City of Santa Fe, New Mexico

200 Lincoln Avenue, P.O. Box 909, Santa Fe, N.M. 87504-0909
www.santafenm.gov

Javier M. Gonzales, Mayor

Councilors:
Signe I. Lindell, Mayor Pro Tem, Dist. 1
Renee Villarreal, Dist. 1
Peter N. Ives, Dist. 2
Joseph M. Maestas, Dist. 2
Carmichael A. Dominguez, Dist. 3
Christopher M. Rivera, Dist. 3
Ronald S. Trujillo, Dist. 4
Mike Harris, Dist. 4

The Honorable Hector Balderas
Office of the Attorney General
408 Galisteo Street
Santa Fe NM 87501

Attn: Patricia Salazar

Dear Attorney General Balderas:

I am writing to ask for clarification regarding your office's Inspection of Public Records Act Compliance Guide ("Compliance Guide") and NMSA 1978, Section 14-2-1(A)(3) ("matters of opinion").

As Mayor I have worked hard to cultivate a culture of accountability among city employees – to each other as well as to the public, for whom we all work. And because I have seen them consistently and honestly hold employees to a high standard of accountability, I know that value is widely shared by senior staff including the hard-working attorney's in the City Attorney's Office (CAO), the City Manager, and the Deputy City Manager.

However, in too many instances, we are not able to share these stories with the public in a way that respects our employees' rights to due process under the law, protects the taxpayer from expensive employment lawsuits, and at the same time reassures the public that we are working for them in a way they can trust. Too often, we let the public think the worst, because we are limited in what we can reveal.

As a result, I believe the current stance has limited our ability as a city to provide accountability and transparency to the public. As I understand it, the City Attorney's Office (CAO) position is based on legal propositions found in the Compliance Guide, IPRA, Constitution, and case law . I am requesting a clarification regarding the legal requirements of the City of Santa Fe to provide records regarding Internal Affairs investigations and disciplinary actions against police officers when requested via IPRA.

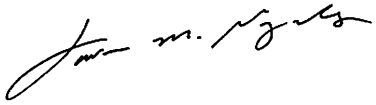
As it has been laid out in discussion with our Attorney's office, the counterpoint to the CAO view asserts that terms of discipline, including the rationale and the penalty, are public

information, that Section 14-2-1(A)(3) does not exempt factual statements, and that terms of discipline are factual statements. This conclusion is based on language in Example 10 from the Compliance Guide: "However, factual information in the file concerning salary, annual leave or conflicts of interest is not similarly protected." (IPRA Guide, 8th ed., p. 10, example 10).

Specifically, I hope the Attorney General's Office will provide clarification regarding Section 14-2-1(A)(3) and perhaps that decision may provide more flexibility in releasing information about our work to hold employees to a high standard of accountability and public trust.

Below, I am enclosing a summary legal argument provided by the CAO supporting its position that Internal Affairs investigations and disciplinary actions are not subject to inspection under IPRA.

Sincerely,



Javier M. Gonzales
Mayor
City of Santa Fe

CAO's Legal Argument

IPRA's declaration of policy states that it is the public policy of New Mexico "that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees." §14-2-5, NMSA 1978. However, not all records of the State are subject to inspection. The statute expressly exempts twelve categories of records from disclosure. §14-2-1(A), NMSA 1978. The police department internal affairs investigations and disciplinary actions are exempt from disclosure under the "matters of opinion" exemption in §14-2-1(A)(3), and the law enforcement exemption of §14-2-1(A)(4). Further, they are exempt pursuant to the exemption in §14-2-1(12), "as otherwise provided by law," as the disclosure would impact and impair the constitutional rights of police officers.

1. Matters of Opinion Exemption, §14-2-1(A)(3).

The seminal opinion interpreting this exemption under IPRA is *Newsome v. Alarid*, 90 N.M. 790, 568 P.2d 1236 (1977). The Supreme Court in Newsome explained the basis for the matters of opinion exemption in documents in personnel files as follows:

> The Legislature quite obviously anticipated that there would be critical material and adverse opinions in letters of reference, in documents concerning disciplinary

> action and promotions and various other opinion information that might have no foundation and fact but, if released for public view, could be seriously damaging to an employee.

Id. at 794, 1240.

As noted in the Compliance Guide, "A more recent case similarly interpreted the exception to cover matters of opinion related to the working relationship between an employer and employee such as internal evaluations; disciplinary reports or documentation; promotion, demotion, or termination information, and performance assessments." IPRA Compliance Guide, 8th ed. at 9, citing *Cox v. New Mexico Dept. of Pub. Safety*, 2010-NMCA-096, ¶ 22. In an unpublished opinion, the Court of Appeals held: "The record before us reflects that the documents in question were created for the purpose of conducting internal disciplinary proceedings. This is sufficient to establish that the documents concern disciplinary action, such that they were properly withheld." *Leirer v. New Mexico Dep't of Pub. Safety*, 2016 WL 3958959, at 1 (N.M. Ct. App. June 7, 2016)(internal citations omitted).

Internal affairs investigations contain the opinions of the investigator regarding conduct of police officers under investigation. Although the internal affairs investigation report is not "in personnel files," such investigations do implicate personnel matters of City employees and so they constitute personnel related opinions falling under the rationale articulated by the Supreme Court in *Newsome*.

"[T]he location of a record in a personnel file is not dispositive of whether the exception applies; rather, the critical factor is the nature of the document itself." *Cox*, 2010-NMCA-096, ¶ 21. Likewise, the internal affairs investigative interviews of witnesses contain matters of opinion of the interviewee about the conduct of the officers under investigation, and should be deemed exempt from disclosure under IPRA.

The purpose of police department internal affairs investigations is to maintain internal discipline, departmental integrity, and to encourage citizens to freely express concerns of misconduct, malfeasance, or other inappropriate conduct of police officers. Both the complainant and the target are informed that the investigation will be kept confidential. If a complainant's identity and statement is disclosed to the public, this could prevent a candid reporting of the perceived misconduct, and impair the department's ability to maintain effective and just law enforcement.

2. <u>Law Enforcement Exemption Under §14-2-1(A)(4)</u>.

These records also enjoy exemptions from public inspection pursuant to §14-2-1(A)(4), NMSA 1978, which exempts specifically:

> Law enforcement records that reveal confidential sources, methods, information or individuals accused but not charged with a crime. Law enforcement records include evidence in any form received or compiled in connection with any criminal investigation or prosecution by any law enforcement or prosecuting

agency, including inactive matters or closed investigations to the extent that they contain the information listed in this paragraph;

Internal affairs investigations are law enforcement records, as it was compiled by an investigator for the Santa Fe Police Department for the purpose of investigating and analyzing potential misconduct or illegal activity of Santa Fe Police officers. The allegations therein relate to officers who have been accused, but not charged with any crime. Taped interviews of witnesses and their transcripts are "evidence in any form . . . compiled in connection with . . . prosecution by any law enforcement . . . agency". The New Mexico Supreme Court has determined that "the IPRA exception for law enforcement records in a criminal investigation is illustrative of a vitally important public policy concern, leading to immunity from discovery for some police investigative materials in civil litigation." *Estate of Romero v. City of Santa Fe*, 2006-N.M.S.C. 028, ¶18, 139 N.M. 671, 678. The *Romero* court was considering a request for documents in the context of discovery in civil litigation, and not in the context of a request for public records. However, that decision clearly underscored the importance of confidentiality for law enforcement investigatory records, and refused to order their disclosure absent an *in camera* review.

Similarly, the Court of Appeals has refused to treat police internal affairs investigative files as public record. In *State v. Pohl*, 89 N.M. 523, 554 P.2d 984 (Ct. App. 1976), the criminal defendant moved to discover internal affairs investigations concerning allegations of police brutality against the arresting officer. The trial court denied the defendant's discovery motion and denied his request for *in camera* inspection of the files to determine relevancy. The Court of Appeals affirmed, but remanded for *in camera* review to determine whether the arresting officer's files contained any material matters to the defense.

Since the *Pohl* decision, criminal defendants in New Mexico have been able to obtain internal affairs investigation files only through the safeguard of the *in camera* inspection procedure. However, where a criminal defendant has not shown a specific need to have such a record reviewed *in camera*, the request has been denied. *See State v. Roybal*, 115 N.M. 27, 846 P.2d 333 (Ct.App. 1992) (Defendant failed to make a requisite showing of need to inspect internal affairs files on one officer when he relied on a newspaper article suggesting that another officer had provided false information.) *cert denied*, 114 N.M. 550, 844 P.2d 130 (1992) *c.f. State v. Baca*, 115 N.M. 536, 854 P.2d 363 (Ct.App. 1993) ("we cannot determine whether the suppressed evidence was material to Defendants' claim of self-defense, but unlike *Pohl*, Defendants neither requested an *in camera* hearing nor showed 'a specific a need as could be expected under the circumstances'").

Courts routinely require that before internal affairs records are disclosed, a protective order is entered which prohibits further disclosure except as necessary for the litigation of the case. *Mason v. Stock*, 869 F.Supp. 828, 836 (D.Kan. 1994); *Beach v. City of Olathe, Kansas*, 203 F.R.D. 489, 495 (D.Kan. 2001). The Federal Courts in New Mexico likewise require protective orders for internal affairs files of police officers, and deny disclosure in certain circumstances after *in camera* review. *See* unreported opinions in *Mazzoni v. Morales*, et al., No. Civ. 07-432 LH/ACT, Jan. 7, 2008 (stipulated protective order for internal affairs files of

police officers in civil rights action, after *in camera* review, not ordered produced for lack of relevance); *Cardenas v. Fisher, et al.*, No. CIV 06-0936 JH/RLP, April 30, 2007 (stipulated protective order for internal affairs file of police officer in civil rights action, after *in camera* review not ordered produced for lack of relevance and based upon police officers' right to privacy*); Jones v. City of Albuquerque, et al.*, No. CIV 04-174 JH/LFG, Oct. 24, 2005 (internal affairs files and complaints against law enforcement officers ordered to be subject to a protective order, the terms of which required Plaintiff and his counsel to "hold . . . internal affairs files in the strictest of confidence, store the files securely, and use the files solely for the purposes of this litigation," return them, and destroy all copies at the conclusion of the case); and *Valles v. City of Albuquerque,* No. CIV 03-1171 BB/LFG, March 2, 2005, (request for production of internal affairs file of police officer denied for lack of relevance).

Clearly, if police internal affairs investigation files are subject to disclosure under IPRA, no *in camera* review is required, nor would there be a need for protective orders which limit the use and disclosures of such files.

3. Constitutional Rights of Officers.

Avoiding the disclosure of personal matters is a privacy interest which the United States Supreme Court recognizes. *Whalen v. Roe*, 429 U.S. 589, 598 (1977). Although it is unspecified in the federal constitution, the right to privacy is "within the penumbra of specific guarantees of the Bill of Right," including the Tenth Amendment to the Constitution of the United States. *Griswold v. Connecticut*, 381 U.S. 479 (1965). More specifically, law enforcement officers have a recognized expectation of privacy as to personal matters. *Denver Policemen's Protection Association v. Lichtenstein*, 660 F.2d 432, 435 (10th Cir. 1981). The privacy privilege is held by the employee and may be waived by them alone. *State ex rel Barber v. McCotter*, 106 N.M. 1, 738 P.2d 119 (1987).

The individual officers who are the subject of an internal affairs investigation enjoy constitutional rights to due process of law for deprivation of their liberty and/or property interests under the Fourteenth Amendment to the United States Constitution. *See Board of Regents v. Roth*, 408 U.S. 564, 570 92 S.Ct. 2701, 2705 (1972). In addition, the named officers are protected from intrusion into fundamental aspects of their personal privacy under the Fourteenth Amendment due process clause. *See Paul v. Davis*, 424 U.S. 693, 713, 96 S.Ct. 1155 (1976); *Stidham v. Peace Officer Standards and Training*, 265 F.3d 1144, 1155 (10th Cir. 2001).

The Tenth Circuit has stated a four part test to determine whether statements in government records violate a persons' liberty interest in his good name and reputation:

> First, to be actionable, the statements must impugn the good name, reputation, honor or integrity of the employee. Second, the statements must be false. Third, the statements must occur in the course of terminating the employer or must foreclose other employment opportunities. And fourth, the statements must be published. (Internal citations omitted.)

Workman v. Jordan, 32 F.3d 475, 480-481 (10th Cir. 1994).

The officers are entitled to a name clearing hearing under due process if they establish a violation of a liberty interest. *Workman v. Jordan* at 480. Because internal affairs investigation reports have always been held as confidential, not subject to production under IPRA, name clearing hearings are not provided by the City of Santa Fe with regard to any stigmatizing allegations made during such investigations. If an internal affairs investigation is held to be public record, individual officers could state a violation of their liberty interest under the due process clause of the Fourteenth Amendment for the City's failure to provide a name clearing hearing. *Buxton v. City of Plant City, Florida*, 871 F.2d 1037 (11th Cir. 1989); *Cox v. Roskelley*, 359 F.3d 1105 (9th Cir. 2004). Failure to provide a name clearing hearing for violation of a police officer's liberty interest has resulted in a jury award in excess of $250,000. *Palmer v. City of Monticello*, 31 F.3d 1499, 1508 (10th Cir. 1994).

A finding that internal affairs investigation files are public record would require due process hearings for all police officers charged with misconduct, even where no allegations of misconduct were substantiated. The public's right to know under IPRA is a statutory right, and cannot trump the federal constitutional rights of individual officers.

In addition, the statements by the individual officers under investigation are compelled under the threat of termination for failure to answer questions in the investigation. The United States Supreme Court has held that statements elicited as a result of a compelling choice between self-incrimination and loss of a public job are inadmissible in Court as impairing a person's rights under the Fifth Amendment to the United States Constitution. *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616 (1967). If the coerced statements of the police officers in internal affairs investigations are disclosed to the public, the officer's protection under *Garrity* would be eviscerated.

Based on this body of law, it is the CAO's position that internal affairs investigations and disciplinary actions are not subject to public inspection under IPRA.