

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

June 11, 2021

VIA ELECTRONIC MAIL ONLY

Lincoln County
Alan P. Morel, Esq.
P. O. Box 1030
Ruidoso, NM 88355-1030
Email: apmpa@apmpa.com

Re: Open Meetings Act Complaint – Mary Montes

Dear Mr. Morel:

Thank you for your response to our inquiry into the complaint submitted to the Office of the Attorney General by Ms. Mary Montes alleging violations of the Open Meetings Act (“OMA”), NMSA 1978, Sections 10-15-1 to -4 (1974, as amended through 2013), by the Lincoln County Board of Commissioners (the “Commission”) and the Lincoln County Historic Preservation Board (the “Board”). As you know, Ms. Montes alleges that the Commission and the Board violated OMA in connection with separate meetings held on April 20, 2021 and April 21, 2021, respectively, by failing to provide an agenda to the public stating the time and location of the meeting. Having carefully reviewed both Ms. Montes’ complaint and your response to our inquiry, we conclude that the agendas for each of these meetings were noncompliant with IPRA insofar as they were misleading and confusing as to the location of the meetings. Going forward, we strongly recommend that the Commission and the Board take greater care in drafting meeting agendas.

Background

The Lincoln County Board of Commissioners held a regular meeting on April 20, 2021. The Commission notified the public of the April meeting through its passage and publication of an annual resolution (dated November 17, 2020) containing the dates of all of the upcoming regular Commission meetings in 2021.¹ The resolution specifically noted that the Commission would hold a regular meeting on April 20, 2021 and that it would “meet at 8:30 A.M. in the Commission Chambers at the Lincoln County Courthouse, in Carrizozo, New Mexico, unless otherwise

¹¹ The Commission published the annual resolution in the *Lincoln County News* on January 7, 2021.

specified.” On April 8, 2021, approximately 12 days prior to the meeting in question, the Commission again posted in the newspaper stating that it “meets at 8:30 am the third Tuesday of each month with April 20 being the next date for the meeting. Agenda and instructions on how to attend virtually, [sic] can be viewed at www.lincolncountynm.gov.”

It appears that, on April 16, 2021, approximately four (4) days prior to the meeting, the Commission posted a notice of the upcoming meeting on the Lincoln County website. The online notice contained both the connectivity information necessary to attend and listen virtually through the Zoom teleconferencing platform and the meeting’s agenda. The Commission’s response to our inquiry explains that it posted the meeting agenda both online and “at the Commission Chambers of the County of Lincoln offices in Carrizozo.” However, the agenda did not state that the Commission would meet virtually. To the contrary, the only line of text regarding the location of the meeting instead stated, “Commission Chambers, Tuesday, April 20, 2021 @ 8:30 A.M.”

There appears to be some confusion as to whether the Commission met virtually or in person on April 20, 2021. While the Commission stated in response to our inquiry that “the April 20, 2021 Regular Commission Meeting was conducted via Zoom,” it also noted that “[c]opies of agendas are also available at the back of the Commission Chambers for those attending in person.” Similarly, the minutes of the meeting state that the meeting was “held at 8:30 AM on April 20, 2021 in the County Commission Chambers, Lincoln County Courthouse, in Carrizozo, New Mexico,” while also reflecting that all five of the Commissioners were present and that only two appeared “Via Zoom.” The minutes further state that a number of members of the public spoke to the Commission during the public comment portion of the meeting. It is therefore unclear whether the Commission met virtually or in person.²

Ms. Montes also complains to our Office regarding the meeting of the Lincoln County Historic Preservation Board on April 21, 2021. Like the Commission, the Board also notified the public of its upcoming regular meetings in the calendar year 2021 through a resolution published in the Lincoln County News on January 7, 2021. That resolution identified April 21, 2021 as the date of one of its regular meetings and stated that, like all other regular meetings, the Board would meet “at the Community Church in Lincoln, New Mexico, at 7:00 p.m.”

On April 16, 2021, approximately five (5) days prior to the April 21, 2021 meeting, the Board posted its agenda on the Lincoln County website alongside another notice of the meeting containing the Zoom connectivity information. The online notice stated, for the first time, that the Board would meet at 6:00 PM rather than the 7:00 PM start time identified in Board’s annual resolution. The agenda itself, though, did not state when the meeting would start. The agenda also did not state that the Board would meet virtually but instead contained only a physical address (109 Kansas City Road, Ruidoso, New Mexico 88345). The minutes from the Board’s meeting confirm that it met “via Zoom due to COVID” starting at 6:03 PM. It is unclear whether any members of the public attended.

² As OMA requires that minutes must describe the meeting’s location, the Commission will need to correct the minutes of its April 20, 2021 meeting if in fact it met virtually. *See* § 10-15-1(G) (providing that meeting minutes must state “the date, time and place of the meeting”).

In her complaint to our Office, Ms. Montes argues that the Commission and the Board each violated OMA at the aforementioned meetings by failing to provide the public with a legally sufficient agenda. Although Ms. Montes appears to focus exclusively on information not contained within the agendas – namely the lack of information as to the virtual setting of both meetings and the missing start time of the Board’s meeting – we must also address the apparent inaccuracies in the agendas. We will begin our analysis by reviewing OMA’s requirements for meeting notices and agendas before considering each meeting individually.

Analysis

The Open Meetings Act provides the public 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). In accordance with this public policy, we interpret OMA 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”). As our Court of Appeals has observed, “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.” *Kleinberg v. Bd. of Educ. of Albuquerque Pub. Sch.*, 1988-NMCA-014, ¶ 18.

So that the public may attend and listen to open meetings, OMA specifically requires public bodies to provide reasonable advance notice to the public prior to conducting any meetings. *See* § 10-15-1(D) (“Any meetings at which the discussion or adoption of any proposed resolution, rule, regulation or formal action occurs and at which a majority or quorum of the body is in attendance, and any closed meetings, shall be held only after reasonable notice to the public.”). As we explain in our OMA Guide, a meeting notice must, at a minimum, “adequately, accurately, and sufficiently in advance inform the public of the meeting’s time, place and date.” OMA Guide, p. 12. In addition, the notice must also either contain “an agenda containing a list of specific items of business to be discussed or transacted at the meeting” or explain “how the public may obtain a copy of such an agenda.” Section 10-15-1(F). Our Office has previously opined that, when a public body conducts a virtual meeting during the COVID-19 pandemic, the notice of the meeting must contain “detailed information about how members of the public may attend and listen via telephone, live streaming, or other similar technologies” in meeting notices. N.M. Att’y Gen. Advisory, Mar. 17, 2020.³

Before applying these legal principles to the Commission’s April 20, 2021 meeting, we note that we proceed with the understanding that the Commission met virtually and that the public was restricted to virtual attendance. As mentioned previously, the minutes of this meeting state that the meeting was “held at 8:30 AM on April 20, 2021 in the County Commission Chambers, Lincoln County Courthouse, in Carrizozo, New Mexico,” but the Commission explained in response to our inquiry that “the April 20, 2021 Regular Commission Meeting was conducted via Zoom.” Since

³ Available at

https://www.nmag.gov/uploads/PressRelease/48737699ae174b30ac51a7eb286e661f/AG_Balderas_Guidance_to_Public_Entities_Regarding_OMA_and_IPRA_Compliance_During_COVID_19_State_of_Emergency.pdf.

we expressly asked the Commission in our inquiry how the public was able to attend and listen to the meeting, we accept its answer as true and complete for the purposes of our analysis.

Assuming that the public was restricted to virtual attendance at the April 20, 2021 meeting, our opinion is that Ms. Montes has likely identified a violation of OMA insofar as the Commission's meeting notice was internally contradictory and misleading. Although the Commission did apparently post the necessary virtual meeting connectivity information on its website, the meeting's agenda did not contain this connectivity information or even state that the Commission would meet virtually. To the contrary, the agenda itself effectively stated that the Commission would meet in person since the only line of text regarding the location of the meeting stated: "Commission Chambers." Looking at this agenda posted physically "at the Commission Chambers of the County of Lincoln offices in Carrizozo," interested members of the public would have had no way of knowing that the only way to attend and listen to the meeting was through Zoom. As a result, since the meeting agenda was, as outlined by Section 10-15-1(F), essentially a component of the meeting notice, the Commission's notice did not "accurately ... inform the public of the meeting's time, place and date." OMA Guide, p. 12.

The notice for the Board's April 21, 2021 meeting suffered similar defects. Just as with the Commission's meeting, the Board's agenda contained only a physical address and did not state that the Board would meet virtually. This omission was, at a minimum, potentially misleading to the public. The necessary connectivity information, while available on the Board's website, was not in the agenda, nor was it apparently posted physically at any location. Moreover, with respect to Ms. Montes's observation that the agenda for the meeting did not contain a start time, it appears that the Board began its meeting approximately one hour earlier – at 6:00 PM rather than 7:00 PM – than it stated in its annual regular meetings resolution posted publicly on January 7, 2021. All told, the Board does not appear to have adequately and accurately notified the public of its upcoming meeting.

To clarify, in most circumstances, a meeting agenda does not have to specify the meeting's location or start time where the public body has already clearly conveyed that information in its meeting notice. Literally speaking, OMA does not require meeting agendas to contain such information, only that they include "a list of specific items of business to be discussed or transacted at the meeting." Section 10-15-1(F). However, because members of the public often rely on meeting agendas in connection with their right to attend and listen to open meetings, agendas cannot be misleading or inaccurate as to the location or time of a meeting.

Conclusion

Because the Commission and the Board do not appear to have "adequately, accurately, and sufficiently" notified the public of the "time, place and date" of their meetings on April 20, 2021 and April 21, 2021, we conclude that these meetings likely violated OMA.⁴ We therefore recommend that the Commission and the Board take "prompt, appropriate and effective" remedial

⁴ Because our conclusion rests on the finding that the agendas and notices for these meetings were misleading to the public, the doctrine of substantial compliance does not operate to cure these violations.

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action at their upcoming meetings. *Kleinberg*, 1988-NMCA-014, ¶ 30. This should consist of reconsidering any substantive actions taken at the April 20, 2021 and April 21, 2021. The Commission in particular also needs to revise the minutes from its April 20, 2021 meeting, since it appears that it did not, in fact, meet in person as those minutes currently state.

In the future, whenever conducting meetings at which the public is either partially or entirely restricted to virtual attendance, the Commission and the Board must accurately and clearly express those restrictions to the public in advance. Listing only a physical address on a meeting agenda is clearly misleading when the public is only able to attend and listen virtually. Even where the public is allowed some limited in person attendance (an attendance limit, for instance), the notice and agenda provided to the public in advance cannot, consistent with OMA, mislead the public on those limitations.

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: Mary Montes