

**CITY OF ALAMOGORDO, NEW MEXICO
CITY COMMISSION REGULAR MEETING MINUTES
6:30 P.M., DONALD E. CARROLL COMMISSION CHAMBERS
August 8, 2023**

**SUSAN PAYNE, MAYOR
SHARON McDONALD, COMMISSIONER
JOSH RARDIN, COMMISSIONER
STEPHEN BURNETT, COMMISSIONER
NICHOLAS PAUL, COMMISSIONER**

**DUSTY WRIGHT, MAYOR PRO-TEM
KARL MELTON, COMMISSIONER
STEPHANIE HERNANDEZ, ACTING CITY MANAGER
ASHLEY SMITH, CITY ATTORNEY
RACHEL HUGHS, CITY CLERK**

CALL TO ORDER / ROLL CALL / INVOCATION / PLEDGE OF ALLEGIANCE

Mayor Payne called the meeting to order at 6:30 p.m. Roll Call was taken by the City Clerk. City Clerk Hughs announced there was a quorum present. Invocation was given by Elder LaTonya Boyce, and the Pledge of Allegiance was led by Commissioner Rardin.

APPROVAL OF AGENDA

Commissioner Burnett moved to approve the agenda.
Commissioner McDonald seconded the motion.
Motion carried with a vote of 7-0-0.

PRESENTATIONS

1. Presentation and Discussion: Open Government, Transparency and Ethics for City Commissions (*Geno Zamora, Ortiz & Zamora Law Firm, through NMSIF Agency Assist Program*)

Mr. Zamora said he was here as part of a new program offered through the New Mexico Self-Insured Fund. The Fund ensures all of our municipalities state-wide in what is called an agency assist program. That is where the Self-Insured Fund will assist me in meeting with city commissions and councils throughout the state to assist them with legal compliance, and there are hot topics that a lot of cities face. Alamogordo is not unique when it faces governance issues. Working with City Attorney Smith, Acting City Manager Hernandez, and in some ways with Mayor Payne, he said he was here to provide this presentation on open government transparency and ethics for municipalities. He said he was with the Ortiz and Zamora Law Firm in Santa Fe, and we represent cities, school districts, and state agencies throughout the state. We currently represent NMSBVI, but in the past, we also represented the school district locally about four years ago, when the Airforce was considering bringing more airmen and airwomen to Alamogordo. We helped them in what was called a community campaign.

He said the laws we are going to review this evening are the New Mexico Open Meetings Act and compliance. This presentation is really geared for the Commission, but it is very important that both staff and public understand some of the restrictions and limitations on commissioners. The Open Meetings Act, the Inspection of Public Records Act, and the New Mexico Governmental Conduct Act, which is really the state-wide ethics statute that is now applicable to local governments. It was about five years ago that the New Mexico Governmental Conduct Act was amended to apply not only to state agencies but to local governments. Cities and school districts are now subject to the Conduct Act.

There will be a very brief review of your Code of Conduct in your ordinance to show some of the consistencies and how it overlaps with the Governmental Conduct Act. He said he took time to review

your Open Meetings Act practices and thought you were doing very well on that, especially for staff. The reason why things can be so militant about the agenda items and documents is because, by law, meeting notices and agenda are required to be published seventy-two hours in advance. If that deadline is missed, a few things happen. In some instances, meetings have to be postponed or cancelled. In other instances, your item is not going to make the agenda and get voted upon. There are no amendments within seventy-two hours, meaning you cannot add anything. Your publication and seventy-two-hour deadline include your website. If it is seventy-one hours published on the website, you will run into trouble. That is three days, but it is hour to hour. If you publish at 5 PM on a Friday, you cannot meet until after 5 PM on a Monday. That is why deadlines are so important and why clerks and administrators get really tough about that. If you miss that seventy-two-hour deadline, you are only allowed to call an emergency meeting; that is calling a meeting and publishing an agenda within seventy-two hours. Anything within that seventy-two-hour period would be considered an emergency meeting. In the last ten years, with all the governing entities that we have worked with, which is over forty at this point, we have had two instances that meet the standard for emergency meetings. That is unforeseen circumstances that will likely result in injury or damage to persons or property, or substantial financial loss. It is not because we missed a deadline and are unable to sign a contract or because we forgot to include it on the agenda. It is a high threshold; you are required to submit your agenda to the Attorney General's Office within ten days for their review. The risk on that is that after ten days, maybe it takes fifteen days or longer, then they can say that it was not a legitimate meeting, which means it did not occur, and you have unraveled and unraveled everything. He said he advises that you call a special meeting rather than an emergency meeting. The special meeting requires seventy-two-hour notice, and you are able to meet within three days and get the work done. He said he previously mentioned two issues that were legitimate that the AG's Office reviewed and approved. Those were substantial dangers involving electrical issues, water, kids, etcetera. That occurred with severe freezes up north that busted water and gas pipes.

He said he included HB 378 as an example of a proposed mandatory public comment period. He said he reviewed your agenda and thought that you did very well on the public comment periods, but there is an underlying thing, which is to treat everybody the same. He said there are tweaks that he is going to recommend. Just looking at this bill, which is representative of some things we want to keep in mind, it allowed for either a general period for public comment, or during specific agenda items. He said he knew that with municipalities, you are going to have different guidelines, like ordinances may bring in public comment specific to that ordinance. You have got that flexibility to determine as a governing body where you place those. He said the thing is, you have got to allow reasonable amount of time and diverse perspectives. When it comes to the public comment period, the commission cannot pick and choose who speaks on what topic, which is to say only pick comments that only favor our initiative, and no comments that disfavor it. You cannot pick and choose between the subject matter and whether they favor you or do not. He said he will talk later about the use of a script to introduce public comment, he was not sure if you currently use a script. Some governing bodies use that, especially if they are running into issues where people come in and disclose confidential personnel information or if they are being unruly; some of the script is to take into consideration other people or perspectives to maintain confidences and use the chain of command.

He said so, when does the Open Meeting Act apply? All meetings with a quorum of members. You are a seven-member commission. Whenever four or more of you gather in the governing body's name, you are acting as the governing body. You have to be highly sensitive to that because there are members of the public who will always be watching that. That does not mean physically in this room. There is something called a rolling quorum, and a lot of commissions have problems with this. He said he was a former City Attorney of Santa Fe for four years, former Chief Counsel to a governor, and former Assistant Attorney General for the State. He has seen these issues back and forth. He has been working with these issues for almost thirty years. He has seen all the examples, including what

has worked really well and things that do not work really well. There used to be a term called counting votes, where you met with these people separately, but you met with them individually to count the votes and make sure you have support for your initiative. That is what is now called a rolling quorum, and the AG's Office says that is the equivalent of a meeting. If you met with more than three members, the three members are okay, but the fourth is not. Those types of meetings can be in person in the Chambers, outside the Chambers, by email, by text, and by video conference. You have got to be very careful about that. The biggest question that comes up is, well, what about events? Let's say you have a ribbon cutting at the supermarket next week. Could four of you be present? The best practice is to send a notification to the public that there is a particular event that says notice of potential quorum where a quorum may be present, but we are not meeting or taking action during this event. It insulates the commission from accusations that something is happening. For school boards, it always comes up when the majority of the school board is hanging out together at a basketball game. They can all be in a corner talking, and then suddenly, there is a complaint to the AG's office that the business of the school district was taking place. There are parallel examples with city commissions. For a lot of governing bodies, that can be an issue. Why is that? The theory behind the open meeting, and the purpose behind the Open Meetings Act, is that the public is entitled to the greatest possible information regarding official acts of officers and employees. Public policy is to be formulated right here in the Commission Chambers. All persons should be permitted to attend and listen. That is why streaming occurred during COVID, and that is why there are accommodation notices; if someone is hearing impaired, that means translation. General concepts are that business is to take place in public, not in a smokey backroom, and the public should have maximum opportunity to listen and observe.

He said at the same time, the Open Meeting Act gives you very limited circumstances in which you can go into executive session. There are certain things that should not be talked about in public, such as confidential personnel matters of any public employee. You have the ability to go into executive session to discuss those. He said he was not sure if this Commission had collective bargaining with the City, but you have that opportunity to discuss collective bargaining strategy and negotiations in executive session. It would be pretty silly if in open sessions, we said to tell the landowner we can only pay \$30,000, but we have up to \$50,000 in our budget to buy it if we have to. Negotiations would be gone at that point in time, and it is the same for collective bargaining and competitive sealed proposals. Attorney-client privileged discussions should not be held in public, they would no longer be privileged if you did that. This is not asking advice about procedure or interpretation of an ordinance, but really when you are thinking about pending or threatened litigation. You have the ability to have that discussion in closed session. The one thing with that is you need to have in that session on attorney-client privileged discussions, is that the attorney needs to be present, or you need to be reviewing a memo or some type of guidance from the attorney. There is an AG's opinion out there that said if your attorney is not involved, you do not talk about attorney-client privilege, and then you are misusing that exception. A lot of governmental entities will do placeholders. They will just publish several executive session items week in and week out, every single meeting, the same executive session items are on there. The AG's Office has been cracking down on that for years. Placeholders are not appropriate. When you place an executive session on the agenda, seventy-two hours or more in advance, it is for a known and particular purpose. You do have to describe it with reasonable specificity. You cannot have a limited personnel matter placeholder in case something comes up on Tuesday evening to talk about it. It really has to be intentional, and it has to be described reasonably specific, and that gets hard with personnel matters. You are not going to be putting an employee's name on there, but it has to be clear it is a particular individual or individuals. You can't take budgetary staff salaries in, or widths broadly reductions. They have to be identifiable individuals.

Mayor Payne said going back to the quorum, we live in a very small town. There have been times when she walked into a room and had no idea about all these Commissioners, because it was truly innocent. We all happened to be involved in the same thing because we live in a small town, which is

not uncommon. We try to separate from each other. She always tries to find someone and say you are my witness that I am not talking City business. We do not necessarily have to leave, right? The premise behind it is that as long as you are not talking city business, right? Mr. Zamora said right, so long as you are not talking city business, developing policy, making decisions, etcetera. He said you raised a very important point, especially in smaller communities. Maybe you just run into each other someplace; that is going to happen. Mayor Payne said yes, there could literally be four of us that walk into the same store at different times; that is not uncommon. Mr. Zamora said it is not the unintentional running into each other that he advises to notice. You are not going to publish a potential quorum at the grocery store on Sundays, or at church. What he is advising is that there are known city events, or other community events. Using the Center of Commerce as an example, perhaps a luncheon or something of that sort, using public forums, or maybe other civic events. There are things you know in advance where four of you may be present, and those are the instances that he recommends just posting for those known events. He said the reason he talks about all of this is that Attorney General complaints are expensive, and it is paid by the city. As an example, back during COVID and video meetings, on a governing body of five, three just stood up on the rostrum talking about the day, and somebody watching on the internet saw a quorum talking during a break, and they reported it to the AG's Office. Then attorneys get involved. They have to investigate it, write a report, and wait for the AG's Office to respond. That gets expensive. Being mindful of all of this and avoiding it saves the expense.

Mayor Payne said her other question is about executive session and posting a notice. You said there are limited specific things you can meet for, but in terms of posting the executive session, should it be more specific? She said she is not thinking of our particular Commission, but she is thinking of another board, and no it is not the County. She said she was wondering how specific you have to be when posting the notice of executive session. Mr. Zamora said it is going to be situational. With attorney-client privilege discussions, when it relates to a specific lawsuit, he recommends listing the lawsuit. You just list the name and case number. You do not get much more specific than that. When it relates to personnel, as an example, some are discussions of evaluations of City Manager. So, evaluations, certain assignments, duties, all that can go in there. When you think about how you manage and evaluate an employee, a lot of that can be done in there. Obviously, if there are disciplinary issues, that would be in there for any employee throughout the city. The reasonable specificity, when it is someone with a title like the City Manager or City Attorney, you may actually use that title. When you start moving through the employees, it may be a Public Works employee or a Clerk's Office employee, something of that sort, something specific enough so that if the AG or public reads it, we know it is an individual and not broad. It is not employees generally. Mayor Payne said so you would say something like, Public Works employee, okay, that is interesting. Mr. Zamora said yes, with school districts, he has said regarding a coach, but which coach? We are not going to narrow it down that much. It is not an exact science, but he could tell you that when he has used a city employee, the AG's Office has come back and said that is not enough specific enough. He said he has a letter from the AG's Office for a governing body that said, when you said limited personnel matters for a school district employee, that was not sufficient. We came back and republished with a coach, and that was sufficient. Sometimes it is hit or miss, and he cannot give exact answers all the time, but he could tell you to err on specificity. Move towards specificity, and you will hear that throughout.

Mr. Zamora said on your meeting notices regarding general specificity, he reviewed the agenda for this evening, and you did a really good job. The more words there are, the more specific it is, and your descriptions are thorough. He said he has seen governing body agendas that say approval of contracts, and that is it. What contracts and to whom? By lining them out, such as approval of food service or paving contracts and beyond that with a little more specificity, you do a really good job on that. You are in really good shape with reasonable specificity but know that when there is a description asked for, it is because we need to comply and provide enough specificity that a member of the public

reading your agenda knows what you are meeting about and what you are deciding. He said he has seen governing bodies intentionally play games by getting very vague and short so that the public does not see because it may be controversial, and they did not want the public to get worked up about it. It is actually the opposite under the statute, be as specific as possible. You also do a good job of this, but you have got to keep written minutes of all meetings. It is not required to be verbatim, governing bodies may choose verbatim or sections that are verbatim, but summary units are sufficient. By statute, you need to have the date, time, and place of the meeting, names of members in attendance and those absent, the substance of the proposals considered, and a record of votes. Those are the bare minimums. Be aware that the first draft of the minutes is to be prepared within ten days of the meeting. They can be marked draft because the body is not going to come back and see them for maybe two or four weeks, and they are not going to be approved. Someone can ask for a copy of the minutes on day ten or eleven, and the law requires having that draft ready. So, stamping and putting a watermarked draft can be very helpful in knowing that a commissioner can come back and say you misheard what I said; please correct this language, or if I voted in favor, not opposed. Remember that with the Open Meetings Act, it is the Attorney General or a District Attorney, or even members of the public, can enforce the Open Meeting Act by filing claims. Intentional actions can be misdemeanors, and we have had that happen with communities in New Mexico, or there can be fines where you pay attorney's fees and costs. It can quickly get expensive. The first expense is responding to an Attorney General's complaint, and he ballparked that as starting at \$5,000 for each complaint. You need to watch yourself to minimize the complaints that are out there.

He said going back to the enforcement of public comment rules, the baseline of public comment is that everyone must be treated the same. He said he understood that the board has business to do at each meeting and that you need to get to that business for the good of the public and employees that are here. He said he advised against a total time limit; he said that on the agenda of no more than twenty-one minutes. He said he advised that the chair of the meeting, the Mayor or Pro-Tem, has the discretion to shorten the amount of minutes. Say the room is packed, and forty people want to speak, there is the opportunity, so long as you treat everyone the same to maintain the discretion to say the standard is three minutes, but you may go down to one minute if necessary. It is not clear legally, and he has not seen an AG opinion on this, but if you get to minute twenty-one and there are people that have not been heard, you are risking complaints. The AG might be of the opinion you are excluding perspectives. He said it is possible, and he has been around enough meetings to see that people can play games on the other side as it relates to public comments. It is possible that someone can get here early, have twenty-one words worth of comment on one very specific opinion, and leave no time for anyone else. You get three minutes, so that is seven people.

Mayor Payne said so what you are saying is do not limit the number of commentators. Mr. Zamora said that is correct. Maintain the advanced sign-up, and make sure that people are not piling on. When they come in, they are ready to comment. Limiting it to twenty-one minutes, which is theoretically seven speakers, has the potential to be a problem. Mayor Payne said what if we have a hot topic for one particular meeting, and because we do not want to limit the number of commentators, what if we say okay, you only get two minutes per person, but then we go to the next meeting and we are back to three minutes. Is that okay? Mr. Zamora said it is because you utilized your discretion in observing the room to say we have forty people here, we have a lot of business, there are important things to move on, we are going to shorten it. You need to inform the public in your disclosure. In public comment, you have three minutes, the standard is three minutes. However, it may be adjusted downward based on the discretion of the chair. Again, treat everybody equally. So, everybody gets one minute, everyone gets three minutes, everyone gets two minutes, but also everyone gets heard.

Commissioner Rardin said that in the past, our public comment used to be at the end of the meeting, and it was unlimited. You could sit here and read the Wall Street Journal all night long if wanted. The

meetings were dragging out, so we moved it to this. What we have typically done is allow the seven people at the beginning of the meeting, and if we have an excessive amount, then at the very end of the meeting, we will allow them to continue so we can get staff and the business taken care of. He said he did not know if that was legal or not, but that is how we used to do it. You would have people sit here the whole meeting. Sometimes, the meetings would go to one in the morning just so they could speak on public comment. Mr. Zamora said he was not going to give a hard and fast rule because there is not one here. Some of these are simply best practices. Much of it is based on the complaints that he has seen go through the AG's Office or the potential for complaints. The general rule is to treat everyone the same. The risk of splitting it is if people are making comments prior to your vote on an agenda item, and their voice is not heard prior to that vote, that can be problematic. He said he has had governing bodies consider whether it is at the end, and they let it go on, but the whole reason they were here, all that action, took place prior to the comment. It is a balance. You are going to know when you have a controversial item on there, and you should plan accordingly, whether with the placement or moving up certain staff items so that staff can get decisions made and get out, and the controversial item or ordinance can be beyond the public comment. He said he was not familiar with whether or not you have governing body rules, but some governing bodies will have rules that dictate the order of the agenda. Where anyone would get caught up is if it is intentionally used in a purpose to subvert public input, and he does not attribute that to you. He said he thinks the governing bodies are always trying to do the best thing. Commissioner Rardin said typically, when we have a hot topic item where fifteen people want to speak, they will actually put the item number down they want to speak on. A lot of times, we give them additional time if they are speaking on the item. Usually with the ones that come in and sign up at the beginning complain about a park or a pothole. Those are the ones we typically limit to three minutes at the beginning of the meeting. If you are here to speak on a specific item, you sign up on that item, and when that item comes up, we allow them to speak. Mr. Zamora said thank you for that background and distinction; he was not aware if you allowed public comment on a particular item. Mayor Payne said that is how we have our sign-up sheet.

Mayor Payne said she is really big on decorum and not letting people come in here willy-nilly and just yell at us. She said she felt like if someone did not have something constructive to say and they were just here to scream at us and call us names, which does not happen very often but used to back in the day; she was sometimes hard and fast with the three-minute rule. Sometimes she would let them go over, so is there anything we should know with that? She said she is big on free speech, so it is a balancing act. Mr. Zamora said again the theme is to treat everyone equally. If your public comment period is independent from the agenda item comments, his advice would be to keep that consistent for every speaker. There will be that person that comes in to yell, and you do not get to select people's speech and say that you can only say positive things about us and not negative things. Mayor Payne said she did not care about that part; she cared about their delivery. Mr. Zamora said there is decorum, and part of the reason for a script is to address decorum, to say, here are the ground rules. You are going to have three minutes, or if you have adjusted it because the room is big, you are going to have one minute. He said he is summarizing, but it is essentially speak reasonably and understand there may be other perspectives and maintain appropriate decorum. So, they can politely say they do not like you, I do not like what you have decided, I do not like this issue, but they have to remain within decorum. You have the opportunity to gavel them down, but it is reading that script that sets the tone for all of it, so that they know before they get in. Which is different than someone getting animated and saying okay, we are done. You have advised them in advance; these are the parameters. We do not speak about personnel matters etcetera; it gives you that much more authority to them to say you are out of order. These scripts typically take about fifteen seconds. Mayor Payne said she thought the school board had a script like that, and she had opinions on it. Mr. Zamora said it is something to consider and something we advise because you can go through waves of folks that are out of line. There are times when governing bodies will say that a person has nothing productive to say, and that is where time limits and consistency come in. If someone else gets six minutes and now they are

limited to three, you risk a complaint. He said he advised that it was three minutes and that it was going to start and end.

Mayor Payne asked if they had to sign up to speak. Mr. Zamora said you have the ability to dictate that. That proposed bill I showed has not passed, so you define the parameters of public comment. Advanced sign-up is not unusual; a lot of school districts and municipalities have that. Some have done that twenty-four hours in advance, but you want to make sure it is easy to do so, and it is not preventing speech. Mayor Payne said nothing makes her crazier than having somebody shout from the audience. Mr. Zamora said that with some he has seen, they must be signed up prior to 6:30. Mayor Payne said that is what we do.

Mr. Zamora said that other things to avoid are properly posted meeting notices. The website is one, but he also recommended it here at City Hall. You have the glass doors seventy-two hours in advance, post the agendas facing outward so a member of the public can see that. There might also be other glass cases you post them in also. Over disclosure can be a rule. He said he has seen some cities that have it as part of their governing body rules that they post at every city facility. That is a lot, so you might specify which facilities. Again, not required, and you will determine what your best practices are, but at the very least, it should be the website and at City Hall where the public can see it after hours.

Mr. Zamora asked the Commission if they still live streamed. That is something that came up during COVID, and it is still best practice since a lot of families cannot make it in the evening if they want to observe. He said he also thought that recording and posting are very helpful to the governing body. If anyone feels that they have been misquoted either in the public or media, you have the ability to point to the tape. You can go to this meeting, at minute forty-two, and here is exactly what I said. Technically, the ability to meet virtually has been lifted, although the AG is sort of allowing that to continue as necessary until statutes can be updated regarding video conferences. The general rule is that you are supposed to be present now.

Commissioner Rardin said he had a question about us being present. Occasionally, we will have a commissioner that may be out of town, and they call in and attend the meeting via telephone. Is that legal? Mr. Zamora said the short answer is yes under appropriate circumstances. It has to be unusual; it cannot be regular. The Open Meetings Act allows for that so long as your annual open meetings act resolution allows for telephone attendance. That is a little bit of a caveat. Commissioner Rardin asked if would that be when we approve our set meetings every year? Mr. Zamora said that under the Open Meetings Act, you are required to adopt what is called an open meetings act resolution annually. He said he has copies for city attorneys to work with and adapt, but it is a resolution that says here is how we comply with the Open Meetings Act. It gives the general meeting schedule by saying we meet the second and fourth Tuesday of every month, and then you have a separate list with the exact days. Commissioner Rardin said we do that in December every year. Mr. Zamora said it tends to be either the last resolution of the year before the start of the new year, or the very first in January. Some do it by fiscal year.

Mr. Zamora said the general rule is that the public has a right to inspect public records except for when there are exclusions. For everyone's intents and purposes, just know that whatever you produce in your work with the city may be a public record, and it may be subject to inspection. That includes emails, texts, pictures, videos, regular documents, draft documents, notes, etcetera. All that relates to city business. He said he once informed a city employee that handwritten notes may be subject to a public records inspection. That employee freaked out and said they are not taking any more notes again in their life. Just be balanced about that. You should take notes and remind yourself what needs to be done. Just be professional in those notes. Do not be writing if you dislike this person or that

person stinks or whatever. Be professional, but know when you are taking notes, emails, texts, or doing those on city equipment that they may be subject to inspection. As an example, a personal phone was used. Someone came into the front office of a college and was incredibly irate and abusive. The secretary took out her personal phone and videotaped the individual. The person was there to conduct business, but they were very abusive in the way they were doing that. That person IPRA'd a copy of that video, and we advised yes, produce it. You were acting in your capacity as a secretary, and you were taking a video of someone coming in to conduct business. It may have been on your personal phone, but it was part of your actions as an employee, and so produce that video. We talked to that employee, and he did the right thing by taking that video, and we preserved the record of how the person acted. If the person wants a copy of how they acted, they can see that. It ended up being a good thing, not a bad thing, but we can have tough reactions. He said he has had to be mindful of his use of texts, videos, and photographs and whether or not he was using a city-issued phone or laptop or whether he was using his own. For the most part, he kept his phone personal but knew there would be things he would have to turn over that were subject to the Inspection of Public Records Act (IPRA). Most governmental entities have email software and logins that you can use on a city-issued phone or personal phone, and he always recommended using that email. When the search occurs, they won't have to come to your phone, they just go to the city system to obtain the emails.

Mr. Zamora said he did not really get a chance to look at IPRA practices, but with an in-house city attorney you are in a much better circumstance to assist with IPRA request reviews. Intend to have a dedicated records custodian. Know that IPRA is enforceable through an AG, district attorney, or private individual whose request has been denied. There are penalties of up to \$100 per day plus cost and attorney fees. IPRA compliance has become very important because it has become a cottage industry; more and more people are suing for errors, mistakes, and improperly answered responses. The damages can be high. We have got decisions from the Court of Appeals and Supreme Court that your search must find all documents. If you did not do a comprehensive enough search and you missed a group of documents, that can be problematic. He said this may not apply to the City of Alamogordo but know that UNM had a private fundraising that was dedicated solely to UNM; that put the fundraising entity within the realm of IPRA request, and that private entity had to provide information. That can happen with your contractors. We have been working with city attorneys to update our contracts to say that you may have a responsibility to provide records that you maintain, private contractor, because you are maintaining them on behalf of us. We have some suggested language to update your contracts to make the contractors aware, and also make them aware if they refuse to comply because there are penalties and legal fees, that the contractors will indemnify the city for refusal to comply. On the *American Civil Liberties Union of N.M. v. Duran* case, the requestor already had the document in their possession, and the governmental agency did not produce it, and then they went to court and said here is what the document looked like; we requested it, and they did not provide it. The court awarded over \$150,000 in damages for them. We have seen \$130,000 with the Secretary of State's Office, and the County got hit for about \$90,000, IPRA's Office got hit for almost \$400,000, and these are all within the last decade or so. There is a trend to make a request, and then to exploit errors. He said he did not think it is to simply exploit the error, it is reinforcing that the public has the right to public information. So, what do we do? We help our records custodians by providing them with resources and staffing to ensure compliance. We, as an entity, provide training to the records custodian and IT department to ensure that records searches are complete, especially with emails and documents on servers. It is not good enough to ask employees to turn over records. When we do this presentation to staff, they have one thousand things on their plate, and now they have to go find records too. The bottom line is if you do not take the time to do a search for the records, then there can be big judgments against the city. It is also about empowering the records custodian to carry a big stick through the city manager to say when we say a records request, it needs to be answered, and here are the time frames. If we don't, then the city is at risk, and the city can get sued. The media might like it when cities get sued, but the city itself does not.

Mayor Payne asked about redactions and said that the State Auditor has a fraud hotline, and when somebody calls that hotline, it is anonymous. Even if the allegations prove not to be true, people use it as a weapon. Frankly, we have had it used against us and it was malicious. When you IPRA that, even when the allegations prove not to be true, they redact the names of the complainant. She said she had an issue with that. At a Municipal League meeting, she called out the current State Auditor and told him she thought it was a dangerous practice, and she still felt that way. We had a situation several years ago where that happened to us, and she said she was reasonably sure she knew who did it, but we have yet to get those names. You said you were a former Assistant Attorney General, and she had an opinion from a former Assistant Attorney General that says their opinion is they should not be redacted. The Attorney General never followed through with it. She said she thought that was so wrong because anyone can make a complaint, and it is still damaging. There was zero truth to it, but her name will forever be on a complaint at the State Auditor's Office. She said she did not understand how every other state agency has to disclose those names and they cannot redact that, but somehow the State Auditor's Office can. She said she understood their premise for why they want to do it, but it just seems that if the complaint proves to be false, they should. Mr. Zamora said he fully understood what she was describing. Circumstances and laws may be different, but there is a catch-all under IPRA that has certain exclusions from public record. In addition, there is the catch-all language that says as otherwise provided by law. There are circumstances, hotlines in some instances by law or state regulation, which can protect disclosures, documents, and other redactions. Another example is CYFD, who has hotlines and complaint lines for the protection of children. Under many circumstances, there are redactions and exclusions for that also. The state of the law in the snapshot may be different in time. There may have been a moment in time, and he did not know specifically with the Auditor's Office and whether or not there was a hotline regulation in place then or now that would protect that information. There are things in the statute about redactions, and certain protected information may be redacted, but certain records may be excluded. For example, personnel evaluation is a record that is protected from disclosure, however, let's say there might be letter that as a record is publicly disclosable, but the contents within that record may be redacted. Just know that is there. I will not be able to give a specific answer, but he can say that he hears and understands. Mayor Payne said there were so many complaints it was ridiculous; it became laughable after a while. It was very clear that people were doing it as retaliation because they were mad because they did not like what we were doing, even though we did not have a choice. She gets that part with protective services and children because there are children involved in a life-or-death situation, but when you are using it as a weapon it feels we are going too far. Mr. Zamora said that is the importance of going to someone that is in charge of investigating and saying please investigate that and I want the report to go along with the complaint; to say here is the complaint, and here is the report that says we looked into it, and it was false. That would then be public record and may be subject to some of the redactions of the name, etcetera, but the follow-up report says we received the complaint, we investigated the complaint, and the complaint was false or not substantiated. Mayor Payne said that is basically what happened. They gave us the complaint and what was said, but they did not give us who said it.

Acting City Manager Hernandez said she had two questions. Are the notebooks that the officers take their notes on, are they IPRA if they transfer them to electronic format? Mr. Zamora said that changing them from format to format is not going to change what the ultimate decision is. He said he would refrain from giving direct legal advice, but IPRA has been amended very substantially as it relates to law enforcement records during pending investigations. That will be a question for your City Attorney, to say, here is the request, here is the information that is responsive to that request, is it protected from disclosure, or am I required? That will change under some very fine facts, so he just wanted to make sure that you are aware of the broadness that IPRA is much better than it was ten years ago as it relates to law enforcement records. It was a little vague, and the answers were more dictated by the courts than they were in the statute, so you had to go find the case law. Now the statute is a lot clearer,

and your analysis of whether or not certain law enforcement records are disclosable is better addressed in the statute.

Acting City Manager Hernandez asked if that was similar to when another law enforcement agency is doing an investigation, but our officers have body cams. If we release that, does that hinder their investigation or not? Mr. Zamora said again, without getting specific because it is circumstance by circumstance, he can say that at certain times, body cam video may be disclosable, but at certain times it may not be. It is going to be very circumstantial. The most important thing is to use your legal counsel to build the IPRA process, help administer the legal process, and evaluate the requests, the law, and the responses. If you get it wrong, there are expenses involved. He said a law enforcement example he was involved with was when a newspaper made an IPRA request for a certain file. He asked the heads of the law enforcement agency to come to the city attorney's office and review the file together, and then decide what was produced. Best practice is to disclose how many documents we review, how many are subject, and potentially not. Let's say I reviewed twenty-five pages of documents. The records custodian responded that twenty-five pages were reviewed, and these two pages were the only ones that were subject to public inspection. We responded that way and got a very angry response from a member of the media that said they have got someone on the inside, and that file is two hundred pages, not twenty-five pages. He said he called in the leadership and said they are saying it is two hundred, and you only brought in twenty-five, what occurred? Well, we pre-reviewed, and we decided that one hundred and seventy-five was not subject to IPRA, and twenty-five was, and that is what we brought. He said he appreciated that pre-review, but it is really the lawyer that needs to make the determination for the full two hundred pages. That was the lesson learned for both of us. Please provide us with the full file and do not prescreen it, and we will work with you. It is all confidential communications as attorney to the client. That goes across the department, and that can happen in any department. Someone else may screen it and say oh, we thought these were the only relevant documents. No, bring us all the documents, and let us determine what the law requires.

Commissioner Rardin said on IPRA, whether it is staff or elected officials, with social media as big as it is, if we are discussing city business on our private Facebook or Twitter, those are subject to IPRA as well, correct? Mr. Zamora said that is correct, and that goes back to his number one recommendation. As a governing body member, sometimes people will say it is just easier if you send it to my office email, do not send it to my city email. He said he advised one hundred percent against that, because that opens up the office email or Gmail to inspection. He said he personally had to have an IT specialist sit next to someone, open up a governing body member's Gmail account, and conduct the data searches. Then they pull up all the family stuff and crazy ads and whatever else. Commissioner Rardin asked if that goes for Facebook, Twitter, Snapchat, or whatever else. Mr. Zamora said all of the above, it can take any form. It can be a text, an instant message rather than a post, the techniques that he used for employees and governing body members is that you that do that pivot for the public that does not understand that when they reach out to you on your personnel email, that makes it subject. As city attorney and a city employee, people knew his private email and they would send me something. Things like hey, can you help with this or look into that. He said he would immediately forward it to his official email and respond from there. Thank you for your email to my personal email, I forwarded it to my official email, and I will respond from there. Commissioner Rardin asked if you could respond back saying that this is a private email, please send this to the appropriate one, or not even respond? Mr. Zamora said you can do one of two things. You can respond immediately from your private, but CC your personal because you want that email chain to jump under the server, and that way you only have to look at the server. You want to get it over to your official email as quickly as possible. So, you can respond from your Gmail with the CC to your official, or you can forward it to your official, and respond from your official. Commissioner Rardin said so we cannot tell them this is a private email, please send it to the other email. Mr. Zamora said you can, but he

recommended CC'ing your official email, because of that one response off your private emails. If you did not share it with your official, someone is still going to have to search for that original email.

Mayor Payne asked about Messenger, because she gets people messaging her on Facebook Messenger about city business. She said she typically responds back and says she cannot talk about city business on this page, here is my city cell phone number, or you can message my mayor page. Mr. Zamora said that is very good practice. It is not as flexible as email, to be able to CC your official, but just push them over there. If there is ever a search, that is exactly what is going to be seen, which is I immediately tried to push them over. Commissioner Rardin said it goes back to the small town we are in. He said he has had the same cell number for twenty-five years, so they do not call me on my city cell, and a lot of times they will call me on my regular cell, or the same thing with emails. A lot of us are business owners, so they have our private emails and city emails. Sometimes stuff gets sent to the wrong one, and then it creates issues. Mr. Zamora said that emails and instant messages are the easiest to control. Texts are a little bit harder, but just be aware that an IPRA could get to texts on a private phone, and that is not the end of the world if it does. Mayor Payne said to be clear, it is not necessarily illegal to talk city business on our private phone; it just opens your phone up, right? Mr. Zamora said correct. Mayor Payne said it is not necessarily illegal to talk city business on your private email; it just opens your private email up. As an example, when she was a commissioner, if we wanted a commissioner phone, we had to pay for it. She said she was not paying for that, and they did not pay her enough for that. So, she did use her phone, and she made it clear that if you want to look at my phone, go ahead because I am not trying to hide anything. Let's say somebody said well, she was talking about a situation with the police department or something, and she is saying yeah, she did text. So, when they go to look for that, they can only look for what pertains to what they are requesting, right? Mr. Zamora said sure, but the search using search terms may capture more, and you may have to examine it. Mayor Payne said that is fine too but like a text or something. It is limited to whatever they are requesting. It is not like they can disclose all my private stuff. Mr. Zamora said correct; it is what they are requesting related to city business. He said he would use grocery stores as an example. Say I am doing an IPRA for all communications by the mayor regarding the grand opening of a grocery store. Okay, city business. You do a text search, and you might find texts that say when you go to the grocery store, pick up milk and oranges. They might get captured in the search, but that will not get produced over because it is not city business. Mayor Payne said and who cares. Mr. Zamora said yes, and who cares.

Commissioner Rardin said as far as commenting on posts, if it is pertaining to city business, is that subject to IPRA as well? Mr. Zamora said that is. That is why you want to push people as much as possible into official accounts. If they are going to your personal Instagram, you can say here is my city council Instagram, please call or email me. Commissioner Rardin said we have a lot of keyboard warriors in Alamogordo. It is called the Alamogordo City Watch page on Facebook, and lots of times there are discussions about whatever we are doing or wrong or whatever it may be. If a staff member or elected official comments on that and starts getting into detail, technically that is subject to IPRA, correct? Mr. Zamora said it is their site that you are commenting on, but probably your account that you are commenting from is going to open it up to search. It can get complicated. Mayor Payne said if you make a public comment on a Facebook page, it is already public, so what does it matter? It is not like you are trying to hide it, it is already public. Mr. Zamora said we are getting a little outside the scope, but always be careful with social media because he has had governing body members go on someone else's Facebook page and say hey, should we fire this particular employee? Now you are opening yourself up. Mayor Payne said she would like to think that we are all smarter than that. Mr. Zamora said he only uses examples because they have occurred.

Mr. Zamora said to make sure your communications are always professional if they are city business. Folks that he calls frequent flyers know they are talking about you, or you are talking about them. So,

every so often they will do an IPRA request over who is talking about me, how many emails are out there for me? He said he has had emails be on front page above the fold in a newspaper because the comments were very crass about a member of the public. You have got to be careful about that. Commissioner Melton asked if there have been any cases related to certain individuals who are deemed too excessive with their IPRA requests, to the point that prevents staff from doing their job? Mr. Zamora said you have to show diligent progress towards answering them. There are very limited cases in which someone has been abusive enough to get a court order to suspend their ability to request. That is in the context of IPRA lawsuits, not in the IPRA requests. For the most part, there is not case law out there on the abuse of requests. There are diligent responses. Someone can request x number of documents, and you may need additional time, sometimes months. He said he has had a request in which the response, which was an inappropriate response, was, we will look at one thousand pages a week for next thirty-six months, but we do not have to drop everything to produce them to you tomorrow. There are different ways to manage that, and your City Attorney can assist in diligent ways. Commissioner Melton said what about cost? Some cities charge, especially if it involves paper copies, but others don't. Is there a point where if it is a certain individual that excessively requests, does the city have the right to say we are happy to help you, but you are going to have to pay for the time? Mr. Zamora said to answer your specific question, are you going to have to pay for the time, no. To bring up a common theme, everybody needs to be treated the same. You have the ability to charge up to \$1.00 per page. The AG tends to frown on the \$1.00 itself. Some are up at a \$1.00, some are \$0.50, some are \$0.25. That becomes a city policy that is uniform for every requester. The difficulty, and he has had a lot of conversations about the unfunded mandate that IPRA is, is it is forty years unfunded now. We need to plan for it at this point. There are things in the law now about digital requests and digital formats and the ability for someone to come in and use a camera and photograph the record but not take it home with them. More often than not, pages do not get paid for, and that is just how the law is written about public disclosure, so be aware of that and the unfunded mandate aspect. Governments need to be in tune with their records custodian and city attorney to understand what the patterns are for requests, what the expense is, and be able to budget and pay for that. Noncompliance is much more expensive than funding compliance.

Mr. Zamora said that on the example that the Mayor had earlier about there is no law against using personal equipment for public purposes, that is correct, but the reverse is not true. We start touching on that in the Governmental Conduct Act. Using city resources for personal or political benefit is prohibited. Taking official actions for cash in banks is frowned upon; it is illegal and a felony. That is one way of using public resources for private gain. Another is using a city truck to put a campaign sign in and drive around town, which is also not allowed under the Governmental Conduct Act. He is saying it because it has happened. That is using public resources for private purposes. The same would be using a city email to say please come to a fundraiser for this charity, or that political event. That is when you go to your private and use that.

Mr. Zamora said that general rules for public officers and employees, the Governmental Conduct Act says treat your position as a public trust, use the power and resources only to advance public interest, and not to obtain personal benefits or pursue private interests. You can get tripped up in here. Some would say whether it is from a governing body member all the way through employees, to say, oh, you want me to engage in this activity, I am going to need cash in bags. Governmental Conduct is going to cover top to bottom, from the governing body to employees. Conduct yourself in a manner that justifies the confidence placed in you by the people, by the taxpayers that pay our salaries. Full disclosure of real or potential conflict shall be the guiding principle. Most folks and ethics ordinances say that if you have a conflict, disclose it. The Governmental Conduct Act says real or potential conflicts; it may be perceived as a conflict but not legally. To be on the safe side, disclose it and make reasonable efforts to avoid undue influence and abuse of office. As this law is out there, you want to stay away from that perception so that there are no complaints with the AG's Office on that.

He said the biggest issue that he covers in the Governmental Conduct Act, and the one that people trip on the most, is prohibited political activities. No coercion by governing body members to contribute, vote, or participate in political activity. No threats to deny promotion or pay increase based on political activities. No requiring employees to make contributions or participate in political events. No advising an employee to take part in a political activity. No use of governmental property for non-authorized purposes, of which political activity is one. Remember to be careful because it is not always what we intend by our words, it can be the perception or how someone receives the request. Hey, I would love to see you Saturday at my fundraiser may be because you have known the person for twenty years, or maybe their parents, but how the person perceives it may be wow, my job is in jeopardy if I do not show up to that political event. Regarding official acts for personal financial interests, yes, he is cartoonish when he talks about cash in bags, but it has happened. Other things can be such as working with contractors where you say you will approve the contract if they go build and addition on my house for free. That has also happened. Things like that can be fourth degree felonies, so please be wary and aware of that, and know that as a public officer or employee, you are disqualified from engaging in any official act that directly affects your financial interest. For a governing body, the best example is if I vote on this particular contract, is it going to personally benefit me? Number one, you have to make that disclosure and refrain from participation. Mayor Payne asked if that would include family members as well. Mr. Zamora said it would, and under the Governmental Conduct Act, there is a realm of family members, which is typically spouses, siblings, parents, and in-laws of each.

Commissioner Rardin said that in the past, we had a commissioner that worked for a gentleman that had a contract with the City. When he voted to approve the budget, since that contract was included in that, would that have been a violation? He always abstained when we voted on the contract, but for clarification, when we voted to approve the budget for the year, would that be a violation since that is funding that contract? Mr. Zamora said he would refrain from specific legal advice on specific instances, but what he can say is the budget generally is not the selection of the contract. Commissioner Rardin asked if it would be at the actual approval of the contract? Mr. Zamora said that is where it most directly benefits. Commissioner Rardin said he always abstained at that point, but he himself did not know how broad that would be. A lot of us are in business, and there are times where we may bid on a project, but we just abstain from voting when it is awarded to whomever we bid on or with. Mr. Zamora said there are procurement exceptions to a lot of this, that is he is not really going over today. That is not problematic, and it seems like you guys are in compliance on that, but it is going to be the more direct action and actual effect on you. The approval of the budget to pave roads is something that you as a governing body participate in, that is your chief duty, but it gets tangled where the rubber hits the road to the contractor itself, that is going to be heightened scrutiny at that point. Be aware that AG's and DA's can enforce this. There can be civil penalties and fines, but there are other things we can get tripped up on, like honoraria. Often even as employees, and definitely as governing body members, we are called to come give speeches or updates on the municipality. We are invited to luncheons; the provision of food is fine, but they cannot pay you to be there. He said he just got a question recently about a conference where a local foundation was paying for attendance. It was significant training for an employee. You want to go through the approval process for the ability to have the trip paid for. Those things are all okay, but you cannot be paid to be present. For example, if they give you a \$5,000 stipend if you go to the chamber of commerce next week. No. Can they provide you with chicken at brunch, yes. Can you reimburse my milage, yes.

Mr. Zamora said regarding enforcement, the best practice here is to avoid conflicts and improper interactions with employees. He said he wanted to pause here and get slightly off-topic because a lot of our communities face this. He is talking about the Governmental Conduct Act, but keep in mind other legal violations such as discrimination, harassment, and sexual harassment. You have got to be on your toes at all times with regard to your interactions with employees, whether they feel pressured

under governmental conduct contacts or pressure under other laws. Again, it is oftentimes not the intent of a comment but how it is received and perceived. You have got to be incredibly mindful because there is a heightened sensitivity with regard to discrimination issues, whether that is ethnicity, race, gender, religion, all the other exclusions, or other protected discrimination aspects. People can receive a comment, whether it be about appearance or something else playful in nature, where you can think it is playful in nature, but for the employee and receiver of that information, it can be a whole different experience. Back to the Governmental Conduct Act, abstain from decisions affecting personal financial interests, and be careful of political campaigns. When you are making public disclosure of financial interests, you may not always think about other conflicts you may have. Some are personal, some are on non-profit boards you serve on, or memberships you are involved with. Some entities, through their ethics ordinance, will have gift reporting required if it is over a certain threshold, where it has to be reported and publicly posted. You have a city commission Code of Conduct, be aware that is there. It mirrors the Governmental Conduct Act, but it is different in other ways. It is very important to have the Code of Conduct and have it in your government's binders, so you are always aware it is there. You have to maintain the public trust and avoid conduct creating the appearance of impropriety. There should be no financial interests in city business if a person is in a decision-making capacity regarding that interest. You have got disclosure requirements; you are disqualified from participating in debate, decision or vote. An example is he had a governing body member get up and say with regard to this issue, I have a personal conflict, I am abstaining from the vote, but I encourage every one of you to vote in favor of it. They stood up, walked to the front row, and mad dogged everybody before they voted. Of course, they voted in favor, but that would be a violation of not only the Code of Conduct but of the Governmental Conduct Act. Yes, that helps because it is silly, but that hurt, and I watched it happen. Interestingly, your Code of Conduct also takes the opposite approach where you cannot vote in favor of certain things, and you cannot vote to prejudice, hinder, or punish enemies or opponents. You cannot intentionally act to favor yourself or intentionally act to retaliate against others.

Mr. Zamora said disclose conflicts of interest and may not solicit gifts, personal benefits, favors, etcetera. Do not misuse confidential, non-public information or attempt to go knock on the door of staff and say hey, can you give me some info that I can then use for my personal monetary benefits. No misuse of city resources or property for private gain or personal advantage; we have talked about that before, but the Code does raise certain rental exceptions that you may be able to rent on the same terms as everyone else in the public, so like rent a place in the park to hold an event, etcetera. There are some good and reasonable exceptions mentioned in there.

Commissioner Rardin said that as far as campaign contributions, it says we are not allowed to solicit them, but if there is an item that comes before us where a particular individual has contributed to his or her campaign, should we abstain from a vote on those items if it is a substantial amount of money? Mr. Zamora asked the Commission if they had campaign contribution limits. Commissioner Rardin said we do not fall under that because we are nonpartisan, but he could not remember if there was a dollar amount. Mayor Payne said she did not think so; we do not even have to report to the State. Commissioner Rardin said we do not report to the Secretary of State or anything; we do self-report to the City, and the Clerk has access, but that is only local though. In the event that someone gives you a very large donation and you come in and vote on a road, building, whatever it may be, is that crossing the line? It appears to be. Mr. Zamora said that is an interesting one. Real or potential conflict; he thinks there will be a threshold but could not say what the number is, in which that becomes a real or perceived potential conflict. So perceived, there might be a point to say I am making this disclosure, and I either do or do not feel there is a conflict here, and I am going to vote or not going to vote. He said the reason he asked about the contribution limit is because he has seen where a city used to have disclosure requirements for large contributions, but they limited the contributions to he thought about \$1,000 for council, he did not remember it was \$2,500 or \$5,000, and therefore they made it so it would be uniform and then took away the conflict because the limits were lower. He said he is not

advocating one way or another, he is just exploring the question. Commissioner Rardin said so as long as it remains under that dollar threshold, then it is okay? Mr. Zamora said right, and they are also disclosed again under the reporting. That is a hard question. Commissioner Rardin said it is a grey area. Mr. Zamora said that at some point, you may wish to disclose because the numbers may be sufficient. Commissioner Rardin said we do. Any candidate files three or four reports each election disclosing real property and in-kind. Even if somebody just donates signs, we report that to the City Clerk's Office. He said he just did not know if there was a dollar threshold. Mr. Zamora said you have that reporting already; it is going to be a personal decision whether you disclose or find that it is a legal or perceived conflict, and the disclosures necessary and stepping out, abstaining. Commissioner Rardin asked if that dollar amount might be in state law, or can we have the Attorney research that? Mr. Zamora said he was not aware of any dollar amount in state law, but there may be some things for the Attorney. Again, to turn some advanced questioning to the Attorney might be appropriate, to say hey, there is an agenda item that I am looking at, and in this attorney-client communication I am going to disclose some things, and what are your thoughts about Code of Conduct? Just know that these things are enforced by your City Ethics Panel. There are civil fines of up to \$500, and there is a potential of censure for not complying, and criminal referral. Your ordinance does not automatically engage a city prosecutor or anything of that sort, but the Ethics Panel may make criminal referrals to a district attorney.

Mr. Zamora said that a reminder to the governing body, and this is from your Charter, but "City Manager shall employ and discharge the employees of the City." This is the hardest part in all of this, in the context of Open Meetings Act, in your correspondence in IPRA, and complying with ethics is sort of everyone is in their lane. Remember that the governing body has a limited number of employees. Sometimes that is only the city manager, sometimes it is the city manager or city clerk or city attorney, but there are limited numbers of employees. Every other employee falls under the City Manager, and that is very important to remember and to stay within the lane so that if there are things that you are getting feedback from the community, which is routing it to the city manager for their handling, both positive and negative. You are going to filter that in, and that is a reminder for even actions in the chambers of making directives to the city manager, for the city manager to then go through the employees. A funny example is a governing body running into a facilities manager at Home Depot, and the governing body said hey, there are too many keys out at the gym, I think that should be re-keyed. It was as simple as that, but that facilities manager that week went out and re-keyed the entire building because they took it as a directive from the governing body member. Remember, the governing body speaks with one voice through a vote to give directives. The facilities manager then knows that the city manager was working on a contractor for a new key system for not only the gym, but the rest of the facilities, and they spent twice the money by re-keying it once to only have it electronically keyed a month later. Be aware of how the governing body is perceived by employees and that sometimes they may take it as a directive and not realize the governing body speaks with one voice through a vote in their directives to the city manager that will then filter down to the employees. Be mindful of that in the context of everything we have talked about.

Mayor Payne asked what the difference is between the Governmental Conduct Act going to the Attorney General or District Attorney for investigation, and the new Ethics Commission? Mr. Zamora said he thought about that on his drive down. Know you are subject to ethics complaints before the Ethics Commission. Municipalities or city commissioners or counselors; there can be a complaint that goes to them, and we are actually handling one for a state official. It gets referred to the Ethics Commission, and then there is an ethics inquiry. He said he knew that Governmental Conduct Act complaints were going to them but did not know the exact mechanism. They are the first receiver of any complaint. Mayor Payne said the Ethics Commission is. Mr. Zamora said the Ethics Commission has the jurisdiction to review complaints that come to them relating to the Governmental Conduct Act, but they are not a prosecutorial entity. Their decision may end up as a referral to a DA or the Attorney

General, but as the statute remains right now, there is the ability for the AG or DA to step in even before an Ethics Commission; there is some overlap. Mayor Payne said there is overlap; her understanding is that they sort of replaced the AG's handling of the Governmental Conduct Act, but that is not necessarily true. Mr. Zamora said that it is not necessarily true because there may be criminal activity under the Governmental Conduct Act that would then need to be handled by a prosecutor, which would be the AG's Office or the DA. Mayor Payne said that would make sense if you were stealing money, taking bribes, or something like that. Then it would be a criminal act, so the Ethics Commission would probably be lesser. Mr. Zamora said it is more of a civil process. They do the investigation. It is more of a back-and-forth process in that they receive a complaint, and they forward the complaint. Let's say it is a city commissioner against a city commissioner, they forward the complaint to the city commissioner for response by the city commissioner. Sometimes that is through counsel. Then the response goes to the Ethics Commission, and the Ethics Commission may ask for a hearing, they might do further investigation, and then they actually issue an opinion on the validity of the point. Mayor Payne said okay, whether it should be moved on, or just a fine, or whichever. Mr. Zamora said right. Mayor Payne said she has been watching that and seeing where they have actually taken action, and she found it interesting. At first, she was wondering if this was really legitimate because it is supposed to be a bipartisan commission, but yes, they have taken action against governmental employees. Mr. Zamora said their opinions can be very strong. He has skimmed their last three years of opinions, mainly by title and then down into the subject matter, and yes, they are very clear cut if this is a violation-yes, or is this a violation-no. They also issue advisory opinions and that is something to think about as a governing body, where you get to an issue where a governing body member, where you get to issue and say, wow, I want to make sure I am in compliance, and they ask for an advisory opinion. They do not always issue one, but they might. So, they have a series of advisory opinions out there. Mayor Payne said there are attorneys on that commission, right? Mr. Zamora said there are, but he did not know the exact makeup of how many required attorneys are on there. He said he knew the members, and several of them are former attorneys, and then there are public and at-large members.

Mayor Payne said the last thing is what she refers to as Google lawyers. They can get their degree in five minutes, an hour, or ten minutes, whichever. She said she always errs on the side of, I am not an attorney, and I am not going to pretend to be one. She said she does not play one anywhere, that kind of thing. She said she always errs on the side of, if we have a question about something, instead of an assumption, we need to make sure our Attorney is involved. Mr. Zamora said his general advice is if an attorney is making an inquiry, an attorney on behalf of the governing body should be involved, that is correct. Every time an attorney is referenced, sometimes somebody will walk in and say former or current employee, a member of the public will walk in and say, well, I have talked to my lawyer and... That is a time-out. If you have engaged an attorney, we cannot continue to communicate. We are going to need to have our Attorney contact your attorney. There are some protections there that yes, you should engage your Attorney. Mayor Payne said what if we are just talking say in an executive session and let's say that one of us just does not feel comfortable, or we are just not sure we are doing something right. Is it appropriate to just have our Attorney there or request that she stay? Mr. Zamora said that is a good point. He has a detailed Open Meetings Act class that goes two hours on just the Open Meeting Act. One thing to remember is governing body executive sessions are your privilege. It is the governing body's privilege only, meaning anyone else is an invitee into executive session. Sometimes that is the attorney, sometimes that is the city manager. It can be longstanding practice that every executive session, the attorney and manager are there. By law, they are not required to be included, but they are included as your invitees. Sometimes that will be a department director or employee coming in to explain maybe there is a lawsuit and then alleges something certain where you say hey, did this actually occur? Mayor Payne said so it is not inappropriate to do that. Mr. Zamora said no, it is not inappropriate; that is within the realm, you can invite the City Attorney at any point.

Commissioner Rardin said before this Ethics Panel was set up, and he knew this from past experiences, but if we had a potential violation of the Governmental Conduct Act, we actually would self-report to the Secretary of State's Office, and then they would make a determination of whether it was or was not. Certain things, like if you voted on something that you may have had a conflict in or whichever, you could just disclose that at the next regular meeting, and that would cure it. Is that the case now if you have violations? Does it go to the Secretary of State or this Ethics Panel? Mr. Zamora said again, when you do something twenty-nine years, and you have been dealing with stuff for a long time, there are old ideas that have been updated. He said he believed, without specifically researching it, that the Ethics Commission is now taking that place in the process. There is self-reporting, and sometimes the reporting is the form of request for an advisory opinion. We engaged in the following activity, is this in compliance with the Governmental Conduct Act? If it is not, what do we do? Commissioner Rardin said so they are basically taking the Secretary of State out of the middle of it. They were the ones that had the authority over the elected officials, whether it was county or city commission, state representatives, whichever. As far as the election, he said he knew the Ethics Panel was set up by the legislature, but was it designed or written by a specific legislature? Like the Local Election Act was? Mr. Zamora said he did not think so. He said he thought the Ethics Panel was a long time coming. That is not anything overnight and to anyone specific. There may have been people leading that charge, but he thought the evolution of having an Ethics Panel like what exists is the best practice that the State had been looking at for years prior to that. On the evolution of it, he said he would have to go back and look for more specifics. Commissioner Rardin said the Governmental Conduct Act went into effect for city and local governments on July 1, 2011. It was a little further back than you were thinking, but he just knew because of an issue back then at that time. Prior to July 1, it did not cover local government, only from county commission on up, and that is when they adopted it and added us in. Mr. Zamora said school districts were pulled in. Commissioner Rardin said school districts as well, yes sir. Mr. Zamora said the details of the transition from the old system with the Secretary of State to the new one with the Ethics Commission included, he would need to go back and do a little bit more. Commissioner Rardin said that in the event that something was to happen and we self-report, do we send to them, rather than the Secretary of State? Mr. Zamora said that is what it appears to be, but again, he just read a series of their opinions, and it appears that is the first stop. Commissioner Rardin said they will do a determination of whether yea, it is a violation or no, it is not, and make a recommendation of which direction we need to head or what to do to fix it. Mr. Zamora said or maybe even decline to opine. That full range is what he has seen through their Advisory Panel.

Mayor Payne asked how many times in your twenty-nine years, or since you have been doing this, have you seen the local DA, other than something outrageous like they are funneling funds or stealing; just how many times do you actually, because she cannot just see our DA doing that. Mr. Zamora said it is typically the Attorney General's Office. Some may be because it is the Attorney General's Office that feels the need to enforce and they have more resources to do that, he would say it is also possible that a local DA may feel a conflict and therefore refer it to the AG's Office. He said he thought there were two reasons why it is more for the AG. Mayor Payne said that is what she is thinking. They are busy, they have other criminal cases, so she said she was just wondering how often you saw that. Mr. Zamora said that potential is there, but you do not see it very often from the DA's Office. Mayor Payne said it would typically be the Attorney General's Office. Mr. Zamora said that is right. Mayor Payne asked if he saw that quite often. Mr. Zamora said yes, you see it very frequently in enforcement of all the above; IPRA, OMA, and Governmental Conduct Act. He said he had seen some severe consequences for failure to comply with the Open Meetings Act. The rolling quorums, the backroom deals, stuff like that. He said he had seen severe AG intervention.

Mr. Zamora said he has spoken with City Attorney Smith to let her know that he is available as a resource and a sounding board. He said he does not have all the answers but is available as a

resource to spitball and interconnect city attorneys throughout the state to share information and best practices.

PUBLIC COMMENT

None.

CITY MANAGER'S REPORT

Acting City Manager Hernandez made the following remarks:

1. Acting City Manager Hernandez introduced some managers that were present.

Mayor Payne thanked everyone for being here and said she thought it was good information for new employees, maybe you never worked for a municipality before. Welcome to the City of Alamogordo and we are so glad to have you.

REMARKS AND INQUIRIES BY THE CITY COMMISSION

Commissioner Rardin made the following comments:

He asked why we are approving the weekly City Manager's Report. Acting City Manager Hernandez said there is a lot of work that goes into it. It is part of open records, but it may as well be part of the public record. There are many times that people want to know what the City and staff do all day, well, at least it is on the record that we do a lot every week.

He asked why there are purple lights on the south overpass. He asked if we could get with PNM and ask them. Acting City Manager Hernandez said if she remembered correctly, she talked to someone about it, and there is a fault in them. She did not think they were purple. Are they the streetlights? Mayor Pro-Tem Wright said he thought we got an email saying that they sent the wrong bulbs or something. Commissioner Rardin said it is just the overpass. Once you get down of the bottom of the hill, it turns back to regular going the other way. Acting City Manager Hernandez said there was some on White Sands too, but she did not know if those have been replaced. Commissioner Rardin said he was just wondering because they do not throw very much light, and they are weird looking. He said he would look back through his emails. Acting City Manager Hernandez said she would ask Bruce about it.

Commissioner Rardin said that on White Sands Boulevard, right in front of the Zoo and Center of Commerce building, and he asked about this before, but we are supposed to get with NMDOT about those ridges. It is mainly in the northbound lane that you notice them. Acting City Manager Hernandez said that last time you brought this up, we submitted a complaint or inquiry to DOT, but we have not gotten a response back. Commissioner Rardin said if they could just run in there with a milling machine and mill those down, it would be really nice. He said he knew they looked at one of them because there is a pile of asphalt in front of it to make a little ramp over it. He said he knew they had addressed it, but it pretty bad right there between 10th and Indian Wells, in that area. Acting City Manager Hernandez said we could resubmit another one. Commissioner Rardin said the guy's name that runs the DOT out there is Aaron.

He said John Seacrest passed away a couple of weeks ago in a car accident. It was in the obituary last Sunday. He was prominent in the community and had been here a long time.

Commissioner McDonald made the following comments:

She said last Thursday, the White Sands Rotary Club gave her an award for Professional Person of the Year, and she wanted to thank them for that. She was placed in the selection, and it was awarded to her. There are so many people in the City of Alamogordo that are doing things, and she felt very honored to have received the award. She brought the award to the City because she had a lot of help over the last three years getting the cleanup together. She said she told Acting City Manager Hernandez that she thought it was a community award. Even if it was presented to her, she wanted to say thank you to the City because no one works alone, and you need all the help you can get.

Mayor Payne made the following comments:

She said they met with the DA's Office to discuss their take on Officer Ferguson's death and got some good information there. She had a meeting with Senator Burt for the same reasons. On Tuesday, she and Commissioner Paul went out to the Base, and the Undersecretary of Defense was there. They talked about housing issues. On Wednesday, we had the Ribbon Cutting for the Scenic Extension. That was very exciting. She said she was getting calls all the time from people that are thrilled that it is open.

CONSENT AGENDA

- 2. Approve the minutes for the July 25, 2023, Regular Commission meeting and the July 28, 2023, Special Commission meeting. (Rachel Hughs, City Clerk)**
- 3. Approve the statements related to the Executive Closed Session held on July 25, 2023. (Rachel Hughs, City Clerk)**
- 4. Approve the weekly City Manager Reports for 7/21/2023 & 7/28/2023. (Stephanie Hernandez, Acting City Manager)**
- 5. Consider, and act upon, the adoption and final publication of Ordinance 1680 to approve a Local Economic Development Project for Secured Assistance Proposed by Learn New Mexico. (Michelle Perry, CEO Learn New Mexico LLC) (Roll Call Vote Required)**
- 6. Consider, and act upon, approval of Resolution No. 2023-38 authorizing and approving submission of completed application for financial assistance and project approval to the New Mexico Finance Authority. (Debbie Osborne, Grant Coordinator) (Roll Call Vote Required)**
- 7. Consider, and act upon, acceptance of a capital outlay reauthorization agreement to Alamogordo Fire Department from the Department of Finance in the amount of \$485,100.00. (Debbie Osborne, Grant Coordinator)**
- 8. Approve Resolution No. 2023-39 authorizing the Mayor to execute the agreement for membership in the Southeastern New Mexico Economic Development District/Council of Governments. (SNMEDD/COG). (Rachel Hughs, City Clerk) (Roll Call Vote Required)**
- 9. Consider, and act upon appointing the Mayor as the Voting Delegate for the New Mexico Municipal League 66th Annual Conference. (Rachel Hughs, City Clerk)**

Commissioner Rardin pulled Item 5 from the Consent Agenda for further discussion.

Commissioner McDonald moved to approve the Consent Agenda as amended.

Mayor Pro-Tem Wright seconded the motion.

Roll Call Vote was taken.

Motion carried with a vote of 7-0-0.

ITEMS REMOVED FROM CONSENT AGENDA

5. Consider, and act upon, the adoption and final publication of Ordinance 1680 to approve a Local Economic Development Project for Secured Assistance Proposed by Learn New Mexico. (Michelle Perry, CEO Learn New Mexico LLC) (Roll Call Vote Required)

Commissioner Rardin said we are giving a million dollars for this, and he did not know if the building out there is \$600,000 or \$800,000, but what are we doing to secure the other couple hundred thousand worth of the loan? Acting City Manager Hernandez said they will put in the \$400,000 in renovations. We are holding the mortgage on the building, and we will file the mortgage with the County. Commissioner Rardin asked if we knew the asking price of the building and how much the renovations are? He said he thought it was \$600,000 and \$400,000 when we last talked about it. Acting City Manager Hernandez said she believed that Michelle Perry is in negotiations right now, and maybe she can answer. Ms. Perry said in regard to the building, she is currently in negotiations with the seller through the real estate agent. We have settled at a price of \$615,000 after some very serious back-and-forth. However, we had it inspected, and there are lots of findings. There are objections she will be filing, and that price is going to go south, or the owner will get those things fixed. Today the gas was turned back on; the gas meters had been pulled, so we had to get those reinstalled and have the gas lines tested. There is lots of plumbing, electricity, HVAC, etcetera, so that is where we are right now. Commissioner Rardin said in the event that you cannot come to an agreement with that owner, what is your Plan B? Ms. Perry said we are going to look for another property. Commissioner Rardin asked if this agreement was tied to that specific piece of property. Acting City Manager Hernandez said the project participation is, so we would have to come back to Commission for approval on the building. Commissioner Rardin said alright; he just wanted to make sure that the City's interest was protected. To the City it is not that much money, but it is a lot of money. In the event something happens, he wanted to make sure we were protecting the taxpayer's money.

**Commissioner McDonald moved to approve.
Commissioner Burnett seconded the motion.
Roll Call Vote was taken.
Motion carried with a vote of 7-0-0.**

NEW BUSINESS

10. Consider, and act upon, Resolution No. 2023-37, adopting an Infrastructure Capital Improvement Plan (ICIP) and identifying the top five (5) recommended capital outlay projects for Fiscal Years 2025-2029. (Debbie Osborne, Grant Coordinator) (Roll Call Vote Required)

Grant Coordinator Osborne said the ICIP is a planning tool used to establish priorities for anticipated capital improvement projects to help prevent emergency situations. It is not a grant application; it covers a five-year fiscal period focusing on repair or replacement of existing infrastructure or the development of new infrastructure, and it encourages a more efficient city operation. It is developed, updated, and submitted annually to the New Mexico Department of Finance Local Government Division, and it can be found on their website. Listing a project on the ICIP list increases funding opportunities because many state, federal, and private funding agencies utilize a city's ICIP in reviewing grant applications. Additionally, a project must be on the ICIP list to be eligible for capital outlay funding. ICIP projects are not part of the City's annual budget. Various street maintenance projects, such as repairs and traffic lights, are included in the City's annual budget. Therefore, we do not list them on the ICIP. The City has its own long-term infrastructure planning project to help develop

a Street Assessment to help prioritize streets for maintenance and approval. This is explained in detail on the City's website. In developing ICIP, department directors evaluate the needs of their departments, then they meet with the City Manager to discuss and select those highlighted in priority. We also reviewed the results of the Citizens Survey that was conducted by Consensus Planning for the development of the Community Services Master Plan. The results of the Bonito Lake Campground Survey were conducted in October 2022, and comments and suggestions were received from the public at a public meeting held on July 31st. An example of projects selected, based on these results, are Zoo improvements, Library improvements, construction of the Natatorium, construction of a playground at Dudley School, reconstruction of circulatory roads at Bonito Lake and development of fishing access and day-use reopening, and a project to design a Community Garden.

She asked the Commission if they wanted to hear the comments received at the meeting and said she previously sent them to all of you. Mayor Payne asked how many people showed up. Grant Coordinator Osborne said there were five members of the public, which is more than we have had in the seven years she has been doing it. Commissioner McDonald, Finance Director Huff, Community Services Director Ortega, Acting City Manager Hernandez, and Parks and Recreation Director Bass were all there. It was well attended, considering the usual attendance. She said she replied to each of the comments sent to you all via email and forwarded them on to the appropriate department directors. She could read them aloud if wanted. Mayor Payne said we all got the email, and she read them. Grant Coordinator Osborne said she believed there was one gentleman who submitted that night on the forms that were distributed to the attendees. Also, Commissioner McDonald and Courtney McCarey had some suggestions on that, which she included in the emails sent to the Commission. She said that she had a list of all the ICIP projects that we used to apply for and were rewarded capital outlay funding in the last three years if you wanted her to read it. It is pretty extensive, but she is happy to read it or email it and share it.

Commissioner Melton said he has a question about the Library's north patio, but it may be more for Acting City Manager Hernandez. Grant Coordinator Osborne said just so you know, I am going to mention all five projects in a meeting to answer them, but you can go ahead and ask now. Commissioner Melton said that a decade ago or longer, we tried to build a new library where Albertsons is. Is this \$125,000 an indication we are moving away from that and more instead opting towards upgrading the existing building? Acting City Manager Hernandez said she did not believe we even had talks about doing a new library in the past however many years, so we are just renovating what we have and expanding it for more outdoor space. Commissioner Melton said it was a while ago, like 2008. Commissioner Rardin said it was back when an old grocery store sat there, and Albertsons purchased the property, tore the old building down, and built the current building. So, there is no chance of that transpiring anymore. Commissioner Melton said he knew, but he only asked because the Library is one of our oldest buildings and not in the best shape. Commissioner Rardin said it is kind of small. Commissioner Melton said exactly, only twenty-thousand square feet. Back when they were trying to pass the bond, it was to double it to forty thousand. Mayor Payne said it could always be changed in the future, but she remembered when that was going on.

Grant Coordinator Osborne said if anyone wants them, the links for either of the complete listing of projects are on TFA's website. The link to the Street Assessment and our infrastructure planning is on the City's website. The link to the information about Consensus Planning and their survey, she said she is happy to send them to you if you wanted, just send her an email asking.

Grant Coordinator Osborne said the top five projects that we used for our capital outlay applications later this year are APD procurement of Police Department vehicles and equipment at \$500,000. The reason for this is it is important to make sure we provide the best vehicles we can for our public officers. They are driving several older vehicles that are not always the best. Next is Community Services with

the bear enclosure renovations and expansion at Alameda Park Zoo at \$400,000. Currently the water feature where the bears are is not working, and it is a small enclosure for a bear, so they would like to renovate and expand that. Community Services would also like to construct and equip a restroom at the Alameda Park Zoo. It will be at the end of the Zoo where there is not currently a restroom; currently, people have to go all the way back to the beginning if they need to use that. The public has indicated it is something they would like. Next is Community Services with the Library's north patio renovations. They will be renovating this to use it as an outdoor reading area, and it will also be used for private access to be able to come in and use computers for telehealth conferences that are increasingly being used. Lastly, Parks and Recreation with the Dudley School Playground, which is a really important project that a lot of community members would like to see happen. Those are the five we would like approved to go on and recommend for our capital outlay applications this year.

Commissioner Rardin said regarding the restroom at the Zoo, he had asked about that years ago. If we were to do that through Alamogordo Friends of the Zoo, there are different guidelines for what they would have to follow versus what we have to follow. Acting City Manager Hernandez said they do not have the Friends of the Zoo anymore. Commissioner Rardin said oh, it is gone? That is a lot of money. Grant Coordinator Osborne said the last one we built at the Balloon Park was \$300,000. It will be a unisex bathroom at the Zoo also because that is how much they are now. Additionally, when we submitted the application for the Balloon Park, that was for park restrooms, we were hoping to be able to do more than one add at that time, but unfortunately, when we got the estimates, it was prohibited to do both at the same time. That is why we would like to apply for this one now. Commissioner Rardin said so this is just through the capital outlay part of it. Grant Coordinator Osborne said yes, through the capital outlay, but there are lots of other grants. Some of the public asked for Animal Control facility improvements. We have received many grants over the last three years. Actually, we received a new one for this current fiscal year from the Carrol Petrie Foundation; they have been tremendously helpful. They helped construct the drop-off center to be used after hours, the new artificial turf in the back of the control building, shade structures, and they have been very supportive of our Animal Control facility applications. With some of the other projects on the list, we have other sources of funding. FAA and the State also are the ones who would usually fund the Airport projects. These are the ones we would not find as many sources of funding other than capital outlay.

Commissioner Rardin moved to approve.

Mayor Pro-Tem Wright seconded the motion.

Roll Call Vote was taken.

Motion carried with a vote of 7-0-0.

11. Appointments to Boards and Committees. (*Susan Payne, Mayor*)

Mayor Payne read the openings and reappointed Randel Y. Wilson to the Airport Zoning Board. No one was opposed.

EXECUTIVE SESSION

12. Adjourn into Executive Closed Session in compliance with 10-15-1(H)(2) NMSA (as amended) to discuss: Limited Personnel Matters (City Manager). (Roll Call Vote Required)

Mayor Pro-Tem Wright moved to adjourn into Executive Closed Session at 8:55 p.m.

Commissioner McDonald seconded the motion.

Motion carried with a vote of 7-0-0.

ADJOURNMENT



ATTEST:



City Clerk Rachel Hughes

FOR 

Mayor Susan L. Payne

(Prepared by Dylan Aleshire, Deputy City Clerk)
Approved at the Regular Meeting held on August 22, 2023.