MINUTES OF THE
SENATE COMMITTEE ON GOVERNMENT AFFAIRS

Seventy-fourth Session
February 26, 2007

The Senate Committee on Government Affairs was called to order by Chair Warren B. Hardy II at 1:36 p.m. on Monday, February 26, 2007, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Warren B. Hardy II, Chair
Senator Bob Beers, Vice Chair
Senator William J. Raggio
Senator Randolph J. Townsend
Senator Dina Titus
Senator Terry Care
Senator John J. Lee

STAFF MEMBERS PRESENT:

Olivia Lodato, Committee Secretary
Eileen O'Grady, Committee Counsel
Michael J. Stewart, Committee Policy Analyst
Erin Miller, Committee Secretary

OTHERS PRESENT:

Cecilia Colling, Deputy Administrator, Bureau of Vocational Rehabilitation, Rehabilitation Division, Department of Employment, Training and Rehabilitation
James E. Keenan, Nevada Public Purchasing Study Commission
Ed Guthrie, Executive Director, Opportunity Village
John Balentine, Purchasing and Contract, Washoe County
Jay David Fraser, Nevada League of Cities and Municipalities
Joseph A. Turco, American Civil Liberties Union of Nevada
Barry Smith, Nevada Press Association

Tom Porta, P.E., Deputy Administrator, Corrective Actions, Mining and Water Programs, Division of Environmental Protection, State Department of Conservation and Natural Resources
Paul Lipparelli, Washoe County District Attorney's Office
Frederick Schlottman, Administrator, Offender Management Division, Carson City, Department of Corrections
Wayne Carlson, Nevada Public Agency Insurance Pool; Public Agency Compensation Trust
William Hoffman, General Counsel, Clark County School District
John Redlein, City of Las Vegas
Michael Pagni, Truckee Meadows Water Authority
Dino DiCianno, Executive Director, Department of Taxation
Richard J. Yeoman, Administrative Officer III, Nevada Department of Transportation
Virginia (Ginny) Lewis, Director, Department of Motor Vehicles
Guy Louis Rocha, Acting Administrator, Division of State Library and Archives, Department of Cultural Affairs
Michael Fischer, Director, Department of Cultural Affairs
Scott Anderson, Deputy for Commercial Recordings, Office of the Secretary of State
Sabra Smith-Newby, Clark County
Dan Musgrove, University Medical Center of Southern Nevada
Maud Naroll, Chief Planner, Department of Administration

CHAIR HARDY:
The first request is Bill Draft Request (BDR) 31-430.

BILL DRAFT REQUEST 31-430: Revises provisions governing improvements constructed, altered, repaired or remodeled pursuant to lease-purchase or installment-purchase agreement. (Later introduced as Senate Bill 163.)

SENATOR TOWNSEND MOVED TO INTRODUCE BDR 31-430.

SENATOR BEERS SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS RAGGIO AND TITUS WERE ABSENT FOR THE VOTE.)

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CHAIR HARDY:
The next request is BDR 20-834.

BILL DRAFT REQUEST 20-834: Revises the authority of certain county fair and recreation boards to enter into certain real estate transactions. (Later introduced as Senate Bill 162.)

SENATOR TOWNSEND MOVED TO INTRODUCE BDR 20-834.

SENATOR BEERS SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS RAGGIO AND TITUS WERE ABSENT FOR THE VOTE.)

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CHAIR HARDY:
We will take testimony on Senate Bill (S.B.) 140 first.

SENATE BILL 140: Revises provisions relating to the Program to Encourage and Facilitate Purchases by Agencies of Commodities and Services From Organizations. (BDR 27-609)

CECILIA COLLING (Deputy Administrator, Bureau of Vocational Rehabilitation, Rehabilitation Division, Department of Employment, Training and Rehabilitation):
This is a relatively simple bill proposed by the Rehabilitation Division. This program carried throughout the nation is often referred to as a State Use Program. The Program allows an exemption for organizations that provide employment through training centers for individuals with disabilities. That exemption is given on the bidding process in state and local governments. The bill requires these organizations, also known as community training centers, register with the Division. This helps us understand who is providing these services and ensures they legitimately employ people with disabilities under this Program.

Senate Bill 140 asks once they have a contract, they report to us quarterly so we fulfill our obligation to report to the Legislature and others about activities of the Program.

CHAIR HARDY:
There are no checks and balances on utilizing this exemption?

MS. COLLING:
That is correct.

SENATOR BEERS:
I thought you certified clients.

MS. COLLING:
Community-based training centers are certified by the Division of Mental Health and Developmental Services. The Rehabilitation Division does not certify training centers. We work to assist centers in developing contracts with state and local government. The certification is not by this Program because some organizations provide services to individuals with disabilities who do not have mental or cognitive disabilities.

CHAIR HARDY:
That could be a logical next step if you determine people are taking advantage of this who should not otherwise be eligible.

MS. COLLING:
We have not seen that occur. However, it is difficult to know when we are not clear who is out there.

CHAIR HARDY:
It is a significant exemption. I am surprised it is not abused, but you have no way of knowing that until we start the Program.

SENATOR BEERS:
What problem are we solving?

MS. COLLING:
We do not have a way of understanding who is promoting these contracts. We are often asked, particularly by the Legislature, to report back on what is occurring with the Program. If we are not aware it is happening, we cannot report it. This bill helps us understand what is occurring, do a validation check and report on the activities.

CHAIR HARDY:
If we do not have this Program, it is an open exemption to competitive bidding laws.

SENATOR BEERS:
We have reports now, but do they only come from our purchasing side?

MS. COLLING:
The community training centers we are aware of provide us with reports. We do not require them to license with us at this time. We ask that they register with us so we can assure they are doing what they proclaim they are doing.

SENATOR BEERS:
Purchasing must know what the state does.

MS. COLLING:
Yes, purchasing works closely with us and informs us. The Legislature often wants to know how many people are working with disabilities, how long they are working and what they are getting paid. The Purchasing Division would not have any information about these subjects.

JAMES E. KEENAN (Nevada Public Purchasing Study Commission):
I am not aware of furnishing after-the-fact reports of what we have done. I have been in touch with the Rehabilitation Division about contracting with someone to do some work. I have not awarded any contracts in Douglas County; therefore, I would not report anything in that manner. State purchasing is different.

SENATOR BEERS:
The government purchaser establishes a fair market price. Is that correct?

MS. COLLING:
The community training center is supposed to establish a fair market price to negotiate with the government purchaser.

ED GUTHRIE (Executive Director, Opportunity Village):
Opportunity Village is the largest community training center in the State of Nevada. We serve about 650 people with severe disabilities. We are certified by the Division of Mental Health and Developmental Services of the Department of

Health and Human Services as a community training center. We pushed for this bill a few sessions ago to provide more vocational opportunities for people with severe disabilities. We probably utilize this provision more than any other group in Nevada. We have between 50 to 100 people working on various contracts under this provision of the law. This Program mirrors a federal program called the Javits-Wagner-O'Day Program, which has been in operation since the early 1930s. We support changes requested because the regulation put in place will maintain the integrity of the Program.

CHAIR HARDY:
We will close the hearing on S.B. 140.

SENATOR BEERS MOVED TO DO PASS S.B. 140.

SENATOR RAGGIO SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR HARDY:
We will now hear testimony on S.B. 137.

SENATE BILL 137: Revises provisions relating to local governmental purchasing. (BDR 27-365)

JOHN BALENTINE (Purchasing and Contract, Washoe County):
As opposed to fixing a problem, this bill will lead to government efficiency. In 1993, the bid limit was partially raised in larger counties. In 1999, smaller counties also raised the bid limit. The bid limit became $25,000. The consumer price index has increased over 40 percent. Given this and other changes in our economic condition and the declining dollar since then, $25,000 is a small purchase threshold. It is not one that should require the time and expense of a sealed bid process. Administrative costs to prepare to award a $25,000 bid are the same as if that bid were $100,000. Local government resources could be more wisely spent on larger procurements.

CHAIR HARDY:
I tried to do research on the 1993 law when it changed. Prior to that, it was broken down by population. Could you give us a tutorial on what happened before the 1993 law? When was the cap last raised?

MR. BALENTINE:
Prior to 1993, the formal bid limit was $10,000 and the informal bid limit was $5,000. In 1993, counties over 100,000 in population were granted a $25,000 formal threshold and a $10,000 informal threshold. The rural counties were kept at the $10,000 formal and $5,000 informal thresholds. In 1999, *Nevada Revised Statute* (NRS) 332.041 went away. The bid limits were set at the $25,000 formal and $10,000 informal threshold under NRS 332.039.

There are several advantages to S.B. 137. It will reduce administrative costs with time spent on purchases and leave more time for our professional purchasing staff to be analysts. It would encourage greater participation from small and minority-owned businesses that often lack the knowledge, resource and expertise to bid on large, complex government contracts. Many suppliers are reluctant to incur administrative costs to prepare sealed bids for the smaller dollar requirements.

All the surrounding states have a higher bid threshold. We find sealed bids are an administrative expense bilaterally incurred by the governmental entity and the vendor submitting formal packages. Costs to do a formal bid are from $300 to $5,000.

SENATOR CARE:
The handout (Exhibit C) references bids for supplies and services. Is it possible that one of these contracts, in excess of $25,000 but less than $50,000, might have an automatic renewal term such that the contract price upon renewal would exceed $50,000?

MR. BALENTINE:
That is possible.

SENATOR CARE:
Would that become public? Is it conceivable you would end up with a contract price in excess of $50,000 doing what you want to do with the bill before us today?

MR. BALENTINE:
We put out a contract for $45,000 with a provision for three one-year renewals which means an aggregate of more than $50,000. In that case, the Washoe County Board of Commissioners would ask me to bring that to them, and they make the award if it exceeds $50,000.

MR. KEENAN:
I, and most of my colleagues, deal on an annual aggregate basis. If a dollar figure is limited to an aggregate of one year, that is the threshold we choose. If it is automatic renewals or extensions and we see an aggregate will exceed the original amount, then we treat it as the larger procurement.

CHAIR HARDY:
That is not addressed in the statute. You are doing that as a matter of policy. Senator Care's question is an important one. That has the potential of getting around the law. We will not process this bill today until some of our questions can be answered by Legal Division.

SENATOR LEE:
Let us say a construction contract goes out. Are you allowed to split the bid: this amount for material and this much for labor?

MR. KEENAN:
If it is a construction contract under NRS 338, it does not apply. In either case, we are not allowed to split awards, whether it is NRS 332 or 338 or a combination. In many instances, the local government buys materials under their own contract. The price we pay for those materials is added to the value of construction work to be done. The total bid is considered for threshold basis.

SENATOR LEE:
That is codified. That is the way the system works.

MR. KEENAN:
Nevada Revised Statute 338 states awards cannot be split.

CHAIR HARDY:
We want to ensure this bill does not encroach on NRS 338 before we process it.

JAY DAVID FRASER (Nevada League of Cities and Municipalities):
We support S.B. 137. Some of our smaller entities want a lower amount before the governing body. The final section in section 1 indicates they can set a lower level.

CHAIR HARDY:
That is the existing law, and it is not our intent to change. We close the hearing on S.B. 137 and open the hearing on S.B. 123. This bill will go to subcommittee; there will be ample opportunity to work with Senator Care and amend S.B. 123.

SENATE BILL 123: Makes various changes to provisions relating to public records. (BDR 19-462)

SENATOR TERRY CARE (Clark County Senatorial District No. 7):
I came to Nevada in 1979 as a reporter for the American Broadcasting Company television affiliate in Las Vegas. I continued to be a print and electronic media journalist until 1986. I have retained an interest about what is a public record and why. In 1991, the Nevada State Legislature commissioned an interim study that resulted in two bills: A.B. No. 364 of the 67th Session and A.B. No. 366 of the 67th Session. One bill intended to clarify a public document; the other assessed how to obtain a public document. Both of those bills died. In 1997, the Legislature tried again with A.B. No. 289 of the 69th Session, which was another attempt to clarify a public document. That bill also died, and there have been no attempts since then. An article in the *Las Vegas Sun* (Exhibit D) deals with financial travails of the University Medical Center (UMC) in Clark County. The last section of the article states the *Las Vegas Sun* requested a list of meeting minutes and other information. The hospital refused to grant any of the requests. I take that as a response of drop dead. Another article (Exhibit E) in the *Las Vegas Review-Journal* deals with a consultant to the Department of Family Services for Clark County excluding certain information from documents turned over not pursuant to a request by the press. I bring this up to show that on rare occasions, there is a cavalier attitude about the taxpayer's right to see what the government is doing. That means the right to inspect documents generated and obtained by the government. There are exceptions, and in Nevada, about 300 statutes govern those exceptions. However, problems persist which is why I come before the Committee with this bill.

Last week after Senator Reid spoke and we adjourned the Senate side, I went back to my desk and on it was the material telling me I could introduce S.B. 123. I stood on the Senate Floor and commented I was not entirely happy with the bill as drafted. Since some Legislators have not received bill drafts, I introduce the bill as written and work out the problems in Committee. I received the amendments today (Exhibit F), so many people who reviewed S.B. 123 have not reviewed my amendments.

The general rule in Nevada is all public books and records of government are open unless the contents are declared confidential by law. This bill does not change the status of anything confidential pursuant to statute or case law. I am more concerned with how the statutory apparatus works when requesting a document that is not confidential.

Section 2 of the original bill and Exhibit F are the same. The Committee should read section 2 as a preamble. Documents held by the government are of such importance that you need a statement of policy. All laws under NRS 239 are to be construed liberally, but any exemptions are narrowly construed. We favor the policy of openness.

Section 3 is a matter of contention. On occasion, the government farms out, by contract, some services it normally performs. Let me give a hypothetical example. If the county decides it needs to privatize the jail, it is absurd to think once that happens, the public has no right to know what goes on inside the jail or how the jail is run. I am not suggesting because a private entity receives public funds, everything it does or every document it has is open to scrutiny or inspection. If an accounting firm is retained to perform certain services, the accounting firm's records concerning other clients should not be open to public scrutiny. In the case of the jail, let us suppose a reporter finds enough cases to convince him or her a process of abuse is going on and wants to see records generated on the performance of that private company carrying out the governmental function. Those records would be public records. That is the intent of sections 3 and 7 of this bill. Section 7 contains definitions including a definition of a nongovernmental entity.

SENATOR RAGGIO:
If those same records were deemed confidential under existing statutes, were it not for the fact it is a nongovernmental entity, would this language preserve that confidentiality status?

SENATOR CARE:
That would not change.

SENATOR BEERS:
If a health care provider uses Medicaid to treat a patient, that patient's medical record is confidential. I do not see that happening in the proposed wording in S.B. 123.

SENATOR CARE:
All I can do today is express the intent. It is not possible to think of every hypothetical when you draft a bill like this, which is probably why we have over 300 statutes governing confidentiality.

CHAIR HARDY:
It is important we establish concerns with the bill and Senator Care's intent and make note of that. When we go to subcommittee, we can work through those issues to assure the intent is accurate.

SENATOR RAGGIO:
That could probably be addressed in the bill by saying the confidential status remains, even in a nongovernmental entity, if otherwise provided.

SENATOR CARE:
That would clarify it. Section 4 of the bill is different than Exhibit F to some degree. If a reporter makes a request, he or she is entitled to know when the government is going to respond. There is no law like that. The biggest concern people expressed to me is the two-day time period. Washoe County has a two-day policy. The city of Reno has a five-day policy. Washoe County has language in the policy that is not absolute. The requestor should know once they make a request, they will get a response within a certain time. If it is not possible to get a response within that time, the requestor can get an explanation why the information cannot be obtained in that time. An entity cannot respond within two days if the information is in boxes and you have to search. The county recorders told me they had a request from Kansas wanting every single document with the county recorder. Clearly, these are extraordinary circumstances that cannot be done in two days. I would like to work this bill with people who brought legitimate concerns to me; there has to be some way the reporter knows the deadline.

Section 4, subsection 1, paragraph (d), subparagraph (2) of the amendment is different, although the principle is the same. If the governmental entity says to the requestor, "We are not going to give it to you, we do not have to," then you have to cite the legal authority. Ultimately the entities that refuse to turn information over for reasons of confidentiality do so because they place faith in a specific statute. I thought about saying case law, but any case law will take you back to a specific statute. You cannot say no without saying why. Another provision in section 4 states if the governmental entity responds by citing a statute, it is stuck with the original position and cannot come up with another position if the requestor petitions the court later.

Section 4, subsection 2 is drafted so if the governmental entity fails to provide notice of the extraordinary circumstances, it waives any reliance it might have upon a statute for confidentiality.

CHAIR HARDY:
Can we do that? We may not be able to waive that.

SENATOR CARE:
What recourse is there when an entity knows it is supposed to turn over documents and says "let them sue us, they will never do it?" If it is not a waiver of confidentiality, there must be some other mechanism.

In Exhibit F, section 4, subsection 2, paragraph (b), lines 20 through 22, I struck the provision regarding personal privacy to avoid giving a clerk the unbridled discretion to say we are not turning this information over because it is a private matter. That is usually the reason an entity does not want to relinquish it; it is embarrassing. If a document is already confidential pursuant to statute, it is because of a policy, security or confidentiality concern. The language "personal privacy rights" does not have to be there. It is assumed in current law.

Section 4, subsection 3, lines 26 through 29 have language stricken. That addresses where the government entity will not turn over the document, and the aggrieved party would not have to seek an administrative hearing; they could go straight to court. That language does not belong there. There is a presumption of bias when the hearing officer is under the same department that denied the request.

Section 4, subsection 4 addresses what happens when confidentiality is waived and damages result to the third party. The bill is drafted to say the government is liable for damages in the event the third party sues and can demonstrate damages.

Section 5 codifies burden is on the government to demonstrate that confidentiality exists. Section 6 says if the document is confidential today, ten years from now, the presumption is it is no longer confidential. However, if the governmental entity can demonstrate it ought to remain confidential, it shall remain confidential. When I drafted this section, I had in mind the State Gaming Control Board. I would love to see the Howard Hughes file. My understanding is that it is confidential in perpetuity. There might have been a reason to keep a document confidential, but deaths, time and events lead to reasons why a document should not remain confidential after a certain point. In my research, I discovered some states had a provision like this.

Section 8 of the bill is new to Nevada. It is the redaction provision. I do not want the government to say, "We have a document that is confidential because on one page, there is a sentence that has confidential information so we will not turn it over." Section 8 says redact it, but turn over the part of the document that does not contain confidential information. The Freedom of Information Act (FOIA) has a similar provision.

Originally, section 10 meant to say ten years after passage of the bill, presumably October 1, the clock starts ticking on the ten years. The revision in Exhibit F says if the bill becomes law on October 1—assuming section 6 with the ten-year provision is still there—those documents held confidential prior to October 1, 1997, would not be confidential unless the courts agreed.

I followed this discussion for years. By and large, the governmental entities perform and honor those requests without incident, but on occasion, they do not. That is the basis for S.B. 123. You are going to hear legitimate objections. There is an example (Exhibit G). I could not have contemplated all the scenarios you are going to hear. I am willing to work with anybody on this bill, but I would like my basic points to survive in some form.

SENATOR RAGGIO:
This bill seems to be one-sided. The requests are going to come mostly from the media. This puts the burden on the governmental entity. What concerns me is

the example you gave where somebody requested copies of all your public records. Should there be some requirement for a specific request in written form? Who is going to pay the cost?

SENATOR CARE:
In current law, the entity is allowed to charge a fee associated with the cost of copying, not the overhead. The reason for that is, as a matter of public policy, requests for public documents are of significance, and when employees of the entity are making copies of those documents, they are working for the taxpayer. The Majority Leader raises a good point. The answer to his question is you cannot honor some requests and not others. Ultimately, there has to be a workable time frame.

SENATOR RAGGIO:
If you require the government entity to reply in written form, you should require the requestor to do so in writing and make a specific request so the items they are looking for are known.

SENATOR CARE:
Under FOIA and the Privacy Act, a form is filled out. However, there are situations where a reporter may need the information for a story to be published tomorrow. That reporter knows somebody in the office knows the whereabouts of the information, picks up the phone and the document is in front of him or her. We can talk about a written request, but I do not want a layman to come into an office, request a document and the clerk says, "You have to send us a letter and fill this form out in triplicate ... ." An oral request should be sufficient. If it is lengthy, it probably has to be in writing.

SENATOR BEERS:
What about the specificity issue Senator Raggio was suggesting?

SENATOR CARE:
An entity cannot respond to a request unless it understands the request. If the request is in writing, you know what that is. Therein lies the problem. On the other hand, I do not know what happened in the case of the *Las Vegas Sun*, but I have a feeling the request to UMC was not in writing. The request seemed perfectly legitimate, and there was no confusion about what documents had been requested.

CHAIR HARDY:
I am wondering about the precedent we are setting. If we are saying these must be liberally carried out, and narrowly carried out on other side, does that have a far-reaching impact on other statutes we do not say that on? I want that as part of the discussion and something for Legal Division to consider.

SENATOR CARE:
The language goes to chapter 237 in NRS, not anywhere else.

CHAIR HARDY:
I want to ensure we are not setting some standard that if this language is not included in every other statute, we are creating some difficulty in the other statutes. The other issue is the part where it states, "extraordinary circumstances exist which make it impossible ... ." I do not know how you would determine what is impossible. These questions are for consideration of the subcommittee and Legal Division.

SENATOR CARE:
I mentioned the case of an entity that knows it has to turn over documents, refuses and takes the let-them-sue-us approach. If they lose, they have to pay reasonable costs and attorney fees. My understanding is there are jurisdictions that impose misdemeanors on public officials who, in spite of knowing better, violate public record law. That language is not in this bill but is a subject I would like to explore during subcommittee.

CHAIR HARDY:
My concern is the example where the requestor wanted all public documents. You and I would say it would be impossible to do that in two days. However, if we put the entire staff on it, the project would not be impossible. We need to be careful about using the word impossible. My intent is to send this to subcommittee with Senator Care as chair and Senators Beers and Townsend.

JOSEPH A. TURCO (American Civil Liberties Union of Nevada):
This bill is an important bill, and people are interested. We favor it because it addresses weaknesses the American Civil Liberties Union has to deal with regularly. Without a time limit, we are faced with dilatory behavior on the side of those who maintain the records. They vacillate and ignore our requests because they can under the present law. Section 8 is important. As the law stands, if a portion of a book or document to be obtained contains confidential

material, the entire document is deemed confidential. Allowing the maintainer of the book or record to redact what is confidential serves the legitimate purpose of the state to protect confidential information as defined. Section 8 is well-crafted because it strikes that balance between public and government. This bill will be tweaked, but the ultimate principle is important for democracy and is nonpartisan.

BARRY SMITH (Nevada Press Association):
Before you are prepared remarks (Exhibit H) with comments and quotes. I am in support of S.B. 123. It strengthens and clarifies the Open Records Act. Two quotes by James Madison and George W. Bush in Exhibit H are examples of the importance of open records. Over the past 200 years, the standard has not changed. The public's right to know should not be replaced by a government-knows-best policy of the need to know. It has to be a right to know for citizens to inform themselves in a democracy. George Bush had it right when he called for a "citizen-centered and results-oriented approach." That is what S.B. 123 can accomplish.

Requests for information are handled regularly and routinely by state and local government which tells me they are fully capable. Section 2 of the bill makes an affirmative statement about the importance of open records similar to the statement made in NRS 241, as shown in Exhibit H. The biggest deficiency in the law is lack of accountability, and S.B. 123 sets out that time line and consequences if there is no response. Members of the Nevada Press Association tell me too often their requests go unanswered. The only recourse is to go to court which does not change under S.B. 123, but it does lay out procedure for the governmental entity to handle requests properly and promptly.

Another important aspect of the bill is justification for withholding a record. I propose the language be amended in section 4, subsection 1, paragraph (d), subparagraph (2) from "legal authority" to "statute." I suggested another amendment to take out the section dealing with personal privacy rights because that is covered elsewhere in the sections.

The Press Association supports S.B. 123. It substantially enhances the state's open records statute and has a significant benefit in ensuring open and transparent government in Nevada through a citizen-centered, results-oriented approach.

CHAIR HARDY:
The processes of government have to be transparent, and I have been privileged to co-sponsor legislation each session I have been here with Senator Care. I look forward to a good-faith effort on this bill.

SENATOR LEE:
By the end of the second business day, the requestor would like an answer, but the presumption is there is a reason why somebody cannot get to it. In your eyes, the presumption is wrong and they should comply much sooner. How do you expect to force, other than the threat of lawsuit, this bill?

MR. SMITH:
This bill does an excellent job of setting parameters, but the only recourse is district court.

SENATOR LEE:
If you think something should take two days to get to you, and the government entity says they cannot give it to you for seven days, does that start a process of legal action? If so, have we really accomplished anything with this bill?

MR. SMITH:
We have accomplished quite a bit. These are generally extraordinary circumstances. To get a response and set a time frame is an accomplishment. This bill says a response within two days and if not the record, a response that says when we will get that document within ten days.

SENATOR LEE:
After ten days, you have the right to threaten a lawsuit?

MR. SMITH:
The court has to decide if this is a public record or not.

TOM PORTA (P.E., Deputy Administrator, Corrective Actions, Mining and Water Programs, Division of Environmental Protection, State Department of Conservation and Natural Resources):
With me today is Dave Emme, Chief of Administrative Services for the Division of Environmental Protection. We appreciate working with Senator Care on S.B. 123. With certain changes, we can support the bill and avoid conflicts with some of our statutory requirements as well as create a transparent government

and protect our regulated communities' right to reasonable confidentiality in matters such as trade secrets and propriety processes. As written, S.B. 123 conflicts with existing statutes and regulations which have confidentiality requirements based on private business practices and trade secrets. We are concerned the bill would require us to release this trade secret information and conflict with our statutes. We are also concerned with potential litigation expenses in the event there is a dispute regarding, for example, the release of a permit applicant's trade secrets. Our suggested amendment (Exhibit I) would add the reference "trade secrets" in section 4, subsection 2, paragraph (b). In addition, we recommend section 6 be deleted entirely or amended to exclude trade secrets and personal information from the provision that allows release of such information after ten years.

The specific time frames for responding to requests pose problems for us. We suggest section 4 clarify such requests must be in writing. Tracking of this information when a person makes the request by phone would likely create uncertainty in interpreting the request and be difficult to implement. Additionally, we suggest the two-day time frame in section 4 be changed. For example, FOIA's time frame is 20 days. In most cases, we grant access to most files immediately. In some cases, we need to retrieve archived files or consult with our attorney before granting access. The two-day time frame does not allow us sufficient time to get the information. If we extend that time frame, it avoids justifying whether it was an extraordinary circumstance or impossible to get.

The agency wants to comply with S.B. 123 if it becomes law. In order to do so, we need to resolve conflicts with other statutes, provide reasonable time frames for the agency to respond and provide some level of confidentiality to our regulated community.

SENATOR CARE:
The ten-year conflict is connected with trade secrets. Give an example of what you run into where the presumption of nonconfidentiality after ten years would not hold?

MR. PORTA:
In our Chemical Accident Prevention Program, engineers look at the processes requested by industry to be kept confidential. These industries have been in

business for more than a decade and want their processes to keep a competitive edge and an equal playing field to remain confidential.

PAUL LIPPARELLI (Washoe County District Attorney's Office):
We pledge our support to work with Senator Care in subcommittee. I have been advising local governments on the law for 15 years and responded to a number of public requests over the years. One important thing we use in that process is the balancing test created by the Nevada Supreme Court in *Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990). We would be concerned about a statute that eliminated discretion necessary in deciding whether a record is a public record. In absence of a comprehensive definition of public record, the balancing test becomes critical in deciding whether a document is a public record. We urge the Committee's support for the concept of the balancing test.

We are concerned about the penalty that results from failure to comply with section 2 of S.B. 123. We live with a two-day, self-imposed turnaround that is a feature of Washoe County's existing public records policy. If we cannot comply with a request within two days, we do not waive or forfeit the confidential nature of the record. We are concerned how to square that with our obligations under federal law to protect certain records we hold. The person who suffers is the person with interest in the privacy of the record, which may be a medical record in the Health Division.

We are concerned about the damages provision in section 4. If the Committee imposes a provision on damages, the citizens of Washoe County should be permitted all rights as in an ordinary trial, including the right to a jury to decide damages. This may cost millions of dollars, especially when talking about trade secrets or land development deals where there are demonstrable losses.

We are concerned about section 5 of S.B. 123 where the county would have opportunity to participate in judicial or administrative proceedings where the public record issue arose. If we are not a party, we do not have the opportunity to be involved.

The ten-year provision in section 6 removes the confidentiality of some records and creates rebuttable presumption. We had a request for the architectural plans for the Washoe County Jail. We cannot figure out the public's interest but

understand why some folks might want to know. There are records we might want to perpetually maintain.

Concerning the redaction provision in section 8, whose discretion is employed in that redaction? It would be easy to take a black marker and black out some paragraphs, but two days is a short period to respond to a request involving thousands of pages of documents. The bill would permit us to give the requestor information on how long it will take, but some discretion should be employed in determining what is private.

We suggest requiring requests in writing. It helps decide what records to produce. For the protection of the public, we urge the Committee declare requests for public records confidential. Some people requesting records would not want others to know what they were getting. The provisions in S.B. 123 could bring several Washoe County departments to a halt in complying with records requests, particularly if failure to comply carries severe penalties.

FREDERICK SCHLOTTMAN (Administrator, Offender Management Division, Carson City, Department of Corrections):
Department of Corrections has concerns specifically related to conflicts we have with other governmental agencies providing information. We get documents from the courts, Department of Homeland Security and Federal Bureau of Investigation that are all confidential. We have to resolve the conflict so we do not create a situation where we are declassifying documents from another agency. We have to provide protection for inmates. For instance, inmates who serve over ten years have reasonable expectations information contained in their files related to their crime does not become public. Other inmates in protective custody or who are safekeepers we would not wish identified. We have documents relating to staffing and facilities that could be used to perpetuate an escape.

CHAIR HARDY:
We are not talking about the definition of a public record. The intent of this bill is access to public records. I would like to focus on the intent of the bill.

SENATOR LEE:
Senator Care, how did you perceive minutes of meetings?

SENATOR CARE:
I did not say whether UMC minute meetings were confidential. It is a county hospital. The article indicates the hospital said no without citing to authority. They may have been confidential, but no is not a sufficient response.
SENATOR LEE:
Are there records you feel are misused more than others so I could better understand this bill?

SENATOR CARE:
It is difficult to decide whether a document should be confidential or a statute stay on the books. I do not want to get into that. I am saying when you have a document kept by the government, presumed to be a public record, what mechanism do you have so citizens can request a document? If the request is denied, after an acceptable period, what recourse does that citizen have?

MR. SCHLOTTMAN:
Regarding inmate litigation, we would have substantial record-keeping and litigation costs with this bill as written. Our Department has been asked to provide a fiscal note.

WAYNE CARLSON (Nevada Public Agency Insurance Pool; Public Agency Compensation Trust):
There are unintended consequences because of some unique structure that we have. I have a private company that manages these two insurance pools because it was cost-effective when they first started. Drawing a line between a private business record and a public record can be difficult. In addition, we have a private claims administration firm, a private managed care organization, a private loss control safety inspection firm and a nonprofit organization that the pools fund to provide human resource consultation to public sector members. Our public sector members are small governmental agencies. Because nonprofit or for-profit agencies administer a program, some information can be confidential. In the hands of the governmental entity, it may lose this confidentiality. For example, a personnel record under certain statutes is confidential. The advice given by the nonprofit human resource advisors may not fall within that confidentiality because it goes to the public entity. I am not sure it is adequately addressed in other places. If the advice becomes public, it can harm the employer-employee relationship and the issues they face. We also have attorneys who give advice to the nonprofit or to me, as the private

company managing the program. Do those confidentiality privileges get lost because those entities become public entities in this nongovernmental situation?

We have concerns with time limits. We are a small office with a staff of six. I am not going to delegate something as significant as a public records request if those records belong to our members or arise out of a claim. Two days may not be sufficient given our small staff.

CHAIR HARDY:
Everyone testifying in opposition to S.B. 123 thinks the two-day time period is a problem.

MR. CARLSON;
In section 4, citing a specific or legal statutory authority sometimes requires an attorney's opinion; attorneys are not always available. Under section 4, subsection 2, confidential settlement agreements with minors may be a problem if it becomes a public record in ten years.

In section 4, subsection 3, the amendment took out provisions of the administrative law. That is good because local governments are not subject to that, and if not taken out, it makes them subject to the provision. Because we provide protection against government entities for liability and bear the first $500,000 loss from our self-insurance fund, we would expect potential activity now that damages would be available as a remedy. We hardly have requests for public records. We had one, and we responded without a problem. However, we may be defending many more cases and incur additional costs. There are criminal penalties for violations of the Nevada Open Records Act and destruction of records. Those penalties might be sufficient to take care of damages. There is legislation on the privacy and protection of confidential information in other settings. If those damage provisions remain, are they subject to NRS 41, which is the cap on damages for local governments?

I am concerned about section 7, subsection 4, paragraph (e). We have a private firm doing appraisals, and those appraisals go to government entities and become public record. That will not be a big issue because we do not release data behind the appraisals. However, we do cover property on law enforcement facilities. Facility information could become public when the private company does the appraisals; there could be consequences.

Section 9 provides a good-faith defense for a public officer employee. What about private persons who are running a public program? This bill does not address what happens to those people. For example, as executive director on behalf of the Nevada Public Agency Insurance Pool and the Public Agency Compensation Trust, am I afforded the same protections as a public entity official when I am caught up in the public records law environment and subject to the reach of that as a private organization?

WILLIAM HOFFMAN (General Counsel, Clark County School District):
We oppose this bill, and I would like to participate in the subcommittee discussions.

JOHN REDLEIN (City of Las Vegas):
I am designated the public records specialist for the City of Las Vegas. I take care of all special public records issues and have done so for ten years. Before I came to work for Las Vegas, I was in charge of the Office of the Attorney General's Las Vegas operations and the public records specialist. I was in charge of advising state clients on the proper disposition of public records and the Attorney General's enforcement issues.

There is a conceptual problem because, despite not wanting to talk about what is a record, this bill is full of the phrase confidential records and there are no such things. We have public records. We have a global declaration in NRS 239 that says everything we generate or obtain and retain for purposes of performing our public duties constitutes public records unless declared by law to be confidential. The Attorney General told us local governments and divisions do not declare any records confidential. The Legislature declared every confidential record that exists in Nevada confidential. When somebody asks for a record, our analysis is simple: We look to see if it is declared confidential and our answer in that instance is we have no such public record. If it is a public record, we try to hand it over in three days. Any entity that does not have a policy for a quick response on requests is making a mistake because concealing a public record is a felony. I have never heard of anybody ignoring public records requests when they have been to the custodian of public records. The confidentiality the Legislature specified for public records is limited. A few years ago, I researched all categories that existed and there were fewer than three dozen. I discovered in researching this subject today that the Legislature allowed certain administrators to designate records within their divisions or departments as confidential. I have counted every confidential record the city possesses and

there are seven. Records of medical treatment, criminal history information, gross revenue figures for our business tax purposes on private business et cetera are confidential by law, and we refuse all requests for them.

A third category is the confusion that caused this bill to be written. There is an unwritten exception to the black-and-white rule of public and confidential documents. This exception is public records where there is good public policy or public interest reasons why they should not be given out. In the past, if somebody requested blueprints for our jail, we asked why they wanted them and examined whether they should be released. If we thought there were good reasons why we should not give them out, we prepared to go to court and follow the mechanism that exists for anybody refused a public record. Someone refused a record declared confidential by the Legislature has no business in court. With regard to making private company records public, it is probably impossible. If somebody went to a private company and asked to see a record, the company could shred the document. There is nothing unlawful about shredding a public record unless it is in violation of a retention schedule set by a state committee. Private entities do not have to comply with those schedules and probably never will.

The provision of S.B. 123—opening records that are in the possession and generated by private companies—appears to earmark a dispute we had 18 months ago with a private contractor over a job gone bad. The contractor wanted all the architect's records. Every single record the architect gave us is a public record and we handed it over. The contractor wanted all the records, including internal memos, correspondence and time cards. We never possessed or retained those records; therefore, they are not public records. That was the only time anybody has taken the City of Las Vegas to court over a public records dispute. It was quickly disposed of because the provision in section 3 did not exist.

There is a problem with the confidentiality of a record expiring after ten years. Your criminal history is something we keep confidential after ten years. A provision in the *Nevada Administrative Code* about obligations for destruction of public records says at the end of ten years, when a confidential record becomes public, I can dispose it. That includes items like criminal history and medical records.

There is an issue with the damages flowing from our refusal to release a "confidential public record." If we have consequences for damages, including punitive damages, for not giving out a confidential public record, why would we keep the confidentiality of the records the Legislature declared confidential? I would hand them over instead of assuming the burden of proof for arguing why the Legislature decided something ought to be confidential. I would run the risk of losing and paying the damages.

SENATOR CARE:
I was not aware of the dispute with the architectural firm. That had nothing to do with the bill. When somebody requests a public document, it is inappropriate for somebody from the government to ask why they want it.

MR. REDLEIN:
The issue about the identity and address of the requestor has surfaced. We have a form for people to fill out that includes name and address information. If they do not want to give you that information, you still give them the record. Nothing in NRS 239 says someone is not entitled to anonymously request a public record.

In response to Senator Care, if it is a confidential record, we do not ask why they want it, we do not give it. If it is a public record, we give it. It is only that category, like blueprints to the jail, when we might ask why. That is the usual predicate to our determination whether we might refuse to give a public record. It almost never happens, but it involves an analysis of why and what harm.

MICHAEL PAGNI (Truckee Meadows Water Authority):
Privileges exist, other than statutory, in common law: decisions from the court system. I ask the subcommittee to consider those privileges and the scope of this bill as it applies to nongovernmental entities. In our case, we are concerned about engineering firms that may have blueprints of water systems that would fall within Homeland Security issues, law firms or building services.

SENATOR CARE:
I disclose Mr. Pagni is a partner with the law firm of which I am a partner.

DINO DICIANNO (Executive Director, Department of Taxation):
We have concerns with respect to sections 5, 8, and 10 of S.B. 123. We deal with taxpayer information which is considered confidential. We would like to

work with the subcommittee to express those concerns and provide information. If we inadvertently release confidential information, there are criminal penalties against the Department of Taxation, employees and officers of the Department.

RICHARD J. YEOMAN (Administrative Officer III, Nevada Department of Transportation):
Our concerns pertain to the two-day response period and confidentiality. I have provided written comments (Exhibit J). We look forward to working on the subcommittee so we can draft legislation. The Nevada Department of Transportation is receptive to the idea of open government and provides records consistently and as thoroughly as we can. We have complex records scattered all over the state.

VIRGINIA (GINNY) LEWIS (Director, Department of Motor Vehicles):
All records of the Department of Motor Vehicles are confidential as defined by statute. We receive over 300,000 requests a year and have staff dedicated to handling those requests. We operate under NRS 481 which dictates what we release, who we release it to and how those records are released. We maintain a five-day turnaround. Our biggest concern is the two-day time limit. If we do not meet the two-day limit, we waive our right to determine those records are confidential.

SENATOR BEERS:
What period of time is comfortable for you?

MS. LEWIS:
We prepared a fiscal note to address the two-day issue. A ten-day time period would reasonably meet the turnaround and ensure we do not release anything confidential.

GUY LOUIS ROCHA (Acting Administrator, Division of State Library and Archives, Department of Cultural Affairs):
My principal concern is addressing section 6 of S.B. 123. In 1981, we had records in the Division of State Library and Archives that were confidential and deemed confidential in perpetuity. I believe in open government and, for research purposes, what is the use of having a confidential record if you never

see it? *Nevada Revised Statute* 378.300 says,

> Public records acquired by the Division which have been declared by law to be confidential must remain confidential for 30 years, or if the record relates to a natural person, until his death, whichever is later, unless another period has been fixed by specific statute.

We are looking at a record being closed forever and no one seeing it or it being opened too soon. We do not want individual rights of privacy compromised or third-party concerns, particularly correction or state mental institute records. This could mean psychiatrists, doctors, snitches or people, other than the media, seeing the record and bringing personal vendettas against people if they get the information too soon. If we had Howard Hughes' gaming license case file, under NRS 378.300—since he died in 1976 and 30 years have elapsed—I could make this file available to the public. With this statute, we tried to include a period that addresses both rights and access to public information for researchers and others without compromising rights of individuals in any acceptable level of privacy. If records were available at ten years, it could raise issues of individuals being compromised with information in these records. The agencies may not transfer those records, but we try to get them to work with us and our retention schedules.

SENATOR CARE:
How do the documents end up in State Archives? If the State Gaming Control Board were to say we are never going to turn the Howard Hughes' files over, you would never have them for the public to see. Is that correct, unless there was some provision in section 6 of this bill?

MR. ROCHA:
That is correct.

SENATOR CARE:
Do you periodically go to state agencies and ask for files for State Archives?

MR. ROCHA:
We maintain state records and generate records retention schedules. In those records retention schedules, which are reviewed by our State Records Committee, we recommend records be transferred to State Archives after a specified period of time. We cannot compel the agency to transfer those

records. We advise them it is the proper thing to do in the interest of research, but we do not have law enforcement authority.

MICHAEL FISCHER (Director, Department of Cultural Affairs):
The broader the recommendation for records, the more fiscal impact it has on a small department like the Department of Cultural Affairs. We are basically neutral on S.B. 123. However, if someone requests all our records, we do not have staff to provide some of those documents in Archives. It is not that the staff does not know where the documents are, but some of them have not been collated, as with former Governor Kenny C. Guinn's records. Mr. Rocha, could you tell us how many cubic feet exist in records?

MR. ROCHA:
Governor Guinn transferred approximately 500-cubic feet of records. We have a staff of two professional archivists, and we try to do a preliminary inventory. To know things down to the individual file or sheet of paper is impossible in a short period of time.

MR. FISCHER:
If someone requests our files, the staff has to leave their regular jobs to carryout that request. It would impact our ability to perform other services.

MR. FRASER:
Our concerns have been enunciated, and we would like to participate in the subcommittee. Vinson Guthreau with the Nevada Association of Counties asked me to convey the same on his behalf. Our members would also like to be involved in that discussion.

SCOTT ANDERSON (Deputy for Commercial Recordings, Office of the Secretary of State):
We share many of the concerns voiced; however, we see value in proper access to public records considering what we do is the public record. I sit on behalf of the Office of the Secretary of State as chair of the State Records Committee. We have yet to address this issue with the Committee in open meeting and may need to do that before we can give any information.

SABRA SMITH-NEWBY (Clark County):
Clark County is in favor of open government but finds many of the provisions in this bill troublesome and difficult to administer. One issue is with the courts,

and I will submit more information on that topic later. Clark County handles the hospital and family services. An infant who enters our care will still be underage in ten years.

DAN MUSGROVE (University Medical Center of Southern Nevada):
A letter was sent to us from the *Las Vegas Review-Journal* (Exhibit K) asking for documents. University Medical Center has been under the lights lately due to issues taking place in southern Nevada, and the press has been active in asking for documents. While we tried to respond to the voluminous request in Exhibit K, this information is not easily produced in the manner they asked. Even though the request was in writing and specific, it takes staff time and resources, a week to ten days, to determine how to bring the information together and produce it in a manner the newspaper would like to see. We are willing to do so, but it displaces job functions at the hospital that need to take place. We responded to the *Las Vegas Review-Journal* with a letter seeking payment for staff time to produce this information. Senator Care felt taxpayers pay our salaries and we should set aside normal duties to produce the documents. That is not in the best interest of our hospital to set aside important duties such as financial collections and invoices to work on public requests. How quickly we turn the request around and at what cost to the hospital staff resources becomes a logistical matter. We would like to work with the subcommittee on addressing those matters.

SENATOR CARE:
If an office gets a request for documents and there is time for staff to retrieve and copy the documents, it would not be the most important function the office serves, but those people would work for taxpayers at that time by satisfying a taxpayer's request for public records. Overhead costs would have to be eaten as a matter of public policy. Whatever happened with the request for a check for staff time?

MR. MUSGROVE:
I have not seen an answer to that. We were looking at staff time of at least two weeks to garner this information. That is a lot of time to take away from normal duties. One good thing about S.B. 123 is it covers nongovernmental entities. The *Las Vegas Sun's* request was about our Medical Executive Committee's (MEC) votes on contracts we were using. The MEC is not part of UMC, and we cannot force them to provide information. The *Las Vegas Sun* claims UMC refused to provide information. There was not a refusal by UMC,

which is the governmental entity; it was a refusal by the MEC, which is a panel that does not operate under the Open Meetings Act. With some provisions in this bill, including the ability to redact information, the MEC would have been willing to provide some of those minutes.

MAUD NAROLL (Chief Planner, Department of Administration):
I have sat on the State Records Committee for the Director of the Department of Administration since the mid-1990s. I cannot speak for the Records Committee because we have not met in open meeting on this issue. I worked on the last set of record bills introduced and will be happy to work with the subcommittee. I have concerns about the two-day and ten-year time periods. Temporary Assistance for Needy Families records need to be kept confidential longer than ten years, and there is a concern about domestic violence issues with home addresses. If someone wants to invoke clauses in this bill, the requests should be in writing. However, I do not want to preclude members of the press from asking—and us from telling the press and the public—about how their tax dollars are being spent.

CHAIR HARDY:
We will close the hearing on S.B. 123 and open the hearing on S.B. 136.

SENATE BILL 136: Designates the month of May of each year as Archeological Awareness and Historic Preservation Month in Nevada. (BDR 19-213)

SENATOR DINA TITUS (Clark County Senatorial District No. 7):
This is one of five bill drafts from the Protection of Natural Treasures interim study committee which I chaired. This bill recognizes the month of May as archeological awareness and historic preservation month and requires the Governor to annually issue a proclamation to that effect. It will recognize the important contribution of many cultures to the history of Nevada and the importance of specific historic archeological and cultural sites. Our committee traveled around the state during the last interim visiting the locations of many of our natural treasures and came to realize that as more people move to Nevada and spend time in the rural part of the state, we are at risk of destroying these treasures. We also heard that Tule Springs in Floyd Lamb State Park is especially known for paleontologic sites in Western North America. Scientific evidence shows areas once covered with sagebrush and bordered by white pine forests have many springs that are the centers of activity for big game hunters and human predators, so the fossils in these areas are irreplaceable. That is why

it is important to continue working cooperatively toward preserving those resources and why we requested S.B. 136.

CHAIR HARDY:
My district is largely rural Clark County. I look at the historical sites in jeopardy and it breaks my heart. I have a bill this session to do an oral history of the Legislature because it occurred to me when former Senator Lawrence E. Jacobsen passed away that there are not going to be any more Senator Jacobsens, Senator Neals or Senator Raggios. It would be a shame to miss that historic opportunity. We need to bring a new awareness to these places because they are important to our history.

SENATOR TITUS:
There is a copy of the report from the Natural Treasures Committee (Exhibit L, original is on file in the Research Library) that includes some of the findings.

CHAIR HARDY:
We will close the hearing on S.B. 136 and bring it up for work session on Wednesday because Senators Raggio and Townsend would like to vote-. If there is no further discussion, this meeting is adjourned at 3:55 p.m.

RESPECTFULLY SUBMITTED:

Erin Miller,
Committee Secretary

APPROVED BY:

Senator Warren B. Hardy II, Chair

DATE: