

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



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ATTORNEY GENERAL

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Deputy of Civil Affairs

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Deputy of Criminal Affairs

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Chief of Staff for Policy and Public Affairs

January 3, 2017

Aaron Holloman, City Attorney
P.O. Box 1508
Santa Fe, NM 87501

Re: Inspection of Public Records Act Complaint – City of Roswell

Dear Mr. Holloman:

We have reviewed the complaint filed by Jeff Tucker alleging that the City of Roswell (“City”) violated Inspection of Public Records Act (“IPRA”), NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2013), and your response, on behalf of the City, to our inquiry (“Response”). The complaint alleges that the City improperly denied the production of responsive records. Based on our review of the complaint, the Response, and applicable law, we are willing to provide the City with the benefit of the doubt that the withholding of the responsive records pursuant to NMSA 1978, Section 14-2-1(A)(3), was done with the intention of complying with its responsibilities under IPRA. Nevertheless, in light of full transparency, we request that the City reexamine the records that it claims are exempt from disclosure and produce any records that contain non-exempt information in redacted form.

The legislative intent and underlying policy of IPRA is, “that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees.” NMSA 1978, Section 14-2-5. There is a presumption which favors disclosure of public records. *See State ex rel. Newsome v. Alarid*, 1977-NMSC-076, ¶ 34, 568 P.2d 1236 (“We hold that a citizen has a fundamental right to have access to public records. The citizen’s right to know is the rule and secrecy is the exception”). Though the presumption is to allow for inspection of records, IPRA does exempt certain records from production. When determining whether the specific exceptions to IPRA apply to a particular record, however, a public body should keep in mind that although IPRA exempts certain matters from the right to inspect, IPRA should not be interpreted as requiring those matters to be kept confidential. It is also important to note that, requested public records containing information that is exempt and nonexempt from disclosure

shall be separated by the custodian prior to inspection, and the nonexempt information shall be made available for inspection. *See* NMSA 1978, § 14-2-9(A).

As a preliminary matter, our analysis is limited to the validity of the withholding of responsive records by the City. On September 26, 2016, Sharon Coll the City's Clerk and Records Custodian sent Mr. Tucker correspondence that stated:

"In your request, you sought "any documents generated for her personnel file in the last six months." Matters in a personnel file are exempt from disclosure if they are matter of opinion, pursuant to NMSA 1978, 14-2-1(A)(3) (2001). Case law holds that this includes "information regarding the employer/employee relationship such as internal evaluations; disciplinary reports or documentation; promotion, demotion, or termination; or performance assessments." *Cox v. N.M. Dep't of Pub. Safety*, 148 N.M. 934, 2010-NMCA-096. Further, investigation and determination are ongoing in this instance and we believe that it is in the interest of public policy to not disclose materials related to these continuing investigations at this time. Given this, there are no documents subject to disclosure that are available for inspection at this time pursuant to your request."

1. The End of Countervailing Public Policy Exception

In the correspondence to Mr. Tucker referenced above, the City stated that "it is in the interest of public policy to not disclose materials related to these continuing investigations..." This is not a valid justification in withholding responsive records. New Mexico courts used to recognize a "rule of reason" exception to the right to inspect public records when there was a countervailing public policy against disclosure. Under this exception, nondisclosure of public records could be justified if the harm to the public interest from allowing inspection outweighed the public's right to know. The New Mexico Supreme Court abolished the rule of reason exception in *Republican Party of New Mexico v. New Mexico Taxation and Revenue Department*, 2012-NMSC-026, 283 P.3d 853. The Court's decision makes it clear that a public body may withhold a public record only if it is based on (1) a specific exception contained within the Act, (2) a statutory or regulatory exception, (3) a rule adopted by the New Mexico Supreme Court, or (4) a privilege protecting a record from disclosure that is grounded in the U.S. or state constitution. Therefore, any document that the City withheld pursuant to "the interest of public policy" needs to be produced to Mr. Tucker for the New Mexico courts no longer permit the withholding of responsive records due to a countervailing public policy.

2. The City Should Reexamine if There Are Producible Non-Exempt Records

NMSA 1978, Section 14-2-1(A)(3) states, "Every person has a right to inspect public records of this state except: letters or memorandums which are matters of opinion in personnel files or students' cumulative files." This exception is aimed at protecting documents in an agency's personnel files that contain subjective rather than factual information about particular individuals. New Mexico courts has substantially expanded this exception and has interpreted the exception to

cover matters of opinion related to the working relationship between an employer and employee such as internal evaluations; disciplinary reports or documentation; promotion, demotion or termination information; and performance assessments. *See Cox*, at 939. *Cox* also makes clear that unless documents relate to the employee's working relationship with his or her employer, matters of opinion are not protected simply because they are kept in the employee's personnel file. *Id.*

In relying on *Cox* to withhold all responsive records the City's response to our office states that, "during the time period requested, the only documents in the personnel file are documents relating to discipline, evaluations, or investigation documents that were created by the City in order to evaluate and determine the course of its continued relationship with the public employee."

It is the position of the New Mexico Attorney General that "matters of opinion" exception extends only to information that is a matter of opinion. Merely factual information or other public information is not protected merely because it is kept in employee personnel files. *See N.M. Att'y Gen. Inspection of Public Records Act Compliance Guide* at 10, Examples 10 and 11 (8th ed. 2015). Therefore, requested documents that contain significant factual information in addition to opinion should be provided with the opinion information blocked out or otherwise redacted. It is also important to note that the presence of protected opinion information in a document does not exempt the remainder of the document from inspection. *See NMSA 1978, § 14-2-9(A)*.

In light of this discussion above regarding the "matters of opinion" exemption, IPRA's general presumption in favor of inspection, and in an acknowledgement towards transparency, the City should reevaluate its blanket withholding of all responsive records due to Section 14-2-1(A)(3) and any countervailing public policy exemption. The City should provide, at minimum, copies of the records requested with redaction of specific matters of opinion which are exempt from disclosure. This approach follows the Office of the Attorney General's recommendation for public bodies to redact records when possible instead of withholding.

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 the Office of the Attorney General Open Government Division.

Thank you for your attention to this important matter.

Sincerely,



Dylan K. Lange
Assistant Attorney General

cc: Jeff Tucker

INSPECTION OF PUBLIC RECORDS ACT ("IPRA") COMPLAINT FORM

New Mexico Office of the Attorney General
Open Government Division

2016 OCT -6 AM 8:50

Attorney General
New Mexico

YOUR CONTACT INFORMATION:

First Name: Jeff Last Name: Tucker

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): City of Roswell

Format of IPRA Request: Written Oral

Date IPRA Request was Submitted to the Public Body: Sept. 22, 2016

Date of all Responses Received from the Public Body: Sept. 22, 2016 ; Sept. 26, 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.

On Sept. 22, 2016, I emailed Roswell City Clerk Sharon Coll, requesting to review the personnel file of city zoo director Elaine Mayfield.
After being asked by Ms Coll to narrow the request, I did so on Sept. 22, 2016

On Sept. 26, 2016, I was denied permission to review documents in Ms. Mayfield's personnel file.

The email chain containing all discussion of the IPRA request is enclosed.

Thank you,

Jeff Tucker

Senior reporter

Roswell Daily Record

ADDITIONAL INFORMATION: Please provide a copy of your original inspection request (if written), and any documentation or evidence you have regarding the alleged IPRA violation.

From: Sharon Coll <S.Coll@roswell-nm.gov>
Subject: RE: IPRA request
Date: September 26, 2016 2:53:43 PM MDT
To: [REDACTED]

Good afternoon Jeff,

As per Legal Counsel:

In your request, you sought "any documents generated for her personnel file in the last six months." Matters in a personnel file are exempt from disclosure if they are matters of opinion, pursuant to NMSA 1978, § 14-21-A(3) (2011). Case law holds that this includes "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 Dep't of Pub. Safety, 2010-NMCA-096, ¶ 21, 148 N.M. 934, 242 P.3d 501. Further, investigation and determination are ongoing in this instance and we believe that it is in the interest of public policy to not disclose materials related to these continuing investigations at this time. Given this, there are no documents subject to disclosure that are available for inspection at this time pursuant to your request.

Sincerely,

Sharon Coll
City Clerk/Records Custodian
City of Roswell, New Mexico
P.O. Box 1838
Roswell, NM 88202
s.coll@roswell-nm.gov
575-637-6202

From: Jeff Tucker [mailto:[REDACTED]]
Sent: Thursday, September 22, 2016 6:03 PM
To: Sharon Coll <S.Coll@roswell-nm.gov>
Subject: Re: IPRA request

Thank you Sharon. How about we make it to review any documents generated for her personnel in the last six months, since March 22, 2016?

Thank you,

Jeff

Jeff Tucker

Record Staff Writer
Roswell Daily Record
[REDACTED]

On Sep 22, 2016, at 4:27 PM, Sharon Coll wrote:

Jeff,

I am out of the office this afternoon but I have received your request and will plan to process it tomorrow. Your request is broad, would you please clarify "select pages"? After clarification, tomorrow I will begin to process.

Thank you.

Sent from my Verizon, Samsung Galaxy smartphone

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

From: Jeff Tucker <[REDACTED]>

Date: 9/22/16 3:26 PM (GMT-07:00)

To: Sharon Coll <S.Coll@roswell-nm.gov>

Subject: IPRA request

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INSPECTION OF PUBLIC RECORDS ACT ("IPRA") COMPLAINT FORM

New Mexico Office of the Attorney General
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YOUR CONTACT INFORMATION:

First Name: Jeff Last Name: Tucker

Address: Roswell Daily Record PO Box 1897

City: Roswell State: NM Zip Code: 88202

Phone Number: 575-622-7710, ext 303

Email: reporter01@rdnews.com

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Subject: RE: IPRA request
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To: Jeff Tucker <reporter01@rdrnews.com>

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