

NEW MEXICO

OPEN MEETINGS ACT

COMPLIANCE GUIDE



**PROVIDED BY THE OFFICE OF THE
NEW MEXICO ATTORNEY GENERAL**

THE
OPEN MEETINGS ACT
NMSA 1978, Chapter 10, Article 15

A Compliance Guide for
New Mexico Public Officials and Citizens

HECTOR BALDERAS
Attorney General

This eighth edition of the Compliance Guide updates the 2010 edition, primarily to reflect a legislative amendment enacted in 2013 that requires a public body to make the agenda of a regular or special meeting available to the public at least 72 hours in advance of the meeting, and to post meeting agendas on a public body's website if one is maintained.

Eighth Edition
2015



Our Mission

Our mission at the New Mexico Department of Justice is to serve and protect the citizens of New Mexico by honorably carrying out the statutory responsibilities of the Attorney General.

Our Vision

Our mission is to seek, strengthen and empower partnerships with and among citizens, community and government agencies, law enforcement, and businesses in order to make our community a safer and more prosperous place to live. We must enforce the laws of New Mexico fairly and uniformly to ensure New Mexicans receive justice and equal protection under the law.

I am pleased to report that we are working hard to make changes necessary to serve and protect the State of New Mexico. I grew up facing many of the hardships that New Mexicans experience every day. It is that shared experience that motivates me to be a fierce advocate and a voice for our communities. My outreach efforts will support long-term goals of improving transparency in government and empowering the citizens of New Mexico.

The “Open Meetings Act,” NMSA 1978, Sections 10-15-1 to 10-15-4, is known as a “sunshine law.” Sunshine laws generally require that public business be conducted in full public view, that the actions of public bodies be taken openly, and that the deliberations of public bodies be open to the public. Like you, I strongly support open government, particularly meetings held by public officials to discuss public business. Public access to the proceedings and decision-making processes of governmental boards, agencies and commissions is an essential element of a properly functioning democracy. As Attorney General, I am charged by law with the responsibility to enforce the provisions of the New Mexico Open Meetings Act. The publication of this Guide is one of the ways to fulfill my office responsibilities as an effective resource for policymakers and the public in order to promote compliance.

A handwritten signature in blue ink, appearing to read "Hector Balderas". The signature is fluid and stylized, with a long, sweeping underline.

HECTOR BALDERAS
Attorney General of New Mexico
2015

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I. Introduction

The “Open Meetings Act,” NMSA 1978, Sections 10-15-1 to 10-15-4, is known as a “sunshine law.” All states have such laws, which are essentially motivated by the belief that the democratic ideal is best served by a well-informed public. Sunshine laws generally require that public business be conducted in full public view, that the actions of public bodies be taken openly, and that the deliberations of public bodies be open to the public.

The Attorney General is authorized by Section 10-15-3(B) of the Act to enforce its provisions. Accordingly, this Compliance (“Guide”) has been prepared by the Attorney General to provide assistance in the application of the provisions of the Act to all boards and commissions of the state, counties, municipalities, school districts, conservation districts, irrigation districts, housing authorities, councils of government and other public bodies that are responsible to the public and subject to the Act. It should be noted that many of the issues discussed in this Guide have not been the subjects of judicial interpretation. By necessity, therefore, the Guide in most respects represents the views of the Attorney General. Although the Attorney General believes the construction of the Open Meetings Act reflected in this Compliance Guide is correct, it is always possible that a court faced with the same issues would disagree with the Attorney General’s interpretation.

New Mexico’s Open Meetings Act addresses four areas. The first defines the basic policy of the state with respect to meetings of non-legislative public bodies and how it is to be applied in conducting

public business; the second defines the policy as it applies to meetings of committees of the state legislature; the third addresses the effect that violating the Act may have on the validity of actions taken by public bodies; and the fourth defines the penalty for violation of the Act. These areas are discussed sequentially in the text of this Guide. For ease of reference, the entire Act is set forth on pages 2 through 5.

The Open Meetings Act was most recently amended during the 2013 legislative session. The amendment requires, with some exceptions, that a public body make the agendas of regular and special meetings available to the public at least seventy-two hours prior to the meetings and post the agendas on the public body’s website if one is maintained.

For ease of understanding, the text in this Guide is divided into three areas:

- 1) **The Law, as written, is in bold type.**
- 2) Commentary or explanation is in regular type.
- 3) *Examples of when the law would and would not apply are in italic type.*

If you would like additional copies of this Guide, or if you have any questions about the Guide or the applicability of the Act, please contact the Open Government Division of the Office of the Attorney General, P.O. Drawer 1508, Santa Fe, New Mexico 87504-1508, or by telephone at (505) 827-6070. This Guide is also posted on the Office of the Attorney General’s website at www.nmag.gov.

II. Open Meetings Act

10-15-1. Formation of Public Policy

A. In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be public 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 meetings. All meetings of any public body except the legislature and the courts shall be public meetings, and all persons desiring shall be permitted to attend and listen to the deliberations and proceedings. Reasonable efforts shall be made to accommodate the use of audio and video recording devices.

B. All meetings of a quorum of members of any board, commission, administrative adjudicatory body or other policymaking body of any state agency, any agency or authority of any county, municipality, district or any political subdivision, held for the purpose of formulating public policy, including the development of personnel policy, rules, regulations or ordinances, discussing public business or for the purpose of taking any action within the authority of or the delegated authority of any board, commission or other policymaking body are declared to be public meetings open to the public at all times, except as otherwise provided in the constitution of New Mexico or the Open Meetings Act. No public meeting once convened that is otherwise required to be open pursuant to the Open Meetings Act shall be closed or dissolved into small groups or committees for the purpose of permitting the closing of the meeting.

C. If otherwise allowed by law or rule of the public body, a member of a public body may

participate in a meeting of the public body by means of a conference telephone or other similar communications equipment when it is otherwise difficult or impossible for the member to attend the meeting in person, provided that each member participating by conference telephone can be identified when speaking, all participants are able to hear each other at the same time and members of the public attending the meeting are able to hear any member of the public body who speaks during the meeting.

D. Any meetings at which the discussion or adoption of any proposed resolution, rule, regulation or formal action occurs and at which a majority or quorum of the body is in attendance, and any closed meetings, shall be held only after reasonable notice to the public. The affected body shall determine at least annually in a public meeting what notice for a public meeting is reasonable when applied to that body. That notice shall include broadcast stations licensed by the federal communications commission and newspapers of general circulation that have provided a written request for such notice.

E. A public body may recess and reconvene a meeting to a day subsequent to that stated in the meeting notice if, prior to recessing, the public body specifies the date, time and place for continuation of the meeting, and, immediately following the recessed meeting, posts notice of the date, time and place for the reconvened meeting on or near the door of the place where the original meeting was held and in at least one other location appropriate to provide public notice of the continuation of the meeting. Only matters appearing on the agenda of the original meeting may be discussed at the reconvened meeting.

F. Meeting notices shall include an agenda

containing a list of specific items of business to be discussed or transacted at the meeting or information on how the public may obtain a copy of such an agenda. Except in the case of an emergency or in the case of a public body that ordinarily meets more frequently than once per week, at least seventy-two hours (72) hours prior to the meeting, the agenda shall be available to the public and posted on the public body's web site, if one is maintained. A public body that ordinarily meets more frequently than once per week shall post a draft agenda at least seventy-two (72) hours prior to the meeting and a final agenda at least thirty-six (36) hours prior to the meeting. Except for emergency matters, a public body shall take action only on items appearing on the agenda. For purposes of this Subsection, an "emergency" refers to unforeseen circumstances that, if not addressed immediately by the public body, will likely result in injury or damage to persons or property or substantial financial loss to the public body. Within ten days of taking action on an emergency matter, the public body shall report to the attorney general's office the action taken and the circumstances creating the emergency; provided that the requirement to report to the attorney general is waived upon the declaration of a state or national emergency.

G. The board, commission or other policymaking body shall keep written minutes of all its meetings. The minutes shall include at a minimum the date, time and place of the meeting, the names of members in attendance and those absent, the substance of the proposals considered and a record of any decisions and votes taken that show how each member voted. All minutes are open to public inspection. Draft minutes shall be prepared within ten working days after the meeting and shall be approved, amended or disapproved at the next meeting where a quorum is present. Minutes shall not become official until approved by the policymaking body.

H. The provisions of Subsections A, B and G of this section do not apply to:

(1) meetings pertaining to issuance, suspension, renewal or revocation of a license except that a hearing at which evidence is offered or rebutted shall be open. All final actions on the issuance, suspension, renewal or revocation of a license shall be taken at an open meeting;

(2) limited personnel matters; provided that for purposes of the Open Meetings Act, "limited personnel matters" means the discussion of hiring, promotion, demotion, dismissal, assignment or resignation of or the investigation or consideration of complaints or charges against any individual public employee; provided further that this Subsection is not to be construed as to exempt final actions on personnel from being taken at open public meetings; nor does it preclude an aggrieved public employee from demanding a public hearing. Judicial candidates interviewed by any commission shall have the right to demand an open interview;

(3) deliberations by a public body in connection with an administrative adjudicatory proceeding. For purposes of this paragraph, an "administrative adjudicatory proceeding" means a proceeding brought by or against a person before a public body in which individual legal rights, duties or privileges are required by law to be determined by the public body after an opportunity for a trial-type hearing. Except as otherwise provided in this section, the actual administrative adjudicatory proceeding at which evidence is offered or rebutted and any final action taken as a result of the proceeding shall occur in an open meeting;

(4) the discussion of personally identifiable information about any individual student, unless the student, his parent or guardian requests otherwise;

(5) meetings for the discussion of bargaining strategy preliminary to collective bargaining negotiations between the policymaking body and a bargaining unit representing the employees of that policymaking body and collective bargaining sessions at which the policymaking body and the representatives of the collective bargaining unit are present;

(6) that portion of meetings at which a decision concerning purchases in an amount exceeding two thousand five hundred dollars (\$2,500) that can be made only from one source and that portion of meetings at which the contents of competitive sealed proposals solicited pursuant to the Procurement Code are discussed during the contract negotiation process. The actual approval of purchase of the item or final action regarding the selection of a contractor shall be made in an open meeting;

(7) meetings subject to the attorney-client privilege pertaining to threatened or pending litigation in which the public body is or may become a participant;

(8) meetings for the discussion of the purchase, acquisition or disposal of real property or water rights by the public body;

(9) those portions of meetings of committees or boards of public hospitals where strategic and long-range business plans or trade secrets are discussed; and

(10) that portion of a meeting of the gaming control board dealing with information made confidential pursuant to the provisions of the Gaming Control Act.

I. If any meeting is closed pursuant to the exclusions contained in Subsection H of this section, the closure:

(1) If made in an open meeting, shall be approved by a majority vote of a quorum

of the policymaking body; the authority for the closure and the subject to be discussed shall be stated with reasonable specificity in the motion calling for the vote on a closed meeting; the vote shall be taken in an open meeting; and the vote of each individual member shall be recorded in the minutes. Only those subjects announced or voted upon prior to closure by the policymaking body may be discussed in a closed meeting; and

(2) if called for when the policymaking body is not in an open meeting, shall not be held until public notice, appropriate under the circumstances, stating the specific provision of the law authorizing the closed meeting and stating with reasonable specificity the subject to be discussed, is given to the members and to the general public.

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. This statement shall be approved by the public body under Subsection G of this section as part of the minutes.

10-15-1.1. Short Title.

NMSA 1978, Chapter 10, Article 15 may be cited as the "Open Meetings Act."

10-15-2. State Legislature; Meetings.

A. Unless otherwise provided by joint house and senate rule, all meetings of any committee or policymaking body of the legislature held for the purpose of discussing public business or for the purpose of taking any action within the authority of or the delegated authority of the committee or body are declared to be public meetings open to the public at all times. Reasonable notice of meetings shall be given to the public by

publication or by the presiding officer of each house prior to the time the meeting is scheduled.

B. The provisions of Subsection A of this section do not apply to matters relating to personnel or matters adjudicatory in nature or to investigative or quasi-judicial proceedings relating to ethics and conduct or to a caucus of a political party.

C. For the purpose of this section, “meeting” means a gathering of a quorum of the members of a standing committee or conference committee held for the purpose of taking any action within the authority of the committee or body.

10-15-3. Invalid Actions; Standing.

A. No resolution, rule, regulation, ordinance or action of any board, commission, committee or other policymaking body shall be valid unless taken or made at a meeting held in accordance with the requirements of NMSA 1978, Section 10-15-1. Every resolution, rule, regulation, ordinance or action of any board, commission, committee or other policymaking body shall be presumed to have been taken or made at a meeting held in accordance with the requirements of NMSA 1978, Section 10-15-1.

B. All provisions of the Open Meetings Act shall be enforced by the attorney general or by the district attorney in the county of jurisdiction. However, nothing in that act shall prevent an individual from independently applying for enforcement through the district courts, provided that the individual first provides written notice of the claimed violation to the public body and that the public body has denied or not acted on the claim within fifteen days of receiving it. A public meeting held to address a claimed violation of the Open Meetings Act shall include a summary of comments made at the meeting at which the claimed violation occurred.

C. The district courts of this state shall have jurisdiction, upon the application of any person to enforce the purpose of the Open Meetings Act, by injunction, mandamus or other appropriate order. The court shall award costs and reasonable attorney fees to any person who is successful in bringing a court action to enforce the provisions of the Open Meetings Act. If the prevailing party in a legal action brought under this section is a public body defendant, it shall be awarded court costs. A public body defendant that prevails in a court action brought under this section shall be awarded its reasonable attorney fees from the plaintiff if the plaintiff brought the action without sufficient information and belief that good grounds supported it.

D. No section of the Open Meetings Act shall be construed to preclude other remedies or rights not relating to the question of open meetings.

10-15-4. Penalty.

Any person violating any of the provisions of NMSA 1978, Section 10-15-1 or 10-15-2 is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five hundred dollars (\$500) for each offense.

Commentary

Public bodies often adopt Robert’s Rules of Order or a similar code of parliamentary procedure to govern the process for calling and conducting meetings and taking action. The public body must take care not to violate the Open Meetings Act in its attempt to comply with its own parliamentary rules. The Open Meetings Act is mandatory and will supersede any such local policy or procedure. While a violation of the Open Meetings Act will void the action taken, actions that do not comply with a body’s own parliamentary rules may not be invalidated where there is no statutory violation.

III. Section 10-15-1.

Formation of Public Policy

A. State Policy on Open Meetings

The Law

In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be public 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 meetings. All meetings of any public body except the legislature and the courts shall be public meetings, and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings. Reasonable efforts shall be made to accommodate the use of audio and video recording devices.

Commentary

This Subsection states the basic open meetings policy of the state. The Act generally prohibits a public body from conducting public business in secret or in closed meetings and requires that such business be conducted by the public body acting as a whole at meetings open to all persons who wish to attend and listen.

The Act requires members of a public body to conduct business in public and to allow all persons desiring to attend and listen to the proceedings. These requirements effectively preclude the members of a public body from conferring privately during meetings by passing notes, sending emails and texts or other means.

Unless a public body cannot reasonably do so, it must permit members of the public attending its meetings to record or video tape the

proceedings. The Act does not require a public body to allow members of the public to speak at its meetings.

Example 1:

A county manager needs the immediate approval of the board of county commissioners before executing a contract and calls the commissioners individually by telephone to secure such approval. Such a telephone poll as a substitute for official board action violates the intent of the Act. However, the board may avoid such hazards if it discusses the anticipated contract at a properly convened meeting and delegates to the county manager, its chief administrative officer, the authority to execute in the board's name. The county manager is not absolutely precluded from telephoning individual commissioners. The telephone poll is improper in this example because it is used to secure the approval of or final action by the board outside of an open meeting.

Example 2:

The city council is contemplating an ordinance adopting an 11:00 p.m. curfew for all persons under 18 years of age. Hundreds of residents attend the first meeting on the ordinance, carrying placards for and against it. The audience becomes loud and agitated and the local police remove several people for making threats against the council. The meeting lasts until 2:15 a.m. At the next meeting on the ordinance, the council limits presentations to those persons whose remarks are submitted to the council five days in advance of the meeting and places a five minute limit on such remarks.

Such restrictions are permitted. The Act requires only that persons be permitted to "attend and listen." An open public meeting is

not necessarily an open forum and, so long as the Act is complied with, public bodies may limit or not allow public debate and may take steps necessary to maintain public order.

Commentary

The courts and the legislature are excluded from the provisions of the Act that apply to other public bodies. Provisions of the Act specifically applicable to the legislature are discussed in Section IV.

Example 3:

The Disciplinary Board established by the State Supreme Court to investigate attorney misconduct holds a meeting to discuss hearing procedures. Because the Board is established by the Supreme Court and is an agency of the court, it is not subject to the Act under the express exemption for courts. Although exempt from the Act's coverage, the Supreme Court is free to promulgate regulations covering whether and when the Board's meetings are open to the public and requirements for public notice if it so chooses.

Commentary

As a policy statement, Subsection A generally sets forth the spirit or intent of The Law and serves as the guiding principle to be followed in applying the particular provisions of the Act. Where a situation is not specifically covered by the Act, doubt as to the proper course of action should be resolved in favor of openness whenever possible. Compliance with the Act is not just a matter of adhering to the Act's specific requirements, but contemplates a more flexible obligation of public bodies to open their deliberations to public scrutiny.

B. Public Meetings Subject to the Act

The Law

All meetings of a quorum of members of any board, commission, administrative

adjudicatory body or other policymaking body of any state agency, any agency or authority of any county, municipality, district or any political subdivision, held for the purpose of formulating public policy, including the development of personnel policy, rules, regulations or ordinances, discussing public business or for the purpose of taking any action within the authority of or the delegated authority of any board, commission or other policymaking body are declared to be public meetings open to the public at all times, except as otherwise provided in the constitution of New Mexico or the Open Meetings Act. No public meeting once convened that is otherwise required to be open pursuant to the Open Meetings Act shall be closed or dissolved into small groups or committees for the purpose of permitting the closing of the meeting.

Commentary

This Subsection defines those meetings that are required to be open to the public, unless otherwise excepted from this requirement by the Constitution or another provision of the Act or an express and unavoidable conflict with more specific language in another law. The provisions of the Act apply to any meeting of a quorum of a policymaking public body held for the purpose of:

- (a) formulating public policy;
- (b) discussing public business; or
- (c) taking any action that the body has authority to take.

1. Rolling Quorums

The Act's requirement for open, public meetings applies to any discussion of public business among a quorum of a public body's members. Usually, a quorum of a public body's members meets together to discuss public business or take action. However, a

quorum may exist for purposes of the Act even when the members are not physically present together at the same time and place. For example, if three members of a five member board discuss public business in a series of telephone or email conversations, the discussion is a meeting of a quorum. This is sometimes referred to as a “rolling” or “walking” quorum. The use of a rolling quorum to discuss public business or take action violates the Act because it constitutes a meeting of a quorum of the public body’s members outside of a properly noticed, public meeting.

Example 4:

Mr. Green and Ms. Thomas, two members of the five-member board of directors for the ZZZ Domestic Mutual Water Users Association (a public body established under the Sanitary Projects Act), have a telephone conversation during which they decide that the board should discharge the Association’s executive director. Mr. Green writes a letter to the director terminating her employment, signs the letter and passes it on to Ms. Thomas. Ms. Thomas signs the letter and delivers it to a third board member, who signs it and delivers it to a fourth board member for his signature. The fifth board member does not participate in the termination action.

The board’s action violates the Act. The letter discharging the executive director and signed by four of the board members amounts to action by a quorum of the board outside of a properly noticed and conducted public meeting. It makes no difference for purposes of the Act that the four members who made up the quorum were not together in the same place when they discussed and signed the letter.

Example 5:

Mr. Jones and Mr. Smith both serve on a board of county commissioners and constitute a quorum of that board. Jones and Smith are also in the same business and frequently run

into each other in the course of a business day. Moreover, they are friends and see each other at various social functions. The Act is not intended to alter the business or social relationships of these men so long as they are not meeting in their capacity as county commissioners for the purpose of conducting public business. Should public business arise in such business or social settings, the two men should avoid discussing the matter between themselves. Rather, the matter should be raised, discussed and decided in an open meeting of the board.

2. Policymaking Bodies

a. Administrative Adjudicatory Bodies

The Act broadly covers every kind of public body that can be characterized as “policymaking,” including those that perform administrative adjudicatory functions. Administrative adjudicatory functions generally include holding trial-type hearings to consider facts and reaching conclusions regarding individual legal rights, duties or privileges.

b. Committees

The Act specifically refers only to meetings of a quorum of the members of a public body. Meetings of a committee of a public body that is composed of less than a quorum of the members or of non-members of the public body may not be subject to the provisions of the Act if the committee engages solely in fact-finding, simply executes the policy decisions or final actions of the public body and does not otherwise act as a policymaking body.

A committee established for fact-finding purposes by a board or commission should be distinguished from committees created by statute performing the same functions. 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 business.

In some situations, even a non-statutory committee appointed by a public body may constitute a "policymaking body" subject to the Act if 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. A public body may not evade its obligations under the Act by delegating its responsibilities for making decisions and taking final action to a committee. This is true even when the public body delegates its authority for holding a meeting or hearing to a single individual. If a hearing would be subject to the Act if convened by the public body, the hearing cannot be closed simply because the public body appoints a single hearing officer to hold the hearing in its place.

Excepted from this rule are hearing officers specifically authorized by statute. In those situations, the legislature has placed responsibility for holding a hearing with either the public body or the hearing officer, and the hearing officer's authority to hold a hearing is not based solely on delegation by the public body. Because, under these circumstances, the hearing officer acts under separate authority rather than as a replacement for the public body and because such a statutory hearing officer is not itself a public body, a hearing held by the hearing officer would not be subject to the Act. However, provisions of law other than the Open Meetings Act may apply and require the proceedings to be open. For example, all hearings under the Uniform Licensing Act, including those conducted by a hearing officer, must be open to the public. See NMSA 1978, Section 61-1-7.

Of course, where the chief policymaking official of an agency is a single individual, the Act does not apply because the official is not a public body, complete decision making

authority is vested solely in the official, and no deliberation or vote is necessary for effective action.

Example 6:

The governor, the superintendent of insurance and the chief of the state police get together to discuss issues about which the three are concerned. These persons, although public officials, do not constitute a "public body" and, therefore, their meeting is not subject to the provisions of the Act.

Example 7:

The parents in a school district have been asked by the superintendent to form a group to study the district's athletic programs and make recommendations to the school board. The group's recommendations are not binding on the board. Because they act solely in an advisory capacity, and have no authority to make decisions on behalf of the board, the parents do not constitute a policymaking body of the school district and their meetings are not subject to the provisions of the Act.

Example 8:

Three members of an eight-member state licensing board are appointed by the chairman as a committee to decide on a final budget. The committee is not given specific budgetary instructions by the board and the committee members use their discretion regarding the specific allocations in the budget. Since the committee independently develops a budget for the board, the budget discussions conducted and decisions made by the committee are meetings of a policymaking body subject to the Act's requirements.

Example 9:

The Public Regulation Commission is a full-time salaried commission regularly engaged in the conduct of public business, i.e., utility rate regulation. Because the Commission is

authorized to take final action and formulate policy, any meeting of a quorum of the members at which public business is discussed, even where no action is taken or policy actually formulated, is subject to the provisions of the Act.

Example 10:

A private non-profit health services corporation receives state and federal funding for its program. Unless a specific contractual provision or a statutory mandate independent of the Act imposes the duty of open meetings, a meeting of a quorum of the board of directors of the corporation is not subject to the provisions of the Act because the board of directors is not a board of the state, county, district or other political subdivision.

Example 11:

A cabinet secretary regularly meets with his key staff on Monday mornings to go over department affairs. From time to time, he may also invite interested legislators and persons from the private sector to advise him and his staff on particular matters. The decision-making authority of the department is nevertheless vested in the secretary, and the assembled Monday group, although influential, remains advisory. These meetings, therefore, are not subject to the Act.

Example 12:

A board of county commissioners is specifically required by statute to issue a particular order upon the occurrence of certain conditions. The duty to issue the order is purely ministerial; i.e., the board may not exercise any discretion or independent judgment. No decision or deliberation of the board is necessary or permitted. The board, at a meeting properly convened according to the Act, may authorize one member or an administrator to issue the order when the requisite conditions occur, and the official action may be taken without a subsequent

meeting that would otherwise be subject to the Act.

Example 13:

Pursuant to its constitution, the board of regents of a state university delegates its policymaking authority to decide post-graduate curricula to the faculty senate of the respective post-graduate departments. Meetings of the faculty senate for the purpose of exercising that authority are subject to the Act.

Example 14:

A five-member city council creates an "advisory committee" composed of two city council members and other city officials to evaluate bidders on city contracts and to recommend a limited number of the bidders to the city council for final selection. By delegating authority to the committee to narrow the choices of potential contractors for the council's consideration, the city council vests the committee with decision-making authority and subjects its meetings to the Act's requirements.

Example 15:

A state commission establishes a search committee composed of experts in the field regulated by the commission to review and evaluate applications for positions on the commission's staff. A provision in the commission's by-laws provides that the search committee's final recommendation on whom to hire is binding on the commission unless the commission receives reliable information from an independent source affecting the finalist's qualifications. Because the commission has delegated virtually all of its decision-making authority to the search committee, the committee's meetings are subject to the Act.

If the search committee's recommendations were not expressly binding on the commission, but the commission routinely adopted the

committee's final recommendation without reviewing the other applicants, the committee's meetings still would be subject to the Act. Although not required to by any express provision, the commission, as a matter of practice, would be delegating to the committee its authority to select employees.

Example 16:

A state board appoints a committee composed of two board members (less than a quorum of the board) and several members of the public to draft proposed regulations in accordance with the board's instructions regarding the substance of the regulations. The board will review the proposed regulations, make all final decisions regarding the text of the regulations and determine whether to hold a public hearing on them. Provided the committee is not statutorily created and charged with drafting regulations for the board, meetings of the committee to draft the regulations will not be subject to the Act.

Example 17:

Pursuant to statute, two incorporated villages establish an intercommunity water supply association empowered to provide a supply of water to the villages' inhabitants. The villages are the association's only members and each village appoints three persons to serve at its pleasure as commissioners of the association. To fulfill its duties, the association is granted certain government powers, including the power of eminent domain. Because it is formed by public bodies and is authorized to perform certain functions on behalf of those bodies, the association also is a public body subject to the Act.

C. Telephone Conferences

The Law

If otherwise allowed by law or rule of the public body, a member of a public body may participate in a meeting of the public

body by means of a conference telephone or other similar communications equipment when it is otherwise difficult or impossible for the member to attend the meeting in person, provided that each member participating by conference telephone can be identified when speaking, all participants are able to hear each other at the same time and members of the public attending the meeting are able to hear any member of the public body who speaks during the meeting.

Commentary

This provision sets forth requirements for members of a public body who attend a meeting by conference call. The Act does not itself authorize attendance by telephone. But if members of a public body have independent authority by law or regulation to participate in meetings by telephone, the requirements will apply.

Example 18:

The state student loan authority is granted the same powers as those exercised by nonprofit organizations incorporated under state law. The Nonprofit Corporation Act allows a nonprofit's board of directors to "participate in a meeting ... by means of a conference telephone or similar communications equipment" and provides that "participation by such means shall constitute presence in person at a meeting." This law authorizes a member of the authority's governing board who is unable to attend a meeting in person to participate by conference telephone if the requirements of the Open Meetings Act are met.

Commentary

Even where attendance by telephone is allowed, it would defeat the purposes of the Open Meetings Act if this were done by a large number of board members. That is why the legislature provided that participation by telephone conference may occur only when

“difficult or impossible.” Thus, in all cases where it is possible, members of a public body should attend meetings in person. Participation by telephone should occur only when circumstances beyond the member’s control would make attendance in person extremely burdensome. The provision is not intended to encourage participation by telephone in cases where personal attendance would be merely inconvenient or would be more efficient or economical for the public body.

D. Notice Requirements

The Law

Any meetings at which the discussion or adoption of any proposed resolution, rule, regulation or formal action occurs and at which a majority or quorum of the body is in attendance, and any closed meetings, shall be held only after reasonable notice to the public. The affected body shall determine at least annually in a public meeting what notice for a public meeting is reasonable when applied to that body. That notice shall include broadcast stations licensed by the federal communications commission and newspapers of general circulation that have provided a written request for such notice.

Commentary

This Subsection requires that reasonable notice be given of public meetings at which proposed rules, regulations, resolutions or formal action will be discussed or adopted. In effect, this means a public body must give notice of all public meetings of a quorum of the public body. The notice must include licensed broadcast stations and newspapers of general circulation that have made a written request for notice of the public body’s meetings.

Example 19:

The governing body of an irrigation district wishes to call a special meeting to discuss an

emergency situation resulting from flood damage. The action of simply calling a meeting is not formal action for purposes of the notice provisions of the Act, since requiring notice of a meeting to call a meeting is obviously impractical. This might be overcome by a policy of the public body authorizing the chairman or president to call such meetings as he or she deems necessary.

Commentary

This Subsection also requires each public body to determine its notice procedures at least once a year in a public meeting. Accordingly, each public body should adopt an annual resolution or other announcement at a regularly scheduled open meeting stating its procedure for giving notice of meetings. The Act does not impose any specific maximum or minimum requirements, and what constitutes reasonable notice may vary according to the type of meeting or public body. In general, however, a reasonable notice must adequately, accurately, and sufficiently in advance inform the public of the meeting’s time, place and date, and should be published or posted in a place and manner accessible to the public, such as a central location at the public body’s main office where the public is allowed, as well as on a web site if the public entity has one

Example 20:

The mayor of the Village of Las Ropas calls a special meeting of the Board of Trustees. The public meeting notice states that the meeting will be held the following Monday at 8:30 a.m. in the Village Hall. At 4:30 p.m. on the Friday preceding the meeting, the meeting notice is posted on the door of the Village Clerk’s office in the Village Hall. The Village Hall closes at 5:00 p.m. on weekdays and is not open at all on weekends. The meeting notice is not reasonable for purposes of the Act because members of the public interested in attending the meeting have no meaningful opportunity to see the notice before the meeting.

Commentary

In most circumstances, the Attorney General will consider reasonable a notice procedure providing ten days advance notice for regular meetings, three days prior notice for special meetings and twenty-four hours advance notice for emergency meetings. If a public body meets regularly on a specific date, time and place, e.g., the second Wednesday of each month at 7:00 p.m. at the city auditorium, the public body need not provide ten days advance notice for each individual meeting as long as the public body sets forth the requisite information in the public body's notice resolution and makes the resolution available to the public.

Regardless of whether a meeting is a regular, special or emergency meeting, the Act requires the public body to provide notice that was given as far in advance as reasonably possible under the circumstances involved. For example, an "emergency meeting" called with little or no notice must involve issues that could not have been anticipated and which, if not addressed immediately by the public body, will threaten the health, safety or property of its citizens, or likely result in substantial financial loss to the public body.

Example 21:

With only one hour's advance notice, a mayor calls an "emergency meeting" of the town's governing board to discuss the purchase of a building. The building's owner has indicated that unless the town council decides to purchase the building in twenty-four hours, he will offer it to someone else. While the town has no particular need for the building, the mayor thinks it is a good deal. The town's open meetings resolution requires ten days notice for regular meetings, three days notice for special meetings, and twenty-four hours notice, if possible, for emergency meetings. The notice given for the meeting is unreasonable because the circumstances justifying an emergency meeting are not present.

Commentary

The next example illustrates a resolution containing notice procedures that generally will be considered reasonable. (NOTE: Paragraph 7 of the model resolution is intended to comply with the requirements of the federal Americans With Disabilities Act ("ADA"). It is not required by the Open Meetings Act, but we recommend that public bodies subject to the ADA include such a notice in their notice resolutions.)

Example 22:

[NAME OF COMMISSION, BOARD OR AGENCY] RESOLUTION NO. _____

WHEREAS, THE _____ met in regular session at _____ on _____, 20__, at _____, a.m./p.m., as required by law; and

WHEREAS, Section 10-15-1(B) of the Open Meetings Act (NMSA 1978, Sections 10-15-1 to -4) states that, except as may be otherwise provided in the Constitution or the provisions of the Open Meetings Act, all meetings of a quorum of members of any board, council, commission, administrative adjudicatory body or other policymaking body of any state or local public agency held for the purpose of formulating public policy, discussing public business or for the purpose of taking any action within the authority of or the delegated authority of such body, are declared to be public meetings open to the public at all times; and

WHEREAS, any meetings subject to the Open Meetings Act at which the discussion or adoption of any proposed resolution, rule, regulation or formal action occurs shall be held only after reasonable notice to the public; and

WHEREAS, Section 10-15-1(D) of the Open Meetings Act requires the _____ to determine annually what

constitutes reasonable notice of its public meetings;

NOW, THEREFORE, BE IT RESOLVED by _____ that:

1. All meetings shall be held at _____ at _____ a.m./p.m., or as indicated in the meeting notice.

2. Unless otherwise specified, regular meetings shall be held each month on _____. The agenda will be available at least seventy-two hours prior to the meeting from _____, whose office is located in _____, New Mexico. The agenda will also be posted at the offices of _____ and on the _____'s website at www._____.

3. Notice of regular meetings other than those described in Paragraph 2 will be given ten days in advance of the meeting date. The notice will include a copy of the agenda or information on how a copy of the agenda may be obtained. If not included in the notice, the agenda will be available at least seventy-two hours before the meeting and posted on the _____'s website at www._____.

4. Special meetings may be called by the Chairman or a majority of the members upon three days notice. The notice for a special meeting shall include an agenda for the meeting or information on how a copy of the agenda may be obtained a copy of the agenda. The agenda will be available at least seventy-two hours before the meeting and posted on the _____'s website at www._____.

5. Emergency meetings will be called only under unforeseen circumstances that demand immediate action to protect the health, safety and property of citizens or to protect the public body from substantial financial loss. The _____ will avoid

emergency meetings whenever possible. Emergency meetings may be called by the Chairman or a majority of the members with twenty-four hours prior notice, unless threat of personal injury or property damage requires less notice. The notice for all emergency meetings shall include an agenda for the meeting or information on how the public may obtain a copy of the agenda. Within ten days of taking action on an emergency matter, the _____ will notify the Attorney General's Office.

6. For the purposes of regular meetings described in Paragraph 3 of this resolution, notice requirements are met if notice of the date, time, place and agenda is placed in newspapers of general circulation in the state and posted in the following locations: _____. Copies of the written notice shall also be mailed to those broadcast stations licensed by the Federal Communications Commission and newspapers of general circulation that have made a written request for notice of public meetings.

7. For the purposes of special meetings and emergency meetings described in Paragraphs 4 and 5, notice requirements are met if notice of the date, time, place and agenda is provided by telephone to newspapers of general circulation in the state and posted in the offices of _____. Telephone notice also shall be given to those broadcast stations licensed by the Federal Communications Commission and newspapers of general circulation that have made a written request for notice of public meetings.

8. In addition to the information specified above, all notices shall include the following language:

If you are an individual with a disability who is in need of a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing or meeting, please contact

_____ at _____
 at least one (1) week prior to the meeting
 or as soon as possible. Public documents,
 including the agenda and minutes, can be
 provided in various accessible formats.
 Please contact _____ at
 _____ if a summary or other
 type of accessible format is needed.

9. The _____ may close
 a meeting to the public only if the subject matter
 of such discussion or action is excepted from the
 open meeting requirement under Section 10-15-
 1(H) of the Open Meetings Act.

(a) If any meeting is closed during an open
 meeting, such closure shall be approved by a
 majority vote of a quorum of the
 _____ taken during the open
 meeting. The authority for the closed meeting
 and the subjects to be discussed shall be stated
 with reasonable specificity in the motion to
 close and the vote of each individual member on
 the motion to close shall be recorded in the
 minutes. Only those subjects specified in the
 motion may be discussed in the closed meeting.

(b) If a closed meeting is conducted when the
 _____ is not in an open
 meeting, the closed meeting shall not be held
 until public notice, appropriate under the
 circumstances, stating the specific provision of
 law authorizing the closed meeting and the
 subjects to be discussed with reasonable
 specificity, is given to the members and to the
 general public.

(c) 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 whether the matters discussed in the closed
 meeting were limited only to those specified in
 the motion or notice for closure.

(d) Except as provided in Section 10-15-1(H) of
 the Open Meetings Act, any action taken as a
 result of discussions in a closed meeting shall be
 made by vote of the _____ in an

open public meeting. Passed by the _____
 _____ this ___ day of _____, 20__.

Commentary

As indicated in the model notice resolution set
 forth above in Example 22, meeting notices
 must include specified information about
 agendas and all meetings, including closed
 meetings, require advance notice to the public.
 The specific provisions of the agenda
 requirements and procedures for closing
 meetings will be discussed below.

E. Reconvened Meetings

The Law

**A public body may recess and reconvene a
 meeting to a day subsequent to that stated in
 the meeting notice if, prior to recessing, the
 public body specifies the date, time and place
 for continuation of the meeting, and,
 immediately following the recessed meeting,
 posts notice of the date, time and place for
 the reconvened meeting on or near the door
 of the place where the original meeting was
 held and in at least one other location
 appropriate to provide public notice of the
 continuation of the meeting. Only matters
 appearing on the agenda of the original
 meeting may be discussed at the reconvened
 meeting.**

Commentary

Sometimes, a public body may convene a
 meeting and then, because of the length of the
 meeting or other circumstances, be forced to
 recess and continue the meeting on another day.
 If this happens, the public body, before
 recessing the meeting, must state the date, time
 and place for continuation of the meeting.
 Immediately after the meeting is recessed, the
 public body also must post notice of the
 continuation on or near the door of the place
 where the meeting originated and in at least one
 other location where it is likely that people
 interested in attending the meeting will see the

notice. The public body may not discuss items at the reconvened meeting that were not on the agenda of the original meeting.

Example 23:

A municipal zoning commission holds a hearing on a variance request. More people than anticipated appear to provide testimony for and against the variance. The commission wants to be sure that it receives input from all interested parties. At midnight, there are still several people left who wish to testify. The commission votes to recess the meeting and, before recessing, announces that the meeting will be reconvened the following day at 5:30 p.m. in the same room. After the meeting is recessed, a notice stating that the meeting will reconvene at the specified date, time and place is posted next to the door of the place where the meeting was held and on the bulletin board outside the commission's offices.

Example 24:

A state board holds a meeting that is interrupted by a bomb threat in the building. A search of the building reveals that the threat was a crank call, but the search takes two hours to complete. When they return to the meeting, the board members realize that they do not have time to discuss the last item on the agenda. They vote to reconvene the meeting two days later and comply with the requisite notice requirements. The next day, the board's administrator contacts the chair to request a meeting to decide on the purchase of office equipment. Although the board plans to reconvene the following day, it cannot discuss the purchase because it was not on the original meeting's agenda and is not an emergency. Instead, the chair must call a separate special meeting to discuss the purchase or wait to discuss the purchase at the next regular meeting.

F. Agenda

The Law

Meeting notices shall include an agenda containing a list of specific items of business to be discussed or transacted at the meeting or information on how the public may obtain a copy of such an agenda. Except in the case of an emergency or in the case of a public body that ordinarily meets more frequently than once per week, at least seventy-two hours (72) hours prior to the meeting, the agenda shall be available to the public and posted on the public body's web site, if one is maintained. A public body that ordinarily meets more frequently than once per week shall post a draft agenda at least seventy-two (72) hours prior to the meeting and a final agenda at least thirty-six (36) hours prior to the meeting. Except for emergency matters, a public body shall take action only on items appearing on the agenda. For purposes of this Subsection, an "emergency" refers to unforeseen circumstances that, if not addressed immediately by the public body, will likely result in injury or damage to persons or property or substantial financial loss to the public body. Within ten days of taking action on an emergency matter, the public body shall report to the attorney general's office the action taken and the circumstances creating the emergency; provided that the requirement to report to the attorney general is waived upon the declaration of a state or national emergency.

1. Seventy-Two Hour Requirement

Public bodies must include an agenda in their meeting notices or information on where a copy of the agenda may be obtained. With two exceptions, a public body must make the agenda available to the public at least 72 hours before a meeting. The 72-hour requirement applies regardless of whether it includes a Saturday, Sunday or holiday. For example, a public body holding a meeting on a Monday at 9:00 a.m. would meet the 72-hour requirement if it made the agenda available on Friday by 9:00 a.m.

The exceptions to the 72-hour requirement apply to: (1) meetings held to address an

emergency, which are discussed in more detail below, and (2) public bodies that ordinarily meet more than once a week. Those public bodies must post a draft agenda at least 72 hours before a meeting and a final agenda at least 36 hours before the meeting.

2. Action on Agenda Items

A public body may discuss a matter, but cannot take action, unless the matter is listed as a specific item of business on the agenda. Action on items that are not listed on the agenda for a meeting must be taken at a subsequent special or regular meeting.

Example 25:

A mutual domestic water users association reserves an hour of its regular board meeting for public comment. During the public comment portion of a meeting, a member of the association complains about frequent interruptions in water service. The topic was not listed on the agenda for the meeting. If they choose, the board members may discuss options for addressing the complaint, but must delay any action on it until a subsequent meeting after the issue is listed on the agenda available to the public seventy-two hours before the meeting.

3. Specific Agenda Items

The agenda must contain a list of “specific items” of business to be discussed or transacted at the meeting. 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. A public body should avoid describing agenda items in general, broad or vague terms, which might be interpreted as an attempt to mislead the public about the business the public body intends to transact. This is an especially important consideration when a public body intends to act on an agenda item.

Example 26:

The agenda for a school board meeting contains the following items of business:

1. *Old Business*
2. *New Business*
 - a. *vending machines in the cafeteria*
 - b. *personnel matters*

Under item 1, the board discusses and acts on three contracts. Under item 2(a), the board discusses and votes to allow vending machines in the middle school cafeteria. Under item 2(b), the board dismisses the director of the district’s administrative office and reorganizes the remaining staff positions. The board’s vote under item 2(a) is proper. In contrast, the board’s actions under items 1 and 2(b) violate the Act because those items were not listed as “specific items of business” on the agenda, as required by the Act. Items 1 and 2(b) are described in such general and vague terms that they do not give the public a reasonably clear idea about the actions the board intended to take at the meeting.

Commentary

The Act relaxes the agenda requirement in cases of emergency. The public body must still provide an agenda for an emergency meeting, but it need not be available twenty-four hours before the meeting. In addition, if an emergency matter arises too late to appear on a meeting’s agenda, the public body is permitted to discuss and take action on the matter. For purposes of the agenda requirements, an “emergency” is a matter that could not be foreseen by the public body and that requires immediate attention by the public body to avoid imminent personal injury or property damage or substantial financial loss to the public body.

Example 27:

One hour before its regular meeting, a county commission is informed by the president of the bank holding deposits of county funds that the

bank is about to fail. Because of certain accounting procedures, the commission's deposits at the bank for the day total \$50,000 above the amount covered by federal deposit insurance. The county commission may consider and act on the matter at its regular meeting to avoid the \$50,000 loss.

Example 28:

A local school board calls a special meeting with three days notice. The meeting notice states that the only item to be discussed is the need for updated instructional materials for the following school year. The school board is not required to do anything else to comply with the agenda requirement of the Act.

Commentary

When a public body takes action on an emergency matter, it has ten days to report to the Office of the Attorney General. The report must include the action taken and the circumstances creating the emergency. Once it receives the report, the Office of the Attorney General will evaluate whether the public body properly treated the matter as an emergency for purposes of the Act's agenda requirements.

When a state or national emergency has been declared, the Act waives the requirement to report to the attorney general.

G. Minutes

The Law

The board, commission or other policymaking body shall keep written minutes of all its meetings. The minutes shall include at a minimum the date, time and place of the meeting, the names of members in attendance and those absent, the substance of the proposals considered and a record of any decisions and votes taken that show how each member voted. All minutes are open to public inspection. Draft minutes shall be prepared within ten working days after the

meeting and shall be approved, amended or disapproved at the next meeting where a quorum is present. Minutes shall not become official until approved by the policymaking body.

Commentary

All public bodies subject to the provisions of this Act are required to keep written minutes of all open meetings. (As discussed in the next section, minutes need not be kept during closed sessions.) Minutes of open meetings shall record at least the following information:

- (a) the date, time and place of the meeting;
- (b) the names of all members of the public body in attendance and a list of those members absent;
- (c) a statement of what proposals were considered; and
- (d) a record of any decisions made by the public body and of how each member voted.

This means that minutes must contain a description of the subject of all discussions had by the body, even if no action is taken or considered. The description may be a concise, but accurate, statement of the subject matter discussed and does not have to be a verbatim account of who said what. It may be useful, although it is not required, to also record in the minutes the other persons invited or present who participate in the deliberations.

A draft copy of the minutes is required to be prepared within ten working days of the meeting. Draft copies of minutes must be available for public inspection and should clearly indicate on the draft that they are not the official minutes and are subject to approval by the public body.

The public body must approve, amend or disapprove draft minutes at the next meeting of a quorum, and the minutes are not official until they are approved. Official minutes open to public inspection under this Subsection are also

subject to public inspection under the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 to -12.

Example 29:

A quorum of the members of a state commission meet with the commission's staff to discuss some technical matters related to internal management. The matters discussed are not exempted by the Act from the open meetings requirement. The discussions conducted by a quorum of the commission constitute the discussion of public business and minutes must be kept.

Commentary

The statute's requirement that the minutes record how the members voted on proposals does not require a roll call on each vote, providing the vote of each member may be ascertained. Thus, a unanimous vote need not be recorded by listing the members. Where the vote is not unanimous, minutes that state "four members in favor, Mr. Jones against the motion" adequately reflects how the members voted as long as the minutes also list the members in attendance. If a vote taken by roll call is required in a particular situation by the rules of parliamentary procedure or otherwise, the minutes should record the vote of each individual member. The Act's requirement that the minutes show how each member voted on a matter decided by the public body precludes the members from voting anonymously.

Example 30:

At a regular open meeting, the State Astronomy Board elects a chairperson. The members want to vote on the nominees by secret ballot. This is not allowed by the Act because the minutes must reflect how each member voted.

H. Exceptions

The Law

The provisions of Subsections A, B and G of this section do not apply to...

Commentary

Subsection H prescribes the circumstances under which certain meetings or portions of meetings are not subject to the open meetings and minute-taking requirements of the Open Meetings Act. Because the basic policy established by the Act favors open meetings, the Act must be strictly followed when meetings are to be closed. As a general rule, meetings may only be closed when the matter to be considered falls within one of the enumerated exceptions defined in the Act and discussed in detail below.

A few closures may be implied from or required by other laws or constitutional principles that specifically or necessarily preserve the confidentiality of certain information. Aside from these limited circumstances, however, no exception to the Open Meetings Act can be implied. The following examples illustrate such laws.

Example 31:

Section 12-6-5 of the Audit Act provides that an audit report does not become a public record, i.e., subject to public inspection, until five days after the auditor releases it to the audited agency. Where the agency being audited is governed by a public body subject to the Open Meetings Act and where release of the report occurs at an exit conference at which a quorum of the members of the body is present, such exit conference need not be open to the public in order to preserve the confidentiality of the information protected by Section 12-6-5.

Example 32:

Section 61-1-7 of the Uniform Licensing Act provides that hearings generally shall be open to the public, but gives a board authority to hold a closed hearing "in cases in which any constitutional right of privacy of an applicant or licensee may be irreparably damaged ... if the board ... so desires and states the reasons for

this decision in the record.” This provision is consistent with the policy of the Open Meetings Act that permits closure when required by the constitution. Accordingly, a board may close a hearing pursuant to Section 61-1-7 if necessary to safeguard privacy interests protected by the New Mexico or United States Constitutions.

Example 33:

A state licensing board holds a hearing at which certain evidence to be presented is alleged to be constitutionally protected. The party making the allegation requests that the hearing be closed during the times the evidence is presented. The board should determine, through a procedure open to the public, whether disclosure would violate any constitutional rights. In making this determination, the board must apply the constitutional test appropriate to the rights asserted (e.g., in some circumstances the test involves balancing the harm to the party resulting from disclosure against the harm to the public and others from nondisclosure). If the board decides that disclosure will violate the party’s constitutional rights, the board can properly close those portions of any subsequent hearing that involve the protected evidence.

Example 34:

A city housing authority responsible for reviewing and approving applications for subsidized home loans for low-income families must necessarily consider the family’s financial records to determine if the family qualifies under the program. Although the housing authority is concerned with preserving the privacy of the applicants, the information required in order to establish eligibility for the loans is not protected and may be discussed in open meetings. As there is no basis for closing the meetings, the housing authority should respect the privacy of the applicants by asking only for the specific information required by the program and no more.

1. Licensing

The Law

Meetings pertaining to issuance, suspension, renewal or revocation of a license except that a hearing at which evidence is offered or rebutted shall be open. All final actions on the issuance, suspension, renewal or revocation of a license shall be taken at an open meeting.

Commentary

This paragraph permits a public body to close a meeting to discuss certain matters pertaining to a particular license. Excepted are hearings conducted to present or rebut evidence in support of disciplinary action against a licensee, which must be open. The public body may close its meeting to deliberate, but all final actions concerning a license must be made in an open meeting.

Boards subject to the Uniform Licensing Act or the Administrative Procedures Act must comply with applicable procedures required by those acts for the issuance, suspension, renewal or revocation of a license.

Example 35:

The State Board of Psychologist Examiners meets in closed session to discuss an applicant for a license to practice psychology. The applicant has failed the examination for professional practice in psychology required by statute. After its discussion, the Board opens the meeting and votes to deny the application. In this situation, the Uniform Licensing Act does not require a hearing, so the board’s action is proper.

Example 36:

To ensure that complaints against licensed practitioners are handled efficiently, the State Board of Medical Examiners establishes a complaint committee. The committee is charged with reviewing complaints made to the Board and deciding which complaints should be presented to the Board for possible action. To decide which complaints will be acted on by the

Board, the committee applies criteria established by the Board. Under these circumstances, the committee is executing rather than establishing Board policy and is not subject to the Act.

2. Limited Personnel Matters

The Law

Limited personnel matters; provided that for purposes of the Open Meetings Act, “limited personnel matters” means the discussion of hiring, promotion, demotion, dismissal, assignment or resignation of or the investigation or consideration of complaints or charges against any individual public employee; provided further that this Subsection is not to be construed as to exempt final actions on personnel from being taken at open public meetings; nor does it preclude an aggrieved public employee from demanding a public hearing. Judicial candidates interviewed by any commission shall have the right to demand an open interview.

Commentary

This exception permits a public body to close meetings for the purpose of discussing certain matters concerning individual employees of the public body. Specifically, a public body may close a meeting to discuss the hiring, promotion, demotion, dismissal, assignment or resignation of an individual public employee or the investigation or consideration of complaints or charges against an individual public employee. A public body may also close a meeting for matters that are closely related to those specifically listed in the exception, such as performance appraisals and interviews with job candidates.

The exception does not permit a public policymaking body to retreat into executive session to discuss personnel policies, procedures, budget items, and other issues not concerning the qualifications or performance of

specific individuals. This point is emphasized in Section 10-15-1(B) of the Act (discussed above), which specifies that meetings of a public body held to formulate public policy “including the development of personnel policy, rules, regulations or ordinances” are open meetings.

Example 37:

A county commission wishes to discuss whether its budget permits it to hire additional staff. The meeting cannot be closed under the limited personnel matters exception because the commission is not considering an individual employee.

Example 38:

The governing body of a municipality is considering a contract to retain an attorney to represent the municipality on a part-time basis. The attorney is to be an independent contractor and not an employee of the municipality. This paragraph does not authorize closing a meeting of the governing body to select an attorney because the matter to be considered does not concern a public employee.

Example 39:

A local school board, pursuant to statutory authority, meets to appoint a person to fill a vacancy on the board. This paragraph does not authorize closing the meeting to consider that appointment because a board member is not an employee of the school district.

Example 40:

A city council meets to conduct a performance evaluation of the city manager. The evaluation may be conducted in a closed meeting. Although not expressly listed among the actions justifying closure under the limited personnel matters exception, it is closely related to the specified actions, all of which require discussion of an employee’s job performance and qualifications. For example, a performance evaluation likely

would provide the basis for any promotion, demotion, dismissal, assignment or resignation.

Example 41:

During its regular meeting, a state commission discusses a contract it has entered into with a person who happens to be employed by a nearby municipality. The state commission cannot close its meeting to discuss the contractor under the limited personnel matters exception. Although the contractor also is a public employee, she is not an employee of the state commission. This exception generally applies only to discussions about individuals employed by the public body invoking the exception.

Commentary

In all cases, a public body must take final action on a personnel matter falling within this exception in open session. This ensures that all final actions taken on personnel matters are announced publicly and the position of each member on the issue is recorded in the official minutes.

Example 42:

A school board meets to consider applicants for the position of superintendent. Discussion of the applicants' qualifications is conducted in closed session but the final decision or vote of the board with respect to hiring one of the applicants as superintendent must be taken in open session.

Example 43:

An administrative licensing board meets in closed session to review complaints against the executive director. The board takes no action. Therefore, nothing needs to be presented by the board during open session.

Commentary

The exception states that it does not preclude an individual employee from demanding an open

hearing. This provision does not confer the right to a hearing, but when an employee has a statutory or constitutional right to a hearing spelled out under another federal or state law, the public body cannot rely on the limited personnel matters exception to close the hearing if the employee wants it to be open. For example, the requirements of due process of law, a constitutional right, often mandate that before a right or privilege may be denied by a public body, the person possessing or seeking to acquire the right must be provided notice of the anticipated action and an opportunity to be heard prior to a final decision. If an employee of a public body is entitled to such a hearing before the public body can take disciplinary or other adverse action against the employee, the employee may demand and obtain an open hearing. Similarly, even if no law provides an employee with the right to a hearing, a public body that elects to give an employee the opportunity to be heard in connection with a personnel matter covered by the exception must conduct the hearing in open session at the employee's request.

Example 44:

A board of county commissioners meets to discuss a complaint that a county building inspector had attempted to rob a private citizen while on duty. The board is considering disciplinary action but wishes to wait until law enforcement authorities have completed their investigation. The board meets, goes into executive session, and decides to suspend the employee with pay. The board takes action in open session. The employee demands an immediate open hearing, even though the county personnel policy does not provide for a hearing for suspension. If the commission is not required by its policies or the state and federal constitutions to conduct a hearing at this stage, no hearing need be granted.

Example 45:

An employee of AAA City is notified by her supervisor that she was to be terminated for

insubordination. Pursuant to the City's personnel policies, the employee requests a post-disciplinary hearing before the City Council. By statute and under the City Charter, the City Council has the power to hire and discharge employees. The City Council delegates its authority to conduct the hearing to a hearing officer. The employee requests a public hearing.

The City's personnel policies give an employee who is discharged the right to a post-disciplinary hearing at the employee's request. Although an individual hearing officer is conducting the hearing, the hearing is subject to the Open Meetings Act because the hearing officer is exercising the City Council's delegated authority to terminate employees. Accordingly, the hearing officer must conduct the hearing in public because the employee requested an open hearing.

Commentary

The limited personnel matters exception confers upon candidates for judicial office the right to a public interview by a commission charged with conducting such interviews.

3. Administrative Adjudicatory Deliberations

The Law

Deliberations by a public body in connection with an administrative adjudicatory proceeding. For purposes of this paragraph, an "administrative adjudicatory proceeding" means a proceeding brought by or against a person before a public body in which individual legal rights, duties or privileges are required by law to be determined by the public body after an opportunity for a trial-type hearing. Except as otherwise provided in this section, the actual administrative adjudicatory proceeding at which evidence is offered or rebutted and any final action taken as a result of the proceeding shall occur in an open meeting.

Commentary

This paragraph permits a public body that conducts "administrative adjudicatory proceedings" to close the proceedings to deliberate. Examples of administrative adjudicatory proceedings contemplated by the exception include factual hearings conducted before issuing licenses and permits, licensee and employee disciplinary hearings, hearings like those conducted by the Human Rights Commission to consider alleged civil rights violations, and hearings held to consider wage and other labor related claims. Like a trial or other court hearing, these proceedings involve the presentation of facts and evidence in a public hearing and an impartial decision maker that must weigh the evidence presented and apply the applicable law, regulation or rule to the particular situation before being heard. Deliberations covered by the exception include discussions among the members of the public body at the conclusion of an administrative adjudicatory hearing during which the evidence, facts and law presented at the hearing are considered to reach a final decision. Deliberations also include discussions during the hearing concerning how to rule on motions and objections made by the parties.

The exception extends to all administrative adjudicatory proceedings the same right to deliberate in private that the Act specifically provides for licensing and personnel hearings. It also parallels the same privilege judges and courts have to weigh and consider in private evidence presented during a trial before reaching their final decision. Permitting agencies to deliberate in private under the specified circumstances encourages the thorough and candid consideration of evidence presented through witnesses or otherwise. As with the licensing and personnel exceptions, the actual proceeding where evidence is offered or rebutted and any final action or decision resulting from the proceeding must occur in a public meeting.

Example 46:

The Human Rights Commission receives a complaint alleging that a hotel refused service to the complainant in violation of her civil rights. The Commission schedules a public hearing during which evidence is presented and witnesses testify on both sides of the issue. At the conclusion of the hearing, the Commission may close the hearing to consider the evidence and the credibility of the witnesses to determine what the facts are and how to apply the Act. The Commission must vote on and announce its final decision in a public meeting. This may occur either on the same day as the hearing or during a subsequent public meeting.

Commentary

The exception applies only where a public body is required by law to determine individual legal rights, duties or privileges after providing the opportunity for a trial-type hearing. Public bodies may not misuse the exception as a means of avoiding the open meeting requirements. In other words, unless the Act mandates that a matter be determined after an administrative adjudicatory proceeding, a public body cannot hold a “hearing” on an issue and then close its meeting to “deliberate” if the issue is one that otherwise would have to be discussed in public and is not one for which the Act mandates a trial- type process.

Example 47:

One of the items discussed at a village council meeting is a contract for garbage collection. One councilor suggests that the village hold a hearing to hear each bidder’s proposal, and then go into executive session to “deliberate” on which proposal to accept. The councilor’s suggestion is correctly voted down after the council’s attorney advises that the selection of a contractor is governed by the Procurement Code, which does not authorize an administrative adjudicatory proceeding prior to awarding a contract.

4. Personally Identifiable Student InformationThe Law

The discussion of personally identifiable information about any individual student, unless the student, his parent or guardian requests otherwise.

Commentary

This exception is intended to cover discussions that involve personally identifiable information about a student. The exception reflects the protection the federal Family Educational Rights and Privacy Act (“FERPA”) provides for similar information in educational records. *See* 20 U.S.C. Section 1232g. Under FERPA, a school risks losing federal funding if it has a policy or practice of permitting the release of records containing information directly related to a student or “personally identifiable information” contained in those records. Federal regulations promulgated under FERPA define “personally identifiable information” to include a student’s name; parent’s or other family member’s name; the address of a student or student’s family; a student’s social security number, student number or other personal identifier; and a list of personal characteristics or other information that would make the student’s identity easily traceable. *See* 34 C.F.R. Section 99.3.

Essentially, therefore, the exception for meetings to discuss personally identifiable information permits a school board or board of education to close a meeting whenever it discusses an individual student, unless the student, or his parent or guardian, requests that the discussion occur in public. Although the exception does not expressly limit its application, the context of the exception makes it clear that it is not meant to apply to any public body that discusses an individual who happens to be a student somewhere. Like FERPA, which applies only to records held by educational agencies and institutions, only those public

bodies that govern or regulate school districts or educational institutions, such as local school boards and university boards of regents, can legitimately rely on the exception to close a meeting.

Example 48:

A local school board meets to discuss whether to suspend a high school student. Unless the student or her parents request a public hearing, the school board should hold a closed meeting to discuss the circumstances leading to the disciplinary action and what action is appropriate.

Example 49:

The Real Estate Commission holds a public hearing before revoking a broker's license. The broker is a student at the local community college. The Commission cannot close the hearing on the basis that it will involve the discussion of personally identifiable information about the broker.

Commentary

As with the exception for limited personnel matters, a school board or similar public body cannot rely on this paragraph to close a meeting to discuss or take action on educational policies and procedures, budgetary matters and other issues that involve students generally. The exception applies only to discussions relating to individual students. Other specific statutes governing schools also may require public meetings to discuss general student matters. For example, *see* NMSA 1978, Section 22-5-4.3 (requiring local school boards to involve parents, school personnel and students in, and to hold public hearings on, the development of student discipline policies).

5. Collective Bargaining

The Law

Meetings for the discussion of bargaining

strategy preliminary to collective bargaining negotiations between the policymaking body and a bargaining unit representing the employees of that policymaking body and collective bargaining sessions at which the policymaking body and the representatives of the collective bargaining unit are present.

Commentary

This exception allows a public body that is involved, or is considering becoming involved, in collective bargaining to discuss its preliminary strategy in closed session and to conduct negotiations with representatives of a collective bargaining unit in closed session. A "bargaining unit" for purposes of the exception is a group of employees with certain occupational characteristics (e.g., blue collar, secretarial, clerical, etc.) that has been confirmed or designated as appropriate for collective bargaining purposes. The "representative of a collective bargaining unit" is generally a labor organization or union that represents employees regarding the terms and conditions of employment.

Example 50:

An ad hoc group of employees of a municipality has formed to petition the governing body for increased salaries. Neither the governing body's preliminary discussion of the request nor the negotiations between representatives of the employees' group and the governing body may be conducted in closed session because the group of employees is not a "bargaining unit" or "representatives of the collective bargaining unit."

Example 51:

The governing board of a local school district receives a request from a local chapter of the state's leading teacher's organization to collectively bargain on behalf of teachers in the district. The organization has been certified by the local labor relations board as the teacher's exclusive representative. Discussion of the

bargaining request may be conducted in closed session.

Commentary

Before the exception will apply, there must be a labor organization and bargaining unit of the public body's employees in existence. In other words, the exception does not cover discussions of general collective bargaining policy by the public body in anticipation of potential negotiations in the future.

Example 52:

A school board is debating whether to establish a local labor relations board and has before it a draft labor/management relations resolution that would create, and establish procedures for, the local board. At this time, no bargaining unit or representative has proposed negotiations, and the board would be discussing only general collective bargaining policy to be applied in the event such bargaining occurs. Therefore, under the collective bargaining exception to the Act, the discussion must occur in an open meeting and the school board may not go into executive session to discuss the resolution.

Commentary

Collective bargaining by public employees generally is governed by the Public Employees Bargaining Act, NMSA 1978, ch. 10, art. 7E. Section 10-7E-17(G) of that Act contains a provision allowing closed meetings in circumstances similar to those set forth in the Open Meetings Act. It provides for closure of the following meetings:

- (1) meetings for the discussion of bargaining strategy preliminary to collective bargaining negotiations between a public employer and the exclusive representative of the public employees of the public employer;
- (2) collective bargaining sessions; and

- (3) consultations and impasse resolution procedures at which the public employer and the exclusive representative of the appropriate bargaining unit are present.

While the first two paragraphs are coextensive with the collective bargaining exception of the Open Meetings Act, the third paragraph describes an additional situation where closure is justified.

6. Certain Purchases

The Law

That portion of meetings at which a decision concerning purchases in an amount exceeding two thousand five hundred dollars (\$2,500) that can be made only from one source and that portion of meetings at which the contents of competitive sealed proposals solicited pursuant to the Procurement Code are discussed during the contract negotiation process. The actual approval of purchase of the item or final action regarding the selection of a contractor shall be made in an open meeting.

Commentary

This paragraph authorizes a public body to discuss two types of purchases in closed session. First, the exception permits a closed meeting to discuss:

- (a) a purchase;
- (b) that exceeds \$2,500 in amount; and
- (c) that can only be made from one source.

The final action taken to approve such a purchase must be taken at an open meeting.

Example 53:

The governing board of a municipality is unable to purchase a particular kind of computer equipment compatible with its other equipment

but has finally located a party who is willing to lease the equipment to the municipality for six months. The value of the computer equipment if purchased outright is \$20,000 and the total rental amount of the lease is \$2,000. In determining whether discussion of this lease may occur in closed session, the governing body should consider the following:

(a) Whether the term “purchase” used in the exemption includes leases. Because the legislature did not use a broader term for acquiring property, it might be argued that it did not intend to include pure lease transactions. By contrast, Section 10-15-1(H)(8) of the Act refers to the “purchase, acquisition or disposal” of real property, clearly indicating the legislature’s intent to encompass all means of acquiring real property. Limiting the meaning of purchase also is consistent with the presumptions that all meetings of a public body are open and that the exceptions be construed narrowly. On the other hand, the terms “purchases” and “one source” in the exception indicate that the legislature had the Public Purchases Act (now the Procurement Code) in mind when it drafted the exemption. At that time, the Public Purchases Act broadly defined “purchasing” as “procuring” materials and services. There also is no obvious policy reason for including purchases but not leases within the exemption. Accordingly, it is reasonable to conclude that, when it drafted the exemption, the legislature intended that the term “purchases” be employed broadly to include leases.

(b) The amount of the lease. Regardless of the value of the computer, the amount actually to be expended by the municipality pursuant to the lease is \$2,000.

(c) Available sources. Under these facts, there would appear to be only a single source.

The governing body could not discuss this lease in closed session because, although the transaction arguably may be a purchase for purposes of the exception and can be made from

only one source, the amount to be expended does not exceed \$2,500.

Example 54:

A board of county commissioners is considering the purchase of a particular dump truck for \$30,000. While there are comparable trucks made by several manufacturers that would serve the same purpose, the governing body desires one particular model since it is the same brand as the county’s existing dumpsters. However, as long as there are comparable models available from other sources, this may not be considered a purchase from a single source for purposes of the Act and must be discussed in open session.

Commentary

As with the exception for limited personnel matters, the requirement that the actual approval of the purchase be made in open session may appear to be a mere formality; but again, this requirement makes the particular action taken by the governing body a matter of public record and informs the public about how each member of the body voted.

Example 55:

In closed session, a school board discusses the controversial purchase of a \$2,750 painting of a cougar to hang in the auditorium as the symbol of the high school basketball team. The painting is available from only one artist. The closed session is proper, but when the discussion is concluded, the board must reconvene in open session to vote on the proposed purchase.

Commentary

The second situation where a public body may close a meeting under this paragraph is intended to parallel the similar protection provided under Section 13-1-116 of the Procurement Code. That provision states that the contents of proposals submitted in response to a public agency’s request for proposals “shall not be disclosed so as to be available to competing

offerors during the negotiation process.” In addition to enhancing a public body’s ability to get the best deal, this exception also tends to level the playing field for offerors.

Example 56:

A water district issues a request for proposals for auditing services. It receives six (6) proposals, none of which exactly fit the district’s needs. The district’s governing board may hold a closed session to discuss the offers and decide how to handle negotiations with the individual offerors.

Commentary

Once the negotiating process is finished, there is no longer a need for the exception and the agency’s final action to select a contractor must be taken in an open meeting.

7. Litigation

The Law

Meetings subject to the attorney-client privilege pertaining to threatened or pending litigation in which the public body is or may become a participant.

Commentary

This exception to the Act is intended to incorporate into the open meetings law the attorney-client privilege protecting confidential communications between attorneys and their public agency clients for the limited purpose of allowing a public body to meet in closed session with legal counsel to discuss threatened or pending litigation involving the public body. Public bodies, no less than private parties to litigation, are entitled to effective representation of counsel, including the opportunity to confer without disclosing the substance of the discussion. However, public bodies may invoke the attorney-client privilege to close a meeting only when the public body is involved in a

lawsuit or faced with an actual or credible threat of litigation. Absent such a threat, the exception does not protect discussions about “possible” or “potential” litigation.

Generally, the public body’s attorney should be present in the closed meeting, either in person or by telephone. In certain limited situations, it may be permissible for a public body to close a meeting to discuss legal advice about litigation that is given by letter or other written memorandum. In all cases, however, to legitimately invoke the pending litigation exception, the closed discussion must involve communications between the public body and its attorney.

Example 57:

A local school board meets to discuss the award of a contract to one of several bidders. The board members would like to close the meeting pursuant to this exception on the theory that it is always possible that one of the unsuccessful bidders may threaten litigation. If there is no actual and credible threat of litigation by one of the bidders, this would be an unwarranted extension of the exception and the meeting may not be closed.

Example 58:

The city council is conducting a hearing on proposed zoning regulations. Several witnesses raise plausible questions about the legality of one of the proposed rules and state that they definitely would challenge the rules in court if adopted. At the hearing or at a later time, the council may meet in closed session with its attorney to evaluate the legality of the proposed rule and make the determination as to whether it could be defended in court.

Example 59:

The attorney for a licensing board feels that a recent Supreme Court decision may affect the validity of certain regulations adopted by the board. Absent a pending lawsuit on this issue in

which the board may participate or an actual threat of litigation, the board and its attorney may not meet in closed session to discuss the impact of the court decision and whether it is necessary to amend the regulations to prevent a possible legal action from being filed against the board.

Example 60:

A municipality and a rancher have both claimed ownership of a particular piece of property. They are attempting to negotiate a settlement of the dispute to avoid having to go to court. The governing body of the municipality properly meets in closed session with its attorney to determine how much they are willing to give up to reach a settlement. Later, at a subsequent meeting, the governing body may go into executive session to discuss a letter from the attorney setting forth the proposed settlement terms and her advice regarding acceptance of the terms.

Example 61:

A teacher who was terminated by a school board has brought an action for breach of contract against the board. The lower court decided in favor of the teacher. The school board and its attorney may meet in closed session to determine whether or not to appeal to a higher court.

Commentary

This exception does not apply only when a public body is sued or is threatened with litigation. It also may be used to close a meeting when the public body wants to consult with its attorney about a lawsuit the public body has initiated or is considering initiating against a defendant.

Example 62:

The result of a lawsuit filed by an individual against another individual will substantially affect a licensing board's ability to apply

certain laws. The board, although not a party to that litigation, may meet in closed session with its attorney to discuss filing a brief as amicus curiae (friend of the court).

Commentary

It is important to note that this exception allows a public body to rely on the attorney-client privilege to close a meeting only when the public body is involved in pending or threatened litigation. There is no exception allowing a public body to rely generally on the attorney-client privilege to close a meeting. Aside from discussions with its attorney that are otherwise excepted from the Act, the public body will either have to hold discussions with its attorney in an open meeting or rely on other means to protect its communications with its attorney that do not violate the Act. For example, the attorney might communicate with each member of the public body individually through one-on-one conversations or letters. Keep in mind, however, that if the attorney's advice is discussed among a quorum of the public body's members--in person, by e-mail, by telephone or otherwise--the discussion must be conducted in accordance with the Act, including the requirements for a public meeting, unless it falls within one of the Act's exceptions.

Example 63:

A five-member state commission wants to make a gift of public money to a worthy charity. The commission's attorney is concerned that the gift may violate the state constitution. She sends a letter to each individual commissioner voicing her concerns. The topic of the gift is placed on the agenda for the next commission meeting. The commissioners' discussion of the gift at that meeting must occur in public, even if they discuss the attorney's advice regarding the gift, because the topic is not covered by one of the Act's exceptions.

8. Real Property and Water Rights

The Law

Meetings for the discussion of the purchase, acquisition or disposal of real property or water rights by the public body.

Commentary

This exception is intended to enable a public body to consider the purchase, acquisition or disposal of real property or water rights without the risk of alerting those who could take action that would result in lost opportunities or greater costs to the public body. The exception applies only to discussions of the proposed transactions it covers. Action on the purchase, acquisition or disposal of real property or water rights by the public body must take place in an open meeting, as required by Section 10-15-1(B).

Example 64:

A board of county commissioners is considering acquiring land for a playground and purchasing playground equipment. The discussion concerning the acquisition of the land may be conducted in closed session. The discussion concerning the purchase of the equipment may not be held in closed session because the equipment is not “real property.”

Example 65:

A city council is considering leasing some of its water rights to another entity. The lease constitutes the “disposal” of water rights and discussion of the transaction may be conducted in closed session.

Example 66:

A state hospital is considering the purchase of an industrial laundry business. If the transaction involves the acquisition of real estate along with the business, the hospital board may discuss that part of the transaction in a private meeting. However, other aspects of the purchase, such as the washing machines, the business’ goodwill, and the operation of the business are not real estate and would not be covered by this exception. These other aspects

would have to be discussed in a public session unless another exception applies, such as the exception for sole source purchases in excess of \$2,500.

9. Public Hospital Board Meetings

The Law

Those portions of meetings of committees or boards of public hospitals where strategic and long-range business plans or trade secrets are discussed.

Commentary

This exception applies to certain topics discussed by public hospital boards and committees. The legislature may have thought that in these limited instances, the policies favoring open meetings were outweighed by considerations such as the hospital’s ability to compete with private health care providers.

Example 67:

The governing board of a county hospital leased to a private corporation meets to discuss its employee drug abuse policies. Unless otherwise excepted by the Act, the discussion must be held in open session because the matters discussed do not involve the board’s strategic or long-range business plans or trade secrets.

10. Gaming Control Board Meetings

The Law

That portion of a meeting of the gaming control board dealing with information made confidential pursuant to the provisions of the Gaming Control Act.

Commentary

This exception applies only to meetings conducted by the Gaming Control Board and

permits the Board to hold a closed meeting to discuss information that is confidential under the Gaming Control Act, NMSA 1978, Sections 60-2E-1 to -61. Information made confidential under the Gaming Control Act includes “confidential security and investigative information,” and confidential information, documents or communications of an applicant or licensee required by law, Board regulations or a subpoena. *See* NMSA 1978, Sections 60-2E-6(C), 60-2E-41.

I. Closed Meetings

Commentary

Before meeting in closed session, a public body must follow the procedures specified in Section 10-15-1(I) of the Act. As discussed below, there are different procedures for closing an open meeting and for holding a closed meeting separately from an open meeting.

1. Closing an Open Meeting

The Law

If any meeting is closed pursuant to the exclusions contained in Subsection H of this section, the closure:

(1) If made in an open meeting, shall be approved by a majority vote of a quorum of the policymaking body; the authority for the closure and the subject to be discussed shall be stated with reasonable specificity in the motion calling for the vote on a closed meeting; the vote shall be taken in an open meeting; and the vote of each individual member shall be recorded in the minutes. Only those subjects announced or voted upon prior to closure by the policymaking body may be discussed in a closed meeting.

Commentary

The agenda of a meeting of a public body normally covers various topics, some of which may fall within the enumerated exceptions to

the open meeting requirement of the Act. When an item is presented for discussion that may be considered in closed session, a motion for closure must be made by a member of the public body stating the authority for closure and the reason for closing the meeting with reasonable specificity. The subject announced will comply with the “reasonable specificity” requirement if it provides sufficient information to give the public a general idea about what will be discussed without compromising the confidentiality conferred by the exception. For example, a motion might be stated: “I move that the commission convene in closed session as authorized by the limited personnel matters exception to discuss possible disciplinary action against an employee.” Or, “I move that the board discuss the case of X vs. The County with the board’s attorney in executive session as authorized by Section 10-15-1(H)(7) of the Open Meetings Act.”

A roll call vote of the members present must be taken on the motion and the vote of each individual member recorded in the minutes. If the motion is approved, the public body shall convene in closed session to consider only the item or items covered by the motion voted on prior to closing the meeting.

Example 68:

Item 6 on the agenda of a regular open meeting of a municipality’s governing board states:

“Purchase of Property for New Courthouse.” A member of the governing body moves that the meeting be closed pursuant to Section 10-15-1(H)(8) to consider the purchase of real property for the new courthouse. The motion is duly seconded and a roll call vote is taken. The minutes reflect that each of the members present voted in favor of the motion. This procedure would comply with the requirements for closing an open meeting under the Act.

Example 69:

A city council has been sued for breach of

contract by a former employee. During an open meeting of the council, one member moves to close the meeting to discuss the status of the case with the city attorney, citing both the limited personnel and litigation exceptions. If the council votes to defeat the motion, the matter is discussed in open session. If the motion passes, any final action taken by the council involving the hiring, promotion, demotion, dismissal, assignment or resignation of the former employee must be taken in open session due to the restriction of Section 10-15-1(H)(2). A final decision as to how to defend the charges alleged in the lawsuit, however, could remain confidential under the litigation exception.

Commentary

Unless an action requiring a vote in public is to be taken, the public body may adjourn the public meeting when it goes into closed session and not return to public session after it completes its closed meeting. If the public body does re-open the meeting after a closed session, the public body may follow whatever procedures it deems appropriate. The Act does not have any requirements for returning to open session after a closed session.

2. Closed Meeting Outside an Open Meeting

The Law

If any meeting is closed pursuant to the exclusions contained in Subsection (H) of this section, the closure: ...

(2) If called for when the policymaking body is not in an open meeting, shall not be held until public notice, appropriate under the circumstances, stating the specific provision of the law authorizing the closed meeting and stating with reasonable specificity the subject to be discussed, is given to the members and to the general public.

Commentary

A public body may sometimes need to meet in a special meeting to discuss only a matter that is covered by one of the exceptions defined in Section 10-15-1(H) of the Act. Under those limited circumstances, the public body must give notice of the meeting to its members and to the public in accordance with its policy regarding notice of special meetings or as may be reasonable under the circumstances. Such notice must state the exception to the Act or other legal authority that authorizes the closed meeting and must state the subject to be discussed with reasonable specificity. When noticed properly, these closed meetings may take place without having an open session before or after the meeting.

Example 70:

A county commission's resolution provides that the chair may call a special meeting on 3 days notice by posting the notice of the meeting at the county courthouse and publishing the notice in the local daily newspaper. The chair discovers that the board must make an immediate decision with respect to the purchase of some land in the county and determines that it is necessary to call a special meeting for that purpose. In addition to the date, time and place of the meeting, the notice states the following in compliance with Section 10-15-1(I)(2):

THIS MEETING IS CALLED TO DISCUSS THE PURCHASE OF LAND AND SHALL BE CLOSED TO THE PUBLIC PURSUANT TO NMSA 1978, SECTION 10-15-1(H)(8).

Commentary

At a closed meeting held outside of an open meeting, topics that are not covered in the notice may not be discussed and no ordinary business, such as the approval of minutes from the last meeting, may be conducted.

Example 71:

A member of a municipality's governing board is informed at 6:00 p.m. Sunday that the

municipality's police officers have called for a wildcat strike to show their disapproval of the board's latest salary offer made during a particularly heated collective bargaining session. The strike is planned for Monday morning.

The board's policy for notice of emergency meetings requires the board president to give 24 hours notice by local radio announcement. The board member who received the information calls the board president who gives two hours notice by radio of an emergency closed meeting to discuss collective bargaining strategy and possible legal actions against the police officers.

Due to the board's interest in planning for such a strike with its attorney, preserving the peace, and protecting the municipality's residents from an immediate threat to their security and safety, the two-hour notice is "appropriate under the circumstances."

Commentary

Although not addressed by the Act, one issue that sometimes comes up is whether it is proper for a public body to permit persons other than its members to be present during a closed meeting. There is no single answer to this question, although generally a public body may include anyone it wants in its executive session. In certain circumstances, however, considerations aside from the Act may affect the permissibility of allowing non-members to be present. For example, when a public body holds a closed session pursuant to Section 10-15-1(H)(3) of the Act to deliberate after an administrative adjudicatory proceeding, it probably should exclude other persons (except, perhaps, its attorney) from the closed session. Otherwise, it may give at least the appearance that the public body is improperly and unfairly receiving additional information about the matter before it without the participation of one or more of the parties to the proceeding.

A public body also should use caution when it

permits persons other than the body's members and its attorney to attend a meeting that is closed under the litigation exception in Section 10-15-1(H)(7) of the Act. That exception expressly applies to meetings "subject to the attorney-client privilege," so the public body should consult with its attorney to ensure that the presence of other persons during the closed session will not affect the privilege and, in turn, make the use of the litigation exception improper.

Example 72:

At a teacher disciplinary hearing held by a school board, the superintendent testifies concerning the events resulting in the proceeding. Although the superintendent usually serves as recording secretary for the board, she may not be present during the board's deliberations after the hearing. Because the board may not hear additional evidence after the close of the hearing, the presence of the superintendent, a witness in the hearing, during the closed session could be viewed as an unfair influence on the board's discussion and decision concerning the teacher.

Example 73:

During its regular meeting, a county commission goes into executive session to discuss the purchase of land. It permits members of the public attending the meeting to remain during the closed session except those people the commission knows are vehemently opposed to the purchase. This is not proper since the commission is using the executive session to unreasonably exclude only certain members of the public from what would otherwise be a public meeting.

Example 74:

A state board holds a closed meeting to discuss competitive sealed proposals it has received in response to a request for proposals made according to the Procurement Code. During its closed discussion, the board may permit each

proposer to come before the board one at a time and answer questions concerning its proposal.

J. Statement Regarding Closed Discussions

The Law

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. This statement shall be approved by the public body under Subsection G of this section as part of the minutes.

Commentary

Section 10-15-1(J) is intended to reinforce the requirement that discussions during closed sessions be limited to topics that are expressly excepted from the open meeting requirements. Because closed meetings or executive sessions

are not open, members of the public are naturally curious about their content and suspicious about any perceived misuse of the exceptions allowing closure. Including the required statement in their minutes, will remind public bodies that there are only a few proper justifications for closure and make them less likely to succumb to any temptation to expand closed discussions beyond the topic announced in the motion for or notice of closure.

Example 75:

During its regular monthly meeting, a city council closes its meeting to discuss hiring a city manager. The minutes for the meeting show that a motion was made to go into executive session to discuss hiring a city manager as authorized by the limited personnel matters exception to the Act. The minutes also record the vote of each councilor on the motion to go into executive session. Finally, the minutes state, as required by Section 10-15-1(J) of the Act: “The only matter discussed during the closed session was the hiring of a city manager.”

IV. Section 10-15-2. State Legislature; Meetings

A. Meetings of Committees and Policymaking Bodies of the Legislature

The Law

Unless otherwise provided by Joint House and Senate Rule, all meetings of any committee or policymaking body of the legislature held for the purpose of discussing public business or for the purpose of taking any action within the authority of or the delegated authority of the committee or body are declared to be public meetings open to the public at all times. Reasonable notice of meetings shall be given to the public by publication or by the presiding officer of each house prior to the time the meeting is scheduled.

Commentary

Article IV, Section 12 of the New Mexico Constitution requires that all sessions of each house of the legislature be open to the public. Section 10-15-2(A) provides that all meetings of any committee or policymaking body of the state legislature held for the purpose of: (a) discussing public business, or (b) taking any action within the authority of the committee or policymaking body, shall be open to the public as well. However, Subsection A must be read in conjunction with Subsection C of this section which provides that: “For the purposes of this section, ‘meeting’ means a gathering of a quorum of the members of a standing committee or conference committee held for the purpose of taking any action within the authority of the committee or body.”

Thus, the open meeting requirement of Subsection

A really only applies to meetings of a standing or conference committee of the legislature.

Standing committees are formed by the senate or house, or by statute, to assist the senate or house in accomplishing their duties. Standing committees convene during the legislative session and interim committees include those that meet on a regular basis between legislative sessions. Conference committees are called upon during a legislative session to resolve disagreements on a particular bill.

Notice of a legislative committee meeting must be provided to the public before the meeting is held.

Example 76:

A meeting of the party leadership of either party of the state legislature is not subject to this provision as those legislators do not constitute a standing committee of the state legislature.

Example 77:

A meeting of the staff for the Senate Finance Committee is not subject to this provision as the staff analysts are not legislators and therefore do not constitute a standing or conference committee of the state legislature.

Example 78:

A reception at which a quorum of the members of the House Judiciary Committee is present is not subject to this provision because this is not a gathering called by the presiding officer of the committee and the members have not met for the purpose of discussing public business or taking official action.

Example 79:

The Chairman of the Legislative Finance Committee, an interim committee, calls a meeting to discuss a study of county and municipal finances ordered by a joint resolution during the previous legislative session. An open meeting must be held.

Example 80:

During a legislative session, the house standing committee on education and the senate standing committee on education have been unable to resolve a major issue on a bill that has been sent back to the house by the senate several times. Testimony and remarks from the public has been lengthy and disruptive. A conference committee of senior members from both the senate's and the house's standing education committees was created in an attempt to negotiate language that the house will approve. The conference committee meeting must be open to the public and preceded by reasonable notice to the public.

B. ExceptionsThe Law

The provisions of Subsection A of this section do not apply to matters relating to personnel or matters adjudicatory in nature or to investigative or quasi-judicial proceedings relating to ethics and conduct or to a caucus of a political party.

Commentary

This Subsection permits standing committees of the legislature to meet in closed session to discuss matters relating to personnel; adjudicatory matters; and investigative or quasi-judicial proceedings relating to ethics and conduct.

The exception for “matters relating to personnel” is broader than the “limited personnel matters” exception under Section 10-15-1(H)(2). Thus, a legislative committee may hold a closed meeting

to discuss personnel matters not directly related to an individual employee. *See State v. Hernandez*, 89 N.M. 698, 556 P.2d 1174 (1976) (discussing predecessor open meetings law that permitted closed meetings to discuss “personnel matters” without defining that term).

Example 81:

The Committee of the Senate meets to discuss and approve a policy for hiring persons recommended by the Chief Clerk of the Senate to work during the legislative session. This meeting may be closed. By contrast, public bodies subject to the limited personnel matters exception in Section 10-15-1(H)(2) would have to discuss the same topic in an open meeting because it does not relate to an individual employee.

Commentary

The Act does not define “matters adjudicatory in nature” that a standing committee might discuss in a closed session, but generally the term refers to hearings and other proceedings in court.

Subsection B also excepts investigative or quasi-judicial proceedings relating to ethics or conduct from the public meeting requirement. The New Mexico Constitution has conferred on the legislature certain functions that may properly be considered quasi-judicial. For example, the power to impeach state officers is vested in the House of Representatives and the impeachment is tried by the Senate. *See* New Mexico Constitution, Article IV, Sections 35 and 36. Thus, the presiding officer of a standing committee might call a closed meeting to discuss the impeachment of a state officer. The Act would not apply to the actual impeachment and trial, and would not justify closing proceedings required to be public by Article IV, Section 12 of the New Mexico Constitution or other authority.

Subsection B expressly excludes political party caucuses from the public meeting requirement applicable to standing and conference committees of the legislature.

C. Definition of “Meeting”

The Law

For the purposes of this section, “meeting” means a gathering of a quorum of the members of a standing committee or conference committee held for the purpose of taking any action within the authority of the committee or body.

Commentary

See Section IV.A.

V. Section 10-15-3. Invalid Actions; Standing

A. Invalid Actions

The Law

No resolution, rule, regulation, ordinance or action of any board, commission, committee or other policymaking body shall be valid unless taken or made at a meeting held in accordance with the requirements of NMSA 1978, Section 10-15-1. Every resolution, rule, regulation, ordinance or action of any board, commission, committee or other policymaking body shall be presumed to have been taken or made at a meeting held in accordance with the requirements of NMSA 1978, Section 10-15-1.

Commentary

This provision establishes a presumption that actions taken by public bodies have been taken at meetings that conform to the requirements of the Act. Where this is shown not to be the case, the actions of a public body may be held invalid.

Example 82:

A state board with rulemaking authority meets in closed session with its attorney to discuss the legality of its Rule X. The attorney advises that Rule X is probably illegal. The board votes in closed session to rescind the rule. The action of the board is of no effect because it did not relate directly to the litigation and was not taken in open session. In order for the rescission to be valid and enforceable, it must be accomplished at a properly noticed open meeting.

Example 83:

A board of county commissioners decides to purchase a piece of land from Mr. Ortiz and enters into an agreement to that effect. Mr. Ortiz later discovers he can sell the land to Mr. Jones for a

better price and attempts to invalidate the agreement by alleging that the board improperly closed the meeting for the discussion of the purchase. Under the presumption created by Section 10-15-3(A) of the Act, the agreement is valid and binding on Mr. Ortiz until it is admitted or proven that the board failed to act in accordance with Section 10-15-1 of the Act.

Commentary

The presumption of validity established by Section 10-15-3(A) of the Act means that any action taken by a public body will stand as valid with respect to the Act unless challenged and proven otherwise. The Act does not, however, specify a time beyond which an action may no longer be challenged. Such a limitation on actions brought to challenge the validity of any rule, regulation, resolution, ordinance or other action taken by a public body will be found in the statutes of limitation enacted by the legislature. Thus, for example, criminal actions brought under Section 10-15-4 of the Act (*see* Section VI) probably would be barred after two years from the time the violation occurred. *See* NMSA 1978, Section 30-1-8. Most other non-criminal actions authorized by the Act, unless covered by a more specific statutory limitations period applicable to the public body, would be barred after four (4) years. *See* NMSA 1978, Section 37-1-4.

B. Enforcement

The Law

All provisions of the Open Meetings Act shall be enforced by the attorney general or by the district attorney in the county of jurisdiction. However, nothing in that act shall prevent an individual from independently applying for enforcement through the district courts, provided that the individual first provides

written notice of the claimed violation to the public body and that the public body has denied or not acted on the claim within fifteen days of receiving it. A public meeting held to address a claimed violation of the Open Meetings Act shall include a summary of comments made at the meeting at which the claimed violation occurred.

Commentary

This Subsection charges the Attorney General and district attorneys with the concurrent duty of enforcing the Act. Since enforcement carries with it the duty to interpret the Act, the Attorney General has issued this Compliance Guide so that public bodies that adhere to the interpretations of the Act presented in this Guide may conduct their affairs in substantial compliance with the Act. Of course, such a guide cannot anticipate all problems or questions that will arise in the course of governmental affairs. Questions raised by a public body about compliance should therefore be initially addressed to the attorney for the public body. If the public body's attorney is unclear about how to proceed, questions may then be addressed to the Office of the Attorney General. It is, however, the Attorney General's intent that this Guide help resolve recurring questions concerning the applicability of the Act.

A person who believes the Act has been violated may report the suspected violation in writing to the appropriate district attorney or to this Office for investigation and suitable action. The complaint should specify in detail the circumstances giving rise to the alleged violation, including dates and the persons involved. The Attorney General's enforcement power will not be used, however, to resolve the internal disputes and disagreements of a public body or public displeasure with a body's exercise of its discretionary authority.

The Attorney General will exercise discretion when considering whether or not to void actions of public bodies and to bring misdemeanor charges for alleged violations of the Act. Unintentional failure to comply with the provisions of the Act may render the actions taken invalid, but will not

necessarily lead to prosecution. It is the intent of the Attorney General to prosecute misdemeanors only in the case of knowing and either flagrant or repeated violations of the requirements of the Act. The Attorney General will not prosecute where there has been a good faith attempt to comply with the Act.

Example 84:

A city council's notice resolution provides that it shall give public notice of all regular meetings by publication in the local newspaper as well as by posting notice on the three bulletin boards in City Hall. Following an open meeting at which a controversial zoning variance was granted and at which several hundred people appeared to express their views, an opponent of the variance determines that the notice of the meeting, while properly published, was posted on only two bulletin boards. The individual requests that the Attorney General declare the variance invalid and prosecute the city councilors. The Attorney General investigates and determines that the failure to post the notice on the third bulletin board was inadvertent and that the public was adequately notified of the meeting. The Attorney General, within his discretion, declines to declare the council's action invalid or to prosecute the city councilors.

Commentary

In most cases, if a violation is found, the Attorney General will enforce the Act by first advising the public body that, in his opinion, the actions taken at a particular meeting of the public body were not in compliance with the Act and are consequently not valid. Unless the violation was part of a pattern or practice of Open Meetings Act violations, the public body would then be advised to begin again and to consider the intended actions in accordance with the provisions of the Act. This could involve re-discussing issues previously addressed as well as voting again on matters previously voted on in violation of the Act. Should the public body, after such notification, refuse to reconsider its actions in a proper manner or otherwise indicate its intention to continue violating the Act, the Attorney General may file criminal charges or take other action

against the public body or those persons allegedly in violation of the Act.

Example 85:

The board of regents of a state educational institution meets in closed session with its attorney pursuant to Section 10-15-1(H)(7) of the Act and takes final action to adopt regulations affecting the student body. The student council reports this action to the Attorney General who finds that there was no threatened or pending litigation discussed. The meeting should not have been closed. The Attorney General notifies the regents of these findings and advises them to suspend the regulations and reconsider them in an open session where representatives of the student body may attend and listen to the discussion. The regents comply with this advice and no prosecution is initiated.

Example 86:

Two members of a local school board want to replace the superintendent and three members want to retain him. The board members discuss the question of the superintendent's contract in a properly called closed session and the final action to renew the superintendent's contract is taken by vote in open session. The two dissenting members now want to invalidate the renewal, and report a violation of the Act alleging that the other three members discussed budgetary matters as well as the superintendent's contract in closed session. They demand an investigation by the Attorney General. If it turns out that the budgetary matters discussed necessarily related to the superintendent's contract, the Attorney General would not involve his Office in this manner to participate in a dispute between factions of a board.

Commentary

As an alternative to seeking a legal remedy through the Attorney General or district attorneys, Section 10-15-3(B) of the Act permits any individual to apply for enforcement in the district court. Before an individual initiates a lawsuit against a public body for a violation of the Act:

(1) the individual must provide the public body with written notice of the claimed violation; and

(2) the public body must have denied or failed to act on the claimed violation within fifteen (15) days of receiving the notice.

The Act does not specify the procedure for providing written notice of an alleged violation to a public body. To avoid confusion about whether or not a public body received the required written notice, an individual might mail the notice to one or more members of the public body, or to other officials representing the public body who can reasonably be expected to alert the public body about the claim. It is only after the public body denies the allegation or fails to act on the alleged violation within fifteen days of receiving the written notice that an individual may go to district court to file legal action.

Example 87:

A county citizen writes to the Office of the Attorney General complaining that the county commission violated the Act by holding a secret meeting to discuss economic development within the county. In her complaint, the citizen states that she discussed the violation with the county manager in a telephone conversation. Two days after writing to the Office of the Attorney General, the citizen files a lawsuit in district court against the county commission based on the same claimed violation. The lawsuit is not proper unless, prior to filing it, the citizen also gave the county commission written notice of the claimed violation and the county commission denied or failed to address the violation within fifteen days of receiving the notice. The notice to the county manager would not be considered sufficient to meet the requirements of the Act because it was verbal rather than written.

Commentary

A public body that receives written notice of a claimed violation has fifteen days from the day it receives the notice to cure the violation if the public body decides the claim is valid and wants to avoid a lawsuit. At a meeting held to address the

claimed violation, the public body must include a summary of the comments that were made at the meeting where the violation occurred. This does not mean that the public body must necessarily repeat the entire previous meeting. It only needs to summarize the portion or portions of the previous meeting that violated the Act.

Example 88:

A state licensing board holds its regular meeting in May. The meeting is properly noticed and the agenda for the meeting is available to the public seventy-two (72) hours in advance of the meeting. During the meeting, the board votes to award a contract for a hearing officer.

A few days later, Mr. Grey writes to the chair of the board alleging that the contract award was invalid because it was not listed on the meeting agenda. The chair determines that Mr. Grey is correct and schedules a special meeting of the board within fifteen days of receiving Mr. Grey's letter. Proper notice of the meeting is provided to the public and the contract is listed on the agenda. At the meeting, the board repeats its discussion of the contract and votes again to award the contract. This action cures the board's previous violation and precludes any further action concerning the violation in district court.

Example 89:

A town board of trustees holds a meeting without providing any advance notice to the public. A resident of the town notifies the mayor in writing about the violation. Because the board of trustees failed to give prior notice of the meeting, the meeting is invalid and without effect. Within fifteen days after receiving the written notice, the board must, after providing proper notice to the public, convene again, summarize all the comments and proposals made at the previous illegal meeting, and take any action or make any decisions made at the previous meeting over again.

Commentary

In some cases, a violation of the Act cannot be effectively addressed by repeating the action at a

properly conducted open meeting. In those cases, the requirement for a summary of comments is not applicable.

Example 90:

Ms. Rose writes to the chair of the county commission alleging the commission violated the Act because it did not approve the minutes for its May meeting at the next meeting of a quorum as required by Section 10-15-1(G) of the Act. The commission holds a meeting within fifteen days after receiving the notification to address the claimed violation. In this case, the commission agrees that it violated the Act, but because the violation did not occur at the May meeting, the commission cannot cure it by re-taking any action or summarizing any discussion. Instead, it agrees that in the future it will use its best efforts to ensure that minutes are approved at the next meeting of a quorum. Ms. Rose is satisfied with this resolution of her claim.

Commentary

Because the Attorney General and district attorneys cannot be everywhere and resources are limited, private individuals who exercise the option provided under Section 10-15-3(B) of the Act and initiate legal action often will be able to obtain more effective and efficient enforcement of the Act. However, while the power to bring private enforcement actions is important, it is not a means to overturn decisions of a public body made in conformity with the Act, but with which the public disagrees.

Example 91:

A local school board meets in closed session to discuss retaining Mr. Jones as the superintendent. After this discussion, the board reconvenes in open session and takes final action to hire Mr. Jones at a higher salary. Many parents disagree and, after following the procedures specified in Section 10-15-3(B) of the Act, seek an injunction in district court to stop the contract. As the parents' complaint does not involve any violation of the Act, they have not correctly applied Section 10-15-3(B). Therefore, the court rejects their application

for injunctive relief.

C. District Court Jurisdiction

The Law

The district courts of this state shall have jurisdiction, upon the application of any person to enforce the purpose of the Open Meetings Act, by injunction, mandamus or other appropriate order. The court shall award costs and reasonable attorney fees to any person who is successful in bringing a court action to enforce the provisions of the Open Meetings Act. If the prevailing party in a legal action brought under this section is a public body defendant, it shall be awarded court costs. A public body defendant that prevails in a court action brought under this section shall be awarded its reasonable attorney fees from the plaintiff if the plaintiff brought the action without sufficient information and belief that good grounds supported it.

Commentary

This Subsection confers jurisdiction on the district courts to hear questions concerning purported violations of the Act. Should a district court determine that a public body's actions were illegally taken, it may declare them invalid, thereby overcoming the presumption of validity conferred under Section 10-15-3(A) of the Act. The court may issue an order enjoining the public body from implementing its illegal action, an order requiring the public body to take action required by the Act or any other appropriate order.

Example 92:

A city council voted in closed session to sell the furnishings of a city-owned building. Twenty (20) days after the city council receives a citizen's written notice of violation and takes no action to address it, the citizen applies to district court to enjoin the sale because the decision to sell was improperly made in a closed meeting. Only the sale of real property may be considered in closed session. The court enjoins the sale and the decision of the city council is nullified. The council must

reconsider the sale at an open meeting.

Commentary

This Subsection also provides that a district court shall award individuals who prevail in a court proceeding to enforce the Act their court costs and reasonable attorney fees.

Example 93:

Ms. Garcia learns from the president of a local construction company that the town council has awarded the company a contract to build a public swimming pool. Ms. Garcia writes to the mayor alleging that the town council violated the Act because it awarded the contract outside of a public meeting. The mayor reads Ms. Garcia's letter and forwards it to the other councilors. The council does not take any steps to address Ms. Garcia's letter. Fifteen days after the mayor received her letter, Ms. Garcia may file a lawsuit against the council to enforce the Act. If she succeeds in proving that a violation occurred, she will be entitled to an award of costs and reasonable attorney fees.

Commentary

If a public body successfully defends itself against a lawsuit brought to enforce an alleged violation of the Act, the public body defendant is entitled to court costs. A prevailing public body defendant is entitled to attorney fees only if the court determines that the person who brought The Lawsuit did so without any valid basis or support.

Example 94:

Assume the same facts set forth in Example 91. At the hearing on the application for injunctive relief, the school board defends itself by alleging that the parents' claims were not supported by any facts showing a violation of the Open Meetings Act. If the parents brought the lawsuit under the Act without any belief that good grounds supported it, the court may find that the lawsuit was frivolous and, in addition to denying the injunction, award the school board its court costs and reasonable

attorney fees.

D. Other Remedies

The Law

No section of the Open Meetings Act shall be construed to preclude other remedies or rights not relating to the question of open meetings.

Commentary

This Subsection simply makes it clear that the remedies available to challenge a public body's action for violating the Act are not exclusive. The public is not precluded from charging the public body with violation of other laws in connection with the same action.

Example 95:

A board of county commissioners votes to apply the sole source exception stated in Section 10-15-1(H)(6) of the Act to close a meeting to discuss and decide upon the purchase of water fountains from Fountain Company when such fountains are available from other vendors. A competing water fountain vendor alleges that the board violated the Act and files suit to overturn the action. If warranted, the competitor might also allege that the board violated the Procurement Code by failing to take bids on this purchase.

VI. Section 10-15-4. Criminal Penalties

The Law

Any person violating any of the provisions of NMSA 1978, Section 10-15-1 or 10-15-2 is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five hundred dollars (\$500) for each offense.

Commentary

If, after investigating charges that the Act has been violated, the Attorney General finds that the charges are valid and substantial, the Attorney General may initiate a criminal prosecution against each of those persons responsible for the violation. The public officers or employees charged may be held personally responsible for violations of the Act if it is shown that they intentionally acted in a manner that violated the Act. In addition to the members of the public body, other officials responsible for implementing the Act's provisions may be found liable.

Example 96:

A city clerk is required by law to keep all minutes of the governing body of a municipality. The city clerk might therefore be found liable for failure to have draft minutes available for public inspection as required by Section 10-15-1(G) of the Act.

Open Meetings Act Compliance Checklist

Open Meetings (§ 10-15-1 (B))

The Open Meetings Act applies to meetings of public bodies:

_____ At which a quorum of the members of the public body is present in person or by telephone; and

_____ During which the public body will formulate public policy, discuss public business or take action.

If the Open Meetings Act applies, the following checklist will help you comply with its requirements. Notice Requirements (§ 10-15-1 (D) and (F))

Non-emergency meetings

_____ Reasonable advance notice of the meeting has been provided to the public (§ 10-15-1 (D)).

_____ The notice complies with the deadlines and procedures for meeting notices adopted by the public body under Section 10-15-1(D) of the Open Meetings Act.

_____ The notice includes the date, time and location of the meeting.

_____ The notice is published or posted in a place and manner accessible to the public.

_____ Notice has been provided to all FCC licensed broadcast stations and newspapers of general circulation that have provided a written request for notice of meetings (§ 10-15-1 (D)).

_____ The notice includes an agenda or information on how the public may obtain a copy of the agenda (§ 10-15-1 (F)).

Emergency Meetings

Under limited circumstances, an emergency meeting may be held with little advance notice if:

_____ The public body did not expect the circumstances giving rise to the meeting; and

_____ If the public body does not act immediately, injury or damage to persons or property or substantial financial loss to the public body is likely.

Meeting Agenda (§ 10-15-1 (F))

The meeting agenda should:

- _____ Include a list of specific items the public body intends to discuss or transact at the meeting.
- _____ Clearly describe agenda items that the public body intends to discuss or act on during the meeting in order to give adequate public notice.
- _____ Except for an emergency meeting, the agenda is available to the public at least 72 hours before the meeting.
- _____ Except for emergency matters, the public body takes action only on those items specifically listed on the agenda 72 hours before the meeting.

Telephonic Participation (§ 10-15-1 (C))

If a member of the public body participates in a meeting by telephone:

- _____ There must be a law or a rule of the public body authorizing its members to participate by conference telephone or similar communications equipment; and
- _____ It must be “difficult or impossible” for that member to attend the meeting in person; and
- _____ Each member participating telephonically can be identified when speaking, all participants are able to hear each other at the same time, and members of the public attending the meeting are able to hear any member of the public body who speaks during the meeting.

Closed Meetings – Permissible Subjects (§ 10-15-1 (H))

If a public body wishes to hold a closed meeting, it may do so only to engage in one or more of the following:

- _____ Deliberations about the issuance, suspension, renewal or revocation of a license (§ 10-15-1(H)(1)).
- _____ Discussion of the hiring, promotion, demotion, dismissal, assignment or resignation of a public employee, or the investigation or consideration of complaints or charges against a public employee (§ 10-15-1(H)(2)).
- _____ Deliberations in connection with an administrative adjudicatory proceeding held by the public body (§ 10-15-1(H)(3)).
- _____ Discussion of personally identifiable information about an individual student (§ 10-15-1(H)(4)).

- _____ Discussion of collective bargaining strategy prior to negotiations between a public body and a union representing employees of the public body; collective bargaining sessions involving the public body and union (§ 10-15-1(H)(5)); and consultations and impasse resolution procedures at which the public body and the union are present (§ 10-7E-17(G) of the Public Employee Bargaining Act).
- _____ Discussion of a sole source purchase that exceeds \$2,500 or of the contents of competitive sealed proposals during the contract negotiation process (§ 10-15-1(H)(6)).
- _____ Meeting with the public body's attorney pertaining to threatened or pending litigation in which the public body is or may become a participant (§ 10-15-1(H)(7)).
- _____ Discussion of the purchase, acquisition or disposal of real property or water rights (§ 10-15-1(H)(8)).
- _____ For committees or boards of public hospitals only, discussion of strategic or long-range business plans or trade secrets (§ 10-15-1(H)(9)).
- _____ For the Gaming Control Board only, a meeting that deals with information made confidential by the Gaming Control Act (§ 10-15-1(H)(10)).

Closed Sessions – Procedures (§ 10-15-1(I))

To properly close a portion of an open meeting, the following actions must be taken:

- _____ A motion stating the specific provision of law authorizing the closed meeting and a reasonably specific description of the subject to be discussed.
- _____ A roll call vote on the motion to close the meeting in the open session, where the vote of each member is to be recorded in the minutes.
- _____ Only the matters stated in the motion to close are discussed in the closed session.
- _____ Generally, action on an item discussed in a closed session must be taken in an open meeting (§ 10-15-1 (H)).
- _____ After a closed meeting is completed, a statement affirming that the matters discussed in the closed meeting were limited to those stated in the motion to close is recorded in the minutes (§ 10-15-1 (J)).

For closed meetings of a public body held separate from an open meeting, the above criteria apply except:

- _____ Instead of a motion to close, appropriate public notice is provided that includes the specific provision of law authorizing the closed meeting and a reasonably specific description of the subject to be discussed (§ 10-15-1 (I)(2)).

_____ Following completion of the closed meeting, a statement is entered into the minutes of the next open meeting specifying that the matters discussed in the closed meeting were limited to those stated in the notice of the closed meeting (§ 10-15-1 (J)).

Meeting Minutes (§ 10-15-1 (G))

If the meeting is open, written minutes are required. Minutes must contain at least:

_____ The date, time and place of the meeting; and

_____ The names of all members of the public body attending the meeting and of those members who are absent; and

_____ A description of the substance of all proposals considered during the meeting; and

_____ A record of any decisions made and votes taken that shows how each member voted (voting by secret ballot is not permitted).

The following also applies to meeting minutes:

_____ A draft copy of the minutes is prepared within 10 working days of the public meeting.

_____ The minutes are approved, amended or disapproved at the next meeting where a quorum of the public body is present.

_____ All minutes are made available for public inspection.

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