

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

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VIA ELECTRONIC MAIL ONLY

Las Vegas City Council
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Re: Open Meetings Act Complaints – Phillip C. Scherer and Melanie Majors

Dear Mr. Aaron:

This letter addresses the complaints filed with the Office of the Attorney General by Mr. Phillip C. Scherer and Ms. Melanie Majors alleging that the Las Vegas City Council (hereinafter the “Council”) violated the Open Meetings Act (“OMA”), NMSA 1978, Sections 10-15-1 to -4 (1974, as amended through 2013). As you know, Mr. Scherer and Ms. Majors allege that the Council violated OMA by taking action on an item of business not listed on the agenda for its February 17, 2021 meeting. Having carefully reviewed these complaints and the documentation of the meeting in question, we agree that the Council violated OMA as alleged. Although we appreciate that the Council has subsequently taken action to remedy this OMA violation, we strongly advise it to thoroughly familiarize itself with OMA so as to avoid potential litigation in the future.

Background

In New Mexico, the Open Meetings Act provides the public with access 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(A) (emphasis added). *See also 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”). In line with the public policy behind the statute, OMA is broadly construed in favor of transparency. *See Attorney General’s Open Meetings Act Compliance Guide*, p. 7 (8th ed. 2015) (“OMA Guide”) (noting that “doubt as to the proper course of action should be resolved in favor of openness whenever possible”).

The Las Vegas City Council held a meeting on February 17, 2021 at which it discussed and took action on the appointment of individuals to serve on a number of its advisory committees. The agenda for the meeting, under the organizational heading “Mayor’s Appointments/Reports and Recognitions/Proclamations,” included an item of business which read, in its entirety, “Appointments to the following Commissions and Committees: Marketing Committee, Extra Territorial Zoning Commission, Youth Commission.” However, the minutes of the meeting show that, upon discussing the approval of this agenda at the start of the meeting, the City Clerk “advised she had an addition to Mayor’ s appointments” and proposed to add “the Film Commission and Museum Board.” The Council voted to approve these additions to the agenda.

When the Council arrived at the item of business for committee appointments, the minutes confirm that it voted to appoint members to the Film Commission and the Museum Board. The motion reflected in the minutes was “to approve the appointments of the Marketing Committee, Youth Commission, Film Commission, and Museum Board” with an accompanying statement “that the Extra Territorial [sic] Zoning Commission would be brought back at a later date.” After this vote, the minutes indicate that there was a discussion of the legality of what had taken place, with the City Mayor asking if the Council should “wait until the next meeting” given the absence of the Film Commission and the Museum Board on the agenda. However, the City Mayor was reassured by his staff that the Council was permitted to take action at the meeting because it had previously voted to amend its agenda. In addition, and as noted by Mr. Scherer’s complaint, the City Clerk explained to the Council that “you can change the agenda.”

We did not receive a detailed response to our inquiry into these complaints. Instead, we received your March 12, 2021 email, essentially acknowledging that the Council violated OMA as alleged. Describing the incident as “an honest mistake,” you further explained that the City Clerk had accidentally “failed to post” an amended agenda on the website.¹ However, you explained that the Council took remedial action: “the City put the appointment of the 3 committees on the March 10, 2021 agenda and re-voted to appoint the 3 committees.” In addition, you emphasized that the members of the Council would be attending an OMA training presented by our Office (later conducted on March 16, 2021) and would treat this OMA violation as a learning experience.

This letter will address three issues related to the Open Meetings Act. First, the primary allegation in both complaints to our Office is that the Council violated OMA by taking action on an item of business – the appointments to the Film Commission and the Museum Board – that were not listed on the agenda. In addition, Mr. Scherer argues that the Council committed a secondary violation by failing to approve the minutes from its February 10, 2021 meeting at its subsequent meeting on February 17, 2021.

Items Not Listed on the Agenda

As noted previously, the primary allegation in both complaints to our Office is that the Council took action on an item of business not listed on the agenda for its February 17, 2021 meeting.

¹ You also suggested that this was due to the fact “that the city clerk had received her first covid shot the day of the mishap, and was suffering from some covid vaccine after effects.”

Although the agenda did specifically include appointments to the City's Marketing Committee, Extra Territorial Zoning Commission, and Youth Commission, it did not identify either the Film Commission or the Museum Board. The Council acted to appoint members to both of those committees without having indicated that it would do so on the meeting agenda, and we agree that this action violated the Open Meetings Act.

OMA specifically requires all public bodies to provide the public with an agenda at least seventy-two hours prior to any meeting. *See* § 10-15-1(F). So as to ensure "that interested members of the public are given reasonable notice about the topics a public body plans on discussing or addressing at a meeting," this agenda must contain a reasonably specific list of all items of business the public body intends to discuss or transact. OMA Guide, p. 17. OMA generally provides that public bodies may only take action at a meeting "on items appearing on the agenda" when it is posted seventy-two hours prior to the meeting. Section 10-15-1(F); *see also* OMA Guide, p. 17 ("Action on items that are not listed on the agenda for a meeting must be taken at a subsequent special or regular meeting."). The only exceptions to this general rule are for emergency items and for those public bodies which "ordinarily meet[...] more frequently than once per week." Section 10-15-1(F).

Here, as the Council itself concedes, it is apparent that the Council violated OMA by taking action on an item of business that was not on the agenda for the February 17, 2021 meeting. When the agenda was posted seventy-two hours prior to the meeting, it did not include appointments to either the Film Commission or the Museum Board, meaning that the Council's vote to act on those appointments was quite literally action on items not appearing on the agenda. Since there was no emergency involved, and as the Council does not "ordinarily" meet more than once per week, the Council's vote was plainly violative of Section 10-15-1(F).

With respect to the City Clerk's statement at the meeting that "you can change the agenda," this statement is entirely incorrect with respect to adding items to an agenda within 72 hours of a meeting. As mentioned previously, the general rule under OMA is that agendas must be posted 72 hours prior to the meeting, and no action may be taken on any item not listed on that posted agenda. *See* § 10-15-1(F) ("Except for emergency matters, a public body shall take action only on items appearing on the agenda."). Public bodies may potentially "change the agenda" at the meeting by removing or reorganizing the order of items² on the agenda, but it is clear that, in the absence of one of the exceptions we have discussed previously, they cannot add items to an agenda within 72 hours of the meeting.

Meeting Minutes

We disagree with Mr. Scherer's other contention that the Council violated OMA by failing to properly consider the minutes of its prior meeting at the meeting on February 17, 2021. Although OMA expressly requires that all meeting minutes "shall be approved, amended or disapproved at the next meeting where a quorum is present," it also provides public bodies "ten working days

² A public body would be constrained in its ability to reorganize items on an agenda where it has previously provided specific start times for each item. For instance, if a public body stated on the agenda that it would consider a particular item of business at 7:30 PM, it would likely not be able to reorganize the agenda during the meeting so as to discuss that item of business at 6:00 PM.

after the meeting” to draft and prepare those minutes. Section 10-15-1(G). In analyzing a previous complaint filed against the Las Vegas City Council, we expressed our view that these two provisions as to the timing of meeting minutes must be viewed in harmony with one another so that “a public body is not required to approve the minutes of its previous meeting at a subsequent meeting held within ten business days.” N.M. Att’y Gen. Letter to Esther Garduno Montoya, Las Vegas City Council, at 2 (Jan. 6, 2020).

Our opinion is that the Council did not violate OMA at its meeting on February 17, 2021 by failing to approve the minutes from its February 10, 2021 meeting. The later meeting on February 17, 2021 was held only five (5) working days after the Council’s meeting on February 10, 2021, well within the ten working day period set forth by Section 10-15-1(G). Consistent with our previous interpretation of this statutory requirement, we think that the Council was not obligated to consider the meeting minutes from its February 10, 2021 meeting until ten working days later. As a result, we do not find that the Council violated OMA in this respect.

Conclusion

The Council’s action to appoint members to the Film Commission and the Museum Board at its February 17, 2021 meeting was clearly a violation of the Open Meetings Act. Public bodies in New Mexico, in general, are permitted to only take action on items not listed on the agenda, and in this case the Film Commission and the Museum Board were not on the Council’s agenda. Although we are encouraged somewhat by the Council’s (apparent) willingness to acknowledge its error and take remedial action, we strongly recommend that it refrain from similar violations in the future. All members of the Council, and for that matter the City’s staff, should be aware that action cannot be taken at a meeting if not listed on the agenda 72 hours in advance. This is a fundamental principle of OMA and one to which all public bodies must closely adhere.

For your reference, a copy of the OMA Guide is available on the website of the Office of the Attorney General at www.nmag.gov. If you have any questions regarding this determination or OMA in general, please let me know.

Sincerely,



John Kreienkamp
Assistant Attorney General

Enclosure

cc: Phillip C. Scherer

Melanie Majors