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March 3, 2016

Via E-Mail
MRindels@ap.org

Michelle C. Rindels
Politics Reporter
The Associated Press

Re: Written response to public records request made by Ms. Michelle C. Rindels.

Dear Ms. Rindels:

On February 25, 2016, you sent an e-mail to Rick Combs, Legislative Counsel Bureau Director, in which you made a written request for public records pursuant to Nevada's Public Records Law in NRS Chapter 239. This letter, which has been prepared by the Legislative Counsel and the Legal Division of the Legislative Counsel Bureau (LCB), serves as the written response to your request.[1]

Because the Director of the LCB "serves as the executive head of the Legislative Counsel Bureau and shall direct and supervise all of its administrative and technical activities" under NRS 218F.110, the Director serves as the supervisory legal custodian of records for the LCB in his official capacity as executive head of the LCB. The Legislative Counsel and the LCB Legal Division have received and accepted your request on behalf of the Director in their representative capacity as legal counsel and legal advisers on all matters arising within the Legislative Department. Therefore, because the Director is represented by legal counsel in this matter, we ask that any future correspondence or communications concerning this matter be directed to Brenda J. Erdoes, Legislative Counsel, and Kevin C. Powers, Chief Litigation Counsel, of the LCB Legal Division. We may be contacted by mail, telephone or e-mail as follows:

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[1] The LCB and its Legal Division are part of the Legislative Department of the Nevada State Government under NRS Title 17. NRS 218F.100. The Legislative Counsel is the chief of the Legal Division, and the Legislative Counsel and the Legal Division are the legal counsel and legal advisers on all matters arising within the Legislative Department. NRS 218F.100 & 218F.700-218F.720.

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For the reasons explained in the legal discussion below, the Public Records Law in NRS Chapter 239 does not apply to your request. However, in the spirit of responding to your request as promptly as possible, we have nevertheless provided this written response within the time set forth in the Public Records Law. In particular, under NRS 239.0107, the time for providing a response is "[n]ot later than the end of the fifth business day" after the date on which the request is received. NRS 239.0107(1).

In your request, you ask for the following information relating to Senators Michael Roberson and Aaron Ford, Speaker John Hambrick and Assemblywoman Irene Bustamante Adams:

> Under the state open-records law, The Associated Press requests copies of the following:
>
> - All emails sent or received from the official Senate or Assembly email accounts of Michael Roberson, Aaron Ford, John Hambrick and Irene Bustamante Adams from Monday, February 1, through Sunday, February 7.
> - A copy of the daily schedule of activities for Michael Roberson, Aaron Ford, John Hambrick and Irene Bustamante Adams from Monday, February 1, through Sunday, February 7. This includes details such as the names of people with whom these lawmakers were scheduled to meet, descriptions of the functions the lawmakers were to attend and the times those meetings and events were to occur.
>
> The AP asks that any fees associated with this request be waived.
>
> If this information is maintained in an electronic format, the AP requests that it be provided electronically.

We have carefully reviewed your request under well-established provisions and principles of constitutional, statutory, parliamentary and common law. As a threshold matter, your request must be denied to the extent that it would require the LCB to create new documents or customized reports by searching for and compiling information from individuals' files or other records. As stated by the Nevada Supreme Court, the Public Records Law does not impose a duty to "create new documents or customized reports by searching for and compiling information from individuals' files or other records." Pub.

Employees Ret. Sys. v. Reno Newspapers, Inc., 129 Nev. Adv. Op. 88, 313 P.3d 221, 225 (2013) (following State ex rel. Kerner v. State Teachers Ret. Bd., 695 N.E.2d 256, 258 (Ohio 1998) (holding that public records laws impose "no duty to create a new document by searching for and compiling information from [a government agency's] existing records")).

In addition, as explained in the legal discussion below, your request must be denied because it asks for the disclosure of materials which are not subject to the Public Records Law. Moreover, even assuming that the Public Records Law could be applied to the materials you requested, your request must be denied because it asks for the disclosure of materials which are confidential, privileged or otherwise protected from disclosure by several well-established provisions and principles of constitutional, statutory, parliamentary and common law. See Pub. Employees Ret. Sys. v. Reno Newspapers, 129 Nev. Adv. Op. 88, 313 P.3d 221, 224-25 (2013) (explaining that "statutes, rules, or caselaw may independently declare individuals' information confidential, privileged, or otherwise protected."); Civil Rights for Seniors v. Admin. Office of the Courts, 129 Nev. Adv. Op. 80, 313 P.3d 216, 219-20 (2013) (explaining that the Public Records Law does not require the disclosure of materials that "are confidential as a matter of law.").

Even though the Public Records Law does not apply to the requested materials, we have nevertheless included in the legal discussion below citations to the specific constitutional provisions, statutes and other legal authority that justifies nondisclosure of the requested materials in the spirit of providing you with a detailed explanation of the reasons for denying your request. See NRS 239.0107(1)(d); Reno Newspapers v. Gibbons, 127 Nev. Adv. Op. 79, 266 P.3d 623, 631 (2011) ("[I]f a state agency declines a public records request . . . it must provide the requesting party with notice and citation to legal authority that justifies nondisclosure.").

Finally, we respectfully direct you to NRS 218F.720, which precludes an award of court costs or attorney's fees against the Legislature or any agency, member, officer or employee of the Legislature in any action or proceeding. Generally speaking, if a governmental entity is subject to the Public Records Law and denies a public records request, the requester may seek relief from the district court in a civil action to enforce the Public Records Law, and if the requester prevails in the civil action, the requester may be awarded court costs and reasonable attorney's fees in the proceeding. NRS 239.011. However, NRS 218F.720, which is a more specific and more recently enacted statute, precludes an award of court costs or attorney's fees against the Legislature or any agency, member, officer or employee of the Legislature in any such action or proceeding.

In particular, the statute provides that in any action or proceeding before any court, agency or officer of this state, the Legislature may not be assessed or held liable for "[a]ny filing or other court or agency fees" or for "[t]he attorney's fees or any other fees, costs or expenses of any other parties." NRS 218F.720(1). In addition, the statute

defines the term "Legislature" to include any "agency, member, officer or employee of the Legislature, the Legislative Counsel Bureau or the Legislative Department." NRS 218F.720(6)(c). The statute also defines the term "agency" to mean "any agency, office, department, division, bureau, unit, board, commission, authority, institution, committee, subcommittee or other similar body or entity, including, without limitation, any body or entity created by an interstate, cooperative, joint or interlocal agreement or compact." NRS 218F.720(6)(b).

Therefore, under the express provisions of this more specific and more recently enacted statute, in any action or proceeding before any court of this state, which includes, without limitation, any action or proceeding before the District Court under the Public Records Law, neither the Legislature nor any agency, member, officer or employee of the Legislature, the Legislative Counsel Bureau or the Legislative Department may be assessed or held liable for: (1) any filing or other court or agency fees; or (2) the attorney's fees or any other fees, costs or expenses of any other parties.

DISCUSSION

You have submitted your request under the Public Records Law in NRS Chapter 239, which provides in relevant part that:

> *Except as otherwise provided in [the listed statutes] . . . and unless otherwise declared by law to be confidential*, all public books and public records of a governmental entity must be open at all times during office hours to inspection by any person, and may be fully copied or an abstract or memorandum may be prepared from those public books and public records.

NRS 239.010(1) (emphasis added).

With respect to your request, the materials you requested are not subject to the Public Records Law and are confidential, privileged or otherwise protected from disclosure for the following reasons: (1) the Public Records Law cannot constitutionally be applied to the materials because such an application would conflict and interfere with the exclusive and paramount constitutional powers of each House of the Legislature under Article 4, Section 6 of the Nevada Constitution to determine the rules of its proceedings; (2) the Public Records Law cannot constitutionally be applied to the materials because such an application would conflict and interfere with the constitutional doctrines of separation of powers and legislative privilege and immunity as recognized under Article 3, Section 1 of the Nevada Constitution and statutorily codified in NRS 41.071; (3) the Public Records Law cannot statutorily be applied to the materials because the Legislature and its agencies, members, officers and employees do not come within the statutory definition of "governmental entity" in the Public Records Law; and (4) the Public Records Law cannot statutorily be applied to the materials because the materials do not come within the ordinary definition of "public books and public records" as those terms are used in the Public Records Law.

In addition, even assuming that the Public Records Law could be applied to the materials you requested, the materials are also protected from disclosure because they are "otherwise declared by law to be confidential" under: (1) the statutory privileges in NRS 218F.150(1) and 218F.150(3); (2) the statutory and common-law attorney-client privilege and work-product privilege; (3) the common-law deliberative process privilege; and (4) the common-law balancing of private and public interests given that the interests in privacy and nondisclosure clearly outweigh any countervailing interests in public access.

1. The Public Records Law cannot constitutionally be applied to the requested materials because such an application would conflict and interfere with the exclusive and paramount constitutional powers of each House of the Legislature under Article 4, Section 6 of the Nevada Constitution to determine the rules of its proceedings.

The Nevada Supreme Court has stated that "statutes must be construed consistent with the constitution—and rejected if inconsistent therewith." Strickland v. Waymire, 126 Nev. Adv. Op. 25, 235 P.3d 605, 613 (2010) (quoting Foley v. Kennedy, 110 Nev. 1295, 1300 (1994)). Thus, the court has rejected "the untenable ruling that constitutional provisions are to be interpreted so as to be in harmony with the statutes enacted pursuant thereto; or that the constitution is presumed to be legal and will be upheld unless in conflict with the provisions of a statute." Foley, 110 Nev. at 1300-01. As a result, the Legislature may not enact "law that changes the constitution's substantive terms without submitting the constitutional change to popular vote." Strickland, 235 P.3d at 613.

Under Article 4, Section 6 of the Nevada Constitution, each House of the Legislature has been given exclusive and paramount constitutional powers to "determine the rules of its proceedings." Specifically, Article 4, Section 6 provides:

> Each House shall judge of the qualifications, elections and returns of its own members, choose its own officers (except the President of the Senate), *determine the rules of its proceedings* and may punish its members for disorderly conduct, and with the concurrence of two thirds of all the members elected, expel a member.

Nev. Const. art. 4, § 6 (emphasis added).

Because the exclusive and paramount power of each House derives from the Nevada Constitution, that constitutional power cannot be delegated, withdrawn or restricted by the Legislature through statutory provisions. See Comm'n on Ethics v. Hardy, 125 Nev. 285, 294 (2009) ("the Legislature may not delegate the constitutionally committed authority conferred on each house to discipline its members for disorderly conduct."); Heller v. Legislature, 120 Nev. 456, 471-72 & n.65 (2004) (explaining that the court does not have a role with respect to the power of each House under Article 4, Section 6 to judge the qualifications, elections and returns of its members and "even if the

Legislature had crafted such a role for this court, there might be an issue as to whether the Legislature had unconstitutionally delegated its power."). Thus, with respect to rules of legislative procedure, "[t]he constitutional right of a state legislature to control its own procedure cannot be withdrawn or restricted by statute." Mason's Manual of Legislative Procedure § 2(3) (2010) (hereafter "Mason's Manual"); see also Gray v. Gienapp, 727 N.W.2d 808, 811 (S.D. 2007) ("Mason's Manual is a widely recognized authority on state legislative and parliamentary procedures.").

The constitutional authority of a legislative house to determine the rules of its proceedings encompasses the power to determine through informal or formal policies whether to permit disclosure of any information relating to telephone communications, electronic communications or any other form of communications concerning legislators or the legislative process. See Des Moines Register & Tribunal v. Dwyer, 542 N.W.2d 491, 501 (Iowa 1996) (holding that the state senate's unwritten and written policies precluding the release of detailed phone information were rules of procedure that constitutionally took precedence over the state's public records law).

For example, in Dwyer, a newspaper submitted a request under Iowa's public records law for copies of the state senate's detailed telephone billing information for each senate telephone showing who the telephone was assigned to, the phone number for each outgoing call and incoming call, and the date, time and length of each call. Id. at 493-94. The Secretary of the Senate, who oversaw all Senate administrative matters, denied the request based on the Senate's unwritten and informal policy that disclosure of the information would violate privacy rights, legislative independence and constitutional guarantees of freedom of speech and would have a detrimental chilling effect on citizens' rights and willingness to petition their elected officials. Id. The newspaper argued that the Senate's policy was not a rule of procedure that constitutionally took precedence over the State's public records law. Id.

The Iowa Supreme Court held that the denial of the newspaper's public records request was within the scope of the Iowa Constitution's grant of authority to the Senate to adopt its own rules of procedure and that, consequently, the public records law had no application to the request. Id. at 496-502. The Court observed that the Senate had the exclusive and paramount constitutional authority to govern the disclosure of information being exchanged over its communication facilities, notwithstanding any contrary provision of the public records law, because "[p]ublic communication with Senators is an integral part of the Senate's performance of its constitutionally granted authority to enact laws." Id. at 499. The court explained further that:

> The Iowa Senate has determined that a wholesale disclosure of its itemized call detail telephone records would be harmful to the public and to the Senate's ability to carry out its responsibilities. Implicit in the Senate's decision is a citizen's right to contact a legislator in person, by mail, or by telephone without any fear or suspicion that doing so would subject the citizen to inquiries from the press or anyone else regarding the nature of the

> conversation. Apart from the inconvenience or possible harassment generated, a citizen subjected to inquiry about contacting a Senator, may, on refusing to discuss the content, find negative inferences are drawn from that fact alone.
>
> The weighing of these factors is indigenous to the political process and is distinctly within the province of the Senate. As elected representatives involved with the political process, Senators are conditioned to decide political questions. A Senatorial policy governing these actions therefore clearly constitutes a "rule of proceeding." We therefore affirm the trial court's ruling that release of the phone records by the Senate constitutes a nonjusticiable political question. The proper forum for a challenge of the Senate's policy on this matter lies not in the courts, but in the political process.

Id. at 501.

In reaching its decision, the Iowa Supreme Court agreed with other courts and commentators that in exercising the power to determine the rules of its proceedings, a legislative house is not required to adopt formal rules with respect to a particular matter in order for the house's internal policies to be given precedence and effect. Id. at 498-502 (collecting cases and other authorities); Mason's Manual § 15(2) ("A legislative body having the right to do an act must be allowed to select the means of accomplishing such act within reasonable bounds."); Crawford v. Gilchrist, 59 So. 963, 968 (Fla. 1912) ("The provision that each house 'shall determine the rules of its proceedings,' does not restrict the power given to the mere formulation of standing rules."). As a result, regardless of whether the house adopts any formal rules regarding a particular matter, the house may still enforce whatever informal policies it deems necessary and proper "in the exercise of any power, in the transaction of any business or performance of any duty conferred upon it by the constitution." Mason's Manual § 3(4); State v. Hagemeister, 73 N.W.2d 625, 629 (Neb. 1955).

In the Nevada Legislature, it is the policy of both Houses to exercise their exclusive and paramount constitutional authority under Article 4, Section 6 to govern and protect the disclosure of information being exchanged with Legislators over the Legislature's communication facilities, notwithstanding any contrary provision of the Public Records Law, because communications with Legislators are an integral part of the Legislature's performance of its constitutionally granted authority to enact laws. This legislative policy choice is reflected in both the Legislature's statutory enactments and its informal rules, policies and procedures. See, e.g., NRS 41.071 and NRS 218F.150, as amended by Assembly Bill No. 496, 2015 Nev. Stat., ch. 511, §§ 2-3, at 3192-95. This legislative policy choice also applies to the disclosure of information being exchanged with Legislators over non-governmental communication facilities. Id. (protecting communications "in any form, including, without limitation, in any oral, written, audio, visual, digital or electronic form").

For example, when it enacted NRS 41.071, the Legislature declared as the public policy of this state that it is "essential to protect the integrity of the legislative process by ensuring that individual legislators may perform their core or essential legislative functions without harassment, intimidation or interference." Senate Bill No. 160, 2009 Nev. Stat., ch. 257, at 1041. To achieve this essential public policy, it is necessary to protect Legislators from outside inquiries that would intrude upon, interfere with or pry into their communications with any other Legislators, staff, public agencies, officials or employees, constituents and interested parties concerning potential legislation, the legislative process and public policy issues. Without this protection, there would be an intolerable chilling effect that the disclosure of such communications would have on the willingness of such persons to communicate ideas and information to their Legislators. And allowing outside inquiries into the motivations of Legislators would be contrary to the public policy declared in NRS 41.071 because the most likely purpose of such outside inquiries would be to harass, intimidate and suppress Legislators in the performance of their legislative functions.

With regard to your request, you are asking for "[a]ll emails sent or received from the official Senate or Assembly email accounts of Michael Roberson, Aaron Ford, John Hambrick and Irene Bustamante Adams from Monday, February 1, through Sunday, February 7." You are also asking for a "copy of the daily schedule of activities for Michael Roberson, Aaron Ford, John Hambrick and Irene Bustamante Adams from Monday, February 1, through Sunday, February 7." You indicated that this request "includes such details as the names of people with whom these lawmakers were scheduled to meet, descriptions of the functions the lawmakers were to attend and the times those meetings and events were to occur." Given that it is the policy of both Houses to restrict the disclosure of such legislative information being exchanged with legislators over governmental or non-governmental communication facilities, the Public Records Law cannot constitutionally be applied to the materials you requested because such an application would conflict and interfere with the exclusive and paramount constitutional powers of each House under Article 4, Section 6 of the Nevada Constitution to determine the rules of its proceedings. Therefore, your request must be denied.

In denying your request, we recognize that, under certain facts and circumstances not present here, the Nevada Supreme Court has applied the Public Records Law to e-mail and telephone information generated or maintained by the *executive branch* and *local governments*. See Reno Newspapers v. Gibbons, 127 Nev. Adv. Op. 79, 266 P.3d 623, 631 (2011) (information from state-issued e-mail account of *executive branch*); DR Partners v. Bd. of County Comm'rs, 116 Nev. 616, 623 (2000) (information from county-issued cell phone account of *county government*). However, those cases are not applicable to a public records request that is submitted to the *legislative branch* because neither the executive branch nor local governments possess any constitutionally-based powers that are similar to the exclusive and paramount constitutional powers of the *legislative branch* under Article 4, Section 6 to determine the rules of its proceedings, notwithstanding any contrary provision of the Public Records Law. Therefore, those

cases have no application to the denial of your request under the constitutional provisions of Article 4, Section 6.

2. The Public Records Law cannot constitutionally be applied to the requested materials because such an application would conflict and interfere with the constitutional doctrines of separation of powers and legislative privilege and immunity as recognized under Article 3, Section 1 of the Nevada Constitution and statutorily codified in NRS 41.071.

The Founders of our Nation viewed the constitutional doctrines of separation of powers and legislative privilege and immunity as fundamental to the system of checks and balances and indispensable to the constitutional structure of separate, coequal and independent branches of government. United States v. Helstoski, 442 U.S. 477, 491 (1979). Among other things, the doctrines prevent the disclosure of legislative materials when such disclosure would intrude upon, interfere with or pry into the legislative process. See Gravel v. United States, 408 U.S. 606, 616-17 (1972); United States v. Rayburn House Office Bldg., 497 F.3d 654, 660 (D.C. Cir. 2007). The constitutional doctrines prevent such disclosure because "the legislative process is disrupted by the disclosure of legislative material, regardless of the use to which the disclosed materials are put." Rayburn, 497 F.3d at 660.

As part of the system of checks and balances, the doctrine of legislative privilege and immunity facilitates the autonomy of the Legislative Branch by curtailing intrusions by the Executive or Judicial Branch into the sphere of protected legislative activities. Helstoski, 442 U.S. at 491. In this way, the doctrine serves an important governmental function by "reinforcing the separation of powers so deliberately established by the Founders." United States v. Johnson, 383 U.S. 169, 178 (1966); State v. Township of Lyndhurst, 650 A.2d 840, 844 (N.J. Super. Ct. Ch. Div. 1994) (explaining that legislative immunity "is a function of the separation of powers"); Holmes v. Farmer, 475 A.2d 976, 982 (R.I. 1984) (explaining that legislative immunity "ensures the separation of powers among the coordinate branches of government").

At the same time, the doctrine of legislative privilege and immunity is also an important individual right which is designed to "protect the integrity of the legislative process by insuring the independence of individual legislators." United States v. Brewster, 408 U.S. 501, 507 (1972). The doctrine fosters individual independence by shielding each legislator from any "executive and judicial oversight that realistically threatens to control his conduct as a legislator." Gravel, 408 U.S. at 618. In this way, the doctrine serves an important personal function by ensuring that individual legislators "are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation." Powell v. McCormack, 395 U.S. 486, 503 (1969).

The doctrine of legislative privilege and immunity has its origins in the Parliamentary struggles of the 16th and 17th centuries when the English monarchs used

civil and criminal proceedings to harass, intimidate and suppress members of Parliament who were critical of the Crown. Tenney v. Brandhove, 341 U.S. 367, 372 (1951). The doctrine was first codified in the English Bill of Rights of 1689, which provided: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." Id. Like many other practices and customs of the British Parliament, legislative privilege and immunity was adopted by the American colonial legislatures where "[f]reedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." Id.

The concept of legislative privilege and immunity is codified in the Speech or Debate Clause of the United States Constitution, which provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6. Even though the Nevada Constitution does not contain a provision that is similar to the federal Speech or Debate Clause, the Nevada Constitution contains a separation-of-powers provision which expressly requires the separation of powers among the three branches of state government. Nev. Const. art. 3, § 1.

Because separation of powers is fundamental to our system of state government, the Nevada Supreme Court has recognized that Nevada Legislators enjoy legislative privilege and immunity as a *state* constitutional right under the separation-of-powers provision of Article 3, Section 1. Guinn v. Legislature, 119 Nev. 460, 472 & n.28 (2003) ("Guinn II"). In describing the source of this constitutional legislative privilege and immunity, the Nevada Supreme Court was unmistakably clear: "Under the separation of powers doctrine, individual legislators cannot, nor should they, be subject to fines or other penalties for voting in a particular way." Id. In making this statement, the Court relied upon Gravel v. United States, a case in which the United States Supreme Court reaffirmed the importance of constitutional legislative privilege and immunity to separation of powers. In Gravel, the High Court found that legislative privilege and immunity "was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch." 408 U.S. at 616.

Like the Nevada Constitution, the California Constitution does not contain a speech or debate clause. Nevertheless, the California appellate courts have recognized that "[t]he California separation of powers provision, however, provides a sufficient ground to protect legislators from punitive action that unduly impinges on their function." Steiner v. Super. Ct., 58 Cal. Rptr. 2d 668, 678 n.20 (Cal. Ct. App. 1996) (citation omitted). Thus, under the California separation-of-powers provision, California legislators enjoy legislative privilege and immunity as a state constitutional right even though there is no speech or debate clause in the California Constitution. Hancock v. Burns, 323 P.2d 456, 461-62 (Cal. Dist. Ct. App. 1958); Allen v. Super. Ct., 340 P.2d 1030, 1033-35 (Cal. Dist. Ct. App. 1959); see also Luther S. Cushing, Elements of the Law & Practice of Legislative Assemblies §§ 601-603 (1856) (stating that in those states

without a speech or debate clause in their state constitutions, "the privilege of freedom of speech and debate exists in these States as fully and effectually, as if it had been expressly provided."); 1 Joseph Story, Commentaries on the Constitution of the United States § 866 (5th ed. 1905) (same); Thomas M. Cooley, A Treatise on Constitutional Limitations 929 (8th ed. 1927) (same).

The provisions of NRS 41.071 codify the legislative privilege and immunity that has been an established part of English and American common law and constitutional law for centuries. During the 2015 legislative session, the Legislature enacted Assembly Bill No. 496 (A.B. 496) to provide more specific detail regarding the types of functions of a legislator that are protected by legislative privilege and immunity. A.B. 496, 2015 Nev. Stat., ch. 511, § 3, at 3193-95 (amending NRS 41.071).

As expressly provided by A.B. 496's amendments, the functions of a Legislator that are protected by legislative privilege and immunity include any actions, in any form, taken or performed within the sphere of legitimate legislative activity, whether or not the Legislature is in a regular or special session, including, without limitation:

> (a) Any actions, in any form, taken or performed with regard to any legislative measure or other matter within the jurisdiction of the Legislature, including, without limitation, conceiving, formulating, investigating, developing, requesting, drafting, introducing, sponsoring, processing, reviewing, revising, amending, communicating, discussing, debating, negotiating, allying, caucusing, meeting, considering, supporting, advocating, approving, opposing, blocking, disapproving or voting in any form.
> (b) Any actions, in any form, taken or performed with regard to any legislative investigation, study, inquiry or information-gathering concerning any legislative measure or other matter within the jurisdiction of the Legislature, including, without limitation, chairing or serving on a committee, preparing committee reports or other documents, issuing subpoenas or conducting disciplinary or impeachment proceedings.
> (c) Any actions, in any form, taken or performed with regard to requesting, seeking or obtaining any form of aid, assistance, counsel or services from any officer or employee of the Legislature concerning any legislative measure or other matter within the jurisdiction of the Legislature, including, without limitation, any communications, information, answers, advice, opinions, recommendations, drafts, documents, records, questions, inquiries or requests in any form.

A.B. 496, 2015 Nev. Stat., ch. 511, § 3, at 3194.

In addition, A.B. 496's amendments state that legislative privilege and immunity applies to communications in "any form," including, without limitation, "any oral, written, audio, visual, digital or electronic form." Id. The amendments also define a "legislative measure" to mean "any existing, suggested, proposed or pending bill,

resolution, law, statute, ballot question, initiative, referendum or other legislative or constitutional measure." Id. The amendments also specify that legislative privilege and immunity applies to:

> (1) Any current or former member of the Senate or Assembly of the State of Nevada; or
> (2) Any other person who takes or performs any actions within the sphere of legitimate legislative activity that would be protected if taken or performed by any member of the Senate or Assembly, including, without limitation, any such actions taken or performed by any current or former officer or employee of the Legislature.

Id. at 3195.

When the Legislature enacted NRS 41.071, it expressly provided that in interpreting and applying legislative privilege and immunity in Nevada, "the interpretation and application given to the constitutional doctrines of separation of powers and legislative privilege and immunity under the Speech or Debate Clause of Section 6 of Article I of the Constitution of the United States must be considered to be persuasive authority." NRS 41.071(3). Thus, Nevada's statute expressly incorporates the long-standing case law interpreting and applying legislative privilege and immunity to Members of Congress under the Speech or Debate Clause of the Federal Constitution. As a result, the legislative privilege and immunity afforded to State Legislators in Nevada is equivalent to the legislative privilege and immunity afforded Federal Legislators in Federal Court.

It is well established that legislative privilege and immunity protects Legislators and legislative personnel from compelled disclosure of legislative materials relating to actions within the scope of legitimate legislative activity. The purpose of legislative privilege and immunity is to guarantee that "the legislative function may be performed independently without fear of outside interference." Supreme Ct. of Va. v. Consumers Union, 446 U.S. 719, 731 (1980). When Legislators and legislative personnel are acting within the "legitimate legislative sphere," the privilege is an absolute bar to interference. Miller v. Transamerican Press, Inc., 709 F.2d 524, 528 (9th Cir. 1983) (citations omitted).

In one of its earliest cases concerning legislative privilege and immunity, the United States Supreme Court stated that legislative privilege and immunity protects "anything generally done in a session of the House by one of its members in relation to the business before it." Kilbourn v. Thompson, 103 U.S. 168, 204 (1881). More recently, the Supreme Court explained that:

> Insofar as the [legislative privilege and immunity] is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of

> proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Gravel v. United States, 408 U.S. 606, 624 (1972).

In United States v. Gillock, 445 U.S. 360, 366-67 (1980), the Supreme Court reiterated its prior holdings that "the Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." Such acts include voting on legislation and other legislative matters, in addition to all other "activities by legislators that directly affect drafting, introducing, debating, passing or rejecting legislation." Baraka v. McGreevey, 481 F.3d 187, 196 (3d Cir. 2007).

Thus, "legislative immunity is not limited to the casting of a vote on a resolution or bill; it covers all aspects of the legislative process, including the discussions held and alliances struck regarding a legislative matter in anticipation of a formal vote." Almonte v. City of Long Beach, 478 F.3d 100, 107 (2d Cir. 2007). For example, legislative immunity protects activities associated with "sponsoring and pushing for passage of legislation." Chappell v. Robbins, 73 F.3d 918, 921 (9th Cir. 1996). It also protects activities associated with blocking or preventing the passage of legislation. Hernandez v. City of Lafayette, 643 F.2d 1188, 1193-94 (5th Cir. 1981). All these activities are protected because they are "integral steps in the legislative process." Bogan v. Scott-Harris, 523 U.S. 44, 55 (1998).

In Miller v. Transamerican Press, Inc., 709 F.2d 524 (9th Cir. 1983), the court had to determine whether the legislative privilege attached to prevent the questioning of a Congressman regarding the identity of a person who had inserted a magazine article into the congressional record. The court determined that information regarding the insertion of material into the congressional record was within the "legislative sphere" and was protected from disclosure. The court found that the activity: (1) was an integral part of the deliberative and communicative processes by which members participate in a committee and house proceedings; and (2) involved proposed legislation or some other subject within Congress' constitutional jurisdiction. Id. at 529. The court upheld the claim of privilege, stating:

> Obtaining information pertinent to potential legislation or investigation is one of the "things generally done in a session of the House," concerning matters within the "legitimate legislative sphere." Constituents may provide data to document their views when urging the Congressman to initiate or support some legislative action. Informants may, in confidence, give information that is useful in exposing corruption within the government or elsewhere.
>
> If a source's identity is disclosed, he could suffer serious adverse consequences. In the case of organized crime, for example, disclosure could even be life-threatening.

> The possibility of public exposure could constrain these sources. It could deter constituents from candid communication with their legislative representatives and otherwise cause the loss of valuable information.
>
> Even more to the point, it would chill speech and debate on the floor. The Congressman might censor his remarks or forgo them entirely to protect the privacy of his sources, if he contemplated that he could be forced to reveal their identity in a lawsuit.
>
> We conclude that the privilege extends to questions about a Congressman's sources of information.

Id. at 530-31 (citations omitted).

In Copsey v. Baer, 593 So. 2d 685, 689 (La. Ct. App. 1991), the court determined that the plaintiff's public records request for work files related to two legislative bills "calls for an inquiry into the motivations behind the preparation and introduction of legislative instruments into the Louisiana Legislature, an inquiry that goes to the very core of the legislative process." Accordingly, the court held that the requested files were protected legislative documents that were exempt from the provisions of Louisiana's public records law. Id.

In Pentagen Techs. Int'l v. Comm. on Appropriations of U.S. House of Reps., 20 F. Supp. 2d 41, 43-45 (D.D.C. 1998), the Court held that the plaintiffs could not rely on the "historic common-law right to inspect and copy public records" to obtain investigative reports from a congressional committee because the reports were protected from compulsory disclosure by legislative privilege and immunity.

With regard to your request, you are asking for "[a]ll emails sent or received from the official Senate or Assembly email accounts of Michael Roberson, Aaron Ford, John Hambrick and Irene Bustamante Adams from Monday, February 1, through Sunday, February 7." You are also asking for a "copy of the daily schedule of activities for Michael Roberson, Aaron Ford, John Hambrick and Irene Bustamante Adams from Monday, February 1, through Sunday, February 7." You indicated that this request "includes such details as the names of people with whom these lawmakers were scheduled to meet, descriptions of the functions the lawmakers were to attend and the times those meetings and events were to occur." The materials you requested are protected by legislative privilege and immunity because they relate to actions, in any form, taken or performed by the specified Legislators with regard to any legislative measure or other matter within the jurisdiction of the Legislature, including, without limitation: (1) conceiving, formulating, investigating, developing, requesting, drafting, introducing, sponsoring, processing, reviewing, revising, amending, communicating, discussing, debating, negotiating, allying, caucusing, meeting, considering, supporting, advocating, approving, opposing, blocking, disapproving or voting in any form; (2) legislative investigation, study, inquiry or information-gathering in any form; or

(3) requesting, seeking or obtaining any form of aid, assistance, counsel or services from any officer or employee of the Legislature, including, without limitation, any communications, information, answers, advice, opinions, recommendations, drafts, documents, records, questions, inquiries or requests in any form. A.B. 496, 2015 Nev. Stat., ch. 511, § 3, at 3194.

In addition, disclosure of the materials would intrude upon, interfere with or pry into the legislative process. In performing their core legislative functions, the members, officers and employees of the legislative branch have a protected right and privilege to communicate with other Legislators, staff, public agencies, officials or employees, constituents and interested parties to obtain information pertinent to potential legislation and other legislative matters and to educate and inform themselves on the public policy issues associated with such matters. Thus, when the members, officers and employees of the legislative branch engage in such communications with such persons concerning potential legislation and public policy issues, they are clearly acting within the scope of legitimate legislative activity, and such communications are protected by legislative privilege and immunity.

Furthermore, if such communications were not protected by legislative privilege and immunity, it would deter such persons from candid communication with their legislative representatives, and it would cause the loss of valuable information. It would also chill legislative speech and debate because Legislators might censor their remarks or forgo them entirely to protect the privacy of their sources from being revealed. It would also allow improper inquiries into the motivations of Legislators regarding the preparation, introduction, consideration, approval or disapproval of legislative matters. Such inquiries into the motivations of Legislators are improper because they have the potential to harass, intimidate and suppress Legislators in the performance of their core legislative functions, which is the evil that legislative privilege and immunity was intended to prevent. See Senate Bill No. 160, 2009 Nev. Stat., ch. 257, at 1041 ("Legislative privilege and immunity has its origins in the Parliamentary struggles of the 16th and 17th centuries when the English monarchs used civil and criminal proceedings to harass, intimidate and suppress members of Parliament who were critical of the Crown.").

Therefore, because the materials you requested relate to actions, in any form, taken or performed by Senators Michael Roberson and Aaron Ford, Speaker John Hambrick and Assemblywoman Irene Bustamante Adams with regard to any legislative measure or other matter within the jurisdiction of the Legislature, the requested materials come within the scope of legitimate legislative activity and are protected from disclosure by the constitutional doctrines of separation of powers and legislative privilege and immunity. As a result, the Public Records Law cannot constitutionally be applied to the requested materials because such an application would conflict and interfere with the constitutional doctrines of separation of powers and legislative privilege and immunity as recognized under Article 3, Section 1 of the Nevada Constitution and statutorily codified in NRS 41.071. Therefore, your request must be denied.

3. The Public Records Law cannot statutorily be applied to the requested materials because the Legislature and its agencies, members, officers and employees do not come within the statutory definition of "governmental entity" in the Public Records Law.

The Public Records Law defines a "governmental entity" to include: (1) "An elected or appointed officer of this State or of a political subdivision of this State"; and (2) "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." NRS 239.005(5).

Although the statutory definition of "governmental entity" is drafted broadly, when interpreting similar statutory definitions in other states' public records laws, Courts have generally concluded that "Congress and state legislatures are not considered 'agencies' for the purpose of freedom of information acts." 37A Am. Jur. 2d Freedom of Information Acts § 12 (2005). For example, when interpreting a similar statutory definition in Massachusetts' public records law, that state's highest Court held that the state legislature and its agencies, members, officers and employees were not subject to the public records law even though the law applied to "any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof." Westinghouse Broad. Co. v. Sergeant-At-Arms of General Court, 375 N.E.2d 1205, 1208 (Mass. 1978). The Court determined that although the State Legislature "has been characterized as one of the 'three great departments of government,' the term 'department' appearing in this statutory clause has a much more restricted meaning." Id. (citations omitted).

Likewise, when interpreting a similar statutory definition in Florida's public records law, that state's highest Court held that the State Legislature and its agencies, members, officers and employees were not subject to the public records law even though the law applied to "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law." Locke v. Hawkes, 595 So. 2d 32, 33-37 (Fla. 1992). The Court agreed with the argument that "if the legislature had intended to include the legislative branch in the general statement of applicability, it would have simply done so and that, because it did not, such an inclusion may not be implied." Id. at 35. Thus, the Court concluded that the public records law did not apply to the legislative branch because:

> if the legislature and its members were intended to be covered, it would have said so. *Expressio unius est exclusio alterius*. "Where a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not *expressly* mentioned." Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976) (emphasis added).

Locke, 595 So. 2d at 36-37.

Thus, when a State Legislature wants a public records law to apply to the Legislative Branch, it typically uses explicit language in the public records law that expressly and specifically mentions the Legislature or the Legislative Department. See, e.g., Weston v. Sloan, 643 N.E.2d 1071, 1071-72 (N.Y. 1994) (explaining that "the Legislature added a new section [to the Freedom of Information Law] which provided for access under FOIL to certain specified State legislative records."). In the absence of such explicit language in Nevada's Public Records Law that expressly and specifically mentions the "Legislature" or the "Legislative Department," it must be presumed that the Legislature did not intend for the Public Records Law to apply to the Legislative Branch and that it expected the Houses to develop their own policies regarding the protection and disclosure of legislative materials pursuant to their exclusive and paramount constitutional powers under Article 4, Section 6 to determine the rules of their proceedings. See Locke, 595 So. 2d at 36-37.

Accordingly, if the Legislature had intended for the Legislative Branch and its members to be covered by the statutory definition of "governmental entity" in the Public Records Law, it would have used explicit language that expressly and specifically mentioned the "Legislature" or the "Legislative Department." Because it did not do so, the Public Records Law cannot statutorily be applied to the materials you requested because the Legislature and its agencies, members, officers and employees do not come within the statutory definition of "governmental entity" in the Public Records Law. Therefore, your request must be denied.

4. The Public Records Law cannot statutorily be applied to the requested materials because the materials do not come within the ordinary definition of "public books and public records" as those terms are used in the Public Records Law.

The Public Records Law applies only to *public* books and records of a governmental entity. NRS 239.010; City of Reno v. Reno-Gazette-Journal, 119 Nev. 55, 60 (2003) (stating that "[t]his statute plainly provides that *public* records must be available for inspection) (emphasis added)). Not all documents and other materials that are made, kept or received by a governmental entity are public records. As explained by the Washington Supreme Court, "[f]irst, we reject the notion that documents are public or private simply because the person who handles them is or is not a public servant (or government employee) . . . Similarly, we reject the idea that just because these officials collectively act upon a document, it becomes public." Cowles Pub. Co. v. Murphy, 637 P.2d 966, 968 (Wash. 1981). Thus, the mere fact that documents and other materials are made, kept or received by a governmental entity does not, by itself, make them public records.

Nevada's Public Records Law does not define the terms "public books and public records." See NRS 239.005 (defining various terms for the Public Records Law). Because those terms are not statutorily defined, they must be given their "plain meaning unless the language is ambiguous." Rogers v. Heller, 117 Nev. 169, 176 (2001). To

determine the plain meaning of statutory language, Courts often look to dictionary definitions because those definitions reflect the ordinary meanings that are commonly ascribed to words and terms. See Kay v. Ehrler, 499 U.S. 432, 436 n.6 (1991); Cunningham v. State, 109 Nev. 569, 571 (1993).

As ordinarily defined, a "public book" means "any of the records (as the daybook, cashbook, salesbook, journal, ledger) in which a systematic record of business transactions may be kept." Webster's Third New International Dictionary 252 (1993). A "public book" is typically the government's equivalent of an "account book" or "shop book" that is maintained in the usual course of business in which business transactions are entered and recorded. Black's Law Dictionary 19 & 1384 (7th ed. 1999) (defining "account book" and "shop book").

As ordinarily defined, a "public record" means: (1) "a record required by law to be made and kept"; (2) "a record made by a public officer in the course of his legal duty to make it"; or (3) "a record filed in a public office and open to public inspection." Webster's Third New International Dictionary 1836 (1993). Similar definitions have been adopted by courts in other states. See, e.g., Keddie v. Rutgers; 689 A.2d 702, 709 (N.J. 1997) (discussing the common-law definition of a "public record" which is "one that is made by a public official in the exercise of his or her public function, either because the record was required or directed by law to be made or kept, or because it was filed in a public office"); Carlson v. Pima County, 687 P.2d 1242, 1244 (Ariz. 1984); McMahan v. Bd. of Trustees, 499 S.W.2d 56, 58 (Ark. 1973). The Arkansas Supreme Court has explained how this ordinary dictionary definition works in the context of a public records law:

> It is at once apparent from even a cursory reading of [the Act] that the records which the General Assembly had in mind are those mentioned in the italicized phrase "which by law are required to be kept and maintained." The Freedom of Information Act *does not itself provide that any particular records shall be kept*; it only provides that records which are required by some statute (other than the Freedom of Information Act) to be made and kept, shall be open to public inspection. There is no semblance of ambiguity in this provision and whether the statute be construed narrowly or broadly, the italicized phrase can only mean one thing, viz., that the Freedom of Information Act, as far as inspection of records is concerned, applies only to those records which by statute are required to be kept and maintained.

McMahan, 499 S.W.2d at 58.

With regard to your request, you are asking for "[a]ll emails sent or received from the official Senate or Assembly email accounts of Michael Roberson, Aaron Ford, John Hambrick and Irene Bustamante Adams from Monday, February 1, through Sunday, February 7." You are also asking for a "copy of the daily schedule of activities for Michael Roberson, Aaron Ford, John Hambrick and Irene Bustamante Adams from

Monday, February 1, through Sunday, February 7." You indicated that this request "includes such details as the names of people with whom these lawmakers were scheduled to meet, descriptions of the functions the lawmakers were to attend and the times those meetings and events were to occur." Based on the ordinary definitions of "public books and public records," the requested materials are not "public books and public records" as those terms are used in the Public Records Law.

In particular, the requested materials are not "public books" because they are not the equivalent of account books or shop books in which a systematic record of public business transactions are kept, such as daybooks, cashbooks, salesbooks, journals or ledgers. In addition, Senators Michael Roberson and Aaron Ford, Speaker John Hambrick and Assemblywoman Irene Bustamante Adams are not required by any statute to make, keep or receive any such public books in the performance of their legislative duties.

Similarly, the requested materials are not "public records" because Senators Michael Roberson and Aaron Ford, Speaker John Hambrick and Assemblywoman Irene Bustamante Adams are not required by any statute to make, keep or receive the requested materials in the performance of their legislative duties. The requested materials also are not "public records" because they were not filed in a public office and open to public inspection, and there is no statute which requires such filing and open public inspection.

Accordingly, the Public Records Law cannot statutorily be applied to the requested materials because the materials do not come within the ordinary definitions of "public books and public records" as those terms are used in the Public Records Law. Therefore, your request must be denied.

5. The Public Records Law does not apply to the requested materials because the materials are "otherwise declared by law to be confidential" under the statutory privileges in NRS 218F.150(1) and 218F.150(3).

The Public Records Law specifically lists NRS 218F.150 among the statutory provisions in Nevada that prohibit the disclosure of or specifically declare public books and public records to be confidential. NRS 239.010(1). With certain limited exceptions not applicable here, NRS 218F.150 provides that the Director and other officers and employees of the Legislative Counsel Bureau shall not:

> disclose to any person outside the Legislative Counsel Bureau the nature or content of *any matter entrusted to the Legislative Counsel Bureau, and such matter is confidential and privileged* and is not subject to discovery or subpoena, unless the person entrusting the matter to the Legislative Counsel Bureau requests or consents to the disclosure.

NRS 218F.150(1), as amended by A.B. 496, 2015 Nev. Stat., ch. 511, § 2, at 3192-93. (emphasis added).

The statute also provides that its provisions "apply to any matter or work in any form, including, without limitation, in any oral, written, audio, visual, digital or electronic form, and such matter or work includes, without limitation, *any communications, information, answers, advice, opinions, recommendations, drafts, documents, records, questions, inquiries or requests in any such form.*" NRS 218F.150(4), as amended by A.B. 496, 2015 Nev. Stat., ch. 511, § 2, at 3192-93. (emphasis added).

Based on its plain language, NRS 218F.150(1) protects from disclosure "any matter entrusted to the Legislative Counsel Bureau." As defined in Webster's Dictionary, the term "entrust" means "[t]o give over (something) to another for care, protection, or performance." Webster's II New College Dictionary 376 (1995).

Under Nevada law, the responsibility for the care, protection and performance of all legislative information, communication and recording systems, including the e-mail and telephone systems, has been entrusted to the LCB. See NRS 218F.300 (providing that "[a]ll administrative services necessary to the operation of the Legislature during and between regular and special sessions must be provided by the Legislative Counsel Bureau"); NRS 218F.500 (providing that the LCB Administrative Division is responsible for the Legislature's communication equipment, information technology services and audio and video services). In addition, the LCB also provides all legal, fiscal, research, audit, administrative, technical and other services to the Legislature and its members. As a result, the Legislature and its members entrust all materials produced, acquired, received, stored or preserved by or from those services to the LCB.[2]

Furthermore, based on its plain language, NRS 218F.150(1) protects both the "nature" and "content" of any matter entrusted to the LCB. If the Legislature had intended to protect from disclosure only the "content" of such matter, it would have limited the statutory privilege by using the term "content" by itself without using the additional term "nature." Because the Legislature used both terms in the statute, each term must be read to "render it meaningful within the context of the purpose of the statute." Redl v. Heller, 120 Nev. 75, 78 (2004) (quoting Bd. of County Comm'rs v. CMC of Nevada, 99 Nev. 739, 744 (1983)). Thus, in determining the scope of the privilege in NRS 218F.150(1), the statute must be interpreted "so that no part is rendered inoperative." IGT v. Dist. Ct., 124 Nev. 193, 200 (2008).

Given the common and ordinary meanings of the terms "content" and "nature," the Legislature clearly intended to protect from disclosure not only the "content" of any matter entrusted to the LCB but also its "nature," which means its very essence or existence. As defined in Webster's Dictionary, the term "content" means the "subject matter" of a thing. Webster's II New College Dictionary 243 (1995). By contrast, the

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[2] See the provisions of Title 17 of NRS which define the powers, duties, functions and responsibilities of the Legislative Counsel Bureau. NRS 218D.050, 218F.100, 218F.110, 218F.120, 218F.300, 218F.500, 218F.510, 218F.520, 218F.600, 218F.610, 218F.710, 218F.720, 218F.810, 218G.110, 218G.120 and 218G.130.

term "nature" means the "essential characteristics and qualities" of a thing or the "natural or real aspect" of a thing. Id. at 729. By protecting from disclosure the "essential characteristics and qualities" and the "natural or real aspect" of any matter entrusted to the LCB, the Legislature was protecting from disclosure the very essence or existence of such matter. Therefore, the statutory privilege in NRS 218F.150(1) prohibits the LCB from disclosing the very essence or existence of any matter entrusted to it, unless the person entrusting the matter to the LCB requests or consents to the disclosure.

In addition, NRS 218F.150(3) provides that "[t]he nature and content of any work produced by the officers and employees of the Legal Division and the Fiscal Analysis Division and any matter entrusted to those officers and employees to produce such work *are confidential and privileged* and are not subject to discovery or subpoena." NRS 218F.150(3), as amended by A.B. 496, 2015 Nev. Stat., ch. 511, § 2, at 3192. (emphasis added). The work produced by the Legal Division and the Fiscal Analysis Division includes, without limitation, all legal and fiscal materials produced for the Legislature and its members.

As a result, the nature and content of any work produced by the Legal Division and the Fiscal Analysis Division and any matter entrusted to those divisions to produce such work are confidential, privileged and protected from disclosure by the statutory privilege in NRS 218F.150(3). Moreover, the statutory privilege applies to "any matter or work in any form, including, without limitation, in any oral, written, audio, visual, digital or electronic form, and such matter or work includes, without limitation, *any communications, information, answers, advice, opinions, recommendations, drafts, documents, records, questions, inquiries or requests in any such form.*" NRS 218F.150(4), as amended by A.B. 496, 2015 Nev. Stat., ch. 511, § 2, at 3192-93. (emphasis added).

With regard to your request, you are asking for "[a]ll emails sent or received from the official Senate or Assembly email accounts of Michael Roberson, Aaron Ford, John Hambrick and Irene Bustamante Adams from Monday, February 1, through Sunday, February 7." You are also asking for a "copy of the daily schedule of activities for Michael Roberson, Aaron Ford, John Hambrick and Irene Bustamante Adams from Monday, February 1, through Sunday, February 7." You indicated that this request "includes such details as the names of people with whom these lawmakers were scheduled to meet, descriptions of the functions the lawmakers were to attend and the times those meetings and events were to occur." Because the materials you requested have been entrusted to the LCB, both the nature and content of those materials are confidential, privileged and protected from disclosure by the statutory privilege in NRS 218F.150(1).

Furthermore, to the extent the materials you requested contain any matter acquired, received, stored or preserved by the LCB or contain any work produced by the Legal Division or the Fiscal Analysis Division or any matter entrusted to those divisions to produce such work, both the nature and content of such matter or work are

confidential, privileged and protected from disclosure by the statutory privileges in NRS 218F.150(1) and 218F.150(3).

Consequently, the Public Records Law does not apply to the requested materials because the materials are "otherwise declared by law to be confidential" under the statutory privileges in NRS 218F.150(1) and 218F.150(3). Therefore, your request must be denied.

6. The Public Records Law does not apply to the requested materials because they are "otherwise declared by law to be confidential" under the statutory and common-law attorney-client privilege and work-product privilege.

Both the attorney-client privilege and the work-product privilege may bar disclosure under a public records law. 37A Am. Jur. 2d Freedom of Information Acts §§ 211-17 (2005). For example, "[m]aterial provided by an attorney to a government body need not be disclosed under a public records act, since a government body needs freedom to confer with its lawyers confidentially to obtain adequate advice." Id. at § 213. And "[f]actual material may be protected as part of the work product even though the facts are not reasonably available to the requester from another source." Id. at § 217.

Since its earliest cases, the Nevada Supreme Court has recognized the importance of the attorney-client privilege to providing effective legal representation and advice to clients. Mitchell v. Bloomberger, 2 Nev. 345 (1866). In Mitchell, the court explained the reason for the privilege as follows:

> In the complicated affairs and relations of life, the counsel and assistance of those learned in the law often become necessary, and to obtain it men are frequently forced to make disclosures which their welfare, and sometimes their lives, make it necessary to be kept secret. Hence, for the benefit and protection of the client, the law places the seal of secrecy upon all communications made to the attorney in the course of his professional employment[.]

Id. at 348-49.

Because of the attorney-client privilege's importance to effective legal representation and advice, Nevada has codified the privilege in NRS 49.095 to 49.115, inclusive. Under Nevada's statutes, "[a] client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications . . . [b]etween the client or the client's representative and the client's lawyer or the representative of the client's lawyer." NRS 49.095.

In addition, under Nevada's common law, "the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." Lisle v. State, 113 Nev. 679, 695 (1997) (quoting United

States v. Nobles, 422 U.S. 225, 238 (1975)). The work-product privilege protects "an attorney's mental impressions, conclusions, or legal theories concerning the litigation, as reflected in memoranda, correspondence, interviews, briefs, or in other tangible and intangible ways." Wardleigh v. Second Jud. Dist. Ct., 111 Nev. 345, 357 (1995) (citing Hickman v. Taylor, 329 U.S. 495, 510-11 (1947)).

Generally speaking, the attorney-client privilege protects a communication made between privileged persons in confidence for the purpose of obtaining or providing legal assistance for the client. Privileged communications include essentially any expression undertaken to convey information for the purpose of seeking or rendering legal advice. Haines v. Liggett Group, Inc., 975 F.2d 81, 90 (3d Cir. 1992) (privilege extends to verbal statements, documents and tangible objects conveyed in confidence for the purpose of legal advice). The broad sweep of privileged communications encompasses not only oral communications, but also documents or other records in which communications have been recorded. United States v. Defazio, 899 F.2d 626 (7th Cir. 1990) (communications from attorney to client are privileged if they constitute legal advice or tend directly or indirectly to reveal the substance of a client confidence); Spectrum Sys. Int'l Corp. v. Chem. Bank, 581 N.E.2d 1055 (N.Y. 1991) (attorney-client privilege applies to an attorney's factual report that contained materials gathered from third-party interviews).

In Sporck v. Peil, 759 F.2d 312, 316 (3d Cir. 1985), the federal court of appeals found that the selection and compilation of documents by counsel reflected "the privacy of an attorney's thought process" and, as such, accorded such materials protection from disclosure under the work-product doctrine. See also Upjohn Co. v. United States, 449 U.S. 383, 401 (1981) (discussing the high level of protection afforded to an attorney's thought process under the work-product privilege).

In James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 144 (D. Del. 1982), the federal district court found that:

> In selecting and ordering a few documents out of thousands counsel could not help but reveal important aspects of his understanding of the case. Indeed, in a case such as this, involving extensive document discovery, *the process of selection and distillation is often more critical than pure legal research.* There can be no doubt that [such documents] were entitled to protection[.]"

Id. (emphasis added); see also Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613, 616 (S.D.N.Y. 1977) (protecting an attorney's work product from disclosure because "counsel's ordering of 'facts,' referring to the prospective proofs, [and] organizing, aligning, and marshaling empirical data with the view to combative employment [are] the hallmark of the adversary enterprise.").

All legal work provided to Legislators by the attorneys of the Legal Division consists of confidential communications undertaken to convey information for the purpose of seeking or rendering legal advice. Thus, such legal work is privileged and

protected from disclosure by the attorney-client privilege. Furthermore, when providing legal work regarding legislative actions or matters, the attorneys of the Legal Division always undertake such work in anticipation of litigation that may challenge the constitutionality or validity of the legislative actions or matters. Therefore, such legal work is privileged and protected from disclosure by the work-product privilege.

With regard to your request, you are asking for "[a]ll emails sent or received from the official Senate or Assembly email accounts of Michael Roberson, Aaron Ford, John Hambrick and Irene Bustamante Adams from Monday, February 1, through Sunday, February 7." You are also asking for a "copy of the daily schedule of activities for Michael Roberson, Aaron Ford, John Hambrick and Irene Bustamante Adams from Monday, February 1, through Sunday, February 7." You indicated that this request "includes such details as the names of people with whom these lawmakers were scheduled to meet, descriptions of the functions the lawmakers were to attend and the times those meetings and events were to occur." To the extent the materials you requested contain any matters that fall within the scope of the attorney-client privilege or the work-product privilege, the nature and content of those matters are confidential, privileged and protected from disclosure by those privileges. Therefore, your request must be denied.

7. The Public Records Law does not apply to the requested materials because the materials are "otherwise declared by law to be confidential" under the common-law deliberative process privilege.

The deliberative process privilege "protects materials or records that reflect a government official's deliberative or decision-making process." DR Partners v. Bd. of County Comm'rs; 116 Nev. 616, 623 (2000). The privilege has been adopted because "public disclosure of certain communications would deter the open exchange of opinions and recommendations between government officials, and it is intended to protect the government's decision-making process, its consultative functions, and the quality of its decisions." City of Colorado Springs vs. White, 967 P.2d 1042, 1047 (Colo. 1998); see also DOI v. Klamath Water Users Prot. Ass'n, 532 U.S. 1, 8-9 (2001).

The Nevada Supreme Court has held that the deliberative process privilege applies to the Executive Branch of Government but has not opined on its application to the Legislative Branch. DR Partners, 116 Nev. at 622. However, because the decision-making process of the Legislative Branch is as dependent on "the open exchange of opinions and recommendations between government officials" as the decision-making process of the Executive Branch, the privilege should apply to the Legislative Branch as well. White, 967 P.2d at 1047.

In order to show that a document is privileged, the government has the burden of establishing that the document is predecisional and deliberative. DR Partners, 116 Nev. at 623-26; Schell v. U.S. Dep't of Health & Human Servs., 843 F.2d 933, 940 (7th Cir. 1988); White, 967 P.2d at 1053. Courts also examine whether "the document is so

candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency." DR Partners, 116 Nev. at 624; Schell, 843 F.2d at 940; White, 967 P.2d at 1051-52.

To warrant protection under the deliberative process privilege, the requested materials must be predecisional, meaning that the government must "identify an agency decision or policy to which the documents contributed." DR Partners, 116 Nev. at 623; see also NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1974) ("the lower courts have uniformly drawn a distinction between predecisional communications, which are privileged, and communications made after the decision and designed to explain it, which are not.") (internal citations omitted); White, 967 P.2d at 1051.

With regard to your request, Legislators have a protected right and privilege to engage in telephone communications, electronic communications and any other form of communications with other Legislators, staff, public agencies, officials or employees, constituents and interested parties concerning potential legislation, the legislative process and public policy issues in order to educate and inform themselves before taking action on important legislative matters and public policy issues. Therefore, when Legislators engage in such communications, they are clearly using the communications prior to a final decision. As such, the communications are predecisional.

In addition to being predecisional, such communications also must be deliberative in order to receive protection under the privilege. To be deliberative, the communications must "consist of opinions, recommendations, or advice about . . . policies." DR Partners, 116 Nev. at 624; see also Nat'l Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d 1114, 1117 (9th Cir 1988) ("In furtherance of this objective the courts have allowed the government to withhold memoranda containing advice, opinions, recommendations and subjective analysis.") (quoting Julian v. U.S. Dep't of Justice, 806 F.2d 1411, 1419 (9th Cir. 1986), aff'd 486 U.S. 1 (1988).

As a general rule, the privilege does not protect purely factual matters unless they are "inextricably intertwined with the policy making process." DR Partners, 116 Nev. at 623. However, even facts are protected when their "disclosure . . . may so expose the deliberative process . . . that it must be deemed exempted." Mead Data Cent., Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977); White, 967 P. 2d at 1052 ("The deliberative process privilege protects factual material that is so inextricably intertwined with the deliberative sections of the documents that its disclosure would inevitably reveal the government's deliberations") (citing In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997)).

With regard to your request, when Legislators engage in telephone communications, electronic communications and any other form of communications with other Legislators, staff, public agencies, officials or employees, constituents and interested parties concerning potential legislation, the legislative process and public policy issues, those communications consist of advice, opinions, recommendations and

subjective analysis regarding such legislative matters. Furthermore, any facts contained in the communications are so inextricably intertwined with legislative policy-making and the legislative process that disclosure of any part of the communications would inevitably reveal legislative deliberations. Therefore, because any facts contained in the communications are "inextricably intertwined" with the deliberative elements, the entire content of the communications are deliberative and protected from disclosure.

Finally, in determining the scope of the deliberative process privilege, Courts also examine whether disclosure of the materials would inhibit honest communications in the future. DR Partners, 116 Nev. at 624; Schell, 843 F.2d at 940; White, 967 P.2d at 1051-52. According to the Court in Schell, "the key question . . . is whether disclosure of materials would expose [the] decision-making process in such a way as to discourage discussion . . . and thereby undermine the agency's ability to perform its functions." 843 F.2d at 940. The privilege "typically covers recommendations, advisory opinions, draft documents, suggestions, and other subjective documents that reflect the personal opinions of the writer." White, 967 P.2d at 1053.

With regard to your request, when Legislators engage in telephone communications, electronic communications and any other form of communications with other Legislators, staff, public agencies, officials or employees, constituents and interested parties concerning potential legislation, the legislative process and public policy issues, they need, anticipate and expect candid, honest and frank communications in order to effectively perform their legislative functions. Moreover, requiring Legislators to disclose their communications concerning potential legislation, the legislative process and public policy issues would have a serious chilling effect on the willingness of such persons to discuss their concerns with Legislators. Indeed, it is unlikely that the persons who have engaged in communications with Legislators would have felt comfortable communicating their ideas freely and frankly if they had known that their communications would be disclosed to the public. Therefore, because disclosure of the communications would have a serious chilling effect on the willingness of such persons to discuss their concerns with Legislators, the requested materials are protected by the deliberative process privilege.

Accordingly, the Public Records Law does not apply to the requested materials because the materials are "otherwise declared by law to be confidential" under the common-law deliberative process privilege. Therefore, your request must be denied.

8. The Public Records Law does not apply to the requested materials because the materials are "otherwise declared by law to be confidential" under the common-law balancing of private and public interests given that the interests in privacy and nondisclosure clearly outweigh any countervailing interests in public access.

When there is no statutory provision that explicitly declares a record to be confidential, there still may be common-law limitations that justify restricting disclosure

based upon a broad balancing of the private and public interests involved. Donrey of Nev. v. Bradshaw, 106 Nev. 630, 635 (1990); DR Partners v. Bd. of County Comm'rs; 116 Nev. 616, 622 (2000). Under the common-law balancing test, the governmental entity bears the burden to prove that the interests in privacy and nondisclosure clearly outweigh the public's interests in access. Reno Newspapers, Inc. v. Sheriff, 126 Nev. Adv. Op. 23, 234 P.3d 922, 927 (2010).

When it enacted NRS 41.071, the Legislature declared as the public policy of this state that it is "essential to protect the integrity of the legislative process by ensuring that individual Legislators may perform their core or essential legislative functions without harassment, intimidation or interference." Senate Bill No. 160, 2009 Nev. Stat., ch. 257, at 1041. To achieve this essential public policy, it is necessary to protect Legislators from outside inquiries that would intrude upon, interfere with or pry into their communications with other Legislators, staff, public agencies, officials or employees, constituents and interested parties concerning potential legislation, the legislative process and public policy issues. Without this protection, there would be an intolerable chilling effect that the disclosure of such communications would have on the willingness of such persons to communicate ideas and information to their Legislators. And allowing outside inquiries into the motivations of Legislators would be contrary to the public policy declared in NRS 41.071 because the most likely purpose of such outside inquiries would be to harass, intimidate and suppress Legislators in the performance of their legislative functions.

The Legislature's goal of protecting the confidentiality of communications among Legislators and other persons regarding potential legislation, the legislative process and public policy issues significantly advances the public policy of this state and is essential to the frank and free exchange of information in the legislative process. As a result, the interests of those persons in their individual privacy and the nondisclosure of their communications with Legislators are substantial, and their interests clearly outweigh any countervailing interests in public access. Therefore, your request must be denied.

RESERVATION OF RIGHTS

The purpose of this written response is to provide you with an overview of the reasons why your request is being denied along with citations to the specific constitutional provisions, statutes and other legal authority that support those reasons. However, this written response is not a legal pleading, legal brief, motion or other document under the Nevada Rules of Civil Procedure or the Nevada Revised Statutes. Therefore, in providing you with this response, the LCB Legal Division: (1) is not required by rule or law to use this response to claim or raise every possible argument, objection or defense, in law or fact, to your request; (2) does not waive or abandon any argument, objection or defense, in law or fact, to your request, regardless of whether it is claimed or raised herein; and (3) reserves the right to claim or raise any argument, objection or defense, in law or fact, to your request in any action or proceeding before any court, agency or officer of this State or any other jurisdiction.

CONCLUSION

Based on the well-established provisions and principles of constitutional, statutory, parliamentary and common law discussed in this letter, your request is respectfully denied to the extent explained herein.

Sincerely,

Brenda J. Erdoes
Legislative Counsel

Kevin C. Powers
Chief Litigation Counsel

BJE:dtm

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