

# Open Meetings Act (OMA): Making Your Meetings Great Again

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## Introduction

- ❑ School board meetings are a key component of effective board decision-making and governance. That means that compliance with the New Mexico Open Meetings Act (OMA) is also key to those processes.
- ❑ This session will ensure that attendees understand not only applicable open meetings laws, but also learn how to apply those laws, in order to make their board meetings great, lawful, and effective.
- ❑ This interactive training, by experienced school attorneys, will provide an engaging overview of New Mexico's open meeting laws, and applicable policy. Further, the session will engage participants in discussions of how to apply that law to board, and district, governance and decision-making.

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## From the Public's Perspective:

A GREAT meeting is one I can easily access.

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## Open Meetings Act on Access

- ❑ NMSA 1978, § 10-15-1(A):
  - ❑ "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."

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## NM Attorney General on Access under OMA

- ❑ New Mexico Attorney General Open Meetings Act Compliance Guide (8<sup>th</sup> Edition 2015):
  - ❑ “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.”

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## The 2024 Legislature’s Modern Twist

SB 137 (Effective date July 1, 2024) codified at NMSA 1978, § 22-5-4.16:

- ❑ “Except as otherwise provided in this section, live audio and video webcasts of local school board meetings shall be accessible through the school district's website and shall include a user interface that allows members of the public to submit written or verbal comments. A webcast shall begin as soon as practicable after the chair has called the meeting to order and shall terminate as soon as practicable after the local school board has adjourned. Recordings of the webcasts and an electronic copy of any minutes approved at the meeting shall be posted on the school district's website within one week of the meeting's conclusion and shall be publicly available for at least three years following the date of the meeting unless the state records retention schedule provides otherwise.”

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## From the Public's Perspective:

**A GREAT meeting is one in which the Board is transparent about what will be discussed and decided at the meeting.**

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## Agenda Content

- ❑ NMSA 1978, § 10 -15-1 (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."



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## Specificity of Agenda Items

- ❑ New Mexico Attorney General Open Meetings Act Compliance Guide (8th Edition 2015):
  - ❑ "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."
  - ❑ "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."

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## No Surprises Allowed

- ❑ OMA Complaint – *Central Consolidated School District* (02/05/16):
  - ❑ Central Consolidated violated the OMA when the agenda for executive session listed "Superintendent Evaluation," and following such executive session, the Board took action to discharge the superintendent and appoint an interim superintendent.
  - ❑ "In reviewing the agenda, a member of the public could reasonably conclude that the only action to be taken was the superintendent's evaluation. The public would not anticipate that the superintendent would be discharged and replaced."

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## From the Public's Perspective:

A GREAT meeting is one in which I can, as a member of the public, speak to the issues that concern me.

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## Open Meetings Act

- ❑ OMA provides that "all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings." NMSA 1978 § 10-15-1(A) (1999).
- ❑ Except for those portions of a meeting that are closed under OMA, a Board meeting is a limited public forum for the *receipt* of information. *Mesa v. White*, 197 F.3d 1041 (10th Cir. 1999).

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## Freedom of Speech

- ❑ If a Board by policy or practice permits public comment during a Board meeting, that portion of the meeting is considered a “limited public forum” for *speech* by members of the public. *MacQuigg v. APS*, Civ. No. 12-1137 (D.N.M. 2015).
- ❑ A limited public forum is considered a forum designed by the government and dedicated to expressive activities.
- ❑ Such a limited public forum triggers certain First Amendment speech protections under the United States Constitution.

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## Restrictions on Speech

- ❑ Under the First Amendment of the United States Constitution, in a limited public forum, a Board may restrict speech if the restrictions are:
  - ❑ Viewpoint Neutral, and
  - ❑ Reasonable in light of the purpose served by meetings of the Board.

See *Shero v. City of Grove, Okl.*, 510 F.3d 1196 (10th Cir. 2007).

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## ***MacQuigg v. APS, Civ. No. 12-1137 (D.N.M. 2015)***

- ❑ Key Quote:
  - ❑ “[T]here does not appear to be a statutory basis for restricting personal attacks...”
  - ❑ “The Board’s policy is viewpoint-based because it ‘permits praise and neutral feedback, but not criticism...’”
  - ❑ “The Board’s ‘personal attacks’ policy is declared on its face to violate the First Amendment. The Board is permanently enjoined from further enforcement of its personal attacks policy.”

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## ***Moms for Liberty v. Brevard Public Schools, 118 F.4th 1324 (8th Cir. 2024)***

- ❑ Background:
  - ❑ “Moms for Liberty challenges three Board policies: the rule against ‘abusive’ speech, the rule against ‘personally directed’ speech, and the rule against ‘obscene’ speech.”
  - ❑ One of the scenarios as set forth in the case:
    - ❑ “A member shared her concern that her child’s elementary school library contained inappropriate books. She began reading one, which detailed an in-school sexual encounter:
      - ❑ I tiptoed toward the door, peering through the window at the boy’s pants around his ankles squeezed between April’s straddled legs as she lay on the teacher’s desk. I swung the door open letting a soft light from the hallway shine a spotlight on them. ‘Shit!’ he muttered.
  - ❑ Belford quickly interrupted the speaker when she got to the word ‘shit.’”

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## ***Moms for Liberty v. Brevard Public Schools,*** **118 F.4th 1324 (8th Cir. 2024)**

- ❑ Ruling:
  - ❑ “Restrictions that bar offensive or otherwise unwelcome speech are impermissible, regardless of the forum in which the government seeks to impose them.”
  - ❑ “[H]ere, the ban on ‘abusive’ speech is an undercover prohibition on offensive speech.”
  - ❑ “[I]t seems clear that at least some iterations of an obscenity policy would be constitutional—obscenity is one of the few unprotected categories of speech under the First Amendment. But that constitutional standard is exceptionally narrow ... the Board used its obscenity policy to bar protected speech ...”

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## ***Moms for Liberty v. Brevard Public Schools,*** **118 F.4th 1324 (8th Cir. 2024)**

- ❑ What about the book excerpt read during public comment?
  - ❑ “That word, though not polite, is also not obscene. Nor is the book’s other content, no matter how objectionable it may be as early childhood reading material. Moreover, the content of books in school libraries is a matter of serious community interest. It would be difficult, if not impossible, for speakers to adequately air their concerns about a particular book without informing both the Board and the community about what that book says. Describing the content of a book is not as potent as reading its words—nor is it as informative. And it is remarkable for the Board to suggest that this speech can be prohibited in a school board meeting because it is inappropriate for children when it came directly from a book that is available to children in their elementary school library.”
  - ❑ “Because this prohibition on obscenity is not about obscenity, and frustrates the purpose of the forum, it is an unreasonable policy, at least as it applies to reading portions of books from school libraries. It is therefore unconstitutional as applied here.”

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## From a Board Member's Perspective:

A GREAT meeting is one that provides a means to discuss and deal with real issues even when difficult.

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## Yes, You Can ... But it Takes Practice

- ❑ You must embrace the policy of the State.
- ❑ NMSA 1978, § 10-15-1(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..."

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## Examples of Real Issues

- ❑ Terminating a contract with a vendor.
  - ❑ “except for expenditures for salaries, [the Board] contract[s] for the expenditure of money according to the provisions of the Procurement Code.” NMSA 1978, § 22-5-4(J).
- ❑ Debating a controversial cell phone ban policy.
  - ❑ The board “develop[s] educational policies for the school district.” NMSA 1978, § 22-5-4(J).
- ❑ Debating and deciding socially charged issues such as the removal of a statue, changing the name of a school, deciding a challenge to a book in the library.

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## Avoid Conduct that Undermines OMA policy

- ❑ New Mexico Attorney General Open Meetings Act Compliance Guide (8<sup>th</sup> Edition 2015):
  - ❑ “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.”

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## Don't Hide Behind Committees

- ❑ New Mexico Attorney General Open Meetings Act Compliance Guide (8th Edition 2015):
  - ❑ "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."

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## Navigating Personnel Matters

- ❑ NMSA 1978, § 10-15-1(H)(2) permits the Board to go into Executive Session to discuss "limited personnel matters" which means "hiring, promotion, demotion, dismissal, assignment or resignation of or the investigation or consideration of complaints or charges against any individual public employee."
- ❑ The exception also includes those things closely related to those specifically listed in the exception, such as performance appraisals and interviews with job candidates.
- ❑ Board's role with regard to personnel:
  - ❑ Employes including evaluates the superintendent (closed session)
  - ❑ Capacity to sue and be sue (closed session; see also, § 10-15-1(H)(7))
  - ❑ Policy (open session)
  - ❑ Budget (closed session)
- ❑ Limits on Board: the superintendent employs, fixes the salaries of, assigns, terminates or discharges all employees of the school district.

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## From a Board President's Perspective:

**A GREAT meeting is one in which all Board Members are Present and Fully Engaged.**

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## Open Meetings Act on Attendance

- ❑ NMSA 1978, 10-15-1(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."

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## Other Relevant State Law

- ❑ “The office of any member of a local school board, if the member misses four consecutive regular meetings, may be declared vacant by a majority vote of the remaining members of the local school board.” NMSA 1978, § 22-5-12(B).
- ❑ “The office of any member of a local school board, if the member misses six consecutive regular meetings, shall be vacant.” NMSA 1978, § 22-5-12(C).

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## What does it mean to be present?

- ❑ New Mexico Attorney General Open Meetings Act Compliance Guide (8th Edition 2015):
  - ❑ “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.”

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## From a Board President's Perspective:

**A GREAT meeting is one in which everyone is working to ensure an OMA compliant meeting.**

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## Working together means self-policing against rolling quorum

- ❑ New Mexico Attorney General Open Meetings Act Compliance Guide (8th Edition 2015):
  - ❑ "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."

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## More on self-policing

- ❑ New Mexico Attorney General Open Meetings Act Compliance Guide (8th Edition 2015):
  - ❑ “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.”
  - ❑ “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.”

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## Working together means not straying from the Executive Session agenda item

- ❑ NMSA 1978, § 10-15-1(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.”

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## More on Not Straying

- ❑ New Mexico Attorney General Open Meetings Act Compliance Guide (8th Edition 2015):
  - ❑ "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."

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