

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

January 6, 2020

VIA ELECTRONIC MAIL ONLY

Tonita Gurule-Giron, Mayor
Las Vegas City Council
1700 N. Grand Avenue
Las Vegas, NM 87701
Email: mayor.tonita.gurule-giron@lasvegasnm.gov

Re: Open Meetings Act Complaint – Lee Einer

Dear Mayor Gurule-Giron:

The Office of the Attorney General has received a complaint by Mr. Lee Einer alleging that the Las Vegas City Council (hereinafter “the Council”) violated the Open Meetings Act, NMSA 1978, Sections 10-15-1 to -4 (as amended through 2013) (“OMA”), at its meeting on September 10, 2018. Specifically, Mr. Einer alleges that the Council closed the meeting to discuss an issue not covered by one of OMA’s exceptions and that the agenda for the meeting was not publicly available seventy-two hours in advance. We have reviewed your response, on behalf of the Council, to our inquiry regarding Mr. Einer’s complaint. Having carefully considered the facts surrounding the relevant meeting, we conclude that the Council did indeed violate the Open Meetings Act, albeit not necessarily in the manner alleged by Mr. Einer. We urge the Council to take greater care to abide by its legal obligations.

Mr. Einer’s complaint alleges multiple OMA violations at the Council’s meeting on September 10, 2018. At that meeting, which was designated as a “special” meeting per the Council’s agenda, the primary items of business were the confirmation of the City Attorney and the Police Chief. These two positions are apparently employees of the City, appointed by the Mayor and confirmed by the Council, who work under contracts. At the meeting, the Council entered into closed session to discuss the confirmation of the Mayor’s appointed candidates. Mr. Einer’s complaint alleges that in closed session, the Council must have discussed the specific contracts to be entered into with the City Attorney and the Police Chief, and that this discussion was not authorized by the limited personnel matters exception to OMA. Additionally, he maintains that the agenda was not available to the public seventy-two hours in advance as required by OMA.

In entering closed session, the Council relied upon the limited personnel matters exception to OMA, which 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) (authorizing closed session for “the discussion of hiring, promotion, demotion, dismissal, assignment or resignation of... any individual public employee”). The limited personnel matters exception in OMA generally 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”).

In this case, Mr. Einer does not contest the Council’s entry into closed session to discuss the hiring of the City Attorney and the Police Chief. Instead, he argues that the Council was *not* authorized to discuss the terms of the contracts with those individuals. At the outset, we would note that we find it difficult to evaluate this argument in part because we do not know precisely what it was that the Council discussed in closed session (more on that below). However, assuming that the Council did discuss the terms of the contracts in closed session, we do not think that this would violate the limited personnel matters exception. As that exception authorizes a discussion of whether to hire an individual employee, surely it must allow some discussion of the hiring terms as well. *See generally* OMA Guide, p. 21 (suggesting that a performance evaluation would be authorized in closed session because “[a]lthough not expressly listed among the actions justifying closure under the limited personnel matters exception, it is closely related to the specified actions”). As the Council has stated that the City Attorney and the Police Chief are employees of the City, we conclude that the discussion in closed session of their contract terms would not have been a violation of OMA.

With respect to Mr. Einer’s second contention, that the Council failed to post its agenda online seventy-two hours in advance, we have insufficient facts at this time in order to determine whether there is an OMA Violation. OMA requires all public bodies to make their meeting agendas “available to the public and posted on the public body’s website, if one is maintained,” at least seventy-two hours prior to any meeting. NMSA 1978, § 10-15-1(F). As the statute is intended to provide 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,” the requirement to post an agenda publicly seventy-two hours in advance is vital in order to have any legal meeting of any public body. Section 10-15-1(A) (emphasis added). While the Council’s response that it “did provide its meeting agenda 72 hours prior to the meeting.” We remain concerned of this ongoing allegation. The OAG has received numerous complaints regarding this issue. As such, it is incumbent upon the council to ensure that agendas are timely placed online. Continued failure to do so will be viewed as willful OMA violations moving forward and may result in enforcement action. We would adamantly stress to the Council the absolute importance of satisfying OMA’s seventy-two hour agenda requirement.

We conclude by noting two violations of OMA not specifically identified by Mr. Einer. First, the Council did not consider the minutes from its previous meeting at the September 10, 2018, meeting. This may very well be a relatively obscure provision of OMA, and one overlooked by more than a few public bodies when holding so-called “special meetings,” but the requirement is

Tonita Gurule-Giron, Mayor

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in statute and therefore must be observed. "Draft minutes... shall be approved, amended or disapproved at the next meeting where a quorum is present." Section 10-15-1(G). *See also* OMA Guide, p. 18 (noting that public bodies are required to "approve, amend or disapprove draft minutes at the next meeting of a quorum"). As this is not the first time that we have observed the Council failing to follow this provision, we again emphasize this as a violation.

More importantly, the minutes of the Council meeting on September 10, 2018, failed to state "that the matters discussed in the closed meeting were limited only to those specified in the motion for closure." Section 10-15-1(J). While the minutes did include a statement that "no decisions were made," this did not satisfy OMA. Our OMA Guide notes that this closed session statement requirement exists because "members of the public are naturally curious... and suspicious about any perceived misuse of the exceptions allowing closure." OMA Guide, p. 34. And, as mentioned previously, OMA exists to provide the public with "the greatest possible information" about governmental affairs. Section 10-15-1(A). That obviously includes information about the subject of closed session discussions by public bodies. Indeed, in this case had the minutes properly included this statement, it is possible that Mr. Einer might not have concluded that the Council's closed session discussion had exceeded the bounds of the limited personnel matters exception. However, in any event, following a closed session, it is a simple matter of law that OMA requires all public bodies to state both during the meeting and in its minutes that the subjects discussed in closed session were limited to those specified in the motion for closure. The Council violated this requirement at its September 10, 2018, meeting, and we advise it not to do so again.

Again, we reiterate that your continued violations may be deemed willful and will place you in danger of OMA penalties. Any person found violating any of the provision of NMSA 1978, Section 10-15-1 or 10-15-2 is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five hundred dollars (\$500) for each offense. The Attorney General may initiate a criminal prosecution against each of those persons responsible for violation.

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

cc: Lee Einer

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

Electronic Complaint Submission

Submission Detail

ECS Reference Number	NMOAG-ECS-20181005-e1c4
Final Submit Date	10/5/2018 2:28:59 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

Mr. Lee Einer

Person

Address

[REDACTED]

Contact information

[REDACTED]

Complaint against

City of Las Vegas, NM

Public Body (Government Entity)

Address

1700 N. Grand Ave
Las Vegas, New Mexico 87701

Contact information

cfresquez@lasvegasnm.gov

(505) 454-1401

www.lasvegasnm.gov

The email address is for the city clerk.

Complaint Specifics

Specific date(s) of OMA violation(s)	September 10, 2018
Agenda	Agenda was not available seventy-two (72) hours prior to the meeting
Closed Meetings	The public body closed the meeting to discuss an issue not covered by one of OMA's exceptions
Other Violation	Please review this agenda in conjunction with the audio recording of this meeting, available at https://youtu.be/1IBTOmgOYx8 Note the following: 1). The properties of the agenda PDF show that it was created on Sept. 7, 2018 at 10:26 pm, less than 72 hours prior to the meeting. 2). Although contracts and amendments to contracts for the City Attorney and Police Chief were discussed and voted on in open meeting, those proposed contracts were not attached to the agenda and therefore the public had no way to know what was being amended or voted on. Additionally, the specifics of the contract amendments were not stated in the open meeting. 3). The fact that the governing body came out of executive session with proposed contract amendments suggests that these amendments were at least part of the closed-door discussion. The contracts with city officers and amendments thereunto are a completely separate issue from the qualifications and performance of the individuals being contracted with. The issue of contract language is also separate from the decision to hire these individuals. I can see no OMA exception which would allow this, and I do believe that this meeting, and the decisions made therein, were illegal.

Transaction

Documents

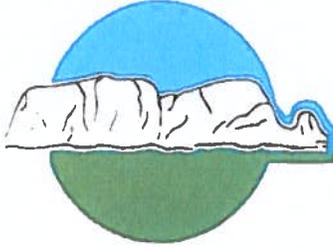


September 10, 2018 Special City Council Packet-1.pdf

Agenda for Sept 10 special meeting

Comments

*** END OF COMPLAINT ***



CITY OF LAS VEGAS

1700 N. GRAND AVE. LAS VEGAS, NEW MEXICO 87701
505-454-1401 FAX: 505-425-7335

Mayor Tonita Gurulé-Girón

CITY OF LAS VEGAS
SPECIAL CITY COUNCIL AGENDA
September 10, 2018–Monday– 5:30 p.m.
City Council Chambers
1700 N. Grand Ave

(The City Council shall act as the Housing Authority Board of Commissioners on any matters on the Agenda concerning the Housing Department.)

- I. **CALL TO ORDER**
- II. **ROLL CALL**
- III. **PLEDGE OF ALLEGIANCE**
- IV. **MOMENT OF SILENCE**
- V. **APPROVAL OF AGENDA**
- VI. **PUBLIC INPUT (not to exceed 3 minutes per person and persons must sign up at least fifteen (15) minutes prior to meeting.)**
- VII. **BUSINESS ITEMS**

1. **Confirmation to appoint Esther Garduno Montoya, City Attorney.**

Mayor Tonita Gurule-Giron-As per City of Las Vegas Municipal Charter, Article V, Officers, Directors and Employees, Section 5.04. City Attorney. The Mayor shall appoint the City Attorney, subject to the Council approval. The Governing Body shall enter into a contract with the City Attorney which shall establish, among other matters, compensation, benefits, duties and responsibilities.

2. **Confirmation to appoint Jerry Delgado, Police Chief.**

Mayor Tonita Gurule-Giron-As per City of Las Vegas Municipal Charter, Article V, Officers, Directors and Employees, Section 5.06. Chief of Police. The Mayor shall appoint the Chief of Police, subject to Council approval. The Governing Body shall enter into a contract with

the Chief of Police which shall establish, among other matters, compensation, benefits, duties and responsibilities.

VIII. EXECUTIVE SESSION

THE COUNCIL MAY CONVENE INTO EXECUTIVE SESSION IF SUBJECT MATTER OF ISSUES ARE EXEMPT FROM THE OPEN MEETINGS REQUIREMENT UNDER § (H) OF THE OPEN MEETINGS ACT.

- A. Personnel matters, as permitted by Section 10-15-1 (H) (2) of the New Mexico Open Meetings Act, NMSA 1978.**
- B. Matters subject to the attorney client privilege pertaining to threatened or pending litigation in which the City of Las Vegas is or may become a participant, as permitted by Section 10-15-1 (H) (7) of the New Mexico Open Meetings Act, NMSA 1978.**
- C. Matters pertaining to the discussion of the sale and acquisition of real property, as permitted by Section 10-15-1 (H) (8) of the Open Meetings Act, NMSA 1978.**

IX. ADJOURN

ATTENTION PERSONS WITH DISABILITES: The meeting room and facilities are accessible to persons with mobility disabilities. If you plan to attend the meeting and will need an auxiliary aid or service, please contact the City Clerk's Office prior to the meeting so that arrangements may be made.

ATTENTION PERSONS ATTENDING COUNCIL MEETING: By entering the City Chambers, you consent to photography, audio recording, video recording and its/their use for inclusion on the City of Las Vegas Web-site, and to be televised on Comcast.

NOTE: A final agenda will be posted 72 hours prior to the meeting. Copies of the Agenda may be obtained from City Hall, Office of the City Clerk, 1700 N. Grand Avenue, Las Vegas, N.M 87701