

**TECHNOLOGICAL CRIME ADVISORY BOARD**  
**Technical Privacy Subcommittee**

**MINUTES OF THE MEETING**  
**January 23, 2015, at 1:30 PM**

The meeting took place at the following locations:  
Office of the Attorney General, Mock Courtroom  
100 N. Carson Street, Carson City, NV 89701-4717  
and  
Office of the Attorney General, Grant Sawyer Building  
555 East Washington Avenue, Suite 3315, Las Vegas, NV 89101

**1. Call to Order and Roll Call.**

Mr. Berghel called the meeting to order. Roll was taken. Mr. Berghel, Mr. Bates, Mr. Earl, Mr. Elste, Mr. Victor, Mr. Cobb and Mr. Lichtenstein were present. A quorum was established.

**2. Public Comment. (Discussion Only) Action may not be taken on any matter brought up under this agenda item until scheduled on an agenda for action at a later meeting.**

There was no public comment.

**3. Chair's Welcome. (Chair)**

Mr. Berghel welcomed the members to the seventh meeting of the Subcommittee and thanked them for their participation. He asked Brett for a report on the new Attorney General.

Mr. Kandt stated that Attorney General Laxalt sent his apologies for being unable to attend the meeting. Mr. Kandt reported that Attorney General Laxalt does find value in what the Subcommittee is doing and in the Advisory Board's mission. He has asked that the Subcommittee weigh in on the issue of cell phone kill switches. Former Attorney General Masto had considered legislation regarding a cell phone kill switch statutory mandate similar to California's. Attorney General Laxalt had some concerns about that. Anytime a statutorily mandated technology solution is imposed, it can have a lot of unintended or negative consequences and may not even address the problem it was intended to address.

In response to a request from Mr. Lichtenstein, Mr. Kandt clarified that a kill switch is an antitheft feature on a mobile device that allows the owner of the device to disable and wipe the device if stolen. California passed legislation requiring that all mobile devices sold in that state have to have that feature. Apple and Samsung already have a kill switch feature in the software on their products.

Attorney General Laxalt felt that before something is mandated by statute as a solution to a technological problem, it should be carefully considered. The BDR has already been withdrawn, but Mr. Kandt stated that he would get a copy of the proposed legislation for the Subcommittee to review if they would like the topic to be placed on the next agenda, along with a discussion of the broader question of what can be done regarding the theft of mobile devices.

Mr. Berghel said he would like to place that topic on the agenda.

Mr. Earl said he is looking at this issue on a practical level and says it seems to him that any producer of wireless, portable, communications devices are going to see the California market as a much larger and more desirable market than Nevada. If California has enacted a statute that requires some sort of embedded solution that would prevent end user data from being compromised in the event that a device is stolen then, as a practical matter, Nevada does not need to adopt a similar statute because that is going to be taken care of by marketers designing for the California market.

Mr. Victor stated he had looked briefly at the California law and recalled that one of the things that stood out to him was that given the global nature of mobile devices which are being manufactured in many places, and are available for purchase over the internet and shipped anywhere, it's not really practical to do some kind of mandate. Not everyone will really respect orders of those types of jurisdictions. There are exceptions--for example the AT&T store--but a lot of devices people are buying and using would be exempt, and would potentially put a Nevada company at a disadvantage versus a foreign, or out-of-state competitor.

Mr. Elste thought that the fact that Attorney General Laxalt asked the Subcommittee to look at this issue is significant and noted the kill switch issue has many components including who triggers the kill switch, under what circumstances, and with what consequences.

Mr. Earl stated that they want to allow law enforcement to disable or prevent the functionality of the kill switch. In years past, law enforcement has been surprised when they tried to do forensics on a cell phone and found there was nothing on the phone. Seized cell phones must be placed into special purpose foil packets. He worries that the wording of a statute might not include an exception allowing law enforcement to preserve evidence. He doesn't think that anything Nevada passes is going to affect the decision of Apple or Samsung to include functionality in their devices.

Mr. Victor said that it is to the advantage of law enforcement when they get a device without a kill switch and that advantage might go away with legislation. He agreed that this is something not to be jumped on and pushed through without careful consideration.

Mr. Cobb commented that the crime deterrent effect is not really the issue. The security of the information accessible on, and through, the phone is the real concern. It is the key to the door to everyone else's information.

Mr. Kandt stated that the discussion and issues originated in the context of the kill switch legislation, however, the Attorney General would like the Subcommittee to consider not only the kill switch legislation, but the broader issues surrounding it. He is interested in hearing whether the Subcommittee has any proposals, suggestions or input on the broader issue of mobile device information security.

Mr. Berghel said that this year, he thought the Subcommittee should address the general issue of security in the context of RF. No one deals with the security aspects until it is too late. We now have an environment where you can lock up the wheels on cars at speed by hacking in through RF to the telematics system of the automobile. It is in a league with the same sort of problems you have with smart phones. If you look at the ways the Silent Circle folks developed their fully encrypted "black phone," it was encrypted at the media layer because the creator did not trust the carriers or the government. Encryption deals with a lot of the PII issues surrounding smart phones. Mr. Berghel would like to have Mr. Victor take charge of this issue and make a report on the issue.

Mr. Victor said he would be happy to take the lead into looking into the kill switch issue and would make a report at the next meeting.

Mr. Cobb noted that one thing that would not require legislative action and would affect the state government is perhaps, as a policy matter, some agencies may want to decide that a requirement for their purchasing is that government phones have a kill switch option.

Mr. Victor stated there may be no need for a kill switch on state government phones if they are strongly encrypted. He will comment on this in his report to the Subcommittee at the next meeting. He noted that the Apple iPhone 6 and Lollipop versions of Android (and newer) phones already have the encryption software built in.

Mr. Kandt asked Mr. Earl if Enterprise Information Technology Services (EITS) designates the specs for all state hardware. Mr. Earl said that EITS does not control the purchases of individual state agencies. However, there may be a misunderstanding regarding the amount of state data that is transferred using phones which the state has procured. He estimates that only 10% of the information that transits wireless phones and tablets is on state-owned devices. The other 90% of information is on employee-owned devices. This issue is being dealt with on an agency by agency basis.

He also commented that the State of Nevada has an encryption law that affects data in transit. This law was drafted and passed at a time when the primary concern was about the transmission of PII in emails. However, with the advent of smart phones and smart applications that may use PII as one type of information to validate an identity, we may already have a statute that requires an encryption on cell phones.

**4. Discussion and possible action on approval of October 24, 2014, meeting minutes.**

Mr. Elste made a motion to approve the minutes of the October 24, 2014, meeting. Mr. Cobb seconded the motion. The minutes were approved without dissent.

**5. Discussion and possible action on recommendations on any bill or bill draft request listed on the Nevada Legislature website for the 78<sup>th</sup> (2015) Nevada Legislative Session. (<http://www.leg.state.nv.us/Session/78th2015/>)**

Mr. Kandt stated that Assemblyman Kirner has a bill, fairly narrow in scope, dealing with the privacy rights of students and the protection of their information in the higher education system. He will send the BDR information to Subcommittee members in an email next week.

Assemblyman Elliot Anderson is going to carry some legislation on drones which will probably address some privacy restrictions, and perhaps some law enforcement restrictions, on the use them. Mr. Kandt has been invited to a meeting with Assemblyman Anderson to discuss his proposal on February 4<sup>th</sup>. If he is given any drafts or proposals, he will forward them to the Subcommittee members for discussion at the next meeting.

Mr. Berghel would like to know how Assemblyman Kirner's bill extends or modifies current federal legislation on student rights.

Mr. Lichtenstein added that he has contacts that work with a group out of Philadelphia, the Foundation for Individual Rights in Education (FIRE) and they have extensive research on that sort of thing so once the Subcommittee gets something, they can certainly run it by the experts at FIRE to get some opinions.

Regarding the drone legislation, Mr. Berghel pointed out that Mr. Bates teaches the drone law course at the university. Mr. Berghel would like to get Mr. Bates connected to anyone proposing legislation concerning privacy and drones. Mr. Kandt suggested that Mr. Bates reach out to Assemblyman Anderson, directly, and offer input.

**6. Discussion and possible action on recommendations for creation of a statewide advisory board on technical and digital privacy.**

Mr. Kandt reported that since the last meeting, there was an election resulting in a change in leadership in both houses of the state legislature. In addition, Assemblyman Bobzien, whom Brett had spoken to about this issue previously, resigned from the legislature to take an appointment to the Reno City Council. So at this point in time, the people Mr. Kandt had spoken to about the creation of the board are no longer in a position to advance the idea.

When the legislative session starts, Mr. Kandt will be at the legislature full time handling legislative affairs for the Attorney General and the district attorneys. One of his goals in conversations with legislators is to continue to promote this idea of a stand-alone state

advisory board for this Subcommittee. He believes Assemblyman Paul Anderson would not only appreciate it, but he is in a leadership position right now.

Mr. Berghel thought that was a good way to proceed. He commented that the problem is not that this Subcommittee is not a free-standing board, but that it reports to TCAB, which is not a good fit. He suggested an intermediate position may be to ask Attorney General Laxalt to pull it from under TCAB and have it as a working group, or by some other arrangement, which would report directly to him.

Mr. Kandt stated that there is nothing that would preclude Attorney General Laxalt from following up on recommendations or findings this Subcommittee makes independently of what the tech crime advisory board does. Separating the Subcommittee from the board may be part of a broader review of TCAB, itself, as its mission moves forward.

Mr. Earl mentioned that private and public organizations have been moving towards appointing privacy officers as there is an increased understanding that privacy is not simply security, and security is not simply privacy. As far as he knows, there are no major agencies in the State that have created a Privacy Officer position despite the fact that some of them are in control of massive amounts of citizen data. He has begun to voice the opinion, internally, that the State should begin looking at the advisability of establishing the position of a State Privacy Officer. Mr. Berghel stated that it would be wise for everyone to be thinking about it.

- 7. Discussion of status of previous recommendations by subcommittee, including, without limitation:**
  - A. Proposed amendment to Nevada Constitution, Article 1 Section 1, establishing an express right to privacy.**
  - B. Request for Nevada Legislature to pass joint resolution calling on Nevada congressional delegation to expand online privacy rights under federal law.**
  - C. Proposed legislation to expand the news shield privilege under NRS 49.275 to address gaps created by technology.**

Mr. Berghel asked if Mr. Kandt had discussed these items with the Attorney General Laxalt. Mr. Kandt noted that although he was willing to discuss it with him, or have the Subcommittee discuss it with him at a future meeting, the Attorney General does not play a role in the process of amending the Constitution or in joint resolutions.

Mr. Berghel thought that the endorsement for the proposed amendment would have to come from someone fairly high up in state government in order to have any support in the legislature.

Mr. Earl stated that if there is no constitutional officer who wants to move forward with a change to the Constitution, then the Subcommittee is in a position of seeking out an individual legislature or else putting this off until the next legislative session.

Mr. Elste said there were some very good recommendations from this Subcommittee which were passed on to TCAB. Because the recommendations are solid and can stand on their own, he suggested repackaging those recommendations in a way that they can be socialized to the other Constitutional officers and members of the legislature to see if there is any interest.

Mr. Victor thought that both the issue of a right to privacy in the Nevada State Constitution and issues like creating a separate board to oversee privacy might be something Assemblyman Carter would take as a friendly amendment to the privacy bill draft.

Mr. Kandt stated he did not think Assemblyman Carter would consider it a friendly amendment because when Mr. Kandt broached the idea of a stand-alone privacy board with him, he did not express any interest or enthusiasm and made it clear what his bill was designed to do. In addition, if he had not already agreed to it, he would not view the proposal as a friendly amendment. Mr. Kandt also noted that a stand-alone board would also have a fiscal impact and that would be a concern to anybody on any legislative committee's bill.

Mr. Elste said that in his mind there are two separate issues. One is taking the Subcommittee's recommendations and trying to find a sponsor for some legislation or some action on them. The other is finding the appropriate body for this Subcommittee to exist under. An amendment to an existing BDR is probably not the path of least resistance. But the Subcommittee members can, as citizens, take the information they have on public record regarding these recommendations and socialize them to other individuals. He asked for feedback from the Subcommittee on whether the notion of packaging the recommendations for individuals in the legislature or the executive branch makes sense.

Mr. Kandt asked if the ACLU has brought up these ideas of the Nevada Constitution or broader protections under the federal law with anyone. He thought those would be issues the ACLU was focused on all the time. Mr. Lichtenstein stated he had not been with the ACLU since last July but during his time there, that had not occurred. He does not know if it has been discussed since then. He commented that he is not sure that going outside the existing structure of this Subcommittee and approaching other constitutional officers or whomever will listen, may not be received that well in terms of the breach of protocol and lines of authority. He is concerned that if it is not received well, that may negatively impact the possibility of creating a better structure for the Subcommittee. He advised proceeding cautiously.

Mr. Kandt said he could discuss the issues with Attorney General Laxalt but the Attorney General is not in a position, alone, to amend the Nevada Constitution and a joint resolution is not within the scope of a BDR that the AG could submit. Besides, the time for BDRs from the AG's Office has passed for the 2015 session. They could look at the possibility that Attorney General Laxalt would want to carry the news shield privilege as a BDR in 2017, but the Nevada Press Association had their reservations about that amendment and their endorsement of it would be essential for it to be successful in the legislature. Mr. Kandt stated that typically, something like they want

would come from a group like the ACLU or other advocacy groups. If there is a proposal in the legislature, then it would not be outside the realm to say that the Subcommittee looked at this and also supports it.

[At this point in the meeting the recorder malfunctioned].

**8. Discussion and possible action on identification and prioritization of issues for consideration by subcommittee, including, without limitation:**

**A. Proposed revisions to the statutory definition of “personal information” in NRS 603A.040.**

Discussion?

**B. Proposed legislation to prohibit Automatic License Plate Reader Systems in Nevada.**

There was discussion of a GPS car tracking case and of first amendment challenges to license plate readers, and of how they are distinguished from biometric identifiers.

**C. Proposed legislation to require full disclosure when metadata is captured and retained by government entities in Nevada.**

There was discussion of the Federal Information Processing Standards and the potential for some type of “Fair Data Collection Practices Act” with meta-level constructs for privacy.

**D. Proposed telematics black box legislation.**

There was discussion of proposed legislation in California that was never enacted into law.

**E. Proposed revisions to Nevada Unmanned Aircraft Systems (UAS) Test Site Privacy Policy (available at <http://www.nias-uas.com/content/nevada-uas-test-site-privacy-policy>)**

There was discussion of concerns over security and vulnerability and the Subcommittee agreed to submit a detailed critique of the (UAS) Test Site Privacy Policy for any hearing on the UAS BDR.

**F. Proposed revisions to Nevada Revised Statutes relating to noirware.**

Mr. Berghel reported that he included this agenda item and that noirware is any technical solution can be developed to counteract negative externalities associated with hardware or software, a “technical antidote.”

**9. Committee comments. (Discussion only.) Action may not be taken on any matter brought up under this agenda item until scheduled on an agenda for action at a later meeting.**

Mr. Kandt advised the Subcommittee that any proposed legislation for the 2017 Legislative Session should be developed within the next 12 months to allow sufficient time to accommodate the deadlines on BDR's placed on state executive branch agencies.

**10. Discussion and possible action on time and location of next meeting.**

The Subcommittee agreed to meet on March 6, 2015, at 1:30PM.

**11. Discussion and possible action on future agenda items.**

None.

**12. Public Comment. (Discussion Only.) Action may not be taken on any matter brought up under this agenda item until scheduled on an agenda for action at a later meeting.**

None

**13. Adjournment.**