

STATE OF NEW MEXICO
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July 25, 2016

Al Henderson
1014 E. Mesa Ave. #1
Gallup, NM 87109

Re: Open Meetings Act Complaint – University of New Mexico, Gallup Faculty Senate

Dear Mr. Henderson:

We have reviewed your complaint alleging that meetings held by the University of New Mexico, Gallup (“UNMG”) Faculty Senate violated the Open Meetings Act (“OMA”), NMSA 1978, §§ 10-15-1 to -4 (as amended through 2013). Additionally, we have reviewed the UNMG Faculty Senate’s response to our inquiry regarding the complaint, *see* letter to Dylan K. Lange, Assistant Attorney General from Nasha Y. Torrez, Esq., Associate University Counsel (Mar. 3, 2016) (“Response”), and other information available to us at this time. As discussed in more detail below, although it is a close question, we conclude that the UNMG Faculty Senate is not required to conduct its meetings in accordance with OMA’s requirements.

The complaint alleges that the UNMG Faculty Senate’s January 15, 2016 meeting violated OMA’s requirements for meeting notices and closed meetings. According to the UNMG Faculty Senate’s Response, the January 15, 2016 meeting of the UNMG Faculty Senate was not subject to OMA because the Faculty Senate was not “operating under the delegated policy making authority of the UNM Board of Regents” and was “operating merely as a fact-finding committee on behalf of the UNM Faculty Senate Curricula Committee.” The Response addresses only the complaint’s allegations regarding the January 15 meeting, but it appears that the UNMG Faculty Senate’s meetings generally do not adhere to OMA’s public meeting requirements.

Policymaking Bodies Covered by OMA

The Response suggests that OMA’s applicability to a meeting held by the UNMG Faculty Senate depends on whether the business conducted at the meeting constitutes policymaking or the exercise of delegated policymaking authority. However, the applicability of OMA does not depend on the policymaking nature of matters addressed at a particular meeting. OMA applies to meet-

ings of a “policymaking body.” If a public body is a policymaking body, OMA applies to its meetings regardless of whether the public body exercises its policymaking authority at a particular meeting.

In pertinent part, OMA provides:

All meetings of a quorum of members of any board, commission ... or other *policymaking* body of any state agency ... held for the purpose of formulating public policy, ... discussing public business or for the purpose of taking any action within the authority or the delegated authority of any board, commission or other *policymaking* body are declared to be public meetings open to the public at all times, except as otherwise provided in the constitution of New Mexico or the Open Meetings Act.

NMSA 1978, § 10-15-1(B) (emphasis added).

Section 10-15-1(B) effectively makes OMA applicable to any meeting of a quorum of the members of a public “policymaking” body. A policymaking body can be a board or commission created by statute, like the UNM Board of Regents, or a committee of a statutory board if the committee engages in policymaking or has been delegated policymaking authority. Thus, the inquiry here is whether the UNMG Faculty Senate has authority or delegated authority to make policy or final determinations affecting the administration and operations of UNMG. If it does, any meeting of a quorum of the UNMG Faculty Senate’s members would be covered by OMA.

In a recent decision, the New Mexico Court of Appeals addressed whether a Litigation Committee established by the New Mexico State Investment Council (“SIC”) was a policymaking body for purposes of OMA. *See New Mexico State Investment Council v. Weinstein*, Nos. 33,787, 34,042 & 34,077 (consol.), slip op. (N.M. Ct. App. Apr. 28, 2016). In that case, the SIC had delegated final authority to the Litigation Committee to settle litigation on the SIC’s behalf. *Id.* at 44. The Court of Appeals quoted Section 10-15-1(B) of OMA and concluded that it “applied to the Litigation Committee because [it] was intended to be a ‘policy[-]making body’ and its meetings were for the purpose of taking an action within the authority of [the SIC].” *Id.* at 46-47. The opinion goes on to state that “[i]t is patently contrary to the OMA’s purpose to permit a public body to avoid the OMA’s requirements simply by delegating its responsibilities to a smaller body.” *Id.* at 48.

Although OMA does not define a “policymaking body” covered by its requirements, the Attorney General’s Open Meetings Act Compliance Guide (8th ed. 2015) (“OMA Guide”) discusses situations where a committee appointed by a public body may constitute a policymaking body subject to OMA. *See* OMA Guide, pp. 8-11. A committee must comply with OMA:

if it makes any decisions on behalf of, formulates recommendations that are binding in any legal or practical way on, or otherwise establishes policy for the public body. A public body may not evade its obligations under the Act by delegating its responsibilities for making decisions and taking final action to a committee.

Id., p. 9. The Guide provides examples of committees and other entities established by public bodies that engage in policymaking by expressly or effectively making decisions on behalf of the public bodies. As noted in the UNMG Faculty Senate's Response, one example posits a faculty senate to which a state university board of regents has delegated its policymaking authority to decide post-graduate curricula. *See id.*, Example 13. Because it is exercising the board of regents' policymaking authority, the faculty senate's meetings are subject to OMA. *See also id.*, Example 14 (committee provided only a limited number of total bids for its parent public body's consideration) and Example 15 (public body was bound to search committee's hiring decisions).

Conversely, the Guide provides an example of a committee that is not a policymaking body. In that example, a public body appoints a committee to draft proposed regulations. *Id.*, Example 16. The public body instructs the committee regarding the substance of the draft regulations, reviews the draft regulations, makes the final decision on the regulations and holds a public hearing on the regulations. Because the committee's actions are subject to the public body's review and its decisions are not final and do not bind the public body, the committee is not a policymaking body subject to OMA's requirements.

Applicability of OMA to the UNMG Faculty Senate

According to its constitution, the UNMG Faculty Senate's voting members are full-time faculty members and elected representatives of part-time faculty members. *See* UNMG Faculty Senate Constitution, Art. I(A) (2013) (available on UNMG website). The UNMG Faculty Senate Constitution confers on the Faculty Senate "the right of review and action" regarding:

- a. Formulation of institutional aims, viewed as the mutual responsibility of faculty, Branch Campus administration, the UNM-Gallup Campus Community College Advisory Board, and the Board of Regents.
- b. Approval of the creation of new departments and programs upon recommendation from the Branch Campus administration and forwarding to appropriate UNM entities for final approval.
- c. Approval of major curriculum changes, upon recommendation from the Branch Campus administration, and forwarding to appropriate UNM entities for final approval.
- d. Establishment of requirements for admission, graduation, honors, and scholastic performance in general, with approval of appropriate Branch Campus and Main Campus personnel.
- e. Approval of candidates for degrees.
- f. Recommendation of policies of appointment and promotion in academic rank.

Id. § I(B)(1). Any action taken by the Faculty Senate "shall be subject to the authority of the UNM-Gallup Branch Community College Advisory Board, the Regents, and such other persons the Regents shall delegate in matters involving finance, personnel and general University policy." *Id.* § I(B)(2).

Based on its Constitution, the UNMG Faculty Senate plays an important role in the operation and administration of UNMG. For the most part, that role consists of participating, along with the UNMG administration and governing bodies, in the creation and approval of certain matters, but without any authority to make unilateral or final decisions. Specifically, the UNMG Faculty Senate Constitution charges the Faculty Senate with formulating institutional aims as part of its “mutual responsibility” with other UNMG and UNM entities, and with approving new departments and programs and major curriculum changes “upon recommendation from” the UNMG administration and forwarding to “appropriate UNM entities” for final approval. *Id.* § I(B)(1)(a)-(c). The Faculty Senate’s responsibility for approving candidates for degrees, *id.* § I(B)(1)(e), is more administrative or ministerial than policymaking because the Faculty Senate presumably approves degree candidates after the UNM administration has determined the candidates’ eligibility. The final responsibility listed in the Constitution is limited to recommending policies; it does not authorize the Faculty Senate to make any final decisions on the policies or faculty appointments and promotions. *Id.* § I(B)(1)(f).

This leaves the UNMG Faculty Senate’s authority to “[e]stablish[] ... requirements for admission, graduation, honors, and scholastic performance in general.” Constitution, § I(B)(1)(d). That authority, in contrast to the Faculty Senate’s other responsibilities, appears to allow the Faculty Senate to take action unilaterally in areas that are central to UNMG’s educational purpose and operations. The Faculty Senate’s authority to establish requirements for admission, graduation, honors and scholastic performance is conditioned on the “approval of appropriate Branch Campus and Main Campus personnel,” and, like all the Faculty Senate’s actions, subject “to the authority of the UNM-Gallup Branch Advisory Board [and] the Regents.” UNMG Faculty Senate Constitution, § I(B)(1), (2). Although it could be stated more clearly, the Constitution appears to preclude the Faculty Senate from taking final action on the requirements it establishes under Section I(B)(1)(d). If so, and assuming the review and approval process is meaningful and the UNMG Faculty Senate does not, in practice or effect, make final, binding decisions on the requirements,¹ we believe the Faculty Senate’s authority under Section I(B)(1)(d) is not, by itself, sufficient to make the UNMG Faculty Senate a “policymaking body” for purposes of OMA.

As represented in its constitution and its Response to the complaint, the UNMG Faculty Senate does not appear to be a policymaking body for purposes of OMA. In contrast to the faculty senate described in Example 13 of the OMA Guide, discussed above, the UNMG Faculty Senate does not make policy, take official action or make final decisions for UNMG. By its terms, the Faculty Senate Constitution does not confer authority to make unilateral decisions that bind UNMG; virtually all of the Faculty Senate’s actions and recommendations are subject to final approval by other UNM and UNMG entities and the authority of UNMG’s governing bodies. For

¹ The UNMG Senate Faculty’s authority over the establishment of admission, graduation and honors requirements would be more problematic if the required approval and oversight is merely perfunctory. As discussed above in the text, a committee of a public body or similar entity that makes a recommendation or takes action that binds a public body “in any legal or practical way” is a policymaking body for purposes of OMA. *See* OMA Guide, p. 9. A committee whose recommendations or actions are routinely approved or rubber-stamped by a public body without any meaningful review is, in effect, exercising the public body’s policymaking authority and the committee’s meetings would be subject to OMA’s requirements. *See also id.*, Example 15.

Mr. Al Henderson

July 25, 2016

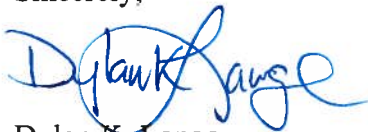
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this reason, absent additional information suggesting otherwise, we conclude that meetings of the UNMG Faculty Senate are not covered by OMA.²

Despite our conclusion, we believe the question is a close one and caution that the applicability of OMA to the meetings of state university faculty senates has not been reviewed by New Mexico appellate courts. Courts in other states have held that faculty senates and similar entities are covered by their states' public meetings laws. *See, e.g., Perez v. City Univ. of NY*, 840 N.E.2d 572, 575-576 (N.Y. 2005) (college senate performed a "quintessentially governmental function," subjecting its meetings to New York's open meetings law, where it had been delegated broad authority to formulate new policy recommendations "on all college matters" and the board of trustees' "formal power to veto recommendations" was not sufficient to make the senate's role purely advisory); *Carl v. Board of Regents of the Univ. of Okla.*, 577 P.2d 912 (Okla. 1978) (admissions board to which the board of regents delegated authority to select medical students for admission came under the purview of Oklahoma's open meetings law); *Cathcart v. Andersen*, 530 P.2d 313, 316 (Wash. 1975) (meetings of law school faculty were covered by Washington's open meetings law where faculty had been delegated substantial rulemaking and governing authority and the board of regents adopted faculty actions "almost as a matter of course"). While we believe those decisions are distinguishable based on the particular state laws and specific authority of the public bodies involved in those decisions, it is always possible that a New Mexico court addressing the issue would find their reasoning persuasive. Because the question is close, it may be advisable for the UNMG Faculty Senate to review its authority and functions to ensure that, in substance and in practice, the Faculty Senate is not acting as a policymaking body for purposes of OMA.

Although we did not find a violation of OMA as alleged in the complaint, we appreciate your bringing the issues discussed above to our attention and allowing us the opportunity to address them. If you have any questions regarding this determination or OMA in general, please let me know. For your reference, copies of the UNMG Faculty Senate's Response and the most recent edition of the OMA Guide are enclosed.

Sincerely,



Dylan K. Lange
Assistant Attorney General

Enclos.

cc: Nasha Y. Torrez, Associate University Counsel

² Although not required by OMA, the UNMG Faculty Senate publishes its meeting agendas and minutes on the UNMG website. *See* www.gallup.unm.edu.

OPEN MEETING ACT ("OMA") COMPLAINT FORM
New Mexico Office of the Attorney General
Open Government Division

Your Contact Information:

First Name: AI Last Name: Henderson
Address: [REDACTED]
City: [REDACTED] State: [REDACTED] Zip Code: [REDACTED]
Phone Number: [REDACTED]
Email: [REDACTED]

Name of Public Body that is the Subject of this Complaint (including city/town, district, county or region, if applicable): University of New Mexico Gallup Branch Faculty Senate
Specific date(s) of OMA violation(s): January 15, 2016

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.

Refer to attached typewritten writeup

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

You are invited to copy any of the information materials I have collected to get better informed about my allegation.

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

On January 15, 2016 at around 12:35 p.m. UNM Gallup Faculty Senate President Lora Stone called the meeting to order. She begin with inclusion of two additional agenda items then she called for the adoption of the Agenda. There was a motion to adopt the agenda and a second, then she called for a vote and announce the "Yeas" have it. At that point I raised my hand and she recognized me. I made a request of the motioning parties to delete the "Executive Session" as the agenda items in the closed session should be discussed in open session. President Stone replied that the faculty senate meeting is conducted with the Robert's Rules of Order, adding that the faculty senate follows their Constitution that sets the agenda. I replied in accordance with Robert's Rules of Order, additional items must first be voted on by those in attendance and when approved it become part of the agenda. It cannot be added without a motion and seconded then voted on as was conducted by President Stone. I reminded her that I have a motion on the floor to delete the "Executive Session" directed to the motioning parties to accept the agenda. To that she referred the matter to the parliamentarian but she did not respond. By this time President Stone was flustered and confused according to my observation. I just thanked her and she proceeded with the meeting. By this time we were about two (2) minutes into the meeting.

The morning of January 15th I made a quick research and reading of the "Open Meetings Act" (OMA) and learned that the two items to be discussed and decided upon are not part of the exclusion that can be considered in a closed session. The two items involved education programs – Elimination of Drafting Certificate and Elimination of Entrepreneurship Certificate. Thus, any action that was taken by the faculty senate in closed session must be declared invalid.

This is one action that I personally witnessed. Prior to this experience I have been informed by some of my faculty colleagues about how some tenured professors have formed a clique that have been active for a very long time. The clique, I am told, hold clandestine meetings to strategize about who will and how to take action on key issues that stand in the way of pushing UNM Gallup toward a research institution as opposed to a community serving college. This issue is a constant tug-of-war and it has caused serious damage to many students and community members over the years. I believe one way the clique tenured professors exert their control and have their way is to control the faculty senate agenda to secure their intended result that is already predetermined.

I invite you to examine the body of information and materials that I have collected which points in the direction of what I believe is institutional racism in practice.

I request the Attorney General's Office to conduct an investigation to remedy any further harm and damage that many of my colleagues, students and community have been incurring for a long time.