

Understanding Ethics and Transparency Obligations for School Districts

PRESENTED TO:

NEW MEXICO SCHOOL BOARDS ASSOCIATION – REGION V

MARCH 16, 2021

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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. – **IPRA Case Law**
- School Board Laws
- New Mexico Governmental Conduct Act, § 10-16-1, et seq.

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
 - Already in NMSBA Policies

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)**

Recent Issues in OMA

- 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

- 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

- **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**
- **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)

■ **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

- ***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

- 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?

- 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
 - Write like a 3rd 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

- **§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 (GCA)

- 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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