"THE INSPECTION OF
PUBLIC RECORDS ACT"
NMSA 1978, Article 14, Chapter 2

A Compliance Guide for New Mexico Public Officials and Citizens

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The Inspection of Public Records Act is intended to provide the public with access to information about governmental affairs. Open government -- that is, the public's access to government actions -- is a crucial aspect of a functioning democracy. This Compliance Guide has been prepared to inform the public, state and local government agencies, and all other public bodies subject to the Act about the Act's requirements and application.

The law requires public access to virtually all public records. While there are a few legitimate exceptions, most are available for public inspection. We encourage public officials to be liberal in providing public access and to honor all reasonable and legitimate requests for records.

Responsibility for enforcement of this Act lies with individual citizens, the District Attorneys and the Attorney General. In giving citizens the right to sue if they are denied access to records and awarding them attorneys fees when they are successful, the legislature wisely created a large number of "private attorneys general" to help enforce the Act. This concept of private attorneys general is a tried-and-true American legal mechanism by which legislators ensure enforcement of important public policies when public funds and public officials' resources are limited. Because the Attorney General and the District Attorneys cannot be everywhere, it is imperative that private citizens enforce their right to public records. This Compliance Guide is intended to assist all citizens in this crucial effort. It also is intended as a guide to public officials to assist them in their efforts to govern in the sunshine. They know that an ounce of prevention is worth a pound of cure.

This Compliance Guide updates the previous edition produced in September, 2000. This edition reflects an amendment to the Act passed by the legislature in 2001 that requires a records custodian to post a public notice describing the right to inspect public records and the procedures for inspecting and making copies of public records.

We sincerely hope you find this Compliance Guide helpful.

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I. INTRODUCTION

Access to public records is one of the fundamental rights afforded people in a democracy. Even where there is no statute, a common law right to inspect and copy public records affords members of the public the opportunity to keep a watchful eye on government. Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978). As acknowledged by the New Mexico Supreme Court, "[w]ritings coming into the hands of public officers in connection with their official functions should generally be accessible to members of the public so that there will be an opportunity to determine whether those who have been entrusted with the affairs of government are honestly, faithfully and competently performing their function as public servants." State ex rel. Newsome v. Alarid, 90 N.M. 790, 795, 568 P.2d 1236 (1977) (quoting with approval MacEwan v. Holm, 359 P.2d 413, 420-21 (Or. 1961)).

As will be discussed in this Guide, there are circumstances where the right to inspect is outweighed by specific competing interests protecting the confidentiality of certain documents. However, judicial interpretations of the Act have established a clear presumption in favor of access in most cases:

A citizen has a fundamental right to have access to public records. The citizen's right to know is the rule and secrecy is the exception. Where there is no contrary statute or countervailing public policy, the right

to inspect public records must be freely allowed.

State ex rel. Newsome v. Alarid, 90 N.M. at 797. Accordingly, public officials and employees should strive to ensure that all reasonable requests to inspect public records are promptly and efficiently granted. To that end, this compliance Guide has been prepared by the Attorney General to inform state and local government agencies and the public about the right to inspect public records under the Act and to assist in resolving questions about the Act's applicability in particular situations.

For ease of understanding the text in this guide is divided into three areas:

1) **The Law, as written, is in bold type.**

2) Commentary or explanation is in regular type.

3) *Examples of when the law would and would not apply are in italic type.*

For the convenience of those who are requesting and responding to requests for public records under the Act, Appendix II of this Guide contains suggested forms that may be followed for those purposes.

If you would like additional copies of this Guide, please write the Civil Division of the Office of the Attorney General, P.O. Drawer 1508, Santa Fe, New Mexico 87504-1508. Questions about the Guide or about the applicability of the Act also may be directed to the Civil Division at the above address or by telephone at (505) 827-6070.

II. INSPECTION OF PUBLIC RECORDS ACT

14-2-1. Right to Inspect~~ion~~ Public Records; Exceptions.

A. Every person has a right to inspect any public records of this state except:

(1) records pertaining to physical or mental examinations and medical treatment of persons confined to any institution;

(2) letters of reference concerning employment, licensing or permits;

(3) letters or memorandums which are matters of opinion in personnel files or students' cumulative files;

(4) law enforcement records that reveal confidential sources, methods, information or individuals accused but not charged with a crime. Law enforcement records include evidence in any form received or compiled in connection with any criminal investigation or prosecution by any law enforcement or prosecuting agency, including inactive matters or closed investigations to the extent that they contain the information listed above.

(5) as provided by the Confidential Materials Act;

(6) trade secrets, attorney-client privileged information and long-range or strategic business plans of public hospitals discussed in a properly closed meeting;

(7) public records containing the identity of or identifying information relating to an applicant or nominee for the position of president of a public institution of higher education; and

(8) as otherwise provided by law.

B. At least twenty-one days before the date of the meeting of the governing board of a public institution of higher education at which final action is taken on selection of the person for the position of president of the institution, the governing board shall give public notice of the names of the finalists being considered for the position. The board shall consider in the final selection process at least five finalists. The required notice shall be given by publication in a newspaper of statewide circulation and in a newspaper of county-wide circulation in the county in which the institution is located. Publication shall be made once and shall occur at least twenty-one days and not more than thirty days before the described meeting.

C. Postponement of a meeting described in Subsection B of this section for which notice has been given does not relieve the governing body from the requirement of giving notice of a rescheduled meeting in accordance with the provisions of Subsection B of this section.

D. Action taken by a governing body without compliance with the notice requirements of Subsections B and C of this section is void.

E. Nothing in Subsections B through D of this section prohibits a governing body from identifying or otherwise disclosing the information described in this section.

14-2-4. Short Title.

Chapter 14, Article 2 NMA 1978 may be cited as the "Inspection of Public Records Act".

14-2-5. Purpose of Act; Declaration of Public Policy.

Recognizing that a representative government is dependent upon an informed electorate, the intent of the legislature in enacting the Inspection of Public Records Act is to ensure, and it is declared to be the public policy of this state, that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees. It is the further intent of the legislature, and it is declared to be the public policy of this state, that to provide persons with such information is an essential function of a representative government and an integral part of the routine duties of public officers and employees.

14-2-6. Definitions.

As used in the Inspection of Public Records Act:

A. "custodian" means any person responsible for the maintenance, care or keeping of a public body's public records, regardless of whether the records are in that person's actual physical custody and control;

B. "inspect" means to review all public records that are not excluded in Section 14-2-1 NMSA 1978;

C. "person" means any individual, corporation, partnership, firm, association or entity;

D. "public body" means the executive, legislative and judicial branches of state and local governments and all advisory boards, commissions, committees, agencies or entitles created by the constitution or any branch of government that receives any public funding, including political subdivisions, special taxing districts, school districts and institutions of higher education; and

E. "public records" means all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained.

14-2-7. Designation of Custodian; Duties.

Each public body shall designate at least one custodian of public records who shall:

A. receive and respond to requests to inspect public records;

B. provide proper and reasonable opportunities to inspect public records; and

C. provide reasonable facilities to make or furnish copies of the public records during usual business hours.

D. post in a conspicuous location at the administrative office of each public body a notice describing:

(1) the right of a person to inspect a public body's records;

(2) procedures for requesting inspection of public records;

(3) procedures for requesting copies of public records;

(4) reasonable fees for copying public records; and

(5) the responsibility of a public body to make available public records for inspection.

14-2-8. Procedure for Requesting Records.

A. Any person wishing to inspect public records may submit an oral or written request to the custodian. However, the procedures set fourth in this section shall be in response to a written request. The failure to respond to an oral request shall not subject the custodian to any penalty.

B. Nothing in the Inspection of Public Records Act shall be construed to require a public body to create a public record.

C. A written request shall provide the name, address and telephone number of the person seeking access to the records and shall identify the records sought with reasonable particularity. No person requesting records shall be required to state the reason for inspecting the records.

D. A custodian receiving a written request shall permit the inspection immediately or as soon as is practicable under the circumstances, but not later than fifteen days after receiving a written request. If the inspection is not permitted within three business days, the custodian shall explain in writing when the records will be available for inspection or when the public body will respond to the request. The three-day period shall not begin until the written request is delivered to the office of the custodian.

E. In the event that a written request is not made to the custodian having possession of or responsibility for the public records requested, the person receiving the request shall promptly forward the request to the custodian of the requested public records, if known, and notify the requester. The notification to the requester shall state the reason for the absence of the records from that person's custody or control, the records' location and the name and address of the custodian.

14-2-9. Procedure for Inspection.

A. Requested public records containing information that is exempt and nonexempt from disclosure shall be separated by the custodian prior to inspection, and the nonexempt information shall be made available for inspection. If necessary to preserve the integrity of computer data or the confidentiality of exempt information contained in a database, a partial printout of data containing public records or information may be furnished in lieu of an entire database.

B. A custodian:

(1) may charge reasonable fees for copying the public records, unless a different fee is otherwise prescribed by law;

(2) shall not charge fees in excess of one dollar ($1.00) per page for documents eleven inches by seventeen inches in size or smaller;

(3) may require advance payment of the fees before making copies of public records;

(4) shall not charge a fee for the cost of determining whether any public record is subject to disclosure; and

(5) shall provide a receipt upon request.

14-2-10. Procedure for Excessively Burdensome or Broad Requests.

If a custodian determines that a written request is excessively burdensome or broad, an additional reasonable period of time shall be allowed to comply with the request. The custodian shall provide written notification to the requester within fifteen days of receipt of the request that additional time will be needed to respond to the written request. The requester may deem the request denied and may pursue the remedies available pursuant to the Inspection of Public Records Act if the custodian does not permit the records to be inspected in a reasonable period of time.

14-2-11. Procedure for Denied Requests.

A. Unless a written request has been determined to be excessively burdensome or broad, a written request for inspection of public records that has not been permitted within fifteen days of receipt by the office of the custodian may be deemed denied. The person requesting the public records may pursue the remedies provided in the Inspection of Public Records Act.

B. If a written request has been denied, the custodian shall provide the requester with a written explanation of the denial. The written denial shall:

(1) describe the records sought;

(2) set forth the names and titles or positions of each person responsible for the denial; and

(3) be delivered or mailed to the person requesting the records within fifteen days after the request for inspection was received.

C. A custodian who does not deliver or mail a written explanation of denial within fifteen days after receipt of a written request for inspection is subject to an action to enforce the provisions of the Inspection of Public Records Act and the requester may be awarded damages. Damages shall:

(1) be awarded if the failure to provide a timely explanation of denial is determined to be unreasonable;

(2) not exceed one hundred dollars ($100) per day;

(3) accrue from the day the public body is in noncompliance until a written denial is issued; and

(4) be payable from the funds of the public body.

14-2-12. Enforcement.

A. An action to enforce the Inspection of Public Records Act may be brought by:

(1) the attorney general or the district attorney in the county of jurisdiction; or

(2) a person whose written request has been denied.

B. A district court may issue a writ of mandamus or order an injunction or other appropriate remedy to enforce the provisions of the Inspection of Public Records Act.

C. The exhaustion of administrative remedies shall not be required prior to bringing any action to enforce the procedures of the Inspection of Public Records Act.

D. The court shall award damages, costs and reasonable attorneys' fees to any person whose written request has been denied and is successful in a court action to enforce the provisions of the Inspection of Public Records Act.

III. SECTION 14-2-1. RIGHT TO INSPECT

PUBLIC RECORDS; EXCEPTIONS

A. RIGHT TO INSPECT PUBLIC RECORDS

The Law

Every person has a right to inspect any public records of this state except:

Commentary

This section sets forth the fundamental rule that a person may inspect any public records of the state except those that are specifically protected. Most records kept by a public entity should be available for inspection, and unless the records custodian is positive that a recognized exception applies, all legitimate and appropriate requests must be honored.

Because of the presumption in favor of the right to inspect, public bodies acquiring information should keep in mind that the records they keep generally are subject to public inspection. Moreover, merely declaring certain documents to be confidential by regulation or agreement will not exclude them from inspection unless the specific limited exceptions described below are met. Thus, to effectively protect personal privacy, the public body should be sure that the information it gathers is actually needed.

EXAMPLE 1:

A city program provides funds to low income families for winterizing homes. To qualify for program funds, applicants must provide certain family and financial information. Because the administrator of the program would like to protect the applicants' privacy, but has no specific legal basis for keeping the applications confidential, the administrator requires only such personal information as is necessary to operate the program.

B. EXCEPTIONS

Commentary
When determining whether the specific exceptions in the Act apply to a record, public entities should keep in mind that, although it excepts certain matters from the right to inspect, the Act should not be interpreted as requiring that those matters be kept confidential. In other words, an agency may release a record covered by an exception if the agency determines that release would be appropriate and not in violation of any other law that specifically requires that the document be kept confidential.

1. Medical Records

The Law

Records pertaining to physical or mental examinations and medical treatment of persons confined to any institution.

Commentary
As written, the Act exempts from disclosure certain medical records of persons confined to public institutions. The exception has been substantially expanded by the New Mexico Supreme Court, however. Specifically, the Court held in State ex rel. Newsome v. Alarid, 90 N.M. 790, 568 P.2d 1236 (1977), that the exception protects employee records pertaining to illness, injury, disability, inability to perform a job task and sick leave. The express language of the exception does not warrant limiting the Supreme Court's ruling only to records concerning public employees. Thus, it appears that, as interpreted by the courts, the exception generally protects records kept by any public agency relating to physical or mental illness or medical treatment of individuals.

EXAMPLE 2:

A former inmate at the state penitentiary is being considered for an important county job. An enterprising local journalist wants to get the former inmate's psychiatric records from the penitentiary as part of a story. Records of inmate mental examinations while confined at the penitentiary are, however, protected from disclosure under this exception.

EXAMPLE 3:

A state employee just got out of St. Vincent Hospital where he underwent a delicate operation. His hospital records are submitted to the personnel department of his office with his claim for insurance. The medical records submitted for insurance payment are protected from disclosure.

EXAMPLE 4:

Applicants for a vacant district court judge position are required to include in their application to the judicial nominating commission information about medical treatment. A local newspaper requests copies of the applications in the hope of obtaining information about one applicant's history of treatment for alcoholism. Any information submitted by the applicant concerning such treatment is protected from disclosure.

2. Letters of Reference

The Law

Letters of reference concerning employment, licensing or permits.

Commentary

This exception protects from public inspection letters of reference an agency might obtain regarding applicants for employment, licenses or permits. A reference necessarily consists of the author's subjective opinion about the applicant and may not necessarily be based on fact. In addition, knowledge that his or her opinion about an applicant might be disclosed could deter a person from providing letters of reference or could chill a candid discussion of the applicant's qualifications.

EXAMPLE 5:

A developer applies to the city council for a permit to construct a supermarket in a mostly residential area. The council solicits references concerning the developer from the public. Mr. Doe, one of the residents in the area, is vehemently opposed to the proposed market, and writes a letter detailing his opinion that the developer is a crook and is not, therefore, qualified to receive the permit. Mr. Roe, a neighbor of Mr. Doe, learns of the letter and asks for a copy. The city council properly refuses Mr. Roe's request for the letter.

3. Matters of Opinion

The Law

Letters or memorandums which are matters of opinion in personnel files or students' cumulative files.

Commentary

This exception is aimed at protecting documents in an agency's personnel or student files that contain subjective rather than factual information about particular individuals. As the Supreme Court explained in the Newsome v. Alarid case with reference to materials in an employee's file:

The Legislature quite obviously anticipated that there would be critical material and adverse opinions in letters of reference, in documents concerning disciplinary action and promotions and in various other opinion information that might have no foundation in fact but, if released for public view, could be seriously damaging to an employee.

As with the exception for medical records, New Mexico courts have broadly interpreted this exception's coverage to include documents concerning infractions and disciplinary action, personnel evaluations, opinions as to whether a person would be re-hired or as to why an applicant was not hired, and other matters of opinion. Note, however, that because this exception has not been applied by the courts outside the personnel and student records contexts, we do not believe this exception applies in other contexts, such as complaints against licensees in the records of a licensing board. (See discussion in Subsection 9 concerning the extent to which complaints not contained in personnel or student files may be protected.)

EXAMPLE 6:

A newspaper reporter interviewed the warden and a spokesperson for a state correctional institution and learned that five night shift employees had been terminated after testing positive for marijuana. The reporter requested permission to review the personnel files of the five employees with the aim of learning their identity. The correctional institution is not required to provide access to the files because, under these facts, where the details about the disciplinary measures and other circumstances regarding the discipline of the employees had already become public, divulgence of the former employees' identities would compromise the privilege against disclosure of disciplinary matters protected by the Act. Under most circumstances, however, the bare fact that a specific employee has been terminated would not be considered confidential information.

Commentary

As indicated in Example 6, this exception does not extend to information that may not be considered a matter of opinion. Factual information or information that is otherwise available is not protected by virtue of being in files kept on employees or students.

EXAMPLE 7:

A city employee who tends to get into trouble with her supervisor has, as a result, several letters of reprimand in her personnel file. Although these letters, as well as her annual evaluations, are not subject to disclosure, factual information in the file concerning salary, annual leave or conflicts of interest is not similarly protected.

Commentary
Requested documents that contain significant factual information in addition to opinion should be provided with the opinion information blocked out or otherwise redacted.

With respect to student files, information not protected by this exception for matters of opinion may be covered by the protection granted student records under federal law. (See discussion of the Family Educational Rights and Privacy Act in Subsection 8(b)).

4. Law Enforcement Records

The Law

Law enforcement records that reveal confidential sources, methods, information or individuals accused but not charged with a crime. Law enforcement records include evidence in any form received or compiled in connection with any criminal investigation or prosecution by any law enforcement or prosecuting agency, including inactive matters or closed investigations to the extent that they contain the information listed above.

Commentary

This exception is intended to protect criminal investigative materials and procedures in a law enforcement agency's records, the disclosure of which could seriously interfere with the effectiveness of an investigation. For example, disclosure of the protected information might alert potential defendants to destroy evidence, coordinate stories or flee the jurisdiction. In addition, the possibility that their identities would be revealed might discourage potential witnesses from cooperating. This exception also is intended to protect information that, if revealed, could unfairly cast suspicion on and invade the privacy of otherwise innocent persons or endanger a person's life. Confidential information protected by this exception that has been obtained during a criminal investigation need never be revealed as a public record, even if an individual is charged or the investigation is closed.

EXAMPLE 8:

During the investigation of a series of armed bank robberies, the state police question a number of suspects, including Mr. Zot. Mr. Zot becomes the target of a grand jury, but is not indicted. Eventually a Mr. Zinc is arrested for the robbery, and is tried and convicted. The state police close their file. One year later, an author writing a biography of Mr. Zot requests a copy of the closed file. The custodian for state police records may provide the file after removing or blocking out material pertaining to Mr. Zot and other information protected by the law enforcement records exception.

EXAMPLE 9:

A village police chief is questioned by the district attorney's office. The reporter for the local newspaper finds out about the interview and contacts one of her sources in the police department. The next day, the headline in the newspaper reads: "Police Chief Accused of Mishandling Public Funds." The reporter decides to write a follow-up article and contacts the police department to request copies of the police chief's expense records for out-of-town trips. The records custodian for the police department cannot deny access to the records because the headline in the newspaper accuses the police chief of a crime. The records custodian may deny inspection on grounds that the requested records "reveal … individuals accused but not charged with a crime" only if the police chief has been designated a suspect or has otherwise been accused (but not charged) by law enforcement officials.

EXAMPLE 10:

Ms. Cat telephones the county animal control department to complain that her neighbor, Mr. Canine, is allowing his dog to run loose in the neighborhood. It is a misdemeanor for a dog to be outside its owner's property unless the dog is on a leash. The department employee who answers the call makes a notation of Ms. Cat's name and Mr. Canine's address, and sends an animal control officer to investigate. The next day, Mr. Canine asks the animal control department for a copy of the department's records

reflecting complaints about his dog. Complaints to the animal control department about dogs do not qualify as protected law enforcement records because they generally do not reveal confidential sources, methods, information or individuals accused but not charged with a crime. Unless another law protects records of complaints to the animal control department from disclosure, the department must give Mr. Canine access to the notation of Ms. Cat's complaint.

EXAMPLE 11:

The director of a city parks department is arrested for allegedly leaving the scene of an accident. A reporter for the local television news program writes to the police department and requests a copy of the 911 tapes of requests for emergency services on the night of the incident. The 911 tapes are public records, and they must be made available to the reporter, except for those portions of the tapes that reveal confidential sources, methods, information or individuals accused but not charged with a crime. If the incident involving the city parks department director was referred to on the 911 tapes, the director's identity would not be protected from disclosure under this exception because the director was arrested and arrest information is public.

Commentary

The law enforcement exemption does not protect information subject to disclosure under the Arrest Record Information Act (codified at NMSA 1978, ch. 29, art. 10). For example, information contained in posters, announcements or lists for identifying or apprehending fugitives or wanted persons; court records of public judicial proceedings; records of traffic offenses and accident reports; and original records of entry compiled chronologically, such as police blotters, are required to be available for public inspection.

Police blotters and other original records of entry that the Arrest Record Information Act makes public are permanent, chronological records of arrests, detentions and other events reported to and kept by police departments and other law enforcement agencies. Typically, a police blotter includes the name, physical description, place and date of birth, address and occupation of persons arrested, the time and place of arrest, the offenses for which the individuals were arrested or detained, and the name of the arresting officer. Other examples of original records of entry besides police blotters are radio logs, dispatch logs, desk logs, offense logs and other records of incidents reported to a law enforcement agency that are organized chronologically.

In addition, records identifying a person who has been arrested are public under the Arrest Record Information Act.

EXAMPLE 12:

Members of the news media make a request to inspect records of the sheriff's department concerning a theft at a grocery store committed by three juveniles who were arrested by the department. There is no law protecting arrest records concerning juveniles. Thus, they must be made available for inspection and copying to the same extent as adult arrest records.

EXAMPLE 13:

Peace officers sent to the scene of an alleged crime are required to fill out a standard incident form. The form is composed of two parts. The first part includes basic information about the incident, including a description of the offense and type of injury or loss; information about the victim and suspect, including names, addresses and telephone numbers; and the identity of the reporting officer. The second part may include initial investigatory information, such as the method used to commit the crime; potential location of the suspect; witness interviews and evidence gathered at the scene. Because the forms are not kept in chronological order, they do not qualify as original records of entry made public by the Arrest Record Information Act. Nevertheless, except to the extent that they qualify as protected law enforcement records under the Inspection of Public Records Act, the forms must be made available to the public. Thus, the law enforcement agency generally makes the first part of the form, which contains information

like that typically included in a police blotter or other incident log, available for public inspection. Before allowing public inspection of the second part of the form, the agency blocks out information that reveals confidential sources, methods, information or persons accused but not charged or arrested in connection with a crime, and evidence received or compiled in connection with the criminal investigation.

EXAMPLE 14:

A deputy sheriff is involved in an accident that results in fatalities. The accident occurs while the deputy is in pursuit of a motorist suspected of driving while intoxicated. The deputy is not accused or charged with a crime and remains on duty. The sheriff's department maintains incident reports in chronological order. A reporter asks for a copy of the incident report on the accident involving the deputy. The request is denied on grounds that the case is subject to an "ongoing investigation." However, the law enforcement records exception does not provide blanket protection from inspection for "ongoing investigations." In this case, incident reports are compiled chronologically and appear to qualify as "original records of entry" that are public under the Arrest Record Information Act. In addition, that Act makes public "records of traffic offenses and accident reports." Under these circumstances, the incident report on the accident involving the deputy must be disclosed.

Commentary

In exceptional circumstances, information contained in an original record of entry or similar record might be redacted or blocked out before the record is disclosed in response to a public records request. Information may be withheld, however, only with substantial justification. For example, if a law enforcement agency knew or reasonably suspected that revealing a specific victim's address would put the victim's life in danger, then the agency could keep the address confidential.

In addition, victims of crimes specified in Article II, Section 24 of the New Mexico Constitution and in the Victims of Crimes Act (NMSA 1978, 31-26-1 to –14) have certain rights, including the right to be treated with respect for the victims' dignity and privacy. The rights conferred under these provisions take effect when an individual is formally charged for allegedly committing one of the specified crimes against a victim. Once a defendant has been charged with the specified crimes, these provisions appear to provide law enforcement agencies, criminal prosecutors and judges with justification for denying public access to records identifying the victims of those crimes.

5. Confidential Materials Act

The Law

As provided by the Confidential Materials Act.

Commentary

The Confidential Materials Act (codified at NMSA 1978, §§ 14-3A-1 to -2) permits any library, college, university, museum or institution of the state or any of its political subdivisions to keep confidential materials of historical or educational value on which the donor or seller has imposed restrictions on access for a specified period. The statutory protection does not apply if the documents donated or sold were public records as defined by the Inspection of Public Records Act while in the possession of the donor or seller at the time of the sale.

EXAMPLE 15:

The chair of the Board of Medical Examiners donates to the UNM Medical School a copy of a public hearing transcript detailing bizarre evidence the Board heard regarding revocation of a particular physician's license. The chair donates the material on condition that the school withhold the transcript from public inspection until he has concluded his term on the Board. A medical student who considered the subject physician his mentor requests a copy of the transcript from the school. The school must provide the transcript because it was a public record while in the possession of the Board at the time it was donated.

6. Public Hospital Records

The Law

Trade secrets, attorney-client privileged information and long-range or strategic business plans of public hospitals discussed in a properly closed meeting.

Commentary

Under this exception, the governing body of a public hospital may keep confidential information in its records that was discussed in a properly closed meeting and that pertains to trade secrets, is protected by the privilege for attorney-client communications or relates to the hospital's long-range or strategic business plans. The exception corresponds to a similar exception in the Open Meetings Act (NMSA 1978, §§ 10-15-1 to –4) that permits public hospital boards to discuss the same information in closed meetings. To constitute a "properly closed meeting" for purposes of the exception, the meeting where the topics covered by the exception are discussed must be closed according to the requirements of the Open Meetings Act.

EXAMPLE 16:

The board of a public hospital holds its regularly scheduled public meeting. During the meeting, a motion is made by one of the board members to go into executive session to discuss the hospital's five-year business plan. The plan contains the details of the board's proposal to expand the hospital's operations within the county and into neighboring communities. The board goes into closed session in accordance with the procedures required by the Open Meetings Act. The day after the meeting, a reporter for the local television station requests a copy of the proposal. The hospital's records custodian may properly deny access to the proposal because it contains the hospital's long-range and strategic business plans.

EXAMPLE 17:

The administrator for a county hospital leased to a private, nonprofit organization creates a pay scale for nonmedical staff positions at the hospital. A member of the custodial staff requests a copy of the pay scale. Unless otherwise protected by law, the pay scale is a public record and must be disclosed because it does not involve trade secrets or long-range business plans of the hospital discussed in a properly closed meeting.

Commentary

It should be noted that a public hospital's records containing trade secrets and attorney-client privileged materials probably are protected by other state laws as well as under this specific exception. See list of state laws below in Subsection III.B.8. Those records, therefore, may remain confidential regardless of whether they are discussed in a properly closed meeting.

7. Identity of Applicants for Public University or College President

The Law

Public records containing the identity of or identifying information relating to an applicant or nominee for the position of president of a public institution of higher education.

A. At least twenty-one days before the date of the meeting of the governing board of a public institution of higher education at which final action is taken on selection of the person for the

position of president of the institution, the governing board shall give public notice of the names of the finalists being considered for the position. The board shall consider in the final selection process at least five finalists. The required notice shall be given by publication in a newspaper of statewide circulation and in a newspaper of county-wide circulation in the county in which the institution is located. Publication shall be made once and shall occur at least twenty-one days and not more than thirty days before the described meeting.

B. Postponement of a meeting described in Subsection B of this section for which notice has been given does not relieve the governing body from the requirement of giving notice of a rescheduled meeting in accordance with the provisions of Subsection B of this section.

C. Action taken by a governing body without compliance with the notice requirements of Subsections B and C of this section is void.

D. Nothing in Subsections B through D of this section prohibits a governing body from identifying or otherwise disclosing the information described in this section.

Commentary

These provisions address the limited category of records pertaining to the identity of applicants or nominees for the position of president of a public university, college or other post-secondary educational institution. In general, an institution may deny public access to these records unless and until an applicant or nominee becomes a finalist for the position.

The names of finalists being considered for the position of president of a public institution of higher education must be publicly noticed at least 21 days before the meeting at which the institution's governing body will take final action on the selection of a person to fill the position. The Act requires the governing body to consider at least five finalists. The notice must be published once in a newspaper of statewide circulation and in a newspaper of countywide circulation in the county where the institution is located. The notice must be published not more than 30 days and not less than 21 days before the meeting. If a meeting to consider finalists is postponed, the same notice requirements apply to the rescheduled meeting.

EXAMPLE 18:

The president of a state college resigns and leaves the position vacant. The college's board of regents launches a statewide search for a new president. Fifty people apply for the position. On May 2, the board of regents publishes a notice in a newspaper of statewide circulation and a newspaper of countywide circulation that lists the names of seven finalists for the position that it will consider at its regular meeting on May 30. On May 25, the board decides to postpone consideration of the finalists until a special meeting on June 15. On June 10, the board publishes notice of the meeting, but does not include the names of the finalists in the notice. On June 15, the board meets and selects a person to fill the position of president.

On June 16, one of the finalists who was not selected requests the résumés of all 50 applicants for the position of president and asserts that the board of regents' action in selecting a person for the position was void and without effect. In response to the request for résumés, the board first concludes that all of the information contained in the résumés is "identifying information" relating to the applicants. It then properly provides only the résumés for the seven finalists and denies the request for the nonfinalists' résumés. The board also concludes that the requester's claim regarding the validity of the board's action is correct because the board failed to republish the names of the finalists to be considered at the June 15 meeting in the manner and within the time designated by the Act. The board holds another meeting that complies with the notice requirements to validate its selection for the position of president.

Commentary

Compliance with the Act's requirements is especially important when selecting a president of a public institution of higher education because any action taken that does not comply is void. The Act also emphasizes that an institution is not prohibited from disclosing the names of applicants and nominees for the position of president – whether they are finalists or not – if the institution chooses to do so.

The provisions governing this exception apply only to information concerning the identity of applicants or nominees for the position of president of a public institution of higher education. The identity of, or identifying information pertaining to, applicants or nominees for other governmental positions should be subject to public inspection unless another law besides the Act protects it. However, as discussed below in Subsection III.B.9, in some instances there may be sufficient countervailing public policy reasons to keep confidential the identity of persons who apply for public positions but who are not selected as finalists. See Example 26.

8. Other Laws

The Law

As otherwise provided by law.

Commentary

The last exception to the inspection right incorporates limitations on access to public records found in other statutes and sources of legal authority. Thus, a person who requests a particular public record may find that it is protected or regulated by a specific statutory or court-recognized rule.

a. State Law

The New Mexico statutes include numerous provisions relating to the confidentiality of certain public records. These statutes are not necessarily consistent; statutes protecting a certain kind of record, for example, financial information, in one agency's files may be silent regarding the same information in another agency's files. The statutes also do not always completely exempt records from public inspection. Some establish the essential confidentiality of records while others simply provide that certain records may be disclosed only in a limited way. Records covered by statutes that govern the confidentiality of records kept by private persons or businesses are not "public records," and are not subject to the Act.

Set forth below is a brief description of some constitutional, statutory and regulatory exceptions to the right of a person to inspect any public record of the state. The list is illustrative only and is not intended to be exhaustive. In any given case, the particular requirements of these provisions and others governing the disclosure of specific records should be reviewed to determine how they apply.

NEW MEXICO STATUTES ANNOTATED (1978)

§ 1-5-24. Voter information

Certain information from voter databases may be released only with authorization by the county clerk and cannot be used for unlawful purposes. Voter registration lists maintained by the secretary of state and voter registration certificates filed with the county clerks are not covered by this statutory provision and are public records that must be disclosed as provided by law.

§ 2-3-13. Service by legislative council service

The director and employees of the legislative council service shall not reveal the contents or nature of requests or statements for service, except with the consent of the person making such request.

§ 4-44-25. Financial disclosures

Disclosures of financial interests by county officials and employees are available from the county clerk for public inspection, except valuations attributed to the reported interests.

§ 6-14-10. Public securities

Records regarding the ownership or pledge of public securities are not subject to public inspection.

§ 7-1-8. Tax returns

It is generally unlawful for employees of the taxation and revenue department to reveal taxpayer information with specified exceptions.

§ 9-18-15. Educational debts

Information obtained from the labor department by a corporation organized under the Educational Assistance Act concerning obligors of student debts shall be used by the corporation only to enforce the debt and shall not be disclosed for any other purpose.

§ 11-13-1. Indian gaming records

Specified information provided to the state gaming representative under the Indian Gaming Compacts is not subject to public disclosure absent permission from the affected tribe or pueblo. Protected information includes trade secrets, security and surveillance system information, cash handling and accounting information, personnel records and proprietary information.

§ 12-6-5. Audit reports

Reports of agency audits and examinations by the state auditor do not become public until ten days after the report is sent to the agency audited or examined.

§ 14-3-15.1. State agency computer databases

The use of state agency databases for commercial, political or solicitation purposes is restricted.

§ 14-6-1. Health information

In general, health information relating and identifying specific individuals as patients is strictly confidential and not a matter of public record.

§ 15-7-9. Claims against governmental entities

Records maintained by the risk management division pertaining to insurance coverage and to claims for damages and other relief against governmental entities, officers and employees are confidential; however, records pertaining to claims are subject to public inspection 180 days after the latest of the four occurrences specified in the statute.

§ 18-9-4. Library patrons

Patron records maintained by public libraries may not be disclosed except to library staff absent the consent of the patron or a court order.

§ 22-1-8. Student lists

Student, faculty and staff lists with personal identifying information obtained from a public school may not be used for marketing goods and services to students, faculty, staff or their families.

§ 24-1-5. Health facility complaints

Complaints about health facilities received by the health services division of the department of health shall not be disclosed publicly in such manner as to identify the individuals or facilities if, upon investigation, the complaint is unsubstantiated.

§ 24-1-20. Medical treatment records

Files and records of the department of health identifying individuals who have received treatment, diagnostic services or preventative care are confidential and not open to inspection except under the specified limited circumstances.

§ 24-14-27. Vital records

It is unlawful for any person to permit inspection of or to disclose information contained in vital records (birth and death certificates) maintained by the vital statistics bureau, or to copy or issue a copy of all or part of any record, except as authorized by law.

§ 27-2B-17. Public assistance

The use or disclosure of the names of participants in public assistance programs administered by the human services department for commercial or political purposes is prohibited.

§ 29-10-4. Arrest record information

Notations of the arrest or filing of criminal charges against an individual by a law enforcement agency that reveal confidential sources, methods, information or individuals accused but not charged with a crime is confidential and dissemination is unlawful except as otherwise provided by law.

§ 29-11A-5.1. Information regarding certain registered sex offenders

Registration information (except social security numbers) regarding certain sex offenders requested from specified law enforcement agencies must be provided no later than seven days after the request is received.

§ 31-21-6. Probation and parole information

All social records concerning prisoners and persons on probation or parole obtained by the parole board are privileged and shall not be disclosed to anyone other than the board, the director of the field services division of the corrections department, sentencing guidelines commission or sentencing judge.

§ 32A-2-32. Juvenile records

Social, medical and psychological records obtained by juvenile probation and parole officers, the juvenile parole board or in the possession of the children, youth and families department are privileged and may be inspected only by authorized persons.

§ 32A-3B-22. Family in need of services

All records concerning a family in need of services in possession of the court or produced or obtained by the children, youth and families department during an investigation in anticipation of or incident to a family in need of court-ordered services proceeding shall be confidential, closed to the public and open to inspection only by authorized persons.

§ 32A-5-8. Adoption records

Files and records regarding adoption proceedings are not open to public inspection.

§ 41-5-20. Medical malpractice information

The deliberations of a medical review commission panel regarding alleged malpractice shall be and remain confidential, and the deliberations and panel's report are privileged from discovery.

§ 41-8-4. Arson reports

Information received by an agency from an insurance company regarding a fire loss investigation shall remain confidential except as provided in the Arson Reporting Immunity Act.

§ 43-2-11. Substance abuse treatment

The record of any alcoholic or drug-impaired person who voluntarily submits himself for treatment at an approved public treatment facility shall be confidential.

§ 45-2-515. Wills

A will deposited by the testator or his agent with the clerk of any district court shall be kept confidential.

§ 50-9-21. Workplace safety inspections

Information obtained in the course of an on-site consultation requested by an employer and any trade secret information obtained in connection with the enforcement of the Occupational Health and Safety Act generally is confidential.

§ 57-10-9. Distress merchandise sale licenses

The filing of an application for a distress merchandise sale, the contents of the application, and issuance of the license are confidential information until after public notice of the proposed sale is given by the applicant.

§ 57-12-12. Unfair trade practices

A demand by the Attorney General for the production of tangible documents or recordings that he believes relevant to an investigation of a probable violation of the Unfair Practices Act is not a matter of public record.

§ 58-1-48. Financial institutions

Records of the financial institutions division of the regulation and licensing department are not subject to subpoena and are not public records.

§ 58-13B-46. Securities

Information obtained by the director of the securities division of the regulation and licensing department is public except information obtained in connection with an investigation of alleged violations and certain privileged financial and trade secret information.

§ 59A-4-11. Insurance examinations

Pending, during and after the examination of an insurance company by the superintendent of insurance, financial statements, reports or findings affecting the status of the company shall not be made public until after the superintendent adopts the examination report.

§ 61-5A-25. Complaints against dental health care licensees

Complaints to the board of dental health care relating to disciplinary action against a dentist or other licensed dental health care provider are confidential until the board acts on the complaint and issues a notice of contemplated action.

§ 61-14-17. Animal inoculations

Animal inoculation records maintained by any state or local public agency are not public records but, upon request, an agency may confirm or deny that a particular animal has received inoculations in the preceding 12 months.

§ 61-18A-9. Collection agency licenses

The financial statement included with the application for a collection agency license shall be confidential and not public record.

§ 66-5-6. Driver's license qualifications

Reports received or made by the health standards advisory board on whether a person is physically, visually or mentally qualified for a driver's license are confidential and may not be divulged to any person or used as evidence in any trial.

§ 66-7-213. Accident reports

With specified exceptions, accident reports made to the state highway and transportation department by persons involved in accidents or by garages are for the confidential use of the department and other specified agencies.

§ 69-11-2. Mining reports

Each mine or mining operation shall furnish yearly to the mining and minerals division of the energy, minerals and natural resources department information regarding production and value of production, which shall beheld confidential except that it may be revealed to specified agencies.

§ 69-25A-10. Coal mining permits

The portion of an application for a surface coal mining and reclamation permit pursuant to the Surface Mining Act with information pertaining to analysis of chemical and physical properties of coal (except that regarding mineral or elemental contents which is potentially toxic in the environment) shall be kept confidential and not be a matter of public record.

§ 74-2-11. Air contaminant information

Confidential business information and trade secrets obtained under the Air Quality Control Act by the environmental improvement board, the environment department or a local air quality control board shall remain confidential.

§ 76-4-33. Pesticide licenses and permits

Records kept by licensees under the Pesticide Control Act to which the New Mexico department of agriculture has access shall be confidential.

NEW MEXICO CONSTITUTION

Art. II, § 24. Victim’s rights

Giving a victim of specified crimes certain rights, including the right to be treated with fairness and respect for the victim’s dignity and privacy throughout the criminal justice process.

Art. VI, § 32. Judicial disciplinary records

All papers filed with the judicial standards commission or masters appointed to conduct hearings are confidential.

SUPREME COURT RULES OF EVIDENCE

Rule 11-503. Lawyer-client privilege

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications between himself and his lawyer, and between other specified persons, made to facilitate the rendition of professional legal services to the client.

Rule 11-508. Trade secrets

A person may refuse to disclose and may prevent others from disclosing a trade secret owned by him.

Rule 11-509. Communications regarding juveniles

A child alleged to be a delinquent or in need of supervision and a parent, guardian or custodian who allegedly neglected his child may prevent the disclosure of privileged confidential communications between himself and a probation officer or a social services worker employed by the human services department made during the course of a preliminary inquiry.

Rule 11-510. Informer identity

With certain exceptions, the state or a subdivision of the state may refuse to disclose the identity of a person furnishing information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer.

SUPREME COURT RULES GOVERNING DISCIPLINE OF LAWYERS

Rule 17-304. Disciplinary proceedings

Investigations and investigatory hearings conducted by disciplinary counsel generally are confidential unless and until the filing of a formal specification of charges with the disciplinary board or other occurrences specified in the rule.

Commentary

Sometimes, a public body will attempt to grant confidentiality to certain records by regulation or ordinance. In most cases, a regulation or ordinance, by itself, may not be used to deny access to public records because it is not a "law" for purposes of the "otherwise provided by law" exception. However, according to the New Mexico Supreme Court, a regulation making certain records private may be proper if the regulation is authorized by a statute and is necessary to carry out the statute's purposes. See City of Las Cruces v. Public Employee Labor Relations Bd., 121 N.M. 688, 917 P.2d 451 (1996).

EXAMPLE 19:

A statute authorizes the Department of Health to establish standards for the delivery of behavioral health services, including "the documentation and confidentiality of client records." Pursuant to this statute, the Department promulgates a regulation that keeps the identity of clients served by public and private mental health clinics confidential. Public health clinics may properly rely on the regulation to deny requests to inspect records containing information that identifies clients.

EXAMPLE 20:

A state agency that oversees collective bargaining by public employees issues a regulation providing that the names of employees on collective bargaining representative petitions shall be kept confidential. A public employer requests access to a petition signed by a number of its employees that indicates the employees' interest in having a representative election. When the state agency denies access to the petition, the public employer files a lawsuit challenging the agency's authority to keep the employees' names confidential because no statute expressly protects the names from public disclosure. The court upholds the agency's decision to deny access to the records based on its regulation. The court rules that the "otherwise provided by law" exception incorporates the regulation because it is authorized by a statute governing collective bargaining by public employees and effectuates the statute's provisions that expressly protect the right of public employees to collectively bargain, to join unions without interference and to conduct representative elections in secret.

b. Federal Law

Some state or local public agencies may be subject to federal laws and regulations governing the disclosure of public records. For example, the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, provides that federal funds will not be available to any educational agency or institution that

permits the release of education records or personally identifiable information (other than directory information) without consent to any individual or agency other than those listed. "Directory information" is defined to include a student's name, address, telephone number, date and place of birth, field of study, athletic participation, dates of attendance and degrees received. This federal statute supplements the protection specifically provided under Section 14-2-1(A)(3) of the Inspection of Public Records Act for matters of opinion in students' files. (It should be noted that FERPA excludes from its protection law enforcement records maintained by a law enforcement unit of an educational institution.)

EXAMPLE 21:

A person claiming to have been a recent honors graduate of a state university applies for a job with START, Inc., a local public relations firm. START, however, is somewhat suspicious of the applicant's claims and writes the university for his scholastic record. The university, being subject to the Family Educational Rights and Privacy Act, can tell START whether the applicant got a degree but cannot send a transcript of his grades without his permission.

Commentary
Another example of federal protections from disclosure are those applicable to social security numbers. In 1990, Congress enacted legislation providing confidentiality for social security account numbers and related records obtained or maintained by state and local government agencies pursuant to any provision of law enacted on or after October 1, 1990. See 42 U.S.C. § 405(c)(2)(C)(viii). There is no federal protection for social security numbers obtained under laws enacted before October 1, 1990, but Congress has recognized in other contexts that the disclosure of social security numbers implicates personal privacy considerations. As discussed in the next subsection, this may be a sufficient countervailing public policy to warrant an agency's refusal to provide social security numbers not specifically protected under the 1990 legislation. (See Example 12 below and accompanying commentary.)

7. Countervailing Public Policy

In addition to the exceptions to the right to inspect records expressly set forth in state and federal statutes, New Mexico courts have fashioned a "rule of reason" that protects otherwise public records when there is a countervailing public policy against disclosure. A countervailing public policy will justify nondisclosure if the harm to the public interest from allowing inspection outweighs the public's right to know.

There is no hard and fast rule for identifying countervailing public polices that will permit an agency to deny the right to inspect a particular public record. As the New Mexico Supreme Court explained in the Newsome case, "blanket guidelines obviously are not practical" and the decision to withhold must be made on a case-by-case basis. However, some reliance can be placed on established legal rules and on judicial pronouncements prohibiting the disclosure of information in other contexts.

For example, it is likely that the reasons underlying executive privilege and other evidentiary privileges would constitute a sufficient countervailing public policy to justify denying public access to records covered by those privileges. In State ex rel. Attorney General v. First Judicial District Court, 96 N.M. 254, 629 P.2d 330 (1981), the New Mexico Supreme Court recognized an "executive privilege" required by the state constitution. The privilege protects communications between members of an executive agency from discovery in judicial proceedings. According to the court,

[t]he purposes of the executive privilege are to safeguard the decisionmaking process of the government by fostering candid expression of recommendations and advice and to protect this process from disclosure. Executive personnel who fear or expect public dissemination of their remarks may temper their comments because of their concern for their own personal interest, safety, or reputation.

The privilege is not absolute and may not be used unless revelation of a particular document will truly compromise the agency's decisionmaking process, and thus outweighs the public's interest in disclosure. In addition, it extends only to documents reflecting recommendations and advice among the members of an executive agency, and does not protect communications between an agency and members of the public or others not employed in the executive branch.

Based on considerations similar to those applying to the executive privilege, the New Mexico Supreme Court held that a list of proposed faculty salaries prepared and used by state university officers and employees to formulate offers submitted to faculty members constituted the agency's "thought processes" and were not public records subject to inspection. See Sanchez v. Board of Regents, 82 N.M. 672, 486 P.2d 608 (1971). (Of course, lists of salaries actually paid to faculty and other public employees are public records that are available for public inspection.)

EXAMPLE 22:

The State Engineer is formulating a formal policy for handling water rights litigation in the state. As part of the process he solicits the recommendations of division heads within the agency. Some of the directors respond with written memoranda addressed to the State Engineer which contain candid and controversial remarks regarding the issues and persons involved in water rights litigation. During the process, word gets out that the State Engineer is developing the policy. Some interested private persons voluntarily submit comments to the State Engineer's office.

An attorney representing a party involved in a water rights lawsuit against the state requests copies of all documents regarding the proposed policy. The request is denied and the attorney challenges the refusal to allow inspection in district court. We think the court would rule that the internal memoranda between the directors and the State Engineer may remain confidential based on the countervailing public

policy represented by the executive privilege, but that the agency must provide access to the letters written by members of the public since those letters are not covered by the privilege.

Commentary
Personal privacy considerations also may justify nondisclosure of public documents in some circumstances.

EXAMPLE 23:

After consulting with the city attorney, a city clerk institutes a policy of blocking out social security numbers from all public records made available for inspection. Most of the social security numbers involved are not protected by federal legislation requiring confidentiality for social security numbers obtained by a government entity. However, the city attorney's research revealed that a number of federal courts have determined that the disclosure of social security numbers amounts to an unwarranted invasion of personal privacy. This conclusion is based, in part, on the legislative history of the federal Privacy Act, which reveals Congress' awareness of and concern with the use of social security numbers as universal identifiers and their capacity to provide access to a vast amount of personal information. Because of these cases, the city attorney rightly concludes that the public's interest in privacy outweighs the public's right of access to social security numbers.

Commentary
Note that the fact that a record was obtained by an agency under a promise of confidentiality is not a sufficient reason to deny access. The rule of reason approach requires that such a promise be justified by a public interest that clearly outweighs the interest in disclosure.

EXAMPLE 24:

A government watchdog group requests the names, addresses and salaries of employees who work for a county's road department. The director of the county personnel office refuses to provide the information because he promised the employees that he would not reveal the information and because he feels revelation would invade he employees' privacy. The director's policy is open to challenge because the names, addresses and salaries of public employees are generally considered public information. Without a recognized countervailing public policy to support it, the mere promise of confidentiality is not adequate to deny access to the requested information.

EXAMPLE 25:

A town resident sues the town government. Before the court issues its decision, the parties agree to settle the case. They enter into a settlement agreement in which the town agrees to pay the plaintiff a specified amount in damages. The settlement agreement includes a provision making the settlement terms confidential. The court enters an order dismissing the case. The order does not incorporate the settlement agreement. Soon afterwards, the mayor signs a voucher for the amount of the settlement payable to the plaintiff in the lawsuit. An interested citizen makes a request for copies of certain vouchers, including the voucher for the settlement amount. The town provides copies of all vouchers requested, except the one issued in connection with the settlement. Access to that voucher is denied on the basis that the settlement amount is confidential under the terms of the settlement agreement. The town cannot properly withhold the voucher because, unless protected by law, information relating to a public body's expenditures is public. The town cannot deny access to otherwise public records merely by entering into a voluntary settlement agreement that declares certain information confidential.

Commentary

Issues also arise in connection with requests for consumer and other complaints filed with licensing boards and other public bodies against professional licensees and other regulated businesses. Unless protected by a specific statute, such complaints should be considered public records. Certain public policy considerations may, however, protect some portions of a complaint or warrant delaying disclosure. For example, if a public body is investigating a claim made in a complaint, the complaint might be withheld from public disclosure until the investigation is concluded and the public body acts on the complaint. This furthers the public interest in efficient and effective investigations into alleged illegal activities. Another countervailing policy consideration might arise where a complainant has a justifiable fear of retaliation should his or her identify be disclosed. In such a case, an agency probably would be justified in redacting the complainant's name before allowing access to the complaint.

EXAMPLE 26:

A home buyer receives what she considers to be deficient service from her real estate broker. In response, she writes a letter to the municipality that issued a business license to the broker and alleges that the broker broke the law. The pertinent municipal department evaluates the complaint and decides that the allegations are not worth pursuing. A newspaper investigating real estate fraud learns about the complaint and requests a copy. No statute protects complaints filed against brokers, and there is no other policy reason the municipality can identify for not disclosing the complaint. The municipality provides the reporter with a copy of the complaint, with a cover letter that explains the municipality's decision not to pursue any investigation and disclaims any position about the truth or falsity of the allegations in the complaint.

Commentary

A note of caution: As will be discussed later, the Act provides that a person denied access to public records who prevails in a subsequent judicial proceeding to obtain access is entitled to attorneys fees and costs. In light of this potential public expense and the underlying preference for disclosure, a public body's records custodian should be certain that any countervailing public policy relied on to deny access to public records is necessary under the circumstances, clearly outweighs the public's interest in inspecting the records, and is likely to be recognized as valid by the courts.

EXAMPLE 27:

Two neighboring cities advertised for applicants for city manger. The local newspaper asked each city to disclose the résumés received for the position. The first city refused to disclose the résumés based solely on an alleged promise of confidentiality to the applicants. When the newspaper challenged the city's refusal in court, the court found against the city because the city had failed to provide any evidence of public policy against disclosure and that therefore the public's right to inspect had not been overcome.

The second city agreed to reveal only those resumes submitted by applicants in serious contention for the position, i.e., those applicants with whom the city was scheduling interviews and checking references. The newspaper agreed that this policy was reasonable because the public interest in information about applicants the city is not seriously considering is slight compared to those applicants' interest in keeping the information confidential, especially from their current employers. Expectations of privacy are less reasonable when applicants' references are being checked.

IV. SECTION 14-2-5. PURPOSE OF ACT;

DECLARATION OF PUBLIC POLICY

The Law

Recognizing that a representative government is dependent upon an informed electorate, the intent of the legislature in enacting the Inspection of Public Records Act is to ensure, and it is declared to be the public policy of this state, that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees. It is the further intent of the legislature, and it is declared to be the public policy of this state, that to provide persons with such information is an essential function of a representative government and an integral part of the routine duties of public officers and employees.

Commentary

This provision sets forth the policy behind the Act. The basic premise is that providing people with access to information about the activities of public agencies results in better government. To underscore the importance of this premise, the Act declares that providing access to public records is included in the

essential functions of government and in the duties of its officers and employees.

V. SECTION 14-2-6. DEFINITIONS

The Law

As used in the Inspection of Public Records Act:

A. "custodian" means any person responsible for the maintenance, care or keeping of a public body's public records, regardless of whether the records are in that person's actual physical custody and control;

B. "inspect" means to review all public records that are not excluded in Section 14-2-1 NMSA 1978;

C. "person" means any individual, corporation, partnership, firm, association or entity;

D. "public body" means the executive, legislative and judicial branches of state and local governments and all advisory boards, commissions, committees, agencies or entities created by the constitution or any branch of government that receives any public funding, including political subdivisions, special taxing districts, school districts and institutions of higher education; and

E. "public records" means all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained.

Commentary

A. CUSTODIAN

A custodian for purposes of the Act is the person designated by a public body who is responsible for the public body's records, wherever they are located.

EXAMPLE 28:

A person interested in the state's policy regarding hunting requests copies of minutes for meetings of the Game and Fish Commission held in June of 1990. The minutes are not kept at the Commission's office, but have been transferred to the State Records Center. Even though the State Records Center has actual custody of the minutes, the custodian of the minutes for purposes of the Act is the Game and Fish Commission employee assigned responsibility for the Commission's records.

B. INSPECT

The term "inspect" as used in the Act means to review any public record that has not been excepted under the Act from the right to inspect.

C. PERSON

Whenever the Act refers to a "person," it can mean almost any type of entity, including, for example, corporations, clubs and partnerships, and is not limited to individuals.

D. PUBLIC BODY

For purposes of the Act, the term "public body" refers to virtually every type of governmental body, office or agency. It includes the state and local governments, and all boards, commissions, agencies and other entities that are created by the state constitution or by any branch of state or local government that receives public funding, including political subdivisions and institutions of higher education.

EXAMPLE 29:

A request is made to inspect the file of an employee of a community action agency. The community action agency is a private, nonprofit organization that administers programs aimed at eliminating poverty. The organization receives state and federal funding for its projects, but it was not created by the constitution or any branch of government, and its programs and day-to-day operations are not subject to any governmental oversight or supervision. Under these circumstances, the organization is not a "public body" and is not required by the Inspection of Public Records Act to provide access to its records.

EXAMPLE 30:

A county commission decides to lease the county hospital to a private, nonprofit corporation that will be solely responsible for the hospital's management and operations. The mill levy proceeds collected by the county will be turned over to the corporation for purposes of providing care to indigent county residents and related operations expenses. Two county commissioners will be members of the hospital governing board and the county commission retains the authority to remove and replace the non-commissioner board members if, in the commission's opinion, the board is not fulfilling its duties to provide adequate health care services to the county's residents. In addition, the hospital board is required to issue a report to the commission twice a year and submit to annual audits by the county. A citizen of the county asks the hospital board for a copy of all expenditures made by the hospital the previous year for medical supplies. The board constitutes a public body for purposes of the Act because the hospital is owned by the county, receives public funding from the county and is subject to oversight and control by the county commission. Unless an exception applies to the expenditure records requested, the hospital board should make the records available to the requester for inspection.

EXAMPLE 31:

The governing body of a pueblo receives a written request for copies of all minutes recorded by the body for its meetings during the prior six months. The governing body is not required by the Inspection of Public Records Act to provide access to the minutes because it is not covered by the Act's definition of "public body." The Act applies to records of state government and local governments of the state. It does not apply to records maintained by the governments of Native American tribes, pueblos or nations or by the federal government.

E. PUBLIC RECORDS

A "public record" is defined to include any document, tape or other material, regardless of form, that is used, created, received, maintained or held by or on behalf of a public body, and is related to public business.

EXAMPLE 32:

The governing board of a municipal electric utility tape records its public meetings and uses the tape to draft written minutes. Once the minutes are drafted, the tapes are erased and reused. Two days after a regular meeting of the board, an individual who attended the meeting asks to listen to the tape of the meeting. Unless the tape has been erased, the board must comply with the request. Until it is erased, a tape recording of a board meeting is used, maintained or held by or on behalf of the board and, therefore, constitutes a public record. During this time, even if it is very short, the tape is subject to inspection.

EXAMPLE 33:

A person studying the process of governmental decisionmaking submits to the records custodian for the governor's office a request to inspect all e-mail messages transmitted between the governor's office and the speaker of the house of representatives during the legislative session. Finding no exception under the Act or other law precluding public disclosure, the records custodian permits the requester to review and print copies of the requested messages that have been stored in the governor's office's computerized database.

EXAMPLE 34:

A request for records pertaining to inmates housed at the county jail is made to the jail administrator. The jail administrator is employed by a private company that provides, manages and operates the county jail. The jail administrator refuses to provide the records on the basis that they are kept by the private company and therefore are not public records. The requester goes to district court for an injunction requiring the jail administrator to allow inspection of the records. The county jail is a public facility and the private jail operator is performing a governmental function that otherwise would be performed by the county. Thus, it is likely that a court reviewing the issue would rule that the inmate records are public records because they are created, used and maintained on behalf of a public body, i.e., the county, and relate to public business.

Commentary

The definition covers virtually all documents generated or maintained by a public entity, including (unless covered by a specific and express exemption) government vouchers and other records of public expenditures, public contracts, employment applications, public employee salaries, names and addresses, final agency decisions, license applications and accident reports. Despite the breadth of the definition, however, there are some documents that may be kept by a public officer or employee that are not public records. Nonpublic records include those protected by law, as discussed above, those that do not relate to a public body's business and those voluntarily kept by employees for their personal use.

EXAMPLE 35:

A state agency allocates federal funds to various arts programs throughout the state. As a courtesy, one such program sent the agency director a copy of a management analysis report purchased with the federal funds. The report was not kept in the state agency's files, but was thrown away or sent on to a nonpublic agency. The report is not a public record because, although temporarily in the custody of the state agency, the report is the product of a service contract between the private arts program and the contractor that prepared the report and was neither created at the request of the state agency nor used by the private arts program as part of any formal report or application required by the state agency.

EXAMPLE 36:

A city employee teaches an evening course in a private college program for adults. He used his lunch hour to prepare for class and keeps his papers for the course in his desk in his office. These papers are not prepared in connection with his employment duties and are not public records of the state subject to inspection upon request.

Commentary
Notes and other materials prepared or collected by public employees solely for their own use may not be public records even if the materials are related to the employees' performance of their public duties. These preliminary materials do not share the degree of finality suggested by the terms "documents,"

"papers" and "letters" in the definition of public records, and generally are not intended to perpetuate, formalize or communicate information for or on behalf of the public agency. Moreover, like information protected by the executive privilege (discussed above in Section III.B.7), dissemination could easily lead to misinformation or false conclusions about the public entity's business. Anticipation of disclosure could unnecessarily hamper a public employee's ability to do his or her job by discouraging or tempering the employee's taking of notes, keeping research materials or experimenting with creative ideas in preliminary drafts of memoranda and letters. An agency's effectiveness would be significantly undermined if its employees, worried that every scrap of paper recording their own impressions or notes could be disclosed publicly, limited what they wrote down in the course of performing their duties. Thus, such materials generally will not be considered public records, provided employees create or use them solely for their own convenience and unless the materials are expressly referenced in or attached to a clearly public document, such as a final report.

EXAMPLE 37:

At the superintendent's request, a school district employee is preparing a proposal for future capital expansion to submit to the school board. The presentation of the report and choice of underlying data basically are within the employee's discretion. In the course of this work, he acquires information on construction costs and property values and does some preliminary analyses of different solutions to the problem. Although his final report with supporting documentation will be presented at a public meeting, his preliminary notes and research are not public records kept by or on behalf of the school district and are not subject to inspection.

EXAMPLE 38:

An elementary school teacher keeps notes on her students during the course of the school year to assist her when it comes time to prepare report cards and conduct parent-teacher conferences. The notes are prepared solely for her own use, are not held by or on behalf of the school and do not become part of the students' educational records. Thus, the notes are not public records available for public inspection.

VI. SECTION 14-2-7. DESIGNATION OF CUSTODIAN; DUTIES

The Law

Each public body shall designate at least one custodian of public records who shall:

A. receive and respond to requests to inspect public records;

B. provide proper and reasonable opportunities to inspect public records; and

C. provide reasonable facilities to make or furnish copies of the public records during usual

business hours.

D. post in a conspicuous location at the administrative office of each public body a notice describing:

(1) the right of a person to inspect a public body's records;

(2) procedures for requesting inspection of public records;

(3) procedures for requesting copies of public records;

(4) reasonable fees for copying public records; and

(5) the responsibility of a public body to make available public records for inspection.

Commentary

A. DESIGNATION OF CUSTODIAN

Each state and local government board, commission, committee, agency or entity must designate a custodian to handle requests to inspect public records. (See discussion of the definition of "custodian" above in Section V.) The person designated should be knowledgeable about the kinds of records kept by the public body, the requirements of the Act, and any specific statutes or regulations protecting or otherwise affecting the public body's records.

Agencies do not have to hire new employees just to be their records custodians. The person who is appointed the records custodian may be an existing employee, e.g., a county clerk. In addition, the Act is not intended to make the custodian the exclusive employee with power to respond to inspection requests; other employees may, on behalf of the records custodian, furnish public records for inspection or otherwise respond to requests to inspect public records.

B. REASONABLE OPPORTUNITY TO INSPECT

Subject to the Act's specific requirements discussed below, a custodian must provide proper and reasonable opportunities to inspect public records. This does not mean that a request to inspect must take precedence over all other business of the public body. Rather, taking into account the office hours, available space, available personnel, the need to safeguard records and other legitimate concerns of a

particular public body, a custodian must provide reasonable access to public records.

The custodian may impose reasonable conditions on access, including appropriate times when, and places where, records may be inspected and copied. In no event is an office required to remain open beyond its normal hours of operation, and generally the obligation to provide reasonable access to public records should not require an office to disrupt its normal operations.

EXAMPLE 39:

A city treasurer's office posts its accounts and closes its books at the end of each month. A request to inspect the account ledgers for the city on the last business day of the month would interfere with the ability of the office to close the accounts. In such a case, it would be reasonable to ask the requester to return the next day to inspect the ledgers.

EXAMPLE 40:

A person wishes to inspect all the contracts entered into by a school district for the past five years. To give the person free access to all the filing cabinets containing such documents would both disrupt the normal operations of the school district administrator's office and disturb the filing system. Therefore, it would be reasonable to ask the person to sit in a part of the office out of the main traffic flow and have staff members bring her the records in batches at reasonable intervals.

C. REASONABLE FACILITIES TO MAKE OR FURNISH COPIES

The right to inspect public records includes the right to make copies of public records. The Act provides that a records custodian must provide reasonable facilities to make or furnish copies during usual business hours.

Ordinarily, the facilities available for copying are those used by the office in the normal course of business. Reasonable use of such facilities does not require the interruption of the regular functions of the office.

EXAMPLE 41:

A person, having inspected several records pertaining to hearings conducted by a state licensing board, has requested copies of the final orders issued by the board. The copies may be made on the agency's copying machine but the requester may be asked to wait a reasonable amount of time until personnel are available to make the copies.

Commentary

A public agency also may impose reasonable requirements to protect public documents, such as requiring the presence of an employee when sensitive documents are inspected, provided the requirements are reasonable and are not intended to discourage inspection or as harassment.

D. PUBLIC NOTICE DESCRIBING PROCEDURES FOR REQUESTING INSPECTION

A records custodian is required to post a notice in a conspicuous location in the administrative office of the public body that describes the right to inspect public records, the procedures for requesting inspection of and copying the public body's records and applicable reasonable fees. A public body that does not have an administrative office might comply with this requirement by making reasonable efforts to post the required notice in the place where the public body's records are maintained or in another appropriate location where persons who are interested in making a request to inspect the public bodies' records are likely to see the notice.

EXAMPLE 42:

The Do Re Mi Mutual Domestic Water Users Association is a small organization with only 30 members. The Association has no office. Requests to inspect the Association's records generally are referred to the secretary of the Association's board of directors, who is also the records custodian. The secretary maintains the Association's records at his home. Under these circumstances, it would be appropriate to post the notice required by Section 14-2-7(D) of the Act in a conspicuous location at the secretary's home, such as on or near the front door.

EXAMPLE 43:

The records custodian for a local school district posts a notice describing the right to inspect public records and applicable procedures for inspection in the district's administrative office. The notice is printed in small type on a 3" by 5" card and thumb-tacked to the wall behind the receptionist's desk. This notice is not sufficient for purposes of the Act. While the location of the notice might qualify as conspicuous, the size of the type used for the notice renders it inconsistent with the clear intent of the Act that the notice be prominent and readily observable by interested members of the public.

Commentary

A model notice describing the rights, duties and procedures pertaining to the inspection of public records as required by Section 14-2-7(D) is contained in Appendix III.

VII. SECTION 14-2-8. PROCEDURE

The Law

A. Any person wishing to inspect public records may submit an oral or written request to the custodian. However, the procedures set forth in this section shall be in response to a written request. The failure to respond to an oral request shall not subject the custodian to any penalty.

B. Nothing in the Inspection of Public Records Act shall be construed to require a public body to create a public record.

C. A written request shall provide the name, address and telephone number of the person seeking access to the records and shall identify the records sought with reasonable particularity. No person requesting records shall be required to state the reason for inspecting the records.

D. A custodian receiving a written request shall permit the inspection immediately or as soon as is practicable under the circumstances, but not later than fifteen days after receiving a written request. If the inspection is not permitted within three business days, the custodian shall explain in writing when the records will be available for inspection or when the public body will respond to the request. The three-day period shall not begin until the written request is delivered to the office of the custodian.

E. In the event that a written request is not made to the custodian having possession of or responsibility for the public records requested, the person receiving the request shall promptly forward the request to the custodian of the requested public records, if known, and notify the requester. The notification to the requester shall state the reason for the absence of the records from that person's custody or control, the records' location and the name and address of the custodian.

Commentary

A. ORAL OR WRITTEN REQUEST

To obtain full advantage of the inspection right provided by the Act, a request to inspect public records should be made in writing. The Act does not prohibit oral requests (and, in fact, expressly authorizes them), but if an oral request is made, the time constraints imposed on a public body for allowing inspection and the procedures discussed below for forwarding a request will not apply. In addition, a custodian who fails to respond to an oral request is not subject to any of the penalties imposed under the Act. Nevertheless, a records custodian cannot ignore an inspection request solely because it is oral. In all cases involving legitimate inspection requests, oral or otherwise, a records custodian should respond readily and provide the requested material in a timely manner, unless the materials are clearly protected.

EXAMPLE 44:

A citizen of a municipality goes to the city personnel office and asks the records custodian for a copy of a specific city employee's salary history. The history is public information. The records custodian is able to immediately access the information and provides it to the requester within 15 minutes of the request.

The Act specifies that a request to inspect public records may be "oral or written." The Act does not define "written request." This raises a question regarding the status of requests that are submitted to a records custodian via electronic mail, commonly known as "e-mail." Because of this ambiguity in the law, each public body should review the issue and adopt policies for handling e-mail requests. Given the Act's purpose to facilitate inspection of public records, the best policy would treat an e-mail request to inspect public records in the same manner as a written request. If a public body nevertheless decides to distinguish between e-mail requests and written requests for purposes of its obligation to respond under the Act, it should at least advise people who make e-mail requests that they should resubmit the request in writing if they want the request to be covered by the procedures and penalty provisions of the Act that apply only to "written requests."

B. CREATION OF PUBLIC RECORDS

The right to inspect applies to any nonexempt public record that exists at the time of the request. A records custodian or public body is not required to compile information from the public body's records or otherwise create a new public record in response to a request.

EXAMPLE 45:

A person asks a county personnel officer for a list of all employees with college degrees. The office does not keep lists of employees with college degrees, although college degree information may be included in an employee's personnel file. The records custodian is not required to go through each file to find and list employees with college degrees. It may, however, make the nonexempt portions of all personnel files available to the requester so she can peruse them in search of employees with college degrees.

C. CONTENT OF WRITTEN REQUESTS

A written request for public records must include the requester's name, address, and telephone number, and must identify the records sought with reasonable particularity. (See Appendix II below, Form I.) This will enable the custodian to keep track of who has had access to records for safekeeping purposes. By "reasonable particularity" the Act does not mean that a person must identify the exact record needed, but the description provided should be sufficient to enable the custodian to identify and find the requested record.

EXAMPLE 46:

A person goes to the offices of the municipal air pollution control board and fills out a records request

form. In the space provided for a description of the records requested he asks to see all complaints about noxious automobile emissions filed with the municipal air pollution control board. (The board has a policy of making complaints public and complainants are informed of the policy when they file a complaint.) The custodian refuses to allow inspection unless the requester identifies the particular vehicle or vehicles that are the subject of the complaint. The custodian's requirement is unreasonable because the requester has identified the records he wants to see with sufficient particularity to enable the custodian to locate and identify them.

Commentary

A person has the right under the Act to inspect public records for any or no reason, including idle curiosity or personal gain. The Act provides that a custodian may not require a requester to state why he or she wants to see a record. However, other statutes governing particular records may restrict their use in certain circumstances.

EXAMPLE 47:

A pharmaceutical salesman wants to put together a mailing list of all the doctors in the state so he can send them samples of his various drugs. He may inspect records of public agencies to put together the list. He may not, however, demand that the agency compile such a list if one is not already available. And, of course, he may be charged the costs of copying the records. (See Section VIII.B below.)

EXAMPLE 48:

A business requests a copy of the State Motor Vehicle Division's driver's license database. The applicable state statute prohibits use of a state agency's computerized database for solicitation or advertisement when the database contains the name, address or telephone number of any person unless such use is otherwise specifically authorized by law. A person who uses or permits the unauthorized use of a database is subject to criminal penalties. In its records request form, the Division may not require the business to state its reason for inspecting the database, but, to help protect itself from criminal liability, may require the business to sign a sworn statement asserting that the database will not be used for solicitation or advertisement.

Commentary

Sometimes questions come up regarding the relationship between the Inspection of Public Records Act and requests for records in the context of discovery in civil litigation. For example, an inspection request under the Act may be made instead of or in addition to a discovery request. Generally, the two schemes for obtaining records are separate and independent; the availability of records under the Act does not affect a litigant’s discovery rights or vice versa. Unless an applicable exception to the right to inspect public records applies, a public body may not deny an inspection request just because the requester is engaged in litigation against the public body or has asked for the same records in discovery. If a public

body involved in litigation believes that another party is misusing either the procedures under the Inspection of Public Records Act or the rules governing discovery to harass the public body, to interfere with its ability to participate in the litigation or for other improper purposes, the public body might petition the court for an appropriate order.

D. TIME FOR INSPECTION

When a records custodian receives a written request for a record, the record must be made available immediately, or as soon as practicable under the circumstances. If access will not be provided within three business days after the written request is delivered to the custodian, the custodian must explain in writing to the requester when the records will be available or when the agency will respond. (See Appendix II below, Form II.) This written explanation should be mailed or delivered to the requester on or before the third business day after receipt of the request. Inspection must be allowed no later than 15 calendar days after the custodian receives the request, unless, as discussed later in Section IX, the request has been determined to be excessively burdensome or broad. (See Appendix I for a chart illustrating the deadlines imposed under the Act.) For purposes of the deadlines imposed by the Act, the day the written request is received is not counted. The following examples comply with the Act:

EXAMPLE 49:

On Monday, the custodian of records for a conservancy district receives a letter requesting copies of the district's vouchers evidencing the district's expenditures for the previous month. The records custodian determines the vouchers are not exempt from disclosure. However, some of the requested vouchers are still in the possession of the official responsible for issuing them, and the custodian cannot obtain the vouchers from that official for 7 days. On Thursday, the custodian sends a letter to the requester informing her that she can come to the office and make copies of the available vouchers immediately and that the remaining vouchers will be available the following Wednesday.

EXAMPLE 50:

The office of the records custodian for a school district is open Monday through Friday. On Friday, a news reporter appears at the custodian's office and makes a written request for copies of résumés received by the district for the position of school superintendent. The following Wednesday (three business days after the request was received), the custodian delivers a notice to the reporter stating that she can make available the résumés of the final candidates for the position, but that she will need some time to obtain the résumés from the search committee. The notice tells the reporter that the records will be available on Monday (10 calendar days after the request was received).

EXAMPLE 51:

A written request is made in person to the records custodian for the Property Control Division for records showing the physical alterations made to ensure that all state office buildings are in compliance

with the Americans with Disabilities Act. The records are being used and not available that day. The custodian fills out a form stating when the records will be available during the next 15 calendar days and gives a copy to the requester.

E. REDIRECTING INSPECTION REQUESTS

Sometimes, a person may send a request for records to the wrong entity. Should this occur, the Act places an affirmative responsibility on the person who receives such a request in writing to forward the request to the proper custodian, if known, and to notify the requester. (See Appendix II below, Form III.) The notification to the requester must state the reason for the absence of the records from that person's custody, the location of the records and the name and address of the proper custodian. If, after reasonable inquiry, the initial recipient of the request is unable to determine where the records might be located or who the proper custodian is, it would be permissible for the recipient to inform the requester that he or she does not have custody and to explain the efforts made to find their location and the result of those efforts.

EXAMPLE 52:

The State Records Center receives a written request for Department of Public Safety records and records of an entity the requester refers to as the "state circus bureau." The Records Center forwards the request to the records custodian of the DPS, and sends a letter to the requester telling him that the Center is not the proper records custodian for DPS records under the Act and that his request has been forwarded to the DPS's records custodian. The letter also states that a state circus bureau does not exist and that the Records Center has not been able to identify any other agency that might have custody of the records described in the request.

Commentary

The time periods discussed in the previous Subsection for responding to an inspection request begin to run when the proper custodian receives the request, not when the request is received by any custodian or public body. Thus, if agency A receives a request that should have gone to agency B, the three-day and 15-day time periods for responding to the request do not apply until the request actually reaches the records custodian for agency B.

VIII. SECTION 14-2-9. PROCEDURE FOR INSPECTION

The Law

A. Requested public records containing information that is exempt and nonexempt from disclosure shall be separated by the custodian prior to inspection, and the nonexempt information shall be made available for inspection. If necessary to preserve the integrity of computer data or

the confidentiality of exempt information contained in a database, a partial printout of data containing public records or information may be furnished in lieu of an entire database.

B. A custodian:

(1) may charge reasonable fees for copying the public records, unless a different fee is otherwise prescribed by law;

(2) shall not charge fees in excess of one dollar ($1.00) per page for documents eleven inches by seventeen inches in size or smaller;

(3) may require advance payment of the fees before making copies of public records;

(4) shall not charge a fee for the cost of determining whether any public record is subject to disclosure; and

(5) shall provide a receipt upon request.

Commentary

A. RECORDS CONTAINING EXEMPT AND NONEXEMPT INFORMATION

In some instances, a record kept by a public body will contain information that is exempt from the right to inspect as well as information that must be disclosed. The Act requires the applicable records custodian to separate out the exempt information in a file or document before making the record available for inspection. The fact that a file may contain some information that may not be disclosed does not protect all the information from public disclosure.

EXAMPLE 53:

A state licensing board receives many requests from disgruntled citizens to inspect the files of its licensees. Mindful of the problem of confidentiality, the board keeps two files for each licensee: one containing test scores, the personal, educational and financial information required by the application for licensure and the other containing letters of reference exempted from disclosure under NMSA 1978, § 14-2-1(A)(2).

Commentary

As discussed above, where protected and public information are contained in the same document, the records custodian may redact or block out the protected information before providing the document to the public or including it in the file available for inspection.

If the record requested is a database maintained by a public agency, the Act provides that a partial printout of data containing public records or information may be furnished rather than the entire

database, if necessary to preserve the integrity of the database or confidentiality of exempt information contained in the database.

B. COPY FEES

A records custodian may charge reasonable fees for copying public records. A public body may not charge more than one dollar per page for documents that are 11 inches by 17 inches or smaller. If a document is larger than 11 inches by 17 inches, a public body may charge more than one dollar if it reasonably reflects the increased cost to the public body of copying oversized documents. Unless otherwise allowed by law, any fee charged by a public body may reflect only the actual cost of copying. Although a person cannot be charged for the cost of determining whether a particular public record is or is not subject to disclosure, the public body may charge for its actual costs in making copies, including any personnel time involved.

EXAMPLE 54:

A state agency makes copies of public records for requesters on its copy machine. The actual cost to the agency for this service is approximately 50 cents per page. This includes the cost of paper and employee time involved in the copying process. Under these circumstances, the amount charged per page for copies is reasonable.

Commentary

A records custodian may require a person to pay before the custodian makes copies. This does not permit the custodian to require payment in advance of allowing inspection. Rather, the custodian should provide the records for inspection, and, if the requester subsequently requests copies of particular records, the custodian may require payment in advance for the pages designated for copying. The Act requires that if the requester requests a receipt for the amount paid for copies, the custodian must provide one.

IX. SECTION 14-2-10. PROCEDURE FOR EXCESSIVELY BURDENSOME OR BROAD REQUESTS

The Law

If a custodian determines that a written request is excessively burdensome or broad, an additional reasonable period of time shall be allowed to comply with the request. The custodian shall provide written notification to the requester within fifteen days of receipt of the request that additional time will be needed to respond to the written request. The requester may deem the request denied and may pursue the remedies available pursuant to the Inspection of Public Records Act if the custodian does not permit the records to be inspected in a reasonable period of time.

Commentary

If a request for public records is excessively burdensome or broad, the Act grants a public entity additional time beyond the 15-day period specified in Section 14-2-8 to comply with the request. The Act does not define "excessively burdensome, or broad," but leaves it to the determination of the custodian. Whether a request meets the statutory criteria will depend on the particular circumstances of the request. In some cases, the request may be excessively burdensome because of the type of record requested, and in other cases because of the number of records requested or their location.

If a records custodian determines that a particular request is excessively burdensome or broad, he or she must notify the requester in writing within 15 days of the request that additional time will be needed to respond. (See Appendix II below, Form IV.) If the records are not made available within a reasonable time, the Act gives the requester the right to deem the request denied and pursue the remedies provided by the Act. (See section XI, below).

EXAMPLE 55:

A request is made to the records custodian of the State Personnel Office to inspect all personnel records of employees employed by the state in 1960. When he gets the request, the custodian determines that the state had 10,000 employees in 1960, and that employee records for years before 1980 are kept on microfilm stored in unmarked boxes in the basement of the State Records Center. Within 15 days of receiving the request, the custodian writes to the requester and explains that the State Personnel Office will need one week beyond the 15-day period to comply with the request.

Commentary

Again, what will constitute a "reasonable time" for inspection will vary according to the request. The custodian should specify in the notification to the requester how much additional time will be necessary to comply. This will give the requester an idea of what the public body considers reasonable for compliance.

X. SECTION 14-2-11. PROCEDURE FOR DENIED REQUESTS

The Law

A. Unless a written request has been determined to be excessively burdensome or broad, a written request for inspection of public records that has not been permitted within fifteen days of receipt by the office of the custodian may be deemed denied. The person requesting the public

records may pursue the remedies provided in the Inspection of Public Records Act.

B. If a written request has been denied, the custodian shall provide the requester with a written explanation of the denial. The written denial shall:

(1) describe the records sought;

(2) set forth the names and titles or positions of each person responsible for the denial; and

(3) be delivered or mailed to the person requesting the records within fifteen days after the request for inspection was received.

C. A custodian who does not deliver or mail a written explanation of denial within fifteen days after receipt of a written request for inspection is subject to an action to enforce the provisions of the Inspection of Public Records Act and the requester may be awarded damages. Damages shall:

(1) be awarded if the failure to provide a timely explanation of denial is determined to be unreasonable;

(2) not exceed one hundred dollars ($100) per day;

(3) accrue from the day the public body is in noncompliance until a written denial is issued; and

(4) be payable from the funds of the public body.

Commentary

A. REQUESTS DEEMED DENIED

A request for inspection may be expressly denied, as discussed below, or may be deemed denied in certain circumstances. Except for excessively burdensome or broad requests, if a written request to inspect records has not been granted within 15 calendar days after the custodian receives the request, the requester may deem the request denied. As discussed above in Section IX, an excessively burdensome or broad request may be deemed denied if not granted within a reasonable time after the end of the 15-day period. (See Appendix I for chart illustrating the deadlines imposed by the Act.)

EXAMPLE 56:

Mr. Edd submits a written request to the state commission regulating cattle brands for information about a particular brand. The commission does not give Mr. Edd any written response concerning when the records will be available, when the agency will be able to respond to the request, whether the agency has denied the request or whether the agency has determined that the request is excessively burdensome or broad. After waiting 20 days, Mr. Edd files an action in district court requesting that the agency be ordered to provide the requested records. Such a lawsuit is proper under the Act's procedures.

B. PROCEDURE FOR DENYING REQUESTS

For requests to inspect that are denied, the custodian must mail or deliver a notice to the requester within 15 days of receiving the request. (See Appendix II, Form V.) The denial notice must be in writing, describe the records sought to be inspected, set forth the names and titles or positions of each person responsible for the denial, and explain the reason for the denial.

EXAMPLE 57:

A reporter submits a written request to a city police department to inspect the records kept by the officer investigating a recent murder. Three days after receiving the request, the records custodian for the department mails the reporter a notice stating that the records are available for inspection immediately, with the following exceptions: records revealing confidential sources, methods, information or individuals accused but not charged with a crime. The notice also sets forth the names and positions of the custodian and the police officer as the persons responsible for the denial and cites Section 14-2-1(A)(4) of the Inspection of Public Records Act, which protects law enforcement records, as the reason for the denial. This notice complies with the Act.

C. DAMAGES FOR FAILURE TO PROVIDE A WRITTEN DENIAL

If a custodian does not deliver or mail a written explanation of denial within 15 days of receiving a request to inspect, an action to enforce the Act may be brought and damages awarded to the requester. Damages are not recoverable if the failure to provide a timely explanation of denial is shown to be reasonable. If unreasonable, a custodian's failure to provide the required explanation may result in damages of up to $100 per day until the written explanation is provided. The Act does not make the custodian personally responsible for payment of any damages awarded, but provides for payment from the funds of the public body.

EXAMPLE 58:

The records custodian for an agency goes on vacation for three weeks. On the first day of her vacation, the office receives a request to inspect certain of the agency's records. The request is placed in the absent custodian's "in box." On the day she returns from vacation (21 days after the inspection request was received), the custodian finds the request, determines the request should be denied and immediately mails a written explanation to the requester. The requester files an action in district court because the explanation was not mailed in a timely fashion. If the court determines that the reason for the delay was not reasonable, it could award damages of up to $600 ($100 per day for day 16 through day 21).

XI. SECTION 14-2-12. ENFORCEMENT

The Law

A. An action to enforce the Inspection of Public Records Act may be brought by:

(1) the attorney general or the district attorney in the county of jurisdiction; or

(2) a person whose written request has been denied.

B. A district court may issue a writ of mandamus or order an injunction or other appropriate remedy to enforce the provisions of the Inspection of Public Records Act.

C. The exhaustion of administrative remedies shall not be required prior to bringing any action to enforce the procedures of the Inspection of Public Records Act.

D. The court shall award damages, costs and reasonable attorneys' fees to any person whose written request has been denied and is successful in a court action to enforce the Inspection of Public Records Act.

Commentary

A. PERSONS AUTHORIZED TO ENFORCE THE ACT

The Act provides that an action to enforce its provisions maybe brought by the Attorney General, district attorneys or a person whose written request for inspection has been denied. The last category of "private attorneys general" is particularly important. Because the Attorney General and district attorneys cannot be everywhere, and resources are limited, private citizens denied inspection often will be able to obtain more effective and efficient enforcement of the Act.

Since enforcement requires interpretation of the Act, the Attorney General has issued this Compliance Guide so that public bodies that adhere to the interpretations presented in the Guide may conduct their operations properly in compliance with the Act. Of course, this Guide cannot anticipate all problems or questions that will arise in the course of government business. Questions raised by a public body as to compliance can best be addressed initially to the attorney for the public body who will have the most familiarity with the circumstances. The Attorney General's Office also will answer questions from members of the public (and public agency attorneys) concerning application of the Act. It is hoped, however, that this Compliance Guide will serve to resolve recurring questions concerning the applicability of the law.

Although the Act does not specify any deadline for bringing a private action to enforce its provisions, general statutes of limitation will apply. Unless covered by a more specific statutory limitation, an action against a municipality generally would be barred unless brought within three years of the act or omission creating the cause of action and, for other public bodies, an action to enforce the Act probably would be barred after four years. See NMSA 1978, Sections 37-1-4, 37-1-24.

B. DISTRICT COURT JURISDICTION AND DAMAGES

The Act confers jurisdiction on the state district courts to hear complaints arising under the Act and to

issue the appropriate remedy. Should a district court determine that a public body has illegally denied access to requested records, it may issue an order requesting inspection. If a private person whose written request has been denied brings the enforcement action and that person prevails in the action, the court also is authorized to award damages, costs and attorneys fees to that person. By contrast, if the Attorney General or a district attorney brings the enforcement action, the Act does not provide for any damages, costs or attorneys fees.

The Act does not specify the type of damages a court may award to a private person who successfully brings an enforcement action. Presumably, however, if the action involves a records custodian who failed to provide a timely written denial, damages might include the penalties discussed above in Section X. Damages also could potentially include amounts necessary to compensate the requester for any losses related to the improper denial. However, in the absence of judicial interpretation of the Act's damages provisions, we do not have a precise picture of what damages are allowed under the Act at this time.

C. EXHAUSTION OF ADMINISTRATIVE REMEDIES

A person whose request is denied or who does not receive a timely notice of denial is authorized to bring an action to enforce the Act directly. He or she does not have to first comply with any intermediate administrative hearings or other procedures created by the public body to handle denied requests.

EXAMPLE 59:

A public school board passes an ordinance providing that if the records custodian denies the right to inspect a particular record, the person denied access may request a hearing before the school board. A person residing within the school district requests a copy of attendance records for one of the elementary schools in the district. The custodian denies the request in a timely fashion, and advises the requester that she has the right to appeal the denial before the school board. The requester may decide to pursue the matter before the school board or may proceed to challenge the denial in district court.

APPENDIX I

DEADLINES APPLICABLE TO THE INSPECTION OF PUBLIC RECORDS

CUSTODIAN RECEIVES WRITTEN REQUEST

DAY ONE (the day after the request is received)

DAY TWO

DAY THREE (business days)

If inspection has not yet been allowed, custodian must deliver or mail notice to the requester explaining when inspection will be allowed or when the public body will respond to the request.

DAY FIFTEEN (calendar days)

Inspection must be allowed unless the request is denied or determined to be excessively burdensome or broad.

If request is denied, written notice must be mailed or delivered to the requester.

If excessively burdensome or broad, written notice that additional time is needed to comply must be delivered or mailed to the requester.

APPENDIX II

MODEL FORM LETTERS FOR INSPECTION REQUESTS AND RESPONSES

NOTE: These form letters should be regarded as suggestions for compliance with the Act's requirements for written requests and responses regarding the inspection of public records. The specific formats used for these forms are not required by the Act, and agencies are free to develop different forms to meet their particular requirements as long as they are consistent with the Act.

FORM I

REQUEST TO INSPECT PUBLIC RECORDS

[DATE]

"THE INSPECTION OF

TO: [NAME]

Records Custodian

[AGENCY NAME & ADDRESS]

FROM: [NAME OF REQUESTER]

[ADDRESS]

[TELEPHONE NUMBER]

I would like to inspect and copy the following documents:

[LIST RECORDS WITH REASONABLE PARTICULARITY]

If your agency does not maintain these public records, please let me know who does, and include the proper custodian's name and address.

I promise to pay $_____ per page for copying charges. If the copying charges will exceed $_____, please call me to discuss. I understand that I may be asked to pay the fee for copies in advance before you make any copies.

Please provide a receipt indicating the copying charges for each document.

Thank you for your prompt attention to this matter.

Signed:

[SIGNATURE OF REQUESTER]

FORM II

THREE DAY LETTER

(Used if the public body cannot permit inspection within three business days after receiving a written request to inspect.)

[DATE]

[REQUESTER'S NAME]

[ADDRESS]

Re: Request to Inspect Public Records

Dear [REQUESTER'S NAME]:

On [DATE], we received your request to inspect certain records. We need additional time to respond, until [DATE].

Sincerely,

[SIGNATURE]

Records Custodian [or “For Records Custodian”]

FORM III

WRONG CUSTODIAN LETTER

(Used when a request is not made to the custodian with possession of or responsibility for the records requested.)

[DATE]

[REQUESTER'S NAME]

[ADDRESS]

Re: Request to Inspect Public Records

Dear [REQUESTER'S NAME]:

On [DATE], we received your request to inspect certain records. We do not have custody or control of the records you request because this agency is not responsible for maintaining those records.

The records may be maintained by [NAME OF AGENCY AND ADDRESS IF KNOWN]. We are forwarding your request to that agency's records custodian for response. To expedite your request, it would be advisable for you to write an additional letter requesting the records to the proper custodian at your earliest convenience.

Sincerely,

[SIGNATURE]

Records Custodian [or "For Records Custodian"]

FORM IV

EXCESSIVELY BURDENSOME LETTER

(Used for excessively burdensome or broad requests and sent within 15 calendar days of receipt of an inspection request.)

[DATE]

[REQUESTER'S NAME]

[ADDRESS]

Re: Request to Inspect Public Records

Dear [REQUESTER'S NAME]:

On [DATE], we received your request to inspect certain records. We believe that your request is excessively burdensome or broad and we need additional time to respond, until [DATE].

Sincerely,

[SIGNATURE]

Records Custodian [or "For Records Custodian"]

FORM V

DENIAL LETTER

(Used when a request to inspect is denied. Sent within 15 calendar days after receipt of a written request.)

[DATE]

[REQUESTER'S NAME]

[ADDRESS]

Re: Request to Inspect Public Records

Dear [REQUESTER'S NAME]:

On [DATE], we received your request to review the following records:

[DESCRIPTION OF RECORDS SOUGHT]

We cannot permit inspection of these records because they are protected from disclosure for the reason(s) checked below.

_____ The records requested pertain to medical records.

_____ The records requested pertain to letters of reference concerning employment, licensing or permits.

_____ The records requested pertain to letters or memoranda that are matters of opinion in personnel files or students' files.

_____ The records requested are deemed confidential under the Confidential Materials Act.

_____ The records requested include confidential law enforcement records.

_____ Other: [DESCRIBE LEGAL SUPPORT FOR NONDISCLOSURE]

Sincerely,

[SIGNATURE]

Records Custodian [or "For Records Custodian"]

Additional person(s) responsible for this denial:

[LIST NAMES AND TITLES OR POSITIONS OF EACH PERSON RESPONSIBLE FOR THE DENIAL]

APPENDIX III

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MODEL PUBLIC NOTICE DESCRIBING PROCEDURES FOR REQUESTING INSPECTION

NOTICE OF RIGHT TO INSPECT PUBLIC RECORDS

By law, under the Inspection of Public Records Act, every person has the right to inspect public records of the (*name of public body*). The Act also makes compliance with requests to inspect public records an integral part of the routine duties of the officers and employees of the (*name of public body*).

Requests to inspect public records should be submitted to the records custodian, located at (*address and telephone number of records custodian and, if available, fax number and email address*).

A person desiring to inspect public records may submit a request to the records custodian orally or in writing. However, the procedures and penalties prescribed by the Act apply only to written requests. A written request must contain the name, address and telephone number of the person making the request. The request must describe the records sought in sufficient detail to enable the records custodian to identify and locate the requested records.

The records custodian must permit inspection immediately or as soon as practicable, but no later than fifteen (15) calendar days after the records custodian receives the inspection request. If inspection is not permitted within three (3) business days, the person making the request will receive a written response explaining when the records will be available for inspection or when the public body will respond to the request. If any of the records sought are not available for public inspection, the person making the

request is entitled to a written response from the records custodian explaining the reasons inspection has been denied. The written denial shall be delivered or mailed within fifteen (15) calendar days after the records custodian received the request for inspection.

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If a person requesting inspection would like a copy of a public record, a reasonable fee may be charged. The fee for documents eleven inches by seventeen inches or smaller is __ per page. The fee for larger documents is __ per page. For records other than documents, the reasonable fee is __. The records custodian may request that applicable fees for copying public records be paid in advance, before the copies are made. A receipt indicating that the fees have been paid for making copies of public records will be provided upon request to the person requesting the copies.

[NOTE: The procedures for copying records specified in this model notice apply to a public body with copy machines or other facilities for making copies of public records. Public bodies that do not have copy machines available for making copies of public records should describe the applicable procedures they follow to furnish copies of public records in compliance with the Act.]