

Opinion 10-02

OPINION OF: GARY K. KING Attorney General

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BY: Elizabeth A. Glenn, Assistant Attorney General

TO: John Bigelow, Chair, New Mexico Sentencing Commission, 2808 Central Avenue, SE, Room 114, Albuquerque, NM 87106

QUESTIONS:

1. Is the policy of the New Mexico Sentencing Commission (“NMSC”) regarding use of a designee for voting purposes authorized by the Open Meetings Act, NMSA 1978, Sections 10-15-1 to -4 (as amended through 2009) (“OMA”)?
2. What constitutes an “official act” of an agency such as the NMSC for purposes of OMA?
3. What are the sanctions for noncompliance with the provisions of OMA?

CONCLUSIONS:

1. To the extent it authorizes members to vote by proxy, the NMSC’s policy regarding the use of a designee for voting purposes is not authorized by OMA.
2. An “official act” for purposes of OMA broadly encompasses any activity related to an agency’s official business, authority and responsibilities.
3. Sanctions for violating OMA include invalidation of agency action, award of attorney fees and costs to plaintiffs who prevail in a court action to enforce OMA, and criminal penalties.

FACTS:

Section 9-3-10 of the Corrections Department Act, NMSA 1978, ch. 9, art. 3 (as amended through 2007), creates the NMSC, which is composed of 24 individuals “or their designees.” *Id.* § 9-3-10(B). Under Section 9-3-10(C), “[a] majority of the members of the [NMSC] constitutes a quorum for the transaction of commission business.”

The NMSC has adopted a policy “[p]ursuant to the authority granted in Section 9-3-10” that permits members to use a designee for voting purposes. Specifically, a member may “designate another person, including another member who serves on the same entity, to vote in the member’s stead.” NMSC Policies Regarding Use of a Designee for Voting Purposes, Section 1. A designee is permitted to cast no “more than three votes

at a single time.” Id. Effectively, the policy enables members to vote by proxy without attending or participating in NMSC meetings. It is not clear from the policy whether members who vote by proxy are counted for purposes of establishing a quorum at NMSC meetings.

ANALYSIS:

1. Use of Designees for Voting Purposes

As a state commission, the NMSC must conduct its meetings in compliance with OMA. See NMSA 1978, § 10-15-1(B). OMA’s purpose is “to open the meetings of governmental bodies to public scrutiny....” Gutierrez v. City of Albuquerque, 96 N.M. 398, 401, 631 P.2d 304 (1981). This purpose is accomplished by OMA’s provisions requiring governmental bodies to make their meetings accessible to the public:

The formation of public policy or the conduct of business by vote shall not be conducted in closed meetings. All meetings of any public body ... shall be public meetings, and all persons desiring shall be permitted to attend and listen to the deliberations and proceedings.

Id. § 10-15-1(A).

The open meetings requirement applies to all “meetings of a quorum of members of any ... commission ... held for the purpose of formulating public policy ..., discussing public business or for the purpose of taking any action....” Id. § 10-15-1(B). OMA requires advance public notice for “[a]ny 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....” Id. § 10-15-1(D) (emphasis added). The written minutes of a meeting must include, among other things, “the names of members in attendance and those absent....” Id. § 10-15-1(G) (emphasis added).

Although not expressly stated, these provisions make clear that a meeting is not open for purposes of OMA unless a quorum of the public body’s members attends the meeting. Generally, OMA contemplates that the members will attend a meeting in person. The only exception is when it is “otherwise difficult or impossible” for a member to be physically present at a meeting. Id. § 10-15-1(C). In those instances, an absent member may participate by conference telephone if the member can be identified when speaking, all participants at the meeting can hear each other at the same time and members of the public can hear any member of the public body who speaks during the meeting. Id.

Requiring a member’s attendance, either physically or by conference telephone, is consistent with the public access to meetings OMA guarantees. This includes the opportunity to observe not only the votes or action taken by the members of a public body, but also the discussions and deliberations that are an essential part of the formulation of public policy. Given OMA’s purposes, it is unlikely that the legislature

intended to allow mechanisms, such as proxy voting, that enable individual members of a public body to discuss business and formulate policy among themselves outside the public view.[1]

Our interpretation of OMA is consistent with pertinent legal authority from other states. For example, a recent Michigan Attorney General opinion concluded that a provision in a municipal board's bylaws that allowed absent board members to vote by proxy violated the Michigan Open Meetings Act. See Mich. Att'y Gen. Op. No. 7227 (2009). According to that opinion, while the bylaw allowed persons attending a meeting to know how an absent member voted,

it nevertheless facilitates a process that denies citizens the equally important opportunity to observe that member's deliberation toward and formulation of that decision. Indeed, voting by proxy effectively forecloses any involvement by the absent member in the board's public discussion and deliberations before the board votes and, if applicable, public comment on a matter effectuating public policy.

See also Miss. Att'y Gen. Op. No. 95-0575 (1995) (for a public body covered by the Mississippi Open Meetings Act "to conduct official acts, a quorum must be physically present, and not present by way of a proxy"); Okl. Att'y Gen. Op. No. 82-7 (1982) (allowing members of a public body to vote by proxy rather than in person would be contrary to Oklahoma Open Meeting Act's protection "against secret decision-making and ... the Legislative intent of facilitating the understanding of government by informed citizens"). Cf. Collins v. Nix, 188 S.E. 2d 235 (Ga. Ct. App. 1972) (holding that because hospital authorities were "in effect instrumentalities of the State discharging essential governmental obligations, it would be contrary to the public interest" to allow board members to "discharge their solemn responsibilities by way of proxies").

In light of its language and underlying policy, we conclude that OMA does not allow a NMSC member to use a designee solely to convey the member's vote at a meeting. Each member or the member's designee must attend meetings in person or, in appropriate circumstances, by conference telephone. In that way, as OMA contemplates, members of the public attending the meeting may observe the give and take among NMSC members and general discussion of public business in addition to any action taken.

2. Official Acts

The first sentence of OMA provides:

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 those officers and employees that represent them.

NMSA 1978, § 10-15-1(A) (emphasis added). This is the only provision in OMA using the term “official acts.”

OMA does not define “official acts.” Consequently, the rules of statutory construction dictate that we give the term its ordinary and usual meaning. See, e.g., State ex rel. Reynolds v. Aamodt, 111 N.M. 4, 5, 800 P.2d 1061 (1990). The dictionary definition of “official” is “[o]f or relating to an office or position of trust or authority.” Black’s Law Dictionary (8th ed. 2004) (on Westlaw). An “official act,” therefore, would be an act of or related to an office. See also Ballentine’s Law Dictionary (1969) (on LEXIS) (defining “official act,” in pertinent part, as an “act done by an officer in his official capacity, under color and by virtue of his office”).

In the context of the statute as a whole, it is unlikely that the reference to “official acts” in Section 10-15-1(A) was intended to limit public access only to formal action taken by a public body. As quoted above, Section 10-15-1(B) requires all meetings of a public body held to take action, formulate public policy or discuss public business to be open to the public. This indicates that “official acts” for purposes of OMA include informal acts by a public body in the course of official business, such as “the acts of deliberation, discussion and deciding occurring prior and leading up to ... affirmative ‘formal action.’” Times Publishing Co. v. Williams, 222 So.2d 470, 474 (Fla. Dist. Ct. App. 1969) (interpreting a provision of the Florida public meetings law declaring that meetings of state and local government bodies “at which official acts are to be taken” are open to the public). See also Board of Trustees v. Mississippi Publishers Corp., 478 So.2d 269, 278 (Miss. 1985) (holding that “official acts” for purposes of Mississippi open meetings law include “actions relating to formation and determination of public policy”).

Even if the term “official acts” was intended to refer only to formal action, it does not change our interpretation. As quoted above, Section 10-15-1(A) declares that “all persons are entitled to the greatest possible information regarding the affairs with government and the official acts” of their representatives in government. This statement of policy ensures public access not only to acts by public officers and employees in their official capacities, but also information regarding those acts. Thus, assuming a narrow definition of the term “official acts,” OMA ensures public access to “information regarding” those acts, which includes discussions among the members during a meeting related to the public body’s decisions, actions and policies.

3. Sanctions for Noncompliance

OMA specifies three remedies or consequences for violations of its provisions. First, “[n]o resolution, rule, regulation, ordinance or action of any board, commission, committee or other policymaking body shall be valid unless taken or made at a meeting held in accordance with the requirements of NMSA 1978, Section 10-15-1.” NMSA 1978, § 10-15-3(A). Section 10-15-1 includes all the substantive provisions of OMA. Action taken at a meeting that does not comply with any of those provisions is deemed invalid and without effect.

Second, “any person” may bring an action in district court “to enforce the purpose of the Open Meetings Act...” NMSA 1978, § 10-15-3(C). A person who is “successful in bringing a court action” to enforce OMA is entitled to court costs and reasonable attorneys fees. Id.

Finally, OMA provides for criminal penalties. A person who is found to have intentionally acted in a manner that violates OMA “is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five hundred dollars (\$500) for each offense.” NMSA 1978, § 10-15-4; Attorney General’s Office Open Meetings Act Compliance Guide, p. 47 (6th ed. 2008).

A public body may avoid the sanctions provided in OMA by taking appropriate action to cure a violation. See Kleinberg v. Board of Educ., 107 N.M. 38, 44, 751 P.2d 722 (Ct. App. 1988). Generally, this entails holding a properly noticed, public meeting to re-take an action or a vote that occurred at a meeting that violated OMA. Id. at 43-44 (local school board corrected failure to vote on teacher’s discharge in open session by promptly holding an open meeting and publicly voting on and ratifying its decision). Under OMA, “[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.” NMSA 1978, § 10-15-3(B).

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[1] Although the legislature could expressly authorize the NMSC to allow its members to vote by proxy, it has not done so. As quoted above, Section 9-3-10(B) currently provides that the NMSC consists of 24 specified “individuals or their designees.” Without more, this simply authorizes a NMSC member to designate a person to attend and participate in a meeting instead of the member. Section 9-3-10(B) does not authorize a member to vote through another member or person without otherwise attending and participating in the meeting.