

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
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May 28, 2021

VIA ELECTRONIC MAIL ONLY

City of Truth or Consequences
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Re: Open Meetings Act Complaints – Ariel Dougherty and Ronald W. Fenn

Dear Mayor Whitehead and Mr. Rubin:

This letter addresses the complaints submitted to the Office of the Attorney General by Ms. Ariel Dougherty and Mr. Ronald W. Fenn alleging that the Truth or Consequences City Commission (hereinafter the “Commission”) violated the Open Meetings Act (“OMA”), NMSA 1978, Sections 10-15-1 to -4 (1974, as amended through 2013). More specifically, the complainants allege that the Commission violated OMA at its meetings on January 27, 2021 and February 24, 2021. We received no reply to our written request (sent to Mr. Rubin) for a response on behalf of the Commission. However, having carefully reviewed the documentation provided to us by the complainants, as well as the documentation publicly available on the Commission’s website, we conclude that the Commission violated OMA at both of the meetings in question. We strongly recommend that the Commission take all possible remedial action.

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”).

Both of these complaints to our Office arise out of the decision by the City of Truth or Consequences to install “smart meters” at the homes of local electric customers. We understand that these installations were the subject of considerable controversy. Most relevant for our purposes is the fact that three members of the public, including both Ms. Dougherty and Mr. Fenn, objected strenuously to the installation of smart meters at their respective homes and attempted to retain their old meters by appealing to the City Commission. The City’s Code of Ordinances expressly permits such an appeal, as it contains a provision which states: “Any person disputing a disconnect notice or other action related to utility service, will be provided a reasonable opportunity to appeal within the department, then to the City Manager, and if dissatisfied with the City Manager’s decision, to the City Commission in accordance with written procedures established by the Electric Department.” Ch. 14, Sec. 14-30(e) (as amended through 2016).

The three appeals of the smart meter installations were first heard by the Commission at its January 27, 2021 meeting. Prior to that meeting, the Commission provided the public with an agenda that contained one item of business which read: “Discussion/Action: Public Appeals in regard to Electric Smart Meters. • Ron Fenn • Ariel Dougherty • Lee Foerstner.” Notably, this agenda item clearly identified all three appellants whose appeals were to be heard by the Commission. In addition, aside from these appeals, the Commission’s agenda also contained a separate item of business under “Executive Session” listed in its entirety as “Limited Personnel Matters Pursuant to 10-15-1(H.2).”

We reviewed both the minutes and the video recording¹ of the Commission’s January 27, 2021 meeting to determine what transpired during the meeting itself. When the smart meter appeals arose on the agenda, the Commission allowed each appellant to speak for up to five minutes,² but only Ms. Dougherty and Mr. Fenn were in attendance so as to actually do so. Following these brief arguments from the appellants, the Commission discussed the smart meter installation issue in general and at length. Eventually, there was a motion made not on the three appeals themselves, but rather on the Commission’s smart meter policy more broadly. The motion, approved by roll call vote, expressly “set a \$50 per month trip charge for those who do not wish to have the Smart Meters installed, and that would cover the city manually reading the meters, and that be the precedence and the process for anyone who does not want a Smart Meter can then follow.” Later in the meeting, the Commission entered into closed session as stated in the minutes:

¹ The Commission posted an incomplete video recording of the meeting on YouTube, available at <https://www.youtube.com/watch?v=emvkzmqzfU0>. We note that this recording was incomplete because it does not show the proceedings that transpired after the Commission entered into closed session, while the meeting minutes reflect that the Commission exited closed session and made statements on the record in open session.

² The video of the meeting reflects that the Commission was very strict about this five-minute rule. At one point towards the end of his opportunity to address the Commission, Mr. Fenn began to explain, “I am appealing because there has been no due process,” but was immediately cut off by an unidentified individual who shouted, “Your five minutes is up!”

Mayor Pro-Tem Forrister moved to approve going into executive session at 11:28 a.m. to discuss Limited Personnel Matters Pursuant to 10-15-1 (H.2). Commissioner Luna seconded the motion. Roll call vote was taken by the Clerk-Treasurer. Motion carried unanimously.

Almost one month later, at its meeting on February 24, 2021, the Commission again discussed and acted on the smart meter appeals. This time, however, the item of business appeared on the agenda only as, “Discussion/Action: Order on Section 14-30 (e) Appeals,” omitting any specific references to which particular appeals the Commission intended to discuss. This agenda also contained an item of business for closed session which reflected that the Commission would discuss three subjects:

1. Committee Strategic Planning Pursuant to 10-15-1(H.9)
2. Threatened & Pending Litigation (current & possible Litigation) pursuant to 10-15-1(H.7)
3. Limited Personnel Matters Pursuant to 10-15-1(H.2)

The minutes and video³ from this February 24, 2021 meeting confirm that both of these subjects – the smart meter appeals and the closed session item – were discussed during the meeting. With respect to the appeals, the Commission discussed, as phrased by the meeting minutes, “putting together an Order that would set forth the Commission’s decision during the January 27th meeting” for the purposes of preparing for a possible appeal to District Court before voting to approve the order drafted by the Commission’s legal counsel. In addition, and maybe more importantly, the Commission also went into closed session pursuant to the same language listed on its agenda and then, upon its return to open session, voted to appoint a particular individual to the position of “Acting City Manager,” effective two days prior to the meeting.

This series of events raises a litany of issues related to the Open Meetings Act, the vast majority of which were identified by Ms. Dougherty and Mr. Fenn. First and foremost, the complainants argue that the Commission failed to provide a reasonably specific agenda for both of the meetings in question. Perhaps more importantly, they also argue that the Commission took action on items of business not listed on the agenda. Although the complainants focus exclusively in this allegation on the Commission’s smart meter vote at the January 27, 2021 meeting, we think it extends to both of the meetings in question. Finally, while the complainants did not themselves identify this as an issue, it appears that the Commission entered into closed session at its February 24, 2021 meeting to discuss an item of business not subject to an exception to OMA.

Reasonable Specificity

The complainants’ first allegation against the Commission is that it failed to provide a reasonably specific agenda for its meetings on January 27, 2021 and February 24, 2021. In particular, the complainants argue that the smart meter appeal items of business on each agenda lacked reasonable specificity, as required by OMA. We agree with this contention only to the meeting on February

³ Available at <https://www.youtube.com/watch?v=llhYjZ8Nhh0>.

24, 2021, although we find that both meetings had other items of business which plainly lacked reasonable specificity.

The Open Meetings Act requires that a public body must provide the public “an agenda containing a list of specific items of business to be discussed or transacted” prior to any meeting. Section 10-15-1(F). “The requirement for a list of specific items of business ensures that interested members of the public are given reasonable notice about the topics a public body plans on discussing or addressing at a meeting.” OMA Guide, p. 17. Our Office has previously expressed our opinion that public bodies must avoid overly broad or vague agenda item descriptions in the interest of conveying a “reasonably clear idea” as to the subject of public business. OMA Guide, p. 17. *Compare* N.M. Atty. Gen. Letter to Pete Dunavant, at 3 (Apr. 15, 2019) (opining that the Village of Angel Fire Council did not violate OMA by discussing the possibility of renaming a road pursuant to the agenda item description “Discussion on Renaming a Village Road Bill Burgess Boulevard”) *with* N.M. Atty. Gen. Letter to Kevin Gick, University of New Mexico, at 4 (Aug. 8, 2018) (concluding that the agenda item for “Discussion and Action on Athletics” was not reasonably specific enough to permit the Board of Regents to eliminate a number of specific athletics programs).

We reach a mixed conclusion with respect to the smart meter appeal items of business on the January 27, 2021 and February 24, 2021 agendas. On balance, the January 27, 2021 item, which read, “Discussion/Action: Public Appeals in regard to Electric Smart Meters. • Ron Fenn • Ariel Dougherty • Lee Foerstner,” was reasonably specific. This language clearly specified not only the appellants whose cases would be heard but also the subject matter of the appeals (the smart meters), which is enough to provide reasonable specificity. By contrast, neither of these pieces of information were present in the item of business on the February 24, 2021 agenda, which read only: “Discussion/Action: Order on Section 14-30 (e) Appeals.” A member of the public would have no reason to know from this description which particular appeals the Commission would act on, since the names of the appellants was not disclosed and Section 14-30(e) of the City’s Code of Ordinances is not specific to smart meters. As a result, while we find that the Commission’s smart meter item of business on the January 27, 2021 agenda was compliant with Section 10-15-1(F), we find that the item of business on the February 24, 2021 agenda was not reasonably specific and therefore violated OMA.

In addition, both of these meetings featured other items of business under the heading “Executive Session” that were plainly lacking in reasonable specificity. Most glaringly, the Commission listed “Limited Personnel Matters Pursuant to 10-15-1(H.2)” as an item of business on both meeting agendas. This was not sufficient for the purposes of Section 10-15-1(F), since our Office has repeatedly emphasized that the phrase “limited personnel matters” is not itself reasonably specific. *See* N.M. Atty. Gen. Letter to Randy Autio, Town of Edgewood Council, at 3 (Feb. 4, 2020) (explaining that the phrase “limited personnel matters” was not sufficiently specific for an agenda because “it did not identify the particular employee or, in the alternative, the employee’s position the Council would be discussing”) and N.M. Atty. Gen. Letter to Kevin Gick, University of New Mexico, at 4 (Aug. 8, 2018) (emphasizing that “the phrase “limited personnel matters” is “an overly broad and vague description for the simple reason that it failed to specify *which* personnel matters the Board would discuss”). The February 24, 2021 agenda also included two other vague and nondescript items of business: “Committee Strategic Planning Pursuant to 10-15-1(H.9)” and

“Threatened & Pending Litigation (current & possible Litigation) pursuant to 10-15-1(H.7).” Since the public would have no way of knowing what type of “strategic planning” or which particular litigation the Commission would discuss, these items were clearly violative of Section 10-15-1(F).

Action on Items of Business Not Listed on the Agenda

As part of OMA’s mandate that each public body must provide the public with “an agenda containing a list of specific items of business to be discussed or transacted at the meeting,” the statute also expressly prohibits public bodies from acting on any items of business not listed on the agenda. *See* § 10-15-1(F) (“Except for emergency matters, a public body shall take action only on items appearing on the agenda.”). This represents by far the most serious allegation in the complaints from Ms. Dougherty and Mr. Fenn, who argue that the Commission acted at both of the January 27, 2021 and February 24, 2021 meetings on matters not listed on the agenda. We agree.

Considering first the Commission’s vote at its January 27, 2021 meeting to “set a \$50 per month trip charge for those who do not wish to have the Smart Meters installed,” we agree with Ms. Dougherty and Mr. Fenn that this violated OMA. Although we do not know how the Commission might have attempted to justify this vote since it did not respond to our inquiry, it is clear that the agenda for the meeting indicated that it would discuss and act on only three specific appeals, including those of the complainants. By contrast, the minutes and video from the January 27, 2021 meeting clearly indicate, as stated by Mr. Fenn, that the Commission voted to impose “a \$50/mo charge that would cover *all future applicants* for similar ‘smart-meter’ exceptions” (emphasis added). Indeed, the motion itself stated that the Commission was establishing a process “for anyone who does not want a Smart Meter,” and the Commission waited to vote on the three appeals until its subsequent meeting on February 24, 2021, where it approved a written order. Because the agenda for the January 27, 2021 meeting simply did not contain an item of business indicating that the Commission would establish a general process for all future smart meter appeals, we agree that its vote represented action on an item of business not listed on the agenda in violation of Section 10-15-1(F).

We reach the same conclusion with respect to the Commission’s vote at its February 24, 2021 meeting to issue an order on the three individual smart meter appeals. As mentioned previously, the agenda for that meeting stated only, “Discussion/Action: Order on Section 14-30 (e) Appeals,” without identifying which particular appeals the Commission intended to discuss and act upon. We have already noted that this was not a reasonably specific agenda description as to those appeals, and this means that, without having identified those appeals, the Commission’s vote and written order clearly constituted an action on an item not listed on the agenda in violation of Section 10-15-1(F).

Similarly, at the February 24, 2021 meeting, we find that the Commission again violated OMA by voting to appoint a new “Acting City Manager.” This action was entirely absent from the meeting’s agenda, as the only item of business appearing on the agenda that might have had any relation to it was “Limited Personnel Matters Pursuant to 10-15-1(H.2).” This item description was not, as we have mentioned, reasonably specific, and it is therefore readily apparent that the vote to appoint an Acting City Manager was an action on an item of business not listed on the agenda.

“Committee Strategic Planning”

Additionally, in reviewing these complaints, our Office also observed an additional Open Meetings Act issue not specifically identified by the complainants related to the Commission’s February 24, 2021 meeting. According to the minutes and the video from this meeting, the Commission entered into closed session in part to discuss “Committee Strategic Planning Pursuant to 10-15-1(H.9).” Since it does not appear that this particular exception to OMA applies to the Commission, it appears likely that the Commission violated OMA by citing it as its legal authority for entering into closed session.

The exception cited by the Commission in entering into closed session, Section 10-15-1(H)(9), does not apply equally to all public bodies in New Mexico. Specifically, this exception applies only to “those portions of meetings of committees or boards *of public hospitals* where strategic and long-range business plans or trade secrets are discussed.” Section 10-15-1(H)(9)(emphasis added). As we explain in our OMA Guide, by its plain language “[t]his exception applies to ... public hospital boards and committees.” OMA Guide, p. 30. Even then, the discussion must involve the public hospital’s “strategic and long-range business plans or trade secrets” in order to qualify for the exception. Section 10-15-1(H)(9).

We raise this as an issue because the Commission is not, by all appearances, overseeing a public hospital so as to qualify for Section 10-15-1(H)(9). The City’s own website notes that the only hospital located in the City of Truth or Consequences is Sierra Vista Hospital,⁴ which has its own governing body.⁵ Equally telling is the fact that, as best we can tell, there is no mention anywhere on the City’s website to a possible role on the part of the Commission in overseeing a hospital. Since Section 10-15-1(H)(9) applies only to “committees or boards of public hospitals” and the Commission is not such a public body, it therefore appears to us that the Commission’s closed session discussion on February 24, 2021 was partially unlawful.

Conclusion

Based on our review of these complaints and the documentation available to us, we have concluded that the Commission violated the Open Meetings Act at both its January 27, 2021 and February 24, 2021 meetings. Along with meeting agendas lacking in reasonable specificity and closed session discussions not subject to one of OMA’s exceptions, it appears to us that the Commission repeatedly acted on items of business not listed on the agenda. Given that OMA expressly states that no action of any public body is valid “unless taken or made at a meeting held in accordance with the requirements of Section 10-15-1,” it is imperative that the Commission take all possible remedial action. This should consist of reconsidering all of the actions that the Commission took on items of business not listed on its meeting agendas along with clarifying for the public the subjects improperly discussed by the Commission in closed session at both of these meetings. More broadly, the individual members of the Commission should all thoroughly familiarize themselves with OMA’s requirements so that future violations such as these do not occur again.

⁴ See http://www.torcnm.org/residents/city_a-z/statistics_for_truth_or_consequences.php.

⁵ See <http://www.svhnm.org/meetings-legal-notice/>.

Lastly, we would pause to express our concern with the City's refusal to cooperate with our Office's investigation into these complaints. We first contacted the City on February 12, 2021 in reference to Mr. Fenn's complaint, requesting a response by March 19, 2021. We received no response even after contacting the City again on multiple occasions.⁶ Upon receipt of Ms. Dougherty's complaint, we contacted the City on March 4, 2021, seeking a response by April 9, 2021, and again received no response. Our Office investigates Open Meetings Act complaints in both its capacity as the agency charged with the enforcement of the statute, see Section 10-15-3(B), and in our constitutionally-recognized role as the "attorney for the State of New Mexico." *State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.*, 1973-NMSC-087, ¶ 5. *See also* N.M. Const., Art. V, § 1. Please be advised that the City's failure to cooperate with our investigation did not go unnoticed, and if this behavior occurs in the future, we may take further action.

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,

A handwritten signature in blue ink, appearing to read "John Kreienkamp". The signature is fluid and cursive, with a large loop at the end.

John Kreienkamp
Assistant Attorney General

Enclosure

cc: Ariel Dougherty

Ronald W. Fenn

⁶ In addition, at one point in these communications the City stated to our Office that we had agreed to an extension of time for it to respond to Mr. Fenn's complaint until April 9, 2021. We have no record or recollection of such an extension. Regardless, even after telling us that we had agreed to an April 9, 2021 response date, the City never delivered a response.