

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

December 2, 2020

Esther Garduño-Montoya, Esq.
City Attorney
City of Las Vegas
1700 N. Grand Avenue
Las Vegas, NM 8701

Re: Open Meetings Act Complaint- City of Las Vegas

Dear Ms. Garduño-Montoya:

Thank you for your response to the April 30, 2019 inquiry regarding the complaint submitted to the Office of the Attorney General's Open Government Division ("OGD") by Mr. Lee Einer, alleging that the City of Las Vegas (the "City") violated the Open Meetings Act ("OMA"), NMSA 1978, Sections 10-15-1 to -4 (as amended through 2013). Specifically, Mr. Einer alleges that the City has failed to post meeting agendas on its website for its varying advisory committees in accordance with Section 10-15-1(F) of OMA. In your response on behalf of the City regarding this matter, you acknowledged that the City had not posted committee agendas on its website in the past, but has changed its policy and has updated the website to include many past committee meeting agendas, as well as all future agendas. You assert that the City has always posted agendas at the City's administrative offices at least 72 hours prior to the committee meetings. You also state that some of the committees are either not subject to OMA or have not met anytime in the past two years despite regularly scheduled meetings outlined in the City's annual OMA resolutions.

As discussed below, based on the information you provided in your response, we have determined the City's committee meetings subject to OMA were not held in compliance with OMA due to the City's failure to post the agendas on its website at least 72 hours prior to the meetings. Additionally, although the City is currently complying with OMA's agenda posting requirement for all of its committee meetings, we disagree with your analysis regarding the applicability of OMA to some of the City's advisory committees.

Background

The City of Las Vegas began posting its city council meeting agendas on its website in 2014. However, the City did not begin posting advisory committee meeting agendas until very recently.

The City's annual OMA resolutions adopted by the City Council between 2015 and 2019 only required that agendas be made available at the City's main office. The resolutions do not mention the City's website or the posting of the City Council or advisory committee meeting notices or agendas on the website. The resolutions do contain regular days and times of the City Council and advisory committee meetings.¹

Both the City Planning and Zoning Commission and the Lodgers Tax Board are authorized by State statute. *See* NMSA 1978 §§ 3-21-1 through -14 (county and municipal zoning authorities); 3-38-22 (Lodgers Tax Advisory Boards). The City's Charter creates several other standing committees of the City Council. The City claims that these committees serve only an advisory role to the City Council and that most of these committees have not held meetings in the past two years. In its response letter, the City acknowledges that the City Planning and Zoning Commission is subject to OMA but that agendas were not posted online until May of 2019. The City also stated that the Lodgers Tax Board, which meets on a regular basis, is only advisory in nature and therefore, is not subject to OMA. The City recently began posting agendas on the City's website for the Lodgers Tax Board. City officials subsequently determined that agendas were not consistently posted prior to all advisory committee meetings held before 2019.

Open Meetings Act

OMA 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, 107 N.M. 38, 42 (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, 76 N.M. 535, 543 (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"). Courts must operate under the presumption that the public body has complied with the requirements of OMA. *See* Section 10-15-3(A). That being said, the statute itself provides a number of strict requirements that all meetings of a quorum of the public body must satisfy. Section 10-15-1. No action of "any board, commission, committee or other policymaking body" is valid unless it complies with these OMA requirements. NMSA Section 10-15-3(A).

1. Application of OMA to Committees of the City Council

OMA applies to "[a]ll meetings of a quorum of members of any board, commission, administrative adjudicatory body or other policymaking body of any state agency or any agency or authority of any county, municipality, district or political subdivision, held for the purpose of formulating public policy, including the development of personnel policy, rules, regulations or ordinances, discussing public business or taking any action within the authority of or the delegated authority of any board, commission or other policymaking body[.]" *See* NMSA § 10-15-1(B). Meetings of a committee consisting of less than a quorum of a public body may not be subject to the provisions

¹ This constitutes sufficient notice for the regularly scheduled meetings of the City so long as the resolution is available to the public. *See* Attorney General's Open Meetings Act Compliance Guide p. 12-13 (8th Ed. 2015) ("OMA Guide").

of the Act if the committee engages solely in fact-finding, simply executes the policy decisions or final actions of the public body, and does not otherwise act as a policymaking body. Attorney General's Open Meetings Act Compliance Guide p. 8 (8th Ed. 2015) ("OMA Guide). However, "[a] committee created by statute is a public body subject to OMA because the legislature considered the committee's functions important enough to provide it with a separate existence as a public body, and because the committee is not simply created by a public body as a means to carry out that public body's business." *Id.* at p. 9. "In some situations, even a non-statutory committee appointed by a public body may constitute a 'policymaking body' subject to 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." *Id.*

Aside from the City Council, which must certainly comply with OMA when holding meetings, the City's Charter created multiple standing committees.² Some of these standing committees serve merely advisory or fact-finding functions; however, others like the Planning and Zoning Commission and the Lodgers Tax Advisory Board are created or authorized by State statute and potentially have significant policymaking authority. Those committees that either have significant policy making authority or that are created or authorized by State statute are public bodies for the purposes of OMA and must adhere to each of its provisions. Failure to do so may invalidate the actions taken by those committees. However, committees that have not met or did not otherwise have a discussion regarding public business involving at least a quorum of the committee could not have violated OMA.³

2. Posting of Agendas

OMA also requires that the public be apprised of the business items that will be discussed at any meeting of a public body. In pertinent part, OMA provides:

Except in the case of an emergency or in the case of a public body that ordinarily meets more frequently than once per week, at least seventy-two hours prior to the meeting, the agenda shall be available to the public and posted on the public body's web site, if one is maintained... Except for emergency matters, a public body shall take action only on items appearing on the agenda.

NMSA1978, § 10-15-1(F). The requirement that the agenda be posted on a public body's website became law in 2013. *See* H.B. 21, 1st Reg. Sess., 51st Leg. (N.M. 2013) (effective June 14, 2013).

Based on assertions made by Mr. Einer as well as those made by the City, we have determined that numerous violations of OMA have occurred relating to the required posting of meeting agendas. Although the City Charter requires that each standing committee adhere to OMA, the most current OMA resolution passed by the City Council does not require that agendas be posted on the City's

² It should be noted that the City's Municipal Charter states that each board or commission shall annually adopt a resolution requiring compliance with the provisions of OMA. City of Las Vegas, New Mexico Municipal Charter, Art. VI, § 6.01(H).

³ Committees may violate OMA without holding a formal meeting if a "rolling quorum" is created where public business is discussed. *See* OMA Guide p. 7-8.

website, but only states that the agendas will be available at the City's main office. This requirement is insufficient to meet OMA provisions related to meeting agendas.

As it pertains to City Council meetings as well as those advisory committee meetings to which OMA applies, the City violated OMA in each instance that an agenda was not posted on the City's website for a specific meeting at least 72 hours prior to the meeting. With regard to the City Council, no violations are believed to have occurred since the City began regularly posting the meeting agendas on the website in 2014. However, the advisory committees to which OMA applies, including the Planning and Zoning Commission and the Lodgers Tax Board, have had numerous recent violations due to the City's failure to timely post the agendas on the City's website. As stated above, those committees to which OMA does not apply or that have not had regular meetings had no obligation to post agendas and therefore could not have violated OMA.

Conclusion

The City has failed to comply with OMA due to its failure to post meeting agendas on its website prior to scheduled City Council meetings as well as advisory committee meetings subject to OMA. To the extent that it has not done so already, the City should ensure that all agendas for meetings subject to OMA are posted on the City's website at least 72 hours prior to a scheduled meeting. The City should review and revise its annual OMA resolution to ensure that it is consistent with OMA where appropriate. Additionally, the City should review the role and source of authority for each of its advisory committees to determine which committees may be subject to OMA and whether those committees are currently complying with OMA.

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,



Sally Malavé
Director, Open Government Division

CC: Lee Einer