

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

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December 2, 2020

**VIA ELECTRONIC MAIL ONLY**

City of Farmington City Council  
Jennifer Breakell, Esq.  
800 Municipal Drive  
Farmington, N.M. 87401  
Email: [jbreakell@fmrn.org](mailto:jbreakell@fmrn.org)

**Re: Open Meetings Act Complaint – David J. Fosdeck**

Dear Ms. Breakell,

Thank you for your response to our inquiry regarding the complaint filed by Mr. David J. Fosdeck with the Office of the Attorney General alleging that the Farmington City Council (hereinafter “FCC”) violated the Open Meetings Act (“OMA”), NMSA 1978, Sections 10-15-1- to -4 (1973, as amended through 2013). As you may recall, Mr. Fosdeck’s complaint alleges the FCC committed multiple OMA violations when some of its members attended a private meeting hosted by Four Corners Economic Development in conjunction with Enchant Energy. The topic of discussion alleged by Mr. Fosdeck, and confirmed by the FCC, was the pre-feasibility study results from Sargent & Lundy regarding the potential of installing Carbon Capture Technology onto the San Juan Generating Station. After reviewing Mr. Fosdeck’s complaint and your response, we have determined there is insufficient evidence to support an OMA violation. However, we have serious concerns about whether an actual quorum was present at the event, and strongly advise the FCC to be as transparent as possible with regard to future meetings, discussions, and events that pertain to this initiative given it is a matter of public business.

The OMA 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, 107 N.M. 38, 42, 751 P.2d 722, 726 (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”). All meetings of a quorum of any public body must be conducted in accordance with OMA’s requirements. *See* § 10-15-3(A)

(providing “[n]o resolution, rule regulation, ordinance or action” of any public body is valid “unless taken or made at a meeting held in accordance with” OMA). Consistent with its stated public policy, the OMA is broadly construed in favor of transparency. *See* Attorney General’s Open Meetings Act Compliance Guide, p. 7 (8<sup>th</sup> ed. 2015) (“OMA Guide”) (noting that “doubt as to the proper course of action should be resolved in favor of openness whenever possible”).

As a preliminary matter, the FCC constitutes a public body for purposes of the OMA. *See* § 10-15-1(B). The next point of inquiry is whether there was a quorum of FCC members at the presentation, and if so, whether public business was discussed. Mr. Fosdeck reported he observed a quorum of the FCC at the event on July 16, 2019. In your response to our inquiry letter, you stated a rolling quorum was not present, but did not discuss or seek to clarify whether an actual quorum was or was not in existence at the presentation. As a result, we do not have sufficient information to conclude an actual quorum of FCC members was present, which would be required to find a violation under Section 10-15-1(B).

Nevertheless, there is cause for concern regarding the lack of transparency, which was the overarching allegation in Mr. Fosdeck’s complaint, surrounding the FCC’s involvement with the July 16 event. The presentation was overwhelmingly a matter of public business for two significant reasons: First, the City of Farmington and Enchant Energy have a public-private partnership, as acknowledged by Mayor Nate Duckett; and second, the feasibility of the project poses financial, environmental, and political implications for the area’s residents, such as taxpayer liabilities and employment prospects.

As such, it is unclear why so many FCC councilors attended the July 16 presentation by Enchant Energy when, based on your response, they had received an identical presentation at a City Council Work Session earlier that morning. It is also troubling the FCC is seemingly unable to distinguish between an event in which certain members of the public are invited versus an event being open to the public for purposes of the OMA. Inviting people present at the Work Session or sending members of the public a private invitation to an event does not render a meeting “open” under the OMA (and held in a locked room, as reported by Mr. Fosdeck). The meeting must be open to all members of the public and properly noticed, an agenda must be posted, and minutes must be kept. *See* §§ 10-15-1(B-G). Relatedly, given the public-private partnership between the City of Farmington and Enchant Energy, it is irrelevant as to who hosted or presented at the event. Pursuant to Section 10-15-1(B), *any* meeting in which a quorum of FCC councilors is present, and public business is discussed, is subject to the OMA.

In closing, we lack sufficient evidence to find the FCC violated the OMA when its members attended the July 16, 2019 meeting hosted by Four Corners Economic Development and Enchant Energy. However, we caution the FCC moving forward with regard to meetings, events, or presentations on issues pertaining to the San Juan Generating Station in light of the social, political, environmental, and financial implications at stake for those in the area. In the future, the FCC must

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be judicious of the open meeting requirements under the OMA, and do all that is necessary to be transparent with regard to this matter.

For reference, a copy of the OMA Compliance Guide is available on our website, [nmag.gov](http://nmag.gov). If you have any additional questions regarding this determination or the OMA in general, please do not hesitate to contact me.

Sincerely,

*Alexis Shannez Dudelczyk*

Alexis Shannez Dudelczyk  
Assistant Attorney General

Enclosure

cc: David J. Fosdeck