

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

January 30, 2020

Kelly Fajardo
State Representative
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Los Lunas, NM 87031

Rebecca Dow
State Representative
806 Sierra Vista
Truth or Consequences, NM 87901

David Gallegos
State Representative
P. O. Box 998
Eunice, NM 88231

Re: Opinion Request – Applicability of Open Meetings Act to Child Protective Services Task Force

Dear Representative Fajardo, Representative Dow, and Representative Gallegos:

You requested our expedited opinion with respect to the Child Protective Services Task Force (hereinafter the “Task Force”) of the New Mexico Children, Youth & Families Department. Specifically, you inquired whether meetings of the Task Force were subject to the provisions of the Open Meetings Act (“OMA”), NMSA 1978, Sections 10-15-1 to -4 (1974, as amended through 2013). As explained below, we conclude that meetings of the Task Force are not currently subject to OMA as a matter of law, barring any future statutory amendments.

Background

The Child Protective Services Task Force was created pursuant to House Joint Memorial 10 from the 2019 Legislative Session. *See* H.J.M. 10, 54th Leg., 1st Sess. (N.M. 2019), *available at* <https://www.nmlegis.gov/Sessions/19%20Regular/final/HJM010.pdf>. That memorial requested the Secretary of the Children, Youth & Families Department (“CYFD”) to convene a task force for the purpose of making recommendations to generally improve “the safety and well-being of

children in the care of the child protective services system.” *Id.* Although the Task Force was requested to produce these recommendations, House Joint Memorial 10 did not obligate CYFD to follow or adopt the Task Force’s recommendations, nor did it vest the Task Force itself with any final authority over any issues or policies. Similarly, House Joint Memorial 10 did not specify the number of members that would comprise the Task Force, although it did direct CYFD’s Secretary to include a number of enumerated participants (such as “two kinship caregivers” and “an expert representative of law enforcement”). *Id.*

For the purposes of this opinion, it is our understanding that the Task Force has held one or more meetings that were closed to the public and that formal meeting notices and agendas were not regularly (if ever) provided to the public. As a result, the issue we must resolve is a fundamental legal one: whether the passage of House Joint Memorial 10 renders the Task Force subject to OMA.

Analysis

In New Mexico, the Open Meetings Act provides the public with access to “the *greatest possible information* regarding the affairs of government and the official acts of those officers and employees who represent them.” Section 10-15-1(A) (emphasis added). *See also Kleinberg v. Bd. of Educ. of Albuquerque Pub. Sch.*, 1988-NMCA-014, ¶ 18, 107 N.M. 38, 42, 751 P.2d 722, 726 (noting that “the public policy of this state, as expressed in the Act, is to conduct the public’s business in the open, allowing persons, so desiring, to attend and listen to the proceedings”). In line with the public policy behind the statute, OMA is broadly construed in favor of transparency. *See New Mexico State Inv. Council v. Weinstein*, 2016-NMCA-069, ¶ 73 (explaining that courts “construe the OMA’s provisions broadly and their exceptions narrowly” in accordance with the public policy underlying the statute) and Attorney General’s Open Meetings Act Compliance Guide, p. 7 (8th ed. 2015) (“OMA Guide”) (noting that “doubt as to the proper course of action should be resolved in favor of openness whenever possible”).

By its terms, the Open Meetings Act applies to any “public body.” *See* § 10-15-1(A) (providing that “All meetings of any public body except the legislature and the courts shall be public meetings, and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings.”). OMA itself effectively provides a definition for the term “public body” in Section 10-15-1(B), where the statute provides that it applies to “[a]ll meetings of a quorum of members of any board, commission, administrative adjudicatory body or other policymaking body of any state agency or any agency or authority of any county, municipality, district or political subdivision.” Although the term may be defined slightly differently for the purposes of other statutes,¹ a particular entity must satisfy the definition set forth in Section 10-15-1(B) in order to be legally subject to OMA’s requirements.

¹ See, for example, Section 14-2-6(F) (defining “public body” as “the executive, legislative and judicial branches of state governments and all advisory boards, commissions, committees or entities created by the constitution or any branch of government that receives any public funding, including political subdivisions, special taxing districts, school districts and institutions of higher education”).

With regard to this analysis, we find two clear distinctions between the Task Force and a “public body” as that term is defined in OMA. First, the Task Force is not a “policymaking” entity because it holds a purely advisory role and exists only to make recommendations to real policymakers. Section 10-15-1(B). Although our Office has previously embraced an expansive interpretation of the word “policymaking” to include all public bodies possessing even small amounts of “decision-making authority,” we have consistently opined that purely advisory bodies are not generally subject to OMA. *See* N.M. Att’y Gen. Op. 90-27 (1990) (concluding that the City of Las Cruces Selection Advisory Committee was a policymaking body subject to the requirements of OMA because it possessed the authority to narrow the field of contract bidders and “eliminate, select, and rank certain professional firms before providing them to the full council for final approval”). *See also* OMA Guide, p. 8 (explaining that, “Meetings of a committee of a public body ... may not be subject to the provisions of the Act if the committee engages solely in fact-finding, simply executes the policy decisions or final actions of the public body and does not otherwise act as a policymaking body.”).

In this case, we can discern nothing in House Joint Memorial 10 that would vest the Task Force with any policymaking or decision-making authority of any kind. The Task Force’s recommendations are not binding on CYFD or any other policymaker, nor do they have any binding effect on the public at large. Further, OMA effectively prohibits any public body from taking any action in the absence of a quorum. *See* § 10-15-1(B). Because House Joint Memorial 10 does not specify the number of members to be appointed to the task force, but rather generally requests that CYFD create it, it is impossible to discern what a quorum of its members would constitute. For these reasons, our opinion is that the Task Force lacks policymaking authority and therefore does not satisfy the definition of a public body for the purposes of OMA.

This conclusion is consistent with our Office’s longstanding observation, stated most prominently in our OMA Guide, that an entity lacking in policymaking authority may still constitute a public body for the purposes of OMA if the legislature should so require. *See* OMA Guide, p. 8-9 (explaining that, “A committee created by statute is a public body subject to the Open Meetings Act because the legislature considered the committee’s functions important enough to provide it with a separate existence as a public body, and because the committee is not simply created by a public body as a means to carry out that body’s business.”). *Id.* House Joint Memorial 10 merely requested that CYFD create a task force, as opposed to legislatively creating a public body separate from CYFD. *See* H.J.M. 10, 54th Leg., 1st Sess. (N.M. 2019). Thus, we cannot interpret the statute as legally binding on the Task Force. Section 10-15-1(B).

Conclusion

Because the Task Force is not a “public body” as that term is defined in the Open Meetings Act, it is our opinion that meetings of the Task Force are not subject to the requirements of the statute. Nonetheless, in the spirit of transparency, the Task Force could voluntarily choose to abide by OMA. Moreover, the legislature should specify and mandate in its legislation whether they desire for all meetings of any legislatively-created task force to be subject to the requirements of OMA.

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Your request to us was for a formal Attorney General's opinion on the matters discussed above. As such, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide this letter to the public.

Sincerely,

A handwritten signature in blue ink, appearing to read "John Kreienkamp". The signature is stylized and cursive, written over a light blue rectangular background.

John Kreienkamp
Assistant Attorney General