

FOR IMMEDIATE RELEASE

August 8, 2018

Contact: David Carl

(505) 288-2465

AG Balderas' Statement on the University of New Mexico's Violation of the Open Meetings Act

Albuquerque, NM - Today, Attorney General Hector Balderas issued this statement regarding the University of New Mexico's violation of the Open Meetings Act:

"The University of New Mexico must be transparent when deciding to cut vital student scholarships and must follow the law by redoing this process in a legal and fair manner to ensure accountability to our community and students."

A copy of the letter is attached.

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

August 8, 2018

Kevin Gick, Esq.
University of New Mexico
Office of University Counsel
1 University of New Mexico MSC 05 3440
Albuquerque, NM 87131-0001
Email: kgick@salud.unm.edu

Re: Open Meetings Act Complaint – Maria Touchet, Esq. and David M. Pato, Esq.

Dear Mr. Gick:

We have reviewed the two complaints submitted to by Ms. Maria Touchet and Mr. David Pato alleging that the University of New Mexico Board of Regents (“the Board”) violated the Open Meetings Act, NMSA 1978, Sections 10-15-1 to -4 (as amended through 2013) (“OMA”). According to both complaints, the Board violated OMA at its meeting on July 19, 2018, by failing to list items on its agenda with reasonable specificity and engaging in a “rolling quorum” prior to the meeting. *See* Touchet and Pato Complaints. In addition to the complaints, we have reviewed the recording of the meeting and the Board’s responses to both to our inquiry letters to the complaints. *See* Letter from Patrick Hart on Touchet Complaint (August 6, 2018) (“Response to Touchet Complaint”) and Letter from Patrick Hart on Pato Complaint (August 6, 2018) (“Response to Pato Complaint”). Based on our review, as discussed in more detail below, we have determined that the Board violated OMA and failed to provide the public with meaningful notice of the Board’s intention to vote on matters pertaining to the defunding of four athletic programs. Based upon these violations, the New Mexico Office of the Attorney General requests the Board to take measures to correct the violations at a properly noticed, open meeting, within fifteen days of this determination.

The facts surrounding these two complaints are summarized as follows. On July 19, 2018, the Board held a special meeting. *See* Complaint. The meeting agenda, in relevant part, included as an action item: “Discussion and Action on Athletics – Eddie Nuñez, Rob Robinson, et.al.” Agenda for July 19, 2018, Board Meeting (attached to Complaint) (“Agenda”). During the discussion on that agenda item, Board members expressed support for “the administration’s plan” and one Board member stated that “we’ve done the right thing here” prior to any vote taking place. Touchet Complaint. The Board then voted

unanimously to defund UNM's men's soccer team, both the men's and women's ski teams, and the women's beach volleyball team. *See Touchet Complaint*. The agenda also included, as a separate item, "[d]iscussion and determination where appropriate of limited personnel matters." *See Agenda*. Ms. Touchet's complaint alleges that the "Athletics" item was not reasonably specific so as to authorize the Board's actions and that the Board had previously engaged in a rolling quorum (as evidenced by the Board member statements at the meeting itself). *See Touchet Complaint*. Mr. Pato argues that the Board's agenda lacked reasonable specificity for both the "Athletics" and the "limited personnel matters" items. *See Pato Complaint*.

The Open Meetings Act

The Open Meetings Act states as a broad policy 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. Section 10-15-1 (emphasis added). The Act requires public bodies to conduct their business openly so that all citizens can observe both the process and the final decision. *See Kleinberg v. Bd. of Educ. of Albuquerque Pub. Sch.*, 1988-NMCA-014, ¶ 18 (noting that "the public policy of this state, as expressed in the Act, is to conduct the public's business in the open, allowing persons, so desiring, to attend and listen to the proceedings") and *Raton Pub. Serv. Co. v. Hobbes*, 1966-NMSC-150, ¶ 18 (observing that the purpose of OMA "was to provide that governing bodies dealing with public funds be required to make decisions in the open where the interested public could observe the action"). Further, the statute provides a number of strict requirements that all meetings of a quorum of the public body must satisfy. *See* § 10-15-3(A) and § 10-15-1. No action of "any board, commission, committee or other policymaking body" is valid unless it complies with these requirements. Section 10-15-3(A).

All meetings of any public body that are "held for the purpose of formulating public policy" are subject to the requirements of OMA. Section 10-15-1(B). Specifically, OMA applies to all meetings consisting of at least a quorum of any public body. *See id.* A quorum can be created by telephonic or electronic communications (or even simple conversations), depending on what is said. *See* Attorney General's Open Meetings Act Compliance Guide, p. 8 (8th ed. 2015) ("OMA Guide"). Commonly referred to as a rolling quorum, our OMA Guide provides an 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." OMA Guide, p. 8. A rolling quorum can also occur when one individual coordinates a discussion amongst a quorum by, for example, telling one member of a public body what another member said about an issue. This means that even when members are not all communicating directly among themselves, their communications through one individual can still constitute a quorum. A rolling quorum is impermissible and violates OMA, which requires all conversations to be had and decisions to be made in an open meeting. Section 10-15-1(B).

¹ Ms. Touchet also alleges that the Board itself was constituted in violation of the New Mexico Constitution by failing to include an active member of the student body. Because our determination is limited to OMA at this this time, we do not address this issue.

OMA further requires that all 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.” Section 10-15-1(F). This language requires reasonable specificity on the part of the government body so as to alert the public as to which issues, topics, and decisions will be discussed at the meeting. *See* OMA Guide, p. 17 (discouraging the use of “general, broad, or vague terms” to describe agenda items, as such language could mislead the public). In other words, an agenda must be sufficiently clear so as to alert the public as to which items of business will be discussed or acted upon by the public body, in compliance with the Act’s broad mandate that the public have the greatest information possible. Items which are vague or overly general fail to satisfy this requirement, and public bodies may not rely upon them in order to take action.

Under OMA, there are limited circumstances in which a public body may deliberate or discuss public business outside of the public’s view in closed session. One of these enumerated exceptions is Section 10-15-1(H)(2), otherwise known as the limited personnel matters exception. This provision authorizes public bodies to enter closed session “for the purpose of discussing certain matters concerning individual employees of the public body.” OMA Guide, p. 21. *See also* § 10-15-1(H)(2). The limited personnel matters exception in OMA enables public bodies to privately deliberate and discuss personnel matters regarding individual employees. *See Kleinberg*, 1988-NMCA-014, ¶ 24 (observing that [d]eliberations and discussion concerning personnel matters may be held in secret, and the public has no right to watch or participate in the proceedings”). By its terms, the exception only applies to the discussion of an *individual* public employee. *See* § 10-15-1(H)(2) (providing that “limited personnel matters” is defined as “the discussion of . . . any *individual* public employee”) (emphasis added) and OMA Guide, p. 21 (noting that “a public body may close a meeting to discuss . . . an individual public employee.”).

The “Athletics” Agenda Item

The central allegation of both complaints is that the Board’s actions to defund UNM’s men’s soccer team, both the men’s and women’s ski teams, and the women’s beach volleyball team were in violation of OMA because the item on the agenda was not reasonably specific. *See* Touchet Complaint and Pato Complaint. In its entirety, that item was listed on the Agenda as “Discussion and Action on Athletics – Eddie Nuñez, Rob Robinson, et.al.” Both complaints allege that this agenda item was so vague and broad as to constitute a violation of Section 10-15-1(F). We agree.

The Board, in their Responses to our inquiry, argues that a meeting agenda need only include the “time, place and date of the meeting” and lack an “intent to mislead.” Response to Touchet Complaint. To that end, the Board cite a nearly thirty-year old opinion that analyzed a prior version of the Open Meetings Act that did not include any agenda requirements. *See* N.M. Att’y Gen. Op. 90-29 (1990) (analyzing the definition of “reasonable notice” in OMA as the statute appeared at the time). Obviously, the legislature’s subsequent changes to OMA have rendered that prior opinion inapplicable here. Today, OMA provides that agendas must contain “a list of specific items of business

to be discussed or transacted at the meeting.” Section 10-15-1(F). This language alone refutes the Regents’ apparent assertion that agendas must only state the “time, place and date of the meeting.” Response to Touchet Complaint. With respect to the language in the Attorney General’s OMA Guide referring to public bodies needing to avoid misleading the public, the OMA Guide is abundantly clear that agendas must identify all items of business with reasonable specificity. OMA Guide, p. 17.

The item name listed on the agenda did not provide the interested public with sufficient information to know which actions the Board might take at its meeting. The term “Discussion and Action on Athletics” is broad enough to encompass virtually any conceivable action or discussion related to any aspect of UNM’s various athletics programs. The Board could just as easily have defunded any or all of its other sports programs or, for that matter, taken a completely different action like changing team uniforms. Based on that description, an interested member of the public could not reasonably anticipate that the Board would be considering defunding the four specific athletics programs it eventually took action on. For this reason, we conclude that the Board’s agenda lacked the reasonable specificity required by Section 10-15-1(F) and violates the broad policy of the Act which mandates that the public have the greatest information possible, and the subsequent actions taken by the Board are in violation of OMA.

The Limited Personnel Matters Agenda Item

We reach the same conclusion with respect to the limited personnel matters agenda item. The item was listed as “[d]iscussion and determination where appropriate of limited personnel matters.” Agenda. This, again, was an overly broad and vague description for the simple reason that it failed to specify *which* personnel matters the Board would discuss. To be clear: OMA’s limited personnel matters exception allows a public body to discuss an *individual* public employee, and to satisfy the reasonable specificity requirement, the public body must list the specific individual employee to be discussed by the Board. Here, the Board did not list the employee’s name or provide any identifying information whatsoever, meaning that there was no reasonable specificity.

While the minutes of the July 19, 2018, meeting were not accessible, the Office of the Attorney General’s review included review of a partial video recording. From that video, it appears that the Board did enter closed session at the meeting under the stated justification of OMA’s limited personnel matters exception. This violated OMA because the Board did not have a reasonably specific item of business listed on its agenda qualifying it for that exception. While not raised in either complaint, this partial video of the meeting also shows that the Board entered into closed session without taking a roll call vote. This too is a violation of OMA, which requires a roll call vote for entering into closed session. See § 10-15-1(I)(1) and OMA Guide, p. 31.

² See New Mexico In Focus, a Production of KNME-TV, *UNM Board of Regents Meeting – Proposed Cuts to Athletics*, YOUTUBE (July 20, 2018), <https://www.youtube.com/watch?v=dhaxzIX6GTE>.

Rolling Quorum

The rolling quorum alleged by Ms. Touchet's complaint is to some degree moot considering our earlier determination on the "Athletics" agenda item. That being said, it is possible that the quotes cited by Ms. Touchet's complaint are sufficient to establish that a rolling quorum occurred. For instance, Board members' expressed support for "the administration's plan" and the phrase "we've done the right thing here" could potentially indicate that the Board members discussed public business in contravention of their OMA obligations. Section 10-15-1(B). However, because we have already concluded that the Board's action on that issue is invalid due to the insufficiently specific agenda item, we will not further elaborate on the issue of a rolling quorum at this time.

Conclusion

Based on our conclusion that the Board committed at least one and possibly two violations of OMA, we direct the Board to take remedial action. Public bodies are afforded the opportunity to correct OMA violations after they have occurred. *See* § 10-15-1(C) (providing that individuals seeking judicial review must give the public body written notice so it may take action on the alleged violation) and *Kleinberg*, 1988-NMCA-014, ¶ 30 (noting that "procedural defects in the Open Meetings Act may be cured by taking prompt corrective action"). In order to remedy its violation of OMA, the Board should hold a new meeting within fifteen (15) days to reconsider its actions, after publishing a proper notice and agenda in accordance with OMA's requirements. § 10-15-1(B). Failure to comply with this directive may subject the Board to further enforcement actions. Prior to the meeting in which the Board takes corrective action, please provide our office with a copy of the public notice and agenda for the meeting.

If you have any questions regarding this determination or OMA in general, please let me know.

Sincerely,



John Kreienkamp
Assistant Attorney General

cc: Mia Touchet, Touchet Law Firm, PC
David M. Pato, Nance, Pato & Stout, LLC
Raul Torrez, Second Judicial District Attorney
Patrick J. Hart, Associate University Counsel

³ For the purposes of this determination, we assume the fairness and accuracy of the quotes offered by Ms. Touchet, as the Board provided no evidence in its response to suggest otherwise.