



Let the Sunshine In: The Open Meetings Act and the Inspection of Public Records Act

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Purpose of “sunshine laws”

- o Give members of the public the right to inspect and copy public records and to know what happens in meetings of public bodies so that the public can keep an eye on the government.
- o “Sunlight is said to be the best of disinfectants; electric light is the most efficient policeman.” Louis D. Brandeis, 1913.

What New Mexico “sunshine laws” apply to School Board members and School District administrators?

- o Inspection of Public Records Act (“IPRA”), NMSA 1978, §§ 14-2-1 through -12
- o Open Meetings Act (“OMA”), NMSA 1978, §§ 10-15-1 through -4

Why should School Board members and School District administrators follow these sunshine laws?

- o Both the IPRA and the OMA contain enforcement provisions
- o Violating these sunshine laws can result in expensive litigation, as well as criminal prosecution of individuals, monetary damages against the School District, and potential recall of School Board members

The Inspection of Public Records Act (“IPRA”)

- o “Every person has a right to inspect any public records of this state except” NMSA 1978, § 14-2-1(A).
- o When the School District’s records custodian receives an IPRA request, the School District must disclose all responsive documents that do not fall within any of the IPRA’s exceptions.

Public records

- o All documents, papers, letters, books, maps, tapes, photographs, recordings, and other materials, regardless of physical form or characteristics, that are:
 - o Used, created, received, maintained, or held by or on behalf of any public body and
 - o Relate to public business.

School Board communications are subject to the IPRA

- o Such communications include e-mail – not only School District e-mail, but also personal e-mail if e-mail is forwarded or used for school business.
- o Text messages made or received on School District telephones are also subject to the IPRA.
 - o Keep Board business in an open meeting. Do not risk having embarrassing communications (or communications you thought were private) disclosed in response to an IPRA request.

Exceptions to the IPRA (slide 1 of 4)

- Records pertaining to physical or mental examinations and medical treatment of persons confined to any institution;
- Letters of reference concerning employment, licensing, or permits;
- Letters or memos that are matters of opinion in personnel files or students' cumulative files;

Exceptions to the IPRA (slide 2 of 4)

- o Law enforcement records that reveal confidential sources, methods, information, or individuals not charged with a crime. Such records include evidence in any form received or compiled in connection with any criminal investigation or prosecution, including inactive matters or closed investigations;
- o As provided by the Confidential Materials Act;

Exceptions to the IPRA (slide 3 of 4)

- o Trade secrets, attorney-client privileged information, and long-range or strategic business plans of public hospitals discussed in a properly closed session;
- o Tactical response plans or procedures prepared for or by the state or a political subdivision of the state, the publication of which could reveal specific vulnerabilities, risk assessments, or tactical emergency security procedures that could be used to facilitate the planning or execution of a terrorist attack; and

Exceptions to the IPRA (slide 4 of 4)

- o As otherwise provided by law. This exception includes, but is not limited to:
 - o Federal laws, such as FERPA and HIPAA;
 - o State laws, including those prohibiting disclosures of certain records, or keeping other records confidential until a certain amount of time has elapsed; and
 - o Rules adopted by the New Mexico Supreme Court.

Protected personal identifier information exempt from IPRA disclosure (slide 1 of 2)

- o All but the last four digits of a:
 - o Taxpayer identification number;
 - o Financial account number; or
 - o Driver's license number;
- o All but the year of a person's date of birth; and
- o A social security number.

Protected personal identifier information exempt from IPRA disclosure (slide 2 of 2)

- o Protected personal identifier information on a record ***does not exempt the record*** from inspection.
 - o Protected personal identifier information contained in a public record may be redacted by a public body before inspection or copying of the record.
- o Unredacted records containing protected personal identifier information shall not be made available on publicly accessible websites operated or managed on behalf of a public body.

Starting the procedure for requesting records

- o Request may be written or oral
- o E-mail is sufficient as written request
- o No requirement to state reason for request

What if a requested record does not exist?

- o Record must exist at the time of the request
- o Nothing in the IPRA requires a public body to create a public record
- o No requirement to compile existing information into a new record

What if you get a request for records?

- o If you are not the School District's records custodian, give the request to the records custodian *immediately!*
- o If you are the records custodian, consult with the School District's lawyer(s) for guidance as to the response and the deadlines for responding to the request.

Further information about the IPRA

Inspection of Public Records Act Compliance Guide, published by the New Mexico Attorney General's Office – available online at

<http://www.nmag.gov/uploads/files/Publications/ComplianceGuides/Inspection%20of%20Public%20Records%20Compliance%20Guide%202015.pdf>

The Open Meetings Act (“OMA”)

- o The OMA *presumes* that public bodies take proper actions, but
- o That presumption does not prevent the OMA from providing a fertile basis for challenges to unpopular School Board decisions.
- o Minimize criticism and avoid violations of the OMA

Notice and Agenda (slide 1 of 4)

- o Notices must include an agenda or information on how to obtain an agenda
- o Must be available to the public at least seventy-two (72) hours before the meeting
- o Must be posted on the school's website
- o Notice must include requesting licensed broadcast stations and newspapers
- o **Board must adopt Open Meetings Resolution annually**

Notice and Agenda (slide 2 of 4)

- o Board can take action only on action items listed on agenda
- o The agenda must contain specific items of business to be discussed or transacted
- o Exceptions to the 72 Hour Requirement
 - o Meetings held to address an emergency
 - o Public bodies that meet more than once per week

Notice and Agenda (slide 3 of 4)

- o What constitutes an emergency?
 - o Issues that could not have been anticipated and
 - o Which if not addressed immediately, will threaten the health, safety or property of its citizens, or likely result in substantial financial loss to the public body
- o Notice must be provided as far in advance as reasonable possible under the circumstances

Notice and Agenda (slide 4 of 4)

- o Board must report to the AG the action taken and the circumstances creating the emergency within ten (10) days of taking action on an emergency matter
- o Except for declaration of a state or national emergency

Closed/executive sessions

- o Closing meetings creates curiosity and suspicion from:
 - o Community members
 - o District employees
 - o The media
- o Use closed/executive sessions sparingly
 - o Only when allowed by law under the OMA
 - o Always use the procedures required by law

Quorum

- o If the School Board is meeting to discuss School District business and a majority of the Board members are present, you have a quorum.
- o If a majority of Board members are in attendance at a basketball game, you are considered to have a quorum, so
- o **DO NOT DISCUSS OR CONDUCT ANY SCHOOL DISTRICT BUSINESS EXCEPT IN AN OPEN MEETING!**

Exceptions to OMA pertinent to school boards (slide 1 of 6)

- o **Limited personnel matters**
 - o Discussions around the hiring, promotion, demotion, dismissal, assignment, or resignation of, or
 - o Investigation or consideration of complaints or charges against,
 - o Any individual public employee.
- o The ***discussion*** is confidential and can take place in a closed executive session; however,
- o Any ***final action*** is public information and must take place in an open meeting.

Exceptions to OMA pertinent to school boards (slide 2 of 6)

- o **Deliberations in administrative adjudicatory proceedings**
 - o Proceeding brought by or against a person before the 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.
 - o The ***proceeding*** is confidential and can take place in a closed executive session; however,
 - o Any ***final action*** is public information and must take place in an open meeting.

Exceptions to OMA pertinent to school boards (slide 3 of 6)

- o **Personally identifiable information about any student**
 - o This information is confidential unless the student, parent, or guardian requests otherwise.
 - o This confidential information includes long-term suspension or expulsion hearings; as well as individual student test scores, grades, health or medical information, etc.
 - o Aggregate data may be disclosed, so long as it is not personally identifiable.
- o The ***information*** is protected by FERPA and cannot be discussed outside of a closed executive session.

Exceptions to OMA pertinent to school boards (slide 4 of 6)

- **Bargaining strategy preliminary to collective bargaining negotiations**
 - DOES NOT include discussion of hiring a collective bargaining consultant, adopting a policy as to the collective bargaining process, or responding to union organizing efforts

Exceptions to OMA pertinent to school boards (slide 5 of 6)

- o **Discussion concerning purchases exceeding \$2,500 from one source**
 - o Sole-source purchases for \$2,500 or less
 - o Competitive sealed proposals discussed for contract negotiation process

Exceptions to OMA pertinent to school boards (slide 6 of 6)

- o **Attorney-client privilege pertaining to pending or threatened litigation**
 - o Situations where public body is or may become a participant in litigation (including as a plaintiff)
 - o Attorney General takes very restrictive view of this exception – requires attorney to be present or on the phone, or has sent letter or memorandum about litigation
 - o NEVER share such information!

Who can complain if School Board violates the OMA?

- o Media/Foundation for Open Government (“FOG”)
- o Parents/school employees/minority Board members displeased with controversial decisions made
- o Any citizen

What actions may be taken to enforce the OMA? (slide 1 of 4)

- *Mandamus petition* to compel compliance with a mandatory nondiscretionary legal duty
- *Petition for injunctive relief* to prevent or enjoin a prospective violation of law
- *Petition for recall of Board members* to remove one or more Board members for misfeasance or malfeasance

What actions may be taken to enforce the OMA? (slide 2 of 4)

- o “*Other appropriate remedies*” – individuals (citizens or media) may seek judicial enforcement of a perceived OMA violation **only** if the individual **first** provides notice of the claimed violation to the public body and the public body has denied or not acted on the claim within 15 days.

What actions may be taken to enforce the OMA? (slide 3 of 4)

- *Courts have authority to invalidate actions taken in violation of the OMA based upon Section 10-15-3(A), which reads: “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 [the Open Meetings Act].”*
- *In addition, Section 10-15-3(D) states: “No section of the Open Meetings Act shall be construed to preclude other remedies or rights not relating to the question of open meetings.”*

What actions may be taken to enforce the OMA? (slide 4 of 4)

- o **Section 10-15-4 states:** “A person violating any of the provisions of Section 10-15-1 or 10-15-2 NMSA 1978 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.”
- o Thus, the Attorney General or District Attorney can file criminal charges for OMA violations. ***Such prosecutions have occurred!***

What relief can be awarded if enforcement action is taken? (slide 1 of 2)

- o District court can issue a writ of mandamus, an injunction, or a declaratory judgment, if a violation is found.
- o “The Court *shall* award costs and reasonable attorneys’ fees to any person who is successful in bringing a court action to enforce the provisions of the [OMA].”
NMSA 1978, § 10-15-3(C)

What relief can be awarded if enforcement action is taken? (slide 2 of 2)

- o If the public body prevails, it ***shall be*** awarded court costs, and ***shall be*** awarded reasonable attorneys' fees from the plaintiff if the plaintiff brought the action "***without sufficient information and belief that good grounds supported it.***" NMSA 1978, § 10-15-3(C)
- o Awards of attorneys' fees to public bodies are rare.

What typically results from a complaint filed with the Attorney General alleging an OMA violation?

- o AG sends a letter to the public body notifying it of the complaint and requesting a response, usually within 20 or 30 days.
- o The School Board then has the opportunity to submit its response and to take corrective action, if necessary.

What should the School Board do if it realizes that it has violated the OMA? (slide 1 of 5)

- o The appropriate response depends upon whether the Board first learns of the violation through a complaint from the Attorney General's office, or whether the violation comes to the Board's attention as a result of a complaint by a citizen.

What should the School Board do if it realizes that it has violated the OMA? (slide 2 of 5)

- o If the Board realizes that an inadvertent violation has occurred, even before a formal complaint from the AG's office is received, the Board should cure the violation by resolution immediately.
- o Doing so probably will require a special meeting (agenda item should read: "Discussion and Board action on resolution to correct possible violation of the Open Meetings Act.").

What should the School Board do if it realizes that it has violated the OMA? (slide 3 of 5)

- o The Board President should read the entire corrective resolution in public before the Board votes on it.
- o If the Board takes this action right away, the Board is then prepared to respond to a letter received later from the Attorney General by submitting the resolution already adopted. The AG's action is then likely to be in the nature of "okay, but don't do it again."

What should the School Board do if it realizes that it has violated the OMA? (slide 4 of 5)

- o Under Section 10-15-3(B), if the error is brought to the Board's attention by a citizen or the media, the Board must take action to correct the violation within 15 days of the notification received from the citizen/media, in order to forestall district court enforcement.
- o In addition, if a corrective resolution is adopted, note that Section 10-15-3(B) also states:

What should the School Board do if it realizes that it has violated the OMA? (slide 5 of 5)

- o “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.”
- o So if a citizen, a reporter, or a School Board member spoke up at the meeting at which the violation happened, the Board must acknowledge those comments in its action to correct it.

Further information about the OMA

Open Meetings Act Compliance Guide,
published by the New Mexico Attorney
General's Office – available online at
<http://www.nmag.gov/uploads/files/Publications/ComplianceGuides/Open%20Meetings%20Act%20Compliance%20Guide%202015.pdf>

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