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WHAT'S NEW AT CUDDY & MCCARTHY

by C. Emery "Buck" Cuddy, Jr.

This summer started on a high note at the 30th Annual School Law Conference in Albuquerque on June 5-6, 2009, which we produced for the New Mexico School Boards Association (NMSBA). Once again, the Conference was a smashing success. A total of 863 people, the second-highest attendance on record, attended the Conference this year, and the feedback was overwhelmingly positive. The Conference continues to be the best-attended education-related event in New Mexico annually, and we strive each year to make the program the best ever.

Cuddy & McCarthy attorneys John Kennedy, Patricia Salazar-Ives and Buck Cuddy made four presentations at the NMSBA Leaders Retreat,

held in Cloudcroft on July 16-18, 2009. In our role as general counsel for NMSBA, we remain firmly committed to supporting NMSBA's function as the primary source of school law training for New Mexico educators. Planning is already in the works for our participation in the NMSBA Convention scheduled for December 4-5, 2009 in Albuquerque. We hope to see you there.

On September 1, 2009, Matt Campbell joined our firm as an associate and will be working in our Albuquerque office. Matt graduated from Arizona State University's Sandra Day O'Connor College of Law in 2007, after which he served as a Law Clerk for the Arizona Court of Appeals. Now that Matt has joined us, Cuddy & McCarthy has 21 lawyers serving you in our two offices (Santa Fe and Albuquerque). We remain a **100% New Mexico law firm.**

STATE GETS SERIOUS ABOUT TIMELY AUDITS

by C. Emery "Buck" Cuddy, Jr.

During August and September, school districts typically select independent auditors to perform the annual audits of school district finances required under New Mexico law. Although a State Auditor's regulation (NMAC 2.2.2.9(A)(1)(c)) has for many years required that school district audits are due at the State Auditor's office by November 15 of each year, a number of school districts have failed to meet that deadline. Shockingly, some districts have been as many as four years behind in their audits.

Several recent high-profile instances of late audits caused the 2009 Legislature to take drastic action aimed at forcing school districts to complete their annual audits in a timely manner. House Bill 321 amended the Audit Act to require the State Auditor to notify the New Mexico Public Education Department when a district's audit is not submitted within 90 days of the due date. House Bill 321 also amended the Public School Finance Act to provide sanctions for a school district's failure to submit its annual audits on time. The sanctions are significant and may be severe, as shown in the table below:

<u>Late:</u>	<u>Penalty:</u>
(1) Late less than 90 days	Must submit monthly reports until PED is satisfied as to compliance
(2) Late between 90 and 180 days	Loss of up to 5% of SEG
(3) Late between 180 and 270 days	Loss of up to 7% of SEG
(4) Late more than 270 days	Loss of up to 7% of SEG and suspension as board of finance

These penalties demonstrate that the Legislature is very serious about the continuing issue of late audits. Each school district must make sure that its annual audit is done in a timely manner, and audits that are not current (that is, prior year audits still not completed) must address that deficiency immediately.

The provisions of HB 321 become effective on July 1, 2010. Make sure your school district uses the time before that date to bring all of its audits current.

RECENT COURT OF APPEALS DECISION REQUIRES DISCLOSURE OF CANDIDATE NAMES AND APPLICATIONS

by Evelyn A. Peyton

In enacting New Mexico's Inspection of Public Records Act ("IPRA"), which is codified at N.M. Stat. Ann. 1978, Sections 14-2-1 *et seq.*, the State Legislature recognized "that a representative government is dependent upon an informed electorate." NMSA 1978, § 14-2-5. The Legislature declared New Mexico's public policy to be "that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees," and "that to provide persons with such information is an essential function of a

representative government and an integral part of the routine duties of public officers and employees.” *Id.* The IPRA governs the procedures for requesting such information, and for responding to those requests.

On May 7, 2009, the Court of Appeals of the State of New Mexico filed its decision in the case of *City of Farmington v. The Daily Times and New Mexico Foundation for Open Government* (Ct.App. No. 27, 858). The *City of Farmington* decision answers a question many school boards face: Must a school district release information regarding all applicants for the position of Superintendent? As the Court of Appeals has indicated, the short answer to that question probably is “yes.”

In January 2007, the City Manager of Farmington announced his intent to retire. With the City Council’s approval, Farmington’s mayor launched a nationwide search for a replacement city manager. Ninety-one people submitted timely applications for the position. In March 2007, *The Daily Times* and the New Mexico Foundation for Open Government (“NMFOG”) made formal IPRA requests for a list that identified all applicants for the City Manager position, as well as for copies of all the applications received by the City. The City denied both requests on the grounds that the applicants’ privacy rights outweighed the open government policy stated in the IPRA. Consequently, only the identities of applicants selected as finalists and invited for on-site interviews would be released at the time the finalist list was determined. The *Daily Times* and NMFOG sued, asking the District Court to direct the City to produce the requested information.

At the hearing before the District Court, the City presented evidence that it decided to keep the names confidential because (1) it hoped to maintain a larger and more qualified applicant pool; (2) other application processes for city managers in other cities and states were closed processes; and (3) by not stating that the application process was open, the City had implicitly guaranteed a confidential process until the finalists were selected. The City also presented evidence that requiring the City to disclose the names of all applicants would deter some people from applying for the position. After the evidence was presented, the District Court ordered the City to produce the documents disclosing the requested information.

The City appealed the order. In upholding the District Court’s decision, the New Mexico Court of Appeals pointed to New Mexico’s public

policy of open government, as well as the IPRA's broad definition of the term "public records." Under the IPRA, public records include "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). The IPRA provides twelve identified exceptions to this broad disclosure, and those statutory exceptions do not include either a complete list of applicants for a high-level public position or copies of all applications from the candidates for such a position.

In addition to the statutory exceptions, the Court of Appeals agreed that New Mexico has recognized a "non-statutory exception" to disclosure. This non-statutory exception, also called the "rule of reason," requires a court to balance the right of all citizens to have reasonable access to public records against the "public policy" considerations favoring confidentiality and non-disclosure. *See State ex rel. Newsome v. Alarid*, 90 N.M. 790, 798-99, 568 P.2d at 1244-45 (1977); *see also Spadaro v. Univ. of N.M. Bd. of Regents*, 107 N.M. 402, 404, 759 P.2d 189, 191 (1988). As the *City of Farmington* Court noted, however, in applying this "rule of reason," courts must give effect to the strong public policy favoring access to public records. The party denying access to public records always has the burden to show why the denial is justified, and the party making the request never has the burden of proving that the request is justified.

The *City of Farmington* Court examined each of the City's reasons for non-disclosure. As to the City's argument that it would receive fewer applications if the hiring process were open, the Court ruled that (1) the City had presented no evidence to support this claim, and (2) even if such evidence had been presented, the public's interest in disclosure outweighs the City's concern that fewer people would apply for the position. With respect to the City's arguments that the hiring processes for city managers in other cities and states are closed processes, and that the City had implicitly guaranteed confidentiality to the applicants for the city manager position, the Court analyzed an Alaska case addressing many of the same points made by the City and concluded that an implicit guarantee of confidentiality is insufficient to overcome the public's interest in information regarding applicants for a high-profile public position.

After the Court of Appeals issued its decision, the City and the *Daily Times* settled the case rather than appealing it to the New Mexico Supreme Court. The City paid the newspaper over \$90,000.00 to settle the newspaper's claim for legal expenses in the lawsuit. The newspaper had sought \$106,000.00 from the City, but the parties agreed on the lower amount.

Because the New Mexico Supreme Court never had the opportunity to rule on the case, the *City of Farmington* decision from the Court of Appeals is the controlling case law. Given that decision, we recommend that school districts inform those considering submitting applications – particularly for high-profile positions at the top administrative levels, or other high-profile positions such as head football coach or athletic director – that the school district cannot guarantee to keep the applications confidential, and that the school district may be required to disclose the applications and certain other documents submitted with those applications in response to an IPRA request. We recommend that you contact your school district's legal counsel for assistance in drafting such a notification, which should be prominently displayed on your application forms and in your vacancy announcements.

NEW LAW'S REQUIREMENTS FOR DOMESTIC ABUSE LEAVE

by Aaron J. Wolf

One of the common, but often overlooked, effects of domestic violence is the disruption to the victim's work life. A victim of domestic abuse may take weeks or months to work up the courage to file a petition for order of protection. During that time, the victim talks to friends, relatives and co-workers instead of taking action, or suffers in silence. When the point comes that the victim finds the courage to take action, the victim often must take time away from work to fill out the petition for a restraining order, wait for signature and filing, and plan for the inevitable explosion when the petition is served on the person from whom the victim seeks protection.

A recent change to New Mexico law attempts to mitigate some of the damage from this difficult process. This new law, entitled the Promoting Financial Independence for Victims of Domestic Abuse Act (the "Act"),

provides some relief for employees coping with domestic abuse. Employers, including school districts, need to understand their obligations under the Act, which took effect on July 1, 2009.¹

The Act provides that an employer must grant an employee domestic abuse leave of up to fourteen days in any calendar year for such activities as obtaining or attempting to obtain an order of protection or other court-ordered relief from domestic abuse, meeting with victim advocates, meeting with law enforcement personnel, and attending the court proceedings. Domestic violence leave must be granted if the employee is engaging in such activities for herself (or himself), or on behalf of a family member.

If the leave is taken in an emergency, the employee must inform the employer within twenty-four hours of commencing the leave. The employer can ask the employee for verification of the need for the domestic abuse leave. Such verification can include a copy of a police report reflecting that the employee or her/his family member was a victim of domestic abuse; copy of court order produced in connection with an incident of domestic abuse; or a written statement from an attorney representing the victim, a victim's advocate, or a prosecuting attorney that the employee or the employee's family member appeared or is scheduled to appear in court in connection with an incident of domestic abuse. The employer cannot disclose the verification information, the fact that the employee or her/his family member was involved in a domestic abuse incident, that the employee requested or obtained domestic abuse leave, or that the employee made any written or oral statement about the need for domestic abuse leave.

All such information must be held in confidence unless the employee consents to, or the law requires, its disclosure.

In taking domestic abuse leave, the employee may use whatever leave is available, including accrued sick leave or annual paid time off, compensatory time, or unpaid leave, depending on the employer's policies. The Act prohibits employers from retaliating against an employee for taking domestic abuse leave. For example, the employer cannot withhold benefits

¹Although not yet codified, the Act's provisions will appear as a new section of Chapter 50, Article 4, NMSA 1978.

otherwise earned by the employee when the employee takes domestic abuse leave.

If an employee feels that the employer has violated her/his rights to domestic abuse leave, the employee may pursue enforcement through the New Mexico Department of Workforce Solutions. The employee can seek injunctions to prohibit further violations by the employer, and/or recovery of actual damages, plus costs and reasonable attorneys' fees.

One question left unanswered by the new legislation is whether the employer can refuse to grant domestic violence leave if the employee's attempt to obtain a restraining order for domestic violence protection is found to be without merit. Unfortunately, New Mexico's Domestic Violence Protection Act can be misused by a petitioner to gain an advantage in the early stages of a break-up of a relationship, by making dubious accusations in order to have the other party temporarily removed from the residence or separated from the children. The employer may prefer not to rely on a petition alone for verification of the need for domestic abuse leave, but so long as the petition appears to be a good-faith effort to gain protection from domestic abuse, the employer should err on the side of granting the leave. We recommend that you contact your school district's legal counsel to address specific situations involving the new Act.

The Education Law Quarterly provides general information of interest to our clients and should not be used or taken as legal advice for specific situations, which depend on evaluation of precise factual circumstances.