



Doña Ana County

December 2, 2025

Sent via email only

NMFOG
Amanda Lavin
7777 Jefferson St NE
Albuquerque, NM 87109
amandalavin@nmfog.org

Re: Response to Alleged Violations of the Open Meetings Act

Dear Ms. Lavin:

The Board of County Commissioners (the “Board”) received your Notice of Open Meetings Act Violation (“Notice”) regarding your concern for a potential violation of the Open Meetings Act (OMA). In accordance with the OMA, Doña Ana County provides the following response:

I. Motion to Convene in Closed Session

The Notice alleges that the Board “violated OMA by failing to properly provide the public with notice of the legal authority for its closed meeting... or specify the subject matter of that closed meeting.” The Notice goes on to say that the “public notice and motion to enter a closed session were deficient because neither specified the authority for the closed meeting or the subject to be discussed.”

The Notice alleges that the Board failed to provide proper legal authority for going into closed session. The general statement included in the agenda states that the Board may convene in closed session and lists the most likely reasons the Board might need to convene in closed session. The statement then includes the citations to the OMA which allow for the closed session. In addition, when the Chair made the motion, he included those same citations, which included the citation for closing a meeting to engage in attorney-client discussions. These citations provide the exact authority under which the Board may convene in closed session. Should you believe that other legal authority is necessary for going into closed session, I would appreciate you sharing that information with me.

The Notice further alleges that the Board failed to specify the subject matter of the closed meeting. While the motion itself did not include the specific reason, it was clarified that the only discussion to take place in the closed meeting was that related to attorney-client privileged information. When the motion was made to go into closed session, the commissioners already made a motion regarding Project Jupiter, which was seconded, and was being discussed. Under Robert’s Rules of Order, the only discussion allowed at that point **must be** related to Project Jupiter. Therefore, going into closed session on an attorney-client privileged matter meant the

conversation would be dictated by the motion on the table and the Open Meetings Act, which limits conversations that may be held in closed session. The Board has since acknowledged that the general public may not be familiar enough with Robert's Rules of Order to understand that when a motion is on the table, the only discussion allowed is related to that motion. The Board cured that potential violation in the October 14th meeting by providing additional information as to the reason for the closed session.

The Notice recounts the events occurring at the September 19, 2025 meeting, including some incorrect factual allegations, but fails to acknowledge that after coming out of closed session and prior to voting on the ordinances in question, the Board asked questions of its bond attorneys, heard hours of public comment, engaged in discussion of the ordinances, and then took a vote. While the County agrees that the motion itself was imperfect, the County also believes that it substantially complied with the OMA, which is the requirement set by the courts and Attorney General. Further, the Board took action to cure the alleged violation at the October 14, 2025 open meeting.

II. Cure to Alleged OMA Violations

The Notice states that "New Mexico law is clear that a public body's action taken in violation of OMA cannot be retroactively corrected." To support this contention, the Notice cites *Palenick v. City of Rio Rancho*, 2012-NMCA-018, ¶ 9. The claim that a retroactive cure is improper, and the case cited for that position, is inapposite to the facts of this matter. In *Palenick*, the Attorney General determined that the City of Rio Rancho engaged in discussions of the City Manager's employment status with the mayor, deputy mayor, and city councilors prior to the meeting in which the Manager's employment was terminated. The Attorney General notified the City of the violation and in response, the City passed a resolution affirming the previous vote. The court explains that the affirmation of the prior vote was an "attempt to retroactively make the prior invalid action valid and effective as of the date it was taken." The court goes on to explain that because the board acted on an employment issue outside the OMA, taking action eleven months later and applying that action retroactively does not cure the violation.

The *Palenick* Court distinguishes the employment action by the City of Rio Rancho from a cure of a procedural defect:

Public entities can cure violations of the Act. *See, e.g., Bd. of Educ. of Santa Fe Pub. Sch. v. Sullivan*, 106 N.M. 125, 125, 740 P.2d 119, 119-20 (1987) (stating that the board was entitled to correct the procedural defect of failing to comply with the Act); *Kleinberg v. Bd. of Educ. of Albuquerque Pub. Sch.*, 107 N.M. 38, 44, 751 P.2d 722, 728 (Ct. App. 1988) (recognizing that "the procedural defect could be corrected through a reinstatement of the termination proceedings").

Id. at ¶ 9. In the instant matter, Doña Ana County's motion to go into closed session – a procedural issue – is in question. The vote itself was not discussed prior to the vote that was taken in the open meeting. In fact, as mentioned previously, prior to voting on the ordinances in question, the Board asked questions of its bond attorneys, heard hours of public comment, engaged in discussion of the ordinances, and then took a vote. Unlike in *Palenick*, there was no discussion prior to the

meeting or in closed session that would invalidate the public vote that was taken. Therefore, the only question at issue is the procedural question of whether the motion to go into closed session was sufficient to satisfy the OMA.

The OMA requires public bodies to respond to and cure violations of the OMA, and the Court expects the public body to provide a cure whether there is a finding of a violation or not. The OMA further specifies that “[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 Section 10-15-3(B). On October 14, 2025, the Board discussed the allegations of violation and the motion that was made. The Board further discussed language what would have more clearly complied with the OMA. There is no caselaw on point for how to cure such a violation, no direction from the OMA other than to state that a summary of the comments should be included, and no direction from Robert’s Rules of Order on how to handle a potential procedural misstep such as an improperly worded motion. Therefore, the Board complied with the OMA and has since taken steps to ensure that motions to go into closed session are clear and specific as to the reasoning for the closed session.

The Notice refers to the letter sent to Kacey Hovden, stating that “the Board misunderstands its obligations under OMA.” As proof that the Board does not understand its obligation under OMA, the Notice takes a statement that the Board is “not required to provide an explanation” out of context. The statement to Ms. Hovden was with regard to a misunderstood question. It was believed that she asked for an explanation of attorney-client privilege or that she asked for details of the attorney-client conversation. The Board is neither required to define “attorney-client privilege” nor is it required to divulge details of conversations held with their attorneys. The Board is well aware that it is expected to provide the subject matter of the conversation, which it did provide in the cure. The Board has shown in recent meetings that it is working to ensure greater compliance with the OMA. If you believe there is something more the Board can do to cure the procedural error, we would be happy to hear any such suggestions. In the meantime, I request that you review recent meetings where the Board moved to go into closed session. You will see that they are working to provide greater detail within the motion so that there is no question or confusion on the part of the public about the topics to be discussed in the closed session.

III. Providing the Public with Information and Conducting Public Business in an Open Meeting

The Notice alleges that the Board violated OMA “by taking final action on an item of business that was incomplete and requires further review and approval by the Board.” The Notice further alleges that “approval of the final draft of the Ordinance outside of an open meeting violates OMA, as OMA requires that all meetings of a public body held for the purpose of formulating public policy, including development of ordinances, be open to the public.” As a preliminary matter, the OMA does not prohibit the Board from taking a vote on an item of business that is “incomplete.” Public Bodies regularly take votes on matters to start an action, have an action continue, or renew an action that will take place at some point in the future. A quorum of members was in attendance at the meeting, and more than a quorum voted in favor of the ordinance.

The Notice appears to assume additional meetings of the public body were held to discuss ordinances or to approve final documents. As acknowledged in the Notice, “the Board made clear there would be no further public discussion or vote on the Ordinance after September 19, 2025;” and there was no additional discussion or meeting of the Board to discuss the ordinances. The Board approved the ordinances as written.

Finally, the Notice asserts that the “Board’s failure to deliberate on and pass the final version of Ordinance No. 367-2025” violates OMA is incorrect. The Board voted on and approved the draft ordinances. The documents which were incomplete were the closing documents for the IRB. Those documents were handled in accordance with State statute and the lack of finality in those documents at the September 19th meeting does not constitute a violation of OMA. The public was provided as much information as possible at every step of the IRB process. Therefore, there was no OMA violation with respect to the board’s action or vote on the ordinance.

We do appreciate your concern for adherence to the OMA and assure you that Doña Ana County is working to ensure compliance with both the OMA and Robert’s Rules of Order in every meeting, no matter the circumstances. I would be happy to discuss any additional thoughts or questions you may have regarding this matter.

Sincerely,



Cari Neill
Doña Ana County Attorney

Cc: Doña Ana County Manager, Doña Ana County Board of County Commissioners