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OPINION
OF
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Opinion No. 90-27

BY: Jonathan L. Barela
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TO: The Honorable Harold "Chub" Foreman
New Mexico State Senator
2245 Thomas Dr.
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QUESTION:

Is the Las Cruces Selection Advisory Committee a policy-making body for purposes of the New Mexico Open Meetings Act?

ANSWER:

Yes.

ANALYSIS:

We understand that the Selection Advisory Committee ("SAC") established by the City of Las Cruces routinely closed its meetings to the public because it believed it is not subject to the Open Meetings Act ("Act") and because it often deals with topics which, members say, are better discussed in private. We initially note that one issue is paramount in our analysis: Is the SAC a "policy-making body" as contemplated by the Act, or is it merely a "fact-finding group" which falls outside the purview of that law?

The Open Meetings Act provides that "[a]ll meetings of any public body. . . shall be public meetings, and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings." NMSA 1978, § 10-15-1(A)(Supp. 1989). The Act further explains, "All meetings of a quorum of members of any board, commission or other policy-making body of

any . . . municipality . . . are declared to be public meetings open to the public at all times." NMSA 1978, § 10-15-1(B)(Supp.) (emphasis added). Much of the debate surrounding the Act's application, therefore, focuses on whether a particular public entity is a "policy-making body." Apparently, the legislature did not intend "fact-finding groups" or other non-decision-making public entities to be governed by the Open Meetings Act.

The Las Cruces Selection Advisory Committee was created pursuant to city ordinance which states, "[t]here is a selection advisory committee which shall consist of three (3) members of the city council, the city manager, the director of utilities and the director of planning, engineering and programs." Las Cruces, N.M., Ordinances § 2-137 (1977). The law further mandates that "[t]he selection advisory committee shall submit the names of at least two (2) but no more than three (3) qualified professional firms or persons in the order in which they are recommended to the city council, for purposes of review and approval by the council." Id. § 2-138(b). While the SAC is also responsible for interviewing and obtaining information regarding various firms, the city council retains final authority to approve the contracts.

New Mexico courts have not addressed the "fact-finding group"/"policy-making body" issue. Furthermore, we were unable to discover another state which uses the "policy-making body" distinction in its open meetings laws. However, there are several jurisdictions which use similar language in describing entities controlled by open meetings statutes. Thus, in Florida, advisory boards whose powers are limited to making recommendations to a public agency and which possess no authority to bind that agency in any way are subject to the state's Sunshine Law. Town of Palm Beach v. Gradison, 296 So.2d 473 (Fla. 1974); accord, Spillis, Candela & Partners v. Centrust Savings Bank,535 So.2d 694 (Fla. Dist. Ct. App. 1988). Likewise, there is no "government by delegation" exception to the Florida open meetings law and public agencies may not avoid their responsibilities or conduct business in secret by use of an alter ego. IDS Properties, Inc. v. Town of Palm Beach, 279 So.2d 353 (Fla. Dist. Ct. App. 1973).

Furthermore, it is the nature of the act performed by the committee, not its makeup or proximity to the final decision, which determines whether an advisory committee is subject to open meetings statutes. Wood v. Marston, 442 So.2d 934 (Fla. 1983). In Wood, the Florida Supreme court ruled that an ad hoc advisory committee appointed to screen applications and make recommendations for the position of dean of a law school played an integral part of the decision-making process and was therefore subject to the Sunshine Law. The court said, "[n]o official act which is in and of itself decision-making can be 'remote' from the decision-making

process, regardless of how many decision-making steps go into the ultimate decision." Id. at 941. The screening committee at issue in Wood is not unlike the SAC in Las Cruces. See also, Krause v. Reno, 366 So.2d 1244 (Fla. Dist. Ct. App. 1979) (chief of police screening committee appointed by the city manager is subject to the Sunshine Law).

Courts in other jurisdictions having somewhat analogous open meetings statutory requirements to New Mexico's have ruled that advisory committees and other bodies cloaked with decision-making powers are subject to the provision of their respective acts. Brockwood Area Homeowners Ass'n v. Anchorage, 702 P.2d 1317 (Alaska 1985) (interpreting a statute using the words, "legislative body;" the open meetings law applies to advisory committees and is not limited to decision-making bodies only); Selkowe v Bean, 109 N.H. 247, 249 A.2d 35 (1968) (municipal finance committee which made recommendations to parent body was an agent of the municipal corporation and thus was subject to the open meetings law.); News-Publishing Co. v. Carlson, 410 So.2d 546 (Fla. Dist. Ct. App. 1982)(committee responsible for preparing multi-million dollar budget and for submitting it to hospital district for final approval is subject to open meetings law); Polillo v. Deane, 74 N.J. 562, 379 A.2d 211 (1977) (open meetings act applied to charter advisory commission designed to propose improved form of city government and the recommendations made by the commission were declared invalid since the commission met wrongfully in closed session); MFY Legal Services, Inc. v. Toia, 402 N.Y.S.2d 510 (N.Y. Super. Ct. 1977)(meetings of a medical advisory committee created by statute to advise the state medical commission were subject to the open meetings law.); Sierra Club v. Austin Trans. Study Policy Advisory Comm., 746 S.W.2d 298 (Tex. Ct. App. 1988) (transportation advisory committee which reported to federal government was subject to the open meetings law).

However, generally, advisory groups that possess little or no decision-making powers are not subject to open meetings laws. For instance, in Memorial Hosp. Ass'n v. Knutson, 239 Kan. 63, 722 P.2d 1093 (1986), the court held that a hospital association was not subject to the open meetings law where it maintained no government decision-making authority to expend funds and was an independent entity not formally connected to any government body. See also Sanders v. Benton, 579 P.2d 815 (Okla. 1978)(citizens advisory group meeting empaneled to provide recommendations to the Board of Corrections concerning locations for a proposed community center were not subject to the open meetings act because the group was not delegated any decision-making authority either actual or de facto); Andrews v. Independent School Dist., 737 P.2d 929 (Okla. 1987) (school board committee which drafted guidelines on academic requirements was not governed by the open meetings law where the committee's function was purely fact-finding and recommendatory and

the committee possessed no decision-making authority whatsoever); Washington School Dist. v. Supreme Court, 541 P.2d 1137 (Ariz. 1975) (school board did not violate the open meetings statute by excluding the public from meetings of the textbook evaluation committee whose membership was not composed of and whose recommendations were not binding on the school board).

Ostensibly, the SAC serves as an information funnel. It narrows the list of potential contractors by reviewing the bidders' merits and reports back to the city council. It is clear that the SAC retains authority over the initial selection process and is empowered to eliminate, select, and rank certain professional firms before providing them to the full council for final approval. While the SAC is not charged with final decision-making authority, it is, nevertheless, delegated a substantial amount of decision-making power. The SAC can theoretically eliminate dozens of offerors and recommend two or three finalists to the city council. It clear that the council delegated a part of its plenary authority to the SAC and thereby expected the SAC to act on its behalf. While known as an "advisory committee," the SAC becomes a "policy-making body" for purposes of the Act when it is shrouded with some decision-making authority. In this case, we conclude that the SAC is a "policy-making body" by virtue of its vested decision-making influence. It does not act exclusively as a fact-finding group, and, by ordinance, its recommendations are to be taken as influential by its parent body, the city council. It cannot be reasonably argued that the Las Cruces SAC is not cloaked with some policy-making and decision-making powers which were delegated by the council.

Furthermore, while we recognize that the "advisory group"/ "policy-making body" distinction is not often clear, we are persuaded by the strong policy established by New Mexico law which declares,

> In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. The formation of public policy or the conduct of business by vote shall not be conducted in closed meeting. All meetings of any public body . . . shall be public meetings, and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings.

NMSA 1978, § 10-15-1(A)(Supp. 1989)(emphasis added).

Other jurisdictions have broadly construed their open meetings law. Cole v. State, 673 P.2d 345 (1984) (statutes pertaining to public's right to obtain information and to participate in legislative decision-making should be interpreted most favorably to protect the beneficiary, the public); Murray v. Palmgren, 251 Kan. 524, 646 P.2d 1091 (1982) (Open Meetings Act was enacted for public benefit and therefore construed broadly in favor of the public to give effect to its specific purpose); Refai v. Central Washington Univ., 49 Wash. App. 1, 742 P.2d 137 (1987) (Open Meetings Act is remedial and should be liberally construed); Florida Parole Comm'n v. Thomas, 364 So.2d 480 (Fla. App. 1978) (spirit, intent, and purpose of the sunshine law requires a liberal judicial construction in favor of the public and a construction which frustrates all evasive devices); Greene v. Athletic Council of Iowa State Univ., 251 N.W.2d 559 (Iowa 1977) (open meetings statute is to be construed most favorably to the public in whose benefit it was enacted).

Based on the above discussion, we conclude that the SAC is a "policy-making body" governed by the provisions of the Open Meetings Act. A pubic policy-making body may not create an alter-ego with a "fact-finding group" facade when, in fact, its subordinate unit is shrouded with a substantial amount of decision-making authority. "Government by delegation" cannot be used as pretext to closing meetings in New Mexico.

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