INTEROFFICE CORRESPONDENCE

TO: Robert J. Perry, Chief Administrative Officer
FROM: David Tourek, City Attorney
RE: Disclosure of Disciplinary Action as a Public Record

Introduction

You have requested our opinion regarding whether the fact of the imposition of disciplinary action on City employees is considered a public record subject to disclosure under the Inspection of Public Records Act ("IPRA" or "Act"), NMSA 1978, Sections 14-2-1 to -12. Requests for this information are frequently made by the media and other sources.

As a preliminary matter, each inquiry regarding the IPRA "starts with the presumption that public policy favors the right of inspection. To overcome this presumption, a public entity seeking to withhold public records bears the burden of proving why their disclosure would be prejudicial to the public interest." See Board of Com'rs of Doña Ana County v. Las Cruces Sun-News, 2003-NMCA-102, ¶ 11, 134 N.M. 283, 76 P.3d 36. In addition, "Where there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed." State ex rel. Newsome v. Alarid, 90 N.M. 790, 797, 568 P.2d 1243 (1977).

Under the IPRA, "Every person has a right to inspect any public records of this state..." NMSA 1978, § 14-2-1(A) (1947 as amended through 2005). The Act defines a "public record" 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) (1993).

Based upon our examination of the relevant New Mexico statutes, opinions and case law authorities, and on the information available to us at this time, we have determined that the imposition of disciplinary action on a City employee are public records and may be disclosed subject to a request under the IPRA. This opinion is limited to the base fact of discipline and does not include other personnel information that may form the basis for discipline including
such items as internal evaluations, disciplinary reports or investigations, or performance assessments. Records such as these clearly fall within the "matters of opinion" exception contained in IPRA (Section 14-2-1(A)(3)) and would have to be evaluated on a case-by-case basis for any potential disclosure.

Analysis

At the outset, it is important to note that the location of a record in a personnel file is not dispositive of whether the "matters of opinion" exception applies. What the New Mexico courts have recently noted is that the critical factor is the nature of the document itself. *Cox v. New Mexico Dept. of Public Safety*, 2010-NMCA-96 ¶21, 148 N.M. 934, 242 P.3d 501 (2010). The Court in *Cox* noted in dicta that "To hold any matter of opinion could be placed in a personnel file, and thereby avoid disclosure under IPRA, would violate the broad mandate embodied in the statute." *Id.* The Court further noted that "...we conclude that the Legislature intended to exempt from disclosure "matters of opinion" that constitute personnel information of the type generally found in a personnel file, i.e. information regarding the employer/employee relationship such as internal evaluations, disciplinary reports or documentation; promotion, demotion, or termination information; or performance assessments." *Id.* Notably absent from this list is the mere fact of disciplinary action. It would appear from the analysis provided from both the *Cox* and *Newsome* cases that the bare fact that a specific employee has been disciplined would not be considered exempt under IPRA. This conclusion flows from the concept that discipline imposed is an objective fact that contains no subjective "matter of opinion".

This interpretation is consistent with the holding in *Newsome*. Specifically, the Court held in *Newsome*, 90 N.M. at 794, that "letters or reference, documents concerning infractions and disciplinary actions, personnel evaluations, opinions as to whether a person would be rehired or as to why an applicant was not hired, and other matters of opinion are also exempt from disclosure under the statute [IPRA]". The Court also held that "...a citizen has a fundamental right to have access to public records. Where there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed." *Id.* at 797. It is important to note that while the mere fact of discipline may not be exempt under IPRA, information or documents or even the nature of the infraction itself may well be exempt.

While not a binding court decision, the New Mexico Attorney General’s (NMAG) guidance on this subject should also be considered as persuasive. In *The Inspection of Public Records Act: A Compliance Guide for New Mexico Public Officials and Citizens*, p. 7 (6th ed. 2009) the NMAG discusses the general concept of exceptions under IPRA and notes that "...public entities should keep in mind that, although it [IPRA] excepts certain matters from the right to inspect, the Act should not be interpreted as requiring those matters to be kept as confidential. In other words, an agency may release a record covered by an exception if the agency determines that release would be appropriate and not in violation of any other law that specifically requires that the record be kept confidential." In discussing the "matters of opinion" exception in particular, the NMAG notes that "Factual information or other public information is not protected merely because it is kept in employee or student files." *Id.* at p. 9.
It should also be noted that while disclosure of the mere fact of discipline may not be a violation of IPRA, other implications from such disclosure should be noted. Initially, employees covered by a collective bargaining agreement (CBA) that contains a provision that matters contained in an employee’s personnel file may not be disclosed may claim that such disclosure would constitute a prohibited practice under the City’s Labor Management Relations Ordinance. Likewise, even if an employee were not covered by a CBA, there could be a claim that such disclosure would do substantial injury to the public interest by invading an employee’s constitutional right to privacy or liberty interest in his or her good name. Each of these potential claims should be considered individually.

As to the potential claim of violation of the CBA by disclosure of the fact of discipline, it should be noted that every contract, including a CBA, is negotiated against the backdrop of the law. As such, a negotiated contract cannot create a new or additional exception to IPRA. The NMAG has commented on this issue and stated that “…merely declaring certain documents to be confidential by regulation or agreement will not exclude them from inspection. To exclude a document from inspection, the custodian must be prepared to demonstrate, if necessary, that a specific limited exception applies.” (NMAG Guide at p. 7). This concept coupled with the notion that an exception does not create a requirement that a matter not be disclosed and that public policy favors disclosure would be the expected defenses to such a claim. In fact, the Newsome court noted that “The promise of confidentiality standing alone would not suffice to preclude disclosure.” Newsome, 90 N.M. at 798.

In determining whether disclosure of a public record would do substantial injury to the public interest by invading an employee’s constitutional right to privacy, courts have generally employed some sort of balancing test to determine whether or not the employee’s privacy interest outweighs the public interest in disclosure. See e.g. Denver Publishing Co. v. University of Colorado, 812 P.2d 682 (Colo. App. 1990). The factors generally considered in such a balancing test are: (1) whether the individual has a legitimate expectation of nondisclosure; (2) whether there is a compelling public interest in access to the information; and (3) where the public interest compels disclosure of otherwise protected information, how disclosure may occur in a manner least intrusive with respect to the individual’s right of privacy. Id. In general, it should be noted that courts have held that public employees have a narrower expectation of privacy than other citizens. This expectation is so narrow in fact that unless violative of some other statutory guarantee of confidentiality, the disclosure must be so “intimate, personal, or sensitive that disclosure of such information would be offensive and objectionable to a reasonable person.” Id. The right to privacy in this context is also limited by society’s right to be informed about legitimate subjects of public interest. See e.g. Capital City Press v. East Baton Rouge Parish Metropolitan Council, 696 So. 2d 562 (LA 1997).

When examined in this light, it would seem that the disclosure of the fact of discipline of a public employee might well be of such a compelling public interest nature that it would outweigh any potential damage to an employee’s right to privacy. The Court in Cox noted that “We also observe that other courts have considered questions similar to the ones presented here and have concluded that public officers do not have a privacy interest in their interactions with the public.” Cox 2010-NMCA-96 ¶29. Citing to cases from Alaska (Jones v. Jennings, 788 P.2d 732 (Alaska 1990)) and the Tenth Circuit (Denver Policemen’s Protective Ass’n v. Lichtenstein,
660 F.2d 432 (10th Cir. 1981)), the Court noted that police officers in particular have no privacy interest in documents related solely to the officer’s work as police officers. While concluding that citizen complaints are not exempt from disclosure under IPRA, it would again appear that based on the Court’s reasoning in Cox, the balance in terms of disclosure of the fact of discipline weighs in favor of public disclosure. While a public employee has a liberty interest in his or her good name, that liberty interest is not absolute and would have to outweigh the public interest in dissemination of information. As well, an employee making such a claim would have to demonstrate an impairment of a tangible interest such as the employee’s interest in continued or future employment. See e.g. Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed. 405 (1976).

Conclusion

Based upon the above analysis, our office concludes that the fact of the specific final discipline of a city employee may be disclosed at the time that action is imposed by the City. While such disclosure may still result in certain claims being brought against the City, there is no strict statutory prohibition against the disclosure of the fact of employee discipline. This opinion should not be read to imply that other documents such as investigations, documents concerning infractions, personnel evaluations, and other “matters of opinion” contained in a personnel file and which may form the basis for disciplinary action are subject to disclosure under IPRA.