

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



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November 26, 2018

Senator Elizabeth Stefanics  
New Mexico State Senate  
P. O. Box 720  
Cerrillos, NM 87010

Re: Opinion request – Use of volunteers at the New Mexico State Board of Nursing

Dear Senator Stefanics:

You requested an Attorney General opinion regarding use of volunteer committee members at the New Mexico State Board of Nursing (the "Board"). More specifically, you asked:

- 1) Are volunteers covered under the liability policies for the State of New Mexico when reviewing complaints and making recommendations for a disciplinary charge against licensed RN, LPH, Nurse Practitioner, Certified Registered Nurse Anesthetist, or Medication Aide?
- 2) Are volunteers making site visits for the purposes of approval of nursing programs, both State and proprietary, appropriate given the proprietary nature of the information involved?
- 3) Are volunteer advisory committees and the complaint committee subject to the Open Meetings Act in the State of New Mexico including access to minutes?

Based on our examination of the relevant New Mexico statutes, case law authorities, Board policies, and the information available to us at this time, we conclude:

- 1) It is likely that a court would find that a volunteer, appointed by the Nursing Board to serve on one of its committees, is a public employee, as defined by the Tort Claims Act, working within the scope of his/her duties and therefore this volunteer would be covered by the liability policies of the State of New Mexico.
- 2) State law allows volunteers, appointed by the Nursing Board to serve on one of its committees, to make site visits for the purposes of approval of nursing programs.

- 3) The Open Meetings Act, and the requirement of minutes, is applicable only if a quorum of the nursing board is present at a meeting of the advisory or complaint committee.

To guide our analysis, we reviewed the New Mexico Tort Claims Act, NMSA 1978, Sections 41-4-1 to -27 (1976, as amended through 2015) (“TCA”); the Nursing Practice Act, NMSA 1978, Sections 61-3-1 to -31 (1968, as amended through 2017) (“NPA”); the Open Meetings Act, NMSA 1978, Sections 10-15-1 to -4 (1974, as amended through 2013) (“OMA”); and Board of Nursing Employee Policies 34.0 (April 16, 2016) (“Policy 34.0”).

#### 1. TCA

The liability of public employees acting within their scope of duty is governed by the TCA. Section 41-4-3(F)(3) defines “public employees” as “persons acting on behalf or in service of a governmental entity in any official capacity whether with or without compensation”.

New Mexico case law has held that the TCA explicitly contemplates that volunteers acting on behalf of the government may be considered public employees subject to its protections and to its waivers of those protections. See Celaya v. Hall, 2004-NMSC-005, ¶ 2, 135 N.M. 115. Specifically, Hall held that:

The TCA treats the volunteer the same as any other employee, thereby encouraging volunteer participation in government. The TCA also protects the public by ensuring that government will be financially accountable when volunteers working within their scope of duty commit certain torts and injure innocent members of the public. Mindful of these purposes to protect both the volunteer and the public, we interpret the TCA so as to give life to legislative intent. Id at ¶ 9.

If a volunteer is determined to be a public employee working within the scope of the volunteer’s duty, the volunteer would be subject to and governed by the New Mexico Tort Claims Act. Depending on the facts of the case, the application of the Act may or may not result in the volunteer being covered under the liability policies for the State of New Mexico.

Applying the analysis from Hall to the facts you provided, we believe a New Mexico court would deem volunteers, charged with reviewing complaints and making recommendations to the Board regarding potential disciplinary action against licensees, public employees acting on behalf or in service of a governmental entity. Therefore, the liability policies of the State of New Mexico likely would cover negligent acts by these volunteers.

#### 2. NPA and State of New Mexico Board of Nursing Employee Policies

Section 61-3-10(B) of the NPA states that the Board is authorized to “prescribe standards and approve curricula for educational programs preparing persons for licensure under the Nursing Practice Act.”

In addition, Section 61-3-10(M) provides that the Board is authorized to “appoint advisory committees consisting of at least one member who is a board member and at least two members expert in the pertinent field of health care to assist it in the performance of its duties.” In compliance with this statute, Section 34.5 of the State of New Mexico Board of Nursing Employee Policies sets forth qualifications of committee members for each of the Board’s advisory committees. For example, Section 34.5.3.3 provides that the Nursing Education Advisory Committee consist of a minimum of seven members, and a maximum of fifteen members; each committee member must hold a current compact state registered nurse license and each committee member must be employed by a Board-approved nursing education program. Thus, although advisory committee members are volunteers, they are well qualified volunteers.

The Board of Nursing’s practice of allowing volunteer committee members to make site visits for the purpose of assisting the Board in approval of nursing programs appears to comply with the law and is appropriate based on the required qualifications of the committee members. Regarding the proprietary nature of the information committee members may be exposed to, we understand that volunteer committee members are required to sign confidentiality agreements to address this concern.

### 3. OMA and State of New Mexico Board of Nursing Employee Policies

Generally, the OMA applies to “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.” Section 10-15-1(B). A non-statutory committee appointed by a board or commission may constitute a policymaking body subject to OMA if it makes decisions on behalf of, formulates recommendations that are in any legal or practical way binding on, or established policy for the board or commission. See Open Meetings Act Compliance Guide, p. 9 (8<sup>th</sup> ed. 2015). Hence, the OMA would apply to an advisory or complaint committee of the Board if said committee engaged in the formation of public policy making or the conduct of business by vote.

Consistent with Section 61-3-10(M) of the NPA, which authorizes the Board to appoint advisory committees to assist it in the performance of its duties, Policy 34.0 establishes the various committees of the Board and sets forth their respective duties, which essentially consist of providing advice and recommendations to the Board on various topics. See Sections 34.3.3 to 34.3.9 of Policy 34.0. Moreover, a careful review of Policy 34.0 reveals that the Board has not delegated to any of its committees the authority to make any decisions or take any final action on behalf of the Board. In fact, Section 34.4.1 expressly limits the official actions of the committees to making formal recommendations to the Board or its executive director. Assuming that the Board is not in any way bound to accept the recommendations or advice made by an advisory committee, OMA would apply only to the extent that an advisory committee includes among its members a quorum of the board (4 board members per Section 61-3-8 of the NPA). In that case, the committee meeting would need to be noticed as a public meeting and minutes would need to be taken. Any minutes that are taken must be open to public access.

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Your request was for a formal Attorney General's opinion on the matters discussed above. Such an opinion is a public document. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, this letter is also a public document and not subject to any attorney-client privilege. Therefore, we may make copies of this letter available to the general public.

Sincerely,



Joseph M. Dworak  
Assistant Attorney General