



# Open Meetings Act (OMA)

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# What we will cover:

- Brief review of what OMA is and why it should be followed.
- When must a board member gathering be public?
- The correct application of exceptions allowing closed meetings most encountered by school boards.
- Frequently asked questions

# OMA : a “sunshine law” and its purpose

- To give members of the public the right to know what happens in public body meetings, allowing the public to be informed and can keep an eye on the government
- “Sunlight is said to be the best of disinfectants; electric light is the most efficient policeman.” Louis D. Brandeis, 1913



# Why is OMA important to School Board members and why should it be followed?

Aside from promoting good governance, OMA contains enforcement provisions violation of which can result in:

- Costly and time consuming litigation
- Criminal prosecution of individuals (\$500 fine)
- Court costs and reasonable attorney fees awarded to the successful party
- Potential recall of School Board members

Actions taken in violation of OMA are void.

Harms reputation of the Board/Perception of lack of transparency



# YOU ARE PRESUMED TO TAKE PROPER ACTIONS

The OMA **presumes** that the public body takes proper actions:

- Before the meeting
  - During the meeting
  - After the meeting
- 
- If that presumption is successfully challenged, the District may be ordered to pay court costs and reasonable attorneys' fees, and subject the person violating the law to criminal penalties (misdemeanor and no more than \$500), likewise,
  
  - The district may recover reasonable attorneys' fees if the action was brought without sufficient information and belief that good grounds support it. But, it still costs a lot of money to prove you got it right. So . . . Let's get it right!

# What Gatherings Must Comply with OMA?

- “All meetings of any public body... shall be public meetings, and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings.” NMSA 10-15-1A.
- **“All meetings of a quorum of members of any board... held for the purpose of formulating public policy, including the development of personnel policy, rules, regulations or ordinances, discussing public business or taking any action within the authority of ...any board, commission or other policymaking body are declared to be public meetings open to the public at all times, except as otherwise provided in the constitution of New Mexico or the Open Meetings Act.”**

# Is it a Meeting?

- It does not matter whether it is called a work session, retreat, training seminar, or phone tree – under the Open Meetings Act, a meeting occurs whenever a quorum of a public body:
  - Formulates public policy
  - Discusses public business
  - Takes action



Do you have a quorum?

A quorum is generally half the members plus one, unless otherwise specified in the Board's laws or regulations. A quorum can occur without members being in the same room; the quorum might discuss public business in a series of emails or phone calls, over several days. This is called a *rolling quorum*, and it is illegal unless the participants follow all the requirements of the Open Meetings Act.

# How far in advance does a public meeting have to be noticed?



- The public body has to (a) notify the public that a meeting is happening, and
- (b) make its meeting agenda available.
  - The law allows the public body to determine annually what notice for a public meeting is reasonable as applied to that public body. This determination is made in the Board's annually adopted Open Meetings Resolution. Notice must be given at least 72 hours in advance of the meeting and may be made simultaneously with the posting of the agenda, if that is what the board determines is reasonable.
  - The agenda must be made available to the public and posted on the district website at least 72 hours in advance of the meeting.
  - Notice must be provided to requesting licensed broadcast stations and newspapers.



The Board must adopt Open Meetings Resolution annually



# Notice and Agenda

- The Board can take action only on action items listed on the posted agenda.
  - The agenda must contain specific items of business to be discussed or transacted.
- Exceptions to the 72 Hour Requirement:
  - meetings held to address an emergency, and
  - public bodies that meet more than once per week.



# What constitutes an emergency?

- Circumstances that could not have been anticipated, and
- 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.
- Notice must be provided as far in advance as reasonably possible under the circumstances.
- The 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.
- The 10-day AG report is not required for a declaration of a state or national emergency.



## Closed/executive session?

- Closing meetings creates curiosity and suspicion from:
  - Community members
  - District employees
  - The media



- Use closed/executive sessions sparingly and
  - only as allowed by law under the OMA, and
  - Is properly identified on the agenda, or
  - pursuant to a motion that:
    - identifies the exemption
    - is stated with “reasonably specificity”
    - determined via roll call vote.

# Exceptions most pertinent to school boards which allow a closed-session

## ➤ Limited personnel matters – subsection H(2)

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



# Exceptions most pertinent to school boards which allow a closed-session

- Deliberations in administrative adjudicatory proceeding – subsection H(3)
  - Proceedings 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.
  - The *proceeding* is confidential and can take place in a closed executive session ; however
  - Any *final action* is public information and must take place in an open meeting.

# Exceptions most pertinent to school boards which allow a closed-session

- Personally identifiable information about any student – subsection H(4)
  - This information is confidential unless the student, parent or guardian requests otherwise. Information includes long-term suspension/expulsion hearings; individual student test scores, grades, health or medical information, etc.
  - Aggregate data may be disclosed, so long as it is not personally identifiable
- The information is protected by FERPA and cannot be discussed outside of a closed executive session (exception for “directory information”).

# Personally Identifying Information Pitfalls

- Discussion of individual students poses a risk of improperly revealing personally identifying information. This is true even if the discussion is innocuous or positive.
  - For example: honoring a student for getting perfect grades could inadvertently open the school board up to a potential FERPA violation.
  - Check the District's policy on FERPA and Directory Information. Unless the information qualifies as Directory Information and the parent or student (over 18) hasn't opted out of providing public information, public bodies must obtain the consent before discussing the student's specific academic or extracurricular achievements in open session.



# Exceptions most pertinent to school boards which allow a closed-session

- Bargaining strategy preliminary to collective bargaining negotiations – subsection H(5)
  - DOES NOT include discussions of hiring a collective bargaining consultant, adopting a policy as to the collective bargaining process, or responding to union organizing efforts.

The exception also applies to collective bargaining sessions at which the board and representatives of the collective bargaining unit are present.





# Exceptions most pertinent to school boards which allow a closed-session

- Discussion concerning purchases exceeding \$2,500 from one source – subsection H(6)
  - Sole-source purchases for more than \$2,500
  - Competitive sealed proposals discussed for contract negotiation process
  - (Note: this exception probably does not apply to a discussion of competitive sealed bids, for which lowest price from a responsible bidder is the only consideration)

# Exceptions most pertinent to school boards which allow a closed-session

- Meetings subject to the Attorney-client privilege pertaining to pending or threatened litigation – subsection H(7)
  - Situations in which a public body is or may become a participant in litigation (including as a plaintiff.)
  - Attorney General takes very restrictive view of this exception – requires attorney to be present or on the phone, or has sent a letter or memorandum about litigation.
  - **NEVER** share such information!

# Exceptions most pertinent to school boards which allow a closed-session

- Meetings to discuss the purchase, acquisition or disposal of real property or water rights by the public body— subsection H(8)

# Coming out of a Closed Session



- OMA requires that public bodies provide a specific statement when coming out of a closed meeting. NMSA 10-15-1(J) This is to address public concerns about the misuse of closed discussions.
- The minutes should reflect the fact that discussion in the closed session was limited to either:
  - (A) the topic(s) mentioned in the motion for closure, or
  - (B) the topic(s) mentioned in the notice of closed session.
- If an open meeting went into closed session, the statement about the topics in the closed session must be in the minutes of open meeting that was closed.
- If a closed meeting was scheduled separately, the statement must be in the minutes of the next open session.

# Closed Session Pitfalls



- Given that a public body cannot go into a closed session without being able to state what the closed session will be about with reasonable specificity, it is not advisable to have a standing agenda item for general closed session topics.
  - For example, closed sessions should not be used to conduct general discussions about personnel matters. Instead, the public body should determine what specific personnel matter will be discussed before making a motion for a closed session.
- While a public body may have attorney-client conversations about a specific topic in closed session, public bodies should not enter into closed session to solely to hold general conversations about any threatened or pending litigation.

# FREQUENTLY ASKED QUESTIONS



## FAQ: What should we do if we violate the OMA?

- Call your lawyer.
- 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.
  - 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.
  - 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.")
  - The Board President should read the entire corrective resolution in public before the Board votes on it.
  - 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."

## FAQ: What should the School Board do if it realizes that it has violated the OMA? (continued)

- 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.
- In addition, if a corrective resolution is adopted, note that Section 10-15-3(B) also states:
  - "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."



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.



# FAQ: Does OMA Apply meetings of the finance subcommittee?

- Hard question and no existing case law.
- NMSA 22-8-12.3 requires board to appoint at least two members to serve on finance subcommittee to assist board in carrying out its finance and budget duties.
- The subcommittee 1) “makes recommendations” to the board about financial planning, monitoring of revenues and expenses, budget preparation, and procurement and 2) serve as an external monitoring committee on budget and finance matters.
- If a quorum of the board isn’t present, and the subcommittee can only make recommendations and can’t bind the board, why should OMA apply?
- AG takes position that a committee established for fact-finding purposes by a board and a committee created by statute for the same purposes should be distinguished. May take position that because the subcommittee is required by statute, OMA applies, even though no quorum present and only formulates recommendations.

# FAQ: What about superintendent search committees?

- Only the board has the authority to hire the superintendent but it can create committees to provide input.
- So long as no quorum of board members serves on the committee, and the committee makes no decisions on behalf of, formulates no recommendations that are binding in any legal or practical way on, any otherwise doesn't establish policy for the public body, OMA does not apply.
- Search committee may only make non-binding recommendations; otherwise OMA applies.
- Don't let the search committee weed out applicants.

FAQ: We have a standing item on the agenda for a closed session to discuss limited personnel matters. Is that a problem?

- Yes, because an agenda item for a closed meeting must state the specific provision of the law authorizing the closed meeting **AND state with reasonable specificity the subject to be discussed.**
- The “reasonable specificity” requirement will be met if the description gives the public a general idea about what will be discussed without compromising the confidentiality conferred by the exception.
- Example: meeting to discuss limited personnel matters pursuant to NMSA 10-15-1(H)(2), a complaint about the superintendent.
- The reasonable specificity requirement applies to the other exceptions allowing closed sessions as well

FAQ: I polled a couple of board members via text/phone about who should be the next board president. Did we violate OMA?

- All discussion of public business by a quorum must be conducted in compliance with OMA. This means that public bodies should not informally pre-arrange votes.
  - For example, members of a public body should not coordinate their votes on who to elect to an officer position prior to casting their formal votes at a public meeting.
  - This would amount to an improper use of a rolling quorum in which the actual decision-making is conducted outside of OMA.



FAQ: Our superintendent just sent an email stating that she was resigning immediately. Can we have an emergency meeting?

- A true emergency allows the Board to forego the requirement to post an agenda 72 hours prior to the meeting and to avoid the requirement to only take action on items appearing on the agenda.
- “emergency” refers to unforeseen circumstances that, if not addressed immediately by the public body, will likely result in injury or damage to persons or property or substantial financial loss to the public body.
- Unless the superintendent’s hasty departure will create those circumstances, no emergency meeting is allowed.
- The board is required to report the circumstance and action taken to the AG.
- The Board should more likely have a special meeting following the 72 hour notice requirement.

# FAQ: Does OMA Require Adherence to Robert's Rules of Order?

- Adopting a set of parliamentary rules may help streamline and organize public meetings.
- The OMA does not require a specific set of parliamentary standards.
- Public bodies may adopt which procedural rules, consistent with the OMA, best fit the needs of their organizations.
- If there conflict between the OMA and the Board's rules of order, the OMA should *always* prevail.
- Violating OMA will incur statutory penalties, including invalidating the action. However, minor deviations from parliamentary rules would not have this effect.



# FAQ: Should the minutes recite everything said at the meeting?

- What does OMA require to be in the Meeting Minutes?
  - Date, time and place of meeting.
  - Names of members present and absent.
  - Statement of the substance of each proposal considered.
  - A record of each decision made by the public body and how each member voted on each decision.



# What goes into the Meeting Minutes?



- The minutes should reflect if a matter was discussed but not voted upon.
- Minutes are not finalized until approved at the next meeting. A public body may also vote to amend or disapprove of draft minutes.
- A draft copy of minutes must be prepared within ten working days of meeting.
- Draft minutes must be made available for disclosure, and must be provided in response to an IPRA request. Draft minutes should state that they are not final to avoid confusion.



# FAQ: What does OMA require be posted on the Website?

- OMA requires complete agendas for both regular and special meetings to be posted on the public entity's website *if* one is maintained.
- OMA does not require a public entity create a website solely for the purpose of providing digital access to agendas.
- This requirement does not apply in emergencies or if the committee meets more than once per week.
- OMA does not required that approved minutes be posted to the website.



# FAQ: Do all votes have to be roll call votes?

- Although OMA requires the minutes reflect how members voted on each proposal, a roll call is not always required.
- For example, a roll call would not be necessary where a vote is unanimous.
- When the minutes list the names of voting members in attendance, it is sufficient to state “Mr. Smith voting in favor, all other members present voting against.”
- Votes may not be anonymous. This includes votes by secret ballot.
- Roll call votes are required on motions to enter closed session. The vote of each individual member shall be recorded in the minutes.
- The Attorney General advisory allowing virtual meetings during the Covid public health emergency requires all votes of the public body taken at a virtual meeting to be by roll call vote



# FAQ: One board member always attends by telephone instead of in-person. Do we have to allow that?

- May attend by telephone (or other similar communication equipment) when:
  - If allowed by law or rule of the public body
  - Otherwise **difficult or impossible** for member to attend in person
  - Each member participating can be identified when speaking
  - All participants can hear each other at the same time
  - Members of the public attending are able to hear any member of the public body who speaks during the meeting.

NMSA 1978 §10-15-1 (C)

- Defeats the purpose of the Act to do this in large numbers
- May only be done when difficult or impossible to attend in person (not just inconvenient)
- This provision is not intended to encourage participation by phone when merely inconvenient.
- (Unless orders related to a state of emergency require otherwise) The board can prohibit attendance by phone/zoom, or create conditions for when it is permissible, so long as the above requirements are met.
- Some amount of flexibility is reasonable to account for a member's schedule or unexpected life event, so long as telephone participation is not abused





# Virtual meetings

Notice must contain detailed information about how members of the public may gain access to the meeting and attend virtually, e.g., Zoom ID and password, phone number, etc.

- To maintain compliance with the OMA, the public body should also do the following:
  - The chair should **announce the names** of the members of the public body participating remotely;
  - All members of the public body must **identify themselves when they speak** and ensure that they are clearly audible to all attendees;
  - Members of the public should be provided **necessary information to access the meeting**;
  - If audio or video is interrupted, the chair should **suspend discussion**;
  - All votes of the public body must be by **roll call vote**; and
  - The public body should produce and maintain a recording of the open session of the meeting.



# Virtual meetings

- In general, OMA allows members to attend meetings telephonically when “it is otherwise difficult or impossible for the member to attend the meeting in person.” NMSA §10-15-1(C)
- This requirement is limited to the rules adopted by the public body and other rules as provided by law.
- The New Mexico Attorney General’s Office has released guidance for complying with OMA during COVID.
- The AG guidelines emphasize that public bodies should follow Department of Health guidance and that public health and safety is a priority.

# Additional OMA resources

*Open Meetings Act Compliance Guide*, published by the New Mexico Attorney General's Office – available online at:

<https://www.nmag.gov/wp-content/uploads/2021/11/Open-Meetings-Act-Compliance-Guide-2015.pdf>

# Using the OMA Compliance Guide

- The New Mexico Attorney General's Office offers a guide for OMA compliance.
- The OMA Compliance Guide does not have the force of law but a court might consider it persuasive.
- The OMA Compliance Guide may not reflect all current developments in the law and may not be accurate on all possible questions involving OMA.



# Contact information

*The information in this handout was created by Cuddy & McCarthy LLP and is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, consult an attorney.*



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