

NRS 241.039 Complaints; enforcement by Attorney General; confidentiality of information compiled during investigation; subpoenas; penalty for failure or refusal to comply with subpoena; exception for public records; completion of investigation.

1. A complaint that alleges a violation of this chapter may be filed with the Office of the Attorney General. The Office of the Attorney General shall notify a public body identified in a complaint of the alleged violation not more than 14 days after the complaint is filed.

2. Except as otherwise provided in subsection 3 and NRS 241.0365, the Attorney General:

(a) Shall investigate and prosecute any violation of this chapter alleged in a complaint filed not later than 120 days after the alleged violation with the Office of the Attorney General.

(b) Except as otherwise provided in paragraph (c), shall not investigate and prosecute any violation of this chapter alleged in a complaint filed with the Office of the Attorney General later than 120 days after the alleged violation.

(c) May, at his or her discretion, investigate and prosecute any violation of this chapter alleged in a complaint filed more than 120 days after the alleged violation with the Office of the Attorney General if:

(1) The alleged violation was not discoverable at the time that the alleged violation occurred; and

(2) The complaint is filed not more than 1 year after the alleged violation with the Office of the Attorney General.

3. The Attorney General is not required to investigate or prosecute any alleged violation of this chapter if the Attorney General determines that the interests of the person who filed the complaint are not significantly affected by the action of the public body that is alleged to violate this chapter. For purposes of this subsection, the interests of the person who filed the complaint are not significantly affected by the action of the public body that is alleged to violate this chapter unless:

(a) The person who filed the complaint would have standing to challenge the action of the public body in a court of law; or

(b) The person who filed the complaint:

(1) Is a natural person and resides within the geographic area over which the public body has jurisdiction; or

(2) Is any form of business, a social organization, a labor organization or any other nongovernmental legal entity in this State that has a mission or purpose to foster or protect democratic principles or promote transparency in government.

4. Except as otherwise provided in subsection 7 and NRS 239.0115, all documents and other information compiled as a result of an investigation conducted pursuant to subsection 2 are confidential until the investigation is closed.

5. In any investigation conducted pursuant to subsection 2, the Attorney General may issue subpoenas for the production of any relevant documents, records or materials.

6. A person who willfully fails or refuses to comply with a subpoena issued pursuant to this section is guilty of a misdemeanor.

7. The following are public records:

(a) A complaint filed pursuant to subsection 1.

(b) Every finding of fact or conclusion of law made by the Attorney General relating to a complaint filed pursuant to subsection 1.

(c) Any document or information compiled as a result of an investigation conducted pursuant to subsection 2 that may be requested pursuant to NRS 239.0107 from a governmental entity other than the Office of the Attorney General.

8. Upon completion of an investigation conducted pursuant to subsection 2, the Attorney General shall inform the public body that is the subject of the investigation and issue, as applicable:

(a) A finding that no violation of this chapter occurred; or

(b) A finding that a violation of this chapter occurred, along with findings of fact and conclusions of law that support the finding that a violation of this chapter occurred.

9. A public body or, if authorized by the public body, an attorney employed or retained by the public body, shall submit a response to the Attorney General not later than 30 days after receipt of any finding that the public body violated this chapter. If the Attorney General does not receive a response within 30 days after receipt of the finding, it shall be deemed that the public body disagrees with the finding of the Attorney General.

(Added to NRS by 2011, 2384; A 2013, 734; 2015, 1061; 2019, 3627)

NRS 241.0395 Inclusion of item acknowledging finding by Attorney General of violation by public body on next agenda of meeting of public body; effect of inclusion.

1. If the Attorney General makes findings of fact and conclusions of law that a public body has violated any provision of this chapter, the public body must include an item on the next agenda posted for a meeting of the public body which acknowledges the existence of the findings of fact and conclusions of law. The opinion of the Attorney General must be treated as supporting material for the item on the agenda for the purposes of NRS 241.020.

2. The inclusion of an item on the agenda for a meeting of a public body pursuant to subsection 1 is not an admission of wrongdoing for the purposes of a civil action, criminal prosecution or injunctive relief.

(Added to NRS by 2011, 2384; A 2019, 3628)

NRS 241.0365 Action taken by public body to correct violation of chapter; timeliness of corrective action; effect.

1. Except as otherwise provided in subsection 4, if a public body, after providing the notice described in subsection 2, takes action in conformity with this chapter to correct an alleged violation of this chapter within 30 days after the alleged violation, the Attorney General may decide not to commence prosecution of the alleged violation if the Attorney General determines foregoing prosecution would be in the best interests of the public.

2. Except as otherwise provided in subsection 4, before taking any action to correct an alleged violation of this chapter, the public body must include an item on the agenda posted for the meeting at which the public body intends to take the corrective action in conformity with this chapter. The inclusion of an item on the agenda for a meeting of a public body pursuant to this subsection is not an admission of wrongdoing for the purposes of civil action, criminal prosecution or injunctive relief.

3. For purposes of subsection 1, the period of limitations set forth in subsection 3 of NRS 241.037 by which the Attorney General may bring suit is tolled for 30 days.

4. The provisions of this section do not prohibit a public body from taking action in conformity with this chapter to correct an alleged violation of the provisions of this chapter before the adjournment of the meeting at which the alleged violation occurs.

5. Any action taken by a public body to correct an alleged violation of this chapter by the public body is effective prospectively.

(Added to NRS by 2013, 727)

RS 241.040 Criminal and civil penalties; members attending meeting in violation of chapter not accomplices; reliance on legal advice.

1. Except as otherwise provided in subsection 6, each member of a public body who attends a meeting of that public body where any violation of this chapter occurs, has knowledge of the violation and participates in the violation, is guilty of a misdemeanor.

2. Except as otherwise provided in subsection 6, wrongful exclusion of any person or persons from a meeting is a misdemeanor.

3. A member of a public body who attends a meeting of that public body at which a violation of this chapter occurs is not the accomplice of any other member so attending.

4. Except as otherwise provided in subsection 6, in addition to any criminal penalty imposed pursuant to this section, each member of a public body who attends a meeting of that public body where any violation of this chapter occurs and who participates in such violation with knowledge of the violation, is subject to an administrative fine in an amount not to exceed:

- (a) For a first offense, \$500;
- (b) For a second offense, \$1,000; and
- (c) For a third or subsequent offense, \$2,500.

5. The Attorney General may recover the penalty in a civil action brought in the name of the State of Nevada in any court of competent jurisdiction. Such an action must be commenced within 1 year after the fine is assessed.

6. No criminal penalty or administrative fine may be imposed upon a member of a public body pursuant to this section if a member of a public body violates a provision of this chapter as a result of legal advice provided by an attorney employed or retained by the public body.

(Added to NRS by 1960, 26; A 1977, 1100; 1983, 1013; 2011, 2390; 2019, 3628)

NRS 241.0357 Authority to delegate decisions regarding litigation. A public body may delegate authority to the chair or the executive director of the public body, or an equivalent position, to make any decision regarding litigation concerning any action or proceeding in which the public body or any member or employee of the public body is a party in an official capacity or participates or intervenes in an official capacity.

(Added to NRS by 2019, 3618)

NRS 241.0353 Absolute privilege of certain statements and testimony.

1. Any statement which is made by a member of a 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 any civil action.

2. 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.

(Added to NRS by 2005, 2242)

**2020 NEVADA
GOVERNMENT CIVIL
ATTORNEYS' VIRTUAL
CONFERENCE**

October 5, 2020

2 CLE hours



3100 W. Charleston Blvd., Ste. 100 Las Vegas, NV 89102

702-382-2200

9456 Double R Blvd. Suite B Reno, NV 89521

775-329-4100

10/5/2020

Let the Sunshine In: Updates to Nevada's Open Meeting Law

2020 Nevada Government Civil Attorneys' Virtual Conference

Sarah A. Bradley, Esq., bradleys@medboard.nv.gov

Sophia G. Long, Esq., slong@ag.nv.gov

1

Legislative Intent

- "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." 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).
- Exceptions to the OML should be strictly construed. *McKay v. Board of Supervisors*, 102 Nev. 644, 730 P.2d 438 (1986).
- "A statute promulgated for the public benefit such as a public meeting law should be liberally construed and broadly interpreted to promote openness in government." *Dewey v. Redevelopment Agency of Reno*, 119 Nev. 87, 94, 64 P.3d 1070, 1075 (2003).
- Open meetings are essential to democracy.
- The Nevada OML was enacted in 1960 to ensure that the actions and deliberations of public bodies be conducted openly.

2

10/5/2020

Applicability of the Open Meeting Law (OML) in Nevada

- All meetings of public bodies must be open and public, and all persons must be permitted to attend any meeting of these public bodies. NRS 241.020(1)
- 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. *Sandoval v. Board of Regents*, 119 Nev. 148, 67 P.3d 902 (2003).

3

What is a Public Body?

- NRS 241.015(4)(a):
 - Any administrative, advisory, executive or legislative body of the State or a local government,
 - Consisting of 2 or more people,
 - Expends or disburses or is supported in whole or in part by tax revenue, or makes recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue,
 - Make collective decisions or recommendations (staff meetings within an agency or interagency meetings with no independent legal authority, budget, and formal mission or purpose will not fall within the definition of a public body) OMLO 2004-04.
- Created by the Nevada Constitution, Nevada Revised Statute (NRS), city charter, the Nevada Administrative Code (NAC), an Executive Order from the Governor, resolution or formal action from a body created by statute or local ordinance, or a resolution or action by a political subdivision.
- Does not include the Nevada Legislature. See NRS 241.016(2)(a).

4

10/5/2020

What About Sub-Committees?

- The OAG's OML Manual states: "...to the extent that a group is appointed by a public body and is given the task of making decisions for or recommendations to the public body, the group would be governed by the Open Meeting Law."
- If a sub-committee recommendation to a parent body is more than mere fact-finding because the sub-committee has to choose or accept options, or decide to accept certain facts while rejecting others, or if it has to make any type of choice in order to create a recommendation, then it has participated in the decision-making process and is subject to the OML. (unless specifically exempted by statute.)
 - See OML Manual, Section 3.04
- Remember the Legislative Intent.
 - When in doubt, consider an open meeting.
- Updated/Clarified Definition in AB70 includes "working groups."

5

What is a Meeting?

- Two Essential Elements from NRS 241.015:
 - 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. No secret ballots or secret promises.
- Quorum + (Deliberation or Action) = Meeting
- A quorum is a simple majority of the total body (NRS 241.015(5)); action requires majority vote of members present (NRS 241.015(1)).
- A gathering of a quorum at a social function or non-body specific training is not a meeting as long as there is no deliberation or action.
- An attorney-client conference on potential and existing litigation is not a meeting as long as there is no action.

6

Meeting Agenda Requirements (I)

- Agenda must contain (see NRS 241.020):
 - Time, place and location of meeting.
 - List of locations posted.
 - 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 notice.nv.gov.
 - Postings must be no later than 9AM of the third working day before the meeting.
 - Clear and complete statement of the topics scheduled to be considered.
 - Action items noted as “for possible action” and what possible action may be taken clear to the public.
 - Public comment at beginning/end or before any action item. NRS 241.020(3)(d)(3). Any restrictions on comments by the general public.

7

What is “Clear and Complete?”

- Agenda items must be clear and complete. NRS 241.020(2)(d)(1).
- A higher degree of specificity is necessary for topics of substantial public interest. *Sandoval v. Board of Regents*, 119 Nev. 148, 154-55, 67 P.3d 902, 906 (2003). Factors to consider include:
 - Does topic generate public comment?
 - Does topic generate debate among members of body?
 - Does topic generate media interest/coverage?
- Agenda items such as “member comments” and “reports” are problematic in that these invite discussion and possible deliberation on topics that are not set forth on the agenda. Any topic that is raised should be included on a future agenda before any discussion can ensue.

8

10/5/2020

Meeting Agenda Requirements (2)

- Agenda must contain:
 - Name of person if (1) administrative action "**regarding**" person contemplated, or (2) character, misconduct, competence, or health of person will be considered.
 - NRS 241.020(3)(d)(5) amended to "regarding" in 2015. Includes hiring a person. Used to be only action "against."
 - Statute authorizing closed session, if a part of the meeting may be closed.
 - Notice that public body will make reasonable efforts to assist and accommodate persons with physical disabilities desiring to attend. NRS 241.020(1).
 - Notice that items on the agenda may be taken out of order, may be combined for consideration, and may be removed from the agenda or delayed for discussion at any time.
 - Supporting materials contact information. NRS 241.020(3)(c). Must be provided to the public, upon request, when provided to public body members. NRS 241.020(7).

9

Closed Sessions (of Meetings)

- The specific statutory authority authorizing that a portion of the meeting may be closed must be on the agenda. NRS 241.020(1); NRS 241.030(3).
- Closed sessions may not be held:
 - To discuss the appointment of any person to public office or as a member of a public body. NRS 241.030(4)(d); see also City Council of City of Reno v. Reno Newspapers, Inc., 105 Nev. 886, 784 P.2d 974 (1989).
 - To consider the character, alleged misconduct, or professional competence of an elected member of a public body, or a person who is an appointed public officer or who serves at the pleasure of a public body as a chief executive or administrative officer or in a comparable position. NRS 241.031(1).

10

Meeting Notice Requirements

- Notice to persons who have requested notice of meetings pursuant to NRS 241.020(4)(c).
- Additional notice requirements for consideration of character, misconduct, competence, or physical or mental health: 5 working days personal service or 21 working days certified mail. NRS 241.033. (See also NRS 233B.121.)
 - Does not apply to passing remarks.

11

General Meeting Requirements

- One copy of the agenda, any supporting materials 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(7); NRS 241.035(2).
- Meeting must be recorded or transcribed. Recording/Transcription must be made available to the public. NRS 241.035(4).
 - If the meeting is transcribed by a court reporter, the court reporter gets his or her per page fee according to the contract with the public body. See NRS 241.035(5); NRS 239.053.

12

10/5/2020

2015 Legislation SB70: "Working Day"

- "Working day" includes Monday through Friday excluding holidays. NRS 241.015(6).
- "[E]very day of the week, except Saturday and Sunday and any day declared to be a legal holiday pursuant to NRS 236.015."



13

13

Meeting Minutes and Recordings

- A copy of the meeting minutes or audio recording* must be made available to a member of the public at no charge.
 - Both available within 30 working days after adjournment of the meeting for inspection by the public.
 - Audio recording not audiotape after 2015.
- Recording of meeting must be kept at least **three** years. NRS 241.035(4)(a). ****Updated from 1 to 3 years in 2019.****
- Meeting minutes are public records and must be kept for at least five years. Thereafter may be transferred for archival preservation. NRS 241.035(2).
- Approved by the public body within 45 days after the meeting or the next meeting of the public body, whichever occurs later. ****New requirement in 2015.****

14

Meeting Minutes

- Minutes must be kept in conformance with NRS 241.035 and include:
 - Date, time and place of meeting;
 - Members in attendance;
 - Substance of all matters proposed, discussed or decided; and
 - Substance of remarks made by any member of public or their written remarks if requested.
- Separate meeting minutes (and recording or transcription) required for closed portions of meetings, also.

15

Governing Board of County or City Population 45,000 or More

- Material provided to the governing body during its meeting must be uploaded to its website within 24 hours of adjournment of the meeting.
- The right of the public to request a paper copy of the material pursuant to NRS 241.020(6) is not eliminated.
 - Same rule for meeting agenda, minutes, and recording: one paper copy at no charge is required if requested.
- Technical problems with the upload does not constitute a violation of the OML.

16

16

10/5/2020

To Mail or not to Mail?

- If a requester of supporting documents has agreed to receive supporting materials by email the public body shall, if feasible, provide it electronically, but this service is only supplementary to the right of the public to request materials in a paper copy.



17

17

State Notice Website

- Posting here is required for all state agencies and local governments.
- All meetings must be noticed on the State's official website, which is run by the Department of Administration.
- <https://notice/nv.gov/> or see Nevada's home page for the one-link click for access. Be sure to log in or contact Department of Administration for assistance with the upload of your URL where the public may find your agenda.



18

18

10/5/2020

19

2015 Legislation SB70: Record of Posting Compliance

- Each public body must make and keep a record of compliance with the statutory requirement for posting notice and agenda before 9 a.m. of the third working day before a public meeting. The record is to be made by the person who posted a copy of the public notice and it must include: (1) date and time of posting, (2) address of location of posting, (3) name, title, and signature of person who posted the public notice.
- Electronic record, e.g., by email is sufficient if all elements are contained in the record.

20

10/5/2020

Public Comment Pitfalls

- Restrictions must be reasonable “time, place, and manner” restrictions. NRS 241.020(2)(d)(7). CANNOT-
 - Halt comment based on viewpoint of speaker;
 - Halt comment upon belief defamation is occurring; or
 - Halt comment critical of public official.
- Presiding officer may halt comments that become unduly repetitive or that stray from the scope of a specific 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).
 - Be careful: Wrongful exclusion of a person violates the OML. See NRS 241.040(2).

21

Violations (I)

- Actions taken in violation of the law are void. NRS 241.036.
- The Office of the Attorney General (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.
- The OAG has subpoena authority to investigate from NRS 241.039(4).
- 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. But corrective action is prospective only. NRS 241.0365(4).

22

10/5/2020

Violations (2)

- Any person denied a right conferred by this chapter may sue to have an action declared void, to require compliance with or prevent violations of this chapter. The court may order payment of reasonable attorney's fees and court costs to a successful plaintiff in a suit brought under this subsection. NRS 241.037(2)
- Criminal and civil penalties may apply if violation is knowing. NRS 241.040.

23

Violations (3)

- Corrective action requires that the public body engage in an independent deliberative action in full compliance with the OML. See, e.g., *Page v. MiraCosta Community College Dist.*, 102 Cal. Rptr. 3rd 902, 930 (Cal. Ct. App. 2009); *Colorado Off-Highway Vehicle Coalition v. Colorado Bd. of Parks and Outdoor Recreation*, 292 P.3d 1132, 1137-8 (Colo. Ct. App. 2012); *Zorc v. City of Vero Beach*, 722 So.2d 891, 902-3 (Fla. Dist. Ct. App. 1998); *Gronberg v. Teton County Housing Authority*, 247 P.3d 35, 42 (Wyo. 2011).
- A public body must clearly denote that corrective action may be taken at a meeting by placing the term "for possible corrective action" next to the appropriate agenda item. NRS 241.020(2)(d)(2).

24

10/5/2020

2015 Legislation: SB70

- Clarifies that complaints alleging OML violations may be filed with the OAG.
- Adds confidentiality provision for all documents and other information compiled as a result of an investigation by the OAG.
 - Note: If the document is public if requested from another governmental entity (other than the OAG), it remains public for that other entity.
- OML complaints are public, along with OAG findings of fact and conclusions of law made by the OAG regarding an OML complaint.

25

2019 Legislation: AB70 (I)

- Clarifies requirements for teleconference or videoconference meetings.
 - Quorum does not have to be present, in-person. Public must be able to hear and observe each member participating by electronic means at least one physical location.
- Allows the public body to delegate authority to the chair or executive director of the public body, or equivalent position, to make litigation decisions concerning "any action or proceeding in which the public body or any member or employee of the public body is a party in an official capacity or participates or intervenes in an official capacity."
 - Not intended to be blanket authority for all litigation, but case-by-case delegation.
 - When in doubt, remember the OML's legislative intent.
- Allows the public body to receive training regarding the legal obligations of the public body, if a quorum is present, without noticing as a meeting as long as there is no deliberation or action.

26

2019 Legislation: AB70 (2)

- Better defines “subcommittee or working group” that is also subject to the OML.
 - Can include staff members in subcommittee and the OML would apply.
 - Goal of group is to make a recommendation to the public body for the public body to take action.
- Defines “supporting material.”
 - Provided to a quorum of the public body, public body reasonably relies on it to deliberate or take action on a matter contained in a published agenda.
- Public officers and employees responsible for a public meeting, must “make reasonable efforts to ensure the facilities for the meeting are large enough to accommodate the anticipated number of attendees.”
 - If reasonable efforts taken, no violation if a person is not allowed to attend the meeting because the facility has reached maximum capacity.
 - Not required to spend money to secure a new facility outside public body’s control or upgrade existing facility.

27

2019 Legislation: AB70 (3)

- Meeting held to recognize or award positive achievements of a person is not subject to notice requirements under NRS 241.033.
 - NRS 241.033 normally requires written notice sent by regular or certified mail at least 21 working days prior, or written notice delivered personally at least 5 working days prior.
 - The notice requirements of NRS 241.034 do not apply because this is not action “against” a person.
 - Requirement of name on the agenda for action “regarding” a person is not addressed. See NRS 241.020(5)(d)(5). Does a person’s name still have to be on the agenda to recognize his or her positive achievements?

28

10/5/2020

2019 Legislation: AB70 (4)

- The OAG has 14 days to notify public body identified in a complaint that the complaint has been filed.
- The OAG will not investigate complaints about alleged violations that occurred more than 120 days ago unless:
 - Violation was not discoverable at the time the violation occurred **AND**
 - The alleged violation did not occur more than one (1) year prior.
- Authorizes the OAG to review “standing” prior to investigating an OML complaint.
 - Significant interests must be affected.
 - Complainant would have “standing” in a court of law.
 - Must be resident of geographic area over which the public body has jurisdiction, unless a business, social organization, a labor organization, or other nongovernmental legal entity that has a mission or purpose to foster or protect democratic principles or promote transparency in government.

29

2019 Legislation: AB70 (5)

- The OAG must notify the public body after investigation is concluded.
 - Notification must be (1) a finding that no violation of the OML occurred OR (2) a finding that a violation did occur, along with FOFCOL supporting the findings.
 - Opportunity for public body to “agree” or “disagree.”
 - Response submitted by public body not later than 30 days after receipt of a finding.
 - If no response filed, deemed that public body “disagrees.”
 - Existence of finding that a violation did occur must be acknowledged in public body’s next meeting agenda.

30

2019 Legislation: AB70 (6)

- Increased administrative fines for violations. Now, second (\$1,000) and third or subsequent (\$2,500). (First is \$500.)
 - Administrative fines are in addition to potential criminal penalty.
 - Fines may be recovered by the OAG in a civil action brought in the name of the State of Nevada.
- Still a misdemeanor to knowingly participate in violations of the OML, but if member of public body relies on legal advice, no criminal penalty or administrative fine may be imposed.

31

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).

32

2019 OML Opinions

- Open Meeting Law Opinions:
 - https://ag.nv.gov/About/Governmental_Affairs/OML_Opinions/
- 19 AG Files for 2019.
- 5 Findings of Fact and Conclusions of Law issued.

33

OAG File No. 13897-257 (I)

- Re: The Incline Village General Improvement District Board of Trustees (the Board)
- Violation: Failing to properly notice and approve the initiation of a lawsuit during a public meeting.
 - The Board initiated a lawsuit in May 2017.
 - Lawsuit was not authorized in a public meeting.

34

10/5/2020

Attorney-Client Conferences (1)

- Permitted under the OML and not required to be noticed as a meeting or open to the public.
- In an attorney-client conference, the public body may receive information regarding potential or existing litigation from their attorney and to deliberate towards a decision on the litigation.
- “A decision that ‘transcends discussion or consultation and entails commitment of public funds,’ including initiating a lawsuit requires action during a properly noticed public meeting.”
 - OAG File No. 13897-257, quoting *Johnson v. Tempe Elementary Sch. Dist. No. 3 Governing Bd.*, 20 P.3d 1148, 1149 (Ariz. Ct. App. 2000).

35

Attorney-Client Conferences (2)

- Cannot use closed attorney-client conferences 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).

36

10/5/2020

OAG File No. I3897-257 (2)

- OML violated because initiation of lawsuit authorized during an attorney-client conference.
 - This is action which must be done in a public meeting.
- Note: Attorney-client conferences are exempt from the OML pursuant to NRS 241.015(3)(b)(2). Not added until 2001. For 41 years, no exception and attorneys briefed members individually.

37

OAG File No. I3897-273

- Re: McDermitt Fire District Board
- Violation 1: Action taken in violation of the OML.
 - Action here was approving the McDermitt Fire District budget and submitting the budget to the Humboldt County Comptroller without properly agendaing the action item or taking the action in an open public meeting.
- Violation 2: Failed to provide agenda and minutes of meeting to requester as required.
 - Requester asked for all agendas for 2018, and meeting minutes for January 19, 2018 meeting.
 - Agenda and meeting minutes for January 19, 2018 not provided.
 - Corrective action: Provided later, but this does not negate the OML violation.

38

10/5/2020

OAG File No. 13897-314 (1)

- Re: Mineral County Board of County Commissioners (the Board)
- Violation 1: Failed to include “clear and complete statement of topics to be considered” on meeting agenda.
 - September 5, 2018 meeting agenda failed to provide notice to the public that the Board planned to deliberate and possibly take action on a business license application for the production and sale of cannabis.
 - Higher degree of specificity required here under *Sandoval v. Board of Regents* because matter is one of significant interest to the public. 119 Nev. 148, 154 (2003).
 - More specificity included in the supporting materials, but the Board cannot rely on supporting materials in order to comply with the “clear and complete” requirement for the agenda.

39

OAG File No. 13897-314 (2)

- Violation 2: Failed to keep written minutes of meeting in compliance with NRS 241.035.
 - “Substance of all matters proposed, discussed or decided” must be included.
 - Here, the minutes were silent as to the substance of the business license application that was considered by the Board.
 - Does not contain information regarding what is actually being produced and ultimately sold.
 - Not clear that agenda item 7.D. was an application for a business license to manufacture and sell cannabis.

40

10/5/2020

OAG File No. 13897-315 (1)

AKA Be Wary of Subcommittees

- Re: Skyland General Improvement District (the District)
- Violation: Subcommittee deliberated and made recommendations to the District while failing to comply with the OML.
- Subcommittee must follow the OML whenever a quorum gathers to deliberate or make a decision, including taking action to make a recommendation to the parent body.
 - NRS 241.015. See *Lewiston Daily Sun, Inc. v. City of Auburn*, 544 A.2d 335 (Me. 1988); *Arkansas Gazette Co. v. Pickens*, 522 S.W.2d 350 (Ar. 1975).

41

OAG File No. 13897-315 (2)

- The label given to a sub-group is immaterial and will not prevent the application of the OML to groups with other labels besides “subcommittee.”
- Even in the absence of a formal appointment process, the OML applies to a committee with de facto authority from the parent public body to act on its behalf.
 - See NRS 241.015(4)(a)(7); NRS 241.016(4).
- If a subcommittee recommendation to a parent body is more than mere fact-finding because the subcommittee has to choose or accept options, or decide to accept certain facts while rejecting others, or if it has to make any type of choice in order to create a recommendation, then it has participated in the decision-making process and is subject to the OML.

42

10/5/2020

OAG File No. 13897-315 (3)

- Mere fact-finding without decision-making does not trigger the OML.
- Here, not all options uncovered by fact-finding were brought back to the parent body.
 - This shows that the “fence committee” participated in the decision-making process and thus the fence committee was required to comply with the OML.
 - When in doubt, consider OML’s legislative intent: All parts of decisions done in a public meeting in compliance with the OML.

43

OAG File No. 13897-316 (1)

- Re: Incline Village General Improvement District Board of Trustees Audit Committee (the Committee)
- Violation: Failed to include as an item on its December 12, 2018 meeting agenda, the Findings of Fact and Conclusions of Law (FFCL) for OAG File No. 13897-260 as required by NRS 241.0395(1).
 - The FFCL for OAG File No. 13897-260, dated February 21, 2018, required both *the Committee* and *the Incline Village General Improvement District Board of Trustees (the Board)* to acknowledge it in their next meeting agendas and include the FFCL in the meeting's supporting materials.
 - The Board included the acknowledgment of the FFCL in its March 13, 2018 meeting agenda and included the FFCL in its supporting materials.
 - The Committee's next meeting after February 21, 2018 was December 12, 2018 and the acknowledgment of the FFCL was not included on the meeting agenda and the FFCL was not included in the meetings' supporting materials.

44

10/5/2020

OAG File No. 13897-316(2)

- The Committee is a separate public body from the Board.
- The fact that the Committee's members are also all members of the Board does not make them the same public body.
 - Note: There are separate agendas, meeting minutes, etc.
- The Committee was found in OAG File No. 13897-260 to have violated the OML itself and was required to acknowledge this finding and include the FFCL in its meeting supporting materials itself, separately from the Board.

45

Additional Points

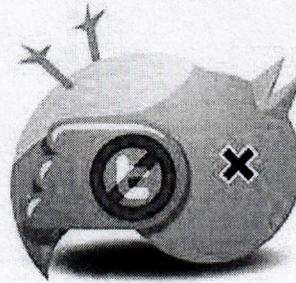
- Parliamentary procedure not addressed in OML - Duties of the presiding officer, recognizing speakers, motions and voting, making a clear record. See Robert's Rules of Order (11th ed. 2011).
- Disclosure and abstention prior to consideration of a topic in conformance with Ethics in Government Law (NRS Chapter 281A). Abstain only in a clear case where the independence of judgment 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*, 129 Nev. 894, 313 P.3d 880 (2013).
 - Disclosures and abstentions must be included in meeting minutes!

46

10/5/2020

The Impact of Social Media

- Draft policies for your public body regarding social media.
- The OML applies to social media.
 - Remind public body members not to deliberate or discuss public body business on social media.
 - Public body members should not "live tweet" or "post live" about public body proceedings.
 - Cannot ask for votes or otherwise poll other members on social media.
 - If it would violate the OML if it was done in person, it violates the OML to do it on social media also.



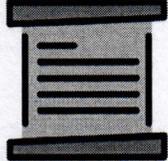
47

OML Resources

- NRS Chapter 241:
<https://www.leg.state.nv.us/NRS/NRS-241.html>.
- Summary regarding the OML available at:
http://ag.nv.gov/About/Governmental_Affairs/OML/
- OAG's Open Meeting Law Manual
 - Statutory provisions,
 - Explanation of requirements,
 - Examples,
 - Compliance checklists, and
 - Sample Forms: agenda, minutes and notice of meeting to consider a person's character, etc.

48

Declaration of Emergency Directive 006



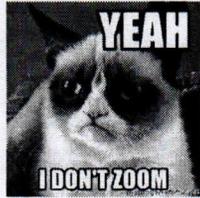
- **Declaration of Emergency**
March 12, 2020: to minimize the impacts, and prevent the further transmission of, COVID-19.
- **Directive 003**
March 20, 2020: regarding non-essential businesses
- **Directive 006 OML**
March 20, 2020: expired on April 16, 2020
- **Declaration extended...**
 - Directive 16: May 15, 2020
 - Directive 18: May 30, 2020
 - Directive 21: June 30, 2020
 - Directive 26: July 31, 2020
 - Directive 29: "shall remain in effect during the current state of emergency"

49

SECTION I:

The requirement contained in NRS 241.023(1)(b) that there be a physical location designated for meetings of public bodies where members of the public are permitted to attend and participate is suspended.

- Only the requirement is suspended
- Meetings can still occur at a physical location
- Follow state COVID-19 safe guidelines
- Public is NOT required to attend physically
- Public must be able to attend virtually

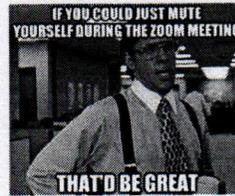


50

SECTION 2:

If a public body holds a meeting by means of teleconference or videoconference and a physical location where members of the public can attend is not provided, the public body must provide a means for the public to provide public comment, and post that means on the public notice agenda posted in accordance with NRS 241.020. Public comment options may include, without limitation, telephonic or email comment.

- Public comment still must be in real time
- No deadline for submitting public comment
- Procedure for taking public comment
- Email comments must still be taken during the meeting



51

SECTION 3:

The requirements contained in NRS 241.020(4)(a) that public notice agendas be posted at physical locations within the State of Nevada are suspended.

SECTION 4:

Public bodies must still comply with the requirements in NRS 241.020(4)(b) and NRS 241.020(4)(c) that public notice agendas be posted to Nevada's notice website and the public body's website, if it maintains one along with providing a copy to any person who has requested one via U.S. mail or electronic mail.

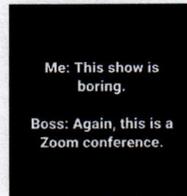
SECTION 5:

The requirement contained in NRS 241.020(3)(c) that physical locations be available for the public to receive supporting material for public meetings is suspended.

SECTION 6:

If a public body holds a meeting and does not provide a physical location where supporting material is available to the public, the public body must provide on its public notice agenda the name and contact information for the person designated by the public body from whom a member of the public may request supporting material electronically and must post supporting material to the public body's website, if it maintains one.

- Suspends any physical requirement
- Notices online and electronic means



52

SECTION 7:

A public body that holds a meeting pursuant to this Executive Order must ensure that any party entitled to or required to appear before it shall be able to do so through remote means and fully able to participate in the agenda items that pertain to them.

- Telephonically
- Computer based audio/video
 - Streaming
- Quorum
- Voting
 - Oral Statement
 - Hand raise
 - Roll call

 brooklundy ...

I hope Zoom has shown everyone that any work meeting over 40 minutes should be swiftly terminated.

53

SECTION 8:

The requirements of NRS 241.033, NRS 241.034 are suspended for any actions necessary to enforce Declaration of Emergency Directive 003 against entities, owners, representatives, agents, or employees that continue to operate or assist in operation after 11 :59 p.m. on March 2020. Public bodies enforcing Declaration of Emergency Directive 003 against entities, owners, agents, or employees pursuant to this section shall provide the responding party with at least 24 hours notice of a meeting to take action; and

SECTION 9:

Public bodies may enforce Declaration of Emergency Directive 003 at an emergency meeting as authorized by NRS 241.020(11) and may make use of all other amendments to NRS chapter 241 included in this Executive Order.

- NRS 241.020(11):
 - Emergency meetings due to unforeseen circumstances
 - COVID-19 related emergencies
 - COVID-19 related matters
- Follow state COVID-19 safe guidelines

I HAVE A ZOOM IN AN HOUR
 TIME TO CHANGE INTO MY
 BUSINESS PANAMA

54

10/5/2020

Dealing with technical difficulties



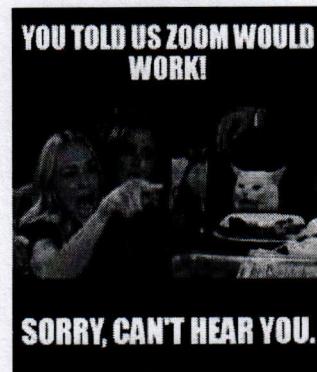
- Zoom information changes/capacity limits
- How to get a hold of dropped people
- Slow internet
- Disruptive attendees
- Disable the chat feature
- Closed meetings
- Privacy concerns (phone numbers)

55

OPEN MEETING LAW AND EXECUTIVE ORDER UPDATE

QUESTIONS

??



56