from this bill as was discussed yesterday, I would hope you would also add county and state employees."

Donald Klasic, General Counsel, University of Nevada, testified he too had served on the advisory committee. Additionally, he said the Board of Regents had authorized him to inform the committee the Board supported all five bills with two exceptions, both in AB 364. He identified one objection as being on Page 3, lines 24-29 saying the committee had heard enough testimony, specifically Mr. Dyer's, stating why the records ought to be closed and presented the committee with the document which had been generated out of the deliberations of the advisory committee (Exhibit F). He then pointed out the language which the University proposed as amendments and also the original language the advisory committee had recommended. The second objection was Section 3 of AB 364, the reverse balancing test. Again, he referenced previous testimony, specifically that of Mr. Isaeff, and detailed how it would work. In further testimony, Mr. Klasic explained his understanding of the Bradshaw case, the correct rendering of the reverse balancing test, his desire to avoid litigation over what constituted public records, how criminal investigations worked, and mentioned a possible fiscal note.

Mrs. Augustine queried the date shown on the bill versus the date shown on the proposed amendment. Mr. Klasic explained the intent had not been to postpone the legislation to 1995, but to retain the 1994 date. The error had occurred in the drafting process.

Mr. Hettrick commented, "You just said files could be open on an investigation if it wasn't going to harm anyone." He then asked, "Is that the actual languages? The question which was raised yesterday, as I recall, is we could have an investigative file with all kinds of allegations, and etc., and that releasing that file could harm people. If in fact the judge's ruling in Bradshaw says you can't release information that would be harmful, is that going to protect those kinds of files."

Mr. Klasic responded, "It might not. I agree that is going to be a problem." He described how the Bradshaw case applied and said, "The courts don't get down to the nitty gritty about the raw data which may actually contain defamatory and false information, and there is a true problem there."

Exhibit G was submitted to the committee secretary on behalf of James Penrose. It contained the amendments as suggested in the testimony of Mike Dyer on April 13, 1993.

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Evan Wallach, General Counsel, Nevada Press Association, was given the opportunity to respond to the testimony of those in opposition to AB 364, AB 365 and AB 366.

Mrs. Lambert, in an effort to understand the balancing test, stated an example. Mr. Wallach replied the employee, as stated in the example, was exempt if the information was released in good faith. Mr. Wallach then gave his own examples of safety valves.

Mrs. Augustine wanted clarification on the statement "request for documents were always denied." Mr. Wallach clarified, "When it comes to me as counsel for the Press Association, and I get into it, my uniform experience has been when dealing with government officials applying the balancing test, they have always applied the balancing test against my clients. And that is true, every single time."

Ande Engleman, Nevada Press Association, added, "Mr. Wallach is not called in on an instance where the press has no problem obtaining documents. He is only called when a problem has evolved."

The hearings on AB 364, AB 365 and AB 366, were closed with no action taken.

ASSEMBLY BILL 367 - Defines "public record" to accommodate various forms in which records are maintained.

ASSEMBLY BILL 368 - Requires charges for copies of public records not to exceed cost.

Mr. Wallach explained the purpose of AB 367 and AB 368. He agreed with Mr. Isaeff's testimony of April 13, 1993, saying there definitely was a conflict with the definition of "governmental entity" in AB 367 which would have to be resolved. He said he preferred the broader of the two definitions. As for AB 368, he said it was the intent of the subcommittee to balance the cost of providing the service with the need to make the cost reasonable to the public, detailing the compromise which was reached.

Ande Engleman added she believed AB 368 set up reasonable costs for copies and hoped the copies would not run more than 25 cents per copy. She pointed out the Secretary of State's budget was largely supported by copying fees and, therefore, urged deleting

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APRIL 14,1993

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, FOR THE RECORD, MY NAME IS GUY ROCHA, THE STATE ARCHIVES AND RECORDS ADMINISTRATOR. I AM REPRESENTING THE STATE LIBRARY AND ARCHIVES AND SERVED AS A MEMBER OF THE EXECUTIVE ADVISORY COMMITTEE. I WAS ALSO CLOSELY ASSOCIATED WITH THE INTERIM LEGISLATIVE STUDY IN 1982 STUDYING PUBLIC BOOKS AND RECORDS, WHICH AS ANDE ENGLEMAN POINTED OUT YESTERDAY, DID NOT RESULT IN UPDATING OUR BADLY OUTDATED PUBLIC RECORDS LAW.

NEVADA IS AMONG THE LAST STATES IN THE NATION TO TRY AND COMPREHENSIVELY ADDRESS THIS COMPLEX AND CONTROVERSIAL PUBLIC POLICY ISSUE WITH ALL ITS MYRIAD FISCAL AND TECHNOLOGICAL RAMIFICATIONS. I HOPE THE EXTENSIVE TESTIMONY WE HEARD YESTERDAY, AND I AM SURE WE WILL HERE AGAIN TODAY, WILL NOT RESULT IN THE TYPE OF PUBLIC POLICY PARALYSIS WE ENCOUNTERED SOME TEN YEARS AGO. LACK OF ACTION THEN HAS ONLY EXACERBATED PUBLIC DISCLOSURE ISSUES WHICH ARE NOW HEIGHTENED BY THE PROLIFERATION OF THE MICROCOMPUTER, ELECTRONIC MAIL, AND OPTICAL IMAGING SYSTEMS. OUR FAST-PACED TECHNOLOGICAL ADVANCEMENTS IN RECORD CREATING AND KEEPING ARE OUTSTRIPPING OUR ABILITY TO LEGISLATE ACCESS TO, AND CONFIDENTIALITY FOR, THESE GOVERNMENTAL RECORDS.

AND WE HAVE CERTAINLY LEARNED THERE ARE INHERENT AND SIZEABLE COSTS TO OPEN GOVERNMENT AND PUBLIC ACCESS IN THE ONGOING DEMOCRATIZATION OF OUR POLITICAL SYSTEM. THE ALARMING IRONY IN THIS ISSUE WE CONFRONT TODAY IN BALANCING RIGHTS OF PRIVACY VERSUS PUBLIC DISCLOSURE IS THE ONGOING REALITY OF CENSORSHIP THROUGH BUDGET

1069

EXHIBIT D 35

EXHIBIT C

Notice of Entry of Order

Electronically Filed
6/23/2017 2:41 PM
Steven D. Grierson
CLERK OF THE COURT

NOTC
STEVEN B. WOLFSON
DISTRICT ATTORNEY
By: MARY-ANNE MILLER
County Counsel – Civil Division
State Bar No. 1419
500 Grand Central Parkway, Fifth Flr.
Las Vegas, Nevada 89155-2215
Phone: (702) 455-4761
Fax: (702) 382-5178
Email: Mary-Anne.Miller@ClarkCountyDA.com
Attorneys for Defendant/Respondent
Steven B. Wolfson, Clark County District Attorney

DISTRICT COURT

CLARK COUNTY, NEVADA

THE LAS VEGAS REVIEW-JOURNAL, Plaintiff/Petitioner, vs. STEVEN B. WOLFSON, CLARK COUNTY DISTRICT ATTORNEY, Defendant/Respondent.	Case No: A-14-711233-W Dept No: XVII

NOTICE OF ENTRY OF DECISION

TO: THE ABOVE NAMED PARTIES:

YOU WILL PLEASE TAKE NOTICE that a Decision was filed on the 14th day of April, 2017, a copy of which is attached hereto.

DATED this 23rd day of June, 2017.

STEVEN B. WOLFSON
DISTRICT ATTORNEY

By: _____
MARY-ANNE MILLER
County Counsel
State Bar No. 1419
500 South Grand Central Pkwy. 5th Flr.
Las Vegas, Nevada 89155-2215
Attorney for *Defendant/Respondent*
Steven B. Wolfson, Clark County District Attorney

///

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Office of the Clark County District Attorney and that on this 23rd day of June, 2017, I served a true and correct copy of the foregoing **Notice of Entry of Decision** (United States District Court Pacer System or the Eighth Judicial District Court Wiznet), by e-mailing the same to the following recipients. Service of the foregoing document by e-mail is in place of service via the United States Postal Service.

Margaret A. McLetchie, Esq.
Matthew J. Rashbrook, Esq.
MCLETCHIE SHELL LLC
616 South Eighth Street
Las Vegas, NV 89101
efile@nvlitigation.com
maggie@nvlitigation.com

An Employee of the Clark County District Attorney's Office – Civil Division

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ORDR

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW JOURNAL, Plaintiff/ Petitioner, v. STEVEN WOLFSON, CLARK COUNTY DISTRICT ATTORNEY Defendant/ Respondent.	Case No.: A-14-711233-W Department: XVII **DECISION**

Plaintiff Las Vegas Review Journal's Motion to Motion for Attorneys Fees came before this Court on April 5, 2017 Calendar. Following review of the papers and files herein and oral argument, the Court rules as follows:

The recovery of attorney fees as a cost of litigation is permissible by agreement, statute, or rule. See *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 956, 35 P.3d 964, 969 (2001). LVRJ submits that because they are a "prevailing party" NRS 239.011(2) allows for such fees and costs. NRS 239.011(2) states in relevant part "...[i]f the requester prevails, the requester is entitled to recover his or her costs and reasonable attorney's fees in the proceeding from the governmental entity whose officer has custody of the book or record." NRS 239.011(2). NRS 239.005 (4)(a) (b) defines "government entity" as "[a]n elected or appointed official of this State or of a political subdivision of this state; or an institution, board, commission, bureau, council, department, division, authority or other unit of government of this State or of a political subdivision."

Michael P. Villani
District Court Judge

Wolfson does not refute the validity of NRS 239.011(2), but rather asserts that he is immune from an award of fees and costs based on his good faith actions. Wolfson seeks protection pursuant to NRS 239.012 which states "Immunity for good faith disclosure or refusal to disclose information. A public officer or employee who acts in good faith in disclosing or refusing to disclose information and the employer of the public officer or employee are immune from liability for damages, either to the requester or to the person whom the information concerns." LVRJ argues that only NRS 239.011 applies and therefore, good or bad faith on behalf of Wolfson is irrelevant for an award of attorney fees and costs. LVRJ further relies on *LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608 (2015) and argues that because LVRJ prevailed on some issues sought during the pendency of litigation, they are entitled to attorney's fees. The Court notes that in *Blackjack Bonding*, the NRS 239.012 "good faith exception" was not timely raised and pursuant to NRAP 40(c) the moving parties Motion for Reconsideration was denied. Therefore, *Blackjack Bonding* is not persuasive to this Court on the issue of the good faith exception.

Therefore, the Court must decide whether NRS 239.012 applies and whether Wolfson is covered under said statute. The Court notes that the Complaint in question names "Steven Wolfson, Clark County District Attorney" only and not Clark County or the Clark County District Attorney's office. The COURT FINDS that Wolfson is an elected officer as defined in NRS 239.005 and covered under NRS 239.012. NRS 239.012 provides immunity for a "public officer" and "the employer of the public officer."

The Court must next decide whether the term "damages" as indicated in NRS 239.012 is meant to include attorneys' fees and costs. Both parties agree that "damages" is not defined within the NRS. Therefore, this Court must resolve this ambiguity by looking to the legislative intent for clarification. See *State v. Lucero*, 127 Nev. 92, 95, 249 P.2d 1226, 1228

(2011)(Finding the starting point for determining legislative intent is a statutes plain meaning, but when the statutory language lends itself to two or more reasonable interpretations, the statute is ambiguous, the Court looks to the legislative history to construe a statute in a manner consistent with reason and public policy). The Court therefore looks to the testimony and minutes of the Assembly Committee on Government Affairs in order to construe the Statute in a manner consistent with public policy. Assembly Bill 365 described as "Substitutes civil enforcement of access to public records for criminal penalty" was the Draft Bill to the now codified NRS 239.011 and NRS 239.012. In determining whether "fees" was intended to be included in the legislature's description of "costs", the Court is swayed by testimony of May 3, 1993. During said testimony, the language of what is now codified NRS 239.011 and NRS 239.012 are discussed at length. The Court notes that both statutes are discussed one after another and conversation of the "good faith" exception continually overlaps with discussion of the now NRS 239.011. The Committee Notes directly link immunity with fees. Ande Englemen of the Nevada Press Association stated to Assembly Committee on Government Affairs:

> Taxpayers were also paying the fees for the agency Mr. Bennett observed. The question was, should the taxpayers, in general, have to cover those costs when the suit might be rather frivolous. Ms. Engleman noted the bill did not grant court costs and attorneys' fees if a suit was over a record everyone had though to be confidential. **Court costs and attorneys' fees were granted only when it was a denial of what was clearly a public record [bad faith].** Therefore, she did not think there would be frivolous lawsuits.

Assembly Committee on Government Affairs Minutes: Hearing on AB 365 Before the Assembly Committee on Government Affairs, 1993 67th Sess. May 3, 1993 (statement of Ande Englemen, Nevada Press Association) (emphasis added); See also Nevada State Library, Archives and Public Records Nevada Public Records Act: A Manual for State Agencies 2014 (Interpreting and

instructing Nevada State Employees that NRS 239.012 relieves a good faith refusal to disclose information).

Therefore, the COURT FINDS that based on a review of the legislative minutes, fees and costs were intended to be linked with the "good faith" immunity exception of what is now NRS 239.012. Moreover, the Court notes that in cases of public records requests, "fees" would be the only likely "damages" available to a party who prevails on a wrongfully withheld disclosure of public record under NRS 239.011.

The Court must next determine whether Wolfson actually acted in "good faith" during the pendency of litigation. The term "good faith" is an intangible and abstract quality with no technical meaning or definition and encompasses, among other things, an honest belief, the absence of malice, and the absence of design to defraud. *Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 273, 849 P.2d 305, 309 (1993). The Court notes that the present case is one where both parties obtained success on various Motions. Furthermore, LVRJ has made no showing of malice or that Wolfson acted in bad faith. The record reflects that Wolfson produced over 1200 pages prior to the commencement of litigation, an immense amount of time was spent redacting documents in the inducement index, and at the end of litigation only 143 additional redacted pages were ordered to be turned over. The Court further notes that as his role as District Attorney, Wolfson is subject to competing interests when dealing with sensitive information such as the information sought in this case. Therefore, based on the history of the litigation, this Court does not find Wolfson acted in bad faith, but rather acted reasonably based on the competing safety and privacy interests at play. Further, the Court Finds that both parties to one extent or another prevailed on significant issues of public interest.

Since the Court finds NRS 239.012 applicable and that Wolfson acted in good faith, Plaintiff's motion for Attorney Fees is DENIED. Counsel for Defendant Wolfson is directed to submit a proposed order consistent with the foregoing within ten (10) days after counsel is notified of the ruling and distribute a filed copy to all parties involved pursuant to EDCR 7.21. Such Order should set forth a synopsis of the supporting reasons proffered to this Court in briefing and be approved as to form and content by both parties.

DATED this 12th day of April, 2017.

MICHAEL P. VILLANI
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed, a copy of this DECISION was electronically served and/or placed in the attorney's folder maintained by the Clerk of the Court and/or mailed via the U.S. postal service as follows:

Margaret A. McLetchie, Esq.
McLetchie Shell, LLC.
701 E. Bridger Ave., Suite 520
Las Vegas, NV 89101
Maggie@nvlitigation.com

Mary-Anne Miller, Esq.
Clark County District Attorney's Office
500 S. Grand Central Pkwy, Suite 5075
Las Vegas, NV 89106
Mary-Anne.Miller@ClarkCountyDA.com

CHERYL CARPENTER
Judicial Executive Assistant

EXHIBIT D

How Can I Obtain an Autopsy or Examination Report

How Can I Obtain an Autopsy or Examination Report?

Copies of the autopsy or examination report and the toxicology report, when completed, are available to specific persons as listed in the Nevada Revised Statutes (NRS) and Washoe County Code (WCC).

The following people are able to request a copy of these reports:

- Legal next-of-kin
- Parents
- Adult-aged children
- Attending physicians
- Law enforcement officers, as required to carry out official duties
- Any person who (by subpoena) seeks information for use in a judicial proceeding

Please complete the form below and send it, and a copy of a photo ID, to the Washoe County Regional Medical Examiner's Office. Requests must be submitted by mail or delivered in person. Examination reports generally take ten to twelve weeks to complete.

The fee to request a report is $25.00 ($50.00 if the case is over 10 years old).

Autopsy and Toxicology Report Request Form

ELKO COUNTY SHERIFF'S OFFICE CORONER

Duties of the Coroner....To Investigate Certain Types of Deaths:

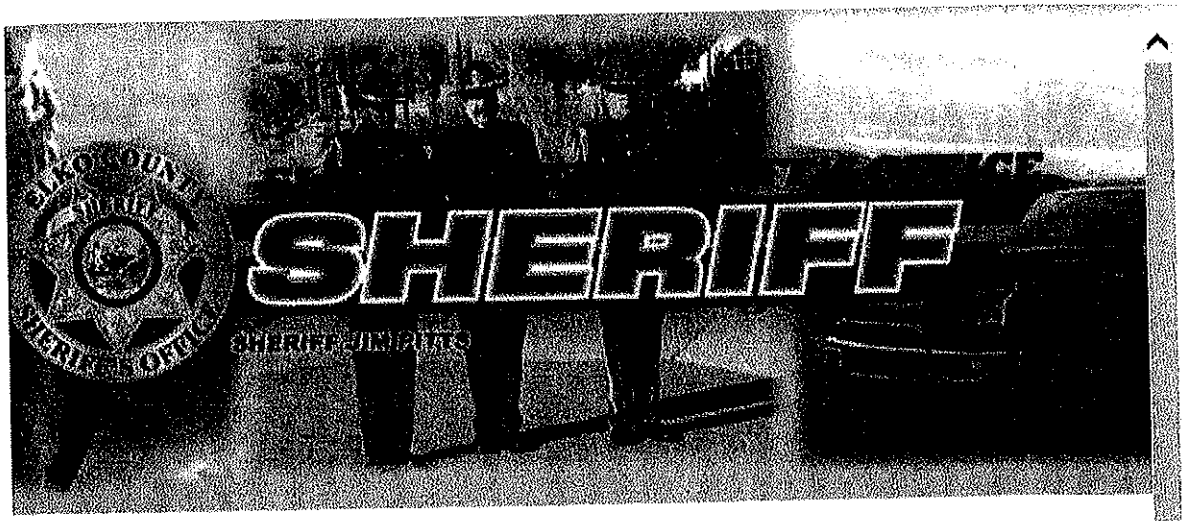
- Homicide
- Suicide
- Accidental
- Unforeseen Sudden Occurrence of Death
- Custodial Deaths (while in custody of law enforcement)
- Child Deaths (under age of 18)
- Unusual or Suspicious Manner of Death

The Elko County Sheriff's Office Coroner Division is currently supervised by Chief Deputy Coroner, Sergeant Nicholas Czegledi, F-ABMDI. For questions regarding Coroner Reports and Investigations, please call 775.777.2505 or email at nczegledi@elkocountynv.net

Legal Responsibilities

WHAT ARE THE LEGAL RESPONSIBILITIES OF THE CORONER

NRS 259.050 Duties of the Coroner to Investigate Cause of Death. When a coroner or the coro



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http://www.elkosheriff.com/coroner.html

Coroner

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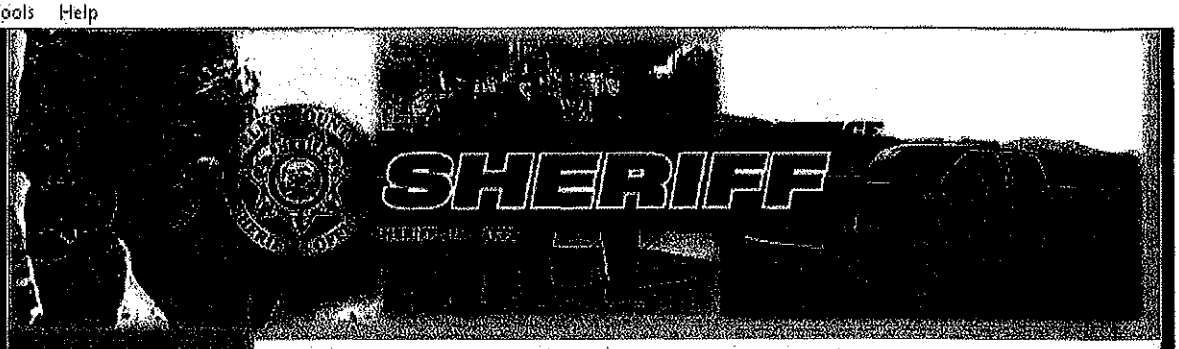

ELKO COUNTY SHERIFF'S OFFICE CORONER

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Legal Responsibilities

WHAT ARE THE LEGAL RESPONSIBILITIES OF THE CORONER

NRS 259.050 Duties of the Coroner to Investigate Cause of Death. When a coroner or the coroner's deputy is informed that a person has been killed, has committed suicide or has suddenly died under such circumstances as to afford reasonable ground to suspect that the death has been occasioned by unnatural means, the coroner shall make an appropriate investigation. In all cases where it is apparent or can be reasonably inferred that the death may have been caused by a criminal act, the coroner or the coroner's deputy shall notify the district attorney of the county where the inquiry is made, and the district attorney shall make an investigation with the assistance of the coroner.

MEDICAL INFORMATION

The Coroner may use many different methods when determining the cause and manner of death. This includes medical records from physicians, hospitals, and other health care facilities. Federal Code concerning protected health information specifically indicates that protected health care information can be disseminated to Coroners for the purpose of aiding an investigation into the cause and manner of death and to assist in the identification of a deceased. Although these records are placed in the case file, they are not subject to public view.

AUTOPSIES

The Elko County Coroner's Office utilizes the services of the Washoe County Medical Examiner's office < https://www.washoecounty.us/coroner/ > to perform autopsies. The Coroner may authorize an autopsy without consent of the next of kin. Autopsies ordered by the coroner are completed at the expense of the coroner's office. The forensic autopsy includes a detailed external examination, surgical examination, X-Rays, and collection of tissue and bodily fluids.

http://www.elkosheriff.com/coroner.html Coroner

View Favorites Tools Help

AUTOPSIES

The Elko County Coroner's Office utilizes the services of the Washoe County Medical Examiner's office < https://www.washoecounty.us/coroner/ > to perform autopsies. The Coroner may authorize an autopsy without consent of the next of kin. Autopsies ordered by the coroner are completed at the expense of the coroner's office. The forensic autopsy includes a detailed external examination, surgical examination, X-Rays, and collection of tissue and bodily fluids. Tissues are prepared and examined microscopically by our forensic pathologist. Bodily fluids are submitted to one or more laboratories locally and throughout the United States for analysis for the detection and quantitation of alcohol, prescription or illicit drugs, or poisons. Cultures may also be prepared for determining viral or bacterial diseases. The results are reviewed by the forensic pathologist to aid in determining the cause of death.

DEATH CERTIFICATES

Death certificates are prepared by the funeral home. Once the investigation is complete, the Coroner will record and certify the death certificate to reflect the cause and manner of death. This information will then be transmitted to the State of Nevada, Department of Vital Statistics. The Coroner does not issue death certificates to the general public. Death certificates are available from the funeral home or the State of Nevada, Department of Vital Statistics.

PERSONAL PROPERTY

The Elko County Coroner's Office may collect personal property that is determined to be of evidentiary value or for safe keeping. Real property, such as residential dwellings, buildings, or automobiles are sealed or secured until the legal next of kin is identified. In most cases, property determined not be of value to the investigation, will be turned over to the legal next of kin. Prescription medications or contraband will be disposed of, destroyed or turned over to law enforcement officials. In the event the legal next of kin cannot be located, the Coroner will work with the Elko County Public Administrator for disposition of the property.

COPIES OF REPORTS

Reports generated by the Elko County Coroner's Office are not subject to public view. These reports are available to the legal next of kin but only at the conclusion of the investigation (including district attorney's review) and upon written request, and appropriate fees being forwarded. The reports do not included protected health information and reports or documents obtained from other agencies.

IDENTIFICATION & VIEWING

Contrary to popular belief, visual identification by family or friends is not always necessary. Many methods are used to identify remains by the Coroner's Office. In most cases, photographic identification is all that is required. Occasionally, other methods, such as fingerprints, DNA comparison, tattoos, X-rays, forensic odontology, etc. maybe utilized for positive identification. We understand that family may want to view their loved one as soon as possible and we will work with funeral homes to insure this can be accomplished as quickly as reasonably possible.

ORGAN & TISSUE DONATION

The Elko County Coroner's Office supports the efforts by the various organ and tissue donation organizations. We will make every effort to accommodate the wishes of families to donate. The Coroner will evaluate the circumstances surrounding the death and determine if donation can proceed. The Coroner may consult with the Prosecuting Attorney of Elko County, if needed. Currently the Nevada Donor Network is the organ procurement agency that facilities donations that occur outside of the hospital. < http://www.nvdonor.org/index.html

RPLY
MARGARET A MCLETCHIE, Nevada Bar No. 10931
ALINA M. SHELL, Nevada Bar No. 11711
MCLETCHIE SHELL LLC
701 East Bridger Ave., Suite 520
Las Vegas, Nevada 89101
Telephone: (702) 728-5300; Fax: (702) 425-8220
Email: maggie@nvlitigation.com
Counsel for Petitioner

DISTRICT COURT

CLARK COUNTY NEVADA

LAS VEGAS REVIEW-JOURNAL, Petitioner, vs. CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Respondent.	Case No.: A-17-758501-W Dept. No.: XXIV **REPLY TO RESPONDENT'S OPPOSITION TO MOTION FOR ATTORNEY'S FEES AND COSTS**

Petitioner the Las Vegas Review-Journal (the "LVRJ"), by and through its undersigned counsel, hereby submits this Reply to Respondent the Clark County Office of the Coroner/Medical Examiner's (the "Coroner's Office") Opposition to its Motion for Fees and Costs. This Reply is supported by the attached memorandum of points and authorities, any attached exhibits, the attached Declaration of Margaret A. McLetchie, the papers and pleadings already on file herein, and any oral argument the Court may permit at the hearing of this Motion.

Respectfully submitted this 4th day of January, 2018.

/s/ Margaret A. McLetchie
Margaret A. McLetchie, Nevada Bar No. 10931
Alina M. Shell, Nevada Bar No. 11711
MCLETCHIE SHELL LLC
701 East Bridger Ave., Suite 520
Las Vegas, Nevada 89101
Counsel for Petitioner

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As the prevailing party in this public records petition, the LVRJ is entitled to reasonable attorney's fees and costs. Contrary to the arguments in the Coroner's Office Opposition (*see generally* Opp., pp. 5-12), a prevailing requester's entitlement to attorney's fees and costs is not predicated upon a finding that a governmental entity acted in bad faith in refusing to disclose public records. Instead, the entire scheme of the NPRA, the plain language of Nev. Rev. Stat. § 239.011(2), and the Nevada legislature's intent in adopting the NPRA all dictate that a requester who is forced to bring a court action to obtain public records and prevails is entitled to recoup his or her reasonable costs and fees.

Thus, the only question is whether the fees and costs are reasonable. This Court should apply the *Brunzell* factors and fully grant the fees and costs requested. Contrary to the Coroner's Office's arguments, the requested rates for the LVRJ's counsel and paraprofessional staff are reasonable, fully documented, and are under market for the experience brought to bear in this action.[1] The LVRJ supported its rates with declarations. Further, the nature of the work and the qualities of the advocates merit a full award. To argue otherwise, the Coroner's Office does not present credible support for the rates it contends should be applied. Most importantly, the LVRJ was fully successful in its petition. While the Coroner's Office is dismissive of the nature of the case at hand, the LVRJ vindicated important rights enshrined in the NPRA. Further, providing full compensation is consistent with the NPRA's expressed legislative intent (Nev. Rev. Stat. § 239.001) as ensuring that a requester is compensated when court action is requires furthers access to records—and disincentives noncompliance. Accordingly, the LVRJ is entitled to a full award for its attorney's fees and costs.

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[1] The Coroner's Office does not contest the work actually performed.

II. LEGAL ARGUMENT

A. The LVRJ's Entitlement to Attorneys' Fees is Not Premised on Disproving "Good Faith."

Pursuant to Nev. Rev. Stat. § 239.011(2), if a "requester prevails [in applying to a district court for access to public records], the requester is entitled to recover his or her costs and reasonable attorney's fees in the proceeding from the governmental entity whose officer has custody of the book or record.. Improperly bootstrapping this section of the NPRA to another section which provides civil immunity to officers who act in good faith in withholding public records, the Coroner's Office argues at length that a requester is only entitled to fees and costs under § 239.011(2) if the requester can demonstrate that the governmental entity acted in bad faith. (*See generally* Opp., pp. 5-12.) This interpretation of § 239.011(2) fails for four reasons. First, this interpretation is contrary to the purpose of the NPRA. Second, the Coroner's Office ignores the Nevada Supreme Court's longstanding rule that a court need not look to legislative history when the meaning of a statute is plain on its face. Third, it is premised on a misapprehension of the legislative history of § 239.011. Fourth, the Coroner's Office's interpretation is contrary to the interpretation of the statute by state governmental entities.

1. Requiring a Requester to Demonstrate "Bad Faith" In Order to Recoup Reasonable Fees and Costs is Contrary to the Purpose of the NPRA.

Although public officials are immune from *damages* pursuant to Nev. Rev. Stat. § 239.012 ("A public officer or employee who acts in good faith in disclosing or refusing to disclose information and the employer of the public officer or employee are immune from liability for damages, either to the requester or to the person whom the information concerns"), that does not eviscerate the provisions of the NPRA which, separately and plainly, provide for attorney's fees. Nev. Rev. Stat. § 239.011(2) provides in part that "[i]f the requester prevails, the requester **is entitled to** recover his or her costs and reasonable attorney's fees in the proceeding from the governmental entity whose officer has custody of the book or record." (emphasis added) Thus, "good faith" is irrelevant to the analysis regarding entitlement to fees. And, this Court does not, contrary to the Coroner's Office's

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
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arguments to the contrary, have discretion to deny fees (Opp., p. 12): the statute plainly mandates that a prevailing requested be awarded fees and costs.[2]

To read a "good faith" exception from a separate section regarding damages into the provision is incorrect and inconsistent with Nev. Rev. Stat. § 239.001 ("Legislative findings and declaration") which, first and foremost, reinforces the important nature of the NPRA. Nev. Rev. Stat. § 239.001(1) ("[t]he purpose of this chapter is to foster democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law"). Nev. Rev. Stat. § 239.001(2) then mandates that "[t]he provisions of this chapter must be construed liberally to carry out this important purpose." The legislature also mandates that "[a]ny exemption, exception or balancing of interests which limits or restricts access to public books and records by members of the public must be construed narrowly." Nev. Rev. Stat. § 239.001(3). Bootstrapping a limitation on damages from one statute in the chapter into another statute addressing attorney's fees would violate these legislative mandates (as well as basic rules of statutory interpretation).

Moreover, the Coroner's Office elides the fact that the provision regarding good faith immunity from damages specifically only refers to immunity for "[a] public officer or employee," (i.e., an individual) whereas the provision on fees makes "governmental entities" liable for fees. Nev. Rev. Stat. § 239.005 (5) defines "governmental entity" as follows:

> (a) An elected or appointed officer of this State or of a political subdivision of this State;
>
> (b) An institution, board, commission, bureau, council, department, division, authority or other unit of government of this State, including, without limitation, an agency of the Executive Department, or of a political subdivision of this State;
>
> (c) A university foundation, as defined in NRS 396.405; or
>
> (d) An educational foundation, as defined in NRS 388.750, to the extent that the foundation is dedicated to the assistance of public schools.

[2] Even if fees were discretionary, the Court should of course grant them to the LVRJ in this case.

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE, SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
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Thus, while non-elected or non-appointed officers and employees have good faith immunity from *damages*, governmental entities such as the Coroner's Office who fall within the definition of Nev. Rev. Stat. § 239.005(5) do not. In short, even if the immunity from liability provision applied, at best it only protects "[a] public employee or officer" (Nev. Rev. Stat. § 239.0112) and the Coroner's Office is neither.

2. The Legislative History Is Irrelevant.

Even though the statute is clear on its face, and even though the legislative intent favoring access to public records is spelled out in the NPRA itself, the Coroner's Office asks this Court to look at the legislative history to interpret the statute. This runs afoul of basic canons of statutory interpretation which mandate that "when a statute is clear on its face, a court cannot go beyond the statute in determining legislative intent." *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) (citation and internal quotation marks omitted); *see also Robert E. v. Justice Court*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983) (same); *see also State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004) ("We must attribute the plain meaning to a statute that is not ambiguous.")

Here, the language of Nev. Rev. Stat. § 239.011(2) is plain: if a requester prevails in an action to obtain public records, "the requester is entitled to recover his or her reasonable costs and attorney's fees in the proceeding from the governmental entity whose officer has custody of the book or record." The statute does not require a requester to demonstrate a governmental entity acted in bad faith; it only requires that the requester prevail. Despite all this, the Coroner's Office is asking this Court to rely on outside "legislative history" to negate an important provision of the NPRA. It should not do so.

3. The Legislative History Does Not Support The Coroner's Office's Position.

Even if it were properly before the Court, the legislative history of Nev. Rev. Stat. § 239.011 supports awarding fees to a prevailing requester—and doing so expeditiously to further access.

First, as the Society for Professional Journalists explained, the bill was designed "so a signal is sent to the public employees who hold public records that it is their job to

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ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
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ensure the public has easy access to those documents which indeed are open to review by taxpayers." (Legislative History of 1993 Assembly Bill 365, attached as **Exh. 6**, p. 15[3].) Rendering the fees and costs provision meaningless would be inconsistent with this purpose, which, as detailed above, is now enshrined in the NPRA.

Second, the history regarding the bill makes clear that there is no bad faith requirement in the fees and costs provision. Section 2 addressed fees and costs and Section 3 separately addressed good faith liability form damages. With regard to Section 2, on May 7, 1993, there was discussion making clear that, as initially written, Section 2 mandated that, if the requester prevails, "he was entitled to recover his costs and fees and attorney's fees in the proceeding, from the agency whose officer had custody of the record. (*Id.*, pp. 43-44.) That is all it said as originally written. During the subcommittee hearing, there was some discussion about whether an agency should be entitled to fees if it prevailed—an idea which was rejected because it would restrict people from going to court. (*Id.*, p. 44.) The Legislative did, however, write one (and only one) limitation into the fees and costs provision: it added the word "reasonable" to qualify the fees and costs to which a requester is entitled. (*Id.*, p. 44.) Then, a separate discussion ensued regarding Section 3 (addressing good faith immunity) (*id.*, p. 44.) *After passing a motion finalizing the fees and costs language*, the committee went on to discuss Section 3. There was explanation that Section 3 "was for a civil penalty to be imposed on a public employee who acted in bad faith." (*Id.*, p. 45.)

Thus, the bill was designed to revamp and strengthen access to public records. It set forth a mechanism by which a requester could go to court—and get fees and costs upon prevailing. It also separately replaced a prior provision that imposed criminal liability with one limiting civil liability to those cases in which the governmental officer or employee did not act in good faith. Nothing in the record shows that Section 3 was intended as a limitation on Section 2. For example, while there was testimony to the committee that costs and fees

[3] The Coroner's Office included a copy of the legislative history of 1993 A.B. 365 as Exh. B to its Opposition which omits pages 36 through 65; the LVRJ's Exh. 6 is the complete legislative history of A.B. 365.

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ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T)/(702)425-8220 (F)
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would be "granted only when it was a denial of what was clearly a public record," that sentence was sandwiched with a discussion of frivolous lawsuits; Ms. Engleman was not urging a limitation on the fees and costs provision—she was assuring legislators that public agencies would not be on the hook for fees and costs if a lawsuit was frivolous. In any case, such "legislative history" certainly cannot be used to dodge the plain text of the NPRA.

4. The Nevada Attorney General Does Not Read a "Bad Faith" Requirement Into Nev. Rev. § 239.011(2).

The Coroner relies on attorney general testimony to support its position that bad faith is a perquisite to a fee award in a NPRA case (Opp., p. 11:7-11). While arguably not even relevant, in fact the Coroner's Office's interpretation of Nev. Rev. Stat. § 239.011(2) is at odds with the State of Nevada's interpretation of the statute. For example, Sarah Bradley, a Senior Deputy Attorney General, authored an article for the April 2012 edition of the Nevada Lawyer, an official publication of the State Bar of Nevada regarding the NPRA. In that article, Deputy Attorney General Bradley noted that

> [i]f a state agency decides not to disclose requested records and the issue is litigated and the agency loses, the requestor is entitled to recover costs and reasonable attorney's fees in pursuing the court action (NRS 239.011). Thus, it is important that the agency and its decision maker recognize that an incorrect decision to withhold requested records may be costly.

Sara Bradley, *Public Records Under the Nevada Public Records Act*, Nevada Lawyer, April 2012, at 17-18.[4] Ms. Bradley has also presented training to various municipal entities and provided the same information regarding a requester's entitlement to attorney's fees and costs in a public records action. (*See* **Exh.** 7 (March 26, 2015 Public Records presentation prepared for Carson City) at p. 32.) Although these publications do not carry the force of law, they are strong indications that the Nevada Attorney General's office—the state agency tasked with interpreting Nevada's laws—does not read a "bad faith" requirement into Nev. Rev. Stat. § 239.011(2).

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[4] Available online at https://www.nvbar.org/wp-content/uploads/NevLawyer_April_2012_Public_Records_V2.pdf (last accessed December 26, 2017).

B. The Coroner's Office Did Not Act in Good Faith in Refusing to Disclose the Requested Records

Assuming *arguendo* that Nev. Rev. Stat. § 239.011(2) requires a prevailing requester to demonstrate a governmental entity acted in bad faith in refusing to disclose public records, the record of this matter demonstrates the Coroner's Office acted in bad faith. Under the NPRA, a governmental entity which seeks to withhold public records must, within five business days of receiving a request, provide the requester written notice of that fact with citation to the "**specific statute or other legal authority** that makes the public book or records, or a part thereof, confidential." Nev. Rev. Stat. § 239.0107(1)(d) (emphasis added). Moreover, the governmental entity bears the burden of proving by a preponderance of evidence that the record(s) it seeks to withhold are confidential. Nev. Rev. Stat. § 239.0113.

In prior papers filed in this matter, the Coroner's Office asserted that under the leadership of its current Coroner, it has "received dozens of requests for autopsy reports from the media, including the RJ." (Response to Memorandum in Support of Petition, pp. 24:28-25-1.) Given this experience with responding to public records requests, the Coroner's Office is presumably aware of its obligations under the NPRA. Yet, in spite of that apparent familiarity with its obligations, the Coroner's Office failed to comply with § 239.0107(1)(d)'s requirement to timely provide specific legal authority to justify its refusal to disclose the requested autopsy records, instead relying on a non-binding Attorney General Opinion.

The Coroner's Office asserts that its reliance on AGO 82-12 demonstrates that it acted in good faith. (Opp, pp. 15:4-16:7.) However, given the Coroner's Office's professed experience with responding to records requests, it should have known it had an obligation to provide legal authority to justify its nondisclosure of public records, and that Attorney General Opinions are not legal authority. *See Univ. & Cmty. Coll. Sys. Of Nevada v. DR Partners*, 117 Nev. 195,203, 18 P.3d 1042, 1048 (2001) (citing *Goldman v. Bryan*, 106 Nev. 30, 42, 787 P.2d 372, 380 (1990)). Moreover, AGO 82-12 predated changes to the NPRA. Thus, the Coroner's Office's reliance on AGO 82-12 does not support its assertion that it acted in good faith.

The Coroner's Office also argues that its refusal to disclose the requested records was in good faith because its "policy of limiting dissemination of autopsy reports to the next of kin is consistent with the practice of Washoe County and Elko County." (Opp., p. 14:13-14.) That argument, however, is misplaced, as the individual practices of local municipalities cannot trump the Nevada legislature's intent in adopting the NPRA. *See, e.g., Lamb v. Mirin*, 90 Nev. 329, 332, 526 P.2d 80, 82 (1974) ("Whenever a legislature sees fit to adopt a general scheme for the regulation of particular subject, local control over the same subject, through legislation, ceases.") *accord Crowley v. Duffrin*, 109 Nev. 597, 605, 855 P.2d 536, 541 (1993). Thus, once the legislature has adopted a scheme to regulate a particular subject—in this case, a general scheme for accessing public records—"[i]n no event may a county enforce regulations which are in conflict with the clear mandate of the legislature." *Lamb*, 90 Nev. 329, 333, 526 P.2d 80, 82 (citing *Mabank Corporation v. Board of Zoning Appeals*, 143 Conn. 132, 120 A.2d 149 (1956)).

The NPRA is a clear expression of the Nevada legislature's intent to develop a comprehensive statutory scheme to facilitate access to public records, and provides that absent statutory or legal authority to the contrary, governmental records are presumptively public records. The Nevada legislature also provided clear and specific guidance regarding the timing and manner for responding to public records request. Thus, that other municipalities take the same position is not relevant to whether the Coroner's Office acted in bad faith when it failed to meet its obligations under the NPRA.

C. The Hourly Rates for Attorney and Paralegal Work Are Reasonable.

This Case Was Not Simple.

The Coroner's Office also takes issue with the reasonable hourly rate counsel for the Review-Journal has requested for the work performed by attorneys, a paralegal, and support staff. The Coroner's Office first asserts that this was "not a time consuming or complex case," and that the "legal principles and arguments presented in this case are ones that these attorneys have analyzed, briefed, and argued many times." (Opp., p. 16:22-26.) While undersigned counsel has litigated NPRA matters, this case—as the Coroner's Office

admits in its Opposition—"involves an unsettled and contentious area of public records law with serious legal questions of public importance." (Opp., p. 16:4-5.) Because this is an unsettled area of law, counsel for the LVRJ was required to do extensive research regarding other states' laws, state and federal court rulings regarding access to autopsy reports, and research regarding the applicability of federal statutes such as HIPAA. Counsel for the LVRJ also performed extensive research regarding Nev. Rev. Stat. § 432B.407, one of the statutes untimely cited by the Coroner's Office as a basis for its nondisclosure. And in addition to traditional legal research, counsel for the LVRJ was also required to review the minutes from several 2017 Nevada Legislative hearing to determine the applicability of Assembly Bill 57.

The Rates Sought Are Reasonable.

With regards to the Coroner's Office's argument regarding the appropriate hourly rate for the attorneys and paraprofessional support staff in this matter, the cases cited by Coroner's Office as establishing the "reasonable" hourly rates are inapposite to the instant case. For example, *Webb v. Ada Cty*, 285 F.3d 829 (9th Cir. 2002)[5] is entirely inapposite, as the attorney's fees in that case—a § 1983 civil rights class action—were limited by the Prison Litigation Reform Act. *See id.* at n. 6 ("In law suits brought by prisoners, . . . the method of calculating the hourly rate for attorney's fees is dictated by the PLRA. *See* 42 U.S.C. § 1997e(d)(3)"). The remainder of the cases cited by the Coroner's Office involved disputes in comparatively straightforward civil matters. For example, *Archway Ins. Servs., LLC v. Harris*, 2014 WL 384530 (D. Nev. 2014), (cited at Opp., p. 17:10-12), involved a dispute over the reasonable hourly rate in a case involving fraud and breach of contract claims that were dismissed by the district court because of plaintiffs' motion for voluntary dismissal. Another case cited by the Coroner's Office, *Conboy v. Wynn Las Vegas, LLC*, 2014 WL 4079483 (D. Nev. 2014), involved a determination of the reasonable hourly rate in a federal torts action. By contrast here, the LVRJ filed a complex petition asking the Court to mandate the Coroner's Office comply with the NPRA. This litigation was complex, and required

[5] Opp, p. 17:7.

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
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significant counsel to expend significant time and resources in successfully litigating the case.

Ms. McLetchie, the primary attorney in this matter, has many years' experience litigating complex civil rights and public records cases—both as an attorney with the ACLU, and while an attorney in private practice. Her hourly rate reflects that breadth of experience. Ms. Shell's hourly rate reflects her years of experience litigating complex federal criminal defense issues while working with the Federal Public Defender for the District of Nevada, and her work on complex civil rights and public records cases after transitioning into private practice in 2015. As reflected in the declaration of attorney Kathleen J. England, an attorney with 37 years of experience practicing in Nevada, the billing rates of McLetchie Shell are reasonable, and "below the market rates [Ms. McLetchie and Ms. Shell] could otherwise command in Southern Nevada." (Exh. 5 (Declaration of Kathleen J. England), ¶ 14.)

In fact, the requested rates for Ms. McLetchie and Ms. Shell are reasonable when compared to the rates of another firm that was hired to litigate against McLetchie Shell in another recent NPRA matter. On March 20, 2017, the LVRJ submitted a public records request to the City of Henderson "seeking all public records related to the retention and payment of the law firm Bailey Kennedy pertaining to legal services" it provided in *Las Vegas Review-Journal v. City of Henderson*, Eighth Judicial District Court Case No. A-16-747289-W, another public records matter. (**Exh. 8** (March 20, 2017 PRA request letter); *see also* Declaration of Margaret A. McLetchie ("McLetchie Decl.") at ¶ 5.) Henderson provided documents responsive to that request on April 4, 2017 reflecting payments made to Bailey Kennedy for legal services provided between November 30, 2016 and February 28, 2017. (**Exh. 9** (April 4, 2017 PRA response); McLetchie Decl. at ¶ 6.) Bailey Kennedy's top billers—Sarah E. Harmon and Dennis L. Kennedy—billed at a rate of $495.00 per hour, while its lowest biller—Kelly B. Stout, a 2010 law graduate—billed at a rate of $300.00 per hour. (Id. at ¶ 7) Moreover, the undersigned believes that these rates are reduced rates.

The Coroner's Office argument that the rate for paraprofessional Pharan Burchfield should be reduced is also misplaced. As with the cases it cited in support of its argument that

MCLETCHIE SHELL
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
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Ms. McLetchie and Ms. Shell's rates are unreasonable, the cases it cites in support of reducing Ms. Burchfield's hourly rate from $150.00 to $125.00 are also inapposite. For example, *Boliba v. Camping World, Inc.*, 2015 WL 5089808 (D. Nev. August 27, 2015)[6], dealt with a straightforward motion to strike a late disclosed expert report. *Id.* at *1.

III. CONCLUSION

For these reasons, and for the reasons set forth in the LVRJ's Motion for Attorney's Fees and Costs, the LVRJ respectfully requests that this Court award the LVRJ all its attorneys' fees and costs, pursuant to Nev. Rev. Stat. § 239.011(2), in the total amount of $32,377.52. The LVRJ also hereby reserves the right to supplement its request for fees with additional fees and costs incurred by counsel in defending its motion for fees and costs, as well as any fees it may incur should it prevail in the appeal filed by the Coroner's Office.

Respectfully submitted this 4th day of January, 2018.

/s/ Margaret A. McLetchie
Margaret A. McLetchie, Nevada Bar No. 10931
Alina M. Shell, Nevada Bar No. 11711
MCLETCHIE SHELL LLC
701 East Bridger Ave., Suite 520
Las Vegas, Nevada 89101

Counsel for Petitioner

[6] Opp, p. 18:17-18.

MCLETCHIE SHELL LLC
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

CERTIFICATE OF SERVICE

Pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, I hereby certify that on this 4th day of January, 2018, I did cause a true copy of the foregoing REPLY TO RESPONDENT'S OPPOSITION TO MOTION FOR ATTORNEY'S FEES AND COSTS in *Las Vegas Review-Journal v. Clark County Office of the Coroner/Medical Examiner*, Clark County District Court Case No. A-17-758501-W, to be served electronically using the Odyssey File & Serve electronic filing service system, to all parties with an email address on record.

Pursuant to NRCP 5(b)(2)(B) I hereby further certify that on the 4th day of January, 2018, I mailed a true and correct copy of the foregoing REPLY TO RESPONDENT'S OPPOSITION TO MOTION FOR ATTORNEY'S FEES AND COSTS by depositing the same in the United States mail, first-class postage pre-paid, to the following:

Mary-Anne Miller and Laura Rehfeldt
Clark County District Attorney's Office
500 S. Grand Central Pkwy., Ste. 5075
Las Vegas, NV 89106
Counsel for Respondent, Clark County Office of the Coroner/Medical Examiner

/s/ Pharan Burchfield
An Employee of MCLETCHIE SHELL LLC

INDEX OF EXHIBITS

Exhibit	Description	Bates
6	Legislative History of 1993 Assembly Bill 365	LVRJ001-LVRJ066
7	March 26, 2015 Public Records presentation prepared for Carson City	LVRJ067-LVRJ108
8	March 20, 2017 PRA request letter	LVRJ109-LVRJ110
9	April 4, 2017 PRA response	LVRJ111-LVRJ120

DECLARATION OF MARGARET A. MCLETCHIE

I, MARGARET A. MCLETCHIE, declare, pursuant to Nev. Rev. Stat. § 53.330, as follows:

1. I have personal knowledge of the facts set forth below, and, if called as a witness, could testify to them.

2. I am an attorney duly licensed to practice law in Nevada.

3. I am a partner at the law firm of McLetchie Shell, LLC, and I am lead counsel for the Las Vegas Review-Journal in *Las Vegas Review-Journal v. Clark County Office of Coroner/ Medical Examiner,* Clark County District Court Case No. A-17-758501-W.

4. I am making this declaration to provide information justifying the fee and costs request in this case, to authenticate documents attached as exhibits in support of Reply to Respondent's Opposition to Motion for Attorney's Fees, and to verify factual representations contained in the Reply.

5. On March 20, 2017, my office submitted a public records request to the City of Henderson "seeking all public records related to the retention and payment of the law firm Bailey Kennedy pertaining to legal services" it provided in *Las Vegas Review-Journal v. City of Henderson*, Eighth Judicial District Court Case No. A-16-747289-W, another public records matter. Attached as Exhibit 8 is a true and correct copy of that request, maintained by my office as a regular course of litigation.

6. The City of Henderson provided documents responsive to that request on April 4, 2017 reflecting payments made to Bailey Kennedy for legal services provided between November 30, 2016 and February 28, 2017. Attached as Exhibit 9 is a true and correct copy of the response sent to my office from City of Henderson.

7. Bailey Kennedy's top billers—Sarah E. Harmon and Dennis L. Kennedy—billed at a rate of $495.00 per hour, while its lowest biller—Kelly B. Stout, a 2010 law graduate—billed at a rate of $300.00 per hour. (*See* Exhibit 9.)

MCLETCHIE SHELL
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., Suite 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
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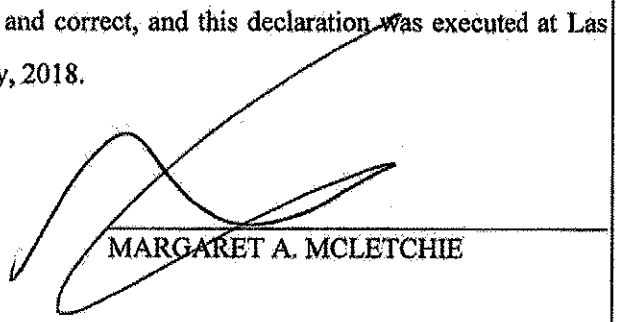
8. I certify and declare under the penalty of perjury under the law of the State of Nevada that the foregoing is true and correct, and this declaration was executed at Las Vegas, Nevada, the 4th day of January, 2018.



MARGARET A. MCLETCHIE

MCLETCHIE LAW
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

EXHIBIT 6

1993

AB 365 By Commerce PUBLIC RECORDS

Substitutes civil enforcement of access to public records for criminal penalty. (BDR 19-393)

Fiscal Note: Effect on Local Government: No. Effect on the State or on Industrial Insurance: No.

03/16	30	Read first time. Referred to Committee on Government Affairs. To printer.
03/17	31	From printer. To committee.
03/17	31	Dates discussed in committee: 4/13, 4/14, 4/20, 4/23, 5/3, 5/11, 5/25 (A&DP)
06/01	84	From committee: Amend, and do pass as amended.
06/01	84	(Amendment number 510.)
06/02	85	Read second time. Amended. To printer.
06/03	86	From printer. To engrossment.
06/03	86	Engrossed. First reprint.
06/04	87	Read third time. Passed, as amended. Title approved. (41 Yeas, 0 Nays, 1 Absent, 0 Excused, 0 Not Voting.) To Senate.
06/05	87	In Senate.
06/05	87	Read first time. Referred to Committee on Govt Affairs. To committee.
06/05	87	Dates discussed in Committee: 6/18, 6/25 (DP)
06/26	104	From committee: Do pass.
06/26	104	Declared an emergency measure under the Constitution and placed on General File for next legislative day.
06/26	104	Placed on General File.
06/26	104	Read third time. Passed. Title approved. (21 Yeas, 0 Nays, 0 Absent, 0 Excused, 0 Not Voting.) To Assembly.
06/27	106	In Assembly.
06/27	106	To enrollment.
06/29	108	Enrolled and delivered to Governor.
07/02	111	Approved by the Governor.
07/06	0	Chapter 393. Section 5 of this act effective 12:01 a.m. October 1, 1993. Remainder of this act effective October 1, 1993.

(* = instrument from prior session)

LVRJ001

NEVADA LEGISLATURE

SIXTY-SEVENTH SESSION

1993

SUMMARY OF LEGISLATION

PREPARED BY

RESEARCH DIVISION

LEGISLATIVE COUNSEL BUREAU

A.B. 365 (Chapter 393)

Assembly Bill 365 removes the criminal penalty for a state officer who refuses to allow access to a public record. Instead of the criminal penalty, the measure substitutes a procedure for civil enforcement of the laws governing access to public records. The bill also grants immunity from liability for damages to public officers, employees and their employers who act in good faith in disclosing or refusing to disclose information.

Referred to Assembly Committee on Government Affairs
ASSEMBLY VOTE: 41-0-1
Referred to Senate Committee on Government Affairs
SENATE VOTE: 21-0-0
Effective October 1, 1993

ASSEMBLY BILL NO. 365—COMMITTEE ON COMMERCE

MARCH 16, 1993

Referred to Committee on Government Affairs

SUMMARY—Substitutes civil enforcement of access to public records for criminal penalty. (BDR 19-393)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION—Matter in italics is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to public information; substituting civil enforcement of access to public books and records for a criminal penalty for denial of access; conferring immunity upon public officers and employees for certain actions in good faith; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 239 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this act.

Sec. 2. *If a request for inspection or copying of a public book or record open to inspection and copying is denied, the requester may apply to the district court in the county in which the book or record is located for an order permitting him to inspect or copy it. The court shall give this matter priority over other civil matters to which priority is not given by other statutes. If the requester prevails, he is entitled to recover his costs and attorney's fees in the proceeding from the agency whose officer has custody of the book or record.*

Sec. 3. *A public officer or employee who acts in good faith in disclosing or refusing to disclose information is immune from liability for damages, either to the requester or to the person whom the information concerns.*

Sec. 4. NRS 239.010 is hereby amended to read as follows:

239.010 [1.] All public books and public records of state, county, city, district, governmental subdivision and quasi-municipal corporation officers and offices of this state (and all departments thereof), the contents of which are not otherwise declared by law to be confidential, [shall] *must* be open at all times during office hours to inspection by any person, and the [same] *books and records* may be fully copied or an abstract or memorandum prepared therefrom, and any copies, abstracts or memoranda taken therefrom may be utilized to supply the general public with copies, abstracts or memoranda of the records or in any other way in which the [same] *books and records* may be used to the advantage of the owner thereof or of the general public.

[2. Any officer having the custody of any of the public books and public records described in subsection 1 who refuses any person the right to inspect such books and records as provided in subsection 1 is guilty of a misdemeanor.]

Sec. 5. NRS 122.040 is hereby amended to read as follows:

122.040 1. Before persons may be joined in marriage, a license must be obtained for that purpose from the county clerk of any county in the state, at the county seat of that county.

2. Before issuing a marriage license, the county clerk may require evidence that the applicant for the license is of age. The county clerk shall accept a statement under oath by the applicant and the applicant's parent, if available, that the applicant is of age.

3. The county clerk issuing the license shall require the applicant to answer under oath each of the questions contained in the form of license, and, if the applicant cannot answer positively any questions with reference to the other person named in the license, the clerk shall require both persons named in the license to appear before him and to answer, under oath, the questions contained in the form of license. If any of the information required is unknown to the person responding to the question, he must state that the answer is unknown.

4. If any of the persons intending to marry is under age and has not been previously married, and if the authorization of a district court is not required, the clerk shall issue the license if the consent of the parent or guardian is:

(a) Personally given before the clerk;

(b) Certified under the hand of the parent or guardian, attested by two witnesses, one of whom must appear before the clerk and make oath that he saw the parent or guardian subscribe his name to the annexed certificate, or heard him or her acknowledge it; or

(c) In writing, subscribed to and acknowledged before a person authorized by law to administer oaths. A facsimile of the acknowledged writing must be accepted if the original is not available.

5. If the authorization of a district court is required, the county clerk shall issue the license if that authorization is given to him in writing.

6. All records pertaining to marriage licenses are public records and open to inspection pursuant to the provisions of NRS 239.010. [Any county clerk who refuses to permit an inspection is guilty of a misdemeanor.]

7. A marriage license issued on or after July 1, 1987, expires 1 year after its date of issuance.

Executive Director, Nevada Association of Counties; William Isaeff, Chief Deputy City Attorney, City of Reno; Michael Pitlock, Member, Nevada Public Service Commission; Myla Florence, Administrator, Welfare Division; Brooke Nielsen, Assistant Attorney General, Office of Attorney General; Debbie Cahill, Nevada State Education Association; Mike Dyer, General Counsel, Nevada State Education Association; Jim Weller, Director, Department of Motor Vehicles and Public Safety; Darcy Coss, Deputy Attorney General, Department of Motor Vehicles and Public Safety; Orland Outland, Self; Robert Gagnier, Executive Director, State of Nevada Employees Association; Frank Barker, Captain, Las Vegas Metropolitan Police Department; Arlene Ralbovsky, Director, Police Records Section, Las Vegas Metropolitan Police Department; Joe Melcher, Washoe County Recorder; James Wright, Chief Deputy Recorder, Washoe County, Robert Cox, Nevada State School Board Association and Washoe County School District; and Jim Richardson, Nevada Faculty Alliance.

ASSEMBLY BILL 364 - Makes various changes regarding access to public books and records.

ASSEMBLY BILL 365 - Substitutes civil enforcement of access to public records for criminal penalty.

ASSEMBLY BILL 366 - Establishes procedures for public inspection of public records.

ASSEMBLY BILL 367 - Defines "public record" to accommodate various forms in which records are maintained.

ASSEMBLY BILL 368 - Requires charges for copies of public records not to exceed cost.

Assemblyman Gene Porter, District 8, testified AB 364, AB 365 and AB 366, as well as AB 367 and AB 368 scheduled to be heard on Wednesday, April 14, resulted from an interim subcommittee which he had chaired, to study Nevada's laws governing public books and records. Committee members, a twelve member advisory group appointed by the Governor to assist in deliberations, and the results of the study can be found in Bulletin No. 93-9, Research Library, Legislative Counsel Bureau. Mr. Porter then described how the study was carried out with the results leading to the adoption of 22 recommendations. It was those 22

recommendations which now made up the aforementioned five bills. Continuing, Mr. Porter said, "The issues involved with public records are difficult ones. There are few areas of public policy that have as many competing interests. The government's need for information, the people's right to have access to that information and the fundamental right to privacy must be delicately balanced. The task before the subcommittee and advisory group was enormous. Our public record's law has not been significantly amended since 1911. What you have before you is our attempt to balance those significant competing interests." Mr. Porter then gave the committee a brief overview of all the bills. In closing, Mr. Porter urged the committee to read the study and said, "The deliberations that you will undergo for the next two days, and subsequent work sessions, force you to balance the information contained, and which is now available in the technology age, with the public's right to know what its government is doing. Government has a lot of information on each of us, private industry has a lot of information on each of us....what the ACR subcommittee tried to do was formulate a broad, general policy that anything done on taxpayer time or expense within the public arena was accessible to the public." He explained the only exception dealt with medical records within a public facility, those records would be kept confidential. He then advised the committee to not try and craft exemptions to accommodate those in the audience who would testify to their own respected interest, as several hundred already existed in Nevada law and a subsequent interim study had been recommended to study those exemptions.

Mrs. Lambert questioned the meaning of the definition "governmental entity." She gave an example utilizing Chapter 624. Mr. Porter replied the subcommittee's definition was contained in Section 2 of AB 364. Mrs. Lambert then asked, "You think having 'funded by public money' will preclude any exemptions, like the example I gave you for the general improvement districts?" Mr. Porter answered he did not see any conflict in the two definitions. Further discussion followed.

Mr. Neighbors asked if a fiscal impact had been determined on any of the bills, specifically AB 366. Mr. Porter responded AB 366 merely outlined how to acquire a record, explaining the process.

Ande Engleman, Nevada Press Association (NPA) introduced Laura Wingard, City Editor, Las Vegas Review-Journal and President, Society of Professional Journalists.

Ms. Wingard presented prepared testimony (EXHIBIT C) to the committee.

Ms. Engleman then introduced Evan Wallach, General Counsel, Nevada Press Association, citing his background.

Mr. Wallach stated the public not only had the right to know, but the need to know, in order to make intelligent decisions and to give informed consent. He then proceeded to elaborate on his statement, addressed Mrs. Lambert's concern regarding the definition of "governmental entity, and explained the objectives of each bill.

Mrs. Lambert queried Mr. Wallach regarding Section 3, page 2 of AB 364. She asked, "Who is going to determine this and will they need guidelines?" Mr. Wallach answered, "This section arises because some years ago the Nevada Supreme Court decided a case called Bradshaw." He then gave his interpretation of the Bradshaw case and its interpretation across the state by governmental entities. He added, "I have yet to hear of a situation where somebody has asked for governmental records which are open by law, and the AG's office or District Attorney has said, 'We balanced it and you won, you get these records.' That's wrong, that's dead flat wrong. That's what this is in here to correct." Further discussion ensued regarding balancing.

Ms. Engleman testified this was not the first attempt to bring Nevada's public record's law into the twentieth century. She referenced the interim study performed in 1982 and the access the public presently had under Nevada Revised Statute 239. In addition, she presented the committee with Exhibit D and said, "You see an article there before you where a Clark County Commissioner could not even access public information as to the financial status of his own County from the County Treasurer who was another elected official....We are not set up to help the public, other than to give them some non-legal advice on things they might ask for when they go in....There really is no one to help the public at all at the present time." She then described the various problems encountered when attempting to acquire public records, the NPA's reluctance to participate in the interim study, the results of a private study she herself had conducted via telephone with each school district in an attempt to find out how much the County Superintendent of Education was paid, and pointed out the bills were a result of compromise. In conclusion, she directed the committee's attention to Exhibit E, a survey commissioned by NPA, and the removal of punitive

affects on a public employee for refusing access to public records.

Mr. Williams asked for more clarification on Section 3. He suggested balancing dealt with a specific situation at a specific time but did not take into consideration future potentialities of abuse to the public. Mr. Wallach replied records closed by law were the only ones being dealt with. He said, "We are not asking that you mandate that somebody provide the information, because if we did and you did it, you would be saying it was open. We are not saying this laundry list of things which should be closed is something which should be opened. All we are saying in here is stop and consider. The situation that you pose is one factor to consider. But there are so many varieties in human experience, that all you can do is ask somebody in the law to apply it on a situation-by-situation basis. It's not perfect but it is the most workable thing we could create and it, at least, addresses your concern."

Mrs. Augustine commented on the survey saying, although statewide, it was such a small sample. A discussion ensued regarding statistical sampling.

In one last comment, Ms. Engleman clarified why it was important to open personnel files.

Karen Kavanau, Director, State Department of Data Processing, stated she had served on the advisory committee adding, "AB 367 which you will hear tomorrow declares electronic or computer records as a public record. AB 366 describes the procedure for accessing a public record. The Department of Data Processing is neutral as to what records should be accessible. This is clearly a legislative decision. I am here today to request two minor modifications to AB 366 and to emphasize a third point. If you would refer to Section 2 of AB 366 it reads,....I would ask that you would strike the words 'or other electronic means.' The reason I say that is because, if you don't, this could be interpreted to permit direct on-line access to government's databases and data communication networks. I don't believe that's your intent and I can tell you that state government simply isn't prepared for it. In Section 3, subsection a, subsection 2, if you would insert the word paper in the sentence that reads,....if you would amend that to say facilities for making 'paper' copies. The reason I ask that is, if you don't, it could be interpreted that government would have to provide facilities to make diskettes and tapes which could be very expensive. And finally, in Section 5, it reads,....I would like you to clarify....that we are talking about the government

entity that actually does gather and use that data, not the data keeper. The word custody is somewhat vague." She then gave an example, adding, "I just need some clarification in that section to make that perfectly clear that the department of data processing or its equivalent in other government organizations is not required to provide information that it does not have authority over."

Chairman Garner asked Ms. Kavanau to provide him with a list of proposed amendments as well as a copy for Mr. Wallach.

Mr. Porter pointed to Section 2 of AB 366 and said what the committee had envisioned was simply a fax machine, therefore, he did not object to the proposed amendment in that area.

Mr. Garner explained he was going to hear all testimony regarding all the bills pertaining to public records, but no action would be taken until a thorough study had been performed.

Tom Grady, Executive Director, Nevada League of Cities (NLC), stated after joint meetings with Nevada Association of Counties (NACO) and the cities and counties, he was pleased to submit the joint statement of the two organizations (Exhibit F) which supported most of the legislation with amendments.

Robert Hadfield, Executive Director, NACO, testified he had been a member of the advisory committee. He agreed with Mr. Porter the proposed legislation affected everyone; and with NPA that there was a spirit of cooperation in the effort to come up with recommendations for the committee. However, he said he thought it was necessary to present the dialogue which had taken place during the study but was not contained in the recommendations. When Mr. Hadfield asked Mr. Garner if he should step through Exhibit F, item by item, or if the committee would prefer to read it at its leisure, Chairman Garner replied he preferred the latter choice. Mr. Hadfield then summarized the concerns of NLC and NACO.

William Isaeff, Chief Deputy City Attorney, City of Reno, stated he had served on the advisory committee and generally was in favor of AB 364, AB 365 and AB 366 with proposed amendments. Regarding AB 364, Mr. Isaeff discussed the definition of "governmental entity," suggesting two definitions were being offered, both differing among the five bills and needing resolution; the reverse balancing test and the results it could render; violations of the supremacy laws of the United States by district or state judges; and open personnel records. Expressing his concerns regarding AB 365, Mr. Isaeff said they

pertained to criminal proceedings against public employees for not providing public records and attorney's fees and costs. He next referenced AB 366 and supported Ms. Kavanau's suggestions, stating his reasons why; expressed his concern regarding Page 1, lines 20-22, which he felt would be creating new records from old records; and said he would appear to testify further on AB 367 and AB 368 at the scheduled hearing. In closing, Mr. Isaeff said, "We think that a good effort has been made here. We obviously don't agree with everything that's in the report. As a member of that advisory committee, I strongly argued for things that did not make it into the report. But this is the legislation before you and we're prepared to support this as much as we can, with amendments we feel will improve the effort."

Mr. Garner asked for written copies of Mr. Isaeff's comments and amendments.

Mrs. Segerblom asked Mr. Isaeff, "Are you suggesting that a government contract with a private company should not be public?" Mr. Isaeff replied absolutely not, with comment.

Michael Pitlock, Member, Nevada Public Service Commission, supported the concept of the legislation but intimated clarification was necessary. He said he would provide the chair with proposed, written amendments.

Myla Florence, Administrator, State Welfare Division, supported concepts but stated concerns. Written testimony, including proposed amendments, was provided to the committee. **Exhibit G** pertained to AB 364, **Exhibit H** to AB 366.

Brooke Nielsen, Assistant Attorney General, Office of Attorney General, introduced Melanie Crossley, Deputy Attorney General, Office of Attorney General, who had participated on the advisory committee. Ms. Nielsen testified she should have signed up in support of the legislation but with amendments. She then provided the committee with **Exhibit I**, written testimony, and proceeded to summarize it.

Debbie Cahill, Nevada State Education Association, introduced Mike Dyer and Jim Penrose, Attorneys, Nevada State Education Association. She then turned the floor over to Mr. Dyer who spoke as general counsel for the organization. Mr. Dyer explained his comments were directed to personnel files of educational employees only and did not support or oppose any other part of AB 364 or the other bills. He said educational

employees were unlike other employees, stressing teachers were subject to questioning by parents and other members of the public on a constant basis. Therefore, he did not think teachers should have their personnel records open to anyone and everyone who could pay the $2.00, $5.00 or $10.00, especially students who could circulate the files around campus and faculty. Mr. Dyer then gave reasons and examples why it would not be good to open personnel records of teachers. In conclusion, Mr. Dyer asked for an amendment to AB 364 to exempt the records of educational employees unless there was a pending civil or criminal action requiring a disclosure of those records.

Mrs. Segerblom asked what information was available on teachers, Mr. Dyer replied under AB 364, everything; under current law, the balancing test and Bradshaw applied. He then gave an example of a legitimate request. When asked how long employee records were kept, Mr. Dyer answered it varied from district to district.

Jim Weller, Director, Department of Motor Vehicles and Public Safety, introduced Darcy Coss, Deputy Attorney General, Department of Motor Vehicles and Public Safety, and said the department's position on the legislation was neutral, but he wanted to express the department's concerns to the committee, which he did.

Darcy Coss concurred with the statements which had been made by previous testifiers and added her own reasons why records should not be opened. In conclusion, Ms. Coss said she would provide her statements in writing to the chair and Mr. Wallach.

Mrs. Kenny questioned the release of names and addresses. Ms. Coss explained those names were released under current law for legitimate purposes such as law enforcement, insurance or accident reports. When asked if a form containing the reason why the request was being made was prepared in these instances, the reply was yes.

Mrs. Freeman asked for clarification regarding the DMV providing lists to catalogs. Mr. Weller responded DMV did sell mailing lists to catalogs, stating the department had realized $21,916 in 1992 and, to date, $21,067. The lists contained name, address and the information requested. Mr. Weller said it would be good if each assemblyman checked with their constituents to see if they would like to have their names sold, as currently, there was no law saying a person could remove their name from the mailing list.

Mrs. de Braga queried if the request to not give out that information was honored. Mr. Weller replied there was nothing to preclude the department from doing that now.

Mr. Hettrick requested clarification on AB 366, lines 4 and 5, suggesting language should be tightened to exclude telephone modems as well.

A discussion ensued between Mr. Ernaut, Mr. Weller and Ms. Coss regarding the denial of access to records by a private citizen versus the selling of name and address lists to catalog businesses.

Mr. McGaughey said, from past legislative sessions, he remembered the reason for selling records had been budgetary, therefore he asked Mr. Weller to enlighten the committee in that regard.

Mr. Weller responded, "As I mentioned, the commercial sale accounts for around $21,000 to $22,000. That is just a small part of the $3.9 million the department's record section brings in for giving out those records. So, you are right, it would have a financial impact. If we did not give out as much as we did, it would reduce staff."

Mr. McGaughey then said, "There is the issue. Do we want to fund $3.9 million someplace else and retain privacy, or do you want to compromise the privacy?"

Orland Outland, speaking for himself, commented against the legislation. In addition, he gave the definition of "malfeasance," and said the legislation was blatantly an act of malfeasance, and the essence of malfeasance needed to be written into the statute with a three-step type penalty. In conclusion, he said he was highly supportive of openness in records, except for those he had spoken against, which he said would compound the problem for the individual constituent.

Mrs. Freeman asked Mr. Outland for his ideas regarding public and private partnerships in access of information. Mr. Outland replied, "I would hate to see it develop as a sham, as a mechanism to avoid accountability. If you are going to have advisory boards or commissions that will fall under this purview, then I feel that those types of activity should fall in the same type of oversight. I would hate to see it developed as an escape clause, as a mechanism to get around accountability. There is a little too much of that now."

Robert Gagnier, Executive Director, State of Nevada Employees Association, addressed AB 364. He cited Page 2, subsection 2, starting on line 27 and said, "All the information you see there, except J on line 38, is currently public record as far as state employees are concerned. We have a law which specifies what is open, public record for classified state employees and it includes almost all of this information. We do have some problem, however, with adding J when you start talking about sick leave." Mr. Gagnier continued by saying he endorsed many of Mr. Isaeff's comments, but he was in opposition to some of the language which he then cited and proposed amendments to. In conclusion, Mr. Gagnier told Mr. Garner he would provide written copies of his amendments to the chair.

Frank Barker, Captain, Las Vegas Metropolitan Police Department, spoke in opposition to the legislation, providing Exhibit J to support his testimony.

Arlene Ralbovsky, Director, Police Records Section, Las Vegas Metropolitan Police Department, presented opposing testimony as outlined in Exhibit K.

Mrs. de Braga asked if a great number of requests for information was being turned down due to a lack of staff. Ms. Ralbovsky said the department was not turning down requests, only delaying them due to staffing. Mr. Barker added the staff limitations in the records department was overflowing into his department and he explained why.

Joe Melcher, Washoe County Recorder, speaking against the legislation, expressed his concerns to the committee and suggested adding language designating what kind of control the County Recorder would have of the records as there were many abuses which currently existed.

Mrs. Lambert queried issuing a subpoena to enforce a real estate transfer tax and asked if the tax statute specifically kept the information confidential. Mr. Melcher said he was not sure because no one had ever asked for that information although the information was available to the public. Further discussion followed.

James Wright, Chief Deputy Recorder, Washoe County, testified his concern was at what point a document became a public record; his department's ability to make a copy of the record before releasing it to the public; and the ability of the public to utilize equipment to make copies. Mr. Melcher agreed the last concern posed several problems for the department.

Robert Cox, Nevada State School Board Association and Washoe County School District, echoed the reservations of Mr. Isaeff, Ms. Nielsen and Mr. Dyer, and requested amendments in those areas. In addition, Mr. Cox addressed the litigation section of AB 364 and stated his argument; AB 365, the balancing test, costs, and attorney fees. In conclusion, Mr. Cox said he would address a letter to the chair and Mr. Wallach stating his concerns and containing proposed amendments.

Chairman Garner explained the committee was running out of time, therefore, he would allow those who did not have the opportunity to testify to sign the attendance roster for the hearing on April 14, 1993, and he would permit them to speak prior to hearing the other bills on the agenda.

Jim Richardson, Nevada Faculty Alliance, expressed his concerns regarding AB 364, especially personnel records of educators. He asked that Section 3, the balancing test, be dropped, and suggested a notification procedure be included. He then cited what he believed to be other problems with the legislation.

There being no further business to come before committee, the meeting was adjourned at 10:56 a.m.

RESPECTFULLY SUBMITTED:

Betty Wills

BETTY WILLS
Committee Secretary

Society of
Professional Journalists
Las Vegas Professional Chapter

ASSEMBLY GOVERNMENT AFFAIRS
Testimony on Open Records Bills
Assembly Bills 364, 365, 366, 367, 368

Good morning. Chairman Garner, members of the committee, my name is Laura Wingard. I'm the city editor for the Las Vegas Review-Journal and am here today in my capacity as president of the Las Vegas chapter of the Society of Professional Journalists, which includes members from newspapers, TV and radio.

My purpose today is not to go line by line through the public records bills before you but to stress to you why they are important and needed.

First, Nevada has more than 165 statutory exemptions to its so-called Open Records Act. The number of exemptions more than doubles when exclusions made through administrative regulations are included. This should disturb anyone committed to making sure that the business of government is done in the open.

Because there are so many exemptions, it is important that these bills pass so a signal is sent to the public employees who hold public records that it is their job to ensure the public has easy access to those documents which indeed are open for review by taxpayers. Journalists, in the course of trying to inform the public about the business of government, frequently encounter roadblocks in gathering open records. Too often, government agencies try to discourage reporters by first refusing access, then delaying access and finally releasing the record.

For example, a Review-Journal reporter told me on Friday the trouble she had obtaining a sexual assault report filed with the Metropolitan Police Department. First, she stood in line in the records department for the report. The records clerk went to pull the report and then refused, saying she could release no sexual assault reports. The reporter knew this was wrong, so she went and tracked down Metro's public information officer, who then intervened on the reporter's behalf. The reporter then returned to the records department and patiently waited for the records clerk to black out information that would identify the victim's name or address. She then paid the $5 Metro requires for

any police report -- whether it's one page or 100 pages. If Metro's public information officer had not been available on Friday, the reporter would have left empty handed when there was no reason to withhold the public report.

This is not an isolated incident. Not a week goes by at the Review-Journal that a reporter does not complain to me about problems in obtaining public records. Some government agencies don't want to provide contracts they've made for lobbying services. Others don't want to reveal details of contracts with consultants and others. Some won't release the individual salaries of public employees. I would argue that all of these records should be open and available for public review.

Some have said the news media should stop whining about lack of access to public records and instead take government agencies to court every time a public record is refused. This would be a costly and unworkable solution. As I've said, my newspaper alone is refused public records every week. Add up all the other news organizations in the state -- not to mention citizens -- who are refused public documents, and the courts would face a glut of such cases. More importantly, lawsuits are public documents. A news organization does not want all of its competitors knowing it is suing for certain records, which -- if the courts ruled they were public — then would be made available to everyone but with only one news organization having paid for the costly litigation.

So, in an effort to make it easier for the public to access the very records they paid to create through taxes, I urge you to pass these open records bills. By so doing, you would send a powerful message that you believe government's business should be done in the open and without fear of public scrutiny.

Thank you for listening to me. I'd be happy to try to answer any questions you may have.

COUNTY GOVERNMENT

Treasurer spars with Schlesinger

Aston, commissioner argue over banks

By Mary Manning
LAS VEGAS SUN

County Commissioner Don Schlesinger threatened to take legal action against county Treasurer Mark Aston after Aston refused to provide a list of banks doing business with county funds.

Aston turned down Schlesinger's month-old request for further financial details Tuesday. "I don't feel by providing it that that information would be of any value to you," he said.

Schlesinger is seeking more information on the banks that handle county investments in an attempt to determine if the banks have good records in dealing with minorities.

But Aston said the information, in the hands of an untrained person, could be misconstrued or misused to the county's detriment.

"I will do whatever it takes to make this information public," Schlesinger said. That includes requesting the Nevada State Press Association to become involved, he said.

"I share with Commissioner (Karen) Hayes my outrage that the public discussion was cut off by the treasurer and any other member on the board," Schlesinger said.

Aston said business with Valley Bank and brokerage houses are listed in monthly reports available to commissioners, County Manager Pat Shalmy and Comptroller Guy Hobbs.

Schlesinger pressed the treasurer for information on other funds connected to McCarran Airport, the Sanitation District or the Water District.

"On what basis do you need that information?" Aston asked.

A startled Schlesinger – his voice rising – responded: "We have the right to find out this information. ...

"I want to know all the banks. It is clear I do not have the information. It is clear the press does not have the information. It is clear the public does not have this information."

"Actually, Don, I don't have to give you the time of day," Aston responded.

"I'm not asking for the time of day," Schlesinger said. "I'm asking for the documents."

"I am not going to put the county's deposits at risk," Aston said.

At that point, Commissioner Paul Christensen moved to table the discussion. That prompted Commissioner Karen Hayes, chairing the meeting in the absence of Chairman Jay Bingham, to ask what was to be tabled.

"We're tabling the public's right to know, let's not kid ourselves," Schlesinger said.

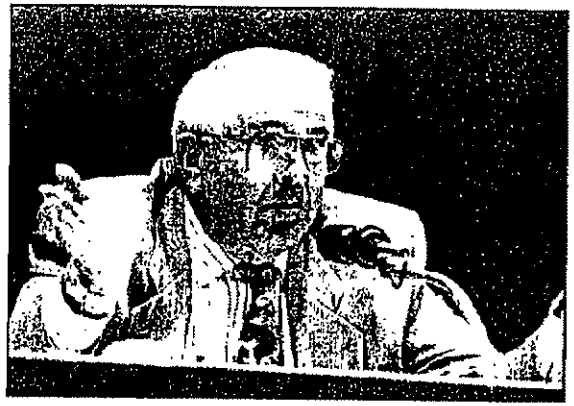
"For the benefit of the commissioner who does not understand his job ... and for the benefit of the chair, who is old enough to know better," Christensen said he would ask Deputy District Attorney Mahlon Edwards to explain tabling.

The motion to table was approved 3-2 with Commissioners William Pearson, Thalia Dondero and Christensen in the majority. Hayes and Schlesinger voted against it. Commissioners Bruce Woodbury and Bingham were absent.

Schlesinger said the issue might wind up in court.

He also asked County Manager Pat Shalmy to draft a disclosure law applying to county records.

Hayes said that the county's investment policy should be reviewed. The board examined it in October.

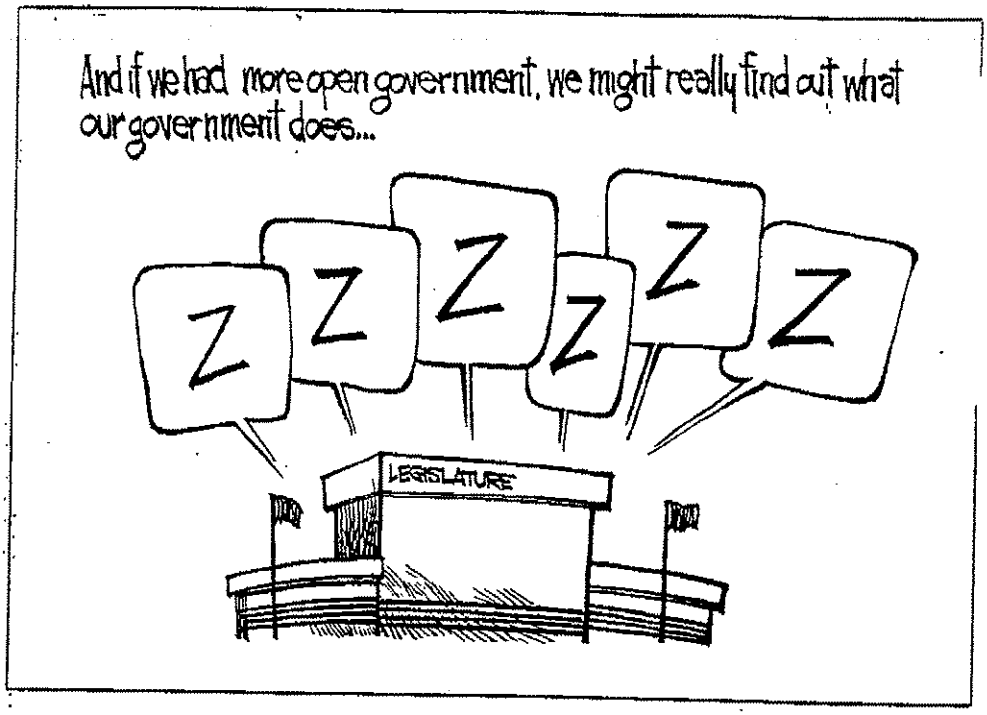


PAUL CHRISTENSEN calls for an end to the argument.

PHOTOS BY BRAD TALBUTT / STAFF

DON SCHLESINGER demands county banking records.

EXHIBIT D 1020



Legislature should open the doors on government

The media have long been pushing for it. Now, the public agrees: State government must be open.

Legislators should pay attention to a survey released earlier this week, showing Nevadans strongly support an end to secrecy in government.

The survey, conducted by the Nevada Press Association, indicated 92 percent of Nevadans want their government agencies to provide their meeting agendas free of charge to the public.

The 500 residents in the survey believe the public's right to know outweighs a public servant's desire for privacy as it relates to job performance, qualifications or possible illegal actions.

Interestingly, even the majority of government workers polled favor open personnel records. That makes us wonder if most of the objections are coming from management positions in government.

Those polled prefer open government by wide margins. Ninety-five percent want records on government spending open, and more than 60 percent want public birth and death certificates. Support was strong for continuing the public notice requirements which newspapers regularly publish.

The association's survey shows what we've long suspected. People don't trust government agencies that operate behind closed doors or hide documents relating to their activities. Voters know open government is more responsive.

A legislative subcommittee has recommended opening more public records and limiting government power to keep its affairs secret. If the Legislature approves, the recommendations would be the first major changes in a law that has survived basically intact since 1911.

The association survey adds ammunition to the subcommittee's recommendations. Government should be more open. Documents should be subject to public review. Agencies should not be permitted to operate in secret.

Historically, government secrecy has been advocated by special-interest groups or well-meaning bureaucrats who think the public should only know what others think it needs to be told.

There are undoubtedly those who will tell the Legislature they need secrecy to to conduct business effectively. But, that's like telling your boss you work better when he isn't aware of what you're doing. Neither he, nor the public, will believe you.

The public must be able to review its government's workings. Without open government, the public cannot ascertain what it is doing. And if the public does not know what the government is doing, it can't make intelligent decisions at the ballot box.

Open government is the essential ingredient for democracies to work.

Research Report

Nevada Press Association, Inc.

1992-93 Statewide Survey
of Registered Voters

Consumer Data Service

3601 North Lincoln
Oklahoma City 73105
(405) 524-0021

LVRJ020 EXHIBIT E 1022 19

BARRY NEWTON
DIRECTOR

DR. ERNEST F. LARKIN
RESEARCH CONSULTANT

Consumer Data Service

3601 North Lincoln Blvd. • Oklahoma City, OK 73105 • 405/524-0021

TO WHOM IT MAY CONCERN:

The data in this report was generated through an extensive market research study conducted jointly by Consumer Data Service (CDS), a market research firm, and the Journalism Research Center at the University of Oklahoma.

The study was commissioned by the Nevada Press Association, Inc. The purpose of the study was to determine attitudes towards government records and the publication of legal notices by registered voters in the state of Nevada.

In order to gain valid insights into citizen preferences and tendencies, a structured questionnaire was developed and tested.

The questionnaire, constructed by Dr. Ernest F. Larkin, director of the Journalism Research Center at OU, was designed to be administered via telephone interviews with a random sample of registered voters in the state of Nevada.

Consumer Data Service and the Journalism Research Center are responsible for the design and execution of the study. All data were processed by CDS and the Journalism Research Center, and the report was prepared by us. I can certify that the data in this report are, to the best of my knowledge, valid and correct.

Respectfully,

Barry Newton
CDS Director

Nevada Press Association, Inc.

1992-93 Statewide Survey of Registered Voters

Executive Summary

Nevada's registered voters are sensitive and alert to issues affecting them personally and to issues and records under the control of their state and local governments. By a substantial majority Nevada's registered voters believe most, if not all, records obtained by government agencies should be accessible by private citizens. Registered voters believe the public's right to know outweighs a public servant's or public employee's contention to privacy with matters relating to job performance, qualifications and illegal actions. Even a majority of government employees are in favor of openness with respect to personnel records.

While Nevada's voters are strongly in favor of open records, they are not insensitive to the cost to provide such records. A majority of Nevada's citizens believe individuals should pay for public records they request, however they do not believe the government should make a profit on public records provided.

A desire for openness in government was expressed by each public sector examined. No significant differences were demonstrated by respondent age group, income category, gender, or rural or metropolitan residence. The basic message received from the survey was that citizens deserve to know what actions their government takes and have a right to access records and information a government may keep and maintain.

The following summary highlights the results of questions asked to 500 registered voters in Nevada regarding their attitudes toward state government records and their usage and feelings toward the publication of legal and public notices. Comparisons by the respondents' residence or by having a government employee in the household are indicated in the text headings accompanying the specific questions asked.

Voter Access to Government Information

Registered voters to the statewide survey were asked if Nevada citizens should have access to specific types of information that were part of present day public records or information collected by public agencies. Of the 500 interviews, respondents were divided by metro and non-metro locations and by government and non-government employment status. By every measure examined, respondents were strongly in favor of openness to the following categories.

Q. *Should private citizens have access to information on . . .*

Response (N=500)	% of total sample	Metro respondents	Non-Metro respondents
Expenditure of taxpayer dollars by gov't agencies	95.8	95.6	96.0
Birth and death certificates	63.0	64.4	61.6
Work experience of public employees	76.2	73.2	79.2
Illegal actions by public employees	88.8	86.8	90.8
Job performance data on Dept of Welfare employees	75.2	74.8	75.6
Court information on hazardous products	93.4	91.6	95.2
Payment of settlements in suits against the government by private citizens	75.2	74.8	75.6
Job performance and job qualifications information on			
Gov't agency heads	90.0	90.0	90.0
Gov't department heads	90.8	89.6	92.0
Government or public agency administrators	90.4	89.6	91.2
All public employees	70.6	66.8	74.4
Teachers in public schools and colleges	77.0	78.4	75.6

	Households with public employee	Household without public employee
Expenditure of taxpayer dollars by gov't agencies	96.2	95.7
Birth and death certificates	63.2	62.4
Work experience of public employees	74.4	77.2
Illegal actions by public employees	86.5	89.9
Job performance data on Dept of Welfare employees	66.9	78.9
Court information on hazardous products	97.0	92.8
Payment of settlements in suits against the government by private citizens	73.7	76.6
Job performance and job qualifications information on		
Gov't agency heads	87.2	91.6
Gov't department heads	88.7	92.2
Government or public agency administrators	87.2	92.5
All public employees	64.7	73.1
Teachers in public schools and colleges	69.9	79.8

Other results from questions relating to government records and meetings revealed that...

- 94.2% believe government agencies should continue to provide agendas of open meetings free of charge to the public.
- 86.0% believe private citizens should have access to all information which government agencies may have about them.
- 58.2% believe private citizens should pay for copies of records they request from government agencies, but...
- 78.7% do not believe government should make a profit on public records they sell or provide to citizens.
- 80.2% do not believe government agencies should arbitrarily close records which presently are open to the public.

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LVRJ024 23

Q. *Should government agencies continue to provide agendas of open meetings free of charge to the public?*

Response (N=500)

	% of total sample	Metro respondents	Non-Metro respondents	Households with gov't employee	Households without gov't employee
Yes	94.2	94.0	94.4	96.2	93.1
No	3.2	3.6	2.8	2.3	3.8
DK/NR	2.6	2.4	2.8	1.5	3.2

Q. *Should private citizens have access to all information which government agencies may have about them?*

Response (N=500)

	% of total sample	Metro respondents	Non-Metro respondents	Households with gov't employee	Households without gov't employee
Yes	86.0	85.2	86.8	85.7	86.7
No	10.8	10.8	10.8	12.0	10.1
DK/NR	3.2	4.0	2.4	2.3	3.2

Q. *Should private citizens have to pay for copies of public records they request from government agencies?*

Response (N=500)

	% of total sample	Metro respondents	Non-Metro respondents	Households with gov't employee	Households without gov't employee
Yes	58.2	55.2	61.2	69.2	52.6
No	38.6	40.4	36.8	27.1	44.2
DK/NR	3.2	4.4	2.0	3.8	3.2

Q. *Should the government charge enough to make a profit on public records they sell to private citizens?*

Response (N=291)

	% of total sample	Metro respondents	Non-Metro respondents	Households with gov't employee	Households without gov't employee
Yes	20.3	23.2	17.6	17.4	20.3
No	78.7	75.4	81.7	82.6	78.0
DK/NR	1.0	1.4	.7	0.0	1.6

Q. *Should government agencies be able to close records to the public which are now open?*

Response (N=500)

	% of total sample	Metro respondents	Non-Metro respondents	Households with gov't employee	Households without gov't employee
Yes	12.2	10.0	14.4	9.8	11.8
No	80.2	81.2	79.2	82.0	80.9
DK/NR	7.6	8.8	6.4	8.3	7.2

Nevada League of Cities
P.O. BOX 2307
CARSON CITY, NV 89702
(702) 882-2121

NACO
NEVADA ASSOCIATION OF COUNTIES
308 N. CURRY ST., SUITE 205
CARSON CITY, NV 89703
(702) 883-7863

April 12, 1993

To: Val Garner, Chairman
Assembly Government Affairs
and Members of the Committee

Re: Assembly Bills 364 - 368

Dear Chairman Garner,

During the interim both the Nevada League of Cities and the Nevada Association of Counties participated in the discussions of the ACR 90 study of public records. Both memberships agreed for the need to clarify certain issues regarding public records. Following the introduction of Assembly Bills 364 - 368, our respective memberships reviewed these proposals and would like to provide you with our comments and suggested amendments to clarify our areas of concern.

Some of our major concerns regard proposed changes to confidential records which could be in conflict with existing federal statutes without further clarification. Many documents including sexual discrimination, disabilities and affirmative action records need to remain confidential to assure that we do not conflict with prior court decisions and state regulations.

We ask that you also consider the fiscal impact of implementing certain aspects of these proposals. It is imperative that local governments retain the right to recover costs associated with providing these services to the public. Keeping in mind that some of the searches and compilation of public records can be extremely time consuming, we are concerned that unrealistic time frames could add significantly to the cost of providing this service as staffing levels may have to be increased or additional overtime accrued to ensure that the agencies will be in compliance with any new statutes.

Attached is a copy of these and other areas of concern for which we would like to offer amended language for your consideration.

Sincerely,

Thomas J. Grady, Executive Director
Nevada League of Cities

Robert S. Hadfield, Executive Director
Nevada Association of Counties

EXHIBIT F
LVRJ026

1028
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PROPOSED AMENDMENTS
Rev 4/9/93

A.B. 365

Section 2 (pg. 1 line 7)

Replace sentence beginning with "if the requester prevails,..." with the sentence "The court may allow the prevailing party to recover court fees and reasonable attorney fees from the losing party."

This section (1) clarifies costs, (2) gives the court discretion in the awarding of costs and (3) allows the prevailing party, whether governmental or private, the opportunity to recover fees.

Section 3 (pg. 1 line 10)

Replace Section 3 with "A public agency, public officer, or employee is immune from liability for damages, either to the requester or the person whom the information concerns, if the public officer or employee acts in good faith in disclosing or refusing to disclose information.".

This clause extends to the public agency the immunity to liability if the employee acts in good faith.

TESTIMONY BEFORE
ASSEMBLY COMMITTEE ON GOVERNMENT AFFAIRS
AB 364, AB 365, AB 366

OFFICE OF THE ATTORNEY GENERAL

BROOKE NIELSEN, ASSISTANT ATTORNEY GENERAL

APRIL 13, 1993, 8:00 A.M.

A clear definition of what is a public record and clear guidance regarding access to records is welcomed by everyone who must deal with public records and the public who is entitled to have access.

While generally in support of this monumental effort to reform our public records law, I have concerns regarding eight areas in these bills and I have recommendations to amend or delete them.

Six items of concern are in today's three bills and two are in AB 368 to be heard tomorrow.

AB 364

FIRST: AB 364 Section 3, provides that records that are confidential by law are still subject to being opened if a judge can be convinced that public policy justifies opening the particular record. It is a novel approach for a legislature to make all confidential records potentially open by letting a judge decide if there is justification to do so. The legislature determined the public policy when it made the record confidential and the public has a right to rely on that.

This section will generate unnecessary litigation costs because the government will have to defend every attempt to open a confidential record, unless appropriate waivers of confidentiality can be obtained. Inmates with nothing else to do will have a field day with this section.

1043
LVB EXHIBIT I 27

SECOND: It is of great concern that the words "state regulations" are omitted in Section 4(2)(a). This section restricts access to records that are presently made confidential by federal statute, federal regulation and state statute, but opens information that is currently made confidential by state regulation.

There is a companion resolution, ACR 29, to be considered in the Assembly Committee on Elections and Procedures April 20, which will authorize an interim study regarding exemptions to disclosure in public records to determine if they should be repealed, amended or added. You should not toss away regulations that restrict access until you have the benefit of ACR 29.

I recommend that Section 4(2)(a) be amended by adding "state regulations of this state or political subdivision" to the list.

THIRD: Section 4(2)(b), while appearing to restrict access to medical records, does so only to the extent that the information would reveal the person's identity. All other information in the record is public. Since AB 366 Section 3 requires that the presence of confidential information in a record is not a reason to withhold the public information, the medical record would have to be edited to eliminate identity information, a very labor intensive task. These are records that should be confidential, I urged you to delete the words at the end of the paragraph which state "but only to the extent that the information would reveal a persons's identity."

FOURTH: Section 4(2)(c) addresses records customarily in the personnel files. This section makes very personal information including home addresses, medical information and evaluations in a personnel file open to anyone if it is related to hiring, retention, promotion, demotion or termination of employment. Opening personnel records may subject employees to harassment or threats, and undermine the rehabilitative purpose of progressive discipline.

There are others in attendance today who will express in detail the concerns that we all share about having personnel files open to the world.

FIFTH: Section 4(2)(g) restricts access to an open investigation file but does not restrict access to that file once the investigation is closed. There are very strong reasons to keep an investigation file confidential even after the matter is closed. An investigation file contains a wide variety of information

which may be rumor, innuendo, untrue or unverified. In some cases release of information garnered in an investigation will risk lives or ruin reputations.

In addition, making an investigation file public once the investigation is closed will have a very detrimental effect on the ability of law enforcement or regulatory bodies to gather information. The Chief investigator for the Attorney General's office advised me that people talk freely to investigators only if they are assured that what they say will remain confidential. You must consider that governmental investigations include complaints against licensees and investigations preparatory to licensure in addition to criminal investigation. It is sobering to think that every inmate in our system will have access to investigation files simply because the investigation is closed.

Though the identity of a confidential informant and investigation techniques are protected elsewhere, there is cause for concern if any information in an investigation file becomes public information.

Subsection (g) must be amended to delete "unless the investigation has been closed."

SIXTH: Section 4(2)(i) & (j) of AB 364 appears to protect information prepared in anticipation of and during lawsuit to the extent it is privileged or not discoverable under the discovery rules. However, in order for the protection for information prepared in anticipation of a lawsuit to be applicable, the lawsuit must be filed. Prior to the lawsuit, access to information prepared in anticipation is not restricted by this language. This gives a great unfair advantage to a plaintiff who is anticipating suing the state or local government. While attorney-client privilege may protect some information, that privilege does not apply to all materials.

I recommend that Section 4(2)(i) be amended by deleting lines 40 and 41, and making line 42 be subsection (i).

Subsection (i) would then read: "It has been filed with a court and contains material which was prepared in anticipation of or during litigation."

Subsection (j) would remain the same.

Next, I would direct your attention to AB 365.

This bill sets forth procedures for appeal of the denial of access to a public record directly to district court. The attorney general opposes the provision which entitles the prevailing requester, but not the prevailing party, to recover attorney fees and costs. It does not permit the agency to recover fees if the agency was correct in the denial of access. Rather than mandatory fees for the requester, it is recommended that AB 365 be amended to provide that "the prevailing party may recover his court costs and reasonable attorney fees in the proceeding at the discretion of the court. The judge can decide on the facts of the case whether attorney fees and costs are appropriate.

AB 366

AB 366 Section 6 sets out procedure for requesting public records and statutory time limits to either deny the request or to fulfill it. While three working days may be sufficient time to produce the requested information or determine whether it is restricted, 13 working days may not be enough time to copy a large volume of records for an agency that does not have adequate copy equipment and enough staff to fill the request and still carry on the tasks of the agency. This is especially problematic if the large volume contains commingled confidential and public information. Sufficient time must be given to do the job with the resources available.

I recommend that, under unusual circumstance at least thirty working days be allowed.

One other correction is needed related to "unusual circumstances." Section 6(4) should be amended to state "unusual circumstances includes but is not limited to"

Section 6(3).

This section is redundant. Section 6(1) already provides that the book or record may be inspected unless the request has been denied.

This concludes my testimony. I am happy to answer any questions.

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Press Association; William Isaeff, Chief Deputy City Attorney, City of Reno; Carole Vilardo, Nevada Taxpayers Association; Nancy Carr, Lyon County Recorder; Joe Melcher, Washoe County Recorder; Margi Grein, Director of Finance, Nevada State Contractors Board; Melanie Crossley, Deputy Attorney General, Office of the Attorney General; Arlene Rablovsky, Director, Police Records Section, Las Vegas Metropolitan Police Department; Wally Lauzan, Assistant Chief of Administrative Services, Department of Motor Vehicles; Darcy Coss, Deputy Attorney General, Department of Motor Vehicles; Lucille Lusk, Nevada Coalition of Conservative Citizens; Anita LaRuy, City of North Las Vegas; and Eric Dabney, Director of Library, Parks & Recreation, City of North Las Vegas.

ASSEMBLY BILL 364 - Makes various changes regarding access to public books and records.

ASSEMBLY BILL 365 - Substitutes civil enforcement of access to public records for criminal penalty.

ASSEMBLY BILL 366 - Establishes procedures for public inspection of public records.

Chairman Garner opened the hearings on AB 364, AB 365 and AB 366 as there were those who had not had the opportunity to testify on April 13, 1993. Mr. Garner called the testifiers in order as they appeared on Exhibit B.

Jerry Zadny, Administrator, Division of Mental Health and Mental Retardation, was unable to appear but, for the record, submitted prepared testimony (Exhibit C) in opposition to AB 364.

Guy Rocha, Administrator, State Archives and Records, in opposition to AB 364, AB 365 and AB 366, read his opposing testimony (Exhibit D) into the record.

Pat Coward, Economic Development Authority of Western Nevada (EDAWN) and Nevada Development Authority (NDA), explained the purpose and mission of the development authorities, how competitive it had become with other states to draw new business, and how crucial it was to keep the confidentiality of information when dealing with potential businesses moving into the area. He said, "This is something that has a lot of the people concerned, maintaining that confidentiality....A business looking at making a move requires as much as two years work

before anything materializes and a firm decision is made." He gave the committee an example of a business which ultimately did not choose the Reno area due to information which had been leaked. He recognized the need to maintain open records for the public in many areas but not necessarily when dealing with potential clients coming into the area. Mr. Coward then proposed an amendment to AB 364 which would provide client confidentiality (Exhibit E).

Mrs. Lambert asked if the boards of EDAWN and NDA were covered by the open meeting law, the answer was no.

Mr. Garner again asked the audience to provide written amendments to the chair.

O.C. Lee, Nevada Conference of Police and Sheriffs, and representing Mark Balin, Professional Fire Fighters of Nevada, said, "We are opposed to the personnel section of the records in AB 364. That does not mean that we have any opinion of any other portion of the bills before you." Mr. Lee referenced the yearly physical examinations, required by law of all police officers and fire fighters, which went into the personnel records. He suggested health records would immediately become public information, therefore, he strongly opposed that section of the bill.

Mrs. Augustine asked if it was true police officers did not have home addresses and telephone numbers published for their own protection, Mr. Lee agreed.

Mike Johaneson, Service Employees International Union, said he too was speaking against the personnel section of AB 364. He continued, "Presently there is quite a body of law regarding the differences, the arguments between privacy and public record, and access to public files, personnel files, that have come about through the Freedom of Information Act. What this bill does is it goes far beyond the existing law and what is accessible by the media and the public record. There is a lot of stuff in personnel files that are very private and would create significant problems for a number of employees. We've gone through this with other bills and if the committee would like, I will provide some court background, some case law on this thing from the Freedom of Information Act. But I don't see anything this bill does but replace existing federal law and go beyond the Freedom of Information Act to allow media access to personnel files. Accordingly, we strongly oppose that section of the law. The other thing I would like to suggest, is if you are going to entertain amendments excluding certain employees

from this bill as was discussed yesterday, I would hope you would also add county and state employees."

Donald Klasic, General Counsel, University of Nevada, testified he too had served on the advisory committee. Additionally, he said the Board of Regents had authorized him to inform the committee the Board supported all five bills with two exceptions, both in AB 364. He identified one objection as being on Page 3, lines 24-29 saying the committee had heard enough testimony, specifically Mr. Dyer's, stating why the records ought to be closed and presented the committee with the document which had been generated out of the deliberations of the advisory committee (Exhibit F). He then pointed out the language which the University proposed as amendments and also the original language the advisory committee had recommended. The second objection was Section 3 of AB 364, the reverse balancing test. Again, he referenced previous testimony, specifically that of Mr. Isaeff, and detailed how it would work. In further testimony, Mr. Klasic explained his understanding of the Bradshaw case, the correct rendering of the reverse balancing test, his desire to avoid litigation over what constituted public records, how criminal investigations worked, and mentioned a possible fiscal note.

Mrs. Augustine queried the date shown on the bill versus the date shown on the proposed amendment. Mr. Klasic explained the intent had not been to postpone the legislation to 1995, but to retain the 1994 date. The error had occurred in the drafting process.

Mr. Hettrick commented, "You just said files could be open on an investigation if it wasn't going to harm anyone." He then asked, "Is that the actual language? The question which was raised yesterday, as I recall, is we could have an investigative file with all kinds of allegations, and etc., and that releasing that file could harm people. If in fact the judge's ruling in Bradshaw says you can't release information that would be harmful, is that going to protect those kinds of files."

Mr. Klasic responded, "It might not. I agree that is going to be a problem." He described how the Bradshaw case applied and said, "The courts don't get down to the nitty gritty about the raw data which may actually contain defamatory and false information, and there is a true problem there."

Exhibit G was submitted to the committee secretary on behalf of James Penrose. It contained the amendments as suggested in the testimony of Mike Dyer on April 13, 1993.

Evan Wallach, General Counsel, Nevada Press Association, was given the opportunity to respond to the testimony of those in opposition to AB 364, AB 365 and AB 366.

Mrs. Lambert, in an effort to understand the balancing test, stated an example. Mr. Wallach replied the employee, as stated in the example, was exempt if the information was released in good faith. Mr. Wallach then gave his own examples of safety valves.

Mrs. Augustine wanted clarification on the statement "request for documents were always denied." Mr. Wallach clarified, "When it comes to me as counsel for the Press Association, and I get into it, my uniform experience has been when dealing with government officials applying the balancing test, they have always applied the balancing test against my clients. And that is true, every single time."

Ande Engleman, Nevada Press Association, added, "Mr. Wallach is not called in on an instance where the press has no problem obtaining documents. He is only called when a problem has evolved."

The hearings on AB 364, AB 365 and AB 366, were closed with no action taken.

ASSEMBLY BILL 367 - Defines "public record" to accommodate various forms in which records are maintained.

ASSEMBLY BILL 368 - Requires charges for copies of public records not to exceed cost.

Mr. Wallach explained the purpose of AB 367 and AB 368. He agreed with Mr. Isaeff's testimony of April 13, 1993, saying there definitely was a conflict with the definition of "governmental entity" in AB 367 which would have to be resolved. He said he preferred the broader of the two definitions. As for AB 368, he said it was the intent of the subcommittee to balance the cost of providing the service with the need to make the cost reasonable to the public, detailing the compromise which was reached.

Ande Engleman added she believed AB 368 set up reasonable costs for copies and hoped the copies would not run more than 25 cents per copy. She pointed out the Secretary of State's budget was largely supported by copying fees and, therefore, urged deleting

APRIL 14,1993

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, FOR THE RECORD, MY NAME IS GUY ROCHA, THE STATE ARCHIVES AND RECORDS ADMINISTRATOR. I AM REPRESENTING THE STATE LIBRARY AND ARCHIVES AND SERVED AS A MEMBER OF THE EXECUTIVE ADVISORY COMMITTEE. I WAS ALSO CLOSELY ASSOCIATED WITH THE INTERIM LEGISLATIVE STUDY IN 1982 STUDYING PUBLIC BOOKS AND RECORDS, WHICH AS ANDE ENGLEMAN POINTED OUT YESTERDAY, DID NOT RESULT IN UPDATING OUR BADLY OUTDATED PUBLIC RECORDS LAW.

NEVADA IS AMONG THE LAST STATES IN THE NATION TO TRY AND COMPREHENSIVELY ADDRESS THIS COMPLEX AND CONTROVERSIAL PUBLIC POLICY ISSUE WITH ALL ITS MYRIAD FISCAL AND TECHNOLOGICAL RAMIFICATIONS. I HOPE THE EXTENSIVE TESTIMONY WE HEARD YESTERDAY, AND I AM SURE WE WILL HERE AGAIN TODAY, WILL NOT RESULT IN THE TYPE OF PUBLIC POLICY PARALYSIS WE ENCOUNTERED SOME TEN YEARS AGO. LACK OF ACTION THEN HAS ONLY EXACERBATED PUBLIC DISCLOSURE ISSUES WHICH ARE NOW HEIGHTENED BY THE PROLIFERATION OF THE MICROCOMPUTER, ELECTRONIC MAIL, AND OPTICAL IMAGING SYSTEMS. OUR FAST-PACED TECHNOLOGICAL ADVANCEMENTS IN RECORD CREATING AND KEEPING ARE OUTSTRIPPING OUR ABILITY TO LEGISLATE ACCESS TO, AND CONFIDENTIALITY FOR, THESE GOVERNMENTAL RECORDS.

AND WE HAVE CERTAINLY LEARNED THERE ARE INHERENT AND SIZEABLE COSTS TO OPEN GOVERNMENT AND PUBLIC ACCESS IN THE ONGOING DEMOCRATIZATION OF OUR POLITICAL SYSTEM. THE ALARMING IRONY IN THIS ISSUE WE CONFRONT TODAY IN BALANCING RIGHTS OF PRIVACY VERSUS PUBLIC DISCLOSURE IS THE ONGOING REALITY OF CENSORSHIP THROUGH BUDGET

1069

LV EXHIBIT D 35

CONSTRAINTS.

JOAN KERSCHNER, STATE LIBRARIAN, AND ALSO A MEMBER OF THE EXECUTIVE ADVISORY COMMITTEE COULD NOT BE HERE. THE STATE LIBRARY AND ARCHIVES HAVE NO PROPOSED AMENDMENTS, BUT I AM HERE TODAY TO ADDRESS ANY SPECIFIC QUESTIONS REGARDING THE PUBLIC RECORDS BILLS BEFORE YOU NOW, OR AT A LATER DAY.

Chairman Garner named the subcommittee to hear AB 364, AB 365, AB 366, AB 367 and AB 368. It consisted of Mr. Bennett as chairman, Mr. Ernaut and Mrs. Freeman.

Chairman Garner requested committee introduction of the following Bill Draft Request 23-1960.

BILL DRAFT REQUEST 23-1960 - Allow employee to be represented at certain hearings before personnel commission by person of his own choosing.

ASSEMBLYMAN BENNETT MOVED FOR A COMMITTEE INTRODUCTION ON BDR 23-1960.

ASSEMBLYMAN BACHE SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

ASSEMBLY BILL NO. 445 - Provides for creation of earthquake safety council.

Assemblyman Rick Bennett, District 16, testified he, along with Assemblyman Bernie Anderson, had represented the State Assembly on an advisory group looking at earthquake safety. He gave the various reasons why he supported the proposed legislation, more so since he had personally experienced the Lander earthquake which had convinced him earthquake safety was indeed needed. He then proceeded to give an in-depth explanation of AB 445.

Assemblyman Bernie Anderson, District 31, stated the bill was noteworthy as Nevada was the third most active earthquake state in the United States, but the state was without legislation regarding earthquake safety. He felt AB 445 would clearly send a message to the public the legislature was concerned about public safety in the state.

Chairman Garner referenced section 8, and asked if retrofitting was being discussed by the word "mitigating." Mr. Bennett replied there were many older buildings, particularly in northern Nevada, which needed to be looked at but it was not the purpose of the council to authorize changes, only to suggest to local government they review ordinances regarding earthquakes and buildings in the area. More discussion followed with Mr. Anderson joining in.

Mr. Garner then pointed to the membership of the council and said, "Under (i), you've included the Division of Emergency

ASSEMBLY BILL 357 - Directs librarian to establish pilot project to provide grants to certain public libraries for purchase of books and library materials.

Mrs. Augustine indicated an amendment had been proposed at the subcommittee meeting (Exhibit M) and stated everyone was satisfied with AB 357 with the amendment.

> ASSEMBLYMAN ERNAUT MOVED TO AMEND AND DO PASS A.B. 357.
>
> ASSEMBLYMAN AUGUSTINE SECONDED THE MOTION.
>
> THE MOTION CARRIED. Assemblymen McGaughey and Bennett were not present.

Chairman Garner indicated the bill would go to Ways and Means Committee.

ASSEMBLY BILL 359 - Makes various changes regarding administration of program of deferred compensation for public employees.

Mr. Bache introduced a proposed amendment to AB 359 and a letter from Mr. Will Keating (Exhibit N).

> ASSEMBLYMAN BACHE MOVED TO AMEND AND DO PASS A.B. 359.
>
> ASSEMBLYMAN HETTRICK SECONDED THE MOTION.
>
> THE MOTION CARRIED. Assemblymen McGaughey and Bennett were not present.

Chairman Garner requested Mr. Bache handle AB 359 on the floor.

ASSEMBLY BILL 364 - 368 - Public Records Bills.

Chairman Garner indicated these bills were being handled in subcommittee and no action would be taken until they came out of subcommittee.

Chairman Garner announced the subcommittee would be expanded to include Mrs. Segerblom and Mrs. de Braga.

ASSEMBLY BILL 415 - Raises threshold for requiring advertisement of competitive bids for purchases by local government.

MINUTES OF THE
ASSEMBLY SUBCOMMITTEE ON GOVERNMENT AFFAIRS

Sixty-seventh Session
May 3, 1993

The Assembly Subcommittee on Government Affairs was called to order by Subcommittee Chairman Rick Bennett, at 9:07 a.m., on Monday, May 3, 1993, in Room 330 of the Legislative Building, Carson City, Nevada. Exhibit A is the Meeting Agenda. Exhibit B is the Attendance Roster.

SUBCOMMITTEE MEMBERS PRESENT:

Mr. Rick C. Bennett, Subcommittee Chairman
Ms. Marcia de Braga
Mr. Pete Ernaut
Ms. Vivian L. Freeman
Ms. Gene W. Segerblom

OTHERS PRESENT:

George Cotton, Clark County Affirmative Action Manager
David Reese, Nevada State Contractors' Board
Lucille Lusk, Nevada Coalition of Concerned Citizens
David Edwards, Clark County Geographic Information System
Ande Engleman, Nevada Press Association
Joe Melcher, Washoe County Recorder
Melanie Mehan-Crossley, Deputy Attorney General
Margaret Lowther, Storey County Recorder
Nile Carson, Reno Police Department
Suzanne Beaudreau, Douglas County Recorder

GUEST LEGISLATORS PRESENT:

Assemblyman Gene Porter, Clark County District 8

Following opening remarks, Subcommittee Chairman Rick Bennett opened the hearing on AB 365.

ASSEMBLY BILL 365 - Substitutes civil enforcement of access to public records for criminal penalty.

Ande Engleman, Nevada Press Association, observed except for one suggested amendment regarding public payment of court costs, AB

365 had probably gained the most support from public employees. She said the present law stated denial of access to a public record was a misdemeanor and a crime. Without a statutory definition of what constituted a "public record," it was sometimes difficult for public employees to make a decision as to what was public and what was not. She said her organization supported removing the misdemeanor charge for refusing access to public records for a public employee. She also supported language on page 1, lines 3-9 as a compromise since they could not agree on an administrative procedure for appeal on denial of public records. The favored procedure, Ms. Engleman stated, would have carried a large fiscal note, and this did not appear to be an opportune time to bring forward anything of that nature.

Ms. Engleman said some Legislators had come to her saying they would favor an out-of-pocket, personal civil penalty as usual in most other states. This would apply in instances where an individual had purposely denied access to public records because the information would have proven embarrassing. She said they opposed having the public pay for court costs and attorneys' fees if a case was lost. The taxpayer had already paid for the other side's attorneys and court costs, through tax dollars.

Taxpayers were also paying the fees for the agency, Mr. Bennett observed. The question was, should the taxpayers, in general, have to cover those costs when the suit might be rather frivolous. Ms. Engleman noted the bill did not grant court costs and attorneys' fees if a suit was over a record everyone had thought to be confidential. Court costs and attorneys' fees were granted only when it was a denial of what was clearly a public record. Therefore, she did not think there would be frivolous lawsuits.

Mr. Bennett questioned the aspect of the judge's discretion in determining who should be awarded costs. Ms. Engleman opined the courts were generally very conservative. If an agency had truly withheld a record which should have been public, Mr. Bennett said he hoped the court would penalize the agency in some way by making them pay the costs.

Drawing attention to Section 3, Mr. Bennett said he had received communication suggesting the possibility of including a public "agency" in the language on page 1, line 10. Ms. Engleman said they had tried to look at the issue from everyone's point of view, but she did not think there would be a problem adding "agency."

Referring to Section 2, Mr. Ernaut asked if the language should specify "a reasonable request." In response, Ms. Engleman said she thought this was addressed in another bill and she did not see the need for additional language.

Representing the Attorney General's Office, Deputy Melanie Mehan-Crossley came forward to respond to Ms. Engleman's testimony. Ms. Crossley reported the Attorney General had asked that the court be given the discretion of granting attorneys' fees and costs when faced with this kind of lawsuit. She said she thought Ms. Engleman's testimony went to giving the court that discretion.

Mrs. Freeman questioned whether they preferred more flexible language than the language on page 1, line 8, "he is entitled to recover his costs. . .". Ms. Engleman said, "Yes," and they had submitted suggested language in earlier testimony.

Representing the State Contractors' Board and the City of Lovelock, David Reese asked the committee to consider loosening the language regarding attorneys' fees and costs to be awarded to the requester. He said there were many situations in which an existing confidentiality statute put the burden on the agency, commission or board, to make certain confidential records remained confidential. He felt there were good reasons why fees or costs awarded to the requester should be discretionary with the judge.

Addressing Mr. Reese's remarks, Ms. Engleman said where there was an exemption stating something was confidential, it should not be called into question as the material was clearly confidential. She said she thought the attitude of government, particularly over the past 10 years was, "when in doubt, keep it closed." She said they were trying to change this attitude to one of "where there is no exemption saying information is confidential, when it doubt it should be released."

Although Mr. Bennett acknowledged Ms. Engleman's remarks, he said he thought even though there had been a great deal of work done on AB 364 in trying to more clearly indicate what was open and what was closed, there would still be gray areas at least until people became more familiar with the new statutes.

Lucille Lusk, Nevada Coalition of Concerned Citizens, remarked from the individual citizen's point of view, the process for using the courts to resolve questions of confidentiality was extremely difficult, if not impossible. She asked if there

would be an internal agency appeal process. Ms. Lusk believed there should be a way for an individual (as opposed to an agency) to appeal to a higher authority if there was disagreement as to confidentiality. Mr. Bennett suggested Ms. Lusk should address this further when AB 366 was discussed.

ASSEMBLY BILL 366 - Establishes procedures for public inspection of public records.

Both Ande Engleman and Dennis Neilander, Legislative Research Analyst, came forward. Ms. Engleman noted this bill was a compromise. In Section 2, the words, "other electronic means," was intended to mean FAX machines and public electronic data bases such as NELIS -- information the courts had ruled should be equally accessible by the public. Ms. Engleman said they had no intention or thought of trying to tap into confidential data bases in state government. She said the Press Association would have no problem with clarifying this section.

Also clarifying, Dennis Neilander explained there was a provision in AB 364 which provided security systems (or hardware system) would be confidential. Referring to AB 366, Mr. Neilander said the bill was largely based on the federal Freedom of Information Act and a study done 10 years ago, which made a similar recommendation regarding procedures for access. He said the law was currently void of any procedures for access and did not provide any procedural mechanisms for someone to either request a record or for the custodian of a record to respond. Thus, in subsection (2) of Section 3, page 1, if a public record contained both confidential and nonconfidential information it would redact out the confidential information.

Referring to language on page 1, line 26 speaking of an exemption provided in NRS 481.063, Mr. Neilander said this dealt with existing law requiring the Department of Motor Vehicles (DMV) to make an inquiry when someone asked for information regarding motor vehicle registration. If the Department determined the information would be used for illegal purposes, it could not release the information. Therefore, except as it applied to the DMV, the language of AB 366 stipulated the agency could not ask why the information was required.

Speaking to the subject, Ms. Engleman noted there had been an earlier bill in the Senate in which a public agency wanted the same permission to determine whether information was going to be used illegally. The DMV statute was clearly unconstitutional,

Acknowledging his support of public/private enterprise, Mr. Ernaut said nevertheless, as a contest between a list and the amendment on Exhibit D, he would be more comfortable with a list. Ms. Morgan said she would work with the Attorney General's Office to tighten the language.

Chairman Bennett invited Brooke Nielsen, Assistant Attorney General, to come forward to address the language of the amendment. Assistant Attorney General Nielsen agreed the language could and should probably be tightened up. The words "substantially" and "directly" were common legal terms which were generally understood and in this instance would refer to a direct connection to the public business. Obviously, she said, someone could not reach into the records of a private company on things that company was doing in another part of the world which had nothing to do with what was going on in Nevada. Assistant Attorney General Nielsen said she would be happy to work with Ms. Morgan in adopting tighter language.

Assistant Attorney General Nielsen said by the language in Exhibit D they were trying to say there was a right to privacy for the business interest; yet at the same time, the public had a right to access those things which directly affected what the company was doing for the public.

Chairman Bennett supported Mrs. Freeman's request for Assistant Attorney General Nielsen and Ms. Morgan to work together to develop more appropriate language.

Another amendment to page 3, lines 37 and 38, proposed by the Attorney General's Office, would delete the words, "unless the investigation had been closed."

Chairman Bennett indicated he had read and considered the case presented by the Attorney General's Office and Mr. Porter (who chaired the interim study committee), and he was not swayed to the extent he was prepared to support changing the language relating to investigation, court cases, etc.

ASSEMBLY BILL 365 - Substitutes civil enforcement of access to public records for criminal penalty.

Two sections had received comments, Chairman Bennett noted. In Section 2 there had been considerable discussion regarding the recovery of costs and attorneys' fees. As currently written, if the requester prevailed, he was entitled to recover his costs

and attorneys' fees in the proceeding, from the agency whose officer had custody of the record.

Chairman Bennett also recalled there had been discussion regarding whether the agency should also be able to recover the costs and attorneys' fees associated with the action, if the agency prevailed. The primary argument against the agency recovery, was this would restrict people from going to court to try to gain access to certain closed records. As AB 364 was written, Chairman Bennett stated there was a large gray area presented which would lead to increased litigation. Limiting some of the gray areas in AB 364 would somewhat alleviate the number of suits which might be brought regarding access to records.

Chairman Bennett said he was of a mind to leave the language as it was written except to add the word "reasonable" before the words "attorney's fees."

ASSEMBLYMAN FREEMAN MOVED TO INSERT THE WORD REASONABLE ON PAGE 1, SECTION 2, LINE 8, MAKING THE LANGUAGE READ ". . . COSTS AND REASONABLE ATTORNEY'S FEES."

ASSEMBLYMAN ERNAUT SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

Discussing Section 3, Chairman Bennett reminded the subcommittee there had been some testimony having to do with expanding the "public officer or employee" to also state, "governmental entity." After discussing this with the bill drafters, they believed the words "And his employer" could be inserted making the language read, "A public officer or employee and his employer who act in good faith in disclosing or refusing to disclose information is immune from liability for damages either to the requester or to the person whom the information concerns."

ASSEMBLYMAN SEGERBLOM MOVED TO INCLUDE THE WORDS "AND HIS EMPLOYER" ON PAGE 1, SECTION 3, LINE 11.

ASSEMBLYMAN FREEMAN SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

Mrs. Freeman asked to have the word "malfeasance" defined. She said earlier testimony had suggested when a person was unable to

get information, there needed to be some definition given to the word "malfeasance." Dennis Neilander, Legislative Counsel Bureau Research Analyst, came forward to clarify. Mr. Neilander said a number of options had been put forward and one was related to the notion of malfeasance. This was for a civil penalty to be imposed on a public employee who acted in bad faith. Although some states had taken this approach, Mr. Neilander said the Nevada subcommittee had rejected the approach, deciding a civil penalty would not be appropriate. Additionally, the misdemeanor penalty would possibly prove unconstitutional because there was no definition of public record. The subcommittee had finally approved the allowance for expedited process.

Mr. Neilander told the committee the operative language in Section 3 was a "good faith" standard. If, indeed, there was a lack of good faith shown on the part of a public employee, NRS 41, which addressed discretionary acts, would take force.

Recapping, Chairman Bennett indicated the rest of AB 365 would remain as written.

ASSEMBLY BILL 366 - Establishes procedures for public inspection of public records.

Chairman Bennett drew attention to Section 2. Concerns had been expressed regarding the language on line 5 regarding the words, "or other electronic means." Primarily, the interim study had assumed this to mean a FAX machine. If this, indeed, was the intent, Chairman Bennett suggested deleting the words, "other electronic means," and stating, "facsimile machine, if available." (See Exhibit E.)

Mr. Ernaut thought the Chairman's language was too narrow and the present language of the bill was too broad. Discussion followed.

ASSEMBLYMAN SEGERBLOM MOVED TO ADOPT THE AMENDMENT PROPOSED IN EXHIBIT E.

ASSEMBLYMAN FREEMAN SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

Following a short break, Chairman Bennett resumed discussion on AB 366, Section 3. Reviewing, the Chairman said he had heard concerns regarding the problems for state or local offices in

ASSEMBLY BILL 314 - Makes various changes to application process for permit for appropriation of public waters and to fees assessed by state engineer.

Mr. Bennett indicated proposed amendments for AB 314 had been taken down to be drafted but had not been received back. Mr. Bennett and Mrs. Lambert reviewed the proposed changes (Exhibit H).

Discussion among committee members ensued.

Chairman Garner indicated there would be no action taken until the amendments had been returned.

ASSEMBLY BILL 352 - Authorizes unincorporated towns to impose impact fees.

Mr. McGaughey briefly reviewed AB 352 stating it had to do with Fernley water impact fees and indicated he had attended a meeting with the city attorney and representatives of the town board and the district trying to find a better way to solve the problem other than using impact fees.

ASSEMBLY BILL 364 - 368 - Public records.

Mr. Bennett indicated several subcommittee meetings and a work session had been held which considered all five bills. He stated there were several proposed amendments approved by the subcommittee being drafted and as soon as the amendments were received back he would give a full report to the committee. Mr. Bennett noted there had been some amendments put forth which had not been accepted by the subcommittee and those would be presented with the report.

ASSEMBLY BILL 378 - Imposes temporary moratorium on adoption of state regulations and creates advisory committee to study such regulations.

Chairman Garner stated he had not heard back from Mr. Humke and it seemed the only viable solution was to look at a study of the subject. He indicated he would not be taking action on AB 378 unless Mr. Humke came forward with a proposal to move the bill.

ASSEMBLY BILL 397 - Provides procedure to verify preference claimed by bidders on public contracts on account of taxes paid.

Mr. Hettrick stated he held a meeting with the north and south AGCs and it appeared to him those at the meeting did not think

Mr. Bennett asked if her amendment dealt with page 2, line 38 regarding the amount of annual and sick leave. Mrs. Segerblom agreed.

Mr. Bennett stated that had been discussed as well as various other information which would be included in subsection 2, defining employment information. He said many concerns had been voiced that this would somehow provide access to reasons for taking sick leave and otherwise open medical information. Mr. Bennett remarked it was his feeling the information regarding annual and sick leave accumulated and number of hours or days taken would be easily handled through payroll records and would in no way divulge reasons for taking leave or medical information. He was not supportive of the amendment.

Mrs. Segerblom stressed she felt a public employee had a right to the sick leave accrued, and if an employee used an excessive amount at any given time, it should be up to the supervisor to handle. She did not feel anyone else should have the right to the knowledge of how much time was taken.

Discussion ensued.

ASSEMBLYMAN SEGERBLOM MADE A MOTION TO AMEND A.B. 364 TO DELETE LINE 38 ON PAGE 2, SECTION 2.

ASSEMBLYMAN WILLIAMS SECONDED THE MOTION.

THE MOTION FAILED.

Chairman Garner stated all amendments to AB 364 had been considered and he would accept a motion to amend and do pass AB 364.

ASSEMBLYMAN BENNETT MOVED TO AMEND AND DO PASS A.B. 364.

ASSEMBLYMAN MCGAUGHEY SECONDED THE MOTION.

THE MOTION CARRIED. Assemblymen Lambert, Ernaut and Williams opposed.

Chairman Garner requested Mr. Bennett handle AB 364 on the floor.

ASSEMBLY BILL 365 - Substitutes civil enforcement of access to public records for criminal penalty.

Mr. Bennett reviewed minor amendments to AB 365 (Exhibit H).

Discussion ensued.

ASSEMBLYMAN BENNETT MOVED TO AMEND AND DO PASS A.B. 365.

ASSEMBLYMAN HETTRICK SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

ASSEMBLY BILL 366 - Establishes procedures for public inspection of public records.

Mr. Bennett reviewed minor amendments to AB 366 (Exhibit I) including the language, "other electronic means."

Mr. Ernaut referenced Section 5 and asked if there had been discussion about the word "custody" in line 3, as there was a problem with archives actually having custody of records. Mr. Bennett indicated he recalled the discussion but did not think any action was taken in subcommittee to amend.

Further discussion ensued.

Mrs. Augustine indicated she had a notation regarding Section 3, line 3 to allow facilities for making paper copies, abstracts or memoranda as there was a concern that microfiche copies could not be duplicated.

Mr. Bennett stated the subcommittee held extensive discussion on Section 3, both relating to paper copies and defining "readily available" and the subcommittee chose to leave the language as written.

ASSEMBLYMAN BENNETT MOVED TO AMEND AND DO PASS A.B. 366.

ASSEMBLYMAN DE BRAGA SECONDED THE MOTION.

Mrs. Augustine proposed to amend the motion to add facilities for making paper copies, abstracts or memorandum of the book or record.

ASSEMBLYMAN AUGUSTINE MOVED TO AMEND THE AMENDMENT TO A.B. 366 TO ADD THE WORD "PAPER" IN SECTION 3, LINE 10.

1993 REGULAR SESSION (67th)

ASSEMBLY ACTION		SENATE ACTION		
Adopted	☐	Adopted	☐	Assembly Amendment to Assembly Bill No. 365 BDR 19-393 Proposed by Committee on Government Affairs
Lost	☐	Lost	☐	
Date:		Date:		
Initial:		Initial:		
Concurred in	☐	Concurred in	☐	
Not Concurred in	☐	Not Concurred in	☐	
Date:		Date:		
Initial:		Initial:		

Amendment No. 510

Replaces Amendment No. 497.
Resolves conflict in section 5 with A.B. No. 146.
Makes substantive changes.

Amend sec. 2, page 1, line 8, after "*costs and*" by inserting "*reasonable*".

Amend sec. 3, page 1, line 11, by deleting "*is*" and inserting:

"*and his employer are*".

Amend sec. 5, page 2, by deleting lines 7 and 8 and inserting:

"obtained for that purpose from the county clerk of any county in the state. Except as otherwise provided in this subsection, the license must be issued at the county seat of that county. The board of county commissioners may, at the request of the county clerk, designate one branch office of the county clerk at which marriage licenses may be issued, if the designated branch office is established in a county office building which is located outside of the county seat.".

Amend the bill as a whole by adding a new section designated sec. 6, following sec. 5, to read as follows:

"**Sec. 6.** Section 5 of this act becomes effective at 12:01 a.m. on October 1, 1993.".

Drafted by: DC:cm **Date: 5/12/93**

A.B. No. 365--Substitutes civil enforcement of access to public records for criminal penalty.

EXHIBIT H
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upon the completion of the project; and providing other matters properly relating thereto.

Assemblyman Porter moved that the bill be referred to the Committee on Commerce.

Motion carried.

By the Committee on Commerce:

Assembly Bill No. 716—An Act relating to architects; requiring a person who claims any of certain exemptions from the provisions relating to architects to file an affidavit asserting the basis for the exemption when obtaining a building permit; providing a penalty; and providing other matters properly relating thereto.

Assemblyman Porter moved that the bill be referred to the Committee on Commerce.

Motion carried.

SECOND READING AND AMENDMENT

Assembly Bill No. 365.

Bill read second time.

The following amendment was proposed by the Committee on Government Affairs:

Amendment No. 510.

Amend sec. 2, page 1, line 8, after "*costs and*" by inserting "*reasonable*".

Amend sec. 3, page 1, line 11, by deleting "*is*" and inserting: "*and his employer are*".

Amend sec. 5, page 2, by deleting lines 7 and 8 and inserting: "obtained for that purpose from the county clerk of any county in the state. Except as otherwise provided in this subsection, the license must be issued at the county seat of that county. The board of county commissioners may, at the request of the county clerk, designate one branch office of the county clerk at which marriage licenses may be issued, if the designated branch office is established in a county office building which is located outside of the county seat.".

Amend the bill as a whole by adding a new section designated sec. 6, following sec. 5, to read as follows:

"Sec. 6. Section 5 of this act becomes effective at 12:01 a.m. on October 1, 1993.".

Assemblyman Bennett moved the adoption of the amendment.

Remarks by Assemblyman Bennett.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

Assembly Bill No. 368.

Bill read second time.

The following amendment was proposed by the Committee on Government Affairs:

Amendment No. 626.

Amend the bill as a whole by deleting sections 5 through 7 and renumbering sec. 8 as sec. 5.

(REPRINTED WITH ADOPTED AMENDMENTS)
FIRST REPRINT A.B. 365

ASSEMBLY BILL NO. 365—COMMITTEE ON COMMERCE

MARCH 16, 1993

Referred to Committee on Government Affairs

SUMMARY—Substitutes civil enforcement of access to public records for criminal penalty. (BDR 19-393)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION—Matter in italics is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to public information; substituting civil enforcement of access to public books and records for a criminal penalty for denial of access; conferring immunity upon public officers and employees for certain actions in good faith; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 239 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this act.

Sec. 2. *If a request for inspection or copying of a public book or record open to inspection and copying is denied, the requester may apply to the district court in the county in which the book or record is located for an order permitting him to inspect or copy it. The court shall give this matter priority over other civil matters to which priority is not given by other statutes. If the requester prevails, he is entitled to recover his costs and reasonable attorney's fees in the proceeding from the agency whose officer has custody of the book or record.*

Sec. 3. *A public officer or employee who acts in good faith in disclosing or refusing to disclose information and his employer are immune from liability for damages, either to the requester or to the person whom the information concerns.*

Sec. 4. NRS 239.010 is hereby amended to read as follows:

239.010 [1.] All public books and public records of state, county, city, district, governmental subdivision and quasi-municipal corporation officers and offices of this state (and all departments thereof), the contents of which are not otherwise declared by law to be confidential, [shall] *must* be open at all times during office hours to inspection by any person, and the [same] *books and records* may be fully copied or an abstract or memorandum prepared therefrom, and any copies, abstracts or memoranda taken therefrom may be utilized to supply the general public with copies, abstracts or memoranda of the records or in any other way in which the [same] *books and*

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records may be used to the advantage of the owner thereof or of the general public.

[2. Any officer having the custody of any of the public books and public records described in subsection 1 who refuses any person the right to inspect such books and records as provided in subsection 1 is guilty of a misdemeanor.]

Sec. 5. NRS 122.040 is hereby amended to read as follows:

122.040 1. Before persons may be joined in marriage, a license must be obtained for that purpose from the county clerk of any county in the state. Except as otherwise provided in this subsection, the license must be issued at the county seat of that county. The board of county commissioners may, at the request of the county clerk, designate one branch office of the county clerk at which marriage licenses may be issued, if the designated branch office is established in a county office building which is located outside of the county seat.

2. Before issuing a marriage license, the county clerk may require evidence that the applicant for the license is of age. The county clerk shall accept a statement under oath by the applicant and the applicant's parent, if available, that the applicant is of age.

3. The county clerk issuing the license shall require the applicant to answer under oath each of the questions contained in the form of license, and, if the applicant cannot answer positively any questions with reference to the other person named in the license, the clerk shall require both persons named in the license to appear before him and to answer, under oath, the questions contained in the form of license. If any of the information required is unknown to the person responding to the question, he must state that the answer is unknown.

4. If any of the persons intending to marry is under age and has not been previously married, and if the authorization of a district court is not required, the clerk shall issue the license if the consent of the parent or guardian is:

(a) Personally given before the clerk;

(b) Certified under the hand of the parent or guardian, attested by two witnesses, one of whom must appear before the clerk and make oath that he saw the parent or guardian subscribe his name to the annexed certificate, or heard him or her acknowledge it; or

(c) In writing, subscribed to and acknowledged before a person authorized by law to administer oaths. A facsimile of the acknowledged writing must be accepted if the original is not available.

5. If the authorization of a district court is required, the county clerk shall issue the license if that authorization is given to him in writing.

6. All records pertaining to marriage licenses are public records and open to inspection pursuant to the provisions of NRS 239.010. [Any county clerk who refuses to permit an inspection is guilty of a misdemeanor.]

7. A marriage license issued on or after July 1, 1987, expires 1 year after its date of issuance.

Sec. 6. Section 5 of this act becomes effective at 12:01 a.m. on October 1, 1993.

Assemblyman Arberry moved that the bill be referred to the Committee on Ways and Means.

Motion carried.

GENERAL FILE AND THIRD READING

Assembly Bill No. 365.

Bill read third time.

Remarks by Assemblyman Bennett.

Roll call on Assembly Bill No. 365:

YEAS—41.

NAYS—None.

Absent—Toomin.

Assembly Bill No. 365 having received a constitutional majority, Mr. Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

Assembly Bill No. 368.

Bill read third time.

Remarks by Assemblyman Bennett.

Roll call on Assembly Bill No. 368:

YEAS—38.

NAYS—Carpenter, Collins, Haller—3.

Absent—Toomin.

Assembly Bill No. 368 having received a constitutional majority, Mr. Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

Assembly Bill No. 655.

Bill read third time.

Remarks by Assemblyman Gibbons.

Roll call on Assembly Bill No. 655:

YEAS—41.

NAYS—None.

Absent—Toomin.

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Assembly Bill No. 655 having received a constitutional majority, Mr. Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

Senate Bill No. 210.

Bill read third time.

The following amendment was proposed by the Committee on Labor and Management:

Amendment No. 730.

Amend sec. 2, page 2, lines 1 and 2, by deleting: "of Nevada System; and" and inserting: "and Community College System of Nevada;".

Amend sec. 2, page 2, line 5, by deleting the period and inserting "; and".

Assemblyman Porter moved the adoption of the amendment.

Remarks by Assemblyman Porter.

erection of a structure within the national recreation area with the exception, or other than a structure developed at the request of the Nevada Division of Wildlife."

Mr. Sukimoto stated that would be acceptable to his division.

Doug Busselman, Executive Director, Nevada Farm Bureau, testified on S.B. 544. He stated his division has a problem with the generic identification of a national conservation area. He explained some of the trends his division is seeing coming out of Washington, D.C. from a federal policy perspective leaves them worrying with regard to establishing this wording in state law. He further explained as future conservation areas come upon them, they will be put under this bill although the intention now is not to do that. He told the committee he has shared with Senator Callister their concerns on this bill and hope they can make a language change. He suggests they specifically mention in the bill the intended area right now so there is not a problem in the future when additional conservation areas are created with more restrictions than they are seeing now. He urged the committee to add the specific designation of Red Rock National Conservation Area into the language of the bill with the amendment and then they will be in agreement with this bill.

Senator Callister stated he spoke earlier with Mr. Busselman and he agrees the amendment should be specific as to the Red Rock National Conservation Area. He told the committee he feels this is appropriate.

Stephanie Lyte, Lobbyist, Nevada Wool Grower's Association, testified on S.B. 544. She told the committee her concernes are the same as Mr. Busselman's regarding the specific designation. She explained they would not have any objection to the bill if they had it designated as the Red Rock Conservation Area.

Joe Johnson, Sierra Club, told the committee his organization supports S.B. 544 with the amendments proposed.

Chairman O'Connell closed the hearing on S.B. 544 and opened the hearing on Assembly Bill (A.B.) 365, Assembly Bill (A.B.) 366 and Assembly Bill (A.B.) 368.

ASSEMBLY BILL 365: Substitutes civil enforcement of access to public records for criminal penalty.

ASSEMBLY BILL 366: Establishes procedures for public inspection of public records.

ASSEMBLY BILL 368: Requires charges for copies of public records not to exceed cost.

Dennis Nielander, Senior Research Analyst, Legislative Counsel Bureau, spoke to the committee on these bills. He told the committee these bills were the result of the study of laws governing public books and records. He started by explaining A.B. 365. He told the committee this bill addresses enforcement. He stated the existing public records law has not been amended significantly since 1911 and in the current provisions for enforcement it contains a criminal penalty which is a misdeamenor for an individual to release a public record in violation of the statute. He stated what this bill does is it removes the criminal penalty and replaces it with an expedited process procedure whereby if a person has been denied access to a public record, they have the opportunity to file in district court and the court is required to give that matter priority on the calendar. He explained if the requestor prevails they are entitled to reasonable attorney fees and costs. Mr. Nielander stated in section 3 it grants immunity for good faith disclosure or nondisclosure and as long as it is done in good faith the public employee is then immune from civil liability.

Chairman O'Connell asked in which one of these bills they should incorporate the definition of a public record.

Mr. Nielander stated the definition is in another bill which has not left the assembly, but they could amend that into A.B. 366 because this bill amends Nevada Revised Statutes (NRS) Chapter 239 which is where the definition has to go and A.B. 366 establishes a procedure for access and currently the law is void of any procedure for getting access. He stated in addition it is void of having a definition.

Mr. Nielander stated A.B. 366 is the bill which establishes procedures for either granting or denying access to records. He explained the law is currently void of any procedural mechanisms to either allow a person to make a record public or to keep it closed. He pointed out this is based in part on the Federal Freedom of Information Act, at least the fundamental concepts are based on that law and also a study which was done 10 years ago on this issue. He explained at that time the subcommittee recommended a procedure similar to this and that bill did not surface from the legislature in 1982. He told the committee this bill says an individual may request a public record in person, by telephone or by FAX machine. He further explained this bill sets forth the duties of the person who is the custodian of the record and what they must do once they have received a request. He stated subsection 2 of section 3 makes it clear that a custodian of a public record cannot release the confidential information with the public information. He explained subsection 3 of that section states they do not have to compile a summary unless it is readily available. Mr. Nielander stated subsection 4 is something that is put in because of first amendment concerns and the fact that the argument is the government should not have a right to know why an individual is requesting that information unless it is to clarify what the

information is they are after. He stated section 5 begins to specify what the custodians must do once they receive a request. He told the committee the procedural mechanism is addressed in lines 17 through 25 and they are the four things that the custodian has to do within a reasonable amount of time, but no later than 3 days after receiving the written appeal. He mentioned they could inform the individuals that unusual circumstances have delayed the request, in which case they have 15 days to comply and inform the requester they do not have the record or deny the appeal. He stated the next section defines what is unusual circumstances which will trigger that 15-day window. He pointed out subsection 3 of section 7 which is another immunity clause for the employee who permits inspection unless they have actual knowledge that the record is not a public record.

Senator Hickey interrupted the testimony by Mr. Nielander to ask the chairman for a bill draft request. He told the committee he wanted to draft a bill which would limit terms in office including federal offices down through county offices.

> SENATOR HICKEY MOVED FOR COMMITTEE INTRODUCTION FOR A BILL DRAFT REQUEST REGARDING TERM LIMITATIONS.
>
> SENATOR LOWDEN SECONDED THE MOTION.
>
> THE MOTION CARRIED. (SENATOR CALLISTER VOTED NO. SENATOR RAGGIO AND SENATOR NEVIN WERE ABSENT FOR THE VOTE.)

* * * * *

Mr. Nielander explained A.B. 368 to the committee. He stated this bill addresses cost. He pointed out subsection 1 of section 1 provides that the fees shall not exceed the cost to the agency and that takes into account the cost of supplies and material, but not time spent by personnel. He explained this is adopted from an Idaho law which essentially reads the same as A.B. 368. He pointed out there is a formula they use to come to the right amount to charge for photocopying and he added the bottom line is they arrive at a total cost per copy. He told the committee each agency in Idaho is required to use this formula to arrive at a per copy cost.

Chairman O'Connell asked if this formula would apply to every agency and an individual could ask for a cost from any division or agency and the cost would not exceed the actual cost.

Mr. Nielander stated that is correct and the provision provides that unless free copies are required by statute. He explained if there is not some other statute that establishes a cost then it must not exceed the actual cost. He continued to explain A.B. 368 to the committee. He stated subsection 2 of the bill provides that an agency may search

Mr. Wright stated if they lose that $62,000 of revenue they will have to ask for more money from the county. He explained the money will have to come from somewhere and if not from copy fees it will be from the taxpayers.

Joe Melcher, Recorder, Washoe County, testified against these bills. He told the committee they should be paying for the service they get and uniformity and standardization of fees is vital to these organizations. He gave the committee some written testimony and statistics on copy fees (Exhibit K).

Ms. Beaudreau stated the Storey County Recorder, Margaret Lowther, had to leave, but wanted it on the record that she opposes these bills.

Melanie Meehan Crossley, Deputy Attorney General, Attorney General's Office, spoke in opposition of these bills. She stated she served on the interim study committee and had not planned to speak today, but felt she must make a few comments regarding adopting an amendment into these bills with the definition of public records. She told the committee what they are trying to do here is a piece of legislation that addresses a vast range of records that are both confidential and not confidential. She gave the committee some suggestions on the language for the amendment.

Mary Henderson, Lobbyist, Washoe County, stated for the record that in Washoe County for their agenda items and backup materials, if people go to the county manager's office they are provided a copy free. If they go to the clerk's office the standard procedure is to send them to the county manager's office so they are not caught up with the fees that the clerk charges for court proceedings. She stated they feel it is essential and it is the public's right to have access to this. She told the committee the only thing they would request is if they do put this into statute in terms of agendas, ordinances, backup materials that it be restricted to one free copy and some nominal fee. She explained her office is not staffed to be a copy service for attorneys and the court system within Washoe County. She feels no county in the state can absorb that type of burden. She stated it is very important to take into consideration the fact that recorder fees have not been increased for over 10 years.

Michell Bero, Lobbyist, Nevada Association of Counties (NACO), stated the previous testimony pretty well explains their position.

Nancy Howard, Lobbyist, Nevada League of Cities, spoke in opposition to these bills. She stated one of their concerns is in A.B. 366 it requires them to provide facilities for making copies and she stated many of her cities do not have these facilities. She explained some of them have a copy room which is also the mailroom and it would be expensive for them to create these facilities.

Sam McMullen, Lobbyist, Nevada Broadcaster's Association, stated they are very strongly in favor of these bills. He told the committee the policy decision clearly put forth by this bill is should the individuals pay a fair approximation of the actual search time related to copying a particular document or should they pay a flat fee.

Ms. Engleman told the committee these bills attempt to address a myriad of problems both bringing Nevada into the 20th Century and trying to prepare Nevada for the 21st Century. She explained some of the problems heard during the interim study were from agencies who had put all of their information on a computer. She further explained if an individual came into this agency requesting some information they were told the information they needed was on the computer and it could not be accessed at that time so the individual wanting the information would have to return the next day. She emphasized individuals need to have access to information and the ability to make copies or even write down notes. She reiterated the proponents of these bills are simply trying to get the cost of copies down to actual costs, not just a simple across-the-board charge since some of the agencies may have a higher charge than others.

Ms. Henderson stated she feels the system in her agency is very simple and straight forward. She explained if they are in a situation where they must identify documents which are simple to pull and copy versus documents which are sitting in a bound volume or sitting in a computer or microfiche she feels they will get into a very difficult and cumbersome bill. She emphasized to the committee they cannot imagine the types of documents county government offices handle. She explained some of the documents are readily accessible and some are not. She told the committee the system they use now is very effective and has worked for several decades. Ms. Henderson pointed out to the committee many of the individuals who request documents do not pay taxes in the state of Nevada. She explained they are individuals who got married in Nevada or individuals in real estate transactions who live out-of-state and therefore do not pay state taxes. She stated these are user fees which have been in place for at least 20 years which help offset some of those costs, so she feels it is wrong to state the taxpayers have also paid for this service, because she feels it is also a service being used by individuals who are not taxpayers.

Senator Hickey asked if part of the storage and copying problem is due to lack of space.

Ms. Henderson stated there is an issue of the lack of space and also an issue of how the documents are stored. She explained some of the documents are stored electronically, some in filing cabinets and other documents are stored in bound volumes.

Chairman O'Connell closed the hearing on Assembly Bill (A.B.) 365, Assembly Bill (A.B.) 366 and Assembly Bill (A.B.) 368 and opened the hearing on Senate Bill (S.B.) 536.

SENATE BILL 536: Requires certain licenses to engage in business to be granted in certain circumstances.

SENATOR NEVIN MOVED TO DO PASS S.B. 536.

SENATOR HICKEY SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR RAGGIO AND SENATOR CALLISTER WERE ABSENT FOR THE VOTE.)

* * * * *

There being no further business, Chairman O'Connell adjourned the hearing at 5:30 p.m.

RESPECTFULLY SUBMITTED:

Tanya Morrison

Tanya Morrison,
Committee Secretary

APPROVED BY:

A. J. O'Connell

Senator Ann O'Connell, Chairman

DATE: _____

THE MOTION CARRIED. (SENATORS RAGGIO, HICKEY AND CALLISTER WERE ABSENT FOR THE VOTE.)

* * * * *

The next measure brought for discussion was A.B. 365.

ASSEMBLY BILL 365: Substitutes civil enforcement of access to public records for criminal penalty. (BDR 19-393)

Ande Engleman, Lobbyist, Nevada Press Association, testified the purpose of A.B. 365 is to remove the criminal penalty for violation of the public records law and provides that court costs and attorney fees can be collected. Ms. Engleman reminded the committee there was no opposition to the measure.

SENATOR RHOADS MOVED TO DO PASS A.B. 365.

SENATOR NEVIN SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS RAGGIO, HICKEY AND CALLISTER WERE ABSENT FOR THE VOTE.)

* * * * *

ASSEMBLY BILL 366: Establishes procedures for public inspection of public records. (BDR 19-397)

Ms. Engleman explained there was no opposition to A.B. 366; however, there was concern with the other two public records bills. She indicated she was proposing the definition of a public record taken from A.B. 364, and an additional new section be amended into A.B. 366. The proposed new section requested by Ms. Engleman is referenced as Exhibit G.

ASSEMBLY BILL 364: Makes various changes regarding access to public books and records. (BDR 19-399)

Chairman O'Connell requested Ms. Engleman to read the proposed definition of a public record. Ms. Engleman read the definition from section 2, paragraphs (a) and (b), lines 3-14 of A.B. 364. It was explained that A.B. 364 was not likely to be passed out of the assembly.

Senator Nevin questioned if that language would open the personnel records of city, county or state employees. He expressed concern since those records were not considered confidential in what was outlined by Ms. Engleman.

Senator Rawson moved that Assembly Bills Nos. 578, 584 be taken from the General File and placed on the General File for the next legislative day.
Remarks by Senator Rawson.
Motion carried.

GENERAL FILE AND THIRD READING

Assembly Bill No. 103.
Bill read third time.
The following amendment was proposed by Senator Townsend:
Amendment No. 1137.
Amend section 1, page 1, line 11, by deleting "*primary or*".
Amend section 1, page 1, line 15, by deleting "*primary or*".
Amend the title of the bill, sixth line, by deleting "primary or".
Senator Townsend moved the adoption of the amendment.
Remarks by Senator Townsend.
Amendment adopted.
Bill ordered reprinted, re-engrossed and to third reading.

Assembly Bill No. 66.
Bill read third time.
Roll call on Assembly Bill No. 66:
YEAS—21.
NAYS—None.

Assembly Bill No. 66 having received a constitutional majority, Madam President declared it passed.
Bill ordered transmitted to the Assembly.

Assembly Bill No. 211.
Bill read third time.
Roll call on Assembly Bill No. 211:
YEAS—21.
NAYS—None.

Assembly Bill No. 211 having received a constitutional majority, Madam President declared it passed.
Bill ordered transmitted to the Assembly.

Assembly Bill No. 244.
Bill read third time.
Remarks by Senator James.
Roll call on Assembly Bill No. 244:
YEAS—21.
NAYS—None.

Assembly Bill No. 244 having received a constitutional majority, Madam President declared it passed, as amended.
Bill ordered transmitted to the Assembly.

Assembly Bill No. 365.
Bill read third time.
Remarks by Senators Brown and O'Connell.

Roll call on Assembly Bill No. 365:
YEAS—21.
NAYS—None.

Assembly Bill No. 365 having received a constitutional majority, Madam President declared it passed.
Bill ordered transmitted to the Assembly.

Assembly Bill No. 435.
Bill read third time.
Remarks by Senator Glomb.
Senator Glomb moved that Assembly Bill No. 435 be taken from the General File and placed on the General File for the next legislative day.
Remarks by Senators Glomb and Neal.
Motion carried.

Assembly Bill No. 535.
Bill read third time.
Remarks by Senators Coffin, Rhoads and Adler.
Roll call on Assembly Bill No. 535:
YEAS—20.
NAYS—Coffin.

Assembly Bill No. 535 having received a constitutional majority, Madam President declared it passed.
Bill ordered transmitted to the Assembly.

Assembly Bill No. 589.
Bill read third time.
Roll call on Assembly Bill No. 589:
YEAS—21.
NAYS—None.

Assembly Bill No. 589 having received a constitutional majority, Madam President declared it passed.
Bill ordered transmitted to the Assembly.

Assembly Bill No. 643.
Bill read third time.
Remarks by Senators Raggio, O'Donnell and Rawson.
Roll call on Assembly Bill No. 643:
YEAS—19.
NAYS—McGinness, O'Connell—2.

Assembly Bill No. 643 having received a constitutional majority, Madam President declared it passed.
Bill ordered transmitted to the Assembly.

Assembly Bill No. 644.
Bill read third time.
Roll call on Assembly Bill No. 644:
YEAS—21.
NAYS—None.

6-26

Assembly Bill No. 365—Committee on Commerce

CHAPTER 393

AN ACT relating to public information; substituting civil enforcement of access to public books and records for a criminal penalty for denial of access; conferring immunity upon public officers and employees for certain actions in good faith; and providing other matters properly relating thereto.

[Approved July 2, 1993]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 239 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this act.

Sec. 2. *If a request for inspection or copying of a public book or record open to inspection and copying is denied, the requester may apply to the district court in the county in which the book or record is located for an order permitting him to inspect or copy it. The court shall give this matter priority over other civil matters to which priority is not given by other statutes. If the requester prevails, he is entitled to recover his costs and reasonable attorney's fees in the proceeding from the agency whose officer has custody of the book or record.*

Sec. 3. *A public officer or employee who acts in good faith in disclosing or refusing to disclose information and his employer are immune from liability for damages, either to the requester or to the person whom the information concerns.*

Sec. 4. NRS 239.010 is hereby amended to read as follows:

239.010 [1.] All public books and public records of state, county, city, district, governmental subdivision and quasi-municipal corporation officers and offices of this state (and all departments thereof), the contents of which are not otherwise declared by law to be confidential, [shall] *must* be open at all times during office hours to inspection by any person, and the [same] *books and records* may be fully copied or an abstract or memorandum prepared therefrom, and any copies, abstracts or memoranda taken therefrom may be utilized to supply the general public with copies, abstracts or memoranda of the records or in any other way in which the [same] *books and records* may be used to the advantage of the owner thereof or of the general public.

[2. Any officer having the custody of any of the public books and public records described in subsection 1 who refuses any person the right to inspect such books and records as provided in subsection 1 is guilty of a misdemeanor.]

Sec. 5. NRS 122.040 is hereby amended to read as follows:

122.040 1. Before persons may be joined in marriage, a license must be obtained for that purpose from the county clerk of any county in the state. Except as otherwise provided in this subsection, the license must be issued at the county seat of that county. The board of county commissioners may, at the request of the county clerk, designate one branch office of the county clerk at which marriage licenses may be issued, if the designated branch

office is established in a county office building which is located outside of the county seat.

2. Before issuing a marriage license, the county clerk may require evidence that the applicant for the license is of age. The county clerk shall accept a statement under oath by the applicant and the applicant's parent, if available, that the applicant is of age.

3. The county clerk issuing the license shall require the applicant to answer under oath each of the questions contained in the form of license, and, if the applicant cannot answer positively any questions with reference to the other person named in the license, the clerk shall require both persons named in the license to appear before him and to answer, under oath, the questions contained in the form of license. If any of the information required is unknown to the person responding to the question, he must state that the answer is unknown.

4. If any of the persons intending to marry is under age and has not been previously married, and if the authorization of a district court is not required, the clerk shall issue the license if the consent of the parent or guardian is:

(a) Personally given before the clerk;

(b) Certified under the hand of the parent or guardian, attested by two witnesses, one of whom must appear before the clerk and make oath that he saw the parent or guardian subscribe his name to the annexed certificate, or heard him or her acknowledge it; or

(c) In writing, subscribed to and acknowledged before a person authorized by law to administer oaths. A facsimile of the acknowledged writing must be accepted if the original is not available.

5. If the authorization of a district court is required, the county clerk shall issue the license if that authorization is given to him in writing.

6. All records pertaining to marriage licenses are public records and open to inspection pursuant to the provisions of NRS 239.010. [Any county clerk who refuses to permit an inspection is guilty of a misdemeanor.]

7. A marriage license issued on or after July 1, 1987, expires 1 year after its date of issuance.

Sec. 6. Section 5 of this act becomes effective at 12:01 a.m. on October 1, 1993.

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Appellant, vs. LAS VEGAS REVIEW-JOURNAL, Respondent.	Case No.: 75095 Appeal from the Eighth Judicial District Court, the Honorable Jim Crockett Presiding

JOINT APPENDIX
Volume 3, Bates Nos. 487–674

Marquis Aurbach Coffing
Micah S. Echols (Bar No. 8437)
10001 Park Run Drive
Las Vegas, Nevada 89145
T: (702) 382-0711 F: (702) 382-5816
mechols@maclaw.com

Steven B. Wolfson
District Attorney
Laura C. Rehfeldt (Bar No. 5101)
Deputy District Attorney
500 South Grand Central Pkwy, 5th Flr.
P.O. Box 552215
Las Vegas, Nevada 89155-2215
T: (702) 455-4761 F: (702) 382-5178
laura.rehfeldt@clarkcountyda.com
Attorneys for Appellant, Clark County Office of the Coroner/Medical Examiner

McLetchie Shell, LLC
Margaret A. McLetchie (Bar No. 10931)
Alina M. Shell (Bar No. 11711)
701 East Bridger Ave., Suite 520
Las Vegas, Nevada 89101
T: (702) 728-5300 F: (702) 425-8220
maggie@nvlitigation.com
alina@nvlitigation.com
Attorneys for Respondent, Las Vegas Review-Journal

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9	July 11, 2017 Email from Coroner's Office with Sample Redacted Files	Vol. 1, Bates Nos. 107–143
Memorandum in Support of Application Pursuant to NRS 239.001/Petition for Writ of Mandamus/Application for Declaratory and Injunctive Relief (filed 08/17/17)		Vol. 1, Bates Nos. 144–161
Attorney Margaret A. McLetchie's Declaration in Support of Memorandum in Support of Application Pursuant to NRS 239.001/Petition for Writ of Mandamus/Application for Declaratory and Injunctive Relief (filed 08/17/17)		Vol. 1, Bates Nos. 162–163
Exhibits to Attorney Margaret A. McLetchie's Declaration in Support of Memorandum in Support of Application Pursuant to NRS 239.001/Petition for Writ of Mandamus/Application for Declaratory and Injunctive Relief		
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1	Order Granting Writ of Mandate in District Court Case No. A-17-750151-W (filed 02/22/17)	Vol. 1, Bates Nos. 164–172
2	Order on Motion for Summary Judgment and Countermotion for Summary Judgment in District Court Case No. A543861 (filed 01/07/09)	Vol. 1, Bates Nos. 173–195

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Exhibits to Petitioner Las Vegas Review-Journal's Motion for Attorney's Fees and Costs		
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1	Declaration of Margaret A. McLetchie (dated 11/29/17)	Vol. 2, Bates Nos. 461–464
2	Attorney Fees by Date	Vol. 2, Bates Nos. 465–471
3	Attorney Fees by Biller	Vol. 2, Bates Nos. 472–478
4	Attorney Costs and Expenses	Vol. 2, Bates Nos. 479–480
5	Declaration of Kathleen Jane England (dated 11/29/17)	Vol. 2, Bates Nos. 481–486
Respondent's Opposition to Las Vegas Review-Journal's Motion for Attorney's Fees and Costs (filed 12/14/17)		Vol. 3, Bates Nos. 487–506
Exhibits to Respondent's Opposition to Las Vegas Review-Journal's Motion for Attorney's Fees and Costs		
Exhibit	**Document Description**	
A	Study of Nevada Laws Governing Public Books and Records, Bulletin No. 93-9 (September 1992)	Vol. 3, Bates Nos. 507–544
B	Legislative History of 1993 Assembly Bill 365 with Selected Exhibits	Vol. 3, Bates Nos. 545–581
C	Notice of Entry of Decision with Decision in District Court Case No. A-14-711233-W (filed 08/23/17)	Vol. 3, Bates Nos. 582–586

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Case Appeal Statement (filed 02/05/18)	Vol. 5, Bates Nos. 768–771
Docket of Case No. A-17-758501-W	Vol. 5, Bates Nos. 772–773

OPP
STEVEN B. WOLFSON
District Attorney
CIVIL DIVISION
State Bar No. 001565
By: **LAURA C. REHFELDT**
Deputy District Attorney
State Bar No. 005101
500 South Grand Central Pkwy.
Las Vegas, Nevada 89155-2215
(702) 455-4761
Fax (702) 382-5178
E-Mail: Laura.Rehfeldt@ClarkCountyDA.com
Attorneys for Respondent
Clark County Coroner/Medical Examiner

DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW JOURNAL, Petitioner, vs. CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Respondent.	Case No: A-17-758501-W Dept. No: XXIV

RESPONDENT'S OPPOSITION TO LAS VEGAS REVIEW-JOURNAL'S MOTION FOR ATTORNEYS' FEES AND COSTS

COMES NOW, Respondent, CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER ("Coroner"), and hereby submits this OPPOSITION TO LAS VEGAS REVIEW JOURNAL'S ("RJ") MOTION FOR ATTORNEYS' FEES AND COSTS in the instant matter. This Opposition is based on the papers and pleadings on file, the following memorandum of law, and any argument the Court may wish to entertain upon a

hearing of this matter.

DATED this 14th day of December, 2017.

Respectfully submitted,
STEVEN B. WOLFSON
DISTRICT ATTORNEY

By: _____
LAURA C. REHFELDT
District Attorney
State Bar No. 005101
Las Vegas, Nevada 89155-2215
Attorney for Respondent
Clark County Coroner/Medical Examiner

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF CASE AND RELEVANT FACTS

In April 2017, the RJ made a records request to the Coroner for Autopsy Reports of juvenile deaths dating back to January 2012. The Coroner denied access to these reports relying on the legal analysis in Attorney General Opinion 82-12, which analyzed the content of the Autopsy Reports and how that content was deemed confidential by law. Ultimately, the Attorney General Opinion concluded that the privacy interests in the Autopsy Reports outweighed public access, a balancing test which was adopted by the Nevada Supreme Court in the case of Donrey of Nev., Inc. v. Bradshaw, 106 Nev. 630, 798 P.2d 144 (1990) eight years later. The Coroner's position with respect to the RJ's request was consistent with its policy that Autopsy Reports are disclosed only to the next of kin. In fact, as established in its Responding Brief in this case, the Coroner's policy is based on the legal analysis and guidance offered by the Attorney General Opinion.

Additionally, in denying access to these records, the Coroner asserted that the 2017 amendments to NRS 259.045, from the legislation known as AB 57, and the supporting legislative history, also limited disclosure of these reports to the direct next of kin and certain enumerated persons (parents, adult children, custodian and guardian). Based on this interpretation, the media was not entitled to the Autopsy Reports.

While the Coroner did not allow access to the Autopsy Reports, immediately after the April 14, 2017 request by the RJ, the Coroner did provide a detailed spreadsheet consisting of public data relating to each juvenile death (of which there were hundreds). This data consisted of the name of the child, the date of death, location of death, age, gender, race, and, most importantly, the cause and manner of death.

When it was later revealed, on May 23, 2017, by the RJ that it was seeking information on child deaths relating to child welfare, the Coroner was forced to assert NRS 432B.407(6) as a basis for nondisclosure. NRS 432B.407(6) states that information and records accessed by a child death review team are confidential and not subject to disclosure. On July 17, 2017, the RJ filed its Petition for access to Autopsy Reports of juvenile deaths dating back to January 2012.

The parties briefed this matter before this Court. The RJ's arguments included the following: 1) that the Coroner could not rely on the legal analysis in an Attorney General's Opinion as a basis for denial of access to the records under NRS 239.0107; 2) the privilege in NRS 432B.407(6) was not timely asserted and, even so, was only temporary while records were reviewed by the child death team; and 3) the Coroner had not established that the records are confidential and, therefore, must be disclosed under Nevada Public Records Law. The Coroner argued that the juvenile autopsy cases that went before the child death review team were confidential under NRS 432B.407(6), and that said statute was properly asserted. The Coroner also claimed that the subject matter contained in the Autopsy Reports is deemed confidential by law. The Coroner further argued that its reliance on the legal analysis in AGO 82-12 was appropriate, including that it was necessary to balance private interests against public access, as later set forth in the Nevada Supreme Court cases of Donrey of Nev., Inc. v. Bradshaw, 106 Nev.630, 798 P.2d 144 (1990) and Reno Newspapers, Inc. v. Gibbons, 127 Nev. 873, 266 P.3d 623 (2011).

The Coroner's argument that the privacy interests outweighed public access was based on certain grounds including the following:

1) The fact that the vast majority of the subject matter of an Autopsy Report consists of medical and health information and such information is protected under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and NRS Chapter 629, and therefore law and public policy supports the nondisclosure of these reports to the public;

2) The records request pertains to Autopsy Reports on juveniles and the law closely guards the release of information relating to children (i.e. NRS Chapters 432B, 62H), and therefore public policy dictates nondisclosure of these reports to the public;

3) Other laws restrict access to information that may be addressed in Autopsy Reports, i.e. NRS 440.650(2) and NAC 440.021(b) (limit access to a death certificate to persons with direct interests to avoid unwarranted invasion of privacy, NRS 440.170(2) (birth out of wedlock), NRS 441A.220 (information relating to communicable disease);

4) The Nevada Legislature, through AB57, which amended NRS 259.045, intended to protect privacy interests in Autopsy Reports by enumerating specific individuals to whom the reports may be released; and

5) Laws of other jurisdictions respect privacy interests in Autopsy Reports and limit dissemination to certain individuals, consistent with the practice of the Coroner, along with the coroners of Elko and Washoe County.

The Court's legal findings included the following: 1) the Attorney General Opinion is not binding precedent; 2) the Coroner could not rely on NRS 432B.407 because it does not provide that records reviewed by the child death team are confidential beyond the review period; 3) HIPAA does not justify nondisclosure as the Coroner is not a covered entity under that law and therefore HIPAA does not apply to autopsy records; 4) that the balancing test does not show that private interests outweigh public access.

The Court ordered, after a hearing, that the Autopsy Reports be provided unredacted, on a rolling basis, and by December 28, 2017. Since then, the Coroner has filed a Notice of Appeal and the Court has stayed the order.

II. LEGAL ARGUMENT

A. The Coroner acted in Good Faith and Is Therefore Entitled to Immunity for Fees and Costs

1. The Plain Meaning of NRS 239.011 and 239.012 Provide for Immunity

Nevada Public Records Law ("NPRL") provides that if the requester prevails it is entitled to recover reasonable attorney's fees and costs in a public record proceeding. See NRS 239.011(2). However, NRS 239.012 gives the Coroner immunity from attorney fees and costs if the Coroner acted in good faith.[1] NRS 239.012 states that:

> **Immunity for good faith disclosure or refusal to disclose information.**
>
> A public officer or employee who acts in good faith in disclosing or refusing to disclose information and the employer of the public officer or employee are immune from liability for damages, either to the requester or to the person whom the information concerns.

NRS 239.012 (emphasis added). Pursuant to NRS 239.011 and 239.012, the Coroner acted in good faith when it did not disclose the Autopsy Reports for child deaths, and, thus, is immune from damages, including attorney fees.

"[T]he construction of a statute is a question of law." Edgington v. Edgington, 119 Nev. 577, 582, 80 P.3d 1282, 1286 (2003) (citation omitted). "In interpreting a statute, 'words . . . should be given their plain meaning unless this violates the spirit of the act.'" Id. (citation omitted). "Thus, when a statute's language is clear and unambiguous, the apparent intent must be given effect, as there is no room for construction." Id. at 582-83 (citations omitted). "If, however, a statute is susceptible to more than one reasonable meaning, it is ambiguous, and the plain meaning rule does not apply." Id. at 583, 1286-87 (citation omitted). "Instead, the legislative intent must be ascertained from the statute's terms, the objectives and purpose, 'in line with what reason and public policy' dictate." Id. at 1287 (citations omitted).

Furthermore, "[s]tatutory interpretation should avoid meaningless or unreasonable

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[1] This is not the first time this issue has been before the Eighth Judicial District Courts. In the case of Las Vegas Review-Journal v. Steven B. Wolfson, Clark County District Attorney, Case No. A711233, the Court ruled against the RJ's request for attorney fees and costs and upheld the immunity argument. Order attached as Exh. C. The RJ has appealed that ruling.

results, and 'statutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained.'" Id. (citations omitted). "Additionally, 'when construing a specific portion of a statute, the statute should be read as a whole, and, where possible, the statute should be read to give meaning to all of its parts.'" Id. (citation omitted).

"[S]tatutes permitting the recovery of costs are to be strictly construed because they are in derogation of the common law." Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998). Awarding fees is also a derogation of the common law, under the American Rule. Thus, it follows that any statutory scheme awarding fees must be construed narrowly, against fees. Hardisty v. Astrue, 592 F.3d 1072, 1077 (9th Cir. 2010). At the same time, "'[w]aivers of immunity,' of course, "must be construed strictly in favor of the sovereign, and not enlarge[d] . . . beyond what the language requires." Id., quoting Ruckelshaus v. Sierra Club, 463 U.S. 680, 685-86 (1983).

Thus, the question presented in this case is whether the term "damages" is meant to include attorneys' fees and costs. The word "damages" is defined as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury." BLACK'S LAW DICTIONARY (7th ed. abr.) at 320. "'Damages' is a broad term and includes special as well as general damages." Taylor v. Neill, 80 Idaho 90, 94, 326 P.2d 391, 393 (1958), citing 25 C.J.S. Damages § 2. Given its Latin and French roots, the term "damage" is synonymous with "loss," and "signifies the thing taken away, -- the lost thing, which a party is entitled to have restored to him so that he may be made whole again." Nordahl v. Dep't of Real Estate, 48 Cal. App. 3d 657, 664, 121 Cal. Rptr. 794, 798 (1975), quoting Fay v. Parker, 53 N.H. 342 (1874).

As set forth herein, Courts have found that the term "damages" must include "fees." For instance, under a statute that permitted a mortgagor to recover "damages" from a mortgagee who refused to discharge a mortgage, the Supreme Court of Utah considered the law of several other states then concluded that "damages" must include attorneys' fees. Swaner v. Union Mortg. Co, 99 Utah 298, 305, 105 P.2d 342, 345-46 (Sup. Ct. 1940). In State ex rel. O'Sullivan v. Dist. Court, 127 Mont. 32, 35, 256 P.2d 1076, 1078 (1953), the Montana Supreme Court held that with regard to a petition for a writ of mandamus, a statute entitling

the petitioner to damages necessarily included the fees incurred.

Indeed, Nevada law recognizes that "damages" may specifically encompass attorneys' fees in certain circumstances, even though the American Rule generally requires each party to pay his own fees, unless a statute, rule, or contract provides otherwise. Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n, 117 Nev. 948, 957-58, 35 P.3d 964, 970 (2001), clarified by Horgan v. Felton, 123 Nev. 577, 584, 170 P.3d 982, 986 (2007). In Andrew v. Century Sur. Co., No. 2:12-cv-00978-APG-PAL, 2014 U.S. Dist. LEXIS 60972, at *26-33 (D. Nev. Apr. 29, 2014), it was concluded that a damages arising from the breach of an insurer's duty to defend included attorney fees. Similarly, in Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., 255 P.3d 268, 277 (Nev. 2011), the court considered damages in the context of an indemnitor's duty to defend and found that breach of that duty may give rise to damages in the form of reimbursement of defense costs incurred by the indemnitee as a result of indemnitor's breach. Thus, it simply cannot be said that the term "damages" can never include "fees."

In common parlance, the term "damages" encompasses the concept of fees. For instance, every civil lawyer is familiar with the phrase "...damages, including attorneys' fees." The term "include" means "[t]o contain as a part of something." BLACK'S LAW DICTIONARY (7th ed. abr.) at 611. "The particle *including* typically indicates a partial list...." Id. In other words, "fees" are but one of many possible subsets of "damages." If there was a different common understanding, then lawyers would not say "damages, *including* fees," but rather would say "damages *and* fees."

With respect to this case, if "damages" do not include "fees," then NRS 239.012 is rendered meaningless in a case like this because there are *no* damages, *other than* fees. The only "money" the RJ incurred as a "loss" caused by the Coroner's assertion of privileges and the balancing test favoring privacy interests are its attorney fees. There is no other monetary loss to the RJ as a result of the nondisclosure of the Autopsy Reports. The RJ indicated that it desires to use the Autopsy Reports to disseminate information affecting positive changes

that might prevent juvenile deaths. It is unclear how the Autopsy Reports will assist with that article since the RJ has the cause and manner of death of each child decedent.

In sum, because the plain meaning of "damages" is very broad, and because the rules of construction (a) disfavor the imposition of fees, (b) favor a broad application of immunity, and (c) require that no statute be rendered meaningless, the Court must construe "damages" to include "fees," and, therefore, the Coroner is immune from liability of such under NRS 239.012.

2. The Legislative History is Abundantly Clear that "Damages" Include "Fees"

"When interpreting a statute, legislative intent 'is the controlling factor." State v. Lucero, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011), quoting Robert E. v. Justice Court, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983). "The starting point for determining legislative intent is the statute's plain meaning; when a statute "is clear on its face, a court cannot go beyond the statute in determining legislative intent." Id., quoting State v. Catanio, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). "But when 'the statutory language lends itself to two or more reasonable interpretations,' the statute is ambiguous, and we may then look beyond the statute in determining legislative intent." Id., quoting State v. Catanio, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). "To interpret an ambiguous statute, we look to the legislative history and construe the statute in a manner that is consistent with reason and public policy." Id. (citation omitted).

Here, the legislative history is perfectly clear. Requestors of public records are entitled to their fees, but only if the government actor acted in bad faith in denying the records. In this case, the Coroner did not act in bad faith in denying the request, nor has the RJ produced any evidence that the Coroner acted in bad faith.

Fees are part of a total overhaul of the NRPA which occurred in 1993. Prior thereto, the only way to enforce the public's right to access public records was through criminal penalties. In 1993, the Legislature made it easier on the requestor by enacting AB 365.[2] Once

[2] Several other bills were enacted that also changed the NPRA, including AB 364, 365, 366, 367, and 368.

the government entity receives a request, it must respond within five days. NRS 239.0107. If any privileges are asserted, they must be included in the response with "[a] citation to the specific statute or other legal authority that makes the public book or record, or a part thereof, confidential." NRS 239.0107(1)(d)(2). If the requestor does not like the response, the procedure is now an expedited writ instead of criminal penalties.

Moreover, the new procedure contemplates fees and costs. In fact, the very statute that provides for fees, provides for this writ process. NRS 239.011. However, the statutory scheme curtails the ability to recover fees and costs by requiring the Court to find that the public entity acted in bad faith pursuant to NRS 239.012.

This intent is clear in the legislative history. First, prior to the legislative session, the Legislative Counsel Bureau published a bulletin that explained the overhaul of the NRPA. The bulletin fully explained the benefits of the writ process, the purpose of the fee and cost-shifting provision, and the purpose of the immunity provision:

> **VII. DISCUSSION OF RECOMMENDATIONS RELATED TO THE ENFORCEMENT OF PUBLIC RECORDS LAWS**
>
> Testimony before the subcommittee and discussions in the advisory committee meetings raised the issue of whether criminal penalties are appropriate in public records cases. . . .
>
> One option suggested during the course of the hearings was that the criminal penalties should be replaced with civil penalties. As discussed in the section on access to records, the subcommittee elected to establish an expedited procedure in court that grants attorneys fees and court costs to a requesting party that prevails. Because of this provision, the subcommittee determined not to recommend civil penalties, and to repeal the criminal penalties. Therefore, the subcommittee recommended that the Legislature:
>
> > **Repeal the existing criminal penalty relative to the failure to disclose a public record. (BDR 19-393)**
> >
> > **Enact legislation that prescribes the procedures for direct appeal to a court of law seeking an order compelling access and giving such proceedings priority on the court's calendar. Provide for court costs and attorneys' fees if the requester prevails. (BDR 19-393) (Also discussed in Section IV regarding access.)**
>
> Because of the complexity associated with modern public records and the sensitive information that is contained in some records, the

> subcommittee determined a need for a liability standard that could be applied to the actions of government employees. The subcommittee elected to base the standard on "good faith." Therefore, the subcommittee recommended the following:
>
> > **Enact legislation providing that governmental entities and employees are immune from suit and liability if they act in good faith in disclosing or refusing to disclose information. (BDR 19-393).**

Exh. A at pg. 25-26. (bold in original, underline added).

Second, the preamble only mentions two issues, civil remedies and immunity. It reads:

> AN ACT relating to public information; substituting civil enforcement of access to public books and records for a criminal penalty for denial of access; conferring immunity upon public officers and employees for certain actions in good faith; and providing other matters properly relating thereto.

Exh. B at p. 3.

Third, the portion of the bill that provides for the civil writ process and for fees is *immediately* followed by the portion of the bill that provides immunity. In other words, in the same bill, the two provisions appear back-to back:

> **Sec. 2.** If a request for inspection or copying of a public book or record open to inspection and copying is denied, the requester may apply to the district court in the county in which the book or record is located for an order permitting him to inspect or copy it. The court shall give this matter priority over other civil matters to which priority is not given by other statutes. If the requester prevails, he is entitled to recover his costs and reasonable attorney's fees in the proceeding from the agency whose officer has custody of the book or record. **[Now codified at NRS 239.011.]**
>
> **Sec. 3.** A public officer or employee who acts in good faith in disclosing or refusing to disclose information and his employer are immune from liability for damages, either to the requester or to the person whom the information concerns. [**Now codified at NRS 239.012.**] *Id.*

Finally, the committee notes directly link immunity with fees. Ande Englemen of the Nevada Press Association essentially told the legislators that public entities need not worry about fees if they have a good faith argument that the records are confidential. Ms. Englemen

stated to the Assembly Committee on Government Affairs:

> Taxpayers were also paying the fees for the agency, Mr. Bennett observed. The question was, should the taxpayers, in general, have to cover those costs when the suit might be rather frivolous. Ms. Engleman noted the bill did not grant court costs and attorneys' fees if a suit was over a record everyone had thought to be confidential. Court costs and attorneys' fees were granted **only** when it was a denial of what was **clearly** a public record. Therefore, she did not think there would be frivolous lawsuits.

Id. at p. 40.[3]

If this is not clear enough, later in that same hearing, the AG's office asked that that the bill's language make it clear that the district courts would merely have *discretion* to award fees. "Ms. Crossley . . . said she thought Ms. Engleman's testimony went to giving the court that discretion." *Id.* at p. 41. Still later in the minutes, the following explanation of the AB 365 again links fees with good faith immunity:

> Dennis Nielander, Senior Research Analyst, Legislative Counsel Bureau, . . . stated the existing public records law has not been amended significantly since 1911 and in the current provisions for enforcement it contains a criminal penalty which is a misdemeanor for an individual to release a public records in violation of the statute. He stated what this bill does is it removes the criminal penalty and replaces it with an expedited process procedure whereby if a person has been denied access to a public record, they have the opportunity to file in district court and the court is required to give that matter priority on the calendar. He explained if the requestor prevails they are entitled to reasonable attorney fees and costs. Mr. Nielander stated in section 3 it grants immunity for good faith disclosure or nondisclosure as long as it is done in good faith the public employee is then immune from civil liability.

Id. at p. 56.

[3] Simply because the Court found in favor of the RJ does not by any means show that the Autopsy Reports were clearly public records. As established thoroughly by the Coroner in this litigation, the Autopsy Report contains information that is deemed confidential by law. The Coroner is placed in a precarious position between these Autopsy Reports and the Nevada Public Records Law statutes and Nevada case law. The only responsible position of the Coroner is to treat these records as confidential and limit dissemination to the person with the right to the body under NRS 451.024 and others as authorized by NRS 259.045.

Thus, the history is very clear that the *new* "penalty" of fees, which replaced the draconian penalty of a criminal misdemeanor charge, was specifically exempted in cases of good faith. Fees can only be granted if the public entity denies the record in bad faith.

This approach is very fair, and it is very consistent with other fee-shifting provisions in the law. A major exception under the American Rule is bad faith. See, e.g., NRS 7.085 (permitting award of fees when attorney acts in bad faith); NRS 18.010(2)(b) (permitting award of fees when litigant acts in bad faith); see also NRCP 68 and Beattie v. Thomas, 99 Nev. 579, 668 P.2d 268 (1983) (granting courts the discretion to award fees when a party rejects an offer of judgment, but only after balancing the relative good faith of the parties).

This approach is also consistent with public policy. Records are public in order to foster democratic principles, and a process is in place to permit newspapers (and others) to obtain public records. However, that process specifically recognizes that many records are confidential, and that different people may arrive at different opinions as to confidentiality. The process also recognizes that public servants usually do their best to balance competing interests fairly. A rule that automatically *requires* fees whenever a court happens to disagree with a public servant will encourage public servants to err on the side of disclosure, even when doing so many injure some third party, as here, or disrupt a criminal investigation. These fees, of course, are coming out of the public treasury, and if used to pay the RJ $32,000, even though the Coroner acted in good faith, that money cannot be used for other services. Thus, there is simply no way to read the statute as *mandating* fees in every case. Rather, this Court has *discretion*, and that discretion is based on whether the public servant has acted in good faith.

With respect to Nevada Public Records Law, there is no escaping the conclusion that the Legislature explicitly intended that immunity for acting in good faith under NRS 239.012 is an exception to the fees and costs provision of NRS 239.011. Thus, in order to grant the present motion, the Court would have to find that the Coroner acted in bad faith.

3. The Coroner Acted in Good Faith

On April 14, 2017, the RJ asked for autopsy reports involving child deaths going back to 2012. Initially the Coroner asserted the legal analysis in AGO 82-12 as the basis for

nondisclosure. That opinion went into detail with respect to the components and subject matter of an autopsy report. The Opinion analyzed whether the components were deemed confidential by law and concluded they were. The Opinion also applied the balancing test and determined that privacy interests in the reports outweighed public access. This is the same balancing test that the Nevada Supreme Court adopted 8 years later in Donrey of Nev., Inc. v. Bradshaw, 106 Nev. 630, 798 P.2d 144 (1990). The Coroner also argued that the 2017 Nevada legislature intended to limit disclosure of the reports to certain enumerated persons (parents, adult children, custodians, guardians) in addition to the direct next of kin. This is now codified in NRS 259.045 and in the legislative history of AB57, as analyzed in the Coroner's Responding Brief.

On May 23, 2017, when it became apparent why the RJ wanted these reports – to report on children under the protection of the Department of Family Services – the Coroner asserted the confidentiality provision in NRS 432B.407(6). Other laws guard against disclosure of information relating to children. Release of autopsy reports to the RJ is the RJ's back-door effort to get information about children that is confidential.[4]

The Coroner recognizes the balance between protecting confidential information and open and transparent government. This is supported by the spreadsheets provided to the RJ consisting of the public data surrounding each juvenile's death (name of decedent, date of death, location of death, race, gender, cause of death and manner of death).

Since autopsy reports involve sensitive information, the RJ's requests required the Coroner to balance important competing interests. This case is not about like a governor's emails or a county commissioner's telephone records. It involves information about private individuals and their family, and could also involve an ongoing criminal investigation. It involves a potential unwarranted invasion of privacy. The Coroner takes this position seriously. Further, this is the only responsible position for the Coroner to take with respect to

[4]A close review of the docket in the Blackjack Bonding case (Supreme Court Case No. 62864) reveals that Metro did not raise the defense of good faith under NRS 239.012 in the district court or in its opening or reply briefs on appeal. In fact, Metro did not raise the argument until *after* the published decision in a petition for rehearing. The Supreme Court denied the petition, citing NRAP 40(c), which provides, in part, "...no point may be raised for the first time on rehearing." Thus, it is indisputable that the Blackjack Bonding opinion does not address NRS 239.012.

this unsettled and contentious area of public records law. Based on the Attorney General Opinion, AB 57, NRS 432B.407, the balancing test adopted by the Nevada Supreme Court, the Coroner, being placed in this unenviable position, had no other choice but to protect against disclosure of this information. The Coroner's position with respect to these reports represents nothing but good faith. It would be impossible to find that the Coroner did not act in good faith. Consequently, the attorney fees and costs should be denied.

The RJ cites to Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc., 343 P.3d 608 (Nev. 2015). The issue there was whether Metro had to provide records related to telephone calls made by inmates at the Clark County Detention Center. Metro was ordered to produce the records, and to pay fees. However, that case is not relevant as it never mentions, let alone discusses immunity under NRS 239.012. Thus, the case does not address the issue presented here.

The Coroner's policy of limiting dissemination of autopsy reports to the next of kin is consistent with the practice of Washoe County and Elko County.[5] The Coroner has acted in good faith with respect to the RJ's request for Autopsy Reports of juvenile deaths going back to January 2012. The Coroner has responded timely, maintained open and professional communication, relied on legal analysis for nondisclosure, provided spreadsheets consisting of public data relating to these deaths, and participated in continuous and prompt discussion regarding the legal basis for non-disclosure.

Thus, based upon the laws that make the components of the Autopsy Reports confidential, along with the application of the balancing test adopted by the Nevada Supreme Court, the Coroner is put in a bind in determining what records are deemed confidential by law and also in applying the balancing test that requires weighing the privacy interests against right to public access. Without question, the Coroner acted in the most responsible manner

[5]See Washoe County Code 35.160(4) for the purpose of demonstrating that the Washoe County Coroner has adopted the same practice as the Coroner, and www.washoecounty.us./coroner/faq/autopsy_report.php. For Elko County see www.elkosheriff.com/coroner.html (reports generated by the Elko County Coroner's Office are not subject to public view. These reports are available to the legal next of kin but only at the conclusion of the investigation (including district attorney's review) and upon written request, and appropriate fees being forwarded. The reports do not included protected health information and reports or documents obtained from other agencies.) Exh. D.

and in good faith by not releasing the Autopsy Reports, despite the precarious position that NRS Chapter 239 and the Nevada case law has placed him in.

4. Reliance on an Attorney General Opinion Demonstrates Good Faith

As established, the Coroner has relied on AGO 82-12, which opined that autopsy reports should not be publicly disseminated. Despite District Court's determination that the Coroner's reliance on the legal analysis in an Attorney General Opinion is unjustified, the Nevada Supreme Court has recognized the purpose of Attorney General Opinions as providing opinions to use as guidelines in applying unsettled areas of law.

In Cannon v. Taylor, 88 Nev. 89, 92, 493 P.2d 1313, 1314 (1972) the Nevada Supreme Court held that where government officials are entitled to rely on opinions of the Attorney General, and do so in good faith, they are not responsible for damages if the opinion is mistaken.[6] State ex rel. Fent v. Okla Water Res. Bd., 66 P.3d 432 (Okla. 2003) (public official is insulated from civil liability for actions in reliance upon the advice of the State Attorney General); State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946) (Attorney General Opinions are for the guidance of state officers until such questions are passed upon by the courts and, if followed in good faith, relieve them from responsibility and protect them); Standard Sur. & Cas. Co. v. Oklahoma, 145 F.2d 605 (10th Cir. 1944) (when there is uncertainty concerning interpretation of a statute, it is the duty of public officials to follow the advice of the Attorney General).

The Coroner's reliance on AGO 82-12 was done so in good faith. The AGO addresses what continues to be an unsettled and contentious area of public records law. The AGO offered legal support and guidelines as to how to handle autopsy reports under public records law. That legal analysis has been timeless with respect to this issue, and the Coroner adopted its policy to release autopsy reports to the legal next of kin based on the Attorney General Opinion. The Coroner provided data to the RJ consisting of critical information relating to decedents and the findings of the Coroner. This data consisted of the names of the decedent,

[6] The Nevada Revised Statutes, classified, arranged, revised, indexed and published by the Legislative Counsel Bureau, include Attorney General Opinions as a list of legal references to a statute. This is particularly true with NRS 239.010.

age, date of death, location of death, race, gender and, most significantly, cause of death and manner of death. By providing this data, the Coroner was able to prevent private information about the decedents from being exposed to the public eye.

This case involves an unsettled and contentious area of public records law with serious legal questions of public importance. The Attorney General Opinion provided advice on this issue that was followed by the Coroner, who, therefore, is immune from liability for damages, being the attorney's fees and costs.

B. In the Alternative, the Fees Sought Must be Apportioned and Reduced

While unfathomable, in the alternative, if this Court somehow finds evidence that the Coroner acted in bad faith by failing to produce the child Autopsy Reports in response to the RJ's request, then the attorney fees and costs requested by the RJ must be apportioned and reduced as set forth below.

1. The Character of the Work Performed was Not Difficult or Complex

Before fees can be awarded, the Court must consider the well-established factors announced in Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969): (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.

Contrary to what the RJ stated in its motion, this is not a time consuming or complex case especially for the caliber and experience of the RJ's attorneys. McKletchie Schell is very experienced with Nevada Public Records Law and litigation in this area. The legal principles and arguments presented in this case are ones that these attorneys have analyzed, briefed and argued many times. For these attorneys, this work is routine. Additionally, this case was rather simple. There was no witness preparation, no evidentiary hearing, no testimony of witnesses. Thus, the RJ has failed to meet the second Brunzell factor.

2. Fees and Costs Incurred Pre-Litigation are Not Recoverable

NRS 239.011(2) specifically limits the fees and costs that can be recovered to those incurred "in the proceeding." Here, the RJ seeks fees and costs incurred before it filed its writ petition. Thus, the fees sought by the RJ which were incurred prior to commencement of the lawsuit should not be recoverable.

3. The Rates Sought are Not Reasonable

A reasonable hourly rate should reflect the prevailing market rates of attorneys practicing in the forum community. Webb v. Ada Cty., 285 F.3d 829, 840, n.6 (9th Cir. 2002); Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984); applied in fraud and breach of contract case, Archway Ins. Servs., LLC v. Harris, No. 2:11-CV-1173 JCM (CWH), 2014 U.S. Dist. LEXIS 107472 (D. Nev. Aug. 5, 2014). In Archway, decided in late 2014, the Court held an hourly rate of $275 was reasonable. Archway Ins. Servs., LLC v. Harris, No. 2:11-CV-1173 JCM (CWH), 2014 U.S. Dist. LEXIS 107472, at *10 (D. Nev. Aug. 5, 2014). In another 2014 District Court case, the court stated, "Based on the court's knowledge and experience, it finds that the requested hourly rates of $225.00 for partners, $200.00 for associates, and $70.00 for paralegals are reasonable." Conboy v. Wynn Las Vegas, LLC, No. 2:11-CV-1649 JCM (CWH), 2014 U.S. Dist. LEXIS 114330, at *7 (D. Nev. Aug. 18, 2014). In Banks v. Robinson, a case related to failure to pay overtime with fees paid related to an offer of judgment, the court found the requested fees were excessive, where senior counsel requested $450 per hour, and the associate requested $350 per hour. Banks v. Robinson, No. 2:11-CV-00441-RLH-PAL, 2012 U.S. Dist. LEXIS 39688, at *3 (D. Nev. Mar. 21, 2012). One of the senior counsel generally worked on a contingency fee basis but, in a declaration, stated he charges hourly between $75-350 on billable matters. Id. at *4. The court reduced the senior counsel bills to $300 per hour, and reduced the fees of the associate to rates of $250 "based on similar work billed by Defendant counsels' associate attorneys" [from Lionel Sawyer]. Id. at *4-5.

Rates have not changed significantly from 2014 to 2016. In fact, they were less in a case where the Court found the hourly rate of $250 for a partner and $125 for an associate representing a surety was reasonable and within the prevailing rates of the Las Vegas legal

market in a bankruptcy case. Am. Contractors Indem. Co. v. Emerald Assets, L.P., No. 2:15-CV-01334-APG-PAL, 2016 U.S. Dist. LEXIS 120056, at *12-13 (D. Nev. Sept. 2, 2016), citing to Next Gaming, LLC v. Glob. Gaming Crp., Inc., No 2:14-CV-0071-MMD-CWH, 2016 WL 3750651, at *5 (D. Nev. July 13, 2016) (granting fees at $350/hour and $255/hour for associate in intellectual property transaction)[7] and Boliba v. Camping World, Inc., No. 2:14-CV-01840-JAD-NJK, 2015 U.S. Dist. LEXIS 113780, 2015 WL 5089808 at *4 (D. Nev. Aug. 27, 2015) (granting fees at $250/hour for a partner and $200 per hour for an associate).

Here, the Court is as familiar as the RJ's counsel and/or its declarants as to prevailing, reasonable rates. The law surrounding the NRPA is not particularly sophisticated or specialized. It entails a handful of Nevada Supreme Court cases and a relatively small chapter of the NRS. This is not a construction defect case, a case involving an intellectual property transaction, bankruptcy, surety or indemnity claim, class action or environmental tort. Based on the cases discussed above, a rate of $300 per hour for the senior attorney is far more reasonable than $450 for this particular matter. Moreover, the rate of $250 per hour for the second chair (Ms. Shell) is more reasonable than $350.

The RJ's paralegal rate of $150 is also too high.[8] $90 to $125.00 is the appropriate range. Boliba v. Camping World, Inc., No. 2:14-CV-01840-JAD, 2015 U.S. Dist. LEXIS 113780, 2015 WL 5089808, at *4 (D. Nev. Aug. 27, 2015) ($125 per hour for paralegals); Tallman v. CPS Sec. (USA), Inc., 23 F. Supp. 3d 1249, 1259 (D. Nev. 2014) ($90 per hour for paralegals). An approximate average of $110 per hour for a paralegal might be more appropriate in this case.

Thus, the RJ's attorney's fees should be apportioned and reduced accordingly.

IV. CONCLUSION

Based on the foregoing, the Coroner respectfully requests that the RJ's Motion for attorney fees and costs be denied on grounds that the Coroner is immune from damages under

[7] In this case a specialist (presumably a legal specialist) was used at a rate of $465.00, just a little more than Ms. McKletchie's $450/hour rate. As discussed, this case is not a complex case. There is no specialized expertise required no specialist was required. Thus, claiming an hourly rate in the range of a specialist is unreasonable.

[8] Interestingly, the paralegal's hourly rate is only $25 less an hour than Mr. Wolport,a licensed practicing attorney.

NRS 239.012.

Alternatively, if fees and costs are awarded, the Coroner respectfully requests that the RJ's request for attorney fees and costs be reduced to the hourly rate of no more than $300 for Ms. McKletchie, $250 for Ms. Schell, and $110 for the paralegal. Additionally, the fees should be apportioned as the character of work in this case was not complex or difficult, and pre-litigation costs are unrecoverable.

DATED this 14th day of December, 2017.

Respectfully submitted,

STEVEN B. WOLFSON,
DISTRICT ATTORNEY

By: _____
LAURA C. REHFELDT
Deputy District Attorney
State Bar No. 5101
500 South Grand Central Pkwy. 5th Floor
P. O. Box 552215
Las Vegas, Nevada 89155-2215
Clark County Coroner/Medical Examiner

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Clark County District Attorney and that on this 14th day of December, 2017, I served a true and correct copy of the foregoing **RESPONDENT'S OPPOSITION TO LAS VEGAS REVIEW-JOURNAL'S MOTION FOR ATTORNEYS' FEES AND COSTS** to the following parties by the method shown below:

ATTORNEYS OF RECORD	PARTIES REPRESENTED	SERVICE METHOD
Margaret A. McLetchie, Esq, Alina M. Shell, Esq. McLetchie Shell LLC 701 East Bridger Avenue #520 Las Vegas, NV 89101 alina@nvlitigation.com maggie@nvlitigation.com	***Petitioner Las Vegas Review Journal***	☑ Electronic Service ☐ Fax Service ☐ Mail Service ☐ Personal Service (ROC)

An Employee of the Clark County District Attorney's Office – Civil Division

EXHIBIT A

Study of Nevada Laws Governing Public Books and Records

Study of Nevada Laws Governing Public Books and Records

Legislative Counsel Bureau

Bulletin No. 93-9

September 1992

STUDY OF NEVADA LAWS GOVERNING PUBLIC BOOKS AND RECORDS

BULLETIN NO. 93-9

SEPTEMBER 1992

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SUMMARY OF RECOMMENDATIONS

Following is a summary of the recommendations approved by the Legislative Commission's Subcommittee to Study the Laws Governing Public Books and Records.

A. DEFINITIONS RELATED TO PUBLIC RECORDS AND CATEGORIZATION OF SUCH RECORDS

1. **Enact legislation that provides for broad definitions of "public record" and "governmental entity." The definition should include electronic records as public records.** (BDR 19-398)

2. **Enact legislation that creates certain categories which, by example, lists those records that are always included as public records.** (BDR 19-399)

   In summary, records that are public include records regarding title to real property, contracts of government agencies, and certain job description information related to government employees.

3. **Enact legislation that creates a category which lists certain information that is not to be considered a public record.** (BDR 19-399)

   In summary, such information includes certain working drafts for personal use, material legally owned by an individual, copy-righted material and proprietyary software.

4. **Enact legislation that lists certain kinds of information that falls within the definition of public records, but notwithstanding that fact, must not be disclosed.** (BDR 19-399)

   In summary, this list includes information where access is restricted by a Federal or State statute, certain medical records, certain personnel files, information that is privileged, and information related to certain governmental investigations.

5. **Enact legislation addressing the category of non-disclosable public records which allows any record deemed non-disclosable to be disclosed if, with**

respect to the particular record, the general policy in favor of open records outweighs an expectation of privacy or a public policy justification. (BDR 19-399)

6. Adopt a resolution requiring a study of all exemptions to the public records laws to determine which exemptions should be repealed, amended, or remain the same. (BDR R-395)

B. PROCEDURES FOR ACCESS TO PUBLIC RECORDS

7. Enact legislation which provides a uniform method of requesting information, procedures to provide access to or deny that information, and time frames within which responses or other actions are required. (BDR 19-397)

In summary, the following elements were recommended:

- Each agency, upon request by any person, shall make public records available for inspection and copying during regular business hours. Provide that the request may be oral or written and may be made in person, by telephone or by mail.

- Unless information is readily retrievable by the agency in the form in which it is requested, an agency is not required to prepare a compilation or summary of its records.

- Each agency shall ensure reasonable access to facilities for duplicating records and for making memoranda or abstracts from them.

- If an agency is not immediately able to fulfill a request for a governmental record, does not intend to fulfill it or denies it, the agency must inform the requester of his right to make a formal written request.

- Within a reasonable time, but no later than 3 working days after receiving a written request

for access which reasonably identifies or describes a governmental record, the agency shall:

a. Make the record available to the requester;

b. Inform the requester that unusual circumstances (such as the volume of records which have been requested or the need to search for, consult with or obtain records from another office or agency) have delayed the handling of the request and specify a time and date, no later than 10 working days after the reply would otherwise be due, when the record will be available;

c. Inform the requester that the agency does not maintain the requested record and provide, if known, the name and location of the agency maintaining the record; or

d. Deny the request.

8. **Enact legislation which provides that where access is denied, the complaining party may directly appeal to a court of competent jurisdiction seeking an order compelling access and giving such proceedings priority on the court's calender. Provide that court costs and attorneys' fees are awardable if the requester prevails.** (BDR 19-393)

9. **Include in the final report a statement of the subcommittee's support for the concept of an intermediate appellate body that would have concurrent jurisdiction with the courts to consider appeals from the denial of a public record.**

10. **Enact legislation to establish that the fact that a record contains restricted and non-restricted information is not a reason for denying access to the non-restricted information.** (BDR 19-397)

11. **Enact legislation that prohibits a public body from inquiring about the intended use of requested public information or making any other inquiry of a person requesting to inspect or receive copies of public information, except to the extent necessary**

to clarify the request for information. Include an exception for information requested from the Department of Motor Vehicles and Public Safety because *Nevada Revised Statutes* 482.170 requires the department to make an inquiry as to the purpose for requesting certain information. (BDR 19-397)

C. THE TREATMENT OF ELECTRONIC RECORDS

12. Urge the Department of Data Processing, in cooperation with the Nevada State Library and Archives, to create and maintain an inventory of statewide hardware, software and information.

13. Urge the Division of Archives and Records to work with other State agencies to establish retention and disposition schedules for records when information systems are designed or redesigned. Furthermore, urge all State agencies to consider record retention/disposition requirements at the point of system design.

14. Urge the Division of Archives and Records to undertake a program to educate State officials about their responsibilities for retention, care, and preservation of government records with special emphasis on electronically-stored public records.

15. Include in the final report a statement of the subcommittee's support for the concept of creating a centralized information storage facility and developing procedures for maintaining information.

(These resolutions are all drafted as BDR R-394.)

D. COSTS ASSOCIATED WITH PUBLIC RECORDS

16. Enact legislation that allows only the cost of the materials and the equipment, not labor, regarding reproduction of records. (BDR 19-396)

17. Include in the final report support for the concept of government using a cost analysis formula to calculate a per copy price. The formula should consider the average number of copies per month, the purchase price of the copying equipment, and an amortized cost per month over the anticipated life

of the equipment to achieve a total machine cost per copy.

18. Enact legislation which authorizes, but does not require, a governmental entity to fill "custom" requests (such as re-formatting information) and to charge a reasonable fee for completing such requests. (BDR 19-396)

19. Enact legislation which provides that, when a requester wants information in a format which is different from the format used to maintain or store the information, the governmental entity is not required to re-format that data. (BDR 19-396)

E. ENFORCEMENT OF PUBLIC RECORDS LAWS

20. Repeal the existing criminal penalty relative to the failure to disclose a public record. (BDR 13-393)

21. Enact legislation that prescribes the procedures for direct appeal to a court of law seeking an order compelling access and giving such proceedings priority on the court's calendar. Provide for court costs and attorneys' fees if the requester prevails. (Discussed in Section C regarding procedures for access.) (BDR 19-393)

22. Enact legislation providing that governmental entities and employees are immune from suit and liability if they act in good faith in disclosing or refusing to disclose information. (BDR 13-393)

REPORT TO THE 67TH SESSION OF THE NEVADA LEGISLATURE BY THE LEGISLATIVE COMMISSION'S SUBCOMMITTEE TO STUDY THE LAWS GOVERNING PUBLIC BOOKS AND RECORDS

I. INTRODUCTION

This report is submitted in compliance with Assembly Concurrent Resolution No. 90 (File No. 184, *Statutes of Nevada 1991*, pages 2643-2644) which directed the Legislative Commission to study Nevada's laws governing public books and records. The Legislative Commission appointed the following legislators to conduct the study:

Assemblyman Gene T. Porter, Chairman
Senator Ron Cook (resigned during the study)
Senator Joseph M. Neal, Jr. (appointed to replace Senator Cook)
Senator Dina Titus
Assemblywoman Jan Evans
Assemblyman James A. Gibbons

The resolution required the Governor to appoint at least five members to serve as a technical advisory group to assist the legislative subcommittee. The Governor responded by appointing the following 12 members representing various groups interested in the public records law:

Melanie Meehan-Crossley, Deputy Attorney General, Office of the Attorney General
Andrea K. Engleman, Nevada Press Association
Gentty Etcheverry, Executive Director, Nevada League of Cities
Robert S. Hadfield, Executive Director, Nevada Association of Counties
William E. Isaeff, Chairman, Public Lawyers Section, Nevada State Bar
Karen Kavanau, Director, Nevada's Department of Data Processing
Joan Kerschner, State Librarian, State Library and Archives
Donald Klasic, General Counsel, University of Nevada System
Dennis Myers, President, Society of Professional Journalists
Guy L. Rocha, State Archivist, Division of Archives and Records, State Library and Archives

Carl Scarbrough, Vice President, Las Vegas Chapter,
Society of Professional Journalists
Larry D. Struve, Director,
Department of Commerce

Legislative Counsel Bureau staff services for the study were provided by:

Dennis Neilander of the Research Division
Principal Staff

Kimberly Ann Morgan
and
Kerry Schomer
of the Legal Division
Legal Counsel

Lyndl Payne of the Research Division
Committee Secretary

SUBCOMMITTEE AND ADVISORY GROUP HEARINGS

A total of 11 meetings were held in association with the study. Four of the hearings were joint meetings with participation from both the legislative subcommittee and the advisory group, although the advisory group did not have any voting privileges.

At the first meeting of the subcommittee, various parties interested in the public records issue testified regarding the problems that exist with the law. The parties included representatives from:

1. A private company that exchanges information with public entities in Nevada;

2. The Health Division of Nevada's Department of Human Resources;

3. Nevada's Department of Motor Vehicles and Public Safety (DMV&PS);

4. The Central Repository for Nevada Records of Criminal History in the Nevada Highway Patrol Division (DMV&PS);

5. The Office of Court Administrator;

6. Nevada district judges;

7. The Office of the Secretary of State;

8. Local government; and

9. The public.

At the second meeting, staff presented a comparison with other state public records laws and an overview of the Federal Freedom of Information Act (FOIA). Presentations regarding computer records and the fraudulent use of information were also given. The Chairman directed the advisory group to consider all the information presented and submit proposals to the subcommittee for consideration at the third meeting.

The advisory group then held a meeting that identified five major areas to be addressed. Those areas were:

- The definition and categorization of public records;
- Procedures for access to public records;
- The treatment of electronic records;
- The costs associated with public records; and
- Enforcement of public records laws.

The advisory group divided into five subgroups to propose recommendations in each of these areas. These groups conducted meetings and reported to the advisory group as a whole. The advisory group subsequently met two additional times and developed recommendations to submit to the legislative subcommittee. The subcommittee considered these proposals at its third and fourth meetings. The subcommittee adopted a total of 22 recommendations.

This final report of the subcommittee contains a discussion of the current status of the public records law in Nevada and an explanation of the recommendations adopted by the members. The report is divided into the areas of concern identified by the advisory group and subcommittee.

II. CURRENT STATUS OF NEVADA'S PUBLIC RECORDS LAW AND PROBLEMS IDENTIFIED

In order to readily understand the recommendations adopted by the subcommittee, this section of the report provides relevant background information. The current status of the law is discussed for each of the five major areas addressed by the subcommittee.

A. THE DEFINITION AND CATEGORIZATION OF PUBLIC RECORDS

This area was the most controversial and received the greatest amount of discussion. The Nevada Public Records Law was enacted in 1911 and has remained largely unchanged since that period. It provides in relevant part:

> All public books and public records of the state * * * the contents of which are not otherwise declared confidential, shall be open at all times during office hours to inspection by any person, and the same may be fully copied * * *

While the law states that "all public books and records" shall be open to the public, it does not define the term. In the early 1900's, the lack of a specific definition was common among state laws. However, the complexion of records has changed dramatically over the years in both the characteristics and kind of records kept by government as well as the volume and manner in which they are maintained.

The lack of definitions has resulted in a constantly evolving body of law that includes related legislation, Attorney General opinions, and judicial decisions. With respect to legislation, the subcommittee discovered over 250 exemptions to the general law that public records be open to the public. These exemptions are contained in both the *Nevada Revised Statutes* (NRS) and the *Nevada Administrative Code*. Appendix A provides the general public records law and a list of the exemptions.

In 1965, the Nevada Legislature amended the law by inserting the term "public" when describing government records. The previous law declared that "all" books and records of the State were open to the public. In common law, the right of access to government records was restricted to public records; therefore, the 1911 law was actually an expansion of the right to access because of its failure to qualify the

records as public. That right was restricted in 1965 by adding the term "public." The 1965 amendment is the most significant change to the law since its enactment.

In an attempt to discern the meaning of the law, at least a dozen opinions interpreting the law have been issued by the Attorney General. Most of these opinions were initiated by various state agencies attempting to decide whether to release a record.

Only one Nevada Supreme Court case dealt squarely with the public records law. That case is attached as Appendix B (*Donrey of Nevada v. Bradshaw*, 106 Nev 630, 798 P.2d 144, [1990]). The case concerned the accessibility of certain criminal investigative records as public records. The party seeking the records argued for the application of a balancing test, which was announced and applied in various Attorney General opinions (although these opinions are not binding). This test balanced the interest and justification of the agency, or the public in general, in maintaining the confidentiality of the document against the interest or need of the public to review the document.

Nevada's Supreme Court agreed and proceeded to apply a balancing test. It held that there were no pending or anticipated criminal proceedings regarding the records at issue, no confidential source or investigative technique to protect, no potential jeopardy to law enforcement personnel, and no possibility of denying someone a fair trial. The court ordered the records to be released.

In so doing, the court weighed the absence of any privacy or policy justifications for nondisclosure and the general policy in favor of open government. The test favors open government, but recognizes the existence of policy or privacy reasons for nondisclosure of public records.

This case has provided some guidance in determining the scope of the term "public record," but state agency officials and others in possession of public records testified that the balancing test is difficult to apply.

B. PROCEDURES FOR ACCESS TO PUBLIC RECORDS

The next area of concern identified by the subcommittee involves access to public records. Even if a definition of a public record is adopted and clarified, the current law is

void of any procedures governing access to such records. The method for agencies to respond to requests and the procedures that should be followed in the granting or denying of a request is not addressed. If a dispute arises, there is no direction regarding the method of resolving it.

C. THE TREATMENT OF ELECTRONIC RECORDS

The subcommittee received testimony indicating that electronic records are generally treated as public records as a matter of practice; however, the law is not specific to electronic records. Because of the unique and technologically advancing means of storing records electronically, it was suggested that any amendments to the law consider and include reference to the treatment of electronic records.

D. THE COSTS ASSOCIATED WITH PUBLIC RECORDS

The law is currently vague about the costs of providing access to and copies of public records. The law does not address the issue of whether an agency or local government may recoup the costs of equipment in addition to copies or the costs of computer equipment that may be necessary to provide equitable access. The law also does not address the issue of the government generating a profit by providing access to certain records.

E. THE ENFORCEMENT OF PUBLIC RECORDS LAWS

The public records law provides that all public records be open to the public for inspection and copying. The current mechanism of enforcement is codified at NRS 239.010 (2) and provides that:

> Any officer having custody of any of the public books and records described in subsection 1 who refuses any person the right to inspect such books and records as provided in subsection 1 is guilty of a misdemeanor.

Testimony indicated that the law is not substantive without some means of enforcement; however, due to the lack of definitions and other ambiguities in the statute, public officials could potentially be criminally liable for failing to release a record in good faith. It was suggested during the hearings that the criminal penalty be repealed and replaced with a civil mechanism of enforcement. On the other hand, it was suggested that, if some of the ambi-

guities in the law were clarified, the criminal penalty may be appropriate.

III. DISCUSSION OF RECOMMENDATIONS RELATED TO THE DEFINITION AND CATEGORIZATION OF PUBLIC RECORDS

Because the current law is void of a definition, the subcommittee recommended the adoption of a definition. In addition, it recommended a categorization scheme for public records.

A. THE DEFINITION OF PUBLIC RECORDS

In an effort to define public records in Nevada, the subcommittee and the advisory group looked to other states' definitions. Appendix C is a summary of the public records laws in the 50 states. An examination of the right to access in other states reveals that, although almost every state guarantees some right of access, the definitions and procedures for such access vary considerably. Parties interested in public records issues represent significant competing interests. Among these interests are the need for government efficiency, the right of the public to know, and the protection of confidential and private information.

After examining the various definitions, there appeared to be consensus among the subcommittee members and the advisory group regarding the basic definition of "public record." (A minority position preferred to use the term "government record" while the majority favored the term "public record.")

Therefore, the subcommittee recommends that the Nevada Legislature:

> **Enact legislation that provides for broad definitions of "public record" and "governmental entity." The definition should include electronic records as public records.** (BDR 19-398)

During the work session, the subcommittee adopted the following language as a model for drafting the definition:

> *"Governmental entity" means the State, its officers, agencies, political subdivisions, and any office, board or commission thereof which is funded, at least in*

part, by public money, or is established by the government to carry out the public's business.

"Public record" means a book, letter, document, paper, final budget, proposed budget and supporting information, map, plan, photograph, film, card, tape, recording or other material and electronic data, regardless of physical form or characteristics, which is prepared, owned, used, received, retained or maintained by a governmental entity in connection with the transaction of public business, the expenditure of public money or the administration of public property.

This model language was derived from Chapter 259, *Laws of Utah 1991*. The previous Utah public records law was similar to Nevada's as it was somewhat ambiguous. The Utah Legislature rewrote the law after studying the issue for over 2 years. The definition is very broad and inclusive.

B. RECORDS THAT ARE PUBLIC

The subcommittee and advisory group determined that, in addition to the basic definition, the law should be amended to include a categorization scheme that, by example, lists what is a record and which records are disclosable and which are not.

Therefore, the subcommittee recommended that the Nevada Legislature:

Enact legislation that creates certain categories which, by example, lists those records that are always included as public records. (BDR 19-399)

The subcommittee adopted the following language as a model to be used in drafting this category. The list identifies those records that are commonly recognized as public and should always be available for public inspection:

"Public record" includes, but is not limited to:
(a) Records maintained by a county recorder, clerk, treasurer, surveyor, the State Land Registrar, the State Engineer and other governmental entities which evidence:
(1) The title or encumbrances to real property;
(2) Any restrictions on the use of real property;
(3) The capacity of a person to take or convey title to real property; or

(4) The amount of any tax assessed to real or personal property, and the status of the account.
(b) Any contract entered into by a governmental entity.
(c) The name, gender, gross compensation, job title, job description, job qualification, business address, business telephone number, number of hours worked per pay period, amount of annual and sick leave taken and date of employment and termination of any former or present officer or employee other than law enforcement officers or investigative personnel if such a disclosure would impair the effectiveness of an investigation or endanger any person's safety.
(d) A draft that has never been made final but was relied upon by the governmental entity in carrying out action or policy.

C. RECORDS THAT ARE NOT PUBLIC

The subcommittee then determined that a list should be created to name those records that should not be deemed public even though the government may have possession of them.

Therefore, the subcommittee recommended that the Legislature:

Enact legislation that creates a category which lists certain information that is not to be considered a public record. (BDR 19-399)

This category contains information not normally considered "public". Access to this information would not be available to the public because it would not be deemed a public record. The subcommittee adopted the following language as a model to be used in drafting this category.

"Public record" does not include:
(a) Except as otherwise provided in this subsection, a temporary draft or similar material which is prepared for the originator's personal use or use by a person for whom the originator is working. A draft of a proposed budget and the supporting information for that proposal are not temporary, for the purposes of this subsection, if the originating department or entity submits that version of the proposal for final approval or adoption.

(b) Any material which is legally owned by a person in his private capacity.
(c) Any material to which access is limited by the laws of copyright or patent, unless the copyright or patent is owned by a governmental entity. This subsection does not grant the right of a governmental entity to obtain a copyright or patent.
(d) Proprietary software.
(e) Junk mail or commercial publications which are received by a governmental entity, officer or employee.
(f) Books, governmental publications or other materials which are:
(1) Cataloged, indexed or inventoried; and
(2) Contained, in the collections of public libraries.
(g) Property acquired by a library or museum for exhibition.
(h) Artifacts and nondocumentary tangible property.

D. PUBLIC RECORDS THAT SHOULD NOT BE DISCLOSED

The subcommittee also determined that a list should be created that categorized certain records and conditions related to those records and provided that, although they may fit the definition of public records, they should not be disclosed.

Therefore, the subcommittee recommended that the Legislature:

Enact legislation that lists certain kinds of information that falls within the definition of public record, but not withstanding that fact, must not be disclosed. (BDR 19-399)

The following list of such records was adopted by the subcommittee, with general agreement among the advisory group, to be used as a model to assist in the drafting of this category. If a record contains one of the following characteristics, it would not be available for public inspection.

1. *Access is restricted by a specific Federal statute or regulation or by a specific statute of this State.*

2. *It contains information of a governmental agency relating to an ongoing or planned audit, unless the final report of the audit has been released.*
3. *Disclosure would jeopardize the physical security of governmental property, juvenile facilities, detentional facilities or correctional institutions.*
4. *The information is related to a governmental investigation, unless the investigation has been closed, or to the identity of a confidential informant.*
5. *The information is privileged from disclosure pursuant to a statute of this State or a rule of the Nevada Supreme Court.*
6. *It is material in a library, archive or museum which has been donated by a private person and the period of limitation on disclosure has not passed. If no period is specifically agreed upon by the donor and the custodian of the material, the period of nondisclosure must be the period of the donor's life or 30 years after the receipt of the material, whichever is longer.*
7. *It contains questions or answers used in, or prepatory information relating to, an academic examination or an examination to determine fitness for licensure, certification or employment, and if:*
   (a) Disclosure would compromise the security, fairness or objectivity of the examination; or
   (b) A contract governing the use of the examination provides for the confidentiality of the questions or answers.
8. *It is information which is in the custody of a governmental entity that performs data processing, microfilming or similar services, but which belongs to another agency that is using those services.*

E. DISPUTED ITEMS

The following possible additions to the list were debated. There was disagreement on some of these issues among the members and the advisory group. Where an addition was made for each of the following various subheadings, the language in italics was adopted as a model to be used in drafting the remainder of this category.

Access Conditionally Restricted

9. *Access is restricted as a condition of participation in a State or Federal program or for receiving State or Federal money.*

There was some discussion of inserting the word "indirectly" to modify "participation." However, it was argued that the omission of the word would cover both indirect and direct participation.

Exemptions by Regulation

Some members of the advisory group favored adding a provision that would exclude records declared confidential by State agency regulations. The subcommittee elected not to include such records in the list, arguing that the responsibility to exempt records should remain with the Legislature.

Information Related to Benefits

Some members of the advisory group favored adding a provision that would protect information concerning eligibility for unemployment insurance benefits, social services, and welfare benefits. The subcommittee chose not to provide any additional protection than is already provided by law.

Personnel Files

After discussions regarding the merit of protecting certain information in personnel files, the subcommittee proposed the following model language:

10. *It is a personnel file of a governmental entity which contains information relating to the preemployment application or a postemployment evaluation, retention or promotion of the employee, to the extent that such information would reveal the person's home phone number, address, medical history or information of a personal or familial nature and not related to compensation or benefits received or to be received by the employee or his or her beneficiaries.*

Medical Files

The subcommittee debated the merits of allowing some medical records to be released as public records. The members determined that medical information of a personal nature should not be public, but such information of a general statistical nature should be public. Therefore, the subcommittee recommended that the following model language be included in the BDR.

11. *Access to a record is restricted if it contains information regarding a person's medical, psychiatric or psychological history, diagnosis, condition, treatment, evaluation, or similar data, to the extent that the information would reveal the person's identity.*

Auditing Techniques

The subcommittee adopted the following model language to protect against the disclosure of information that could facilitate embezzlement activity with government money by circumventing an audit.

12. *It contains information that would disclose auditing techniques, procedures or policies if disclosure would risk circumvention of an audit.*

Licensing Boards

Some members of the advisory group suggested a provision to protect information within the possession of licensing boards regarding a person's criminal history. It was argued that this information is already addressed by other state statutes, and such a provision was not included.

Government Appraisal and Procurement

It was also suggested that a provision be added to protect real estate appraisal information as the publication of this data may make future negotiations by the government for real property more difficult. The subcommittee determined that such publication did not create an unfair advantage and elected not to include such a provision.

A similar argument was made based on governmental procurement and the creation of an advantage in contracting, but

the subcommittee dismissed the notion for the same reasons stated earlier.

Litigation

The subcommittee adopted the following model language to protect certain information related to court cases.

> 13. *It contains material directly related to an existing lawsuit prepared in anticipation of or during litigation which has not been filed with a court or which would not be discoverable in accordance with the rules of Federal or State courts in which the matter is being litigated and which has been specifically determined by that court to be privileged for good cause shown under the standards of rule 26(c) of Nevada Rules of Civil Procedure by the Parties seeking nondisclosure.*

Trade Secrets

The subcommittee adopted model language to protect trade secrets. There appeared to be consensus among the advisory group and the members on the following language:

> 14. *The information contains trade secrets as defined in NRS 600A.030.*

Record Keeping Systems

The subcommittee recommended the following model language to protect the security of certain record keeping systems:

> 15. *It contains non-substantive administrative or technical information, including that contained in computer systems and programs, operating procedures or manuals, whose disclosure would jeopardize the security of a record keeping system.*

Balancing Test

One of the major points of contention during the study involved the balancing test adopted by Nevada's Supreme Court in *Donrey v. Bradshaw*. The majority of the advisory group argued that this balancing test is imperative because

it is impossible to define the universe of public records, and judgment calls will always be necessary. Even with a comprehensive definition and categorization of records, some information will inevitably be missed by the law. Also, some information collected by governments in the future may not be contemplated by the current law. This position also argued that the balancing test originates in the privacy protections guaranteed by the *United States Constitution* and cannot be altered by the State Legislature.

Another position argued that the balancing test was instituted because no statutory definition of public record and a definition would eliminate the need for the test. This position also argued that the balancing test is inconsistently applied by various agencies that and it is improper for an Executive Branch employee to conduct what is essentially a judicial test.

During the course of the hearings, it was also suggested that a different balancing test be adopted. The new test would be applied only to a record deemed nondisclosable. Some members of the advisory group argued that this use of the test was the intent of Nevada's Supreme Court in *Bradshaw* and that the case has been misconstrued. The balancing test should be applied to records deemed nondisclosable to determine if they should be disclosed, rather than applying them to public records to determine if they should not be disclosed.

After much debate, the subcommittee chose the latter approach and retained the balancing test but amended its application. The model language adopted by the subcommittee follows:

> **Enact legislation addressing the category of nondisclosable public records which allows any record deemed nondisclosable to be disclosed if, with respect to the particular record, the general policy in favor of open records outweighs an expectation of privacy or a public policy justification. (BDR 19-399)**

F. EXEMPTIONS

The advisory group determined that, due to the number of exemptions in Nevada law, it would be impossible to review them adequately within the budget and time constraints of

this legislative interim period. Thus, it was suggested that the exemptions remain as they are and be examined during the next interim.

Therefore, the subcommittee recommends that the 1993 Legislature:

Adopt a resolution requiring a study of all exemptions to the public records laws to determine which exemptions should be repealed, amended, or remain the same. (BDR R-395)

IV. DISCUSSION OF RECOMMENDATIONS RELATED TO PROCEDURES FOR ACCESS TO PUBLIC RECORDS

The subcommittee determined that the final report should recommend rules of access to records and procedures for the denial of access and an appeal of such denial. The current law is void of any such guidelines.

The subcommittee and advisory group examined the Federal FOIA's provisions in this regard and utilized the concept of providing a uniform means of requesting information and responding to such requests. Appendix D provides an explanation of the FOIA.

The subcommittee and advisory group also examined the results of a previous study and relied on that study in establishing procedures for access to public records. The results of that study are reported in Legislative Counsel Bureau Bulletin No. 83-2, *Access to Government Records*.

A. INITIAL PROCEDURES REGARDING ACCESS TO PUBLIC RECORDS

Based primarily on the analysis of the 1983 recommendations and relevant provisions in the FOIA, the subcommittee recommended that the 1993 Legislature:

Enact legislation which provides a uniform method of requesting information, procedures to provide access to or deny that information, and time frames within which responses or other actions are required. (BDR 19-397)

Following is the model language adopted by the subcommittee regarding the procedures for access to public records:

1. Except as otherwise provided, each agency upon request by any person shall make public records available for inspection and copying during regular business hours. The request may be oral or written and may be made in person, by telephone or by mail.

2. Unless information is readily retrievable by the agency in the form in which it is requested, an agency is not required to prepare a compilation or summary of its records.

3. Each agency shall ensure reasonable access to facilities for duplicating records and for making memoranda or abstracts from them.

4. If an agency is not immediately able to fulfill a request for a governmental record, does not intend to fulfill it or denies it, the agency shall inform the requester of his right to make a written request.

5. Within a reasonable time, but no later than 3 working days after receiving a written request for access which reasonably identifies or describes a governmental record, the agency shall:

(a) Make the record available to the requester, including, if necessary, an explanation of any code readable by machine or any other code or abbreviation;

(b) Inform the requester that unusual circumstances, such as the volume of records which have been requested or the need to search for, consult with or obtain records from another office or agency, have delayed the handling of the request and specify a time and date, no later than 10 working days after the reply would otherwise be due, when the record will be available;

(c) Inform the requester that the agency does not maintain the requested record and provide, if known, the name and location of the agency maintaining the record; or

(d) Deny the request.

B. PROCEDURES UPON DENIAL OF ACCESS TO PUBLIC RECORDS

There appeared to be consensus among both the subcommittee and the advisory group on the initial procedures and rules regarding access. The subcommittee addressed the issue of denial of a request for information at the agency level.

The advisory group initially recommended that the subcommittee establish an intermediate appeals committee or panel that could review the agency decision to deny access. Some members of the advisory group preferred an ombudsman approach rather than an appellate panel. Other members of the advisory group did not support the concept of an appellate body but preferred to create a mechanism for appeals to be advanced directly to the courts in an expedited manner.

After much debate, the subcommittee recommended that the Legislature:

> **Enact legislation which provides that where access is denied, the complaining party may directly appeal to a court of competent jurisdiction seeking an order compelling access and giving such proceedings priority on the court's calendar. Provide that court costs and attorneys' fees are awardable if the requester prevails.** (BDR 19-393)

C. ADMINISTRATIVE PANEL FOR APPEALS

As discussed earlier, some members of the subcommittee supported the concept of an intermediate panel and proposed that it be further explored. Testimony revealed that the State Library and Archives was requesting a bill draft separate from the interim study that would establish a committee for the approval of records and retention schedules. A similar bill was requested in 1991 but never introduced. The suggested committee was similar to the Utah public records committee which was considered by the advisory group and the subcommittee as a model during the course of the hearings. Chairman Porter directed the staff of the State Library and Archives to include the appellate board proposal in the bill draft as discussed by the advisory group. Thus, the subcommittee recommended to:

> **Include in the final report a statement of the subcommittee's support for the concept of an intermediate appealate body that would have concurrent jurisdiction with the courts to consider appeals from the denial of a public record.**

Although the subcommittee did not recommend specifically the establishment of an appellate committee, it did support the concept and directed that this report include a

discussion of the various alternatives. Following is a description of the alternatives considered by the advisory group and the subcommittee throughout the course of the hearings.

The majority of the advisory group supported the creation of an administrative level committee or panel to decide appeals when access has been denied. Some members of the advisory group supported an "ombudsman" approach similar to that used in New York. That state has a Policymaking Committee and an Executive Director that hears appeals in these matters.

The group did not agree on the membership of the committee but agreed it should be broad based and ad hoc. The group analyzed Utah's approach and determined it could be used as a model. The group agreed that the Office of the Attorney General should not be on the panel, but should act as counsel to the panel.

Some examples of approaches used in other states follow.

New York

The New York Committee on Open Government is made up of 11 members that set policy and serve staggered 4-year terms. Six members are from the news media and the public. The remaining five are from government agencies. The committee establishes policy and the Executive Director actually hears the individual appeals.

Connecticut

The Connecticut Freedom of Information Commission actually hears the appeals and consists of five part-time commissioners. Two are from the media, two are from agencies and one is a lay person. No more than three may be from one political party.

Utah

Since the advisory group and subcommittee studied the Utah scheme closely, the following description of the Utah program is included in the report.

1. The State Records Committee was created within the Utah Department of Administrative Services. The committee is made up of the following individuals:

   a. The State Archivist;

   b. The State Librarian;

   c. One citizen member appointed to a four year term by the governor upon the recommendation of the records committee;

   d. One individual representing the news media appointed by the Governor to a 4-year term;

   e. The Director of the Division of History;

   f. One individual representing political subdivisions appointed by the Governor for a 4-year term; and

   g. The State Auditor.

2. The Records Committee is required to take the following actions:

   a. Meet at least once every 3 months to review and approve rules and programs for the collection, classification, and disclosure of records;

   b. Review and approve retention and disposal of records;

   c. Hear appeals from determinations of access; and

   d. Appoint a chairman from among its members.

3. The Records Committee is authorized to:

   a. Make rules to govern its own proceedings; and

   b. Reassign classification for any record series by a governmental entity if that classification is inconsistent with the law.

4. The State Archivist is the Executive Secretary to the committee.

5. The State Archivist provides staff and supportive services for the records committee.

6. Unless otherwise reimbursed, the citizen member and the representative of the news media receive a per diem.

7. If the records committee reassigns the classification of a record, the governmental entity may appeal the re-classification to the district court.

The Utah law allows appeals to the records committee with the following being the major procedural and substantive provisions:

1. Appeal requested within 30 days after denial by the agency, or within 35 days after an agency has failed to act.

2. Records Committee schedules hearing no later than 5 days after notice of appeal and holds hearing within 30 days of the notice.

3. Records Committee provides notice to relevant parties.

4. Records Committee holds hearing allowing testimony and evidence and must issue an order within 3 days following the hearing.

5. The statute describes the requirements of the order and notice of right to appeal to district court.

D. OTHER PROVISIONS REGARDING ACCESS TO PUBLIC RECORDS

Testimony indicated that at times public information may be withheld because it is mixed with confidential information. The current law does not address this issue. Thus, the subcommittee recommended to:

Enact legislation to establish that the fact that a record contains both restricted and non-restricted information is not a reason for denying access to the non-restricted information. (BDR 19-397)

It was argued that once information is declared to be public and accessible, the government should not have an interest in attempting to determine the intended purpose of the information.

The members adopted the following recommendation in that regard:

> **Enact legislation that prohibits a public body from inquiring about the intended use of requested public information or making any other inquiry of a person requesting to inspect or receive copies of public information, except to the extent necessary to clarify the request for information. Include an exception for information requested from the Department of Motor Vehicles and Public Safety because *Nevada Revised Statutes* 482.170 requires the department to make an inquiry as to the purpose for requesting certain information.** (BDR 19-397)

An exception to this rule would exist for information requested from the DMV&PS because NRS 482.170 requires the department to make an inquiry as to the purpose for requesting certain information. The department is entitled to deny the information if it appears that it will be used for an illegal purpose.

V. DISCUSSION OF RECOMMENDATIONS RELATED TO THE TREATMENT OF ELECTRONIC RECORDS

The advisory group determined that any recommendations, in providing definitions, should address the status of the record storage medium. This includes micrographic, audio, video, digital and optical formats, and how these forms of information storage, when deemed public records, should be preserved and managed.

There appeared to be consensus among the advisory group and the subcommittee regarding the adoption of the five major recommendations made by a consultant, Margaret Hedstrom, in her December 1990 report to the Nevada State Historical Records Advisory Board entitled: "Management and Preservation of Nevada's Electronic Public Records." A summary of the report is attached as Appendix E. This study was done pursuant to executive order, and the recommendations address the concerns expressed during the course of the hearings.

These recommendations are listed below. The subcommittee recommended that they be in the form of resolutions urging action rather than mandates. This is due in part, to the budget constraints and uncertainties related to the economy. The subcommittee recommended the following:

- **The Department of Data Processing, in cooperation with the Nevada State Library and Archives is urged to create and maintain an inventory of statewide hardware, software and information.**

- **The Division of Archives and Records is urged to work with other State agencies to establish retention and disposition schedules for records when information systems are designed or redesigned. All State agencies are urged to consider record retention/disposition requirements at the point of system design.**

- **The Division of Archives and Records is urged to undertake a program to educate State officials about their responsibilities for retention, care, and preservation of government records with special emphasis on electronically-stored public records.**

- **Include in the final report support for the concept that the State should create an information storage facility and develop procedures for maintaining information.**

(These resolutions are all drafted as BDR R-394.)

VI. DISCUSSION OF RECOMMENDATIONS RELATED TO THE COSTS ASSOCIATED WITH PUBLIC RECORDS

The subcommittee determined that the costs of providing access to public records is primarily a part of the government "doing business". The members supported the concept that government agencies should be allowed to recoup the costs associated with reproduction of records. Some members of the advisory group suggested a flat copying fee be enacted into law. However, local governments objected to this approach as it would require amendment by the Legislature for any changes in the fees. Also, they argued that a flat fee may not be appropriate in rural areas of Nevada as the costs of copying may be higher because of service fees and other pertinent charges.

Therefore, the subcommittee recommended that the Legislature:

> **Enact legislation that allows only the cost of the materials and the equipment, not labor, regarding reproduction of records.** (BDR 19-396)

The advisory group and subcommittee examined the Idaho Public Records Law with respect to costs for copying information. The subcommittee based its recommendations, in part, on that law. The members directed that information relative to the Idaho law be included in this report, although it did not mandate the use of the exact formula. Appendix F is a letter from the Idaho Attorney General that explains the Idaho law, including the provisions addressing the costs of providing copies. Therefore, the subcommittee recommended the following:

> **Include in the final report support for the concept of government using a cost analysis formula to calculate a per copy price. The formula should consider the average number of copies per month, the purchase price of the copying equipment, and an amortized cost per month over the anticipated life of the equipment to achieve a total machine cost per copy.**

There was discussion among the advisory group and the subcommittee concerning "custom requests." These requests involve such things as personalized searches for records. The subcommittee recommended that agencies should not be mandated to conduct such searches, but if an agency determines to fulfill such a request, it may charge a reasonable fee for the search. The fee may take into account personnel time in additional to costs related to equipment.

The subcommittee, therefore, recommended that the Legislature:

> **Enact legislation which authorizes, but does not require, a governmental entity to fill "custom requests" (such as re-formatting information) and to charge a reasonable fee for completing such requests.** (BDR 19-396)

Some members of the advisory group raised the issue of requests for information in a format that is not normally

used by a government entity. The existing law does not provide guidance in this regard.

The subcommittee determined that re-formatting data to comply with such a request should not be mandatory, but should be permissive. Such requests are "custom requests" and should be governed by the preceding recommendation. Therefore, the subcommittee recommended the following:

> **Enact legislation which provides that, when a requester wants information in a format which is different from the format used to maintain or store the information, the government entity is not required to re-format the data. (BDR 19-396)**

VII. DISCUSSION OF RECOMMENDATIONS RELATED TO THE ENFORCEMENT OF PUBLIC RECORDS LAWS

Testimony before the subcommittee and discussions in the advisory committee meetings raised the issue of whether criminal penalties are appropriate in public records cases. Various agency directors argued that the current Nevada law, which makes it a misdemeanor to withhold a public record, is inappropriate since there is no definition of public record. It has also been argued that the statute may have constitutional deficiencies because it is vague. Others have argued that the use of penalties is not an issue since the statute has never been used to charge a government official.

The enforcement of the public records laws is discussed last because its provisions were dependent upon the amendments and other additions to the law regarding access.

One option suggested during the course of the hearings was that the criminal penalties should be replaced with civil penalties. As discussed in the section on access to records, the subcommittee elected to establish an expedited procedure in court that grants attorneys fees and court costs to a requesting party that prevails. Because of this provision, the subcommittee determined not to recommend civil penalties, and to repeal the criminal penalties. Therefore, the subcommittee recommended that the Legislature:

> **Repeal the existing criminal penalty relative to the failure to disclose a public record. (BDR 19-393)**

Enact legislation that prescribes the procedures for direct appeal to a court of law seeking an order compelling access and giving such proceedings priority on the court's calendar. Provide for court costs and attorneys' fees if the requester prevails. (BDR 19-393) (Also discussed in Section IV regarding access.)

Because of the complexity associated with modern public records and the sensitive information that is contained in some records, the subcommittee determined a need for a liability standard that could be applied to the actions of government employees. The subcommittee elected to base the standard on "good faith."

Therefore, the subcommittee recommended the following:

Enact legislation providing that governmental entities and employees are immune from suit and liability if they act in good faith in disclosing or refusing to disclose information. (BDR 19-393)

EXHIBIT B

Detail Listing from First to Last Step

N. " L I S

DETAIL LISTING
FROM FIRST TO LAST STEP

TODAY'S DATE:Oct. 14, 1993
TIME :11:12 am
LEG. DAY:93 Regular
PAGE : 1 OF 1

1993

AB 365 By Commerce PUBLIC RECORDS

Substitutes civil enforcement of access to public records for criminal penalty. (BDR 19-393)

Fiscal Note: Effect on Local Government: No. Effect on the State or on Industrial Insurance: No.

03/16	30	Read first time. Referred to Committee on Government Affairs. To printer.
03/17	31	From printer. To committee.
03/17	31	Dates discussed in committee: 4/13, 4/14, 4/20, 4/23, 5/3, 5/7, 5/11, 5/25 (A&DP)
06/01	84	From committee: Amend, and do pass as amended.
06/01	84	(Amendment number 510.)
06/02	85	Read second time. Amended. To printer.
06/03	86	From printer. To engrossment.
06/03	86	Engrossed. First reprint.
06/04	87	Read third time. Passed, as amended. Title approved. (41 Yeas, 0 Nays, 1 Absent, 0 Excused, 0 Not Voting.) To Senate.
06/05	87	In Senate.
06/05	87	Read first time. Referred to Committee on Govt Affairs. To committee.
06/05	87	Dates discussed in Committee: 6/18, 6/25 (DP)
06/26	104	From committee: Do pass.
06/26	104	Declared an emergency measure under the Constitution and placed on General File for next legislative day.
06/26	104	Placed on General File.
06/26	104	Read third time. Passed. Title approved. (21 Yeas, 0 Nays, 0 Absent, 0 Excused, 0 Not Voting.) To Assembly.
06/27	106	In Assembly.
06/27	106	To enrollment.
06/29	108	Enrolled and delivered to Governor.
07/02	111	Approved by the Governor.
07/06	0	Chapter 393. Section 5 of this act effective 12:01 a.m. October 1, 1993. Remainder of this act effective October 1, 1993.

(* = instrument from prior session)

NEVADA LEGISLATURE

SIXTY-SEVENTH SESSION

1993

SUMMARY OF LEGISLATION

PREPARED BY

RESEARCH DIVISION

LEGISLATIVE COUNSEL BUREAU

A.B. 365 (Chapter 393)

Assembly Bill 365 removes the criminal penalty for a state officer who refuses to allow access to a public record. Instead of the criminal penalty, the measure substitutes a procedure for civil enforcement of the laws governing access to public records. The bill also grants immunity from liability for damages to public officers, employees and their employers who act in good faith in disclosing or refusing to disclose information.

Referred to Assembly Committee on Government Affairs
ASSEMBLY VOTE: 41-0-1
Referred to Senate Committee on Government Affairs
SENATE VOTE: 21-0-0
Effective October 1, 1993

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ASSEMBLY BILL NO. 365—COMMITTEE ON COMMERCE

MARCH 16, 1993

Referred to Committee on Government Affairs

SUMMARY—Substitutes civil enforcement of access to public records for criminal penalty. (BDR 19-393)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION—Matter in italics is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to public information; substituting civil enforcement of access to public books and records for a criminal penalty for denial of access; conferring immunity upon public officers and employees for certain actions in good faith; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 239 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this act.

Sec. 2. *If a request for inspection or copying of a public book or record open to inspection and copying is denied, the requester may apply to the district court in the county in which the book or record is located for an order permitting him to inspect or copy it. The court shall give this matter priority over other civil matters to which priority is not given by other statutes. If the requester prevails, he is entitled to recover his costs and attorney's fees in the proceeding from the agency whose officer has custody of the book or record.*

Sec. 3. *A public officer or employee who acts in good faith in disclosing or refusing to disclose information is immune from liability for damages, either to the requester or to the person whom the information concerns.*

Sec. 4. NRS 239.010 is hereby amended to read as follows:

239.010 [1.] All public books and public records of state, county, city, district, governmental subdivision and quasi-municipal corporation officers and offices of this state (and all departments thereof), the contents of which are not otherwise declared by law to be confidential, [shall] *must* be open at all times during office hours to inspection by any person, and the [same] *books and records* may be fully copied or an abstract or memorandum prepared therefrom, and any copies, abstracts or memoranda taken therefrom may be utilized to supply the general public with copies, abstracts or memoranda of the records or in any other way in which the [same] *books and records* may be used to the advantage of the owner thereof or of the general public.

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[2. Any officer having the custody of any of the public books and public records described in subsection 1 who refuses any person the right to inspect such books and records as provided in subsection 1 is guilty of a misdemeanor.]

Sec. 5. NRS 122.040 is hereby amended to read as follows:

122.040 1. Before persons may be joined in marriage, a license must be obtained for that purpose from the county clerk of any county in the state, at the county seat of that county.

2. Before issuing a marriage license, the county clerk may require evidence that the applicant for the license is of age. The county clerk shall accept a statement under oath by the applicant and the applicant's parent, if available, that the applicant is of age.

3. The county clerk issuing the license shall require the applicant to answer under oath each of the questions contained in the form of license, and, if the applicant cannot answer positively any questions with reference to the other person named in the license, the clerk shall require both persons named in the license to appear before him and to answer, under oath, the questions contained in the form of license. If any of the information required is unknown to the person responding to the question, he must state that the answer is unknown.

4. If any of the persons intending to marry is under age and has not been previously married, and if the authorization of a district court is not required, the clerk shall issue the license if the consent of the parent or guardian is:

(a) Personally given before the clerk;

(b) Certified under the hand of the parent or guardian, attested by two witnesses, one of whom must appear before the clerk and make oath that he saw the parent or guardian subscribe his name to the annexed certificate, or heard him or her acknowledge it; or

(c) In writing, subscribed to and acknowledged before a person authorized by law to administer oaths. A facsimile of the acknowledged writing must be accepted if the original is not available.

5. If the authorization of a district court is required, the county clerk shall issue the license if that authorization is given to him in writing.

6. All records pertaining to marriage licenses are public records and open to inspection pursuant to the provisions of NRS 239.010. [Any county clerk who refuses to permit an inspection is guilty of a misdemeanor.]

7. A marriage license issued on or after July 1, 1987, expires 1 year after its date of issuance.

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Executive Director, Nevada Association of Counties; William Isaeff, Chief Deputy City Attorney, City of Reno; Michael Pitlock, Member, Nevada Public Service Commission; Myla Florence, Administrator, Welfare Division; Brooke Nielsen, Assistant Attorney General, Office of Attorney General; Debbie Cahill, Nevada State Education Association; Mike Dyer, General Counsel, Nevada State Education Association; Jim Weller, Director, Department of Motor Vehicles and Public Safety; Darcy Coss, Deputy Attorney General, Department of Motor Vehicles and Public Safety; Orland Outland, Self; Robert Gagnier, Executive Director, State of Nevada Employees Association; Frank Barker, Captain, Las Vegas Metropolitan Police Department; Arlene Ralbovsky, Director, Police Records Section, Las Vegas Metropolitan Police Department; Joe Melcher, Washoe County Recorder; James Wright, Chief Deputy Recorder, Washoe County, Robert Cox, Nevada State School Board Association and Washoe County School District; and Jim Richardson, Nevada Faculty Alliance.

ASSEMBLY BILL 364 - Makes various changes regarding access to public books and records.

ASSEMBLY BILL 365 - Substitutes civil enforcement of access to public records for criminal penalty.

ASSEMBLY BILL 366 - Establishes procedures for public inspection of public records.

ASSEMBLY BILL 367 - Defines "public record" to accommodate various forms in which records are maintained.

ASSEMBLY BILL 368 - Requires charges for copies of public records not to exceed cost.

Assemblyman Gene Porter, District 8, testified AB 364, AB 365 and AB 366, as well as AB 367 and AB 368 scheduled to be heard on Wednesday, April 14, resulted from an interim subcommittee which he had chaired, to study Nevada's laws governing public books and records. Committee members, a twelve member advisory group appointed by the Governor to assist in deliberations, and the results of the study can be found in Bulletin No. 93-9, Research Library, Legislative Counsel Bureau. Mr. Porter then described how the study was carried out with the results leading to the adoption of 22 recommendations. It was those 22

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recommendations which now made up the aforementioned five bills. Continuing, Mr. Porter said, "The issues involved with public records are difficult ones. There are few areas of public policy that have as many competing interests. The government's need for information, the people's right to have access to that information and the fundamental right to privacy must be delicately balanced. The task before the subcommittee and advisory group was enormous. Our public record's law has not been significantly amended since 1911. What you have before you is our attempt to balance those significant competing interests." Mr. Porter then gave the committee a brief overview of all the bills. In closing, Mr. Porter urged the committee to read the study and said, "The deliberations that you will undergo for the next two days, and subsequent work sessions, force you to balance the information contained, and which is now available in the technology age, with the public's right to know what its government is doing. Government has a lot of information on each of us, private industry has a lot of information on each of us....what the ACR subcommittee tried to do was formulate a broad, general policy that anything done on taxpayer time or expense within the public arena was accessible to the public." He explained the only exception dealt with medical records within a public facility, those records would be kept confidential. He then advised the committee to not try and craft exemptions to accommodate those in the audience who would testify to their own respected interest, as several hundred already existed in Nevada law and a subsequent interim study had been recommended to study those exemptions.

Mrs. Lambert questioned the meaning of the definition "governmental entity." She gave an example utilizing Chapter 624. Mr. Porter replied the subcommittee's definition was contained in Section 2 of AB 364. Mrs. Lambert then asked, "You think having 'funded by public money' will preclude any exemptions, like the example I gave you for the general improvement districts?" Mr. Porter answered he did not see any conflict in the two definitions. Further discussion followed.

Mr. Neighbors asked if a fiscal impact had been determined on any of the bills, specifically AB 366. Mr. Porter responded AB 366 merely outlined how to acquire a record, explaining the process.

Ande Engleman, Nevada Press Association (NPA) introduced Laura Wingard, City Editor, Las Vegas Review-Journal and President, Society of Professional Journalists.

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Ms. Wingard presented prepared testimony (EXHIBIT C) to the committee.

Ms. Engleman then introduced Evan Wallach, General Counsel, Nevada Press Association, citing his background.

Mr. Wallach stated the public not only had the right to know, but the need to know, in order to make intelligent decisions and to give informed consent. He then proceeded to elaborate on his statement, addressed Mrs. Lambert's concern regarding the definition of "governmental entity, and explained the objectives of each bill.

Mrs. Lambert queried Mr. Wallach regarding Section 3, page 2 of AB 364. She asked, "Who is going to determine this and will they need guidelines?" Mr. Wallach answered, "This section arises because some years ago the Nevada Supreme Court decided a case called Bradshaw." He then gave his interpretation of the Bradshaw case and its interpretation across the state by governmental entities. He added, "I have yet to hear of a situation where somebody has asked for governmental records which are open by law, and the AG's office or District Attorney has said, 'We balanced it and you won, you get these records.' That's wrong, that's dead flat wrong. That's what this is in here to correct." Further discussion ensued regarding balancing.

Ms. Engleman testified this was not the first attempt to bring Nevada's public record's law into the twentieth century. She referenced the interim study performed in 1982 and the access the public presently had under Nevada Revised Statute 239. In addition, she presented the committee with Exhibit D and said, "You see an article there before you where a Clark County Commissioner could not even access public information as to the financial status of his own County from the County Treasurer who was another elected official,...We are not set up to help the public, other than to give them some non-legal advice on things they might ask for when they go in....There really is no one to help the public at all at the present time." She then described the various problems encountered when attempting to acquire public records, the NPA's reluctance to participate in the interim study, the results of a private study she herself had conducted via telephone with each school district in an attempt to find out how much the County Superintendent of Education was paid, and pointed out the bills were a result of compromise. In conclusion, she directed the committee's attention to Exhibit E, a survey commissioned by NPA, and the removal of punitive

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affects on a public employee for refusing access to public records.

Mr. Williams asked for more clarification on Section 3. He suggested balancing dealt with a specific situation at a specific time but did not take into consideration future potentialities of abuse to the public. Mr. Wallach replied records closed by law were the only ones being dealt with. He said, "We are not asking that you mandate that somebody provide the information, because if we did and you did it, you would be saying it was open. We are not saying this laundry list of things which should be closed is something which should be opened. All we are saying in here is stop and consider. The situation that you pose is one factor to consider. But there are so many varieties in human experience, that all you can do is ask somebody in the law to apply it on a situation-by-situation basis. It's not perfect but it is the most workable thing we could create and it, at least, addresses your concern."

Mrs. Augustine commented on the survey saying, although statewide, it was such a small sample. A discussion ensued regarding statistical sampling.

In one last comment, Ms. Engleman clarified why it was important to open personnel files.

Karen Kavanau, Director, State Department of Data Processing, stated she had served on the advisory committee adding, "AB 367 which you will hear tomorrow declares electronic or computer records as a public record. AB 366 describes the procedure for accessing a public record. The Department of Data Processing is neutral as to what records should be accessible. This is clearly a legislative decision. I am here today to request two minor modifications to AB 366 and to emphasize a third point. If you would refer to Section 2 of AB 366 it reads,....I would ask that you would strike the words 'or other electronic means.' The reason I say that is because, if you don't, this could be interpreted to permit direct on-line access to government's databases and data communication networks. I don't believe that's your intent and I can tell you that state government simply isn't prepared for it. In Section 3, subsection a, subsection 2, if you would insert the word paper in the sentence that reads,....if you would amend that to say facilities for making 'paper' copies. The reason I ask that is, if you don't, it could be interpreted that government would have to provide facilities to make diskettes and tapes which could be very expensive. And finally, in Section 5, it reads,....I would like you to clarify....that we are talking about the government

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entity that actually does gather and use that data, not the data keeper. The word custody is somewhat vague." She then gave an example, adding, "I just need some clarification in that section to make that perfectly clear that the department of data processing or its equivalent in other government organizations is not required to provide information that it does not have authority over."

Chairman Garner asked Ms. Kavanau to provide him with a list of proposed amendments as well as a copy for Mr. Wallach.

Mr. Porter pointed to Section 2 of AB 366 and said what the committee had envisioned was simply a fax machine, therefore, he did not object to the proposed amendment in that area.

Mr. Garner explained he was going to hear all testimony regarding all the bills pertaining to public records, but no action would be taken until a thorough study had been performed.

Tom Grady, Executive Director, Nevada League of Cities (NLC), stated after joint meetings with Nevada Association of Counties (NACO) and the cities and counties, he was pleased to submit the joint statement of the two organizations (Exhibit F) which supported most of the legislation with amendments.

Robert Hadfield, Executive Director, NACO, testified he had been a member of the advisory committee. He agreed with Mr. Porter the proposed legislation affected everyone; and with NPA that there was a spirit of cooperation in the effort to come up with recommendations for the committee. However, he said he thought it was necessary to present the dialogue which had taken place during the study but was not contained in the recommendations. When Mr. Hadfield asked Mr. Garner if he should step through Exhibit F, item by item, or if the committee would prefer to read it at its leisure, Chairman Garner replied he preferred the latter choice. Mr. Hadfield then summarized the concerns of NLC and NACO.

William Isaeff, Chief Deputy City Attorney, City of Reno, stated he had served on the advisory committee and generally was in favor of AB 364, AB 365 and AB 366 with proposed amendments. Regarding AB 364, Mr. Isaeff discussed the definition of "governmental entity," suggesting two definitions were being offered, both differing among the five bills and needing resolution; the reverse balancing test and the results it could render; violations of the supremacy laws of the United States by district or state judges; and open personnel records. Expressing his concerns regarding AB 365, Mr. Isaeff said they

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pertained to criminal proceedings against public employees for not providing public records and attorney's fees and costs. He next referenced AB 366 and supported Ms. Kavanau's suggestions, stating his reasons why; expressed his concern regarding Page 1, lines 20-22, which he felt would be creating new records from old records; and said he would appear to testify further on AB 367 and AB 368 at the scheduled hearing. In closing, Mr. Isaeff said, "We think that a good effort has been made here. We obviously don't agree with everything that's in the report. As a member of that advisory committee, I strongly argued for things that did not make it into the report. But this is the legislation before you and we're prepared to support this as much as we can, with amendments we feel will improve the effort."

Mr. Garner asked for written copies of Mr. Isaeff's comments and amendments.

Mrs. Segerblom asked Mr. Isaeff, "Are you suggesting that a government contract with a private company should not be public?" Mr. Isaeff replied absolutely not, with comment.

Michael Pitlock, Member, Nevada Public Service Commission, supported the concept of the legislation but intimated clarification was necessary. He said he would provide the chair with proposed, written amendments.

Myla Florence, Administrator, State Welfare Division, supported concepts but stated concerns. Written testimony, including proposed amendments, was provided to the committee. Exhibit G pertained to AB 364, Exhibit H to AB 366.

Brooke Nielsen, Assistant Attorney General, Office of Attorney General, introduced Melanie Crossley, Deputy Attorney General, Office of Attorney General, who had participated on the advisory committee. Ms. Nielsen testified she should have signed up in support of the legislation but with amendments. She then provided the committee with Exhibit I, written testimony, and proceeded to summarize it.

Debbie Cahill, Nevada State Education Association, introduced Mike Dyer and Jim Penrose, Attorneys, Nevada State Education Association. She then turned the floor over to Mr. Dyer who spoke as general counsel for the organization. Mr. Dyer explained his comments were directed to personnel files of educational employees only and did not support or oppose any other part of AB 364 or the other bills. He said educational

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employees were unlike other employees, stressing teachers were subject to questioning by parents and other members of the public on a constant basis. Therefore, he did not think teachers should have their personnel records open to anyone and everyone who could pay the $2.00, $5.00 or $10.00, especially students who could circulate the files around campus and faculty. Mr. Dyer then gave reasons and examples why it would not be good to open personnel records of teachers. In conclusion, Mr. Dyer asked for an amendment to AB 364 to exempt the records of educational employees unless there was a pending civil or criminal action requiring a disclosure of those records.

Mrs. Segerblom asked what information was available on teachers, Mr. Dyer replied under AB 364, everything; under current law, the balancing test and Bradshaw applied. He then gave an example of a legitimate request. When asked how long employee records were kept, Mr. Dyer answered it varied from district to district.

Jim Weller, Director, Department of Motor Vehicles and Public Safety, introduced Darcy Coss, Deputy Attorney General, Department of Motor Vehicles and Public Safety, and said the department's position on the legislation was neutral, but he wanted to express the department's concerns to the committee, which he did.

Darcy Coss concurred with the statements which had been made by previous testifiers and added her own reasons why records should not be opened. In conclusion, Ms. Coss said she would provide her statements in writing to the chair and Mr. Wallach.

Mrs. Kenny questioned the release of names and addresses. Ms. Coss explained those names were released under current law for legitimate purposes such as law enforcement, insurance or accident reports. When asked if a form containing the reason why the request was being made was prepared in these instances, the reply was yes.

Mrs. Freeman asked for clarification regarding the DMV providing lists to catalogs. Mr. Weller responded DMV did sell mailing lists to catalogs, stating the department had realized $21,916 in 1992 and, to date, $21,067. The lists contained name, address and the information requested. Mr. Weller said it would be good if each assemblyman checked with their constituents to see if they would like to have their names sold, as currently, there was no law saying a person could remove their name from the mailing list.

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Mrs. de Braga queried if the request to not give out that information was honored. Mr. Weller replied there was nothing to preclude the department from doing that now.

Mr. Hettrick requested clarification on AB 366, lines 4 and 5, suggesting language should be tightened to exclude telephone modems as well.

A discussion ensued between Mr. Ernaut, Mr. Weller and Ms. Coss regarding the denial of access to records by a private citizen versus the selling of name and address lists to catalog businesses.

Mr. McGaughey said, from past legislative sessions, he remembered the reason for selling records had been budgetary, therefore he asked Mr. Weller to enlighten the committee in that regard.

Mr. Weller responded, "As I mentioned, the commercial sale accounts for around $21,000 to $22,000. That is just a small part of the $3.9 million the department's record section brings in for giving out those records. So, you are right, it would have a financial impact. If we did not give out as much as we did, it would reduce staff."

Mr. McGaughey then said, "There is the issue. Do we want to fund $3.9 million someplace else and retain privacy, or do you want to compromise the privacy?"

Orland Outland, speaking for himself, commented against the legislation. In addition, he gave the definition of "malfeasance," and said the legislation was blatantly an act of malfeasance, and the essence of malfeasance needed to be written into the statute with a three-step type penalty. In conclusion, he said he was highly supportive of openness in records, except for those he had spoken against, which he said would compound the problem for the individual constituent.

Mrs. Freeman asked Mr. Outland for his ideas regarding public and private partnerships in access of information. Mr. Outland replied, "I would hate to see it develop as a sham, as a mechanism to avoid accountability. If you are going to have advisory boards or commissions that will fall under this purview, then I feel that those types of activity should fall in the same type of oversight. I would hate to see it developed as an escape clause, as a mechanism to get around accountability. There is a little too much of that now."

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Robert Gagnier, Executive Director, State of Nevada Employees Association, addressed AB 364. He cited Page 2, subsection 2, starting on line 27 and said, "All the information you see there, except J on line 38, is currently public record as far as state employees are concerned. We have a law which specifies what is open, public record for classified state employees and it includes almost all of this information. We do have some problem, however, with adding J when you start talking about sick leave." Mr. Gagnier continued by saying he endorsed many of Mr. Isaeff's comments, but he was in opposition to some of the language which he then cited and proposed amendments to. In conclusion, Mr. Gagnier told Mr. Garner he would provide written copies of his amendments to the chair.

Frank Barker, Captain, Las Vegas Metropolitan Police Department, spoke in opposition to the legislation, providing Exhibit J to support his testimony.

Arlene Ralbovsky, Director, Police Records Section, Las Vegas Metropolitan Police Department, presented opposing testimony as outlined in Exhibit K.

Mrs. de Braga asked if a great number of requests for information was being turned down due to a lack of staff. Ms. Ralbovsky said the department was not turning down requests, only delaying them due to staffing. Mr. Barker added the staff limitations in the records department was overflowing into his department and he explained why.

Joe Melcher, Washoe County Recorder, speaking against the legislation, expressed his concerns to the committee and suggested adding language designating what kind of control the County Recorder would have of the records as there were many abuses which currently existed.

Mrs. Lambert queried issuing a subpoena to enforce a real estate transfer tax and asked if the tax statute specifically kept the information confidential. Mr. Melcher said he was not sure because no one had ever asked for that information although the information was available to the public. Further discussion followed.

James Wright, Chief Deputy Recorder, Washoe County, testified his concern was at what point a document became a public record; his department's ability to make a copy of the record before releasing it to the public; and the ability of the public to utilize equipment to make copies. Mr. Melcher agreed the last concern posed several problems for the department.

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Robert Cox, Nevada State School Board Association and Washoe County School District, echoed the reservations of Mr. Isaeff, Ms. Nielsen and Mr. Dyer, and requested amendments in those areas. In addition, Mr. Cox addressed the litigation section of AB 364 and stated his argument; AB 365, the balancing test, costs, and attorney fees. In conclusion, Mr. Cox said he would address a letter to the chair and Mr. Wallach stating his concerns and containing proposed amendments.

Chairman Garner explained the committee was running out of time, therefore, he would allow those who did not have the opportunity to testify to sign the attendance roster for the hearing on April 14, 1993, and he would permit them to speak prior to hearing the other bills on the agenda.

Jim Richardson, Nevada Faculty Alliance, expressed his concerns regarding AB 364, especially personnel records of educators. He asked that Section 3, the balancing test, be dropped, and suggested a notification procedure be included. He then cited what he believed to be other problems with the legislation.

There being no further business to come before committee, the meeting was adjourned at 10:56 a.m.

RESPECTFULLY SUBMITTED:

Betty Wills

BETTY WILLS
Committee Secretary

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Society of Professional Journalists
Las Vegas Professional Chapter

ASSEMBLY GOVERNMENT AFFAIRS
Testimony on Open Records Bills
Assembly Bills 364, 365, 366, 367, 368

Good morning, Chairman Garner, members of the committee, my name is Laura Wingard. I'm the city editor for the Las Vegas Review-Journal and am here today in my capacity as president of the Las Vegas chapter of the Society of Professional Journalists, which includes members from newspapers, TV and radio.

My purpose today is not to go line by line through the public records bills before you but to stress to you why they are important and needed.

First, Nevada has more than 165 statutory exemptions to its so-called Open Records Act. The number of exemptions more than doubles when exclusions made through administrative regulations are included. This should disturb anyone committed to making sure that the business of government is done in the open.

Because there are so many exemptions, it is important that these bills pass so a signal is sent to the public employees who hold public records that it is their job to ensure the public has easy access to those documents which indeed are open for review by taxpayers. Journalists, in the course of trying to inform the public about the business of government, frequently encounter roadblocks in gathering open records. Too often, government agencies try to discourage reporters by first refusing access, then delaying access and finally releasing the record.

For example, a Review-Journal reporter told me on Friday the trouble she had obtaining a sexual assault report filed with the Metropolitan Police Department. First, she stood in line in the records department for the report. The records clerk went to pull the report and then refused, saying she could release no sexual assault reports. The reporter knew this was wrong, so she went and tracked down Metro's public information officer, who then intervened on the reporter's behalf. The reporter then returned to the records department and patiently waited for the records clerk to black out information that would identify the victim's name or address. She then paid the $5 Metro requires for

1018 EXHIBIT C 15

any police report -- whether it's one page or 100 pages. If Metro's public information officer had not been available on Friday, the reporter would have left empty handed when there was no reason to withhold the public report.

This is not an isolated incident. Not a week goes by at the Review-Journal that a reporter does not complain to me about problems in obtaining public records. Some government agencies don't want to provide contracts they've made for lobbying services. Others don't want to reveal details of contracts with consultants and others. Some won't release the individual salaries of public employees. I would argue that all of these records should be open and available for public review.

Some have said the news media should stop whining about lack of access to public records and instead take government agencies to court every time a public record is refused. This would be a costly and unworkable solution. As I've said, my newspaper alone is refused public records every week. Add up all the other news organizations in the state -- not to mention citizens -- who are refused public documents, and the courts would face a glut of such cases. More importantly, lawsuits are public documents. A news organization does not want all of its competitors knowing it is suing for certain records, which -- if the courts ruled they were public -- then would be made available to everyone but with only one news organization having paid for the costly litigation.

So, in an effort to make it easier for the public to access the very records they paid to create through taxes, I urge you to pass these open records bills. By so doing, you would send a powerful message that you believe government's business should be done in the open and without fear of public scrutiny.

Thank you for listening to me. I'd be happy to try to answer any questions you may have.

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COUNTY GOVERNMENT

Treasurer spars with Schlesinger

Aston, commissioner argue over banks

By Mary Manning
LAS VEGAS SUN

County Commissioner Don Schlesinger threatened to take legal action against county Treasurer Mark Aston after Aston refused to provide a list of banks doing business with county funds.

Aston turned down Schlesinger's month-old request for further financial details Tuesday. "I don't feel by providing it that that information would be of any value to you," he said.

Schlesinger is seeking more information on the banks that handle county investments in an attempt to determine if the banks have good records in dealing with minorities.

But Aston said the information, in the hands of an untrained person, could be misconstrued or mislead to the county's detriment.

"I will do whatever it takes to make this information public," Schlesinger said. That includes requesting the Nevada State Press Association to become involved, he said.

"I share with Commissioner (Karen) Hayes my outrage that the public discussion was cut off by the treasurer and any other member on the board," Schlesinger said.

Aston said business with Valley Bank and brokerage houses are listed in monthly reports available to commissioners, County Manager Pat Shalmy and Comptroller Guy Hobbs.

Schlesinger pressed the treasurer for information on other funds connected to McCarran Airport, the Sanitation District or the Water District.

"On what basis do you need that information?" Aston asked.

A startled Schlesinger – his voice rising – responded: "We have the right to find out this information. ...

"I want to know all the banks. It is clear I do not have the information. It is clear the press does not have the information. It is clear the public does not have this information."

"Actually, Don, I don't have to give you the time of day," Aston responded.

"I'm not asking for the time of day," Schlesinger said. "I'm asking for the documents."

"I am not going to put the county's deposits at risk," Aston said.

At that point, Commissioner Paul Christensen moved to table the discussion. That prompted Commissioner Karen Hayes, chairing the meeting in the absence of Chairman Jay Bingham, to ask what was to be tabled.

"We're tabling the public's right to know, let's not kid ourselves," Schlesinger said.

"For the benefit of the commissioner who does not understand his job ... and for the benefit of the chair, who is old enough to know better," Christensen said he would ask Deputy District Attorney Mahlon Edwards to explain tabling.

The motion to table was approved 3-2 with Commissioners William Pearson, Thalia Dondero and Christensen in the majority. Hayes and Schlesinger voted against it. Commissioners Bruce Woodbury and Bingham were absent.

Schlesinger said the issue might wind up in court.

He also asked County Manager Pat Shalmy to draft a disclosure law applying to county records.

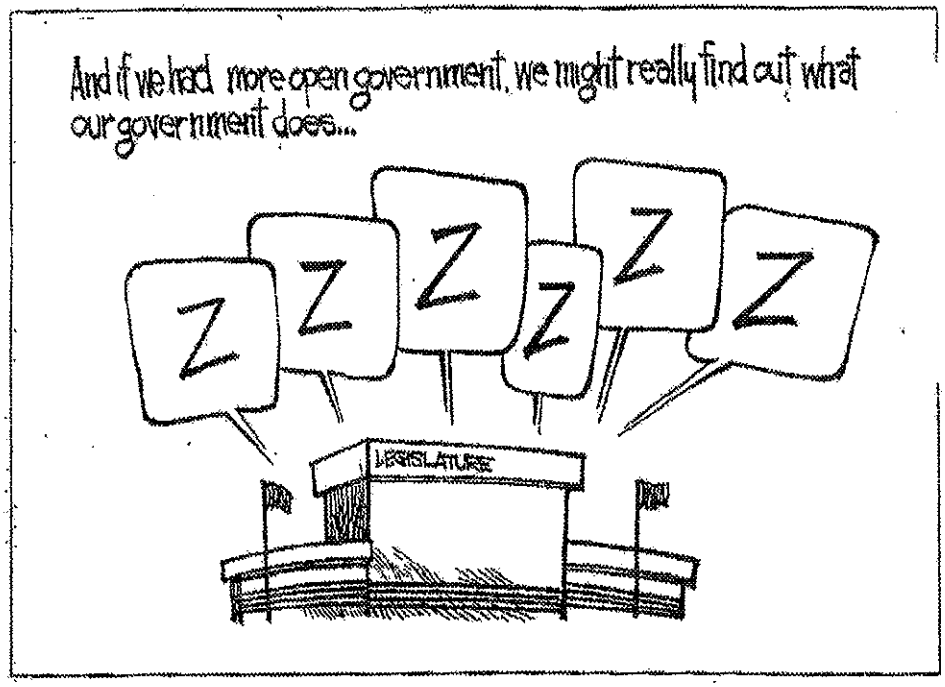
Hayes said that the county's investment policy should be reviewed. The board examined it in October.

PAUL CHRISTENSEN calls for an end to the argument.

DON SCHLESINGER demands county banking records.

PHOTOS BY BRAD TALBUIT / STAFF

EXHIBIT D 1020



Legislature should open the doors on government

The media have long been pushing for it. Now, the public agrees: State government must be open.

Legislators should pay attention to a survey released earlier this week, showing Nevadans strongly support an end to secrecy in government.

The survey, conducted by the Nevada Press Association, indicated 92 percent of Nevadans want their government agencies to provide their meeting agendas free of charge to the public.

The 500 residents in the survey believe the public's right to know outweighs a public servant's desire for privacy as it relates to job performance, qualifications or possible illegal actions.

Interestingly, even the majority of government workers polled favor open personnel records. That makes us wonder if most of the objections are coming from management positions in government.

Those polled prefer open government by wide margins. Ninety-five percent want records on government spending open, and more than 60 percent want public birth and death certificates. Support was strong for continuing the public notice requirements which newspapers regularly publish.

The association's survey shows what we've long suspected. People don't trust government agencies that operate behind closed doors or hide documents relating to their activities. Voters know open government is more responsive.

A legislative subcommittee has recommended opening more public records and limiting government power to keep its affairs secret. If the Legislature approves, the recommendations would be the first major changes in a law that has survived basically intact since 1911.

The association survey adds ammunition to the subcommittee's recommendations. Government should be more open. Documents should be subject to public review. Agencies should not be permitted to operate in secret.

Historically, government secrecy has been advocated by special-interest groups or well-meaning bureaucrats who think the public should only know what others think it needs to be told.

There are undoubtedly those who will tell the Legislature they need secrecy to to conduct business effectively. But, that's like telling your boss you work better when he isn't aware of what you're doing. Neither he, nor the public, will believe you.

The public must be able to review its government's workings. Without open government, the public cannot ascertain what it is doing. And if the public does not know what the government is doing, it can't make intelligent decisions at the ballot box.

Open government is the essential ingredient for democracies to work.

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Research Report

Nevada Press Association, Inc.

1992-93 Statewide Survey
of Registered Voters

Consumer Data Service

3601 North Lincoln
Oklahoma City 73105
(405) 524-0021

EXHIBIT E 1022 19

BARRY NEWTON
DIRECTOR

DR. ERNEST F. LARKIN
RESEARCH CONSULTANT

Consumer Data Service

3601 North Lincoln Blvd. • Oklahoma City, OK 73105 • 405/524-0021

TO WHOM IT MAY CONCERN:

The data in this report was generated through an extensive market research study conducted jointly by Consumer Data Service (CDS), a market research firm, and the Journalism Research Center at the University of Oklahoma.

The study was commissioned by the Nevada Press Association, Inc. The purpose of the study was to determine attitudes towards government records and the publication of legal notices by registered voters in the state of Nevada.

In order to gain valid insights into citizen preferences and tendencies, a structured questionnaire was developed and tested.

The questionnaire, constructed by Dr. Ernest F. Larkin, director of the Journalism Research Center at OU, was designed to be administered via telephone interviews with a random sample of registered voters in the state of Nevada.

Consumer Data Service and the Journalism Research Center are responsible for the design and execution of the study. All data were processed by CDS and the Journalism Research Center, and the report was prepared by us. I can certify that the data in this report are, to the best of my knowledge, valid and correct.

Respectfully,

Barry Newton
CDS Director

Nevada Press Association, Inc.

1992-93 Statewide Survey of Registered Voters

Executive Summary

Nevada's registered voters are sensitive and alert to issues affecting them personally and to issues and records under the control of their state and local governments. By a substantial majority Nevada's registered voters believe most, if not all, records obtained by government agencies should be accessible by private citizens. Registered voters believe the public's right to know outweighs a public servant's or public employee's contention to privacy with matters relating to job performance, qualifications and illegal actions. Even a majority of government employees are in favor of openness with respect to personnel records.

While Nevada's voters are strongly in favor of open records, they are not insensitive to the cost to provide such records. A majority of Nevada's citizens believe individuals should pay for public records they request, however they do not believe the government should make a profit on public records provided.

A desire for openness in government was expressed by each public sector examined. No significant differences were demonstrated by respondent age group, income category, gender, or rural or metropolitan residence. The basic message received from the survey was that citizens deserve to know what actions their government takes and have a right to access records and information a government may keep and maintain.

The following summary highlights the results of questions asked to 500 registered voters in Nevada regarding their attitudes toward state government records and their usage and feelings toward the publication of legal and public notices. Comparisons by the respondents' residence or by having a government employee in the household are indicated in the text headings accompanying the specific questions asked.

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Voter Access to Government Information

Registered voters to the statewide survey were asked if Nevada citizens should have access to specific types of information that were part of present day public records or information collected by public agencies. Of the 500 interviews, respondents were divided by metro and non-metro locations and by government and non-government employment status. By every measure examined, respondents were strongly in favor of openness to the following categories.

Q. Should private citizens have access to information on . . .

Response (N=500)	% of total sample	Metro respondents	Non-Metro respondents
Expenditure of taxpayer dollars by gov't agencies	95.8	95.6	96.0
Birth and death certificates	63.0	64.4	61.6
Work experience of public employees	76.2	73.2	79.2
Illegal actions by public employees	88.8	86.8	90.8
Job performance data on Dept of Welfare employees	75.2	74.8	75.6
Court information on hazardous products	93.4	91.6	95.2
Payment of settlements in suits against the government by private citizens	75.2	74.8	75.6
Job performance and job qualifications information on			
Gov't agency heads	90.0	90.0	90.0
Gov't department heads	90.8	89.6	92.0
Government or public agency administrators	90.4	89.6	91.2
All public employees	70.6	66.8	74.4
Teachers in public schools and colleges	77.0	78.4	75.6

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	Households with public employee	Household without public employee
Expenditure of taxpayer dollars by gov't agencies	96.2	95.7
Birth and death certificates	63.2	62.4
Work experience of public employees	74.4	77.2
Illegal actions by public employees	86.5	89.9
Job performance data on Dept of Welfare employees	66.9	78.9
Court information on hazardous products	97.0	92.8
Payment of settlements in suits against the government by private citizens	73.7	76.6
Job performance and job qualifications information on		
Gov't agency heads	87.2	91.6
Gov't department heads	88.7	92.2
Government or public agency administrators	87.2	92.5
All public employees	64.7	73.1
Teachers in public schools and colleges	69.9	79.8

Other results from questions relating to government records and meetings revealed that...

- 94.2% believe government agencies should continue to provide agendas of open meetings free of charge to the public.
- 86.0% believe private citizens should have access to all information which government agencies may have about them.
- 58.2% believe private citizens should pay for copies of records they request from government agencies, but...
- 78.7% do not believe government should make a profit on public records they sell or provide to citizens.
- 80.2% do not believe government agencies should arbitrarily close records which presently are open to the public.

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Q. *Should government agencies continue to provide agendas of open meetings free of charge to the public?*

Response (N=500)

	% of total sample	Metro respondents	Non-Metro respondents	Households with gov't employee	Households without gov't employee
Yes	94.2	94.0	94.4	96.2	93.1
No	3.2	3.6	2.8	2.3	3.8
DK/NR	2.6	2.4	2.8	1.5	3.2

Q. *Should private citizens have access to all information which government agencies may have about them?*

Response (N=500)

	% of total sample	Metro respondents	Non-Metro respondents	Households with gov't employee	Households without gov't employee
Yes	86.0	85.2	86.8	85.7	86.7
No	10.8	10.8	10.8	12.0	10.1
DK/NR	3.2	4.0	2.4	2.3	3.2

Q. *Should private citizens have to pay for copies of public records they request from government agencies?*

Response (N=500)

	% of total sample	Metro respondents	Non-Metro respondents	Households with gov't employee	Households without gov't employee
Yes	58.2	55.2	61.2	69.2	52.6
No	38.6	40.4	36.8	27.1	44.2
DK/NR	3.2	4.4	2.0	3.8	3.2

Q. *Should the government charge enough to make a profit on public records they sell to private citizens?*

Response (N=291)

	% of total sample	Metro respondents	Non-Metro respondents	Households with gov't employee	Households without gov't employee
Yes	20.3	23.2	17.6	17.4	20.3
No	78.7	75.4	81.7	82.6	78.0
DK/NR	1.0	1.4	.7	0.0	1.6

Q. *Should government agencies be able to close records to the public which are now open?*

Response (N=500)

	% of total sample	Metro respondents	Non-Metro respondents	Households with gov't employee	Households without gov't employee
Yes	12.2	10.0	14.4	9.8	11.8
No	80.2	81.2	79.2	82.0	80.9
DK/NR	7.6	8.8	6.4	8.3	7.2

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Nevada League of Cities
P.O. BOX 2307
CARSON CITY, NV 89702
(702) 882-2121

NACO
NEVADA ASSOCIATION OF COUNTIES
308 N. CURRY ST., SUITE 205
CARSON CITY, NV 89703
(702) 883-7863

April 12, 1993

To: Val Garner, Chairman
Assembly Government Affairs
and Members of the Committee

Re: Assembly Bills 364 - 368

Dear Chairman Garner,

During the interim both the Nevada League of Cities and the Nevada Association of Counties participated in the discussions of the ACR 90 study of public records. Both memberships agreed for the need to clarify certain issues regarding public records. Following the introduction of Assembly Bills 364 - 368, our respective memberships reviewed these proposals and would like to provide you with our comments and suggested amendments to clarify our areas of concern.

Some of our major concerns regard proposed changes to confidential records which could be in conflict with existing federal statutes without further clarification. Many documents including sexual discrimination, disabilities and affirmative action records need to remain confidential to assure that we do not conflict with prior court decisions and state regulations.

We ask that you also consider the fiscal impact of implementing certain aspects of these proposals. It is imperative that local governments retain the right to recover costs associated with providing these services to the public. Keeping in mind that some of the searches and compilation of public records can be extremely time consuming, we are concerned that unrealistic time frames could add significantly to the cost of providing this service as staffing levels may have to be increased or additional overtime accrued to ensure that the agencies will be in compliance with any new statutes.

Attached is a copy of these and other areas of concern for which we would like to offer amended language for your consideration.

Sincerely,

Thomas J. Grady, Executive Director
Nevada League of Cities

Robert S. Hadfield, Executive Director
Nevada Association of Counties

EXHIBIT F 1028
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PROPOSED AMENDMENTS
Rev 4/9/93

A.B. 365

Section 2 (pg. 1 line 7)

Replace sentence beginning with "if the requester prevails,..." with the sentence "The court may allow the prevailing party to recover court fees and reasonable attorney fees from the losing party."

This section (1) clarifies costs, (2) gives the court discretion in the awarding of costs and (3) allows the prevailing party, whether governmental or private, the opportunity to recover fees.

Section 3 (pg. 1 line 10)

Replace Section 3 with "A public agency, public officer, or employee is immune from liability for damages, either to the requester or the person whom the information concerns, if the public officer or employee acts in good faith in disclosing or refusing to disclose information.".

This clause extends to the public agency the immunity to liability if the employee acts in good faith.

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TESTIMONY BEFORE
ASSEMBLY COMMITTEE ON GOVERNMENT AFFAIRS
AB 364, AB 365, AB 366

OFFICE OF THE ATTORNEY GENERAL

BROOKE NIELSEN, ASSISTANT ATTORNEY GENERAL

APRIL 13, 1993, 8:00 A.M.

A clear definition of what is a public record and clear guidance regarding access to records is welcomed by everyone who must deal with public records and the public who is entitled to have access.

While generally in support of this monumental effort to reform our public records law, I have concerns regarding eight areas in these bills and I have recommendations to amend or delete them.

Six items of concern are in today's three bills and two are in AB 368 to be heard tomorrow.

AB 364

FIRST: AB 364 Section 3, provides that records that are confidential by law are still subject to being opened if a judge can be convinced that public policy justifies opening the particular record. It is a novel approach for a legislature to make all confidential records potentially open by letting a judge decide if there is justification to do so. The legislature determined the public policy when it made the record confidential and the public has a right to rely on that.

This section will generate unnecessary litigation costs because the government will have to defend every attempt to open a confidential record, unless appropriate waivers of confidentiality can be obtained. Inmates with nothing else to do will have a field day with this section.

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EXHIBIT I 27

SECOND: It is of great concern that the words "state regulations" are omitted in Section 4(2)(a). This section restricts access to records that are presently made confidential by federal statute, federal regulation and state statute, but opens information that is currently made confidential by state regulation.

There is a companion resolution, ACR 29, to be considered in the Assembly Committee on Elections and Procedures April 20, which will authorize an interim study regarding exemptions to disclosure in public records to determine if they should be repealed, amended or added. You should not toss away regulations that restrict access until you have the benefit of ACR 29.

I recommend that Section 4(2)(a) be amended by adding "state regulations of this state or political subdivision" to the list.

THIRD: Section 4(2)(b), while appearing to restrict access to medical records, does so only to the extent that the information would reveal the person's identity. All other information in the record is public. Since AB 366 Section 3 requires that the presence of confidential information in a record is not a reason to withhold the public information, the medical record would have to be edited to eliminate identity information, a very labor intensive task. These are records that should be confidential, I urged you to delete the words at the end of the paragraph which state "but only to the extent that the information would reveal a persons's identity."

FOURTH: Section 4(2)(c) addresses records customarily in the personnel files. This section makes very personal information including home addresses, medical information and evaluations in a personnel file open to anyone if it is related to hiring, retention, promotion, demotion or termination of employment. Opening personnel records may subject employees to harassment or threats, and undermine the rehabilitative purpose of progressive discipline.

There are others in attendance today who will express in detail the concerns that we all share about having personnel files open to the world.

FIFTH: Section 4(2)(g) restricts access to an open investigation file but does not restrict access to that file once the investigation is closed. There are very strong reasons to keep an investigation file confidential even after the matter is closed. An investigation file contains a wide variety of information

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which may be rumor, innuendo, untrue or unverified. In some cases release of information garnered in an investigation will risk lives or ruin reputations.

In addition, making an investigation file public once the investigation is closed will have a very detrimental effect on the ability of law enforcement or regulatory bodies to gather information. The Chief investigator for the Attorney General's office advised me that people talk freely to investigators only if they are assured that what they say will remain confidential. You must consider that governmental investigations include complaints against licensees and investigations preparatory to licensure in addition to criminal investigation. It is sobering to think that every inmate in our system will have access to investigation files simply because the investigation is closed.

Though the identity of a confidential informant and investigation techniques are protected elsewhere, there is cause for concern if any information in an investigation file becomes public information.

Subsection (g) must be amended to delete "unless the investigation has been closed."

SIXTH: Section 4(2)(i) & (j) of AB 364 appears to protect information prepared in anticipation of and during lawsuit to the extent it is privileged or not discoverable under the discovery rules. However, in order for the protection for information prepared in anticipation of a lawsuit to be applicable, the lawsuit must be filed. Prior to the lawsuit, access to information prepared in anticipation is not restricted by this language. This gives a great unfair advantage to a plaintiff who is anticipating suing the state or local government. While attorney-client privilege may protect some information, that privilege does not apply to all materials.

I recommend that Section 4(2)(i) be amended by deleting lines 40 and 41, and making line 42 be subsection (i).

Subsection (i) would then read: "It has been filed with a court and contains material which was prepared in anticipation of or during litigation."

Subsection (j) would remain the same.

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Next, I would direct your attention to AB 365.

This bill sets forth procedures for appeal of the denial of access to a public record directly to district court. The attorney general opposes the provision which entitles the prevailing requester, but not the prevailing party, to recover attorney fees and costs. It does not permit the agency to recover fees if the agency was correct in the denial of access. Rather than mandatory fees for the requester, it is recommended that AB 365 be amended to provide that "the prevailing party may recover his court costs and reasonable attorney fees in the proceeding at the discretion of the court. The judge can decide on the facts of the case whether attorney fees and costs are appropriate.

AB 366

AB 366 Section 6 sets out procedure for requesting public records and statutory time limits to either deny the request or to fulfill it. While three working days may be sufficient time to produce the requested information or determine whether it is restricted, 13 working days may not be enough time to copy a large volume of records for an agency that does not have adequate copy equipment and enough staff to fill the request and still carry on the tasks of the agency. This is especially problematic if the large volume contains commingled confidential and public information. Sufficient time must be given to do the job with the resources available.

I recommend that, under unusual circumstance at least thirty working days be allowed.

One other correction is needed related to "unusual circumstances." Section 6(4) should be amended to state "unusual circumstances includes but is not limited to"

Section 6(3).

This section is redundant. Section 6(1) already provides that the book or record may be inspected unless the request has been denied.

This concludes my testimony. I am happy to answer any questions.

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Press Association; William Isaeff, Chief Deputy City Attorney, City of Reno; Carole Vilardo, Nevada Taxpayers Association; Nancy Carr, Lyon County Recorder; Joe Melcher, Washoe County Recorder; Margi Grein, Director of Finance, Nevada State Contractors Board; Melanie Crossley, Deputy Attorney General, Office of the Attorney General; Arlene Rablovsky, Director, Police Records Section, Las Vegas Metropolitan Police Department; Wally Lauzan, Assistant Chief of Administrative Services, Department of Motor Vehicles; Darcy Cosa, Deputy Attorney General, Department of Motor Vehicles; Lucille Lusk, Nevada Coalition of Conservative Citizens; Anita LaRuy, City of North Las Vegas; and Eric Dabney, Director of Library, Parks & Recreation, City of North Las Vegas.

ASSEMBLY BILL 364 - Makes various changes regarding access to public books and records.

ASSEMBLY BILL 365 - Substitutes civil enforcement of access to public records for criminal penalty.

ASSEMBLY BILL 366 - Establishes procedures for public inspection of public records.

Chairman Garner opened the hearings on AB 364, AB 365 and AB 366 as there were those who had not had the opportunity to testify on April 13, 1993. Mr. Garner called the testifiers in order as they appeared on Exhibit B.

Jerry Zadny, Administrator, Division of Mental Health and Mental Retardation, was unable to appear but, for the record, submitted prepared testimony (Exhibit C) in opposition to AB 364.

Guy Rocha, Administrator, State Archives and Records, in opposition to AB 364, AB 365 and AB 366, read his opposing testimony (Exhibit D) into the record.

Pat Coward, Economic Development Authority of Western Nevada (EDAWN) and Nevada Development Authority (NDA), explained the purpose and mission of the development authorities, how competitive it had become with other states to draw new business, and how crucial it was to keep the confidentiality of information when dealing with potential businesses moving into the area. He said, "This is something that has a lot of the people concerned, maintaining that confidentiality....A business looking at making a move requires as much as two years work

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before anything materializes and a firm decision is made." He gave the committee an example of a business which ultimately did not choose the Reno area due to information which had been leaked. He recognized the need to maintain open records for the public in many areas but not necessarily when dealing with potential clients coming into the area. Mr. Coward then proposed an amendment to AB 364 which would provide client confidentiality (Exhibit E).

Mrs. Lambert asked if the boards of EDAWN and NDA were covered by the open meeting law, the answer was no.

Mr. Garner again asked the audience to provide written amendments to the chair.

O.C. Lee, Nevada Conference of Police and Sheriffs, and representing Mark Balin, Professional Fire Fighters of Nevada, said, "We are opposed to the personnel section of the records in AB 364. That does not mean that we have any opinion of any other portion of the bills before you." Mr. Lee referenced the yearly physical examinations, required by law of all police officers and fire fighters, which went into the personnel records. He suggested health records would immediately become public information, therefore, he strongly opposed that section of the bill.

Mrs. Augustine asked if it was true police officers did not have home addresses and telephone numbers published for their own protection, Mr. Lee agreed.

Mike Johanneson, Service Employees International Union, said he too was speaking against the personnel section of AB 364. He continued, "Presently there is quite a body of law regarding the differences, the arguments between privacy and public record, and access to public files, personnel files, that have come about through the Freedom of Information Act. What this bill does is it goes far beyond the existing law and what is accessible by the media and the public record. There is a lot of stuff in personnel files that are very private and would create significant problems for a number of employees. We've gone through this with other bills and if the committee would like, I will provide some court background, some case law on this thing from the Freedom of Information Act. But I don't see anything this bill does but replace existing federal law and go beyond the Freedom of Information Act to allow media access to personnel files. Accordingly, we strongly oppose that section of the law. The other thing I would like to suggest, is if you are going to entertain amendments excluding certain employees

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