

## **Opinion No. 93-03**

February 3, 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. Is the State Records Administrator required to perform any duties under Section 12-8-6 of the Administrative Procedures Act, NMSA 1978, §§ 12-8-1 to -25 (Repl. Pamp. 1988) ("APA"), when her employer, the Commission on Public Records, has not been subjected to the APA under NMSA 1978, § 12-8-23?
2. If so, do the publication requirements set forth in Section 12-8-6 of the APA apply to all rules filed with the records center or only to rules filed by agencies made subject to the APA under NMSA 1978, § 12-8-23?
3. If the answer to the first question is affirmative, does Section 14-4-7.1 of the State Rules Act, providing for publication of a New Mexico register, supersede the requirements of Section 12-8-6 of the APA governing the publication of rules and permissible charges for copies of a rules bulletin?

### **CONCLUSIONS**

1. Yes. The State Records Administrator's duties under Section 12-8-6 of the APA apply to rules filed by agencies subject to the APA, regardless of whether the State Commission of Public Records is made subject to the APA under Section 12-8-23.
2. Section 12-8-6 of the APA applies only to rules filed by agencies subject to the APA.
3. Yes. Because it was enacted after the APA and a contrary interpretation would be unreasonable, Section 14-4-7.1 of the State Rules Act supersedes Section 12-8-6 of the APA to the extent the two provisions conflict.

### **FACTS**

The APA requires an agency to file "each rule, amendment or repeal thereof" it adopts according to the State Rules Act. **ID.** § 12-8-5. Section 12-8-6(A) of the APA provides that the State Records Administrator

(1) shall compile and publish all effective rules adopted by each agency. Compilations shall be supplemented or revised as often as necessary and at least once every two years;

(2) Shall publish a bimonthly bulletin setting forth the text of all rules filed during the preceding month, excluding rules in effect upon the adoption of the Administrative Procedures Act; and

(3) may omit from the bulletin or compilation any rule, the publication of which would be unduly cumbersome, expensive or otherwise inexpedient, if the rule, in printed or processed form, is made available on application to the adopting agency and if the bulletin or compilation contains a notice stating the general subject matter of the omitted rule and stating how a copy thereof may be obtained.

The 1989 legislature amended the State Rules Act, NMSA 1978, §§ 14-3-24 to -25, 14-4-1 to -9 (Repl. Pamp. 1988 & Cum. Supp. 1992), to require the State Records Administrator to "provide ... for development and publication of a New Mexico register at least twice a month after January 1, 1990." 1989 N.M. Laws, ch. 38 (codified at NMSA 1978, § 14-4-7.1 (Cum. Supp. 1992)). The amendment provides that

The New Mexico register shall be the official publication for all notices of rule makings and filings of adopted rules, including emergency rules, by agencies. The register 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.

NMSA 1978, § 14-4-7.1(B). The questions posed seek clarification of the requirements imposed by the two statutes.

## ANALYSIS

### 1. State Records Administrator's Duties Under the APA.

The first question concerns the effect of Section 12-8-23 of the APA on the State Records Administrator's duties under Section 12-8-6 of the statute. Section 12-8-23 provides that "[t]he provisions of the [APA] apply to agencies made subject to its coverage by law, or by agency rule or regulation if permitted by law." **See also** NMSA 1978, § 12-8-2(A) (defining "agency" as used in the APA to mean "any state board, commission, department or officer ... which is specifically placed by law under the [APA]").

The agency employing the State Records Administrator, the State Commission of Public Records, has not been made subject to the APA under Section 12-8-23. This means it is not required to comply with the APA's provisions governing its own rulemaking, adjudicatory proceedings and other matters. **See also Livingston v. Ewing**, 98 N.M. 685, 687, 652 P.2d 235, 237 (1982) (APA did not apply to actions of Board of Regents

of the Museum of New Mexico absent any provision subjecting the Board to the Act); **Mayer v. Public Employees Retirement Bd.**, 81 N.M. 64, 463 P.2d 40 (Ct.App. 1970) (court had no jurisdiction under the APA to review decisions of an agency not placed under the APA nor subjected to its provisions). That the State Commission of Public Records is exempt from the APA generally, however, does not affect the duties of the State Records Administrator under Section 12-8-6. The State Records Administrator is specifically referred to in Section 12-8-6 of the APA and given the responsibility of publishing other agencies' rules. Therefore, the State Records Administrator is subject to the APA to the extent described in that provisions and must perform the required duties.

## **2. Applicability of the APA's Publication Requirements.**

The second question is answered, for the most part, in our response to question one. Section 12-8-5(A) of the APA requires "each agency" to file each rule it adopts, and section 12-8-6 requires the State Records Administrator to publish the rules filed. Because the APA pertains only to those agencies specifically made subject to its coverage, NMSA 1978, §§ 12-8-2(A), 12-8-23, the duties of the State Records Administrator under Section 12-8-6 apply only to rules filed by agencies subject to the APA.

## **3. Effect of New Mexico Register.**

Both Section 12-8-6 of the APA and Section 14-4-7.1 of the State Rules Act require the State Records Administrator to publish rules adopted by state agencies, and to some extent their requirements conflict. Section 12-8-6 requires publication of a bimonthly bulletin setting forth the text of all rules filed during the preceding month.<sup>1</sup> A rule may be omitted from the bulletin if its publication "would be unduly cumbersome, expensive or otherwise inexpedient" and the rule is made available from the adopting agency and notice of the omitted rule is contained in the bulletin. Under Section 14-4-7.1, the New Mexico register is required to be published at least twice a month and "may include the text of any or all ... adopted rules ... in full or in part at the discretion and agreement of the issuing agency and the state records administrator." In addition, while Section 12-8-6(B) provides that the bulletin published under the APA "shall be made available upon request to state agencies, institutions and political subdivisions free of charge," Section 14-4-7.1(C) provides that the

New Mexico register shall be available ... at a reasonable charge approved by the state records administrator. The administrator may authorize distribution of a certain number of copies of the register without charge to agencies or political subdivisions as it deems economically feasible and appropriate.

Section 14-4-7.1 of the State Rules Act was enacted in 1989 and Section 12-8-6 of the APA was enacted in 1969. Based on the rules for repeal by implication, Section 14-4-7.1 should supersede Section 12-8-6 to the extent the two provisions are inconsistent. **See City of Alamogordo v. Walker Motor Co., Inc.**, 94 N.M. 690, 692, 616 P.2d 403,

405 (1980) ("[i]t is ... well-settled that where the conflict between an earlier act and a later act is clear and irreconcilable, the later act, as the most recent expression of legislative intent, will be considered to have repealed by implication the earlier conflicting statute to the extent of the inconsistency").<sup>2</sup> Interpreting Section 14-4-7.1 to supersede the conflicting provisions of Section 12-8-6 promotes public convenience, avoids absurdity and is consistent with common sense. This interpretation furthers the objectives of the legislature because both Section 12-8-6 and Section 14-4-7.1 share the same object of making periodic notices of agency rules publicly available.

Therefore, we conclude that the State Rules Administrator is not required to publish a separate bulletin under Section 12-8-6 of the APA for agencies subject to that statute. Specifically, the provisions of Section 14-4-7.1 supersede the requirements in Section 12-8-6 for issuing a bimonthly publication, for publishing the full text of rules except under the specified conditions and for providing bulletins free of charge to state agencies and political subdivisions upon request.

### ATTORNEY GENERAL

TOM UDALL, Attorney General

### GENERAL FOOTNOTES

[n1](#) The term "bimonthly" is somewhat ambiguous because while it generally is defined as "once every two months," it can sometimes mean "twice a month." Webster's Third New International Dictionary 217 (1986). Although adopting the latter meaning would cause less of a conflict between Section 12-8-6 of the APA and Section 14-4-7.1 of the State Rules Act, the first meaning is the most common and is likely the one the legislature intended. **See Bettini v. City of Las Cruces, 82 N.M. 633, 634, 485 P.2d 967 (1971) (statutory words are presumed to be used in their ordinary and usual sense).**

[n2](#) Although Section 12-8-24 of the APA states that "[t]he provisions of the [APA] may be amended, repealed or superseded by another act of the legislature only by direct reference to the section or sections of the [APA] being amended, repealed or superseded," we do not believe when the legislature enacted Section 14-4-7.1 of the State Rules Act and did not explicitly amend Section 12-8-6 of the APA that it intended to require the State Records Administrator to engage in the duplicative and costly chore of publishing both a bulletin and a register containing essentially the same information. In this instance countervailing principles of statutory construction outweigh a literal application of Section 12-8-24. **See e.g., State ex rel. Bd. of County Comm'rs v. Jones, 101 N.M. 660, 661, 687 P.2d 95, 96 (1984) ("[s]tatutes should be construed so as to promote public convenience and to avoid inequity, absurdity, and hardship"); and State ex rel. Newsome v. Alarid, 90 N.M. 790, 794, 568 P.2d 1236, 1240 (1977) (statutes must be interpreted "to accord with common sense and reason" and be given a construction "which will not render the statute's application absurd or unreasonable and which will not defeat the object of the Legislature").**

Moreover, cases from other jurisdiction have held that whether a later statute repeals by implication a prior one is a judicial decision, **Abell v. United States**, 518 F.2d 1369, 1379 (Ct. Cl. 1975), **cert. denied**, 429 U.S. 817 (1976), and that statements in one legislative enactment attempting to preclude implied repeals by subsequent statutes are not controlling. **See Merlo v. Johnston City & Big Muddy Coal & Mining Co.**, 258 Ill. 328, 101 N.E. 525 (1913); **Great Northern Ry. Co. v. Glover**, 194 Wash. 146, 157, 77 P.2d 598, 603 (1938) ("one session of the Legislature may not bind a subsequent session in regard to the mode of effecting a repeal of an existing law").