STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

HECTOR H. BALDERAS
ATTORNEY GENERAL

July 8, 2021

VIA ELECTRONIC MAIL ONLY

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

Re: Inspection of Public Records Act Complaint – Lucinda Montoya

Dear Mr. Heinz:

Thank you for your response to our inquiry regarding the complaint filed with the Office of the Attorney General by Ms. Lucinda Montoya 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, Ms. Montoya's complaint alleges that the City violated IPRA in responding to her public records request dated October 6, 2020. Based on the documentation available to us, we have some concern as to the scope of the City's initial search for responsive records, as well as the sufficiency of several of its written communications with Ms. Montoya. Although we find that the City substantially complied with IPRA, we recommend that it provide additional information in its written communications to future records requestors as to the status of their requests.

Background

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. Section 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").

On October 6, 2020, Ms. Montoya sent a public records request to the City seeking copies of "hiring/selection documentation" related to a particular employment vacancy. The City responded the next day, acknowledging that it received Ms. Montoya's request on October 6, 2020 and stating "it will take up to 15 calendar days to respond … which will be on October 21, 2020." It was not until October 22, 2020, however, sixteen calendar days after receiving the request; that the City responded again. On that date, the City wrote to Ms. Montoya stating only the following: "We are still reviewing records for your request, we will notify you when records become available. Thank you for your patience." Unsatisfied with this response, Ms. Montoya filed her complaint with our Office the following day, October 23, 2020.

The City sent its next substantive response on October 30, 2020. In that written communication, the City stated that it "has completed our search and review of all responsive records" and that it was prepared to provide copies of a number of responsive records to Ms. Montoya after receipt of a small copying fee. In addition, the City's records custodian explained that her "office" had redacted records pursuant to a number of exceptions, including IPRA's exception for letters of reference in Section 14-2-1(B), the matters of opinion exception in Section 14-2-1(C), and two City ordinances. This letter did not state that any records were withheld, but in response to our inquiry the City stated that it "withheld one letter of recommendation."

After paying for and receiving the records provided to her by the City, Ms. Montoya determined that a number of records were missing and unaccounted for. She contacted both our Office and the City on or about November 18, 2020 stating that she knew that there were records in the City's possession that were not provided. Upon receipt of this information, the City explains that it conducted another search, located the records that Ms. Montoya had identified as missing, and provided "[t]he missing records" to her on December 1, 2020.

In her complaint to our Office, which was filed before the City provided the responsive records on October 30, 2020 and December 1, 2020, Ms. Montoya contended that the City violated IPRA by failing to allow inspection or otherwise substantively respond to her request within fifteen calendar days. For its part, the City maintains that, by ultimately providing Ms. Montoya the records she sought, it substantially complied with IPRA, and it suggests that the imperfect nature of its response to Ms. Montoya was partially attributable to the obstacles created by the COVID-19 pandemic. We will begin our analysis by addressing the City's argument as to substantial compliance before addressing the defects in the City's written communications with Ms. Montoya.

Substantial Compliance

The City's primary defense of its handling of Ms. Montoya's request, expressed in response to our inquiry, is that it substantially complied with the mandates of IPRA even if it may have committed minor technical violations. As a legal matter, we agree. Our Court of Appeals has previously held that public bodies may substantially comply with IPRA by responding on a later date after the deadlines set forth in the statute have expired, so long as this compliance occurs prior to the initiation of a legal enforcement action. *See Derringer v. State*, 2003-NMCA-073, ¶ 15 (holding that IPRA "does not provide for damages pursuant to an action brought after a public body has

complied with the Act"). Given that the City has, by all indications, provided copies to Ms. Montoya of all nonexempt records, it appears that it (belatedly) substantially complied with IPRA.

That being said, the fact remains that its initial search for records responsive to Ms. Montoya's request was plainly insufficient. The City expressly stated to Ms. Montoya on October 30, 2020 that it had "completed our search and review of all responsive records," but it took her only a few days to recognize that the City had failed to provide her copies or otherwise account for a number of other records. If nothing else, the City's apparent failure to locate these missing records shows that its initial search was inadequate. As a result, as the City conducts its internal review of its own public records procedures, there may be room for improvement with respect to the thoroughness of its searches for responsive records.

Written Communications

The allegation made by Ms. Montoya's complaint, which again we note was filed before the City substantively responded to her request, is that the City did not allow inspection or otherwise substantively respond to her request within fifteen calendar days. *See* § 14-2-8(D) ("A custodian receiving a written request shall permit the inspection immediately or as soon as is practicable under the circumstances, but not later than fifteen days after receiving a written request."). To that end, the calendar shows that the City's fifteen-day substantive response was due on October 21, 2020, but it did not respond until the follow day, October 22, 2020. Notwithstanding the City's claim that it responded substantively to Ms. Montoya "on the 15th day after *acknowledging the request*" (emphasis added), that is not the legal standard under IPRA, whose deadlines are calculated based on the date on which the custodian receives the request. *See* § 14-2-8(D). While the City's response was indeed only a single day late, we do not consider it a grave violation of IPRA.

We have more concern as to the substance of the City's response than we do its timeliness. As mentioned before, the City's letter to Ms. Montoya dated October 22, 2020 stated, in its entirety: "We are still reviewing records for your request, we will notify you when records become available. Thank you for your patience." Although we recognize that this letter was intended to invoke Section 14-2-10 of IPRA so as to obtain "an additional reasonable period of time" within which the City could respond, this was not, in our view, adequately explained to Ms. Montoya. First and foremost, the City's response did not literally notify Ms. Montoya that "additional time will be needed to respond to the written request," instead simply stating that the City was still "reviewing records" and that it would notify her when those records became available. Section 14-2-10. The City's letter neither explicitly designated Ms. Montoya's request as "excessively burdensome or broad" nor gave her any indication as to when she might expect to hear from the City again. Section 14-2-10. Providing such information is to a requestor, at a minimum, a best practice, and we strongly advise the City to ensure that future broad and burdensome letters are more informative.

We also have several concerns as to the "written explanation of denial" the City provided to Ms. Montoya upon redacting a number of records and withholding one other record. Section 14-2-11(B). Preliminarily, the City's October 30, 2020 letter to Ms. Montoya did not, as required by

IPRA, "set forth the names and titles or positions of each person responsible for the denial." Section 14-2-11(B)(2). The City's custodian did state that "my office" had redacted a number of records, but this was plainly not an identification of which individual was responsible for those redactions. Strictly speaking, it was not legally compliant with Section 14-2-11(B). In addition, and perhaps more importantly, the City's letter to Ms. Montoya stated only that a number of records were redacted but did not mention the fact that it had withheld one record in its entirety. (In response to our inquiry, the City stated that it "withheld one letter of recommendation which was responsive to this request."). We think this too was legally insufficient, since, by failing to inform Ms. Montoya of the fact that it had withheld this record, she would have no reason to know of its existence. *See generally American Civil Liberties Union of New Mexico v. Duran*, 2016-NMCA-063, ¶ 38 ("Denials are valuable information-gathering tools. With respect to any given record request, the absence of either (1) production of responsive records or (2) a conforming denial based upon a valid IPRA exception sends a strong message to the requester that no responsive public record exists."). Ms. Montoya should have been informed that the City was both redacting and withholding records.

Conclusion

While we agree that the City has substantially complied with IPRA, and while we appreciate that the COVID-19 pandemic has created additional burdens for public bodies in responding to IPRA requests, the City's response to Ms. Montoya could have been better. Most importantly, the City's first search for records responsive to Ms. Montoya's request was plainly inadequate, given that other records existed which it did not initially locate, and this suggests to us that more thorough searches are in order. Additionally, we strongly suggest that the City's written communications to requestors should include more information. Any broad and burdensome letter should both explain to the requestor that the request has been deemed excessively broad and contain some information as to when the City will next respond. Written explanations of denial too should be more than perfunctory, as they are required by law to identify the individual responsible for the denial and ideally whether the City is redacting or withholding records. We trust that the City will take these suggestions under advisement as it handles future requests.

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,

John Kreienkamp
Assistant Attorney General

Enclosure

cc: Lucinda Montoya