

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

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July 8, 2021

**VIA ELECTRONIC MAIL ONLY**

City of Santa Fe  
Michael N. Prinz, Esq.  
200 Lincoln Ave.  
Santa Fe, NM 87504  
Email: [mnprinz@santafenm.gov](mailto:mnprinz@santafenm.gov)

**Re: Inspection of Public Records Act Complaint – AFSCME Local 3999**

Dear Mr. Prinz:

Thank you for your response to the complaint filed with the Office of the Attorney General by AFSCME Local 3999 (hereinafter “AFSCME”) alleging that the City of Santa Fe (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, AFSCME alleges that the City violated IPRA by failing to provide records responsive to its public records request dated December 8, 2020. Although we cannot definitively conclude that the City has violated IPRA in connection with this request, it does appear to us that the City may not have provided AFSCME the records it originally requested. We recommend that the City reevaluate this request and ensure that it has provided the requested paystubs to AFSCME.

**Background**

On December 8, 2020, AFSCME Local 3999 requested the “Pay Stubs for the year of 2017” for a particular City employee. The City first responded to this request on December 14, 2020, four business days after receiving the request, when it sent AFSCME a one-page PDF document containing online links to other records. Along with this document, the City sent an online message to AFSCME stating, “You have been sent electronic file(s) in response to your request,” and explaining that the City considered the request fulfilled. However, although the embedded links in the one-page PDF document were intended to enable AFSCME to access records the City considered responsive to the request, the links did not work, meaning that AFSCME did not receive any records. Several days later, on December 23, 2020, AFSCME sent another message to the City (through the City’s online public records request system) explaining that the links were non-functioning and it was

unable to access the records. However, according to the City, its records custodian “did not see” this message “[f]or reasons that remain unclear.”

The City became aware of AFSCME’s inability to access the records after receipt of our Office’s letter inquiring into this complaint. As the City stated in response to our inquiry, “On the same day, and upon notice of the issue, the Records Custodian uploaded each of the individual paystubs onto the portal and notified AFSCME.” Once again, the City considered the matter closed.

Having reviewing the records provided by the City, AFSCME remains unsatisfied. AFSCME argues to our Office that information as to employee leave accrual is standard for City paystubs and that this information was omitted from the records provided by the City. In addition, AFSCME has provided our Office with a copy of a paystub it obtained from the City pursuant to a different IPRA request, and emphasizes the significant differences between that document and the records provided by the City in response to its December 8, 2020 request. As a result, AFSCME argues that the City violated IPRA by withholding responsive records.

#### Analysis

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 (8<sup>th</sup> ed. 2015) (“IPRA Guide”).

Our Office’s ability to contest a public body’s claim that it has provided all responsive records depends on the evidence available to us. In general, without evidence contradicting the public body’s claim, we cannot speculate as to the existence of additional records. *See, e.g., Kozol v. Washington State Dep’t of Corrections*, 366 P.3d 933 (Wash. Ct. App. 2016) (noting that Washington State’s public records law only required access to records that existed, “not nonexistent records that one believes should exist”) and *Smith Butz, LLC v. Pennsylvania Dep’t of Env’tl. Prot.*, 142 A.3d 941, 945 (Pa. Commw. Ct. 2016) (observing that, without “competent evidence” that a public body “acted in bad faith or that the...records exist,” the court must accept as true the public body’s assertion that the public records do not exist). However, where evidence available to us suggests that additional records do or may exist, we may question the public body’s claim. *See Filippi v. Wallin*, No. A-1-CA-37195, mem. op. at ¶ 14-15 (N.M. Ct. App. Dec. 16, 2020) (non-precedential) (finding that there was evidence in the record to support the allegation that responsive records existed and were withheld by the public body, thus requiring further inquiry and *in camera* review on the part of the District Court).

Here, there is evidence to support AFSCME's claim that the City failed to provide responsive records. In particular, it appears that the City provided AFSCME "Paystub History" records instead of the paystubs themselves. AFSCME has provided our Office with a copy of a 2018 paystub it obtained from the City in response to a different request,<sup>1</sup> noting the significant differences between the 2018 paystub and the various documents provided by the City in response to AFSCME's December 8, 2020 request.<sup>2</sup> The 2018 paystub looks precisely like a standard paystub, containing the hours reported by the employee and the leave (vacation and sick) accrued by the employee. By contrast, the records provided by the City in response to AFSCME's December 8, 2020 request are labeled "Paystub History - Pay Stub History Information" and do not appear to contain the accrued leave data. AFSCME maintains that "the accruals of leave time (e.g sick leave, annual leave, comp time, S&W leave) ... is standard with every paystub issued by the city, and information that is provided when other such requests for the paystubs of employees are made via IPRA." Given that the paystub example provided to us by AFSCME differs considerably from the records provided by the City in this case, this is enough evidence for us to question whether the City actually provided all responsive records.

We do acknowledge that these records might differ for any number of reasons. The two employees themselves might be different in terms of employment status (part or full time employee, for example, or one might be on probationary status). Another possible difference might be found in the year of the two documents (2017 versus 2018), insofar as the City might have changed its paperwork or online system. If there is a valid reason to distinguish these records, the City should explain it to AFSCME (or provide AFSCME the missing leave information), even if providing such an explanation is not required by IPRA.<sup>3</sup>

### Conclusion

Although we have not definitively determined that the City violated IPRA, we have evidence to suggest that the City may not have provided AFSCME the records it requested. As a result, we recommend that the City promptly reopen this request to ensure that it provided AFSCME the actual paystubs instead of some type of close variant. In the event that AFSCME has misunderstood the records provided by the City or the reason why those records differed from a standard paystub, it would be in the City's best interest to provide AFSCME with a brief explanation.

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<sup>1</sup> The City designated this separate request, which it received on December 12, 2020, as Request #20-1948. The records provided by the City are available online at <https://cityofsantafenm.nextrequest.com/requests/20-1948>.

<sup>2</sup> Similarly, the City's response to AFSCME's December 8, 2020 request, along with the records it provided to AFSCME, is available online at <https://cityofsantafenm.nextrequest.com/requests/20-1902>.

<sup>3</sup> IPRA does not require public bodies to create new records or otherwise explain why records do not exist. *See* § 14-2-8(B) ("Nothing in the Inspection of Public Records Act shall be construed to require a public body to create a public record."). However, in certain cases doing so may nevertheless be a best practice.

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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](http://www.nmag.gov). If you have any questions regarding this determination or IPRA in general, please let me know.

Sincerely,

A handwritten signature in blue ink, appearing to read "John Kreienkamp".

John Kreienkamp

Assistant Attorney General

Enclosure

cc: AFSCME Local 3999