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PUBLIC MEMORANDUM

State Ethics Commission May Conduct Virtual Meetings Consistent with the Open Meetings Act

On March 11, 2020, Governor Michelle Lujan Grisham announced the first confirmed cases of Coronavirus disease 2019 (COVID-19) epidemic.¹ The Governor has ordered “[a]ll branches of State government [to] cooperate with federal authorities, other states, and private agencies to provide resources and services necessary to minimize physical and economic harm and assist in the provision of lodging, shelter, health care, food, transportation, or shipping necessary to protect lives or public property.”² On March 12, 2020, the Governor ordered the close of public schools for at least three weeks.³

¹ Exec. Order No. 2020-004 (March 11, 2020), available at <https://www.governor.state.nm.us/wp-content/uploads/2020/03/Executive-Order-2020-004.pdf>.

² *Id.* at 2.

³ Office of the Governor, *Press Release: New Mexico Schools to temporarily close* (March 12, 2020), available at <https://www.governor.state.nm.us/2020/03/12/new-mexico-schools-to-temporarily-close/> (last accessed March 13, 2020).

Police, emergency services, and public health officials undoubtedly have the most responsibility over the coming weeks as the epidemic runs its course in New Mexico. But dozens of other public bodies, including the State Ethics Commission, must determine how state government can continue to serve the public while minimizing the risk of spreading disease. Like many other public bodies, the State Ethics Commission meets regularly to conduct business and make important decisions. Open meetings and sunshine laws are not (and indeed, cannot be) suspended by the governor’s emergency declaration; democratic government must go on as best it can under the circumstances.

Public bodies are trying to prevent community spread of COVID-19 by holding virtual meetings. For example, on March 12, 2020, the Albuquerque City Council and the Bernalillo County Commission announced that members of the public would not be permitted to attend their meetings in person, and would instead be required to watch on the television or the internet and address the council in writing.⁴ But this is an imperfect solution: City Counsellors and County Commissioners are still required to be in the same room and in close proximity, even if the public is not allowed to participate. A member of a public body could fall sick, depriving the public body of a needed quorum at a time when critical decisions need to be made. Some public bodies have members who are elderly or suffer from respiratory or pulmonary conditions, making them especially vulnerable. For these reasons, State Ethics Commission staff is exploring whether the Commission may hold its meetings “virtually”—i.e., the Commission and any interested members of the public meet entirely online, through a teleconferencing or videoconferencing application. Certainly this is feasible: there are dozens of platforms that can be used to hold a virtual meeting. But is a virtual meeting permitted under New Mexico’s Open Government Act? As explained below, I conclude that virtual meetings are indeed permitted under the Open Meetings Act, and that under the circumstances the State Ethics Commission should hold at least its next meeting virtually.

I. COVID-19 BACKGROUND

Coronaviruses are a large family of viruses that are common in people and many different species of animals, including camels, cattle, cats, and bats. Rarely, animal coronaviruses can infect people and then

⁴ See Jessica Dyer, *City Council to continue sans public*, Albuquerque Journal (March 12, 2020), available at <https://www.abqjournal.com/1431078/city-council-to-continue-sans-in-person-audience.html> (last accessed March 13, 2020).

spread between people such as with MERS-CoV, SARS-CoV, and now with this new virus (named SARS-CoV-2).

The SARS-CoV-2 [COVID-19] virus is a betacoronavirus, like MERS-CoV and SARS-CoV. All three of these viruses have their origins in bats. The sequences from U.S. patients are similar to the one that China initially posted, suggesting a likely single, recent emergence of this virus from an animal reservoir.

Early on, many of the patients at the epicenter of the outbreak in Wuhan, Hubei Province, China had some link to a large seafood and live animal market, suggesting animal-to-person spread. Later, a growing number of patients reportedly did not have exposure to animal markets, indicating person-to-person spread. Person-to-person spread was subsequently reported outside Hubei and in countries outside China, including in the United States. Some international destinations now have apparent community spread with the virus that causes COVID-19, as do some parts of the United States. Community spread means some people have been infected and it is not known how or where they became exposed.⁵

COVID-19 is thought to spread mainly from person to person: between people who are in close contact with one another (6 feet or less), and through respiratory droplets produced when an infected person coughs or sneezes.⁶ The Centers for Disease Control and Prevention (CDC) has assessed it “likely . . . widespread transmission of COVID-19 in the United States will occur.”⁷ If widespread transmission takes place, “large numbers of people [will need] medical care at the same time.”⁸ COVID-19 can cause viral pneumonia, especially in vulnerable populations; fairly intensive treatment is required; and no cure or prophylactic vaccination has been developed.⁹

⁵ Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19) Situation Summary (March 11, 2020), available at <https://www.cdc.gov/coronavirus/2019-nCoV/summary.html> (last accessed March 13, 2020).

⁶ Centers for Disease Control and Prevention, How COVID-19 Spreads (March 4, 2020), available at <https://www.cdc.gov/coronavirus/2019-nCoV/summary.html> (last accessed March 12, 2020).

⁷ Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19) Situation Summary (March 11, 2020), available at <https://www.cdc.gov/coronavirus/2019-nCoV/summary.html> (last accessed March 12, 2020).

⁸ *Id.*

⁹ Murthy S, Gomersall CD, Fowler RA. Care for Critically Ill Patients With COVID-19. *JAMA*. Published online March 11, 2020. doi:10.1001/jama.2020.3633.

II. RESTRICTIONS ON PUBLIC GATHERINGS AND OTHER “SOCIAL DISTANCING” MEASURES ARE IN TENSION WITH THE IMPERATIVE OF OPEN, TRANSPARENT GOVERNMENT.

The COVID-19 situation is rapidly evolving; as of the date of this memorandum, the Secretary of Health has (with some exceptions) barred public gatherings of more than one hundred persons.¹⁰ The Secretary of Health has encouraged preventive precautions, including avoiding close contact with people who are sick, frequent hand washing, and avoiding handshakes.¹¹ CDC interim guidance¹² encourages businesses to explore policies and practices such as telecommuting and staggered shifts “to increase the physical distance among employees and between employees and others if state and local health authorities recommend the use of social distancing strategies.”¹³

One of the core functions of state government, in particular state commissions like the State Ethics Commission, is meeting to make decisions.¹⁴ Under the Open Meetings Act, “[t]he formation of public policy or the conduct of business by vote shall not be conducted in closed meeting. 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.”¹⁵ This mandate grows from the “recognition of the fact that a representative government is dependent upon an informed electorate, . . . [and] 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.”¹⁶ Commission meetings are “declared to be public meetings open to the public at all times, except as otherwise provided in the constitution of New Mexico or the Open Meetings Act.”¹⁷

Community spread of COVID-19 and state government efforts to halt the spread by restricting public movement and gatherings are in direct tension with the

¹⁰ See New Mexico Department of Health, Public Health Order (March 12, 2020), available at https://www.governor.state.nm.us/wp-content/uploads/2020/03/03.12.20_PublicHealthOrder.pdf.

¹¹ *Id.*

¹² Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19) Situation Summary (March 11, 2020), available at <https://www.cdc.gov/coronavirus/2019-nCoV/summary.html> (last accessed March 12, 2020).

¹³ *Id.*

¹⁴ See, e.g., NMSA 1978, § 10-16G-3(G) (2019) (“The commission shall meet as necessary to carry out its duties pursuant to the State Ethics Commission Act.”).

¹⁵ NMSA 1978, § 10-15-1(A) (2013).

¹⁶ *Id.*

¹⁷ NMSA 1978, § 10-15-1(B) (2013).

imperative of open government. Although the Commission staff has been maintaining physical distance and discouraging in-person meetings, Commission members live in different areas of the state.¹⁸ Regardless of precautionary steps, physical Commission meetings will cause the close physical proximity and interaction that public health authorities strongly discourage. This calculus has led government agencies to cancel or postpone meetings or other events. Indeed, the Attorney General’s office has issued guidance stating that “the most prudent thing to do to ensure compliance with [the Open Meetings Act] would be to postpone/cancel a public meeting,” and that a meeting should only go forward if a board or commission “has a time-sensitive matter to attend to[.]”¹⁹

But postponing or canceling a meeting carries its own cost. It significantly raises the likelihood that public business will be conducted in private, in violation of the Open Meetings Act’s text and spirit. And at a certain point delays and cancellations become unsustainable: it is generally believed that the COVID-19 pandemic will resolve only once an effective vaccine is developed, and experts estimate that substantial vaccine production is at least one year to 18 months away.²⁰

Simply put, state government should not be paused for one, let alone eighteen, months. This is true for the most to the least important boards and commissions: all serve constituents who have a right to observe state government decisionmaking as it occurs, not after the fact. This is particularly so with the State Ethics Commission, which must comply with statutory deadlines for the investigation of administrative complaints²¹ and the issuance of advisory opinions.²² The Commission is also required to prepare a model code of conduct and make recommendations to the legislature about changes to the laws within the Commission’s jurisdiction before the 2021 legislative session.²³ The Commission

¹⁸ Four commission members live in Albuquerque, two live in Las Cruces, and one lives in Santa Fe.

¹⁹ Office of the Attorney General, *Open Government Division Advisory During COVID-19 State of Public Health Emergency* (March 17, 2020), available at <https://www.nmag.gov/uploads/Files/COVID-19/OpenGovernmentDivisionAdviceCOVID-19.pdf> (last accessed March 17, 2020).

²⁰ Roy M Anderson et al., *How will country-based mitigation measures influence the course of the COVID-19 epidemic?*, *The Lancet* (March 9, 2020), available at [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30567-5/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30567-5/fulltext) (last accessed March 9, 2020).

²¹ See NMSA 1978, § 10-16G-11(A) (2019) (requiring the Commission to dismiss a complaint or instruct the executive director to continue the investigation of the complaint if a hearing on the complaint has not been scheduled within ninety days after the complaint is received).

²² NMSA 1978, § 10-16G-8(A)(3) (requiring an advisory opinion to “be issued within sixty days of receipt of the request unless the commission notifies the requester of a delay in issuance and continues to notify the requester every thirty days until the advisory opinion is issued”).

²³ See NMSA 1978, § 10-16G-5(B)(4) (2019).

must meet to perform these essential functions, and other state bodies are no doubt under similar legal requirements to make policy decisions in open meetings. In short, indefinitely postponing or canceling public meetings is not a viable continuing response to the COVID-19 pandemic. Nor is it compatible with democratically responsive government.

III. THE OPEN MEETINGS ACT PERMITS THE COMMISSION TO HOLD VIRTUAL MEETINGS.

The best way to resolve the tension between the Commission’s duty to provide the public with “the greatest possible information regarding [its] affairs” and the need to mitigate the COVID-19 public health emergency in New Mexico is to hold Commission meetings on a teleconference or web conference service that is open to the public.²⁴ All Commissioners can attend remotely, and Commission staff can enable the public to attend by either telephonically dialing in on accessing the meeting through a personal computer.

The Open Meetings Act permits virtual meetings. At the outset, the Act contemplates that a meeting may occur telephonically or through a telecommunications platform. The Act states that “[a]ll meetings of a quorum of members of any board, commission, administrative adjudicatory body or other policymaking body of any state agency . . . held for the purpose of formulating public policy . . . are declared to be public meetings open to the public at all times[.]”²⁵ “Meeting” is undefined. However, the text of the Act makes it clear that a meeting occurs when a quorum of members of any board formulate public policy.²⁶ Whether the quorum meets in the same physical location is irrelevant: as the Attorney General’s Open Meetings Act Compliance Guide explains, a meeting occurs when a quorum of a public body makes a decision, regardless of whether the decision is reached through telephone calls or sequential written correspondence.²⁷

Further, the Open Meetings Act expressly permits a member of a public body to attend a meeting virtually under certain conditions. The Act provides:

²⁴ This is not unprecedented. For example, the United States Court of Appeals for the District of Columbia Circuit has made live audio transmissions of oral arguments available to the public, and has discouraged public attendance of oral arguments in its courtrooms.

²⁵ NMSA 1978, § 10-15-1(B) (2019).

²⁶ *Id.*

²⁷ See New Mexico Attorney General, Open Meetings Act Compliance Guide at 8 (2015).

If otherwise allowed by law or rule of the public body, a member of a public body may participate in a meeting of the public body by means of a conference telephone or other similar communications equipment when it is otherwise difficult or impossible for [a] member to attend [a] meeting in person, provided that each member participating by conference telephone can be identified when speaking, all participants are able to hear each other at the same time and members of the public attending the meeting are able to hear any member of the public body who speaks during the meeting.²⁸

The Act's conditions on telephonic or virtual participation in a meeting of a public body are readily satisfied.

First, it is “difficult or impossible” for a Commissioner to meet in person under the circumstances; the Governor has declared a state of emergency, closed public schools, and barred public gatherings of more than 100 people. Under these circumstances, virtual meetings are both commonsense and lawful. Compelling virtual attendance is also critical to “social distancing” measures—if commissioners and the public are permitted but not required to attend a meeting virtually, there is a substantial risk that commissioners will feel compelled out of a needless sense of duty to physically attend a meeting, which increases the risk of COVID-19 community spread.

Second, the Commission's rules satisfy the “otherwise allowed” condition that the Open Meetings Act establishes for virtual participation in a public body's meeting. The Commission has promulgated a rule that authorizes the Executive Director to issue standing orders addressing general practice issues for the handling of cases before the Commission, including a standing order calling for virtual Commission meetings to handle administrative complaints filed with the Commission when in-person meetings jeopardize public health.²⁹ So long as the Executive Director issues an appropriate standing order under 1.8.3.8 NMAC, the “otherwise allowed” condition does not prevent the Commission from holding virtual meetings.

²⁸ NMSA 1978, § 10-15-1(C) (2013).

²⁹ 1.8.3.8 NMAC.

To be sure, the Open Meetings Act states that a public body “may recess and reconvene a meeting to a day subsequent . . . if, prior to recessing, the public body specifies the date, time and place for continuation of the meeting and, immediately following the recessed meeting, posts notice of the date, time and place for the reconvened meeting on or near the door of the place where the original meeting was held and in at least one other location appropriate to provide public notice of the continuation of the meeting.”³⁰ The Act also requires a public body to “keep written minutes,” which must “include at a minimum the date, time and place of the meeting[.]”³¹ These references to the “place” of a meeting can be read to suggest that a meeting must occur in a physical location. But the “place” of a meeting is part of the “notice” that must be provided to the public to enable it to attend.³² If a public body has determined that notice on its website is a reasonable method for communicating notice that a meeting is to occur,³³ a virtual meeting notice that provides the date, time, and instructions to the public about how to attend and participate complies with the Open Meetings Act.

The Open Meetings Act requires that “all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings” at a public meeting, and a public meeting must be “open to the public at all times[.]”³⁴ In noticing a virtual meeting, a public body can ensure these requirements are met if the notice to the public informs the public of how to participate and the method of participation is free and straightforward. If a virtual meeting is noticed on a platform that requires users to sign up for an account or pay a fee, the public body has arguably violated the Open Meetings Act by denying members of the public the opportunity to attend and listen to the proceedings. In addition, if a regulation or practice requires a public body to accept public comment, the public body holding a virtual meeting should likewise permit the public to submit virtual comments and questions. Otherwise, the public body could violate the Open Meetings Act by making decisions without critical public input.

The Office of the Attorney General has asked that boards and commissions who hold virtual meetings adhere to the following rules:

³⁰ NMSA 1978, § 10-15-1(E) (2013).

³¹ NMSA 1978, § 10-15-1(G) (2013).

³² NMSA 1978, § 10-15-1(D), (E), (F) (2013).

³³ See NMSA 1978, § 10-15-1(D) (2013) (stating that a public body “shall determine at least annually in a public meeting what notice for a public meeting is reasonable when applied to that body”).

³⁴ NMSA 1978, §§ 10-15-1(A)-(B).

- At the start of the meeting, the chair should announce the names of those members of the public body participating remotely.
- All members of the public body participating remotely must identify themselves whenever they speak and must be clearly audible to the other members of the public body and to the public.
- Members of the public should be afforded remote access, via live stream or other similar technology, if possible, or call-in number for listening by phone.
- Chair should suspend discussion if the audio or video is interrupted.
- All votes of the public body must be by roll call vote.
- The public body should produce and maintain a recording of the open session of the meeting.³⁵

It is worth noting that given the proliferation of mobile telephones and internet access, and New Mexico's vast territorial expanse, it is arguably easier for a member of the public to attend a virtual meeting than an actual public meeting, even if the COVID-19 pandemic was not a consideration. Moreover, existing law does not require public bodies to make every vote by roll call, or ensure that all attendees of a public meeting are able to hear everything said. In other words, these salutary considerations, including the making a meeting recording available for the public to access later, are enabled and not frustrated by virtual meetings. The State Ethics Commission should heed these requirements at any future virtual meetings.

IV. CONCLUSION

The Open Meetings Act permits the State Ethics Commission to hold its meetings virtually, as long as public attendance and participation is free and easy. Given the emerging COVID-19 outbreak, I recommend that the Executive Director issue a revised meeting notice to the public that the Commission will be meeting virtually at its upcoming April 4, 2020 meeting and at subsequent meetings as appropriate. The meeting notice should explain how members of the public can attend and make public comment.

³⁵ Office of the Attorney General, *Open Government Division Advisory During COVID-19 State of Public Health Emergency* at 1-2 (March 17, 2020), available at <https://www.nmag.gov/uploads/Files/COVID-19/OpenGovernmentDivisionAdviceCOVID-19.pdf> (last accessed March 17, 2020).