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May 25, 2016

Kevin Morrow
Assistant City Attorney
City of Albuquerque
P.O. Box 2248
Albuquerque, NM 87103

Re: Determination of Open Meetings Act Complaint

Dear Mr. Morrow:

We have concluded our review regarding Charles Arasim's complaint alleging the City of Albuquerque has violated the Open Meetings Act ("OMA"), NMSA 1978, Sections 10-15-1 to -4 (1974, as amended through 2013). The complaint alleges specifically that the City has failed to properly notify the public of the time, dates, and agendas for hearings before a Personnel Hearing Officer, that these hearings have been closed to the public, and that members of the public have been precluded from video or audio recording such hearings.

The City has adopted a Personnel Policy which governs the hiring, promotion, discharge and general regulation of employees. *See* Albuquerque, N.M., Rev. Ordinances ch. 3, art. I. The City's Personnel Policy establishes the City's Personnel Board, as well as adopts the criteria for Personnel Hearing Officers. Under this policy, a City employee who has been suspended without pay for more than five days, demoted for disciplinary reasons, or discharged has a right to appeal the discipline to the Personnel Board within ten calendar days of the occurrence of the disciplinary decision. Once an employee has filed an appeal with the Personnel Board, the appeal is referred to a Personnel Hearing Officer, who conducts an evidentiary hearing and prepares a report containing a summary of the evidence taken at the hearing and proposed findings of fact. Following the submission of the Personnel Hearing Officer's report, the Board reviews the recommendations and renders a decision.

The OMA applies to “all meetings of a quorum of members of any board, commission, administrative adjudicatory body, . . . [of] any agency or authority of any county, municipality, district or any political subdivision, held . . . for the purpose of taking any action within the authority of or the delegated authority[.]” NMSA 1978, § 10-15-1(B). There are a number of situations where a hearing before a hearing officer would be subject to the requirements of the OMA. These include situations where a public body has delegated its authority to hold hearings to a hearing officer or situations where other laws require a hearing to be open. We have previously determined that “[a] public body may not evade its obligations under the [OMA] by delegating its responsibilities” to a hearing officer. N.M. Att’y Gen. Open Meetings Act Compliance Guide at 9 (8th ed. 2015) (available on our website, www.nmag.gov). This would include the requirement that “all persons desiring shall be permitted to attend and listen to the deliberations and proceedings” and that “[r]easonable efforts shall be made to accommodate the use of audio and video recording devices.” NMSA 1978, § 10-15-1(A). See Open Meetings Act Compliance Guide at 6 (“Unless a public body cannot reasonably do so, it must permit members of the public attending its meetings to record or video tape the proceedings.”).

However, if a hearing officer is specifically authorized by statute “the hearing officer acts under separate authority rather than as a replacement for the public body and because such a statutory hearing officer is not itself a public body, a hearing held by the hearing officer would not be subject to the [OMA].” Open Meetings Act Compliance Guide at 9. The rationale could be equally applicable in a situation where the hearing officer is created by city ordinance, unless the ordinance is otherwise delegating authority from a public body subject to the OMA such as the City Council. The Albuquerque Code of Ordinances, passed by the City Council, states that where an employee has the right to appeal a disciplinary action to the Personnel Board, “[t]he Personnel Board shall refer the appeal to a Personnel Hearing Officer to conduct an evidentiary hearing.” Albuquerque, N.M., Rev. Ordinances ch. 3, art. I, § 3-1-25(C). The ordinances further lay out the qualifications required of a Personnel Hearing Officer. See Albuquerque, N.M., Rev. Ordinances ch. 3, art. I, § 3-1-26 (1998). It appears then that while the Personnel Board is subject to the OMA, the Personnel Hearing Officers may not be. That being said, the City expressed in its Response that

personnel hearings, overseen by the individual independent Hearing Officers, are open and transparent, because those preliminary and non-binding hearings are always open to the public, audio recordings are made at each hearing, and all of the audio recordings are available for free public inspection or for copying for a nominal charge.

We must also note that the City has expressed an intention for the Open Meetings Act to apply to “[m]eetings of the Personnel Board, *including hearings*,” Albuquerque, N.M., Rev. Ordinances ch. 3, art. I, §3-1-5(B) (emphasis added), in which case it could be interpreted that the City intends the OMA to apply to hearings before Personnel Hearing Officers as well.

The public policy of the OMA is “that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.” NMSA 1978, § 10-15-1(A). Bearing in mind any applicable law regarding confidentiality, we encourage the City to abide by its intent to maintain an open and transparent process for its hearings, whether they are held before a board, commission, or a hearing officer.

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This would include posting notice of hearings and indicating what matters will be heard at those hearings. This would also include permitting audio and video recordings of hearings if this can be reasonably accommodated and does not disrupt or interfere with the hearing itself. *See* N.M. Att’y Gen. Op. 73-10 (1973) (determining that because verbatim reports could be published by persons attending an open meeting it is reasonable for the press to record public meetings so long as “the recording process does not effectively interfere with certain legitimate governmental interests such as the need to provide for order, decorum, etc.”).

Thank you for your cooperation in this important matter. Should you have any questions concerning this determination, please let me know.

Sincerely,

A handwritten signature in blue ink that reads "Caroline Manierre". The signature is fluid and cursive, with the first name "Caroline" written in a larger, more prominent script than the last name "Manierre".

CAROLINE MANIERRE
Assistant Attorney General

cc: Mr. Charles Arasim

3/13/2015

The Office of the New Mexico Attorney General Mail - FW: City of Albuquerque Meeting Act violations

[REDACTED]

FW: City of ABQ Open Meeting Act violations

1 message

[REDACTED]

Fri, Mar 13, 2015 at 11:36 AM

[REDACTED]

From: Charles Arasim [mailto:
Sent: Monday, March 09, 2015 8:32 AM
To: lrroller@nmag.gov
Subject: City of ABQ Open Meeting Act violations

Ms. Roller,

I spoke with you on the phone last week about what appears to be ongoing a violations of the NM Open Meetings Act (OMA). I say 'ongoing violations' due to the fact that the Albuquerque City Clerk's office, in charge of setting and administering, has failed to properly notify the public of the times, dates and agendas of these hearings.

The City of Albuquerque has a personal grievance system for employees that might feel they have been improperly disciplined or fired. This includes a quasi-judicial public personal hearing where the evidence is presented to what are suppose to be "Independent Hearing Officers" (IHO) that are NM licensed attorneys under City Council approved 2 year contracts with the City. This is all spelled out in a City Ordinance O-2012-024 put into effect by the Council in September 2012 with the 4 current IHOs contracts approved by the Council until October of last year. No contract extensions or new 2 year contracts have been approved by the Council as required under the Ordinance.

Last week, Friday, I went to the City Clerk's office asking for the docket of the upcoming personal hearings only to be told that every other type of hearing, such as DUI and car seizure hearings are docketed, but the personal hearings are not and are only kept on the personnel calendars of the clerk's staff. I was forced to file an IPRA request for the information, but only for the hearing officers names (there are 4 such officers), as I was given the names of the greivants and the dates of their set upcoming hearings on the spot. The phone rang and the clerk's staff, after they gave me the name of the IHO for the first secluded hearing, were told by someone that I would have to file an IPRA for that info.

3/13/2015

The Office of the New Mexico Attorney General Mail - FW: City of ABC Meeting Act violations

Being that these hearings are open to the public, I have attended several, and that the hearing officer, in this example, allows audio recording (I have been allowed to audio record at other such hearings), I believe these meetings are open and fall under the OMA as such.

My video of the action can be seen here: https://www.youtube.com/watch?v=M_LGeVc708E

I have looked over the AG's OMA compliance guide and I believe example 45 describes this situation to a tee, and that it does fall under the OMA as an open meeting.

I would would ask that your office look into this issue ASAP as I intend to attend another hearing next week with my camera rolling.

These meetings are of vital public interest, as you can see I have had over 2,000 views of my attached video, and I have been asked and encouraged by the recently approved City/DOJ monitor, Mr. James Ginger, to assist him (and his team) in bringing information to him that will be helpful in the 4 year reform of the Albuquerque Police Department (APD).

Thanks for your time and assistance in this matter,

Charles (Charlie) Arasim

P.S. If you speak with the AG about this you might jog his memory of me as I met with him a few weeks ago with Mr. Mike Gomez. I spoke with the AG about the issue of his investigation of the former APD Chief of Police, Ray Schultz, and his relationship with Taser International. I also spoke with the AG concerning issues at the Albuquerque Police Training Academy in context to revelations brought forward by former instructor John Corvino.

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