

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

July 20, 2021

VIA ELECTRONIC MAIL ONLY

Public Employees Retirement Association of New Mexico Board of Trustees
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Re: Open Meetings Act Complaint – Lenora Chavez

Dear Ms. Schoeppner:

Thank you for your response to our inquiry regarding the complaint filed with the Office of the Attorney General by Ms. Lenora Chavez alleging that the Public Employees Retirement Association of New Mexico Board of Trustees (hereinafter the “Board”) violated the Open Meetings Act (“OMA”), NMSA 1978, Sections 10-15-1 to -4 (1974, as amended through 2013). As you know, Ms. Chavez contends that the Board violated OMA through a meeting of its “RFP evaluation committee,” which she argues constituted a discussion of public business outside of an open meeting. Having carefully reviewed both Ms. Chavez’s complaint and your response to our inquiry, we conclude that the Board did not violate OMA as alleged. Going forward, however, we recommend that the Board remain cautious in its creation and use of subcommittees.

Background

Ms. Chavez alleges that the Board violated OMA through a meeting of its “RFP evaluation committee” on December 18, 2019. The Board, which consists of twelve (12) members and requires seven (7) members to constitute a quorum, appears to create evaluation committees on a procurement-by-procurement basis.¹ See § 10-11-130(G) (“A majority of retirement board members shall constitute a quorum.”). In response to our inquiry, the Board stressed the necessity

¹ The Public Employees Retirement Act, NMSA 1978, Sections 10-11-1 to -143 (1987, as amended through 2020), specifically authorizes the Board to “designate committees and designate committee members, including individuals who may not be members of the association.” NMSA 1978, Section 10-11-130(A)(11).

of its use of such committees, noting that the Board was “legally obligated” to refrain from disclosing “[p]roposals for investment-related services submitted by applicants, as well as their presentations to the committee” prior to the award of the contract because they often contained “confidential and proprietary information.” We understand the Board to maintain that its RFP evaluation committees review the proposals submitted in connection with particular contracts and then submit those reviews and proposals to the Board, where “a final selection is made at a public meeting.”

We further understand that, in 2019, Board created one such RFP evaluation committee to evaluate the finalists for a particular contract involving general investment consultant services. On December 18, 2019, the committee met to interview and listen to presentations from two finalists. The Board provided notice and an agenda to the public for this meeting, although it did not permit the public to attend. Five (5) Board members – less than a quorum of the full Board – attended this meeting. We understand that neither the Board nor its committee took action at this meeting, and that the committee only interviewed and heard from the two finalists.

In her complaint to our Office, Ms. Chavez alleges that this RFP evaluation committee meeting constituted a discussion of public business outside of an open meeting. Although her complaint does not elaborate on this allegation, we can only surmise that she means to contend that the RFP evaluation committee is effectively subject to OMA and that its meetings must therefore be open to the public. The Board denies that it violated OMA, emphasizing that a quorum of the Board was not present and effectively arguing that its RFP evaluation committee is not a policymaking body subject to OMA.

Analysis

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”).

The Open Meetings Act expressly states that it applies to any “policymaking” body of state or local government. Section 10-15-1(B). In general,² the statute therefore applies only to those public bodies who have the ability to take some final action on a matter of public policy, not to those who

² One exception to the “policymaking” scope of OMA is those public bodies that have been created by statute. As we explain in our OMA Guide, “[a] committee created by statute is a public body subject to the Open Meetings Act 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 body’s existence.” OMA Guide, p. 8-9.

serve only an advisory role. *See generally* N.M. Att’y Gen. Op. Letter to Rep. Kelly Fajardo, et. al., at 3 (Jan. 30, 2020) (explaining that “purely advisory bodies are not generally subject to OMA”). Where a public body wields policymaking authority, any meeting of a quorum of its members held to discuss public business, formulate public policy, or take any action is subject to OMA. Section 10-15-1(B).

Because public bodies cannot “avoid the OMA’s requirements simply by delegating its responsibilities to a smaller body,” the statute will on occasion apply to subcommittees created by public bodies. *New Mexico State Inv. Council v. Weinstein*, 2016-NMCA-069, ¶ 75. As we explain in our OMA Guide, a subcommittee will be subject to OMA where 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.” OMA Guide, p. 9.

Applying these principles to the Board and its RFP evaluation committee meeting on December 18, 2019, we conclude that the Board did not violate the Open Meetings Act. Preliminarily, the RFP evaluation committee did not appear to consist of a quorum of the Board, and no such quorum was present at the committee meeting on December 18, 2019. The Board itself, therefore, could not itself have violated OMA. Moreover, there is no evidence that the RFP evaluation committee was delegated any of the Board’s policymaking authority so as to become a public body subject to OMA unto itself. It appears that the Board empowered the committee only to evaluate and interview the finalists for the contract at issue, not to select or eliminate any particular candidates. Lacking any policymaking authority, then, the RFP evaluation committee was not subject to OMA³ and did not violate the statute by holding a meeting closed to the public on December 18, 2019.

However, we would nevertheless caution the Board that it must be cognizant of OMA when utilizing RFP evaluation committees in the future. In particular, although the Board emphasized in response to our inquiry that it makes “a final decision ... at a public meeting,” in the context of procurement it should be aware that policymaking authority is broader than simply the ultimate decision on a contract award. For instance, one prior Attorney General opinion concluded that a City of Las Cruces procurement committee was a policymaking body subject to OMA because it was “empowered to eliminate, select, and rank certain professional firms before providing them to the full council for final approval.” N.M. Att’y Gen. Op. 90-27 (1990). In that situation, notwithstanding the fact that the City council made the final decision on the award of the contract, the committee still wielded “some decision-making authority” insofar as it could “theoretically eliminate dozens of offerors and recommend two or three finalists to the city council.” *Id.* In light of this opinion and others from this Office,⁴ we recommend that the Board carefully structure the authority of its RFP evaluation committees so as not to run afoul of OMA.

³ We note that neither the Public Employees Retirement Act nor any other statute appears to have directly created the RFP evaluation committee so as to render it subject to OMA as a “committee created by statute.” OMA Guide, p. 8.

⁴ Our Office has consistently “embraced an expansive interpretation of the word ‘policymaking’ to include all public bodies possessing even small amounts of ‘decision-making authority.’” N.M. Att’y Gen. Op. Letter to Rep. Kelly Fajardo, et. al., at 3 (Jan. 30, 2020).

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Conclusion

Based on the documentation provided to us by Ms. Chavez and the Board, we conclude that the Board did not violate OMA in connection with its RFP evaluation committee meeting on December 18, 2019. A quorum of the Board was not in attendance at this meeting, and we have no evidence to indicate that the RFP evaluation committee possessed the policymaking authority necessary for it to become subject to the requirements of OMA. However, given OMA's mandate that the Board provide the public access to "the greatest possible information" about its affairs, Section 10-15-1(A), we urge it to remain cognizant of the permissible boundaries of authority for subcommittees in the area of procurement.

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: Lenora Chavez