

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



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April 25, 2016

Diane Goodman
14112 Grand Avenue NE
Albuquerque, New Mexico 87123

Re: Your January 13, 2016 Inspection of Public Records Act complaint against the Regulation and Licensing Department

Dear Ms. Goodman:

We have completed our review of your most recent complaint alleging that the Regulation and Licensing Department (“RLD”) violated the Inspection of Public Records Act (“IPRA” or “the Act”), NMSA 1978, §§ 14-2-1 to -12 (1947, as amended through 2013). This review was separate and independent of our earlier determination of the IPRA complaint against the RLD you previously submitted to this office on or about October 1, 2015.

As stated in your pending complaint, you submitted the written request in question to the RLD on September 19, 2015 seeking public documents, but no records were produced and no written explanation provided within fifteen calendar days. Specifically, your request of September 19th asked for “any written correspondence including but not limited to notes, letters, emails containing a string of any of the following words **Investigations and Enforcement** combined with the word **Bureau**.” (Emphasis in original.) Both your complaint and the response submitted by RLD reference and contain copies of a series of emails between you and RLD in the wake of this request. Ultimately, RLD informed you by email dated January 5, 2016 that it could not find any records that were responsive to your request.

In accordance with our procedure for handling IPRA complaints, a copy of your complaint was sent to RLD with a letter of inquiry. RLD submitted a detailed response through its Deputy General Counsel, Claudia Armijo, which has been provided to you. In particular, this response catalogs RLD’s efforts to locate responsive records and again categorically states that no such records could be found. Where an agency reports no responsive records were found to exist after the exercise of due diligence, this office is in no position to refute that claim. If you are in possession of evidence showing such a claim to be false, as you suggest in your email to me dated March 25, 2016, we ask that you provide it to this office and to RLD at your earliest

convenience. The Act is clear that “[n]othing in the Inspection of Public Records Act shall be construed to require a public body to create a public record.” NMSA 1978, §§ 14-2-8(B). Accordingly, based upon the information available to us at this time, we cannot find that the RLD has violated IPRA by failing to produce records responsive to your request.

You also allege that RLD violated the Act by failing “to allow inspection or otherwise respond to the request within fifteen (15) calendar days from the date the custodian received the request.” Given the totality of circumstances, as set forth in your complaint and in RLD’s response, we conclude that the agency substantially complied with the requirements of the Act. See Derringer v. State, 2003-NMCA-073, 133 N.M. 721 (2003). In making this determination, we find three sets of facts of particular significance.

First, following a series of email communications relating to RLD’s need for additional time to conduct a search, and an actual search by RLD technical staff and Ms. Armijo, you were informed by letter dated January 5, 2016 that RLD could find no responsive documents. We note that neither the Act nor the New Mexico Inspection of Public Records Compliance Guide (8th ed. 2015) specifically addresses the situation where an agency conducts a reasonable search and does not locate any records responsive to a public records request. Logic dictates that the failure of an agency to provide copies or allow inspection of records that it cannot find after a reasonable search or that do not exist does not constitute a denial of the request. Accordingly, we cannot conclude that the timelines contained in NMSA 1978, §14-2-11 regarding denied requests control.

Second, your request does not identify a class or type of record, but rather asks that the agency produce documents containing a string of words. Essentially, your request requires the agency to conduct a computer search for specified search terms. While such a search is increasingly common and can, under certain circumstances, be easy to perform, it presupposes at the very least that all potentially responsive documents exist in a digital format that is amenable to an electronic search. Neither the IPRA nor any other applicable law of which we are aware requires public bodies – including the RLD, to digitize all of its records in a form that allows for the efficient electronic search for specific terms. In this case, it appears that the RLD did take reasonable steps to identify a class of records most likely to contain documents with the specified search terms, and, with the necessary assistance of technical staff, subject them to electronic searches for the terms specified in your request. Given the information at our disposal – including what you have provided – we are in no position to dispute the agency’s assertion that no responsive documents were located.

Third, we note that that the request at the center of this complaint was one of numerous requests from you being fielded by RLD at the same time. A list of your IPRA requests compiled by RLD and attached to its response shows your September 19, 2015 request was one of ten separate IPRA requests sent by you to RLD during that month alone. This list documents an additional nine requests submitted to the agency during October of 2015. The list documents a total of ninety separate IPRA requests submitted by you to RLD in 2015. While the Act imposes no limit on the number of requests an individual can submit to a public body, it is not surprising and perhaps even predictable that such a volume of requests from the same requestor would result in confusion, communication shortcomings, and even delays.

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Accordingly, we do not find that RLD violated the Act with respect to either the timeliness or content of its communications with you regarding your September 19, 2015 request.

Although we do not find a violation of the Act, we thank you bringing to our attention your concerns about possible violations. Please contact me if you have any questions about this determination.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard Word". The signature is fluid and cursive, with a long horizontal stroke at the end.

Richard B. "Rick" Word
Assistant Attorney General
Open Government Division
Tel.: (505) 827-6029
Email: rword@namg.gov

cc: Claudia Armijo, Esq.

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INSPECTION OF PUBLIC RECORDS ACT ("IPRA") COMPLAINT FORM
New Mexico Office of the Attorney General
Open Government Division

YOUR CONTACT INFORMATION:

First Name: DIANNE
Last Name: GOODMAN
Address: [REDACTED]
City: [REDACTED]
State: [REDACTED]
Zip Code: [REDACTED]
Phone Number: [REDACTED]
Email: [REDACTED]

IPRA REQUEST TO THE PUBLIC BODY:

Name of the Public Body that is the subject of this complaint **Regulation and Licensing,**
http://www.rld.state.nm.us/IPRA_Requests.aspx

Format of IPRA Request: Written
Date IPRA Request was Submitted to the Public Body: 09/19/15
Date of all Responses Received from the Public Body: Various. Final response from Claudia Armijo, RLD General Counsel, on 01/05/16. See detailed explanation.

ALLEGED VIOLATIONS OF IPRA BY THE PUBLIC BODY: Please select from the following list the violations you allege the public body committed. Check all that apply.
RECORDS:

No records were provided.

Page 2

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)

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.

DETAILED EXPLANATION OF ALLEGED IPRA VIOLATIONS (Required):

See attachment labeled "091915 ipra request first email chain re investigations and enforcement bureau." I summarize the relevant parts below for your convenience.

09/19/15 - IPRA Request: any written correspondence including but not limited to notes, letters, emails containing a string of any of the following words **Investigations and Enforcement** combined with the word **Bureau**.

09/22/15 - RLD responds: The Department needs additional time to review your request. Therefore, the Department will respond to your request on or before October 4, 2015.

10/09/15 - Goodman responds: I have not received any response from you re: this IPRA request other than the email you sent below. Please provide the status of this request since it is late.

10/12/15 - Goodman responds: This IPRA request was due on October 4th. I sent you an email on October 9th notifying you that this is past due and asking for an update. See email chain below. Last Friday I spoke with Tania Maestas and she indicated that CID is blaming the creation of the Investigations and Enforcement Bureau on Justin Wolfe, whose last day was in early January of 2015. She also indicated that she has contacted IT to obtain any documentation of the decision to create the Investigations and Enforcement Bureau. Please confirm or correct my understanding of the latest re: my IPRA request and the new date for providing the responsive documents.

See attachment labeled "091915 ipra request email chain re investigations and enforcement bureau." I summarize the relevant parts below for your convenience.

10/14/15 - Goodman writes: The only IPRA request that I am waiting for your response is the 09/19/15 IPRA request for anything related to the Investigations and Enforcement Bureau.

10/14/15 - RLD responds: I am checking the status of the 09/19/15 IPRA relating to the Investigations and Enforcement Bureau and will get back to you.

10/14/15 - Goodman responds: I would like to wait to confirm a time until I get a response from you regarding the IPRA request for the **Investigations and Enforcement Bureau**. If you need an extension, that would be fine. I will need that in writing to ensure no confusion.

10/15/15 - RLD responds: I will obtain more information on the status of this request and let you know.

10/15/15 - RLD writes: With regard to your 9/19/15 IPRA request, we have asked our Information Technology (IT) Department to conduct a search of past records that may have been maintained by Mr. Justin Wolff, former Deputy Director of CID who left the department in early 2015. IT has informed us that this search will take approximately two weeks to complete, therefore, it is deemed burdensome, per IPRA and we will need additional time to respond. We will respond on or before October 28, 2015.

11/2/15 - RLD writes: We request additional time to fulfill your IPRA request of 9/19/15 due to your IPRA request being transferred to a new employee. The requested information will be forwarded to you at an approximated date of November 16, 2015.

See attachment labeled "010516 claudia closing 091915 ipra request investigations and enforcement bureau." I summarize the relevant parts below for your convenience.

01/05/16 Goodman writes (re: a confirmation of IPRA's to be reviewed at a scheduled meeting): We are in agreement except for the 9/19/15 IPRA request for "any written correspondence including but not limited to notes, letters, emails containing a string of any of the following words Investigations and Enforcement combined with the word Bureau."

I've attached two email chains related to this IPRA request. The last correspondence I received is in the second email chain dated 11/02/15 indicating that the responsive documents will be available by 11/16/15.

I would let this go except that the registered letter I recently received closing my July 2015 complaint came from "Enforcement and Investigation" with no individual to be accountable for this letter and no signature. I've asked Amanda Roybal, who emailed me this letter originally in a Word document, who is responsible for this letter, but she has ignored my email. Since it appears there is an "entity" now called "Enforcement and Investigation" who is writing registered letters, I would like some definitive answers. Responsive documents to my 9/19/15 IPRA request will be a good start.

01/05/16 Claudia Armijo, RLD General Counsel, responds: In an effort to find any records in response to your request, after speaking with RLD/CID staff, I asked my predecessor, Tania Maestas if she had any information about this. She advised me that Justin Wolfe, former RLD employee, may have referred to the group of CID employees that work on investigations and enforcement matters as the "Investigations and Enforcement Bureau". Other than that conversation with Ms. Maestas, to this date, staff and I have not found any records responsive to your request.

Consequently, unless you can direct me to the exact person's or persons' emails or other written correspondence, and indicate to a time-frame certain in which I can try to search for such documents, I have to close this request indicating we do not have a record or records in response to your request.

To be clear, there is no "Investigations and Enforcement Bureau" within RLD/CID. Rather, there are CID employees that perform investigation and enforcement functions.

See attachment labeled "010616 my response to claudias 010516 email." I summarize the relevant parts below for your convenience.

01/06/16 Goodman writes: Again, as you did with the Tawney IPRA requests, you ask me to provide you the responsive documents so that you can provide them back to me. It is not my job to educate you on why I do my IPRA requests or where I discovered this information or what documents I already have which will verify if RLD can be trusted to provide comprehensive responsive documents. However, I will provide some helpful information in the 2015 time period. Please go back and listen to previous CIC meetings where it was discussed and have your IT person do a search for the words as I outlined in my IPRA request for all correspondence. You also may want to discuss this with anyone who was working under the auspices of the Enforcement and Investigation Bureau, even well after Justin Wolfe had left CID. I expect that you will then find volumes of responsive documents which would comply with this request. ***Please confirm that you have reopened this IPRA request so I won't need to file a complaint with the AG for violation of IPRA.***

As of today, 01/13/16, I have not received a response from RLD, either the Custodian or the General Counsel.

Page 3

ADDITIONAL INFORMATION: See Attached documents as I reference in my detailed complaint.

CONFLICT OF INTEREST: Tania Maestas, the previous RLD General Counsel, had authority over this initial request when there were violations at RLD, as is noted in the detailed description above. She is now the AG's Director of Open Government, which has authority over IPRA complaints filed with the AG. Since her current position puts her in a position to rule on this IPRA complaint, I request that the oversight of this complaint be handled by an independent entity as there is a conflict of interest.

Thanks for your time and attention. I do hope that after the public sees what one has to go through to obtain public records, the AG will send a strong message to RLD that they are public servants who serve the public and they should provide responsive documents as requested rather than spending a lot of time obfuscating, as can be seen with the other content of the attached documents.