

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



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August 4, 2016

John M. Sullivan, P.E.
Sullivan Design Group, Inc.
227 E. Palace Ave.
PO Box 283
Santa Fe, NM 87504-0283

Re: Proceedings of the NMFA Water Trust Board Policy and Project Review Committees

Dear Mr. Sullivan:

We have reviewed your complaint alleging that the Water Trust Board (WTB) has violated the Open Meetings Act ("OMA"), NMSA 1978, §§ 10-15-1 to -4 (as amended through 2013). You specifically allege that the WTB improperly conducts business through its Project Review Committee and Policy Committee, both of which hold meetings without providing advance notice to the public or otherwise complying with OMA. As discussed in more detail below, based on our review of your complaint, the WTB response to our inquiry regarding your complaint and information available to us at this time, we conclude that the WTB did not violate OMA as alleged in your complaint.

Project Review Committee and Policy Committee of WTB

Among other statutory responsibilities, WTB recommends grants and loans for appropriation by the legislature from the water project fund and authorizes qualifying water projects to the New Mexico Finance Authority (NMFA). See NMSA 1978 § 72-4A-5 (2011). The WTB's statutory duties require it to review, evaluate and prioritize applications from a wide variety of proposed water projects seeking funding. The NMFA provides staff support for WTB, develops application procedures for grants and loans from the water project fund and financing for qualifying water projects authorized by the legislature. *Id.*, § 72-4A-6 (2006).

WTB established the Project Review Committee to review and recommend water projects for funding according to factors developed by the Board. *See* 19.25.10.7 (L) NMAC (defining the role of the Project Review Committee) and 19.25.10.8 NMAC (establishing criteria for priority funding). The Project Review Committee evaluates proposals and “make[s] a recommendation” to WTB on each water project proposal.” *Id.* After receipt of the Committee’s recommendations, WTB discusses and approves the qualifying proposals for recommendation to the legislature. *See* 19.25.10.9 (D). *See also* WTB’s response (enclosed), describing the responsibilities of the Board and the Project Review Committee.

WTB also established a Policy Committee responsible for reviewing “policies and policy[-] related matters” and making recommendations to the full WTB. *See* 19.25.7.10 (J) NMAC (defining the role of the Policy Committee). According to WTB’s response, the Policy Committee drafts policies or changes to policies at the request of the Board and presents them to the Board for consideration and discussion at a public meeting held in compliance with OMA. The Board may return policies to the Committee for additional changes or approve the final draft.

Policymaking Bodies Covered by OMA

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, such as WTB, or a committee or subcommittee of a statutory Board, if the committee or subcommittee engages in policymaking. Thus, the inquiry here is not whether the Project Review or the Policy Committee is comprised of less than a quorum of WTB’s members but, instead, whether the committees make policy. If they constitute policymaking bodies, a meeting of a quorum of either Committee’s members would be covered by OMA.

The New Mexico Court of Appeals recently addressed a similar issue involving a litigation committee established by the New Mexico State Investment Council (“SIC”). *See New Mexico State Investment Council v. Weinstein*, Nos. 33,787, 34,042 and 34,077 (consol.), slip op. (N.M.Ct. App. Apr. 28, 2016). In that case, SIC delegated final authority to settle litigation to its

litigation committee. *Id.* at 44. The Court of Appeals quoted § 10-15-1(B) of OMA and concluded that OMA “applied to the Litigation Committee because [it] was intended to be a ‘policymaking body’ and its meetings were for the purpose of taking an action within the authority of [the SIC]” *Id.* at 46-47. The opinion states 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 in which a committee appointed by a public body may constitute a policymaking body subject to OMA. 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 established by public bodies that engage in policymaking by expressly or effectively making decisions on behalf of a public body. *See id.*, Example 14 (defining as “policymaking” the role of a subcommittee authorized to limit the field of candidates to be considered by a city council) and Example 15 (defining as “policymaking” the binding hiring decisions made by a subcommittee).

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 rules. *Id.*, Example 16. The public body instructs the committee regarding the substance of draft rules, reviews the draft rules, makes the final decision on the rules and holds a public hearing on the rules. In these circumstances, the committee is not a policymaking body subject to OMA requirements.

Applicability of OMA to the Project Review Committee and Policy Committee of WTB

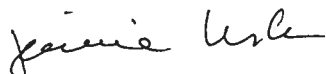
Based on WTB’s representations and rules regarding the roles and functions of the Project Review and Policy Committees, we conclude that these WTB committees are more like the non-policymaking committees illustrated in the OMA Guide. Neither committee has been delegated any of the WTB’s decision-making authority. The Project Review Committee reviews applicants according to factors developed by the Board, makes a recommendation on each application and submits the recommendations to the full Board for consideration in a public meeting. The Committee does not make a final decision and its recommendations are not binding on the Board. The Board retains complete discretion regarding the Project Review Committee’s recommendations—including approval, disapproval or deferral of action pending the receipt of additional information.

Similarly, the Policy Committee drafts policies or amendments to policies at the request of WTB. The draft policies are submitted to and considered by WTB at a public meeting and the Board is not obligated to accept a policy drafted by the Committee. The Board determines the scope and substance of its policies and chooses whether to accept, reject or request revisions of policies drafted by the Committee.

In sum, although the Water Project and Policy Committees created by WTB perform important functions, neither makes decisions or sets policy on the Board's behalf. The Committees perform their responsibilities within parameters set by the Board, their recommendations do not bind the Board, and the Board makes all final decisions regarding applications reviewed by the Project Review Committee and policies drafted by the Policy Committee. Because the Committees are not policymaking bodies for purposes of OMA, they are not required to conduct their meetings in public or otherwise adhere to OMA's requirements. Of course, although not obligated by OMA to do so, WTB may, in the spirit of transparency underlying OMA, voluntarily apply OMA requirements to meetings of the committees.

Although we did not find a violation of OMA as alleged in your complaint, we appreciate your bringing the issues discussed above to our attention and allowing us the opportunity to address them. For your reference, a copy of WTB's response and a copy of the most recent edition of the OMA Guide are enclosed.

Sincerely,



Jennie Lusk
Assistant General Counsel

Enclosures

cc: Robert B. Coalter, CEO, NMFA



ATTORNEY GENERAL
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sullivan design group, incorporated
227 east palace avenue, p.o. box 283, santa fe, n.m. 87504-0283
engineering • planning • construction management

January 7, 2015

Attorney General Hector Balderas
State of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504-1508

Re: NMFA Water Trust Board Committee Meetings

Dear Attorney General Balderas:

As a practicing professional engineer involved in community water system projects throughout New Mexico, I am concerned about the policies of the NMFA Water Trust Board with regard to meetings of its Policy Committee and Project Review Committee, all of which are held in secret.

The Water Trust Board sets policies and awards approximately \$30,000,000 in funds each year for water system, flood prevention and watershed projects based on the decisions reached in these closed committee meetings. The policies and funding awards are then subsequently ratified in open sessions with little or no discussion or dissent.

NMSA 10-15-1.A. states that "...it is declared to be public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government ..." The statute further states: "The formation of public policy or the conduct of business by vote shall not be conducted in closed meetings." This is exactly what is happening. The shortest meetings of the year are the annual spring meetings of the Water Trust Board when it awards funding. An Excel chart is presented by staff and made available to the public for the first time, and then quickly approved. It is a *fait accompli*.

I have inquired as to why secret committee meetings are necessary and the only response has been because NMSA 10-15-1.B. allows them to do it if a quorum of the Board is not in attendance. In my experience and opinion, there is no reason why the substantive deliberations regarding which entities will be funded each year should be done in secret.

I have enclosed a CD of documents I received as a result of my recent IPRA request for documents and recordings pertaining to these committee meetings which have taken place during the past six months. There were five Policy Committee meetings and four Project Review Committee meetings. Included in the digital folders for the 8/3/15 and 9/30/15 Policy Committee meetings are also recordings of the entire meetings. NMFA claims that no committee meetings other than these two were recorded.

A review of the documents clearly shows that these are formal meetings with prepared agenda, an attendance roll, extensive staff backup documents and minutes of committee actions. Votes are taken and annotations made as whether each issue is "Approved" or not. The recordings also show that that DFA Secretary, who is the Water Trust Board Chair, directs the staff as to application policies and other requirements to be imposed on funding applicants during these closed committee meetings.

The Water Trust Board does solicit public comments each year on its voluminous and intricate regulations, but not its own administrative structure, which is the larger problem.

The New Mexico Foundation for Open Government has written NMFA about this matter and received basically the same response, i.e. we do it because our attorneys say we can.

My request is that your staff review these documents and the procedures currently in place at the Water Trust Board and determine if the New Mexico Open Meetings Act is being violated, and if there is a way by which you can direct or encourage the Water Trust Board to adopt greater transparency in its dealings. Their decisions result in the expenditure of millions of dollars in public funds each year with virtually no public oversight.

Should you have questions, feel free to email me or call me at (505) 982-4481 ext. 3, or on my mobile phone at (505) 699-9188.

With best regards, I remain

Very truly yours,

A handwritten signature in black ink, appearing to read "John M. Sullivan", with a long horizontal flourish extending to the right.

John M. Sullivan, P.E., P.S.
President

encls: IPRA Request Documents – CD
Correspondence File