STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

HECTOR H. BALDERAS
ATTORNEY GENERAL

June 23, 2021

VIA ELECTRONIC MAIL ONLY

Gallup-McKinley County Schools
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Re: Inspection of Public Records Act Complaint – Douglas Ballard

Dear Mr. Sanchez:

Thank you for your response to our inquiry regarding the complaint filed with the Office of the Attorney General by Mr. Douglas Ballard alleging that the Gallup-McKinley County Schools (hereinafter the "District") violated the Inspection of Public Records Act ("IPRA"), NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2019). As you know, Mr. Ballard alleges that the District violated IPRA in connection with his public records request dated March 31, 2021. Having thoroughly reviewed this complaint and your response to our inquiry, we are concerned that the District may have misapprehended the scope of the confidentiality provision of the federal Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, and in so doing withheld nonexempt information responsive to Mr. Ballard's request. In addition, we find that the District did not properly explain to Mr. Ballard its decision to withhold responsive records, and that it may have charged him excessive copying fees. We therefore recommend that the District reevaluate its response to Mr. Ballard's request.

Background

The declared public policy of the State of New Mexico 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." Section 14-2-5. Pursuant to this public policy, the Inspection of Public Records Act provides that the public has the right to inspect all public records held by or on behalf of government agencies except as provided by law. *See generally* § 14-2-1. In construing IPRA and its various provisions, New Mexico's appellate courts consistently interpret the statute in light of its purpose of facilitating transparency and accountability in government. *See New Mexico*

Found. for Open Gov't v. Corizon Health, 2020-NMCA-014, ¶ 15 (explaining that "IPRA must be construed in light of its purpose"). *See also* Attorney General's Inspection of Public Records Act Compliance Guide, p. 1 (8th ed. 2015) ("IPRA Guide") (observing that "courts interpreting the Act have established a clear presumption in favor of access").

Mr. Ballard sent a public records request to the District through email on March 31, 2021. He specifically requested "all emails … that have my name in the body title [sic] or any form of text," while also noting that he wanted the records to be "printed off." Later that day, on March 31, 2021, the District's records custodian responded by explaining that the District had received his request and that it would respond on or before April 15, 2021 (within approximately fifteen calendar days). The records custodian also explained that the District charged records requestors $1.00 per page for printed records and $0.35 per page for electronic records. On April 2, 2021, when Mr. Ballard emailed the District again to ask about the scope of his request, he wrote, "I am aware the total could be over a thousand dollars in which I'm prepared to pay." The District's records custodian responded to this email several days later, on April 5, 2021, stating in part that the District would require full payment in advance of delivering copies to Mr. Ballard.

The District responded substantively to Mr. Ballard's request in an email and accompanying letter dated April 15, 2021. In the letter, the District's records custodian explained to Mr. Ballard that the District was prepared to furnish copies of 1,547 pages of records to him upon payment of a $1,547.00 copying fee. She further explained that this fee was calculated "at a rate of $1.00 per page with 1547 pages having been produced," and an attached invoice confirmed that this was a "Hard Copy Fee" for the production of printed records. The records custodian's letter to Mr. Ballard also explained that the District had withheld some of the responsive records pursuant to the federal Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. No other exceptions to disclosure were identified in the letter, nor did the letter contain a list of the individuals responsible for the decision to withhold some of the responsive records.

Following this letter from District's records custodian, Mr. Ballard and the District exchanged several email correspondence. On April 15, 2021, the same day as the letter, Mr. Ballard replied by requesting "a total on an invoice for an electronic invoice of 35 cent copies," while also asking where and how he could pay the copying fee. Eight minutes later, however, he responded again by asking if he could pay the $1,547.00 copying fee through a money order, expressing his desire to "take that over right away." The next day, on April 16, 2021, the District's Director of Curriculum & Assessment responded to Mr. Ballard by emphasizing that he had originally requested "printed emails" and stating, "If you would like electronic materials you will need to submit a brand new IPRA request stating that you would like the materials in electronic format." Subsequent emails reflect that Mr. Ballard paid the $1,547.00 copying fee and picked up the printed records at the District's office on April 16, 2021.

Mr. Ballard's complaint to our Office effectively raises three issues related to IPRA. His primary allegation is that the District improperly withheld "hundreds of emails" responsive to his request.[1]

[1] Mr. Ballard replied to the District's response to our inquiry by stating in part, "I know there are thousands of emails that they are not turning over."

We understand him to argue that, pursuant to IPRA, public bodies may only rely on FERPA in redacting students' identifying information and not for withholding records in their entirety. Secondly, as a procedural matter, it appears that the District did not properly explain to Mr. Ballard that it was withholding the responsive records. Finally, we understand Mr. Ballard to challenge the copying fee charged by the District. We will address each of these issues in turn.

Withheld Records

The central allegation in Mr. Ballard's complaint is that the District violated IPRA by entirely withholding a number of responsive records that it could have provided to him, consistent with FERPA, upon simply redacting student identifying information. Preliminarily, it is necessary to preface our analysis of this issue by acknowledging that, since we ourselves have not reviewed the withheld records, we cannot say definitively that the District either did or did not violate IPRA by withholding the records. That being said, we agree with Mr. Ballard that, as a matter of law, public bodies may not withhold records under FERPA where the records may be redacted so as to remove student identifying information.

As the District stated in response to our inquiry, the Family Educational Rights and Privacy Act is a valid exception to disclosure through IPRA. FERPA specifically provides that federal education funding shall not be made available to educational institutions which "permit[] the release of education records (or personally identifiable information contained therein other than directory information …) of students without the written consent of their parents to any individual, agency, or organization," except as disclosure is otherwise authorized. 20 U.S.C.A. § 1232g(b)(1). Our Office has previously recognized this as an exception to disclosure through IPRA. *See* IPRA Guide, p. 20.

However, while FERPA is a valid exception to disclosure through IPRA, it does not operate as a blanket exception to disclosure. The administrative rules promulgated by the federal Department of Education contain an exception to confidentiality for "[d]e-identified records and information":

> An educational agency or institution, or a party that has received education records or information from education records under this part, may release the records or information without the consent required by § 99.30 after the removal of all personally identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.

34 C.F.R. § 99.31. This administrative rule is consistent with case law from other states that have found that FERPA does not operate as a total prohibition on the release of educational records. *See Osborn v. Board of Regents of Univ. of Wisc. Syst.*, 647 N.W.2d 158, 168-69 (Wis. 2002) (relying on "the plain language of FERPA" in concluding that "[i]t is … clear … that FERPA does not prohibit disclosure of all information contained in such records") and *State ex rel. ESPN v. Ohio State Univ.*, 970 N.E.2d 939, 947–48, 2012-Ohio-2690, ¶ 34 ("With the personally identifiable information concerning the names of the student-athlete, parents, parents' addresses, and the other

person involved redacted, FERPA would not protect the remainder of these records."). As the Supreme Court of Kentucky recently held, "The FERPA 'education record' exclusion was clearly not intended as an 'invisibility cloak' that can be used to shield any document that involves or is associated in some way with a student." *Univ. of Kentucky v. Kernel Press, Inc.*, 620 S.W.3d 43, 57 (Ky. 2021).

The District's response to our inquiry left us unclear as to whether it recognizes these limitations to FERPA's confidentiality provision. In particular, the District described confidentiality under FERPA in sweeping terms, and it did not appear to recognize that federal law clearly allows public bodies to provide de-identified records to records requestors. Similarly, the District contended that "the federal law applicable to student education records in this matter, unfortunately, trumps the provision of State-issued requests or demands, including requests under the IPRA."[2]

In any case, FERPA plainly does not operate as a total prohibition on the release of educational records, and the District should promptly reevaluate its response to Mr. Ballard if it operated under a contrary understanding of the law. To be clear, if the District could have redacted the email records sought by Mr. Ballard so that "a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information," then IPRA did not permit the District to withhold those emails in their entirety.[3] 34 C.F.R. § 99.31.

Written Explanation of Denial

Aside from the legality of the District's substantive decision to withhold records, there remains a separate question as to whether it explained that decision to Mr. Ballard in a statutorily compliant manner. As part of its stated public policy of providing the public access to information, IPRA expressly requires public bodies to provide certain information to the requestor whenever denying a records request. *See* § 14-2-11(B); *see also Am. Civil Liberties Union of New Mexico v. Duran*, 2016-NMCA-063, ¶ 38 ("While information can come in the form of tangible documents, it can also be gathered based upon an agency's denials."). This required information is an explanation of the exceptions relied on by the public body, a description of the records originally sought by the requestor, and an identification of "the names and titles or positions of each person responsible for the denial." Section 14-2-11(B); *see also* IPRA Guide, p. 40.

[2] This contention, in which the District seemingly argued that IPRA was preempted by federal law pursuant to the Supremacy Clause, U.S. Const. art. VI, cl. 2., is misplaced considering that IPRA itself contains an exception to disclosure which incorporates all exceptions set forth by federal law. *See* § 14-2-1(H). There is no conceivable conflict between IPRA and FERPA, since the latter operates as an exception to disclosure pursuant to the express language of the former.

[3] This conclusion is also evident from the plain language of IPRA itself, which requires public bodies to redact rather than withhold records consisting only partially of exempt information. *See* § 14-2-9(A) ("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 also Jones v. Dep't of Pub. Safety*, 2020-NMSC-013, ¶ 39 ("Section 14-2-9(A) provides that requested law enforcement records containing both exempt and nonexempt information cannot be withheld in toto.").

Our review of the District's "written explanation of denial" provided to Mr. Ballard on April 15, 2021 revealed two deficiencies. First, the letter plainly did not "set forth the names and titles or positions of each person responsible for the denial," as required by Section 14-2-11(B)(2). While this is a relatively technical issue, it is nevertheless a textual requirement of IPRA and for that reason we bring it to the District's attention. More important is the District's omission of several of its substantive legal bases for withholding records from Mr. Ballard. Although its letter to him on April 15, 2021 cited only FERPA in support of its decision, the District's response to our inquiry also explained that it based its decision on "the Individuals with Disabilities Education Act … and the New Mexico Public School Code." To the extent that the District relied on these additional exceptions in arriving at its decision to withhold records, it should have informed Mr. Ballard of that reliance.

Copying Fees

The final issue presented by Mr. Ballard's complaint is the District's $1,547.00 copying fee. This contention appears to have two separate points of disagreement between the parties: whether the District effectively denied Mr. Ballard his right to obtain electronic copies, and whether the District's $1,547.00 fee for printed copies was lawful. We reached mixed conclusions on these issues.

IPRA expressly limits the ability of public bodies to charge copying fees in connection with public records requests. Most importantly, the statute permits only "copying" fees, not inspection fees. Section 14-2-9(C)(1). This means that a public body cannot charge a requestor for simply inspecting a record or for carrying out activities or responsibilities that are uninvolved with copying. *See* N.M. Att'y Gen. Letter to Patricia Matthews, Mission Achievement and Success Charter School, at 3 (Dec. 10, 2019) ("IPRA provides the public with the right to both personally inspect public records free of charge and to obtain copies of public records for only small, reasonable fees."). As we explain in our IPRA Guide (which we note the District repeatedly cites in defense of its own fees), "any fee charged by a public body may reflect only the actual cost of copying." IPRA Guide, p. 36.

Copying fees themselves are also expressly limited by IPRA. In general, all copying fees must be "reasonable," Section 14-2-9(C)(1), but the maximum allowable fee amount differs significantly between printed and electronic records. For printed records, public bodies may charge copying fees up to $1.00 per page. Section 14-2-9(C)(2). By contrast, where the requestor is provided electronic records, the public body may only charge its "actual costs" associated with downloading or transmitting the record, along with the cost of the storage device (such as a CD or a USB drive). *See* § 14-2-9(C) (providing that the public body may charge "the actual costs associated with downloading copies of public records to a computer disk or storage device, including the actual cost of the computer disk or storage device" as well as "the actual costs associated with transmitting copies of public records by mail, electronic mail or facsimile").

Preliminarily, we disagree with Mr. Ballard's contention that the District improperly denied him the right to obtain electronic copies of the records he requested. As a factual matter, he did not originally request electronic copies; to the contrary, he asked that the records be "printed off." *See*

§ 14-2-9(B) ("A custodian shall provide a copy of a public record in electronic format if the public record is available in electronic format and an electronic copy is specifically requested."). While IPRA would not have prohibited him from changing his mind and requesting electronic copies instead, even when Mr. Ballard asked for "a total on an invoice for an electronic invoice of 35 cent copies," he contacted the District eight (8) minutes later by asking if he could pay the $1,547.00 copying fee through a money order. The District's confusion in this respect is therefore understandable, especially given that Mr. Ballard appears to have paid the $1,547.00 fee the next day without having asked again for electronic copies.[4] Regardless, even though we do not find that the District violated IPRA in this respect, we suggest that the District contact Mr. Ballard and work with him to provide him the electronic copies he apparently still desires.

As to the legality of the District's $1,547.00 fee for printed copies, it appears to us that the District may have again misconstrued IPRA's statutory limitations. Although it is technically legal for public bodies to charge requestors for printed records "at a rate of $1.00 per page," see Section 14-2-9(C)(2), all copying fees under IPRA must still be "reasonable," meaning that such fees may still be challenged even if within this permissible per page range. Section 14-2-9(C)(1). Here, we have reason for concern insofar as, in response to our inquiry, the District stated that the $1.00 per page fee included its "costs to knowingly review each page for possible production with appropriate redactions of confidential or nonpublic information, if necessary." If the District means what this language says – that it factored its cost of reviewing responsive records as part of its copying fee – then the $1,547.00 fee included costs that the District could not charge Mr. Ballard. IPRA specifically provides that public bodies "shall not charge a fee for the cost of determining whether any public record is subject to disclosure" Section 14-2-9(C)(6). Even if this was only part of the District's $1.00 per page fee, IPRA prohibited it. Our recommendation therefore is that the District should promptly reevaluate both the $1,547.00 fee it charged Mr. Ballard and its copying fees more generally.

On the subject of the District's copying fees, we would also note that the District's policy of charging requestors $0.35 per page for electronic records is even more clearly inconsistent with IPRA. Since public bodies may only charge only their "actual costs" associated with downloading or transmitting electronic records, along with the costs of storage devices (such as a CD or a USB drive), our Office has repeatedly found that the statute does not permit public bodies to charge per page fees for copies of electronic records. *See* N.M. Att'y Gen. Letter to Stephen E. Doerr, Curry County, at 2 (May 31, 2019) (concluding that an electronic copying fee of $1.00 per page was unlawful under IPRA because it was "wholly unrelated to the County's 'actual costs' for downloading or transmitting the electronic records") and N.M. Att'y Gen. Letter to Dr. Ebubekir Orsun, Albuquerque School of Excellence, at 3 (May 3, 2019) (emphasizing that, where electronic records are concerned, IPRA "requires a case-specific accounting of the actual costs involved). Here, since the District stated to Mr. Ballard that it charges all requestors $0.35 per page for electronic records, we would state simply that this fee policy is inconsistent with IPRA and the District should be modify it as soon as possible.

[4] We understand that Mr. Ballard left the District several voicemails (by phone), the earliest of which mentioned the possibility of obtaining electronic copies but also stated that printed copies "would be ok."

Conclusion

We have identified a number of apparent deficiencies in the District's response to Mr. Ballard's public records request. Because it may have improperly withheld records responsive to his request while charging him an apparently excessive fee, and because it clearly did not provide him a statutorily sufficient "written explanation of denial," Section 14-2-11(B), we recommend that the District take remedial action as soon as possible. Most importantly, this should consist of the District reevaluating both its decision to withhold rather than redact responsive records and its $1,547.00 copying fee. The District should also provide Mr. Ballard with an amended denial letter for those records it continues to redact or withhold. Lastly, since it appears that Mr. Ballard may desire electronic copies of the responsive records, the District should work to furnish those copies to him. More broadly, we strongly recommend that the District revise its fee policy, both to comply with the plain language of Section 14-2-9(C) and to abide by IPRA's mandate that it provide the public with access to "the greatest possible information" about its affairs. Section 14-2-5.

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: Douglas Ballard