

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



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September 14, 2016

Joseph Craine
1908 Bluehill Rd.
Manhattan, Kansas 66502

Re: Inspection of Public Records Act Complaint – University of New Mexico

Dear Mr. Craine:

We have reviewed your complaint dated April 21, 2016, alleging that the University of New Mexico (“UNM”) violated the Inspection of Public Records Act, NMSA 1978, §§ 14-2-1 to -12 (as amended through 2013) (“IPRA”), by failing to fully respond to your request to inspect public records. In addition to the complaint, we have reviewed UNM’s response to our inquiry regarding the complaint (“UNM’s Response”) (copy enclosed). As discussed in more detail below, based on our review of the complaint, UNM’s Response, and applicable law, we conclude that UNM did not violate IPRA as alleged in the complaint.

According to the complaint and UNM’s Response, you submitted a request dated January 12, 2016, to UNM for copies of emails between Scott Collins, a professor in UNM’s Department of Biology, and Don Strong or Debra Peters between October 1, 2013 and December 31, 2013. On January 27, 2016, John Rodriguez, UNM’s records custodian, provided you with copies of six emails in response to your request, one of which was outside the date range you specified.

On January 28, 2016, you made a follow-up request for the same public records you requested on January 12. You asked Mr. Rodriguez to inform you if it did not have any responsive email correspondence in addition to those UNM provided on January 27, 2016. UNM responded by email dated January 29, 2016, stating that after searching again, no additional email correspondence matching your search criteria had been found. On February 3, Mr. Rodriguez agreed to have UNM’s IT department check again for responsive records. By letter dated March 7, 2016, Mr. Rodriguez confirmed that UNM had not located records responsive to your request in addition to those it had already provided to you.

The complaint questions UNM's representations that it has no additional public records that respond to your request. Those questions stem from records New Mexico State University ("NMSU") provided in response to a request you made on January 29, 2016 for emails between Debra Peters and several individuals, including Scott Collins, between October 1, 2013 and December 31, 2013. The complaint states that NMSU provided documents between Professor Collins and Ms. Peters that met the criteria of your request to UNM and that you believe UNM should have provided in response to that request.

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." NMSA 1978, § 14-2-8(D). IPRA broadly defines "public records" as "all documents...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...." *Id.* § 14-2-6(G). 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).

According to UNM's response, it conducted a thorough search and provided you with all records it possessed that responded to your request. Based on our research, there appear to be no reported New Mexico cases addressing a challenge to a public body's claim that records requested 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 requested 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 public records do not exist); *Block v. City of Gold Bar*, 355 P.3d 266 (Wash. Ct. App. 2015) (city did not violate public records law where it conducted an adequate search in response to a request for public records, even though requester subsequently obtained additional responsive records from other sources and the city in response to other requests).

Speculation that 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 the agency's search was thorough and it provided "entirely plausible reasons for the absence of the 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 UNM complied with its obligations under IPRA in response to your initial request made on January 26, 2016 and your follow-up request on January 28. We understand that, based on records you obtained from NMSU, you question whether UNM has provided you with all records that respond to your request. However, NMSU's possession of records you believe UNM should have, by itself, is not sufficient to show that UNM violated IPRA. UNM's Response suggests that non-UNM participants in the email correspondence you requested might have retained them for a longer period than Professor Collins. This seems reasonable, particularly in light of the more than two years that passed between the creation of the email correspondence and your request. In any event, absent additional evidence showing that UNM acted in bad faith or with the intent to evade its obligations under IPRA, we are unable to conclude that UNM improperly failed to provide you with responsive records in its custody at the time of your request.

Although we did not determine that UNM 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.

Sincerely,



Dylan K. Lange
Assistant Attorney General

Encl: UNM's Response

cc: Kimberly Bell, Senior Deputy University Counsel, UNM

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

New Mexico Office of the Attorney General

Open Government Division

2016 APR 25 AM 8:07

YOUR CONTACT INFORMATION:

First Name: Joseph Last Name: CRANE

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): University of New Mexico

Format of IPRA Request: Written Oral

Date IPRA Request was Submitted to the Public Body: Jan 13, 2016 ;
Jan 28, 2016

Date of all Responses Received from the Public Body: 1/27/16 ; 3/7/16

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.

SEE ATTACHED

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.

see attached