

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

May 8, 2019

VIA ELECTRONIC MAIL ONLY

Charles C. Kretek
Luna County Attorney
P.O. Box 551
Deming, N.M. 88030
Email: charles_kretek@lunacountynm.us

RE: Inspection of Public Records Act Complaint – Alan Edmonds

Dear Mr. Kretek:

On or about July 25, 2018, the Office of the Attorney General, Open Government Division (“OGD”), received a complaint filed by Alan Edmonds against Luna County and Deming-Luna County Humane Society (“Humane Society”), alleging violations of the Inspection of Public Records Act (“IPRA”), NMSA 1978, 14-2-1 through -14-2-12. The complaint alleges that Luna County and the Humane Society failed to: (a) acknowledge the IPRA request within three business days; (b) permit inspection of records within fifteen calendar days from the date the records custodian received the request; (c) provide any records; (d) provide a written explanation for the denial; and (d) forward the request to the proper records custodian.

On June 13, 2018, Mr. Edmonds submitted an IPRA request to Luna County requesting all records from January 1, 2015 to June 13, 2018 pertaining to applications for multiple animal site permits, inspections related to multiple animal site permit applications and/or renewals, and the issuance of multiple animal facility permits. On June 13, 2018, Andrea Rodriguez, Luna County Clerk, responded to the IPRA stating that the request was sent to the wrong public records custodian and that the request would be forwarded to Glory Juarez. There are no email strings indicating when the IPRA request was received by Ms. Juarez, but Luna County admits in its response that it did not respond to the IPRA request until the fourth business day. On June 20, 2018, Luna County informed Mr. Edmonds that Luna County did not possess the documents requested, but believed that the Humane Society had possession of the records he sought. On that same day Mr. Edmonds responded:

Deming-Luna County [Humane Society] is a contractor for the county, but as a nonprofit, they are not required to produce these records for me. However, they are, as a contract employee of Luna County, required to keep [sic] produce those records to the County in response to my IPRA request.

On June 21, 2018, Luna County responded that “Luna County is solely a funding agency for the Luna County Humane Society. The records requested are not kept nor required [to be maintained] by Luna County; therefore we are not considered the custodian of such records. “

On July 23, 2018, Mr. Edmonds filed an identical IPRA request with the Humane Society. It is unclear from the documents submitted with the complaint whether the Humane Society provided the requested documents.

The Humane Society is a nonprofit, nongovernment entity. Mr. Edmonds argues that the Humane Society is a contract employee of Luna County, and therefore, Luna County is obligated to obtain those records from the Humane Society. Luna County responded that the relationship between Luna County and the Humane Society is solely as a funding agency.

In support of its position that Luna County’s relationship with the Humane Society is that of a funding agency, Luna County provided our office with the Memorandum of Agreement (“Agreement”) it entered into with the Humane Society. Luna County entered into the Agreement with the Humane Society to meet its obligations under Luna County, N.M., Ordinance No. 52 Amended Section 7(C) (2002, Amended 2016). Luna County contracted with the Humane Society to provide (1) “facilities for segregation of suspect animals to ensure the safety and the protection of other animals in the shelter”, (2) “regulation, control, and vaccination against rabies of all domesticated dogs and cats residing within the boundaries of the county”, (3) “investigate all reports of cruelty to animals or violations of county ordinance and report same to the sheriff’s office” and (4) “maintain suitable hours that are posted at the gate for receiving and releasing animals at the shelter. Drop cages will be provided for the depositing of animals outside regular hours and telephone service will be available where inquiries or reports may be made” in fulfillment of Luna County’s obligations under county ordinance. The Humane Society was chosen to provide select services to Luna County, in part, because it currently “operates a facility for the care and housing of lost, abandoned, and unwanted animals”. The Agreement does not provide for payment by Luna County for “veterinarian fees, pet food, and maintenance of the shelter” and the Humane Society retains “sole authority for determining such disposition of all animals coming within its jurisdiction” except for “suspect” animals.

In addition, the Agreement requires the Humane Society provide Luna County with monthly reports detailing the number and species of animals entering the shelter, the number of animals adopted, returned to owner, or sent to a rescue organization, and the number of animals euthanized.” Luna County, N.M., Ordinance No. 52 Amended Section 7(C) – (D) (2002, Amended 2016). For its services, the Humane Society is paid by Luna County, one hundred and ten thousand dollars (\$110,000) per fiscal year, payable in equal monthly installments of nine thousand one hundred sixty-six dollars and sixty-six cents (\$9,166.66). Adoption fees, fines and donations received from other sources remain the property of the Humane Society. The Humane Society operates from a pound, premises or building maintained by the City of Deming the County of Luna. *Id.* at Section 1(D).

The Agreement does not require the Humane Society maintain applications for multiple animal site permits, inspections related to multiple animal site permit applications and/or renewals, and issuance of multiple animal facility permits; however, Ordinance No. 52 Amended explicitly designates the Humane Society as responsible for issuing licenses, multiple companion animal site permits and multiple animal facility permits and conducting inspections for compliance with the Ordinance on behalf of Luna County. *Id.* at Sections 7(D), (F), 8 and 9 (2002, Amended 2016). Fees are set annually by agreement between Luna County and the Humane Society and are retained by the Humane Society. *Id.* at Sections 1(D), 7(F) and 8.

A site permit may be denied, suspended or revoked by the licensing agency upon a determination that the operator of the site is in violation of the Ordinance. *Id.* at Section 9(E)(1). Adjoining property owners may petition the Humane Society for revocation, modification or suspension of the permit if the adjoining property owner is reasonably aggrieved by any effects of the site permit. *Id.* at Section 9. Appeals of site permits are filed with the Humane Society who notifies the County Manager. The County Manager appoints a hearing officer to preside over the case and issue a determination. *Id.* at Section 9 (E).

IPRA applies to public bodies of the state. NMSA 1978, Section 14-2-1. Public bodies is defined as “the executive, legislative and judicial branches of state and local governments and all advisory boards, commissions, committees, agencies or entities created by the constitution or any branch of government that receives any public funding, including political subdivisions.” NMSA 1978, Section 14-2-6(F). 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.” NMSA 1978, Section 14-2-6(G). Absent an express exemption from disclosure, public agencies must produce all records, even those held by or created by a private entity on behalf of the public agency. *State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, ¶10, 287 P. 3d 364. The public body has an affirmative obligation to forward

IPRA requests filed with it to the proper records custodian if the public body does not have possession of the requested records and to notify the requester. NMSA 1978, 14-2-8(E). If a public body does not provided the requested documents, the public body must issue a written explanation for the denial within 15 days after receipt of the IPRA request. NMSA 1978, Section 14-2-11.

The question that must be resolved is whether the Humane Society is an entity subject to compliance with IPRA. The Humane Society may be subject to compliance with IPRA if it is acting on behalf of Luna County. *Toomey*, 2012-NMCA-104, ¶10. New Mexico adopted the *Toomey* totality of factors approach to determine when a government has transferred its responsibility to a private entity sufficient to making that entity subject to the IPRA. *Id.* at ¶ 20. The *Toomey* factors are:

1) the level of public funding; 2) commingling of funds; 3) whether the activity was conducted on publicly owned property; 4) whether the services contracted for are an integral part of the public agency's chosen decision-making process; 5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform; 6) the extent of the public agency's involvement with, regulation of, or control over the private entity; 7) whether the private entity was created by the public agency; 8) whether the public agency has a substantial financial interest in the private entity; and 9) for who[se] benefit the private entity is functioning. *Id.* at 13.

Evidence supports the conclusion that, by the totality of the factors, the Humane Society is subject to IPRA. The Humane Society is the appointed designee for Luna County to provided services both by contract and through ordinance to include care of animals, issuance and enforcement of site permits and licenses, inspections to ensure compliance with the Ordinance and business is conducted on property maintained by Luna County.

Our office concludes that the Humane Society is acting on behalf of Luna County sufficient to subject them to compliance with IPRA for the particular records sought in the IPRA request. Therefore, Luna County is required to refer the IPRA request to the Humane Society or obtain responsive records from the Humane Society on behalf of the requester pursuant to NMSA 1978, Sections 14-2-8(D) and (E). Requested documents must be provided within 15 days, or if the request is denied, a denial letter must be issued pursuant to NMSA 1978, Section 14-2-11. Accordingly, we find that Luna County failed to refer the IPRA request to the Humane Society, obtain the requested documents or issue a valid denial letter in violation of IPRA and recommend Luna County immediately provided the requested records or issue a denial letter.

Luna County received the IPRA request and notified Mr. Edmonds the same day that the request would be referred to the correct records custodian, Glory Juarez. Luna County

Charles C. Kretek

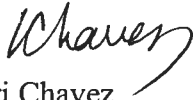
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Page 5

admits Ms. Juarez was one day late responding to Mr. Edmonds' request in violation of NMSA 1978, Section 14-2-8(D). Based upon the information provided to this office, it appears that Luna County has taken remedial action to come into compliance with the statute. *See Derringer v. State*, 2003-NMCA-073, ¶ 15, 133 N.M. 721, 68 P.3d 961, *cert. denied*, 133 N.M. 727, 69 P.3d 237. (We hold that, by its plain language, the Inspection of Public Records Act does not provide for damages pursuant to an action brought after a public body has complied with the Act.)

Thank you for affording our office this opportunity to be of assistance.

Sincerely,



Lori Chavez

Assistant Attorney General

cc: Alan Edmonds

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

Electronic Complaint Submission

Submission Detail

ECS Reference Number	NMOAG-ECS-20180725-c235
Final Submit Date	7/25/2018 11:07:59 AM

Disclosure of your complaint: This complaint is a public record, thus available under provisions of the NM Inspection of Public Records Act.

Disclosure to other entities: This complaint, its content, and other information may be disclosed to other law enforcement and regulatory agencies.

I understand this complaint and any submitted documents are public record and may be shared with other law enforcement and regulatory agencies.

DECLARATION: By submitting this form, I attest that the information in this complaint is true and accurate to the best of my knowledge. I further understand that by submitting this form I may be called to testify as a witness in this matter.

I understand declaration statement.

The New Mexico Office of the Attorney General cannot give legal advice regarding this complaint and will not act as your personal attorney. If you have questions regarding your rights please contact a private attorney.

Submission of this complaint is not confirmation that an investigation will be initiated.

Complaint Detail

Complaint Type Inspection of Public Records (IPRA) Complaint

Retained Attorney

Parties

Complainant

Mr Alan Christopher Edmonds

Person

Address

[REDACTED]

Contact information

[REDACTED]

Complaint against

Luna County - Glory Juarez

Public Body (Government Entity)

Address

700 S. Silver Avenue
Deming, New Mexico 88030

Contact information

glory_juarez@lunacountynm.us

(575) 546-0494

<http://lunacountynm.us>

Custodian of Public Records

Other Party

Deming-Luna County Humane Society

Organization

Address

2125 Onate Rd SE
Deming, New Mexico 88030

Contact information

deminganimalshelter@gmail.com

(575) 546-2024

<https://www.facebook.com/deminganimalshelter/>

Luna County: "Luna County is solely a funding agency for the Luna County Humane Society. The records requested are not kept nor required by Luna County; therefore, we are not considered the custodian of such records."

Complaint Specifics

Format of IPRA request:	Written
Date IPRA request was submitted to the public body:	Luna County: 6/13/18. Deming-Luna County Humane Society: 7/16/18
Date of all responses received from the public body:	Luna County: 6/20/18, 6/21/18 Deming-Luna County Humane Society: None as of 7/25/18
Records	No records were provided., The public body does not have custody or responsibility for the records, and the records custodian did not forward the request to the proper custodian.
Denied requests to inspect public records	No records were provided and the records custodian did not deliver or mail a written explanation to the requester within fifteen (15) calendar days after receiving the request that included a description of the records sought, the names and titles of each person responsible for denying the request, and a description of the reasons for the denial.
Deadlines (For purposes of deadlines imposed by the IPRA, the date the request is received is not counted)	Inspection was not allowed within three (3) business days and the public body did not timely send a written "three-day letter" to the requester explaining when the records would be available or when the public body would respond to the request., The public body did not allow inspection or otherwise respond to the request within fifteen (15) calendar days from the date the custodian received the request.

Transaction

Documents



Luna County Clerk Records Request.pdf

IPRA request & resulting email chain

Comments



DLHS Public Records Request.pdf

IPRA Request and resulting email chain

Comments

*** END OF COMPLAINT ***



From: Alan Edmonds alan@apnm.org
Subject: Re: Public Records Request
Date: July 23, 2018 at 11:30 AM
To: deminganimalshelter@gmail.com
Cc: Glory Juarez glory_juarez@lunacountynm.us
Bcc: Leslie King leslie@apnm.org

Dear Deming-Luna County Humane Society:

Luna County advised me you are the custodian of the requested records.

Within three business days after the submission of my IPRA request, I should have received a notice from you.

I have received nothing. Please advise.

Sincerely,

Alan Edmonds
Cruelty Case Manager
Animal Protection of New Mexico
505-265-2322 Ext. 29
or 877-5HUMANE
alan@apnm.org

On Jul 16, 2018, at 9:43 AM, Alan Edmonds <alan@apnm.org> wrote:

July 16, 2018

Alan Edmonds
Animal Protection of New Mexico
301 Gold Ave. SW
Albuquerque, NM
87102

To whom it may concern at the Deming Luna County Humane Society:

Please provide any and all records from 1/1/2015 to 7/16/2018 pertaining to:

- 1) Applications for Multiple Animal Site Permits
- 2) Inspections related to Multiple Animal Site Permit applications and/or renewals, and
- 3) Multiple Animal Permits issued.

Thanks in advance for your attention to this matter.

Sincerely,

Alan Edmonds
Cruelty Case Manager
Animal Protection of New Mexico
301 Gold Ave. SW
Albuquerque, NM
87102
505-265-2322 Ext. 29
or 877-5HUMANE
alan@apnm.org

From: Yossie Nieblas <yossie_nieblas@lunacountynm.us>
Subject: FW: Clerk Records Request
Date: June 21, 2018 at 1:25:53 PM MDT
To: <alan@apnm.org>
Cc: 'Glory Juarez ' <glory_juarez@lunacountynm.us>

Mr. Edmonds,

Please be advised Luna County is solely a funding agency for the Luna County Humane Society. The records requested are not kept nor required by Luna County; therefore, we are not considered the custodian of such records. I apologize for the inconvenience.

Please refer back to NMSA 1978, 14-2-8 "B. Nothing in the Inspection of Public Records Act [14-2-4 NMSA 1978] shall be construed to require a public body to create a public record."

to require a public body to create a public record.

Respectfully,

Yossie Nieblas for
Glory Juarez, Custodian of Public Records

From: Alan Edmonds [mailto:alan@apnm.org]
Sent: Wednesday, June 20, 2018 5:24 PM
To: Yossie Nieblas <yossie_nieblas@lunacountynm.us>
Cc: Glory Juarez <glory_juarez@lunacountynm.us>
Subject: Re: Clerk Records Request

Thanks, Ms. Nieblas & Ms. Juarez.

The Deming-Luna County is a contractor for the County, but as a nonprofit, they are not required to produce these records for me.

However, they are, as a contract employee of Luna County, required to keep produce those records to the County in response to my IPRA request.

Please obtain these records from your contractor and provide them for my inspection.

Thanks in advance for your attention to this matter.

Sincerely,

Alan Edmonds
Cruelty Case Manager
Animal Protection of New Mexico
505-265-2322 Ext. 29
or 877-5HUMANE
alan@apnm.org

On Jun 20, 2018, at 5:11 PM, Yossie Nieblas <yossie_nieblas@lunacountynm.us> wrote:

Good afternoon Mr. Edmonds,

I apologize for the late response on your request pertaining to applications for Multiple Animal Site Permits; inspections related to Multiple Animal Site Permit applications and/or renewals; and Multiple Animal Facility Permits issued. Mrs. Rodriguez was correct, unfortunately Luna County does not keep record of applications or permits for animals. Please contact the Luna County Humane Society at 575-546-2024 to assist you further with your request.

Please advise if I can be of further assistance. Luna County is providing you with what we deem are responsive records per the Act. Please accept this as a final response for IPRA.

Respectfully,

Yossie Nieblas for
Glory Juarez, Custodian of Public Records

<image002.gif>
Yossie Nieblas
Executive Assistant

Luna County Administration
700 S. Silver Avenue
Deming, NM 88030
(575) 546-0494 Phone / (575) 544-4293 Fax
www.lunacountynm.us / Yossie_nieblas@lunacountynm.us

Luna County Offices are open 7:00am to 5:30pm Monday - Thursday (Administrative Offices will be closed on Friday.)

Confidentiality Notice: This email message and any files transmitted with it may contain confidential information intended only for the person(s) to whom this email is addressed. If you have received this email in error, please notify the sender immediately by phone or email and destroy the original message without making a copy. Thank you.

From: Glory Juarez [mailto:glory_juarez@mail.lunacountynm.us]

----- Original message -----

From: Alan Edmonds <alan@apnm.org>

Date: 6/20/18 2:28 PM (GMT-07:00)

To: Andrea Rodriguez <andrea_rodriguez@lunacountynm.us>

Cc: Leslie Nabours <leslie_nabours@lunacountynm.us>, Glory Juarez <glory_juarez@lunacountynm.us>

Subject: Re: Clerk Records Request

To whom it may concern:

Within three business days after the submission of my IPRA request, I should have received a notice from the Custodian (please see attached IPRA flowchart).

To date, I have received nothing but the below email.

By 6/28, 15 calendar days after the request, I should be allowed to inspect the records unless the request is denied or determined to be excessively burdensome or broad.

Please advise.

<image003.png>

Sincerely,

Alan Edmonds
Cruelty Case Manager
Animal Protection of New Mexico
505-265-2322 Ext. 29
or 877-5HUMANE
alan@apnm.org

On Jun 13, 2018, at 6:49 PM, Alan Edmonds <alan@apnm.org> wrote:

Thanks, Ms. Rodriguez!

Ms. Juarez, please advise me if I need to take any additional action and/or you have any questions pertaining to my Public Records Request.

Sincerely,

Alan
Alan Edmonds
Cruelty Case Manager
Animal Protection of New Mexico
505-265-2322 Ext. 29
or 877-5HUMANE
alan@apnm.org

On Jun 13, 2018, at 4:52 PM, Andrea Rodriguez <andrea_rodriguez@lunacountynm.us> wrote:

Mr. Edmonds,

I don't believe we deal with animal permits but I'm going to copy your email to the correct Public Records Custodian, Glory Juarez. You might want to contact her directly.

Please let me know if I may be of any further assistance.

Andrea Rodriguez

Luna County Clerk
575 546-0491
700 S Silver Avenue Box 7
Deming NM 88031
<image001.png>

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From: noreply@lunacountynm.us [mailto:noreply@lunacountynm.us]
Sent: Wednesday, June 13, 2018 2:52 PM
To: andrea_rodriguez@lunacountynm.us
Cc: leslie_nabours@lunacountynm.us
Subject: Clerk Records Request

Name = Alan Edmonds

Phone = 505-506-4000

Email = Comments = Dear Public Records Custodian: Please provide any and all records from 1/1/2015 to present (6/13/2018) pertaining to:

- 1) applications for Multiple Animal Site Permits
- 2) inspections related to Multiple Animal Site Permit applications and/or renewals, and
- 3) Multiple Animal Facility Permits issued.

Thanks in advance for your attention to this matter.

From: Yossie Nieblas yossie_nieblas@lunacountynm.us
Subject: FW: Clerk Records Request
Date: June 21, 2018 at 1:26 PM
To: alan@apnm.org
Cc: Glory Juarez glory_juarez@lunacountynm.us



Mr. Edmonds,

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