



Understanding Ethics and Transparency Obligations 2.0

Presented to:

New Mexico School Boards Association

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Laws/Polices To Be Reviewed

- New Mexico Open Meetings Act (OMA), § 10-15-1, et seq.
- New Mexico Inspection of Public Records Act (IPRA), § 14-2-1, et seq. – **NEW CASE LAW**
- School Board Laws
- New Mexico Governmental Conduct Act, § 10-16-1, et seq.
- NEW FORMAT – Discussion, Law, Examples



Open Meetings Act

- **Meeting notices published 72 hours in advance**
 - No amendments within 72 hours
 - Publication required on website if have one
- **Emergency Meetings**
 - AG must be informed of emergency meetings within 10 days after the emergency meeting
 - Must be unforeseen circumstances that will likely result in injury or damage to persons or property or substantial financial loss
- **Proposed: Mandatory Public Comment period**
 - HB 378 (2015) - Either general period or during agenda items
 - Allow reasonable amount of time and diverse perspectives
 - Topics limited to those in scope of board authority



OMA Important Provisions

- **Applies to all meetings with a quorum of members (§10-15-1(D)):**
 - No rolling quorums
 - Meeting of a quorum by email included
- **Decisions must be made in open meetings (§10-15-1(A)):**
 - Public entitled to the greatest possible information including the official acts of officers and employees
 - Formulation of public policy or the conduct of business by vote shall be done in open meetings
 - All persons shall be permitted to attend and listen, reasonable efforts shall be made to accommodate use of audio and video devices



OMA Important Provisions

- **Meeting Notices shall contain an agenda with a list of specific items of business to be discussed or transacted (§10-15-1(F))**
- **Minutes (§10-15-1(G)): The policymaking body shall keep written minutes of all its meetings including:**
 - Date, time and place of meeting
 - Names of members in attendance and absent
 - Substance of the proposals considered and a record of votes
 - **Minutes shall be prepared within 10 days**, shall be approved at the next meeting with a quorum and are not official until approved by the policymaking body
- **Enforcement and penalties: AG, DA or individual enforcement; penalties include misdemeanor and/or fines, attorneys fees and costs (§10-15-3)**



Open Meetings Act – Best Practices

- **Meeting Notices and Agendas**
 - Publish by 5 pm Friday the week before
 - Include copies of board packet online
 - No additions, only deletions, after publishing
- **Include a Public Comment item**
 - Limit comments to topics within Board Authority?
 - No disclosure of student information
 - Limit to 2 to 3 minutes per person, and no sharing of time
 - Treat all the same
 - Use a “script” to introduce public session

//////////////////////////////////// Open Meetings Act – Best Practices

- **Use Specific Language in Agenda Items, including Executive Session**
- **Post Draft Meeting Minutes Online within 10 days, until Final Minutes are Adopted**
- **Consider taping or live streaming meetings and posting online**



OMA Takeaways

- Conduct business in open session
- Early and substantive notice
- No rolling quorums
- Implement best practices



Inspection of Public Records Act (IPRA)

■ **NEWER**

- Draft documents that are not otherwise protected are public record
- Unless there is a specific exclusion, the document is public record - No “rule of reason”

■ **Public has the right to inspect public records except for limited exclusions**

- Records include emails, texts, pictures, videos, etc.
- Response Timelines (§ 14-2-8): Immediately or as soon as practicable but not later than 15 days

■ **Enforcement action (§ 14-2-12): Brought by AG, DA or requestor**

■ **Penalties: Damages up to \$100 per day, costs and attorneys fees (§ 14-2-11)**



What's New in IPRA?

- CASES, CASES, CASES
 - **Britton v. Office of the AG of N.M. (2018) - Your search must find all documents!**
 - The New Mexico AG's Office failed to provide all non-exempt records responsive to a IPRA request and then failed to provide an explanation for their refusal to disclose the records.
 - The AG's Office thought that they had properly responded to the request, but the requestor later came into possession of a document that was responsive to the request but was not provided by the AG's office.
 - She filed suit and won, and the Appellate Court ruled that the "Per-Day" penalty is an incentive for public entities to provide more than a "perfunctory response" – It makes damages that were not previously accessible to requesters in this type of IPRA case- accessible
 - **What does it mean?! – Potentially costs the District more money!**
 - **Need trained records custodian with comprehensive compliance procedures**



What's New? (Cont.)

- *American Civil Liberties Union of N.M v. Duran*, 2016-NMCA-063
 - **You must produce the document even if they already have it**
 - The requestors already knew that the documents that they wanted existed, however they wrote an unwieldy records request to the N.M. Secretary of State's office
 - The Sec. of State's Office denied the request and said that the exact records sought were not responsive to the request. However, under another IPRA request they produced the records that the requestor wanted.
 - The Court ruled: if the requestor already possesses the documents, but they request the same documents from you, and you don't produce them, you must pay their attorney's fees if they win.
 - **What does it mean?! – Potentially costs the District even more money!**
 - **Allows for large attorney fee awards in long, protracted IPRA cases**
 - **This case ended up costing the Sec. of State's office \$130,000.**



What's New ? (Cont.)

- Money is becoming the driving force behind IPRA litigation
 - These are actual awards given by Court's against public entities
 - \$130,000 paid by the N.M. Secretary of State's Office
 - \$90,334.49 awarded against Doña Ana County.
 - \$397,659.02 awarded against the N.M. Governor's Office
- **Plus you are paying your attorneys too!**
 - Typically, no NMPSIA coverage



What's New (Cont.)

- *Libit v. UNM Foundation, Inc. and the Board of Regents of the University of New Mexico*, Second Judicial District Court, (2018)
 - **If you have a private entity fundraising solely for you, their documents and communications regarding that fundraising may be subject to IPRA.**
 - An IPRA request was submitted for all documents, records, and communications between the UNM Foundation and WiseGuys regarding the naming of the PIT.
 - The Foundation rejected the IPRA request because it is a private entity.
 - The Court ruled that because the Foundation sole purpose is fund raising for UNM, and fundraising is inherently public, therefore those actions are taken on behalf of a public entity, and their records are available to IPRA.
 - **What does this mean?!**
 - **Booster Clubs?**



What can we do about the new IPRA cases?

- Help your Record's Custodians
 - Provide them with the resources and staff to ensure IPRA compliance
 - Training – Provide Record's Custodians with the I.T. training and ensure that the District's I.T. Department plays a role in records searches.
 - It is no longer good enough just to ask for administrators or teachers to turn over records. You must find them, if they exist.
- Use your legal counsel
 - Make sure that your District's legal counsel is involved in building the IPRA process, especially communications with requestors.
 - If the District's employees aren't sure how something in IPRA works, ensure that they have a way to pass a request up to the District's legal counsel.



IPRA Best Practices

- ALWAYS Use District Email for School Business
 - Avoids a search of your personal email
- Only Use District Cell Phones for District Business
 - Understand implications of using personal cell
- Written Communications Should Always be Professional
- District should have a Centralized public records custodian, with records as primary duty

State Laws Applicable to School Boards

- **§22-5-6 Nepotism Prohibited** - Superintendent may not employ board family members (parents, children, siblings, in-laws of each)
- **§22-5-6 Prohibited Employment** - Board member shall not be employed in any capacity by a school district “**during the term of office** for which the member was elected or appointed”
- **§22-21-1 Prohibiting sales to school districts and personnel**
 - (A) Board member shall not directly or indirectly sell or be a party to any transaction to sell materials, furnishings, equipment, insurance, supplies to the district, or work under contract with the district; no commission or profit permitted
 - (C) No board member shall solicit or be a party to a transaction to sell insurance or investment securities to any employee of the district
 - Penalty: 4th degree felony
- **§22-21-5 Prohibition on the sale or use of student, faculty and staff lists in direct marketing** - offender pays damages of \$500 or more, plus attorneys fees to recipient



New Mexico Governmental Conduct Act

- General Rules for public officers or employees (§ 10-16-3):
 - Treat their position as public trust and use powers/resources only to advance the public interests, not obtain personal benefits or pursue private interests
 - Conduct themselves in a manner that justifies the confidence placed in them by the people
 - Full disclosure of real or potential conflicts of interest shall be a guiding principle for determining appropriate conduct
 - Make reasonable efforts to avoid undue influence and abuse of office



NMGCA (cont.)

- Prohibited Political activities (§ 10-16-3.1):
 - No coercion to contribute, vote or participate in political activity
 - No threats to deny promotion or pay increase
 - No requiring employee contribution or event ticket
 - No advising an employee to take part in political activity
 - No use of governmental property for non-authorized purposes
- Official Acts for personal financial interest prohibited (§ 10-16-3.1):
 - Knowing and willful violation is a 4th degree felony
 - Public officer or employee is disqualified from engaging in any official act directly affecting their financial interest



NMGCA (cont.)

- Other important provisions:
 - No honoraria for speeches/service relating to the performance of public duties (expenses ok)
 - No use of confidential information for private gain
 - Restrictions on contracts involving current or former officers or employees
 - Prohibited bidding
- Enforcement and penalties (§ 10-16-14, 17, 18):
 - Enforced by Attorney General or District Attorney
 - Penalties: discipline, dismissal, demotion or suspension
 - Criminal penalties include misdemeanor (unless otherwise specified) and up to \$1,000 fine
 - Civil penalties of \$250 per violation up to \$5,000



Ethics – Best Practices

- Avoid conflicts and improper interactions with employees
- Abstain from decisions affecting personal financial interests
- Be careful with political campaigns
- Public disclosures of financial interests, non-profit, memberships and gifts received



Questions you must ask yourself

- Is there a clear guidance regarding board and staff roles in open meetings and disclosure of public records?
- Is there clear guidance regarding ethical considerations for board members and staff?
- Are we doing enough to protect ourselves and the District from any potential violations?
- If the answer to any of these is “I Don’t Know” than find out... It is that important



ADDITIONAL QUESTIONS/DISCUSSION

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