

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

September 3, 2020

VIA ELECTRONIC MAIL ONLY

Governing Body of the City of Santa Fe
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Re: Open Meetings Act Complaint – Berl Brechner

Dear Ms. McSherry:

Thank you for your response to our inquiry into the complaint submitted to the Office of the Attorney General by Mr. Berl Brechner alleging that the Governing Body of the City of Santa Fe (“the Governing Body”) violated the Open Meetings Act (“OMA”), NMSA 1978, Sections 10-15-1 to -4 (1974, as amended through 2013). As you know, Mr. Brechner alleges that the Governing Body violated OMA in connection with a virtual meeting held on March 25, 2020. Having carefully considered both Mr. Brechner’s complaint and your response to our inquiry, we conclude that the Governing Body did not violate OMA as alleged. However, we encourage the Governing Body to continue to improve its virtual meeting protocols so as to ensure that both the public and the individual members of the Governing Body are able to hear all those who are participating in the meeting.

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”).

Mr. Brechner's complaint to our Office arises out of the Governing Body's meeting on March 25, 2020. Due to the COVID-19 pandemic and state of public health emergency declared by the Governor, the meeting was held entirely online, with the public, Governing Body members, and City staff all attending virtually. The meeting was broadcast live on YouTube, cable television, and local radio. Members of the public who desired to offer public comment were permitted to do so by registering via email beforehand no later than 1:00 PM on the day of the meeting. In his complaint to our Office, Mr. Brechner identified at least nine (9) separate issues with the technical aspects of the meeting as potential violations of OMA, including:

- "Audio was at times faded, blocked, or garbled."
- "Statements from the phone-in public participants (audio only) could not be heard by virtual meeting Councilor participants, and various of them so stated that during the meeting, including public hearings."
- "The statements of public call-in commenters was briefly summarized by those at city hall who had the main connection, for remote-located Councilors who could not hear the statement. The summarizations did not convey key specific points the public presenter had stated."
- "The video to the public was of a shot of a computer monitor that was moved at times, and occasionally blocked by people in front of the camera."
- "There were gaps in proceedings for technical issues or call-in participants being phoned."
- "Governing body members sometimes disappeared from the screen."
- "... normally in Council chambers during hearings in Santa Fe, public presenters are sworn in. At this virtual meeting, public participants were both unseen and unsworn."
- "... the mandate that public participation required advance registration limited such participants to comments only for agenda item(s) they selected in advance, and worked against interchange between public participants and council members."
- "This virtual meeting was viewable only to individuals with appropriate devices. (Libraries closed; no computers available there.) And technical issues made it a challenge to watch."

For its part, the Governing Body largely acknowledged that many of these technical issues did occur but also emphasized that they were isolated moments and inconsequential.

Virtual Meetings and New Mexico's Open Meetings Act

In providing that all meetings held by a quorum of any public body in New Mexico must be "open" to the public, OMA specifically guarantees the public the right to "attend and listen to the deliberations and proceedings." Section 10-15-1(A). As our Office notes in our OMA Guide, this represents "the basic open meetings policy of the state," that public business "be conducted by the public body ... at meetings open to all persons who wish to attend and listen." OMA Guide, p. 6.

Although under normal circumstances OMA's requirement that the public be permitted to "attend and listen" is simple and straightforward, it becomes far more challenging in a pandemic during which gatherings of people is either dangerous or outright prohibited. The language of New

Mexico's Open Meetings Act does not contemplate virtual meetings. To the contrary, many provisions of the statute indisputably operate under the presumption that meetings must be held in a particular physical location: members seeking to appear telephonically, for example, may only do so "when it is otherwise difficult or impossible for the member to attend the meeting in person." Section 10-15-1(C). Similarly, a meeting may only be reconvened on a later date if the public body "posts notice of the date, time and place for the reconvened meeting on or near the door of the place where the original meeting was held." Section 10-15-1(E). As these provisions clearly indicate, in normal times a public body would not be able to hold a meeting entirely online. However, although OMA clearly requires in-person meetings as a general rule, it is equally clear that the statute "requires substantial, not strict, compliance." *Parkview Cmty. Ditch Ass'n v. Peper*, 2014-NMCA-049, ¶ 14. "Substantial compliance has occurred when the statute has been sufficiently followed so as to carry out the intent for which it was adopted and serve the purpose of the statute." *Gutierrez v. City of Albuquerque*, 1981-NMSC-061, ¶ 14, 96 N.M. 398.

Based on the doctrine of substantial compliance, in the early days of the pandemic in New Mexico our Office issued an advisory to the public as to the permissibility of and best practices for virtual meetings. This advisory stated our opinion that public bodies could, consistent with OMA, conduct meetings virtually during the pendency of the state of emergency caused by COVID-19, provided that the public was given ample opportunity to attend and listen through virtual means. Our advisory included the following specific guidelines:

- Notice of the meeting must still comply with the mandates of OMA, and it should contain detailed information about how members of the public may attend and listen via telephone, live streaming, or other similar technologies---this should include such detail as relevant phone numbers, web addresses, etc.;
- While provided by alternative means, the public must have some form of access to the meeting to substitute for the access it would during any normally scheduled public meeting subject to OMA;
- Where possible, videoconference is the best alternative method of holding meetings;
- At the start of the meeting, the chairperson should announce the names of those members of the public entity participating remotely;
- All members of the public entity participating remotely must identify themselves whenever they speak and must be clearly audible to the other members of the public entity and to the public;
- The chairperson or person leading the meeting should suspend discussion if the audio or video is interrupted;
- All votes of the public entity should be by roll call vote;
- The public entity should produce and maintain a recording of the open session of the meeting.

Technical Problems at the March 25, 2020 Meeting

In effect, the sole cognizable allegation in Mr. Brechner's complaint with respect to OMA¹ is that the technical problems at the Governing Body's March 25, 2020 meeting were so critical as to have effectively rendered much of the public unable to attend and listen to the meeting. On this point, having considered the information available to us (including the recording of the meeting available on YouTube), we do not agree. In our view, the City's meeting did substantially comply with the requirements of OMA.

At the outset, we note that some of Mr. Brechner's allegations with respect to the technical conduct of the Governing Body's meeting are not relevant to the substantial compliance analysis. First, his allegations as to public comment, which noted that some public comment was summarized rather than read verbatim, that public commenters were not sworn in, and that public comment required advance registration prior to the meeting, are not pertinent because (unlike open meetings laws in a handful of other states) New Mexico's OMA simply does not require the public be afforded the opportunity to comment.

Next, we agree with the Governing Body that its video feed being infrequently "moved at times, and occasionally blocked by people in front of the camera," is no different than an individual's view being momentarily obstructed by another member of the public at an in-person meeting. It does not establish a violation of OMA. Lastly, the allegation that "[t]here were gaps in proceedings for technical issues or call-in participants being phoned," if anything, only bolsters the Governing Body's argument that its meeting *did* comply with OMA. In fact, our advisory specifically encouraged public bodies to "suspend discussion if the audio or video is interrupted." Thus, none of these allegations shows that the Governing Body's meeting was noncompliant with OMA.

There remain, though, several allegations that are consequential to our review. Most importantly, several of Mr. Brechner's allegations contend that the audio feed was at times inaudible both to the members of the Governing Body and to the general public. That is highly relevant to any analysis of whether a public body has enabled the public to effectively attend and listen to a meeting, and to whether the public body has complied with the express requirements for telephonic and virtual attendance in Section 10-15-1(C).² However, the Governing Body appears to be correct that, for the overwhelming majority of the meeting, the audio feed was audible and the members of the public body could hear each other and be heard by the public. Isolated and discrete moments of difficulty with the audio feed are not grounds to invalidate a meeting. Similarly, although we are more concerned with the public comment portions of the meeting because the Governing Body has acknowledged that it was unable to hear much of what was said by public commenters, we cannot conclude that this invalidates the meeting either.

¹ One of Mr. Brechner's allegations is unrelated to OMA and therefore outside the scope of our review. In particular, his allegation that the Governing Body contravened one of its own ordinances to permit itself to extend a public health emergency is not a cognizable claim under OMA, as it does not implicate any specific provision in the statute. Therefore, we will not address it in this determination.

² Specifically, OMA permits members of a public body to appear telephonically or virtually only where "all participants are able to hear each other at the same time and members of the public attending the meeting are able to hear any member of the public body who speaks during the meeting." Section 10-15-1(C).

Lastly, it appears to us that the meeting was, in fact, accessible to the public with respect to methods of access. As the Governing Body emphasizes, the public was able to attend and listen to the meeting online through smartphones, computers, and tablets, and the meeting itself was broadcast live on television and radio. In an era of a pandemic and limitations on public gatherings, this likely was sufficient to substantially comply with OMA.

Conclusion

In reviewing this complaint, we note that the Governing Body's March 25, 2020 meeting took place near the beginning of the COVID-19 pandemic in New Mexico. It is our expectation and presumption that, since this complaint was filed, the Governing Body and the larger City of Santa Fe have continued to improve their virtual meeting practices and accessibility. At the risk of offering unnecessary suggestions that are by now moot, we would suggest that the Governing Body work with the City's staff to improve public access to its future virtual meetings, particularly in the area of public comment and ensuring a clean and consistent audio feed. We trust that the individual members of the Governing Body would prefer to hear directly from the public rather than be read a summary or a transcript of a public comment, and this should be an area where the City makes improvements. In addition, it was unclear to us in our review of this complaint as to whether the public was permitted to attend and listen to the meeting telephonically: all public bodies conducting virtual meetings should, we think, make telephonic attendance an option for the public. More broadly, we encourage the Governing Body to continue to make its meetings more accessible and open to the public in the spirit of the Open Meetings Act.

If you have any questions, please do not hesitate to contact us. Additionally, our OMA Guide is available on the website of the Office of the Attorney General at www.nmag.gov.

Sincerely,



John Kreienkamp
Assistant Attorney General

Enclosure

cc: Berl Brechner