Open Meetings Act
NMSA 1978, Sections 10-15-1 to -4
Department of Finance and Administration
2019 Budget Conference
November 14, 2019
About the Open Government Division

• Office of the Attorney General Structure: Civil Affairs & Criminal Affairs
  • OGD is within Civil Affairs

• Represent approximately 80 state boards and commissions

• Have a variety of functions:
  • Client representation
  • Contract review
  • Draft Official Attorney General Opinions
  • Bill analysis
  • Other duties as assigned
  • Enforce Open Meetings Act (OMA) and Inspection of Public Records Act (IPRA)
This Presentation

• OMA as public policy
• Who is subject to OMA?
• Notices, agendas, and minutes
• Exceptions and closed session
• Enforcement
• Best practices
OMA as Public Policy

- Public is entitled to greatest possible information about government affairs
- Representative government depends on informed electorate
- No closed meetings for:
  - Formation of public policy
  - Conduct of business by vote
- All meetings of a public body are public meetings, and anyone can attend
- Must make reasonable efforts to accommodate audio and video recordings

Section 10-15-1(A)
Who Is Subject to OMA?

• “Public body” = very broad definition
  • Any board, commission, administrative adjudicatory body, or other policymaking body of any state agency or political subdivision

• Any meeting of a quorum held to:
  • Formulate public policy
  • Discuss public business
  • Take any action

• Must be policymaking
  • Not purely advisory bodies

• Includes bodies that have delegated authority
  • Can’t delegate authority so as to avoid OMA
  • Formulate a binding decision or action on behalf of the public body

Section 10-15-1(B)
Who is subject to OMA?

Example

Pursuant to its constitution, the board of regents of a state university votes to delegate its authority to decide and approve postgraduate curricula to the faculty senate of the respective post-graduate departments.

After this delegation, are meetings of the faculty senate subject to OMA?
Quorums

• OMA applies to all meetings of a quorum
• Quorum: usually a majority
  • Unless quorum is defined otherwise
• Can occur on committees too
• Rolling quorums
  • Members not present together at same time and place
  • Separate conversations (in person, telephone)
  • Emails

Section 10-15-1(B)
What’s not subject to OMA?

• Remember: must relate to public business
• Not social situations
• Not accidental, chance encounters
• Public bodies can take steps to avoid appearance of violations

Section 10-15-1(B)
Quorums: Examples

1. Two members of a three-member school board attend the retirement party of the District’s longtime superintendent. While at the party, the Board members have a long conversation about the upcoming baseball season.
   - Was this a violation of OMA?

2. After the meeting, one of these Board members sends a text message to the other (using their personal cell phones), urging him to vote in favor of the proposed budget at the next meeting. The other Board member texts back that he definitively plans to vote in favor of the budget.
   - Was this a violation of OMA?

Section 10-15-1(B)
Meeting Notices - Generally

• Reasonable advance notice of all meetings
• Applies to both open and closed meetings
  • No secret meetings
• All public bodies must determine reasonable notice once per year
  • Should adopt an annual OMA resolution annually
• Can reconvene meetings: 10-15-1(E)

Section 10-15-1(D)
Meeting Notices - Specifically

• Must include:
  • Date, time, and location
  • Agenda (or how to get a copy)

• Provided to, at minimum:
  • Broadcast stations and newspapers of general circulation that make a written request for notice
  • Published or posted in place and manner accessible to the public
  • Other requirements found by the public body to be reasonable

• Reasonable notice is considered to be at least 10 days prior to a regular meeting

Section 10-15-1(D)
Meeting Notices - Language

• Not specifically in OMA
• Statute: depends on population
  • $\geq 75\%$ English: notice in English is sufficient
  • $25\% - 75\%$ English/Spanish: notice required in both English and Spanish
  • $\leq 25\%$ English: notice in Spanish is sufficient

Section 14-11-11
Agendas

• Meeting notice must include agenda (or information on how to get a copy)
• Must contain a list of specific items of business
  • Must be reasonably specific
• No action may be taken at a meeting unless the item appears on final agenda
  • Posted 72 hours in advance
  • Exception for emergency meetings

Section 10-15-1(F)
Agendas: Timing

• Must be posted at least 72 hours before a meeting
• Must be on website
  • If public body has one
  • Again, 72 hours in advance
• Exception: public bodies that meet more than once a week
  • Draft agenda: 72 hours before a meeting
  • Final agenda: 36 hours before a meeting
Agendas: Example 1

School Board Agenda
123 Fictitious Ave.,
Santa Fe, NM
May 23, 2019
5:00 PM

I. Call to order
II. Approval of Meeting Agenda
III. Approval of Minutes from April 24, 2019, Meeting
IV. Old Business
V. New Business
   a) Vending machines in the cafeteria
   b) Limited personnel matters
VI. Adjourn

The Board discusses and acts on three contracts. Was this agenda item reasonably specific?
The Board discusses and votes to allow vending machines in the school cafeteria. Was this agenda item reasonably specific?
The board dismisses the director of the district’s administrative office and reorganizes the remaining staff positions. Was this agenda item reasonably specific?
School Board Agenda
123 Fictitious Ave.,
Santa Fe, NM
May 23, 2019
5:00 PM

I. Call to order
II. Approval of Meeting Agenda
III. Approval of Minutes from April 24, 2019, Meeting
IV. Evaluation of Superintendent performance and action on renewal of contract with an annual raise
V. New Business
   a) Vending machines in the cafeteria
   b) Limited personnel matters
VI. Adjourn

While in closed session, the Board discusses a lawsuit pending in District Court filed by a citizen who claims the Board violated OMA by approving a lease in closed session (in 2017). Any OMA violations?

The Board enters into closed session and evaluates the Superintendent. Any OMA violations?
Agendas: Example 3

Sue, the School Board’s Secretary, is responsible for putting out agendas for every meeting. The next meeting is scheduled for Friday at 5:00 PM, so Sue puts out the agenda on Tuesday at 5:00 PM. The next morning, on Wednesday at 8:00 AM, Sue realizes she forgot to put a particular contract item on the agenda.

Can Sue add the contract item to the agenda for Friday’s meeting?
Minutes

• Must keep minutes of all meetings
• At minimum, must include:
  • Date, time, and place
  • Names of members present and absent
  • Substance of proposals considered
  • Record of decisions made and any votes
• Voting: how each member voted
  • No secret ballots

Section 10-15-1(G)
Minutes: Timing

• Minutes are available for inspection
  • Includes draft minutes
  • Even if not yet approved by public body

• Draft minutes must be prepared in 10 working days

• Must be considered at next meeting

• Subject to IPRA

Section 10-15-1(G)
Minutes: Example

School Board Meeting – June 3, 2019

Meeting Minutes

Member A moved to adopt the 2019 Open Meetings Act Resolution. Member B seconded the motion. A vote was held and the motion was approved.

... 

Member C moved to approve the minutes from the Board’s May 1, 2019, meeting. Member D seconded the motion. A vote was held and it was unanimous in favor, with the exception of Member E, who voted nay.

This is a nine member Board. Any Open Meetings Act violations?
Emergency Meetings

• Requirements for notice and agenda are relaxed

• Very strict definition:
  • “unforeseen circumstances that, if not addressed immediately by the public body, will likely result in injury or damage to persons or property or substantial financial loss to the public body”

• Must submit a report to the Office of the Attorney General afterwards

Section 10-15-1(F)
Telephonic Attendance

• Phone, skype, etc. is allowed sometimes

• Requirements:
  1. Authorized by a rule by the public body
  2. Difficult or impossible to attend in person
  3. Each member identifiable when speaking
  4. All participants can hear each other at same time
  5. Public can hear all members who speak

Section 10-15-1(C)
Closed Meetings - Generally

- Closed = private, exclude the public
  - OMA *allows* but does not require closed session
- Agenda item under discussion must qualify for one of OMA’s exceptions
  - Ten exceptions
  - No catch-all exception
  - Very limited
- Almost always must take action in open meeting
- Allowed at either a separate, closed meeting, or a closed session during an open meeting
- Must follow proper procedures

Section 10-15-1(I)
Closing an Open Meeting

• Requirements:
  • A motion citing:
    • legal authority for closure AND
    • topic to be discussed with reasonable specificity
  • A roll call vote

• Afterwards, need statement in open session confirming that the topics discussed were limited to those in the motion to close

Section 10-15-1(I)(1)
Example 1: Closing a Meeting

CHAIR: I will entertain a motion to enter into closed session.
Member 1: I move that the Board enter into closed session.
Member 2: Second.
CHAIR: The motion to enter into closed session has been made and seconded. Any discussion? Seeing none, all in favor say aye.

CHORUS: Aye.
CHAIR: The aye’s have it, we are now in closed session.

Any OMA violations?

Motion did not state either:
• legal authority for closure
• topic to be discussed with reasonable specificity

Section 10-15-1(I)(1)
Example 2: Closing a Meeting

CHAIR: I will entertain a motion to enter into closed session.

Member 1: I move that the Board enter into closed session as authorized by the licensing exception of the Open Meetings Act to discuss the disciplinary matters as listed on the agenda.

Member 2: Second.

CHAIR: The motion to enter into closed session has been made and seconded. May we have a roll-call vote?

Secretary: [takes a roll call vote.]

CHAIR: The motion to enter into closed session carries. Let the record show that the Commission entered into closed session at ___________ a.m./p.m. We are off the record.

Section 10-15-1(I)(1)
Closed Meeting – Separate

• Can also hold a closed meeting that is not part of an open meeting

• Requirements:
  • prior public notice stating:
    • specific law authorizing closure AND
    • topic to be discussed with reasonable specificity

Section 10-15-1(I)(2)
Closed Meetings: Minutes

• Minutes from an open meeting must state:
  • matters discussed in closed session were limited to those specified in the motion to close

• Minutes from a closed meeting:
  • Minutes of next open meeting must state that matters discussed during the separate closed meeting were limited to those specifically listed in the notice of the closed meeting

Section 10-15-1(J)
OMA Exceptions

• Ten exceptions authorize closed session
  1. Licensing
  2. Limited Personnel Matters
  3. Deliberations for Administrative Adjudicatory Proceedings
  4. Personally Identifiable Student Information
  5. Collective Bargaining Strategy
  6. Certain Purchases
  7. Pending or Threatened Litigation
  8. Purchase, Acquisition or Disposal of Real Property/Water Rights
  9. Strategic & Long-Range Business Plans/Trade Secrets
  10. Certain Gaming Control Board Meetings

Section 10-15-1(H)
OMA Exceptions – (2) Limited Personnel Matters

• “discussion of hiring, promotion, demotion, dismissal, assignment or resignation of, or the investigation or consideration of complaints or charges against, any individual public employee”

• Does not cover general personnel policy
  • Limited to individual employees
  • Needs to be an employee over whom the public body has supervisory authority

• Need to specify the employee on the agenda
  • Either by name or by position, if that is specific

• Does not preclude aggrieved public employee from demanding public hearing

• Final action must be taken in an open meeting

Section 10-15-1(H)(2)
OMA Exceptions – (6) Certain Purchases

“That portion of meetings at which a decision concerning purchases in an amount exceeding two thousand five hundred dollars ($2,500) that can be made only from one source and that portion of meetings at which the contents of competitive sealed proposals solicited pursuant to the Procurement Code are discussed during the contract negotiation process. The actual approval of purchase of the item or final action regarding the selection of a contractor shall be made in an open meeting.”

• Effectively two exceptions:
  • Discussion of one source purchases in an amount exceeding $2,500
  • Discussion, during the contract negotiation process, of contents of competitive sealed proposals solicited pursuant to the Procurement Code

• Action must be taken in open session
  • Vote taken in open session
OMA Exceptions – (7)
Litigation

• Covers discussion of pending or threatened litigation
  • Must pertain to threatened or pending litigation in which the public body is or may become a participant
• Only exception that expressly allows closed meeting to discuss attorney-client privileged matters

Section 10-15-1(H)(7)
Enforcement

• Attorney General and District Attorneys
  • AGO has enforcement process designed to encourage compliance

• Private individuals
  • Written notice to public body required; public body has 15 days to act on alleged violation
  • Individual can recover reasonable costs & attorneys’ fees

• Actions taken in violation of Act may be deemed invalid
  • Presumption: public body complied with OMA

• Criminal penalty: full misdemeanor, punishable by $500 fine

Section 10-15-1(3)
Review and Best Practices

• Agendas must be reasonably specific
  • Detail is good
• Action cannot take place in closed session
• Follow specific procedures to enter closed “executive” session
  • And must have an applicable exception
• Be somewhat cautious about telephonic participation
• Avoid “rolling quorums”
Questions?

• Consult your attorney

• Attorney General Open Meetings Act and Inspection of Public Records Act Compliance Guides, [www.nmag.gov](http://www.nmag.gov)

• NM Attorney General’s Office
  • Open Government Division, (505) 490-4060

• NM Foundation for Open Government
  • [www.nmfog.org](http://www.nmfog.org)