

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

September 3, 2021

VIA ELECTRONIC MAIL ONLY

Mr. Jeffrey A. Howey
5231 Comanche Trl.
Las Cruces, New Mexico 88012-7362
Email: jeffhoweynm2@gmail.com

Re: Open Meetings Act Complaint – Las Cruces City Council

Dear Mr. Howey:

The Office of the Attorney General, Open Government Division (hereinafter “OGD”) has received your complaint alleging violations of the Open Meetings Act (“OMA”), NMSA 1978, Sections 10-15-1 to -4 (1974, as amended through 2013), by the Las Cruces City Council (the “Council”). The OGD is charged with enforcement of OMA and in that capacity has reviewed the facts and allegations in your complaint. *See* NMSA 1978, § 10-15-3(B) (authorizing the Office of the Attorney General to enforce all provisions of the Open Meetings Act). Having carefully reviewed your complaint, we conclude that you have not identified a violation of OMA.

Background

Your complaint to our Office alleges that the Council violated OMA in connection with its meeting on July 19, 2021. At least 72 hours prior to this meeting, the Council provided the public with an agenda containing the following item of business (capitalization in original omitted):¹

Resolution No. 22-002: A Resolution Renewing the Mayor’s Emergency Proclamation and Clarifying the Requirements Regarding Masks in Council Chambers.

The agenda also included an embedded link for this agenda item that, if clicked, linked to a copy of the resolution itself and supporting documentation. This item was located on the agenda under

¹ For the purposes of this letter, we will also subsequently refer to the agenda with capitalization omitted.

the organizational heading for “Resolution(s) and/or Ordinance(s) for Consent Agenda.” The agenda also included the following statement: “Those items on the agenda indicated by an asterisk (*) are on the consent agenda and will be voted on by one motion.” An asterisk did not accompany “Resolution No. 22-002”.

Notwithstanding the fact that the item for “Resolution No. 22-002” did not include an asterisk, we understand that the Council voted on it alongside the other four consent agenda items in a single vote. Your complaint suggests that, prior to this vote, certain members of the public may have refrained from speaking about the resolution during the “Public Participation” with the understanding that they could address it later in the meeting. However, both the minutes and the video² of the meeting confirm that, upon realizing that some attendees may have been inadvertently deprived of an opportunity to speak about the resolution, the Council voted to “suspend the rules” and reopen the item for additional public comment. As part of this discussion, the City Mayor noted that the resolution had “already been voted on” but wanted to give the public an opportunity to comment further. After hearing additional public comment, the Council did not vote again on the resolution.

Your complaint alleges that, in light of the missing asterisk, the Board violated OMA in connection with its approval of the resolution. Specifically, you argue that the Council’s agenda item lacked reasonable specificity and that the Council effectively deprived the public of the opportunity to speak on the resolution. Further, you allege that the Council provided an inadequate agenda because it did not notify the public that it would vote on the resolution as part of a singular vote to approve its consent agenda. Although our review of your complaint did not require a response from the Council, we do note that the City publicly denied³ all of your allegations in an article published by the Las Cruces Sun-News.⁴

Analysis

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). The OMA governs all actions taken by “any board, commission, committee or other policymaking body,” Section 10-15-3(A), requiring that all public bodies open their meetings to the public and allow interested individuals the opportunity to attend and listen. Section 10-15-1(A). In accordance with the intent 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”). Among

² Available at <https://lascruces.civicweb.net/document/15471?splitscreen=true&media=true>.

³ Although you allege that the City Mayor “admitted violating the Open Meetings Act,” we interpret his email as admitting only that the agenda did not include an asterisk next to the agenda item in question.

⁴ *See* Michael McDevitt, *Las Cruces blames 'clerical error' for confusion over public input before mask vote*, LAS CRUCES SUN-NEWS (Jul. 21, 2021), available at <https://www.lcsun-news.com/story/news/2021/07/21/las-cruces-city-council-covid-vaccination-mask-rule-prompts-resident-complaint-nm-attorney-general/8030355002/>.

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other specific procedural requirements, the statute provides that public bodies may only take action on items listed on the agenda with reasonable specificity at least 72 hours prior to the meeting. *See* § 10-15-1(F).

Preliminarily, we disagree with your contention that the item of business on the Council's agenda for "Resolution No. 22-002" lacked reasonable specificity. First and foremost, this item description not only specified the precise resolution on which the Council would vote, but also included an embedded link to a copy of the resolution itself along with supporting documentation. This alone clearly conveyed a "reasonably clear idea" as to the subject of public business. OMA Guide, p. 17. Moreover, the agenda also provided a description of the resolution: "A Resolution Renewing the Mayor's Emergency Proclamation and Clarifying the Requirements Regarding Masks in Council Chambers." Given that this appears to have been precisely what the Council voted on, there is no question that the agenda was reasonably specific as to this item of business.

As to your contention that the Council effectively deprived the public of the opportunity to speak on the resolution in question, we find no merit to this argument. First and foremost, the Council voted to reopen the resolution for public comment upon realizing that some in the audience had desired to comment on the resolution, so as a factual matter it does not appear that the public was generally deprived of the chance to comment. Moreover, even if true, this is not a cognizable OMA violation. As our Office has observed in the past, "unlike open meetings laws in a handful of other states... New Mexico's OMA simply does not require the public be afforded the opportunity to comment." N.M. Att'y Gen. Letter to Erin K. McSherry, Governing Body of the City of Santa Fe, at 4 (Sept. 3, 2020). The statute requires that public bodies enable the public to "attend and listen" but not necessarily to participate and comment. Section 10-15-1(A). Therefore, even if we were to accept as true that the public was unable to speak on the resolution, this would not establish a violation of OMA.

Similarly, the lack of an asterisk in the Council's agenda did not mean that its vote to approve the resolution as part of its consent agenda violated OMA. Notwithstanding the apparent custom at Council meetings to provide this information to the public in advance of its meetings, OMA does not generally govern the decisions of public bodies to vote on items of business singularly or collectively. That is, in requiring agendas to be reasonably specific as to the items of business the public body might act on, Section 10-15-1(F) does not require them to preview the actual number of votes the public body will take to act on those items. Here, because the Council's agenda was clearly reasonably specific as to the fact that it would vote on this particular resolution, it is immaterial that it did not clearly convey in advance whether that would be a standalone vote or a vote alongside other consent agenda items.

Finally, with respect to all of your arguments regarding the Council's July 19, 2021 meeting, we would emphasize that "New Mexico law ... requires substantial, not strict, compliance with the OMA." *Parkview Cmty. Ditch Ass'n v. Peper*, 2014-NMCA-049, ¶ 12. Even if we had found that the Council had acted improperly by voting on the resolution as part of its consent agenda, the omission of a single asterisk on an agenda is not a valid basis to invalidate an otherwise proper

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action, at least under these circumstances. Because this item of business was clearly outlined with reasonable specificity in the Council's agenda, and in light of the fact that the Council reopened public comment on the resolution after recognizing public confusion on the issue, it plainly acted in the spirit of transparency and therefore substantially complied with OMA. "A meeting could hardly be more open or more public." *Gutierrez v. City of Albuquerque*, 1981-NMSC-061, ¶ 15, 96 N.M. 398.

Conclusion

Based on the facts presented by your complaint and supplemented by public documents available online, we have concluded that the Council did not violate OMA at its July 19, 2021 meeting as alleged. We nonetheless appreciate you bringing possible violations to this Office and will welcome any further complaints you may submit. If you have any concerns in the future, please do not hesitate to contact us. Additionally, the OMA Guide is available on the website of the Office of the Attorney General at www.nmag.gov.

Sincerely,



John Kreienkamp
Assistant Attorney General

Enclosure

cc: Jennifer Vega-Brown, Esq.
Las Cruces City Attorney