

November 24, 2008 Information Requests to Agencies

David Abbey, Director
Legislative Finance Committee
325 Don Gaspar, Suite 101
Santa Fe, NM 87501

Re: Opinion Request - Information Requests to Agencies

Dear Mr. Abbey:

You have requested our advice regarding the authority of the Legislative Finance Committee (“LFC”) to request and obtain information from state agencies. In particular, you ask:

1. Should a LFC request to an agency for information under LFC’s statutory authority to examine the costs and effectiveness of state government be treated the same as a request to inspect public records made by a member of the public under the Inspection of Public Records Act, NMSA 1978, §§ 14-2-1 to -12 (as amended through 2005) (“IPRA”)?
2. Are there any procedures LFC might use to protect confidential information it requests from an agency?

As discussed below, based on the information available to us at this time and applicable law, we conclude that (1) LFC’s information requests to agencies are not subject to the requirements and procedures that apply to requests to inspect public records under IPRA; and (2) no mechanism or process exists that generally allows LFC to protect confidential information provided by state agencies. As in any case involving the non-disclosure of information maintained by a public body, LFC’s authority to protect that information will depend on the particular characteristics of the requested information and the law that allows the providing agency to keep the information confidential.

1. Applicability of IPRA to LFC Requests for Information

IPRA generally gives “[e]very person ... a right to inspect any public records of this state,” with certain exceptions. NMSA 1978, § 14-2-1(A). Although it could, LFC does not have to rely on IPRA when it requests information from state agencies because it has independent statutory authority to make those requests.

Specifically, LFC is required by statute to “annually review budgets and appropriations requests, and the operation and management of selected state agencies, departments and institutions and ... make recommendations with respect thereto to the legislature.” NMSA 1978, § 2-5-4(A) (1967). A state agency must furnish LFC with “a copy of its appropriation request made to the department of finance and administration,” and “shall also furnish to the legislative finance committee and its staff any other supporting

information or data deemed necessary to carry out the purposes of this section.” Id. § 2-5-4(C).

Each state agency has a statutory duty to cooperate with LFC. An agency shall, “upon request, furnish and make available to the legislative finance committee such documents, material or information as may be requested by members of the committee or its director or staff which are not made confidential by law.” Id. § 2-5-7 (1965). If necessary, LFC may obtain information it deems necessary by subpoena, which may be enforced in the appropriate district court. Id. § 2-5-5 (1957).

Although not subject to IPRA, LFC’s authority to request information and documents from state agencies is not unqualified. As quoted above, Section 2-5-7 requires an agency to provide “such documents, material or information” requested by LFC “which are not made confidential by law.” Consequently, an agency may deny LFC access to information if the agency can identify a law that makes the information confidential.

The term “law” as used in Section 2-5-7 is not defined. Under the rules of statutory construction, when the legislature fails to define a term in a statute, other statutory provisions addressing the same subject matter (“in pari materia”) may be used to determine the legislative intent. See New Mexico Bd. of Veterinary Medicine v. Riegger, 2007-NMSC-044, ¶ 13, 164 P.3d 947, 952.

As noted above, IPRA creates a right to inspect public records, subject to certain exceptions. The last exception is “as otherwise provided by law.” NMSA 1978, § 14-2-1(A)(12). Although the quoted phrase is used in a different context than that covered by Section 2-5-7, the statutory provisions are in pari materia. Both statutes deal with requests for agency records and neither requires disclosure if the records are protected “by law.” Accordingly, it is appropriate to interpret the term “law” in Section 2-5-7 similarly to same term used in Section 14-2-1(A)(12) of IPRA.

This office has long interpreted the phrase “otherwise provided by law” in Section 14-2-1(A)(12) to refer to a federal or state statute or a court rule prohibiting or limiting the disclosure of agency records. See Attorney General’s IPRA Compliance Guide, pp. 17-24 (5th ed. 2008). See also City of Las Cruces v. Public Employee Labor Relations Bd., 1996-NMSC-024, 917 P.2d 451, 453 (IPRA’s “otherwise provided by law” exception incorporates statutes and agency rules that are “promulgated in accordance with the statutory mandate to carry out and effectuate the purpose of the applicable statute”). Similarly, we believe that an agency is not obligated to provide information to LFC under Section 2-5-7 if the information is “made confidential by law,” i.e., by statute or court rule.[1]

2. Protection for Confidential Information Obtained by LFC

As discussed above, NMSA 1978, Section 2-5-7 allows agencies to deny LFC access to requested records and information that are made confidential by law. If an agency nevertheless chose to provide LFC with confidential information, LFC might not be able

to keep the information confidential if a person made an IPRA request to inspect records containing the information.

Once in LFC's possession, information and data provided by agencies are "public records" under IPRA. See NMSA 1978, § 14-2-6(E) ("public records" include documents and other materials "that are used, created, received, maintained or held by ... a public body and relate to public business..."). LFC, like all agencies subject to IPRA, must make its records available for inspection upon request, unless an exception applies. An exception that allowed an agency to deny public inspection of a record in its custody could apply once the agency transferred the record to LFC. However, this is not necessarily always the case. Compare NMSA 1978, § 14-6-1 (1977) (health information pertaining to specific patients in the records of any governmental agency is "strictly confidential") with Rules 11-503 & 11-511 NMRA (client waives privilege for lawyer-client communications if the client voluntarily discloses the communication to a third party). Thus, absent a statutory amendment,[2] LFC cannot guarantee protection for confidential information it obtains from other agencies.

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: Albert J. Lama, Chief Deputy Attorney General

[1] Under IPRA, an agency may deny inspection of public records if they are protected by a "countervailing public policy." See State ex rel. Newsome v. Alarid, 90 N.M. 790, 797, 568 P.2d 1236 (1977). The "countervailing public policy" exception, also known as the "rule of reason," is a judicially created, "non-statutory confidentiality exception." Board of Comm'rs v. Las Cruces Sun-News, 2003-NMCA-102, ¶ 17, 76 P.3d 36, 43. See also Spadaro v. University of New Mexico Bd. of Regents, 107 N.M. 402, 404-405, 759 P.2d 189 (1988) (rule of reason applies "only to claims of confidentiality asserted for public records that do not fall into one of [IPRA's] ... statutory exceptions to disclosure"). It applies when the harm to the public interest from allowing inspection outweighs the public's right to know. See Newsome, 90 N.M. at 798. The countervailing policy exception is unique to requests for public records under IPRA. An agency could not rely solely on countervailing public policy to deny LFC access to information it requested in connection with its statutory duties. Unless information is "made confidential by law," Section 2-5-7 requires an agency to make it available to LFC upon request.

[2] For example, Hawaii has a law providing that an agency statutorily authorized to receive government records from another agency “shall be subject to the same restrictions on disclosure of the records as the originating agency.” Haw. Rev. Stat. § 92F-19(b) (1994).