

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



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VIA ELECTRONIC MAIL ONLY

Timberon Water and Sanitation District
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Re: Open Meetings Act and Inspection of Public Records Act Complaint – Noreen Gonzalez

Dear Mr. Jones:

Thank you for your response to our inquiry regarding the complaint filed with the Office of the Attorney General by Ms. Noreen Gonzalez against the Timberon Water and Sanitation District (hereinafter the “District”) and its Board of Directors (the “Board”). In particular, Ms. Gonzalez alleges that the Board violated the Open Meetings Act, NMSA 1978, Sections 10-15-1 to -4 (1973, as amended through 2013) (“OMA”), at its meeting on August 4, 2020. She also alleges that the District violated the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2019) (“IPRA”), in responding to her public records request dated September 14, 2020. We have carefully reviewed both her complaint and your responses to our inquiries. Based on the information available to us, we conclude that the Board clearly violated OMA at its meeting on August 4, 2020 by failing to provide the public a reasonably specific agenda, improperly entering and exiting closed session, and failing to draft adequately detailed meeting minutes (even after being supplemented). With respect to IPRA, we are concerned that the District may have misapprehended the scope of Ms. Gonzalez’s request. We recommend that the Board and the District take all possible remedial action with respect to both OMA and IPRA, and that it better educate its members and staff on their obligation to provide the public with access to “the greatest possible information” about governmental affairs. Section 10-15-1(A); Section 14-2-5.

Background

The Timberon Water and Sanitation District Board of Directors held a meeting on August 4, 2020. Prior to this meeting, the Board had provided the public with an agenda that contained the following three relevant items of business under the heading “Closed session to discuss litigation issues”:

Discuss/Approve Mr. Jones' recommendation for Situation A.
Discuss/Approve Mr. Jones' recommendation for Situation B.
Discuss/Approve Mr. Jones' recommendation for Situation C.

According to the minutes of the August 4, 2020 meeting (as originally drafted and approved by the Board on August 15, 2020), when those items of business arose on the agenda, the Board entered into closed session pursuant to a motion to close the meeting as follows: "Director Martin moved to go into closed session to discuss litigation issues." The minutes then reflect that the Board re-entered the open meeting at a later point in time and made a statement about the contents of the closed session discussion: "Chairman McMullen stated that no decisions were made, but now we must vote on options the attorney presented to us. The particulars will not be discussed in the open meeting, as they fall under attorney/client privilege."

After returning to open session, the Board took action on each of the three "situations." According to the original minutes of the meeting and Ms. Gonzalez's firsthand account of the meeting, the Board voted separately on each situation. In particular, the Board voted to approve what it labeled only as "Option 1" for "Situation A," "Option 3" for "Situation B," and "Option 1" for "Situation C," respectively. Ms. Gonzalez informs our Office that, following these votes, she "inquired to what each situation and vote represented and was told by the TWSD Board that it fell under Attorney Client privilege."

The Board having stymied her efforts to obtain clarification during the meeting, Ms. Gonzalez then submitted an IPRA request to the District on September 14, 2020, seeking information about each of the three votes. Desiring information on those items of business, Ms. Gonzalez requested "[t]he complete public records of the Timberon Water and Sanitation District Board of Directors Meeting conducted Tuesday, August 4, 2020." She also posed a number of informational questions to the District regarding the agenda items such as, "What was option 1 in the approval of Situation A?"

After acknowledging receipt of Ms. Gonzalez's request on September 15th, the District responded substantively on September 21, 2020 by denying inspection of all responsive records on the grounds that they were confidential "attorney-client communications." We understand the District did not provide Ms. Gonzalez a copy of the meeting minutes from August 4, 2020, apparently because these were available on the District's website, explaining to Ms. Gonzalez that it would, through the Board, formally "supplement" its meeting minutes by providing additional information as to the three agenda items in question.

At its meeting on October 6, 2020, the Board voted to approve a supplement to the minutes from the August 4, 2020 meeting. This supplement provided information to clarify each of the three "situations" and votes. It explained that "Situation A" meant the "demand for reimbursement of fees and assessments from Smile4U Inc." and that "Option 1" was a vote "not to reimburse any fees or assessments to Smile4U Inc." As for "Situation B," this apparently meant several ongoing litigation matters involving the Timberon Water and Sanitation District, and by voting for "Option 3" the Board "voted to propose the assumption of T10 Block 111 Lot 041 from the receivership in exchange for partial satisfaction of amounts owed in back fees and assessments." Finally, "Situation C" represented one of the same ongoing litigation matters and, by voting for "Option

1” in that case, the Board “voted not to allow for short sales of lots or assumption by [the District] of the cost of any transfer of properties to new owners.”

Our Office sent the District separate inquiries into Ms. Gonzalez’s IPRA and OMA allegations, and we understand that, upon receipt of our inquiry into the meeting on August 4, 2020, the Board decided to take additional action to remedy potential open meetings violations. In particular, the Board’s response to our inquiry states that it reconsidered each of the three “situations” anew at its meeting on May 15, 2021, after providing the public with an agenda listing each item of business with additional specificity (consistent with the language used in the supplement to the August 4, 2020 meeting minutes). The Board has forwarded us the draft minutes from its May 15, 2021 meeting, which show that it voted to take the same actions it had approved previously on August 4, 2020.

Ms. Gonzalez’s complaint to our Office alleges that the Board violated both OMA and IPRA. Most importantly, she argues that the Board was noncompliant with OMA at its meeting on August 4, 2020 by failing to provide the public with a reasonably specific agenda beforehand, improperly entering and exiting closed session, and failing to draft and approve adequately detailed meeting minutes. Her contention with respect to IPRA is simpler but no less important: she argues that the Board failed to provide her with records responsive to her request. For its part, the Board appears to deny all of these allegations, although its defense of its compliance with OMA is less emphatic. We will consider first Ms. Gonzalez’s OMA allegations before addressing her contention with respect to IPRA.

Open Meetings Act

The purpose of New Mexico’s Open Meetings Act is to provide 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). OMA governs all actions taken by “any board, commission, committee or other policymaking body,” Section 10-15-3(A), requiring that all public bodies open their meetings to the public and allow interested individuals the opportunity to attend and listen. Section 10-15-1(A). We interpret the statute 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”).

Preliminarily, with respect to the primary point of contention in this complaint, the Board quite clearly violated OMA at its August 4, 2020 meeting through its agenda items for “Situation A,” “Situation B,” and “Situation C,” respectively. None of these agenda item descriptions were compliant with OMA’s Section 10-15-1(F), which requires all public bodies to provide the public with “an agenda containing a list of *specific* items of business to be discussed or transacted” prior to any meeting. *Id.* (emphasis added). Our Office has previously expressed our view that agenda items must convey to the public a “reasonably clear idea” as to the subject of public business, OMA Guide, p. 17, and here the public would have had no idea whatsoever as to what the Board intended to discuss. OMA required the Board to list each of these three items of business with the level of specificity the Board later provided the public in the supplement to the August 4, 2020 meeting minutes. By failing to do so, the items of business for “Situation A,” “Situation B,” and “Situation C” were plainly lacking in reasonable specificity.

Ms. Gonzalez is also correct that the Board did not properly enter into or exit from closed session at its meeting on August 4, 2020. At any open meeting, OMA's Section 10-15-1(I)(1) permits a public body to enter into closed session only upon a motion stating "the subject to be discussed" with reasonable specificity. Here, though, the minutes from the Board's August 4, 2020 meeting reflect that it entered into closed session pursuant to a motion "to go into closed session to discuss litigation issues," without clarifying either which particular litigation issues or agenda items it intended to discuss while in closed session. This information was necessary to satisfy the reasonable specificity requirement of Section 10-15-1(I)(1). In addition, while OMA requires the public body to affirm for the record, in returning to open session after its closed session discussion, that "the matters discussed in the closed meeting were limited only to those specified in the motion for closure,"¹ no such statement was made by the Board. Section 10-15-1(J). To the contrary, the meeting minutes contain only the following information about the contents of the Board's closed session discussion: "Chairman McMullen stated that no decisions were made, but now we must vote on options the attorney presented to us. The particulars will not be discussed in the open meeting, as they fall under attorney/client privilege." Given that the Board did not state that "the matters discussed in the closed meeting were limited only to those specified in the motion for closure," we must agree with Ms. Gonzalez that the Board did not comply with OMA in entering or exiting closed session.

Finally, the Board also has failed to provide adequately detailed meeting minutes for the meeting on August 4, 2020. Even setting aside its initial descriptions of the "Situation A," "Situation B," and "Situation C" items prior to their being supplemented, the minutes of the August 4, 2020 are still lacking due to more basic deficiencies: the Board did not state when or where the meeting was held. Although OMA specifically requires that meeting minutes "shall include at a minimum the date, time and place of the meeting," the Board's minutes do not state the time the meeting was held, nor they state the location of the meeting or whether it was held virtually. Section 10-15-1(G). As a result, even after the Board supplemented them, it is still evident that the minutes for the August 4, 2020 are insufficient for the purposes of OMA.

Inspection of Public Records Act

Outside of the Open Meetings Act, Ms. Gonzalez's complaint to our Office also argues that the Board violated the Inspection of Public Records Act by failing to provide her with records responsive to her request. Although she appears to argue that the Board lacked the legal justification to withhold records based on attorney-client privilege, we interpret her request as having been broader than was understood by the Board. We therefore have some concern as to whether the Board provided Ms. Gonzalez copies of all non-exempt records.

Like OMA, the Inspection of Public Records Act provides that the people of New Mexico are entitled to "the greatest possible information" about governmental affairs. NMSA 1978, § 14-2-5. *See also San Juan Agr. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶ 16 (noting that, "IPRA is intended to ensure that the public servants of New Mexico remain accountable to the people they serve."). To that end, IPRA states that the public has the right to inspect and copy all

¹ From a strictly literal standpoint, OMA requires only that this statement be included in the minutes of the meeting. *See* § 10-15-1(J) ("Following completion of any closed meeting, the minutes of the open meeting that was closed or the minutes of the next open meeting if the closed meeting was separately scheduled shall state that the matters discussed in the closed meeting were limited only to those specified in the motion for closure or in the notice of the separate closed meeting.").

“public records” except as otherwise provided by law. Section 14-2-1. This means that public records requests may be denied, consistent with IPRA, “because of a specific exception contained within IPRA, or statutory or regulatory exceptions, or privileges adopted by [the Supreme] Court or grounded in the constitution.” *Republican Party of N.M. v. N.M. Taxation & Revenue Dep’t*, 2012–NMSC–026, ¶ 8.

In responding to Ms. Gonzalez’s request, it appears that the Board understood her to seek all records pertaining to the three agenda items listed as “Situation A,” “Situation B,” and “Situation C,” respectively, and it determined that these records were subject to the attorney-client privilege. At the outset, there is no question that the attorney-client privilege is a valid exception to disclosure under IPRA. *See* § 14-2-1(F) (providing that “attorney-client privileged information” is exempt from disclosure) and Rule 11-503 NMRA. To the extent that some of the records responsive to Ms. Gonzalez’s request consisted of confidential communications sent “for the purpose of facilitating or providing professional legal services,” we agree with the Board that the records would be at least potentially exempt from disclosure on the basis of attorney-client privilege.²

However, the plain language of Ms. Gonzalez’s request included “[t]he *complete* public records of the Timberon Water and Sanitation District Board of Directors Meeting conducted Tuesday, August 4, 2020” (emphasis added). We do not interpret that language as having been restricted to the three “Situation A,” “Situation B,” and “Situation C,” agenda items. At a minimum, the records responsive to her request would have included the agenda, public notice, and minutes from the meeting, as well as any meeting materials provided to the members of the Board prior to the meeting. We have no indication that these were provided to Ms. Gonzalez, although it is perhaps possible to interpret the District’s September 21, 2020 denial letter as having referred her to the District’s website to locate its meeting minutes. It appears to us, therefore, that the District may not have provided Ms. Gonzalez with “[t]he complete public records” of the Board meeting on August 4, 2020.

Ms. Gonzalez’s request may not have been artfully worded, but the District should have, at least as a best practice, reached out to her for clarification if it considered her request ambiguous. Rather than interpret her request narrowly, the District should have asked Ms. Gonzalez to clarify which particular public records she was seeking. To be sure, she herself recognized that she was posing specific “questions” to the District, and it is well-settled that public records laws do not oblige public bodies to answer informational questions. *See, e.g., Hudgins v. I.R.S.*, 620 F. Supp. 19, 21 (D.D.C. 1985) (noting that “FOIA neither requires an agency to answer questions disguised as a FOIA request ... or to create documents or opinions in response to an individual’s request for information”), *aff’d mem.*, 808 F.2d 137 (D.C.Cir. 1987), and *Kenyon v. Garrels*, 540 N.E.2d 11, 13 (Ill. Ct. App. 1989) (explaining that Illinois’s public records law “does not compel the agency to provide answers to questions posed by the inquirer”). But while the District was not obligated to answer Ms. Gonzalez’s questions, it was obligated to provide her with “[t]he complete public records” of the Board meeting as she had requested. This meant that, if the District was confused as to which records Ms. Gonzalez sought, it should have asked her to clarify what she meant.

² We would emphasize, though, that, having not examined these records ourselves, we cannot opine definitively as to whether the privilege applied to them.

Conclusion

Based on the information available to us, we have found merit in Ms. Gonzalez's allegations against the Board. With respect to OMA and the Board's August 4, 2020 meeting, it is clear that the Board failed to provide the public with a reasonably specific agenda, entered into and exited from closed session improperly, and failed to prepare and approve adequately detailed meeting minutes. As for IPRA, while we agree that the Board was likely within its rights to deny Ms. Gonzalez access to attorney-client privileged records, it appears to us that it may also have misunderstood her request and failed to provide other responsive records. We interpret "[t]he complete public records" of the Board meeting on August 4, 2020 as being more than those pertaining to three discrete agenda items and as inclusive of, at a minimum, the agenda, public notice, minutes, and materials provided to members of the Board prior to the meeting.

In the short term, the Board needs to take further action address both Ms. Gonzalez's OMA and IPRA allegations. While the Board's action at its May 15, 2021 meeting likely addressed the actions it took at its August 4, 2020 meeting, it still has not prepared and approved legally sufficient meeting minutes. The Board should rectify this as soon as possible. Similarly, the Board should also act as soon as possible on Ms. Gonzalez's public records request. To the extent that the Board may have more narrowly interpreted this request, we recommend that it conduct another search for responsive records and ensure that it has provided all nonexempt records to Ms. Gonzalez, as required by IPRA.

The Board's future conduct and practices are perhaps more important than its short-term remedial action. These allegations by Ms. Gonzalez and our own conclusions with respect to both OMA and IPRA are troubling, especially given that the catalyst for this complaint and situation was the Board's obviously insufficient descriptions of its discussions and actions ("Situation A" and "Option 1," and so forth). We strongly suggest that the Board familiarize itself with its statutory obligation under both OMA and IPRA to provide the public with access to "the greatest possible information" about its affairs. Section 10-15-1(A) and Section 14-2-5. We think it is particularly vital that the Board overhaul its open meetings practices to ensure that it consistently provides the public with more information in its agendas, motions, and minutes.

For your reference, copies of our OMA and IPRA Guides are 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 or IPRA in general, please let me know.

Sincerely,



John Kreienkamp
Assistant Attorney General

Enclosure

cc: Noreen Gonzalez