



Steve Sisolak
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STATE OF NEVADA
PUBLIC UTILITIES COMMISSION

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Commissioner

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Executive Director

October 16, 2020

VIA EMAIL

Angel DeFazio
PUCN Watchdogs
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Las Vegas NV, 89126
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Re: Request for Records

Dear Ms. De Fazio:

On September 30, 2020, the Public Utilities Commission of Nevada ("PUCN"), an executive branch agency of the State of Nevada, received your correspondence requesting "Copies of all/any bill draft requests that have been submitted for the 2021 Legislative Session." The PUCN responded that it would not be able to provide you with any non-confidential or non-privileged responsive records, if any exist, by October 8, 2020.

NRS 239.0107(1)(d) mandates that if a governmental entity denies a person's request to inspect a public record, or a part thereof, based on the confidential nature of the record, the governmental entity must provide written notice of the fact and a citation to the specific statute or other legal authority supporting the record's confidentiality. Therefore, the PUCN now notifies you that it is withholding records related to bill draft requests that have been submitted by the PUCN for the 2021 legislative session. Any non-public records associated with proposed bill draft requests are confidential and protected from disclosure by the attorney-client privilege, the work product doctrine, the deliberative process privilege, and the legislative privilege.

At this time, the following BDR numbers and descriptions, available on the Legislature's website, comprise the only non-confidential information responsive to your request:

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58-277 **Public Utilities Commission of Nevada**

Revises provisions relating to penalties for violations of certain laws governing public utilities.

58-331 **Public Utilities Commission of Nevada**

Revises provisions relating to the judicial review of decisions of the Public Utilities Commission of Nevada.

Attorney-Client Privilege and Work-Product Privilege

The attorney-client privilege, memorialized at NRS 49.095, provides that “[a] client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications: 1) [b]etween the client or the client’s representative and the client’s lawyer or the representative of the client’s lawyer; 2) [b]etween the client’s lawyer and the lawyer’s representative; [or] 3) [m]ade for the purpose of facilitating the rendition of professional legal services to the client, by the client or the client’s lawyer to a lawyer representing another in a matter of common interest.”

The attorney-client privilege applies to all records of communications between attorneys for the PUCN and their clients, as well as communications between the PUCN’s attorneys and the Legislature’s counsel made to facilitate the rendition of professional legal services related to legislative matters. In addition to the attorney-client privilege, Nevada law also recognizes the work-product doctrine, which “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 doctrine protects “an attorney’s mental impressions, conclusions, or legal theories concerning the [case], 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)).

All legal work, including any drafts of bill language, provided by the PUCN’s attorneys consists of confidential communications undertaken to convey information to seek or render legal advice. Thus, such legal work is privileged and protected from disclosure by the attorney-client privilege and work-product doctrine.

In your request, you ask for the disclosure of records that have not been publicly disclosed by the legislative branch as part of the legislative process. The requested materials fall within the scope of the attorney-client privilege and/or the work-product doctrine; thus, both the nature and content of the requested materials are confidential, privileged, and protected from disclosure. Consequently, Nevada’s Public Records Law does not require disclosure of the requested bill draft records because they are “otherwise

declared by law to be confidential” under the attorney-client privilege and work-product doctrine. Therefore, your request must be denied.

Deliberative Process Privilege

The deliberative process privilege “covers ‘documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’” *Dept. of Interior v. Klamath Water Users Protective Ass’n.*, 532 U.S. 1, 8 (2001) (quoting *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)). “Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances ... to the detriment of the decision-making process.” *United States v. Nixon*, 418 U.S. 683, 705 (1974). The Nevada Supreme Court has held that the deliberative process privilege applies to pre-decisional and deliberative materials or records and “permits ‘agency decision-makers to engage in that frank exchange of opinions and recommendations necessary to the formulation of policy without being inhibited by fear of later public disclosure.’” *DR Partners v. Bd. of County Comm’rs of Clark County*, 6 P.3d 465, 469 (Nev. 2000)(quoting *Paisley v. C.I.A.*, 712 F.2d 686, 697 (D.C.Cir.1983).

The deliberative process privilege protects the withheld records because their disclosure would reveal internal deliberation and decision-making processes in addressing whether and how to make recommendations to the Legislature regarding proposed legislation and whether and how to respond to requests for statements or information. Furthermore, the deliberative process privilege protects the PUCN’s uninhibited discussion as it develops recommendations and other materials to present to the Legislature or other outside entities. The withheld items are records of the PUCN’s internal administrative decision-making process. Any interference with the PUCN’s confidential deliberative process in developing legislative recommendations and/or presentations will ultimately have a detrimental effect on the quality of the PUCN’s recommendations and information-sharing.

Moreover, the PUCN has a protected right and privilege to engage in communications with legislators and legislative staff, with public agencies, officials, and employees, and with any constituents, lobbyists, and other interested persons, as necessary, to educate and inform itself before taking an official position regarding specific legislation. When PUCN personnel engage in such communications, the agency is gathering information before reaching a final decision regarding how best to assist the Legislature in developing public policy. As such, the communications are pre-decisional.

Further, any facts in the requested records of communications are so inextricably intertwined with legislative policy-making and the deliberative 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 is deliberative and protected from disclosure. Additionally, disclosure of the materials would inhibit honest communications in the future. When the PUCN engages in communications concerning potential legislation, both internally and externally—including communications with legislators and legislative staff, public agencies, officials, and employees and any constituents, lobbyists, and other interested persons—candid, honest, and frank communications are required. The disclosure of those communications would have a serious chilling effect on the deliberative process; thus, the privilege protects the requested materials.

Accordingly, based on the deliberative process privilege, the PUCN denies your request.

Legislative Privilege

In NRS 218F.150(1), the Legislature declared that materials which have been entrusted to the Legislative Counsel Bureau (“LCB”) but which have not been publicly disclosed by the legislative branch as part of the legislative process are confidential and privileged:

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*...

NRS 218F.150(1)(b) (emphasis added).

In NRS 218F.150(3), the Legislature also declared that any work produced by the LCB Legal Division or the LCB Fiscal Analysis Division—and any materials entrusted to those divisions to produce such work—are confidential and privileged:

The 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) (emphasis added).

The Legislature also declared that the confidentiality provisions of NRS 218F.150(1) and 218F.150(3) extend 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) (emphasis added).

To achieve these essential legislative policies, it is necessary to protect from disclosure any materials relating to communications with legislative committees, legislators, or legislative staff that have not been publicly disclosed by the legislative branch as part of the legislative process. Without this protection, there would be an intolerable chilling effect that the disclosure of such materials would have on the open, frank, and free exchange of information and ideas during the legislative process. Therefore, allowing outside inquiries or intrusions into this process would be contrary to the public policy declared in NRS 41.071 and 218F.150 and the legislative branch's formal and informal rules, policies, and procedures.

Accordingly, your request must be denied by the PUCN because it asks for the disclosure of materials relating to communications with legislative committees, legislators, or legislative staff, which have not been publicly disclosed by the legislative branch as part of the legislative process. Moreover, Nevada's Public Records Law does not apply to the requested material because the materials are "otherwise protected by law to be confidential" under the statutory privileges of NRS 218F.151 and 218F.150(3). The PUCN may not disclose any records that would reveal confidential communication with Nevada legislators without the involved legislators first waiving the legislative privilege, which applies to materials relating to actions within the scope of legitimate legislative activity.

Finally, balancing the interest for nondisclosure of the withheld records (the PUCN maintaining its ability to engage with legal counsel candidly and to effectively develop responses and/or recommendations to legislators regarding proposed legislation) against the general policy in favor of an open and accessible government requires the PUCN to restrict access to the withheld records.¹ Beyond the general policy in favor of an open government, there is no specific public interest advanced through disclosure of the records.

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¹ There is a presumption that "all public records are open to public disclosure unless either (1) the Legislature has expressly and unequivocally created an exemption or exception by statute...or (2) balancing the private or law enforcement interests for nondisclosure against the general policy in favor of an open and accessible government requires restricting public access to government records." *Reno Newspapers v. Sherriff*, 234 P.3d 922, 925 (2010).

If you have any questions, please feel free to contact me.

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