IN RE: THE MATTER CONCERNING  
A PUBLIC HEARING REGARDING  
PROPOSED CHANGES TO CERTAIN  
RULES BY THE COMMISSION OF  
PUBLIC RECORDS  

MAY 21, 2019 RULE HEARING EXHIBIT LIST  

COMES NOW, the Rule Hearing Officer and hereby identifies the following exhibits to be introduced and considered.  

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NOTICE OF REGULAR MEETING AND OF RULEMAKING

The New Mexico Commission of Public Records ("CPR") has scheduled a regular meeting and rule hearing for Tuesday, May 21, 2019, at 10:00 A.M. at the New Mexico State Records Center and Archives, which is an accessible facility, at 1209 Camino Carlos Rey, Santa Fe, NM. If you are an individual with a disability who is in need of a reader, amplifier, qualified sign language interpreter, or any form of auxiliary aid or service to attend or participate in the meeting, please contact Georgette Chavez at 476-7926 by May 8, 2019, or as soon as possible. Public documents, including the agenda and minutes, can be provided in various accessible formats.

The CPR may consider the following items of rulemaking at the meeting:

Amend:
1.21.2 NMAC Retention and Disposition of Public Records

Synopsis:
The proposed amendment of 1.21.2 NMAC consists of the following modifications:
Section 844 is being amended to add toxicology to the title and description.

Amend:
1.13.11 NMAC Access to Public Records, Research in the New Mexico Archives

Synopsis:
The proposed amendment of 1.13.11 NMAC is to comply with changes to the Inspection of Public Records Act ("IPRA") as a result of Senate Bill 118 and consists of the following modifications:
Section 11 is being amended to remove definitional language and to add language that references IPRA definitions instead;
A new Section 17 is being added to provide parameters for requesting, redacting and releasing law enforcement records in conformance with IPRA.

A summary of the proposed revisions and copies of the full text of the proposed rules may be accessed at the Commission's website (www.nmcrp.state.nm.us), or by contacting Rick Hendricks at Rick.Hendricks@state.nm.us, or via regular mail at 1205 Camino Carlos Rey, Santa Fe, New Mexico 87505 or 476-7911.

At the hearing the CPR and Administrator will take oral and written comments related to the rulemaking actions listed below and during the meeting consider approving these rulemaking actions. The Commission may vote on the proposed rules during the meeting on May 21, 2019. The State Records Administrator may take action on those rules at the close of the public rulemaking hearing.

Interested persons may submit comments on the proposed rules at the rule hearing or may submit written comments via email at rmd.cpr@state.nm.us. Written comments must be received no later than 5 p.m. on May 10, 2019. If submitting written comments by email, please indicate in the subject line the number of each rule(s) for which you are providing comments. Persons offering written comments at the hearing must have eight (8) copies for the Commission and Administrator to review. Oral comments will also be accepted at the rule hearing, subject to time limitations.

A copy of the agenda for the combined regular meeting and rule hearing is also available on the Commission website and at the office of the State Records Administrator located at the State Records Center and Archives at 1209 Camino Carlos Rey, Santa Fe, NM. The agenda is subject to change up to 72 hours prior to the meeting. Legal authority for this rulemaking can be found in the Public Records Act, Section 14-3-1, et seq. and in the State Rules Act, Section 14-4-1, et seq. NMSA 1978.

Exhibit A
Notice of Regular Meeting and Rule Hearing

The New Mexico Commission of Public Records (CPR) has scheduled a regular meeting and rule hearing for Tuesday, May 21, 2019, at 10:00 A.M. at the New Mexico State Records Center and Archives, which is an accessible facility, at 1209 Camino Carlos Rey, Santa Fe, NM.

If you are an individual with a disability who is in need of a reader, amplifier, qualified sign language interpreter, or any form of auxiliary aid or service to attend or participate in the meeting, please contact Georgette Chavez at 476-7926 by May 8, 2019, or as soon as possible.

Public documents, including the agenda and minutes, can be provided in various accessible formats.

The Commission of Public Records ("CPR") and State Records Administrator ("SRA") may consider the following items of rulemaking at the meeting:

Exhibit B

http://www.nmcpr.state.nm.us/notice-of-regular-meeting-and-rule-hearing
Amend:  
**1.21.2 NMAC** Retention and Disposition of Public Records (CPR Rule)  

Synopsis:  
The proposed amendment of 1.21.2 NMAC consists of the following modifications: Section 844 is being amended to add toxicology to the title and description.

Amend:  
**1.13.11 NMAC** Access to Public Records, Research in the New Mexico Archives  

Synopsis:  
The proposed amendment of 1.13.11 NMAC is to comply with changes to the Inspection of Public Records Act ("IPRA") as a result of Senate Bill 118 and consists of the following modifications: A new Section 17 is being added to provide parameters for requesting, redacting and releasing law enforcement records in conformance with IPRA.

A summary of the proposed revisions may be accessed here **1.21.2 NMAC amendment** and **1.13.11 NMAC amendment** or by contacting Rick Hendricks at Rick.Hendricks@state.nm.us, or via regular mail at 1205 Camino Carlos Rey, Santa Fe, New Mexico 87505 or (505) 476-7911.

At the hearing the CPR and Administrator will take oral and written comments related to the rulemaking actions listed below and during the meeting consider approving these rulemaking actions. The Commission may vote on the proposed rules during the meeting on May 21, 2019. The State Records Administrator may take action on those rules at the close of the public rulemaking hearing.

Interested persons may submit comments on the proposed rules at the rule hearing or may submit written comments via email at rmd.cpr@state.nm.us. Written comments must be received no later than 5 p.m. on May 10, 2019. If submitting written comments by email, please indicate in the subject line the number of each rule(s) for which you are providing comments. Persons offering written comments at the hearing must have eight (8) copies for the Commission and Administrator to review. Oral comments will also be accepted at the rule hearing, subject to time limitations.

A copy of the agenda for the combined regular meeting and rule hearing is available **HERE** and at the office of the State Records Administrator located at the State Records Center and Archives at 1209 Camino Carlos Rey, Santa Fe, NM.

The agenda is subject to change up to 72 hours prior to the meeting. Legal authority for this rulemaking can be found in the Public Records Act, Section 14-3-1, et seq. and in the State Rules Act, Section 14-4-1, et seq. NMSA 1978.

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Exhibit B

I. OPENING ACTIVITIES
   A. Call to Order
   B. Approval of Agenda
   C. Approval of Minutes of the February 19, 2019, Regular Commission Meeting

II. RULE HEARING
   A. Amend
      1.21.2 NMAC Retention and Disposition of Public Records (CPR Rule)
      1.13.11 NMAC Access to Public Records, Research in the New Mexico Archives (CPR Rule)

III. ACTION ITEMS
   A. Vote on Proposed Commission Rules
      1. 1.21.2 NMAC Retention and Disposition of Public Records (CPR Rule)
      2. 1.13.11 NMAC Access to Public Records, Research in the New Mexico Archives (CPR Rule)
   B. Election of Chair and Secretary
   C. Adoption of Fiscal Year 2020 Commission of Public Records Reasonable Meeting Notice Resolution pursuant to the Open Meeting Act, Section 10-15-1 (D) NMSA 1978.
   D. Acceptance of Deed of Gift
      1. Robert John Stahl Collection

IV. NEW BUSINESS
   A. Report of New Mexico Historical Records Advisory Board Regrant Approvals
   B. Radon Report from Jay Stimmel, New Mexico Environment Department

V. DIRECTOR'S REPORT

VI. SCHEDULING OF NEXT MEETING

VII. ADJOURNMENT
Dear Legislative Council Service Representative:

The State Commission of Public Records has a rule hearing on Tuesday, May 21, 2019. Below is our rulemaking information as required under the newly amended State Rules Act under section 2.E.7.

E. "provide to the public" means for an agency to distribute rulemaking information by:
(7) providing it to the New Mexico legislative council for distribution to appropriate interim and standing legislative committees;

Here is a link to our notice of rulemaking and the proposed amendments on our website: [http://www.nmcrpr.state.nm.us/notice-of-regular-meeting-and-rule-hearing](http://www.nmcrpr.state.nm.us/notice-of-regular-meeting-and-rule-hearing)

Also attached is a PDF of the notice and proposed amendments.

Here is a link to our notice of rulemaking which appears today in the New Mexico Register: [http://164.64.110.134/nmcr/docs/xxx07](http://164.64.110.134/nmcr/docs/xxx07)

Please let me know if there is anything else that you require to fulfill this requirement.

Sincerely,

Georgette L. Chávez
Deputy State Records Administrator
505-476-7926

NEW MEXICO
State Records Center and Archives
Your Access to Public Information
1205 Camino Carlos Rey, Santa Fe, New Mexico 87507

[Facebook](http://facebook.com/newmexicoarchive)
Rule Hearing Search

Hearing Date:  
Comments Deadline Date:  
Agency:
All  
All  
State Records Center/Archives  
Search

Return to Search Results:

Proposed Rule Name:
CPR_SRCA_NOTICE OF RULEMAKING AND RULEMAKING RECORD
Agency:
State Records Center/Archives
Purpose:
The CPR and Administrator will take oral and written comments related to the rulemaking actions listed below and during the meeting consider approving these rulemaking actions.
Summary:
Synopsis:
The proposed amendment of 1 21.2 NMAC consists of the following modifications:
Section 444 is being amended to add toxicology to the title and description.
Synopsis:
The proposed amendment of 1 13.11 NMAC is to comply with changes to the inspection of Public Records Act ("IPRA") as a result of Senate Bill 118 and consists of the following modifications:
A new Section 17 is being added to provide parameters for requesting, redacting and releasing law enforcement records in conformance with IPRA.

Rule Complete Copy:
A summary of the proposed revisions and copies of the full text of the proposed rules may be accessed at the Commission's website (http://www.mscpr.state.nm.us), or by contacting Rick Hendricks at Rick.Hendricks@state.nm.us

How to submit Comments:
Interested persons may submit comments on the proposed rules at the rule hearing or may submit written comments via email at cprd.compliance@state.nm.us

When are comments due:
5/10/2019 2:05 PM
Hearing Date:
5/21/2019 2:05 PM
Public Hearing Location:
NM Records Center and Archives
1205 Camino Carlos Ray
Santa Fe, New Mexico 87505

How to participate:
If you are an individual with a disability who is in need of a reader, amplifier, qualified sign language interpreter, or any form of auxiliary aid or service to attend or participate in the meeting, please contact Georgette Chavez at 478-7828 by May 8, 2019, or as soon as possible.

File Name  File Type  C
Notice_May 21, 2019  PDF
RevAmendment_212  PDF
CPR 13.11 amend_neo  PDF
REVISED DFT


4/11/2019
NOTICE OF REGULAR MEETING AND OF RULEMAKING

The New Mexico Commission of Public Records (CPR) has scheduled a regular meeting and rule hearing for Tuesday, May 21, 2019, at 10:00 A.M. at the New Mexico State Records Center and Archives, which is an accessible facility, at 1209 Camino Carlos Rey, Santa Fe, NM. If you are an individual with a disability who is in need of a reader, amplifier, qualified sign language interpreter, or any form of auxiliary aid or service to attend or participate in the meeting, please contact Georgette Chavez at 476-7926 by May 8, 2019, or as soon as possible. Public documents, including the agenda and minutes, can be provided in various accessible formats.

The Commission of Public Records ("CPR") and State Records Administrator ("SRA") may consider the following items of rulemaking at the meeting:

Amend:
1.21.2 NMAC Retention and Disposition of Public Records (CPR Rule)

Synopsis:
The proposed amendment of 1.21.2 NMAC consists of the following modifications:
Section 844 is being amended to add toxicology to the title and description.

Amend:
1.13.11 NMAC Access to Public Records, Research in the New Mexico Archives

Synopsis:
The proposed amendment of 1.13.11 NMAC is to comply with changes to the Inspection of Public Records Act ("IPRA") as a result of Senate Bill 118 and consists of the following modifications:
A new Section 17 is being added to provide parameters for requesting, redacting and releasing law enforcement records in conformance with IPRA.

A summary of the proposed revisions and copies of the full text of the proposed rules may be accessed at the Commission's website (www.nmcrpr.state.nm.us), or by contacting Rick Hendricks at Rick.Hendricks@state.nm.us, or via regular mail at 1205 Camino Carlos Rey, Santa Fe, New Mexico 87505 or 476-7911.
At the hearing the CPR and Administrator will take oral and written comments related to the rulemaking actions listed below and during the meeting consider approving these rulemaking actions. The Commission may vote on the proposed rules during the meeting on May 21, 2019. The State Records Administrator may take action on those rules at the close of the public rulemaking hearing.

Interested persons may submit comments on the proposed rules at the rule hearing or may submit written comments via email at rind.cpr@state.nm.us. Written comments must be received no later than 5 p.m. on May 13, 2019. If submitting written comments by email, please indicate in the subject line the number of each rule(s) for which you are providing comments. Persons offering written comments at the hearing must have eight (8) copies for the Commission and Administrator to review. Oral comments will also be accepted at the rule hearing, subject to time limitations.

A copy of the agenda for the combined regular meeting and rule hearing is also available on the Commission website and at the office of the State Records Administrator located at the State Records Center and Archives at 1209 Camino Carlos Rey, Santa Fe, NM.

The agenda is subject to change up to 72 hours prior to the meeting. Legal authority for this rulemaking can be found in the Public Records Act, Section 14-3-1, et seq. and in the State Rules Act, Section 14-4-1, et seq. NMSA 1978.

Thank you,

Tanya Vigil, Agency Analysis Bureau Chief
Records Management Division
1205 Camino Carlos Rey
Santa Fe, NM 87507
Telephone: 505-476-7921
www.nmcrs.state.nm.us
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Exhibit F
1.21.2 NMAC
Retention and Disposition of Public Records
(CPR Rule)

Proposed Amendment
This is an amendment to 1.21.2 NMAC, Section 844, effective XX/XX/2019

1.21.2.844 FORENSIC AND TOXICOLOGY ANALYSIS:
A. Category: Public health and social services - laboratory management
B. Description: Records related to forensic or toxicology analysis.
C. Retention: destroy 10 years from date of final disposition of corresponding case

[1.21.2.844 NMAC - N, 10/1/2015, A, XX/XX/2019]
1.21.2 NMAC
Retention and Disposition of Public Records
(CPR Rule)

No Comments Received
1.13.11 NMAC Access to Public Records, Research in the New Mexico Archives (CPR Rule)

Proposed Amendment
This is an amendment to Section 11 and adding a new section 17 to 1.13.11 NMAC, effective July 1, 2019.

1.13.11.11 ACCESS:

A. Under the Inspection of Public Records Act, Section 14-2-1 NMSA 1978, access to certain records is restricted.

   [(1) medical records;]
   [(2) personnel files;]
   [(2) law enforcement records that reveal confidential sources, methods, or information on individuals accused but not charged with a crime;]
   [(4) confidential material, which would invade the privacy of an individual.] For certain law enforcement records, see 1.13.11.17 NMAC for inspection or duplication.

B. The use of donated materials shall be subject to restrictions placed by the donor.

C. Access to materials which are not arranged or are being processed may also be restricted.

D. Access to fragile or very valuable materials may also be restricted.

E. Access to permanent agency records in the custody of the NMSRCA, but not yet accessioned into the archives shall be requested by the state records administrator.

[07/01/96; 1.13.11.11 NMAC - Rn, 1 NMAC 3.2.10.2.11, 07/15/03; A, 06/01/06; A, 07/01/2019]

1.13.11.17 REQUIREMENTS FOR CONFIDENTIAL RECORDS

A. The inspection and reproduction of certain confidential records shall only be made with full agreement of the requestor to the terms and conditions prescribed within this rule and 1.13.2 NMAC.

B. The requestor shall provide, but not be limited to, the following information:

   [(1) a valid form of photographic government identification card for the person or a valid government-issued badge, commission, or identification card for government staff making records request;]
   [(2) the printed name of the requestor;]
   [(3) a valid physical and email address of the requestor;]
   [(4) a statement of intended use of records by the requestor; and]
   [(5) the date of the request.]

C. If SRCA staff determines that there may be protected personal identifier information in any request for archival records, staff may request that the originating agency or court of originating jurisdiction ("originating agency") conduct a review of records prior to release.

D. For any records request made, an originating agency has an obligation to review any records sent to it by SRCA and provide a response as soon as possible and in conformance with time limits set out in IPRA.

E. SRCA may delay access to any requestor due to a failure of originating agency to respond to SRCA request.

F. If photocopy/duplication request is made by requestor, costs shall be paid prior to release of documents.

[N, 07/01/2019]
Senate Bill 118

An act relating to Public Records; Protecting the confidentiality of certain victims of and witnesses to certain crimes.
AN ACT

RELATING TO PUBLIC RECORDS; PROTECTING THE CONFIDENTIALITY OF CERTAIN VICTIMS OF AND WITNESSES TO CERTAIN CRIMES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 14-2-1 NMSA 1978 (being Laws 1947, Chapter 130, Section 1, as amended) is amended to read:

"14-2-1. RIGHT TO INSPECT PUBLIC RECORDS--EXCEPTIONS.-- Every person has a right to inspect public records of this state except:

A. records pertaining to physical or mental examinations and medical treatment of persons confined to an institution;

B. letters of reference concerning employment, licensing or permits;

C. letters or memoranda that are matters of opinion in personnel files or students' cumulative files;

D. portions of law enforcement records that reveal:

(1) confidential sources, methods or information; or

(2) before charges are filed, names, address, contact information, or protected personal identifier information as defined in this Act of individuals who are:
(a) accused but not charged with a
crime; or

(b) victims of or non-law-enforcement
witnesses to an alleged crime of: 1) assault with intent to
commit a violent felony pursuant to Section 30-3-3 NMSA 1978
when the violent felony is criminal sexual penetration;
2) assault against a household member with intent to commit a
violent felony pursuant to Section 30-3-14 NMSA 1978 when the
violent felony is criminal sexual penetration; 3) stalking
pursuant to Section 30-3A-3 NMSA 1978; 4) aggravated stalking
pursuant to Section 30-3A-3.1 NMSA 1978; 5) criminal sexual
penetration pursuant to Section 30-9-11 NMSA 1978; or
6) criminal sexual contact pursuant to Section 30-9-12
NMSA 1978.

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 subsection; provided that the
presence of such information on a law enforcement record does
not exempt the record from inspection;

E. as provided by the Confidential Materials Act;

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

G. 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

H. as otherwise provided by law."

SECTION 2. A new section of the Inspection of Public
Records Act, Section 14-2-1.1 NMSA 1978, is enacted to read:

"14-2-1.1. PERSONAL IDENTIFIER INFORMATION.--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 websites operated by or managed on behalf
of a public body."
1.13.11 NMAC Access to Public Records, Research in the New Mexico Archives (CPR Rule)

Comments Received
Chavez, Georgette, SRCA

From: Lucero, Leo, SRCA
Sent: Friday, May 10, 2019 5:04 PM
To: Chavez, Georgette, SRCA
Subject: Fwd: [EXT] Proposed amendments to Rule 1.13.11.11; proposed new Rule 1.13.11.17
Attachments: Comments.pdf

Sent from my T-Mobile 4G LTE Device

-------- Original message --------
From: Kip Purcell <Kpurcell@rodey.com>
Date: 5/10/19 4:53 PM (GMT-07:00)
To: "CPR, RMD, SRCA" <RMD.CPR@state.nm.us>
Cc: Kip Purcell <Kpurcell@rodey.com>
Subject: [EXT] Proposed amendments to Rule 1.13.11.11; proposed new Rule 1.13.11.17

Please see the attached letter.
VIA E-MAIL: rmd.epr@state.nm.us

Dr. Rick Hendricks
Administrator
New Mexico State Records Center and Archives
1205 Camino Carlos Rcy
Santa Fe, New Mexico 87505

Re: Proposed amendments to Rule 1.13.11.11; proposed new Rule 1.13.11.17

Dear Dr. Hendricks:

I write on behalf of the New Mexico Foundation for Open Government (“FOG”) to comment on the pending proposals to amend Rule 1.13.11.11 and to promulgate a new Rule 1.13.11.17. We appreciate this opportunity to offer our perspective.

As an initial matter, FOG commends the New Mexico Commission of Public Records (“the Commission”) and the New Mexico State Records Center and Archives (“the Records Center”) for proposing to do away with the existing language of Rule 1.13.11.11(A), which inaccurately suggests that the Inspection of Public Records Act (“IPRA”) accords confidentiality to entire “personnel files” (when in fact the statute protects only “letters or memoranda that are matters of opinion” within those files) and to “confidential material, which would invade the privacy of the individual” (when in fact the statute is much more narrowly and precisely drawn). Deleting these provisions – and substituting a citation to IPRA itself – would be a welcome and worthwhile change.

On the other hand, in addition to citing the statute, the proposed amendments would refer the reader to proposed new Rule 1.13.11.17 to learn about the inspection or duplication of “certain law enforcement records.” Rule 1.13.11.17 similarly alludes to “certain confidential records.” Neither rule cites a specific provision of IPRA or otherwise identifies the kinds of records about which it is speaking. Because the phrase “certain confidential records” remains
entirely undefined, the rule threatens to give the Records Center unfettered discretion to restrict access to public records that no constitutional provision, statute, or supreme court rule makes confidential.

This prospect concerns FOG, because the right to inspect public records “is limited only by the Legislature’s enumeration of certain categories of records that are excepted from inspection,” and by “constitutively mandated privileges” and supreme court rules. Republican Party of N.M. v. N.M. Taxation & Revenue Dep't, 2012-NMSC-026, ¶ 13, 283 P.3d 853. To be sure, IPRA’s “catch-all exception,” id., for records whose confidentiality is “otherwise provided by law,” NMSA 1978, § 14-2-1(A)(8) (2011), encompasses “regulatory bars to disclosure,” Republican Party of N.M., 2012-NMSC-026, ¶ 13, but only to the extent that such regulations “ha[ve] the force of law,” Edenburn v. N.M. Dep't of Health, 2013-NMCA-045, ¶ 26, 299 P.3d 424. “Whether a rule has the force of law depends on whether the rule was promulgated in accordance with the statutory mandate to carry out and effectuate the purpose of the applicable statute,” City of Las Cruces v. Pub. Emp. Labor Relations Bd., 1996-NMSC-024, ¶ 5, 121 N.M. 688, 917 P.2d 451 – in other words, whether the rule was “statutorily authorized,” id., ¶ 7.

A rule that purports to grant greater protection to public records than the confidentiality provided by IPRA itself, by other legislative enactments, by constitutionally mandated privileges, or by supreme court rules cannot have “the force of law.” “It is well settled that an agency may not create a regulation that exceeds its statutory authority.” Marbob Energy Corp. v. N.M. Oil Conservation Comm’n, 2009-NMSC-013, ¶ 5, 146 N.M. 24, 206 P.3d 135 (internal quotation marks and brackets omitted). “Separation of powers principles are violated when an administrative agency goes beyond the existing New Mexico statutes ... it is charged with administering and claims the authority to ... create new law on its own.” Tri-State Generation & Transmission Assn., Inc. v. D’Antonio, 2012-NMSC-039, ¶ 13, 289 P.3d 1232 (internal quotation marks omitted). Consequently, “[a] regulation adopted by an administrative agency creating an exemption not contemplated by the act or included within the exemption specified therein is void.” State ex rel. McCulloch v. Ashby, 1963-NMSC-217, ¶ 17, 73 N.M. 267, 387 P.2d 588.

Given these well-established principles, FOG wants to make sure that any regulation limiting public access to public records hews closely to IPRA. Unfortunately, proposed Rule 1.13.11.17 appears at odds with IPRA. FOG’s reservations about the rule’s vague allusion to “certain confidential records,” see supra p. 1, is heightened by the way the rule treats such records: whereas IPRA either subjects public records to public inspection or else excepts them from that regime, see § 14-2-1(A), Rule 1.13.11.17 undertakes to impose certain “conditions” on the inspection of supposedly “confidential” records. That approach puzzles FOG. Either records are “confidential” – in which case the Records Center has no obligation to make them available under any conditions, except to the extent that redaction may render them disclosable in part, see NMSA 1978, § 14-2-9(A) (2013) – or else they are not confidential, in which case the Records Center must make them available under the conditions set forth in IPRA. I recognize that a
The conditions enumerated in Rule 1.13.11.17 go beyond what IPRA requires in several respects. Under IPRA, a requester need only provide “the name, address and telephone number of the person seeking access to the records.” NMSA 1978, § 14-2-8(C) (2009). But the rule demands, as the first order of business, “a valid form of photographic government identification card for the person or a valid government-issued badge, commission, or identification card for government staff making [the] records request.” Rule 1.13.11.17(B)(1). To my knowledge, no statute in New Mexico – except for a statute that directs banks to take certain precautions against money laundering that are mandated by federal law, see NMSA 1978, § 58-32-606(C)(2) (2016) – requires possession or production of photographic identification for any purpose other than driving on the state’s highways. And while most records requesters will presumably be able to present photo i.d., many will not. “[M]illions of American citizens do not have government-issued photo identification, such as a driver’s license or passport… [C]ertain groups – primarily poor, elderly, and minority citizens – are less likely to possess [such identification] than the general population.” Frank v. Walker, 773 F.3d 783, 785 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc) (internal quotation marks omitted). That’s why, for example, our legislature has repeatedly rejected bills that would require New Mexicans to show photographic identification to poll workers in state elections. Inspecting a public record – a right enjoyed by “[e]very person,” § 14-2-1(A) – shouldn’t be more difficult than casting a ballot.1

Rule 1.13.11.17(B)(3) requires the requester to provide, in addition to photo i.d., “a valid physical and email address.” But IPRA requires only one “address,” see § 14-2-8(C), by which the statute presumably means a mailing address to facilitate the records custodian’s communications with the requester, see, e.g., § 14-2-8(D) to (E). Of course a requester who makes a request by e-mail, see § 14-2-8(F), will disclose “a valid … email address” in the process, but the right to inspect a public record shouldn’t depend on the requester’s possession of an e-mail account.

Rule 1.13.11.17(B)(5) requires the request to be dated, but IPRA imposes no such requirement. Instead, the statute pegs time limits to the date when the public body receives the request. § 14-2-8(D). The burden is therefore on the records custodian to date-stamp any

1 I realize that a supreme court rule – Rule 1-079(D)(3) of the New Mexico Rules of Civil Procedure – requires that persons seeking access to court records produce “a government-issued form of identification.” Thus, it may be appropriate for the Records Center to impose an identical condition on the disclosure of court records in its custody. But not even the supreme court rule calls for photographic identification.
request that doesn’t otherwise disclose the date of receipt. I agree that IPRA requesters are well advised to date their requests, but they shouldn’t be required to do so.

Most alarmingly, Rule 1.13.11.17(B)(4) requires “a statement of intended use of records by the requestor.” That provision is directly contrary to IPRA, which provides that “[n]o person requesting records shall be required to state the reason for inspecting the records.” § 14-2-8(C).

Regarding subsections (C) through (E) of Rule 1.13.11.17, which collectively seek to require originating agencies to take responsibility for redacting “protected personal identifier information,” FOG sympathizes with the position in which the Records Center finds itself as the ultimate repository of records created by other public bodies. And FOG doesn’t fault the Records Center for asking originating agencies to repossess their records for the purpose of redacting them “as soon as possible and in conformance with time limits set out in IPRA.” Rule 1.13.11.17(D). But the buck, for better or worse, stops with the Records Center. If an originating agency rejects the Records Center’s invitation to redact its records, or simply fails to respond to that invitation in a timely fashion, there is no statutory basis for “delay[ing] access to [the] requestor.” Rule 1.13.11.17(E). To the contrary, it is the custodian of records at the time of a written request — not the records custodian of the public body that first generated the records before transferring them — who must “permit the inspection immediately or as soon as is practicable under the circumstances, but not later than fifteen days after receiving [the] request.” § 14-2-8(D). It is only “[i]n the event that a written request is not made to the custodian having possession of or responsibility for the public records requested” that the custodian who receives the request may forward the request to the actual custodian, § 14-2-8(E) — at which point the actual custodian becomes responsible for complying with the statutory deadlines, and the clock starts ticking. To the extent that Rule 1.13.11.17(E) itself represents an attempt to shift to the originating agency “responsibility for the public records requested,” § 14-2-8(E), the attempt reflects a misconstruction of IPRA. The statute makes clear that the records custodian who receives an IPRA request lacks “possession of or responsibility for the public records requested” only when the records are “absent[ ] from that person’s custody or control.” § 14-2-8(E). The statute doesn’t authorize the custodian to procure that absence. See also § 14-3-8 (“The center ... shall be the facility for the receipt, storage or disposition of all inactive and infrequently used records ....”).

In any event, I believe that the proposed rule is an overreaction to the possibility that records transferred to the Records Center and subsequently made the subject of an IPRA request may contain “protected personal identifier information.” IPRA says that such information “may be” redacted before a record is made available for public inspection. § 14-2-8(B). But the only redaction duty it imposes on public bodies is to remove the information before making the record “available on publicly accessible web sites” for which the public body is responsible. See id. Short of that kind of worldwide electronic dissemination, IPRA neither states nor even suggests that a public body could ever be held liable for disclosing personal identifier information.
RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

Dr. Rick Hendricks
May 10, 2019
Page 5

I understand from Susan Boe that the impetus for the proposed rule is the Records Center’s recent acquisition of responsibility for archiving court records, coupled with the 2019 legislature’s enactment of a new IPRA exception for the identities of certain crime victims. But in this context, the Records Center’s concerns about inadvertent disclosure are even less substantial. In the first place, the soon-to-be-effective IPRA exception applies “before charges are filed.” § 14-2-1(D)(2) (2019). That means that the documents about which the legislature was primarily concerned are police reports and investigative records and prosecutors’ files – not court files, which don’t come into being until after “charges are filed.” And in the second place, the supreme court has already instituted measures to guard against the inclusion of protected personal identifier information in court records – measures that, at the same time, tend to absolve the courts of responsibility for litigants’ violation of those policies. Consider, for example, the rules of civil procedure for the district courts:

(1) The court and the parties shall avoid including protected personal identifier information in court records unless deemed necessary for the effective operation of the court’s judicial function. If the court or a party deems it necessary to include protected personal identifier information in a court record, that is a non-sanctionable decision.

(2) The court clerk is not required to review documents for compliance with this paragraph ... The court clerk is not required to screen court records released to the public to prevent disclosure of protected personal identifier information.

Rule 1-079(D)(1) to (2) NMRA; see also Rule 2-112(C)(1) to (2) (identical rule of civil procedure for magistrate courts); Rule 3-112(C)(1) to (2) (metropolitan courts); Rule 5-123(D)(1) to (2) (identical rule of criminal procedure for district courts); Rule 6-114(C)(1) to (2) (magistrate courts); Rule 7-113(C)(1) to (2) (metropolitan courts); Rule 8-112(C)(1) to (2) (municipal courts); Rule 10-166(D)(1) to (2) (identical rule of procedure for children’s courts); Rule 12-314(D)(1) to (2) (identical rule of procedure for appellate courts).

What is more, to the extent that court files are confidential for reasons other than the fact that they contain protected personal identifier information, the courts themselves seal the files, see, e.g., Rule 1-079(C), (E) to (H) – but any file that isn’t sealed is “subject to public access,” Rule 1-079(A). Following this binary scheme – sealed records are confidential, everything else is subject to public inspection – should be one of the Records Center’s easier tasks under IPRA. It shouldn’t necessitate the promulgation of rules that would make documents less accessible than they were in the hands of the originating agency.

FOG therefore requests that the Commission and the Records Center rethink the proposed amendments in several respects. First, FOG asks that the proposed new sentence in Rule
1.13.11.11 not be added, or at least that the reference to "certain law enforcement records" be made more precise, depending on what the Commission and the Records Center decide to do about Rule 1.13.11.17. Regarding the latter rule, FOG requests (a) that the reference to "certain confidential records" in subsection (A) be made more specific, see supra pp. 1-2; (b) that subsection (B)(1) be deleted, or at least that it be limited to requests for court records and that the reference to "photographic" identification be omitted, see supra p. 3 & note 1; (c) that the words "physical and email" be deleted from subsection (B)(3), see supra p. 3; (d) that subsection (B)(4) be deleted, see supra p. 4; (e) that subsection (B)(5) be deleted, see supra pp. 3-4; and (f) that subsections (C), (D), and (E) be deleted, or at least clarified to provide that a request to the originating agency to purge protected personal identifier information from its documents shall not relieve the Records Center of its responsibility to comply with the deadlines specified in IPRA. The Commission and Records Center may also wish to add a subsection analogous to Rule 1-079(D)(2) of the Rules of Civil Procedure, to emphasize the Records Center’s non-liability for disclosure of public records containing protected personal identifier information: “The SRCA is not required to screen records released to the public to prevent disclosure of protected personal identifier information.” Any such rule would be a mere restatement of the permissive language of IPRA itself, see § 14-2-1(B), and would therefore “ha[ve] the force of law,” Edenburn, 2013-NMCA-045, ¶ 26.

Thanks again for the opportunity to comment on the proposed rules.

Sincerely,

Charles K. Purcell
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<tr>
<th>Name/Print</th>
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# State Commission of Public Records
## Regular Meeting and Rule Hearing Sign-In
### May 21, 2019

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Veronica Gonzales         | Ned Fuller            | Stephanie Wilson    | Acting Supreme Court Law Librarian |
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**NMAC Transmittal Form**

**Issuing agency name and address:**
State Commission of Public Records, 1205 Camino Carlos Rey, Santa Fe, New Mexico 87507

**Contact person's name:**
Tanya Vigil

**Number of pages:** 1

**Type of rule action:**
- Amendment

**Title number:** 1

**Title name:** General Government Administration

**Chapter number:** 21

**Chapter name:** Functional Records Retention and Disposition Schedules (FRRDS)

**Part number:** 2

**Part name:** Retention and Disposition of Public Records

**Amendment description (If filing an amendment):**
Amending (1) Section

**Amendment's NMAC citation (If filing an amendment):**
Section 844 of 1.21.2 NMAC

**Are there any materials incorporated by reference?**
No

**If materials are attached, has copyright permission been received?**
Yes

**Concise Explanatory Statement For Rulemaking Adoption:**

**Specific statutory or other authority authorizing rulemaking:**
Public Records Act, Section 14-3-1 et. seq. NMSA 1978

**Notice date(s):**
4/9/2019

**Hearing date(s):**
5/21/2019

**Rule adoption date:**
5/21/2019

**Rule effective date:**
5/11/2019

**Findings required for rulemaking adoption:**

Findings MUST include:
- Reasons for adopting rule, including any findings otherwise required by law of the agency, and a summary of any independent analysis done by the agency;
- Reasons for any change between the published proposed rule and the final rule; and
- Reasons for not accepting substantive arguments made through public comment.

See page 2 for findings

Continued on next page

7/1/2018
Findings required for rulemaking adoption:
continued

Section 14-3-4(F) NMSA 1978 authorizes the commission to adopt regulations to carry out the purpose of the Public Records Act.
Section 14-3-6 NMSA 1978 authorizes 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.

1. Section 844 is be amended to add toxicology to the title and description

These rule amendments were made to include public comments received at the public hearing held on Tuesday, May 22, 2019.

Issuing authority (If delegated, authority letter must be on file with ALD):
Name: 
Title: Chair, State Commission of Public Records
Signature: (BLACK ink only) 
Date signed: 5.21.2019
This is an amendment to 1.21.2 NMAC, Section 844, effective 6/11/2019.

1.21.2.844 FORENSIC AND TOXICOLOGY ANALYSIS:
   A. Category: Public health and social services - laboratory management
   B. Description: Records related to forensic or toxicology analysis.
   C. Retention: destroy 10 years from date of final disposition of corresponding case

[1.21.2.844 NMAC - N, 10/1/2015, A, 6/11/2019]