

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY



GENERAL

HECTOR H. BALDERAS
ATTORNEY GENERAL

November 18, 2021

Rick Hendricks, PhD
State Records Administrator
1205 Camino Carlos Rey
Santa Fe, New Mexico 87507

RE: Opinion Request – Authority of Commission of Public Records and SRCA

Dear Dr. Hendricks:

You requested an Attorney General opinion regarding the statutory authority of State Records Center and Archives (“SRCA”) and the Commission of Public Records (the “Commission”) to conduct independent investigations into the compliance of State executive agencies with the notice and hearing requirements of the State Rules Act with respect to the promulgation of administrative rules. Specifically, you requested an updated opinion on the issue addressed in New Mexico Attorney General Opinion 78-07, dated May 9, 1978. Based on our examination of the relevant constitutional, statutory, and case law authorities, the opinion of our Office has not changed. We have concluded that the authority of SCRA and the Commission is limited to the authority specifically conferred by statute, and as such does not include the authority to independently investigate the actions of state agencies with respect to their adherence to the notice and hearing requirements of the State Rules Act.

Analysis

New Mexico courts have consistently held that “[a]dministrative bodies are creatures of statute and can act only on those matters which are within the scope of authority delegated to them.” *Matter of Proposed Revocation of Food & Drink Purveyor’s Permit for House of Pancakes*, 1984-NMCA-109, ¶ 13, 102 N.M. 63, 691 P.2d 64 (internal citations omitted); *See also Public Service Co. of New Mexico v. New Mexico Environmental Imp. Bd.*, 1976-NMCA-039, ¶ 7, 89 N.M. 223, 549 P.2d 638; *Foster v. Board of Dentistry of State of N.M.*, 1986-NMSC-009, ¶ 5, 103 N.M. 776, 714 P.2d 580. “An agency cannot amend or enlarge its authority through rules and regulations.” *Matter of Proposed Revocation of Food & Drink Purveyor’s Permit for House of Pancakes*, 1984-NMCA-109, ¶ 13. Further, administrative bodies “have no common law or inherent powers.” *Pub. Serv. Co. of New Mexico v. New Mexico Envntl. Imp. Bd.*, 1976-NMCA-039, ¶ 7 (internal citations omitted).

The Commission of Public Records is an administrative agency created pursuant to NMSA 1978, Section 14-3-3, and, as such, the authority of the Commission is limited to that which is provided by statute. The state records administrator is employed by the Commission pursuant to NMSA 1978, 14-3-4, and the administrator’s duties are enumerated in Section 14-3-6. Likewise, SRCA

was created pursuant to Section 14-3-8, and is “under the supervision and control of the [records] administrator.”

NMSA 1978, Section 14-4-3, addresses, among other things, the role of the state records administrator with respect to the format, filing, and distribution of rules. Specifically, subsection A of Section 14-4-3 provides:

Each agency promulgating any rule shall place the rule in the format and style required of the state records administrator and shall deliver the rule to the state records administrator or the administrator’s designee, accompanied by the concise explanatory statement required by the State Rules Act. The state records administrator or the administrator’s designee shall note thereon the date and hour of filing.

Further, subsection D of Section 14-4-3 provides:

The state records administrator, after written notification to the filing agency, may make minor, nonsubstantive corrections in spelling, grammar and format in filed rules. The state records administrator shall make a record of the correction and shall deliver the record to the filing agency and issuing authority within ten days of the change. Within thirty days of receiving that state records administrator’s record of a correction, the agency shall provide to the public notice of the correction in the same manner as the agency used to give notice of the rulemaking proceeding pursuant to Section 4 of this 2017 act.

In addition, the State Rules Act addresses the required notice of proposed rulemaking (§ 14-4-5.2), public participation, comments and rule hearings (§ 14-4-5.3), time limits on the adoption of a proposed rule, filing and compliance (§ 14-4-5), the rulemaking record (§ 14-4-5.4), the New Mexico register (§ 14-4-7.1), and the New Mexico Administrative Code (§ 14-4-7.2).

Thus, the State Rules Act does provide the state records administrator broad authority with respect to determining the format and style with respect to rules promulgated by state agencies. The State Rules Act also clearly permits the state records administrator to make minor, non-substantive corrections to filed rules. The State Rules Act currently does not, however, provide the Commission, the state records administrator, or SRCA the authority to investigate the actions of state agencies with respect to their adherence to the notice and hearing requirements of the State Rules Act. Instead, the State Rules Act places an affirmative duty on agencies with rulemaking authority to comply with the rulemaking procedures set out in the State Rules Act. See NMSA 1978, § 14-4-5.6 (“[a]n agency shall comply with the rulemaking procedures of the State Rules Act unless” it finds that the time required to complete the procedures would cause imminent peril, unanticipated loss of funding or a violation of federal law).

Conclusion

Because the SRCA and the Commission are created by statute, their authority is clearly limited to that which is specifically delegated by statute. As such, the SRCA and the Commission do

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not have the authority to independently investigate the actions of state agencies with respect to their adherence to the notice and hearing requirements of the State Rules Act. For the state records administrator or SCRA to undertake a more active role in state agency rulemaking, including investigations to ensure compliance, would require additional legislative action.

You have requested a formal opinion on the matter above. Please note that such an opinion is a public document available to the general public. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Respectfully,



Gregory S. Smithkier
Assistant Attorney General