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Via electronic mail only

Re: Written comment for the April 29, 2010 meeting of the Open Meeting Law Task Force

Dear George:

I will be unable to attend the second meeting of the Open Meeting Law Task Force. I have attempted to use subtitles in this letter related to the items in the agenda for the April 29, 2010 meeting to divide my comments concerning the various subjects being considered at the meeting.

I used Ann Taylor Schwing's book, *Open Meeting Laws 2d* (2000) as the starting point for my research based on the Attorney General's recommendation in the *Nevada Open Meeting Law Manual*.

Civil Penalties

Civil monetary penalties for violation of the open meeting law are common. *Open Meeting Laws 2d* at 507-09. Features common to laws authorizing this remedy are either a fixed amount or range for the initial penalty, increased penalties for subsequent violations may be authorized, who may bring the action seeking the penalty is specified, the nature of the process to obtain the penalty is provided, the burden of proof to obtain imposition of the penalty is delineated and the legal disability, if any, following imposition of the penalty is spelled out. *Id.* The decision to create this new type of remedy in the Nevada Open Meeting Law is a policy decision made by the Legislature based on recommendation of the Attorney General. The last observation is based on experience in 1983 when the current injunctive and declaratory relief provisions were added to the existing misdemeanor provision because the Legislature found just the penal provision afforded less than adequate enforcement tools.

For clarity's sake, any new remedy of this sort must address all of the features mentioned in the second sentence of the previous paragraph. An initial penalty in a fixed amount is the easiest to draft and helps promote uniform assessment. A provision authorizing increased penalty amounts for subsequent violations up to a statutorily specified maximum may increase the deterrent effect

to the extent any remedy serves as a deterrent in this area of the law. The Attorney General should be the only party or official authorized to seek this monetary penalty; this is consistent with other enforcement provisions presently in the law. NRS 241.037(4). Private plaintiffs are left with adequate statutory civil remedies codified in NRS 241.037(2). The penalty should be recoverable on complaint brought by the Attorney General in summary proceedings for the remedy to have its greatest utility. The standard of proof needs to be a preponderance of evidence to avoid the difficulties associated with criminal prosecution. Finally, the new provision creating this remedy needs to provide the assessment of this new civil penalty does not constitute a crime and does not give rise to disability or legal disadvantage based on conviction for a criminal offense; but if repeated assessments are going to serve as the basis for removal, this consequence needs to be expressly stated in the provision creating the new civil penalty.

Repeat Offender-Removal from Office

Currently a person convicted of a misdemeanor under NRS 241.040 may be removed from office pursuant to the grounds stated in NRS 283.040(1)(d). Depending on the nature of the office held by the misdemeanant, either the Attorney General or the District Attorney prosecutes the removal proceeding. NRS 283.040(2). This statutory treatment is consistent with accepted notions concerning the harshness of the removal remedy, the common law treatment of many removal proceedings as being quasi-criminal in nature and the higher standard of proof (either clear and convincing or proof beyond a reasonable doubt) many courts say is necessary to support a successful removal action.

Consequently, when evaluating expansion of the grounds for removal to include violations of the Nevada Open Meeting Law that are not criminal in nature, especially when borrowing statutory text from another jurisdiction, care must be given to state the specific grounds for removal. Examples from other states include “willful violation,” intentionally violating the law “with intent to deprive the public of information or the opportunity to be heard,” intentionally violating the open meeting law “in three or more actions...involving the same public body,” “knowing violation of an injunction issued under the open meeting act,” “two prior violations...for which damages were assessed during the member’s term.” *Open Meeting Laws 2d* at 527-28.

Text like that just mentioned limits use of the removal remedy to the more egregious cases and should be added to NRS 283.040 for consistency if the existing grounds for removal are going to be expanded to include reasons other than conviction for a misdemeanor under the Nevada Open Meeting Law. It might also make sense to amend NRS 283.040(2) to provide only the Attorney General prosecutes removal proceedings based on multiple violations (or other legal cause) concerning the Nevada Open Meeting Law since your office will be the repository of the information needed to maintain removal actions on this basis.

Attorney’s Fees and Court Costs

If the Attorney General wants to be eligible for an award of fees and costs, it seems like a new last sentence can be added to NRS 241.037(1) reading comparably to the last sentence of NRS 241.037(2) but substituting “Attorney General” for the term “plaintiff.” In deciding whether to add this provision, the Legislature may want to know the extent of the resources the Attorney

General's office has and does commit to the conduct of injunctive and declaratory relief actions commenced pursuant to this subsection.

Personal Liability for Civil Penalties

Some civil penalty provisions make the penalty payable to the unit or level of government in which the penalized official serves. *Open Meeting Laws 2d* at 507. Other jurisdictions assess the penalty against the penalized official's unit of government. *Id.* If the penalized public official's entity is prohibited from paying the penalty, making the penalty payable to the entity in which the official serves makes sense. If responsibility for the penalty's payment is placed on the entity which the penalized official serves, payment to the state seems like little more than wealth transfer between different levels of government or from one fund to another in state government.

Based on personal experience, I think some public officials will attempt to be extremely creative in finding ways around any statutory requirement of personal responsibility for paying the civil penalty if this remedy is added to the law.

Committees, Subcommittees and Subsidiaries

At the initial Task Force meeting we discussed whether the Nevada Open Meeting Law should be amended to codify some of the legal interpretations made by the Attorney General over time. The Attorney General's advice given concerning the Governor, agency or staff committees and advisory bodies has been part of the *Nevada Open Meeting Law Manual* for a long time, is well understood and followed, for the most part, by public entities in this state.

Legislation and decisional law on this subject in other states is not consistent making numerous options available for consideration. *Open Meeting Law 2d* at 84-99. However, one jurisdiction has legislation providing all committees, commissions and other multimember bodies appointed to serve the governor or any official under the policy control of the governor must comply with open meeting law requirements if membership includes individuals not employed by the state. This jurisdiction also has comparable provisions imposing the same requirement on local governments. Md. Ann. Gov't Code sec. 10-502(h)(2)(i) (2009). Given recent events here, the Maryland provision, had it been part of our law, would have been a useful complement to the Attorney General's advice in this area.

Some fact-finding committees are exempt from open meeting legislation. *Open Meeting Law 2d* at 90 footnote 186. However, the policy issue is how large a hole should be carved from the statutory requirement of openness codified in chapter 241 of NRS since the facts found are a critical part of the ultimate decision making power exercised by the entity clearly and expressly having "public body" status under NRS 241.015(3)(a) and (b). The legislative history of subsection 3 in NRS 241.015 has been to make the provision remain as broad in scope as possible. Exempting fact-finding committees from coverage under this provision runs contrary to this history in addition to the difficulty of developing an unambiguous definition for the committees covered by this exemption.

Experience teaches more and more blue ribbon committees, special commissions and government task forces are being created to address public issues. The more controversial or intractable the issue, the higher the probability a blue ribbon committee, special commission or government task force will be created and used to deal with the problem. The public should be able to see these multimember groups discharge their responsibilities to the maximum extent because of the growing role these groups play in formulation of public policy.

Reports of Open Meeting Law Enforcement Activity

The existing text of NRS 228.100 and NRS 228.160 is broad enough to allow for periodic reporting of enforcement activity related to the Nevada Open Meeting Law by the Attorney General. Specific reporting requirements could be added to these provisions to standardize reports of enforcement activity concerning this legislation from one administration to the next and make this information more readily available for use by the Legislature as it considers changes and improvements to the Nevada Open Meeting Law.

Having hundreds of individual public bodies report annually the Open Meeting Law complaints and dispositions made against each body during the previous year might not be the most effective way to gather information. The reporting requirement under former NRS 218.5391, now NRS 218E.305(1)(a)(b), was observed more by the seventeen district attorneys through failing to file their annual reports rather than by compliance with the reporting requirements during the period I served in that capacity. The same incomplete information gathering may happen regarding the open meeting law if decentralized reporting is employed.

It seems one report coming from the official with primary responsibility for enforcement of this legislation would capture the majority of the information needed. The notable exception would be the civil actions maintained pursuant to NRS 241.037(2) by plaintiffs other than the Attorney General. In this latter circumstance, public bodies could report these actions and their status to the Attorney General. The Attorney General could compile the information into the biennial report. This limited reporting requirement placed on the various public bodies is not great because of the relatively small number of private plaintiff actions commenced each year seeking enforcement of the Nevada Open Meeting Law. Many entities have to report other significant litigation, as part of their external audit process under financial practices legislation, so reporting this infrequent type of litigation to the Attorney General periodically will not be difficult or novel for them.

Subpoena Power for the Attorney General

According to the spreadsheet information for 2009, there are 39 matters for which calculations can be made of the interval between the date the public body was contacted and the date the Attorney General received the response from the public body. Calculations were not made for matters 09-006, 09-008, 09-009, 09-013, 09-016, 09-017, 09-018, 09-024, 09-027 and 09-038 because there were no dates supplied or the information otherwise did not permit a calculation. Average response time for the 39 matters was about 18.4 calendar days. There were four matters where response time was very slow (file nos. 09-001, 09-039, 09-040 and 09-041) which took 62 days and 51 days respectively for the public body to file their response with your office. If these

four slowest matters are dropped from the average, the response time for the remaining 35 matters averages 14.4 calendar days or just slightly more than two weeks. Other than four notable exceptions, the level of cooperation in producing records and responding to investigative inquiries is quite good if I understand the 2009 spreadsheet information correctly.

The request for the Legislature to give the Attorney General administrative subpoena power is truly directed at a small number of public bodies, like the four in 2009 who ignored the Attorney General's Office for about two months before responding. The other thirty-five agencies, for which response times can be calculated in 2009, did what is impliedly required under NRS 241.035(5) and (6) and made timely responses. Historically, the Legislature has been reluctant to pass legislation conferring administrative subpoena power on the Attorney General in the investigatory context of an alleged Open Meeting Law violation. Legislators may be reluctant to do so again when only four of thirty-nine entities were not acting reasonably under NRS 241.035(5) and (6) in 2009.

Another way to attack non-responsive public bodies, other than use of a new subpoena power, is to amend the limitations periods in NRS 241.037(3). A short limitations period was adopted in 1983 and statutory time frames were put in their present form in 1985 with promotion of stability in public body decision-making being a key factor during both legislative sessions. Under this approach, when a public body fails to produce the meeting records called for in NRS 241.035(5) and (6) within a statutorily prescribed time period, the limitations periods in NRS 241.037(3) are extended on a day-for-day basis for each day beyond the prescribed production period the public body takes to fulfill its statutory duty to produce the records for the Attorney General. This concept places the onus for delayed production of investigatory materials on the uncooperative public body without resort to subpoena authority applicable to and unnecessary for the large percentage of public bodies that cooperate in open meeting law investigations.

Serial Briefings Under *Dewey v. Reno Redevelopment Authority*

So long as Nevada stays with the majority of states defining a quorum as provided presently in NRS 241.015 (4), and public bodies adhere to the line drawn in *Dewey v. Reno Redevelopment Authority* permitting serial briefings of groups less than a quorum to receive information outside of the public process as long as there is no evidence these groups collectively deliberated on or took action with respect to a matter of public business, no violation of our state's open meeting legislation occurs. As I said at the Task Force's initial meeting, I have used serial briefings several times during my career because the process was useful in imparting sensitive information to public bodies. I have mixed feelings about the process because of its utility being tempered by public mistrust of government officials when the public does not have the opportunity to be present during this briefing process.

If it is determined the public policy in NRS 241.010 is best served by legislatively overruling *Dewey*, there are at least two approaches. One approach is to join the minority of jurisdictions applying their open meeting law requirements to fewer than a quorum of the particular public body (non-quorum states). *Open Meeting Laws 2d* at 271-72. A second approach is to adopt a statutory prohibition against serial communications. *Id.* at 294-95.

Online Bulletin Board Meetings

On the subject of electronic communications, I admit being no farther along in my review than the position of many jurisdictions mentioned at the outset of section 6.46 in *Open Meeting Laws 2d* where the author states very few open meeting laws address email and similar computer communications. *Open Meeting Laws 2d* at 303. I need to do some more study to determine if legislation passed since the publication of this treatise in 2000 more effectively addresses this concern.

We do have the electronic communication prohibition in NRS 241.030(5). This prohibition could be interpreted to address meetings of this sort. The interpretive analysis in *Open Meeting Laws 2d* at 304-06 is a useful starting point for interpretive text in a revised edition of the *Nevada Open Meeting Law Manual* dealing with this topic. However, Ann Taylor Schwing's analysis needs to be updated given her treatise is now a decade old.

Private Corporations Serving a Public Purpose Being Subject to the Open Meeting Law

The Legislature has employed an incremental approach in adding organizations of this sort to the definition of "public body" codified in NRS 241.015, with the latest addition being made in 2009 and codified as NRS 241.015(3)(b). Please refer to my discussion of the collective bargaining exemption, below, for my thoughts about "bargaining agents" and "employee organizations" potentially being included as "public Bodies" at a future date if study indicates the need for that change when these entities engage in public sector collective bargaining under the Local Government Employee-Management Relations Act.

Exemption for Labor Negotiations

I asked that Barry Smith's column be included in the discussions of the Task Force not because Mr. Smith forcefully argued the law should apply to the Legislature to a greater extent than it does presently, but because of his discussion of SCR 1 adopted in the special session just concluded. Barry Smith, "Legislature is a Contradiction in Open Government" *Nevada Appeal* (March 18, 2010 edition) at A9. The Senate Concurrent Resolution calls for, in part, the process of local government collective bargaining to be examined during the next regular session of the Legislature with the goal of increasing transparency in the process to provide the public with a meaningful opportunity to hold local governments and local government employee organizations accountable.

One refrain heard frequently is government needs to operate more like a business. Currently, the Nevada Open Meeting Law exemption codified in NRS 288.220 places local government collective bargaining on a footing like that used by private business under National Labor Relations Act bargaining practices. This exemption has been in our law since the initial passage and approval of the Local Government Employee-Management Relations Act ("EMRA") in 1969. This business-based practice of collective bargaining used by local governments is at variance with the general policy of openness codified in NRS 241.010.

In 2009, EMRA was amended by addition of NRS 288.153 requiring collective bargaining agreements be approved at public hearings and a report of each agreement's fiscal impact being made by the local government's chief executive officer to the local government employer. I view SCR 1, as a statement of opinion the Legislature wants more openness in the public sector collective bargaining process used by local government. If the Legislature pursues this goal, care must be taken to avoid creating a "bargaining table" that is not level.

Currently, neither the "bargaining agent" or "employee organization" nor the "local government employer" develops their bargaining strategy in public or engages in the collective bargaining process in public. The Open Meeting Law applies to "public bodies." Given the definitions in EMRA, a requirement of openness in NRS 241.010, made applicable to aspects bargaining process under EMRA, through just amendment to NRS 288.220, would apply only to the governing body and any negotiating subcommittee of the "local government employer"-not the "bargaining agent" and "employee organization" under current statutory text. This unequal treatment can be rectified only if the "bargaining agent" (defined in NRS 288.027) and an "employee organization" (defined in NRS 288.040) are also defined as "public bodies" in NRS 241.015 when they are engaging in "collective bargaining" (defined in NRS 288.033) and conducting meetings to develop strategy related to collective bargaining or at which progress related to the collective bargaining process is reported.

My preference, with respect to the opinion expressed in SCR 1, is to leave NRS 288.220 as presently codified during the next regular session of the Legislature and monitor compliance with and the effect of the NRS 288.153 during the interim after the 2011 session to determine how this new provision increases public acceptance of the results obtained in the local government collective bargaining process. If in 2013, based on the results of the monitoring conducted during the interim, the Legislature concludes more transparency is needed for the collective bargaining process exemption codified in NRS 288.220, an incremental step can be taken like that contained in Colorado's law rather than taking the entire collective bargaining process public.

A few jurisdictions have made the entire bargaining process public. However, I recommend Colorado's approach if performance of an interim study here shows change to be needed in the text of NRS 288.220 because of Colorado's balanced development of their public and closed session requirements for public sector collective bargaining recounted the legal authorities cited by *Open Meeting Law 2d* at 422-23 footnotes 361 and 364. *See Littleton Educ. Ass'n v. Arapahoe Cnty. School Dist.*, 553 P.2d 793,798 (Colo. Sup. Ct. 1976) (interpreting the 1973 text of the state's Public Meetings Law to prohibit the school board from meeting in executive sessions with the district's negotiation team to review the progress of negotiations and determine policy as well as strategy) *followed in School Dist. No. 11 v. Colorado Springs Teachers Ass'n*, 583 P.2d 952, 954 (Colo. Ct. App. 1978) (giving same construction to prior law adopted in 1973); *Compare with* Colo. Rev. Stat. secs. 24-6-402(3)(a)(V) and 24-6-402(4)(e) (2009) (provisions legislatively overrule *Littleton* and *School Dist. No. 11* by authorizing state and local public bodies to meet in executive session to determine positions relative to matters that may be subject to negotiations with employees or employee organizations; developing strategy for and receiving reports on the progress of such negotiations; and instructing negotiators).

The Colorado law was initially construed to require open sessions for the collective bargaining process and subsequently amended to allow strategy and progress reporting concerning labor negotiations to be conducted in closed session. I appreciate the Legislature's concern for "shared sacrifice" necessitated by current economic conditions as stated in SCR 1. However, the enabling legislation for collective bargaining done by local governments needs to be structured for bargaining conducted in all economic circumstances; not just the current "down" economy with its unprecedented and widespread bargaining for employee concessions on the list of subjects codified in NRS 288.150. The incremental approach to address transparency afforded by the collective bargaining process exemption based on interim study and potential use of Colorado's statutory structure permits Nevada to profit from Colorado's experience and tailor its statutory exemption in NRS 288.220 at some future point if our state needs to make that change.

Exemption for Quasi-Judicial Proceedings

I think this judicially created exemption is an appropriate topic for interpretive advice presented in a revised edition of the *Nevada Open Meeting Law Manual*. While the manual is the official publication of your office, I think expanded text on this topic would fit well at section 4.04 on page 27 of the current edition of the manual. The decision in *Stockmeir* adopts minimum procedural safeguards analysis to determine which proceedings are quasi-judicial in nature, but leaves open the applicability of this analysis to state agency proceedings other than those of the panel involved in that litigation. Both the majority and dissenting opinions in *Witherow* address the judicial function test. The majority opinion seems to employ both the judicial function test and minimum procedural safeguards analysis. The dissent cites the inconsistency between the statutory policy of the Nevada Open Meeting Law and *Stockmeir's* reliance on minimum due process safeguards as justification to overrule *Stockmeir* and adopt the judicial function test as the basis for determining a quasi-judicial function exemption from the Nevada Open Meeting Law.

Stockmeir and *Witherow* must be considered in light of existing statutory exceptions like NRS 241.030(1)(a)-(c), inclusive, and the very strict interpretive standards in *Attorney General v. Nevada Tax Commission*. Reading all of these authorities harmoniously, together with other "specific," "explicit" and "definite" statutory provisions, does not compel the conclusion all "contested cases" under the Administrative Procedures Act are exceptions to the public proceeding requirement in NRS 241.020(1).

Advice can be given in revised manual text about which portions of contested case proceedings might be closed versus those portions to be conducted in public. General advice given in a revised edition of the manual can be supplemented with specific advice to particular state agencies having special statutory provisions tempering the general advice. Comparable advice can be given concerning hearings conducted regularly by local governments not subject to the Administrative Procedures Act's "contested case" provisions; but having procedural safeguards similar to APA contested cases and arguably within *Stockmeir* minimum procedural safeguard analysis which also are properly characterized as judicial functions under *Witherow*. Much of this advice is already set out in the existing manual's text preceding section 4.04 so the task of rewriting the manual may not be as daunting as outlined here. An interpretive approach in

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dealing with this judicially created exemption has the flexibility to deal with what seems to be an evolving doctrine.

In addition to the observations just made for possible language in the next edition of the manual, the Attorney General can seek a legislative resolution defining the contours of the quasi-judicial exemption to the Nevada Open Meeting Law. Many states have done this by legislating a statutory exemption for all contested cases conducted under their Administrative Procedures Act. This approach seems to carve too large a hole in the openness requirement given the current state of the law here. Another difficulty with the statutory approach is the complexity of categorizing the proceedings that are public versus those that are exempt or exceptions to public proceeding requirements. Maryland's Government Code is an example of this. Md. Ann. Gov't Code secs. 10-503(a)(1)(i)-(iii) and 10-502(b)-(f) and (i)-(j) (2009).

Summary

I noticed toward the end of this week's agenda there is an item for "best practices" drawn from open meeting law legislation in other states. Hopefully, the content of this letter is a start on that topic as well. Thank you for considering this letter. I regret being unable to attend Thursday's Task Force meeting.

Sincerely,

Scott W. Doyle

cc Linda Fitzgerald