

Open Meeting Law Training

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2018 Training

ROADMAP

- ▶ What are the legal authorities for Open Government requirements ?
- ▶ How does Open Government apply in Nevada?
- ▶ What is a “meeting” and what is required for compliance with Nevada law?
 - ▶ Notice
 - ▶ Agenda
 - ▶ Public Comment
- ▶ Public Comment
- ▶ Violations
- ▶ Technological considerations

What is Open Government?

- ▶ Open Government is: the democratic principle that our republican government is “for the people and by the people.”
 - ▶ Constitutional Right (1st Amendment)
 - ▶ The U.S. Supreme Court consistently has recognized that the public and press have a presumptive First Amendment right of access to judicial proceedings in criminal cases, finding that “a presumption of openness inheres in the very nature of a criminal trial under our system of justice.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980).
 - ▶ In addition to the constitutional right - and even where it does not apply - “the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.” *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978)
 - ▶ Federal Laws and Regulations
 - ▶ Freedom of Information Act 5 USC 552a
 - ▶ Privacy Act 1974
 - ▶ Classified Information - Executive Order 13526
 - ▶ Controlled Unclassified Information (CUI) 32 CFR Part 2002
 - ▶ State Laws
 - ▶ Nevada Open Meeting Law (OML) -1960, 2011
 - ▶ Nevada Public Records Act (NPRA)

Applicability of the Open Meeting Law (OML) in Nevada

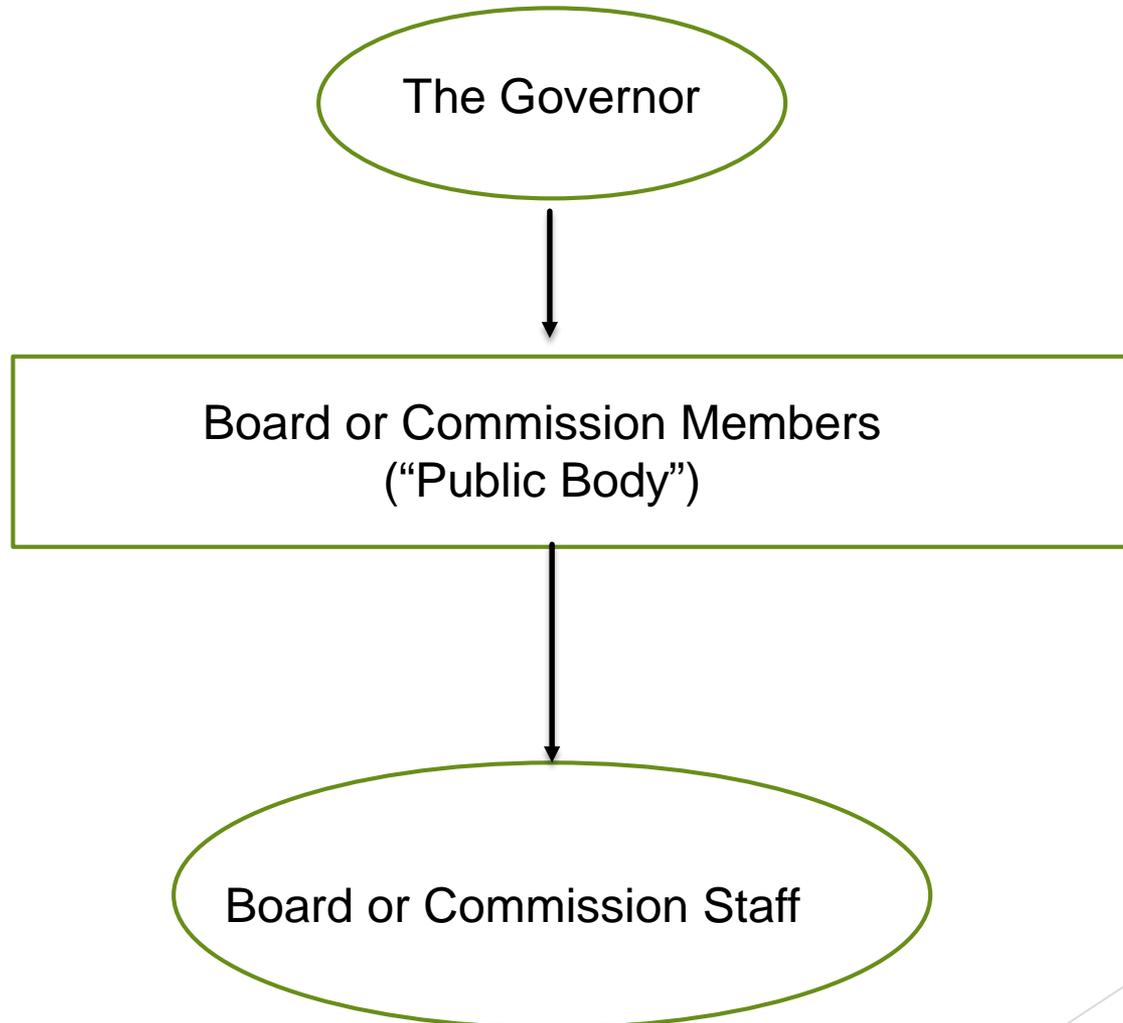
- ▶ Administrative, legislative, and executive organizations may all be “public bodies.”
- ▶ Public bodies working on behalf of Nevada citizens must conduct open meetings in conformity with the statutory requirements of the OML including the requirement to publish an agenda that provides full notice and disclosure of discussion topics and any possible action.
- ▶ The definition of a “public body” is found at NRS 241.015(4)(a).

NRS 241.015(4)(a)

Any administrative, advisory, executive or legislative body of the State or a local government consisting of at least two persons 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, including, but not limited to, any board, commission, committee, subcommittee or other subsidiary thereof . . . if the administrative, advisory, executive or legislative body is created by:

- ▶ (1) The Constitution of this State;
- ▶ (2) Any statute of this State;
- ▶ (3) A city charter and any city ordinance which has been filed or recorded as required by the applicable law;
- ▶ (4) The Nevada Administrative Code;
- ▶ (5) A resolution or other formal designation by such a body created by a statute of this State or an ordinance of a local government;
- ▶ (6) An executive order issued by the Governor; or
- ▶ (7) A resolution or an action by the governing body of a political subdivision of this State; . . .

BOARD AND COMMISSION STRUCTURE



Open Meeting Law (NRS Chapter 241) – Legislative Intent

- ▶ “In exacting 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.” NRS 241.010(1).
- ▶ “The exceptions provided in this chapter, and electronic communication, must not be used to circumvent the spirit or letter of this chapter to deliberate or act, outside of an open and public meeting, upon a matter over which the public body has supervision, control, jurisdiction or advisory powers.” NRS 241.016(4).
- ▶ The spirit and policy behind the OML favors open meetings and any exceptions thereto should be strictly construed. *McKay v. Board of Supervisors*, 102 Nev. 644, 730 P.2d 438 (1986).

Open Meeting Law (NRS Chapter 241) – Key Requirements

- ▶ AGENDA: Must provide full notice and disclosure of discussion topics and any possible action.
- ▶ DECISIONS: Deliberation and action must be properly noticed and taken openly.
- ▶ DECISIONS: Action is only taken by the body as a whole.
- ▶ SUBCOMMITTEES: To the extent a multimember group is appointed by a public body and given the task of making recommendations to that public body, that group is also a “public body” subject to the OML.

What is a Meeting?

- ▶ Meetings have two essential elements:
- ▶ NRS 241.015 provides that a meeting is when the following elements exist:
 - ▶ **Quorum** of members of a public body *gathering* together with, EITHER:
 - ▶ **Deliberation** toward a decision; and/or
 - ▶ **Action**: which means making a decision, commitment or promise over a matter within the public body's supervision, jurisdiction, control or advisory power.

Meeting Notice and Agenda - NRS 241.020

- ▶ Time, place and location of meeting
- ▶ List of locations posted
- ▶ Agenda consisting of a **clear and complete** statement of the topics scheduled to be considered
- ▶ Action items clearly denoted as “for possible action”
- ▶ Public comment at beginning/end or before any action item
- ▶ Posted at office of the public body *or* location of meeting *and* 3 other separate, prominent places within Nevada
- ▶ Posted at public body website *and* at www.notice.nv.gov
- ▶ Posted no later than 9 AM of the third working day before the meeting

What is “Clear and Complete?”

- ▶ General Requirement for all agendas
- ▶ Agenda items must be clear and complete. NRS 241.020(2)(d)(1).
- ▶ NOTE: A higher degree of specificity is necessary for topics of substantial public interest. *Sandoval*, 119 Nev. at 154-55, 67 P.3d at 906. Factors to consider include:
 - ▶ Does the topic generate public comment?
 - ▶ Does the topic generate debate among the members of the body?
 - ▶ Does the topic generate media interest/coverage?

Meeting Notice and Agenda Contents

- ▶ **RECORDS REQUEST CONTACT:** Name and contact information for person the public may request supporting materials from and locations where the supporting material is available
- ▶ **ITEMS FOR CLOSED SESSION:** If any portion of the meeting will be closed to consider the character, alleged misconduct or professional competence of a person, the name of the person
- ▶ **ADMINISTRATIVE ACTIONS:** If the public body will consider whether to take administrative action regarding a person, the name of the person

Additional Requirements (Accommodations and Notice)

- ▶ ACCOMODATIONS: Public bodies shall make reasonable efforts to assist and accommodate persons with physical disabilities desiring to attend. NRS 241.020(1).
- ▶ Notice to persons who have requested notice of meetings pursuant to NRS 241.020(3)(c).
- ▶ Additional notice requirements for consideration of character, misconduct, competence, or physical or mental health: 5 days personal service or 21 days certified mail. NRS 241.033. This would not apply to passing remarks.
- ▶ An emergency meeting may only be called where the need to act upon a matter is truly unforeseen and circumstances dictate that immediate action is required. NRS 241.020(9).

Meeting Materials and Recording

- ▶ One copy of the agenda, any supporting materials, and the recording of a public meeting must be provided at no cost to a member of the public requesting them and *at least* one copy made available at the meeting. NRS 241.020(6); NRS 241.035(2).
- ▶ Supporting materials must be available to the public when provided to public body members. NRS 241.020(7).
- ▶ Meeting must be recorded or transcribed. NRS 241.035(4).

Exceptions - NRS 241.030

- ▶ Closed sessions may be held by any public body to consider:
 - ▶ Character;
 - ▶ Alleged misconduct;
 - ▶ Professional competence;
 - ▶ Physical or mental health of a person,
 - ▶ With some exceptions, or to prepare, revise, administer, or grade examinations administered on behalf of the public body;
 - ▶ Consider an appeal by a person of the results of an examination administered on behalf of the public body.

Public Comment Pitfalls

- ▶ Restrictions must be reasonable “time, place, and manner” restrictions. NRS 241.020(d)(7). This means NO:
 - ▶ Halting comment based on viewpoint of speaker;
 - ▶ Halting comment upon belief defamation is occurring; or
 - ▶ Halting comment critical of a public official.
- ▶ But, presiding officer may halt comments that become unduly repetitive or that stray from the scope of a specified agenda topic for which comment is offered, or halt conduct that is willfully disruptive. See *Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266 (9th Cir. 1995); *White v. City of Norwalk*, 900 F.2d 1421, 1425-26 (9th Cir. 1990).
- ▶ The OML does not “[p]revent the removal of any person who willfully disrupts a meeting to the extent that its orderly conduct is made impractical.” NRS 241.030(4)(a).

Violations

- ▶ Actions taken in violation of the law are void. NRS 241.036.
- ▶ The OAG has statutory enforcement powers under the OML and the authority to investigate and prosecute violations of the OML. NRS 241.037; NRS 241.039; NRS 241.040.
- ▶ When a violation of the OML occurs or is alleged, the OAG recommends that the public body made every effort to promptly correct the apparent violation. NRS 241.0365.
- ▶ Although it may not completely eliminate the violation, corrective action can mitigate the severity of the violation and further ensure that the business of government is accomplished in the open.
- ▶ Corrective action is prospective only. NRS 241.0365(4).

Using Technology for a Meeting

- ▶ Quorum of a public body using serial electronic communication to deliberate toward or make a decision violates law. NRS 241.016(4); *Del Papa v. Board of Regents*, 114 Nev. 388, 956 P.2d 770 (1998).
- ▶ If technology is used to convene a quorum for a public meeting:
 - ▶ There must always be a physical location for members of the public to attend the meeting. NRS 241.020(1).
 - ▶ All the members of the public body and the members of the public who are present at the meeting must be able to hear or observe and participate in the meeting. NRS 241.010(2).
 - ▶ That technology must not be used to circumvent the spirit or letter of the OML. NRS 241.016(4).

Procedure and Ethics Guidelines

- ▶ Parliamentary procedure is not addressed in the OML - Duties of the presiding officer, recognizing speakers, motions and voting, making a clear record. See *Robert's Rules of Order* (11th ed. 2011).
- ▶ Disclosure and abstention **prior to consideration of a topic** in conformance with Ethics in Government Law (NRS Chapter 281A). Abstain only in a clear case where the independence of judgement of a reasonable person in your situation would be materially affected by the conflict of interest disclosed. See NRS 281A.420; see *also Carrigan v. Commission on Ethics*, __ Nev. __, 313 P.3d 880 (2013).

Q & A