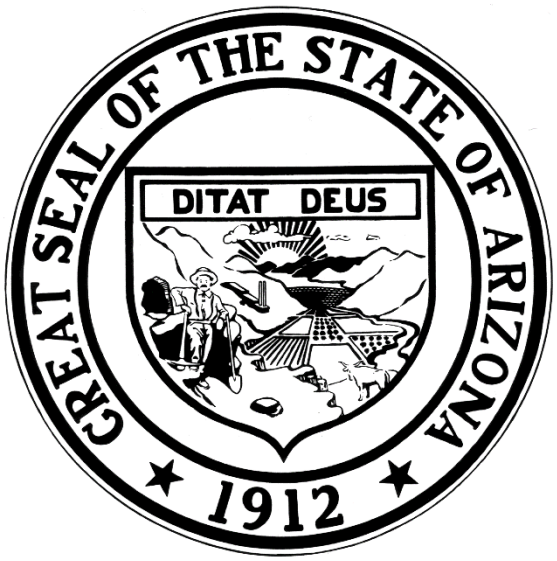

Arizona Ombudsman-Citizens' Aide

Preliminary Report of Investigation

Case # 2105629

Mescal J-6 Fire District

January 10, 2022

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Summary

On July 28, 2021, a resident of the Mescal J-6 Fire District (hereinafter, "Complainant")filed a complaint with our office that the Mescal J-6 Fire District (hereinafter, "District" or "Mescal J-6 Fire District") violated the Arizona Open Meeting Law. She alleged that the District held a call to the public during its July 28, 2021 governing board meeting; however, the call to the public was not listed on the agenda for the meeting.

We find that the Mescal J-6 Fire District acted contrary to law by holding a call to the public during a governing board meeting without including the call to the public on its agenda for the meeting.

Background

The Complainant provided what she purported to be the agenda for the District governing board's July 28, 2021 meeting and an audio recording of the call to the public portion of the meeting. We also obtained the July 28 agenda directly from the District's website. It appeared to be identical to the one provided by the Complainant.

The agenda listed four items, none of which were a call to the public. There was nothing on the agenda to indicate that the governing board would allow the public to speak at the meeting.

On the recording, a male voice can be heard talking about the call to the public. The Complainant asserts that the voice belongs to Board Chair Mark Lee. The male voice can be heard saying that, at "the last meeting," the governing board decided to "reinstate the call to the public." Although it is not exactly clear what the male voice says next, it sounds like he unilaterally adds a call to the public to the agenda because it requires no action from the governing board.

During the meeting, the governing board held a call to the public at which multiple members of the public spoke.

Authority

The Ombudsman – Citizens' Aide (hereinafter, "OCA"), pursuant to Title 41, Chapter 8, Article 5 of the Arizona Revised Statutes and Title 2, Chapter 16 of the Arizona Administrative Code, has authority to investigate and issue reports on administrative acts of agencies, including alleged violations of public access laws by public bodies.

Upon receiving a complaint, the OCA "may investigate administrative acts of agencies that the ombudsman-citizens aide has reason to believe may be . . . [c]ontrary to law. . . ."[1] After completing an investigation and consulting with the agency about the OCA findings and recommendations, the OCA may present its opinions and recommendations to the Governor, the Legislature, an appropriate prosecutor, and the public.[2]

Allegations:

Complainant alleges that the District governing board acted contrary to law by holding a call to the public without indicating in the meeting agenda that it would do so.

Findings:

Substantiated.

The Mescal J-6 Fire District acted contrary to law by holding a call to the public during a public meeting of the governing board without the call to the public indicated in the meeting agenda.

In short: The District violated the text and spirit of the Open Meeting Law. The Open Meeting Law requires a public body to produce an agenda to the public at least 24 hours before each meeting. The agenda must indicate what will occur at the meeting. Nothing substantive that is not reasonably related to an agenda item can happen at a meeting. In this case, the District did not list a call to the public on its agenda. Nevertheless, the District held a "call to the public," in clear violation of the law.

"In 1962, the legislature passed Arizona's Open Meeting Law. The enactment was an effort to ensure that the public could attend and monitor the meetings of all public bodies."[3] In the original Open Meeting Law, the Legislature specifically laid out the purpose for it: "It is the public policy of this state that proceedings in meetings of governing bodies of the state and political subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this act that their official deliberations and proceedings be conducted openly."[4][5]

Today, the Open Meeting Law contains a policy statement from the Legislature,

> It is the public policy of this state that meetings of public bodies be conducted openly and that notices and agendas be provided for such meetings which contain such information as is reasonably necessary to inform the public of the matters to be discussed or

[1] A.R.S. § 41-1377(A).
[2] See A.R.S. § 41-1376(B).
[3] Fisher v. Maricopa County Stadium Dist., 185 Ariz. 116, 122–23, 912 P.2d 1345, 1351–52 (App. 1995).
[4] Laws 1962, Ch. 138 s 1.
[5] For further discussion on the history and purpose of the Arizona Open Meeting Law, *see* Ariz. Att'y Gen. Op. No. 75-7.

> decided. Toward this end, any person or entity charged with the interpretations of this article shall construe this article in favor of open and public meetings.[6]

The Open Meeting Law requires that public bodies, such as the District governing board, produce an agenda for each meeting and make it available to the public at least 24 hours before the meeting.[7] "Agendas [. . .] shall list the specific matters to be discussed, considered or decided at the meeting. The public body may discuss, consider or make decisions only on matters listed on the agenda and other matters related thereto."[8]

Under the Open Meeting Law, the agenda is to act as a road map for everything that will occur at a meeting. This includes informing the public in the agenda that a public body will solicit comment from the public during the meeting. A proper agenda allows the public to know (and properly oversee) what public bodies in the State of Arizona will be doing, which is the main purpose of the Open Meeting Law. If a public body does not properly inform the public ahead of time of what will be happening at a meeting, members of the public cannot make an informed decision as to whether they want to attend the meeting, and it becomes unreasonably difficult for a member of the public to know what a public body is doing and oversee it.

The District governing board's agenda for the July 28 meeting did not include that the board would hold a call to the public. Nonetheless, the Board Chair explained at the meeting that the board would be holding a call to the public, and the board then held the call to the public at the meeting. Members of the public who reviewed the agenda ahead of the meeting would have had no idea that they would be permitted to speak at the meeting or be able to hear what other members of the public said to the board. This is contrary to the Open Meeting Law's explicit agenda requirements and the main purpose and spirit of the Open Meeting Law.

Should there be any doubt about the agenda requirement language, the Legislature has instructed those charged with interpreting it to do so in favor of openness.[9] It runs counter to this openness to allow some members of the public to speak at a meeting without informing the general public of the opportunity in the agenda for the meeting.

On August 27, 2021, District Fire Chief John Moran responded on behalf of the District to our office about the allegation. First, citing A.R.S. §38-431.02(H), he said, "No business was discussed or considered, and nothing was decided. It was simply an opportunity for two concerned citizens to address the board." Second, citing the "actual emergency" exception listed in A.R.S. §38-431.02(J), he said, "Tax payers were in attendance with intentions of having their concerns presented to the board. As required by Subsection J, the Board Chair made the required statement." Chief Moran also said, "As you know, the intent of the Open Meeting Law is to maximize public access to the governmental process. That was our sole intent."

[6] A.R.S. § 38-431.09(A)
[7] A.R.S. § 38-431.02(G)
[8] A.R.S. § 38-431.02(H).
[9] A.R.S. § 38-431.09(A).

The Chief's first point is essentially that a public body can do a variety of things at its meetings without listing them on the agenda as long as the public body does not discuss, consider, or decide any of the public body's business. For instance, under Chief Moran's apparent reading of the Open Meeting Law, the District governing board could solicit testimony from non-board members on any topic, question non-board members on any topic, allow a single board member to speak on any topic, and/or hold calls to the public without any indication on the agenda as long as the board did not collectively discuss or act in response. As explained above, allowing conduct at meetings that is not indicated on an agenda runs counter to the text, spirit, and purpose of the Open Meeting Law.

The Chief's second point seems to be that an actual emergency existed that necessitated allowing members of the public who happened to be in attendance to speak despite there being no call to the public listed on the agenda. He cited A.R.S. §38-431.02(J), which reads,

> Notwithstanding subsections H and I of this section, in the case of an actual emergency a matter may be discussed and considered and, at public meetings, decided, if the matter was not listed on the agenda and a statement setting forth the reasons necessitating the discussion, consideration or decision is placed in the minutes of the meeting and is publicly announced at the public meeting. In the case of an executive session, the reason for consideration of the emergency measure shall be announced publicly immediately before the executive session.

This provision allows a public body to do things at a meeting that are not reasonably related to an agenda item as long as there is an actual emergency necessitating it.

While "actual emergency" is not defined in the Open Meeting Law, the Arizona Court of Appeals has said, "'[E]mergency' is generally defined as an unforeseen combination of circumstances which call for immediate action."[10][11] For example, the Court of Appeals held that consideration of an existing Scottsdale annexation ordinance, even working under the pressure caused by a competing annexation proposal from another City, does not constitute an "actual emergency" under the Open Meeting Law.[12]

In light of the above, it is unreasonable to conclude that "taxpayers" showing up to public meetings wishing to present concerns is an "actual emergency." It was not unforeseen that members of the public might attend and wish to speak. Their attendance did not call for immediate action. The members of the public could have spoken at a future meeting (for which the agenda indicated a call to the public) or addressed their concerns to each of the board members (or staff) outside of the meeting. Last, it is unlikely that the situation was serious enough to be what the Legislature contemplated when it exempted actual emergencies from the Open Meeting Law's agenda requirements.

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[10] Carefree Imp. Ass'n v. City of Scottsdale, 133 Ariz. 106, 113, 649 P.2d 985, 992 (App. 1982).

[11] The Court of appeals has said, "The word 'actual' means 'real' as opposed to 'nominal' and 'existing in fact' as opposed to 'constructive' or merely 'possible' or 'conceivable.'" Carefree Imp. Ass'n v. City of Scottsdale, 133 Ariz. 106, 113, 649 P.2d 985, 992 (App. 1982) [Internal citation omitted].

[12] Id.

The Chief claims that the governing board's "intent" was to "maximize public access to the governmental process." The Chief and the District appear to have conflated access with participation. In doing so, the District reduced openness and transparency and hampered the public's ability to know what would happen at the meeting. The Open Meeting Law is not supposed to maximize direct public participation in the government decision-making process. Instead, it is supposed to maximize the transparency of the process. Again, public bodies are to be clear about what will happen at their meetings so the public can decide whether to attend and listen. The governing board's agenda, lacking a call to the public, would have led the general public to conclude that there would be no opportunity to make or listen to public comments. As a result, the agenda may have discouraged members of the public from attending and deprived them of an opportunity to speak to the District governing board and hear what members of the public ended up saying to the governing board. This is exactly the type of thing the Open Meeting Law is supposed to prevent.

On September 10, 2021, the OCA issued a confidential preliminary report of its findings to the District. On October 1, 2021, the District responded in writing. In its response, the District concedes that the agenda "should have included an agenda item for a Call to the Public" and that it was not included due to a "clerical error." This heavily implies that the District recognizes the omission as improper. Nevertheless, in its response, the District also made several new arguments as to why it believes holding the call to the public despite not indicating it on the agenda was not improper:

First, the District asserts that conducting the call to the public despite it not being on the agenda was "in the best interest of both the [District] and [its residents]." Whether a public body judges something to be "in the best of interest" of the government and/or the public does not entitle the public body to violate the open meeting law. Such a standard would subvert the rule of law and the Legislature's decisions to the caprice and judgment of every public body. Further, there is no guarantee that a public body will properly judge what is in the best interest of the government or the public when it comes to government transparency. It would be very tempting for a public body to reduce transparency contra the intent of the open meeting law under the guise that it is simply looking out for the public's best interests.

Second, the District asserts that, because the District had decided at a meeting the prior month to "reinstate" calls to the public, two members of the public "expected" there would be a call to the public at the July 28th meeting. This argument is flawed.

First, it ignores the law. As explained above, everything that occurs at a meeting must be reasonably related to an agenda item. The agenda for the July 28th meeting did not list the call to the public; therefore, it was a violation of the law to hold one. A public body's guess as to what the public expects at a meeting does not entitle the public body to conduct business that is not on the agenda.

Second, it is unreasonable to expect the public to have attended and recalled everything said at prior meetings to know what will happen at future meetings. The main point of a notice and agenda is to directly inform the public of what will (or may) occur at a particular meeting. It is

unlawful and unreasonable to require the public to attend every meeting or review materials for prior meetings to guess what will happen at future meetings.

Third, and similarly, the District argued that not permitting two members of the public to speak would not have been "respectful to the effort they made" in attending the July 28 meeting. The desire of two members of the public to speak at a meeting does not entitle the District to violate the open meeting law. Proper notice of the public of what will occur at a meeting is a basic cornerstone of the open meeting law. Moreover, holding a call to the public when it is not listed on the agenda is not respectful to those who may have reviewed the agenda, saw no call to the public listed, and chosen not to attend.

Application of the District's respect-for-expectations logic could lead to all sorts of unlawful and absurd results. For instance, if a public body states at a meeting that it will discuss and act on the yearly budget at the next meeting, does that then entitle the Board to discuss and act on the budget at the next meetings even if it does not list it on the agenda? What if a couple of members of the public show up expecting the budget to be considered and acted upon despite it not being listed on the agenda? According to the text and spirit of the open meeting law, discussing and/or acting on the budget in this scenario would be unlawful. Under the District's reasoning, however, it would be proper.

The District is not consistent when arguing about the two people who spoke at the call to the public. On the one hand, the District states, "Two citizens … arrived at the July 28th meeting with the expectation that they would be provided an opportunity to speak to the governing board in person." In other words, a key interest for the two in attending the meeting was thinking they would be permitted to speak to the Board. On the other hand, the District takes issue with our office arguing that someone might not attend a meeting if the agenda did not indicate a call to the public.[13] Specifically, the District states, "A citizen cannot reasonably be expected to use the Call to the Public [ ] as a determining factor when deciding whether to attend a board meeting . . . ."

In sum: The Open Meeting Law requires the Board to create an agenda for each meeting, which indicates what will occur at the meeting. The Open Meeting Law prohibits a public body from discussing or permitting something to occur that is not listed on the agenda. This requirement allows the public to know what will happen at each meeting and decide whether to attend. In this case, the Board held a call to the public despite knowing that it was not listed on the agenda – a clear violation of the text and spirit of the Open Meeting Law.

Recommendations

Recommendation 1:
We recommend that the District comply with the agenda requirements set out in the Arizona Open Meeting Law going forward, including by only holding a call to the public when it is clearly noted in the agenda.

[13] *See* discussion *supra* pp. 4-5.

Recommendation 2:
We recommend that the District provide education and/or educational materials concerning the Open Meeting Law to members of the District governing board and staff.

Recommendation 3:
Pursuant to A.R.S. §41-1376(B)[14], we are providing this report to the Attorney General's office so that the Attorney General's office may consider investigating whether District officials committed a "knowing" violation[15] of the Open Meeting Law and/or violated the Open Meeting Law "with intent to deprive the public of information"[16] that is potentially actionable under A.R.S. §38-431.07(A).

[14] "After the conclusion of an investigation and notice to the head of the agency pursuant to section 41-1379, the ombudsman-citizens aide may present the ombudsman-citizens aide's opinion and recommendations to the governor, the legislature, the office of the appropriate prosecutor or the public, or any combination of these persons. The ombudsman-citizens aide shall include in the opinion the reply of the agency, including those issues that were resolved as a result of the ombudsman-citizens aide's preliminary opinion or recommendation."

[15] "The attorney general may also commence a suit in the superior court in the county in which the public body ordinarily meets against an individual member of a public body for a knowing violation of this article, and in such a suit the court may impose a civil penalty against each person who knowingly violates this article or who knowingly aids, agrees to aid or attempts to aid in violating this article and order equitable relief as the court deems appropriate in the circumstances." A.R.S. §38-431.07(A).

[16] "If the court determines that a public officer with intent to deprive the public of information knowingly violated any provision of this article, the court may remove the public officer from office and shall assess the public officer or a person who knowingly aided, agreed to aid or attempted to aid the public officer in violating this article, or both, with all of the costs and attorney fees awarded to the plaintiff pursuant to this section." A.R.S. §38-431.07(A).

Agency Response

MESCAL-J6 FIRE DISTRICT

448 N. Warren Rd. Benson, AZ 85602
Phone (520)586-4690 Fax (520)586-8598

December 13, 2021

Arizona Ombudsman- Citizens' Aide
Danee Garone
7878 N. 16th Street Suite 2235
Phoenix, AZ 85020

RE: Comments regarding final disposition of Case #2105629

Mr. Garone-

Please accept the following as the Mescal-J6 Fire District's response to your office's final public report:

It is a reasonable expectation that our initial response will be included in its entirety with your submission to the Attorney General Office. You have paraphrased our response and taken things out of context to support your position. The very fact that we quoted statutes with which we think we are in compliance is proof the decision was not taken lightly and there was no intent to deceive the public or anyone else, nor was there any criminal intent.

Your statement that more people would have shown up if they knew there was going to be a call to the public is not supported by an ounce of historic data, a detail you left out of your report. You also left out the name of the complainant, Mary McCool, a well-documented antagonist of this Fire District for many years. Considering your final report will be an Arizona public record, wouldn't the name of the complainant be relevant?

Obviously, it would not be a good practice to make a habit of having a Call to the Public without including a provision to do so in a properly posted meeting agenda. That said, we are of the opinion that the statute provides a means to correct a mistake in a timely manner, and in a manner which benefits the taxpayers who support the District and our actions were appropriate for the situation at the time.

Ombudsman Recommendation 1:
We recommend that the District comply with the agenda requirements set out in the Arizona Open Meeting Law going forward, including by only holding a call to the public when it is clearly noted in the agenda.

MESCAL-J6 FIRE DISTRICT

448 N. Warren Rd. Benson, AZ 85602

Phone (520)586-4690 Fax (520)586-8598

District Response:
The District does not agree with the finding of the Ombudsman- Citizen's Aide, but moving forward we will implement the recommendation to only hold a call to the public when it is clearly noted in the agenda.

Ombudsman Recommendation 2:
We recommend that the District provide education and/or educational materials concerning the Open Meeting Law to members of the District governing board and staff.

District Response:
The District does not agree with the finding of the Ombudsman- Citizen's Aide, but will implement the recommendation to provide education and/or educational materials concerning the Open Meeting Law to members of the District governing board by December 31st, 2021.

Respectfully,

John Moran
Fire Chief

Agency Response Continued

On September 10, 2021, pursuant to statute and administrative rule, the OCA produced a confidential preliminary version of this report to the Mescal J-6 Fire District for its review and response. The District provided its written response to the preliminary report on October 1, 2021.

In its written response to this final, public report, the Mescal J-6 Fire District stated, “It is a reasonable expectation that our initial response will be included in its entirety with your submission to the Attorney General Office.” In accordance with this statement, the OCA is including the District’s October 1, 2021 response to the September 10, 2021 OCA preliminary report as part of the District’s response to this final, public report.

MESCAL-J6 FIRE DISTRICT

448 N. Warren Rd. Benson, AZ 85602
Phone (520)586-4690 Fax (520)586-8598

October 1, 2021

Danee Garone
Arizona Ombudsman-Citizen's Aide
7878 N. 16th St. Suite 2235
Phoenix, AZ 85020

RE: Case #2105629

Mr. Garone-

Please accept the following comments in response to your September 10th, 2021 preliminary investigation report, regarding an alleged Open Meeting Law violation occurring during the July 28th, 2021 Regular Business Meeting:

On June 30th, 2021, the MJFD Governing Board elected to reinstate the Call to the Public at future meetings. The July 28th, 2021 Regular Business Meeting should have included an agenda item for a Call to the Public; however, a clerical error resulted in the Call to the Public being left off the agenda. Two citizens, informed of the reinstatement of the Call to the Public while watching the June 30th meeting on Facebook, arrived at the July 28th meeting with the expectation that they would be provided an opportunity to speak to the governing board in person. Our Board Chair, Mark Lee, made the decision to allow both parties to address the governing board, despite there being no written provision for a call to the public on that evening's agenda, because doing so was in the best interest of both the Mescal-J6 Fire District and our residents.

The Ombudsman-Citizen's Aide (OCA) has declared our Board Chair's action to allow these citizens to address the board without a Call to the Public being listed as agenda item, to be contrary to state law. I disagree with the OCA and offer the following to support our position:

The Arizona Legislature enacted the Open Meeting Law (OML) *"to open the conduct of the business of government to the scrutiny of the public and to ban decision-making in secret." Karol v. Board of Educ. Trustees, 122 Ariz. 95, 97, 593 P.2d 649, 651 (1979)*

A citizen cannot reasonably be expected to use the Call to the Public (CTTP) as a determining factor when deciding whether to attend a board meeting because the public has no more of an idea as to who will speak or what will be said than the board members themselves. Nor can that citizen reasonably determine that the lack of a CTTP should preclude them from attending because they would not be allowed an opportunity to address the board. The board is prohibited by law from taking any official action regarding anything the citizen mentions during the CTTP.

The contention that these people could have spoken at a future meeting is not respectful to the effort they made. These people set aside a portion of their life to show up at that meeting and express their opinion. A portion of their life they will never get back. Furthermore, in order to talk to a board member after the meeting, those people would have had to make their presentation a minimum of three times to avoid meeting with a quorum of board members. There was no guarantee these people could have done that.

Historical data does not support the idea that someone desired to speak and did not show up because the item was not on the agenda. In eleven years there have only been a few instances where more than one person showed up to address the board. In most of those instances, participants were organized by one person. Most of the time, no one shows up to participate in the call to the public, and when they do it is always the same person. If anyone did not show up because the CTTP was not on the agenda they were obviously content to wait until the next meeting.

As Mr. Garone stated, "should there be any doubt about the agenda requirement language, the legislature, has commanded those charged to do so in favor of openness." The public's right to speak should not be censored and it was in this spirit the board took action.

ARS 38-431.02(H) specifically states the public body may discuss, consider, or make decisions only on matters listed on the agenda and other matters related thereto. This subsection of the statue does not say the public body can't *do* anything unless it is on the agenda. Listening to what these people had to say did not require discussion, consideration or action on the part of the board and none was taken. The statute was not violated. In fact, allowing these people to express their opinions was compliant with the intent of the open meeting law, which is to provide openness in the governmental process.

ARS 38-431.02(J) states "in the case of an actual emergency, a matter may be discussed and considered and, at public meetings, decided, if the matter was not listed on the agenda..... This subsection does not define what constitutes an emergency, nor does it indicate who has the authority to decide. In this case, the board was faced with making a decision on the spot. Listening to what these people had to say was not a violation of ARS 38-431.02(H). Furthermore, emergency is generally defined as an unforeseen combination of circumstances which call for immediate action. That was the situation facing the board that evening. The board had previously posted their intent to have a CTTP and, due to a clerical error, it was left of the agenda. The decision to proceed with the CTTP was an effort to correct an unforeseen error and called for immediate action.

It is impossible to know what was on the legislature's mind when it exempted actual emergencies. It is not described in statute. It is reasonable to think this exactly the kind of thing the legislature envisioned and provided the public body a mechanism to correct an error in a timely manner.

The example of case law regarding the City of Scottsdale bears no similarity to this issue. In that example, the City of Scottsdale actually discussed an annexation proposal which could potentially affect many people. In our situation, listening to what these people had to say did not affect anyone.

MESCAL-J6 FIRE DISTRICT

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The board had reinstated the CTTP on June 30, 2021. As such, the public expected there would be a CTTP at the July 28th, 2021 meeting. The decision was posted in the draft minutes following the meeting. Two people showed up based on that information, with the intent of addressing the board. If two people showed up, others would have known has well.

Sincerely,

John Moran

John Moran
Fire Chief