August 23, 2007 Applicability of the Inspection of Public Records Act

The Honorable Patrick H. Lyons
Commissioner of Public Lands
P.O. Box 1148
Santa Fe, NM 87504-1148

Re: Opinion Request - Applicability of Inspection of Public Records Act

Dear Commissioner Lyons:

You asked for our advice regarding the applicability of the Inspection of Public Records Act, NMSA 1978, §§ 14-2-1 to -12 (1947, as amended through 2005) ("IPRA"), to certain records maintained by the State Land Office. In particular, your inquiry stems from a request from a newspaper reporter for access to commercial lease files containing appraisals, interoffice memoranda, field reports and attorney-client documents. As discussed below, we conclude that unless documents contained in the commercial lease files are protected from disclosure by law or legally recognized countervailing public policy, they must be made available in response to an inspection request under IPRA.

Under IPRA, "[e]very person has a right to inspect any public records," except those described in IPRA. NMSA 1978, § 14-2-1. In addition, New Mexico courts have adopted a "rule of reason" that allows a public body to deny access to public records when there is a "countervailing public policy" against disclosure. State ex rel. Newsome v. Alarid, 90 N.M. 790, 797, 568 P.2d 1236 (1977).[1] A countervailing public policy will justify nondisclosure only in rare instances where the harm to the public interest from allowing inspection of a record outweighs the public's right to know. Id. at 798. Because of New Mexico's clear policy in favor of public access to the workings of government and, in addition, the potential financial consequences to a public body that improperly denies access to its records, public bodies should rely on countervailing public policy to deny an inspection request only when it is "necessary under the circumstances, clearly outweighs the public's interest in inspecting the records and is likely to be recognized as valid by the courts." New Mexico Attorney General's IPRA Compliance Guide, p. 26 (4th ed. Jan. 2004) ("IPRA Guide").

IPRA covers all "public records," which are broadly defined as:

> all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained.

NMSA 1978, § 14-2-6(E). Thus, the State Land Office must make records contained in commercial lease files it maintains available for inspection upon request, unless they

are excepted under IPRA. IPRA lists eleven specific exceptions from the inspection right, NMSA 1978, §§ 14-2-1(A)(1)-(11), followed by a twelfth "catch-all" provision that excepts records "as otherwise provided by law." § 14-2-1(A)(12). The first eleven exceptions do not appear to cover the records in the commercial lease files, as you describe them. As a result, we need only determine whether the records are "otherwise" protected by law under the twelfth exception or by countervailing public policy.

Appraisals

By statute, records of the State Land Office generally are accessible to the public. NMSA 1978, Section 19-1-21 (1971) provides, in pertinent part: "When requested to do so, the commissioner shall furnish copies of any records, plats, including but not limited to maps, tracings, graphs, recordings tapes, machine printouts and other documents or instruments constituting records of the state land office…." Nothing in the statutes governing the sale or lease of state trust lands appears to expressly or impliedly allow the Commissioner to deny requests to inspect appraisals under IPRA.[2]

In addition, we have not found any judicially-recognized countervailing public policy outweighing the public's right to inspect appraisals maintained by the State Land Office. To the contrary, other states' courts reviewing the issue under laws similar to IPRA generally uphold the public's right to inspect appraisals maintained by government bodies. See, e.g., Gannett Co., Inc. v. Goldtrap, 302 So.2d 174 (Fla. Dist. Ct. App. 1974) (written appraisal obtained by county in connection with negotiations for proposed landfill site was a public record not protected from disclosure by statute or under common law); City of Chester v. Getek, 572 A.2d 1319 (Pa. Commw. Ct. 1990) (appraisals done on properties acquired by city for construction of recycling center were public records subject to disclosure). Accordingly, we conclude that IPRA requires the State Land Office to make appraisals available for inspection upon request.[3]

Interoffice Memoranda

Interoffice memoranda prepared by or on behalf of a public body, such as the State Land Office and relating to public business are public records for purposes of IPRA. New Mexico has no law protecting a record created or held by a public body merely because it is an internal or interoffice memorandum. Accordingly, unless an applicable exception or countervailing public policy protects their contents, interoffice memoranda contained in commercial lease files maintained by the State Land Office generally must be made available for public inspection.

As discussed above, no law or countervailing public policy specifically protects property appraisals from disclosure. Under limited circumstances, however, the considerations underlying executive privilege may provide a sufficient countervailing public policy to justify denying access to information in internal memoranda and other records that are preliminary to the final appraisals. Executive privilege is a court-recognized privilege for recommendations and advice by members of an executive agency as part of the agency's internal decision- or policy-making process. See State ex rel. Attorney General

v. First Judicial Dist. Ct., 96 N.M. 254, 629 P.2d 330 (1981); IPRA Guide, pp. 23-24. The privilege is not absolute, id. at 258, and does not protect internal documents and other materials simply because they relate to an inchoate or undeveloped policy or decision. A state agency seeking to protect records or portions of records based on executive privilege must be able to demonstrate that public disclosure will inhibit or compromise the agency's decision-making process. IPRA Guide, p. 24.

We are not aware of any reported New Mexico case that applies executive privilege to a request to inspect public records under IPRA. Cases from other states suggest that a public body that relies on the privilege to protect information collected and used to value property is unlikely to prevail if challenged in court. See, e.g., Gold v. McDermott, 347 A.2d 643 (Conn. Super. Ct. 1975) (allowing inspection of raw valuation data and assessment data compiled by city for revaluation of taxable properties where no statutory exception applied and city assessor failed to show that "the request for inspection will impede the expeditious transaction of public business").[4]

Field Reports

We understand that field reports maintained by the State Land Office are prepared by Office employees who inspect state trust land and recommend it for sale, exchange or lease. A typical report includes the technical aspects of the property, including improvements and valuation of improvements, and the inspector's commentary and opinion regarding the appropriate disposition of the property.

The field reports are public records covered by IPRA. Accordingly, like the appraisals and interoffice memoranda discussed above, the field reports must be made available for inspection upon request, absent an applicable exception. There appears to be no law allowing the State Land Office to deny inspection of the field reports. There also appears to be no countervailing public policy that generally outweighs the public's right to disclosure of the field reports and supports a blanket denial of access to the reports.

Our conclusion that the field reports are public records open to inspection under IPRA is bolstered by cases from other states reviewing similar records. For example, Massachusetts' highest court determined that field assessment cards prepared by a private contractor to assist a city board of assessors in reassessing real property within the city were public records subject to disclosure. See Attorney General v. Board of Assessors, 378 N.E.2d 45 (Mass. 1978). According to the decision in that case, employees of the private contractor "inspected the properties, collected relevant data, and recommended valuations. The details, physical and financial, together with the inferences drawn from them," were recorded on the field assessment cards. Id. at 45. After reviewing the arguments pro and con, the court held that the field assessment cards were public records available for disclosure to the public. Id. at 47. See also Menge v. City of Manchester, 311 A.2d 116 (N.H. 1973) (field record cards containing detailed information used to assess real property, including "ownership of land, whether it is rental property, property factors (topography, improvements, trend of the district), type of occupancy, construction, computations as to how the value was arrived at, and a

sketch of the property" were public records subject to disclosure); Hearst Corp. v. Hoppe, 580 P.2d 246 (Wash. 1978) (county assessor files containing field appraisers' work notes and information relevant to determining market value for appraisal were public records subject to inspection and copying under Washington Public Disclosure Act).

Attorney-Client Documents

Like the other materials contained in the commercial lease files, attorney-client documents are "public records" under IPRA. However, in contrast to the other materials, the attorney-client documents may be protected from disclosure under Section 14-2-1(A)(12) of IPRA, the "otherwise provided by law" exception. In particular, Rule 11-302 of the New Mexico Supreme Court Rules of Evidence provides an evidentiary privilege that protects from disclosure communications between a lawyer and a client "made for the purpose of facilitating the rendition of professional legal services to the client." If an attorney-client document maintained by the State Land Office qualifies for the privilege, the document may properly be withheld from inspection.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

ELIZABETH A. GLENN, Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General

[1] The rule of reason approach to requests to inspect public records was adopted in Newsome primarily because in 1977, when the case was decided, IPRA did not have a definition of "public records." See Newsome, 90 N.M. at 797. The current definition of "public records" was added to IPRA in 1993; nevertheless, the rule remains viable as shown by subsequent decisions by New Mexico courts affirming and applying the rule. See City of Las Cruces v. Public Employees Labor Relations Bd., 121 N.M. 688, 691, 917 P.2d 451 (N.M. 1996); Board of County Comm'rs v. Las Cruces Sun-News, 2003-NMCA-102, 11, 134 N.M. 283, 288, 76 P.3d 36.

[2] NMSA 1978, Section 19-1-2.1 requires the State Land Office to hold confidential the "provisions of any confidential contract, reserve data or other confidential information required to be submitted under any lease or rule or regulation of the commissioner of public lands, and which is clearly marked as confidential by the person from whom submission is required…." On its face, this requirement does not appear to apply to the materials described in your inquiry.

[3] Of course, if an appraisal contained tax information, trade secrets or other information that is confidential under New Mexico law, the State Land Office could redact that information before making the appraisal available for inspection. See Ariz. Att'y Gen. Op. No. I90-052 (1990), 1990 WL 484065 (portions of appraisal report created by Arizona state land department that are confidential under state statutes should be redacted and the remainder of the report released for public inspection). See also La. Att'y Gen. Op. No. 78-1371 (1978), 1978 WL 32497 (appraisals of property subject to eminent domain are public records unless they were prepared in anticipation of litigation and protected under discovery rules).

[4] Other out-of-state judicial decisions have considered the applicability of statutory exceptions based on executive privilege to public records similar to the commercial lease files maintained by the State Land Office. Their conclusions vary depending on the language used in the particular statute, but generally support public disclosure. See, e.g., Attorney General v. Board of Assessors, 378 N.E.2d 45, 46 (Mass. 1978) (statutory exceptions for "inter-agency and intra-agency memoranda or letters relating to policy positions being developed by the agency…." and materials constituting "an unwarranted invasion of personal privacy" were "conceivably … pertinent," but ultimately "irrelevant" to court's holding that field assessment cards used to assess real property were public records); Hearst Corp. v. Hoppe, 580 P.2d 246, 251-52 (Wash. 1978) (statutory exemption for "[p]reliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended…" did not apply to folios containing notes and information used for real property appraisals, even though some of the data consisted of subjective evaluations). But see David v. Lewisohn, 535 N.Y.S.2d 793, 796 (N.Y. App. Div. 1988) (statutory exception from New York's Freedom of Information Law for "intraagency and interagency materials which are not statistical or factual tabulations or data, instructions to the staff that affect the public, or final agency policy or determination" covered "significant/insignificant" notations contained in sales data listings city provided to state board of equalization), appeal denied, 545 N.E.2d 868 (N.Y. 1989).