

MEMORANDUM

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To: Hon. Chairman and Members, Pima County Board of Supervisors

From: Andrew L. Flagg, Chief Civil Deputy County Attorney 

Date: January 31, 2019

Subject: Responding to criticism leveled during call to the public

At the January 22 meeting, the Chairman requested a memorandum regarding how a Board Member may permissibly respond to criticism made during call to the public. As explained further below, it is our view that the call-to-the-public statute is best applied narrowly, allowing individual Members to respond only to criticism leveled *at that Member*, and allowing only the Chairman to respond to criticism leveled at the Board as a whole. A response is permissible if its subject is within the scope of the criticism leveled at the Board Member (or Board as a whole), but may not address issues other than the criticism leveled unless the subject discussed is within the scope of an agenda item. In addition, the response must be made *at the conclusion of call to the public*. If there are other speakers who wish to address the Board after the criticism is leveled, the responding Member may not respond immediately, but must wait until the conclusion of call to the public.

The rules for call to the public are in A.R.S. § 38-431.01(H), which reads in full:

A public body may make an open call to the public during a public meeting, subject to reasonable time, place and manner restrictions, to allow individuals to address the public body on any issue within the jurisdiction of the public body. At the conclusion of an open call to the public, individual members of the public body may respond to criticism made by those who have addressed the public body, may ask staff to review a matter or may ask that a matter be put on a future agenda. However, members of the public body shall not discuss or take legal action on matters raised during an open call to

the public unless the matters are properly noticed for discussion and legal action.

The statute permits individual Members to “respond to criticism,” even though the subject of the criticism is not within the scope of an item on the agenda. It requires that the response come “[a]t the conclusion” of call to the public, *not* immediately following the speaker who levels the criticism.¹ Neither the statute nor any caselaw define or further elaborate on what it means to “respond to criticism.” Courts interpreting the language would look to the text of the statute, reading it in concert with other statutes, and looking to dictionary definitions of undefined terms.² The dictionary definition of “criticize” includes both positive and negative commentary.³ And “respond” includes anything said “in return” or “answer[ing]” to something.⁴ Thus, any statement that falls within the same subject matter as the criticism—whether the response is in agreement or disagreement with the criticism or is neutral—constitutes a response and is therefore permitted.

This doesn’t totally answer the question, though, because the statute doesn’t clearly state whether the Member can respond only to criticism *leveled at that Member* or whether the Member can respond to *anything that qualifies as criticism at all* (for example, criticism of the Board or County as a whole, or certain aspects of society in general, both of which are heard with some regularity at call to the public). Though the language of the statute might permit the broader reading, the narrow reading is the better of the two because it ensures the Board will not inadvertently violate the open-meeting law. The last sentence of § 38-431.01(H) prohibits any “discuss[ion] or . . . legal action on matters raised during an open call to the public unless the matters are properly noticed for discussion and legal action.”⁵ If we followed the broader reading, and any individual Member could respond to any criticism at all regarding a subject not on the agenda, this would invite discussion of the same item by multiple Members. The Chairman would then need to ensure that the number of Members addressing the issue did not reach a quorum to avoid a violation the statute, which could be difficult to do in practice and would arbitrarily allow only the first two Members wishing to address the criticism to do so, while silencing any remaining Members who might wish to do the same.

Suppose, for example, that Speaker 3 of 10 at call to the public criticizes the Board for awarding a contract. At the conclusion of call to the public, Member A then asks to respond to criticism and addresses the criticism from Speaker 3. Member B then asks to respond to criticism and does the same. The Chairman would then have to ensure that Members C and D, and the Chairman himself, did not address the same matter, to avoid discussion of that matter among a quorum. This may be difficult to do in practice, and the result—that only Members A and B may respond simply because

¹The statute also permits an individual Member to “ask staff to review a matter” or “ask that a matter be put on a future agenda.” Because the Chairman’s question was only addressed to the portion permitting responses to criticism, I do not further discuss or elaborate on these other provisions here.

²E.g., *Stambaugh v. Killian*, 242 Ariz. 508, 509-10, ¶¶ 7, 10 (2017).

³See CRITICIZE, www.merriam-webster.com (“to consider the merits and demerits of and judge accordingly”; “to find fault with : point to the faults of”); see also CRITICISM(1)(a), www.merriam-webster.com (“the act of criticizing *usually* unfavorably” (emphasis added)).

⁴RESPOND(1), www.merriam-webster.com.

⁵§ 38-431.01(H).

they asked first—would come across as arbitrary and perhaps unfair. Accordingly, the safer (and, in our view, better) reading of the statute permits individual Members to respond only to criticism leveled at them. If criticism is leveled at the Board as a whole, to avoid a violation, the best practice would be to allow only the Chairman to respond.

One final point—the statute does not prohibit discussion that moves beyond responding to criticism, if the discussion relates to a matter that is on the agenda. If a Member goes beyond responding to criticism, the discussion will not violate the open-meeting law if the subject discussed is within the scope of an item on the agenda. It may be that such a discussion would be out of order, but that is not a violation of the open-meeting law because the open-meeting law does not require that items on the agenda be considered in any particular order, so long as the public has a fair opportunity to attend and listen to the discussion.⁶ Rather, the order of consideration is a parliamentary-procedure issue to be addressed to the Chairman. If a Member goes beyond responding to criticism and addresses a subject on the agenda, the Chairman may, in his discretion as parliamentarian, require that the discussion be delayed until the agenda item is considered.

To summarize: in our view, the following parameters apply to responses to criticism during call to the public:

- Individual Board Members may respond to criticism *leveled at that Board Member*;
- The Chairman may respond to criticism *leveled at the Board as a whole*;
- A permissible response includes any comment that is within the same subject matter, whether positive, negative, or neutral, as the comments being responded to;
- Responses should come at *conclusion* of call to the public, not immediately after the speaker being responded to; and
- Comments that are not responses to criticism under § 38-431.01(H) may nonetheless be permissible under the open-meeting statutes if they relate to an item on the agenda, but the proper order of discussion may be addressed to the Chairman, who (as parliamentarian) may require that the discussion be delayed until the agenda item is considered.

c: C.H. Huckelberry, Pima County Administrator

⁶Op. Ariz. Att'y Gen. no. 183-056.