City of Santa Fe

Agenda

ARTS COMMISSION

Monday, December 9, 2019
City Councilors' Conference Room, 200 Lincoln Avenue
505-955-6707
5:00 PM

1. Call to Order

2. Roll Call

3. Approval of Agenda

4. Approval of Minutes
   a) November 12, 2019

5. Report of the Chair

6. Report of Director *(Pauline Kanako Kamiyama, pkkamiyama@santafenm.gov, 955-6653)*
   a) Commission vacancies, and interest submissions
   b) Committee assignments
   c) Mayor's Arts Awards

7. Discussion Items

   a) Review of Open Meetings Act and Robert's Rule of Order (*Gabriel A. Smith*, gasmith@santafenm.gov, 955-6967)

   b) 2020 Grant Cycle Calendar (Tentative, subject to change) (*Jeff Norris*, jtnorris@santafenm.gov, 955-6710)

   c) AIPP Public Art Policy Update

8. Adjourn

Persons with disabilities in need of accommodations, contact the City Clerk's office at 955-6520 five (5) working days prior to meeting date.

RECEIVED AT THE CITY CLERK'S OFFICE	
DATE:	December 4, 2019
TIME:	4:20 PM

Cover Page	**Action Item**	**Page 0**
Call to Order	Chair, Alex Hanna, called the Arts Commission meeting to order at 5:00 pm in the City Councilor's Conference Room. Roll call reflects quorum.	Page 1
Approval of Agenda	***Ms. Hnasko moved to approve the agenda as presented, second by Ms. Hanley, motion carried by unanimous voice vote.***	Page 1
Approval of Minutes November 12, 2019	***Minutes postponed to next month meeting***	Page 1
Report of the Chair	*Informational*	Page 1 - 2
Report of the Director, Pauline Kamiyama	*Informational*	Page 2 - 3
Discussion Items a) Review of Open Meeting Act and Robert's Rule of Order b) 2020 Grant Cycle Calendar c) AIPP Public Art Policy Update	Informational Staff recommendations to place on next month agenda. Arts Commission members to draft a letter to Mr. Daniel Hernandez, Project Manager.	Page 3 - 4
Comments from Commissioners	Informational:	Page 4 - 5
Adjourn and Signature Page	There being no further business to come before the Arts Commission the Chair called for adjournment at 6:05 pm	Page 5

ARTS COMMISSION
Monday, December 9, 2019
City Councilor's Conference Room
5:00 PM – 6:05 PM

MINUTES

1. **Call to Order**

   Alex Hanna, Chair, called the Arts Commission meeting to order at 5:00 pm in the City Councilor's Conference Room. Roll call reflects a quorum.

2. **Roll Call**

   Present:
   Alex Hanna, Chair
   David Scheinbaum
   Andrea Hanley
   Exilda Trujillo-Martinez
   Adelma Hnasko

   Not Present:
   Jorge Bernal
   Bernadette Ortiz-Pena

   Staff Present:
   Pauline Kamiyama, Director
   Gabriel A. Smith, Legal

   Others Present:
   Fran Lucero, Stenographer

3. **Approval of Agenda**

   Ms. Hnasko moved to approve the agenda as presented, second by Ms. Hanley, motion carried by unanimous voice vote.

4. **Approval of Minutes – November 12, 2019**
   Postponed until next month.

5. **Report of the Chair**
   Thank you to the Mayor for appointing Mr. Hanna as the Chair of the Arts Commission. Mr. Hanna said that within the last year many valued members and the Director all went on to different avenues. Even with the loss we gained a new Director and we will grow our membership, Ms. Adelma Hnasko supported Mr. Hanna at all times. Mr. Hanna asked for appointment of Ms. Hnasko as Vice Chair and she explained that she would not seek the

position of Chair at the end of Mr. Hanna's term. She is honored to serve as Vice Chair. Mr. Hanna said with the department being named Arts and Culture there are many expectations, and it provides the Arts Commission an opportunity to support staff.

6. **Report of Director Pauline Kamiyama**

a) Commission vacancies and interest submissions

A press release is expected to go out this week, there are two vacancies on the Arts Commission. Ms. Kamiyama asked that the members share this opportunity with the community for interest. She also asked that if there is a business individual with the financial expertise that Mr. Chippeaux contributed; this would be very helpful. Ms. Kamiyama is looking to establish a working relationship to obtain funding for Culture Connects. Ms. Kamiyama is working on getting new binders with updated information and the strategic plan, goals and expectations for the next year. Ms. Kamiyama does not expect the commission members to go out and be fund raisers but she looks at the expertise and community involvement and connections of this committee to share with the public. Ms. Kamiyama is looking for partnerships she does not want to compete with other art organizations.

The Chair reiterated to please circulate the press release with the members. Ms. Kamiyama said that there will be a group that vets the applications as well as the Chair and the committee members. Ms. Kamiyama said that the notice will also go out to everyone who applied in the past.

b) Committee Assignments

Ms. Kamiyama stated that the committee members selected will vet the applications and bring the selected choices to the Arts Commission members.

Mr. Hanna noted that Andrea Hanley will become the Chair for Art in Public Places. Jorge Bernal will also be joining the AIPP.

Finance Committee: Adelma Hnasko, David Scheinbaum and Mr. Hanna.

Youth Arts: Adelma Hnasko, Bernadette Ortiz y Pena and Exilda Trujillo-Martinez.

c) **Mayor's Art Awards**

The Mayor's Art Awards will be held, he likes the month of June 2020. Other city events will be looked at in order to not compete. The Mayor shared that he is looking for new ideas, casual and different. The process leading up to this event will be evaluated by Ms. Kamiyama and she will provide the committee members with a list of all the past awardees. It will be a nomination process.

Mr. Scheinbaum said once we know the awardees it could dictate the entertainment and venue.

The Chair stated that time leading up to the Mayor's Art Awards is important, possibly have everything to the Mayor no later than May and possibly April. The Chair also

suggested SITE Santa Fe as a venue and Ms. Hanley also said the Wheelwright Museum would be a great venue.

Kudos to Elizabeth Jacobson, Poet Laureate, her book was selected and she is doing some wonderful things. She may have a workshop at the Senior Center and develop a transition of her skills with the seniors.

7. **Discussion Items**

a) Review of Open Meetings Act and Robert's Rule of Order, Gabriel Smith

Handout provided to the Arts Commissioners.
Mr. Smith also explained IPRA. Records custodian can work with staff directly if there are questions and staff in the legal office can review the exceptions. Most important is if you receive a records request from the Records Custodian, answer in an expeditious manner. Response time is 3 days and an extension up to 10 days can be requested.

Ms. Kamiyama will invite Mr. Smith back and also discuss Robert's Rule of Order and Ethics in a more detailed fashion. Ms. Kamiyama said if the public approach the Arts commissioners to please refer them to her for responses.

b) 2020 Grant Cycle Calendar, Jeff Norris

Ms. Kamiyama provided information on Cultural Investment Funding Programs, (Exhibit A), in the absence of Jeff Norris. Ms. Hnasko did suggest that any fiscal agent has to be from New Mexico and that should be documented. On the 2-year grants, they are reviewed annually but they only apply every 2-years.

c) AIPP Public Art Policy Update

Ms. Hanley said initially they spoke about the City not having a Collections Management policy and she has provided examples in the past months. One of the past staff members from the Arts Commission wrote some language on deaccessioning. Ms. Hanley feels we should do a comprehensive outline to get the feedback from all members. A draft has been created, outline listed below. Thank you for spearheading this project. Below are her listed points to discuss at a future meeting.

City of Santa Fe Collections Management Policy Outline.

I. Introduction to Collections Policy
   a. Statements of Purpose
      i. Vision Statement
      ii. Mission Statement
      iii. Strategic Goals
      iv. Community History Statement
   b. Purpose of the Collections Policy
   c. Scope of Collections
      i. Santa Fe Provenance Artifacts | Artworks | Public Art | Art Installations
      ii. Evaluation of Artifacts | Artworks |Public Art |Art Installations

d. Glossary

II. Acquisitions
   a. Permanent Collections
   b. Objects Found in the Collections
   c. Donations Process and Criteria

III. Deaccessions
   a. Introduction
   b. Purpose
   c. Evaluation
   d. Permanent Collections – Deaccession of an Artwork
   e. Deaccession Options
   f. Permanent Collections – Disposal of an Artwork

IV. Loans
   a. Loan Statement
   b. Incoming Loans
   c. Out-going Loan
   d. Objects left in the Custody of the City

V. Review Process for Gifts, Loans or Bequests
   a. Criteria for Evaluating the Artwork
   b. Revisions
   c. Agreement of Parties

VI. Research Access to the Permanent Collections
   a. Access to Permanent Collections
   b. Access to Objects from Incoming Loans

VII. Collection Management Statements
   a. Records
   b. Care of Collections
   c. Insurance

VIII. Policy, Procedures and Accessions Committee
   a. Responsibilities

IX. Statements on Standards of Conduct and Ethics
   a. City of Santa Fe (Personnel Rules and Regulations)
   b. General City of Santa Fe Arts and Culture Department Policy
      i. (City Staff and Commission)
   c. Personal Acquisition of Artworks
   d. Appraisals of Artworks
   e. Dealing in Artworks

X. Addendum
   a. Auxiliary Materials
   b. Preservation Originals

Commissioner Comments:

Ms. Adelma Hnasko:

If a group wants to partner how would they give us funding if we are not a 501(c)3?

The Chair said that in the past the committee had the discussion about funding going through the Santa Fe Community Foundation.

Future Meeting: Status on Warehouse Santa Fe, what if any city funding has been give and how was it used.

8. **Adjourn**

There being no further business to come before the Art Commission the Chair called for adjournment at 6:05 pm.

Signature:

Adelman N. Hanna

Alex Hanna, Chair

Acting Chair

Fran Lucero

Fran Lucero, Stenographer

CULTURAL INVESTMENT FUNDING PROGRAMS

Through service contracts with local nonprofit arts organizations, the Arts Commission supplies a variety of cultural activities that generate significant impact for the community. Every dollar provided by the City is matched by the organizations, generating a total annual investment of over $1.5 million in cultural infrastructure. The services supported range from hands-on educational programs for underserved communities, to high-profile arts events by established cultural institutions, to exciting new cultural activities. All investments support our long-term policy planks: Youth Arts, Creative Spaces, Economic Growth and Engagement.

Potential applicants are encouraged to review our General Eligibility guidelines, but should note that some categories have additional requirements.

Lodgers' Tax for the Arts Funding

Funding for this program is authorized by the City of Santa Fe Ordinance No. 1987-45, which earmarks Lodgers' Tax for the Arts the "promotion and advertising of nonprofit attractions and nonprofit performing arts in Santa Fe." NMSA "Lodgers' Tax Act" (3-38-21) authorizes a municipality to use tax proceeds to defray costs of advertising, publicizing, and promoting tourism attractions within the area. Therefore, eligible organizations must play a role in promoting tourism and apply the funding received primarily towards the project's promotional, advertising and marketing costs.

Categories

TARGET IMPACT SUPPORT (Formerly Category A): Small, accessible amounts designed to jumpstart marketing/promotional efforts for finite projects while also providing organizations with a City-investment to leverage additional, private support. Requests up to $10,000; multiple deadlines; single fiscal year contract; expedient application/review process. Eligibility: Annual operating budget of less than $200,000.

REGIONAL ARTS MARKETING (Formerly Category B): Supplementary funds for marketing/promotion of seasonal or year-round programming, this program's simpler application process is ideal for organizations with limited full-time staff. Request up to $35,000; annual deadline; one contract year; simplified application/review process. Eligibility: Annual operating budget between $150,000 and $500,000.

NATIONAL ARTS MARKETING (Formerly Category C): Meaningful contract amounts for organizations that provide marketing/promotional services for larger-scale cultural events along with educational, outreach and economic benefit to the community. Contracts are multiyear with audit and site visit requirements. Requests up $75,000 per year; biannual deadline; one year contract, renewable for second year; full application/review process. Eligibility: Annual operating budget between $250,000 and $1,500,000.

GLOBAL ARTS MARKETING (Formerly Category D): Larger contract amounts for providing marketing/promotional services for major cultural events and year-round institutional programs. Organizations also provide programs and services that support the Commission's work in the areas of youth arts, economic growth, creative spaces and engagement. Marketing efforts reaching a national and international audience. Contracts are multiyear with audit and site visit requirements. Requests up $100,000 per year; biannual deadline; one year contract, renewable for second year; full application/review process. Eligibility: Annual operating budget above $600,000; project budget of $350,000+; minimum of 2 FTEs

COMMUNITY ARTS DEVELOPMENT: The Community Arts Development program funds community-based organizations and projects of high artistic quality that provide arts services to the local community, with an emphasis on projects that bring the community together to celebrate the

Exhibit A

diversity of artistic heritage. Education through the arts projects in schools and other settings are eligible to apply. Applications are limited to requests of $6,000 or less.

COLLABORATIVE ARTS MARKETING: The Collaborative Arts Marketing Program is designed to develop citywide, multi-partner arts events for the purposes advertising, publicizing, and promoting tourist-related attractions, facilities and events, specifically as they relate to nonprofit art activities and nonprofit performing arts in Santa Fe. For the purpose of this program, collaborative arts marketing is defined as a complementing effort between two or more nonprofit arts organizations that is based on a common theme, art form, season/time of event, audience/desired audience, and/or geography. The marketing effort must be designed to attract audiences to visit multiple partner events, venues, attractions, etc. through a single cohesive brand. The collaborative effort should provide value to other business sectors such as galleries, hotels and restaurants through affiliated partnership opportunities.

GENERAL ELIGIBILITY

The following are general eligibility guidelines for all Cultural Investment categories. However, please be advised that some categories have additional and/or more restrictive requirements. Organizations considering applying for funding are encouraged to contact the Arts Commission at (505) 955-6707 prior to submitting an application. We are available to help ensure that both an organization and a project are eligible for funding, as well as to provide guidance regarding in which funding program to apply.

Organizational Eligibility

Potential applicants should carefully review the follow requirements to determine their eligibility:

- With rare exception, only Santa Fe-based organizations will be funded.
- Generally, only organizations whose mission includes the arts will be funded.
- Projects must take place in the northern portion of Santa Fe county (i.e. Madrid/ Galisteo to northern boundary of county)
- Organizations must be a federally recognized nonprofit with an IRS 501(c)3 status; a public agency (as defined in NMSA Section 11-1-1 or any county, state or education institution specified in Article 12, Section 11 of the NM Constitution.); or apply through a fiscal agent. (See "Using a Fiscal Agent" below.)
- Organizations must have a State of New Mexico Incorporation Certificate as a domestic or foreign nonprofit corporation and be in good standing with the State.
- Organizations must have a current City of Santa Fe business registration number.
- City of Santa Fe-operated programs are not eligible.
- Except for the Collaborative Arts Marketing Program, organizations may only be funded in one category a year.

Using a Fiscal Agent

An organization that does not have its nonprofit status and/or NM Incorporation Certificate may apply through a fiscal agent, provided the fiscal agent meets all the eligibility requirements. The fiscal agent becomes legally responsible for the completion of the project, submission of all reports, as well as receipt and proper management of Arts Commission funds.

The fiscal agent's role is strictly administrative; it is not a partner or collaborator in the programmatic or artistic content of the project. The donation of goods or services by the fiscal agent (such as in-kind space rental or administrative services) may be included as part of the applicant/fiscal agent relationship. In instances where the relationship between applicant and fiscal agent extends beyond these parameters, the eligible organization must submit the application for funding under its own name.

Project Eligibility

The intent of the Arts Commission's funding is to support the presentation of artistic content to the general public. We do not provide general operating funds or funding to support ancillary, non-arts-based programs. Examples of public presentations include performances, productions, exhibitions, art markets, fairs and festivals (i.e. indoor or outdoor community celebrations of the arts), and workshops or conferences. All public presentations must be open and accessible to the general public.

The Arts Commission cannot fund certain projects and project elements. These include:

- Demonstration and master classes
- Scholarships and fellowships
- Closed subscription series
- Projects which are part of a post-secondary academic degree program
- Awards (ribbons, trophies, prizes, etc.)
- Deficits and debt reduction (including finance charges, loan fees, etc.)
- Meals, catering, lodging or transportation
- Capital expenses (including the purchase of equipment or real property, labor or materials costs for renovations, remodeling or new construction, etc.)
- Tuition assistance for college, university or other post-secondary formal course work
- Fund-raising (events, personnel, merchandise, invitations, etc.)

In many instances, the larger project budget or organizational budget may include some of these elements; however, Arts Commission funds cannot be applied toward these costs.

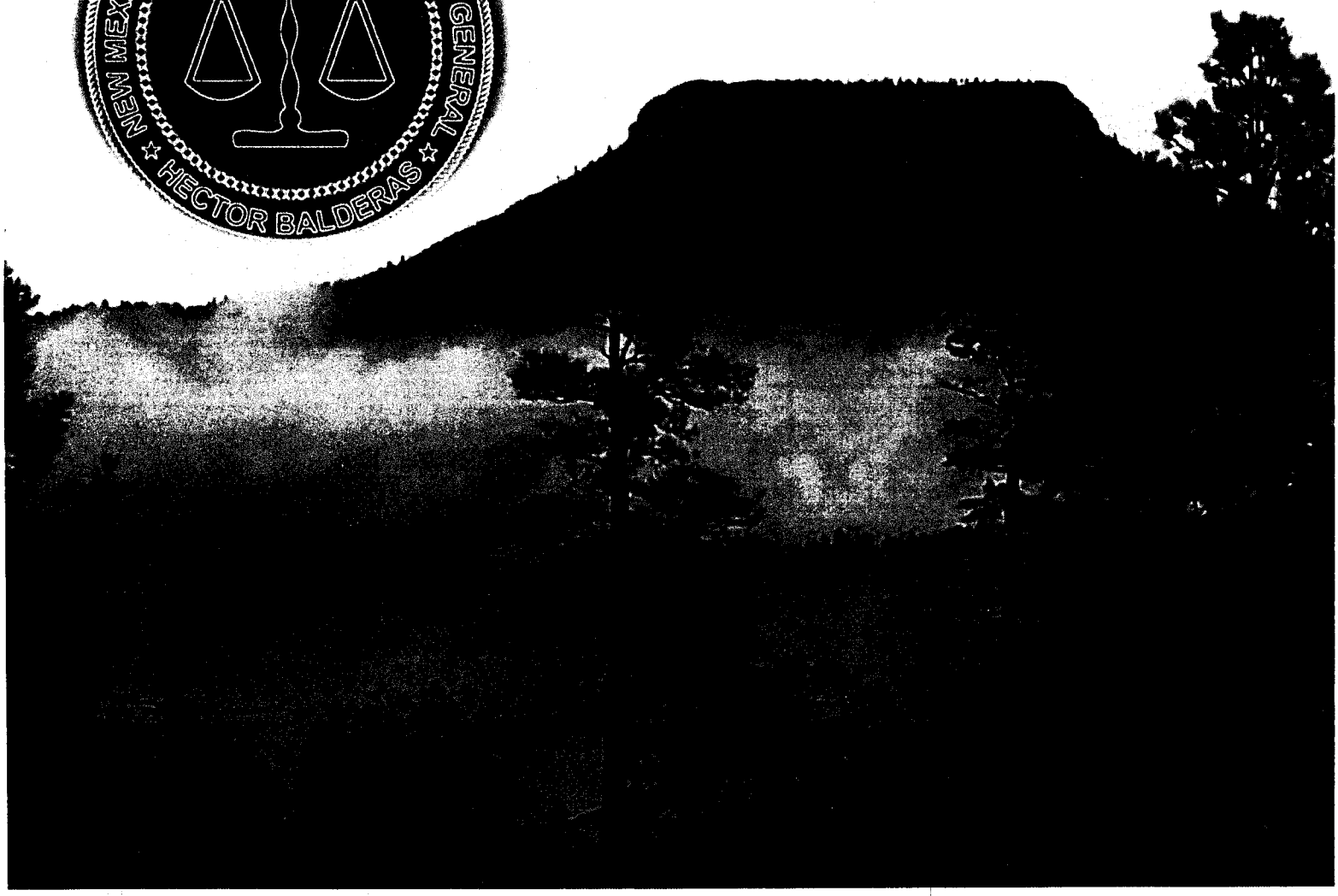
Cultural Investment Program Fiscal Year 2019-20 - DRAFT Schedule

Program	RFP Issue	Technical Assistance	Applications Due	Link to Panelists	Panel Review	Finance Committee	City Council	Final Report	Final Reimbursem Requests
Global Arts Marketing (Two-Year)	1/2/2020	1/8/2020	1/30/2020	2/7/2020	3/4/2020	4/6/2020	4/15/2020	6/18/2021	7/8/2021
National Arts Marketing (Two-Year)	1/13/2020	1/29/2020	2/12/2020	2/17/2020	3/11/2020	4/20/2020	5/13/2020	6/18/2021	7/8/2021
Regional Arts Marketing	1/13/2020	1/29/2022	2/12/2020	2/17/2020	3/18/2020	4/20/2019	5/13/2020	6/18/2021	7/8/2021
Collaborative Arts Marketing	3/10/2020	3/25/2020	4/20/2020	4/27/2020	5/6/2020	N/A	N/A	6/18/2021	7/8/2021
Target Income Support	4/6/2020	4/22/2020	5/5/2020	5/11/2020	5/20/2020	N/A	N/A	6/20/2021	7/8/2021
Community Arts Development	4/14/2020	4/29/2020	5/12/2020	5/18/2020	5/28/2020	N/A	N/A	6/27/2021	7/8/2021

NEW MEXICO

OPEN MEETINGS ACT

COMPLIANCE GUIDE



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NEW MEXICO ATTORNEY GENERAL

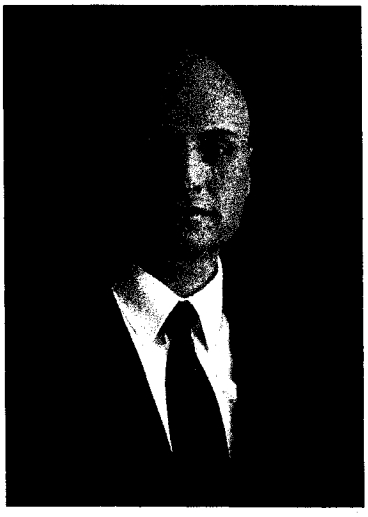
THE
OPEN MEETINGS ACT
NMSA 1978, Chapter 10, Article 15

A Compliance Guide for
New Mexico Public Officials and Citizens

HECTOR BALDERAS
Attorney General

This eighth edition of the Compliance Guide updates the 2010 edition, primarily to reflect a legislative amendment enacted in 2013 that requires a public body to make the agenda of a regular or special meeting available to the public at least 72 hours in advance of the meeting, and to post meeting agendas on a public body's website if one is maintained.

Eighth Edition
2015



Our Mission

Our mission at the New Mexico Department of Justice is to serve and protect the citizens of New Mexico by honorably carrying out the statutory responsibilities of the Attorney General.

Our Vision

Our mission is to seek, strengthen and empower partnerships with and among citizens, community and government agencies, law enforcement, and businesses in order to make our community a safer and more prosperous place to live. We must enforce the laws of New Mexico fairly and uniformly to ensure New Mexicans receive justice and equal protection under the law.

I am pleased to report that we are working hard to make changes necessary to serve and protect the State of New Mexico. I grew up facing many of the hardships that New Mexicans experience every day. It is that shared experience that motivates me to be a fierce advocate and a voice for our communities. My outreach efforts will support long-term goals of improving transparency in government and empowering the citizens of New Mexico.

The "Open Meetings Act," NMSA 1978, Sections 10-15-1 to 10-15-4, is known as a "sunshine law." Sunshine laws generally require that public business be conducted in full public view, that the actions of public bodies be taken openly, and that the deliberations of public bodies be open to the public. Like you, I strongly support open government, particularly meetings held by public officials to discuss public business. Public access to the proceedings and decision-making processes of governmental boards, agencies and commissions is an essential element of a properly functioning democracy. As Attorney General, I am charged by law with the responsibility to enforce the provisions of the New Mexico Open Meetings Act. The publication of this Guide is one of the ways to fulfill my office responsibilities as an effective resource for policymakers and the public in order to promote compliance.

HECTOR BALDERAS
Attorney General of New Mexico
2015

Table of Contents

I. Introduction

The "Open Meetings Act," NMSA 1978, Sections 10-15-1 to 10-15-4, is known as a "sunshine law." All states have such laws, which are essentially motivated by the belief that the democratic ideal is best served by a well-informed public. Sunshine laws generally require that public business be conducted in full public view, that the actions of public bodies be taken openly, and that the deliberations of public bodies be open to the public.

The Attorney General is authorized by Section 10-15-3(B) of the Act to enforce its provisions. Accordingly, this Compliance ("Guide") has been prepared by the Attorney General to provide assistance in the application of the provisions of the Act to all boards and commissions of the state, counties, municipalities, school districts, conservation districts, irrigation districts, housing authorities, councils of government and other public bodies that are responsible to the public and subject to the Act. It should be noted that many of the issues discussed in this Guide have not been the subjects of judicial interpretation. By necessity, therefore, the Guide in most respects represents the views of the Attorney General. Although the Attorney General believes the construction of the Open Meetings Act reflected in this Compliance Guide is correct, it is always possible that a court faced with the same issues would disagree with the Attorney General's interpretation.

New Mexico's Open Meetings Act addresses four areas. The first defines the basic policy of the state with respect to meetings of non-legislative public bodies and how it is to be applied in conducting public business; the second defines the policy as it applies to meetings of committees of the state legislature; the third addresses the effect that violating the Act may have on the validity of actions taken by public bodies; and the fourth defines the penalty for violation of the Act. These areas are discussed sequentially in the text of this Guide. For ease of reference, the entire Act is set forth on pages 2 through 5.

The Open Meetings Act was most recently amended during the 2013 legislative session. The amendment requires, with some exceptions, that a public body make the agendas of regular and special meetings available to the public at least seventy-two hours prior to the meetings and post the agendas on the public body's website if one is maintained.

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.*

If you would like additional copies of this Guide, or if you have any questions about the Guide or the applicability of the Act, please contact the Open Government Division of the Office of the Attorney General, P.O. Drawer 1508, Santa Fe, New Mexico 87504-1508, or by telephone at (505) 827-6070. This Guide is also posted on the Office of the Attorney General's website at www.nmag.gov.

II. Open Meetings Act

10-15-1. Formation of Public Policy

A. In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be 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 those officers and employees who represent them. The formation of public policy or the conduct of business by vote shall not be conducted in closed meetings. All meetings of any public body except the legislature and the courts shall be public meetings, and all persons desiring shall be permitted to attend and listen to the deliberations and proceedings. Reasonable efforts shall be made to accommodate the use of audio and video recording devices.

B. All meetings of a quorum of members of any board, commission, administrative adjudicatory body or other policymaking body of any state agency, any agency or authority of any county, municipality, district or any political subdivision, held for the purpose of formulating public policy, including the development of personnel policy, rules, regulations or ordinances, discussing public business or for the purpose of taking any action within the authority of or the delegated authority of any board, commission or other policymaking body are declared to be public meetings open to the public at all times, except as otherwise provided in the constitution of New Mexico or the Open Meetings Act. No public meeting once convened that is otherwise required to be open pursuant to the Open Meetings Act shall be closed or dissolved into small groups or committees for the purpose of permitting the closing of the meeting.

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

D. Any meetings at which the discussion or adoption of any proposed resolution, rule, regulation or formal action occurs and at which a majority or quorum of the body is in attendance, and any closed meetings, shall be held only after reasonable notice to the public. The affected body shall determine at least annually in a public meeting what notice for a public meeting is reasonable when applied to that body. That notice shall include broadcast stations licensed by the federal communications commission and newspapers of general circulation that have provided a written request for such notice.

E. A public body may recess and reconvene a meeting to a day subsequent to that stated in the meeting notice if, prior to recessing, the public body specifies the date, time and place for continuation of the meeting, and, immediately following the recessed meeting, posts notice of the date, time and place for the reconvened meeting on or near the door of the place where the original meeting was held and in at least one other location appropriate to provide public notice of the continuation of the meeting. Only matters appearing on the agenda of the original meeting may be discussed at the reconvened meeting.

F. Meeting notices shall include an agenda

containing a list of specific items of business to be discussed or transacted at the meeting or information on how the public may obtain a copy of such an agenda. Except in the case of an emergency or in the case of a public body that ordinarily meets more frequently than once per week, at least seventy-two hours (72) hours prior to the meeting, the agenda shall be available to the public and posted on the public body's web site, if one is maintained. A public body that ordinarily meets more frequently than once per week shall post a draft agenda at least seventy-two (72) hours prior to the meeting and a final agenda at least thirty-six (36) hours prior to the meeting. Except for emergency matters, a public body shall take action only on items appearing on the agenda. For purposes of this Subsection, an "emergency" refers to unforeseen circumstances that, if not addressed immediately by the public body, will likely result in injury or damage to persons or property or substantial financial loss to the public body. Within ten days of taking action on an emergency matter, the public body shall report to the attorney general's office the action taken and the circumstances creating the emergency; provided that the requirement to report to the attorney general is waived upon the declaration of a state or national emergency.

G. The board, commission or other policymaking body shall keep written minutes of all its meetings. The minutes shall include at a minimum the date, time and place of the meeting, the names of members in attendance and those absent, the substance of the proposals considered and a record of any decisions and votes taken that show how each member voted. All minutes are open to public inspection. Draft minutes shall be prepared within ten working days after the meeting and shall be approved, amended or disapproved at the next meeting where a quorum is present. Minutes shall not become official until approved by the policymaking body.

H. The provisions of Subsections A, B and G of this section do not apply to:

(1) meetings pertaining to issuance, suspension, renewal or revocation of a license except that a hearing at which evidence is offered or rebutted shall be open. All final actions on the issuance, suspension, renewal or revocation of a license shall be taken at an open meeting;

(2) limited personnel matters; provided that for purposes of the Open Meetings Act, "limited personnel matters" means the discussion of hiring, promotion, demotion, dismissal, assignment or resignation of or the investigation or consideration of complaints or charges against any individual public employee; provided further that this Subsection is not to be construed as to exempt final actions on personnel from being taken at open public meetings; nor does it preclude an aggrieved public employee from demanding a public hearing. Judicial candidates interviewed by any commission shall have the right to demand an open interview;

(3) deliberations by a public body in connection with an administrative adjudicatory proceeding. For purposes of this paragraph, an "administrative adjudicatory proceeding" means a proceeding brought by or against a person before a public body in which individual legal rights, duties or privileges are required by law to be determined by the public body after an opportunity for a trial-type hearing. Except as otherwise provided in this section, the actual administrative adjudicatory proceeding at which evidence is offered or rebutted and any final action taken as a result of the proceeding shall occur in an open meeting;

(4) the discussion of personally identifiable information about any individual student, unless the student, his parent or guardian requests otherwise;

(5) meetings for the discussion of bargaining strategy preliminary to collective bargaining negotiations between the policymaking body and a bargaining unit representing the employees of that policymaking body and collective bargaining sessions at which the policymaking body and the representatives of the collective bargaining unit are present;

(6) that portion of meetings at which a decision concerning purchases in an amount exceeding two thousand five hundred dollars ($2,500) that can be made only from one source and that portion of meetings at which the contents of competitive sealed proposals solicited pursuant to the Procurement Code are discussed during the contract negotiation process. The actual approval of purchase of the item or final action regarding the selection of a contractor shall be made in an open meeting;

(7) meetings subject to the attorney-client privilege pertaining to threatened or pending litigation in which the public body is or may become a participant;

(8) meetings for the discussion of the purchase, acquisition or disposal of real property or water rights by the public body;

(9) those portions of meetings of committees or boards of public hospitals where strategic and long-range business plans or trade secrets are discussed; and

(10) that portion of a meeting of the gaming control board dealing with information made confidential pursuant to the provisions of the Gaming Control Act.

I. If any meeting is closed pursuant to the exclusions contained in Subsection H of this section, the closure:

(1) If made in an open meeting, shall be approved by a majority vote of a quorum of the policymaking body; the authority for the closure and the subject to be discussed shall be stated with reasonable specificity in the motion calling for the vote on a closed meeting; the vote shall be taken in an open meeting; and the vote of each individual member shall be recorded in the minutes. Only those subjects announced or voted upon prior to closure by the policymaking body may be discussed in a closed meeting; and

(2) if called for when the policymaking body is not in an open meeting, shall not be held until public notice, appropriate under the circumstances, stating the specific provision of the law authorizing the closed meeting and stating with reasonable specificity the subject to be discussed, is given to the members and to the general public.

J. Following completion of any closed meeting, the minutes of the open meeting that was closed, or the minutes of the next open meeting if the closed meeting was separately scheduled, shall state that the matters discussed in the closed meeting were limited only to those specified in the motion for closure or in the notice of the separate closed meeting. This statement shall be approved by the public body under Subsection G of this section as part of the minutes.

10-15-1.1. Short Title.

NMSA 1978, Chapter 10, Article 15 may be cited as the "Open Meetings Act."

10-15-2. State Legislature; Meetings.

A. Unless otherwise provided by joint house and senate rule, all meetings of any committee or policymaking body of the legislature held for the purpose of discussing public business or for the purpose of taking any action within the authority of or the delegated authority of the committee or body are declared to be public meetings open to the public at all times. Reasonable notice of meetings shall be given to the public by

publication or by the presiding officer of each house prior to the time the meeting is scheduled.

B. The provisions of Subsection A of this section do not apply to matters relating to personnel or matters adjudicatory in nature or to investigative or quasi-judicial proceedings relating to ethics and conduct or to a caucus of a political party.

C. For the purpose of this section, "meeting" means a gathering of a quorum of the members of a standing committee or conference committee held for the purpose of taking any action within the authority of the committee or body.

10-15-3. Invalid Actions; Standing.

A. No resolution, rule, regulation, ordinance or action of any board, commission, committee or other policymaking body shall be valid unless taken or made at a meeting held in accordance with the requirements of NMSA 1978, Section 10-15-1. Every resolution, rule, regulation, ordinance or action of any board, commission, committee or other policymaking body shall be presumed to have been taken or made at a meeting held in accordance with the requirements of NMSA 1978, Section 10-15-1.

B. All provisions of the Open Meetings Act shall be enforced by the attorney general or by the district attorney in the county of jurisdiction. However, nothing in that act shall prevent an individual from independently applying for enforcement through the district courts, provided that the individual first provides written notice of the claimed violation to the public body and that the public body has denied or not acted on the claim within fifteen days of receiving it. A public meeting held to address a claimed violation of the Open Meetings Act shall include a summary of comments made at the meeting at which the claimed violation occurred.

C. The district courts of this state shall have jurisdiction, upon the application of any person to enforce the purpose of the Open Meetings Act, by injunction, mandamus or other appropriate order. The court shall award costs and reasonable attorney fees to any person who is successful in bringing a court action to enforce the provisions of the Open Meetings Act. If the prevailing party in a legal action brought under this section is a public body defendant, it shall be awarded court costs. A public body defendant that prevails in a court action brought under this section shall be awarded its reasonable attorney fees from the plaintiff if the plaintiff brought the action without sufficient information and belief that good grounds supported it.

D. No section of the Open Meetings Act shall be construed to preclude other remedies or rights not relating to the question of open meetings.

10-15-4. Penalty.

Any person violating any of the provisions of NMSA 1978, Section 10-15-1 or 10-15-2 is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five hundred dollars ($500) for each offense.

Commentary

Public bodies often adopt Robert's Rules of Order or a similar code of parliamentary procedure to govern the process for calling and conducting meetings and taking action. The public body must take care not to violate the Open Meetings Act in its attempt to comply with its own parliamentary rules. The Open Meetings Act is mandatory and will supersede any such local policy or procedure. While a violation of the Open Meetings Act will void the action taken, actions that do not comply with a body's own parliamentary rules may not be invalidated where there is no statutory violation.

III. Section 10-15-1. Formation of Public Policy

A. State Policy on Open Meetings

The Law

In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be 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 those officers and employees who represent them. The formation of public policy or the conduct of business by vote shall not be conducted in closed meetings. All meetings of any public body except the legislature and the courts shall be public meetings, and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings. Reasonable efforts shall be made to accommodate the use of audio and video recording devices.

Commentary

This Subsection states the basic open meetings policy of the state. The Act generally prohibits a public body from conducting public business in secret or in closed meetings and requires that such business be conducted by the public body acting as a whole at meetings open to all persons who wish to attend and listen.

The Act requires members of a public body to conduct business in public and to allow all persons desiring to attend and listen to the proceedings. These requirements effectively preclude the members of a public body from conferring privately during meetings by passing notes, sending emails and texts or other means.

Unless a public body cannot reasonably do so, it must permit members of the public attending its meetings to record or video tape the proceedings. The Act does not require a public body to allow members of the public to speak at its meetings.

Example 1:

A county manager needs the immediate approval of the board of county commissioners before executing a contract and calls the commissioners individually by telephone to secure such approval. Such a telephone poll as a substitute for official board action violates the intent of the Act. However, the board may avoid such hazards if it discusses the anticipated contract at a properly convened meeting and delegates to the county manager, its chief administrative officer, the authority to execute in the board's name. The county manager is not absolutely precluded from telephoning individual commissioners. The telephone poll is improper in this example because it is used to secure the approval of or final action by the board outside of an open meeting.

Example 2:

The city council is contemplating an ordinance adopting an 11:00 p.m. curfew for all persons under 18 years of age. Hundreds of residents attend the first meeting on the ordinance, carrying placards for and against it. The audience becomes loud and agitated and the local police remove several people for making threats against the council. The meeting lasts until 2:15 a.m. At the next meeting on the ordinance, the council limits presentations to those persons whose remarks are submitted to the council five days in advance of the meeting and places a five minute limit on such remarks.

Such restrictions are permitted. The Act requires only that persons be permitted to "attend and listen." An open public meeting is

not necessarily an open forum and, so long as the Act is complied with, public bodies may limit or not allow public debate and may take steps necessary to maintain public order.

Commentary

The courts and the legislature are excluded from the provisions of the Act that apply to other public bodies. Provisions of the Act specifically applicable to the legislature are discussed in Section IV.

Example 3:

The Disciplinary Board established by the State Supreme Court to investigate attorney misconduct holds a meeting to discuss hearing procedures. Because the Board is established by the Supreme Court and is an agency of the court, it is not subject to the Act under the express exemption for courts. Although exempt from the Act's coverage, the Supreme Court is free to promulgate regulations covering whether and when the Board's meetings are open to the public and requirements for public notice if it so chooses.

Commentary

As a policy statement, Subsection A generally sets forth the spirit or intent of The Law and serves as the guiding principle to be followed in applying the particular provisions of the Act. Where a situation is not specifically covered by the Act, doubt as to the proper course of action should be resolved in favor of openness whenever possible. Compliance with the Act is not just a matter of adhering to the Act's specific requirements, but contemplates a more flexible obligation of public bodies to open their deliberations to public scrutiny.

B. Public Meetings Subject to the Act

The Law

All meetings of a quorum of members of any board, commission, administrative adjudicatory body or other policymaking body of any state agency, any agency or authority of any county, municipality, district or any political subdivision, held for the purpose of formulating public policy, including the development of personnel policy, rules, regulations or ordinances, discussing public business or for the purpose of taking any action within the authority of or the delegated authority of any board, commission or other policymaking body are declared to be public meetings open to the public at all times, except as otherwise provided in the constitution of New Mexico or the Open Meetings Act. No public meeting once convened that is otherwise required to be open pursuant to the Open Meetings Act shall be closed or dissolved into small groups or committees for the purpose of permitting the closing of the meeting.

Commentary

This Subsection defines those meetings that are required to be open to the public, unless otherwise excepted from this requirement by the Constitution or another provision of the Act or an express and unavoidable conflict with more specific language in another law. The provisions of the Act apply to any meeting of a quorum of a policymaking public body held for the purpose of:

(a) formulating public policy;

(b) discussing public business; or

(c) taking any action that the body has authority to take.

1. Rolling Quorums

The Act's requirement for open, public meetings applies to any discussion of public business among a quorum of a public body's members. Usually, a quorum of a public body's members meets together to discuss public business or take action. However, a

quorum may exist for purposes of the Act even when the members are not physically present together at the same time and place. For example, if three members of a five member board discuss public business in a series of telephone or email conversations, the discussion is a meeting of a quorum. This is sometimes referred to as a "rolling" or "walking" quorum. The use of a rolling quorum to discuss public business or take action violates the Act because it constitutes a meeting of a quorum of the public body's members outside of a properly noticed, public meeting.

Example 4:

Mr. Green and Ms. Thomas, two members of the five-member board of directors for the ZZZ Domestic Mutual Water Users Association (a public body established under the Sanitary Projects Act), have a telephone conversation during which they decide that the board should discharge the Association's executive director. Mr. Green writes a letter to the director terminating her employment, signs the letter and passes it on to Ms. Thomas. Ms. Thomas signs the letter and delivers it to a third board member, who signs it and delivers it to a fourth board member for his signature. The fifth board member does not participate in the termination action.

The board's action violates the Act. The letter discharging the executive director and signed by four of the board members amounts to action by a quorum of the board outside of a properly noticed and conducted public meeting. It makes no difference for purposes of the Act that the four members who made up the quorum were not together in the same place when they discussed and signed the letter.

Example 5:

Mr. Jones and Mr. Smith both serve on a board of county commissioners and constitute a quorum of that board. Jones and Smith are also in the same business and frequently run into each other in the course of a business day. Moreover, they are friends and see each other at various social functions. The Act is not intended to alter the business or social relationships of these men so long as they are not meeting in their capacity as county commissioners for the purpose of conducting public business. Should public business arise in such business or social settings, the two men should avoid discussing the matter between themselves. Rather, the matter should be raised, discussed and decided in an open meeting of the board.

2. Policymaking Bodies

a. Administrative Adjudicatory Bodies

The Act broadly covers every kind of public body that can be characterized as "policymaking," including those that perform administrative adjudicatory functions. Administrative adjudicatory functions generally include holding trial-type hearings to consider facts and reaching conclusions regarding individual legal rights, duties or privileges.

b. Committees

The Act specifically refers only to meetings of a quorum of the members of a public body. Meetings of a committee of a public body that is composed of less than a quorum of the members or of non-members of the public body may not be subject to the provisions of the Act if the committee engages solely in fact-finding, simply executes the policy decisions or final actions of the public body and does not otherwise act as a policymaking body.

A committee established for fact-finding purposes by a board or commission should be distinguished from committees created by statute performing the same functions. A committee created by statute is a public body subject to the Open Meetings Act because the legislature considered the committee's functions important enough to provide it with a

separate existence as a public body, and because the committee is not simply created by a public body as a means to carry out that body's business.

In some situations, even a non-statutory committee appointed by a public body may constitute a "policymaking body" subject to the Act if it makes any decisions on behalf of, formulates recommendations that are binding in any legal or practical way on, or otherwise establishes policy for the public body. A public body may not evade its obligations under the Act by delegating its responsibilities for making decisions and taking final action to a committee. This is true even when the public body delegates its authority for holding a meeting or hearing to a single individual. If a hearing would be subject to the Act if convened by the public body, the hearing cannot be closed simply because the public body appoints a single hearing officer to hold the hearing in its place.

Excepted from this rule are hearing officers specifically authorized by statute. In those situations, the legislature has placed responsibility for holding a hearing with either the public body or the hearing officer, and the hearing officer's authority to hold a hearing is not based solely on delegation by the public body. Because, under these circumstances, the hearing officer acts under separate authority rather than as a replacement for the public body and because such a statutory hearing officer is not itself a public body, a hearing held by the hearing officer would not be subject to the Act. However, provisions of law other than the Open Meetings Act may apply and require the proceedings to be open. For example, all hearings under the Uniform Licensing Act, including those conducted by a hearing officer, must be open to the public. *See* NMSA 1978, Section 61-1-7.

Of course, where the chief policymaking official of an agency is a single individual, the Act does not apply because the official is not a public body, complete decision making authority is vested solely in the official, and no deliberation or vote is necessary for effective action.

Example 6:

The governor, the superintendent of insurance and the chief of the state police get together to discuss issues about which the three are concerned. These persons, although public officials, do not constitute a "public body" and, therefore, their meeting is not subject to the provisions of the Act.

Example 7:

The parents in a school district have been asked by the superintendent to form a group to study the district's athletic programs and make recommendations to the school board. The group's recommendations are not binding on the board. Because they act solely in an advisory capacity, and have no authority to make decisions on behalf of the board, the parents do not constitute a policymaking body of the school district and their meetings are not subject to the provisions of the Act.

Example 8:

Three members of an eight-member state licensing board are appointed by the chairman as a committee to decide on a final budget. The committee is not given specific budgetary instructions by the board and the committee members use their discretion regarding the specific allocations in the budget. Since the committee independently develops a budget for the board, the budget discussions conducted and decisions made by the committee are meetings of a policymaking body subject to the Act's requirements.

Example 9:

The Public Regulation Commission is a full-time salaried commission regularly engaged in the conduct of public business, i.e., utility rate regulation. Because the Commission is

authorized to take final action and formulate policy, any meeting of a quorum of the members at which public business is discussed, even where no action is taken or policy actually formulated, is subject to the provisions of the Act.

Example 10:

A private non-profit health services corporation receives state and federal funding for its program. Unless a specific contractual provision or a statutory mandate independent of the Act imposes the duty of open meetings, a meeting of a quorum of the board of directors of the corporation is not subject to the provisions of the Act because the board of directors is not a board of the state, county, district or other political subdivision.

Example 11:

A cabinet secretary regularly meets with his key staff on Monday mornings to go over department affairs. From time to time, he may also invite interested legislators and persons from the private sector to advise him and his staff on particular matters. The decision-making authority of the department is nevertheless vested in the secretary, and the assembled Monday group, although influential, remains advisory. These meetings, therefore, are not subject to the Act.

Example 12:

A board of county commissioners is specifically required by statute to issue a particular order upon the occurrence of certain conditions. The duty to issue the order is purely ministerial; i.e., the board may not exercise any discretion or independent judgment. No decision or deliberation of the board is necessary or permitted. The board, at a meeting properly convened according to the Act, may authorize one member or an administrator to issue the order when the requisite conditions occur, and the official action may be taken without a subsequent meeting that would otherwise be subject to the Act.

Example 13:

Pursuant to its constitution, the board of regents of a state university delegates its policymaking authority to decide post-graduate curricula to the faculty senate of the respective post-graduate departments. Meetings of the faculty senate for the purpose of exercising that authority are subject to the Act.

Example 14:

A five-member city council creates an "advisory committee" composed of two city council members and other city officials to evaluate bidders on city contracts and to recommend a limited number of the bidders to the city council for final selection. By delegating authority to the committee to narrow the choices of potential contractors for the council's consideration, the city council vests the committee with decision-making authority and subjects its meetings to the Act's requirements.

Example 15:

A state commission establishes a search committee composed of experts in the field regulated by the commission to review and evaluate applications for positions on the commission's staff. A provision in the commission's by-laws provides that the search committee's final recommendation on whom to hire is binding on the commission unless the commission receives reliable information from an independent source affecting the finalist's qualifications. Because the commission has delegated virtually all of its decision-making authority to the search committee, the committee's meetings are subject to the Act.

If the search committee's recommendations were not expressly binding on the commission, but the commission routinely adopted the

committee's final recommendation without reviewing the other applicants, the committee's meetings still would be subject to the Act. Although not required to by any express provision, the commission, as a matter of practice, would be delegating to the committee its authority to select employees.

Example 16:

A state board appoints a committee composed of two board members (less than a quorum of the board) and several members of the public to draft proposed regulations in accordance with the board's instructions regarding the substance of the regulations. The board will review the proposed regulations, make all final decisions regarding the text of the regulations and determine whether to hold a public hearing on them. Provided the committee is not statutorily created and charged with drafting regulations for the board, meetings of the committee to draft the regulations will not be subject to the Act.

Example 17:

Pursuant to statute, two incorporated villages establish an intercommunity water supply association empowered to provide a supply of water to the villages' inhabitants. The villages are the association's only members and each village appoints three persons to serve at its pleasure as commissioners of the association. To fulfill its duties, the association is granted certain government powers, including the power of eminent domain. Because it is formed by public bodies and is authorized to perform certain functions on behalf of those bodies, the association also is a public body subject to the Act.

C. Telephone Conferences

The Law

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

Commentary

This provision sets forth requirements for members of a public body who attend a meeting by conference call. The Act does not itself authorize attendance by telephone. But if members of a public body have independent authority by law or regulation to participate in meetings by telephone, the requirements will apply.

Example 18:

The state student loan authority is granted the same powers as those exercised by nonprofit organizations incorporated under state law. The Nonprofit Corporation Act allows a nonprofit's board of directors to "participate in a meeting ... by means of a conference telephone or similar communications equipment" and provides that "participation by such means shall constitute presence in person at a meeting." This law authorizes a member of the authority's governing board who is unable to attend a meeting in person to participate by conference telephone if the requirements of the Open Meetings Act are met.

Commentary

Even where attendance by telephone is allowed, it would defeat the purposes of the Open Meetings Act if this were done by a large number of board members. That is why the legislature provided that participation by telephone conference may occur only when

"difficult or impossible." Thus, in all cases where it is possible, members of a public body should attend meetings in person. Participation by telephone should occur only when circumstances beyond the member's control would make attendance in person extremely burdensome. The provision is not intended to encourage participation by telephone in cases where personal attendance would be merely inconvenient or would be more efficient or economical for the public body.

D. Notice Requirements

The Law

Any meetings at which the discussion or adoption of any proposed resolution, rule, regulation or formal action occurs and at which a majority or quorum of the body is in attendance, and any closed meetings, shall be held only after reasonable notice to the public. The affected body shall determine at least annually in a public meeting what notice for a public meeting is reasonable when applied to that body. That notice shall include broadcast stations licensed by the federal communications commission and newspapers of general circulation that have provided a written request for such notice.

Commentary

This Subsection requires that reasonable notice be given of public meetings at which proposed rules, regulations, resolutions or formal action will be discussed or adopted. In effect, this means a public body must give notice of all public meetings of a quorum of the public body. The notice must include licensed broadcast stations and newspapers of general circulation that have made a written request for notice of the public body's meetings.

Example 19:

The governing body of an irrigation district wishes to call a special meeting to discuss an emergency situation resulting from flood damage. The action of simply calling a meeting is not formal action for purposes of the notice provisions of the Act, since requiring notice of a meeting to call a meeting is obviously impractical. This might be overcome by a policy of the public body authorizing the chairman or president to call such meetings as he or she deems necessary.

Commentary

This Subsection also requires each public body to determine its notice procedures at least once a year in a public meeting. Accordingly, each public body should adopt an annual resolution or other announcement at a regularly scheduled open meeting stating its procedure for giving notice of meetings. The Act does not impose any specific maximum or minimum requirements, and what constitutes reasonable notice may vary according to the type of meeting or public body. In general, however, a reasonable notice must adequately, accurately, and sufficiently in advance inform the public of the meeting's time, place and date, and should be published or posted in a place and manner accessible to the public, such as a central location at the public body's main office where the public is allowed, as well as on a web site if the public entity has one

Example 20:

The mayor of the Village of Las Ropas calls a special meeting of the Board of Trustees. The public meeting notice states that the meeting will be held the following Monday at 8:30 a.m. in the Village Hall. At 4:30 p.m. on the Friday preceding the meeting, the meeting notice is posted on the door of the Village Clerk's office in the Village Hall. The Village Hall closes at 5:00 p.m. on weekdays and is not open at all on weekends. The meeting notice is not reasonable for purposes of the Act because members of the public interested in attending the meeting have no meaningful opportunity to see the notice before the meeting.

Commentary

In most circumstances, the Attorney General will consider reasonable a notice procedure providing ten days advance notice for regular meetings, three days prior notice for special meetings and twenty-four hours advance notice for emergency meetings. If a public body meets regularly on a specific date, time and place, e.g., the second Wednesday of each month at 7:00 p.m. at the city auditorium, the public body need not provide ten days advance notice for each individual meeting as long as the public body sets forth the requisite information in the public body's notice resolution and makes the resolution available to the public.

Regardless of whether a meeting is a regular, special or emergency meeting, the Act requires the public body to provide notice that was given as far in advance as reasonably possible under the circumstances involved. For example, an "emergency meeting" called with little or no notice must involve issues that could not have been anticipated and which, if not addressed immediately by the public body, will threaten the health, safety or property of its citizens, or likely result in substantial financial loss to the public body.

Example 21:

With only one hour's advance notice, a mayor calls an "emergency meeting" of the town's governing board to discuss the purchase of a building. The building's owner has indicated that unless the town council decides to purchase the building in twenty-four hours, he will offer it to someone else. While the town has no particular need for the building, the mayor thinks it is a good deal. The town's open meetings resolution requires ten days notice for regular meetings, three days notice for special meetings, and twenty-four hours notice, if possible, for emergency meetings. The notice given for the meeting is unreasonable because the circumstances justifying an emergency meeting are not present.

Commentary

The next example illustrates a resolution containing notice procedures that generally will be considered reasonable. (NOTE: Paragraph 7 of the model resolution is intended to comply with the requirements of the federal Americans With Disabilities Act ("ADA"). It is not required by the Open Meetings Act, but we recommend that public bodies subject to the ADA include such a notice in their notice resolutions.)

Example 22:

[NAME OF COMMISSION, BOARD OR AGENCY] RESOLUTION NO. _____

WHEREAS, THE _____ met in regular session at _____ on _____, 20__, at _____, a.m./p.m., as required by law; and

WHEREAS, Section 10-15-1(B) of the Open Meetings Act (NMSA 1978, Sections 10-15-1 to -4) states that, except as may be otherwise provided in the Constitution or the provisions of the Open Meetings Act, all meetings of a quorum of members of any board, council, commission, administrative adjudicatory body or other policymaking body of any state or local public agency held for the purpose of formulating public policy, discussing public business or for the purpose of taking any action within the authority of or the delegated authority of such body, are declared to be public meetings open to the public at all times; and

WHEREAS, any meetings subject to the Open Meetings Act at which the discussion or adoption of any proposed resolution, rule, regulation or formal action occurs shall be held only after reasonable notice to the public; and

WHEREAS, Section 10-15-1(D) of the Open Meetings Act requires the _____ _____ to determine annually what

constitutes reasonable notice of its public meetings;

NOW, THEREFORE, BE IT RESOLVED by _____ that:

1. All meetings shall be held at _____ _____ at _____, a.m./p.m., or as indicated in the meeting notice.

2. Unless otherwise specified, regular meetings shall be held each month on _____. The agenda will be available at least seventy-two hours prior to the meeting from _____, whose office is located in_____, New Mexico. The agenda will also be posted at the offices of _____ and on the _____ _____'s website at www._____.

3. Notice of regular meetings other than those described in Paragraph 2 will be given ten days in advance of the meeting date. The notice will include a copy of the agenda or information on how a copy of the agenda may be obtained. If not included in the notice, the agenda will be available at least seventy-two hours before the meeting and posted on the _____'s website at www._____.

4. Special meetings may be called by the Chairman or a majority of the members upon three days notice. The notice for a special meeting shall include an agenda for the meeting or information on how a copy of the agenda may be obtained a copy of the agenda. The agenda will be available at least seventy-two hours before the meeting and posted on the _____'s website at www._____.

5. Emergency meetings will be called only under unforeseen circumstances that demand immediate action to protect the health, safety and property of citizens or to protect the public body from substantial financial loss. The _____ will avoid emergency meetings whenever possible. Emergency meetings may be called by the Chairman or a majority of the members with twenty-four hours prior notice, unless threat of personal injury or property damage requires less notice. The notice for all emergency meetings shall include an agenda for the meeting or information on how the public may obtain a copy of the agenda. Within ten days of taking action on an emergency matter, the _____ will notify the Attorney General's Office.

6. For the purposes of regular meetings described in Paragraph 3 of this resolution, notice requirements are met if notice of the date, time, place and agenda is placed in newspapers of general circulation in the state and posted in the following locations: _____. Copies of the written notice shall also be mailed to those broadcast stations licensed by the Federal Communications Commission and newspapers of general circulation that have made a written request for notice of public meetings.

7. For the purposes of special meetings and emergency meetings described in Paragraphs 4 and 5, notice requirements are met if notice of the date, time, place and agenda is provided by telephone to newspapers of general circulation in the state and posted in the offices of _____. Telephone notice also shall be given to those broadcast stations licensed by the Federal Communications Commission and newspapers of general circulation that have made a written request for notice of public meetings.

8. In addition to the information specified above, all notices shall include the following language:

> *If you are an individual with a disability who is in need of a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing or meeting, please contact*

_____ at _____ at least one (1) week prior to the meeting or as soon as possible. Public documents, including the agenda and minutes, can be provided in various accessible formats. Please contact _____ at _____ if a summary or other type of accessible format is needed.

9. The _____ may close a meeting to the public only if the subject matter of such discussion or action is excepted from the open meeting requirement under Section 10-15-1(H) of the Open Meetings Act.

(a) If any meeting is closed during an open meeting, such closure shall be approved by a majority vote of a quorum of the _____ taken during the open meeting. The authority for the closed meeting and the subjects to be discussed shall be stated with reasonable specificity in the motion to close and the vote of each individual member on the motion to close shall be recorded in the minutes. Only those subjects specified in the motion may be discussed in the closed meeting.

(b) If a closed meeting is conducted when the _____ is not in an open meeting, the closed meeting shall not be held until public notice, appropriate under the circumstances, stating the specific provision of law authorizing the closed meeting and the subjects to be discussed with reasonable specificity, is given to the members and to the general public.

(c) Following completion of any closed meeting, the minutes of the open meeting that was closed, or the minutes of the next open meeting if the closed meeting was separately scheduled, shall state whether the matters discussed in the closed meeting were limited only to those specified in the motion or notice for closure.

(d) Except as provided in Section 10-15-1(H) of the Open Meetings Act, any action taken as a result of discussions in a closed meeting shall be made by vote of the _____ in an open public meeting. Passed by the _____ _____ this ___ day of _____, 20__.

Commentary

As indicated in the model notice resolution set forth above in Example 22, meeting notices must include specified information about agendas and all meetings, including closed meetings, require advance notice to the public. The specific provisions of the agenda requirements and procedures for closing meetings will be discussed below.

E. Reconvened Meetings

The Law

A public body may recess and reconvene a meeting to a day subsequent to that stated in the meeting notice if, prior to recessing, the public body specifies the date, time and place for continuation of the meeting, and, immediately following the recessed meeting, posts notice of the date, time and place for the reconvened meeting on or near the door of the place where the original meeting was held and in at least one other location appropriate to provide public notice of the continuation of the meeting. Only matters appearing on the agenda of the original meeting may be discussed at the reconvened meeting.

Commentary

Sometimes, a public body may convene a meeting and then, because of the length of the meeting or other circumstances, be forced to recess and continue the meeting on another day. If this happens, the public body, before recessing the meeting, must state the date, time and place for continuation of the meeting. Immediately after the meeting is recessed, the public body also must post notice of the continuation on or near the door of the place where the meeting originated and in at least one other location where it is likely that people interested in attending the meeting will see the

notice. The public body may not discuss items at the reconvened meeting that were not on the agenda of the original meeting.

Example 23:

A municipal zoning commission holds a hearing on a variance request. More people than anticipated appear to provide testimony for and against the variance. The commission wants to be sure that it receives input from all interested parties. At midnight, there are still several people left who wish to testify. The commission votes to recess the meeting and, before recessing, announces that the meeting will be reconvened the following day at 5:30 p.m. in the same room. After the meeting is recessed, a notice stating that the meeting will reconvene at the specified date, time and place is posted next to the door of the place where the meeting was held and on the bulletin board outside the commission's offices.

Example 24:

A state board holds a meeting that is interrupted by a bomb threat in the building. A search of the building reveals that the threat was a crank call, but the search takes two hours to complete. When they return to the meeting, the board members realize that they do not have time to discuss the last item on the agenda. They vote to reconvene the meeting two days later and comply with the requisite notice requirements. The next day, the board's administrator contacts the chair to request a meeting to decide on the purchase of office equipment. Although the board plans to reconvene the following day, it cannot discuss the purchase because it was not on the original meeting's agenda and is not an emergency. Instead, the chair must call a separate special meeting to discuss the purchase or wait to discuss the purchase at the next regular meeting.

F. Agenda

The Law

Meeting notices shall include an agenda containing a list of specific items of business to be discussed or transacted at the meeting or information on how the public may obtain a copy of such an agenda. Except in the case of an emergency or in the case of a public body that ordinarily meets more frequently than once per week, at least seventy-two hours (72) hours prior to the meeting, the agenda shall be available to the public and posted on the public body's web site, if one is maintained. A public body that ordinarily meets more frequently than once per week shall post a draft agenda at least seventy-two (72) hours prior to the meeting and a final agenda at least thirty-six (36) hours prior to the meeting. Except for emergency matters, a public body shall take action only on items appearing on the agenda. For purposes of this Subsection, an "emergency" refers to unforeseen circumstances that, if not addressed immediately by the public body, will likely result in injury or damage to persons or property or substantial financial loss to the public body. Within ten days of taking action on an emergency matter, the public body shall report to the attorney general's office the action taken and the circumstances creating the emergency; provided that the requirement to report to the attorney general is waived upon the declaration of a state or national emergency.

1. Seventy-Two Hour Requirement

Public bodies must include an agenda in their meeting notices or information on where a copy of the agenda may be obtained. With two exceptions, a public body must make the agenda available to the public at least 72 hours before a meeting. The 72-hour requirement applies regardless of whether it includes a Saturday, Sunday or holiday. For example, a public body holding a meeting on a Monday at 9:00 a.m. would meet the 72-hour requirement if it made the agenda available on Friday by 9:00 a.m.

The exceptions to the 72-hour requirement apply to: (1) meetings held to address an

emergency, which are discussed in more detail below, and (2) public bodies that ordinarily meet more than once a week. Those public bodies must post a draft agenda at least 72 hours before a meeting and a final agenda at least 36 hours before the meeting.

2. Action on Agenda Items

A public body may discuss a matter, but cannot take action, unless the matter is listed as a specific item of business on the agenda. Action on items that are not listed on the agenda for a meeting must be taken at a subsequent special or regular meeting.

Example 25:

A mutual domestic water users association reserves an hour of its regular board meeting for public comment. During the public comment portion of a meeting, a member of the association complains about frequent interruptions in water service. The topic was not listed on the agenda for the meeting. If they choose, the board members may discuss options for addressing the complaint, but must delay any action on it until a subsequent meeting after the issue is listed on the agenda available to the public seventy-two hours before the meeting.

3. Specific Agenda Items

The agenda must contain a list of "specific items" of business to be discussed or transacted at the meeting. The requirement for a list of specific items of business ensures that interested members of the public are given reasonable notice about the topics a public body plans on discussing or addressing at a meeting. A public body should avoid describing agenda items in general, broad or vague terms, which might be interpreted as an attempt to mislead the public about the business the public body intends to transact. This is an especially important consideration when a public body intends to act on an agenda item.

Example 26:

The agenda for a school board meeting contains the following items of business:

1. Old Business
2. New Business
a. vending machines in the cafeteria
b. personnel matters

Under item 1, the board discusses and acts on three contracts. Under item 2(a), the board discusses and votes to allow vending machines in the middle school cafeteria. Under item2(b), the board dismisses the director of the district's administrative office and reorganizes the remaining staff positions. The board's vote under item 2(a) is proper. In contrast, the board's actions under items 1 and 2(b) violate the Act because those items were not listed as "specific items of business" on the agenda, as required by the Act. Items 1 and 2(b) are described in such general and vague terms that they do not give the public a reasonably clear idea about the actions the board intended to take at the meeting.

Commentary

The Act relaxes the agenda requirement in cases of emergency. The public body must still provide an agenda for an emergency meeting, but it need not be available twenty-four hours before the meeting. In addition, if an emergency matter arises too late to appear on a meeting's agenda, the public body is permitted to discuss and take action on the matter. For purposes of the agenda requirements, an "emergency" is a matter that could not be foreseen by the public body and that requires immediate attention by the public body to avoid imminent personal injury or property damage or substantial financial loss to the public body.

Example 27:

One hour before its regular meeting, a county commission is informed by the president of the bank holding deposits of county funds that the

bank is about to fail. Because of certain accounting procedures, the commission's deposits at the bank for the day total $50,000 above the amount covered by federal deposit insurance. The county commission may consider and act on the matter at its regular meeting to avoid the $50,000 loss.

Example 28:

A local school board calls a special meeting with three days notice. The meeting notice states that the only item to be discussed is the need for updated instructional materials for the following school year. The school board is not required to do anything else to comply with the agenda requirement of the Act.

Commentary

When a public body takes action on an emergency matter, it has ten days to report to the Office of the Attorney General. The report must include the action taken and the circumstances creating the emergency. Once it receives the report, the Office of the Attorney General will evaluate whether the public body properly treated the matter as an emergency for purposes of the Act's agenda requirements.

When a state or national emergency has been declared, the Act waives the requirement to report to the attorney general.

G. Minutes

The Law

The board, commission or other policymaking body shall keep written minutes of all its meetings. The minutes shall include at a minimum the date, time and place of the meeting, the names of members in attendance and those absent, the substance of the proposals considered and a record of any decisions and votes taken that show how each member voted. All minutes are open to public inspection. Draft minutes shall be prepared within ten working days after the meeting and shall be approved, amended or disapproved at the next meeting where a quorum is present. Minutes shall not become official until approved by the policymaking body.

Commentary

All public bodies subject to the provisions of this Act are required to keep written minutes of all open meetings. (As discussed in the next section, minutes need not be kept during closed sessions.) Minutes of open meetings shall record at least the following information:

(a) the date, time and place of the meeting;
(b) the names of all members of the public body in attendance and a list of those members absent;
(c) a statement of what proposals were considered; and
(d) a record of any decisions made by the public body and of how each member voted.

This means that minutes must contain a description of the subject of all discussions had by the body, even if no action is taken or considered. The description may be a concise, but accurate, statement of the subject matter discussed and does not have to be a verbatim account of who said what. It may be useful, although it is not required, to also record in the minutes the other persons invited or present who participate in the deliberations.

A draft copy of the minutes is required to be prepared within ten working days of the meeting. Draft copies of minutes must be available for public inspection and should clearly indicate on the draft that they are not the official minutes and are subject to approval by the public body.

The public body must approve, amend or disapprove draft minutes at the next meeting of a quorum, and the minutes are not official until they are approved. Official minutes open to public inspection under this Subsection are also

subject to public inspection under the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 to -12.

Example 29:

A quorum of the members of a state commission meet with the commission's staff to discuss some technical matters related to internal management. The matters discussed are not exempted by the Act from the open meetings requirement. The discussions conducted by a quorum of the commission constitute the discussion of public business and minutes must be kept.

Commentary

The statute's requirement that the minutes record how the members voted on proposals does not require a roll call on each vote, providing the vote of each member may be ascertained. Thus, a unanimous vote need not be recorded by listing the members. Where the vote is not unanimous, minutes that state "four members in favor, Mr. Jones against the motion" adequately reflects how the members voted as long as the minutes also list the members in attendance. If a vote taken by roll call is required in a particular situation by the rules of parliamentary procedure or otherwise, the minutes should record the vote of each individual member. The Act's requirement that the minutes show how each member voted on a matter decided by the public body precludes the members from voting anonymously.

Example 30:

At a regular open meeting, the State Astronomy Board elects a chairperson. The members want to vote on the nominees by secret ballot. This is not allowed by the Act because the minutes must reflect how each member voted.

H. Exceptions

The Law

The provisions of Subsections A, B and G of this section do not apply to...

Commentary

Subsection H prescribes the circumstances under which certain meetings or portions of meetings are not subject to the open meetings and minute-taking requirements of the Open Meetings Act. Because the basic policy established by the Act favors open meetings, the Act must be strictly followed when meetings are to be closed. As a general rule, meetings may only be closed when the matter to be considered falls within one of the enumerated exceptions defined in the Act and discussed in detail below.

A few closures may be implied from or required by other laws or constitutional principles that specifically or necessarily preserve the confidentiality of certain information. Aside from these limited circumstances, however, no exception to the Open Meetings Act can be implied. The following examples illustrate such laws.

Example 31:

Section 12-6-5 of the Audit Act provides that an audit report does not become a public record, i.e., subject to public inspection, until five days after the auditor releases it to the audited agency. Where the agency being audited is governed by a public body subject to the Open Meetings Act and where release of the report occurs at an exit conference at which a quorum of the members of the body is present, such exit conference need not be open to the public in order to preserve the confidentiality of the information protected by Section 12-6-5.

Example 32:

Section 61-1-7 of the Uniform Licensing Act provides that hearings generally shall be open to the public, but gives a board authority to hold a closed hearing "in cases in which any constitutional right of privacy of an applicant or licensee may be irreparably damaged ... if the board ... so desires and states the reasons for

this decision in the record." This provision is consistent with the policy of the Open Meetings Act that permits closure when required by the constitution. Accordingly, a board may close a hearing pursuant to Section 61-1-7 if necessary to safeguard privacy interests protected by the New Mexico or United States Constitutions.

Example 33:

A state licensing board holds a hearing at which certain evidence to be presented is alleged to be constitutionally protected. The party making the allegation requests that the hearing be closed during the times the evidence is presented. The board should determine, through a procedure open to the public, whether disclosure would violate any constitutional rights. In making this determination, the board must apply the constitutional test appropriate to the rights asserted (e.g., in some circumstances the test involves balancing the harm to the party resulting from disclosure against the harm to the public and others from nondisclosure). If the board decides that disclosure will violate the party's constitutional rights, the board can properly close those portions of any subsequent hearing that involve the protected evidence.

Example 34:

A city housing authority responsible for reviewing and approving applications for subsidized home loans for low-income families must necessarily consider the family's financial records to determine if the family qualifies under the program. Although the housing authority is concerned with preserving the privacy of the applicants, the information required in order to establish eligibility for the loans is not protected and may be discussed in open meetings. As there is no basis for closing the meetings, the housing authority should respect the privacy of the applicants by asking only for the specific information required by the program and no more.

1. Licensing

The Law

Meetings pertaining to issuance, suspension, renewal or revocation of a license except that a hearing at which evidence is offered or rebutted shall be open. All final actions on the issuance, suspension, renewal or revocation of a license shall be taken at an open meeting.

Commentary

This paragraph permits a public body to close a meeting to discuss certain matters pertaining to a particular license. Excepted are hearings conducted to present or rebut evidence in support of disciplinary action against a licensee, which must be open. The public body may close its meeting to deliberate, but all final actions concerning a license must be made in an open meeting.

Boards subject to the Uniform Licensing Act or the Administrative Procedures Act must comply with applicable procedures required by those acts for the issuance, suspension, renewal or revocation of a license.

Example 35:

The State Board of Psychologist Examiners meets in closed session to discuss an applicant for a license to practice psychology. The applicant has failed the examination for professional practice in psychology required by statute. After its discussion, the Board opens the meeting and votes to deny the application. In this situation, the Uniform Licensing Act does not require a hearing, so the board's action is proper.

Example 36:

To ensure that complaints against licensed practitioners are handled efficiently, the State Board of Medical Examiners establishes a complaint committee. The committee is charged with reviewing complaints made to the Board and deciding which complaints should be presented to the Board for possible action. To decide which complaints will be acted on by the

Board, the committee applies criteria established by the Board. Under these circumstances, the committee is executing rather than establishing Board policy and is not subject to the Act.

2. Limited Personnel Matters

The Law

Limited personnel matters; provided that for purposes of the Open Meetings Act, "limited personnel matters" means the discussion of hiring, promotion, demotion, dismissal, assignment or resignation of or the investigation or consideration of complaints or charges against any individual public employee; provided further that this Subsection is not to be construed as to exempt final actions on personnel from being taken at open public meetings; nor does it preclude an aggrieved public employee from demanding a public hearing. Judicial candidates interviewed by any commission shall have the right to demand an open interview.

Commentary

This exception permits a public body to close meetings for the purpose of discussing certain matters concerning individual employees of the public body. Specifically, a public body may close a meeting to discuss the hiring, promotion, demotion, dismissal, assignment or resignation of an individual public employee or the investigation or consideration of complaints or charges against an individual public employee. A public body may also close a meeting for matters that are closely related to those specifically listed in the exception, such as performance appraisals and interviews with job candidates.

The exception does not permit a public policymaking body to retreat into executive session to discuss personnel policies, procedures, budget items, and other issues not concerning the qualifications or performance of specific individuals. This point is emphasized in Section 10-15-1(B) of the Act (discussed above), which specifies that meetings of a public body held to formulate public policy "including the development of personnel policy, rules, regulations or ordinances" are open meetings.

Example 37:

A county commission wishes to discuss whether its budget permits it to hire additional staff. The meeting cannot be closed under the limited personnel matters exception because the commission is not considering an individual employee.

Example 38:

The governing body of a municipality is considering a contract to retain an attorney to represent the municipality on a part-time basis. The attorney is to be an independent contractor and not an employee of the municipality. This paragraph does not authorize closing a meeting of the governing body to select an attorney because the matter to be considered does not concern a public employee.

Example 39:

A local school board, pursuant to statutory authority, meets to appoint a person to fill a vacancy on the board. This paragraph does not authorize closing the meeting to consider that appointment because a board member is not an employee of the school district.

Example 40:

A city council meets to conduct a performance evaluation of the city manager. The evaluation may be conducted in a closed meeting. Although not expressly listed among the actions justifying closure under the limited personnel matters exception, it is closely related to the specified actions, all of which require discussion of an employee's job performance and qualifications. For example, a performance evaluation likely

would provide the basis for any promotion, demotion, dismissal, assignment or resignation.

Example 41:

During its regular meeting, a state commission discusses a contract it has entered into with a person who happens to be employed by a nearby municipality. The state commission cannot close its meeting to discuss the contractor under the limited personnel matters exception. Although the contractor also is a public employee, she is not an employee of the state commission. This exception generally applies only to discussions about individuals employed by the public body invoking the exception.

Commentary

In all cases, a public body must take final action on a personnel matter falling within this exception in open session. This ensures that all final actions taken on personnel matters are announced publicly and the position of each member on the issue is recorded in the official minutes.

Example 42:

A school board meets to consider applicants for the position of superintendent. Discussion of the applicants' qualifications is conducted in closed session but the final decision or vote of the board with respect to hiring one of the applicants as superintendent must be taken in open session.

Example 43:

An administrative licensing board meets in closed session to review complaints against the executive director. The board takes no action. Therefore, nothing needs to be presented by the board during open session.

Commentary

The exception states that it does not preclude an individual employee from demanding an open hearing. This provision does not confer the right to a hearing, but when an employee has a statutory or constitutional right to a hearing spelled out under another federal or state law, the public body cannot rely on the limited personnel matters exception to close the hearing if the employee wants it to be open. For example, the requirements of due process of law, a constitutional right, often mandate that before a right or privilege may be denied by a public body, the person possessing or seeking to acquire the right must be provided notice of the anticipated action and an opportunity to be heard prior to a final decision. If an employee of a public body is entitled to such a hearing before the public body can take disciplinary or other adverse action against the employee, the employee may demand and obtain an open hearing. Similarly, even if no law provides an employee with the right to a hearing, a public body that elects to give an employee the opportunity to be heard in connection with a personnel matter covered by the exception must conduct the hearing in open session at the employee's request.

Example 44:

A board of county commissioners meets to discuss a complaint that a county building inspector had attempted to rob a private citizen while on duty. The board is considering disciplinary action but wishes to wait until law enforcement authorities have completed their investigation. The board meets, goes into executive session, and decides to suspend the employee with pay. The board takes action in open session. The employee demands an immediate open hearing, even though the county personnel policy does not provide for a hearing for suspension. If the commission is not required by its policies or the state and federal constitutions to conduct a hearing at this stage, no hearing need be granted.

Example 45:

An employee of AAA City is notified by her supervisor that she was to be terminated for

insubordination. Pursuant to the City's personnel policies, the employee requests a post-disciplinary hearing before the City Council. By statute and under the City Charter, the City Council has the power to hire and discharge employees. The City Council delegates its authority to conduct the hearing to a hearing officer. The employee requests a public hearing.

The City's personnel policies give an employee who is discharged the right to a post-disciplinary hearing at the employee's request. Although an individual hearing officer is conducting the hearing, the hearing is subject to the Open Meetings Act because the hearing officer is exercising the City Council's delegated authority to terminate employees. Accordingly, the hearing officer must conduct the hearing in public because the employee requested an open hearing.

Commentary

The limited personnel matters exception confers upon candidates for judicial office the right to a public interview by a commission charged with conducting such interviews.

3. Administrative Adjudicatory Deliberations

The Law

Deliberations by a public body in connection with an administrative adjudicatory proceeding. For purposes of this paragraph, an "administrative adjudicatory proceeding" means a proceeding brought by or against a person before a public body in which individual legal rights, duties or privileges are required by law to be determined by the public body after an opportunity for a trial-type hearing. Except as otherwise provided in this section, the actual administrative adjudicatory proceeding at which evidence is offered or rebutted and any final action taken as a result of the proceeding shall occur in an open meeting.

Commentary

This paragraph permits a public body that conducts "administrative adjudicatory proceedings" to close the proceedings to deliberate. Examples of administrative adjudicatory proceedings contemplated by the exception include factual hearings conducted before issuing licenses and permits, licensee and employee disciplinary hearings, hearings like those conducted by the Human Rights Commission to consider alleged civil rights violations, and hearings held to consider wage and other labor related claims. Like a trial or other court hearing, these proceedings involve the presentation of facts and evidence in a public hearing and an impartial decision maker that must weigh the evidence presented and apply the applicable law, regulation or rule to the particular situation before being heard. Deliberations covered by the exception include discussions among the members of the public body at the conclusion of an administrative adjudicatory hearing during which the evidence, facts and law presented at the hearing are considered to reach a final decision. Deliberations also include discussions during the hearing concerning how to rule on motions and objections made by the parties.

The exception extends to all administrative adjudicatory proceedings the same right to deliberate in private that the Act specifically provides for licensing and personnel hearings. It also parallels the same privilege judges and courts have to weigh and consider in private evidence presented during a trial before reaching their final decision. Permitting agencies to deliberate in private under the specified circumstances encourages the thorough and candid consideration of evidence presented through witnesses or otherwise. As with the licensing and personnel exceptions, the actual proceeding where evidence is offered or rebutted and any final action or decision resulting from the proceeding must occur in a public meeting.

Example 46:

The Human Rights Commission receives a complaint alleging that a hotel refused service to the complainant in violation of her civil rights. The Commission schedules a public hearing during which evidence is presented and witnesses testify on both sides of the issue. At the conclusion of the hearing, the Commission may close the hearing to consider the evidence and the credibility of the witnesses to determine what the facts are and how to apply the Act. The Commission must vote on and announce its final decision in a public meeting. This may occur either on the same day as the hearing or during a subsequent public meeting.

Commentary

The exception applies only where a public body is required by law to determine individual legal rights, duties or privileges after providing the opportunity for a trial-type hearing. Public bodies may not misuse the exception as a means of avoiding the open meeting requirements. In other words, unless the Act mandates that a matter be determined after an administrative adjudicatory proceeding, a public body cannot hold a "hearing" on an issue and then close its meeting to "deliberate" if the issue is one that otherwise would have to be discussed in public and is not one for which the Act mandates a trial- type process.

Example 47:

One of the items discussed at a village council meeting is a contract for garbage collection. One councilor suggests that the village hold a hearing to hear each bidder's proposal, and then go into executive session to "deliberate" on which proposal to accept. The councilor's suggestion is correctly voted down after the council's attorney advises that the selection of a contractor is governed by the Procurement Code, which does not authorize an administrative adjudicatory proceeding prior to awarding a contract.

4. Personally Identifiable Student Information

The Law

The discussion of personally identifiable information about any individual student, unless the student, his parent or guardian requests otherwise.

Commentary

This exception is intended to cover discussions that involve personally identifiable information about a student. The exception reflects the protection the federal Family Educational Rights and Privacy Act ("FERPA") provides for similar information in educational records. *See* 20 U.S.C. Section 1232g. Under FERPA, a school risks losing federal funding if it has a policy or practice of permitting the release of records containing information directly related to a student or "personally identifiable information" contained in those records. Federal regulations promulgated under FERPA define "personally identifiable information" to include a student's name; parent's or other family member's name; the address of a student or student's family; a student's social security number, student number or other personal identifier; and a list of personal characteristics or other information that would make the student's identity easily traceable. *See* 34 C.F.R. Section 99.3.

Essentially, therefore, the exception for meetings to discuss personally identifiable information permits a school board or board of education to close a meeting whenever it discusses an individual student, unless the student, or his parent or guardian, requests that the discussion occur in public. Although the exception does not expressly limit its application, the context of the exception makes it clear that it is not meant to apply to any public body that discusses an individual who happens to be a student somewhere. Like FERPA, which applies only to records held by educational agencies and institutions, only those public

bodies that govern or regulate school districts or educational institutions, such as local school boards and university boards of regents, can legitimately rely on the exception to close a meeting.

Example 48:

A local school board meets to discuss whether to suspend a high school student. Unless the student or her parents request a public hearing, the school board should hold a closed meeting to discuss the circumstances leading to the disciplinary action and what action is appropriate.

Example 49:

The Real Estate Commission holds a public hearing before revoking a broker's license. The broker is a student at the local community college. The Commission cannot close the hearing on the basis that it will involve the discussion of personally identifiable information about the broker.

Commentary

As with the exception for limited personnel matters, a school board or similar public body cannot rely on this paragraph to close a meeting to discuss or take action on educational policies and procedures, budgetary matters and other issues that involve students generally. The exception applies only to discussions relating to individual students. Other specific statutes governing schools also may require public meetings to discuss general student matters. For example, *see* NMSA 1978, Section 22-5-4.3 (requiring local school boards to involve parents, school personnel and students in, and to hold public hearings on, the development of student discipline policies).

5. Collective Bargaining

The Law

Meetings for the discussion of bargaining strategy preliminary to collective bargaining negotiations between the policymaking body and a bargaining unit representing the employees of that policymaking body and collective bargaining sessions at which the policymaking body and the representatives of the collective bargaining unit are present.

Commentary

This exception allows a public body that is involved, or is considering becoming involved, in collective bargaining to discuss its preliminary strategy in closed session and to conduct negotiations with representatives of a collective bargaining unit in closed session. A "bargaining unit" for purposes of the exception is a group of employees with certain occupational characteristics (e.g., blue collar, secretarial, clerical, etc.) that has been confirmed or designated as appropriate for collective bargaining purposes. The "representative of a collective bargaining unit" is generally a labor organization or union that represents employees regarding the terms and conditions of employment.

Example 50:

An ad hoc group of employees of a municipality has formed to petition the governing body for increased salaries. Neither the governing body's preliminary discussion of the request nor the negotiations between representatives of the employees' group and the governing body may be conducted in closed session because the group of employees is not a "bargaining unit" or "representatives of the collective bargaining unit."

Example 51:

The governing board of a local school district receives a request from a local chapter of the state's leading teacher's organization to collectively bargain on behalf of teachers in the district. The organization has been certified by the local labor relations board as the teacher's exclusive representative. Discussion of the

bargaining request may be conducted in closed session.

Commentary

Before the exception will apply, there must be a labor organization and bargaining unit of the public body's employees in existence. In other words, the exception does not cover discussions of general collective bargaining policy by the public body in anticipation of potential negotiations in the future.

Example 52:

A school board is debating whether to establish a local labor relations board and has before it a draft labor/management relations resolution that would create, and establish procedures for, the local board. At this time, no bargaining unit or representative has proposed negotiations, and the board would be discussing only general collective bargaining policy to be applied in the event such bargaining occurs. Therefore, under the collective bargaining exception to the Act, the discussion must occur in an open meeting and the school board may not go into executive session to discuss the resolution.

Commentary

Collective bargaining by public employees generally is governed by the Public Employees Bargaining Act, NMSA 1978, ch. 10, art. 7E. Section 10-7E-17(G) of that Act contains a provision allowing closed meetings in circumstances similar to those set forth in the Open Meetings Act. It provides for closure of the following meetings:

(1) meetings for the discussion of bargaining strategy preliminary to collective bargaining negotiations between a public employer and the exclusive representative of the public employees of the public employer;

(2) collective bargaining sessions; and

(3) consultations and impasse resolution procedures at which the public employer and the exclusive representative of the appropriate bargaining unit are present.

While the first two paragraphs are coextensive with the collective bargaining exception of the Open Meetings Act, the third paragraph describes an additional situation where closure is justified.

6. Certain Purchases

The Law

That portion of meetings at which a decision concerning purchases in an amount exceeding two thousand five hundred dollars ($2,500) that can be made only from one source and that portion of meetings at which the contents of competitive sealed proposals solicited pursuant to the Procurement Code are discussed during the contract negotiation process. The actual approval of purchase of the item or final action regarding the selection of a contractor shall be made in an open meeting.

Commentary

This paragraph authorizes a public body to discuss two types of purchases in closed session. First, the exception permits a closed meeting to discuss:

(a) a purchase;

(b) that exceeds $2,500 in amount; and

(c) that can only be made from one source.

The final action taken to approve such a purchase must be taken at an open meeting.

Example 53:

The governing board of a municipality is unable to purchase a particular kind of computer equipment compatible with its other equipment

but has finally located a party who is willing to lease the equipment to the municipality for six months. The value of the computer equipment if purchased outright is $20,000 and the total rental amount of the lease is $2,000. In determining whether discussion of this lease may occur in closed session, the governing body should consider the following:

(a) Whether the term "purchase" used in the exemption includes leases. Because the legislature did not use a broader term for acquiring property, it might be argued that it did not intend to include pure lease transactions. By contrast, Section 10-15-1(H)(8) of the Act refers to the "purchase, acquisition or disposal" of real property, clearly indicating the legislature's intent to encompass all means of acquiring real property. Limiting the meaning of purchase also is consistent with the presumptions that all meetings of a public body are open and that the exceptions be construed narrowly. On the other hand, the terms "purchases" and "one source" in the exception indicate that the legislature had the Public Purchases Act (now the Procurement Code) in mind when it drafted the exemption. At that time, the Public Purchases Act broadly defined "purchasing" as "procuring" materials and services. There also is no obvious policy reason for including purchases but not leases within the exemption. Accordingly, it is reasonable to conclude that, when it drafted the exemption, the legislature intended that the term "purchases" be employed broadly to include leases.

(b) The amount of the lease. Regardless of the value of the computer, the amount actually to be expended by the municipality pursuant to the lease is $2,000.

(c) Available sources. Under these facts, there would appear to be only a single source.

The governing body could not discuss this lease in closed session because, although the transaction arguably may be a purchase for purposes of the exception and can be made from only one source, the amount to be expended does not exceed $2,500.

Example 54:

A board of county commissioners is considering the purchase of a particular dump truck for $30,000. While there are comparable trucks made by several manufacturers that would serve the same purpose, the governing body desires one particular model since it is the same brand as the county's existing dumpsters. However, as long as there are comparable models available from other sources, this may not be considered a purchase from a single source for purposes of the Act and must be discussed in open session.

Commentary

As with the exception for limited personnel matters, the requirement that the actual approval of the purchase be made in open session may appear to be a mere formality; but again, this requirement makes the particular action taken by the governing body a matter of public record and informs the public about how each member of the body voted.

Example 55:

In closed session, a school board discusses the controversial purchase of a $2,750 painting of a cougar to hang in the auditorium as the symbol of the high school basketball team. The painting is available from only one artist. The closed session is proper, but when the discussion is concluded, the board must reconvene in open session to vote on the proposed purchase.

Commentary

The second situation where a public body may close a meeting under this paragraph is intended to parallel the similar protection provided under Section 13-1-116 of the Procurement Code. That provision states that the contents of proposals submitted in response to a public agency's request for proposals "shall not be disclosed so as to be available to competing

offerors during the negotiation process." In addition to enhancing a public body's ability to get the best deal, this exception also tends to level the playing field for offerors.

Example 56:

A water district issues a request for proposals for auditing services. It receives six (6) proposals, none of which exactly fit the district's needs. The district's governing board may hold a closed session to discuss the offers and decide how to handle negotiations with the individual offerors.

Commentary

Once the negotiating process is finished, there is no longer a need for the exception and the agency's final action to select a contractor must be taken in an open meeting.

7. Litigation

The Law

Meetings subject to the attorney-client privilege pertaining to threatened or pending litigation in which the public body is or may become a participant.

Commentary

This exception to the Act is intended to incorporate into the open meetings law the attorney-client privilege protecting confidential communications between attorneys and their public agency clients for the limited purpose of allowing a public body to meet in closed session with legal counsel to discuss threatened or pending litigation involving the public body. Public bodies, no less than private parties to litigation, are entitled to effective representation of counsel, including the opportunity to confer without disclosing the substance of the discussion. However, public bodies may invoke the attorney-client privilege to close a meeting only when the public body is involved in a lawsuit or faced with an actual or credible threat of litigation. Absent such a threat, the exception does not protect discussions about "possible" or "potential" litigation.

Generally, the public body's attorney should be present in the closed meeting, either in person or by telephone. In certain limited situations, it may be permissible for a public body to close a meeting to discuss legal advice about litigation that is given by letter or other written memorandum. In all cases, however, to legitimately invoke the pending litigation exception, the closed discussion must involve communications between the public body and its attorney.

Example 57:

A local school board meets to discuss the award of a contract to one of several bidders. The board members would like to close the meeting pursuant to this exception on the theory that it is always possible that one of the unsuccessful bidders may threaten litigation. If there is no actual and credible threat of litigation by one of the bidders, this would be an unwarranted extension of the exception and the meeting may not be closed.

Example 58:

The city council is conducting a hearing on proposed zoning regulations. Several witnesses raise plausible questions about the legality of one of the proposed rules and state that they definitely would challenge the rules in court if adopted. At the hearing or at a later time, the council may meet in closed session with its attorney to evaluate the legality of the proposed rule and make the determination as to whether it could be defended in court.

Example 59:

The attorney for a licensing board feels that a recent Supreme Court decision may affect the validity of certain regulations adopted by the board. Absent a pending lawsuit on this issue in

which the board may participate or an actual threat of litigation, the board and its attorney may not meet in closed session to discuss the impact of the court decision and whether it is necessary to amend the regulations to prevent a possible legal action from being filed against the board.

Example 60:

A municipality and a rancher have both claimed ownership of a particular piece of property. They are attempting to negotiate a settlement of the dispute to avoid having to go to court. The governing body of the municipality properly meets in closed session with its attorney to determine how much they are willing to give up to reach a settlement. Later, at a subsequent meeting, the governing body may go into executive session to discuss a letter from the attorney setting forth the proposed settlement terms and her advice regarding acceptance of the terms.

Example 61:

A teacher who was terminated by a school board has brought an action for breach of contract against the board. The lower court decided in favor of the teacher. The school board and its attorney may meet in closed session to determine whether or not to appeal to a higher court.

Commentary

This exception does not apply only when a public body is sued or is threatened with litigation. It also may be used to close a meeting when the public body wants to consult with its attorney about a lawsuit the public body has initiated or is considering initiating against a defendant.

Example 62:

The result of a lawsuit filed by an individual against another individual will substantially affect a licensing board's ability to apply certain laws. The board, although not a party to that litigation, may meet in closed session with its attorney to discuss filing a brief as amicus curiae (friend of the court).

Commentary

It is important to note that this exception allows a public body to rely on the attorney-client privilege to close a meeting only when the public body is involved in pending or threatened litigation. There is no exception allowing a public body to rely generally on the attorney-client privilege to close a meeting. Aside from discussions with its attorney that are otherwise excepted from the Act, the public body will either have to hold discussions with its attorney in an open meeting or rely on other means to protect its communications with its attorney that do not violate the Act. For example, the attorney might communicate with each member of the public body individually through one-on-one conversations or letters. Keep in mind, however, that if the attorney's advice is discussed among a quorum of the public body's members--in person, by e-mail, by telephone or otherwise--the discussion must be conducted in accordance with the Act, including the requirements for a public meeting, unless it falls within one of the Act's exceptions.

Example 63:

A five-member state commission wants to make a gift of public money to a worthy charity. The commission's attorney is concerned that the gift may violate the state constitution. She sends a letter to each individual commissioner voicing her concerns. The topic of the gift is placed on the agenda for the next commission meeting. The commissioners' discussion of the gift at that meeting must occur in public, even if they discuss the attorney's advice regarding the gift, because the topic is not covered by one of the Act's exceptions.

8. Real Property and Water Rights

The Law

Meetings for the discussion of the purchase, acquisition or disposal of real property or water rights by the public body.

Commentary

This exception is intended to enable a public body to consider the purchase, acquisition or disposal of real property or water rights without the risk of alerting those who could take action that would result in lost opportunities or greater costs to the public body. The exception applies only to discussions of the proposed transactions it covers. Action on the purchase, acquisition or disposal of real property or water rights by the public body must take place in an open meeting, as required by Section 10-15-1(B).

Example 64:

A board of county commissioners is considering acquiring land for a playground and purchasing playground equipment. The discussion concerning the acquisition of the land may be conducted in closed session. The discussion concerning the purchase of the equipment may not be held in closed session because the equipment is not "real property."

Example 65:

A city council is considering leasing some of its water rights to another entity. The lease constitutes the "disposal" of water rights and discussion of the transaction may be conducted in closed session.

Example 66:

A state hospital is considering the purchase of an industrial laundry business. If the transaction involves the acquisition of real estate along with the business, the hospital board may discuss that part of the transaction in a private meeting. However, other aspects of the purchase, such as the washing machines, the business' goodwill, and the operation of the business are not real estate and would not be covered by this exception. These other aspects would have to be discussed in a public session unless another exception applies, such as the exception for sole source purchases in excess of $2,500.

9. Public Hospital Board Meetings

The Law

Those portions of meetings of committees or boards of public hospitals where strategic and long-range business plans or trade secrets are discussed.

Commentary

This exception applies to certain topics discussed by public hospital boards and committees. The legislature may have thought that in these limited instances, the policies favoring open meetings were outweighed by considerations such as the hospital's ability to compete with private health care providers.

Example 67:

The governing board of a county hospital leased to a private corporation meets to discuss its employee drug abuse policies. Unless otherwise excepted by the Act, the discussion must be held in open session because the matters discussed do not involve the board's strategic or long-range business plans or trade secrets.

10. Gaming Control Board Meetings

The Law

That portion of a meeting of the gaming control board dealing with information made confidential pursuant to the provisions of the Gaming Control Act.

Commentary

This exception applies only to meetings conducted by the Gaming Control Board and

permits the Board to hold a closed meeting to discuss information that is confidential under the Gaming Control Act, NMSA 1978, Sections 60-2E-1 to -61. Information made confidential under the Gaming Control Act includes "confidential security and investigative information," and confidential information, documents or communications of an applicant or licensee required by law, Board regulations or a subpoena. *See* NMSA 1978, Sections 60-2E-6(C), 60-2E-41.

I. Closed Meetings

Commentary

Before meeting in closed session, a public body must follow the procedures specified in Section 10-15-1(I) of the Act. As discussed below, there are different procedures for closing an open meeting and for holding a closed meeting separately from an open meeting.

1. Closing an Open Meeting

The Law

If any meeting is closed pursuant to the exclusions contained in Subsection H of this section, the closure:

(1) If made in an open meeting, shall be approved by a majority vote of a quorum of the policymaking body; the authority for the closure and the subject to be discussed shall be stated with reasonable specificity in the motion calling for the vote on a closed meeting; the vote shall be taken in an open meeting; and the vote of each individual member shall be recorded in the minutes. Only those subjects announced or voted upon prior to closure by the policymaking body may be discussed in a closed meeting.

Commentary

The agenda of a meeting of a public body normally covers various topics, some of which may fall within the enumerated exceptions to the open meeting requirement of the Act. When an item is presented for discussion that may be considered in closed session, a motion for closure must be made by a member of the public body stating the authority for closure and the reason for closing the meeting with reasonable specificity. The subject announced will comply with the "reasonable specificity" requirement if it provides sufficient information to give the public a general idea about what will be discussed without compromising the confidentiality conferred by the exception. For example, a motion might be stated: "I move that the commission convene in closed session as authorized by the limited personnel matters exception to discuss possible disciplinary action against an employee." Or, "I move that the board discuss the case of X vs. The County with the board's attorney in executive session as authorized by Section 10-15-1(H)(7) of the Open Meetings Act."

A roll call vote of the members present must be taken on the motion and the vote of each individual member recorded in the minutes. If the motion is approved, the public body shall convene in closed session to consider only the item or items covered by the motion voted on prior to closing the meeting.

Example 68:

Item 6 on the agenda of a regular open meeting of a municipality's governing board states:

"Purchase of Property for New Courthouse." A member of the governing body moves that the meeting be closed pursuant to Section 10-15-1(H)(8) to consider the purchase of real property for the new courthouse. The motion is duly seconded and a roll call vote is taken. The minutes reflect that each of the members present voted in favor of the motion. This procedure would comply with the requirements for closing an open meeting under the Act.

Example 69:

A city council has been sued for breach of

contract by a former employee. During an open meeting of the council, one member moves to close the meeting to discuss the status of the case with the city attorney, citing both the limited personnel and litigation exceptions. If the council votes to defeat the motion, the matter is discussed in open session. If the motion passes, any final action taken by the council involving the hiring, promotion, demotion, dismissal, assignment or resignation of the former employee must be taken in open session due to the restriction of Section 10-15-1(H)(2). A final decision as to how to defend the charges alleged in the lawsuit, however, could remain confidential under the litigation exception.

Commentary

Unless an action requiring a vote in public is to be taken, the public body may adjourn the public meeting when it goes into closed session and not return to public session after it completes its closed meeting. If the public body does re-open the meeting after a closed session, the public body may follow whatever procedures it deems appropriate. The Act does not have any requirements for returning to open session after a closed session.

2. Closed Meeting Outside an Open Meeting

The Law

If any meeting is closed pursuant to the exclusions contained in Subsection (H) of this section, the closure: ...

(2) If called for when the policymaking body is not in an open meeting, shall not be held until public notice, appropriate under the circumstances, stating the specific provision of the law authorizing the closed meeting and stating with reasonable specificity the subject to be discussed, is given to the members and to the general public.

Commentary

A public body may sometimes need to meet in a special meeting to discuss only a matter that is covered by one of the exceptions defined in Section 10-15-1(H) of the Act. Under those limited circumstances, the public body must give notice of the meeting to its members and to the public in accordance with its policy regarding notice of special meetings or as may be reasonable under the circumstances. Such notice must state the exception to the Act or other legal authority that authorizes the closed meeting and must state the subject to be discussed with reasonable specificity. When noticed properly, these closed meetings may take place without having an open session before or after the meeting.

Example 70:

A county commission's resolution provides that the chair may call a special meeting on 3 days notice by posting the notice of the meeting at the county courthouse and publishing the notice in the local daily newspaper. The chair discovers that the board must make an immediate decision with respect to the purchase of some land in the county and determines that it is necessary to call a special meeting for that purpose. In addition to the date, time and place of the meeting, the notice states the following in compliance with Section 10-15-1(I)(2):

> *THIS MEETING IS CALLED TO DISCUSS THE PURCHASE OF LAND AND SHALL BE CLOSED TO THE PUBLIC PURSUANT TO NMSA 1978, SECTION 10-15-1(H)(8).*

Commentary

At a closed meeting held outside of an open meeting, topics that are not covered in the notice may not be discussed and no ordinary business, such as the approval of minutes from the last meeting, may be conducted.

Example 71:

A member of a municipality's governing board is informed at 6:00 p.m. Sunday that the

municipality's police officers have called for a wildcat strike to show their disapproval of the board's latest salary offer made during a particularly heated collective bargaining session. The strike is planned for Monday morning.

The board's policy for notice of emergency meetings requires the board president to give 24 hours notice by local radio announcement. The board member who received the information calls the board president who gives two hours notice by radio of an emergency closed meeting to discuss collective bargaining strategy and possible legal actions against the police officers.

Due to the board's interest in planning for such a strike with its attorney, preserving the peace, and protecting the municipality's residents from an immediate threat to their security and safety, the two-hour notice is "appropriate under the circumstances."

Commentary

Although not addressed by the Act, one issue that sometimes comes up is whether it is proper for a public body to permit persons other than its members to be present during a closed meeting. There is no single answer to this question, although generally a public body may include anyone it wants in its executive session. In certain circumstances, however, considerations aside from the Act may affect the permissibility of allowing non-members to be present. For example, when a public body holds a closed session pursuant to Section 10-15-1(H)(3) of the Act to deliberate after an administrative adjudicatory proceeding, it probably should exclude other persons (except, perhaps, its attorney) from the closed session. Otherwise, it may give at least the appearance that the public body is improperly and unfairly receiving additional information about the matter before it without the participation of one or more of the parties to the proceeding.

A public body also should use caution when it permits persons other than the body's members and its attorney to attend a meeting that is closed under the litigation exception in Section 10-15-1(H)(7) of the Act. That exception expressly applies to meetings "subject to the attorney-client privilege," so the public body should consult with its attorney to ensure that the presence of other persons during the closed session will not affect the privilege and, in turn, make the use of the litigation exception improper.

Example 72:

At a teacher disciplinary hearing held by a school board, the superintendent testifies concerning the events resulting in the proceeding. Although the superintendent usually serves as recording secretary for the board, she may not be present during the board's deliberations after the hearing. Because the board may not hear additional evidence after the close of the hearing, the presence of the superintendent, a witness in the hearing, during the closed session could be viewed as an unfair influence on the board's discussion and decision concerning the teacher.

Example 73:

During its regular meeting, a county commission goes into executive session to discuss the purchase of land. It permits members of the public attending the meeting to remain during the closed session except those people the commission knows are vehemently opposed to the purchase. This is not proper since the commission is using the executive session to unreasonably exclude only certain members of the public from what would otherwise be a public meeting.

Example 74:

A state board holds a closed meeting to discuss competitive sealed proposals it has received in response to a request for proposals made according to the Procurement Code. During its closed discussion, the board may permit each

proposer to come before the board one at a time and answer questions concerning its proposal.

J. Statement Regarding Closed Discussions

The Law

Following completion of any closed meeting, the minutes of the open meeting that was closed, or the minutes of the next open meeting if the closed meeting was separately scheduled, shall state that the matters discussed in the closed meeting were limited only to those specified in the motion for closure or in the notice of the separate closed meeting. This statement shall be approved by the public body under Subsection G of this section as part of the minutes.

Commentary

Section 10-15-1(J) is intended to reinforce the requirement that discussions during closed sessions be limited to topics that are expressly excepted from the open meeting requirements. Because closed meetings or executive sessions are not open, members of the public are naturally curious about their content and suspicious about any perceived misuse of the exceptions allowing closure. Including the required statement in their minutes, will remind public bodies that there are only a few proper justifications for closure and make them less likely to succumb to any temptation to expand closed discussions beyond the topic announced in the motion for or notice of closure.

Example 75:

During its regular monthly meeting, a city council closes its meeting to discuss hiring a city manager. The minutes for the meeting show that a motion was made to go into executive session to discuss hiring a city manager as authorized by the limited personnel matters exception to the Act. The minutes also record the vote of each councilor on the motion to go into executive session. Finally, the minutes state, as required by Section 10-15-1(J) of the Act: "The only matter discussed during the closed session was the hiring of a city manager."

IV. Section 10-15-2. State Legislature; Meetings

A. Meetings of Committees and Policymaking Bodies of the Legislature

The Law

Unless otherwise provided by Joint House and Senate Rule, all meetings of any committee or policymaking body of the legislature held for the purpose of discussing public business or for the purpose of taking any action within the authority of or the delegated authority of the committee or body are declared to be public meetings open to the public at all times. Reasonable notice of meetings shall be given to the public by publication or by the presiding officer of each house prior to the time the meeting is scheduled.

Commentary

Article IV, Section 12 of the New Mexico Constitution requires that all sessions of each house of the legislature be open to the public. Section 10-15-2(A) provides that all meetings of any committee or policymaking body of the state legislature held for the purpose of: (a) discussing public business, or (b) taking any action within the authority of the committee or policymaking body, shall be open to the public as well. However, Subsection A must be read in conjunction with Subsection C of this section which provides that: "For the purposes of this section, 'meeting' means a gathering of a quorum of the members of a standing committee or conference committee held for the purpose of taking any action within the authority of the committee or body."

Thus, the open meeting requirement of Subsection A really only applies to meetings of a standing or conference committee of the legislature.

Standing committees are formed by the senate or house, or by statute, to assist the senate or house in accomplishing their duties. Standing committees convene during the legislative session and interim committees include those that meet on a regular basis between legislative sessions. Conference committees are called upon during a legislative session to resolve disagreements on a particular bill.

Notice of a legislative committee meeting must be provided to the public before the meeting is held.

Example 76:

A meeting of the party leadership of either party of the state legislature is not subject to this provision as those legislators do not constitute a standing committee of the state legislature.

Example 77:

A meeting of the staff for the Senate Finance Committee is not subject to this provision as the staff analysts are not legislators and therefore do not constitute a standing or conference committee of the state legislature.

Example 78:

A reception at which a quorum of the members of the House Judiciary Committee is present is not subject to this provision because this is not a gathering called by the presiding officer of the committee and the members have not met for the purpose of discussing public business or taking official action.

Example 79:

The Chairman of the Legislative Finance Committee, an interim committee, calls a meeting to discuss a study of county and municipal finances ordered by a joint resolution during the previous legislative session. An open meeting must be held.

Example 80:

During a legislative session, the house standing committee on education and the senate standing committee on education have been unable to resolve a major issue on a bill that has been sent back to the house by the senate several times. Testimony and remarks from the public has been lengthy and disruptive. A conference committee of senior members from both the senate's and the house's standing education committees was created in an attempt to negotiate language that the house will approve. The conference committee meeting must be open to the public and preceded by reasonable notice to the public.

B. Exceptions

The Law

The provisions of Subsection A of this section do not apply to matters relating to personnel or matters adjudicatory in nature or to investigative or quasi-judicial proceedings relating to ethics and conduct or to a caucus of a political party.

Commentary

This Subsection permits standing committees of the legislature to meet in closed session to discuss matters relating to personnel; adjudicatory matters; and investigative or quasi-judicial proceedings relating to ethics and conduct.

The exception for "matters relating to personnel" is broader than the "limited personnel matters" exception under Section 10-15-1(H)(2). Thus, a legislative committee may hold a closed meeting to discuss personnel matters not directly related to an individual employee. *See* State v. Hernandez, 89 N.M. 698, 556 P.2d 1174 (1976) (discussing predecessor open meetings law that permitted closed meetings to discuss "personnel matters" without defining that term).

Example 81:

The Committee of the Senate meets to discuss and approve a policy for hiring persons recommended by the Chief Clerk of the Senate to work during the legislative session. This meeting may be closed. By contrast, public bodies subject to the limited personnel matters exception in Section 10-15-1(H)(2) would have to discuss the same topic in an open meeting because it does not relate to an individual employee.

Commentary

The Act does not define "matters adjudicatory in nature" that a standing committee might discuss in a closed session, but generally the term refers to hearings and other proceedings in court.

Subsection B also excepts investigative or quasi-judicial proceedings relating to ethics or conduct from the public meeting requirement. The New Mexico Constitution has conferred on the legislature certain functions that may properly be considered quasi-judicial. For example, the power to impeach state officers is vested in the House of Representatives and the impeachment is tried by the Senate. *See* New Mexico Constitution, Article IV, Sections 35 and 36. Thus, the presiding officer of a standing committee might call a closed meeting to discuss the impeachment of a state officer. The Act would not apply to the actual impeachment and trial, and would not justify closing proceedings required to be public by Article IV, Section 12 of the New Mexico Constitution or other authority.

Subsection B expressly excludes political party caucuses from the public meeting requirement applicable to standing and conference committees of the legislature.

C. Definition of "Meeting"

The Law

For the purposes of this section, "meeting" means a gathering of a quorum of the members of a standing committee or conference committee held for the purpose of taking any action within the authority of the committee or body.

Commentary

See Section IV.A.

V. Section 10-15-3. Invalid Actions; Standing

A. Invalid Actions

The Law

No resolution, rule, regulation, ordinance or action of any board, commission, committee or other policymaking body shall be valid unless taken or made at a meeting held in accordance with the requirements of NMSA 1978, Section 10-15-1. Every resolution, rule, regulation, ordinance or action of any board, commission, committee or other policymaking body shall be presumed to have been taken or made at a meeting held in accordance with the requirements of NMSA 1978, Section 10-15-1.

Commentary

This provision establishes a presumption that actions taken by public bodies have been taken at meetings that conform to the requirements of the Act. Where this is shown not to be the case, the actions of a public body may be held invalid.

Example 82:

A state board with rulemaking authority meets in closed session with its attorney to discuss the legality of its Rule X. The attorney advises that Rule X is probably illegal. The board votes in closed session to rescind the rule. The action of the board is of no effect because it did not relate directly to the litigation and was not taken in open session. In order for the rescission to be valid and enforceable, it must be accomplished at a properly noticed open meeting.

Example 83:

A board of county commissioners decides to purchase a piece of land from Mr. Ortiz and enters into an agreement to that effect. Mr. Ortiz later discovers he can sell the land to Mr. Jones for a better price and attempts to invalidate the agreement by alleging that the board improperly closed the meeting for the discussion of the purchase. Under the presumption created by Section 10-15-3(A) of the Act, the agreement is valid and binding on Mr. Ortiz until it is admitted or proven that the board failed to act in accordance with Section 10-15-1 of the Act.

Commentary

The presumption of validity established by Section 10-15-3(A) of the Act means that any action taken by a public body will stand as valid with respect to the Act unless challenged and proven otherwise. The Act does not, however, specify a time beyond which an action may no longer be challenged. Such a limitation on actions brought to challenge the validity of any rule, regulation, resolution, ordinance or other action taken by a public body will be found in the statutes of limitation enacted by the legislature. Thus, for example, criminal actions brought under Section 10-15-4 of the Act (*see* Section VI) probably would be barred after two years from the time the violation occurred. *See* NMSA 1978, Section 30-1-8. Most other non-criminal actions authorized by the Act, unless covered by a more specific statutory limitations period applicable to the public body, would be barred after four (4) years. *See* NMSA 1978, Section 37-1-4.

B. Enforcement

The Law

All provisions of the Open Meetings Act shall be enforced by the attorney general or by the district attorney in the county of jurisdiction. However, nothing in that act shall prevent an individual from independently applying for enforcement through the district courts, provided that the individual first provides

written notice of the claimed violation to the public body and that the public body has denied or not acted on the claim within fifteen days of receiving it. A public meeting held to address a claimed violation of the Open Meetings Act shall include a summary of comments made at the meeting at which the claimed violation occurred.

Commentary

This Subsection charges the Attorney General and district attorneys with the concurrent duty of enforcing the Act. Since enforcement carries with it the duty to interpret the Act, the Attorney General has issued this Compliance Guide so that public bodies that adhere to the interpretations of the Act presented in this Guide may conduct their affairs in substantial compliance with the Act. Of course, such a guide cannot anticipate all problems or questions that will arise in the course of governmental affairs. Questions raised by a public body about compliance should therefore be initially addressed to the attorney for the public body. If the public body's attorney is unclear about how to proceed, questions may then be addressed to the Office of the Attorney General. It is, however, the Attorney General's intent that this Guide help resolve recurring questions concerning the applicability of the Act.

A person who believes the Act has been violated may report the suspected violation in writing to the appropriate district attorney or to this Office for investigation and suitable action. The complaint should specify in detail the circumstances giving rise to the alleged violation, including dates and the persons involved. The Attorney General's enforcement power will not be used, however, to resolve the internal disputes and disagreements of a public body or public displeasure with a body's exercise of its discretionary authority.

The Attorney General will exercise discretion when considering whether or not to void actions of public bodies and to bring misdemeanor charges for alleged violations of the Act. Unintentional failure to comply with the provisions of the Act may render the actions taken invalid, but will not necessarily lead to prosecution. It is the intent of the Attorney General to prosecute misdemeanors only in the case of knowing and either flagrant or repeated violations of the requirements of the Act. The Attorney General will not prosecute where there has been a good faith attempt to comply with the Act.

Example 84:

A city council's notice resolution provides that it shall give public notice of all regular meetings by publication in the local newspaper as well as by posting notice on the three bulletin boards in City Hall. Following an open meeting at which a controversial zoning variance was granted and at which several hundred people appeared to express their views, an opponent of the variance determines that the notice of the meeting, while properly published, was posted on only two bulletin boards. The individual requests that the Attorney General declare the variance invalid and prosecute the city councilors. The Attorney General investigates and determines that the failure to post the notice on the third bulletin board was inadvertent and that the public was adequately notified of the meeting. The Attorney General, within his discretion, declines to declare the council's action invalid or to prosecute the city councilors.

Commentary

In most cases, if a violation is found, the Attorney General will enforce the Act by first advising the public body that, in his opinion, the actions taken at a particular meeting of the public body were not in compliance with the Act and are consequently not valid. Unless the violation was part of a pattern or practice of Open Meetings Act violations, the public body would then be advised to begin again and to consider the intended actions in accordance with the provisions of the Act. This could involve re-discussing issues previously addressed as well as voting again on matters previously voted on in violation of the Act. Should the public body, after such notification, refuse to reconsider its actions in a proper manner or otherwise indicate its intention to continue violating the Act, the Attorney General may file criminal charges or take other action

against the public body or those persons allegedly in violation of the Act.

Example 85:

The board of regents of a state educational institution meets in closed session with its attorney pursuant to Section 10-15-1(H)(7) of the Act and takes final action to adopt regulations affecting the student body. The student council reports this action to the Attorney General who finds that there was no threatened or pending litigation discussed. The meeting should not have been closed. The Attorney General notifies the regents of these findings and advises them to suspend the regulations and reconsider them in an open session where representatives of the student body may attend and listen to the discussion. The regents comply with this advice and no prosecution is initiated.

Example 86:

Two members of a local school board want to replace the superintendent and three members want to retain him. The board members discuss the question of the superintendent's contract in a properly called closed session and the final action to renew the superintendent's contract is taken by vote in open session. The two dissenting members now want to invalidate the renewal, and report a violation of the Act alleging that the other three members discussed budgetary matters as well as the superintendent's contract in closed session. They demand an investigation by the Attorney General. If it turns out that the budgetary matters discussed necessarily related to the superintendent's contract, the Attorney General would not involve his Office in this manner to participate in a dispute between factions of a board.

Commentary

As an alternative to seeking a legal remedy through the Attorney General or district attorneys, Section 10-15-3(B) of the Act permits any individual to apply for enforcement in the district court. Before an individual initiates a lawsuit against a public body for a violation of the Act:

(1) the individual must provide the public body with written notice of the claimed violation; and

(2) the public body must have denied or failed to act on the claimed violation within fifteen (15) days of receiving the notice.

The Act does not specify the procedure for providing written notice of an alleged violation to a public body. To avoid confusion about whether or not a public body received the required written notice, an individual might mail the notice to one or more members of the public body, or to other officials representing the public body who can reasonably be expected to alert the public body about the claim. It is only after the public body denies the allegation or fails to act on the alleged violation within fifteen days of receiving the written notice that an individual may go to district court to file legal action.

Example 87:

A county citizen writes to the Office of the Attorney General complaining that the county commission violated the Act by holding a secret meeting to discuss economic development within the county. In her complaint, the citizen states that she discussed the violation with the county manager in a telephone conversation. Two days after writing to the Office of the Attorney General, the citizen files a lawsuit in district court against the county commission based on the same claimed violation. The lawsuit is not proper unless, prior to filing it, the citizen also gave the county commission written notice of the claimed violation and the county commission denied or failed to address the violation within fifteen days of receiving the notice. The notice to the county manager would not be considered sufficient to meet the requirements of the Act because it was verbal rather than written.

Commentary

A public body that receives written notice of a claimed violation has fifteen days from the day it receives the notice to cure the violation if the public body decides the claim is valid and wants to avoid a lawsuit. At a meeting held to address the

claimed violation, the public body must include a summary of the comments that were made at the meeting where the violation occurred. This does not mean that the public body must necessarily repeat the entire previous meeting. It only needs to summarize the portion or portions of the previous meeting that violated the Act.

Example 88:

A state licensing board holds its regular meeting in May. The meeting is properly noticed and the agenda for the meeting is available to the public seventy-two (72) hours in advance of the meeting. During the meeting, the board votes to award a contract for a hearing officer.

A few days later, Mr. Grey writes to the chair of the board alleging that the contract award was invalid because it was not listed on the meeting agenda. The chair determines that Mr. Grey is correct and schedules a special meeting of the board within fifteen days of receiving Mr. Grey's letter. Proper notice of the meeting is provided to the public and the contract is listed on the agenda. At the meeting, the board repeats its discussion of the contract and votes again to award the contract. This action cures the board's previous violation and precludes any further action concerning the violation in district court.

Example 89:

A town board of trustees holds a meeting without providing any advance notice to the public. A resident of the town notifies the mayor in writing about the violation. Because the board of trustees failed to give prior notice of the meeting, the meeting is invalid and without effect. Within fifteen days after receiving the written notice, the board must, after providing proper notice to the public, convene again, summarize all the comments and proposals made at the previous illegal meeting, and take any action or make any decisions made at the previous meeting over again.

Commentary

In some cases, a violation of the Act cannot be effectively addressed by repeating the action at a properly conducted open meeting. In those cases, the requirement for a summary of comments is not applicable.

Example 90:

Ms. Rose writes to the chair of the county commission alleging the commission violated the Act because it did not approve the minutes for its May meeting at the next meeting of a quorum as required by Section 10-15-1(G) of the Act. The commission holds a meeting within fifteen days after receiving the notification to address the claimed violation. In this case, the commission agrees that it violated the Act, but because the violation did not occur at the May meeting, the commission cannot cure it by re-taking any action or summarizing any discussion. Instead, it agrees that in the future it will use its best efforts to ensure that minutes are approved at the next meeting of a quorum. Ms. Rose is satisfied with this resolution of her claim.

Commentary

Because the Attorney General and district attorneys cannot be everywhere and resources are limited, private individuals who exercise the option provided under Section 10-15-3(B) of the Act and initiate legal action often will be able to obtain more effective and efficient enforcement of the Act. However, while the power to bring private enforcement actions is important, it is not a means to overturn decisions of a public body made in conformity with the Act, but with which the public disagrees.

Example 91:

A local school board meets in closed session to discuss retaining Mr. Jones as the superintendent. After this discussion, the board reconvenes in open session and takes final action to hire Mr. Jones at a higher salary. Many parents disagree and, after following the procedures specified in Section 10-15-3(B) of the Act, seek an injunction in district court to stop the contract. As the parents' complaint does not involve any violation of the Act, they have not correctly applied Section 10-15-3(B). Therefore, the court rejects their application

for injunctive relief.

C. District Court Jurisdiction

The Law

The district courts of this state shall have jurisdiction, upon the application of any person to enforce the purpose of the Open Meetings Act, by injunction, mandamus or other appropriate order. The court shall award costs and reasonable attorney fees to any person who is successful in bringing a court action to enforce the provisions of the Open Meetings Act. If the prevailing party in a legal action brought under this section is a public body defendant, it shall be awarded court costs. A public body defendant that prevails in a court action brought under this section shall be awarded its reasonable attorney fees from the plaintiff if the plaintiff brought the action without sufficient information and belief that good grounds supported it.

Commentary

This Subsection confers jurisdiction on the district courts to hear questions concerning purported violations of the Act. Should a district court determine that a public body's actions were illegally taken, it may declare them invalid, thereby overcoming the presumption of validity conferred under Section 10-15-3(A) of the Act. The court may issue an order enjoining the public body from implementing its illegal action, an order requiring the public body to take action required by the Act or any other appropriate order.

Example 92:

A city council voted in closed session to sell the furnishings of a city-owned building. Twenty (20) days after the city council receives a citizen's written notice of violation and takes no action to address it, the citizen applies to district court to enjoin the sale because the decision to sell was improperly made in a closed meeting. Only the sale of real property may be considered in closed session. The court enjoins the sale and the decision of the city council is nullified. The council must reconsider the sale at an open meeting.

Commentary

This Subsection also provides that a district court shall award individuals who prevail in a court proceeding to enforce the Act their court costs and reasonable attorney fees.

Example 93:

Ms. Garcia learns from the president of a local construction company that the town council has awarded the company a contract to build a public swimming pool. Ms. Garcia writes to the mayor alleging that the town council violated the Act because it awarded the contract outside of a public meeting. The mayor reads Ms. Garcia's letter and forwards it to the other councilors. The council does not take any steps to address Ms. Garcia's letter. Fifteen days after the mayor received her letter, Ms. Garcia may file a lawsuit against the council to enforce the Act. If she succeeds in proving that a violation occurred, she will be entitled to an award of costs and reasonable attorney fees.

Commentary

If a public body successfully defends itself against a lawsuit brought to enforce an alleged violation of the Act, the public body defendant is entitled to court costs. A prevailing public body defendant is entitled to attorney fees only if the court determines that the person who brought The Lawsuit did so without any valid basis or support.

Example 94:

Assume the same facts set forth in Example 91. At the hearing on the application for injunctive relief, the school board defends itself by alleging that the parents' claims were not supported by any facts showing a violation of the Open Meetings Act. If the parents brought the lawsuit under the Act without any belief that good grounds supported it, the court may find that the lawsuit was frivolous and, in addition to denying the injunction, award the school board its court costs and reasonable

attorney fees.

D. Other Remedies

The Law

No section of the Open Meetings Act shall be construed to preclude other remedies or rights not relating to the question of open meetings.

Commentary

This Subsection simply makes it clear that the remedies available to challenge a public body's action for violating the Act are not exclusive. The public is not precluded from charging the public body with violation of other laws in connection with the same action.

Example 95:

A board of county commissioners votes to apply the sole source exception stated in Section 10-15-1(H)(6) of the Act to close a meeting to discuss and decide upon the purchase of water fountains from Fountain Company when such fountains are available from other vendors. A competing water fountain vendor alleges that the board violated the Act and files suit to overturn the action. If warranted, the competitor might also allege that the board violated the Procurement Code by failing to take bids on this purchase.

VI. Section 10-15-4. Criminal Penalties

The Law

Any person violating any of the provisions of NMSA 1978, Section 10-15-1 or 10-15-2 is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five hundred dollars ($500) for each offense.

Commentary

If, after investigating charges that the Act has been violated, the Attorney General finds that the charges are valid and substantial, the Attorney General may initiate a criminal prosecution against each of those persons responsible for the violation. The public officers or employees charged may be held personally responsible for violations of the Act if it is shown that they intentionally acted in a manner that violated the Act. In addition to the members of the public body, other officials responsible for implementing the Act's provisions may be found liable.

Example 96:

A city clerk is required by law to keep all minutes of the governing body of a municipality. The city clerk might therefore be found liable for failure to have draft minutes available for public inspection as required by Section 10-15-1(G) of the Act.

Open Meetings Act Compliance Checklist

Open Meetings (§ 10-15-1 (B))

The Open Meetings Act applies to meetings of public bodies:

_____At which a quorum of the members of the public body is present in person or by telephone; and

_____During which the public body will formulate public policy, discuss public business or take action.

If the Open Meetings Act applies, the following checklist will help you comply with its requirements.

Notice Requirements (§ 10-15-1 (D) and (F))

Non-emergency meetings

_____Reasonable advance notice of the meeting has been provided to the public (§ 10-15-1 (D)).

_____The notice complies with the deadlines and procedures for meeting notices adopted by the public body under Section 10-15-1(D) of the Open Meetings Act.

_____The notice includes the date, time and location of the meeting.

_____The notice is published or posted in a place and manner accessible to the public.

_____Notice has been provided to all FCC licensed broadcast stations and newspapers of general circulation that have provided a written request for notice of meetings (§ 10-15-1 (D)).

_____The notice includes an agenda or information on how the public may obtain a copy of the agenda (§ 10-15-1 (F)).

Emergency Meetings

Under limited circumstances, an emergency meeting may be held with little advance notice if:

_____The public body did not expect the circumstances giving rise to the meeting; and

_____If the public body does not act immediately, injury or damage to persons or property or substantial financial loss to the public body is likely.

Meeting Agenda (§ 10-15-1 (F))

The meeting agenda should:

_____Include a list of specific items the public body intends to discuss or transact at the meeting.

_____Clearly describe agenda items that the public body intends to discuss or act on during the meeting in order to give adequate public notice.

_____Except for an emergency meeting, the agenda is available to the public at least 72 hours before the meeting.

_____Except for emergency matters, the public body takes action only on those items specifically listed on the agenda 72 hours before the meeting.

Telephonic Participation (§ 10-15-1 (C))

If a member of the public body participates in a meeting by telephone:

_____There must be a law or a rule of the public body authorizing its members to participate by conference telephone or similar communications equipment; and

_____It must be "difficult or impossible" for that member to attend the meeting in person; and

_____Each member participating telephonically can be identified when speaking, all participants are able to hear each other at the same time, and members of the public attending the meeting are able to hear any member of the public body who speaks during the meeting.

Closed Meetings – Permissible Subjects (§ 10-15-1 (H))

If a public body wishes to hold a closed meeting, it may do so only to engage in one or more of the following:

_____Deliberations about the issuance, suspension, renewal or revocation of a license(§ 10-15-1(H)(1)).

_____Discussion of the hiring, promotion, demotion, dismissal, assignment or resignation of a public employee, or the investigation or consideration of complaints or charges against a public employee (§ 10-15-1(H)(2)).

_____Deliberations in connection with an administrative adjudicatory proceeding held by the public body (§ 10-15-1(H)(3)).

_____ Discussion of personally identifiable information about an individual student (§ 10-15-1(H)(4)).

_____Discussion of collective bargaining strategy prior to negotiations between a public body and a union representing employees of the public body; collective bargaining sessions involving the public body and union (§ 10-15-1(H)(5)); and consultations and impasse resolution procedures at which the public body and the union are present (§ 10-7E-17(G) of the Public Employee Bargaining Act).

_____Discussion of a sole source purchase that exceeds $2,500 or of the contents of competitive sealed proposals during the contract negotiation process (§ 10-15-1(H)(6)).

_____Meeting with the public body's attorney pertaining to threatened or pending litigation in which the public body is or may become a participant (§ 10-15-1(H)(7)).

_____Discussion of the purchase, acquisition or disposal of real property or water rights (§ 10-15-1(H)(8)).

_____For committees or boards of public hospitals only, discussion of strategic or long-range business plans or trade secrets (§ 10-15-1(H)(9)).

_____For the Gaming Control Board only, a meeting that deals with information made confidential by the Gaming Control Act (§ 10-15-1(H)(10)).

Closed Sessions – Procedures (§ 10-15-1(I))

To properly close a portion of an open meeting, the following actions must be taken:

_____A motion stating the specific provision of law authorizing the closed meeting and a reasonably specific description of the subject to be discussed.

_____A roll call vote on the motion to close the meeting in the open session, where the vote of each member is to be recorded in the minutes.

_____Only the matters stated in the motion to close are discussed in the closed session.

_____Generally, action on an item discussed in a closed session must be taken in an open meeting (§ 10-15-1 (H)).

_____After a closed meeting is completed, a statement affirming that the matters discussed in the closed meeting were limited to those stated in the motion to close is recorded in the minutes (§ 10-15-1 (J)).

For closed meetings of a public body held separate from an open meeting, the above criteria apply except:

_____Instead of a motion to close, appropriate public notice is provided that includes the specific provision of law authorizing the closed meeting and a reasonably specific description of the subject to be discussed (§ 10-15-1 (I)(2)).

_____Following completion of the closed meeting, a statement is entered into the minutes of the next open meeting specifying that the matters discussed in the closed meeting were limited to those stated in the notice of the closed meeting (§ 10-15-1 (J)).

Meeting Minutes (§ 10-15-1 (G))

If the meeting is open, written minutes are required. Minutes must contain at least:

_____The date, time and place of the meeting; and

_____The names of all members of the public body attending the meeting and of those members who are absent; and

_____A description of the substance of all proposals considered during the meeting; and

_____A record of any decisions made and votes taken that shows how each member voted (voting by secret ballot is not permitted).

The following also applies to meeting minutes:

_____A draft copy of the minutes is prepared within 10 working days of the public meeting.

_____The minutes are approved, amended or disapproved at the next meeting where a quorum of the public body is present.

_____All minutes are made available for public inspection.

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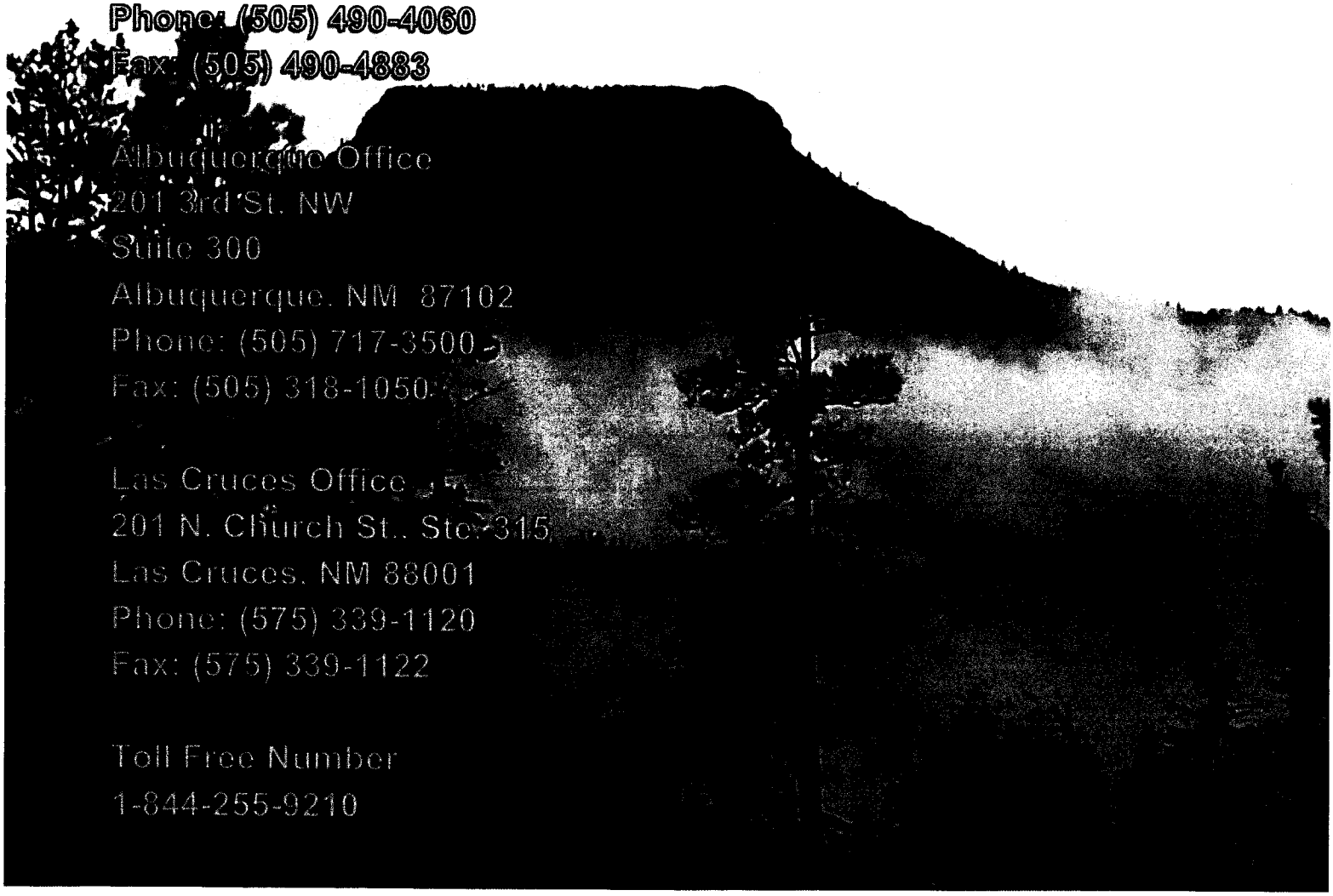
P.O. Drawer 1508
Santa Fe, NM 87504-1508

Santa Fe Office
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501
Phone: (505) 490-4060
Fax: (505) 490-4883

Albuquerque Office
201 3rd St. NW
Suite 300
Albuquerque, NM 87102
Phone: (505) 717-3500
Fax: (505) 318-1050

Las Cruces Office
201 N. Church St., Ste. 315
Las Cruces, NM 88001
Phone: (575) 339-1120
Fax: (575) 339-1122

Toll Free Number
1-844-255-9210



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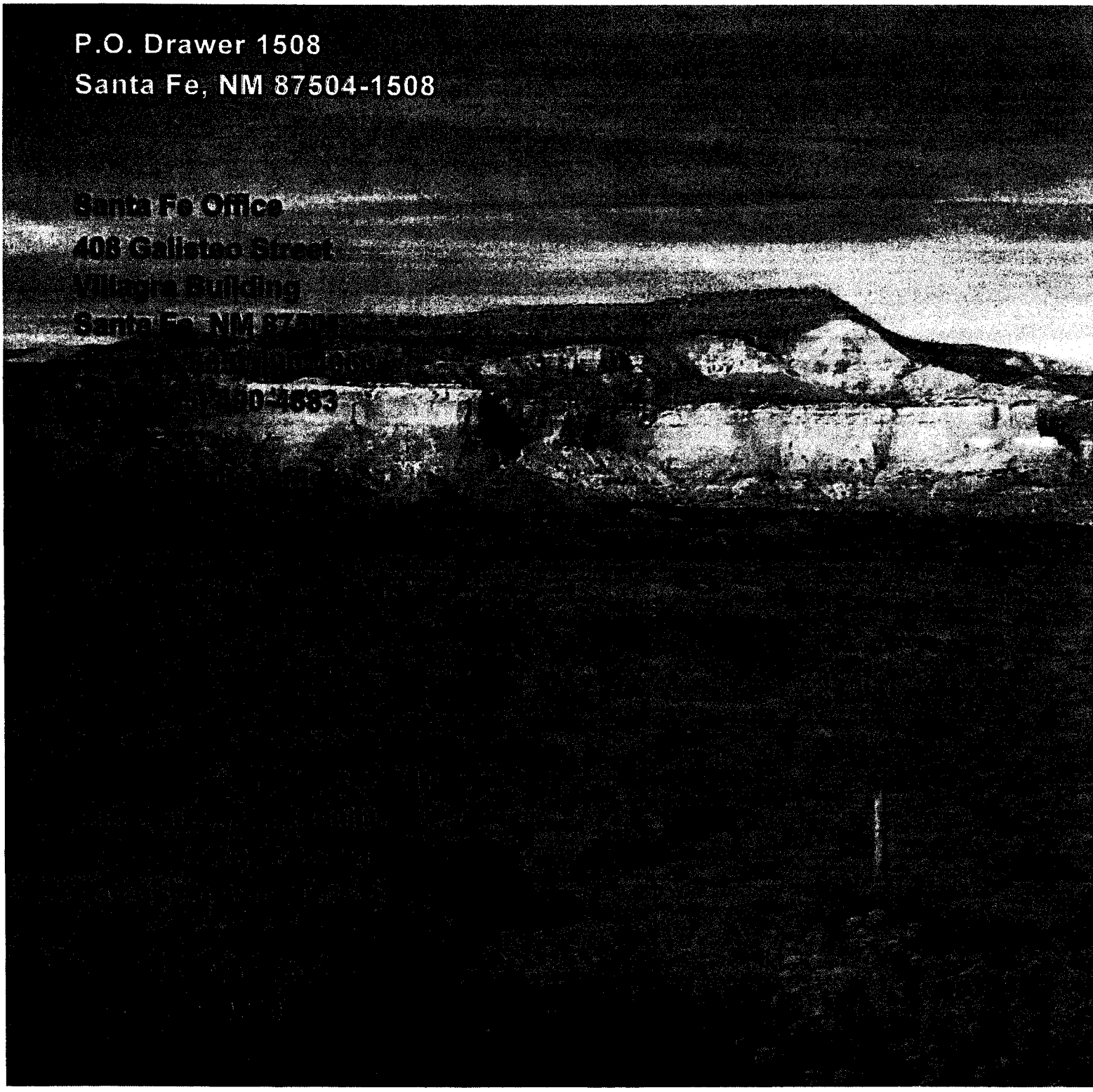
P.O. Drawer 1508
Santa Fe, NM 87504-1508
Santa Fe Office
408 Galisteo Street
Villagra Building

Denied Requests to Inspect Public Records (§ 14-2-11)

If the inspection request is denied, the custodian must:

_____Deliver or mail a written explanation to the requester no later than 15 calendar days after receiving the request. The written explanation must:

_____Describe the records sought; and

_____Include the names and titles of each person responsible for denying the request; and

_____Describe the reasons for the denial.

_____Notify the requester that the records are not in the custody and control of the custodian, state where the records are located, and provide contact information for the proper custodian, if known.

If the public body *does* have custody or responsibility for the requested records, the custodian must:

_____Determine if the requestor is asking for a record that is exempt or contains information covered by an exception to public inspection (§ 14-2-1).

_____Separate records containing exempt and nonexempt information (including redacting exempt information contained in an otherwise public record), if the records or parts of the records are exempt (§ 14-2-9).

_____Provide copies of public records in electronic format if requested and available in electronic format.

_____If inspection is not allowed within three business days, explain to the requester, in writing, when the records will be available for inspection or when the public body will respond to the request.

_____Allow inspection or otherwise respond to the request within 15 calendar days from the date the custodian received the request.

If the request is deemed excessively burdensome or broad the custodian must (§ 14-2-10):

_____Notify the requester in writing that additional time is needed to respond.

_____Provide such notification within 15 calendar days after the custodian received the inspection request. (Please note that if inspection is not permitted within a reasonable time, the requester may deem the request denied and pursue the remedies available under the Act.)

Copy and Transmission Fees (§ 14-2-9)

If the public body charges a fee for copying public records, the public body:

_____Shall not charge fees in excess of $1.00 per printed page for documents 11" x 17" or smaller.

May charge the actual costs of downloading copies of public records to a disk or other storage device, including the actual cost of the disk.

May charge the actual costs of transmitting copies of public documents by regular mail, email or fax.

_____The fee must exclude the cost to the public body of finding the records, determining whether the records are subject to disclosure and other costs not related to copying or transmitting the records.

_____The fee must be applied consistently to all requesters.

_____The custodian must provide a receipt upon request.

Appendix IV

INSPECTION OF PUBLIC RECORDS ACT COMPLIANCE CHECKLIST

Designation of Custodian of Public Records (§ 14-2-7)

Each public body must designate at least one Custodian of Public Records to:

_____Receive and respond to requests to inspect records; and

_____Arrange proper and reasonable inspection opportunities; and

_____Provide facilities for making copies of records or furnish copies of records to the requestor.

Notice of Inspection Rights and Responsibilities (§ 14-2-7)

Each public body must post in a conspicuous location at its administrative office and on the public body's website a notice that sets forth:

_____The right of any person to inspect the public body's records and the public body's responsibility to make public records available for inspection; and

_____The procedures for requesting inspection of public records; and

_____The procedures for requesting copies of public records; and

_____Reasonable fees for copying public records.

Response to a Request to Inspect Public Records (§ 14-2-8)

Oral Requests:

_____If a request to inspect public records is made orally, the custodian should respond to the request, but the Act's procedures for handling requests do not apply.

Written Requests:

A written request is a printed, email or facsimile communication.

_____If the request is written, the records custodian should determine whether the public body has possession or responsibility for the records requested.

If the public body does *not* have custody or responsibility for the records, the custodian must:

_____Forward the request to the proper custodian, if known; and

Appendix III

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)**. Compliance with requests to inspect public records is an integral part of the routine duties of the officers and employees of the **(name of public body)**.

Procedures for Requesting Inspection. Requests to inspect public records should be submitted to the records custodian, located at **(address, telephone number, fax number and e-mail address of records custodian)**.

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. Written requests may be submitted in person or sent via US mail, email or facsimile. 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 15 calendar days after the records custodian receives the inspection request. If inspection is not permitted within three 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 15 calendar days after the records custodian receives the request for inspection.

Procedures for Requesting Copies and Fees. If a person requesting inspection would like a copy of a public record, a reasonable fee may be charged. The fee for printed documents 11 inches by 17 inches or smaller is (___) per page. The fee for larger documents is (___) per page. The fee for downloading copies of public records to a computer disk or storage device is (__). If a person requests that a copy of a public record be transmitted, a fee of (____) may be charged for transmission by mail, (____) for transmission by e-mail and (__) for transmission by facsimile. 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 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.]

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 excepted from disclosure for the reason(s) described below.

_____ The records requested are medical records protected under Section 14-2-1(A)(1) of the Inspection of Public Records Act.

_____ The records requested are letters of reference concerning employment, licensing or permits protected under Section 14-2-1(A)(2) of the Inspection of Public Records Act.

_____ The records requested are letters or memoranda that are matters of opinion in personnel files or students' files protected under Section 14-2-1(A)(3) of the Inspection of Public Records Act.

_____ The records requested are confidential law enforcement records protected under Section 14-2-1(A)(4) of the Inspection of Public Records Act.

_____ The records requested are [DESCRIBE SPECIFIC LEGAL BASIS FOR NONDISCLOSURE]

_____ Protected personal identifier information contained in the requested records has been redacted under Section 14-2-1(B) of the Inspection of Public Records Act.

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]

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 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 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 I
REQUEST TO INSPECT PUBLIC RECORDS

[DATE]

TO: [NAME]
Records Custodian
[AGENCY NAME & ADDRESS]0.

FROM: [NAME OF REQUESTER]
[ADDRESS]
[TELEPHONE NUMBER]

I would like to inspect and copy the following records:

[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 agree to pay the applicable fees for copying and transmitting the records. If the charges will exceed $___, please call me to discuss. I understand that I may be asked to pay the fees in advance.

Please provide a receipt indicating the charges for each document.

Thank you for your prompt attention to this matter.

Sincerely,

[SIGNATURE OF REQUESTER]

Appendix II

MODEL FORM LETTERS FOR INSPECTION REQUESTS AND RESPONSES

FORM I. INSPECTION REQUEST

FORM II. THREE-DAY LETTER

FORM III. WRONG CUSTODIAN LETTER

FORM IV. EXCESSIVELY BURDENSOME LETTER

FORM V. DENIAL LETTER

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.

Appendix I

DEADLINES APPLICABLE TO THE INSPECTION OF PUBLIC RECORDS ACT

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.

Example 64:
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.

D. DAMAGES

If a private individual whose written request has been denied (or is deemed denied) brings an enforcement action and that person prevails, the court 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 Chapter 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.

As interpreted by New Mexico courts, the legal remedies provided in the Act are to be used, if necessary, to force a public body to comply timely and promptly with requests to inspect public records. Accordingly, a private individual is not entitled to statutory damages in a lawsuit brought after a public body complies with the Act. See Derringer v. State, 133 N.M. 721, 68 P.3d 961 (Ct. App.), cert. denied, 133 N.M. 727, 69 P.3d 237 (2003).

Example 65:
On the same day, Mr. Deeds and Ms. Brooks file separate requests to inspect public records with the records custodian for a school district. Both requests are overlooked or ignored by the district. After a month passes with no response from the district, Ms. Brooks files a lawsuit in district court to enforce the Act. Two weeks after the lawsuit is filed, the school district notifies both Ms. Brooks and Mr. Deeds that the records they requested are available for inspection.

One month after the school district makes the records available for inspection, the district court finds that the district did not comply with the Act and awards Ms. Brooks attorney fees, costs and damages in the amount of $50.00 per day from the date the school district was required to allow inspection until the date it made them available. Mr. Deeds, unlike Ms. Brooks, did not file a lawsuit to enforce the Act before the school district made the records he requested available for inspection. Because the school district has now complied with the Act, although belatedly, Mr. Deeds may not now recover statutory damages in a lawsuit against the school district under the Act.

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 may be 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.

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, §§ 37-1-4, and 37-1-24.

B. DISTRICT COURT JURISDICTION

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 a writ or order requiring the public body to allow inspection.

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.

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 board be ordered to provide the requested records. Such a lawsuit is proper under the Act's procedures.

(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. The reason provided in the denial notice must be authorized by the Act, another law, court rule, or the U.S. or state constitution, as discussed in Chapter III, Section B.10.

Example 62:
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 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.

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.

Example 63:
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 records that the agency maintains. 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).

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 in Chapter 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 61:
Mr. Edd submits a written request to the state board regulating cattle brands for information about a particular brand. The board 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

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. A request may be excessively burdensome or broad because it will require the custodian to locate and review a large number of records, because the requested records are difficult to locate or obtain or because other circumstances exist that support the determination that the requested records cannot be made available within 15 days of the request.

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, 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 Chapter XI).

Example 60:

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. As permitted by the Act, and 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.

Example 58:
Most requests to inspect the public records of XYZ Mutual Domestic Water Users Association ask that copies of the requested records be mailed to the requester. Because of the increased mailing costs, the Association decides to amend its procedures for inspection of public records by adding a fee for mailing copies of printed public records. The amount of the fee is limited to the cost of postage. This fee reflects the actual costs associated with transmitting copies of public records by mail and is permitted by the Act.

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.

D. SALE OF DATA

Although the Act requires a public body to provide copies of public records in electronic format when requested, the Act makes clear that it does not limit a custodian's authority to sell data under NMSA 1978, Sections 14-3-15.1 and 14-3-18.

Section 14-3-15.1 requires state agencies to make printed or hard copies of its computer databases available for inspection under the Act. However, if a person requests an electronic copy of a state agency database, Section 14-3-15.1 permits the agency to limit the use of the database and to require payment of a royalty or other consideration.

Example 59:
A private business provides information about state property taxes to paying subscribers across the United States. The business makes a request for electronic copies of the state tax department's entire property tax database, excluding exempt information, and requests that updates to the database be provided on a monthly basis. The tax department agrees to provide electronic copies of the database, including monthly updates, if the business pays a royalty and meets the other requirements of Section 14-3-15.1. If the business refuses to pay the royalty, the department is under no obligation to provide the business with an electronic copy of the database.

In this case, the private business was not interested in obtaining a hard copy of the database. Had the business requested a printed copy of the database rather than an electronic copy, the department would have been required to comply with the request and provide the printed copy in accordance with the Inspection of Public Records Act.

Commentary

Section 14-3-18 gives counties and municipalities authority to charge fees for electronic copies of their computer databases. It allows a county or municipality to charge a reasonable fee for an electronic copy of a computer database based on the cost of materials, making an electronic copy and personnel time to research and retrieve the electronic record.

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 may keep two files for each licensee. One containing public information, such as test scores and personal, educational and financial information required for licensure, and the other containing letters of reference exempted from disclosure under Section 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.

For requests to inspect records in electronic format, the Act requires the custodian to remove exempt information and corresponding metadata from the records prior to disclosure. The Act requires the custodian to use methods or redaction tools that prevent the recovery of exempt information from a redacted electronic record.

B. ELECTRONIC COPIES

A custodian must comply with a specific request for a copy of a public record in electronic format if the record exists in electronic format. However, the requester is not entitled to specify the file format of the electronic copy. The Act requires only that the custodian provide the electronic record in the file format in which the record exists at the time of the request.

Example 56:
A person files an inspection request seeking public records reflecting the salaries of the public body's employees. The requester asks to inspect an electronic copy of the records in Microsoft Word format. The public body uses Word Perfect and does not have the requested records in Word format. The public body is only required to provide the requester with the electronic copy in Word Perfect.

C. COPY FEES

A records custodian may charge reasonable fees for copying public records.

Printed copies. A custodian may not charge more than one dollar per printed page for documents that are 11 inches by 17 inches or smaller. If a document is larger than 11 inches by 17 inches, custodian may charge more than one dollar if it reasonably reflects the increased cost to the public body of copying oversized printed documents.

Downloaded copies. A custodian may charge the actual costs of downloading copies of public records to a computer disk or other storage device, including the actual cost of the storage device.

Transmitting copies. A custodian may charge the actual costs of transmitting copies of public records by mail, e-mail, or facsimile.

Unless otherwise allowed by law, any fee charged by a public body may reflect only the actual cost of copying. This may include the actual costs to the public body for making and transmitting copies, including any personnel time involved. The Act does not allow a custodian to charge for the cost of determining whether a particular public records is or is not subject to disclosure.

Example 57:
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.

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. Exempt information in an electronic document shall be removed along with the corresponding metadata prior to disclosure by utilizing methods or redaction tools that prevent the recovery of exempt information from a redacted electronic document.

B. A custodian shall provide a copy of a public record in electronic format if the public record is available in electronic format and an electronic copy is specifically requested. However, a custodian is only required to provide the electronic record in the file format in which it exists at the time of the request.

C. 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 printed page for documents eleven inches by seventeen inches in size or smaller;

(3) may charge the actual costs associated with downloading copies of public records to a computer disk or storage device, including the actual cost of the computer disk or storage device;

(4) may charge the actual costs associated with transmitting copies of public records by mail, electronic mail or facsimile;

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

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

(7) shall provide a receipt upon request.

D. Nothing in this section regarding the provision of public data in electronic format shall limit the ability of the custodian to engage in the sale of data as authorized by Sections 14-3-15.1 and 14-3-18 NMSA 1978, including imposing reasonable restrictions on the use of the database and the payment of a royalty or other consideration.

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 55:

II, 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 54:
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 complies with the Act by forwarding the request to the records custodian of the DPS, and sending a letter to the requester telling him that the Center is not the proper records custodian for purposes of requests for DPS records 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 above 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.

F. WRITTEN REQUEST INCLUDES EMAIL AND FACSIMILE

Under the Act, a written request to inspect public records may be submitted via email or facsimile to a records custodian. As written requests, email and facsimile requests to inspect public records must comply with Section 14-2-8(C) of the Act, which, as previously discussed, specifies the information that must be included in a written inspection request. The email address and facsimile number to be used for receiving electronic requests needs to be included in the public notice required by Section 14-2-7(E) of the Act.

As a written request, an email or a facsimile request to inspect public records is covered by the same requirements and deadlines that apply to any other written request. Consequently, public bodies must ensure that electronic communications are directed to and received by their records custodian for prompt and proper processing. Furthermore, appropriate measures need to be taken for handling electronic requests in the records custodian's absence. For example, a public body might set up a separate email address to which inspection requests may be sent or directed and which is accessible to the records custodian and other employees responsible for handling inspection requests.

Sometimes questions come up regarding the relationship between the 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 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, 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 Chapter 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 51:
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 seven 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 52:
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 of the final candidates 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 the résumés available, but that she will need some time to obtain them from the search committee. The notice tells the reporter that the records will be available on Monday (ten calendar days after the request was received).

Example 53:
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

requirements of the Act.

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 47:
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, Form I.) 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 48:
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 49:
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.

Example 50:
A business requests a copy of the Taxation and Revenue Department's unclaimed property database. Even if the records requested are otherwise public, 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 may be subject to criminal penalties. In its records request form, the Department 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

VII. Section 14-2-8. Procedure for Requesting Records

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.

F. For the purposes of this section, "written request" includes an electronic communication, including email or facsimile; provided that the request complies with the requirements of Subsection C of this section.

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 46:
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 salary history is public information. The records custodian is able to immediately access the information and provides it to the requester within 15 minutes of oral the request, thus satisfying the

Example 44:
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(E) of the Act in a conspicuous location at the secretary's home, such as on or near the front door.

Example 45:
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 thumbtacked 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(E) is contained in Appendix III.

inspect must take precedence over all other business of the public body. Rather, the duty to provide reasonable opportunities to inspect permits a records custodian to take into account the public body's office hours, available space, available personnel, need to safeguard records and other legitimate concerns. Accordingly, the custodian may impose reasonable conditions on access, including appropriate times when, and places where, records may be inspected and copied. Generally, the obligation to provide reasonable access to public records should not require an office to disrupt its normal operations or remain open beyond its normal hours of operations.

Example 41:
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 42:
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.

D. 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 43:
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.

E. 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 and on the public body's publicly accessible web site, if any. The notice must describe, at a minimum, the right to inspect public records, contact information for the records custodian, the procedures for requesting inspection and copies of the public body's records and applicable reasonable fees for copying records. The Act makes clear that the notice must be posted on a website only if the public body maintains a publicly accessible website. The Act does not address the posting requirement for public bodies that do not have an administrative office. If a public body does not have an administrative office, it might comply with the Act 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 body's records are likely to see the notice.

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 requests, including electronic mail or facsimile, to inspect public records;

B. respond to requests in the same medium, electronic or paper, in which the request was made in addition to any other medium that the custodian deems appropriate;

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

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

E. post in a conspicuous location at the administrative office, and on the publicly available website, if any, 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, including the contact information for the custodian 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" in Chapter V, Section A) 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. RESPONSE IN SAME MEDIUM

A custodian receiving an inspection request must respond in the same medium in which the custodian received the request, be it electronic or paper. The custodian may provide an additional response to the same request in any other medium the custodian deems appropriate.

C. 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

access to the same information contained in the records of public bodies. This view has changed in recent years, due to the wide availability of and access to information on the Internet, concerns about identity theft, and public pressure to limit unwanted telephone, mail, and email solicitations. Records of home addresses and telephone numbers of a public body's employees constitute "public records" for purposes of the Act only if they "relate to public business." This is consistent with the Act's purpose, discussed above, to ensure public access to "information regarding the affairs of government and the official acts of public officials and employees." Generally, a public body maintains employee home addresses, telephone numbers and similar personal contact information for administrative purposes. The information, by itself, reveals nothing about the official acts of the employees or the operations or activities of the public body. Thus, in most cases a public body may deny a request to inspect records of its employees' personal contact information because that information is not a "public" record.

Example 40:
A newspaper requests payroll information for a village's employees. The records include the employees' names, home addresses and salaries. The village provides the newspapers with copies of the records, after redacting the employees' home addresses. The village properly denied inspection of the home addresses because that information is not a public record that is open to inspection under the Act.

Commentary

In limited situations, personal contact information for a public body's employees may constitute a public record that must be made available for inspection. For example, public inspection may be appropriate if a public body's employee works at home, so that the employee's work address is also that employee's home address. Another example is where a public official is required by law to reside within a certain city, county or district. In that situation, the portion of the official's address that shows the city, county or district in which the employee lives might constitute a public record.

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. See Toomey v. City of Truth or Consequences, 2012-NMCA-104 (holding that a private company that contracted with a city to manage the city's public access cable TV channel was acting on the city's behalf, which meant that video recordings of city commission meetings held by the contractor were public records covered by IPRA's disclosure requirements).

Commentary

The definition of public records 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, 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 body or its employees that are not public records. Records are not public if a law states that they are not public records, if they do not relate to a public body's business or if they are not kept by or on behalf of a public body.

Example 38:
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 federal funds. The report was not kept in the state agency's files, but was thrown away or sent on to a private organization. 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 to the state agency. Of course, even though the report is not a public record subject to inspection, the Act would not have prohibited the agency from voluntarily providing the report in response to an inspection request made while the report was temporarily in the agency's custody.

Example 39:
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 city subject to inspection upon request.

Commentary

In some situations, personal contact information held by a public body may not constitute a "public record" for purposes of the Act. In a recent case, the New Mexico Court of Appeals determined that personal information included in a citizen's complaint filed with a public body, such as the citizen's home address and telephone number and social security number, might be redacted before making the complaint available for public inspection. See Cox, 148 N.M. at 941. The court observed that the personal information was not directly related to the complaint submitted to the public body, was not necessary to the public's inspection of the substance of the complaints, and that release might lead to substantial harm to the citizen complainant such as identity theft. (As discussed above in Chapter III, Section B.8, the Act now expressly permits a public body to redact social security numbers and other "protected personal identifier information" in a public record before allowing inspection and copying.)

For reasons similar to those the court used to justify protecting personal contact information in complaints filed by private citizens, the home address and telephone numbers of public employees may also be protected from disclosure. In the past, a public employee's personal contact information was considered a public record and subject to public inspection. Because home addresses and telephone numbers were already available to the public through publication in telephone directories and similar sources, there appeared to be little justification for denying public

American tribes, pueblos or nations or by the federal government.

G. 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 33:
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 34:
A person studying the process of governmental decision making submits to the records custodian for the governor's office a request to inspect all email 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, thereby complying with the Act.

Commentary

Records used, created, received, maintained or held on behalf of a public body are public records just as if they were maintained by the public body itself. In this regard, if email is used to conduct public business, the email is a public record even though a personal account is used. The person using the personal account is effectively using, creating, receiving, maintaining or holding the public record on behalf of the public body. On the other hand, not every personal email of a public official is necessarily a public record. The communication must relate to public business and be maintained or held on behalf of a public body to be a public record.

Example 35:
The mayor of a city routinely uses his personal email account to communicate, in his official capacity, with city councilors and lobbyists regarding city business. An interested citizen requests all email communications between the mayor and lobbyists regarding an issue currently facing the city. In responding to the request, the mayor must include all applicable messages sent to and from his personal email account as they are records related to public business held on behalf of the city.

Example 36:
Joe works for the Department of Game and Fish. Joe receives a personal email, on his personal account, from Jane, a private citizen, that contains a comment on an issue before the Department of Health. Jane is Joe's personal friend and is not connected to his work for the state. Joe replies to the email. The emails were not sent or received in Joe's official capacity and did not influence his work. We do not believe the emails are public records, even though they technically relate to public business, because they were not used, created, received, maintained or held on behalf of a public body.

Example 37:
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

review any public record that the Act has not excepted from the right to inspect.

D. PERSON

The term "person" is not limited to individuals and can apply to almost any type of entity, including corporations, clubs and partnerships.

E. PROTECTED PERSONAL IDENTIFIER INFORMATION

As discussed above in Chapter III, Section B.8, the Act permits a public body to redact "protected personal identifier information" in a public record before providing the record for inspection and copying. For purposes of the Act, "protected personal identifier information" is all but the last four digits of a taxpayer identification number, financial account number or driver's license number; all but the year of a person's date of birth; and a social security number. If a request is made to inspect public records containing personal information, it may be redacted on the grounds that it is "protected personal identifier information" only if the personal information requested falls within the Act's definition. Personal information in public records that is not "protected personal identifier information" as defined by the Act, must be made available in response to an inspection request, unless that information is protected by another law.

F. 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 30:

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 Act to provide access to its records.

Example 31:

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 32:

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 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

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. "file format" means the internal structure of an electronic file that defines the way it is stored and used;

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

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

E. "protected personal identifier information" means:

(1) all but the last four digits of a:
(a) taxpayer identification number;
(b) financial account number; or
(c) driver's license number;

(2) all but the year of a person's date of birth; and

(3) a social security number.

F. "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

G. "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 29:
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. FILE FORMAT

The term "file format" means the internal structure of an electronic file that defines the way it is stored and used. For example, a public body may use Microsoft Word to create electronic documents. Microsoft Word is the file format for those documents.

C. INSPECT

The term "inspect" as used in the Act means to

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.

public records when there was a countervailing public policy against disclosure. Under this judicially-created exception, nondisclosure of public records could be justified if the harm to the public interest from allowing inspection outweighed the public's right to know.

The New Mexico Supreme Court abolished the rule of reason exception in Republican Party of New Mexico v. New Mexico Taxation and Revenue Department, 2012-NMSC-026, 283 P.3d 853. The Court's decision makes it clear that a public body may withhold a public record only if it is based on (1) a specific exception contained within the Act, (2) a statutory or regulatory exception, (3) a rule adopted by the New Mexico Supreme Court, or (4) a privilege protecting a record from disclosure that is grounded in the U.S. or state constitution.

b. Executive Privilege

The Republican Party case also limited the use of executive privilege, which had been widely used by state executive agencies to deny public access to communications within those agencies regarding policy. The NM Supreme Court determined that the privilege was grounded in constitutional separation of powers principles, which meant it could be relied on to protect public records from disclosure. But then the Court strictly limited the application of the privilege to pre-decisional communications between the head of the executive (e.g., the governor) and his or her closest advisers regarding the head executive's constitutionally-mandated duties. After Republican Party, the executive privilege is not available to cabinet agencies controlled by the governor or to local public bodies.

Example 27:
The State Engineer is formulating a formal policy for handling water rights litigation in the state. As part of the process, she solicits the recommendations of division directors within the agency. Some of the directors respond with written memoranda addressed to the State Engineer that contain candid and controversial remarks regarding the issues and persons involved in water rights litigation.

An attorney representing a party involved in a lawsuit against the state requests copies of all documents regarding the proposed policy. The request is denied based on executive privilege. The attorney challenges the refusal to allow inspection in district court. We think that, after the Republican Party decision, it is now clear that executive privilege would not protect the State Engineer's Office's internal memoranda and they would have to be provided to the attorney.

Example 28:
A construction project is proposed in an area that relies on groundwater for its water supply. The state agency charged with enforcing the state's safe drinking water laws has contracted for a study of the impact of the project on local water supplies. A draft of the study was forwarded to the governor for review. A concerned resident requests a copy of the study from the agency. The agency denies the request on the basis that the copy is a draft document and protected by executive privilege.

There is no statute or court rule that allows a public body to deny inspection of a record simply because it is a draft. See Edenburn v. New Mexico Department of Health, 2013 NMCA 045, ¶ 23 (holding that draft documents are public records under IPRA). The study is also not protected by the executive privilege because the study was prepared and provided to the agency by a third party contractor and the study is not a "communication" to the governor or a communication between the governor and his or her closest advisors. Unless the state agency can identify a law permitting it to deny inspection of the study, the state agency must make the study available for inspection and copying.

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 25:
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 correctly rules that the "otherwise provided by law" exception incorporates the regulation because the regulation 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 26:
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 protection from disclosure is that applicable to social security numbers. In 1990, Congress enacted legislation providing confidentiality for social security account numbers and related records obtained or maintained by a state or local government agency pursuant to laws 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. (Social security numbers are now expressly protected under the Inspection of Public Records Act as "protected personal identifier information." See discussion in Chapter III, Section B.8 of this Guide.)

10. End of Countervailing Public Policy Exception and Clarification of Executive Privilege

a. Countervailing Public Policy

For many years, New Mexico courts recognized a "rule of reason" exception to the right to inspect

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 children, youth and families 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 24:
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

confidential.

§ 50-9-21. Workplace safety inspections
Information obtained by the Department of Labor 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 with a county or municipality, the contents of the application, and issuance of the license are confidential information until after the applicant gives public notice of the proposed sale.

§ 57-12-12. Unfair trade practices
A demand by the Attorney General for the production of tangible documents or recordings that is believed to be 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.

§ 58-13C-607. 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 or reaches a settlement.

§ 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.

§ 66-2-7.1. Drivers' personal information
Disclosure of personal information about drivers obtained by the Motor Vehicle Division is unlawful, with limited exceptions.

§ 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
Information regarding production and value of production for individual mines furnished yearly to the mining and minerals division of the energy, minerals and natural resources department shall be held 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

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.

§ 28-17-13. Long-term care client records
Files and records pertaining to clients, patients and residents held by the state long-term care ombudsman are confidential and not subject to the provisions of the Inspection of Public Records Act.

§ 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.

§ 29-12A-4. Crime Stoppers records
Records and reports of a local crime stoppers program are confidential.

§ 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 specified state and federal agencies 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

§ 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.

§ 9-26-14. 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 five 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.

§ 14-3-18. Local government databases
Counties and municipalities may charge fees for electronic copies of computer databases and for access to their computer and network systems to search, manipulate or retrieve information from a computer database.

§ 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.

§ 14-8-9.1 Documents filed with county clerk
Documents filed and recorded in a county clerk's office are public records subject to disclosure, with certain exceptions including health information relating to specific patients and discharge papers of a veteran of the U.S. Armed Forces. Death certificates are available for inspection but may not be copied for 55 years.

§ 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.

§ 22-21-2. 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

exempt the record from inspection. Unredacted records that contain protected personal identifier information shall not be made available on publicly accessible web sites operated by or managed on behalf of a public body.

Commentary

The Act permits a public body to redact or block out "protected personal identifier information" contained in a public record before making the record available for inspection or copying. As discussed below in Chapter V, Section E, the Act defines "protected personal identifier information" that may properly be redacted. A public body may not deny inspection of a public record merely because the record contains protected personal identifier information. To protect the personal identifier information, the public body may redact it from the public record and then make the redacted record available for inspection and copying.

The Act permits but does not require a public body to redact protected personal identifier information contained in a public record before providing the record for inspection or copying. In contrast, the Act prohibits a public body from making records that contain protected personal identifier information available on the public body's web site unless the protected personal identifier information has first been redacted.

9. 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. While some establish the essential confidentiality of records, 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)

§ 1-4-5.5 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.

discussed in a properly closed meeting.

Example 21:
The administrator for a county hospital leased to a private, non-profit 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 the list of state laws in Chapter III, Section B.9). Those records, therefore, may remain confidential regardless of whether they are discussed in a properly closed meeting.

7. Tactical Response Plans

The Law

Tactical response plans or procedures prepared for or by the state or a political subdivision of the state, the publication of which could reveal specific vulnerabilities, risk assessments or tactical emergency security procedures that could be used to facilitate the planning or execution of a terrorist attack.

Commentary

Particularly since the September 11, 2001 terrorist attacks, state and local governments have focused on the development and refinement of plans and procedures for responding to emergencies, including potential terrorist attacks. This exception is intended to protect New Mexico state and local government tactical response plans or procedures that, if made public, could reveal specific vulnerabilities, risk assessments or tactical emergency security procedures that could be used by terrorists to plan or carry out an attack. Information sought to be protected under the exception must be included in a governmental tactical response plan or procedure. Otherwise, it is not sufficient to deny an inspection request that the requested records could conceivably be useful to terrorists planning an attack.

Example 22:
A county resident requests a copy of a geological survey map that designates the reservoir supplying the county's drinking water. The map is not part of the county's tactical response plans or procedures. Thus, access to the map may not be denied just because the location of the reservoir might possibly be of interest to a terrorist.

Example 23:
Homeowners in a village are required to file copies of their building plans with the village clerk. Some residents are concerned that burglars could use the plans to rob the residents' homes if the plans were made available for inspection. Nevertheless, unless the building plans are otherwise protected by law, the village clerk may not rely on the exception for tactical response plans or procedures to deny public access to the building plans.

Commentary

It also would not be proper to simply designate information as a "tactical response plan" in order to avoid public disclosure. To afford confidentiality to a plan under this exception it must (1) address the state's or a local government's plan or procedures for dealing with a crisis or emergency and (2) contain "specific vulnerabilities, risk assessments or tactical emergency security procedures" that could facilitate a terrorist attack if made public.

8. Protected Personal Identifier Information

The Law

Protected personal identifier information contained in public records may be redacted by a public body before inspection or copying of a record. The presence of protected personal identifier information on a record does not

the Victims of Crimes Act (NMSA 1978, §§ 31-26-1 to -14), including murder, rape and other serious criminal offenses, have certain rights, including the right to have their dignity and privacy respected. 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 may provide law enforcement agencies, criminal prosecutors and judges with justification for denying public access to those portions of records that identify the victims of those crimes. The rights conferred under the constitution and the Victims of Crimes Act end upon final disposition of the court proceedings.

5. Confidential Materials Act

The Law

As provided by the Confidential Materials Act.

Commentary

The Confidential Materials Act (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 donated or sold materials 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 19:
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 with the 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 when the information to be kept confidential 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(H)(9)) 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 20:
The board of a public hospital holds its regularly scheduled public meeting. During the meeting, a board member moves 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, and was

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, 911 tapes and other records of incidents reported to a law enforcement agency that are organized chronologically.

Example 15:
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.

Example 16:
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 17:
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 18:
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 designates "records of traffic offenses and accident reports" as public information. 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

• records containing information that might unfairly cast suspicion on and invade the privacy of innocent people or endanger a person's life.

Whether a law enforcement agency can deny inspection of a particular record may depend on the phase of the criminal investigation or prosecution. For example, the name of a suspect will no longer be covered by the exception if the person is charged with a crime. However, if the target of an investigation or a suspect is not charged, that person's identity can remain confidential even after the investigation is closed.

Example 12:
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 13:
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 merely because the headline in the newspaper accuses the police chief of a crime. However, the records custodian may deny inspection on grounds that the requested records "reveal ... individuals accused but not charged with a crime" if the police chief has been designated a suspect or has otherwise been accused (but not charged) by law enforcement officials.

Example 14:
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.

Commentary

The law enforcement records exception does not protect information subject to disclosure under the Arrest Record Information Act (NMSA 1978, §§ 29-10-1 to -8). This includes records identifying a person who has been arrested. In addition, 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

Commentary

This exception extends only to information that is a matter of opinion. Factual information or other public information is not protected merely because it is kept in employee or student files.

Example 10:
A city employee who tends to get into trouble with her supervisor has, as a result, several letters of reprimand in her personnel file. These letters, as well as her annual evaluations, are not subject to disclosure. However, factual information in the file concerning salary, annual leave or conflicts of interest is not similarly protected.

Example 11:
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

Requested documents that contain significant factual information in addition to opinion should be provided with the opinion information blocked out or otherwise redacted. The presence of protected opinion information in a document does not exempt the remainder of the document from inspection. Job applications and applicant resumes are not matters of opinion and should be provided upon request. With respect to student files, information not protected by this exception may otherwise be covered by the protection granted to student records under federal law. (See discussion in Chapter III, Section B.9.b of this Guide regarding the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g.

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 does not protect all records held by a law enforcement agency. The exception applies only to records that are (1) created or used by a law enforcement agency in connection with a criminal investigation or prosecution and (2) reveal confidential sources, methods, information or individuals accused but not charged with a crime.

Generally, the records that fall within the exception's protection are those that, if made public, would seriously interfere with the effectiveness of a criminal investigation or prosecution. Examples of records that typically fall within the exception's protection include:

- records that detail the methods and procedures a law enforcement agency follows when investigating crimes;

- evidence and other records that, if disclosed, would alert potential defendants to destroy evidence, coordinate stories or flee the jurisdiction;

- witness testimony that is crucial to a criminal investigation and prosecution; and

licensing or permits.

Commentary

This exception protects letters of reference an agency might obtain regarding applicants for employment, licenses or permits from public inspection. 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 8:
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 other public bodies for which the developer had performed similar construction services. Mr. Doe, the town manager for a neighboring town, writes a letter to the council detailing his opinion that the developer did not adequately control cost overruns on a town project overseen by the developer. Mr. Roe, a resident of a neighborhood near the planned supermarket site, requests a copy of Mr. Doe's letter. The city council properly refuses Mr. Roe's request on the grounds that Mr. Doe's letter is a letter of reference concerning a permit.

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 regarding 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.

Newsome, 90 N.M. at 795. As with the exception for medical records, the Newsome case 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. A more recent case similarly interpreted the exception to cover matters of opinion related to the working relationship between an employer and employee such as internal evaluations; disciplinary reports or documentation; promotion, demotion or termination information; and performance assessments. See Cox v. New Mexico Dep't of Public Safety, 148 N.M. 934, 939, 242 P.3d 501 (Ct. App. 2010). That case also makes clear that unless they relate to the employee's working relationship with his or her employer, matters of opinion are not protected simply because they are kept in the employee's personnel file.

Example 9:
The sheriff's office received a complaint from a citizen regarding what she perceived as misconduct by the deputy during a routine traffic stop. The complaint is placed in the deputy's personnel file. A reporter for a news blog asks to inspect and copy the complaint. Although maintained in the deputy's personnel file, the complaint is not a matter of opinion exempt from disclosure. The complaint came from a member of the public and related to her interaction with the deputy. The complaint was not generated by the sheriff or at the sheriff's request in connection with the sheriff and deputy's employment relationship. Accordingly, the sheriff's office must make the complaint available to the reporter for inspection and copying.

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.

B. EXCEPTIONS

When determining whether the specific exceptions to the Act apply to a particular 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 those matters to 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 record 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, however, the New Mexico Supreme Court has substantially expanded the exception. Specifically, the Court held in Newsome, 90 N.M. 790, that the exception protected employee records pertaining to illness, injury, disability, inability to perform a job task and sick leave. In addition, the Court did not require, as a condition for confidentiality, that the records pertain only to persons confined to institutions. Thus, the exception generally protects records kept by any governmental agency relating to physical or mental illness or medical treatment of individuals, as those terms have been judicially interpreted.

Example 5:
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 6:
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 7:
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,

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 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. Unless the records custodian is positive that a recognized exception applies, all legitimate and appropriate requests must be honored.

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.

Example 2:
A homebuyer 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. 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

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. Merely declaring certain documents to be confidential by regulation or agreement will not exclude them from inspection. Similarly, an agency cannot deny access to a record simply because the agency obtained it under a promise of confidentiality. To exclude a record from inspection, the custodian must be prepared to show that a specific law, court rule or constitutional privilege supports confidentiality. Because of the presumption in favor of inspection and to effectively protect personal privacy, the public body should be sure that the information it gathers is actually needed.

Example 3:
A government watchdog group requests the names 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 the employees' privacy. The director's policy is open to challenge because the names and salaries of public employees are generally considered public information. Without a specific law, court rule or constitutional privilege to support it, the mere promise of confidentiality is not adequate to deny access to the requested information.

Example 4:
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

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.

attorney in the county of jurisdiction; or

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

with transmitting copies of public records by mail, electronic mail or facsimile;

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

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

(7) shall provide a receipt upon request.

D. Nothing in this section regarding the provision of public data in electronic format shall limit the ability of the custodian to engage in the sale of data as authorized by Sections 14-3-15.1 and 14-3-18 NMSA 1978, including imposing reasonable restrictions on the use of the database and the payment of a royalty or other consideration.

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

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.

F. For the purpose of this section, "written request" includes an electronic communication, including email or facsimile, provided that the request complies with the requirements of Subsection C of this section.

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. Exempt information in an electronic document shall be removed along with the corresponding metadata prior to disclosure by utilizing methods or redaction tools that prevent the recovery of exempt information from a redacted electronic document.

B. A custodian shall provide a copy of a public record in electronic format if the public record is available in electronic format and an electronic copy is specifically requested. However, a custodian is only required to provide the electronic record in the file format in which it exists at the time of the request.

C. 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 printed page for documents eleven inches by seventeen inches in size or smaller;

(3) may charge the actual costs associated with downloading copies of public records to a computer disk or storage device, including the actual cost of the computer disk or storage device;

(4) may charge the actual costs associated

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. "file format" means the internal structure of an electronic file that defines the way it is stored and used;

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

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

E. "protected personal identifier information" means:

(1) all but the last four digits of a:
(a) taxpayer identification number;
(b) financial account number; or
(c) driver's license number;

(2) all but the year of a person's date of birth; and

(3) a social security number.

F. "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

G. "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 requests, including electronic mail or facsimile, to inspect public records;

B. respond to requests in the same medium, electronic or paper, in which the request was made in addition to any other medium that the custodian deems appropriate;

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

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

E. post in a conspicuous location at the administrative office, and on the publicly available website, if any, 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, including the contact information for the custodian 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.

II. Inspection of Public Records Act

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

A. Every person has a right to inspect 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) tactical response plans or procedures prepared for or by the state or a political subdivision of the state, the publication of which could reveal specific vulnerabilities, risk assessments or tactical emergency security procedures that could be used to facilitate the planning or execution of a terrorist attack; and

(8) as otherwise provided by law.

B. Protected personal identifier information contained in public records may be redacted by a public body before inspection or copying of a record. The presence of protected personal identifier information on a record does not exempt the record from inspection. Unredacted records that contain protected personal identifier information shall not be made available on publicly accessible web sites operated by or managed on behalf of a public body.

14-2-4. Short Title.

Chapter 14, Article 2 NMSA 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

I. Introduction

Access to public records is one of the fundamental rights afforded to 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 Compliance Guide, there are circumstances where the right to inspect public records is outweighed by specific competing interests protecting the confidentiality of certain records. However, courts interpreting the Act have established a clear presumption in favor of access:

> 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..., the right to inspect public records must be freely allowed.

Newsome, 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 ("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, this Compliance 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, or if you have any questions about it or the applicability of the Act, please contact the Open Government Division of the Office of the Attorney General at P.O. Drawer 1508, Santa Fe, New Mexico 87504-1508, or by telephone at (505) 827-6070. The Guide is also available at the Office of the Attorney General's website at www.nmag.gov.

This Guide does not attempt to anticipate all problems or questions that may arise in the course of government business. It is hoped, however, that the Guide will serve to resolve recurring questions concerning the applicability of the law. For questions not addressed in the Guide, public bodies should direct compliance questions to their attorneys. In addition, the Office of the Attorney General will answer questions from members of the public and government agencies concerning application of the Act.

The Office also provides educational workshops on the Act throughout the state for members of the public and state and local governments. To find out when the next Inspection of Public Records Act workshop will be held in your area, please contact the Open Government Division.

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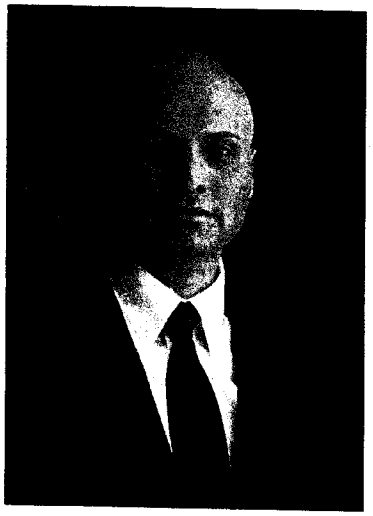


Our Mission

Our mission at the New Mexico Department of Justice is to serve and protect the citizens of New Mexico by honorably carrying out the statutory responsibilities of the Attorney General.

Our Vision

Our vision is to seek, strengthen, and empower partnerships with and among citizens, community and government agencies, law enforcement, and businesses in order to make our community a safer and more prosperous place to live. We must enforce the laws of New Mexico fairly and uniformly to ensure New Mexicans receive justice and equal protection under the law.

As Attorney General, I am pleased to report that we are working hard to make the changes necessary to serve and protect the State of New Mexico. I grew up facing many of the hardships that New Mexicans experience every day, and it is that shared experience that motivates me to be a fierce advocate and a voice for our communities. My outreach efforts will support long-term goals of improving transparency in government and empowering New Mexicans.

The Inspection of Public Records Act (IPRA) is intended to provide the public with access to information about governmental affairs. This Compliance Guide has been prepared to inform the public, state and local government agencies, and all other public bodies subject to the IPRA about its requirements and applications. The law requires public access to virtually all public records. While there are legitimate exceptions, most records are available for public inspection. We encourage public officials to be reasonable in providing public access and to honor all legitimate requests for records. The responsibilities of supporting, complying with, and enforcing IPRA lie with citizens, agencies, District Attorneys and the Attorney General. This guide is intended to assist public officials in their efforts to govern in a transparent manner, and will help New Mexicans understand their right to inspect public records.

HECTOR BALDERAS
Attorney General of New Mexico
2015

IPRA GUIDE

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

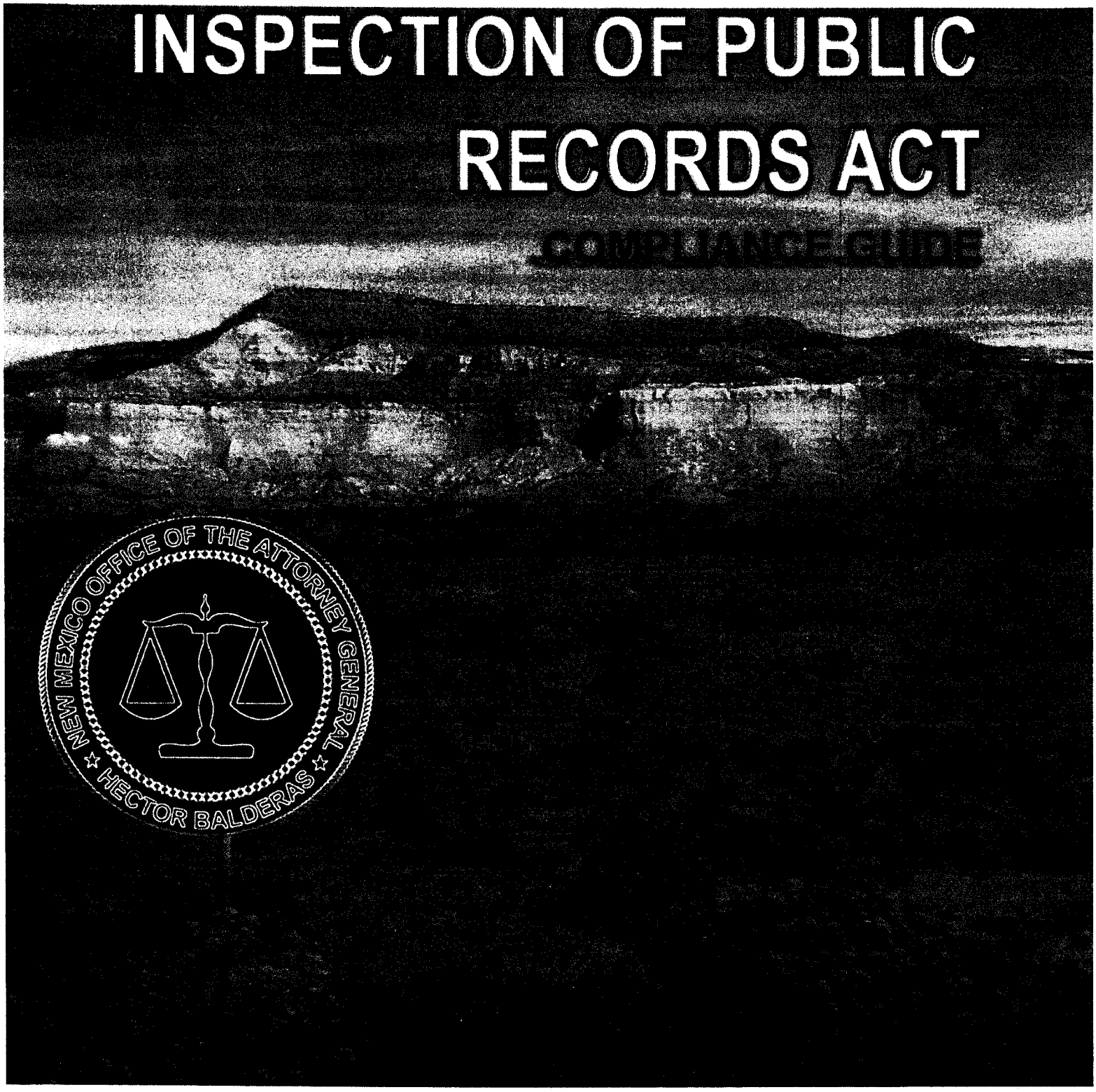
A Compliance Guide for
New Mexico Public Officials and Citizens

HECTOR BALDERAS
Attorney General

This eighth edition of the Compliance Guide updates the 2012 edition to reflect amendments to the Inspection of Public Records Act made in 2013. The amendments codified the definition of protected personal identifier information and added a reference to the statutory authority of counties and municipalities to sell data in computer databases.

Eighth Edition
2015

NEW MEXICO



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NEW MEXICO ATTORNEY GENERAL