

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

April 15, 2019

VIA ELECTRONIC MAIL ONLY

Mr. Javier Carrasco
20 First Plaza Center NW
Albuquerque, NM 87102
Email: carrasco.javier335@gmail.com

Re: Open Meetings Act Complaint – University of New Mexico

Dear Mr. Carrasco,

The Office of the Attorney General, Open Government Division (“OGD”) has received your complaint alleging violations of the Open Meetings Act (“OMA”), NMSA 1978, Sections 10-15-1 to -4 (2013) by the University of New Mexico Board of Regents (“the Board”). Your complaint alleges that the University violated the OMA by eliminating its men’s soccer program at a meeting during the summer of 2018. As you may know, the OGD previously wrote a determination about the Board’s meeting held on July 19, 2018, where it voted to defund the UNM men’s soccer program. We ultimately concluded that the Board had indeed violated the OMA. (A copy of that letter is attached.) Currently, that meeting is the subject of pending litigation in the Second Judicial District Court, Case No. D-202-CV-2018-05954. For this reason, our Office has determined that we must stay any further review of the meeting in question.

The long-standing policy of the Office of the Attorney General mandates that we abstain from opining on any matter that is the subject of pending litigation. This policy is maintained in deference to the authority and procedures of the judicial system. In accordance with this policy, we will take no further action regarding this OMA complaint, as the District Court has now been called upon to determine the merits of the matter.

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We will maintain this complaint as a public record. We trust that you will understand the inappropriateness of this Office's further involvement in this matter. If you have any questions about this Office's response, please let me know.

Sincerely,

A handwritten signature in blue ink, appearing to read "John Kreienkamp". The signature is fluid and cursive, with a large loop at the end.

John Kreienkamp
Assistant Attorney General

Attachment

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

August 8, 2018

Kevin Gick, Esq.
University of New Mexico
Office of University Counsel
1 University of New Mexico MSC 05 3440
Albuquerque, NM 87131-0001
Email: kgick@salud.unm.edu

Re: Open Meetings Act Complaint – Maria Touchet, Esq. and David M. Pato, Esq.

Dear Mr. Gick:

We have reviewed the two complaints submitted to by Ms. Maria Touchet and Mr. David Pato alleging that the University of New Mexico Board of Regents (“the Board”) violated the Open Meetings Act, NMSA 1978, Sections 10-15-1 to -4 (as amended through 2013) (“OMA”). According to both complaints, the Board violated OMA at its meeting on July 19, 2018, by failing to list items on its agenda with reasonable specificity and engaging in a “rolling quorum” prior to the meeting. *See* Touchet and Pato Complaints. In addition to the complaints, we have reviewed the recording of the meeting and the Board’s responses to both to our inquiry letters to the complaints. *See* Letter from Patrick Hart on Touchet Complaint (August 6, 2018) (“Response to Touchet Complaint”) and Letter from Patrick Hart on Pato Complaint (August 6, 2018) (“Response to Pato Complaint”). Based on our review, as discussed in more detail below, we have determined that the Board violated OMA and failed to provide the public with meaningful notice of the Board’s intention to vote on matters pertaining to the defunding of four athletic programs. Based upon these violations, the New Mexico Office of the Attorney General requests the Board to take measures to correct the violations at a properly noticed, open meeting, within fifteen days of this determination.

The facts surrounding these two complaints are summarized as follows. On July 19, 2018, the Board held a special meeting. *See* Complaint. The meeting agenda, in relevant part, included as an action item: “Discussion and Action on Athletics – Eddie Nuñez, Rob Robinson, et.al.” Agenda for July 19, 2018, Board Meeting (attached to Complaint) (“Agenda”). During the discussion on that agenda item, Board members expressed support for “the administration’s plan” and one Board member stated that “we’ve done the right thing here” prior to any vote taking place. Touchet Complaint. The Board then voted

unanimously to defund UNM's men's soccer team, both the men's and women's ski teams, and the women's beach volleyball team. *See Touchet Complaint*. The agenda also included, as a separate item, "[d]iscussion and determination where appropriate of limited personnel matters." *See Agenda*. Ms. Touchet's complaint alleges that the "Athletics" item was not reasonably specific so as to authorize the Board's actions and that the Board had previously engaged in a rolling quorum (as evidenced by the Board member statements at the meeting itself). *See Touchet Complaint*. Mr. Pato argues that the Board's agenda lacked reasonable specificity for both the "Athletics" and the "limited personnel matters" items. *See Pato Complaint*.

The Open Meetings Act

The Open Meetings Act states as a broad policy 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. Section 10-15-1 (emphasis added). The Act requires public bodies to conduct their business openly so that all citizens can observe both the process and the final decision. *See Kleinberg v. Bd. of Educ. of Albuquerque Pub. Sch.*, 1988-NMCA-014, ¶ 18 (noting that "the public policy of this state, as expressed in the Act, is to conduct the public's business in the open, allowing persons, so desiring, to attend and listen to the proceedings") and *Raton Pub. Serv. Co. v. Hobbes*, 1966-NMSC-150, ¶ 18 (observing that the purpose of OMA "was to provide that governing bodies dealing with public funds be required to make decisions in the open where the interested public could observe the action"). Further, the statute provides a number of strict requirements that all meetings of a quorum of the public body must satisfy. *See* § 10-15-3(A) and § 10-15-1. No action of "any board, commission, committee or other policymaking body" is valid unless it complies with these requirements. Section 10-15-3(A).

All meetings of any public body that are "held for the purpose of formulating public policy" are subject to the requirements of OMA. Section 10-15-1(B). Specifically, OMA applies to all meetings consisting of at least a quorum of any public body. *See id.* A quorum can be created by telephonic or electronic communications (or even simple conversations), depending on what is said. *See* Attorney General's Open Meetings Act Compliance Guide, p. 8 (8th ed. 2015) ("OMA Guide"). Commonly referred to as a rolling quorum, our OMA Guide provides an example: "if three members of a five member board discuss public business in a series of telephone or email conversations, the discussion is a meeting of a quorum." OMA Guide, p. 8. A rolling quorum can also occur when one individual coordinates a discussion amongst a quorum by, for example, telling one member of a public body what another member said about an issue. This means that even when members are not all communicating directly among themselves, their communications through one individual can still constitute a quorum. A rolling quorum is impermissible and violates OMA, which requires all conversations to be had and decisions to be made in an open meeting. Section 10-15-1(B).

¹ Ms. Touchet also alleges that the Board itself was constituted in violation of the New Mexico Constitution by failing to include an active member of the student body. Because our determination is limited to OMA at this this time, we do not address this issue.

OMA further requires that all meeting 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.” Section 10-15-1(F). This language requires reasonable specificity on the part of the government body so as to alert the public as to which issues, topics, and decisions will be discussed at the meeting. *See* OMA Guide, p. 17 (discouraging the use of “general, broad, or vague terms” to describe agenda items, as such language could mislead the public). In other words, an agenda must be sufficiently clear so as to alert the public as to which items of business will be discussed or acted upon by the public body, in compliance with the Act’s broad mandate that the public have the greatest information possible. Items which are vague or overly general fail to satisfy this requirement, and public bodies may not rely upon them in order to take action.

Under OMA, there are limited circumstances in which a public body may deliberate or discuss public business outside of the public’s view in closed session. One of these enumerated exceptions is Section 10-15-1(H)(2), otherwise known as the limited personnel matters exception. This provision authorizes public bodies to enter closed session “for the purpose of discussing certain matters concerning individual employees of the public body.” OMA Guide, p. 21. *See also* § 10-15-1(H)(2). The limited personnel matters exception in OMA enables public bodies to privately deliberate and discuss personnel matters regarding individual employees. *See Kleinberg*, 1988-NMCA-014, ¶ 24 (observing that [d]eliberations and discussion concerning personnel matters may be held in secret, and the public has no right to watch or participate in the proceedings”). By its terms, the exception only applies to the discussion of an *individual* public employee. *See* § 10-15-1(H)(2) (providing that “limited personnel matters” is defined as “the discussion of . . . any *individual* public employee”) (emphasis added) and OMA Guide, p. 21 (noting that “a public body may close a meeting to discuss . . . an individual public employee.”).

The “Athletics” Agenda Item

The central allegation of both complaints is that the Board’s actions to defund UNM’s men’s soccer team, both the men’s and women’s ski teams, and the women’s beach volleyball team were in violation of OMA because the item on the agenda was not reasonably specific. *See* Touchet Complaint and Pato Complaint. In its entirety, that item was listed on the Agenda as “Discussion and Action on Athletics – Eddie Nuñez, Rob Robinson, et.al.” Both complaints allege that this agenda item was so vague and broad as to constitute a violation of Section 10-15-1(F). We agree.

The Board, in their Responses to our inquiry, argues that a meeting agenda need only include the “time, place and date of the meeting” and lack an “intent to mislead.” Response to Touchet Complaint. To that end, the Board cite a nearly thirty-year old opinion that analyzed a prior version of the Open Meetings Act that did not include any agenda requirements. *See* N.M. Att’y Gen. Op. 90-29 (1990) (analyzing the definition of “reasonable notice” in OMA as the statute appeared at the time). Obviously, the legislature’s subsequent changes to OMA have rendered that prior opinion inapplicable here. Today, OMA provides that agendas must contain “a list of specific items of business

to be discussed or transacted at the meeting.” Section 10-15-1(F). This language alone refutes the Regents’ apparent assertion that agendas must only state the “time, place and date of the meeting.” Response to Touchet Complaint. With respect to the language in the Attorney General’s OMA Guide referring to public bodies needing to avoid misleading the public, the OMA Guide is abundantly clear that agendas must identify all items of business with reasonable specificity. OMA Guide, p. 17.

The item name listed on the agenda did not provide the interested public with sufficient information to know which actions the Board might take at its meeting. The term “Discussion and Action on Athletics” is broad enough to encompass virtually any conceivable action or discussion related to any aspect of UNM’s various athletics programs. The Board could just as easily have defunded any or all of its other sports programs or, for that matter, taken a completely different action like changing team uniforms. Based on that description, an interested member of the public could not reasonably anticipate that the Board would be considering defunding the four specific athletics programs it eventually took action on. For this reason, we conclude that the Board’s agenda lacked the reasonable specificity required by Section 10-15-1(F) and violates the broad policy of the Act which mandates that the public have the greatest information possible, and the subsequent actions taken by the Board are in violation of OMA.

The Limited Personnel Matters Agenda Item

We reach the same conclusion with respect to the limited personnel matters agenda item. The item was listed as “[d]iscussion and determination where appropriate of limited personnel matters.” Agenda. This, again, was an overly broad and vague description for the simple reason that it failed to specify *which* personnel matters the Board would discuss. To be clear: OMA’s limited personnel matters exception allows a public body to discuss an *individual* public employee, and to satisfy the reasonable specificity requirement, the public body must list the specific individual employee to be discussed by the Board. Here, the Board did not list the employee’s name or provide any identifying information whatsoever, meaning that there was no reasonable specificity.

While the minutes of the July 19, 2018, meeting were not accessible, the Office of the Attorney General’s review included review of a partial video recording. From that video, it appears that the Board did enter closed session at the meeting under the stated justification of OMA’s limited personnel matters exception. This violated OMA because the Board did not have a reasonably specific item of business listed on its agenda qualifying it for that exception. While not raised in either complaint, this partial video of the meeting also shows that the Board entered into closed session without taking a roll call vote. This too is a violation of OMA, which requires a roll call vote for entering into closed session. See § 10-15-1(I)(1) and OMA Guide, p. 31.

² See New Mexico In Focus, a Production of KNME-TV, *UNM Board of Regents Meeting – Proposed Cuts to Athletics*, YOUTUBE (July 20, 2018), <https://www.youtube.com/watch?v=dhaxzIX6GTE>.

Rolling Quorum

The rolling quorum alleged by Ms. Touchet's complaint is to some degree moot considering our earlier determination on the "Athletics" agenda item. That being said, it is possible that the quotes cited by Ms. Touchet's complaint are sufficient to establish that a rolling quorum occurred. For instance, Board members' expressed support for "the administration's plan" and the phrase "we've done the right thing here" could potentially indicate that the Board members discussed public business in contravention of their OMA obligations. Section 10-15-1(B). However, because we have already concluded that the Board's action on that issue is invalid due to the insufficiently specific agenda item, we will not further elaborate on the issue of a rolling quorum at this time.

Conclusion

Based on our conclusion that the Board committed at least one and possibly two violations of OMA, we direct the Board to take remedial action. Public bodies are afforded the opportunity to correct OMA violations after they have occurred. See § 10-15-1(C) (providing that individuals seeking judicial review must give the public body written notice so it may take action on the alleged violation) and *Kleinberg*, 1988-NMCA-014, ¶ 30 (noting that "procedural defects in the Open Meetings Act may be cured by taking prompt corrective action"). In order to remedy its violation of OMA, the Board should hold a new meeting within fifteen (15) days to reconsider its actions, after publishing a proper notice and agenda in accordance with OMA's requirements. § 10-15-1(B). Failure to comply with this directive may subject the Board to further enforcement actions. Prior to the meeting in which the Board takes corrective action, please provide our office with a copy of the public notice and agenda for the meeting.

If you have any questions regarding this determination or OMA in general, please let me know.

Sincerely,



John Kreienkamp
Assistant Attorney General

cc: Mia Touchet, Touchet Law Firm, PC
David M. Pato, Nance, Pato & Stout, LLC
Raul Torrez, Second Judicial District Attorney
Patrick J. Hart, Associate University Counsel

³ For the purposes of this determination, we assume the fairness and accuracy of the quotes offered by Ms. Touchet, as the Board provided no evidence in its response to suggest otherwise.

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

Electronic Complaint Submission

Submission Detail

| | |
|-----------------------------|-------------------------|
| ECS Reference Number | NMOAG-ECS-20181011-76cb |
| Final Submit Date | 10/11/2018 2:39:33 PM |

Disclosure of your complaint: This complaint is a public record, thus available under provisions of the NM Inspection of Public Records Act.

Disclosure to other entities: This complaint, its content, and other information may be disclosed to other law enforcement and regulatory agencies.

I understand this complaint and any submitted documents are public record and may be shared with other law enforcement and regulatory agencies.

DECLARATION: By submitting this form, I attest that the information in this complaint is true and accurate to the best of my knowledge. I further understand that by submitting this form I may be called to testify as a witness in this matter.

I understand declaration statement.

The New Mexico Office of the Attorney General cannot give legal advice regarding this complaint and will not act as your personal attorney. If you have questions regarding your rights please contact a private attorney.

Submission of this complaint is not confirmation that an investigation will be initiated.

Complaint Detail

Complaint Type Open Meetings (OMA) Complaint

Retained Attorney

Parties

Complainant

Javier Carrasco

Person

Address

[REDACTED]

Contact information

[REDACTED]

Complainant Attorney

Carrasco Residence

Public Body (Government Entity)

Address

3460 Opitz Rd
Anthony , New Mexico 88021

Contact information

carrasco.javier335@gmail.com
(915) 740-4244

Complaint against

University of New Mexico - Stokes & Board of Regents

Public Body (Government Entity)

Address

MSC05 3200
1 University of New Mexico
Albuquerque , New Mexico 87131

Contact information

mreviere@unm.edu
(505) 277-7639

Complaint Specifics

| | |
|--|--|
| Specific date(s) of OMA violation(s) | Summer 2018 |
| 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 |
| Agenda | Agenda was not available seventy-two (72) hours prior to the meeting |
| Closed Meetings | Final action was taken by the public body in the closed meeting |
| Other Violation | <p>Albert Bandura (1986) notes the importance of social cognitive theory, which is composed of tenets that affect behavior. He notes by altering an environment, behavior will change. The University of New Mexico Men's Soccer Program focuses on 7 key tenets which alter the behavior of student athletes to produce model citizens across the country. This is noted with prominent alumni in leadership roles who have graduated from prestigious universities (Stanford, Penn, & the University of Texas). The key tenets of the men's soccer program are: leadership, competitiveness, enthusiasm, self-belief, social responsibility, self-discipline, & team first. Each player develops based on the cornerstones of the program & are contributors to the countries social & economic development. The University of New Mexico is cutting a living legend with over 300 career wins that is a key contributor to the university markets the university wherever he goes. The assistant coach has experience from both Harvard & Stanford & experience as a professional player in Major League Soccer. These types of leaders are sought after by prominent universities & are mainstays at institutions for many years & states across the country would be fortunate to have either coach, much less both of them on the same field. Both of these leaders provide leadership in marketing campaigns, summer camps, & are key stewards of the University of New Mexico. The men's soccer program works hand in hand with other programs within the university to empower its learners. Specifically, the journalism department currently has a key partnership with the men's soccer program as students are provided real world experiences to develop 21st century skills by being a part of "Fish Off the Pitch". These undergraduate students from the University of New Mexico are honing their journalism skills via a locally developed news program. The men's soccer program success on the field (MAC Herman Trophy Finalist (2005); MAC Herman Trophy Semi-finalist (2006, 2012, & 2013); NCAA tournament appearances (2001, 2002,</p> |

2004, 2005, 2006, 2007, 2009, 2010, 2011, 2012, 2013, & 2016); National Finalist (2005); National Semi-finalist (2005, 2013); National Sweet 16 (2004, 2005, 2011, 2012, & 2013); Conference tournament champions (2001, 2002, 2011, & 2016); & Over 40 All-American awards) & in the classroom (25 Academic All-Americans & 14 National Soccer Coaches Association of America (NSCAA) Team Academic Awards) is unmatched. Lobo Men's Soccer has appeared on national television, national radio and national print media outlets such as, but not limited to ESPN, KOAT, KRQE, KOB, the NY Times & ESPN radio. The University of New Mexico is demonstrating no regard for the state of New Mexico as children want to play the most popular sport in the world from Las Cruces, Gallup, Farmington, to Taos, Belen & Anthony. These children grow up wanting to be Lobos, attend soccer camps, & they all have Lobo role models to look up to & follow the dream from the Flagship program within the region. This is one of the most imprudent decisions in the history of the University of New Mexico. Please reconsider as Albuquerque loves it's Lobo Men's Soccer Team!! Viewing things as a whole - academics, community impact, winning, and the future – the UNM Men's Soccer Program is the best in the country. Javier Carrasco, PhD

Transaction

Documents

*** END OF COMPLAINT ***