



POLICY AND PROGRAM REPORT



Open Meeting Law

April 2016

Most states have enacted so-called “open meeting” laws (also known as sunshine laws) requiring governmental entities to give advance notice of meetings and agendas, to permit public attendance and participation, and to keep records of such meetings.

Nevada’s Open Meeting Law (OML) was first enacted in 1960 and is codified in Chapter 241 (“Meetings of State and Local Agencies”) of *Nevada Revised Statutes* (NRS). Nevada has one of the strongest open meeting laws in the United States because there are so few exceptions to the general rule that all meetings of public bodies must be open to the public. To that end, courts construe the OML liberally in favor of the public and will not imply exceptions to the general rule.

Nevada’s Office of the Attorney General convenes a task force in between legislative sessions to review the OML and has submitted a bill draft request in recent sessions to make various changes to Chapter 241 of NRS. Their office assists public bodies in complying with the OML by publishing the *Nevada Open Meeting Law Manual* (OML Manual) and an OML “compliance checklist,” which are both available on the following website: http://ag.nv.gov/About/Governmental_Affairs/OML/.

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Public Policy for Nevada’s Open Meeting Law

The statement of legislative intent in NRS 241.010 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.”

DEFINITIONS

Defining terms as clearly as possible is critical to the application of the OML, especially defining “deliberate,” “public body,” and “meeting.” “Deliberate” is defined in NRS 241.015(2) as follows: “collectively to examine, weigh and reflect upon the reasons for or against the action. The term includes, without limitation, the collective discussion or exchange of facts preliminary to the ultimate decision.” The term “public body” is broadly defined in NRS 241.015(4) to include:

. . . 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 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 and includes an educational foundation as defined in subsection 3 of NRS 388.750 and a university foundation as defined in subsection 3 of NRS 396.405, 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

The definition further provides that a public body includes:

. . . Any board, commission or committee consisting of at least two persons appointed by: (1) The Governor or a public officer who is under the direction of the Governor, if the board, commission or committee has at least two members who are not employees of the Executive Department of the State Government; (2) An entity in the Executive Department of the State Government consisting of members appointed by the Governor, if the board, commission or committee otherwise meets the definition of a public body pursuant to this subsection; or (3) A public officer who is under the direction of an agency or other entity in the Executive Department of the State Government consisting of members appointed by the Governor, if the board, commission or committee has at least two members who are not employed by the public officer or entity

Finally, the definition also provides that a “public body” includes “. . . a limited-purpose association that is created for a rural agricultural residential common-interest community as defined in subsection 6 of NRS 116.1201.”

The definition of public body was amended significantly in 2011 to add provisions clarifying the method by which the public body is created and to specify that boards, commissions, and other committees appointed by the Governor are also considered public bodies. Because the definition of public body includes subcommittees and advisory committees, they are subject to the open meeting provisions to the same extent as the public body that created them. Executive directors and the staff of executive or other governmental agencies are not subject to the OML, and most private nonprofit organizations are not considered public bodies.

Since open government is the goal, formal or informal polling of members to reach a decision, whether by telephone, by mail, electronically, or through a group of meetings attended by less than a full quorum, is considered a violation of the OML.

What is a meeting under the Open Meeting Law?

As defined in subsection 3 of NRS 241.015, a “meeting” is:

The gathering of members of a public body at which a quorum is present, whether in person or by means of electronic communication, to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.

A meeting also includes:

Any series of gatherings of members of a public body at which:

- (I) Less than a quorum is present, whether in person or by means of electronic communication, at any individual gathering;
- (II) The members of the public body attending one or more of the gatherings collectively constitute a quorum; and
- (III) The series of gatherings was held with the specific intent to avoid the provisions of this chapter.

Excluded from the definition of a meeting is a:

. . . gathering or series of gatherings of members of a public body . . . at which a quorum is actually or collectively present, whether in person or by means of electronic communication:

- (1) Which occurs at a social function if the members do not deliberate toward a decision or take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.
- (2) To receive information from the attorney employed or retained by the public body regarding potential or existing litigation involving a matter over which the public body has supervision, control, jurisdiction or advisory power and to deliberate toward a decision on the matter, or both.

EXCEPTIONS

There are specific statutory exceptions for certain entities from the OML, including the Legislature, certain meetings of the State’s Commission on Ethics, the Nevada Commission on Homeland Security and committees appointed by the Chair of the Commission, student expulsion hearings by school boards, certain labor negotiations, and investigative hearings of the Nevada Gaming Control Board. Closed sessions may also be held, for limited purposes, by the Certified Court Reporters’ Board of Nevada, the Public Employees’ Retirement Board, the State Board of Pharmacy, the Nevada Tax Commission, and public housing authorities. Portions of disciplinary hearings conducted by occupational and licensing boards are also exempt unless the licensee requests an open meeting. An agency or board may close a portion of a meeting to receive information deemed confidential by law. Although judicial proceedings are exempt from open meeting requirements, statute requires sitting courts to be open to the public, with some exceptions. In 2013, the Legislature amended the OML to clarify that any other provision of law which exempts a meeting, hearing, or proceeding from the

requirements of the OML, or otherwise authorizes or requires a closed meeting, hearing, or proceeding, prevails over the general provisions of the OML. These changes and others can be found in Assembly Bill 65 (Chapter 193, *Statutes of Nevada*).

The OML authorizes, but does not require, the conduct of closed sessions by a public body to consider the character, alleged misconduct, professional competence, or the physical or mental health of a person. During a closed session, a public body generally may not take action of any sort and minutes must still be taken. The 2015 Legislature enacted Senate Bill 70 (Chapter 226, *Statutes of Nevada*), which requires a public body to include on its agenda the name of a person who may be the subject of any type of administrative action, including administrative actions that are not adverse to a person, such as appointment of the person to a position.

In 2001, Nevada's OML was amended to provide a limited exemption for communications between a public body and its legal counsel on potential or existing litigation. Attorney-client discussions are not considered meetings and, therefore, no notice or agenda is required. However, according to the most recent edition of the OML Manual (June 2012), a public body may only take action on potential or existing litigation matters in an open meeting.

In 2005, the Legislature made several significant changes relating to closed meetings, including allowing a person who is the subject of a closed meeting to waive closure of the meeting and requiring a public body to honor such a request. Meetings may not be closed to discuss the character, conduct, or competence of an appointed public officer or a person who serves at the pleasure of a public body or as a chief executive or administrative officer. This includes county and city managers, school district superintendents, and university and college presidents. These changes and others were made in S.B. 267 (Chapter 466, *Statutes of Nevada*).

As the result of litigation over a Nevada Tax Commission decision made in a closed session, A.B. 433 (Chapter 296, *Statutes of Nevada*) of the 2007 Legislative Session clarified when the Tax Commission may meet in closed session. The bill also clarified that any meeting of a public body closed pursuant to a specific statute may only be closed to the extent specified in law. In addition to clarifying the use of taxpayer records by the Tax Commission, S.B. 33 (Chapter 160, *Statutes of Nevada*) of the 2011 Legislative Session clarified that a taxpayer may request a closed hearing of the Commission in writing not later than 14 calendar days before the date of the hearing or, if authorized by the Executive Director for good cause shown, not later than 5 calendar days before the hearing.

In the 2009 Session, S.B. 267 (Chapter 419, *Statutes of Nevada*) clarified that workshops and public hearings on proposed regulations by State agencies, as required by Chapter 233B ("Nevada Administrative Procedure Act") of NRS, are subject to the provisions of the OML.

Assembly Bill 59 (Chapter 383, *Statutes of Nevada*) of the 2011 Legislative Session clarified that proceedings of a public body that are quasi-judicial in nature are subject to the OML. Exceptions to this provision are meetings of the State Board of Parole Commissioners when acting to continue, deny, grant, or revoke parole of a prisoner. Finally, S.B. 187 (Chapter 368, *Statutes of Nevada 2011*)

provided that subject to the OML are panels charged with evaluating whether prisoners who were convicted of certain sexual offenses are likely to reoffend in a sexual manner.

RECENT LEGISLATION

Assembly Bill 65 of the 2013 Session revised the OML to prohibit a member of a public body from designating another person to attend a meeting in his or her place unless expressly authorized to do so by the provisions of law or other legal authority that created the public body. When permitted, such a designation must be made in writing or made on the record at a meeting of the public body. The same measure also provides that a quorum of members may be present at a meeting by means of electronic communication as long as all members of the public body and members of the public present at the meeting can hear or observe and participate in the meeting. Additionally, the bill provides that governing bodies of cities with populations of 45,000 or more must post meeting materials to their websites at the same time they are provided to members of the governing body or, if the material is provided at the meeting, not later than 24 hours after the meeting.

Senate Bill 33 (Chapter 262, *Statutes of Nevada 2015*) authorized the board of hospital trustees of a county hospital to hold a closed meeting to discuss: (1) providing a new service or materially expanding an existing service or (2) acquiring an additional facility or materially expanding an existing facility.

In addition to the provisions previously described, S.B. 70 of the 2015 Session made various changes to the OML to make government more transparent, including revising the public notice requirements for public meetings and requiring a public body to approve the minutes of its public meeting not later than 45 days after the meeting or at the next meeting of the public body, whichever occurs later.

Senate Bill 158 (Chapter 84, *Statutes of Nevada 2015*) required a local government employer to make the following documents available to the public not less than three business days before a public hearing by its governing body to approve a collective bargaining agreement: (1) the proposed agreement and any exhibits or other attachments to the proposed agreement; (2) any modifications to a previous agreement; and (3) the fiscal impact of the agreement.

LEGISLATURE

Although the Legislature is specifically exempted from the OML in paragraph (a) of subsection 2 of NRS 241.016, the Legislature has a long-standing tradition of voluntary compliance. When the Legislature is not in session, the ongoing statutory committees and interim studies or task forces voluntarily comply with the OML. During legislative sessions, the standing rules of the Senate and Assembly require all legislative committees to “be open to the public.” As a matter of practice, legislative committees generally provide three days’ advance notice and post agendas. However, due to the 120-day limit on legislative sessions, advance notice and availability of agendas may be shortened significantly near certain bill passage deadlines and the end of the session to ensure that committees are able to move bills to the Senate or Assembly floor for action in a timely fashion.

NOTICE OF MEETINGS

In order to give the public an opportunity to observe or participate in meetings of public entities, the law requires that notice must be given not less than three full working days prior to the meeting. Thus, if a meeting is to be held on a Wednesday, notice must be given not later than 9 a.m. on the preceding Friday. Notice is given by posting notice in at least four places, one of which should be the principal office of the public body, and by mailing copies of the notice to any person who requests notification of meetings. If the public body maintains a website, then supplemental notice must be posted on the website.

In 2013, A.B. 445 (Chapter 363, *Statutes of Nevada*) was approved, requiring the Department of Administration to establish a location on the State's official website on which public bodies must post notices of open meetings not later than 9 a.m. on the third working day before a meeting. These notices must include a link to the public body's website or an e-mail address for contacting the public body. See the following link: <http://nv.gov/>.

Notice must include the time, location, and date of the meeting, and the agenda for the meeting. The agenda shall consist of a clear and complete statement of the topics to be considered and shall designate those items on which action may be taken. If a meeting will be closed to consider the character, conduct, competence, or health of a person, or if administrative action may be taken against a person during a meeting, the agenda must include the name of any such person.

Two measures approved in 2011 made notable changes to the meeting notice requirements set forth in the OML. Specifically, A.B. 59 required meeting agendas to include "for possible action" next to agenda items on which action may be taken and to state whether there is any time, place, or manner of restrictions on public comments. Agendas must also include a notice that items may be taken out of order, combined, or removed. In addition, A.B. 257 (Chapter 459, *Statutes of Nevada*) required meeting agendas to provide at least two periods for public comment—one at the beginning of the meeting before any action items and one prior to adjournment. Alternatively, the public body may choose to include public comment after each action item on the agenda but before the public body takes action on the item. Finally, the public body must, at some time before adjournment of the meeting, allow the general public to comment on any matter that is not specifically included as an action item on the agenda. The 2015 Legislature further required a public body to document in writing its compliance with the posting requirements according to specific provisions in S.B. 70.

The public body must also provide, upon request and at no charge to the requestor, a copy of the agenda and any ordinances or regulations or other supporting materials to be discussed at the meeting. Special notice requirements apply in certain situations, such as a meeting to acquire property by eminent domain or a closed meeting to consider the character, alleged misconduct, professional competence, or the physical or mental health of a person.

Emergencies sometimes arise that necessitate either a meeting on less than three days' notice or the late addition of an agenda item to an already scheduled meeting. The statutes do not define "emergency," but the guidance in the OML Manual limits emergencies to situations where:

- The need to discuss or act on an item is truly unforeseen at the time the agenda was posted or the meeting was called; and
- The item is truly of such a nature as to require immediate action.

Although not required by law, the OML Manual recommends providing as much advance supplementary notice of emergency meetings or agenda additions as possible to the public and news media to comply with the spirit of the law.

MEETING RECORDS

For the members of the public who cannot attend a meeting, the OML requirements to maintain records of meetings provide an important substitute. Minutes must be prepared for all meetings of a public body and must include the: (1) date, time, and place of the meeting; (2) names of the members present and absent; and (3) substance of all matters proposed, discussed, or decided. Upon the request of a member, the minutes shall also include a record of the vote taken on a matter and any other information the member wishes to include. At the request of a member of the public, the minutes shall include the substance of remarks made by the member of the public or a copy of prepared written remarks if submitted for inclusion.

Since October 1, 2005, public bodies have been required to make an audio recording of a meeting or provide a transcript prepared by a certified court reporter. However, if a public body is prevented from doing so due to factors beyond its control, such as power outages or mechanical breakdowns, the failure will not be considered a violation of the OML. Recordings and transcripts must be preserved for at least one year and made available to the public.

ATTORNEY GENERAL OPINIONS

A member of the public who believes that the OML has been violated may file a complaint, subject to certain deadlines, with Nevada's Attorney General. The Attorney General will investigate the complaint and provide an opinion as to whether a violation occurred. If the Attorney General is of the opinion that a violation has occurred, he or she may file litigation to enforce the OML. In addition, a public body may ask the Attorney General for an advisory opinion relating to compliance with, or interpretation of, the OML.

However, Attorney General opinions are advisory, not binding, and only a court can determine whether or not a violation of the OML has occurred. The OML decisions are available online from the Attorney General's website at: http://ag.nv.gov/About/Governmental_Affairs/OML_Opinions/.

PENALTIES FOR VIOLATION

The OML recommends corrective action for violations of the law to mitigate the effect of a violation. For example, improper notice can be corrected by rescheduling the meeting. The law states that actions taken in violation of the OML are void. Suits alleging violations may be brought by private citizens or the Attorney General. Any member of a public body who knowingly violates the open

meeting statutes, or wrongfully excludes a person from a meeting, is subject to misdemeanor criminal sanctions (up to six months in jail and/or a fine of not more than \$1,000). A member of a public body who is convicted of a violation of the OML must vacate his or her office.

Assembly Bill 59 of the 2011 Legislative Session also made several changes and additions to provisions relating to OML violations. The measure added a civil penalty of not more than \$500 for any member of a public body who participates in an action in violation of the OML with knowledge of the violation. The action may be brought by the Attorney General in any court and must be commenced within one year of the action in violation of the law.

Assembly Bill 59 also clarified that the Attorney General shall investigate and prosecute any violation of the OML and is authorized to issue subpoenas when investigating OML complaints. A public body is required to include on its next agenda an acknowledgement of the Attorney General's findings and conclusions relating to a violation of the OML.

In 2013, A.B. 65 amended these provisions by stipulating that the Attorney General may decide not to prosecute a public body's violation of the OML if the body takes corrective action within 30 days of the alleged violation and the corrective action takes place in a public meeting for which the item has been clearly agendaized. The corrective action is deemed to be prospective.

WEBSITE AND CONTACT

Open Meeting Law
Office of the Attorney General
Telephone (Carson City): (775) 684-1100
Telephone (Reno): (775) 688-1818
Telephone (Las Vegas): (702) 486-3420
Website: <http://ag.nv.gov/>

RESEARCH STAFF CONTACTS

Jennifer Ruedy
Principal Research Analyst
E-mail: Jennifer.Ruedy@lcb.state.nv.us

Jered M. McDonald
Senior Research Analyst
E-mail: Jered.McDonald@lcb.state.nv.us

Research Division
Legislative Counsel Bureau
Telephone: (775) 684-6825
Fax: (775) 684-6400