public to comment on any matter that is not specifically included on the agenda as an action item at some time before adjournment of the meeting. This promotes public input into government decisionmaking.

Conclusion

Taken together, these changes should better ensure that Nevada's Open Meeting Law operates for the protection and benefit of its citizens, by requiring transparency in the conduct of the people's business by public bodies. ■

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1 *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, L., dissenting).
2 NRS 241.010. See also *McKay v. Board of Sup'rs of Carson City*, 102 Nev. 644, 651, 730 P.2d 438, 443 (1986) ("spirit and policy behind NRS chapter 241 favors open meetings"), cited, *Del Papa v. Board of Regents of University and Community College System of Nevada*, 114 Nev. 388, 394, 956 P.2d 770, 774, (1998); *Dewey v. Redevelopment Agency of City of Reno*, 119 Nev. 87, 94, 64 P.3d 1070, 1075 (2003).
3 The Attorney General's task force will continue to meet throughout the 2011-2012 interim to identify potential recommendations for submission in the 2013 Legislative Session.
4 See *Stockmeier v. State, Department of Corrections*, 122 Nev. 385, 390, 135 P.2d 220, 223 (2006) ("[q]uasi-judicial proceedings are those proceedings having a judicial character that are performed by administrative agencies"), abrogated on other grounds by *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008). See also *Witherow v. State Bd. of Parole Com'rs*, 123 Nev. 305, 167 P.3d 408 (2007) (parole hearings are quasi-judicial proceedings not subject to the open meeting law).
5 NRS 241.015(3)(a).
6 NRS 241.015(3)(b).
7 NRS 241.020(2)(c)(2).
8 NRS 241.020(2)(c)(6).
9 NRS 241.020(2)(c)(7).