

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



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April 22, 2016

Alex Brown
Town Manager and Finance Director
Town of Silver City
P.O. Box 1188
Silver City, NM 88062
townmanager@silvercitynm.gov

Re: Open Meetings Act Complaint Determination

Dear Mr. Brown:

Thank you for responding to our request for information regarding a complaint received from Mr. Randal Seyler concerning Silver City Town Council's possible violation of the New Mexico Open Meetings Act ("OMA"), NMSA 1978, Sections 10-15-1 to -4. Our office reviewed Mr. Seyler's complaint as well as your response to our inquiry, and has concluded the Silver City Town Council (the "Council") violated OMA at its meeting on June 18, 2015.

Mr. Seyler's complaint alleged that the Council violated OMA when it went into closed session to discuss the allocation of lodger tax funds during its June 18, 2015 meeting. Evidenced in its September 1, 2015, response to our office, the Council applied Section 10-15-1(H)(6) of OMA, an exception related to certain types of purchases, as the authority to enter into closed session. Section 10-15-1(H)(6) allows for a meeting to be closed under the following circumstances:

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. (emphasis added).

Under Section 10-15-1(H)(6) there are two exceptions that may permit closure of a meeting. As further explained below, neither situation occurred at the Council's June 18 meeting.

The first exception under Section 10-15-1(H)(6) applies to meetings concerning certain purchases that can be made only from one source. Pursuant to the state Procurement Code, NMSA 1978, Sections 13-1-1 to -199, and the definition on page 5 of the Council's request for proposals (RFP: 14/15-2P) provided to our office, the request for bids for allocation of lodger tax funds is categorized as a "multiple source award" and therefore not subject to the first exception under Section 10-15-1(H)(6).

The second exception under Section 10-15-1(H)(6) applies to meetings at which proposals solicited pursuant to the Procurement Code are discussed during the contract negotiation process. The Council used a request for proposals (RFP) process to solicit competitive sealed bids for services from various organizations to advertise, publicize, and promote tourism leading to overnight lodging in Silver City.¹ Discussing contents of competitive sealed proposals solicited pursuant to the Procurement Code may be subject to the OMA exception only if the discussion takes place "during the contract negotiation process." Section 10-15-1(H)(6). The Council's June 18 meeting was outside the contract negotiation process. This is evidenced in the Council's request for proposals provided to our office, which describes a sequence of events on pages 7 and 8. See RFP: 14/15-2P. The RFP's sequence of events show that negotiations are the responsibility of an evaluation committee, not the Council, and were scheduled between May 13 and June 5, 2015. This timeline indicates that the RFP negotiation process ended on June 5, and followed with the award of the contract by the Council on June 18, 2015. There is no indication that the Council was involved in negotiations or that the negotiation process was extended to June 18, the date of the Council's meeting.

Because the Council's RFP was a multiple source award and that the Council's discussion of the competitive sealed proposals was not part of the contract negotiation process, no authority existed under OMA Section 10-15-1(H)(6) to enter into executive session and close the June 18 public meeting. Although the Council's discussion regarding the contents of the competitive sealed proposals violated OMA, the final action of approving the RFPs was made in public session during the June 18 meeting, as required by OMA.

It is important that the Council avoid violations of state law in the future. Application of any exceptions to OMA must be applied judiciously, and the state's public policy toward transparency should be weighed carefully when contemplating whether to close a public meeting. Consequences for failure to comply with OMA may be serious. The local district attorney, the attorney general, or an individual of the public may seek legal action to enforce OMA. See § 10-15-3. A judicial finding of a violation may result in a court order, costs, and reasonable attorney fees paid by the public body. A criminal proceeding can result in additional penalties, including a misdemeanor with a fine of up to five hundred dollars (\$500) per offense. See § 10-15-4.

¹ Our office was not asked to examine the method of allocating local tax proceeds through an RFP process and we do not opine as to any other legal considerations related to the process. This determination is limited only to the specific question raised regarding the application of an OMA exception as authority to close a public meeting.

For more information about OMA, please see our [Open Meetings Act Compliance Guide](#), available on our website at: www.nmag.gov. If you have questions about the specific matters addressed in this determination or the Open Meetings Act in general, you may reach me directly at jdworak@nmag.gov or contact the Open Government Division of the Office of the Attorney General at (505) 827-6070.

Thank you for your prompt attention to this important matter.

Sincerely,

 /S/

Joseph M. Dworak
Assistant Attorney General

Cc: Randal Seyler
rseyler@scsun-news.com

OPEN MEETING ACT ("OMA") COMPLAINT FORM

New Mexico Office of the Attorney General

Open Government Division

Your Contact Information:

First Name: Randal Last Name: Seyler

Address: _____

City: _____ State: _____ Zip Code: _____

Phone Number: _____

Email: _____

Name of Public Body that is the Subject of this Complaint (including city/town, district, county or region, if applicable): Silver City town Council

Specific date(s) of OMA violation(s): June 18, 2005

ALLEGED VIOLATIONS OF THE OMA BY THE PUBLIC BODY: Please select from the following list the violations you allege the public body committed. Check all that apply.

DEFICIENCIES IN NOTICE OF THE MEETING

- Notice did not comply with the deadlines or procedures for meeting notices adopted by the public body, or with the reasonable notice requirement in the OMA
- Notice did not include date, time, and/or location of the meeting
- Notice was not published or posted in a place and manner accessible to the public
- Notice did not include an agenda or information on how the public may obtain a copy of the agenda
- A meeting was reconvened by the public body, but notice of the date, time, and place of the reconvened meeting was not placed on or near the door of the place where the original meeting was held or in at least one other location appropriate to provide public notice

AGENDA

- Agenda was not available seventy-two (72) hours prior to the meeting

- Agenda did not include a list of specific items the public body intended to discuss or transact at the meeting or the items listed and acted upon were not listed with reasonable specificity
- Public body took action on items that were not listed on the agenda
- In a reconvened meeting, the public body discussed or took action on items not appearing on the agenda of the original meeting

MINUTES

- The minutes did not contain the date, time, and/or place of meeting, the name of all members of the public body attending the meeting and those absent
- The minutes did not contain a description of the substance of all proposals considered during the meeting or a record of any decisions made and votes taken
- A draft copy of the minutes was not available within ten (10) working days of the meeting
- The minutes were not approved, amended, or disapproved at the next meeting where a quorum of the public body was present

CLOSED MEETINGS

- The public body did not follow the required closing procedures to close a meeting (e.g., did not list the items they were going to discuss in the motion to close, or the motion to close did not contain the provision of law permitting the closing of the meeting)
- The public body closed the meeting to discuss an issue not covered by one of OMA's exceptions
- Matters not stated in the motion to close were discussed in the closed session.
- Final action was taken by the public body in the closed meeting

CONDUCTING/DISCUSSING BUSINESS OUTSIDE OF AN OPEN MEETING

- A quorum of the public body formulated policy, discussed public business, or took action outside of an open meeting
- A "rolling quorum" was used to discuss public business (i.e., a quorum may exist even when the members are not physically present at the same place, such as discussing public business in a series of telephone or email conversations)

___ A committee was created by the public body that constitutes a policymaking body that formulated recommendations that were binding on the public body or otherwise established policy for the public body, outside of an open meeting

DETAILED EXPLANATION OF ALLEGED OMA VIOLATIONS: Please provide a description of the actions taken by the public body that violated the OMA, including specific dates and times, and why you believe the OMA has been violated.

The town Council went into Executive Session to discuss allocation of Lodge's Tax funds. The Council cited the "certain purchases" reason for the meeting and claimed the requests for tax funding was an "RFP" process.

The Council violated the OMA, in my opinion, because the closed session was not to discuss a purchase exceeding \$2,500 from one source, nor were they considering sealed competitive proposals. Rather, they divided the money (\$200,000 in Lodge's Tax funds) among a dozen different groups and festivals.

ADDITIONAL INFORMATION: Please attach any documentation or evidence you have regarding the alleged OMA violation.

See attached link to news story