

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

July 8, 2021

VIA ELECTRONIC MAIL ONLY

City of Albuquerque Aviation Department
Alan V. Heinz, Esq.
P.O. Box 2248
Albuquerque, NM 87103
Email: aheinz@cabq.gov

RE: Inspection of Records Act Complain – Derek Drew

Dear Mr. Heinz:

Thank you for your response to our inquiry regarding the complaint filed with the Office of the Attorney General by Mr. Derek Drew alleging that the City of Albuquerque (hereinafter the “City”) violated the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2019) (“IPRA”). As you know, Mr. Drew’s complaint alleges that the City violated IPRA in responding to his public records request dated October 15, 2020. Having carefully considered both his complaint and your response to our inquiry, and in light of the fact that the City is still in the process of fulfilling Mr. Drew’s IPRA request, we agree with the City’s contention that it has substantially complied with IPRA. We are, however, somewhat skeptical about the length of time the City is taking to fulfill Mr. Drew’s IPRA request. In this regard, we recommend that the City begin providing Mr. Drew documents responsive to his request on an installment basis as the City continues to process his request.

The Inspection of Public Records Act guarantees the people of the State of New Mexico access to “the greatest possible information” about governmental affairs. NMSA 1978, § 14-2-5. *See also Am. Civil Liberties Union of New Mexico v. Duran*, 2016-NMCA-063, ¶ 25 (noting that the purpose of IPRA is “to promote the existence of (1) an informed electorate and (2) transparency in governmental affairs”). IPRA specifically provides that individuals may inspect and copy all “public records” with only limited and specifically enumerated exceptions. § 14-2-1(A). We interpret IPRA’s various provisions in light of the “presumption in favor of the right to inspect.” Attorney General’s Inspection of Public Records Act Compliance Guide, p. 7 (8th ed. 2015) (“IPRA Guide”).

Mr. Drew sent a public records request to the City on October 15, 2020, specifically requesting:

1. All time stamps, employee clock-in and clock-out times for all Aviation Department employees from March 1, 2020 to October 13, 2020;
2. Any correspondence, including but not limited to e-mails, interviews, video, audio tapes between Aviation Employees regarding the Kronos Timekeeping System;
3. All e-mails from Facilities Maintenance manager, David A. Urioste;
4. All Matrix and Proximity records for all Aviation Employees from March 1, 2020 to October 13, 2020;
5. Video and/or audio of the Sunport from 1505 hours to 1535 hours on October 14, 2020, on Level 2, specifically in front of the Sunport's Communication Center;
6. Any information regarding the Aviation Department Director's ability authority to change the City of Albuquerque's timekeeping policy;
7. List of Aviation Department Personnel that are not required to use the Kronos timekeeping system; and
8. Any and all records the City of Albuquerque's Aviation Department employee, Derek Drew's permissible access within the Sunport from October 12, 2020 to October 14, 2020.

The City responded to this request on October 20, 2020 acknowledging the request and, at the same time, the City deemed the request excessively broad and burdensome and requested additional reasonable time stating some requests may take up to 45 to 60 days.

Although public bodies generally are required to permit inspection within fifteen calendar days of receiving a request, IPRA specifically allows for additional time in those circumstances where the request is "excessively burdensome and broad." § 14-2-10. We explain in our IPRA Guide that both the determination as to whether a request is excessively burdensome or broad and the length of the "additional reasonable period of time" to comply with the request depends largely on the circumstances. § 14-2-10. Our Office has previously observed that "public bodies and records custodians are likely entitled to a degree of deference in their determination that a records request is excessively burdensome or broad," while recognizing that such a determination is still subject to review and scrutiny. N.M. Att'y Gen. Letter to Kyle Brian Land (Feb. 3, 2020). *See also* IPRA

Guide, p. 39 (“The Act does not define ‘excessively burdensome or broad,’ but leaves it to the determination of the custodian.”).

Circumstances which may be considered include whether “it will require the custodian to locate and review a large number of records” or “the requested records are difficult to locate or obtain.” *Id.* In response to the COVID-19 pandemic, our Office has also expressed the opinion that the difficulty of obtaining records maintained in physical form at an office or permitting in-person inspection while complying with social distancing mandates may also constitute relevant factors in the excessively broad and burdensome analysis. Given the necessity of considering the unique circumstances surrounding each request, it is likely impossible to comprehensively outline all permissible and relevant considerations. However, in general, it would seem that the public body has acted in a “reasonable” manner when it has fairly balanced its own legitimate needs, capacities, and resources with its legal duty to afford the requestor with access to “the greatest possible information” about its affairs. § 14-2-5.

This “reasonable” balance of considerations informs our view with respect to the explanation provided in your correspondence of March 12, 2021. As explained in your letter, the City’s determination that Mr. Drew’s request was excessively burdensome was based, in part, on “the burdens imposed on all public bodies as a result of the COVID pandemic and the duty to comply with the consequent public health orders.” Moreover, your correspondence cited “other records requested, and the burden placed on all public bodies during the pandemic, and the sheer volume of requests the City receives” as justifications for the City’s position that completing Mr. Drew’s IPRA request by mid-August would be a reasonable period of additional time.

As stated above, impediments related to the COVID-19 are valid considerations with respect to the broad and burdensome analysis and it is understandable that the City may have taken longer to respond to an IPRA request in light of difficulties related to the pandemic. It is important to note, however, that effective July 1, 2021, Governor Michelle Lujan-Grisham has lifted all pandemic-related occupancy restrictions and all businesses in New Mexico will once again be permitted to operate at 100 percent of maximum capacity.¹

While IPRA does not expressly require public bodies to provide records in installments, at a minimum it is a best practice and a gesture of good faith on the part of the public body to do so. In reviewing a complaint against a public body, we would be far more likely to conclude that it behaved reasonably in requesting additional time if it made efforts to provide some records to the requestor while continuing to search for or review additional ones. In this instance, we highly recommend that the City begin providing emails responsive to Mr. Drew’s request as they are reviewed in installments rather than waiting until August of 2021 to begin providing documents. Mr. Drew submitted his IPRA request over eight months ago, and the City has had ample time to review a substantial portion of

¹ <https://www.governor.state.nm.us/2021/06/18/n-m-pandemic-restrictions-gone-july-1/>

City of Albuquerque Aviation Department
July 8, 2021
Page 4

the emails it has identified as potentially responsive to Mr. Drew's request. Moreover, we anticipate that the City will be able to complete the review of the remaining documents more expeditiously in light of the fact that pandemic-related office occupancy restrictions will imminently be lifted. As such, we recommend that the City begin producing documents to Mr. Drew in installments as soon as practicable.

For your reference, a copy of the IPRA Guide is available on the website of the Office of the Attorney General at www.nmag.gov. If you have any questions regarding this determination or IPRA in general, please let me know.

Sincerely,



Gregory S. Smithkier
Assistant Attorney General

Enclosure

cc: Derek Drew