

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

February 4, 2020

VIA ELECTRONIC MAIL ONLY

Town of Edgewood Council
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Re: Open Meetings Act Complaints – Karen Kiser

Dear Mr. Autio:

Thank you for your response to our inquiry regarding the three complaints submitted to the Office of the Attorney General by Ms. Karen Kiser alleging that the Town of Edgewood Council (hereinafter the “Council”) violated the Open Meetings Act (“OMA”), NMSA 1978, Sections 10-15-1 to -4 (1974, as amended through 2013). As you know, Ms. Kiser alleges that the Council has violated OMA in various ways over the past three years. Having thoroughly reviewed her complaint and your response, we are concerned as to the specificity of the Council’s meeting agendas and its motions to close meetings. We advise the Council to revise its procedures so as to ensure that it fully complies with its OMA obligations in the future.

Background

In New Mexico, the Open Meetings Act provides the public with access to “the *greatest possible information* regarding the affairs of government and the official acts of those officers and employees who represent them.” Section 10-15-1(A) (emphasis added). *See also Kleinberg v. Bd. of Educ. of Albuquerque Pub. Sch.*, 1988-NMCA-014, ¶ 18 (noting that “the public policy of this state, as expressed in the Act, is to conduct the public’s business in the open, allowing persons, so desiring, to attend and listen to the proceedings”). In line with the public policy behind the statute, OMA is broadly construed in favor of transparency. *See* Attorney General’s Open Meetings Act Compliance Guide, p. 7 (8th ed. 2015) (“OMA Guide”) (noting that “doubt as to the proper course of action should be resolved in favor of openness whenever possible”).

Ms. Kiser's trio of complaints to our Office allege that the Council violated OMA¹ at approximately seven (7) meetings held over the course of the past three years. For practical purposes and in the interest of providing relevant guidance to the Council, we limited our review to only those meetings that occurred within the past two years: February 7, 2018, April 18, 2018, January 23, 2019, and April 10, 2019. Ms. Kiser's allegations can largely be divided into two categories: allegations about the Council failing to post meeting agendas online in a timely manner, and allegations about the specificity of the Council's meeting agendas and motions to close otherwise open meetings. We will address each subject in turn.

Timing of Meeting Agendas

OMA is perfectly clear that all meeting agendas must be posted online seventy-two hours in advance of any meeting. *See* § 10-15-1(F) (providing that, "Except in the case of an emergency or in the case of a public body that ordinarily meets more frequently than once per week, at least seventy-two hours prior to the meeting, the agenda shall be available to the public and posted on the public body's web site, if one is maintained."). This is a bright-line rule: if a public body maintains a website and fails to post its agenda online no later than seventy-two hours before the meeting, that meeting cannot take place. *See* N.M. Atty. Gen. Letter to Francis Bee, Gallup Business Improvement District (July 8, 2019) (explaining that, "If this requirement is not satisfied for any future meeting, the Board simply cannot meet as scheduled.").

On this issue, we are presented with dueling narratives. On the one hand, Ms. Kiser strenuously maintains that the Council failed to post its agenda online within seventy-two hours of the meetings held on January 23, 2019, and April 10, 2019. On the other, the Council stated in response to our inquiry that the meeting agendas had been timely posted and provided our Office with copies of emails sent prior to both meetings that state as much. The Council further stated that, "Ms. Kiser's claim that the meeting agendas were not posted in a timely manner are unsupported by any evidence." Having no direct evidence either way, we cannot resolve this issue. We do not have sufficient information to conclude that the Council violated OMA in this respect.

Reasonable Specificity

The primary allegation in Ms. Kiser's three complaints is that the Council repeatedly failed to provide reasonable specificity in agendas and motions to close open meetings. This argument arises out of several distinct OMA provisions. Most importantly, Section 10-15-1(F) requires all meeting agendas to include "a list of specific items of business to be discussed or transacted at the meeting." As we explain in our OMA Guide, "The requirement for a list of specific items of business ensures that interested members of the public are given reasonable notice about the topics a public body plans on discussing or addressing at a meeting." OMA Guide, p. 17. Agenda items must give the public a "reasonably clear idea" as to the subject of public business. *Id.* A public body cannot discuss or take action on overly vague or broad agenda items because the interested public would not know in advance the subjects to be discussed or transacted.

¹ As our review is limited in this matter to the Open Meetings Act, we will not address Ms. Kiser's extraneous allegations.

The requirement for reasonable specificity also extends to items that the public body might desire to discuss *in closed* session. In addition to being listed on the agenda with reasonable specificity, OMA also requires the subject to be discussed in closed session to be identified with reasonable specificity in the motion to close the meeting. *See* § 10-15-1(I)(1) (providing that “the authority for the closure and the subject to be discussed shall be stated with reasonable specificity in the motion calling for the vote on a closed meeting”); *see also* OMA Guide, p. 31. The public body may only discuss an item of public business if it is specified in the motion to close the meeting. *See* § 10-15-1(I)(1).

Ms. Kiser identifies three meetings at which she claims that the Council ran afoul of OMA’s reasonable specificity requirements. The first of these occurred on February 7, 2018. That meeting’s agenda included the following item: “discussion of the purchase, acquisition or disposal of real property (§ 10- 15-1 (H) (8).”² During the meeting itself, the Board entered into closed session to discuss this item, and the minutes of the meeting reflect that the motion language was identical to that in the agenda. Unfortunately, this language was not reasonably specific. It did not identify the land at issue. By failing to include this information it also failed to adequately describe “the subject to be discussed,” even if it did identify the legal authority for the closure. We would note, in reaching this conclusion, that we concluded the same in reviewing another recent OMA complaint against the Council. *See* N.M. Atty. Gen. Letter to Tanya Mangum (Apr. 29, 2019) (concluding that the agenda item for “discussion of the purchase, acquisition or disposal of real property” did not “rise to the level of reasonable specificity because no public member could possibly know which real property the Town intended to discuss based on the agenda”). The Council’s meetings on April 18, 2018, and April 10, 2019, also suffered from the same deficient descriptions.

Although the focus of Ms. Kiser’s complaints are the Council’s discussions of real property, we identified two other deficient items on the agenda for the meeting on April 10, 2019. The first was for a discussion of “Pending Litigation. Specifically, an update to the members of the Governing Body on on-going Litigation.” This item lacked reasonable specificity because the public could not know which *particular* litigation the Council intended to discuss. The term “pending litigation” is not, by itself, sufficient for OMA purposes. Similarly, the discussion of “Limited Personnel Matters. Specifically, the discipline of a public employee,” was insufficient because it did not identify the particular employee or, in the alternative, the employee’s position the Council would be discussing. *See* N.M. Atty. Gen. Letter to Kevin Gick, University of New Mexico, at 4 (Aug. 8, 2018) (concluding that “to satisfy the reasonable specificity requirement, the public body must list the specific individual employee to be discussed”).

² At its meeting on February 7, 2018, the Council also entered into closed session to discuss “Limited Personnel Matters (§ 10-15-1(H) (2). - Police Department Pay Matrix.” Although this item was probably reasonably specific, it is abundantly clear that the Council was not authorized to discuss this item in closed session pursuant to OMA’s exception for limited personnel matters. That exception authorizes only a discussion about “any *individual* public employee.” Section 10-15-1(H)(2). The Council’s discussion was evidently not about a particular employee but rather about the pay matrix for the entire police department. It was therefore not subject to OMA’s limited personnel matters exception, and the Board’s discussion was a violation of OMA. Although Ms. Kiser’s complaints did not identify this as an OMA violation, we raise it to better educate and inform the Council so as to prevent future statutory noncompliance.

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Following many of these violations, it appears that the Council did not take any official action.³ This is important because, in the absence of any action, the Council is not necessarily required to take remedial action. *See Kleinberg*, 1988-NMCA-014, ¶ 30 (noting that “procedural defects in the Open Meetings Act may be cured by taking prompt corrective action”); *see also* § 10-15-3(B) (requiring that an individual seeking enforcement action in District Court must provide the public body with fifteen days to take remedial action). However, this is not to say that these insufficiently specific agendas and motions did not represent violations of OMA: they were violations, and the Council should strive to avoid such noncompliance in the future.

Conclusion

Because we have identified what appears to be a consistent pattern of deficient specificity in agendas and motions to close meetings, we strongly recommend that the Council take better care in the future to satisfy OMA’s requirements. In the interest of providing the public with access to “the *greatest possible information* regarding the affairs of government,” public bodies simply cannot use overly vague terms to describe agenda items. Section 10-15-1(A) (emphasis added). Future agendas should generally identify the specific land being discussed (perhaps with *exceptions in unusual circumstances*). All agendas should identify any litigation or specific employees the Council intends to discuss. Lastly, to the extent that this too may be a problem, the Council should take care to always provide its agendas to the public at least seventy-two hours prior to any meeting.

For your reference, a copy of the IPRA Guide is available on the website of the Office of the Attorney General at www.nmag.gov. If you have any questions regarding this determination or IPRA in general, please let me know.

Sincerely,



John Kreienkamp
Assistant Attorney General

Enclosure

cc: Karen Kiser

³ There is, however, at least one action which may require some remedial action on the part of the Council: its decision to terminate a particular employee on April 10, 2019, after failing to provide reasonable specificity in its agenda. We recommend that the Council reevaluate this item and take all appropriate steps to rectify this violation.