

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



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January 30, 2017

Office of the City Attorney
George W. Kozeliski, Esq.
110 West Aztec Avenue
Gallup, NM 87301

RE: Open Meetings Act Complaint- City of Gallup

Dear Mr. Kozeliski,

Thank you for providing, on behalf of the City of Gallup, a response to the complaint filed against you by Richard Reyes alleging that the City of Gallup ("COG") violated the Open Meetings Act ("OMA"), NMSA 1978 Sections 10-15-1 to -4 (as amended through 2013) in connection with a member of the public's request to attend a meeting of Joint Powers Committee ("Committee") comprised of members of the City Council and the McKinley County Board of Commissioners. The Complaint raised several concerns with a Committee meeting on May 26, 2015. The Complaint alleges that this meeting violated the OMA when the Committee met without proper notice or agenda posted, without proper access to an agenda, and improperly closed its meeting. Additionally, when this member of the public attempted to attend the meeting, County Counsel advised that this meeting was a "closed meeting." Our findings are based on a review of the Complaint from Mr. Reyes, the response by your office, and supporting documentation. Our office is unable to conclude that the COG has violated OMA. However, there are some concerns with regard to the practices of the COG and the Committee when conducting this particular meeting. The issues of this particular Complaint are detailed in two separate issues discussed below.

First, the Complaint alleges that members of the Committee met without posting a proper notice or agenda to the public. Generally, in order for a public body to be subject to the OMA regulations, the meeting must constitute a quorum of a policymaking body. NMSA 1978, § 10-15-1 (B). Once a quorum has been reached, a notice and an agenda must be posted at "any meetings at which the discussion or adoption of any proposed resolution, rule, regulation, or formal action occurs...and any closed meetings." NMSA 1978, § 10-15-1 (D). In your response, you stated that there was not a quorum of any public body attending the meeting, and that the county manager, county attorney, city manager, city attorney, a member of city council, and a member of the county

commission were the only members who attended this meeting. As you state, this Committee was formed to assist the county commission and city council in forming a joint resolution on how to spend the funds acquired from the Liquor Excise Tax. Additionally, based on your response, it appears that this committee does not meet in order to take formal action on any specific items.

However, the COG should keep in mind that some committees can appear to act as policymaking bodies if they make a final decision or take final action with regard to the information they are presented. A committee is considered a policymaking body when it makes any decisions on behalf of, formulates recommendations that are binding in any legal or practical way on, or otherwise establishes policy for a public body. *Gutierrez v. City of Albuquerque*, 1981-NMSC-061, 96 N.M. 398. For example, a city council who creates an "advisory committee" to evaluate bidders on city contracts, eliminate certain candidates, and recommend final candidates to the city council can be considered a policymaking body. That advisory committee would be subject to OMA, even if the advisory committee did not have anything to do with the city council's final decision.

It appears that the purpose of the Committee in this case is to simply gather financial data about the revenue being generated from the Liquor Excise Tax and formulate recommendations to the public bodies on how to spend this money based on the needs of the city and the county. Based on your representations, it appears as though the Committee does not issue final decisions or take final action. However, both the City Council and County Committee should take care, when adopting its own joint resolution, to not simply adopt the findings of the Joint Powers Committee without undertaking their own discussions and reviewing all records regarding the spending of the Liquor Excise Tax. Simply taking the Committee's recommendations without further discussion can be construed as delegating authority to the Joint Powers Committee, and such a meeting would then be subject to OMA. As you state, these meetings are purely staff level meetings in order to formulate recommendations, with the recommendations then being discussed and decided upon by the two governing bodies in an open meeting. Therefore, are unable to find a violation of OMA as alleged.

Second, the Complaint alleges that the Committee improperly closed a meeting to members of the public which should have been held in an open meeting. Specifically, the Complainant attempted to attend the meeting in question and was advised by the County Counsel that the meeting was a "closed meeting." As you know, all meetings not subject to an exception under OMA must be held open to the public. NMSA 1978, § 10-15-1. There are exceptions in which an open meeting can be closed, but since you contend that this was not a closed meeting and was only the result of a misunderstanding, we will not address those here. There is a presumption that a public body has acted in accordance with OMA (NMSA 1978, § 10-15-3(A)) and we are willing to give the COG the benefit of the doubt that the meeting was not meant to be closed and that it was simply a misunderstanding between County Counsel and Mr. Reyes. In the future, all members of this committee should take care not to use language that may indicate to members of the public that they are not permitted to attend a meeting.

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We trust that the City of Gallup and its public bodies will continue to take all steps necessary to ensure compliance with the Open Meetings Act. If you have questions about specific matters addressed in this letter, or about the Open Meetings Act in general, please let me know.

Sincerely,

Kara Szkotak

Kara Szkotak
Assistant Attorney General

cc: Mr. Richard Reyes

Open Meetings Act Complaint - City of Gallup

May 26th,
2015

Closed session to discuss projected revenue from the Liquor Excise Tax

- No notice
- No agenda

In attendance: mayor, city manager, city attorney, county manager, county attorney & 1 county commissioner

- No quorum for either the Gallup City Council nor the McKinley County Bd. of Commissioners

"joint powers committee" → recommendation for the city council & county commission.

Joint Resolution: County of McKinley & City of Gallup
- Joint Powers Agreement entered into by parties on May 16, 2014.

- JR requires an annual meeting of JPA Revenue Receipt & Allocation Task Force to "determine the availability of funds and allocate and distribute the funds to be used by the parties ..."

Gallup City Council Regular Mtg.
6/9/15

E. (2) Resolution No. R2015-18
Joint Resolution w/ McKinley County ...

McKinley County Bd. of Commissioners approved the Resolution at their May 6, 2014 meeting.

Neither the agenda, nor the minutes provide any clarity other than indicating the action taken / approval of Resolution.