

# Understanding Ethics and Transparency Obligations for School Districts

PRESENTED TO:

NEW MEXICO SCHOOL BOARDS ASSOCIATION – REGION I

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APRIL 7, 2021

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# Laws/Polices To Be Reviewed

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

# Open Meetings Act

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- **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
  - Already in NMSBA Policies

# OMA Important Provisions

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- **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

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- **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)**

# Recent Issues in OMA

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- Streaming Meetings
- Vague Agenda Items
- Executive Session placeholders
- Discussions during a meeting recess
- Compliance with minutes requirements
- Enforcement of public comment rules
- Properly posted meeting notices
- ATTORNEY GENERAL INQUIRIES
  - Costly – monetarily and public opinion

# OMA During COVID

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- AG's Guidance for Open Meetings during COVID
  - Verbally Identify yourself at the beginning of the meeting and when you speak
  - Public must be able to have remote access or call-in number to listen
  - All Votes must be by Roll Call Vote
  - If the audio or video is interrupted the Chair should suspend the discussion until it is operational again.
- Guidance Ends when Public Health Emergency is Lifted

# Open Meetings Act – Best Practices

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- **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

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- **Use Specific Language in Agenda Items, including Executive Session**
- **Post Draft Meeting Minutes Online within 10 days, until Final Minutes are Adopted**
- **NO Rolling Quorums!**
- **Conduct as much business as possible in Open Session**
- **Consider taping or live streaming meetings and posting online**

# Inspection of Public Records Act (IPRA)

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- **NEWER ISSUES**

- 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
- If the Request is vague or contradictory, you can ask the Requester for Clarity

- **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)**

# NEW IPRA CASE LAW

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- ***Britton v. Office of the AG of N.M. (2018)* - Your search must find all documents!**
  - **Need trained records custodian with comprehensive compliance procedures**
  - **Allows for Punitive Damages and Attorneys' Fees for all IPRA litigation**
- ***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. – Booster Clubs**
- ***American Civil Liberties Union of N.M v. Duran, 2016-NMCA-063***
  - **You must produce the document even if they already have it**

# Potential Cost to Districts

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- Money is becoming the driving force behind IPRA litigation
  - \$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 can we do about the new IPRA cases?

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- 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

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- 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
  - Write like a 3<sup>rd</sup> party is going to read your emails
- District should have a centralized public records custodian, with records as primary duty

# State Laws Applicable to School Boards

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- **§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: 4<sup>th</sup> 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 (GCA)

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- 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.)

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- 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 4<sup>th</sup> degree felony
  - Public officer or employee is disqualified from engaging in any official act directly affecting their financial interest

# NMGCA (cont.)

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- 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

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- 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

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- 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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