

Opinion No. 93-01

January 5, 1993

OPINION OF: TOM UDALL, Attorney General

BY: Elizabeth A. Glenn Assistant Attorney General

TO: Mary R. Granito State Records Administrator State Records Center and Archives
404 Montezuma Santa Fe, NM 87503

QUESTIONS

1. Are state agencies which are subject to the State Rules Act, NMSA 1978, §§ 14-3-24 to -25, 14-4-1 to -9 (Repl. Pamp. 1988 & Cum. Supp. 1992), required to file all policy directives and policy manuals as rules?
2. Does the word "rule" or the word "standard" in the definition of rule in the State Rules Act include procedural standards and requirements?
3. If part of the material contained in a policy or procedure manual is required to be filed, must the agency file the entire manual?
4. Where material is defined as a rule under the Act and the State Records Administrator has not specifically allowed incorporation by reference, may a state agency avoid filing the material and subsequent publishing in the New Mexico Register by incorporating by reference such material in a rule otherwise properly filed and published?

CONCLUSIONS

1. If a policy manual or directive contains statements of policy purporting to affect one or more agencies besides the agency issuing the manual or to affect persons not members or employees of the issuing agency, it must be filed in accordance with the State Rules Act.
2. The terms "rule" and "standard" in the Act's definition of rule include procedural standards, manuals, directives and requirements if they purport to affect one or more agencies besides the issuing agency or persons other than the issuing agency's members or employees.
3. An agency need file only those portions of a policy or procedural manual that contain rules as defined by the Act.
4. An agency may not avoid filing and publishing a rule by incorporating it by reference in an otherwise properly filed and published rule. However, the State Rules Act grants

the State Records Administrator and the issuing agency discretion to agree on publication of less than the full text of incorporated materials.

FACTS

Clarification of the Act's requirements is requested to avoid future confusion about the rules an agency is required to file. Some agencies apparently believe they are not required to file procedural rules or rules that affect other state agencies but not the general public. Other agencies have attempted to avoid the Act's filing and publishing requirements by incorporating by reference into their rules procedural manuals and other documents that have not been filed under the Act.

ANALYSIS

The State Rules Act applies to state agencies, including "any agency, board, commission, department, institution or officer of the state government except the judicial and legislative branches of the state government." NMSA 1978, § 14-4-2(A) (Repl. Pamp. 1988). Agencies subject to the Act "issuing any rule shall place the rule in the format and style required by rule of the records center and shall cause seven copies to be delivered to the records center." **Id.** § 14-4-3. A rule issued by an agency is not valid or enforceable unless it is filed as required by the Act. **Id.** § 14-4-5. Filed rules are published in the New Mexico Register, which "may include the text of any or all proposed rules and adopted rules, including emergency rules, in full or in part at the discretion and agreement of the issuing agency and the state records administrator." **Id.** § 14-4-7.1(B) (Cum. Supp. 1992). The state records administrator is authorized to charge for publication of notice and other items in the Register. **Id.** § 14-4-7.1(A).

The definition of rules covered by the Act's requirements is broad. **State v. Ellis**, 95 N.M. 427, 429-30, 622 P.2d 1047 (Ct. App. 1980), **cert. denied**, 95 N.M. 426, 622 P.2d 1046 (1981). With certain exceptions not pertinent here, a "rule" is

any rule, regulation, order, standard, statement of policy, including amendments thereto or repeals thereof issued or promulgated by any agency and purporting to affect one or more agencies besides the agency issuing such rule or to affect persons not members or employees of such issuing agency. An order or decision or other document issued or promulgated in connection with the disposition of any case or agency decision upon a particular matter as applied to a specific set of facts shall not be deemed such a rule nor shall it constitute specific adoption thereof by the agency.

NMSA 1978, § 14-4-2(C) (Repl. Pamp. 1988).

1. Policy manuals and directives.

Under statutory construction principles applicable to the State Rules Act,

state statutes are to be given effect as written and, where they are free from ambiguity, there is no room for construction [and] where the meaning of statutory language is plain, and words used by the legislature are free from ambiguity, there is no basis for interpreting the statute."

Johnson v. Francke, 105 N.M. 564, 566, 734 P.2d 804 (Ct. App. 1987) (citations omitted) (construing exception from State Rules Act's filing requirements for rules relating to the discipline of penal institution inmates).

Rules the State Rules Act requires to be filed include **any** rule, regulation, order, standard, or **statement of policy** that purports to affect agencies and persons other than the issuing agency or its members or employees. Nothing in the definition suggests that it is not intended to cover all policy manuals or directives¹ issued by agencies subject to the Act if the policy manuals or directives purport to affect agencies and persons other than the agency or its members or employees. Therefore, unless it is meant to apply only to the issuing agency or its employees, policy statements contained in a manual or other document must be filed to be valid and enforceable. **See State v. Joyce**, 94 N.M. 618, 614 P.2d 30 (Ct. App. 1980) (policy established by Board of Regents of the Museum of New Mexico was a rule within the meaning of the State Rules Act).

It is possible, of course, that a manual will simply describe or restate policy measures and other rules that already have been properly filed. If so, the manual need not be separately filed.

2. Procedural rules, directives, standards and manuals.

The terms used in the definition of the rule are not qualified or limited. Any rule, order, standard or document which consists of material which has not previously been filed with the Records Center must be filed. It makes no difference if a standard or other rule is characterized as procedural; it is covered by the definition if it applies to state agencies and other persons besides the issuing agency, its members or employees.

3. Manuals containing rules.

The filing requirements of the State Rules Act apply only to rules. Accordingly, a state agency need not file those parts of a policy or procedural manual that do not contain rules as defined by the Act. However, the agency should be sure that the parts of the manual submitted for filing make sense when published separately from the manual. A filed rule that is vague or unintelligible out of context would be vulnerable to constitutional attack by those subject to its provisions. **See, e.g., State v. Segotta**, 100 N.M. 498, 499, 672 P.2d 1129 (1983) (a statute violates due process of law if it "either forbids or requires the doing of an act in terms so vague that [persons] or common intelligence must guess at its meaning and differ as to its application"). In addition, all rules, including those extracted from manuals, must be filed in the format and style required by the Records Center. NMSA 1978, § 14-4-3.

4. Incorporation by reference.

An agency may not avoid the filing requirements of the State Rules Act by incorporating by reference materials which have not previously been filed. One of the evident purposes of the filing requirements is to insure that persons potentially affected by an agency's rule are notified of the rule's substance. **State v. Joyce**, 94 N.M. 618 at 621. This purpose would be frustrated if an agency were permitted to file rules that incorporated other unfiled rules by reference. Although in some cases material incorporated by reference might be otherwise available to the public, the statute makes no exception from the filing requirements for such material if it constitutes a rule. **See State v. Joyce**, 94 N.M. 618 at 621 (actual notice of a rule does not dispel the necessity of compliance with the State Rules Act). Therefore, if the incorporated materials qualify as rules as defined by the Act, they must be physically filed with the Records Center. NMSA 1978, § 14-4-3. Until they are filed, they are not valid or enforceable. **Id.** § 14-4-5.

By contrast to the filing requirement, the State Rules Act does not necessarily require that entire rules and materials which are incorporated in the rules by reference be published in full. As noted above, the Act provides that the New Mexico Register "**may** include the text of ... proposed rules and adopted rules ... **in full or in part** at the discretion and agreement of the issuing agency and the state records administrator." NMSA 1978, § 14-4-7.1(B) (emphasis added).² We believe that where an agency incorporates by reference lengthy materials such as building codes or federal guidelines that are already available to the public in some form, this provision enables the State Records Administrator and the issuing agency the flexibility to work together and agree on publication of something less than the full text of the incorporated materials.³

ATTORNEY GENERAL

TOM UDALL Attorney General

GENERAL FOOTNOTES

[n1](#) We attach no significance to the word "directive" for purposes of the filing requirements of the State Rules Act. A directive is the same as an order, Webster's New Universal Unabridged Dictionary 517 (2d ed. 1983), and orders are explicitly included in the Act's definition of rule. NMSA 1978, § 14-4-2(C).

[n2](#) Currently, the State Records Center requires, with some exceptions, that rules be published in full. SRC Rule 90-10(E)(1)(b) (Aug. 1, 1990).

[n3](#) **Cf.** 5 U.S.C. § 552(a)(1) (matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of Federal Register).

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