

The background of the slide is a dark grey collage of various white line-drawn symbols. These include a large letter 'V' in the top left, a globe in the top center, a microscope on the left side, a cross in the bottom left, and various geometric shapes and symbols like a plus sign, a percent sign, and a less-than sign in the bottom right.

In or Out? Understanding the Rules of Closed Session

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OPEN GOVERNMENT – PUBLIC POLICY

- ❑ “...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.” NMSA 1978, § 10-15-1 (A)
- ❑ “... the ***formation of public policy*** or the conduct of ***business by vote*** shall not be conducted in closed meetings...[a]ll meetings of any public body...shall be public meetings[.]” NMSA 1978, § 10-15-1 (A)

EXCEPTIONS – CLOSED MEETINGS

- ❑ NMSA 1978, § 10-15-1 (H) of the Act prescribes the circumstances under which certain meetings, or portions of meetings, are ***not*** subject to open meetings and ***minute-taking*** requirements of the OMA.
- ❑ Regardless of the exception, the public must be provided:
 - ❑ *reasonable notice - NMSBA, 1978, § 10-15-1 (D); and*
 - ❑ *an agenda within 72 hours with items to be discussed or transacted - NMSBA, 1978, § 10-15-1 (F).*

IN OR OUT?

UNDERSTANDING THE RULES OF CLOSED SESSION

- ❑ OUT: “...approved by a majority vote of a quorum of the policy making body;” – NMSA 1978, 10-15-1 (I)(1).
- ❑ OUT: “...**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;” *Id.*
- ❑ OUT: “...the vote of each individual member shall be recorded in the minutes.” *Id.*
- ❑ IN: “Only those subjects announced or voted upon prior to closure by the policy making body may be discussed in a closed meeting.” *Id.*

REASONABLE SPECIFICITY OF AGENDA ITEMS

- ❑ “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.”

Open Meetings Act Compliance Guide (Eighth Edition 2015), page 17.

REASONABLE SPECIFICITY OF AGENDA ITEMS

- ❑ “[T]he 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.”

Open Meetings Act Compliance Guide (Eighth Edition 2015), page 31.

COMMON CLOSED MEETING – LIMITED PERSONNEL MATTERS

NMSA 1978 § 10 -15-1 (H)(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.*”

COMMON CLOSED MEETING – LIMITED PERSONNEL MATTERS

- ❑ “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.”

Open Meetings Act Compliance Guide (Eighth Edition 2015), page 21.

COMMON CLOSED MEETING – LIMITED PERSONNEL MATTERS

- ❑ “If an employee of a public body is entitled to... 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.”

Open Meetings Act Compliance Guide (Eighth Edition 2015), page 22.

RELATED EXCEPTIONS- IPRA

NMSA 1978 § 14-2-1 (A)(2):

- ❑ “Every person has a right to inspect public records of this state except ... letters of reference concerning employment, licensing or permits.”

NMSA 1978 § 14-2-1 (A)(3):

- ❑ “Every person has a right to inspect public records of this state except ... letters or memorandums which are matters of opinion in personnel files...”

REASONABLE SPECIFICITY — LIMITED PERSONNEL MATTERS

- ❑ It has historically been the practice in New Mexico to simply put “limited personnel matters” or “personnel matters” as the enumerated agenda item when going into closed session to discuss a wide array of issues.
- ❑ The New Mexico Attorney General’s Office (“NMAGO”), the entity charged with enforcement of the OMA, has determined that this practice is now in violation of the OMA.

REASONABLE SPECIFICITY — LIMITED PERSONNEL MATTERS

- ❑ In *Belen Consolidated School District Board Re: Open Meetings Act Complaint*, the NMAO concluded that “limited personnel matters” was an ***insufficient description*** in a closed session agenda item “because it does not provide the public with adequate notice of what business the Board is discussing.” November 20, 2015, Page 2.
- ❑ “Notices or agendas describing business items only as ‘personnel matters’ violate OMA Section 10-14-1(F).” *Id.*

REASONABLE SPECIFICITY – LIMITED PERSONNEL MATTERS

- ❑ For lower level employees where there is no action to be taken by the Board, we recommend: “Limited Personnel Matters as permitted under Section 10-15-1(H)(2), specifically so the Superintendent can update the Board regarding [**specify subject matter**] of a [**classification of employee**].”
- ❑ If the matter is a discharge or termination hearing or grievance hearing before the Board, and the Board will take action, then more specificity will be required in the agenda and an action item would be required.
- ❑ Likewise, if the matter is evaluation of the superintendent or discussion of the superintendent’s contract more specificity may be needed and an action item is necessary for contract decisions.

REASONABLE SPECIFICITY?

LIMITED PERSONNEL MATTERS

- ❑ Agenda: Executive Session – *Limited Personnel Matters*
 - ❑ Motion: I move that the board convene in Executive Session to discuss limited personnel matters.

- ❑ Agenda: Executive Session - *Limited Personnel Matters* as permitted under 10-15-1 (H)(2); specifically to discuss the superintendent's annual evaluation.
 - ❑ Motion: I move that the Board enter executive session under Limited Personnel Matters as permitted under 10-15-1 (H)(2); specifically to discuss the superintendent's annual evaluation.

IN OR OUT?

UNDERSTANDING THE RULES OF CLOSED SESSION

- ❑ After sorting through application packets in Executive Session of the finalist candidates for Superintendent, the Board goes into Open Session to take action to appoint a new Superintendent.
- ❑ After the vote, one Board member feels compelled to explain his vote and includes describing and comparing the letters of reference of the finalists.

COMMON CLOSED MEETING – PERSONALLY IDENTIFIABLE STUDENT INFORMATION

- ❑ Discussion regarding personally identifiable information regarding individual students. NMSA 1978, § 10-15-1 H (4).
- ❑ As with the exception for limited personnel matters, a school board... 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.

Open Meetings Act Compliance Guide (Eighth Edition 2015), pages 24 – 25.

RELATED EXCEPTIONS- FERPA

- ❑ 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.

Open Meetings Act Compliance Guide (Eighth Edition 2015), page 24.

RELATED EXCEPTIONS - FERPA

- ❑ “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.” *Id.*
- ❑ “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.” *Id.*

REASONABLE SPECIFICITY?

PERSONALLY IDENTIFIABLE STUDENT INFORMATION

- ❑ Agenda: Executive Session – Personally Identifiable Student Information.
 - ❑ Motion: I move that the board convene in Executive Session to discuss Personally Identifiable Student Information.

- ❑ Agenda: Executive Session - *Personally Identifiable Student Information Matters* as permitted under 10-15-1 (H)(4); specifically to conduct an expulsion hearing.
 - ❑ Motion: I move that the Board enter executive session under Personally Identifiable Student Information Matters as permitted under 10-15-1 (H)(4); specifically to conduct an expulsion hearing.

IN OR OUT?

UNDERSTANDING THE RULES OF CLOSED SESSION

- ❑ During public comment the mother of a student at XYZ Elementary complains about the district policy that students must wear school uniforms. She says this policy is causing a financial hardship for her family and she wants the dress code changed to let students wear regular clothing.
- ❑ After public comment is over, one Board member requests that the discussion of this parents concern about her student be added to the agenda for the next meeting and he thinks the Board should discuss this in executive session because the discussion will include personally identifiable student information.

COMMON CLOSED MEETING – COLLECTIVE BARGAINING

NMSA 1978 § 10 -15-1 (H)(5):

- ❑ “[M]eetings 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...”

COMMON CLOSED MEETING – COLLECTIVE BARGAINING

- ❑ “Before the exception will apply, there must be a labor organization and bargaining unit of the public body’s employees in existence.”

Open Meetings Act Compliance Guide (Eighth Edition 2015), page 26.

RELATED EXCEPTIONS — PUBLIC EMPLOYEES BARGAINING ACT

- ❑ Collective bargaining by public employees generally is governed by the Public Employees Bargaining Act.
- ❑ NMSA 1978, Section 10-7E-17(G) contains a provision allowing closed meetings in circumstances similar to those set forth in the Open Meetings Act.

RELATED EXCEPTIONS — PUBLIC EMPLOYEES BARGAINING ACT

- (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.

REASONABLE SPECIFICITY? – COLLECTIVE BARGAINING

- ❑ Agenda: Executive Session - Collective Bargaining.
 - ❑ I move that the board convene in Executive Session to discuss union concerns.
- ❑ Agenda: Executive Session – *Collective Bargaining Matters* as permitted under 10-15-1 (H)(5); specifically to discuss negotiations with the XYZ-NEA.

NOTE: Final actions must be taken in an open public meeting.

IN OR OUT? –

UNDERSTANDING THE RULES OF CLOSED SESSION

- ❑ After meeting in Executive Session regarding collective bargaining strategies, a Board member who is a retired teacher expresses frustration in open session that the plan is to give 2 percent raises. She states that she believes the staff deserves at least a 5 percent increase and the Board have an obligation to find the money to make this happen.

COMMON CLOSED MEETING – ATTORNEY-CLIENT PRIVILEGE

- ❑ Discussion between the Board and their Attorney regarding threatened or pending litigation. NMSA 1978, § 10-15-1 H (7).

COMMON CLOSED MEETING – ATTORNEY-CLIENT PRIVILEGE

- ❑ “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.”

Open Meetings Act Compliance Guide (Eighth Edition 2015), page 28.

RELATED EXCEPTIONS – ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

- ❑ NM Rules of Evidence § 11-503 (B):
 - ❑ “A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made for the purpose of facilitating or providing professional legal services to that client...”
- ❑ NM Rules of Evidence § 11-503 (A)(1):
 - ❑ “[A] ‘client’ is a person, public officer, corporation, association, or other entity who consults with, seeks advice from, or retains the professional services of a lawyer or a lawyer’s representative.”

REASONABLE SPECIFICITY?

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

- ❑ Agenda: Executive Session – Pending litigation.
 - ❑ I move that the board convene in Executive Session to discuss pending litigation.
- ❑ Agenda: Executive Session – to discuss matters that are subject to the *Attorney-Client Privilege* as permitted under 10-15-1 (H)(7); specifically *Smith v Board of Education*, Case # XXXX.

IN OR OUT?

UNDERSTANDING THE RULES OF CLOSED SESSION

- ❑ The Superintendent asks the District's legal counsel for an opinion regarding whether the District's website, which was developed and is maintained by a third party, complies with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

IN OR OUT?

UNDERSTANDING THE RULES OF CLOSED SESSION

- ❑ The attorney writes a letter that is shared with the Board, which states her belief that the website is not accessible, and gives recommendations for dealing with the concern. At the next Board meeting, when the motion to terminate the third party contract fails, one Board member complains that the Board is not following the advice of legal counsel and reveals the contents of the letter.

DUTY OF CONFIDENTIALITY

- ❑ Code of Ethics for NM School Board Members:
 - ❑ “I will ... respect the confidentiality of information that is privileged under applicable law.”

CAN THE BOARD DELETE AGENDA ITEMS?

- ❑ “[I]n order to avoid confusion in future meetings where the Board intends not to discuss a matter listed on the agenda—particularly when listed under the executive session – we recommend the Board consider its agenda to delete items that it does not intend to discuss.”

NM Gaming Control Board (OMA Complaint 02-01-2016).

CLOSED MEETING – EXECUTIVE SESSION

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

CLOSED MEETING – EXECUTIVE SESSION

- ❑ 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.

CLOSED MEETING – EXECUTIVE SESSION

- ❑ 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.

Open Meetings Act Compliance Guide (Eighth Edition 2015), page 32.

CLOSED MEETING – EXECUTIVE SESSION

- ❑ “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.” NMSA 1978 § 10 -15-1 (J).

CLOSED MEETING – EXECUTIVE SESSION

- ❑ 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.

CLOSED MEETING – EXECUTIVE SESSION

- ❑ 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.

Open Meetings Act Compliance Guide (Eighth Edition 2015), page 28.

THE OPEN MEETINGS ACT

- ❑ The Open Meetings Act is located at NMSA 1978, Sections 10-15-1 to 10-15-4.
- ❑ The New Mexico Open Meeting Act Compliance Guide is published by the NM Attorney General. The 2015 is available at:
<http://www.nmag.gov/uploads/files/Publications/ComplianceGuides/Open%20Meetings%20Act%20Compliance%20Guide%202015.pdf>.

INSPECTION OF PUBLIC RECORDS ACT (IPRA)

- ❑ The Inspection of Public Records Act is located at NMSA 1978, Sections 14-2-1 to 14-2-11.
- ❑ The New Mexico Inspection of Public Records Act Compliance Guide is published by the NM Attorney General. The 2015 Guide is available at:
<http://www.nmag.gov/uploads/files/Publications/ComplianceGuides/Inspection%20of%20Public%20Records%20Compliance%20Guide%202015.pdf>.

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