STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

HECTOR H. BALDERAS
ATTORNEY GENERAL

March 7, 2022

VIA ELECTRONIC MAIL ONLY

Children, Youth and Families Department
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Re: Inspection of Public Records Act Complaint – New Mexico Foundation for Open Government

Dear Mr. Young:

Thank you for your response to our inquiry into the complaint filed with the Office of the Attorney General by the Foundation for Open Government ("FOG") alleging that the Children, Youth and Families Department (hereinafter the "Department") violated the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2019) ("IPRA"). As you know, FOG alleges that the Department violated IPRA in denying the public records request submitted by Mr. Ed Williams on or about August 23, 2021. Having carefully reviewed both this complaint and your response to our inquiry, we conclude that the Department likely lacked the legal justification to deny Mr. Williams' request. Although we appreciate that the Department has expressed its position in good faith, we find that NMSA 1978, Section 32A-2-32 (1993, as amended through 2009), does not exempt the Department's "Tree Stats" data from disclosure once all individual identifying information has been removed.

Background

We understand that the Department maintains a great deal of statistical data regarding its work in New Mexico's juvenile justice system. Pursuant to the Delinquency Act, NMSA 1978, Sections 32A-2-1 to -33 (1993, as amended through 2019), the Department is responsible for receiving, examining, and acting on "complaints and allegations that a child is a delinquent child." Section 32A-2-5. The Department, as it explained in response to our inquiry, therefore creates and maintains data regarding "all clients referred to the Department during a given year through the juvenile justice system." Each year, the Department uses its "individual client data" to generate a

"Tree Stats diagram" that aggregates the data to "illustrate the flow of all clients" in the juvenile justice system.

In creating the annual "Tree Stats diagram," it appears that the Department extracts information from its database and creates a spreadsheet containing a single line of data specific to each client.[1] This line of data contains identifying information such as the client's gender, ethnicity, and date of birth. The line also includes more complex information regarding the client's case as it moves through the criminal justice system, such as the type of referral received by the Department, decisions made by juvenile probation and parole officers, referrals to children's court attorneys, and petitions filed in court alleging delinquency. Importantly, while the aggregate data summary provided by the Tree Stats diagram is provided to the public, the spreadsheet containing the underlying client-specific data is considered by the Department to be strictly confidential.

Mr. Williams, a journalist with Searchlight New Mexico, submitted two public records requests to the Department on August 23, 2021. Although Mr. Williams appears to have emailed these requests to the Department separately,[2] in total the two requests sought "the full tree stats … reflecting all individual referrals" for fiscal years 2015-2020. Both of his requests clearly stated that Mr. Williams did not seek "the aggregate data published in CYFD's annual reports" but instead the underlying client-specific data. He also asked the Department, in each request, to redact "personally identifiable information … including names and FACTS number if applicable." However, fifteen days later, on September 7, 2021, the Department denied both requests in their entirety, explaining that "NMSA 1978 §32A-2-32(A) … makes confidential all juvenile justice client records and information."

Over the next several months, Mr. Williams and FOG repeatedly contacted the Department asking that it reconsider its denial of both public records requests. In an email dated September 9, 2021, Mr. Williams argued that the Department had misinterpreted Section 32A-2-32(A) because "these underlying documents and stats are not records pertaining to the child as contemplated by the statute nor were they developed in connection with treatment of the child." He further argued that removing "names and any other identifying information assures that CYFD personnel will not breach the statute in regard to any confidentiality concerns." After the Department apparently did not respond to this email, FOG contacted it on several occasions to urge that the Department provide Mr. Williams the data he requested. This prompted one response from the Department on November 9, 2021, when it responded to FOG by reiterating its position with respect to Section 32A-2-32(A). At that time, in an effort to demonstrate the type of data contained within the spreadsheet, the Department also provided the requested spreadsheet with all but the column headings redacted. Several weeks later, having not convinced the Department to reconsider its position, FOG filed this complaint with our Office.

[1] We understand that the dispute surrounding Mr. Williams' request involves an existing record. That is, notwithstanding the fact that the data sought by Mr. Williams is regularly maintained in an electronic database, the Department has not argued either to Mr. Williams or to our Office that his request would effectively require it to create a new record. *See* § 14-2-8(B) ("Nothing in the Inspection of Public Records Act shall be construed to require a public body to create a public record."). The existence of the disputed spreadsheet appears to have been confirmed by the Department as well, as it provided FOG a copy of the spreadsheet with all but the column headings redacted.

[2] Mr. Williams requested the data from fiscal year 2020 in one request and the data from fiscal years 2015-2019 in a separate request.

The sole allegation in FOG's complaint is that the Department lacked the legal justification to withhold the "individual client data" contained within the Department's spreadsheet. While FOG and Mr. Williams appear to interpret Section 32A-2-32(A) as authority for the Department to redact identifying information within the spreadsheet such as the child's name or date of birth, they argue that non-identifiable information regarding a particular referral to the Department is open to inspection once identifying information is redacted. For its part, the Department argues that no information regarding any child or referral to the Department is open to inspection, emphasizing that Section 32A-2-32(A) exempts from disclosure "[a]ll records pertaining to the child."

Analysis

The Inspection of Public Records Act provides that the people of New Mexico are entitled to "the greatest possible information" about governmental affairs. NMSA 1978, § 14-2-5. *See also San Juan Agr. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶ 16 (noting that, "IPRA is intended to ensure that the public servants of New Mexico remain accountable to the people they serve."). IPRA states that the public has the right to inspect and copy all "public records" except as otherwise provided by law. Section 14-2-1. This means that public records requests may only be denied, consistent with IPRA, "because of a specific exception contained within IPRA, or statutory or regulatory exceptions, or privileges adopted by [the Supreme] Court or grounded in the constitution." *Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-026, ¶ 8.

In considering exceptions to disclosure through IPRA, "we begin our analysis with the strong presumption that the public has a right to inspect" the requested records. *Cox v. New Mexico Dep't of Public Safety*, 2010-NMCA-096, ¶ 16, 148 N.M. 939. As our appellate courts have repeatedly emphasized, "The citizen's right to know is the rule and secrecy is the exception." *State ex rel. Newsome v. Alarid*, 1977-NMSC-076, ¶ 34, 90 N.M. 790, 797, *superseded by statute as stated in Republican Party of N.M.*, 2012-NMSC-026, ¶ 16. Exceptions to disclosure are "narrowly drawn," *Dunn v. Brandt*, 2019-NMCA-061, ¶ 10, and must be construed wherever possible to effectuate the intent of the Legislature.

With these principles in mind, we turn to Section 32A-2-32(A). In its entirety, this statutory provision reads as follows:

> All records pertaining to the child, including all related social records, behavioral health screenings, diagnostic evaluations, psychiatric reports, medical reports, social studies reports, records from local detention facilities, client-identifying records from facilities for the care and rehabilitation of delinquent children, pre-parole or supervised release reports and supervision histories obtained by the juvenile probation office, parole officers and the juvenile public safety advisory board or in possession of the department, are confidential and shall not be disclosed directly or indirectly to the public.

Section 32A-2-32(A). Preliminarily, we note that this provision uses several broad and sweeping phrases, most notably "[a]ll records pertaining to the child" and "all related social records," that

suggest a broad legislative intent to afford confidentiality to records related to children accused of delinquent acts. The word "including" is also significant, as this word is considered one of "expansion rather than of limitation," *Matter of Estate of Corwin*, 1987-NMCA-100, ¶ 4, 106 N.M. 316, 317, again indicating a broad applicability of Section 32A-2-32(A)'s confidentiality. *See also United Rentals Nw., Inc. v. Yearout Mech., Inc.*, 2010-NMSC-030, ¶ 13, 148 N.M. 426, 430-31 (observing that "caselaw … recognizes that the use of the word 'includes' to connect a general clause to a list of enumerated examples demonstrates a legislative intent to provide an incomplete list of activities").

Beyond this plain language, Section 32A-2-32 includes other provisions suggesting that the Legislature intended to afford broad confidentiality to records related to children accused of delinquent acts. For one, Section 32A-2-32(E) goes so far as to provide a criminal penalty for anyone who "intentionally and unlawfully releases any information or records closed to the public pursuant to this section." In addition, notwithstanding their large number, the 17 exceptions to confidentiality outlined in Section 32A-2-32(C) are quite limited in scope[3] and are further limited by the proviso that the "agency, person or institution receiving information shall not re-release the information without proper consent or as otherwise provided by law."

FOG's contention, however, that de-identified statistical data would not fall within the confidentiality mandate of Section 32A-2-32(A) is not without merit. Most importantly, the evident purpose of the provision itself is not apparently implicated where the data has been de-identified. Whereas Section 32A-2-32(A) is clearly designed to shield a child's identity from public view, likely in the interests of rehabilitation and "remov[ing] from children committing delinquent acts the adult consequences of criminal behavior," Section 32A-2-2(A), this confidentiality would seem to serve little purpose where the data is so heavily redacted as to render identification of the child impossible.

Several statutory provisions appear to support this interpretation of the intent behind Section 32A-2-32(A). One of these is in the provision itself: among the types of records rendered expressly confidential by the provision is "*client-identifying* records from facilities for the care and rehabilitation of delinquent children" (emphasis added). Not all records from such facilities are declared to be confidential, but instead only those which are "client-identifying." Similarly, Section 32A-2-32(B) is notable because it provides that "all mental health and developmental disability records" are subject to disclosure only pursuant to the Children's Mental Health and Developmental Disabilities Act, NMSA 1978, Sections 32A-6A-1 to -30 (2007, as amended through 2015). In turn, Section 32A-6A-24 appears to permit the Department to release information about a child after redacting "confidential information from which a person well-acquainted with the child *might recognize the child as the described person* or any code, number or other means that could be used *to match the child with confidential information regarding the child*." Section 32A-6A-24(A) (emphasis added). The purpose, in other words, appears to be to shield the identity of the child.

[3] For example, a foster parent may only obtain records pursuant to Section 32A-2-32(C) "if the records are those of a child currently placed with that foster parent or of a child being considered for placement with that foster parent, when the disclosure of the information is necessary for the child's treatment or care and shall include only that information necessary to provide for treatment and care of the child." Section 32A-2-32(C)(11).

Our New Mexico appellate courts have previously emphasized the importance of legislative intent in construing possible exceptions to disclosure. For instance, notwithstanding the language in IPRA's Section 14-2-1(C) excepting from disclosure "*letters or memoranda* that are matters of opinion in personnel files or students' cumulative files" (emphasis added), our Court of Appeals previously minimized this literal language in favor of an interpretation excepting "'matters of opinion' that constitute personnel information of the type generally found in a personnel file." *Cox*, 2010-NMCA-096, ¶ 21. Similarly, we note in our Guide that while IPRA's Section 14-2-1(A) may be interpreted as exempting health records only for "persons confined to an institution," the New Mexico Supreme Court appears to have embraced a broader interpretation applicable to "records kept by any governmental agency relating to physical or mental illness or medical treatment of individuals." IPRA Guide, p. 8, *citing to Newsome*, 1977-NMSC-076, ¶ 11.

Based on our interpretation of the legislative intent behind Section 32A-2-32(A), we agree with FOG that the statute likely does not prohibit the Department from releasing the de-identified statistical data in the Department's spreadsheet. In accordance with prevailing case law, we interpret Section 32A-2-32(A) in light of both its specific (and evident) statutory purpose and the more general principle of transparency. Clearly, records requestors are not entitled to records or information identifying specific children who have been referred to the Department for proceedings under the Delinquency Code and, as FOG and Mr. Williams have conceded from the beginning of this dispute, there is no question that the Department may (indeed, must) redact all such identifying information from its spreadsheet. After doing so, however, Section 32A-2-32(A) does not appear to continue to operate as an exception to disclosure. The identity and confidentiality of the children ("clients") is not implicated where identifying information has been thoroughly redacted, whereas the interest in public disclosure would remain. *See* § 14-2-5. For this reason, our opinion is that the Department should redact all identifying data from its spreadsheet and provide the remainder to Mr. Williams in response to his requests.[4]

We would emphasize, in reaching this conclusion, that we are mindful of the Department's important statutory role in effectuating the provisions of the Delinquency Code. In that capacity, the Department's interpretation of Section 32A-2-32 is entitled to a degree of deference. *See Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 11 ("When an agency that is governed by a particular statute construes or applies that statute, the court will begin by according some deference to the agency's interpretation."). However, with respect to Mr. Williams' request and the relatively unique circumstances of the Department's spreadsheet, the Department's position appears to be inconsistent with Section 32A-2-32(A). Although we appreciate the Department's expertise in this area, we cannot agree with its interpretation and application of the statute in these circumstances.

Conclusion

Because the evident legislative intent behind Section 32A-2-32(A) is to shield from disclosure the identities of children accused of delinquent acts, our opinion is the statute likely does not prohibit

[4] We would emphasize the unique circumstances presented by this complaint and the Department's spreadsheet. In most circumstances, where the record at issue pertains to a single child, Section 32A-2-32(A) would likely require withholding a document in its entirety. Similarly, other exceptions to disclosure (such as those for medical records, attorney client privilege, and attorney work product) would also permit or require withholding an entire record.

the Department from releasing the de-identified statistical data in the Department's spreadsheet. Although we find that the Department has acted in good faith and articulated an interpretation supported to a degree by the statute's literal language, we do not think that Section 32A-2-32(A) operates as an exception to disclosure for de-identified statistical data. Instead, as we interpret the statute, we think the Department should redact all identifying information from its spreadsheet and then provide the remaining data to Mr. Williams. This course of action would appear to comport with both the legislative intent behind the Delinquency Act and the Department's more general statutory duty of providing the public with "the greatest possible information" about its affairs. Section 14-2-5.

For your reference, a copy of the IPRA Guide is available on the website of the Office of the Attorney General at www.nmag.gov. If you have any questions regarding this determination or IPRA in general, please let me know.

Sincerely,

John Kreienkamp
Assistant Attorney General

Enclosure

cc: Shannon Kunkel, Executive Director
New Mexico Foundation for Open Government

Ed Williams
Searchlight New Mexico