

## Opinion 06-02

April 17, 2006

**OPINION OF: PATRICIA A. MADRID** Attorney General

**BY:** Sonny Swazo, Assistant Attorney General

**TO:** The Honorable Domingo Martinez, State Auditor, 2113 Warner Circle, Santa Fe, NM, 87505-5499

### QUESTIONS PRESENTED:

1. Is a mutual domestic water association ("MDWA" or "association") organized under the Sanitary Projects Act considered a state agency?
2. Does a MDWA handle "public money" when it has revenues that consist only of levies on members?
3. Does a MDWA, whose revenues consists only of levies on members, and a MDWA, whose revenues consist of both levies on members and state funds, need to follow the Open Meetings Act, the Inspection of Public Records Act, the Procurement Code, the Per Diem and Mileage Act?

### CONCLUSION:

Based on our examination of the relevant New Mexico constitutional, statutory and case law authorities, and on the information available to us, we conclude a MDWA is not a state agency, but it qualifies as a public body/ political subdivision and thus has statutory responsibilities to abide by open government laws.

### ANALYSIS:

Your first question is whether a MDWA organized under the Sanitary Projects Act, NMSA 1978, Sections 3-29-1 to -20 (1965, amended through 2006) ("SPA") is considered a state agency. The New Mexico Supreme Court discussed what constitutes a state agency in Harrington v. Atterberry, 21 N.M. 50, 153 P. 1041 (1915). Under Harrington, an entity is considered a state agency when it is under the control of the state. See id. at 61, 72. An entity is generally considered a state agency when the entity is operated and managed by officers appointed by the government and created by statute. See id. An entity that performs functions beneficial to the public or receives appropriations regulated by the government is not a state agency if the government does not otherwise control the entity. See id. at 54, 63, 74.

The 2006 Legislature amended the purpose of the SPA. The purpose used to read: "improve the public health of the people of New Mexico through a program which will

provide for the installation of sanitary domestic water facilities...." NMSA 1978, § 3-29-3 (1965). The 2006 change to the law now states that the purpose is to "improve the public health of rural communities in New Mexico by providing for the establishment and maintenance of a political subdivision of the state that is empowered by the state to receive public funds for acquisition, construction and improvement of water supply, reuse, storm drainage and wastewater facilities in communities, and to operate and maintain such facilities for the public good." NMSA 1978, § 3-29-3 (2006) (emphasis added). With the 2006 legislative change, it is clear that associations established under the SPA are political subdivisions. Nevertheless, the SPA provides a mixed explanation regarding the State government control. For example, associations are created by citizen petition drive and by citizen vote. Any community member may join the association. See NMSA 1978, § 3-29-11 (1965). Association members elect the association's board of directors from association membership. See NMSA 1978, § 3-29-12(A). Projects are determined by the association's board of directors, "acting upon recommendations from and subject to the approval of the [environment] department." NMSA 1978, § 3-29-4 (1971). Associations are responsible for providing labor, materials, and at least one-third of the project funds. See NMSA 1978, § 3-29-5(A)(4) & (D) (2000).

On the other hand, state project funds are available only to those communities that have organized associations. See NMSA 1978, § 3-29-12(E) (1969) ("The [environment] department shall require that an association shall be formed and a board of directors chosen before any community may participate in any benefits."). These funds include "public funds for acquisition, construction and improvement of water supply, reuse, storm drainage and wastewater facilities." NMSA 1978, § 3-29-3 (2006). Under the SPA, associations are regulated by the Environment Department, which is "empowered and directed . . . to carry out the legislative intent" of the SPA. NMSA 1978, § 3-29-4 (1971); see El Vadito de los Cerrillos Water Ass'n v. N.M. Pub. Serv. Comm'n, 115 N.M. 784, 787, 858 P.2d 1263, 1267 (stating the SPA "grants control of SPA associations to the New Mexico Environmental Improvement of the Health and Environment Department ("NMEID") and provides a comprehensive legislative scheme under which NMEID supervises local SPA associations as these associations develop water facilities and sewage works in rural communities otherwise lacking adequate domestic water supplies").

On balance, we conclude that such associations do not constitute state agencies as defined in Harrington. See N.M. Att'y Gen. Op. 89-34 (1989) (concluding that community action agencies were not state agencies because their governing boards were not appointed by the state, there was no suggestion in the statutes that board members or agency employees were state employees, and the state did not exercise any control over the agencies' operations); N.M. Att'y Gen. Op. 87-44 (1987) (concluding that beef council was a state agency because it was created by state statute and council members were appointed by a state official). Association members and their governing board of directors are not appointed by the state, but rather consist of individuals from the community where the project is occurring. Anyone in the project's community may join the association and any association member may be elected by association

members to serve on the association's board of directors. The SPA does not create associations, but rather outlines the conditions that rural unincorporated communities must meet in order to qualify as an association eligible for SPA funds. Associations are also responsible for obtaining and contributing labor, materials, and funds to projects.

This conclusion does not necessarily exempt an association from open government laws. Your second question asks whether an association's revenues, which consist only of levies on members it serves, constitute "public money." In previous attorney general opinions, this office, quoting the case of Storen v. Sexton, 209 Ind. 589, 200 N.E. 251, has stated that the term "public money" generally means:

". . . all funds impressed with a public interest, that is, funds raised by general taxation, or special levies upon special assessment districts, or the income from publicly owned properties, or funds arising from private sources in the hands of public officers which are designed for public use."

N.M. Att'y Gen. Op. 67-128 (1967); N.M. Att'y Gen. Op. 62-9 (1962). Under this definition, the revenues would constitute "public moneys" because the funds are intended for a public purpose, which is to provide for the installation, operation and maintenance of sanitary domestic water facilities that serve entire rural unincorporated communities. See El Vadito, 115 N.M. at 791-92 (recognizing that SPA associations are obligated to provide sanitary domestic water services for geographically defined communities). Thus, it is our opinion that revenues collected by an association to pay for the installation, operation, and maintenance of community serving projects constitute "public money."

Your final question asks whether associations, whose revenues either consist only of levies on members or consist of both levies on members and state funds, need to follow the Open Meetings Act ("OMA"), NMSA 1978, §§ 10-15-1 to -4 (1974, as amended through 1999), the Inspection of Public Records Act ("IPRA"), NMSA 1978, §§ 14-2-1 to -12 (1947, as amended through 2005), the Procurement Code ("Code"), NMSA 1978, §§ 13-1-1 to -199 (1969, as amended through 2005), and the Per Diem and Mileage Act ("PDMA"), NMSA 1978, §§ 10-8-1 to -8 (1963, as amended through 2003). We have had telephonic discussions and Open Meetings Act and Inspection of Public Records Act determinations on these topics before, however, this letter will memorialize these items in an Attorney General Advisory Letter. See, e.g. letter from Assistant Attorney General Elizabeth Glenn to Patricia Smith, Manager, North Star Domestic Water Consumers (July 1, 1994) (concluding that associations are subject to the Open Meetings Act).

In order to determine whether associations are subject to the four above-mentioned statutes, we need to discern the legislative intent with each statute. See Medina v. Berg Constr., Inc., 122 N.M. 350, 356, 924 P.2d 1362, 1368 (Ct. App. 1996) ("The primary purpose of statutory construction is to discern and give effect to the intent of the legislature."). Absent a statutory exemption, we look at the plain language of each statute and the object sought to be accomplished and the wrong to be remedied. See

Gutierrez v. City of Albuquerque, 96 N.M. 398, 400, 631 P.2d 304, 306 (1981) (describing statutory interpretation).

The OMA provides that "[a]ll meetings of any public body except the legislature and the courts shall be public meetings." NMSA 1978, § 10-15-1(A) (1999). The OMA applies to "any board, commission, administrative adjudicatory body or other policymaking body of any state agency, any agency or authority of any county, municipality, district or any political subdivision." Section 10-15-1(B) (emphasis added). The IPRA provides that "[e]very person has a right to inspect public records of this state except [those records prohibited by the statute or] as otherwise provided by law." NMSA 1978, § 14-2-1(A) (2005). "Public records" are defined in the IPRA as records of a "public body." NMSA 1978, § 14-2-6(E) (1993). "Public body" is defined in the IPRA as the "executive, legislative and judicial branches of state and local governments and all advisory boards, commissions, committees, agencies 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." NMSA 1978, § 14-2-6(D) (emphasis added). The Code applies to all nonfederal expenditures "by state agencies and local public bodies for the procurement of items of tangible personal property, services and construction." NMSA 1978, § 13-1-30(A) (2005). "Local public body" is defined in the Code as "every political subdivision of the state and the agencies, instrumentalities and institutions thereof, including two-year post-secondary educational institutions, school districts and local school boards and municipalities, except as exempted pursuant to the Procurement Code." NMSA 1978, § 13-1-67 (2003) (emphasis added). The PDMA establishes reimbursement rates "for travel for public officers and employees coming under the Per Diem and Mileage Act." NMSA 1978, § 10-8-2 (1971). Although the PDMA provides a definition for "employee," "public officer" seems to be the appropriate focus for purposes of our inquiry since we are not presented with any facts concerning individuals who may be employed by associations. The PDMA defines "public officer" and "public official" as "every elected or appointed officer of the state, local public body or any public post-secondary educational institution." NMSA 1978, § 10-8-3(G) (1989). "Local public body" is defined in the PDMA as "all political subdivisions of the state and their agencies, instrumentalities and institutions, except public post-secondary educational institutions." NMSA 1978, § 10-8-3(D) (1989) (emphasis added).

The plain language of each statute does not expressly cite to the application of each statute to associations. However, the "primary goal [of statutory interpretation] is to give effect to the intent of the legislature." State v. Saiz, 2001-NMCA-035, 2, 130 N.M. 333, 24 P.3d 365. Indeed, "[t]he purpose of [the OMA] is clearly to open the meetings of governmental bodies to public scrutiny by allowing public attendance at such meetings." Gutierrez v. City of Albuquerque, 96 N.M. 398, 401, 631 P.2d 304, 307 (1981); see NMSA 1978, § 10-15-1(A) (1999). The OMA expresses the "public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." NMSA 1978, § 10-15-1(A) (1999). The purpose of the IPRA is to ensure that the public receives "the greatest possible information regarding the affairs of government and the

official acts of public officers and employees." NMSA 1978, § 14-2-5 (1993). The IPRA states that providing such information "is an essential function of a representative government and an integral part of the routine duties of public officers and employees." Id. The goal of the Procurement Code is "to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity." NMSA 1978, § 13-1-29(C) (1984). The Code is designed to protect "against the evils of favoritism, nepotism, patronage, collusion, fraud, and corruption in the award of public contracts." Planning & Design Solutions v. City of Santa Fe, 118 N.M. 707, 710, 885 P.2d 628, 631 (1994). The Code states that it "shall be liberally construed and applied to promote its purposes and policies." NMSA 1978, § 13-1-29(A) (1984). Similarly, the goal of the Per Diem and Mileage Act is "to establish rates for reimbursement for travel for public officers and employees coming under the Per Diem and Mileage Act." NMSA 1978, § 10-8-2 (1971).

In the past, we have reached the conclusion that the associations are a form of public bodies or governmental entities. We have noted that the legislature has referred to associations as public bodies in other statutes. See NMSA 1978, § 4-38-13.1 (2005) (authorizing boards of county commissioners to lease property "for the benefit of community ditch associations, mutual domestic water associations or other public entities"); NMSA 1978, § 72-4A-3(C) (2003) ("Political subdivision" means a municipality, county, irrigation district, conservancy district, special district, acequia, soil and water conservation district, water and sanitation district or an association organized and existing pursuant to the Sanitary Projects Act."). In Attorney General Opinion 90-30 (1990), we stated that while associations are defined in the SPA as a "body corporate" under Section 3-29-15(A), the statutes suggested "that such associations may be governmental entities." We have also pointed out that under the SPA associations have the power of eminent domain and the power to borrow money and issue bonds. We have also concluded that associations were governmental entities subject to the Audit Act, NMSA 1978, Sections 12-6-1 to -14 (1969, as amended through 2005), based on the fact that the legislature explicitly excluded all associations from the waiver of governmental liability under the Tort Claims Act. See NMSA 1978, § 41-4-13 (1977) ("All community ditches or acequias and all associations created pursuant to the Sanitary Projects Act [3-29-1 to 3-29-19 NMSA 1978] are hereby excluded from the waiver of immunity liability under Sections 41-4-6 through 41-4-12 NMSA 1978.").<sup>1</sup>

The 2006 Legislature has provided an even clearer interpretation on this matter. House Bill 438 used the phrase "political subdivision" in referring to associations. This bill was enacted and signed into law. The phrase "political subdivision" is expressly listed in the four open government statutes. Therefore, that constitutes further sound reason to conclude that associations have such characteristics that they should be considered subject to these open government statutes.

In conclusion, associations fall within the intent of each of the statutes analyzed. It does not matter whether a MDWA has revenues consisting only of levies on members or both levies on members and state funds. Instead, the key is that they are made up of citizens

democratically selected and governmentally organized for a community goal. The purpose of the OMA, IPRA, Procurement Code and MDWA is to make such operations visible to the electorate. Therefore, we advise that associations need to follow the Open Meetings Act, the Inspection of Public Records Act, the Procurement Code, and the Per Diem and Mileage Act.

[1] In Memorial Medical Ctr., Inc. v. Tatsch Constr., Inc., 2000-NMSC-030, 24, 129 N.M. 677, 12 P.3d 431, the Supreme Court stated "that under current New Mexico law there are circumstances in which a private corporation must be deemed a political subdivision or a local public body because the private entity has so many public attributes, is so controlled and conducted, or otherwise is so affiliated with a public entity that as a matter of fairness it must be considered the same entity." *Id.* 34. The Court stated that "when necessary, substance should prevail over form in order to effectuate the legislature's intent." *Id.*; see Raton Pub. Serv. Co. v. Hobbes, 76 N.M. 535, 539, 417 P.2d 32, 35 (1966) (concluding that a corporation which operated a municipal electric utility system was a governmental body subject to the Open Meetings Act because, although not within the governmental body definition of the statute, the corporation was within the object, spirit, and meaning of the statute).