

Disclosure

of Personal Sensitive Information by State Agency Employees

by Somos un Pueblo Unido and
ACLU of New Mexico

New Mexicans must disclose their sensitive personal information in order to access a slew of critical state services whether for themselves or their children. State residents have a reasonable expectation their personal sensitive information will remain confidential and will not be handed over to outside parties. While some state agencies have clear policies and guidelines on when and when not to share someone's sensitive personal information, many do not.

This is needed now because in the last year, there have been a number of high profile requests for blanket access to New Mexicans' sensitive personal information, including from the U.S. Census Bureau and the Department of Homeland Security. Likewise, some state agencies have been releasing New Mexican's sensitive personal information to outside agencies with little to no oversight. New Mexicans need to know their information will be protected.

Methodology & Findings

The findings in this report were garnered from public records requests submitted to numerous state agencies by *Somos un Pueblo Unido* and the ACLU of New Mexico from July to December of 2019. Somos submitted public records requests to the New Mexico Department of Health, the New Mexico Human Services Department, the New Mexico Corrections Department's Probation and Parole Division, the Motor Vehicle Division and the Department of Workforce Solutions, requesting all communications between the state departments and the U.S. Department of Homeland Security, including Immigration and Customs Enforcement (ICE). The ACLU requested all communications between MVD and federal agencies as well as policies and procedures governing the sharing of information.

The communications — mostly emails — reveal a pattern and practice of state agency employees readily providing New Mexicans' sensitive personal information to federal employees with little to no questioning. State agencies disclosed information on New Mexican's homeless status, immigration status, including Deferred Action for Childhood Arrivals status, history of mental illness, as well as information that could be used to locate people, such as the names of shelters they were residing at, home addresses, upcoming court dates, and information on family members.

The state's MVD released the sensitive personal information of over 40 New Mexicans to agents with U.S. Immigration and Customs Enforcement (ICE) for the first seven months of 2019 without limitations. Many requests were of a broad nature, i.e. requesting the driver's license and vehicle registration information of all individuals from a particular address, without a subpoena or an order from a judge. In some cases, MVD staff even went to the trouble of expending state time and resources to create spreadsheets when agents requested information on numerous New Mexicans.

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New Mexico’s state agencies need clear guidelines for all employees, especially front-line staff, to know when it is appropriate, if at all, to release someone’s sensitive personal information. New Mexicans have a reasonable expectation that information submitted to a government agency will remain confidential, unless disclosing such information is necessary to carry out a function of that agency. By not having a clear standard across the board, many New Mexicans understandably may be wary of sharing their information even for accessing crucial services and programs. This may be especially true for New Mexicans from vulnerable communities.

By amending the state’s Governmental Conduct Act¹ to include a definition of sensitive personal information and delineate under what circumstances state agencies can release information, state workers would not have to second-guess their actions. Sensitive personal information should include a person’s social security number or ITIN (Individual Tax ID Number), national origin, immigration status, status as a recipient of public assistance or as a crime victim, and LGBTQ status.

By adopting a standard non-disclosure policy with these new categories of protected information, New Mexicans will not have to think twice before accessing health, public safety, and other government services, or participating in the 2020 Census. All state employees will also have clear guidelines and training on how to deal with information requests from outside agencies.

I. Expressed desire by Administration not to share, yet no clear guidelines for front-line staff

The communications between state and federal immigration officials in 2019 numbered in the hundreds. Yet, there was a drop off in communication and sharing of sensitive personal information following two public announcements from the Administration that sharing would halt. Despite this marked change from the previous administration, department clerks are still struggling with the contours of the non-sharing directive, which lacks written guidelines and additional training.

While exercising its statutory discretion, the MVD director denied the U.S. Census Bureau’s request in October 2019 for administrative records data including driver license and ID issuance via a proposed memorandum of understanding between the two entities.² Within the MOU, the U.S. Census Bureau would have had access to the MOU monthly data until 2023, including: driver’s license or identification numbers, type of card, name, address, date of birth, sex, eye color, citizenship status and dates issued and updated.

In its rejection, the MVD touts its statutory charge of protecting state residents’ “personal identifying information” (PII), which is defined as name, date of birth and address, and “makes every effort to protect the PII of New Mexico residents.”

“Inter-department emails post-July 2019 show a lack of clarity from department officials on what personal information can be disclosed and if there are any statutory guidelines for releasing the information.”

While the MVD may disclose individuals’ PII obtained by the Division in connection with a license or an identification card for use by any government agency to carry out its function, state³ nor federal⁴ laws mandate the Division to disclose such information to any state or federal agency, including the U.S. Census Bureau. Yet while the Division was lauded for its public protection of New Mexicans’ personal information in the case of the U.S. Census, the Division had not been equally discerning when disclosing personal identifying information of state’s residents when it came to other federal agencies, such as ICE. Inter-department emails post-July 2019 show a lack of clarity from department officials on what personal information can be disclosed and if there are any statutory guidelines for releasing the information.

DWS

Likewise, DWS in August 2019 declined to provide access to its workers’ information database to the district ICE office based in El Paso.⁵ However, in the months since the pronouncement of “no sharing on immigration cases,” the DWS staff continues to send sensitive personal information along to local ICE agents.

In the email exchanges following August 2019, DWS clerks inform the ICE agents they cannot provide information regarding “immigration” cases; the agents simply reply the individual in question is being investigated for “violations of federal law” or is “currently under federal investigation,” without a court order or a subpoena. In only one case is a criminal subpoena produced by agents working with attorneys from the U.S. Department of Justice.

Similarly, a clerk at the state Human Services Department released sensitive, personal information after an ICE agent produced an “administrative subpoena,” which does not require approval from a judge and poses a host of 4th Amendment protection concerns.

The state’s probation and parole agency produced communications dating back to 2017 with a total of 226 immigrant probation participants involved in the communications. Within the communications produced, 132 email exchanges were initiated by state probation and parole staff and 54 by ICE agents. In 2019, about 20 immigrant probation participants were picked up by an ICE agent during a probation appointment and placed in deportation proceedings. State probation staff also reached out to ICE agents for the sole purpose of informing them of the participants’ national origin; in some cases the participants have legal immigration status or U.S. citizenship. In another case, following divulging a parole participant’s immigrant status, an ICE agent reported back the participant was not deportable. In at least one case, the probation officer coordinated the arrest of the probation participant with an ICE agent over text messaging.

There are a few state agencies served with an IPRA request that did protect

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New Mexicans' sensitive personal information via statute with corresponding regulations, such as documents related to child neglect cases, mental health treatment of minors and adoptions. New Mexicans' sensitive personal information via statute with corresponding regulations, such as documents related to child neglect cases,⁶ mental health treatment of minors⁷ and adoptions⁸.

II. What other states, cities and jurisdictions are doing to protect residents' sensitive personal information

Several jurisdictions in New Mexico and in the rest of the country are inclined to protect their residents' personal information by establishing a myriad of statutes, regulations or policies to do so.

Following a 2018 executive order⁹ in Washington state, all requests for information from its motor vehicle database must be submitted directly to the Governor's Office and the information would only be released with a judicial warrant.¹⁰ Washington also terminated its data sharing agreements with ICE and other DHS agencies following the revision of the state's contracts to prohibit the use of its database for enforcement of immigration related violations.

Furthermore, Washington lawmakers approved a slew of statutory¹¹ protections in 2019 geared towards immigrant residents, such as requiring all state agencies to review their confidentiality policies to ensure the prohibition against releasing of personal information, except as required by law or court order, or as necessary to perform the agency's duties.

California MVD privacy protections are part of its motor vehicle code and require a court order, a subpoena, or for law enforcement to be responding to an "urgent health or safety need."¹² Similarly New York's vehicle code requires a "lawful court order, judicial warrant signed by a judge appointed pursuant to article III of the United States Constitution, or subpoena for individual record issued pursuant to the criminal procedure law or the civil practices law and rules."¹³ Nevada's motor vehicle code does not release personal sensitive information "for any purpose relating to the enforcement of immigration laws."¹⁴ When it comes to social security and Individual Tax Identification numbers, New Jersey requires a warrant signed by a "state or federal judge, a lawful court order or a subpoena."¹⁵

Within New Mexico, local governments have also taken steps to protect individuals' sensitive personal information. In February 2017, the City of Santa Fe approved a resolution, including a comprehensive non-disclosure policy defining "sensitive, personal" information to include an individual's SSN or ITIN; a person's status as a recipient of public assistance or as a crime victim; and a person's sexual orientation, gender identity, physical or mental disability, immigration or citizenship status, national origin or religion. The City of Santa Fe's resolution also included clear training mandates for City employees, including the police department.¹⁶

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Both the cities of Albuquerque and Las Cruces followed suit with similar policies in April 2018 and December 2018.

B. Proposed guidelines for New Mexico

There are many ways to address the alarming sharing of New Mexican's sensitive personal information. Amending the state's Governmental Conduct Act ensures the changes are made across all state agencies with accompanying regulations tailored to each agency's particular charge. Under recent legislative proposals—HB 108 and SB 107 in the 2020 Legislative Session—the Governmental Conduct Act would be amended to define protected personal identifier information as an individual's social security number or Individual Tax Identification Number; a person's status as a recipient of public assistance or as a crime victim; and a person's sexual orientation, gender identity, physical or mental disability, immigration or citizenship status, national origin or religion. Under these proposals the exceptions for disclosure of sensitive personal information would be:

- o Necessary to carry out a function of the state agency
- o Necessary to comply with an order from a state or federal court
- o Made in court records or in connection to a judicial proceeding
- o Required by state IPRA
- o Made with the written consent of the person whose information would be disclosed
- o Required by federal law

By adopting a standard non-disclosure policy with these new categories of protected information within the Act that guides state employee conduct, they will not have to bear alone the burden of having to decide with little information about the complexities of immigration and other laws how and when to turn over information to outside agencies. And New Mexicans, often vulnerable because of their sensitive information, will not have to think twice before accessing essential health, public safety, and other government services, as well as participating in the Census.

Amending the Act is the most effective way of providing clear guidelines and expectations to all state employees for their comportment and ensures compliance. Once amended, state agencies can establish written rules and policies which currently do not exist to limit and restrict the disclosure of an individuals' sensitive personal information, followed by staff training and a centralized review process for handling requests. The Act is meant to assist public employees in understanding their ethical responsibilities and as well as the specific prohibitions and limitations that require them to conduct themselves solely in the interest of the public. Safeguarding the sensitive personal information of vulnerable minority groups is within the public interest.

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