

Opinion No. 96-01AL

May 10, 1996

OPINION OF: Elizabeth A. Glenn, Assistant Attorney General

BY: Elizabeth A. Glenn, Assistant Attorney General

TO: Ms. L. Elaine Olah State Records Administrator, State Record Center and Archives,
404 Montezuma, Santa Fe, New Mexico 87501

ANALYSIS

Advisory Letter

May 10, 1996

L. Elaine Olah

State Records Administrator

State Records Center and Archives

404 Montezuma

Santa Fe, New Mexico 87501

Dear Ms. Olah:

Re: Opinion Request -- Applicability of Public Records Act to State Educational Institutions

Your predecessor, Mary Granito, requested this office's advice regarding whether state educational institutions are "agencies" for purposes of the Public Records Act. NMSA 1978, ch. 14, art. 3 (Repl. Pamp. 1995). As discussed below, we conclude that state educational institutions are covered by the Act's definition of "agency."

Before discussing the substance of your request, we apologize for the delay in responding to the request. After Ms. Granito left her position and during the intervening change in administration, there was some question about whether our advice was still required. However, we understand that, at this time, your office remains interested in obtaining our opinion on this issue.

The issue of the Public Records Act's applicability to state educational institutions apparently arose when certain state universities questioned whether the records retention schedules established by the State Records Center applied to them.¹

According to your request, the State Records Center has always considered its records retention schedules applicable to state educational institutions.

For purposes of the Public Records Act, "public records" are

all books, papers, maps, photographs or other documentary materials, regardless of physical form or characteristics, made or received by any agency in pursuance of law or in connection with the transaction of public business and preserved, or appropriate for preservation, by the agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the government or because of the information and historical value of data contained therein.

NMSA 1978, § 14-3-2(C). Excluded from the definition are "library or museum material of the state library, state institutions and state museums, extra copies of documents preserved only for convenience of reference and stocks of publications and processed documents." **Id.** "Agency" is defined as "any state agency, department, bureau, board, commission, institution or other organization of the state government, the territorial government and the Spanish and Mexican governments in New Mexico." **Id.** § 14-3-2(D).

On its face, the definition of the term "agency" for purposes of the Public Records Act includes state educational institutions. As quoted above, the definition includes "any state ... institution." Nothing in the definition or elsewhere in the Act suggests that the term "institution" was intended to refer to all state institutions except educational institutions. To the contrary, the explicit exclusion from the definition of "public records" for "library or museum material of the state library, **state institutions** and state museums," NMSA 1978, § 14-3-2(C) (emphasis added), is consistent with the intent to include state educational institutions within the definition. "Library material," in particular, would more likely be maintained by a state educational institution than by other types of state institutions.

Further support for including state educational institutions in the Public Records Act's definition of "agency" is found in similar definitions of the term "agency" or "state agency" in other statutes. In general, the legislature's use of the term "institution" in those definitions includes state educational institutions. **See , e.g. ,** NMSA 1978, § 12-6-2 (Repl. Pamp. 1988) (defining "agency" for purposes of the Audit Act to include "any ... institution ... of the government of the state"); § 41-4-3(G) (Cum. Supp. 1995) (defining "state agency" for purposes of the Tort Claims Act to include "the state of New Mexico or any of its ... institutions").

When the legislature determines that a particular definition of "agency" should not cover state educational institutions, they are explicitly excluded. **See , e.g. ,** NMSA 1978, § 10-8-3(E) (Repl. Pamp. 1995) (exclusion from Per Diem & Mileage Act's definition of "agency" for "public post-secondary educational institutions"); § 14-4-2 (A),(C) (Repl. Pamp. 1995) (defining "agency" for purposes of the State Rules Act to include "any ... institution ... of state government," but excluding from the definition of "rule" those "rules

made relating to the management of any particular educational institution"). In fact, the legislature did this in Section 14-3-21 of the Public Records Act, where the term "agencies" for purposes of the Act's provision governing state publications and manuals of procedure is defined to exclude "those educational institutions listed in Article 12, Section 11 of the New Mexico Constitution." This further bolsters the conclusion that the legislature intended to include state educational institutions in the definition of "agency" under Section 14-3-2(D), subject to any specific exclusions elsewhere in the Act.

Despite their inclusion in the Public Records Act's definition of "agency," state educational institutions have argued that their records cannot constitutionally be subjected to the State Records Center's record retention regulations. This assertion is based on Article XII, Section 11, which confirms the University of New Mexico, New Mexico State University, New Mexico Highlands University and other specified schools as "state education institutions," and on Section 13 of the same article, which requires the legislature to "provide for the control and management" of the institutions specified in Section 11 "by a board of regents." The state educational institutions argue that the imposition of record retention schedules applicable to other state agencies impermissibly interferes with their boards of regents' authority to control and manage those institutions' internal affairs.

Legislative enactments are presumed constitutional. **E.g. , Wells v. County of Valencia** , 98 N.M. 3, 6, 644 P.2d 517 (N.M. 1982). New Mexico courts have not enunciated the extent to which the state constitution exempts the boards of regents of constitutionally-confirmed state educational institutions from regulations applicable to other state government entities.² Courts in other states with similar state educational institutions have reached varying conclusions based on those states' particular constitutional and statutory provisions. Thus, for example, California courts have characterized the Regents of the University of California as "a branch of the state itself" with "virtual autonomy in self-governance" and "virtually exclusive" power to "operate, control, and administer the University." **Regents of the Univ. of Calif. v. City of Santa Monica** , 143 Cal.Rptr. 276, 279 (Cal. Ct. App. 1978). Consequently, policies established by the University of California Regents "as matters of internal regulation may enjoy a status equivalent to that of state statutes." **Id. See also Michigan United Conservation Clubs v. Board of Trustees of Mich. State Univ.** , 431 N.W.2d 217, 219 (Mich. Ct. App. 1988) (board of trustees was "an independent authority possessing power coordinate with and equivalent to the Legislature within the scope of its functions").

Other state courts, however, have not construed the authority of the governing boards of constitutionally confirmed or created educational institutions as broadly. **See , e.g. , University of Utah v. Board of Examiners** , 295 P.2d 348, 371 (Utah 1956) (holding, after an exhaustive examination of the history of the state constitutional provisions establishing the University of Utah, that the University "is a public corporation not above the power of the Legislature to control, and is subject to the laws of this State from time to time enacted relating to its purposes and government"). Even in California which, as discussed above, accords broad powers of self-governance to the University of California Board of Regents, "legislation regulating public agency activity not generally

applicable to the public may be made applicable to the university when the legislation regulates matters of statewide concern not involving internal university affairs." **San Francisco Labor Council v. Regents of the Univ. of Calif.** , 608 P.2d 277, 279 (Cal. 1980).

Other state courts have determined that certain statutes applied to boards of regents of state educational institutions and did not interfere with the institutions' internal functions or the boards' authority to manage, including administrative procedures acts, **McGrath v. University of Alaska** , 813 P.2d 1370 (Alaska 1991); civil service and collective bargaining laws, **Levi v. University of Hawaii** , 628 P.2d 1026 (Haw. 1981); and laws prohibiting age discrimination in employment, **Board of Regents of Univ. of Nevada Sys. v. Oakley** , 637 P.2d 1199 (Nev. 1981).

Significantly, for purposes of your opinion request, cases from other states generally uphold the application of public records and open meetings laws to state educational institutions. See , e.g. , **Carter v. Alaska Pub. Employees Ass'n** , 663 P.2d 916 (Alaska 1983) (public records disclosure law); **Tafoya v. Hastings College of Law** , 236 Cal.Rptr. 395 (Cal. Ct. App. 1987) (discussing the application of open meetings law to the University of California); **Board of Regents of the Univ. Sys. of Georgia v. Atlanta Journal** , 378 S.E.2d 305, 306 (Ga. 1989) (open records act); **Board of Trustees of State Institutions of Higher Learning v. Mississippi Publishers Corp.** , 478 So.2d 269, 276 (Miss. 1985) (submission to open meetings law did not unconstitutionally infringe upon or interfere with board's power to manage and control state institutions of higher learning).

In New Mexico, state educational institutions are covered by both the Open Meetings Act, NMSA 1978, §§ 10-15-1 to -4 (Repl. Pamp. 1995), and the Inspection of Public Records Act, **id.** §§ 14-2-1 to -12 (Repl. Pamp. 1995). The legislature evidently has determined that the procedures for keeping and providing access to the workings of state government, including the records of state agencies and institutions, are a matter of statewide concern. The application of the Public Records Act to state educational institutions is consistent with this concern.

As stated above, New Mexico courts have not directly addressed the general nature and extent of the governing authority of the boards of regents of state educational institution confirmed by Article XII, Section 11 of the state constitution or whether those boards are exempt from laws applicable to other state governmental entities. There also is no clear indication in cases from other jurisdictions that the inclusion of constitutionally-confirmed state educational institutions within the Public Records Act's definition of "agency" would, by itself, interfere with the institutions' internal affairs or essential functions. In particular, the imposition of procedures for retaining public records does not apparently affect the Regents' power to conduct the substantive business of state educational institutions.³ Given this, and the presumption of constitutionality accorded legislative enactments, we conclude that state educational institutions are "agencies" for purposes of the Public Records Act, and are subject to the records retention schedules established by the State Records Center.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

Elizabeth A. Glenn

Assistant Attorney General

cc: Thaddeus Bejnar

Bill Keller

ATTORNEY GENERAL

Elizabeth A. Glenn, Assistant Attorney General

GENERAL FOOTNOTES

[n1](#) In pertinent part, the Public Records Act requires the state records administrator to establish a records management program for the application of efficient and economical management methods to the creation, utilization, maintenance, retention, preservation and disposal of official records.... The administrator shall establish records disposal schedules for the orderly retirement of records and adopt regulations necessary for the carrying out of the Public Records Act. NMSA 1978, § 14-3-6 (Repl. Pamp. 1995).

[n2](#) In **State ex rel. Sego v. Kirkpatrick** , 86 N.M. 359, 524 P.2d 975 (1974), the New Mexico Supreme Court held that the legislature did not have authority to appropriate federal and other nonstate funds to state educational institutions. The decision in **Sego** did not discuss whether and to what extent state educational institutions confirmed by the state constitution are subject to laws applicable to state agencies generally.

[n3](#) We would, of course, have serious reservations about any regulations promulgated pursuant the Public Records Act that, in fact, interfered with a constitutionally-confirmed state educational institution's internal functions such as the determination of faculty salaries, **see** N.M. AG Op. No. 70-73 (1970), course selection or admissions policies. **See Levi v. University of Hawaii** , 628 P.2d at 1029.

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