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)
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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.

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May 10, 2019

VIA E-MAIL: rmd.cpr@state.nm.us

Dr. Rick Hendricks
Administrator
New Mexico State Records Center and Archives
1205 Camino Carlos Rey
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 "constitutionally 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 Ass'n, 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

separate statute makes public inspection of the Records Center's documents "subject to reasonable rules and regulations prescribed by the administrator," NMSA 1978, § 14-3-8 (1959), but that statute merely gives the Records Center rulemaking power; it does not suggest that a rule at variance with IPRA would be "reasonable."

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 "absen[t] ... 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.

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,

CK Purcell

Charles K. Purcell