

# New Mexico Inspection of Public Records Act

## Proposal for Amendments – LCC draft with NMSU talking points

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### **14-2-1.A (2) Expanded exemption for those providing references or evaluations in forms other than formal letters in order to protect privacy of applicants and reviewers who provide information and to encourage forthright comments.**

(2) Letters of reference or other written opinions or evaluations concerning employment, licensing or permits;

#### **Rationale:**

The external and internal evaluation of job applicants often comes in a variety of formats other than letters of reference. The potential release of the name(s) of the evaluator(s), or details in an evaluation that would allow an applicant to “guess” the identity of the evaluator discourages honest and frank feedback on the qualifications of candidates. Evaluators should have the opportunity to provide candid evaluations free of fear of embarrassment or retaliation by the applicant. Evaluators have a reasonable expectation of privacy and confidentiality when providing assessments during the interview process. Without this assurance, we can expect that they will be hesitant to provide written feedback. Individuals who are the subject of such evaluations also suffer an invasion of their privacy interest when disclosure of such evaluations is required.

Although the law currently exempts disclosure of “matters of opinion in personnel files” from disclosure, this exception does protect documents relating to and accumulated during the recruitment process since these documents are not part of the personnel file.

**Example:** NMSU received an IPRA request from an employee who, when she was not selected to become the director of the unit in which she worked, wanted to see the evaluation ratings and comments written in an online survey by other NMSU employees and others who attended an applicant forum or who wished to give feedback to the search committee. Although the evaluators’ names were not part of the online survey seeking feedback, the comments and direct examples of behavior cited in the survey responses would readily revealed the originator of some comments. Since the applicant was already an NMSU employee working in the unit for which she was seeking the director position, there was a potential for retaliation or perceived retaliation against those making the comments.

In another IPRA request, NMSU was asked to provide “all recruiting records” related to a past search. Though the request was amended later to exclude the specific identities, absent the cooperation of the requestor, NMSU would have been required to reveal the names, ratings, and comments provided from various search participants.

**14-2-1.A (4) Law enforcement – expansion of current exception to protect victim privacy and to provide alignment with Federal FOIA statute exemptions**

(4) law enforcement records that: ~~[reveal confidential sources, methods, information or individuals accused but not charged with a crime.]~~

(a) if released:

1) could reasonably be expected to interfere with law enforcement proceedings;

2) would deprive a person of a right to a fair trial or an impartial adjudication;

3) could reasonably be expected to constitute an unwarranted invasion of personal privacy, including law enforcement records that reveal the identity of the victims of sexual assault and other sex-related crimes, minors who are victims of crimes and individuals accused but not charged with a crime;

4) could reasonably be expected to disclose the identity of a confidential source;

5) would disclose techniques, procedures or guidelines for investigations or prosecutions; or

6) could reasonably be expected to endanger an individual's life or physical safety;

and

(b) [Law enforcement records] include evidence in any form received or compiled in connection with a criminal investigation or prosecution by a law enforcement or prosecuting agency, including inactive matters or closed investigations to the extent that they contain the information listed in this paragraph;

[I objected to the the formatting of the LFC bill insofar as it would exempt only documents which include "evidence" and many other kinds of law enforcement records need exemption as indicated by our examples. I am hoping that LCC will make another revision and will call Lisa Sullivan at LCC about it. LGE]

## Rationale:

This proposed amendment improves clarity of existing law enforcement records exceptions, and expands exceptions relating to the records compiled for law enforcement purposes to be consistent with those presently available to federal law enforcement agencies under the Federal Freedom of Information Act exemptions. With respect to specific subparts:

(a) The right to a fair trial is fundamental in the United States and the State of New Mexico, and this right should not be jeopardized for the purpose of the larger public having access to information prior trial. Once a trial has been completed, this exception would no longer apply, and the public would have the right to access the information. Thus, under this exception, the right of the public to access the information would only be delayed to the extent necessary to protect the right to a fair trial of a defendant.

(b) Victims of sexual assault are often afraid to come forward due to the stigma associated with such events. Current law already protects the identity of anyone accused of a crime, prior to charges being filed, but does nothing to protect the privacy of victims. A child who is a victim of a crime may suffer greater emotional trauma and social stigma should peers or others find out about the crime, particularly in cases which might involve significant embarrassment, like sexual assault, child abuse, and child abandonment. Finally, the proliferation of body-worn cameras in law enforcement, and the fact that such recordings are considered "records" under IPRA, makes it is important that recordings that take place in highly personal areas and/or of highly personal situations are protected from release to the general public.

EXAMPLE: If an officer is helping with a rescue of a person who slipped and fell in the shower and has their recorder turned on, the recording of the person while they are nude and in need of rescue should not be made public as there is no public interest in that footage.

Another concern is the potential for false reports or staged incidents designed to cause a police response in order to force video to be recorded, only so it can later be demanded under IPRA and used for sensational media reporting. So called "SWATting" situations involving celebrities can cause a law enforcement response into the celebrity's home, followed by a request to inspect the video footage of the victim and the interior of the victim's home. Such invasions of privacy need to be protected against, even as efforts to hold police more accountable to the public expand.

(c) This is currently an exception under IPRA, and should continue.

(d) This is currently an exception under IPRA, and should continue.

(e) This exception is intended to prevent individuals from using IPRA to gain access to police records to track down intended victims (e.g., stalking using police records). This would only apply in situations where articulable information exists to show the person might be placed in physical danger by release of the information. Examples of information that might be withheld include addresses of safe houses, phone numbers of victims, and names and addresses of victim's relatives.

**14-2-1.A (7) Exception to protect privacy of applicants and enable public entities to access highly qualified candidates in employment recruitment.**

(7) records pertaining to an employee recruitment process but only to the extent that such records would reveal the identity of applicants for the position;

**Rationale:**

The ability of public entities to recruit the most qualified employees is impeded by the potential public disclosure of applicants' identity. Highly qualified applicants are reticent to apply for public sector positions due to the potential damage to their current employment relationship resulting from disclosure of their identity as an applicant.

**Example:** In NMSU's recent search for an Athletic Director, lists of applicants and finalists were requested and provided to the media under the NM IPRA law. A number of highly qualified applicants withdrew from consideration when they learned of this disclosure, and the search committee members were subjected to outside influence from members of the public who learned of the identity of the applicants from the media.

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Note: this exception would allow public entities to redact applicant names and information leading to identification, but entities would still be required to produce redacted records

Note: applicant names could still be disclosed pursuant to discovery in litigation

**14-2-1.A (8) Exemption created for trade secrets and proprietary information provided to universities to support research and economic development activities.**

(8) records held by a public post-secondary educational institution that could reveal:

(a) trade secrets or proprietary commercial or business information provided by private parties or entities pursuant to a confidentiality agreement; or

(b) data, records or information of a proprietary nature produced or collected by or for faculty or staff of a public post-secondary educational institution in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues where such data, records or information has not been publicly released, published, copyrighted or patented;

**Rationale:**

The ability of universities to reach their full research and economic development potential is hampered by the public inspection law. Private sector entities are unwilling to provide their proprietary information to universities for joint research and economic development activities if that information might then become part of the public domain. Similarly, universities that have invested substantial funds in the development of research with potential economic value may lose the ability to benefit from that research if it becomes part of the public domain.

Although the use of URPEDA corporations has helped universities in this regard, those URPEDA corporations often find it necessary to partner with the university faculty to achieve their objectives and to the extent that information is provided to the University faculty, and is then “maintained” in the records of the public entity for research and development purposes, it is potentially subject to IPRA requests.

Federal law has a similar but broader exemption: “A trade secret or privileged or confidential commercial or financial information obtained from a person;”

Aside from the research and economic development activities, universities also find it difficult to contract for certain services due to their inability to assure confidentiality of proprietary information that the contracting party would reveal.

**EXAMPLES:**

For example, if a university seeks to purchase proprietary software, the software developer require assurance that the software code will be maintained in confidence. At the present time, the law is not clear that universities can such a commitment. Similar situations arise whenever a university researcher seeks to collaborate with the private sector to expand or improve an invention owned by a private company.

**14-2-1.A (9) Exemption to protect privacy of individuals making civil rights complaints and privacy of those accused of civil rights violations but not yet found culpable.**

(9) records pertaining to complaints alleging civil rights violations filed with or submitted to an office within a public entity's investigations office or to the staff that performs investigatory functions;

**Rationale:**

The potential for public disclosure of complaints of discrimination and the investigation of such complaints discourages victims of such discrimination, harassment or other improper conduct from coming forward and filing internal complaints, and conversely damages the reputation of the individuals accused of such improper conduct irrespective of the validity of the claim. Providing an exemption from public disclosure will encourage public entities to undertake a full and complete investigation of any such complaints, and will encourage witnesses and others to fully participate in such investigations.

**14-2-6.E. Expanded definition of “protected personal identifier information” –to provide additional protection of individual privacy rights.**

E. "protected personal identifier information" means:

- (1) all but the last four digits of [a] an individual's:
  - (a) taxpayer identification number;
  - (b) financial account number; or
  - (c) driver's license number;
- (2) all but the year of [a person's] an individual's date of birth; [and]
- (3) a social security number;
- (4) the personal telephone or cell phone number of an individual;
- (5) (5) the [personal] email address of an individual; and
- (6) (6) all but the zip code of an individual's residential address;

[Change in red is suggested by NMSU GC; not part of LCC bill. We requested this change of LCC but have not had a response. LGE]

**Rationale:**

The IPRA law currently allows public entities to redact a very narrowly defined set of “protected personal identifier information”. The permitted exclusions include social security numbers, all but the year of a person’s date of birth. The definition does not include personal contact information held by a public entity. Public disclosure of an individual’s contact information is an unwarranted invasion of privacy and can place the individual’s safety and security at risk. Individuals have a reasonable expectation of privacy with respect to this information, even when it is provided to a public entity for specific purposes (such as employment). Public entities would still be required to reveal work contact information.

## CURRENT LAW:

N.M. Stat. Ann. § 14-2-1 (2013)

### § 14-2-1. Right to inspect public records; exceptions

A. Every person has a right to inspect public records of this state except:

(1) records pertaining to physical or mental examinations and medical treatment of persons confined to an institution;

(2) letters of reference concerning employment, licensing or permits;

(3) letters or memoranda that are matters of opinion in personnel files or students' cumulative files;

(4) law enforcement records that reveal confidential sources, methods, information or individuals accused but not charged with a crime. Law enforcement records include evidence in any form received or compiled in connection with a criminal investigation or prosecution by a law enforcement or prosecuting agency, including inactive matters or closed investigations to the extent that they contain the information listed in this paragraph;

(5) as provided by the Confidential Materials Act [14-3A-1 NMSA 1978];

(6) trade secrets, attorney-client privileged information and long-range or strategic business plans of public hospitals discussed in a properly closed meeting;

(7) tactical response plans or procedures prepared for or by the state or a political subdivision of the state, the publication of which could reveal specific vulnerabilities, risk assessments or tactical emergency security procedures that could be used to facilitate the planning or execution of a terrorist attack; and

(8) as otherwise provided by law.

B. Protected personal identifier information contained in public records may be redacted by a public body before inspection or copying of a record. The presence of protected personal identifier information on a record does not exempt the record from inspection. Unredacted records that contain protected personal identifier information shall not be made available on publicly accessible web sites operated by or managed on behalf of a public body.

**HISTORY:** 1941 Comp., § 13-501, enacted by Laws 1947, ch. 130, § 1; 1953 Comp., § 71-5-1; Laws 1973, ch. 271, § 1; 1981, ch. 47, § 3; 1993, ch. 260, § 1; 1998 (1st S.S.), ch. 3, § 1; 1999, ch. 158, § 1; 2003, ch. 288, § 1; 2005, ch. 126, § 1; 2011, ch. 134, § 2.

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### § 14-2-6. Definitions

E. "protected personal identifier information" means:

(1) all but the last four digits of a:

(a) taxpayer identification number;

(b) financial account number; or

(c) driver's license number;

(2) all but the year of a person's date of birth; and

(3) a social security number;

## **Current Federal law (applies only to federal entities)**

### **Federal Law: Freedom of Information Act Exemptions**

The Freedom of Information Act entitles the following exemptions on documents being requested by the public:

1. Those documents properly classified as secret in the interest of national defense or foreign policy;
2. Related solely to internal personnel rules and practices;
3. Specifically exempted by other statutes;
4. A trade secret or privileged or confidential commercial or financial information obtained from a person;
5. A privileged inter-agency or intra-agency memorandum or letter;
6. A personnel, medical, or similar file the release of which would constitute a clearly unwarranted invasion of personal privacy;
7. Compiled for law enforcement purposes, the release of which
  - a. could reasonably be expected to interfere with law enforcement proceedings,
  - b. would deprive a person of a right to a fair trial or an impartial adjudication,
  - c. could reasonably be expected to constitute an unwarranted invasion of personal privacy,
  - d. could reasonably be expected to disclose the identity of a confidential source,
  - e. would disclose techniques, procedures, or guidelines for investigations or prosecutions, or
  - f. could reasonably be expected to endanger an individual's life or physical safety;
8. Contained in or related to examination, operating, or condition reports about financial institutions that the SEC regulates or supervises; or
9. And those documents containing exempt information about gas or oil wells.

<http://www.sec.gov/foia/nfoia.htm>