

# THE INSPECTION OF PUBLIC RECORDS ACT

A Compliance Guide on Government Transparency  
for New Mexicans and their Public Officials

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Ninth Edition • 2024





Dear Fellow New Mexicans,

We are pleased to share this comprehensive update of the Inspection of Public Records Act (IPRA) Compliance Guide. As one of New Mexico's core Sunshine Laws, IPRA enables access to public records of governmental entities in New Mexico. Recognizing that a "representative government is dependent upon an informed electorate" and that the public is entitled to "information regarding the affairs of government and the official acts of public officers and employees," IPRA sets out the rights the public has to public records and establishes the procedures for making such requests.

Inspecting public records is an important civic action that can enrich policy discussions, encourage free speech, empower local communities, and increase education and understanding of our government. By helping to shine light on the affairs of state and local government, IPRA is a fundamental tool for promoting good government in New Mexico. The New Mexico Department of Justice makes use of this important tool by training governmental entities to comply with IPRA, fulfilling records requests submitted to our office, and enforcing violations of IPRA statewide. In so doing, we advance fairness and transparency in government.

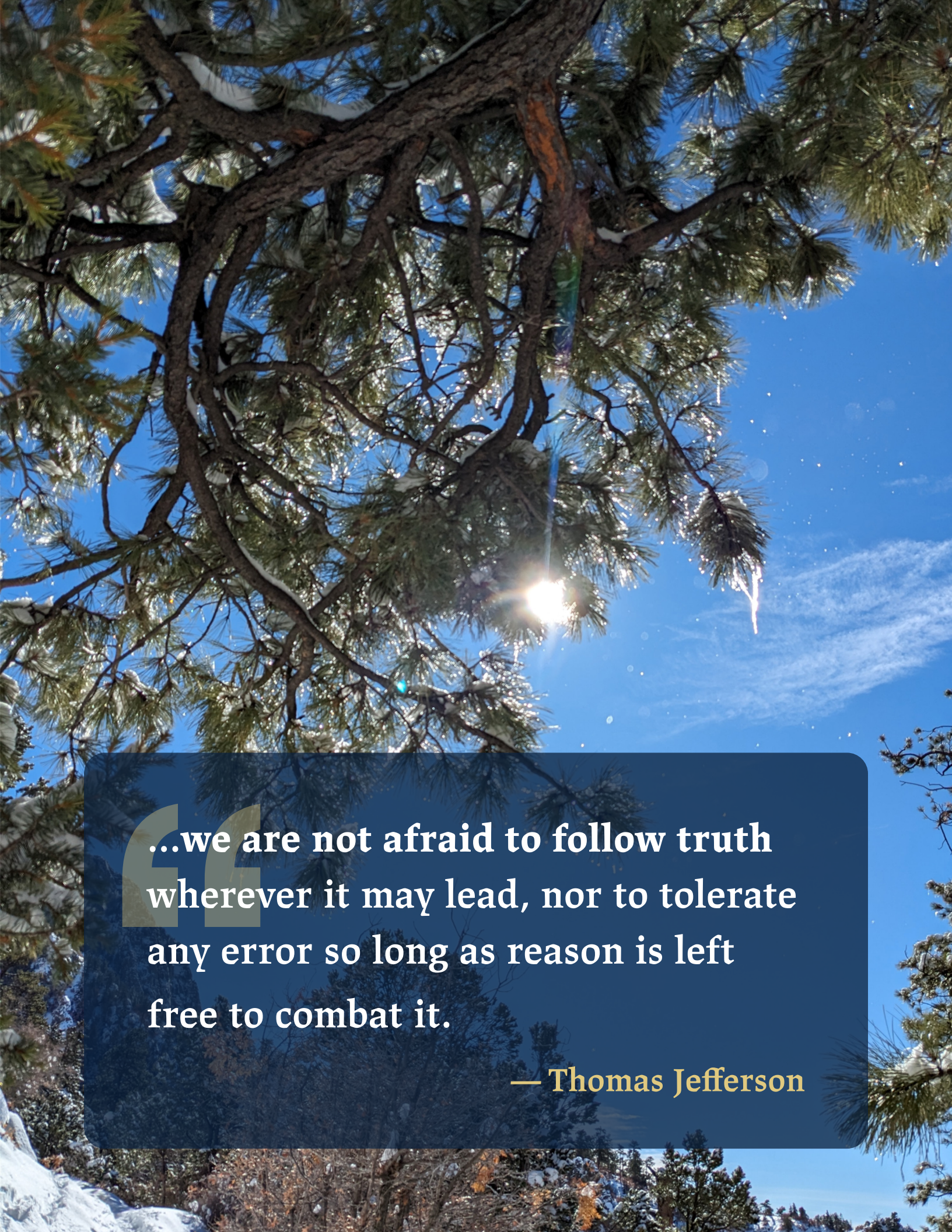
Our hope is that each person who uses this guide will play their part in helping ensure our government remains transparent and accountable.

Sincerely,

A handwritten signature in black ink, appearing to read "RTB", with a long horizontal stroke extending to the right.

Raúl Torrez

Attorney General



**“...we are not afraid to follow truth  
wherever it may lead, nor to tolerate  
any error so long as reason is left  
free to combat it.**

**— Thomas Jefferson**

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# Introduction

## How to Use this Guidebook

This and other guides published by the New Mexico Department of Justice are intended to provide a clear explanation of legal requirements that our state and local governments must follow. While much of this guide is intended to assist public officials and employees understand and comply with the law and its various requirements, it also serves to inform the public of their right to access information, how to make effective requests, and what limits and exceptions there are to accessing public records.

Readers should find this guide useful without having legal background or training, but endnotes are found throughout the guide that include information and citations to specific laws, court opinions, and other more technical legal analysis that may be particularly helpful for attorneys, legal professionals, and anyone wishing to better understand the nuances of the law.

The New Mexico Department of Justice provides resources, information, and training on compliance with this and other government accountability laws. However, the office it does not represent local governments or individuals and cannot provide legal advice. State and local governments, referred to throughout this guide as public bodies, should consult their attorney when facing any noncompliance or threat of litigation.

## Public Policy Behind the Law

Across our country, it is understood that access to public records is a fundamental right afforded to people in a democracy. The United States Supreme Court has recognized a general right to inspect and copy certain public records that affords members of the public the opportunity to keep a watchful eye on government.<sup>i</sup>

In New Mexico, the Inspection of Public Records Act provides an even greater presumption that favors public access to government records in declaring a policy that “all persons are entitled to the greatest possible information regarding the affairs of government and the officials acts of public officers and employees.”<sup>ii</sup> From the highest levels of the state to our smallest local and municipal governments, providing access to public records is a critical role every public body has in making information available to the people; the ultimate authority on government accountability.

# History and Recent Updates

## 2023

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The legislature created a new section focused on law enforcement records, and added an exception related to critical infrastructure and IT system information.

Finding that IPRA's exception governing matters of opinion in a personnel file applies to entire letters or memoranda, the Court of Appeals in *Henry v. Gauman* held that records custodians are not required to separate fact from opinion in documents subject to the exception.<sup>iii</sup>

## 2022

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The Court of Appeals, in *Franklin v. Dept. of Public Safety*, held that a state agency did not provide an inmate with “reasonable opportunity” to inspect requested records when it first required paying a copying fee. The Court did not elaborate what measures would have been reasonable, leaving a question of what might be required of public bodies to satisfy a “reasonable opportunity” for inspection.<sup>iv</sup>

## 2020

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Examining IPRA's application to government contractor records, the Court of Appeals in *Corizon* expanded on its 2012 *Toomey* decision, holding that third-party settlement agreements with a private prison contractor were public records. The case underscores that government contractors create and hold public records and that public bodies must work with them to comply with IPRA.<sup>v</sup>

The NM Supreme Court held in *Jones v. APD*

that the law enforcement records exception (Section 14-2-1(A)) cannot be interpreted so broadly as to withhold records simply based on the presence of an ongoing criminal investigation.<sup>vi</sup>

Personal email addresses submitted in applications for licenses by the Department of Game and Fish were held to be public records subject to IPRA in *Dunn v. Dept. of Game and Fish*. The decision suggests a presumption favoring disclosure but does not fully address the broader issue of determining what is considered a “public record” related to public business and subject to inspection, and what is a “non-public record” not subject to IPRA.<sup>vii</sup>

## 2019

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The legislature created a new Section 14-2-1.1 addressing personal identifier information, broadened the scope of allowed exceptions “otherwise provided by law,” and exceptions for portions of records related to crime victims and individuals accused but not charged with crimes.

Holding that damages available under Sections 14-2-11 and 14-2-12 are not mutually exclusive, the Court of Appeals in *Britton v. Attorney General* examined the records custodian's diligence in fulfilling their responsibility to search, provide copies, and explain any good-faith belief of exceptions used to deny a request.<sup>viii</sup> The Court focused on the obligation of public bodies to provide the “greatest possible information,” including a written explanation of any denial, and justified larger monetary damages based on intentional or bad faith withholding of records. The court found that damages should

be based on “the dual objectives of both punishing the underlying violation and deterring future noncompliance.”<sup>ix</sup>

Addressing confidentiality of attorney communication, the Court of Appeals in *Albuquerque Journal v. Board of Ed. Of Albuquerque Public Schools* examined the elements of the common-interest doctrine, which can extend an attorney-client privilege to individuals beyond the client. In finding that a public body must prove the privilege exists when challenged, the court emphasized a need to show evidence that a mutual effort was made between the parties to keep certain information confidential. The court also affirmed that exceptions for closing a meeting under the Open Meetings Act do not create any privilege or exception under IPRA.<sup>x</sup>

The Court of Appeals in *Dunn v. Brandt* held that protective orders issued by a court prohibiting disclosure of certain records are a recognized IPRA exception as “otherwise provided by law” and can be used to withhold records.<sup>xi</sup>

## 2018

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The legislature added a definition of “trade secret” in Section 14-2-6, clarifying that the exception is limited to trade secrets defined under the Uniform Trade Secrets Act.

Addressing the nexus between official and private actions of public officials, the NM Supreme Court in *Pacheco v. Hudson* issued several notable holdings. First, individual social media sites maintained solely for election campaigns are not public records.<sup>xii</sup> Second, the “judicial deliberation privilege” under IPRA’s “otherwise provided by law” exception provides an “absolute privilege [that] covers a judge’s mental impressions and thought

processes in reaching a judicial decision [and] protects confidential communications among judges and between judges and court staff made in the course of and related to their deliberative processes in particular cases.”<sup>xiii</sup> Finally, an enforcement action may only be filed against a designated records custodian and in the judicial district where the records are maintained.<sup>xiv</sup>

## 2016

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In reviewing a “somewhat unwieldy” request to a state agency, the Court of Appeals in *ACLU v. Duran* found that the agency failed to deconstruct language of the request using basic grammar and take reasonable steps to conduct a proper search.<sup>xv</sup> When records initially withheld, even in good faith, are subsequently determined to be responsive to a request, those records may justify damages, including attorney fees which are calculated based on a set of five criteria.<sup>xvi</sup>

## 2015

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The NM Supreme Court clarified the types of damages available in IPRA enforcement actions in *Faber v. King*. The Court held that two separate forms of damages are authorized under Sections 14-2-11 and 14-2-12, but that neither punitive nor statutory damages are permitted. A custodian’s failure to properly respond to a request is subject to damages under Section 14-2-11, while damages for post-denial enforcement of IPRA fall under Section 14-2-11.<sup>xvii</sup> The question of damages is further addressed by the Court in *Britton*, a 2019 case mentioned above.

The Court of Appeals held that oral requests documented in writing by a public body do not



constitute a written request for the purposes of the IPRA and cannot be enforced.<sup>xviii</sup>

## 2013

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The legislature defined “protected personal identifier information” as information that could be redacted and also clarified the conditions that database information of public bodies may be copied and sold.

The Court of Appeals in *Edenburn v. New Mexico Dept. of Health* held that “a document’s designation as a ‘non-record’ for the purposes of the Public Records Act has no impact on its status as a public record under IPRA[,]” and that records in draft form are subject to inspection under IPRA.<sup>xix</sup>

## 2012

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The NM Supreme Court abolished the “rule of reason” in *Republican Party of NM v. NM Taxation & Revenue Dep’t*.<sup>xx</sup> The “rule of reason” was a judicially created exception from 1977, recognizing a countervailing public policy against disclosure when a perceived harm to the public from allowing inspection outweighed the public’s right to know. The Court’s 2012 decision made clear that a public body may only withhold a public record 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 NM Supreme Court, or (4) a privilege protecting a record from disclosure that is grounded in the U.S. or state constitution.<sup>xxi</sup>

In the same *Republican Party* case, the Court limited the use of executive privilege, which had been used by state executive agencies to deny public access to communications

within those agencies regarding policy. Our Supreme Court recognized that the privilege was grounded in constitutional separation of powers principles, but strictly limited it to policy-making communications between the governor and their closest advisers regarding the governor’s constitutionally-mandated duties and could not be invoked by cabinet agencies or by local public bodies.<sup>xxii</sup>

Also in 2012, the Court of Appeals issued a ruling in *State ex rel. Toomey v. City of Truth or Consequences*, finding that certain files held by a private company working under a contract for a municipality were public records under IPRA.<sup>xxiii</sup>

## 1993

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The legislature named the statute the “Inspection of Public Records Act” and adopted significant amendments, including requiring designated records custodians responsible for facilitating inspection, establishing inspection procedures, and adding enforcement authority.

## 1970s - 80s

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Several small but notable additions to the law were made during this time, including exceptions for letters of reference in personnel and student files, the exception under the Confidential Materials Act, and in 1983 a new enforcement method for a requester to file a writ of mandamus action to compel compliance.

## 1947

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The original statute, which did not have a title but is sometimes referred to as the state’s “right to know act,” included little of what we know today as IPRA.

# Best Practices for Government

As part of on-boarding or orientation into any government role, every public employee and public official in the state should be made aware of the Inspection of Public Records Act and the assumption that all, or nearly all, records created or held related to their government work are subject to public inspection. Embracing this presumption helps distill the expectation of transparency and enforces the importance of public accountability in every role in our government. It is also important for every public employee and public official to be informed of their basic obligations under IPRA. This is especially important for individuals new to the public body, but this information should also be shared annually as a reminder for employees and officials. A list of items to cover is provided below as an example for public bodies in New Mexico.

## What Government Employees and Officials Need to Know

### Awareness of IPRA

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Every employee and official of a public body must know that IPRA exists, that their work is a public record, and that records requests must be handled properly. This can be facilitated by having an internal policy that is provided at orientation to all employees and officials.

### Designated Records Custodian

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Every public body must designate a records custodian and should share this information with the organization.

### Compliance

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Everyone should understand the significance of IPRA compliance and to prioritize directions from the records custodian or their staff.

### Forwarding Records Requests

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At a minimum, everyone in a public body should know what to do when they receive a records request and who to forward it to, as well as the importance of expediting any communication related to records requests.

### Questions

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Employees and officials should be told who to go to with questions regarding IPRA. This does not necessarily have to be the records custodian, but could be a supervisor, legal counsel, other point of contact. This guide and other internal policies are encouraged to be shared as resources.

## Communicating with Requesters

Open communication with requesters is an important part of making compliance with IPRA easier. This expectation goes beyond the information and written deadlines required by IPRA that a public body must follow when responding to requests. Records custodians and other employees or officials involved in IPRA compliance should focus on the tone and quality of their communication with requesters, who are exercising one of their many legal rights to participate in our democracy. Requests should not be viewed by the public body as a burden or adversarial. Requesters can be unfamiliar with the process or skeptical of why information requested is not more accessible. Records custodians and others who communicate with the public are in a position to set a professional but helpful tone.

Best practices are suggested throughout this guide, but several specific to improving communication include:

- Provide clear instructions for the public to submit a records request, or offer a fillable form or on-line portal, to reduce vague and overly broad search terms and improve the quality of requests.
- Call or email the requester when needed, especially if the request is unclear or vague, or if the request is overly broad. A discussion with the requester may result in more specific search terms. Clarifying or narrowing the search can reduce the number of irrelevant records the requester would receive and may reduce the time it takes for the records to be provided.
- Provide helpful information, avoid arguing with any member of the public, and escalate communication to a supervisor if it becomes argumentative or threatening.
- Consider providing records in batches on a rolling basis for excessively burdensome and broad requests taking longer than 15 days to complete.
- Be mindful of deadlines and seek to prioritize timely responses to any communication related to records requests.

## Identifying Applicable Exceptions to Inspection

As discussed in this guide, exceptions to inspection of public records are often found in various state and federal law outside the text of IPRA and will vary greatly depending the public body and types of records it regularly creates or maintains. In order to better understand and keep track of what legal exceptions may apply, every public body, with the assistance of legal counsel, should create and maintain a list of common exceptions that pertain to its records. Having a list of common exceptions will make it much easier for a records custodian to identify and include specific exceptions when withholding or redacting records without having to conduct research or seek legal counsel as often.



# Best Practices for the Public

## Understanding Your Rights

In many instances where a simple records request is provided there is no need for an individual requester to worry about the nuances of IPRA. However, for requesters who have complicated or large record requests, as well as requesters who experience a problem with the public body responding to their request, it is important to know what is and is not required under IPRA. Understanding what rights the public have and what obligations a public body have can empower an individual requester and help them obtain records they are entitled to inspect and may play an important role in holding public bodies accountable. Individuals who make regular requests or who are at odds with a public body over a request should also take time to understand some of the limits of IPRA, which this guide is intended to also help explain.

## Submitting Requests

It is best practice to submit records requests in writing. If a public body has provided notice of a specific process for submitting records requests any request made should at least attempt to follow the instructions. The process is likely there to help standardize intake, ensure requests are submitted in writing, and facilitate timely processing of all requests. If the process is overly burdensome the concern should be raised with the public body. Ultimately, regardless of any specific process a public body may implement, the public body must respond to any written records request it receives.

It is required by IPRA that requests include enough information to identify the records sought with “reasonable particularity.” This is incredibly important because such a request can be denied if it is not possible to understand what is being requested. Providing specificity to a request also alleviates the burden on the public body, which may otherwise conduct an unnecessarily large and more time-consuming search. The requester has a self-interest to submit requests that are specific as possible, as a narrower request will more likely produce fewer and more relevant records and the search will be completed more quickly.

## Limits of IPRA

The requirements and limits of IPRA are described throughout this guide, but some of the notable limitations that cause confusion among the public include:

- IPRA does not require public bodies to answer questions, compile information or data into a document, or create any new record.
- Requests into the future, sometimes referred to as standing or rolling requests, are not allowed under IPRA, as the public body will only provide documents that exist at the time the request is received.
- While IPRA allows oral requests, only written requests are enforceable.
- IPRA only applies to inspection of records, not retention or destruction of public records. A public body that has not properly retained a record is not violating IPRA but may be violating another law related to state records retention or preservation.
- IPRA is similar but not identical to the Freedom of Information Act (FOIA), a federal law governing public access to records of the federal government.

## Communicating with Public Bodies

IPRA provides an important right for public access to records of our state and local government. Public bodies carry a responsibility to requesters who wish to exercise this right and are expected to always maintain professional communication and assist requesters when needed. Individuals requesting records should also be polite and professional with communication that focuses on the details of the request that will help the records custodian understand what records to search for. Requesters should be open to answering questions from the records custodian that seek to clarify or even narrow the nature of a vague or broad request.

# Full Text of the Inspection of Public Records Act

The full text of the Inspection of Public Records Act, provided below, is current through the 2024 first regular session of the New Mexico Legislature. The law is located in the New Mexico Statutes Annotated, Chapter 14, Article 2, Sections 1 to 12. The statute and citing references are available through NMOnesource, a legal research tool provided by the New Mexico Compilation Commission at [www.NMOnesource.com](http://www.NMOnesource.com).

## Chapter 14, Article 2

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

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

- A.** records pertaining to physical or mental examinations and medical treatment of persons confined to any institution;
- B.** letters of reference concerning employment, licensing or permits;
- C.** letters or memorandums which are matters of opinion in personnel files or students' cumulative files;
- D.** portions of law enforcement records as provided in Section 14-2-1.2 NMSA 1978;
- E.** as provided by the Confidential Materials Act;
- F.** trade secrets;
- G.** attorney-client privileged information;
- H.** long-range or strategic business plans of public hospitals discussed in a properly closed meeting;
- I.** 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
- J.** information concerning information technology systems, the publication of which would reveal specific vulnerabilities that compromise or allow unlawful access to such systems; provided that this subsection shall not be used to restrict requests for:

**(1)** records stored or transmitted using information technology systems;

**(2)** internal and external audits of information technology systems, except for those portions that would reveal ongoing vulnerabilities that compromise or allow unlawful access to such systems; or

**(3)** information to authenticate or validate records received pursuant to a request fulfilled pursuant to the Inspection of Public Records Act;

**K.** submissions in response to a competitive grant, land lease or scholarship and related scoring materials and evaluation reports until finalists are publicly named or the award is announced; and

**L.** as otherwise provided by law.

#### **14-2-1.1 Personal Identifier Information.**

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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.

#### **14-2-1.2 Law Enforcement Records.**

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**A.** Law enforcement records are public records, except as provided by law and this subsection, and provided that the presence of nonpublic information may be redacted from a written record or digitally obscured in a visual or audio record, including:

**(1)** before charges are filed, names, addresses, contact information or protected personal identifier information of individuals who are victims of or non-law-enforcement witnesses to an alleged crime of:

**(a)** assault with intent to commit a violent felony pursuant to Section 30-3-3 NMSA 1978 when the violent felony is criminal sexual penetration;

**(b)** assault against a household member with intent to commit a violent felony pursuant to Section 30-3-14 NMSA 1978 when the violent felony is criminal sexual penetration;

**(c)** stalking pursuant to Section 30-3A-3 NMSA 1978;

**(d)** aggravated stalking pursuant to Section 30-3A-3.1 NMSA 1978;

**(e)** criminal sexual penetration pursuant to Section 30-9-11 NMSA 1978;

**(f)** criminal sexual contact pursuant to Section 30-9-12 NMSA 1978; or

**(g)** sexual exploitation of children pursuant to Section 30-6A-3 NMSA 1978;

**(2)** before charges are filed, names, addresses, contact information or protected personal identifier information of individuals who are accused but not charged with a crime;

**(3)** visual depiction of a dead body, unless a law enforcement officer, acting in that capacity, caused or is reasonably alleged or suspected to have caused the death;

**(4)** visual depiction of great bodily harm, as defined in Section 30-1-12 NMSA 1978,

or acts of severe violence resulting in great bodily harm, unless a law enforcement officer, acting in that capacity, caused or is reasonably alleged or suspected to have caused the great bodily harm or act of severe violence;

**(5)** visual depiction of an individual's intimate body parts, including the genitals, pubic area, anus or postpubescent female nipple, whether nude or visible through less than opaque clothing;

**(6)** visual or audio depiction of the notification to a member of the public of a family member's death;

**(7)** confidential sources, methods or information; or

**(8)** records pertaining to physical or mental examination and medical treatment of persons unless the information could be relevant to a criminal investigation or an investigation of misfeasance, malfeasance or other suspected violation of law conducted by a person elected to or employed by a public body.

**B.** A request for release of video or audio shall specify at least one of the following:

**(1)** the computer-aided dispatch record number;

**(2)** the police report number;

**(3)** the date or date range with reasonable specificity and at least one of the following:

**(a)** the name of a law enforcement officer or first responder;

**(b)** the approximate time; or

**(c)** the approximate location; or

**(4)** other criteria established and published by a law enforcement agency to facilitate access to videos.

**C.** Except for confidential sources, methods or information, a request to view video or hear audio on-site of a public body is not subject to the restrictions in Subsections A and B of this section. Any recording or copying of video or audio from such viewing or listening is subject to the restrictions in this section.

**D.** As used in this section, "law enforcement records" includes evidence in any form received or compiled in connection with a criminal investigation or prosecution by a law enforcement or prosecuting agency, including inactive matters or closed investigations to the extent that they contain the information listed in this subsection; provided that the presence of such information on a law enforcement record does not exempt the record from inspection.

## **14-2-2 [Repealed].**

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### **14-2-2.1 Copies of Records Furnished.**

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When a copy of any public record is required by the veterans' administration to be used in determining the eligibility of any person to participate in benefits made available by the veterans' administration, the official custodian of such public record shall, without charge, provide the applicant for such benefits, or any person acting on his behalf, or the authorized representative of the veterans' administration, with a certified copy of such record.



### 14-2-3 [Repealed].

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### 14-2-4. Short Title.

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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.

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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.

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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.** “information technology systems” means

computer hardware, storage media, networking equipment, physical devices, infrastructure, processes and code, firmware, software and ancillary products and services, including:

- (1)** systems design and analysis;
- (2)** development or modification of hardware or solutions used to create, process, store, secure or exchange electronic data;
- (3)** information storage and retrieval systems;
- (4)** voice, radio, video and data communication systems;
- (5)** network, hosting and cloud-based systems;
- (6)** simulation and testing;
- (7)** interactions between a user and an information system; and
- (8)** user and system credentials;

**D.** “inspect” means to review all public records that are not excluded in Section 14-2-1 NMSA 1978;

**E.** “person” means any individual, corporation, partnership, firm, association or entity;

**F.** “protected personal identifier information” means:

- (1)** all but the last four digits of a:
  - (a)** taxpayer identification number;
  - (b)** financial account number; or
  - (c)** credit or debit card number; or
  - (d)** driver’s license number.

**(2)** all but the year of a person’s date of

birth; and

**(3)** a social security number; and

**(4)** with regard to a nonelected employee of a public body in the context of the person's employment, the employee's nonbusiness home street address, but not the city, state or zip code;

**G.** "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;

**H.** "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; and

**I.** "trade secret" means trade secret as defined in Subsection D of Section 57-3A-2 NMSA 1978.

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

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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.**

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**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.**

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**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.

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

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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.**

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**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:

**C.** describe the records sought;

**D.** set forth the names and titles or positions of each person responsible for the denial; and

**E.** be delivered or mailed to the person requesting the records within fifteen days after the request for inspection was received.

**F.** 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.

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**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.

# Commentary, Explanation, and Examples

This section delves into the text of the Inspection of Public Records Act by providing commentary for parts of the statute and illustrating IPRA's applications through realistic examples. Text of the statute itself is repeated here in light blue boxes, followed by legal commentary and relevant real-world examples highlighted in light yellow boxes.

## Exceptions to Inspection

After declaring that “[e]very person has a right to inspect public records of this state,” the Inspection of Public Records Act immediately turns to exceptions to the law in Section 14-2-1. Any public record in the state is subject to inspection unless one of the Act’s specific exceptions apply. While twelve exceptions are addressed in Section 1, including the notable “otherwise provided by law” exception, additional exceptions are found in Sections 14-2-1.1 and 1.2, which are addressed later in this guide.

### § 14-2-1(A) with Commentary

**A.** records pertaining to physical or mental examinations and medical treatment of persons confined to any institution;

As written, the Act exempts from disclosure certain medical records of persons confined to public institutions. However, this exception also protects employee records pertaining to illness, injury, disability, inability to perform a job task and sick leave.<sup>xxiv</sup> 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.

Importantly, there are many other federal and state laws that provide for confidentiality of medical records and related information that would all fall under the “otherwise provided by law” exception of IPRA. While some exceptions under IPRA are permissive, which allow for a public body to choose whether to withhold or redact a record, many medical records are confidential by law and cannot be disclosed. A public body that regularly receives or maintains medical records should determine what exceptions may apply to its records, but exceptions in state law include:

**§ 14-6-1.** Health information relating and identifying specific individuals as patients is strictly confidential and not a matter of public record.

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

**§ 24-1-5.** Health facility complaints 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 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.

### Examples for § 14-2-1(A)

**1** A former inmate at the state penitentiary is being considered for an important county job. A local journalist seeks 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 and should not be disclosed.

**2** A state employee's hospital records are submitted to the personnel de-

partment of his office with his claim for insurance. The medical records submitted for insurance payment are protected from disclosure and should not be disclosed.

**3** 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.

### § 14-2-1(B) with Commentary

**B.** letters of reference concerning employment, licensing or permits;

This exception applies to letters of reference a public body might obtain regarding applicants for employment, licenses or permits. A letter of reference should be considered the author's subjective opinion about the applicant and may not necessarily be based on fact. Ensuring that reference letters may be protected from inspection is intended to encourage honest feedback from references who might otherwise be deterred from sharing their opinion.

### Examples for § 14-2-1(B)

**4** 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. 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. A resident of a neighborhood near the planned supermarket site requests a copy of the manager's letter. The city council properly refuses the request on the grounds that Mr. Doe's letter is a letter of reference concerning a permit.

### § 14-2-1(C) with Commentary

**C.** letters or memorandums which are matters of opinions in personnel files or students' cumulative files;

Similar to the exception addressing letters of reference, 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. Our courts have recognized that "[t]he Legislature quite obviously anticipated that there would be critical material and adverse opinions in ... documents concerning disciplinary action ... that might have no foundation in fact but, if released for public view, could be seriously damaging to an employee."<sup>xxv</sup>

This exception's coverage includes 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 related to the working relationship between an employer and employee such as evaluations, promotion, demotion or termina-

tion information. Importantly, whether or not a document is kept in a personnel file does not determine if it is covered by the exception but, instead, whether the document is a matter of opinion as described above.<sup>xxvi</sup> If an investigation of an employee is not performed by, or at the direction of the public employer, documents concerning the investigation are not covered under this exception.<sup>xxvii</sup>

This exception extends only to letters and memoranda that are a matter of opinion. Factual information or other public information is not necessarily protected merely because it is kept in employee or student files. Job applications and applicant resumes are not matters of opinion and should be provided upon request.

As a related issue, some or all of the materials in students' cumulative files are otherwise confidential as student records under federal law pursuant to the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, and exempt from inspection.

### Examples for § 14-2-1(C)

**5** 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.

**6** A TV 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, even where the details about the disciplinary measures and other circumstances regarding the discipline of the employees had already become public, releasing the former employees' identities would compromise the privilege against disclosure of disciplinary matters protected by the Act. However, the bare fact of an employee's termination would not be considered confidential information.

### § 14-2-1(D) with Commentary

**D.** portions of law enforcement records as provided in Section 14-2-1.2 NMSA 1978;

This exception was significantly expanded and provided a dedicated section in 2023 with the creation of Section 14-2-1.2, discussed in detail further below.

### § 14-2-1(E) with Commentary

**E.** as provided by the Confidential Materials Act;

The Confidential Materials Act, Sections 14-3A-1 to -2 NMSA 1978, 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.

### Examples for § 14-2-1(E)

**7** 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. The transcript is subject to IPRA and inspection unless it was subject to some other lawful exception at the time it was donated.

### § 14-2-1(F) with Commentary

**F.** trade secrets;

This exception uses a legal term and should not be applied without careful consideration and confirmation that the term is applicable to the records responsive to the request. Applying the definition under the Uniform Trade Secrets Act, Section 57-3A-2 NMSA 1978, to fall under the exception the document must

have “information, including a formula, pattern, compilation, program, device, method, technique or process, that: (1) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

### § 14-2-1(G) with Commentary

#### G. attorney-client privileged information;

The Act is understood to exempt all communications that fall within the scope of attorney-client privilege, which is provided under the New Mexico Rules of Evidence, Rule 11-503 NMRA. All other privileges established by New Mexico Supreme Court Rule similarly remain exempt from disclosure to the extent applicable to public bodies.<sup>xxviii</sup> Such privileges may include required reports privileged by statute (Rule 11-502), trade secrets (Rule 11-508), communications to juvenile probation officers and social services workers (Rule 11-509) and identity of informer (Rule 11-510).

While it is necessary that an attorney, or representative of an attorney, be a party to any communication that invokes this attorney-client privilege and exception under IPRA, the privilege and exception may not apply if the communication is not made privately or the attorney is not acting in a legal role with the public body. Use of this exception should be reviewed by the attorney in which the privilege is held.

Any public records should be redacted which contain communications to or from the public

body that fall within the scope of this privilege. The privilege can only be waived by the client, whether that is a public official or a majority of a public policy-making body.

### § 14-2-1(H) with Commentary

#### H. long-range or strategic business plans of public hospitals discussed in a properly closed meeting;

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 relates to the hospital's long-range or strategic business plans. The exception corresponds to an exception in the Open Meetings Act, Section 10-15-1(H)(9), that permits public hospital boards to discuss the same information in closed meetings.

A public hospital's records containing trade secrets and attorney-client privileged materials may be protected by other exceptions in the Act. Those records remain confidential regardless of whether they are discussed in a properly closed meeting.

### Examples for § 14-2-1(H)

**8** During a meeting of the board of a public hospital, a board member moves to go into closed session to discuss the hospital's five-year business plan to expand the hospital's operations. The board properly enters into closed session in accordance with the Open Meetings Act. After the meeting, a reporter requests a copy of the written proposal. The hospital's records custodian may deny use the

exception to deny the request because the records contain the hospital's long- range and strategic business plans and was discussed in a properly closed meeting.

**9** The administrator for a county hospital creates a pay scale for non-medical staff positions at the hospital. A member of the staff requests a copy of the pay scale. The pay scale is a public record and must be provided for inspection because it does not involve trade secrets or long-range business plans of the hospital discussed in a properly closed meeting.

### § 14-2-1(I) with Commentary

**I.** 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;

Since the September 11, 2001 terrorist attacks and recent tragic experiences with mass shootings at schools, 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 such sensitive information. Information sought to be protected under the exception must be included in a governmental tactical response plan or procedure, and not simply just broadly related to

public safety or security.

### Examples for § 14-2-1(I)

**10** A county resident requests a 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.

**11** 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 simply because there is a concern over security.

### § 14-2-1(J) with Commentary

**J.** information concerning information technology systems, the publication of which would reveal specific vulnerabilities that compromise or allow unlawful access to such systems; provided that this subsection shall not be used to restrict requests for:

- (1)** records stored or transmitted using information technology systems;
- (2)** internal and external audits of infor-

mation technology systems, except for those portions that would reveal ongoing vulnerabilities that compromise or allow unlawful access to such systems; or

**(3)** information to authenticate or validate records received pursuant to a request fulfilled pursuant to the Inspection of Public Records Act;

This exception was added in 2023 to address basic cyber-security measures and the need to avoid disclosure of sensitive information about computer systems, including software coding and network architecture.<sup>xxix</sup> The exception follows trends around the country, and also conforms with a federal mandate from the Department of Energy to harden domestic utility computer systems to prevent or mitigate cyber attacks.

### § 14-2-1(K)-(L) with Commentary

**K.** submissions in response to a competitive grant, land lease or scholarship and related scoring materials and evaluation reports until finalists are publicly named or the award is announced; and

**L.** as otherwise provided by law.

This is a significant provision in the list of exceptions, and applies to exceptions found in state statutes, the New Mexico Constitution, state court rules, and federal law. It is important for public bodies to stay apprised of changes to these laws that might affect their obligation to disclose records.

Sometimes, a public body will attempt to grant confidentiality to certain records by regulation or ordinance. In most situations, a regulation

or ordinance, by itself, may not serve as a valid basis to deny inspection under IPRA. A regulation or ordinance is not a “law” for purposes of the “otherwise provided by law” exception unless promulgated or adopted to further a clear legislative intent that contemplates a confidentiality but does not expressly provide such exception in statute.<sup>xxx</sup>

New Mexico statutes include numerous sections creating or 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 or redacted only in a limited way.

Included below are some constitutional, statutory and regulatory exceptions that are “otherwise provided by law.” 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 and other exceptions might apply to a public body.

### Otherwise Provided by Law Exceptions Examples from the New Mexico Statutes Annotated (NMSA 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. This is a complicated area of law and use of this exception should be in consultation with legal counsel.

**§ 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.

**§ 14-2A-1. Protection of victims of crimes or accidents; police reports; commercial solicitation prohibited.** Although not an exemption, when attorneys, health care providers, or their agents request to inspect police reports, it is a good practice to advise them of this provision which prohibits the use of police reports to solicit victims or their relatives.

**§ 14-3-15.1. State agency computer databases.** The use of state agency databases for commercial, political or solicitation purposes is restricted.

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

**§ 14-6-1. Health information.** In general, health information relating and identifying specific individuals as patients is strictly confidential and not a matter of public record.

**§ 14-8-9.1 Documents filed with county clerk.** Documents filed and recorded in a county clerk's office are public records subject to disclosure, with certain exceptions including health information relating to specific patients and discharge papers of a veteran of the U.S.

Armed Forces. Death certificates are available for inspection but may not be copied for 55 years.

**§ 15-7-9. Claims against governmental entities.** Records maintained by the risk management division pertaining to insurance coverage and to claims for damages and other relief against governmental entities, officers and employees have limited and temporary confidentiality.

**§ 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.

**§ 27-7-29. Adult protective services records.** Records created or maintained pursuant to investigations under the Adult Protective Services Act or for whom application has ever been made for protection are confidential and may be inspected only by authorized persons.

**§ 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.<sup>xxx</sup>

**§ 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.

**§ 52-5-21. Workers' Compensation Administration Records.** All records of the Workers' Compensation Administration are generally confidential and thus not public records except as otherwise provided in that section.

**§ 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 civil investigative demand (CID) 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.** Written and oral communications to the board of dental health care relating to disciplinary action against a dentist or other licensed dental health care provider are confidential unless and until the board acts on the complaint and issues a notice of contemplated action or reaches a settlement.

**§ 61-6-34. Complaints against medical board licensees.** Written and oral communications to the medical board relating to disciplinary action against a dentist or other licensed dental health care provider are confidential unless and 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 conform or deny that a particular animal has received inoculations in the preceding twelve 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 obtained by the Motor Vehicle Division about license holders or applicants 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.

## **Otherwise Provided by Law Exceptions Examples from the New Mexico Constitution**

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**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.

**Art. VII, § 1.** "The legislature shall enact such laws as will secure the secrecy of the ballot and the purity of elections and guard against the abuse of elective franchise."

## **Otherwise Provided by Law Exceptions Examples from the New Mexico Supreme Court Rules**

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**Rules 11-503 Lawyer-client privilege and 11-508 Trade secrets.** While lawyer-client privilege and trade secrets are specifically identified and protected in the Act, the explicit listing of these does not preclude any other rel-

evant privileges that may apply as established by New Mexico Supreme Court rule.<sup>xxxii</sup> Those unlisted privileges can be exempt under IPRA as they are "otherwise provided by law."

**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.

**Rule 16-106. Confidentiality of information.** This rule is the fundamental source of confidentiality between attorneys and their clients. Unless a client gives informed consent to release information, attorneys are not allowed to disclose information relating to the representation of a client.

**Rule 16-308.** Special responsibilities of a prosecutor. As ministers of justice, prosecutors have a responsibility to protect the integrity of criminal proceedings and trials by refraining from and preventing investigators, law enforcement personnel, and other employees from making extrajudicial statements that are false or create a danger of prejudicing a criminal proceeding or trial. Prosecutors should use special care in evaluating IPRA requests to ensure statements are not released that could

impair fair proceedings and trials for defendants. This could mean redacting or withholding materials until they are presented in open court.

**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.

### Examples for § 14-2-1(K)-(L)

**12** 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 because the enabling statute expressly contemplates the creation of confidentiality regulations.

**13** A state agency that oversees collective bargaining by public employees issues a regulation providing that the names of employees on collective bargaining representative petitions are confidential. A public employer requests access to a petition for a representative election signed by some its employees. The state agency denies the request, and the public employer files a lawsuit challenging the agency’s authority to keep the employees’ names confidential, arguing that no statute expressly protects the names from disclosure. The court upholds the agency’s decision to deny based on the agency’s regulation. The court reasons that the “otherwise provided by law” exception incorporates the regulation because the regulation is authorized by a statute governing collective bargaining by public employees. The court articulates that the regulation effectuates the statute’s provisions that expressly protects the right of public employees to collectively bargain, to join unions without interference, and to conduct representative elections in secret.

## Personal Identifier Information

To protect certain individual privacy interests, Section 14-2-1.1 of the Act provides specific instructions regarding personal identifier information.

### § 14-2-1.1 with Commentary

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 informa-

tion shall not be made available on publicly accessible web sites operated by or managed on behalf of a public body.

The Act permits a public body to redact or block out “protected personal identifier information,” defined in Section 14-2-6(F), contained in a public record before making the record available for inspection or copying. 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. However, the Act prohibits a public body from making records that contain protected personal identifier information available on the public body’s website unless the protected personal identifier information has first been redacted. While public records often contain

private or personal information, public bodies generally have limited discretion to withhold public records that are created for administrative purposes, even if the records may contain personal information.<sup>xxxiii</sup>

In certain circumstances with justification by the public body, personal information of employees or non-employees contained in a record might be redacted before the record is disclosed if the information is not related to public business.<sup>xxxiv</sup>

Independent of the exception for personal identifier information, victims of crimes specified in Article II, Section 24(A)(3) of the New Mexico Constitution and in the Victims of Crimes Act (Sections 31-26-1 to -14 NMSA 1978), including murder, rape and other serious criminal offenses, have certain rights, including the right to have their dignity and privacy respected. The rights conferred to victims under these provisions take effect when an individual is charged with one of the specified crimes and may provide a basis for denying inspection of records that identify the victims.

## Law Enforcement Records

Section 14-2-1.2 sets out new requirements pertaining to law enforcement records.

### § 14-2-1.2(A) with Commentary

**A.** Law enforcement records are public records, except as provided by law and this subsection, and provided that the presence of nonpublic information may be redacted from a written record or digitally obscured in a visual or audio record...

The exceptions in this section may apply to public records held by public bodies other than a law enforcement or prosecuting agency described in Subsection (D), below, so long as the records were received or compiled in connection with a criminal investigation or prosecution by a law enforcement or prosecuting agency.<sup>xxxv</sup>

Not operating as blanket exceptions, this section permits the redaction or digital obscuring of law enforcement records. Depending on the stage of the criminal investigation or prosecution other laws may permit withholding certain law enforcement records.

### § 14-2-1.2(A)(1)-(2) with Commentary

**(1)** before charges are filed, names, addresses, contact information or protected personal identifier information of individuals who are victims of or non-law-enforcement witnesses to an alleged crime of:

**(a)** assault with intent to commit a violent felony pursuant to Section 30-3-3 NMSA 1978 when the violent felony is criminal sexual penetration;

**(b)** assault against a household member with intent to commit a violent felony pursuant to Section 30-3-14 NMSA 1978 when the violent felony is criminal sexual penetration;

**(c)** stalking pursuant to Section 30-3A-3 NMSA 1978;

**(d)** aggravated stalking pursuant to Section 30-3A-3.1 NMSA 1978;

**(e)** criminal sexual penetration pursuant to Section 30-9-11 NMSA 1978;

**(f)** criminal sexual contact pursuant to Section 30-9-12 NMSA 1978; or

**(g)** sexual exploitation of children pursuant to Section 30-6A-3 NMSA 1978;

**(2)** before charges are filed, names, addresses, contact information or protected personal identifier information of individuals

who are accused but not charged with a crime;

This section establishes that certain information contained in law enforcement records are “nonpublic information” and not subject to inspection until related criminal charges are filed.

It is important to note a distinction between misdemeanors and felonies regarding the question of whether “charges are filed.” For misdemeanor offenses, charges are filed upon the filing of a criminal complaint by a law enforcement officer. However, felony charges require an additional step before they are “filed.” Charges in a felony matter can only proceed after a grand jury finds probable cause and an indictment is filed, or a judge finds probable cause after a preliminary hearing.

Once criminal charges are filed, the information described in these paragraphs of IPRA is generally subject to public inspection. The conditions here are similar to the Arrest Record Information Act (ARIA), Sections 29-10-1 to -8 NMSA 1978, which makes it unlawful to release certain arrest record information of individuals accused but not charged with a crime.

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 exempt 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 may remain confidential even after the investigation is closed because they were never charged with a crime. Here, “charges” refer to a criminal charge filed against any person, not just the person whose identity is at issue in the records request.

## Examples for § 14-2-1.2

**14** After a TV news story about a arrest for the aggravated stalking of a popular high school teacher, a district attorney's office receives a request for "the entire file, including all witness information" in the case. Several of the teacher's neighbors witnessed the defendant stalking the victim and gave interviews with detectives that were recorded on lapel camera videos. Multiple neighbors were recorded giving detectives all of their personal contact information. With the underlying allegations constituting felony offenses and the matter not yet having been charged through an indictment or preliminary hearing, the district attorney's office properly redacts the names, addresses, contact information and protected personal identifier information of the defendant, victim, and all non-law enforcement witnesses from the videos and other records in its response to the request.

### § 14-2-1.2(A)(3)-(7) with Commentary

**(3)** visual depiction of a dead body, unless a law enforcement officer, acting in that capacity, caused or is reasonably alleged or suspected to have caused the death;

**(4)** visual depiction of great bodily harm, as defined in Section 30-1-12 NMSA 1978, or acts of severe violence resulting in great bodily harm, unless a law enforcement officer, acting in that capacity, caused or is reasonably alleged or suspected to have caused the great bodily harm or act of severe violence;

**(5)** visual depiction of an individual's inti-

mate body parts, including the genitals, pubic area, anus or postpubescent female nipple, whether nude or visible through less than opaque clothing;

**(6)** visual or audio depiction of the notification to a member of the public of a family member's death;

**(7)** confidential sources, methods or information;

These exceptions protect interests of privacy of victims and witnesses, who are recorded by law enforcement. With the increasing use of body-worn cameras, law enforcement encounters with the public frequently result in video recordings of crime scenes which include graphic visual depictions of death, grave bodily injuries, the intimate body parts of victims, witnesses, or bystanders, as well as the notifications to members of the public of a family member's death. This Section allows for the redaction of those video or audio depictions.

The exception also protects the integrity of criminal investigations and prosecutions by exempting those records 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 information that, if disclosed, would alert potential defendants to destroy evidence, coordinate stories or flee the jurisdiction;
- witness testimony that is crucial to a crimi-

nal 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.

Law enforcement records that reveal confidential sources, methods, information or individuals accused but not charged with a crime are exempt, "even if the law enforcement records relate to inactive matters or closed investigations to the extent that [the records] contain the information listed in this paragraph."<sup>xxxvi</sup>

### Examples for § 14-2-1.2

**15** During the trial of a defendant charged with first degree murder, the prosecutor presents a lapel video of a witness giving a statement to a police officer. A reporter submits a request to the officer's law enforcement agency to inspect a copy of the full video the prosecutor showed in court. In the background of the video, the body of the deceased victim is clearly visible. Multiple gunshot wounds are exposed on the partially clothed body. The records custodian, recognizing that the defendant has been formally charged, releases the video without redacting the names and addresses of the defendant and witnesses. However, the records custodian properly redacts the graphic visual depictions of the dead body.

### § 14-2-1.2(A)(8) with Commentary

**(8)** records pertaining to physical or mental examination and medical treatment of persons unless the information could be

relevant to a criminal investigation or an investigation of misfeasance, malfeasance or other suspected violation of law conducted by a person elected to or employed by a public body.

This exception also is similar to the exception for "records pertaining to physical or mental examination and medical treatment of persons." However, it narrows the scope of exempt medical records to exclude information that "could be relevant to a criminal investigation or an investigation of misfeasance, malfeasance or other suspected violation of law conducted by a person elected to or employed by a public body."

### § 14-2-1.2(B)-(C) with Commentary

**B.** A request for release of video or audio shall specify at least one of the following:

- (1)** the computer-aided dispatch record number;
- (2)** the police report number;
- (3)** the date or date range with reasonable specificity and at least one of the following:

**(a)** the name of a law enforcement officer or first responder;

**(b)** the approximate time; or

**(c)** the approximate location; or

**(4)** other criteria established and published by a law enforcement agency to facilitate access to videos.

**C.** Except for confidential sources, methods or information, a request to view video

or hear audio on-site of a public body is not subject to the restrictions in Subsections A and B of this section. Any recording or copying of video or audio from such viewing or listening is subject to the restrictions in this section.

This section of IPRA imposes specific requirements on requests made for law enforcement video and audio records. The required information places a new obligation on requesters to identify records sought with greater specificity, which should reduce vague and broad requests that could create confusion between what the requester is looking for and what the public body searches for. Requests made without providing this information should not simply be rejected, but the records custodian should respond and inform the requester of the requirements under the new law and that the records cannot be provided until the necessary identifying information is provided to the custodian.

Some larger law enforcement agencies in the state utilize computer software programs that help identify and redact certain personal identifying information that greatly assist in the storing, organizing, reviewing, and releasing of these electronic audio and video records. However, despite software advances, requesters should be aware that reviewing, redacting, and processing video files is extremely time consuming. Requests that result in multiple responsive video files can easily become excessively burdensome. To the extent possible, proactive steps should be taken by public bodies possessing these types of records, including updates to policies and practices, to anticipate the need to provide inspection of these types of records.

## Examples for § 14-2-1.2

**16** The receptionist at a county sheriff's office receives a written request for a copy of an audio file referenced in a blog post. The receptionist immediately provides the request to the sheriff's records custodian. The records custodian logs the request and calendars when a three-day letter should be sent to the requester. Upon initial review, the records custodian recognizes that the requester did not include the information required by this section of the statute. In the three-day letter, the records the request and calendars when a three-day letter should be sent to the requester. Upon initial review, the records custodian recognizes that the requester did not include the information required by this section of the statute.

In the three-day letter, the records abandoned and informs the requester that they can reopen their request by providing the statutorily required information. The denial is proper. Two months later, the requester provides the necessary information and the records custodian reopens the request, calculates a new three-day and 15-day clock. The records custodian produces the audio file with her three-day letter.

### § 14-2-1.2(D) with Commentary

**D.** As used in this section, 'law enforcement records' includes evidence in any form received or compiled in connection with a criminal investigation or prosecution by a law enforcement or prosecuting agency, including inactive matters or closed

investigations to the extent that they contain the information listed in this subsection; provided that the presence of such information on a law enforcement record does not exempt the record from inspection.

This definition should be interpreted to also include all “arrest record information” as defined in the Arrest Record Information Act (ARIA), Sections 29-10-1 to 29-10-8 NMSA 1978. ARIA defines arrest record information as “notations of the arrest or detention or indictment or filing of information or other formal criminal charge against an individual made by a law enforcement agency.” Specific records containing arrest information are exempted by that act, such as information contained in poster announcements or lists identifying fugitives or wanted persons and court records of public judicial proceedings. Records of traffic offenses, accident reports, and original records of entry compiled chronologically are required to be available for public inspection.<sup>xxxvii</sup> Police blotters and other original records of entry, such as radio logs, dispatch logs, desk logs, and offense logs, that the Arrest Record Information Act makes public are permanent, chronological records of arrests, detentions and other events reported to and kept by law enforcement agencies.

Reading ARIA and IPRA together, there may be records that are expressly made public under ARIA but could fall under the law enforcement records exception of IPRA. In this situation, as is the case with most exceptions, applying an exception to withhold or redact records is permissive, not mandatory. Neither ARIA nor IPRA provide a general exception that protects the identity of adults who are charged with a crime.<sup>xxxviii</sup>

## Examples for § 14-2-1.2

**17** An HR directory for a public agency that operates a transportation service for senior citizens sees a news story about an employee at her agency being arrested for driving while intoxicated. Having concerns about the employee’s conduct, the HR director begins an internal investigation and submits an IPRA request for police reports and lapel videos of the incident to the arresting law enforcement agency. The law enforcement agency’s records custodian logs the request and calendars when a three-day and 15-day letter should be sent to the requester. After confirming that a criminal complaint had been filed in magistrate court in the matter, the records custodian releases the requested records with limited redactions of the defendant’s social security number, all but the last four digits of his driver’s license number, and all but the year of his date of birth.

**18** A group of students from a community college and their attorney hold a press conference to announce a civil law suit against the college’s drama instructor, alleging improper sexual contact. The allegations appear to rise to the level of felonious conduct. The local district attorney and sheriff’s department have had an ongoing criminal investigation into the matter but no arrests have been made and no charges have been filed. A reporter who attended the press conference follows up with an IPRA request to the sheriff’s office. The sheriff’s records custodian confers with the district attorney’s office to determine the status of any charges in the matter and learns that none have been filed as the



matter is still in investigative stages. The records custodian sends a three-day letter indicating that he will have a response on day 15. The records custodian provides heavily redacted police reports and videos. In addition to redacting the personal identifier information, the records custodian digitally obscures references to the names and contact information of the defendant, victims, and all non-law enforcement witnesses. Additionally, the records custodian redacts statements in the reports and videos that the district attorney's office identifies under Rule 16-308 as threatening the fairness of upcoming criminal proceedings if released at this stage.

**19** 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 reporter provides the computer-aided dispatch record number. The 911 tapes are public records, and they must be made available to the reporter. However, the 911 tapes may be redacted to protect the identity of the director as a person accused but not charged with a crime. If the reporter instead requested to view the 911 tape on-site, it could not be redacted. Furthermore, ARIA does not protect the 911 tapes because they do not fall within the definition of arrest record information.

## Purpose and Public Policy

Section 14-2-5 articulates the legislature's purpose in enacting IPRA and New Mexico's public policy concerning the public's entitlement to public records.

### § 14-2-5 with Commentary

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 func-

tion of a representative government and an integral part of the routine duties of public officers and employees.

This language reflects the strong legal presumption favoring public access to records. Courts, attorneys, and government transparency advocates frequently cite this provision. Public bodies should be mindful that erring on the side of being more transparent is not simply a belief, but a standard set by this language which articulates the legislature's intention of allowing the public the greatest possible access to records held by our state and local governments.

To underscore the importance of this premise, IPRA declares that providing access to public records is an essential function of governments in our state and is an integral part of the duties of its officers and employees. This is intended to ensure public servants remain accountable to the people that they serve.<sup>xxxix</sup> New Mexico’s policy of open and accountable government protects the public from having to rely solely on the representations of public officials that they have acted appropriately.<sup>xl</sup>

Courts in our state favor transparency and have recognized the importance of transparency in a democratic government, and public bodies should embrace the same policy when responding to records requests.

As acknowledged by the New Mexico Supreme Court, “writings 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.”<sup>xli</sup>

It is a best practice for all state and local government employees to be made aware of IPRA and this public policy upon entering into employment or office, and at least annually thereafter. It is the responsibility of public bodies in our state to inform those individuals who create and maintain public records that the records are not private, and that they should assume that any public record may be seen by the public at any time unless the record is subject to an identified exception in the law.

## Definitions

Section 14-2-6 defines certain terms as used in IPRA.

### § 14-2-6(A) with Commentary

**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;

Often referred to as a “records custodian,” every public body in the state must have at least one person that is given this title who is responsible for managing IPRA requests and production. It should be clear to the public and other employees and officials of the public body to know who is the designated custodian, and the custodian should use the title in

any written correspondence.

It is common, especially in smaller public bodies, for the employee designated as the custodian to have many other responsibilities. It is also possible for large public bodies to have more than one designated custodian. However, it is expected that every public body in the state have a plan to manage their obligations under IPRA.

This includes cross-training other employees when their designated custodian is out for more than a few days (to ensure that acknowledgments of IPRA requests are provided within three days after receiving a records request), and contingency planning when the custodian

is unable to keep up with the volume of IPRA or the custodian leaves their position.

It is important to note that the Public Records Act, a different state statute governing the maintenance and destruction of public records held by the state government, also defines the position of a “records custodian.”<sup>xlii</sup> For public bodies in state government, the designated records custodian responsible for maintaining records under the Public Records Act may be the same person designated to respond to records request under IPRA, or the responsibilities may be assigned to different individuals in the public body.

### Examples for § 14-2-6(A)

**20** 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 2000. 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 as signed responsibility for the Commission’s records.

### § 14-2-6(B) with Commentary

**B.** “file format” means the internal structure of an electronic file that defines the way it is stored and used;

This term helps differentiate electronic file formats and is often used to clarify requests that

seek the original, or native, format of electronic records. Examples of different file formats include, but are not limited to, records saved in: Word, Excel, Outlook, PDF, JPEG, TIFF, GIF, PNG, TXT, WAV, MP3, AVI, and MP4.

Generally, the file format is based on the program used to create or view the file. For records that are not electronic or digital, the file format is typically some form of paper.

### § 14-2-6(C) with Commentary

**C.** “information technology systems” means computer hardware, storage media, networking equipment, physical devices, infrastructure, processes and code, firmware, software and ancillary products and services, including:

- (1) systems design and analysis;
- (2) development or modification of hardware or solutions used to create, process, store, secure or exchange electronic data;
- (3) information storage and retrieval systems;
- (4) voice, radio, video and data communication systems;
- (5) network, hosting and cloud-based systems;
- (6) simulation and testing;
- (7) interactions between a user and an information system; and
- (8) user and system credentials;

This definition was added in 2023 to define the term “information technology systems” used in

the new exception found at Section 14-2-1(J).

### § 14-2-6(D) with Commentary

**D.** “inspect” means to review all public records that are not excluded in Section 14-2-1 NMSA 1978;

This definition pertains to the explicit right that exists in New Mexico which provides the public access to view government records unless there is a specific exception in law that excludes a record from that right under IPRA. However, the law is clear that inspection only allows a right to “review” records. The law allows for copying of records under certain circumstances, which is explained in this guide.

### § 14-2-6(E) with Commentary

**E.** “person” means any individual, corporation, partnership, firm, association or entity;

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

### § 14-2-6(F) with Commentary

**F.** “protected personal identifier information” means:

- (1)** all but the last four digits of a:
  - (a)** taxpayer identification number;
  - (b)** financial account number; or
  - (c)** credit or debit card number; or
  - (d)** driver’s license number.
- (2)** all but the year of a person’s date of

birth; and

**(3)** a social security number; and

**(4)** with regard to a nonelected employee of a public body in the context of the person’s employment, the employee’s nonbusiness home street address, but not the city, state or zip code;”

IPRA allows 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, credit or debit card number, or driver’s license number; all but the year of a person’s date of birth; a social security number, and the nonbusiness home street address of a nonelected employee of the public body, except for the city, state and zip code. 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 generally be made available in response to an inspection request, unless that information is protected by another law.

### Examples for § 14-2-6(F)

**21** A licensing board receives a request “for all documents containing any of the non-business home addresses of each board member or of any person employed by the board.” The

Board redacts the street addresses but not city, state, and zip code information for each employee. It provides the documents showing the non-business home addresses of the board members without redaction. The board properly does so because the definition of personal identifiers at Section 14-2-6(F)(4) of the Act only applies to non-elected employees. While board members are not elected (rather, they are appointed), they are likely not employees based upon a consistent reading of Section 7-3-2(6) of the NM Withholding Tax Act.

### § 14-2-6(G) with Commentary

**G.** “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;

For purposes of the Act, the term “public body” refers to virtually every type of governmental body, office or agency. It includes 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.

In certain circumstances, a private person or entity that is contracted to perform a public function for a public body may act in the

capacity of a public body for purposes of responding to records requests under IPRA. It is important for public bodies to inform their contractors that they may have responsibilities under IPRA even as private entities. When a request is received by a public body that potentially implicates a contractor, the request should be communicated to the contractor, and the records custodian should determine whether the contractor may be obligated to search for records or even respond to a records request. Records custodians should work with their counsel to evaluate expectations and obligations related to IPRA compliance.

To determine whether a contractor may be acting in the capacity of a public body and responsible for receiving and responding directly to records requests, the following nine factors are considered: (1) “government involvement in the promotion of the concept of a contract or project”; (2) “government participation in the funding of the project”; (3) “financial benefits inuring to a government entity”; (4) “the public purpose of the project”; (5) “continuing control over corporate governance, even if it is potential control”; (6) “continuing control over the current or final disposition of the assets that are or will be the product of the contract or project”; (7) “commingled public and private financing”; (8) “whether the activity of the private entity is conducted on publicly owned property”; and (9) “whether the private entity was created by the public entity.”<sup>xliii</sup>

Although these factors are still useful in considering the intertwining of government and a private contractor, our appellate courts caution that the evaluation “must also examine both the potential relationship created by the legal

contract that binds the entities and the actual day-to-day relationship among them.”<sup>xliv</sup>  
“[F]orm does not control over substance; substance must control over form.”<sup>xlv</sup>

### Examples for § 14-2-6(G)

**22** 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.

**23** 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 hospital 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.

**24** 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.

### § 14-2-6(H) with Commentary

**H.** “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;

The definition of public records is purposefully broad and should be interpreted liberally in favor of transparency. It covers virtually all files, whether physical or digital, generated or maintained by a public entity, including but not limited to government vouchers and other records of public expenditures, public contracts, employment applications, public employee salaries, final agency decisions, license applications and accident reports. It is important to clarify that a public record subject to one of the listed exceptions in IPRA is still a “public record” under this definition. The exceptions in IPRA allow a public body to choose to withhold or redact a public record, and the exceptions do not change the fact that the records are still considered public records under this definition.

Despite the broad scope of the definition, there are some documents that may be kept by a public body or its employees that are not public records. Records do not fall under this definition, and are not governed by IPRA, if they clearly do not relate to public business or if a law explicitly provides that the record is not a public record (which is different than a public record simply being subject to an exception under IPRA). Records that are entirely personal in nature and do not relate to public business are not likely subject to IPRA, as discussed in one of the examples below. In some situations, personal contact information held by a public body may not constitute a “public record” for purposes of IPRA. Public records with personal information may be subject to an IPRA exception, allowing the record to be redacted or withheld, such as personal identifier information, medical records, and other privacy and confidentiality laws.

Importantly, this definition can cover records held by private individuals or entities in certain circumstances. When a private company or person is contracted by a public body, records created by the company for the services provided are typically considered to be public records.<sup>xlvi</sup> The considerations to determine whether a public body has an obligation to produce records held by a private entity are discussed above.

### Examples for § 14-2-6(H)

**25** 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 requests to listen to the tape of the meeting. Unless the tape has been erased, the board must comply with the request.

**26** A person studying the process of governmental decision making submits to the governor’s office a request to inspect all email messages 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 must permit inspection.

**27** The mayor of a city routinely uses his personal email account and phone to communicate, in his official capacity, with city councilors and lobbyists regarding city business. An interested community member requests all written

communications between the mayor and lobbyists regarding a specific issue currently facing the city. In responding to the request, the records custodian must include all applicable messages sent to and from his personal email account and texts from his phone as they are records related to public business held on behalf of the city. Both emails and text messages are considered records and subject to inspection.

**28** Joe works for the Department of Game and Fish. Joe receives a personal email, on his personal email 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 or relate to his official work. The emails are not likely public records. Even though they technically relate to public business, they were not related to the work of the public body or the public employee and were not created or received on behalf of the public body.

**29** 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. In this situation, the county jail is a public facility, and the private company is performing a distinct governmental function that otherwise would be performed by the county. A

court reviewing the issue would likely rule that the records are public records because they are created, used and maintained on behalf of a public body, the county, and specifically relate to a public function that has been contracted to a company. While certain records of the contractor, such as corporate board files, may not directly relate to government work being provided, it should be addressed in contracts with private companies that records created for use of the public body may be subject to IPRA.

**30** 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 under IPRA.

### § 14-2-6(l) with Commentary

**I.** "trade secret" means trade secret as defined in Subsection D of Section 57-3A-2 NMSA 1978.

This exception refers to the Uniform Trade Secrets Act, which defines a "trade secret" as:

Information, including a formula, pattern, compilation, program, device, method, technique or process, that:

(1) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain eco-



conomic value from its disclosure or use; and  
(2) is the subject of efforts that are reasonable

under the circumstances to maintain its secrecy.

## Records Custodian Duties

Section 14-2-7 describes the responsibilities of records custodians.

### § 14-2-7 with Commentary

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

The designation of the records custodian is as significant as identifying individuals in the public body responsible for human resources, financial deposits, supervision, emergencies, and other critical and essential tasks. While it is common for a records custodian to have other responsibilities in addition to managing IPRA compliance, it is required by state law that every public body in the state designate a least one individual as its records custodian. There should never be any confusion over who is the designated custodian, and it is important for every employee and official of the public body to be able to know who serves in this role.

It is the responsibility of the public body to ensure that its records custodian understand the role and its responsibilities. The designated custodian may already have the required knowledge or can be trained, but the individual must be aware of the types of records created and maintained by the public body, the process for receiving and responding to IPRA requests, and any specific statutes or regulations protecting or otherwise affecting the public body's records. The individual should have significant access across the public body, including senior employees or officials, IT staff,

and legal counsel. A records custodian cannot reasonably know of all records held by their public body, but they must have necessary resources made available to facilitate a thorough search in response to any request.

Records custodians may hold other titles or positions and be assigned other responsibilities. This is particularly common in smaller public bodies, including municipalities where administrators and clerks often assume IPRA duties and serve as the designed records custodian. Consideration should be given to ensure a records custodian with other duties is able to reasonably allocate sufficient time to fulfill their duties under IPRA.

IPRA is not intended to make the custodian the only individual with power to respond to inspection requests; other employees may, on behalf of the records custodian, furnish public records for inspection, respond to requests, or fulfill other duties of the records custodian discussed below. However, the records custodian is the only person who is legally obligated to fulfill the duties required under IPRA, and the records custodian is the only official subject to a lawsuit to enforce IPRA.<sup>xlvii</sup>

### § 14-2-7(A) with Commentary

**A.** receive requests, including electronic mail or facsimile, to inspect public records;

The law requires public bodies to respond to any written requests for records. A public body may not deny a request because the request was made by one written method when it prefers requests be submitted in a different format. This does not prevent a public body from creating preferred methods for the public to submit requests, such as an on-line records request portal or a fillable request form, so long as any written request is accepted.

### § 14-2-7(B) with Commentary

**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;

The law requires that requests received through postal mail be responded to through the same medium, by sending a letter on paper, in an envelope, through the regular mail. The same would apply to complaints received through email or facsimile (for those that still exist). However, if a request is made on paper but included an email address, or other combination of medium and contact information, it may not be clear what medium to respond on. When in doubt on which medium a response should be provided through, or when it would be more effective to communicate through email, it is helpful to simply ask and obtain the consent of the requester. If the same request was submitted through different mediums, there is only an obligation to respond through a single medium, but it is advisable to reference the other requests received in the response to the requester.

### § 14-2-7(C) with Commentary

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

While neither “proper” nor “reasonable” are defined, records custodians should always consider the overarching public policy of IPRA and other government transparency and accountability laws that greatly favor public access to information and records. However, this does not mean that accommodating a records request must necessarily take precedence over all other business of the public body. Rather, considering reasonableness allows a records custodian to take into account the public body’s office hours, available space, other work obligations of the custodian and staff, size of the public body, additional precautions needed to protect records while being inspected, and other reasonable considerations. Accordingly, the custodian may impose reasonable conditions on access, including times when records may be inspected in-person 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, but a custodian should work with the requester to reasonably accommodate their right to inspection.<sup>xlviii</sup>

### Examples for § 14-2-7(C)

**31** A person incarcerated in a county correctional facility sends a request to the county to inspect the contract between the county and the private company running the facility. The county makes the contract available at the county’s offices

instead of at the facility. The inmate then brings a lawsuit against the county for failing to provide a reasonable opportunity to inspect. In trial, the county fails to articulate a reasonable justification for not making the contract available for inspection at the county correctional facility which houses the requester. The court enforces the Act, compelling the county to make the contract available at the facility.

**32** 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.

**33** A person wishes to inspect all the contracts entered into by a school district for the past five years. To give the person 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 private room and have the records brought to the room in batches at reasonable intervals.

**34** A group of employees of a public body in a small municipal government play the lottery together outside of work. On their lucky day, a jackpot, the largest in U.S. history, is drawn with their ticket numbers. Despite their overwhelming passion for public service, the pressure on the employees from family, friends, and total strangers is too much, and within a

month the employees submit resignations and travel the world. After the departures, the public body is left with an 80% vacancy, placing an unexpected and tremendous burden on the remaining employees. At the same time a series of large records requests are received. The public body is still obligated to follow all deadlines under IPRA but the request is deemed overly burdensome given the circumstances.

While staffing shortages cannot be used indefinitely as justification to deem all records requests burdensome, periods of staffing shortages or prolonged absences of key personnel due to required leave, such as the Family Medical Leave Act or Military Leave (20-5-14 NMSA 1978), are factors that can justify a public body's action as reasonable.

#### § 14-2-7(D) with Commentary

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

While more and more record requests are being produced electronically, the requirement of this Section reflects the original intent of allowing inspection of public records in-person at offices of public bodies. This obligation still exists and a records custodian is responsible for securing space, when needed, to facilitate the in-person review of records, if preferred by the requester.

If an individual requester walks in and delivers a written IPRA request to a public body, immediate inspection is not required under IPRA as

the law allows up to 15 days, and a reasonable period beyond that if a request is excessively burdensome. With a walk-in request, it is good practice to quickly evaluate the request to determine if the responsive records are of such a nature that they might be readily available. If so, then inspection could be allowed at the time of the walk-in, assuming the requester also has time to wait for the records to be gathered and to inspect them. Otherwise, the public body and the requester can coordinate a date and time for an in-person inspection.

Reasonable conditions may be set to protect public records, such as requiring the presence of an employee when sensitive documents are inspected, provided the requirements are reasonable under the circumstances. Custodians must also have access to a printer or copy machine to make copies of records when physical copies are specifically requested. As explained below, the records custodian may charge a fee for copies. It is not required under IPRA to provide a requester access to a copy machine for making their own copies during an in-person inspection, but a public body cannot prohibit a requester from taking photos, scanning, or making another form of copy so long as doing so is not create an unreasonable burden or disruption.

### Examples for § 14-2-7(D)

**35** A person stopped by the office of a state licensing board to drop off a notarized form that was needed for an application. While at the office, the person handed the board staff a records request to inspect the original copy of a signed order recently issued by the board. The board staff, knowing the order was readily avail-

able, informed the records custodian and they facilitated inspection by allowing the requester to review the document in the board's conference room. While immediate inspection was not required under IPRA, the record was of such a nature that it was readily available and sufficient staff were available to fulfill the request during the walk-in.

### § 14-2-7(E) with Commentary

**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.

Every public body is required by law to post a public notice that informs the public of their right to inspect records, how to submit a request, a complete explanation of any fees that may be charged for physical copies, and any other relevant information to help facilitate the request and inspection of its records.

This notice must be posted in a prominent and visible location both at the office and website (if a website exists). Although not explicitly contemplated by IPRA, public bodies that have more than one building or multiple public reception areas should consider posting the notice in any reception area that typically receives the public. If a public body does not have an administrative office, reasonable efforts to post the notice at the place where the public body's records are maintained or in another appropriate location where individuals who are interested in making a records request are likely to see the notice. Notices should not be difficult to locate or read either in-person or on the website.

### Examples for § 14-2-7(E)

**36** A mutual domestic water association is a small public body with only 30 members. It has no office. Requests to inspect its records generally are referred to the board of director's secretary,

who is also the records custodian. The secretary maintains the records at his home. Under these circumstances, the association should post the IPRA Notice on their website, if one is maintained, and post the public notice at a publicly accessible place such as the government building where the board meets.

**37** 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 and type of document used for the notice does not satisfy the clear intent of the law that the notice be prominent and readily observable by interested members of the public.

## Requesting Records

Section 14-2-8 describes the process for making requests to inspect records.

### § 14-2-8(A) with Commentary

**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.

By expressly allowing any person to submit a

records request, public bodies cannot deny a request to someone because they live in another county, another state, or even a different country.

The intent of this law is not to allow public bodies to ignore oral requests, but to recognize written requests as the preferred method and prevent enforcement actions when there is no written record of a disputed request. While it may be the preference or even policy of a

public body that records requests be made in writing, public bodies should not ignore an inspection request solely because it was made orally.

It is best practice for a public body that receives an oral request in person to facilitate the inspection of responsive records, if practicable, or immediately inform the requester of the process to request records and direct them to the form or manner of submitting a written request.

While a records custodian and their public body cannot be found liable for penalties under IPRA from non-compliance with an oral request, the willful failure to respond to oral requests is not in the spirit of IPRA.

### Examples for § 14-2-8(A)

**38** An individual asks the city's records custodian for a copy of a specific city employee's salary history through specified payroll records. 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 the oral request, thus satisfying the requirements of the Act. If the employee had instead told the requester that they would email the records the next week but had forgotten, the city would have not complied with their obligation but would not be liable for damages because the request was not in writing.

### § 14-2-8(B) with Commentary

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

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. This commonly applies to requests that a public body provide a list of specific information that is related to business of the public body, where the information may exist and be compiled, but no document exists that has the requested information together.

Some public bodies maintain large databases that include public information, but the information sought in a records request cannot be obtained without running a report on the data and creating a new record. In this instance a public body is not required to use the software to run a report and create a new record, but should provide the data if it is in a readable format, such as Excel. Also, some database's raw data is often not in a readable format without propriety software and requests for information from a database maintained by a public body is governed by the Public Records Act, not IPRA, and may be created as new records only when payment is provided.<sup>xlix</sup>

### Examples for § 14-2-8(B)

**39** A person asks the county 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. While the county could arguably respond that no responsive record was found, it would be more appropriate to tell the requester that there is no

document that lists this information and ask if they would instead want to inspect the nonexempt portions of all personnel files so they could compile the information from the records.

**40** A licensee asks a state licensing board for a list of all persons holding a particular license type. The board's staff maintains an electronic record containing all such information using an Excel file. The Act does not obligate the Board to create a document or other public record by compiling information from the Excel file in response to the request. However, the board staff could make a copy of the entire Excel file and provide it to the requester. It would be up to the requester to extract the desired list from the Excel file themselves.

### § 14-2-8(C) with Commentary

**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.

A requester must include the information listed in the statute in order to submit a valid records request. Upon submission, a requester's request becomes a public record itself. In addition to establishing a minimum level of formality and conformity for requests, the required information ensures that the public body has methods of contacting the requester with any questions and, ultimately, processing and responding to the request. Rather than deny

a request for failing to provide the required information, records custodians should inform requesters of the missing information and offer the requester an opportunity to provide the missing information.

By requiring requests to identify records with "reasonable particularity," the law does not mean that a person must identify the exact record needed but, instead, places an expectation that the description of the request should be sufficient to enable the custodian to reasonably know the scope of the records sought and conduct an adequate search. Stated differently, for records to be identified with "reasonable particularity" the requester should provide the subject being sought and the source of the record. This kind of information greatly facilitates a custodian's search process. Overly vague requests do not satisfy this requirement and could be denied as not being reasonably specific enough. However, custodians should respond to records requests that are determined to not be reasonably specific, inform that requester that the public body is unable to identify the scope of records sought, and ask for further clarification. Public bodies and custodians should exhibit patience with requesters who may not understand how to more adequately describe what they are looking for.

While an inquiry into the reasons a requester wants to inspect certain public records is not allowed, a custodian or public body may ask questions of the requester in an attempt to clarify the records request and help facilitate inspection for the requester. However, if the requester does not provide answers, the public body must still facilitate inspection based on the plain language of the request unless the

public body determines that it is unable to conduct a search at all because the request does not define the scope of records with reasonable particularity, as required by this Section.

Searches based on vague requests often return large quantities of records and result in excessively burdensome and broad determinations. Processing such requests is very time consuming and will likely be subjected to the procedure for excessively burdensome or broad requests in Section 14-2-10 of IPRA, which allows the public body more time to search for and provide inspection. In such instances, it is a good practice for public bodies to produce records in multiple installments in order to both start producing records to the requester and manage the production over time.

### Examples for § 14-2-8(C)

**41** A person goes to the offices of a municipal air pollution control board and fills out a records request form. In the space provided for a description of the records requested the requester asks to see all complaints about noxious automobile emissions filed with the municipal air pollution control board. The records custodian responds and asks if the requester can: 1) identify the time period of complaints to narrow down the search; and 2) the identify the types of complaints or types of automobiles that are the subject of the complaints sought. The records custodian may ask these questions in an attempt to narrow the scope of the request and facilitate a search and production of desired records. The records custodian could explain that the scope of the request as stated would be excessively burdensome

and broad as it would go back to the first complaint ever filed and would encompass every type of complaint for every type of vehicle. The records custodian could further explain that excessively burdensome requests take additional time to search for and ultimately produce responsive records. However, if the requester does not focus their request, the records custodian cannot deny this request as the records sought were identified with reasonable particularity as sufficient information was included in the request for the public body to conduct a search for the records.

### § 14-2-8(D) with Commentary

**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.

Public bodies and records custodians are expected to respond to requests and permit inspection of public records as soon as practicable. It is not acceptable for public bodies to establish standard practices of regularly and arbitrarily waiting until 15 days after receiving a request to allow inspection or provide the records. If inspection is not facilitated immediately after receiving a records request, the public body is expected to have circumstances that



reasonably justify the delay. While no public body is the same, and practicable delays for inspection will vary based on individual circumstances of a public body and nature of a records request, all public bodies in New Mexico are required under this law to process requests and permit inspection expeditiously. Inspection facilitated within three days after receiving the request will also create an efficiency but avoiding the need to send an acknowledgment, otherwise referred to as a “Three-Day Letter.”

### Examples for § 14-2-8(D)

**42** On Monday, the records custodian for a conservancy district receives a letter requesting to review in-person the original 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 of times she can come to the office and make copies of the available vouchers, as well as times that the remaining vouchers may be inspected the following Wednesday. This satisfies IPRA because the requester was responded to within three days and is given the opportunity to inspect all the original copies at the office within 15 days. The record custodian could have also waited to permit inspection until all the records were available before the 15-day period ended, as it was reasonable under the circum-

stances that the records were not available immediately.

**44** 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). This may be reasonable under the circumstances as the records were not in the possession or readily available to the records custodian at the time the initial response (Three-Day Letter) was sent.

**45** A written request is made in-person to a city’s facilities office for records permits that certify the physical alterations made to city office buildings in the past 10 years are in compliance with the Americans with Disabilities Act. The staff that received the request are not familiar with these records and are unable to conduct a search without additional consultation. Although the city staff tell the requester that the records will not be available for a few days, a written response is still required (Three-Day Letter) if inspection is not permitted within three days.

## § 14-2-8(E) with Commentary

**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.

This provision creates an expectation that a public body and its records custodian provide basic information and training to each employee and official of the public body necessary to ensure records requests are routed properly. This does not require that every member of a public body become an expert or even understand the rights or obligations provided under IPRA. But it does suggest that public employees and officials should know, at bare minimum, that IPRA exists and who in the public body they should forward any written communication that might be considered a records request. This expectation is based off the statutes use of the word "person" in this Subsection instead of "records custodian," which is assumed and interpreted as being intentionally broad.

More specifically, the law also places an affirmative obligation for records custodians, who should be well versed in communicating with requesters, to respond to requests that seek records not held by their public body. Records custodians are obligated to respond to such request within three days, and also forward the

request to the correct public body, if known. Sometimes it is not known what public body might hold responsive records, but the records custodian should be as helpful as possible in trying to direct the requester to another public body that they reasonably believe might maintain the records sought. Also not required, but notification to the requester can be combined with forwarding the request to another records custodian, which can help create efficiency and more quickly connect the requester with the public body that may respond to their forwarded records request.

A records requested forwarded by another public body should be treated as a new request under IPRA, with a response to the original requester within three days of receiving the forwarded request.

### Examples for § 14-2-8(E)

**46** The Department of Finance and Administration receives a written request for specific Department of Public Safety (DPS) records and all active personnel records of an entity the requester refers to as the "state circus bureau." The custodian complies with the Act by responding in writing that the agency is not the proper records custodian of DPS records, but that the DPS records custodian is copied on the correspondence and is being forwarded the request and will respond separately. The letter also states that no responsive records related to a "state circus bureau" were located, that the agency has not been able to identify any other agency that might have custody of the records described in the request, and that the request is considered closed.

## § 14-2-8(F) with Commentary

**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.

While postal mail and facsimile (fax machines) are not a common method of communication as in decades past, the law requires public bodies to respond to all written requests, whether received in physical or electronic form. While this does not require a public body to

buy a fax machine (some reading this will have to look up what a fax machine) or adopt new technology, it does mean that if the public body maintains a fax or email then requests received through them must be responded to. Public bodies can better facilitate record requests by creating forms that can be filled out and submitted in person or electronically, and even fillable on-line forms or portals, but a request cannot be denied simply because a requester did not or refused to use the public body’s request form. In short, any written request for records – whether written on a form, in an email, faxed, or mailed – must be responded to.

## Allowing Inspection

Section 14-2-9 describes procedures for allowing inspection of records.

## § 14-2-9(A) with Commentary

**A.** Requested public records containing information that is exempt and nonexempt from disclosure shall be separated by the custodian prior to inspection, and the non-exempt 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.

In many 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 necessarily protect all the information from public disclosure. 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.

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.

### Examples for § 14-2-9(A)

**47** A state licensing board receives many requests to inspect the files of its licensees. Mindful of the ability to maintain confidentiality of certain records, the board may organize two files for each licensee. One containing public information and another containing letters of reference and other material exempted from disclosure under Section 14-2-1.

### § 14-2-9(B) with Commentary

**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.

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. This prohibits a public body from only allowing physical printed copies of records in order to charge per page of printed copies when the record exists and can be provided electronically. While the law explicitly requires electronic copies when specifically requested, public bodies should keep in mind the spirit of facilitating inspection and consider providing electronic copies of electronic records even if

the requester does not “specifically” indicate that they want electronic copies.

Importantly, a requester cannot require a public body to take a record that is maintained in one format and convert or copy the record into a different format, as that would be considered a new record and is not required under Section 14-2-8(B).

### Examples for § 14-2-9(B)

**48** A person files an inspection request seeking public records reflecting the salaries of a public body’s employees. The requester asks for copies in Microsoft Word format but the record only exists in Microsoft Excel. The public body should respond to the request by providing the records in their original format, Microsoft Excel, and inform the requester that the responsive records are being provided in the electronic format in which they are maintained.

### § 14-2-9(C)(1)-(2) with Commentary

**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;

These two provisions, read together, allow a public body to charge copying fees. However, electronic records produced and provided in

electronic format cannot be charged a page-by-page fee since the law clearly states that fees are for copies “per printed page.” This omission of fees for electronic records is increasingly significant as more and more public records are created and maintained in electronic formats and charged for printed copies if produced electronically.

The maximum per-page fee for physical copies is a maximum and should not be the default amount for any copies of public records by a public body. Each public body must decide copying fees and include such fee schedule in its Public Notice required under Section 14-2-7(E). Reasonable fees are intended to only recover the costs incurred by the public body of making additional copies. This fee is only associated with copying costs and may not be used to recoup staff costs associated with receiving requests, conducting searches, reviewing records, or permitting inspection. The legislative intent and public policy of IPRA clearly provides that these duties are “an essential function of a representative government and an integral part of the routine duties of public officers and employees.”<sup>1</sup>

### Examples for § 14-2-9(C)

**49** A state agency makes copies of public records when requested on its copy machine. The copy machine is leased and the state agency is charged 10 cents for black-and-white copies and 75 cents for color copies. Including the cost of paper, toner, and supplies, the state agency calculates a cost of copying of 15 cents per page and 85 cents per page for black-and-white and color copies, respectively. The state agency charges requesters the calcu-

lated cost for copies made in response to IPRA request. Under these circumstances, the amount charged per page for copies is reasonable.

### § 14-2-9(C)(3)-(4) with Commentary

**(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;

These two provisions should also be read together as identifying what limited fees may be charged for electronic copies and copies sent through the mail.

Public bodies may charge a set fee for the actual cost of a storage device, such as a DVD, hard drive, or flash drive. These fees are commonly higher than just the actual cost of the storage device because the law is commonly interpreted as including small ancillary costs incurred by the public body that would not have been incurred but for having to obtain the storage device and download copies of the electronic records. Such costs cannot include staff time associated with receiving requests, conducting searches, or reviewing records prior to providing the electronic records.

Similarly, public bodies may charge a fee for the actual cost of postage when sending physical copies or storage device in the mail. However, with modern technology it is futile to attempt to quantify “actual costs” associated

with transmitting electronic records, especially as the per unit cost would vary wildly based on the total number of transmissions. The statute's language here was likely intended to address the costs associated historically with sending faxes. It was common in the past to see fax services charge high rates for each page sent. Today, applying a fee for transmitting electronic copies should be used very cautiously - or better yet not at all. What is clear from these provisions is that "actual costs" associated with producing electronic records cannot be calculated on the same page-by-page basis as physical printed copies.

### Examples for § 14-2-9(C)

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

### § 14-2-9(C)(5) with Commentary

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

A records custodian may require a person to pay the appropriate copying fees 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. The Act does not explicitly state what limitations a public body may place upon the manner of payment – e.g., cash only, or exact change, or credit card only – but public bodies should not place unreasonable barriers to public inspection or copying of its records.

### Examples for § 14-2-9(C)

**51** A public body receives a records request to inspect the copies of several large contracts that are highly controversial but not subject to any exception under IPRA. The records custodian, knowing the sensitivity of the records, informs the requester that the records can be produced only if the requester submits payment first. In this situation, the records custodian may require prior payment but only if 1) the records are not available in an electronic format, and 2) the requester wishes to receive copies and not just inspect the records in person (without cost).

### § 14-2-9(C)(6) with Commentary

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

This important provision explicitly prohibits

public bodies from assessing any fee that is associated with the public body's costs of reviewing records and determining whether an exception under IPRA applies, and if the exception will be invoked to withhold or redact responsive records. It may be specifically intended to address legal costs that could be connected to in-house counsel or contract counsel review of responsive records, which, if passed on to requesters, could quickly grow to an unreasonable fee that would have a chilling effect on requests for and access to public records.

### § 14-2-9(C)(7) with Commentary

**(7)** shall provide a receipt upon request.

Although IPRA only requires a formal receipt for fees paid when requested, public bodies should implement some written acknowledgment of payment as standard practice to have a complete record related to each records request, including confirmation of payment when records are produced after imposing a fee.

### § 14-2-9(D) with Commentary

**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.

This provision of IPRA recognizes that databases maintained by public bodies are also

subject to specific provisions of a different act, the Public Records Act.<sup>ii</sup> Unlike requests solely implicating IPRA, requests for records in databases are subject to “a reasonable fee for the service” of researching, retrieving, reviewing, redacting, and printing records from a database under Section 14-3-15.1. Thus, in contrast to IPRA requests, a public body may charge for the staff time and technical services needed.

Further, this provision does not limit state and local government's authority to sell certain limited data in databases and condition the use of such data as specified under the Public Records Act.

Note, the Public Records Act recognizes that provisions of state and federal law may restrict access to databases. Accordingly, not all databases maintained by governments and not all information within databases are subject to inspection under IPRA or eligible for sale under these Sections of the Public Records Act. The sale of this data is common for licensed professions where national organizations or continuing education providers seek public contact information for marketing or advocacy purposes and, instead of utilizing IPRA to get the same but uncompiled information, the private organization can contract with a public body and pay a fee (and usually royalties) to purchase the data in a more usable format under the Public Records Act.

### Examples for § 14-2-9(D)

**52** A private business provides information about 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 and GIS (geographic information system) map and data, excluding exempt information. The business further 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 permitted by Section 14-3-15.1. If the business refuses to enter into such an agreement, the department is under no obligation to provide the business with an

electronic copy of the databases.

In this case, the private business was not interested in obtaining a hard copy of the database. Had the business requested a printed copies of the database rather than an electronic copy, the department would have been required to comply with the request and provided the printed copy, but could have charged "a reasonable fee for the service" of researching, retrieving, reviewing, redacting, and printing records from a database under Section 14-3-15.1.

## Burdensome and Broad Requests

Section 14-2-10 describes procedures for addressing excessively burdensome or broad requests.

### § 14-2-10 with Commentary

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.

If a request for public records is excessively burdensome or broad, IPRA allows a public

body additional time beyond the 15-day period to permit inspection. The Act does not define exactly what constitutes an "excessively burdensome, or broad" request but leaves it to the determination of the records custodian. Individual requesters can often avoid delays in receiving their records by identifying the records sought with as much specificity as possible with search criteria such as specific dates or a date range, key words, certain individuals, or other descriptions that could narrow the request and scope of the search.

Whether a request meets this burdensome and broad exception to allow more time to produce records will depend on the particular circumstances of the request and the specific public body. A request may be excessively burdensome or broad if:

- it requires the custodian to locate and re-



view a very large number of records;

- the requested records are difficult to locate or obtain because they are not in one location;
- the search involves the coordination among multiple people;
- it requests records spanning many years or decades; or
- it encompasses a wide-range of subjects or individuals, and the requester declines to narrow the parameters of the request;
- legal review is needed on a large number of records to determine whether any exceptions to disclosure apply; or
- a significant number of other records requests were received unexpectedly about the same time and the public body that normally has adequate staff needs additional time to complete the unusually large list of requests.

The above are some example of circumstances that can make a request excessively burdensome or broad. As circumstances can vary widely, public bodies should ask if their determination is reasonable based on the specific request and conditions at the time of the request when considering whether a request is excessively burdensome or broad. For example, while unexpected staffing issues, such as prolonged absences of key personnel due to required leave (Family Medical Leave Act or Military Leave (20-5-14 NMSA 1978)), are a reasonable justification for certain circumstances, long-term staffing shortages are not likely reasonable based on the law's explicit expectation that IPRA compliance is "an essential function" and "an integral part of the

routine duties" of state and local government. Public bodies should be prepared to articulate why a request is excessively burdensome, in the event the decision is challenged in district court.

The same three-day response deadline applies to excessively burdensome and broad requests, and that is often a good opportunity for the records custodian to communicate to the requester that the request may be considered excessively burdensome or broad. Facilitating communication with a requester can greatly benefit a public body in this situation since it serves to inform the requester of broad scope of the request and offers an opportunity to discuss whether the requester is able and willing to provide more specificity to their request that will likely result in a faster search and production, fewer unintended or unwanted records, and less burden on the public body.

Requesters should be patient in receiving records in response to these large or complicated requests. The records custodians and other staff typically work hard and as quickly as they can to fulfill requests. Both the records custodian and the requester should be reasonable with how quickly a large request can be fulfilled. If an excessively burdensome or broad request results in a significant delay, public bodies may consider a "rolling production" or "installment production" which means the public body releases responsive records in batches as they become available during the search and review process. This is common for complex requests that involve very large volumes of records that require lengthy legal review. By providing records in a rolling production the public body may build better trust with the requester and help reduce the

chance of an enforcement action in district court, and it also demonstrates an effort by the public body to comply with the spirit of the law

and avoid unreasonable delays with providing public records.

## Denied Requests

Section 14-2-11 describes procedures for denying requests.

### § 14-2-11(A) with Commentary

**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.

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.

### Examples for § 14-2-11(A)

**53** Mr. Edd submits a written request to the state board regulating cattle brands for records about a particular brand. The board does not give Mr. Edd any written response, including any acknowledgment or denial of the request. After waiting 20 days, Mr. Edd files an action in district court requesting that the board be ordered to provide the requested records and seeking damages. Such a lawsuit is proper and would likely result in a judgment against the public body.

Public bodies are required to provide a written explanation of denials. This requirement also applies to partial denials, which are requests that are granted in part and denied in part, meaning that some responsive records are provided while others are redacted or withheld. Public bodies should clearly identify the specific legal exception(s) used as the basis to deny any requests by using legal citation(s) or specific reference(s) to the exception(s) being relied upon. Providing the name and title or position of each person responsible for the denial is an important but sometimes overlooked requirement of denial letters. The person responsible for the denial may not necessarily be the records custodian. Depending on specific circumstances, an attorney for the public body, a manager, or other authorized person within the public body may be responsible for a denial.

### § 14-2-11(B) with Commentary

**B.** If a written request has been denied, the custodian shall provide the requester

As part of a denial letter, it is a good practice for records custodians to encourage requesters to reach out before filing an enforcement action when a requester believes a record that was not produced exists, or if they question any redactions. While this is not a required step, open and collaborative communication between the requester and the records custodian can often avoid confusion, quickly remedy any issues, and avoid resources and time on IPRA complaints or litigation for issues that can be easily fixed.

### Examples for § 14-2-11(B)

**54** A reporter submits a written request to a city police department to inspect all records kept by a specific officer related to their investigation of a recent murder. Knowing that a request for video or audio files can make the processing of requests take longer, the reporter excludes video and audio records from her request. Three days after receiving the request, the records custodian for the department responds stating that the records are available for inspection immediately, with the following redacted: information revealing confidential sources or methods, information about individuals accused but not charged with a crime, and protected personal identifier information. The response cites Section 14-2-1.2 of IPRA, which provides exceptions for certain law enforcement records, and Section 14-2-6(F), which protects personal identifier information, as the reasons for these redactions. The response also sets forth the names and positions of the custodian and the police officer as the persons responsible for the redactions. This

response complies with IPRA procedures partially denied requests.

### § 14-2-11(C) with Commentary

**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.

Damages listed in this Section may be combined with damages available in Section 14-2-12, which is discussed below and includes reasonable costs and attorney's fees associated with bringing an enforcement action against the public body in district court.<sup>lii</sup>

Damages are not recoverable if a public body's failure under Section 14-2-11 is shown to be reasonable. As interpreted by New Mexico courts, the legal remedies provided in this Section address "the 'wrong' done by a public body, i.e., a public body's failure to respond to a request, which, ... includes everything from a complete failure to respond at all, to failing to

permit inspection of all nonexempt responsive records, to failing to issue an explanation of denial in conformance with Section 14-2-11(B) when records are being withheld from inspection.<sup>liii</sup>

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. Courts will examine the circumstances surrounding the denial when determining how many dollars per day will be awarded. While efforts by the public body to comply with IPRA may be a basis to lower the per-day damages, intentional violations of the Act or bad-faith exhibited by a public body may be a basis to raise the per-day damages higher, up to \$100 per day limit.<sup>liv</sup>

## Enforcement

Section 14-2-12 describes actions to enforce IPRA.

### § 14-2-12(A) with Commentary

**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.

Enforcement actions, or lawsuits, may be brought against a public body that has violated the Inspection of Public Records Act. These actions may be filed by the Attorney General, local District Attorneys, or a person whose written request for inspection has been denied. This last category, called a "private right of

The best practice for public bodies when faced with questions regarding associated with the failure to issue a denial or the propriety of a denial is to mitigate further liability by issuing a denial letter or sending out an updated denial letter. Public bodies should strive for compliance and delayed compliance is better than no compliance at all.

In the event of an enforcement action in district court, the public body and the records custodian, will likely be named as parties in the lawsuit. IPRA does not make the named individuals personally responsible for payment of any damages awarded. Any such damages are to be paid from the funds of the public body.

action," is the most common type of enforcement action. By allowing for the recovery of attorneys fees and cost on top of the per-day damages that may awarded to the requester under Section 14-2-11, IPRA empowers denied requesters with a mechanism to hold errant public bodies accountable to IPRA.

Although the Act does not specify any deadline for bringing an enforcement action, 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.

### § 14-2-12(B) with Commentary

**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.

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.

### § 14-2-12(C) with Commentary

**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.

A person whose request is denied or who does not receive a timely notice of denial is authorized to bring an action to enforce IPRA immediately. There is no obligation for the individual to continue to ask or otherwise communicate with the public body regarding the outstanding or denied request.

### Examples for § 14-2-11

**55** A public school board passes a resolution 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 atten-

dance 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 school board may not require the requester to pursue the matter before the school board administratively. The requester may immediately proceed to challenge the denial in district court.

### § 14-2-12(D) with Commentary

**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.

"Section 14-2-12... is designed to correct the 'wrong' done to the requester when his or her right of inspection is improperly denied."<sup>lv</sup>

While Section 14-2-11, discussed above, "is focused on deterring nonresponsiveness and noncompliance by public bodies in the first instance,...Section 14-2-12 is focused on making whole a person who, believing his or her right of inspection has been impermissibly denied, brings a successful enforcement action."<sup>lvi</sup>

The Act does not specify the type of damages a court may award to a private person who successfully brings an enforcement action. Presumably, if the action involves a records custodian who failed to provide a timely written denial, damages might include both the per-day penalties discussed above Section 14-2-11 as well as damages and attorney's fees and

costs necessary to compensate the requester for any losses related to the improper denial.

# Sample Templates and Forms

This section offers sample templates and forms that should be regarded as suggestions for compliance with IPRA. No specific forms are required by IPRA, but these examples incorporate the basic requirements and some best practices. Agencies are free to customize the forms and templates to meet their particular circumstances, so long as they meet the requirements of IPRA.

## For the Public

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## For Public Bodies

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# Records Request Letter

A letter of this type should be used to request records from a public body.

---

[Date]

TO:           Records Custodian  
              [Agency Name]  
              [Agency Address or Email]

FROM:        [Requester's Name]  
              [Requester's Address]  
              [Requester's Phone Number]  
              [Requester's Email]

Dear Records Custodian,

I would like to inspect and copy the following records:

[List records with reasonable particularity. Identify the subject and source of the records you seek. Specify the date range you are interested in.]

If your agency does not possess or maintain these public records and you are aware of the agency that does, please forward my request to that agency and copy me on that correspondence.

If the records exist in a digital format, I request copies of the records in the same format. I agree to pay the applicable fee for copying and transmitting the records. If the charges will exceed \$\_\_\_, please contact me to discuss before making copies. I understand that I may be asked to pay the fees in advance. Please provide a receipt indicating the charge for each document.

Thank you for your assistance in this matter.

Best Regards,

[Signature of Requester]



## Acknowledgment (Three-Day) Letter

A letter of this type is used if the public body is not able to provide inspection within three days after receiving a written request.

---

[Date]

[Requester's Name]

[Requester's Address]

[Requester's Email]

Re: Request to Inspect Public Records - Three-Day Letter

Dear [Requester's Name]:

On [Date], we received your request to inspect:

[Insert Requester's Exact Request]

After reviewing your request, we need additional time to search for, collect, and process any responsive records. We will have a response for you no later than [Day 15].

Best regards,

[Signature]

Records Custodian [or "For Records Custodian"]

## Wrong Custodian Letter

A letter of this type is used when a request is made to a public body that is not in possession of or responsible for the requested records.

---

[Date]

[Requester's Name]

[Requester's Address]

[Requester's Email]

Re: Request to Inspect Public Records - Wrong Custodian

Our office received your records request for:

[Insert Requester's Exact Request]

After reviewing your request and conducting a search, we did not find any responsive records. Generally, the types of records you requested are not typically the types of records possessed or maintained by this office.

The records you seek may be maintained by the [Name of Agency and Address]. We are forwarding your request to that agency's records custodian for their review and response. To expedite your request, you may consider submitting an additional records request to that agency's records custodian directly.

With this explanation, we consider your request closed. If you believe a record exists that was not provided to you, please let us know at the earliest opportunity.

[Name and Title] is the official responsible for any denial of your request.

Best regards,

[Signature]

Records Custodian [or "For Records Custodian"]

## Excessively Burdensome or Broad Letter

A letter of this type is used when a request is excessively burdensome or broad and additional time is needed to process an IPRA request. When used, this type of letter must first be sent no later than 15 calendar days from the date of receipt of a request.

---

[Date]

[Requester's Name]

[Requester's Address]

[Requester's Email]

Re: Request to Inspect Public Records - Excessively Burdensome or Broad

Dear [Requester's Name]:

On [Date], we received your request to inspect:

[Insert Requester's Exact Request]

Due to the breadth of your request and the number of records requiring review [or other explanation making the request excessively burdensome or broad], this request is excessively burdensome at this time, and we need more time to process your request. We will have a further response to you by [Date].

[Name and Title] is the official responsible for any denial of your request.

Best regards,

[Signature]

Records Custodian [or "For Records Custodian"]

## Denial Letter

A letter of this type is used when a request is being denied. When used, this type of letter must first be sent no later than 15 calendar days from the date of receipt of a request.

---

[Date]

[Requester's Name]

[Requester's Address]

[Requester's Email]

Re: Request to Inspect Public Records - Denial

Dear [Requester's Name]:

On [Date], we received your request to inspect:

[Insert Requester's Exact Request]

After reviewing your request and conducting our required searches, we determined that [no responsive records exist at this time or other specific grounds for denial]. With this explanation, we consider this request closed. If you believe a record exists that was not provided to you, please let us know at the earliest opportunity.

[Name and Title] is the official responsible for any denial of your request.

Best regards,

[Signature]

Records Custodian [or "For Records Custodian"]

# Production Letter

A letter of this type is used when producing records.

---

[Date]

[Requester's Name]

[Requester's Address]

[Requester's Email]

Re: Request to Inspect Public Records - Production

Dear [Requester's Name]:

On [Date], we received your request to inspect:

[Insert Requester's Exact Request]

We are providing the records that are responsive to your request.

[If No Redactions or Withholding: No redactions were made to these records, and no records were withheld.]

[If Redactions or Withholding: Redactions were made to records pursuant to {list specific grounds for redactions}. Some records were withheld pursuant to {list specific grounds for withholdings}.]

With this production and explanation, we consider your request closed. If you believe a record exists that was not provided to you, please let us know at the earliest opportunity.

[Name and Title] is the official responsible for any denial of your request.

Best regards,

[Signature]

Records Custodian [or "For Records Custodian"]

## Public Notice of IPRA Rights

Section 14-2-7(E) requires every public body to post a public notice that informs the public of their right to inspect records, how to submit a request, a complete explanation of any fees that may be charged for physical copies, and any other relevant information to help facilitate the request and inspection of its records. This notice must be posted in a prominent and visible location both at the office and website (if a website exists). The following is an example of such notice.

---

### Notice of Right to Inspect Public Records

By law, under the Inspection of Public Records Act, every person has the right to inspect public records of [Agency]. Compliance with requests to inspect public records is an integral part of the routine duties of the officers and employees of the [Agency].

### Procedures for Requesting Inspection

Our office accepts records requests via mail, in-person, fax, and email to the contact information included below. Requests should be directed to the Records Custodian:

Records Custodian  
[Agency]  
[Agency Address]  
[Agency IPRA Email]  
[Agency Fax]

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

The Records Custodian must permit inspection immediately or as soon as practicable, but no later than 15 calendar days after the Records Custodian receives the inspection request. If inspection is not permitted within three business days, the person making the request will receive a written response explaining when the records will be available for inspection or when the public body will respond to the request. If any of the records sought are not available for public inspection, the person making the request is entitled to a written response from the Records Custodian explaining the reasons inspection has been denied. The written denial shall be delivered or mailed within 15 calendar days after the Records Custodian receives the request for inspection.

## Procedures for Requesting Physical Copies and Fees

There is [no fee][\_\_\_\_\_ fee] for records produced electronically. However, if a person requesting inspection would like a physical copy of a public record, a reasonable fee will be charged. The fee for printed documents 8.5 inches by 11 inches or smaller is \_\_\_\_\_ per page. The fee for larger documents is \_\_\_\_\_ per page. The fee for CD or DVD is \_\_\_\_\_ per disc. The Records Custodian may request that applicable fees for copying public records be paid in advance, before the copies are made. A receipt indicating that the fees have been paid will be provided upon request to the person requesting the copies.

# Endnotes

- i *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 55 L. Ed. 2d 570 (1978).
- ii Section 14-2-5 NMSA 1978.
- iii *Henry v. Gauman*, 2023-NMCA-078, ¶¶ 17-18, 536 P.3d 498, 504, cert. denied (Oct. 5, 2023) (finding that the matters of opinion exception applies to the entire document, and not requiring separation of opinion from fact through redaction).
- iv *Franklin v. New Mexico Dep't of Pub. Safety*, 2022-NMCA-058, ¶¶ 12-13, 517 P.3d 953, 958 (holding that an opportunity to inspect records must be reasonable under the circumstances).
- v *New Mexico Foundation for Open Government v. Corizon Health*, 2020-NMCA-014, 460 P.3d 43.
- vi *Jones v. City of Albuquerque Police Dep't*, 2020-NMSC-013, ¶ 37, 470 P.3d 252, 262 (exceptions pertaining to law enforcement records were moved in 2023 to a new Section 14-2-1.2).
- vii *Dunn v. New Mexico Dep't of Game & Fish*, 2020-NMCA-026, ¶ 1, 464 P.3d 129, 130.
- viii *Britton v. Office of Attorney Gen.*, 2019-NMCA-002, 433 P.3d 320.
- ix *Id.* at ¶ 39.
- x *Albuquerque Journal v. Bd. of Educ. of Albuquerque Pub. Sch.*, 2019-NMCA-012, 436 P.3d 1 (finding that a common-interest privilege requires mutual understanding and actions between parties to be utilized as an exception to inspection and that exceptions to close public meetings under the Open Meetings Act do not create exceptions to inspect public records under IPRA).
- xi *Dunn v. Brandt*, 2019-NMCA-061, ¶¶ 8-14, 450 P.3d 398, 402-404.
- xii *Pacheco v. Hudson*, 2018-NMSC-022, ¶ 28, 415 P.3d 505, 511 (finding that a social media company was not conducting governmental business when housing a public official's personal election campaign material, the court relied on a nonexclusive nine-point totality-of-factors test established in *State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, ¶ 13, 287 P.3d 364).
- xiii *Id.* at ¶¶ 39-44 (Recognizing the judicial deliberation privilege as a lawful exception to the inspection of public records, the New Mexico Supreme Court provided context from other jurisdictions and distinguished its decision from its earlier ruling limiting executive privilege in *Republican Party v. Tax. and Rev. Dept.*, 2012-NMSC-026, 283 P.3d 853).
- xiv *Id.* at ¶¶ 57-62 (IPRA enforcement actions filed against the designated records custodian is treated as a lawsuit against the public body, and the requirement to file in the local district court is based on jurisdictional authority provided by the New Mexico Constitution, Article VI, Section 13).
- xv *Am. Civil Liberties Union of New Mexico v. Duran*, 2016-NMCA-063, ¶¶ 30-31, 392 P.3d 181, 189.
- xvi *Id.* at ¶¶ 41 and 45 (The reasonableness of attorney fees is measured against an established set of objective standards and criteria, including: (1) the time and labor required, the novelty and difficulty of the questions involved and skill required; (2) the fee customarily charged in the locality for similar services; (3) the amount involved and the results obtained; (4) the time limitations imposed



- by the client or by the circumstances; and (5) the experience, reputation and ability of the lawyer or lawyers performing the services.).
- xvii *Faber v. King*, 2015-NMSC-015, 348 P.3d 173.
- xviii *Holland v. City of Albuquerque*, 2015-NMCA-014, ¶ 4, 343 P.3d 192, 193.
- xix *Edenburn v. New Mexico Dept. of Health*, 2013-NMCA-045, ¶ 23, 299 P.3d 424.
- xx *Republican Party of New Mexico v. New Mexico Taxation & Revenue Dept.*, 2012-NMSC-026, ¶ 16, 283 P.3d 853, 860.
- xxi *Id.*
- xxii *Id.* ¶¶ 42-49.
- xxiii *State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, 287 P.3d 364
- xxiv *State ex rel. Newsome v. Alarid*, 1977-NMSC-076, ¶ 11, 794, 568 P.2d 1236, 1240.
- xxv *Hall v. City of Carlsbad*, 2023-NMCA-042, ¶ 10, 531 P.3d 642, 646 (citing *Newsome*, 1977-NMSC-076, ¶ 12, 568 P.2d 1236).
- xxvi *Cox v. New Mexico Dep't of Pub. Safety*, 2010-NMCA-096, ¶ 21, 242 P.3d 501, 506.
- xxvii *Hall v. City of Carlsbad*, 2023-NMCA-042, 531 P.3d 642.
- xxviii *Ammerman v. Hubbard Broad., Inc.*, 1976-NMSC-031, ¶ 17, 551 P.2d 1354, 1359.
- xxix H.B. 232, 56th Leg., 1st Sess. (N.M. 2023), <https://www.nmlegis.gov/Legislation/Legislation?Chamber=H&LegType=B&LegNo=232&year=23>.
- xxx *See City of Las Cruces v. Public Employee Labor Relations Bd.*, 1996-NMSC-024, ¶ 5, 917 P.2d 451, 453.
- xxxi *See, e.g., Dunn v. Child., Youth & Fams. Dep't*, No. A-1-CA-35642, 2018 WL 6583187, at \*3 (N.M. Ct. App. Nov. 5, 2018).
- xxxii *Ammerman v. Hubbard Broad., Inc.*, 1976-NMSC-031, ¶ 17, 551 P.2d 1354, 1359 ("Under our Constitution the Legislature lacks power to prescribe by statute rules of evidence and procedure, this constitutional power is vested exclusively in this court, and statutes purporting to regulate practice and procedure in the courts cannot be binding.").
- xxxiii *See Dunn v. New Mexico Dep't of Game & Fish*, 2020-NMCA-026, ¶ 10, 464 P.3d 129, 133.
- xxxiv *See Cox, supra*, at ¶31. *Dunn, supra*, appears to eliminate any exception established in *Cox* regarding private identifying information not within the scope of the definition of personal identifier information in Section 14-2-1.1. However, the facts in *Dunn* did not include threats to the safety of the persons so identified.
- xxxv *State v. Strauch*, 2015-NMSC-009, ¶ 37, 345 P.3d 317, 327 (citing the New Mexico Legislative Council Service's Legislative Drafting Manual 31 (2000, amended 2008) for the proposition that "[t] here is no need to write 'includes but is not limited to'; the word 'includes' implies an incomplete listing. Put another way, 'includes' contains the concept of 'not limited to.'")
- xxxvi *Jones v. City of Albuquerque Police Dep't*, 2020-NMSC-013, ¶ 37, 470 P.3d 252, 262 (decided under prior version of law enforcement exception).
- xxxvii *See* Section 29-10-7(A), NMSA 1978 of ARIA.
- xxxviii *See* Atty Gen. Op. No. 94-02.
- xxxix Due in part to this unequivocal statement of public policy that providing access to public records is an essential function of governments in our state, IPRA differs significantly from the federal Freedom of Information Act and is interpreted differently. *See San Juan Agr. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶¶ 16, 38, 257 P.3d 884, 892.
- xl *City of Farmington v. The Daily Times*, 2009-NMCA-057, ¶ 17, 210 P.3d 246, overruled on

- other grounds by *Republican Party*, 2012-NMSC-026, ¶ 16, 283 P.3d 853.
- xli *State ex rel. Newsome v. Alarid*, 1977-NMSC-076.
- xlii See Section 14-3-2 NMSA 1978, Definitions.
- xliii *Murphy v. Lash*, 2023 WL 7125067, at \*4 (N.M. Ct. App. Oct. 26, 2023) (citing *Mem'l Med. Ctr., Inc. v. Tatsch Const., Inc.*, 2000-NMSC-030, ¶ 35 n. 2, 12 P.3d 431).
- xliv *Id.* ¶ 15.
- xlv *Id.*
- xlvi *New Mexico Found. for Open Gov't v. Corizon Health*, 2020-NMCA-014, ¶ 21, 460 P.3d 43, 51 (holding that a private company contracting with the department of corrections to provide medical care to persons incarcerated by the department was performing a public function); see, e.g., *Libit v. Univ. of New Mexico Lobo Club*, 2022-NMCA-043, ¶ 15, 516 P.3d 217, 223, cert. granted (Aug. 16, 2022) (private foundation obligated to respond to public records request).
- xlvii *Pacheco v. Hudson*, 2018-NMSC-022, ¶ 57, 415 P.3d 505, 516.
- xlviii *Franklin v. New Mexico Dep't of Pub. Safety*, 2022-NMCA-058, ¶ 12, 517 P.3d 953, 958.
- xlix Information from databases is addressed by the Public Records Act is at Section 14-3-15.1 NMSA 1978; see, e.g., *Crutchfield v. New Mexico Dep't of Tax'n & Revenue*, 2005-NMCA-022, ¶ 24, 106 P.3d 1273, 1280.
- I See Section 14-2-5 (emphasizing that IPRA compliance is an essential and routine duty of public employees and that fees are not permitted for staff costs except for those associated with copying costs).
- li Information from certain databases maintained by public bodies is considered a public record but fees separate from those in IPRA may be charged for copies pursuant to the Public Records Act, Sections 14-3-15.1 NMSA 1978 (for state government databases) and 14-3-18 NMSA 1978 (for county and municipal databases). See also *Crutchfield*, 2005-NMCA-022, ¶ 23 (“When two statutes deal with the same subject, one general and one specific, the specific statute controls.”)
- lii Regarding damages available under IPRA. See *Faber v. King*, 2015-NMSC-015, ¶ 29, 348 P.3d 173, 181 (“[W]e hold that the Legislature intended for Section 14-2-12 to only authorize the recovery of compensatory damages, costs, and attorneys’ fees associated with the litigation to enforce a wrongfully denied IPRA request.”); and *Britton v. Off. of Att’y Gen.*, 2019-NMCA-002, ¶ 35, 433 P.3d 320, 333 (Holding that IPRA’s “Section 14-2-11 and Section 14-2-12 damages are not mutually exclusive insofar as a public body may first occasion wrong to the requester and a requester may be separately and subsequently injured by the ensuing inaccessibility of records obtainable under IPRA.”)
- liii *Britton v. Off. of Att’y Gen.*, 2019-NMCA-002, ¶ 35, 433 P.3d 320 (emphasis in the original).
- liv See *Id.* ¶ 39.
- lv *Id.*
- lvi *Id.* ¶ 34.





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