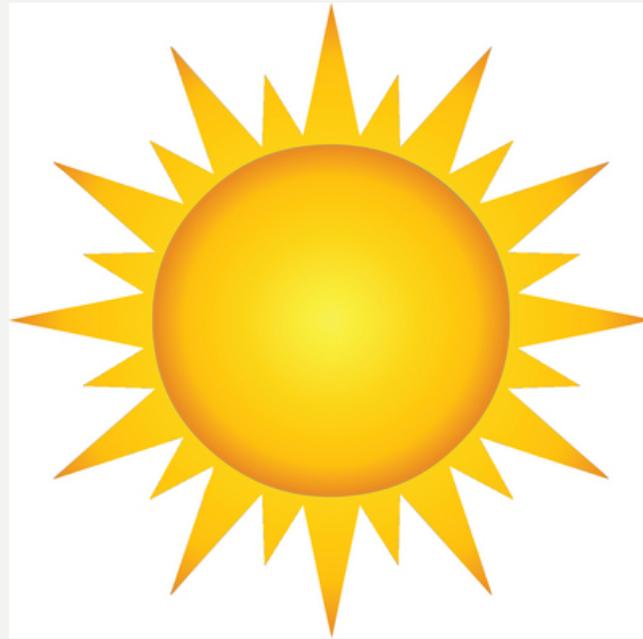


OPEN MEETING LAW TRAINING

PUBLIC EMPLOYEES' BENEFITS PROGRAM BOARD

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- Every state, the District of Columbia, and the federal government have all adopted open meeting (AKA “sunshine”) laws
- Designed to ensure that the people’s business is done in a transparent way



Resources

Nevada adopted open meeting law provisions in 1960

- NRS Chapter 241
- Nevada Supreme Court opinions
- Attorney General website:
 - Attorney General Opinions
 - Open Meeting Law Manual
 - OML training materials

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)

Exceptions exist—but they are NARROW

- ❑ “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).

Applicability

- Meetings of public bodies. NRS 241.016(1).
- A “public body” is “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” NRS 241.015(4).
- Includes subcommittees created by public bodies. NRS 241.015(4).

PEBP Board is a public body – all meetings are subject to OML

PENALTIES AND REMEDIES

- Actions taken in violation of law are void. NRS 241.036.
- Attorney General has statutory enforcement powers and authority to investigate and prosecute violations. 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 make every effort to promptly correct the apparent violation. NRS 241.0365.
- Although it may not completely eliminate a 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).

NRS 241.040:

- Members who attend a meeting where any violation of OML occurs, have knowledge of the violation, and participate in the violation, are guilty of a MISDEMEANOR
 - Also subject to administrative fines:
 - First offense: \$500
 - Second offense: \$1,000
 - Third or subsequent offense: \$2,500
- Wrongful exclusion of any person is a MISDEMEANOR
- Legal advice: No criminal penalty or administrative fine may be imposed upon a member if violation is a result of legal advice provided by an attorney employed or retained by the public body.

“Meeting”

- NRS 241.015:
 - **Quorum** of members of a public body gathering together with:
 - **Deliberation** toward a decision; and/or
 - **Action**: making a decision, commitment or promise over a matter within the public body’s supervision, jurisdiction, control or advisory power.
- A quorum is a simple majority of the total body (NRS 241.015(5));
- “Deliberate’ means to examine, weigh and reflect upon the reasons for or against the action. The term includes, without limitation, collective discussion and the collective acquisition or exchange of facts preliminary to the ultimate decision.” (NRS 241.015(2));
- Action requires majority vote of members present (NRS 241.015(1)).

Exceptions:

- A gathering of a quorum at a social function 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.

Constructive quorums/meetings

- Serial communications or “walking quorums” can constitute a constructive meeting
- A constructive quorum can exist with less than a quorum speaking together at any given time if opinions are relayed between members
- Email pitfalls – “Reply all” email chains can constitute a meeting
- Example of a constructive quorum: Two members of a five-member public body discuss how they intend to vote on an issue and why. One of those members then has that same discussion with a third member, including how both the first two members intend to vote and why. A quorum (three members) has deliberated on an issue outside of a meeting.

Subcommittees/Advisory Committees

- 2019 Legislature set forth a better definition of “subcommittee or working group” as having a majority that are members or staff or that is authorized to make a recommendation to or take action on behalf of the public body. See NRS 241.015(4)(d).
- Subcommittee meetings governed by the open meeting law
- Board assignment of a matter to an individual is not creating a subcommittee
 - Individual given assignment may not engage a quorum of the Board

Texting

- Scenario: During public meeting, a number less than a quorum of board members text each other and board staff on subjects under discussion
- “... **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).
- Recommendation: Refrain from texting each other about Board business

Closed meetings

- ▣ Closure pursuant to NRS 241.030
 - Except as otherwise provided in this section and NRS 241.031 and 241.033, a public body may hold a closed meeting to . . . Consider the character, alleged misconduct, professional competence, or physical or mental health of a person.

PEBP-specific statute

NRS 287.0415(4):

The Board may meet in closed session:

- (a) To discuss matters relating to personnel;
- (b) With investment counsel to plan future investments or establish investment objectives and policies;
- (c) With legal counsel to receive advice upon claims or suits by or against the Program;
- (d) To prepare a request for a proposal or other solicitation for bids to be released by the Board for competitive bidding; or
- (e) As otherwise provided pursuant to chapter 241 of NRS.

Must publish and follow clear and complete agendas . . .

NRS 241.020(3):

Except in an emergency, written notice of all meetings must be given at least 3 working days before the meeting. The notice must include:

(a) The time, place and location of the meeting.

(b) A list of the locations where the notice has been posted.

(c) The name and contact information for the person designated by the public body from whom a member of the public may request the supporting material for the meeting described in subsection 7 and a list of the locations where the supporting material is available to the public.

(d) An agenda consisting of:

(1) A clear and complete statement of the topics scheduled to be considered during the meeting.

(2) A list describing the items on which action may be taken and clearly denoting that action may be taken on those items by placing the term “for possible action” next to the appropriate item or, if the item is placed on the agenda pursuant to NRS 241.0365, by placing the term “for possible corrective action” next to the appropriate item.

(3) Periods devoted to comments by the general public, if any, and discussion of those comments.

Comments by the general public must be taken:

(I) At the beginning of the meeting before any items on which action may be taken are heard by the public body and again before the adjournment of the meeting; or

(II) 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.

Must publish and follow clear and complete agendas . . .

- What is clear and complete?

“Nevada's Open Meeting Law seeks to give the public clear notice of the topics to be discussed at public meetings so that the public can attend a meeting when an issue of interest will be discussed.”

Sandoval v. Board of Regents of University, 119 Nev. 148, 155 (2003)

Must publish and follow clear and complete agendas . . .

Further guidance from *Sandoval*:

- Do not “exceed the scope of a clearly and completely stated agenda topic.”
 - *Sandoval* involved an information item:
 - Review UCCSN, state and federal statutes, regulations, case law, and policies that govern the release of materials, documents, and reports to the public.
 - After presentation of the information item, the Board of Regents went beyond the foregoing information item:
 - [A] Regent . . . proceeded to discuss a controversial report, prepared by the Nevada Division of Investigation (NDI), regarding a dormitory raid that occurred on the University of Nevada, Las Vegas (UNLV) campus. [The regent] discussed details of the dormitory raid, criticized the UNLV police department’s actions, and recommended that the UNLV police department be disarmed. [Another regent] then commented on the danger of drugs on the UNLV campus.

IS ACTION ITEM CORRECTLY DISCLOSED?

The agenda should have a higher degree of specificity when addressing a subject of special or significant interest to the public. Sandoval at pp. 154-5

- Reno City Counsel Agenda, November 14, 2012:
- “Discussion, direction to staff and possible approval of Limited Guaranty pertaining to Settlement and Restructuring Agreement.”



“CLEAR AND COMPLETE” WHEN AGENCY WANTS TO DISCUSS BILL DRAFTS

- The Nevada Supreme Court has held that when a public body was reviewing legislation during session for possible recommendations, it did not violate the clear and complete requirement although the specific legislation was not listed on the noticing agenda, as the agenda referred to a website where list of legislation could be found prior to the hearing date, which the Court found to be “reasonable notice.”

Schmidt v. Washoe County, 123 Nev. 128, 138 (2007)

CLEAR AND COMPLETE AGENDA: ADMINISTRATIVE ACTION REGARDING A PERSON

- Agenda must include name of person regarding whom action may be taken. NRS 241.020(5). For example: appointees, contract awards.
- If a person is to be named in a motion, that person's name should be on the agenda

“FOR POSSIBLE ACTION”

- Agenda must contain: A list describing the items on which action may be taken and clearly denoting what action may be taken on those items by placing the term “for possible action” next to the appropriate item.
- The Board cannot take action on item not designated as an action item.

Boards may be required to give individual notice in certain circumstances

- NRS 241.033: Except for employment applicants, “a public body shall not hold a meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of any person or to consider an appeal by a person of the results of an examination conducted by or on behalf of the public body unless it has (a) Given written notice to that person of the time and place of the meeting; and (b) Received proof of service of the notice . . .”

Boards may be required to give individual notice in certain circumstances

- In other words, public bodies should avoid discussions of character, alleged misconduct, professional competence, or physical or mental health of specifically identifiable persons unless (1) that subject is within the scope of the clear and complete agenda item and (2) the person has been given individual notice.
- Notice required: 5 working days personal delivery or 21 working days by certified mail
- New in 2019 Legislature: clarification that meeting held to recognize or award positive achievements of a person is not subject to the notice requirements of NRS 241.033.

OTHER INDIVIDUAL NOTICE REQUIREMENT

- Same notice required before holding meeting to consider administrative action against a person
- “Administrative action against a person”
 - “Person” includes corporate entities
- Per Open Meeting Law Manual: Administrative Action against a person “does not occur unless the matter being acted on is uniquely personal to the individual or entity. ‘Administrative action against a person’ does not occur when the legal basis of the action is consideration of the inanimate characteristics of a facility or property and no consideration of the characteristics or qualifications of the individual or entity (the person) that has sought the governmental approval.”

Make Meeting Materials Available

NRS 241.020

7. Upon any request, a public body shall provide, at no charge, at least one copy of:
 - (a) An agenda for a public meeting;
 - (b) A proposed ordinance or regulation which will be discussed at the public meeting; and
 - (c) Subject to the provisions of subsection 8 or 9, as applicable, any other supporting material provided to the members of the public body for an item on the agenda, except materials:
 - (1) Submitted to the public body pursuant to a nondisclosure or confidentiality agreement which relates to proprietary information;
 - (2) Pertaining to the closed portion of such a meeting of the public body; or
 - (3) Declared confidential by law, unless otherwise agreed to by each person whose interest is being protected under the order of confidentiality.

The public body shall make at least one copy of the documents described in paragraphs (a), (b) and (c) available to the public at the meeting to which the documents pertain. As used in this subsection, “proprietary information” has the meaning ascribed to it in NRS 332.025.

Make Meeting Materials Available

NRS 241.020 (cont'd)

8. Unless it must be made available at an earlier time pursuant to NRS 288.153, a copy of supporting material required to be provided upon request pursuant to paragraph (c) of subsection 7 must be:

(a) If the supporting material is provided to the members of the public body before the meeting, made available to the requester at the time the material is provided to the members of the public body; or

(b) If the supporting material is provided to the members of the public body at the meeting, made available at the meeting to the requester at the same time the material is provided to the members of the public body.

If the requester has agreed to receive the information and material set forth in subsection 7 by electronic mail, the public body shall, if feasible, provide the information and material by electronic mail.

- OMLO 98-01 “Made available” does not equal “mailed.” In other words, a requester who wants a paper copy of supporting materials before the meeting may be required to come to the agency to get it.

RECORDING MEETING— MINUTES

- NRS 241.035 requires that written minutes be kept of:
 - (a) The date, time and place of the meeting.
 - (b) Those members of the public body who were present and those who were absent.
 - (c) The substance of all matters proposed, discussed or decided and, at the request of any member, a record of each member's vote on any matter decided by vote.
 - (d) The substance of remarks made by any member of the general public who addresses the public body if the member of the general public requests that the minutes reflect those remarks or, if the member of the general public has prepared written remarks, a copy of the prepared remarks if the member of the general public submits a copy for inclusion.
 - (e) Any other information which any member of the public body requests to be included or reflected in the minutes.

PUBLIC COMMENT

- Must be on agenda at least (1) once before first action item and again before end of meeting OR (2) on all action items (before action taken) if additional opportunity is given to provide comment on other items, as well
- The Board may not take action based on public comment except as it relates to an action agenda item
- Court may discuss public comment it receives
- The Board may not discriminate based on viewpoint
- Comment may be limited to areas relevant to Board jurisdiction
- Repetition and caustic personal attacks may be limited
- Any time limit or other permissible restriction on public comment should be spelled out on agenda

Recent changes (2019 Legislature)

- Ability to delegate litigation decisions to chair or executive officer: NRS 241.0357
- Language regarding use of teleconferencing or videoconferencing technology for a meeting: NRS 241.023
- Ability of a public body to receive certain training outside of a public meeting, so long as there is no deliberation or action on any matter within the public body's jurisdiction and control: NRS 241.015(3)(b)(3)

Recent changes cont'd

- 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 are taken, no violation if a person is not allowed to attend the meeting because the facility has reached maximum capacity.
 - Public body not required to incur costs to secure a facility outside the control or jurisdiction of the public body or to upgrade, improve or otherwise modify an existing facility to accommodate the anticipated number of attendees.

NRS 241.020(2).

COVID-19

Some OML provisions temporarily affected by Governor's Emergency Directives related novel coronavirus:

- Requirement for physical location where members of public are permitted to attend and participate (NRS 241.023(1)(b)) suspended
 - If meeting held by teleconference or video conference only, agenda should explain how public may provide public comment
- Requirement for agenda to be posted at physical locations (NRS 241.020(4)(a)) suspended
 - Agendas must still be posted to Nevada's notice website and public body's website; must still provide copy to those who request them by U.S. mail or email
- Requirement that physical locations be available for the public to receive supporting material for public meetings (NRS 241.020(3)(c)) suspended.
 - Must provide on agenda the name and contact information for person from whom supporting material may be requested electronically; must also post to public body's website
- Must ensure that any party entitled to or required to appear is able to do so through remote means and fully able to participate in the agenda items that pertain to them.

QUESTIONS?

