

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



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Deputy of Criminal Affairs

February 27, 2017

Pete Rivera
1135 Sunset Rd. SW
Albuquerque, NM 87105

Re: Inspection of Public Records Act- Bernalillo County Commission

Dear Mr. Rivera,

This letter addresses the complaint that you filed with the Office of the Attorney General alleging that the Bernalillo County Commission ("Commission") violated the Inspection of Public Records Act ("IPRA"), NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2013) in connection with your IPRA request.

With respect to your complaint, you allege that the Commission provided you with some, but not all of the records you requested and were otherwise not responsive to your request. We have received the Commission's response, wherein Senior Assistant County Attorney, Michael Garcia, answered all of your allegations and attached supporting documents. I have enclosed the Commission's response with this letter.

I have reviewed your complaint, as well as the Commission's response, and supporting documentation. I am unable to conclude that the Commission has violated IPRA. The Commission states that they have provided all records they maintain and that nothing has been withheld from the request.

According to your complaint, and the Commission's response, you submitted a request dated January 25, 2016 to the Commission requesting documents on public meetings held by the Commission and the Commission's reasoning behind not providing a more detailed advertisement of the roundabout project at Rio Grande Blvd and Candelaria. The Commission states that they responded with all the information they had on January 25th, and provided further information as to where you could find requested documents on February 8th. Additionally, further requests were filed on June 16, June 17, and June 30, regarding the Gatewood storm drain project. The Commission responded to your requests for documentation on June 20, and June 30. The Commission further states that no records were withheld in any of these responses. Based on this information, it is our position that the Commission is in compliance with IPRA.

IPRA requires a records custodian who receives a written request for public records to “permit the inspection immediately or as soon as is practicable under the circumstances, but not later than fifteen days after receiving [the] written request. If the inspection is not permitted within three business days, the custodian shall explain in writing when the records will be available for inspection or when the public body will respond to the request.” NMSA 1978, § 14-2-8(D). IPRA requires a public body to provide responsive public records in its custody at the time the request is made. IPRA does not require a public body to create a public record in response to a request. *Id.* § 14-2-8(B).

In your complaint, you state that you believe that the Commission has withheld records from your request and that you have issues with the information provided in the records requested. Based on our research, there appear to be no reported New Mexico cases addressing a challenge to a public body’s claim that records request under IPRA do not exist. Courts outside New Mexico addressing the issue under laws similar to IPRA have uniformly concluded that those laws provide no remedy when a public body represents that a request public record does not exist or cannot be located, absent concrete evidence that the public body did not conduct an adequate search for the record or otherwise acted in bad faith. See, e.g., *Smith Butz, LLC v. Pennsylvania Dep’t of Env’tl. Protection*, 2016 WL 3354564, at 4 (Pa. Commw. Ct. June 17, 2016) (without “competent evidence” that a public body “acted in bad faith or that the...records exist,” the court will accept as true the public body’s assertion that the public records do not exist).

Speculation that the responsive records exist or should exist, without more, is not sufficient evidence to question a public body’s representation that it does not possess requested public records. See *Safecard Serv., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991) (“[m]ere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them”); *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 772 (D.C. Cir. 1981) (agency’s failure to provide seemingly responsive documents referenced in numerous materials provided in response to request did not establish agency’s bad faith where agency’s search was thorough and it provided “entirely plausible reasons for the absence of missing documents”); *Kozol v. Washington State Dep’t of Corrections*, 366 P.3d 933 (Wash. Ct. App. 2016) (public records law only required access to records that existed, “not nonexistent records that one believes should exist”).

Based on the information available to us at this time, we believe that the Commission has complied with its obligations under IPRA in response to your requests made on January 25, June 16, June 17, and June 30. The Commission has stated that they have provided every available record regarding your request to you, and they have no further documents to give. Therefore, we are unable to conclude that the Commission improperly failed to provide you with responsive records in its custody at the time of your request.

Although we did not determine that the Commission violated IPRA as alleged in the complaint, we appreciate your bringing this matter to our attention. If you have any questions about this determination or IPRA in general, please let me know.

Mr. Pete Rivera
February 27, 2017
Page 3 of 3

Sincerely,

Kara K. Szkotak

Kara K. Szkotak
Assistant Attorney General

Encl: County Counsel's Response

cc: Michael I. Garcia, Senior Deputy County Counsel, Bernalillo County

8-29-16

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

YOUR CONTACT INFORMATION:

First Name: Pete Last Name: Rivera

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 (including city/town, county or region, if applicable): Rodrigo Eichwald, Roger Paul, Heather Aguilar

Format of IPRA Request: Written Oral

Date IPRA Request was Submitted to the Public Body: 6-16-16, 6-17-16, 6-30-16, 7-11-16, 8-1-16

Date of all Responses Received from the Public Body: 6-27-16, 8-23-16

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.
- The agency provided some but not all of the records responsive to the request.
- Records were provided, but they were not responsive to the request.
- 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.
- The request was for records in electronic format and although the records are available in electronic format, the copies of the public records were not provided in an electronic format.

DENIED REQUESTS TO INSPECT PUBLIC RECORDS

- ___ Although some records were provided, the custodian did not include a written explanation for denying the production of exempt records or for redacting confidential information from 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.

NOTICE

- ___ Public body did not post in a conspicuous location at its administrative office or on the public body's website a notice setting forth: the rights of any person to inspect the public body's public records, the public body's responsibility to make public records available for inspection, the procedures for requesting inspection of public records, the procedures for requesting copies of public records, and/or reasonable fees for copying public records

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.

FEES

- ___ The public body charged fees in excess of \$1.00 per printed page for documents 11"X17" or smaller, or charged fees that exceeded the actual costs to copy the records.

- ___ The public body did not provide a receipt upon request.

DETAILED EXPLANATION OF ALLEGED IPRA VIOLATIONS (Required): Please provide a description of the actions taken by the public body that violated the IPRA, including specific dates and why you believe the IPRA has been violated.

The recent I file the (IPRA) I wanted to find out who was elected official that requested the sidewalks and storm drain and streetlight on front of the Herrera houses. I believe it was Miguel Garcia State Representative I heard it was a family member that lived there. If it is not that, did he take it on his own to do a favor for the Herrera. The document they sent me does not show who requested it. If I am wrong about Mr. Garcia, I could apologize. Still somebody requested for that project. In addition, I still want to have the documentation to find out who it is. The documents they sent me clearly shows it was a safety issue for children and pedestrians. The documents also say the sidewalks and the storm drain on front of the Armijo elementary school, but the sidewalks, storm drain are on front of the Herrera houses. The County of Bernalillo when I brought up this was a safety issue for Armijo elementary school that children's could be injured or killed for any pedestrians or residents. That was in 2011, once I realize they were not going to help me. That is when I made the decision to go after our elected officials and asked for help. They did do some work, because it was election-year they were more concerned about that than the safety of the children. The bus company claims they had a drain pond install but when you look in the front of their property. There is no drain pond on front of the property. The four streets Lovato Rd. SW. Sunbeam Rd. Brother Rd. Waldie Rd. Word those storm drains install before Gatewood storm drain. Gatewood has a drain pond. I am asking the Attorney General office to investigate the projects on front of the Herrera houses. Was that paid for with federal and state funds.

Pete Rivera