STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

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VIA ELECTRONIC MAIL ONLY

Los Lunas Schools Board of Education
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Re: Open Meetings Act Complaints – Claire Cieremans, Andrew Garcia, Heather Rindels, and Dana Sanders

Dear Mr. Sanchez:

Thank you for your response to our inquiry into the complaints filed with the Office of the Attorney General by Claire Cieremans, Andrew Garcia, Heather Rindels, and Dana Sanders alleging that the Los Lunas Schools Board of Education (the "Board") violated the Open Meetings Act ("OMA"), NMSA 1978, Sections 10-15-1 to -4 (1973, as amended through 2013). As you know, these complaints allege that the Board violated OMA at a number of its meetings between March and May 2020. Having reviewed these complaints and your response, we conclude that it appears the Board violated OMA at its meeting on March 16, 2020 by entering into closed session pursuant to an inapplicable exception. We strongly urge the Board to reconsider its overly broad and plainly erroneous interpretation of OMA's pending or threatened litigation exception.

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").

Although the complaints that have been filed with our Office involve a wide range of laws and issues,[1] we have identified two allegations related to the Open Meetings Act. First, and most importantly, the complaints allege that the Board violated OMA by improperly entering into closed session at its meetings on March 16, 2020, April 6, 2020, April 16, 2020, April 21, 2020, and May 26, 2020. In general, these closed sessions appear to have involved pending financial complaints against the then-Superintendent and the Board's subsequent investigation and personnel actions. However, the specific topics discussed by the Board in closed session and the legal authority cited to justify the closure of each meeting differed from meeting to meeting. For organizational purposes, we divide these meetings between the one meeting on March 16, 2020 that relied exclusively on OMA's exception for pending or threatened litigation and the remainder which relied at least in part on the statutory exception for limited personnel matters.

At its March 16, 2020 meeting, the Board entered into closed session relying solely upon OMA's pending or threatened litigation exception. *See* § 10-15-1(H)(7) (providing an exception for "meetings subject to the attorney-client privilege pertaining to threatened or pending litigation in which the public body is or may become a participant"). Both the agenda and the motion to enter into closed session stated the following: "Closed Session Regarding Communications with Legal Counsel; Specifically, Discussion Regarding Complaints Made on Financial Matters for Investigation in Anticipation of Litigation." The minutes from this meeting indicate that no action was taken by the Board on the matters it discussed in closed session.

The Board appears to have entered into closed session at each of the meetings on April 6, 2020, April 16, 2020, April 21, 2020, and May 26, 2020 pursuant to OMA's exception for limited personnel matters. *See* § 10-15-1(H)(2) (permitting closed session for "the discussion of hiring, promotion, demotion, dismissal, assignment or resignation of or the investigation or consideration of complaints or charges against any individual public employee"). Although the Board also relied in part on the pending or threatened litigation exception at the meetings on April 16, 2020 and April 21, 2020, these closed session discussions all apparently involved discussions of the then-superintendent's leave status, financial complaints against the then-superintendent, or the Board's appointment of an interim superintendent.

[1] Our Office has received an extraordinary number of complaints and related communications from the above-named complainants regarding the Board and Los Lunas Schools. These complaints, which all appear to relate to an ongoing dispute between several members of the Board and its staff, have included allegations of financial and contractual improprieties, improper handling of public records requests, and ethical violations. While our Office continues to review the allegations related to the Inspection of Public Records Act ("IPRA"), NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2019), and will address those separately, we cannot offer an opinion as to the remainder of these issues. In particular, many of the remaining allegations have been forwarded to the 13th Judicial District Attorney's Office, so out of respect for that process we will not address them.

The other OMA allegation made by these complaints is that the Board impermissibly permitted public comment at its meeting on May 6, 2020, despite the fact that the agenda did not list public comment as an item of business. Our review of the minutes from that meeting indicate that, while public comment was not an item of business and while the public was not permitted to address the Board on any and all topics, individual members of the public were permitted to speak to the Board as to one of the items on the agenda ("Report of LLS Graduation Ceremonies and Community Celebration Developed in Collaboration with Multiple Entities and Agencies"). The Board's response to our inquiry maintained that this was not an OMA violation because, "[t]he inclusion of public comment made the Board meeting in question more open and transparent."

Closed Session

The primary allegation made by all of these complaints is that the Board entered into closed session at its meetings on March 16, 2020, April 6, 2020, April 16, 2020, April 21, 2020, and May 26, 2020 without adequate legal authority. In particular, although the Board cited to OMA's pending or threatened litigation exception at three of the meetings in question, there was no pending litigation and no individual had threatened the Board with litigation at that time. The complaints argue that the lack of literal pending or threatened litigation at these meetings rendered those closed session discussions unlawful.

Before reviewing any of the meetings in question, our analysis begins with the language in the Open Meetings Act which permits public bodies to enter into closed session. As a general rule, public bodies may only enter into closed session to discuss an item covered by one of OMA's ten exceptions. *See generally* § 10-15-1(H). Because the public policy behind OMA is one of transparency and openness, see Section 10-15-1(A), we interpret all of OMA's exceptions as narrowly as possible. *See* OMA Guide, p. 7 (noting that "doubt as to the proper course of action should be resolved in favor of openness whenever possible").

One of the two exceptions relevant to our analysis is OMA's exception for limited personnel matters, which generally 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 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"). Specifically, OMA expressly states that public bodies may discuss in closed session the "hiring, promotion, demotion, dismissal, assignment or resignation of or the investigation or consideration of complaints or charges against any individual public employee." Section 10-15-1(H)(2). Although this exception is applicable to only those discussions involving individual employees (as opposed to wide-ranging discussions of general personnel policy), we

explain in our OMA Guide that the exception applies to any discussion that is "closely related" to any of the actions specified in its text. OMA Guide, p. 21.

OMA also permits public bodies to enter into closed session at "meetings subject to the attorney-client privilege pertaining to threatened or pending litigation in which the public body is or may become a participant." Section 10-15-1(H)(7). We discuss this issue at length in our OMA Guide:

> Public bodies, no less than private parties to litigation, are entitled to effective representation of counsel, including the opportunity to confer without disclosing the substance of the discussion. However, public bodies may invoke the attorney-client privilege to close a meeting only when the public body is involved in a lawsuit or faced with an actual or credible threat of litigation. Absent such a threat, the exception does not protect discussions about "possible" or "potential" litigation.

OMA Guide, p. 28. This analysis is consistent with previous New Mexico appellate decisions which have interpreted the exception. For instance, in *Board of County Commissioners, Luna County v. Ogden*, 1994-NMCA-010, ¶ 16, 117 N.M. 181, 185, our Court of Appeals held that this exception permitted public bodies to enter into closed session for the purposes of discussing "litigation that the public body may initiate and legal disputes that have not yet reached the courts." *Id.* at ¶ 15. More recently, the Court of Appeals reaffirmed the vitality of its *Ogden* decision in *New Mexico State Investment Council v. Weinstein*, 2016-NMCA-069, ¶ 79, where it held that the pending or threatened litigation exception permitted public bodies to approve settlement agreements in closed session.

Turning to the meetings at issue in these complaints, we conclude that the Board did not violate OMA by entering into closed session at four of the five meetings in question because the discussions, even if not subject to the pending or threatened litigation exception, were subject to the statutory exception for limited personnel matters. At each of the meetings on April 6, 2020, April 16, 2020, April 21, 2020, and May 26, 2020, the Board entered into closed session relying in part on Section 10-15-1(H)(2), which clearly applied to the subject matter listed on the agenda. The leave and employment status of the superintendent, for instance, which was the subject of discussion on April 16, 2020, April 21, 2020, and May 26, 2020, is closely related to the "assignment" or "dismissal" of an individual public employee. Section 10-15-1(H)(2). Similarly, the appointment of an interim superintendent, which was discussed on April 6, 2020, constitutes either "hiring" or "assignment." *Id.* Lastly, although the discussion of the financial complaints apparently made against the then-superintendent may be more unusual or unique, the limited personnel matters exception itself states that it applies to the discussion of "complaints or charges against any individual public employee." Section 10-15-1(H)(2). Therefore, it is our opinion that the Board cited a valid exception to justify holding these discussions in closed session.

We reach a slightly different conclusion with respect to the meeting on March 16, 2020, at which the Board relied exclusively on OMA's pending or threatened litigation exception. Based on the facts available to us, it appears that the Board entered into closed session at that meeting for the purpose of discussing whether and how to conduct an investigation into certain financial complaints against the then-superintendent. Indeed, the agenda itself stated as much: "Closed Session Regarding Communications with Legal Counsel; Specifically, Discussion Regarding Complaints Made on Financial Matters for Investigation in Anticipation of Litigation." Assuming that understanding is correct, we do not think that such a discussion would qualify for the pending or threatened litigation exception[2] because any subsequent litigation was, at that stage, only possible and theoretical.

The Board's interpretation of OMA's pending or threatened litigation exception, which it outlined in its response to our inquiry, is staggering in its breadth. The Board appears to argue that the pending or threatened litigation exception is actually simply an attorney-client privilege exception. ("[T]he OMA cannot be interpreted to impede, limit or prohibit a public body from communicating confidentially with its legal counsel to obtain legal services in a closed session in support of its governmental decision-making and in its ability to act.") Any time a public body wishes to receive attorney-client privileged advice from its attorney, the Board seemingly argues, it may invoke the exception and hold its discussions behind closed doors. Notwithstanding the fact that the exception itself is limited by its plain language to "pending or threatened litigation," Section 10-15-1(H)(7), the Board apparently is under the impression that this means *any* discussion involving attorney-client privileged advice. We disagree.

To be clear, Section 10-15-1(H)(7) permits a public body to enter into closed session only when it is discussing or acting on "pending or threatened litigation." This includes litigation that the public body itself might initiate. *See Ogden*, 1994-NMCA-010, ¶ 16. It does not include each and every situation, circumstance, or occurrence that at some point in the future could potentially lead to litigation. Here, had the Board's agenda stated, "Consideration of initiation of litigation against superintendent based on financial complaints," such a discussion would have been subject to the exception. But a discussion of an investigation which could or could not at some point in the future potentially lead to litigation is not "pending or threatened litigation."

To the extent that the Board's legal interpretation differs from ours, it is incorrect. First, neither *Ogden* nor *Weinstein* held that Section 10-15-1(H)(7) operated as a flat exception for all discussions involving attorney-client privilege. Any interpretation of those decisions to the contrary is plainly erroneous. Second, the interpretation we have outlined above (and the one

[2] We find the Board's conduct and legal decision-making puzzling, to say the least. Although its closed session discussion at the March 16, 2020 would plainly have been subject to the limited personnel matters exception, which permits the discussion of "complaints or charges against any individual public employee," Section 10-15-1(H)(2), it did not identify this exception as its authority to enter into closed session.

embraced by our OMA Guide and New Mexico's appellate courts) relies on the plain language of OMA itself. *See Storey v. University of New Mexico Hospital/BCMC*, 1986-NMSC-096, ¶ 7, 105 N.M. 205, 207 ("An unambiguous statute should be given effect according to its clear language."). The exception literally states that it applies only to "pending or threatened litigation," a phrase that would be rendered pure surplusage were we to agree with the Board's apparent contention that the exception broadly applies to any discussion involving the attorney-client privilege. As a result, we reject the Board's hugely overbroad interpretation of OMA's pending or threatened litigation exception.

However, notwithstanding the Board's incorrect interpretation of Section 10-15-1(H)(7), its closed session discussion at the March 16, 2020 meeting would have been authorized by OMA's limited personnel matters exception. Since that exception applies to the discussion of "complaints or charges against any individual public employee," Section 10-15-1(H)(2), it would have permitted a discussion of conducting an investigation into the financial complaints against the then-superintendent. Although the Board cited only to Section 10-15-1(H)(7) when entering closed session, the fact that it could have validly entered into closed session pursuant to another exception is nevertheless relevant to our analysis. OMA, after all, "requires substantial, not strict, compliance." *Parkview Cmty. Ditch Ass'n v. Peper*, 2014-NMCA-049, ¶ 14.

Public Comment at May 6, 2020 Meeting

We find no merit to the remaining allegation which posits that the Board violated OMA by permitting public comment on an agenda item at its meeting on May 6, 2020. Although we appreciate that the agenda for this meeting did not include a dedicated agenda item for public comment,[3] our review of the minutes reflect that the only public comments received by the Board during the meeting pertained directly to a specific item of business that was on the agenda ("Report of LLS Graduation Ceremonies and Community Celebration Developed in Collaboration with Multiple Entities and Agencies"). Since OMA does not require public bodies to exhaustively list on an agenda all those who may speak on a particular item of business, the Board's decision to permit the public to comment and weigh in clearly was not an OMA violation.

Conclusion

Although we have largely concluded that the OMA allegations raised by these complaints lack merit, we strongly advise the Board to revise its approach to the statute's pending or threatened

[3] Since accepting comments from members of the public does not, in and of itself, constitute a discussion of public business by the members of the public body, it may be argued that a dedicated "Public Comment" agenda item is not a prerequisite to accepting comments from members of the public.

litigation exception. OMA simply does not contain a broad and all-encompassing exception for closed session discussions that involve the attorney-client privilege. Section 10-15-1(H)(7) is limited to those situations involving litigation that is ongoing or in which the public body may become a participant. The statute clearly permits a public body to discuss initiating a lawsuit, but it is not a broad exception for discussions of all situations which could possibly at some point in the future lead to litigation.

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: Claire Cieremans
Andrew Garcia
Heather Rindels
Dana Sanders