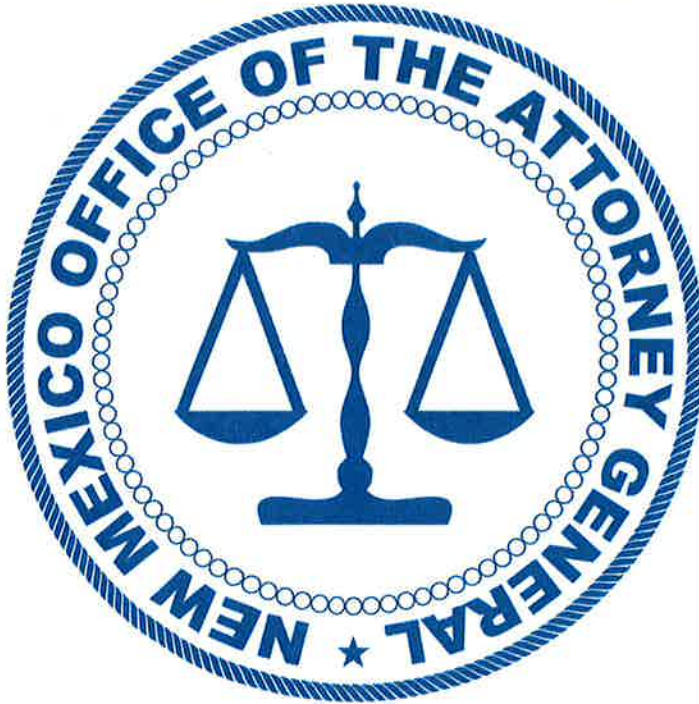


New Mexico

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# INSPECTION OF PUBLIC RECORDS ACT *COMPLIANCE GUIDE*

PROVIDED BY THE OFFICE OF THE NEW MEXICO ATTORNEY GENERAL



# IPRA GUIDE

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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



## 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.

A handwritten signature in blue ink, appearing to read "Hector Balderas". The signature is stylized and fluid.

HECTOR BALDERAS  
Attorney General of New Mexico  
2015

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# 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](http://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.

## 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 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.

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

**(5) may require advance payment of the fee 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 attorney in the county of jurisdiction; or

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

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

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

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

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

## A. RIGHT TO INSPECT PUBLIC RECORDS

### The Law

**Every person has a right to inspect 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*



*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,**



## 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.*

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

- 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



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 contain 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 enforcer 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

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*

*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 government 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**



**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.

### **§ 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 to 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 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 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 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 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. STAR, 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 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 advisers. 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.*

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

### The Law

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

### Commentary

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

## V. Section 14-2-6. Definitions

### The Law

As used in the Inspection of Public Records Act:

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

B. "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 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 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 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 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.

## 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 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.

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.



## 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 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

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 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.



## 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:

*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.*

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 procedure 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.

## 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.



# 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 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.*

### **B. PROCEDURE FOR DENYING REQUESTS**

For requests to inspect that are denied, the custodian must mail or deliver a notice to the requester within 15 days of receiving the request.

(See Appendix II, Form V.) The denial notice must be in writing, describe the records sought to be inspected, set forth the names and titles or positions of each person responsible for the denial, and explain the reason for the denial. 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.

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).*

# 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.

#### *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.*