

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**

New Mexico Department of Workforce Solutions  
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**Re: Inspection of Public Records Act Complaint – Andrew J. Ostic**

Dear Ms. Christman:

Thank you for your responses to our inquiries regarding the complaint filed with the Office of the Attorney General by Mr. Andrew J. Ostic alleging that the New Mexico Department of Workforce Solutions (hereinafter the “Department”) 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. Ostic alleges that the Department violated IPRA by failing to respond to his request for records dated August 3, 2020. We understand the Department to contend that its failure to respond in writing to Mr. Ostic was not a violation of IPRA because he did not originally send his request to the Department’s designated records custodian. Having carefully reviewed both his complaint and your response, and in light of the IPRA’s plain language, we find that the Department violated IPRA by failing to respond to Mr. Ostic’s request. We strongly recommend that the Department both respond directly to Mr. Ostic and refamiliarize itself with its obligations under IPRA.

**Background**

Mr. Ostic’s complaint to our Office appears to arise out of an administrative appeal regarding unemployment benefits in 2020. We understand that the Department denied Mr. Ostic unemployment benefits after several evidentiary hearings during which witnesses testified and exhibits were admitted into evidence. Mr. Ostic appears to claim that, at some point during this testimony, one of the witnesses referred to a particular document called the “February 2019 Do Not Hire list.” The Department appears to have ruled against Mr. Ostic in the appeal.

Seeking clarification of the basis for the Department's decision in his appeal, Mr. Ostic requested a copy of the "February 2019 Do Not Hire list" from the Department in an email sent on August 3, 2020. Mr. Ostic sent this email, which specifically stated that his request was sent "[p]ursuant [to] IPRA," not to the Department's designated records custodian<sup>1</sup> but instead to two other Department email addresses,<sup>2</sup> one of which appears to have been either the Department's communications or technology office.<sup>3</sup> The Department never responded to Mr. Ostic's request, either substantively or otherwise. Having received no response whatsoever, he then filed his complaint with our Office.

As part of our investigation into Mr. Ostic's complaint, we contacted the Department and asked it to provide certain documentation and written responses both to his allegations and a number of our own questions. In its first response to our Office, the Department did not specifically respond to our questions, nor did it provide us any documentation. Instead, responding approximately one month later, the Department stated simply:

The Department of Workforce Solutions has no record of an IPRA request from this complaint either in August 2020 or any other time being received by our record custodian. Additionally, based on the information in this complaint, it appears the request is for a "do not hire list" which NMDWS does not maintain. Even if this request were received, there are no documents responsive to this request.

Finding this response lacking in sufficient detail, we contacted the Department again to request additional information. The Department then explained that the "February 2019 Do Not Hire list" was not admitted into evidence at the hearing or part of the administrative record of the appeal. It added the following:

The Department also wants to note that we do not consider Mr. Ostic's request a formal IPRA since it was never properly sent to our Record Custodian for response, and while we still assert that we do not have the documents he requested, Unemployment Compensation records are considered confidential under NMDS 51-1-32 and NMAC 11.3.100.106 unless there is a pending appeal. ... Absent a signed authorization from both the employer and the claimant, we would deny this request under the "other laws" exception of IPRA.

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<sup>1</sup> The Department's website lists contains the name and contact information for its designated records custodian. See <https://www.dws.state.nm.us/Inspection-of-Public-Records-Act>.

<sup>2</sup> Those email addresses were "higherauthority@state.nm.us" and "nmdws.communications@state.nm.us."

<sup>3</sup> On the Department's website, the email address "nmdws.communications@state.nm.us" is listed on a number of pages which invite members of the public to send an email "[i]f you have problems accessing a page on this site."

Based on these responses from the Department, we understand that it has still not responded to Mr. Ostic's request, apparently due to the fact that he himself did not send it to the Department's records custodian.

### 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").

Preliminarily, although we are unable to determine whether the Department withheld records responsive to Mr. Ostic's request, we would nevertheless urge it to conduct a thorough search for records if it has not already done so. To be sure, the Department has expressly claimed that "we do not have the documents [Mr. Ostic] requested," and we have no evidence to the contrary. *See 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"). It is unclear, however, whether the Department actually searched for responsive records,<sup>4</sup> and to the extent that it did not do so, we would urge it to conduct a thorough search as soon as possible. *See generally 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).

However, even if we cannot say that the Department withheld any responsive records, we can say that it violated IPRA insofar as it failed to provide any response whatsoever to Mr. Ostic. The largest problem with all of the defenses the Department asserted in response to our Office – that Mr. Ostic sought the type of record the Department does not maintain, that his request was actually not an IPRA request at all, and that the records were exempt from disclosure pursuant to various exceptions – is that none of these were actually conveyed in writing by the Department to Mr. Ostic. He submitted his request to the Department on August 3, 2020 and has still, as far as we are aware, received nothing in writing from the Department. That represents a clear violation of IPRA, which mandates a written response. *See* § 14-2-8(D).

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<sup>4</sup> Originally, responding to our Office, the Department stated that "based on the information in this complaint, it appears the request is for a 'do not hire list' which NMDWS does not maintain." We do not interpret this as a definitive statement that the Department conducted a search and found no responsive records.

As for the Department's assertion that it "do[es] not consider Mr. Ostic's request a formal IPRA since it was never properly sent to our Record Custodian for response," this is an obvious misunderstanding of IPRA. In New Mexico, there is no question that the public body's obligation to respond to a public records request is not contingent on whether the requestor originally sent his request to the formally-designated records custodian. To the contrary, IPRA contains a specific provision for this situation:

In the event that a written request is not made to the custodian having possession of or responsibility for the public records requested, the person receiving the request shall promptly forward the request to the custodian of the requested public records, if known, and notify the requester. The notification to the requester shall state the reason for the absence of the records from that person's custody or control, the records' location and the name and address of the custodian.

Section 14-2-8(E). This language clearly demonstrates that where the requestor, either inadvertently or otherwise, sends his request to an employee or other person not the proper records custodian, that person must by law forward the request on to the proper custodian, if known.

The Department plainly did not abide by Section 14-2-8(E) in handling Mr. Ostic's request. As mentioned previously, Mr. Ostic sent his request to two separate Department email addresses (one of which appears to have been either the Department's communications or technology office). Neither of these recipients forwarded the request on to the proper custodian, much less "promptly," as required by IPRA. Section 14-2-8(E). Even more glaring, the Department still did not respond to Mr. Ostic even after receiving our Office's inquiry, instead continuously insisting that the request was not "a formal IPRA" because Mr. Ostic had not originally sent it to the records custodian. Let us be clear: it is the statutory obligation of any and all Department employees, not records requestors, to forward public records requests to the Department's custodian, and the Department cannot refuse to respond to public records requests as it did here.

### Conclusion

Because the Department apparently still has not responded to Mr. Ostic, we strongly advise it to do so as soon as possible. His request should be forwarded to the Department's records custodian, who then needs to conduct a thorough search and provide a written response. *See* § 14-2-8(D). If, having searched for responsive records held by the Department or on its behalf, the Department's records custodian determines that no responsive records exist, then this information must be conveyed to Mr. Ostic. On the other hand, if the Department does have records responsive records to his request, then it must provide him either those records or a proper "written explanation of denial." Section 14-2-11(B).

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More broadly, this complaint has demonstrated that the Department's internal public records processes are in need of reevaluation and revision. It is apparent that the Department has misunderstood its obligation under Section 14-2-8(E) to forward its records custodian those requests sent to the wrong employees, and we would strongly suggest that all Department personnel be advised of this responsibility. Even more broadly, we would suggest that, rather than embrace an overly-formalistic interpretation of IPRA, the Department should design all of its public records policies in light of its statutory responsibility to 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](http://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: Andrew J. Ostic