

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



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21 September 2016

William R. Babington, Jr.
City Attorney
P.O. Box 2000
Las Cruces, NM 88004-9002

Re: John Wenke IPRA Complaint – City of Las Cruces

Dear Mr. Babington:

Thank you for responding to our request for information regarding a complaint from Mr. John Wenke, which alleged the City of Las Cruces (the “City”) violated the New Mexico Inspection of Public Records Act (“IPRA”), NMSA 1978, Sections 14-2-1 to -12. Our office reviewed Mr. Wenke’s complaint as well as your letter in response, and has determined the City violated IPRA by failing to timely respond to the request and provide responsive records subject to public inspection.

The City’s Denial Was Untimely

Mr. Wenke’s complaint alleged the City failed to provide a written response to his public records request. The records request was provided to the City via e-mail by Mr. Wenke on November 17, 2015, which requested “Any job applications, resumes and cover letters submitted by Elizabeth Melendez [...] in the past two years.” Mr. Wenke apparently received a phone call two days later, on September 19, from a City employee denying his request. Despite another e-mail from Mr. Wenke on September 19 specifically asking the City for a written response denying his records request, the City did not provide a written response to until Mr. Wenke sent another email on January 19, 2016, over four month after his original request was made.

In regard to the failure to provide a timely written response to his records request, the City’s only stated in its January letter that “Mr. Aguayo apologized for not responding to Mr. Wenke’s request in writing and for any inconvenience that may have been caused to Mr. Wenke.” The Inspection of Public Record Act requirements for responding to records requests are clear. Section 14-2-7(B) directs a public body’s records custodian to “respond to requests in the same medium, electronic or paper, in which the request was made in addition to any other medium the custodian deems appropriate.” In this instance, the appropriate medium for responding to Mr.

Wenke's request was e-mail, at minimum. A telephonic response does not satisfy the response requirements under IPRA. Furthermore, when a records request is denied under IPRA there are specific requirements that must be followed:

B. If a written request has been denied, the custodian shall provide the requester with a written explanation of the denial. The written denial shall:

- (1) describe the records sought;
- (2) set forth the names and titles or positions of each person responsible for the denial; and
- (3) be delivered or mailed to the person requesting the records within fifteen days after the request for inspection was received.

NMSA 1978, §14-2-11 (emphasis added). Mr. Wenke was not provided a response within fifteen days even after his initial request that the City provide such written response. The City's failure to timely respond to Mr. Wenke's request violated requirements under Section 14-2-11 of IPRA.

Records Withheld Do Not Fall Within the Cited Exception

Mr. Wenke's complaint further alleged that the records he requested are not matters of opinion in a personnel file, as contemplated under Section 14-2-1(A)(3), and were improperly denied by the City. Although Mr. Wenke contested the City's justification for withholding prospective or current employee job applications, resumes, or cover letters, the City maintained that any responsive records were subject to the cited exception and are continued to be withheld from public inspection.

The IPRA statute, New Mexico case law, and the Office of the Attorney General have maintained clear and consistent positions that job applications and resumes received by a public body are public records and do not fall under IPRA's exception for matters of opinion in personnel files. The exception cited by the City, Section 14-2-1(A)(3), pertains to "information regarding the employer/employee relationship such as internal evaluations; disciplinary reports or documentation; promotion, demotion, or termination information; or performance assessments." Cox v. New Mexico Dept. of Pub. Safety, 2010-NMCA-096, ¶ 21, 242 P.3d 501, 506. Resumes, job applications, and cover letters are largely factual statements, and is clearly separate from the "matters of opinion" that the exception pertains to. See Id. (noting that not all documents in a personnel file are protected from disclosure). Looking to the Court's holding in Cox, application of this exception applies to evaluations or commentary of an ongoing employee-employer relationship. Documents received as part of the application process do not require commentary or evaluations on the working relationship because the relationship has not even begun. Thus, as reiterated in our office's published compliance guide, "[j]ob applications and applicant resumes are not matters of opinion and should be provided upon request." N.M. Att'y Gen. Inspection of Public Records Act Compliance Guide at 10 (8th ed. 2015).

Our office finds the City's argument that job applications and cover letters fall under the personnel files exception as matters of opinion to be unpersuasive and not supported by

established precedent and current case law. The City's own analysis relies on outdated precedent that considered the "rule of reason," which allowed public policy considerations to apply broader exceptions under IPRA. In 2012 the Supreme Court overruled the "rule of reason" as justification for withholding records requested under IPRA, limiting exceptions under the law. Republican Party of New Mexico v. New Mexico Taxation and Revenue Dept., 2012-NMSC-026, 283 P.3d 853. The City's concern that privacy concerns of the individual prospective employee outweigh the interest of public transparency under IPRA is not supported. Personal identifiers and personal contact information may be redacted from such application material while still releasing the document as a public record. In this instance, the City's blanket denial and withholding of the documents violates IPRA and contradicts legal precedent.

Conclusion

The City violated IPRA by failing to properly and timely respond to Mr. Wenke's IPRA request, and by refusing to provide responsive records subject to inspection. The City was obligated to promptly respond to Mr. Wenke in writing, via e-mail, and to also provide the requested records. Because of its failure to respond and produce these records as soon as practical, the City is found to have violated Sections 14-2-7(B), 14-2-8(D), and 14-2-11 of the Act.

Our office urges the City to review its practices and procedures for receiving, reviewing, and responding to IPRA requests in order to help prevent similar violations in the future. We request proper training be provided to the City's records custodian(s) regarding their legal obligations under Section 14-2-8(E) of the Act. In order to cure this violation the City should immediately provide Mr. Wenke with records responsive to his IPRA request.

For more information about IPRA you may refer to the Office of the Attorney General's Inspection of Public Records Act Compliance Guide, available on our website at www.nmag.gov. If you have any questions about the specific matters addressed in this letter or about the Inspection of Public Records Act in general you may contact me directly or call the Office of the Attorney General Open Government Division at (505) 827-6070.

Thank you for your attention to this important matter.

Sincerely,



Joseph M. Dworak
Assistant Attorney General

Encl. IPRA Compliance Guide

cc: John Wenke (w/o enclosures)
Linda Lewis
David Aguayo

1701d
2-17-16

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

YOUR CONTACT INFORMATION:

First Name: John Last Name: Wenke

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): Las Cruces Clerk's Office

Format of IPRA Request: Written Oral

Date IPRA Request was Submitted to the Public Body: Nov. 17, 2015

Date of all Responses Received from the Public Body: Jan. 19, 2016

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.

See attached correspondence
