

Opinion No. 93-02

January 8, 1993

OPINION OF: TOM UDALL, Attorney General

BY: Elizabeth A. Glenn Assistant Attorney General

TO: Mary R. Granito State Records Administrator State Records Center and Archives
404 Montezuma Santa Fe, NM 87503

QUESTIONS

1. Does publication of a notice of rulemaking in the New Mexico Register fulfill the notice requirements of the Open Meetings Act?
2. Does publication of a notice in the New Mexico Register fulfill the requirements for publishing legal notices under NMSA 1978, §§ 14-11-1 to -8 (Repl. Pamp. 1988 & Cum. Supp. 1992)?
3. Does publication of a notice, proposed rule, or adopted rule in the New Mexico Human Services Register fulfill the requirements of publication in the New Mexico Register?
4. Does publication of a notice, proposed rule, or adopted rule in the New Mexico Register obviate the need to publish such notice, proposed rule or adopted rule in the New Mexico Human Services Register?

CONCLUSIONS

1. A notice of proposed rulemaking in the New Mexico Register probably would not constitute reasonable notice under the Open Meetings Act because the Register is not widely circulated and is not readily available to the general public.
2. A notice published in the New Mexico Register would not fulfill the requirements for legal publication under NMSA 1978, §§ 14-11-1 to -8 (Repl. Pamp. 1988 & Cum. Supp. 1992) because the Register is not a newspaper of general paid circulation.
3. Publishing a notice, proposed rule or adopted rule in the New Mexico Human Services Register does not eliminate the need to publish in the New Mexico Register.
4. Because publication of the New Mexico Human Services Register is not required by statute, whether publication in the New Mexico Register obviates the need to publish in the New Mexico Human Services Register depends on the policy and rules of the Human Services Department.

FACTS

Various agencies have asked the State Records Administrator whether publication of notices in the New Mexico Register also fulfills the notice requirements of the other statutes or whether it is necessary to separately comply with the publication requirements of each statute.

ANALYSIS

1. Open Meetings Act.

Section 14-4-7.1 of the State Rule Act, NMSA 1978, §§ 14-3-24 to -25, 14-4-1 to -9 (Repl. Pamp. 1988 & Cum. Supp. 1992) provides that the New Mexico Register

shall be the official publication for all notices of rule makings and filings of adopted rules, including emergency rules, by agencies. The register may include the text of any or all proposed rules and adopted rules, including emergency rules, in full or in part at the discretion and agreement of the issuing agency and the state records administrator.

Agencies required to publish the specified notices and rules in the Register are "any agency, board, commission, department, institution or officer of the state government except the judicial and legislative branches of the state government." NMSA 1978, § 14-4-2. The Register is required to be published at least twice a month, and is available to any person by subscription and single copy purchase at a reasonable charge approved by the State Records Administrator. **Id.** § 14-4-7.1(A), (C). In addition to notices of rulemaking and adopted rules, the Register also may include, among other things, "a calendar listing the date, time and place of all or selected agency rule-making hearings." **Id.** § 14-4-7.1(D).

The Open Meetings Act, NMSA 1978, §§ 10-15-1 to -4 (Repl. Pamp. 1992), provides:

Any meetings at which the discussion or adoption of any proposed resolution, rule, regulation or formal action occurs and at which a majority or quorum of the body is in attendance, and any closed meetings, shall be held only after reasonable notice to the public. The affected body shall determine at least annually in a public meeting what notice for a public meeting is reasonable when applied to that body. That notice shall include broadcast stations licensed by the federal communications commission and newspapers of general circulation which have provided a written request for such notice.

NMSA 1978, § 10-15-1(C). Although the statute gives agencies some flexibility to fashion notice procedures that reflect the character of the agency and its constituency, this office has established guidelines for determining whether an agency's notice procedures provide "reasonable notice to the public." Attorney General's Open Meetings Act Compliance Guide, p. 7 (Sept. 1991); AG Op. No. 90-29 (1990). In general, notice is reasonable if it (1) adequately and accurately informs the public of the proposed

meeting's time, place and date; (2) is posted or published in a prominent location accessible to the public; and (3) is published sufficiently in advance of the meeting, taking into consideration the items to be discussed, public rights affected, and the necessity for public participation.¹ This office recommends that public bodies publish notice at least 10 days before a regular meeting, three days before special meetings and as practicable for emergency meetings. Many agencies applying these guidelines publish their meeting notices in newspapers of general circulation.

A notice of hearing published in the New Mexico Register probably could be drafted and published far enough in advance to meet the first and third requirements for reasonable notice. We do not believe, however, that publication in the New Mexico Register would constitute adequate notice "to the public." The purpose of the notice requirement is to inform members of the public interested in action taken by the public body that a meeting will be held so that they can attend and listen to the proceedings. If notice is posted or published so that it is not accessible to the interested public, it will not be considered reasonable. Presently, the New Mexico Register has only about 125 subscribers. Most of the subscribers are state agencies, law firms, environmental and engineering firms, university libraries, a few public libraries, and other institutional subscribers. At this time, therefore, the Register is not widely available to private citizens and many persons affected or interested in an agency's rulemaking hearings could not readily obtain a copy. Under these circumstances, we do not believe that in most cases a notice published in the Register would be sufficiently accessible to constitute reasonable notice to the public.

2. Legal Notices.

Notices subject to the requirements for publishing legal notices are "[a]ny notice or other written matter whatsoever required to be published in a newspaper by any law of this state, or by the order of any court of record of this state." NMSA 1978, § 14-11-1 (Repl. Pamph. 1988). A legal notice may "be published only in a daily, a triweekly, a semiweekly or a weekly newspaper of general paid circulation, which is entered under the second-class postal privilege in the county in which said notice ... is required to be published." **Id.** § 14-11-2.

We do not believe that a legal notice published in the New Mexico Register complies with these provisions. The statute requires publication in "a newspaper of general paid circulation." A "newspaper" is "a publication...published regularly at short intervals, containing information and editorials on current events and news of general interest." Black's Law Dictionary 940 (5th ed. 1979). A newspaper is of general circulation if it "contains news of general interest to the community and reaches a diverse readership." **Moore v. State**, 553 P.2d 8, 21 (Alaska 1976). **Cf. Nevada State Press Ass'n v. Fax, Inc.**, 378 P.2d 674 (Nev. 1963) (daily publication containing information about county's public records was not a newspaper of general circulation because it contained no political, religious, commercial, social or other news of general interest). **See generally** Annotation, **What Constitutes Newspaper of "General Circulation" Within Meaning**

of State Statutes Requiring Publication of Official Notices and the Like in Such Newspaper, 24 A.L.R.4th 822 (1983).

Information published in the Mexico Register pertains only to proposed rules, adopted rules and "other material related to administrative law and practice." NMSA 1978, 14-4-7.1(B), (D). The Register does not contain any news of general interest to the public and has only a limited readership. Thus, the New Mexico Register does not qualify as a newspaper of general paid circulation for purposes of the legal notice publication requirements.

3. Publication in the New Mexico Human Services Register.

The Human Services Department publishes a Human Services Register containing notices and information concerning proposed rules, rulemaking hearings and adopted rules of the Department's various divisions. Unlike the New Mexico Register, the Human Services Register is not required by statute. We understand that it was established to comply with the rulemaking requirements of the Human Services Department Act, NMSA 1978, §§ 9-8-1 to -12 (Repl. Pamp. 1991), which provide for a public hearing on proposed regulations and direct that

[n]otice of the subject matter of the regulation, the action proposed to be taken, the time and place of the hearing, the manner in which interested persons may present their views and the method by which copies of the proposed regulation, proposed amendment or repeal of an existing regulation may be obtained shall be published once at least thirty days prior to the hearing date in a newspaper of general circulation and mailed at least thirty days prior to the hearing date to all person who have made a written request for advance notice of hearing.

Id. § 9-8-6(E)²

Rules of statutory construction require that statutes be read in a way that facilitates their operation and the achievement of their goals. **Miller v. New Mexico Dept. of Transportation**, 106 N.M. 253, 255, 741 P.2d 1374 (1987). **See also State v. Garcia**, 93 N.M. 51, 53, 596 P.2d 264 (1979) (court is required to interpret statutes in a way which will not render their application unreasonable nor defeat the intended objective of the legislature). It is presumed that, when enacting a statute, the legislature is well informed as to existing statutory and common law and does not intended to enact a nullity, **Incorporated County of Los Alamos v. Johnson**, 108 N.M. 633, 634, 776 P.2d 1252 (1989), and language not contained in a statute may not be read into it, particularly if the statute makes sense as written. **State ex rel. Barela v. New Mexico State Bd. of Educ.**, 80 N.M. 220, 222, 453 P.2d 583 (1969).

The New Mexico Register is the official publication for all notices of rulemaking and filings of adopted rules by agencies. NMSA 1978, § 14-4-7.1(B). The publication requirements clearly apply to all agencies except the legislature and judicial branches, and were enacted despite existing statutes like the Human Services Department Act

requiring individual agencies to publish notices of proposed rulemaking. This indicates that the legislature intended the New Mexico Register to be a single source of information pertaining to all agency rules and rulemaking. This intent would be frustrated if the statute were construed to include implied exceptions for agencies which voluntarily issued similar publications covering their regulations. Accordingly, we conclude that publication in the Human Services Register does not fulfill the Human Services Department's duty to publish materials required by the New Mexico Register.

4. Publication in the New Mexico Register.

Because there is no statute requiring publication of a Human Services Register, it is up to the Human Services Department to decide whether publishing notices, proposed rules and adopted rules in the New Mexico Register obviates the need to publish in the Human Services Register, or whether, due to the printing schedule of the New Mexico Register or otherwise, publication in the Human Services Register, in addition to the New Mexico Register, will better meet the notice of rulemaking requirements of the Human Services Department Act. **See** NMSA 1978, § 9-8-6(E) (requiring 30 days advance notice of proposed rule hearings).

ATTORNEY GENERAL

TOM UDALL Attorney General

GENERAL FOOTNOTES

[n1](#) This opinion does not address additional meeting notice requirements which public bodies may be required to provide under the Americans with Disabilities Act. **See** 42 U.S.C. § 12132; 28 C.F.R. § 35.106.

[n2](#) Other state agencies are subject to similar requirements for notice and a hearing on proposed rules. **See**, e.g., NMSA 1978, § 61-1-29 (Repl. Pamp. 1989) (Uniform Licensing Act rulemaking requirements).