MEMORANDUM

TO: Board of Trustees

THROUGH:

FROM: Trustee Matthew Dent

SUBJECT: Review and discuss public records request fulfillment, policies, and include potential witnesses.

STRATEGIC PLAN REFERENCE(S):

DATE: 9/5/17

I. RECOMMENDATION

Review and discuss public records request fulfillment, policies, and include potential witnesses.

II. BACKGROUND

NRS 239.0107 Requests for inspection or copying of public books or records: Actions by governmental entities.

1. Not later than the end of the fifth business day after the date on which the person who has legal custody or control of a public book or record of a governmental entity receives a written or oral request from a person to inspect, copy or receive a copy of the public book or record, a governmental entity shall do one of the following, as applicable:

   (a) Except as otherwise provided in subsection 2, allow the person to inspect or copy the public book or record or, if the request is for the person to receive a copy of the public book or record, provide such a copy to the person.

   (b) If the governmental entity does not have legal custody or control of the public book or record, provide to the person, in writing:

      (1) Notice of that fact; and

      (2) The name and address of the governmental entity that has legal custody or control of the public book or record, if known.
(c) Except as otherwise provided in paragraph (d), if the governmental entity is unable to make the public book or record available by the end of the fifth business day after the date on which the person who has legal custody or control of the public book or record received the request, provide to the person, in writing:

(1) Notice of that fact; and

(2) A date and time after which the public book or record will be available for the person to inspect or copy or after which a copy of the public book or record will be available to the person. If the public book or record or the copy of the public book or record is not available to the person by that date and time, the person may inquire regarding the status of the request.

(d) If the governmental entity must deny the person’s request because the public book or record, or a part thereof, is confidential, provide to the person, in writing:

(1) Notice of that fact; and

(2) A citation to the specific statute or other legal authority that makes the public book or record, or a part thereof, confidential.

2. If a public book or record of a governmental entity is readily available for inspection or copying, the person who has legal custody or control of the public book or record shall allow a person who has submitted a request to inspect, copy or receive a copy of a public book or record.

(Added to NRS by 2007, 2061; A 2013, 321)

VIII. BUSINESS IMPACT

Include one of the five following statements: ("Rule" means an ordinance, regulation, resolution or other type of instrument by the adoption of which the governing body of a local government [IVGID Board of Trustees] exercises legislative powers. This does not include items which are authorized pursuant to Chapters 271 (local improvements districts) or Chapters 278, 278A or 278B (zoning and planning) of the Nevada Revised Statutes.)

This item is not a "rule" within the meaning of Nevada Revised Statutes, Chapter 237, and does not require a Business Impact Statement.

or

This item is a "rule" within the meaning of Nevada Revised Statutes, Chapter 237, but it does not impose a direct and significant economic burden on a business, or directly restrict the formation, operation or expansion of a business, and therefore does not require a Business Impact Statement.
This item is a "rule" within the meaning of Nevada Revised Statutes, Chapter 237, but IVGID does not have the authority under federal or state law or a contract into which it has entered, to consider less stringent measures.

or

This item is a "rule" within the meaning of Nevada Revised Statutes, Chapter 237, but emergency action is necessary to protect the public health and safety (requires unanimous vote of the Board and cannot be in effect more than six months).

or

This item is a "rule" within the meaning of Nevada Revised Statutes, Chapter 237, and a Business Impact Statement is attached. (Note: A business impact statement must be prepared and made available to any interested person before a hearing is held to adopt the rule.)
IVGID's efforts to conceal public records gets bizarre

Staff blandly admits felony-level destruction of email records

BY STEVEN MILLER
© 2017, NEVADA JOURNAL | WEDNESDAY, AUGUST 23, 2017 | 2 COMMENTS

Has Indcline Village's often-criticized local government — the Incline Village General Improvement District, or "IVGID" — finally gone off the deep end?

According to district staff, members of the public can no longer review any history of top administrators' email communications on matters of public controversy, or anything else, older than 30 days.

The reason, District Clerk Susan Herron told records-requester Mark E. Smith, is that, for emails, the district suddenly has a new 30-day "retention policy."

Such a policy would directly contradict state law, which makes it a C class felony to destroy or conceal emails and other public records.

Herron, who also has the titles Executive Assistant and Public Records Officer, answers to IVGID General Manager Steven Pinkerton, who, along with IVGID Public Works Director Joseph Pomroy, was the subject of Smith's requests under the Nevada Public Records Act.

Smith is a longtime activist on north Lake Tahoe's problem with roving bears and the unsecured garbage and waste containers that attract them.

"I was pretty active in getting the trash ordinance updated" in 2016, he told Nevada Journal. His June 4 public-records request, he says, had been triggered by learning "that the [IVGID] board of trustees was going to have a review of the new franchise agreement with the trash disposal company, Waste Management."

Also coming up was a board review of Pinkerton's performance. In April, the members had extended his contract for three years. Then in June he'd requested a reputed $64,000 raise.

Smith wanted to see how vocal Incline Village and Crystal Bay residents had been with complaints about the new franchise agreement. It had increased IVGID's financial subsidy of Waste Management local operations, he said, but service, nevertheless, had continued to decline.

"They" — IVGID and the trash company — "had a huge problem meeting their obligations this spring," he said. Under the new franchise agreement, Waste Management committed to pick up "green waste" — mainly pine needles, pine cones and tree debris — every week.

However to service Smith's neighborhood this spring, he said, it took the company five weeks. And, he learned, talking to other people, as well as IVGID insiders, that throughout the district
Waste Management had not provided anything like the weekly service it had promised and for which property owners had paid.

“So yes, over the whole neighborhood, big piles all over the place for a month and a half,” said Smith.

“The period runs late May to late July: a two-month period when they’re supposed to pick up green waste. And for five weeks out of the eight weeks they didn’t pick up green waste in a lot of the community.”

There were also chronic problems with Waste Management’s servicing of damaged commercial dumpsters.

“It was taking them, in some cases, a month to service dysfunctional dumpsters,” he said. “But part of their agreement with the district was they would also upgrade trash service in terms of their responsiveness. But that got markedly less responsive.” And it was the same thing with residential service.

So, on June 4, Smith — seeking a multi-year picture of the issue — submitted his records request, writing IVGID:

Also, by way of this letter, I am making a Public Records Act request for each and every complaint that IVGID has received about any aspect of:

a) Waste Management’s service for the period of 1 January 2010 to the present date,

b) The performance or lack thereof of IVGID’s trash enforcement program for the period of the first engagement of George Valentic to the present,

c) Mr. Pinkerton’s performance related in any way to trash collection or trash enforcement, for the period of his first day of employment for the District to the current date; and

d) Mr. Joe Pomroy’s performance related in any way to trash collection or trash enforcement for the same period as noted in (c), above.

Further, I request each and every email sent or received by Mr. Pinkerton or Mr. Pomroy to or from any person representing Waste Management or any Waste Management subcontractor, supplier or vendor, in any regards for the period from Mr. Pinkerton’s first day of engagement with the District until the present date.

Finally, I also request each and every document related to all corrective action the District has taken in attempts to resolve the failure of Waste Management to abide by the Franchise Agreement.

Five weeks later, I VGID Clerk Herron emailed Smith a peculiar response:

I just wanted to give you a status on your document request of June 4, 2017. Staff has advised that for Items 1. through 3. Waste Management has responded/taken care of those requests. For a), b), c) and d) I have no public records responsive to your requests. I continue to work on the balance and will update you again at the end of this month if not before.

In fact, says Smith, Waste Management had not “responded/taken care of” the requests he’d made to I VGID.

Moreover, it is I VGID, as a local government, that is subject to the Nevada Public Records Act, not the trash company.

On August 1, 58 days after the initial request, I VGID finally turned over a handful of emails. Although Smith’s request had covered multiple years, with special attention to 2016, the district had released only a dozen recent emails. And the earliest was dated a couple of weeks after his June 4th request.

“So the two problems,” Smith told Nevada Journal, “are, one, they didn’t [provide] anywhere near [the records requested], but, two is, they received my email on June 4th, and after they received my request, they deleted emails.”

Wrote Herron:
IVGID’s efforts to conceal public records gets bizarre | Nevada Journal

In response to your request for e-mails between our District General Manager and Director of Public Works and Waste Management, I have a thumb drive available for your pick up at our 893 Southwood offices. You will see thirty days of e-mails as that is our retention policy. (Emphasis added.)

This appears to be the first time that anyone at Lake Tahoe or anywhere else had ever heard of a “30-day email retention policy.”

Smith had also submitted a requests record to review any email communications between IVGID’s Pinkerton and Pomroy on one side and representatives of the Parasol Foundation, on the other. The nonprofit has been seeking to interest IVGID’s board in changing the terms of Parasol’s long-term lease of IVGID land, on which Parasol’s building sits. The proposal has elicited skepticism and controversy.

Only a few of those requested email records were provided Smith. The rest — under the 30 day policy, were either withheld or deleted.

If any of these requested emails still exist in some form of digital backup, IVGID would have illegally concealed them, a category C felony under Nevada law, specifically NRS 239.320. If the emails were destroyed, that, also, is a C felony under the same statute:

NRS 239.320 Injury to, concealment or falsification of records or papers by public officer. An officer who mutilates, destroys, conceals, erases, obliterates or falsifies any record or paper appertaining to his or her office, is guilty of a category C felony and shall be punished as provided in NRS 193.130.

Under NRS 193.130, at least one year in jail is mandatory:

A category C felony is a felony for which a court shall sentence a convicted person to imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 5 years. In addition to any other penalty, the court may impose a fine of not more than $10,000, unless a greater fine is authorized or required by statute."

IVGID Clerk Susan Herron had apparently been convinced by her IVGID bosses that their sudden new “policy” of destroying emails after a mere 30 days was legal because of three interlocking arguments:

1. The general manager, Pinkerton, legally the real controller of the records, had told her to do it.

2. Under a policy statement adopted by a 2011 IVGID board of trustees, the general manager was allegedly given “the discretion to interpret and to modify” board policy “on a case by case basis, as deemed necessary and appropriate under the circumstances.” It is unknown if such discretion was ever reviewed by the state archivist.

3. Twenty-three years ago, in 1994 — well before the planet-wide explosion of email — the Nevada State Archives Administrator, under the law then in place, had approved IVGID’s then “proposed schedule(s) for the retention and/or disposition of records,” which, of course, did not mention emails.

What Herron never acknowledged was that Nevada records-retention law frequently changes, and did so many times in the next 20 years. An appendix to the Nevada Local Government Retention Manual, issued by the state, reveals hundreds of such changes, just over the last nine years. One such important change is that email records have long been explicitly protected at the same level as hard-copy records. Thus, emails to and from the IVGID executive — that is, the general manager — must be permanently retained, and all complaints must be retained for at least three years, as this page from the Nevada Local Government Retention Schedule indicates.

Nevada Administrative Code 239.155 now also requires that any change in retention schedules that would dispose of records — such as IVGID’s alleged “policy” of destroying all emails after 30 days — must first be reviewed and approved by the State Library’s Archives and Public Records Administrator. NRS 239.125 also requires that records-retention policies must be adopted by the governing board of a local government, not merely by its hired executive or a lawyer who reports to him.
IVGID's efforts to conceal public records gets bizarre | Nevada Journal

Given the sudden, apparently ad hoc, obstacles thrown up against Smith's attempt to see General Manager Pinkerton's email communications over the last couple of years, Nevada Journal asked Smith if he thought the new "policy" might just be a way to not honor his records request.

"I think that's exactly right," he said. "This is the most blatant time when they've done something that seems so obviously intentional. In the past, you chalk it up to ineptitude, or lack of time, bureaucratic fumbles with no malicious intent. Here, I have a hard time finding a non-malicious reason for this."

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For the last 20 years, Nevada Journal has been published by the Nevada Policy Research Institute, a non-partisan public-policy think tank.

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Incline Village government commits felony-level crimes to conceal public records

By Michael Schaus
Wednesday, August 23, 2017

In a stunning admission reported earlier today exclusively by the Nevada Journal, staff at the Incline Village General Improvement District (IVGID) openly confessed to destroying or concealing public records as a matter of policy — a felony-level crime under Nevada state law.

After area resident Mark Smith submitted a public records request for, among other things, copies of all email correspondence between IVGID general manager Steve Pinkerton and the district’s trash company, Waste Management, IVGID staff responded by only providing copies of emails from the past 30 days, citing a “retention policy” whereby any emails older than 30 days were either destroyed or withheld from production.

Yet, NAC 239.155 expressly requires that local governments permanently retain the email correspondence of executives like IVGID general manager Steve Pinkerton. The only exception to this mandate is if a local government adopted their own written records retention schedule, which had received the approval of the State Library, Archives and Public Records Administrator. Yet, by IVGID’s own admission, their 30-day retention policy received no such approval.

As Nevada Journal managing editor and NPRI senior vice president Steven Miller reported:

If any of the requested emails still exist in some form of digital backup, IVGID would have illegally concealed them, a category C felony under Nevada law, specifically NRS 239.320. If the emails were destroyed, that, also, is a C felony under the same statute.

In addition to the District’s policy violating the letter of the law, it also eviscerates the spirit and intent of the state’s public records law, as this exact case demonstrates:

On August 1, 58 days after the initial request, IVGID finally turned over a handful of emails. Although Smith’s request had covered multiple years, with special attention to 2016, the district had released only a dozen recent emails. And the earliest was dated a couple of weeks after his June 4th request.

“So the two problems,” Smith told Nevada Journal, “are, one, they didn’t [provide] anywhere near [the records requested], but, two is, they received my email on June 4th, and after they received my request, they deleted emails.”
In responses to the allegations of criminality at IVGID, NPRI communications director Michael Schaus released the following statement:

It is imperative that local governments be transparent and are held accountable to the people they serve. In order to keep taxpayers in the dark, IVGID has chosen to blatantly and flagrantly defy state law. The State must immediately investigate IVGID’s unlawful actions and take any means necessary to bring them into compliance with the state’s public records law.

Be sure to visit NevadaJournal.com or click here to read the story, *IVGID’s efforts to conceal public records gets bizarre*, in its entirety.

You can find this online at: http://www.npri.org/issues/publication/incline-village-government-commits-felony-level-crimes-to-conceal-public-records

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IVGID officials caught in false testimony

State's top authority refutes district's compliance claims

BY STEVEN MILLER
© 2017, NEVADA JOURNAL | TUESDAY, AUGUST 29, 2017 | 2 COMMENTS

Functionaries of Incline Village’s local government repeatedly insisted last week that their sudden scheme to destroy all emails to and from top executives after 30 days had the State of Nevada's stamp of approval.

The very next day, however, the state's top authority on the matter explicitly denied their assertions.

"As Administrator I have not approved the Incline Village General Improvement District’s current records retention policy whereby all emails older than 30 days are deleted," reported Jeffrey Kintop, administrator for the Nevada State Library, Archives and Public Records.

Kintop had been copied on the original email that first revealed IVGID administrators had promulgated a new "retention policy," allowing them to destroy — or at the very least withhold — all public-record emails.

IVGID Clerk Susan Herron, executive assistant to General Manager Steven Pinkerton as well as his appointed public-records officer, had sent that original email to Tahoe resident Mark E. Smith, explaining why IVGID was denying him virtually all of the email records he’d requested.

Smith — active in the effort to reform North Shore trash administration and thus protect trash-diving Tahoe wildlife — had requested all emails between Pinkerton or his public works director and IVGID contractor Waste Management, as well as all complaints made by area residents to IVGID about the district’s earring trash-collection service.

After 58 days, Herron responded with only a handful of the requested records, explaining the wholesale denial by referencing the alleged new 30-day policy.

Smith and others have speculated that the 58 days had largely been devoted — by Herron’s boss Pinkerton and IVGID General Counsel Jason Guinasso — to looking for legal-sounding rationales for keeping Pinkerton’s email communications with Waste Management secret from the public.

However, the email letter of State Public Records Administrator Kintop — sent in response to an inquiry from NPRI's transparency research director, Robert Feltner — implied that any such rationale fails, since under the Nevada Public Records Act, NRS 239.125, local governments' minimum periods of records retention must be formally approved by the Administrator.

The same statute also indicates that any such new record-retention policies "must be approved by the governing body" of the local government. However, Tuesday’s discussion of IVGID...
trustees revealed that Pinkerton and Guinasso had never brought their sudden truncation of email life before that board for approval.

Nevertheless, IVGID Clerk Susan Herron, IVGID General Counsel Jason Guinasso and IVGID Chair Kendra Wong had all, at the August 22 meeting, assured the four remaining board trustees and the attending public that the district was in full compliance with state law. The threesome, however, never addressed key provisions of the record-retention directives that the State of Nevada sets out for local governments. One such key directive — cited by Records Administrator Kintop in his response to NPRI — is that, "E-mail is managed by its content, not its format."

In itself that statement would appear to demolish Herron’s basic argument — which Guinasso repeatedly allowed her to make and which she repeatedly attributed to the Administrator’s office — that all email, regardless of content, are “transitory records,” and thus can legally be destroyed after 30 days.

To the contrary, wrote Public Records Administrator Kintop to NPRI, citing page 9 of the official administrative schedules online here, “E-mail messages are public records when they are created or received in the transaction of public business. They must be retained as evidence of official policies, actions, decisions, or transactions.”

The retention time period for executive communications, such as Pinkerton’s emails, say the directives, is permanent. For complaints from the public, the retention period is a minimum of three years.

While Clerk Herron and Chair Wong could conceivably have remained ignorant regarding the relevant contents of the record-retention manual Nevada provides local governments, full knowledge and candid reporting to the board of those regulations would seem to be a core, ethical responsibility of IVGID General Counsel Guinasso.

The above link goes to a key page of the 2016 Nevada Local Government Retention Schedule. The complete 455-page document is online here. The entire August 22 IVGID board meeting can be livestreamed from these two links: First part and Second part.

Nevada Journal’s initial story on IVGID’s effort to not comply with state public record law was published August 23. It can be accessed here.

Steven Miller is managing editor of Nevada Journal and senior vice president at the Nevada Policy Research Institute

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NPRI files public records complaint with AG's office

Monday, August 28, 2017

In response to last week's Nevada Journal report — which found that the Incline Village General Improvement District's records retention policy violates state law — the Nevada Policy Research Institute has chosen to file a formal complaint with the Attorney General's office.

NPRI president John Tsarpalas issued the following statement:

"Nevadans deserve maximum transparency from their government, which is something the state's public records law is supposed to provide. But this law means nothing if governments are free to defy it without consequence. The Attorney General must ensure all governments provide their citizens with the maximum transparency they deserve, and that the law demands."

Click here to read more about the Incline Village General Improvement District's efforts to conceal their records from the public.

For more information, please contact NPRI transparency director Robert Fellner at 702.222.0642 or rf@npri.org.

You can find this online at: http://www.npri.org/issues/publication/npri-files-public-records-complaint-with-ags-office

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