

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

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March 12, 2019

Joseph Jose Villegas  
10 Camino Torcido Loop  
Santa Fe, NM 87508  
Email: [Caselda2010@hotmail.com](mailto:Caselda2010@hotmail.com)

**Re: Open Meetings Act Complaint – New Mexico Counseling & Therapy Practice Board**

Dear Mr. Villegas:

The Office of the Attorney General Open Government Division (“OGD”) received the complaint, alleging that the New Mexico Counseling & Therapy Board (“Board”) violated the Open Meetings Act, NMSA 1978, Sections 10-15-1 to -4 (as amended through 2013) (“OMA”) by discussing and taking action on an item not listed on the agenda. According to your complaint, the Board discussed and took action on a policy memorandum that was not listed on the agenda. You further allege that the superintendent and Director of the New Mexico Regulation and Licensing Division (“RLD”) violated unnamed statutory requirements by “pressuring the [Board] to exhibit an arbitrary . . . [decision] . . . against the clear weight of substantial evidence in the record . . . .” The OGD received correspondence from RLD responding to your complaint. We have enclosed the correspondence for your review.

Based on our review of your complaint, RLD’s response, and the applicable law, we conclude that there was no OMA violation at the Board’s October 21, 2016 meeting. Please be advised that our determination is limited solely to whether the Board complied with OMA. *See* Section 10-15-3(B) (empowering the attorney general to enforce the OMA). Because RLD is not a public body making policy, RLD is not subject to OMA. *See* § 10-15-1(A).

**Regulation & Licensing Division**

The 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). Again, because RLD provides support to boards and does not formulate policy, RLD itself is not subject to OMA requirements.

### Agendas

The 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).

In pertinent part, OMA provides:

Meeting notices shall include an agenda containing a list of specific items of business to be discussed or transacted at the meeting or information on how the public may obtain a copy of such an agenda. 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.

Section 10-15-1(F). This Section also requires reasonable specificity on the part of the government body to alert the public as to which issues, topics, and decisions will be discussed at the meeting. See Attorney General’s Open Meetings Act Compliance Guide, p. 17 (8<sup>th</sup> ed. 2015) (“OMA Guide”) (discouraging the use of “general, broad, or vague terms” to describe agenda items, as such language could mislead the public). While all public bodies must follow OMA’s requirements, the statute “requires substantial, not strict, compliance.” See *Gutierrez v. City of Albuquerque*, 1981-NMSC-061, ¶ 13, 96 N.M. 398, 401 (noting that substantial compliance is sufficient for OMA). This means that courts will not penalize a public body for minor, technical violations where it has complied with the spirit of OMA. See *Gutierrez*, 1981-NMSC-061, ¶ 14 (noting that courts will not find a public body in violation of OMA “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”). For this reason, even where it finds a possible violation of OMA, a court must consider the applicability of the substantial compliance doctrine.

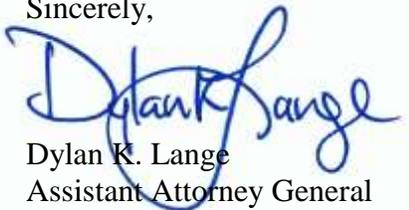
OMA also provides public bodies with the opportunity to cure any violations. *See* Section 10-15-3(B) (requiring an individual considering a judicial remedy to first provide written notice to the public body of the alleged violation, thereby providing the public body with fifteen days to cure its violation). “A public body that receives written notice of a claimed violation has fifteen days from the day it receives the notice to cure the violation if the public body decides the claim is valid and wants to avoid a lawsuit.” OMA Guide, p. 40. To do this, the public body does not need to repeat the entirety of the previous meeting, but rather simply the portion of the meeting that violated OMA. *See* OMA Guide, p. 41.

The major contention relates to the specificity of the Board’s agenda item (V)(1) “Scope of Practice for LSAA Licenses: 16.27.13, 16.27.19 NMAC.” Based on the Board’s response, the Board to corrective action and revisited this item at its next subsequent meeting to clarify that a policy memo would be discussed. *See* March 31, 2017 Agenda item (V)(a): “LSAA Scope of Practice Policy Memo 10/21/16 Board Meeting.” We believe this action by the Board cured any potential violation regarding the specificity of its original agenda.

#### Conclusion

Although we did not find a violation of the OMA as alleged in your complaint, we appreciate you bringing the issues discussed to our attention and allowing us the opportunity to address them. If you have any questions regarding this determination or OMA in general, please let me know.

Sincerely,



Dylan K. Lange  
Assistant Attorney General

Encl.

OPEN MEETING ACT ("OMA") COMPLAINT FORM  
New Mexico Office of the Attorney General  
Open Government Division

RECEIVED  
FEB 2 2017  
NM ATTORNEY  
GENERALS OFFICE

Your Contact Information:

First Name: JOSEPH José Last Name: Villegas

Address: [REDACTED]

City: [REDACTED] State: [REDACTED] Zip Code [REDACTED]

Phone Number: [REDACTED]

Email: [REDACTED]

Name of Public Body that is the Subject of this Complaint (including city/town, district, county or region, if applicable):

The NEW MEXICO COUNSELING & Therapy Practice Board  
The NEW MEXICO Regulation and Licensing Department

Specific date(s) of OMA violation(s):  
October 21, 2016

**ALLEGED VIOLATIONS OF THE OMA BY THE PUBLIC BODY:** Please select from the following list the violations you allege the public body committed. Check all that apply.

DEFICIENCIES IN NOTICE OF THE MEETING

- Notice did not comply with the deadlines or procedures for meeting notices adopted by the public body, or with the reasonable notice requirement in the OMA
- Notice did not include date, time, and/or location of the meeting
- Notice was not published or posted in a place and manner accessible to the public
- Notice did not include an agenda or information on how the public may obtain a copy of the agenda
- A meeting was reconvened by the public body, but notice of the date, time, and place of the reconvened meeting was not placed on or near the door of the place where the original meeting was held or in at least one other location appropriate to provide public notice

AGENDA

- Agenda was not available seventy-two (72) hours prior to the meeting

- Agenda did not include a list of specific items the public body intended to discuss or transact at the meeting or the items listed and acted upon were not listed with reasonable specificity
- Public body took action on items that were not listed on the agenda

In a reconvened meeting, the public body discussed or took action on items not appearing on the agenda of the original meeting

#### MINUTES

- The minutes did not contain the date, time, and/or place of meeting, the name of all members of the public body attending the meeting and those absent
- The minutes did not contain a description of the substance of all proposals considered during the meeting or a record of any decisions made and votes taken
- A draft copy of the minutes was not available within ten (10) working days of the meeting
- The minutes were not approved, amended, or disapproved at the next meeting where a quorum of the public body was present

#### CLOSED MEETINGS

- The public body did not follow the required closing procedures to close a meeting (e.g., did not list the items they were going to discuss in the motion to close, or the motion to close did not contain the provision of law permitting the closing of the meeting)
- The public body closed the meeting to discuss an issue not covered by one of OMA's exceptions
- Matters not stated in the motion to close were discussed in the closed session.
- Final action was taken by the public body in the closed meeting

#### CONDUCTING/DISCUSSING BUSINESS OUTSIDE OF AN OPEN MEETING

- A quorum of the public body formulated policy, discussed public business, or took action outside of an open meeting
- A "rolling quorum" was used to discuss public business (i.e., a quorum may exist even when the members are not physically present at the same place, such as discussing public business in a series of telephone or email conversations)
- A committee was created by the public body that constitutes a policymaking body that formulated recommendations that were binding on the public body or otherwise established policy for the public body, outside of an open meeting

**DETAILED EXPLANATION OF ALLEGED OMA VIOLATIONS:** Please provide a description of the actions taken by the public body that violated the OMA, including specific dates and times, and why you believe the OMA has been violated.

*Please review letter dated February 2, 2017.*

Handwritten signature: *John J. McGowan Sr.*

**ADDITIONAL INFORMATION:** Please attach any documentation or evidence you have regarding the alleged OMA violation.

*Please review attachments with letter dated February 2, 2017.*

*John L. McGowan Sr.*

February 2, 2017

New Mexico Attorney General Office  
The Honorable Hector H. Balderas  
Special Attention: Open Government Division

**Re: Opens Meeting Act Complaint – Against the New Mexico Regulations and Licensing Department and the New Mexico Counseling and Therapy Practice Board**

The Honorable Attorney General Hector H. Balderas:

On October 21, 2016, the New Mexico Counseling & Therapy Practice Board (NMCTPB) with the legal consultation of the New Mexico Regulation and Licensing Department (RLD) violated the OMA by failing to:

1. Notice did not comply with the deadlines or procedures for meeting notices adopted by the public body, or with the reasonable notice requirements in the OMA.
2. Agenda did not include a list of specific items the public body intended to discuss or transact at the meeting and acted upon were not listed with reasonable specificity.
3. Public body took action on items that were not listed on the agenda.

On October 21, 2016, I arrived for the scheduled NM Counseling & Therapy Practice Board meeting which was located at the NM State Capitol in Room 311, 490 Old Santa Fe Trail.

From the following transcription of this meeting, the New Mexico Counseling & Therapy Practice Board Chairman Steward Sroufe began to discuss: Agenda V. Old Business, Item 1.

In his opening statement, it reads as follows: “A *proposed resolution*, and we will have a little time to open this up for *discussion on this matter only*, at this particular time.”

The NMCTPB Chairman verbatim reads an official document generated from the New Mexico Regulations and Licensing Department to the Board Members and the general public stating: “A *Policy Memorandum*” dated October 21, 2016.

After reading the document in the public hearing, the NMCTPB Chairman opened the floor for public discussion and input from the Board Members.

After the public comment was completed, the NMCTPB Chairman stated: "We have a rules committee that's going to meet after this, and that will be something that we'll take a look at before it goes into the rules. What I'm proposing here is a **"Policy Resolution"** for the board.

The NMCTPB Chairman stated: "Anyone else? No other comments or questions. I ask for a **motion** on this proposal."

Board Member Chuck Dawson stated: "Mr. Chairman, I have a **motion**. I move that the sense of the board and the **vote** of this **motion** resolve that we **adopt** the Chair's proposal and wording with the insertion of a group process as written, and I have a copy of it for you, the **motion**."

Board Member Chuck Dawson: "Further, that this **resolution** be forwarded to the administration for use in policy guidelines decisions as applicable to the rules committee, and also forwarded to rules committee for refinement of any language and inclusion of into the working rules draft in process now."

Board Member Mr. Spies: "I second, that **motion**."

The NMCTPB Chairman: "Any comments from the board? All in favor of acceptance of this **resolution motion** made, say aye."

The Members: "Aye."

The NMCTPB Chairman: "Any Opposed?" "**Motion Carried**."

In summary, in accordance to the NM OMA 10-15-3(a). **Invalid Actions: Standing:**  
A. No resolution, rule, regulation, ordinance or action of any board, commission, committee or other policymaking body shall be valid unless taken or made it at a meeting held in accordance with the requirements of NMSA 1978, Section 10-15-1.

In accordance to the NM OMA 10-15-1(d). Formation of Public policy; procedures for open meetings; exceptions and procedures for closed meetings: D. Any meetings at which the discussion or adoption of any proposed resolution, rule, regulations 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.

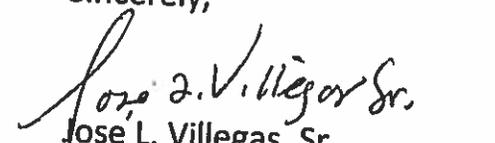
In accordance to the NM OMA 10-15-1(f). Formation of Public Policy: F. Meeting notices shall include an agenda containing a list of specific items of business to be discussed or transacted at the meeting or information on how the public may obtain a copy of such an agenda. Except for emergency matters, a public body shall take action only on items appearing on the agenda. In this case, the "Policy Memorandum" dated October 26, 2016 was not listed on the original meeting notice and agenda that was posted for public release.

In conclusion, I allege that the NMCTPB violated the OMA and the current statutory authority and these parts which are promulgated pursuant to the Counselor and Therapy Practice Act, Section 61-9A1 through 61-9A NMSA 1978: Title 16, Chapter 27, Part 1 through 24; Article 1 – Uniform Licensing Act 61-1-29. Adoption of regulations; notice and hearing; and Article 1 – Uniform Licensing Act 61-1-36. Emergency regulations: Appeal provisions on October 26, 2016.

It is my strongest opinion the RLD Superintendent Robert Unthank and Director Enrique C. Knell also violated the OMA and statutory requirements that were approved and adopted by the New Mexico State Legislature by pressuring the NMCTPB to exhibit an arbitrary, capricious or an abuse of discretion; contrary to law; and against the clear weight of substantial evidence in the record that was presented to the NMCTPB on August 5, 2016 relating to the legal status of the LSAA's: Scope of Practice per state law and provisions.

If you have any questions, please contact me at: 505-470-7046.

Sincerely,

  
Jose L. Villegas, Sr.  
Former Chairman of the New Mexico Counseling & Therapy Practice Board  
10 Camino Torcido Loop  
Santa Fe, New Mexico 87508