

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



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13 September 2016

Dona Ana Board of County Commissioners  
c/o Blaine T. Mynatt  
Holt Mynatt Martinez P.C.  
1660 Hickory Loop  
P.O. Box 2699  
Las Cruces, NM 88004-2699

Re: Open Meetings Act Complaint

Dear Mr. Mynatt:

Thank you for providing, on behalf of the Dona Ana Board of County Commissioners (the "Board"), the documents and information our office requested regarding the complaint submitted by Sheriff Enrique Vigil (the "Complaint"), which alleged the Board violated the New Mexico Open Meeting Act ("OMA"), NMSA 1978, Sections 10-15-1 to -4 (1974, as amended through 2013). The Complaint raised several concerns regarding the Board's 25 April meeting and alleged the Board acted improperly when it entered into closed session. Our office requested information and records from the Board regarding the meeting and specific agenda items. Our findings are based on review of the Complaint and subsequent letter from Sheriff Vigil, the responses and information provided by the Board, and our own research and investigation. Our office finds no evidence of a violation of OMA as alleged in Sheriff Vigil's complaint, and the allegations raised in the Complaint are grouped into three primary issues and discussed below.

The first general issue raised in the Complaint alleges the Board meeting agenda item #16 discussed in closed session did not fall under an enumerated exception in OMA. This allegation is unsupported. The agenda item was described specifically as discussions related to "administrative adjudicatory proceedings" and "bargaining strategy preliminary to collective bargaining negotiations" with four identified union groups. The agenda explicitly cited to two separate provisions of OMA as authorization to enter closed session, which were Section 10-15-1(H)(3) (for administrative adjudicatory deliberations) and Section 10-15-1(H)(5) (for collective

bargaining). The Complaint argues that the collective bargaining exception only applies if a collective bargaining unit representative is present in the closed session. We do not believe such interpretation to be correct, as the statute applies to discussions of strategy “preliminary to” bargaining negotiations.

(5) meetings for the discussion of bargaining strategy **preliminary to** collective bargaining negotiations between the policymaking body and a bargaining unit representing the employees of that policymaking body **and** collective bargaining sessions at which the policymaking body and representatives of the collective bargaining unit are present;

NMSA 1978, § 10-15-1(H)(5) (emphasis added). Reviewing the exception in its entirety, and applying the accepted use and definition of “preliminary” as a preceding event, the exception applies to both 1) preliminary meetings to discuss bargaining strategy, and 2) collective bargaining sessions at which the policymaking body and bargaining unit representative are present. This interpretation is consistent with the established position of our office. See Open Meetings Act Compliance Guide, Office of the Attorney General (8<sup>th</sup> ed. 2015) at 25-26 (recognizing the exception applies to either meetings to discuss preliminary strategy or for meetings to negotiate with a bargaining unit representative). In response to our inquiry letter, the Board revealed that all four unions listed on the meeting agenda for closed session discussion were in active negotiations with the Board at the time of the meeting. As such, the collective bargaining exemption of OMA was appropriate. Our review revealed no evidence that a lawful exception to OMA was not provided prior to entering closed session or that the motion, vote, or action to enter closed session was improper.

The Complaint also alleged that the second OMA exception listed, Section 10-15-1(H)(3), citing administrative adjudicatory proceedings, did not apply to the corresponding agenda item. Because our review of the matter determined the Board lawfully closed its meeting pursuant to OMA’s collective bargaining exception, we decline to examine whether the other exception would have, by itself, been appropriate to authorize a closed session. However, public bodies should endeavor to only cite those exceptions that specifically apply to each situation.

The second issue raised in the Complaint alleges the Board’s discussion in closed session for agenda item #16 (collective bargaining strategy of unions) inappropriately related to another agenda item, item #17 (proposed resolution regarding union pay), and therefore extended the closed session discussion beyond the scope of what was authorized pursuant to the cited OMA exception. Discussion of agenda item 16 and collective bargaining strategy in the Board’s closed session obviously relates to or could have an impact on the subsequent agenda item, item #17, a resolution which included a directive regarding pay increases for certain public union employees. Substantive discussion of the resolution under agenda item #17 may not fall under an OMA exception, and should not be discussed generally in the closed session for agenda item 16, but discussion in closed session of agenda item #16 could have caused Commissioner Benavidez to decide to withdrawal her proposed resolution as a result of the collective bargaining strategy discussed by the Board. There is insufficient evidence to conclude that matters discussed in closed session exceeded the scope of what was noticed on the agenda. Commissioner Benavidez

independently withdrew her proposed resolution and the vote to table the resolution was taken in open session.

The last issue raised in the Complaint alleges the Board's action was an intentional and premeditated plan to violate a public right to government transparency. No evidence was found of any willful act to violate the state's sunshine laws. The Board included a valid exception under OMA to enter into closed session to discuss its strategy for active collective bargaining, and the action to withdrawal a resolution that could have been affected by the bargaining strategy discussed in closed session was withdrawn by its authored commissioner and the Board's vote to table the resolution was taken in open session.

While every public body should take action in limiting discussion in closed session only to those matters included in its motion for closure, it is presumed the Board acted in accordance with the law. See NMSA 1978, §10-15-3(A) (OMA establishes a presumption that actions taken by public bodies conform to its requirements). We are unable to find evidence to overcome that presumption in this matter. Our office does not find evidence the Board's closed session discussion exceeded its permitted scope or that any official action took place in closed session. Therefore, the Board is found to be in substantial compliance with OMA. See Gutierrez v. City of Albuquerque, 1981-NMSC-061, 96 N.M. 398. As such, we consider this matter closed.

For more information about OMA, please see the Open Meetings Act Compliance Guide, available on our website at: [www.nmag.gov](http://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](mailto:jdworak@nmag.gov) or contact the Open Government Division of the Office of the Attorney General at (505) 827-6070.

Thank you for your attention to this important matter.

Sincerely,



Joseph M. Dworak  
Assistant Attorney General

Encl: OMA Compliance Guide

cc: Sheriff Enrique Kiki Vigil



# Doña Ana County Sheriff's Department

Main Station - 845 N. Motel Blvd

**Enrique Kiki Vigil, Sheriff** Las Cruces, NM 88007 **Edward J. Lerma, Undersheriff**

May 5, 2015

Office of New Mexico Attorney General Hector Balderas  
Civil Division, Ethics Section  
ATTN: Roscoe Woods, Esq.  
PO Drawer 1508  
Santa Fe, NM 87504-1508

Office of Third Judicial District Attorney Mark D'Antonio  
845 N. Motel Boulevard  
Second Floor, Suite D  
Las Cruces, NM 88007

**RE: *Open Meetings Act Complaint Against Chairman Billy Garrett, Vice Chair Wayne Hancock, Assistant County Attorney Fred Kennon and Assistant County Manager Chuck McMahan- Doña Ana County Board of Commissioners Meeting of April 28, 2015***

Dear Mr. Balderas, Mr. D'Antonio and Open Meetings Act Complaint Staff:

As the elected Sheriff of Doña Ana County, charged with the enforcement of criminal laws and the reporting of violations of the law, I write to report to you an apparent intentional, premeditated and egregious violation of the New Mexico Open Meetings Act (hereinafter sometimes "the Act"), NMSA 1978, Chapter 10, Article 15 (NMSA 1978, §10-15-1 through §10-15-4). Under NMSA 1978, §10-5-3(B), "All provisions of the Open Meetings Act shall be enforced by the attorney general or by the district attorney in the county of jurisdiction."

Pursuant to NMSA 1978, §10-15-4, each violation of the Act is a criminal offense punishable by a fine of \$500. In bringing this complaint, I am relying on guidance provided pursuant to the Open Meetings Act Compliance Guide (2015 edition) published by the Office of the Attorney General and the letter of the Act. The specific details of the violation are related to you in the remainder of this letter.

**SPECIFIC DATE OF POTENTIAL VIOLATION: 28 April 2015**

Main Station Phone (575) 525-1911 • Toll Free (800) 332-2121 • Fax 575 525-8853  
Anthony Substation • 865 Anthony Dr Anthony NM 88021 • (575) 882-4596 • Toll Free (800) 521-6289  
Hatch Substation • 5 Chile Capital Lane Hatch NM 87937 • (575) 525-8893  
Chaparra Substation • 121 W Lisa Chaparral, NM 88081 • (575) 824-0449

**CHARACTER FIRST!**

**DESCRIPTION OF PUBLIC BODY THAT TOOK THE ACTION IN QUESTION:** Commission Chairman Garrett and Vice-Chair Hancock, with the advice and counsel of Assistant County Attorney Fred Kennon and Assistant County Manager Chuck McMahon directed and facilitated the Board of County Commissioners of Doña Ana County, New Mexico.

**DESCRIPTION OF THE SPECIFIC CIRCUMSTANCES SURROUNDING THE ALLEGATION:**

1. On April 28, 2015, a duly noticed meeting of the Doña Ana County Board of Commissioners (DACBC) was convened. A copy of the Amended Agenda for this meeting is attached hereto and herein incorporated by reference as Exhibit "A."
2. The Amended Agenda (Exhibit A) reflects an intent by the Commission, under the direction, advice and guidance of Chairman Billy Garrett, Vice-Chairman Wayne Hancock, and Assistant County Attorney Fred Kennon, to retire into "Closed Session." The Agenda section reflecting this reads as follows:

***THE COMMISSION MAY CONVENE IN CLOSED SESSION to discuss deliberations in connection with an administrative adjudicatory proceeding for a Planned Unit Development and bargaining strategy preliminary to collective bargaining negotiations with Communications Workers of America, Local 7911, and the American Federation of State, County and Municipal Employees; NM Council 18, Locals 1529 (Blue Collar and Detention Center), 1879 (Court Security) and as authorized by the Open Meetings Act, §10-15-1 (H)(3) and (5).***

(Agenda, Exhibit A, attached, following Agenda Item 16 and preceding Agenda Item 17)

3. Agenda Item 17 was a Resolution and Directive presented to the DACBC for consideration by Leticia Benavidez, District 5 Commissioner. A copy of said resolution appeared (misidentified as Item 14) on the Doña Ana County website and is attached hereto and herein incorporated by reference as Exhibit "B."
4. Agenda Item 17 was intended and designed to clarify and direct county management with respect to the implementation of the allocation of revenues generated by a County Hold Harmless Gross Receipts Tax enacted on 24 March 2015, as otherwise discussed in the Resolution and Directive, attached hereto and herein incorporated by reference as Exhibit B.

5. There was considerable public interest at the DACBC meeting of 28 April 2015 in Agenda Item 17, as the subject of under-funding of the Sheriff's Department and a threat by county management personnel to reduce the Sheriff's regular budget by the amount of revenue realized under the Hold Harmless Gross Receipts Tax (in other words, to "supplant" the budget), in contravention of the intent of a majority of the Commissioners, had been extensively debated and discussed at previous DACBC meetings and in the public media. A significant number of Doña Ana County residents present at the meeting of 28 April 2015 were there because they had an interest in hearing and seeing the proceedings as they related to the Sheriff's Department budget.
6. The meeting was convened at 9:00 a.m., in accordance with the published agenda. Around 1:30 p.m. on 29 April 2015, after lengthy Commission proceedings on other Agenda items, Commissioner Benavidez requested that Agenda Item 17, her proposed Resolution and Directive, be considered BEFORE the Commission retired into "closed session." Commissioner Benavidez' request was responded to by Chairman Billy Garrett, who stated that there were matters concerning Agenda Item 17 that were to be discussed in closed session, and for that reason open session treatment of Agenda Item 17 could not be pursued prior to the Commission retiring. Commissioner Benavidez' request was not honored.
7. The DACBC retired into closed session, the Commissioners, the County Clerk, Assistant County Attorney Fred Kennon, Assistant County Manager Chuck McMahan, County Human Resources Director Deborah Weir, Detention Center Director Chris Varela, and possibly others from county management in attendance, at around 2:30 p.m. and did not emerge from closed session and again enter into open session until about one hour later, around 3:30 p.m. on 28 April 2015.
8. Upon emerging from closed session, Commissioner Benavidez announced that there were extenuating circumstances involving union negotiations and personnel matters that required further study, and withdrew her proposed Resolution and Directive from the Agenda for the meeting.
9. Comments by various commissioners made on the record during open session following the "closed session," as well as information gained by the undersigned following the meeting, reveal the following:
  - a. The closed session, as it related to Agenda Item 17, WAS NOT held for purposes of discussing any individual personnel matter, but was

held for purposes of discussing general concerns regarding allocation of Hold Harmless Gross Receipts Tax funds for purposes of salary increases at the Sheriff's Department, Detention Department and Roads Department.

- b. The closed session, as it related to Agenda Item 17, DID NOT involve union negotiations, nor was there any union negotiator present in the closed session.
- c. The material dealt with in the closed session, as it related to Agenda Item 17, DID NOT fall within the parameters of any condition identified pursuant to the New Mexico Open Meetings Act that would have authorized convening the Board of County Commissioners behind closed doors and away from public scrutiny.
- d. The closed session, as it related to Agenda Item 17, was held for purposes of convincing Commissioner Benavidez and other commissioners, in whole or in part through the intercession of the Assistant County Attorney, that supposed "legal reasons" required that she withdraw her proposed Resolution and Directive, Item No. 17 on the Agenda.
- e. The closed session was held in contravention of Commissioner Benavidez' request that her proposed resolution be heard first, prior to the Commission entering into closed session.
- f. The closed session involved substantial discussion and at least one critical decision that were improperly shielded from public scrutiny and the opportunity for public comment and participation.
- g. The closed session was willfully, intentionally and in premeditated fashion planned to violate the public's right to openness and transparency in the affairs of government.
- h. The overall conduct of the meeting, including the excessive delay caused by placing Agenda Item 17 at the very end of the Agenda and the lengthy closed session, was designed to diminish and chill public participation and comment in the proceedings. Many members of the public had left the proceedings and the press had also largely departed before Agenda Item 17 was addressed.

**DISCUSSION:**

The Open Meetings Act, NMSA 1978, §10-15-1 declares it to be the public policy of the State of New Mexico 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. The formation of public policy or the conduct of business by vote **shall not be conducted in closed meetings. All meetings of any public body except the legislature and the courts shall be public meetings,** and all persons desiring shall be permitted to attend and listen to the deliberations and proceedings....” (NMSA 1978, §10-15-1(A) Emphasis added.)

Notwithstanding this public policy, governmental bodies such as boards of county commissioners are allowed to conduct certain business in “executive session” or “closed session,” subject to very stringent guidelines. These guidelines are set forth in NMSA 1978, §10-15-1 (H). That section enumerates exactly ten (10) circumstances under which a closed session of a meeting otherwise subject to the Open Meetings Act may be held, to wit:

(1) Meetings pertaining to issuance, suspension, renewal or revocation of a license except that a hearing at which evidence is offered or rebutted shall be open. All final actions on the issuance, suspension, renewal or revocation of a license shall be taken at an open meeting;

**COMMENT:** As they relate to Agenda Item 17, nothing in the facts of this case would bring the closed session of the DACBC meeting on 28 April 2015 under the umbrella of this exception.

(2) limited personnel matters; provided that for purposes of the Open Meetings Act, “limited personnel matters” means the discussion of hiring, promotion, demotion, dismissal, assignment or resignation of or the investigation or consideration of complaints or charges **against any individual public employee;** provided further that this Subsection is not to be construed as to exempt final actions on personnel from being taken at open public meetings; nor does it preclude an aggrieved public employee from demanding a public hearing. Judicial candidates interviewed by any commission shall have the right to demand an open interview. (Emphasis added);



**COMMENT:** The Agenda for the 28 April 2015 DACBC meeting uses this exception as a justification for the “closed session.” However, there was no discussion of the case of “any individual public employee” that would justify the closed session under this exception.

(3) deliberations by a public body in connection with an administrative adjudicatory proceeding. For purposes of this paragraph, an “administrative adjudicatory proceeding” means a proceeding brought by or against a person before a public body in which individual legal rights, duties or privileges are required by law to be determined by the public body after an opportunity for a trial-type hearing. Except as otherwise provided in this section, the actual administrative adjudicatory proceeding at which evidence is offered or rebutted and any final action taken as a result of the proceeding shall occur in an open meeting;

**COMMENT:** As they relate to Agenda Item 17, nothing in the facts of this case would bring the closed session of the DACBC meeting on 28 April 2015 under the umbrella of this exception. There was no administrative adjudicatory proceeding at issue with respect to Agenda Item 17.

(4) the discussion of personally identifiable information about any individual student, unless the student, his parent or guardian requests otherwise;

**COMMENT:** As they relate to Agenda Item 17, nothing in the facts of this case would bring the closed session of the DACBC meeting on 28 April 2015 under the umbrella of this exception. No “personally identifiable information” about any student was discussed.

(5) meetings for the discussion of bargaining strategy preliminary to collective bargaining negotiations between the policy-making body and a bargaining unit representing the employees of that policymaking body and collective bargaining sessions at which the policymaking body and the representatives of the collective bargaining unit are present; (Emphasis added.)

**COMMENT:** As they relate to Agenda Item 17, nothing in the facts of this case would bring the closed session of the DACBC meeting on 28 April 2015 under the umbrella of this exception. No representatives of the collective bargaining unit were present in the “closed session,” and no such discussions occurred with any bargaining unit representative in the closed session. *→ Rq not needed*

(6) that portion of meetings at which a decision concerning purchases in an amount exceeding two thousand hundred dollars (\$2,500) that can be made

only from once 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;

**COMMENT:** As they relate to Agenda Item 17, nothing in the facts of this case would bring the closed session of the DACBC meeting on 28 April 2015 under the umbrella of this exception. No purchases were discussed in the closed session.

(7) meetings subject to the attorney-client privilege pertaining to threatened or pending litigation in which the public body is or may become a participant;

**COMMENT:** As they relate to Agenda Item 17, nothing in the facts of this case would bring the closed session of the DACBC meeting on 28 April 2015 under the umbrella of this exception. No "threatened or pending" litigation exists in regards to this agenda item, and any discussion or implication of the threat of litigation was purely conjectural or speculative in nature.

(8) meetings for the discussion of the purchase, acquisition or disposal of real property or water rights by the public body;

**COMMENT:** As they relate to Agenda Item 17, nothing in the facts of this case would bring the closed session of the DACBC meeting on 28 April 2015 under the umbrella of this exception. No purchase, acquisition or disposal of real property or water rights by the public body are implicated in this agenda item and no such discussions occurred in the "closed session."

(9) those portions of meetings of committees or boards of public hospitals where strategic and long-range business plans or trade secrets are discussed; and

**COMMENT:** As they relate to Agenda Item 17, nothing in the facts of this case would bring the closed session of the DACBC meeting on 28 April 2015 under the umbrella of this exception. The DACBC is not a committee or board of a public hospital.

(10) that portion of a meeting of the gaming control board dealing with information made confidential pursuant to the provisions of the Gaming Control Act.

**COMMENT:** As they relate to Agenda Item 17, nothing in the facts of this case would bring the closed session of the DACBC meeting on 28 April 2015 under the

umbrella of this exception. The DACBC is not the gaming control board nor were matters made confidential pursuant to the Gaming Control Act discussed.

It is clear, then, that insofar as Agenda Item 17 was concerned, the closed session of the DACBC meeting on 28 April 2015 did not fit under any provision of the Act that would have permitted such a closed session. It is moreover clear, given all of the facts and circumstances attendant to this case, that the closed session was conducted in a deliberate and premeditated fashion with the intent of circumventing public participation and input, and with the intent of achieving a significant change in the Agenda before public comment and participation were allowed, as well as discouraging the local press from reporting on an important public matter, thereby violating both the letter and the spirit of the Act. The intentional departure to closed session, prevents not only the public from being able to review and provide input, but it also prevents members of the press from being able to accurately report on all aspects of government business in which they would otherwise be entitled to report on. The fact that significant portions of what transpired in closed session were made public by one or more Commissioners after the fact does not cure or rectify the violation, as the removal of Agenda Item 17 from the Agenda and its "indefinite postponement" were for all intents and purposes "done deals" by the time that the Commission resumed in open session.

### CONCLUSION

Violation of the Open Meetings Act is a criminal act that impacts significantly and negatively on the integrity of government. Substantive rights of the public are involved, and such rights are abridged and disrespected when the Act is violated. These rights include the right to be present and to participate in the proceedings of governmental bodies, the right to comment and make argument as regards proposed decisions of such governmental bodies, and the right to see and hear the arguments and discussions that take place in official meetings of governmental bodies. All of these rights were abridged and denied by the actions of the Chair and Vice-Chair of the Doña Ana County Board of Commissioners, under the advice and counsel of the Assistant County Attorney and the Assistant County Manager, when they illicitly directed the Commission to retire into closed session on 28 April 2015 during its regularly convened public meeting. Chairman Garrett, Vice-Chairman Hancock, Assistant County Attorney Kennon, and Assistant County Manager McMahan, who provided leadership and guidance to the Commission, and who planned and directed the closed session, are directly

May 5, 2015

Re: *Open Meetings Act Complaint Against Garrett, Hancock, Kennon and McMahon*

Office of New Mexico Attorney General Hector Balderas  
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responsible for this violation. This matter is therefore presented to you for your investigation and for appropriate further action.

Sincerely,



Enrique "Kiki" Vigil  
Sheriff of Doña Ana County

Cc: County Commissioner Leticia Benavidez  
County Commissioner David Garcia  
County Commissioner Benjamin Rawson

PLEASE NOTE: A video recording of the April 28, 2015 meeting of the Doña Ana County Board of County Commissioners is posted online at <https://donaanacounty.org/bocc/video>