

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



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May 18, 2016

Cas Tabor
Eddy County Attorney
Caraway, Tabor and Byers, L.L.P.
P.O. Box 1718
Carlsbad, NM 88221-1718

Re: Determination of Open Meetings Act Complaint - Eddy County

Dear Mr. Tabor:

This letter concerns a complaint filed by Ronald Barron with the Office of the Attorney General ("OAG") alleging violation(s) of the Open Meetings Act ("OMA"), NMSA 1978, Sections 10-15-1 to -4 (1974, as amended through 2013) by the Eddy County ("County") Board of Commissioners ("Commission") from December 2013 through March 2015.¹ Mr. Barron alleges that Commission meeting agendas from December 2013 – March 2015 were not specific regarding matters to be discussed in closed session, and therefore the public was not aware that the Commission intended to give the County Manager a raise.

Mr. Barron also claims that a draft copy of the minutes was not available within 10 working days of the meeting, that minutes were not approved, amended or disapproved at the next meeting where a quorum of the public body was present, and that meeting notices did not comply with deadlines or procedures for meeting notices adopted by the public body, or with the reasonable notice requirement in OMA.

An analysis was based on review of the complaint, the County's October 6, 2015 response to this Office and the County's December 15, 2015 letter to Mr. Barron. As discussed in more detail below, we conclude that Eddy County violated OMA by failing to provide sufficient specificity as to matters discussed in certain closed sessions of the Commission and acted on in open

¹ Mr. Barron also filed a separate complaint with the OAG in which Mr. Barron claimed that the County violated the Inspection of Public Records Act ("IPRA"), NMSA 1978 §§ 14-2-1 to -12 (1993, as amended through 2013) in handling his June 9, 2015 and July 3, 2015 requests to inspect public records. The OAG's determination regarding Mr. Barron's IPRA complaint is contained in a separate letter to Mr. Barron, with a copy to the County.

session; and that certain minutes did not adequately indicate consideration of the County Manager's June 2014 raise.

Specificity requirement for agenda items

The OMA provides that “[m]eeting notices shall include an agenda containing a list of specific items of business to be discussed or transacted at the meeting or information on how the public may obtain a copy of such an agenda.” § 10-15-1(F) (2013). The requirement for a list of specific items of business ensures that interested members of the public are given reasonable notice about the topics a public body plans on discussing or addressing at a meeting. A public body should avoid describing agenda items in general, broad or vague terms, which might be interpreted as an attempt to mislead the public about the business the public body intends to transact. This is especially important when a public body intends to act on an agenda item. See N.M. Att’y Gen. OMA Compliance Guide, 8th ed. 2015, p. 17 (“OMA Guide”). Meetings of a public body may only be closed when the matter to be considered falls within one of the enumerated exceptions defined in the OMA. See § 10-15-1(H) (2013).

As to a review of the agendas and minutes for Commission meetings held from December 3, 2013 through March 17, 2015, documentation provided appears to include some 39 Commission meetings. For the meetings held beginning November 14, 2014 and thereafter, it appears that the agendas were reasonably specific as to the subjects to be discussed in closed meeting.² However, nearly every agenda for meetings held in the December 2013 – October 2014 period (approximately 26 meetings) contained the following generic description (or similar) for closed meetings:

“[Agenda Item #] CLOSED MEETING: In accordance with the State of New Mexico Open Meetings Act, Section 10-15-1(H)(2), (7), & (8), authorizes the Board of County Commissioners to hold a closed meeting to discuss the following:

- a. Limited personnel matters
- b. Threatened or pending litigation
- c. Real Property”

It appears that there were five Commission meetings— January 16, 2014, April 15, 2014, May 6, 2014, June 9, 2014 and September 2, 2014— in which the agenda contained a generic description for a closed meeting, the motion to enter the closed meeting likewise stated a generic description, and the Commission took action in open meeting on a specific matter which wasn’t identified in the agenda for closed meeting after exiting the closed meeting. For example, at the

² In your October 6, 2015 letter to this Office, you explained that the agendas have “evolved into the new agendas used by November 4, 2014.”

January 16 meeting, after exiting the closed session, the Commission unanimously approved the restructuring of the Emergency Services Department into two departments and appointed a Director of Emergency Services; at the April 15 meeting, after exiting closed session the Commission approved adjustments in Sheriff's Department personnel from 9 corporals, 5 deputies and 2 sergeants to 0 deputies leaving the deputies and sergeants unchanged, approved "other personnel requests," approved funding for the City of Artesia and three other municipalities, approved increases in "PSAs," and approved budget requests involving public works; at the May 6 meeting, after exiting closed session, the Commission unanimously approved a motion to join a lawsuit involving the Endangered Species Act and also approved increasing the utility right-of-way easement at the Happy Valley Fire Station; at the June 9 meeting, after exiting closed session the Commission approved an agreement with a law firm to represent the County as co-plaintiff in the Lesser Prairie Chicken lawsuit and a separate agreement with the Permian Basin Petroleum Association also involving the same lawsuit; and at the September 2 meeting after exiting closed session the Commission voted to approve an extension to a contract for legal services for the Assessor's Office.

The Commission's agendas and motions to close, as described above, violated the OMA. Simply stating in generic terms that the Commission would discuss "personnel matters," "threatened or pending litigation" or "real property" did not provide sufficient specificity as to the matters discussed in the closed meetings and acted on in open session. *See* Section 10-15-1(F) ("[m]eeting notices shall include an agenda containing a list of specific items of business to be discussed or transacted at the meeting...") and Section 10-15-1(I) ("the authority for the closure and the subject to be discussed shall be stated with reasonable specificity in the motion calling for the vote on a closed meeting").

The OMA provides that "[n]o resolution ... or action of any board, commission, committee or other policymaking body shall be valid unless taken or made at a meeting held in accordance with the requirements of Section 10-15-1 NMSA 1978." § 10-15-3(A) (1997). The Commission's actions summarized above violate the OMA because the items acted on were not listed as specific items of business on the agenda and the Commission's motions to close failed to describe with "reasonable specificity" the subjects to be discussed in closed session.

A public body that has violated the OMA is provided the opportunity to correct the violation and avoid an enforcement action. *See* § 10-15-3(B) (1997). Accordingly, the Commission may cure these violations by convening and holding another meeting in accordance with the OMA, including the requirements for an agenda "containing a list of specific items of business to be discussed or transacted," and properly closing and reopening any closed session to discuss the specific personnel, threatened or pending litigation, or real estate matters considered at the January 16, 2014, April 15, 2014, May 6, 2014, June 9, 2014 and September 2, 2014 meetings.

County Manager raises

Next, as to Mr. Barron's contention that because the agendas were not specific the public did not know that the Commission intended to give the County Manager a raise, your October 6, 2015 letter states that the County Manager received a raise in January 2014 and June 2014. You indicated that the January raise was approved at the meeting held on January 7, 2014, and the June raise was approved at meetings held on April 15, 2014 and May 6, 2014.

January raise - January 7, 2014 meeting

Items 10 and 11 of the January 8, 2014 agenda state "Annual Salary Survey – Kenny Rayroux" and "COLA Adjustment – Kenny Rayroux", respectively. The minutes indicate that Mr. Rayroux presented information to the Commission regarding these two items. Item 10 of the minutes states that the Commission voted 5-0 in favor of providing a raise to all County employees whose salaries were not stipulated by statute at a cost of "\$370K" for the remainder of the fiscal year. Item 11 of the minutes states that the Commission voted 5-0 in favor of providing a 2.5% cost of living adjustment (COLA) to all eligible employees. No employees were mentioned by name.

In your October 6, 2015 letter you explained that the County Manager's contract provided that he is given the same COLA and adjustment raises that are given to other employees and therefore the County Manager received the raise and COLA approved for employees, without mentioning names, at the January 7, 2014 meeting. According to the minutes, it appears that the raises and COLAs which were approved at the meeting were market increases for various classifications of employees and that there was no discussion of or intent to specifically target the County Manager for an increase or COLA. Accordingly, we conclude that the Commission did not violate the OMA with regard to the raise the County Manager received as a result of the raises and COLAs approved at the January 7, 2014 meeting.

June raise - April 15, 2014 and May 6, 2014 meetings

You stated in your October 6, 2015 letter to us that "the June raise was more of a mystery" but that after speaking to various County employees you concluded that the raise was part of the budgeting process discussed in meetings on April 15, 2014 and May 6, 2014. Item 26 of the agenda for the April 15 meeting states "FYE 15 Budget Work Session." Item 27 of the agenda states the generic "closed meeting ... limited personnel matters" language discussed earlier in my letter. Item 28 of the minutes states that "all personnel requests were approved []." There is, however, nothing in the minutes regarding approving a raise for the County Manager (or any employee). Regarding the May 6, 2014 meeting, item 28 of the agenda states "Budget Workshop # 2". Item 29 of the agenda for the May 6 meeting states the generic "closed meeting... limited personnel matters" language. Although there is a lengthy description in the

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May 6 minutes regarding the budget workshop, there is nothing in the minutes regarding approving a raise for the County Manager (or any employee).

The OMA generally does not allow “mystery” in conducting public business. Nothing in the agendas for either the April 15, 2014 or May 6, 2014 meetings would inform the public that the Commission intended to give raises to employees in general or the County Manager in particular. Nor did the minutes of either meeting indicate that raises had been approved. Accordingly, we conclude that the Commission violated the OMA with regard to the County Manager’s June 2014 raise. As stated previously, a public body that has violated the OMA is provided the opportunity to correct the violation and avoid an enforcement action. *See* § 10-15-3(B). Accordingly, the Commission may cure this violation by convening and holding another meeting in accordance with the OMA, including the agenda requirements discussed above, and properly closing and reopening closed session to discuss the specific personnel matter (County Manager raise) considered at the April 15, 2014 and/or May 6, 2014 meeting.

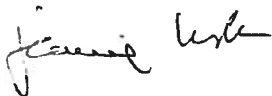
Availability of Minutes, approval of minutes, notice deadlines

Finally, as to Mr. Barron’s contention that a draft copy of the minutes was not available within 10 working days after the meetings; that minutes were not approved, amended or disapproved at the next meeting where a quorum was present, and that meeting notices did not comply with deadlines, your October 6, 2015 letter indicates no record of such problems and indicates that the Commission has followed all proper procedures. Mr. Barron did not provide any specific dates or information to this Office regarding this aspect of his complaint, and a review of the agendas and minutes did not indicate that the Commission failed to comply with OMA’s requirements for timely approving final minutes or deadlines for posting meeting notices.

The Attorney General is authorized by Section 10-15-3(B) of the OMA to enforce its provisions. The Commission is encouraged to review the OMA and consult the OMA Guide for additional guidance and examples so that it may avoid OMA violations in the future.

Thank you for your response to our inquiry into this matter. Should you have specific questions about the matters addressed in this letter, please contact me.

Sincerely,



Jennie Lusk
Assistant Attorney General

cc: Mr. Ronald Barron

OPEN MEETING ACT ("OMA") COMPLAINT FORM

New Mexico Office of the Attorney General
Open Government Division

DATE 8-17-2015

Your Contact Information:

First Name: Ronald Last Name: Barron

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): Eddy County Commission

Specific date(s) of OMA violation(s): Dec: 2013 thru March 2015 SEE ATTACHMENT

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.

SEE ATTACHMENTS

Closed MEETING without REASONABLE SPECIFICITY.

Did NOT HAVE minutes within 10 DAYS OF COMMISSIONERS MEETINGS AS REQUIRED BY OMA

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

SEE ATTACHMENTS