

Office of the Secretary

NEW MEXICO ENVIRONMENT DEPARTMENT



POLICY AND PROCEDURE 01-06

- SUBJECT:** Inspection of Public Records Policy
- PURPOSE:** To establish a uniform procedure for responding to requests for making public records of the New Mexico Environment Department (Department) available for public inspection.
- REVISIONS:** This policy supersedes NMED Policy Numbered 01-06 Inspection of Public Records Policy dated September 29, 2009.
- APPLICABILITY:** All divisions of the Department.
- POLICY:** The Department shall implement the provisions of the Inspection of Public Records Act to provide access by the public to Department public records in accordance with the Inspection of Public Records Act.
- REFERENCES:** Inspection of Public Records Act, NMSA 1978, §§14-2-1 *et seq.*; NMED Policy 05-02
- PROCEDURES:**
- I. Scope
 - II. Definitions
 - III. Public Records Custodians
 - IV. Public Records Requests
 - V. Responding to Requests
 - VI. Exempt Records or Information
 - VII. Denial and Referral of Requests
 - VIII. Records from Electronic Information Systems
 - IX. Fees

APPROVAL:

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DATE:

3-9-11

I. SCOPE:

This policy prescribes procedures for making Department public records available to the public for inspection and copying pursuant to the provisions of the Inspection of Public Records Act (NMSA 1978, Sections 14-2-1 *et seq.*, hereinafter the "Act"). The Department shall treat all Freedom of Information Requests as requests under the Inspection of Public Records Act.

II. DEFINITIONS: As used in this policy:

A. "Department public records" or "public records" are all documents, papers, letters, books, maps, tapes, photographs, recordings, e-mail, documents from electronic information systems and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of the Department and that relate to Department business, whether or not the records are required by law to be created or maintained. Department public records do not include records such as:

1. Notes, including field notes, and other materials prepared or collected by public employees solely for their own use that are preliminary and are not intended to perpetuate, formalize or communicate information for or on behalf of the public agency. Disclosure of such materials could unnecessarily hamper a public employee's ability to do his/her job by discouraging or tempering the employee's taking of notes, keeping research materials or experimenting with creative ideas in preliminary drafts of memoranda and letters;
2. Draft documents or draft versions of documents that are circulated for comments that are turned into a final document;
3. Records that do not relate to a public body's business and are voluntarily kept by employees for their personal use;
4. Publicly available books, periodicals or other publications that are owned, distributed or copyrighted by non-Department sources; or
5. Any records that are exempt, as provided in Section VI, below.

B. "Public Records Custodian" also referred to as the Department Public Records Custodian or the Bureau/District Public Records Custodian shall receive and respond to requests to inspect public records, provide reasonable opportunities to inspect public records, and provide reasonable facilities to make or furnish copies of the public records during usual business hours.

C. "Uncommon" requests means any request to inspect public records that differs from those requests normally received. This includes requests from the media involving sensitive issues as defined in the Department's Communications (Media Inquires, Press Releases) Policy 01-05; requests concerning ongoing litigation in which NMED is involved; requests for non-final contracts; requests for non-confidential personnel information such as salaries when the request is made for purposes other than to verify employment or for a credit check; requests for draft documents not intended for public circulation; requests for exempt records; requests for data

contained within an electronic information system or requests for information in electronic form and requests that require a significant expenditure of resources.

D. "Unusual circumstances" means:

1. The need to search for and collect the requested public records from field facilities or offices that are separate from the office processing the request;
2. The need to search for, collect and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request;
3. The need for consultation with one or more bureau/district office having a substantial interest in the request; or
4. Other unusual circumstances beyond the control of the Public Records Custodian that could cause delay.

III. PUBLIC RECORDS CUSTODIANS

A. Department Public Records Custodian

1. The Cabinet Secretary shall, upon the recommendation of the General Counsel, appoint the Department Public Records Custodian, who may be an employee of the Office of General Counsel.
2. If the Department Public Records Custodian receives a request for public records, he/she shall immediately upon receiving the request assign it to the appropriate Bureau or District Public Records Custodian(s).

B. Bureau or District Public Records Custodians

1. Each bureau and each district office shall designate an employee from that bureau/district office to be the Public Records Custodian for the bureau/district, who shall ensure the bureau/district responds to requests it receives to inspect public records.
2. The Bureau/District Public Records Custodian, with the assistance of the employee in the bureau/district responsible for or in possession of the requested public records, shall:
 - a. receive and respond to requests to inspect public records received directly from the public or by referral from the Department Public Records Custodian;
 - b. make the public records available for inspection; and
 - c. provide reasonable facilities to make or furnish copies of the public records during usual business hours.

3. If a Bureau/District Public Records Custodian receives a public records request that pertains to another bureau/district, he/she shall immediately forward the request to that Bureau's/District's Public Records Custodian, with a copy to the Department Public Records Custodian indicating to which bureau(s) the request has been forwarded.

IV. PUBLIC RECORDS REQUESTS

A. Any person may request orally or in writing, including e-mail, to inspect the Department's public records. Requests to inspect public records shall be directed either to the Department Public Records Custodian or Bureau/District Public Records Custodian. If the request is directed to the Department Public Records Custodian, the Department Public Records Custodian shall assign the request to the appropriate Bureau/District Public Records Custodian(s).

B. The request must describe the public records sought with reasonable particularity or identify the public record in sufficient detail to enable Department personnel to reasonably identify and locate the records. A request for a specific category of public records shall be regarded as fulfilling this requirement if it enables records to be identified.

1. All written requests must provide the name, address and telephone number of the person seeking access to the public records. The request does not need to state the reason for the request.

2. Whenever possible, a request shall include specific information about each public record sought, such as the date, title or name, author, recipient and subject matter of the record. In addition, if the request seeks non-exempt records pertaining to pending litigation, the request should, if possible, indicate the title of the case, the court in which the case was filed and the nature or subject matter of the case.

3. If the Department determines that a request does not describe the public records sought with reasonable particularity, the Department shall advise the requestor and may request additional information. The Department also may extend to the requestor an opportunity to confer with Department personnel in order to reformulate the request in a manner that will meet this requirement.

C. Public Information Request Form is attached.

V. RESPONDING TO REQUESTS

A. Department employees receiving requests to inspect public records shall promptly forward the request to the Bureau/District Public Records Custodian and send a copy to the Department Public Records Custodian.

1. If the inspection is not permitted within 3 days, the Department Public Records Custodian shall prepare a letter explaining that more time is needed and the date the request will be satisfied.

2. If there is more than one bureau involved in the document request, the Department Public Records Custodian may coordinate the response or assign a lead Bureau to coordinate the response.

B. For requests for information in paper form, the Bureau/District Public Records Custodian shall as soon as practicable under the circumstances ensure non-exempt Department public records are provided for inspection. Requests for information from an electronic information system or information in electronic format shall follow the process in Section VIII below.

1. The Bureau/District Public Records Custodian shall respond directly to the requestor and shall provide the Department Public Records Custodian with a copy of the response if the response was in writing. The written response shall either offer to provide a copy of the documents once the fee is paid or set out the time, location and manner for inspection of the identified public records.

2. Unless unusual circumstances exist, as defined in this policy, the Bureau/District Public Records Custodian shall ensure the requested non-exempt public records are provided for inspection no later than fifteen (15) days after receiving the request.

3. The inspection may take place at the location within the Department where the records are actually maintained or, at the discretion of the Bureau/District Public Records Custodian, in any other location within the Department that is reasonable and responsive to the needs of the Department or the person making the written request. A person making a written request for copies of public information, after following the fee payment procedures, may have a copy of the requested public records provided by mail or other reasonable delivery method, without first inspecting the records.

C. If a written request seeks an unusually voluminous amount of documents or is excessively burdensome or broad or where other unusual circumstances exist, the Bureau/District Public Records Custodian shall promptly notify the requestor in writing that additional time beyond the 15-day period for inspection will be needed to respond. The Bureau/District Public Records Custodian shall describe the circumstances that cause the request to be excessively burdensome or broad, and may suggest possible modifications to the request that would decrease the burdensome or broad nature of the request on the Department. The Bureau/District Public Records Custodian shall ensure that the request is responded to within a reasonable period of time under the circumstances.

D. If the Department does not possess the records sought, or cannot respond to the written request without consultation with another public entity, the Department Public Records Custodian shall promptly forward the request to the appropriate public entity. Upon forwarding the request to another public entity, the Public Records Custodian shall ensure the requestor is notified in writing of the location where the Public Records Custodian believes the records may be found, including the name and address of that public entity's Public Records Custodian.

E. The Bureau/District Public Records Custodian shall keep a Public Information Log to document oral requests for Public Information. Oral requests for Department public records shall be responded to immediately, if the records are readily available and it is convenient for the Public Records Custodian, or as soon as practicable under the circumstances.

F. The Bureau/District Public Records Custodian shall identify or designate reasonable facilities to make or furnish paper copies of the public records requested during usual business hours. This may include a private copy company where the documents may be taken and picked-up by the private copy company or the Department staff, but copied at the requestor's expense. Custody of original documents may not be released to the requestor, but may only be released to a private copy facility with instructions to that facility to release the records back only to the Department. Payment for copies should be made directly from the requestor to the copy facility.

VI. EXEMPT RECORDS OR INFORMATION

A. Upon receiving a request, whether oral or written, a Bureau/District Public Records Custodian shall first determine whether any public records sought are exempt from disclosure as defined in this section. Where a request seeks records that contain exempt documents or information, the Public Records Custodian shall, prior to the release of the records, (1) separate and retain exempt documents or (2) redact or delete exempt information from documents that are otherwise nonexempt. Where a request seeks information from an electronic information system or information in electronic format, the requestor must sign the New Mexico Environment Department's Release of Public Information in Electronic Format form.

B. The following public records or information are exempt, and shall not be released:

1. All health or medical information that identifies specific individuals or patients, including medical records pertaining to physical or mental examinations or treatment, and including records that are submitted for insurance payment for medical expenses;

2. Documents maintained for purposes of the Americans with Disabilities Act;

3. Letters of reference concerning employment, licensing or permits;

4. Personnel records containing subjective (nonfactual) matters of opinion, other documents concerning employee infractions and disciplinary actions, employee performance appraisals and opinions as to whether a person should be reemployed, and the employee's college transcripts; lab reports or test results concerning an employee; information on the race, color, religion, national origin, ancestry, political affiliation, sexual orientation or disability of an employee; military discharge of an employee, if other than honorable;

5. Tactical response plans or procedures prepared for or by 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;

6. Law enforcement records that reveal confidential sources, methods or information, or identify individuals who are accused but not charged with a crime;
7. Records that are maintained by the Department under a promise of confidentiality, as provided by the Confidential Materials Act, NMSA 1978, Sections 14-3A-1 to -2;
8. Legal opinions, advice or work-product protected by the attorney-client privilege or attorney work product;
9. The Occupational Health and Safety Act protects (a) names of complainants who request that their names not be revealed (NMSA 1978, §50-9-10.B); (b) reports of occupational injuries and illnesses filed by employers, as well as the names of such employers (NMSA 1978, §50-9-19.B); (c) information obtained or received in connection with an OSHA investigation (NMSA 1978, §§50-9-21(B) and 50-9-6(B)); (d) information obtained under the consultation program, except for statistical purposes if the employer is not identified (NMSA 1978, §50-9-21); and trade secrets defined as any scientific technical information, design, process, procedure, formula or improvement which is secret and of value (NMSA 1978, §§50-9-21 (C) and 50-9-24 (M)); and
10. Records protected from disclosure by the following federal laws: the Critical Infrastructure Information Act of 2002 and the Safe Drinking Water Act.
11. Any other records that are deemed exempt under federal or state law and for which a sufficient countervailing public policy to justify denying public access to records under Newsome v. Alarid, 90 N.M. 790, 568 P.2d 1236 (1977) exists. Some categories that may apply to NMED include the following:
 - a. Executive privilege: Communications between members of an executive agency to safeguard the decision-making process of government by fostering candid expression of recommendations and advice.
 - b. Personal privacy: Social security numbers and dates of birth shall be redacted in public documents that are disclosed. Information on race, color, religion, sex, national origin, political affiliation, age and disability of employees shall not be disclosed.
 - c. Settlement documents: Correspondence or other documents prepared in negotiating a settlement, which the parties have agreed to maintain as confidential. Once all parties have approved a settlement agreement, that agreement and related final documents must be made available to the public upon request.
 - d. Business information: Records, reports or information shall be held confidential if the following guidelines are satisfied, (see the Air Quality Control Act, NMSA 1978, §74-2-11; the Hazardous Waste Act, NMSA 1978, §74-4-4.3; the Solid Waste Act, NMSA 1978, §74-9-33; and the Water Quality Act, NMSA 1978, §74-6-15):
 1. The business has asserted a claim of confidentiality, which has not been waived or withdrawn;

2. The business has satisfactorily shown that disclosure of the information would divulge confidential business records or methods or processes entitled to protection as confidential information or trade secrets.¹
- e. Requests for Proposals: The contents of proposals submitted in response to Requests for Proposals shall not be made available to the public and shall be confidential until the contract is awarded and signed by the successful offeror. NMSA 1978, §13-1-116.
- f. Superfund Hazard Ranking System Scores and Evaluations: Superfund Hazard Ranking System scores and evaluations shall be kept confidential at the request of EPA.

VII. DENIAL AND REFERRAL OF REQUESTS

A. Except as provided in paragraph B of this section, if as a result of the review of a request, the Public Records Custodian determines that disclosure of the Department records should be denied in whole or in part, or if the request is uncommon, as defined by this policy, the Public Records Custodian shall submit that determination to a Department attorney, who will make an independent determination whether the disclosure of the Department public records should be denied in whole or in part. If the request is for the name of complainants or information contained in on-going investigation files, then the Public Records Custodian shall submit the determination to a Department attorney. If the Department attorney determines that the Department records sought are exempt from disclosure, the Department attorney shall notify the requestor of the determination in the manner provided in Section VII(C) below.

B. For Department records located in a Department attorney's possession, a Department attorney shall review the records to make the determination of whether to deny Department records in whole or in part.

C. If a written request is denied, the Public Records Custodian or Department attorney shall provide the requestor with a written denial. The written denial shall:

1. Describe the records sought;
 2. Set forth the names and titles or positions of each person responsible for the denial;
- and
3. Be delivered or mailed to the person requesting the records within 15 days after the request for inspection was received, unless the requestor was notified additional time was needed.

VIII. RECORDS FROM ELECTRONIC INFORMATION SYSTEMS

A. "Electronic information systems" means records whose informational content has been encoded and recorded on a digital medium such as magnetic tape, drums, or discs. The encoded information is retrievable only with the help of a computer. 1.13.3.6.P NMAC. Electronic

¹ The AQCA, HWA, SWA and WQA refer to 18 U.S.C. 1905, which precludes the disclosure of trade secrets, processes, operations, style of work, or apparatus, or to identity confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof.

information systems include but are not limited to information contained within databases, email systems, word processing documents, and spreadsheets.

B. Electronic information system means a structured collection of information or data that is stored in a computer-based electronic information system. An electronic information system relies upon software to organize the storage of the data, hardware on which the data is stored, operating system and other utility software, and specialized software used to extract desired information.

1.13.3.6.K NMAC. Electronic information system includes electronic information, spreadsheets or emails.

C. For information stored in electronic form including information stored within NMED electronic information systems and information requested in electronic format, the New Mexico Environment Department's Release of Public Information in Electronic Format form must be completed. For further information on public information on electronic records, please see NMED Policy 05-02 and 1.13.3 NMAC Management of Electronic Records.

D. Upon receiving the completed Release of Public Information in Electronic Format form, the Public Records Custodian shall, upon approval of the Department's Chief Information Officer, release the electronic information.

IX. FEES

A. Copies of Paper Records: The Public Records Custodian may charge reasonable fees for copying public records, payable in advance, and, upon request, shall provide a receipt. NMSA 1978, § 14-2-9.B. Unless a different fee is otherwise prescribed by law or regulation, the following fees apply to producing copies of paper records.

- (1) 8 ½" x 11" - \$0.25 per page
- (2) 8 ½" x 14" (1 to 99 copies) - \$0.30 per page
- (3) 8 ½" x 14" (100 to 499 copies) - \$0.60 per page in excess of 99
- (4) 8 ½" x 14" (500 or more copies) - \$1.00 per page in excess of 499
- (5) 11" x 17" (1 to 99 copies) - \$0.35 per page
- (6) 11" x 17" (100 to 499 copies) - \$0.70 per page in excess of 99
- (7) 11" x 17" (500 or more copies) - \$1.00 per page in excess of 499

B. Audio tape reproduction: \$2.00 per tape if copied by the Department; if the Department does not have the capability to copy the tape with reasonable audio quality, the Department may charge the cost required to have the tape copied by an outside service.

C. Printed Copies of Records from Department Electronic Information Systems: Information contained in an electronic information system shall be disclosed in printed or typed format upon payment of a reasonable fee. NMSA 1978, §14-3-15.1.A. If an Inspection of Public Records Act request requires searching, manipulating, retrieving or reviewing data from an electronic information system, a fee shall be charged for the service. NMSA 1978, §14-3-15.1.F.

1 For requests resulting in less than 100 pages of records, the Department's reasonable fee shall be the copy cost set forth in Section IX.A. If the Department receives multiple requests

from the same or related requestors, the Department may aggregate the requests and charge a fee under Section IX.C.2.

2. For requests of 100 or more pages of records, a reasonable fee shall be the actual staff salary multiplied by the staff time taken to complete the request plus the copy cost set forth in Section IX.A. For requests of 100 pages or more from information systems databases, the Department shall provide an estimate to the requestor and may require a down payment of the estimate before beginning to retrieve records. The Department may charge additional down payments as documents are retrieved and produced.

D. Electronic Format of Electronic Information: If an Inspection of Public Records Act request requires searching, manipulating, retrieving or reviewing data from an electronic information system, a fee shall be charged for the service. NMSA 1978, §14-3-15.1.F. The fee to produce information in electronic format is the actual staff salary multiplied by the staff time taken to complete the request.

E. Prints from digital images: 5" x 7" or 8" x 10" - \$15.00 (ea.).

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