

New Mexico Foundation for Open Government

April 1, 2010

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Secretary Ron Curry
New Mexico Environment Department
P.O. Box 5469
Santa Fe, NM 87502-5469

Dear Secretary Curry,

I am writing to express my concern regarding certain portions of the Department's Policy and Procedure 01-06, the Inspection of Public Records Policy. Much of the policy is tailored very closely to the requirements of state law, and I applaud NMED for adopting a clear and thorough policy.

However, I have two concerns with specific provisions. They are as follows:

1. **Draft Documents. Section II.A.2** exempts from inspection "draft documents or draft versions of documents that are circulated for comments that are turned into a final document."

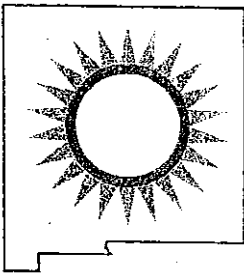
Under the Inspection of Public Records Act and the New Mexico Attorney General's interpretation of that law, draft documents dealing with public business are public records and are subject to inspection so long as they do not contain information that falls under one of the IPRA's limited exceptions.

2. **Electronic Records. Section VI.A** requires that "where a request seeks information from an electronic information system or information in electronic format, the requestor must sign the New Mexico Environment Department's Release of Public Information in Electronic Format form." This release form requires the requestor to agree to various conditions including a restriction on copying and sharing, payment of a royalty and written disclosure of how the information will be used.

Section VIII.A-B assign a very broad definition to "electronic information systems," including databases, email systems, word-processing documents and spreadsheets.

Section IX.C-D both provide that "If an Inspection of Public Records Act request requires searching, manipulating, retrieving or reviewing data from an electronic information system, a fee shall be charged for the service."

At first glance, these provisions all seem to track the Public Records Act dealing with computer databases (NMSA 14-3-15.1) to the letter. However, the Department's policy actually veers from the letter, and certainly the spirit, of state sunshine law in its extremely broad definition of electronic information systems, its burdensome requirements for any IPRA requests that encompass electronic records, and its conflation of inspection requests with copying/commercial re-selling requests. In at least one recent instance, this has resulted



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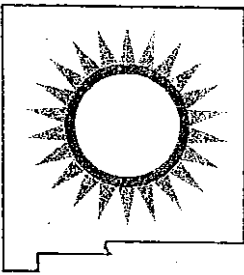
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in an IPRA requestor, Alexa Schirtzinger, being charged onerous fees to inspect public documents. After requesting a number of standard reports “in their original format,” Ms. Schirtzinger was asked to pay a “service fee” of \$1,547.25 to cover the cost of an electronic document review by Department staff, and she was required to disclose her reason for requesting public documents. Both requirements violated her inspection rights under the IPRA. (The fee has since been reduced to \$247.17; although I appreciate the staff’s willingness to work with Ms. Schirtzinger, the levying of any fee is contrary to IPRA and it erects an unacceptable barrier to access.)

Note that under the IPRA, every person has a right to inspect any public records. Furthermore, public records are broadly defined to include all information materials dealing with public business “regardless of physical form or characteristics.” (NMSA 1978 14-2-1.A and 14-2-6.E) **Providing such information is part of the routine duties of a public body,** (NMSA 1978 14-2-5) and the only cost that can be passed on to requesters is the cost of making copies. The IPRA even makes explicit reference to electronic information in its provision that “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.” (NMSA 1978 14-2-9.A) Finally, the IPRA’s statement of public policy clearly directs all government agencies to provide interested persons with the maximum possible information about the affairs of government. (NMSA 1978 14-2-5)

By contrast, the Department’s policy relies upon the restrictive Public Records Act, NMSA 14-3-15.1, to set retrieval and inspection procedures for all documents in electronic format. In today’s world, that covers a broad and growing swath of public documents. Given that the Public Records Act contains no definition of “information systems databases,” and given that the Act seems clearly targeted toward commercial re-selling of state information, the Department’s IPRA policy is an unwarranted expansion of the Public Records Act’s scope and reach.

To be sure, NMSA 14-3-15.1 does mandate that certain conditions be placed upon the electronic copying of state databases. But that statute is not intended to serve as a limitation on the public’s free inspection rights under IPRA. Rather, it has primarily been used as a records-management tool for large data collections. The fee conditions are typically applied to data for which a commercial market exists, such as court databases, motor vehicle databases and surveying-information databases. Note that NMSA 1978 14-3-15.1F, which your policy uses to justify document-review fees that are expressly contrary to IPRA, applies to situations in which a state agency allows a third party to search, manipulate or retrieve data or make a copy “for any private or nonpublic use.” This is clearly a different situation



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from a citizen's lawful request to review public information, which falls squarely under the mandates of IPRA.

I would also note that even for commercial data re-sellers, database-access royalties have been the subject of heated debate. To further expand 14-3-15.1's scope to include government e-mails, word-processing documents and reports submitted electronically is contrary to the law, tradition and spirit of open government.

Regarding Ms. Schirtzinger's situation, I urge Department staff to comply with the IPRA and provide an inspection opportunity for the requested documents as soon as practicable.

Furthermore, if you are amenable to amending the Department's IPRA policy to prevent such circumstances from occurring in the future, we at NM-FOG would be happy to work with you. Please contact me if you have any questions or concerns, and thank you for your time and attention.

Sincerely,

Sarah Welsh
Executive Director

Cc: Tannis L. Fox, Deputy General Counsel; Judy Fisher, Environmental Specialist; Mary Uhl, Chief, Air Quality Bureau