

POLICY AND PROCEDURE

INSPECTION OF PUBLIC RECORDS AND RECORDS MANAGEMENT REQUIREMENTS FOR ELECTRONIC MESSAGING

SUBJECT: Inspection of Public Records Policy and Records Management Requirements for Electronic Messaging.

PURPOSE: To establish a uniform procedure for responding to requests to inspect public records kept by the New Mexico Public Regulation Commission (“Commission or “NMPRC”), and set procedures for records management for electronic messaging by the Commission.

APPLICABILITY: All public records of the Commission.

POLICY: The Commission shall implement the provisions of the Inspection of Public Records Act to provide access by the public to Commission public records in accordance with the Inspection of Public Records Act. The Commission shall implement the provisions of the Records Management for Electronic Messaging Rule 1.13.4 NMAC.

REFERENCES: Inspection of Public Records Act, NMSA 1978, §§ 14-2-1 to -12; Public Records Act, NMSA 1978, §§ 14-3-1 to -25. In addition, the State Commission of Public Records and State Records Administrator’s Rules 1.13.2 NMAC, entitled Fees; 1.13.3 NMAC, entitled Management of Electronic Records; and 1.13.4 NMAC, entitled Records Management Requirements for Electronic Messaging; are incorporated herein by reference and made a part hereof in their entirety.

PROCEDURES:

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- III. Public Records Custodians
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I. SCOPE:

This policy prescribes procedures for making Commission 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 Commission shall treat all “Freedom of Information” requests as requests under the Inspection of Public Records Act.

II. DEFINITIONS: As used in this policy:

- A. **Commission public records" or "public records"** are all documents, papers, letters, books, maps, tapes, photographs, recordings, e-mail, texts, and documents from electronic information systems (databases) and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of the Commission and that relate to Commission business, whether or not the records are required by law to be created or maintained. Commission public records do not include records such as:
1. Records that do not relate to a public body's business and are voluntarily kept by employees for their personal use;
 2. Publicly available books, periodicals or other publications that are owned, distributed or copyrighted by non-Commission sources; or
 3. Any records that are exempt from the Act, as provided in Section VI, below.
 4. Any "non records" as defined below, adopted definition from 1.13.4.7.F NMAC
- B. **"Electronic records"** 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. Quote from 1.13.3.7.P NMAC
- C. **"Electronic message"** includes, but is not limited to, a text message, social media and e-mail that is created and delivered in an electronic format. Quote from 1.13.4.7.D NMAC
Electronic records include, but are not limited to, information contained within databases and e-mail systems and cell phone text messages.
- D. **"Information system"** means an electronic framework by which hardware and software resources are coordinated to manipulate and convert inputs and outputs in order to achieve the objective of an enterprise. Quote from 1.13.3.7.U NMAC.
- E. **"Non-record"** means extra copies of documents kept solely for convenience of reference, stocks of publications, transitory records, records not usually included within the scope of the official records of an agency or government entity and library material intended only for reference or exhibition. The following specific types of materials are non-records: materials neither made nor received in pursuance of statutory requirements nor in connection with the functional responsibility of the officer or agency, extra copies of correspondence, preliminary drafts, blank forms, transmittal letters or forms that do not add information, sample letters, and informational files. Quote from 1.13.4.7.F NMAC.
- F. **"Social media"** means forms of electronic communication through which users create online communities to share information, ideas, messages and other content (e.g., twitter, facebook, instagram, pinterest, linkedin, etc.). Quote from 1.13.4.G. NMAC.
- G. **"Transitory"** means messages which serve to convey information of temporary importance in lieu of oral communication. Transitory messages are only required for a limited time to ensure the completion of a routine action or the preparation of a

subsequent record. Transitory messages are not required to control, support or to document the operations of government. Quote from 1.13.4.H NMAC.

- H. **"Public Records Custodian"** also referred to as the Commission 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.
- I. **"Uncommon"** requests means any request to inspect public records that differs from those requests normally received. By way of example, but not of limitation, this includes requests from the media involving sensitive issues; requests concerning ongoing litigation in which the Commission is involved; requests from or related to public officers; 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 exempt records; requests for data contained within an electronic information system; requests for information in electronic form and requests that require a significant expenditure of resources.
- J. **"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. Other unusual circumstances beyond the control of the Public Records Custodian that could cause delay; and 4. Any other broad and burdensome request as provided by the Act.

III. COMMISSION PUBLIC RECORDS CUSTODIAN:

- A. The Chief of Staff, upon the recommendation of the Commission, shall appoint the Commission Public Records Custodian, who is an employee of the Commission. If the Commission Public Records Custodian receives a request for public records, he/she shall immediately upon receiving the request shall: a) forward the request to the Office of General Counsel, the Chief of the Legal Division, the Chief of Staff, and any other Commission employee or Commissioner that may possess public records that may be responsive to the request; b) determine whether the requested public records exist, and if so, whether the documents are exempt pursuant to Section VI; c) make the public records available for inspection; and d) provide reasonable facilities to make or furnish copies of the public records during usual business hours.

IV. PUBLIC RECORDS REQUESTS:

- A. Any person may request orally or in writing, including e-mail, to inspect the Commission's public records. The request does not need to be submitted on the official Commission Inspection of Public Records Form, although it is encouraged for record keeping purposes. Requests to inspect public records shall be directed to the Commission Public Records Custodian.
- B. The request must describe the public records sought with reasonable particularity or identify the public record in sufficient detail to enable Commission 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, telephone number and email address of the person seeking access to the public records. The request does not need to state the reason for the request.
 2. If the Commission determines that a request does not describe the public records sought with reasonable particularity, the Commission shall advise the requestor and may request additional information. The Commission also may extend to the requestor an opportunity to confer with Commission personnel in order to reformulate the request in a manner that will meet this requirement.
- C. The Commission Inspection of Public Records Form is attached to this policy.

V. RESPONDING TO REQUESTS:

- A. Commission employees receiving requests to inspect public records shall promptly forward the request to the Commission Public Records Custodian. The Commission Public Records Custodian shall, as soon as practicable under the circumstances, ensure non-exempt Commission 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.
- B. If the inspection is not able to be permitted within 3 days, the Commission Public Records Custodian shall prepare a letter explaining that more time is needed and the date the request will be satisfied. Unless **unusual circumstances exist, or it is an uncommon request**, as defined in this policy, the 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. If the Public Records Custodian determines that a request is **uncommon or unusual circumstances exist**, as defined by this policy, the Office of General Counsel shall be informed before processing the request.
- C. If a request seeks an unusually voluminous amount of documents or is excessively burdensome or broad or the request is **uncommon** or where other **unusual circumstances** exist, the Commission Public Records Custodian shall, as soon as the voluminous or excessively broad and burdensome nature of the request is determine, but no later than 15 days after the request is received, notify the requestor in writing that additional time beyond the 15-day period for inspection will be needed to respond. The Public Records Custodian shall briefly describe the circumstances that cause the request to be excessively burdensome or broad, and approximate an amount of time that will be needed to respond. The Public Records Custodian shall ensure that the request is responded to within a reasonable period of time under the circumstances.
- D. Prior to providing a response to an uncommon or unusual circumstance or broad and burdensome request, the Commission Public Records Custodian shall communicate to the requester an approximate fee that the requester will be required to pay to the Commission in advance of the Commission making copies of responsive documents. The requester shall respond with an agreement to pay the fee in advance or with a notification that the requester will come to the Commission to inspect the records in person.
- E. The written response provided by the Public Records Custodian, for any type of public records request, 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. The inspection may take place at the Commission. 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 email or other reasonable delivery method, without first inspecting the records. If the records request has been submitted by an attorney or law firm, or regards pending or anticipated litigation, or regards a Commissioner, or regards a sensitive issue, the Office of General Counsel shall be informed and provided with the opportunity to review the requested documents in advance of inspection by the requestor

- F. If the Commission does not possess the records sought, the Commission Public Records Custodian shall notify the requestor. Then, the Commission Public Records Custodian shall promptly forward the request to the custodian of the records in another agency or public entity. The notification to the requestor shall state the reason for the absence of the records from the Commission's custody or control and shall notify the requestor of the records' location, if known, and the name and address of the custodian.
- G. The Public Records Custodian shall keep a Public Information Log to document oral requests for Public Information. Oral requests shall be treated in the same manner as written requests.
- H. The 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 Commission staff, but copied at the requestor's expense. In addition, a requester may, if inspecting records at the Commission, may use their own copy machine or smart phone or camera to make a copy or photograph of the document. Original public records may not be released to the requestor for copying purposes, but may only be released to a private copy facility with instructions to that facility to release the records back only to the Commission. 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, the 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 Commission's Release of Public Information in Electronic Format form attached to this policy. The Public Records Custodian shall follow the procedure found in Section VII after it has been determined that there are or may be documents that are exempt from production.
- B. The following are some of the more frequently requested records that are exempt from the Act records which shall not be released—this is not an exclusive list of exempt records:
 - 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. Personnel records containing subjective (nonfactual) matters of opinion, including but not limited to, letters of reference, 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. Records that are maintained by the Commission under a confidentiality agreement, as provided by the Public Utility Act, NMSA 1978, Section 62-6-17 or a Protective Order issued by the Commission in a docketed matter, or as provided by the Confidential Materials Act, NMSA 1978, Sections 14- 3A-1 to -2 or the Uniform Trade Secrets Act;

6. Attorney advice, attorney opinions or attorney work-product protected by the attorney-client privilege or attorney work product;

7. "Protected personal identifier information" which: "means (1) all but the last four digits of a: (a) taxpayer identification number; (b) financial account number; or (c) driver's license number; (2) all but the year of a person's date of birth; and (3) a social security number;" Section 14-2-6 NMSA 1978.

8. Any other records that are deemed exempt under federal or state law.

VII. DENIAL AND REFERRAL OF REQUESTS:

A. If, as a result of the review of a request, the Commission Public Records Custodian determines that disclosure of the Commission records should be denied in whole or in part, the Public Records Custodian shall submit that determination to the General Counsel or a Commission attorney designated by the General Counsel, who will make an independent determination. If the General Counsel or Commission attorney determines that the Commission records sought are exempt from disclosure, the Commission Public Records Custodian, in consultation with the Commission attorney, shall notify the requestor of the determination in the manner provided in Section VII(B) below.

B. If a written request is denied, the Commission Public Records Custodian in consultation with the Commission attorney shall provide the requestor with a written denial. The written denial shall:

1. Describe the records sought;

2. 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 AND RECORDS MANAGEMENT REQUIREMENTS FOR ELECTRONIC MESSAGING:

A. For requests for electronic records, including information stored within the Commission information systems (databases), the Commission's Release of Public Information in Electronic Format Form must be completed and submitted to the Commission Public Records Custodian. For further information on electronic records, please see 1.13.3 NMAC (Management of Electronic Records).

B. Pursuant to NMSA 1978, § 14-3-15.1(C), the Commission may authorize a copy to be made of a computer¹ tape or other medium containing a computerized database of a

¹ 1.13.3.7.F NMAC defines "computer" as including work and personal cell phones, used for public business that create public records as follows: "means an electronic device designed to accept data (input), perform prescribed mathematical and logical operations at high speed (processing) and supply the results of these operations (outputs). This includes, but is not limited to, mainframe computers, minicomputers, and microcomputers, personal

public record for any person if the requestor agrees, through the Release of Public Information in Electronic Format form:

1. not to make unauthorized copies of the database;
2. not to use the database for any political or commercial purpose unless the purpose and use is approved in writing by the state agency that created the database;
3. not to use the database for solicitation or advertisement when the database contains the name, address or telephone number of any person unless such use is otherwise specifically authorized by law;
4. not to allow access to the database by any other person unless the use is approved in writing by the state agency that created the database; and
5. to pay a royalty or other consideration to the state as may be agreed upon by the state agency that created the database.

C. RECORDS MANAGEMENT REQUIREMENTS FOR ELECTRONIC

MESSAGING: To comply with the Public Records Act, Section 14-3-1 et seq. NMSA 1978, electronic messages must be managed pursuant to established record retention and disposition schedules adopted by the commission and published in 1.21.2 NMAC, Retention and Disposition of Public Records. The Commission has determined that the official copy of an electronic message is either an electronic message received from an outside source into the inbox of a Commission employee's computer, the sender's copy or the final electronic message of a thread discussion. Electronic messages that are classified as a public record, either sent or received from: a) a computer outside a state electronic messaging system; b) a state owned smart phone used for public record messaging; or c) a personally owned smart phone that is used for public record messaging, shall be transferred² to the Commission's records management system for proper retention and disposition. Non-records are not required to be retained by an agency and regular deletion should be included in an agency's procedure for management of electronic messages. Electronic systems used to manage electronic messages shall ensure that messages and attachments classified as public records are maintained in their native format until their final disposition and can be accessed, retrieved and read. Electronic messages and attachments that are classified as public records are subject to the provisions in 1.13.10 NMAC, Records Storage and Access and 1.13.30 NMAC, Disposition of Public Records and Non-Records. Electronic messages and attachments, classified as public records, shall not be destroyed without the prior written approval of the state records administrator (1.13.30 NMAC, Disposition of Public Records and Non-Records). Electronic messages potentially relevant to a pending audit, investigation or litigation shall be preserved, even if the retention period has been met. An electronic message that is legally confidential should be marked as confidential.

computers, portable computer, pocket computer, tablet computer, telephones capable of storing information, PDAs, smart phones and other devices.”

² “Transferred to the Commission's records management system” means performing one of the following: i) can forwarding the electronic message to a state computer or to a state electronic messaging system or ii) syncing the state owned smart phone or personal smart phone or computer outside a state electronic messaging system with a state computer or state electronic messaging system.

IX. FEES: 1.13.2 NMAC Fees Rule, is incorporated herein by reference, and made a part hereof.

A. Copies of electronic records or electronic conversion of paper records: The Public Records Custodian may charge reasonable fees for copying electronic public records or converting paper public records into electronic pdf format, payable in advance, and, upon request, shall provide a receipt. NMSA 1978, § 14-2-9.B. Fees shall be remitted by either money order or check made out to “New Mexico Public Regulation Commission” or “State of New Mexico.” Unless a different fee is otherwise prescribed by 1.13.2 NMAC, entitled Fees for public records, the following fees apply to producing copies of electronic records, to paper records and to scanning paper records and making them into pdf files for electronic delivery.

(1) 8 ½ x 11" - \$0.25 per page

(2) 8 ½ x 14" - \$0.30 per page

(3) 11" x 17" - \$0.35 per page

(4) portable document format file (pdf) from any source --\$0.25 per page. pdf files can be sent electronically at \$0.25 per page. Sending pdfs by email may be at no charge for the email but there is still a charge for # of pages or #pdf files.

Additionally pdfs can be transferred to a CD at the cost of \$0.25 per blank CD plus \$0.25 per page on the CD. CDs shall be provided by the Commission at \$0.25 per CD. External drives are prohibited. 1.13.2.17 NMAC.

B. Audio tape or digital recording reproduction from digital/video audio file: \$15.00 plus \$0.25 to place audio onto a CD purchased from the Commission. 1.13.2.13.C NMAC.

C. Printed Copies of Records from Commission 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 Commission's reasonable fee shall be the copy cost set forth in Section IX.A. If the Commission receives multiple requests from the same or related requestors, the Commission 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 Commission shall provide an estimate to the requestor and may require a down payment of the estimate before beginning to retrieve records. The Commission 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. Emails and text messages shall be converted into pdf format to preserve the integrity of the document.
- E. Prints on photo quality paper from digital images: 5" x 7" or 8" x 10"- \$17.00 (ea.). For all other types of digital reproduction of photographs, documents, oversized records and moving image material, see 1.13.2.13 NMAC.