

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

June 23, 2021

VIA ELECTRONIC MAIL ONLY

Socorro County
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Re: Inspection of Public Records Act Complaint – Cynthia L. Eiler

Dear Mr. Nance:

Thank you for your response to our inquiry regarding the complaint filed with the Office of the Attorney General by Ms. Cynthia L. Eiler alleging that Socorro County (hereinafter the “County”) 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. Eiler’s complaint alleges that the County violated IPRA in responding to her public records request dated January 4, 2021. Having carefully reviewed Ms. Eiler’s complaint and your response to our inquiry, we have some concern as to the County’s written communications with Ms. Eiler.

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”).

Ms. Eiler submitted a public records request to the County on January 4, 2021 in connection with the death of her sister. In particular, Ms. Eiler appears to have sought “Congress Bill 8,” “OMI

report,” and “all citizen contact and police report any finding involved with my sister.” The County responded on the same day, January 4, 2021, by acknowledging receipt of the request and stating that it would respond again “no later than January 19, 2021.” Four days later, on January 8, 2021, the County’s records custodian responded again in a letter stating that she was in receipt of the records Ms. Eiler had requested and that there would be a copying fee of \$14.00 for the records, which would be provided on two CD’s. However, when Ms. Eiler responded on January 10, 2020 by expressing her interest in picking up the records at the County’s office, the records custodian immediately clarified that the requested records were still under review. The records custodian added that “There are still at least 8 days left to meet the deadline.” On January 22, 2021, three days after the County’s fifteen calendar day deadline had expired, Ms. Eiler emailed the records custodian again asking for an update. The records custodian responded immediately by declaring Ms. Eiler’s request “burdensome” and stating that the County would respond again by January 29, 2021.

The County responded substantively to Ms. Eiler on January 29, 2021, when it informed her again that it possessed the records she sought and that there would be a copying fee of \$6.00 for one flash drive. When Ms. Eiler contacted the County to pay this fee, though, the County stated that there would be an additional cost associated with mailing the flash drive to her. It appears that the County contacted Ms. Eiler again on February 4, 2021 as a “second notice” of the steps she needed to take to obtain the records. On February 8, 2021, the County Manager emailed Ms. Eiler again as “a reminder” that the records were available, telling her for the first time that one video record had been redacted as containing medical information and another video record had been withheld pursuant to IPRA’s law enforcement records exception. *See* § 14-2-1(D).¹ Finally, later that day, on February 8, 2021, the County’s records custodian responded again to Ms. Eiler by stating that she had successfully paid the \$11.35 fee and that the request was closed.

In her complaint to our Office, Ms. Eiler alleges that the County improperly withheld and redacted records responsive to her request. She appears to argue both that the County was required to provide her the video footage she had requested without redaction and that there were other records in existence that were not provided. The County denies both of these contentions. In addition, our review of the communications involved with Ms. Eiler’s complaint indicated that the County’s written correspondence with her may have been slightly untimely and confusing. We will address each of these issues separately.

Responsive Records

Preliminarily, we do not have sufficient information to support Ms. Eiler’s apparent contention that a number of existing records were withheld in secret by the County. While she appears to argue that other videos and records exist whose existence the County has not acknowledged, we have no evidence to support that contention, and the County has denied that it withheld any records beyond one video (which we address below). In the absence of evidence to the contrary, we cannot contest a public body’s claim that no responsive records exist or that it has permitted inspection of

¹ The County’s communications with both Ms. Eiler and our Office cited this as “Section 14-2-1 (A) (4) (2019),” which represents a prior version of IPRA’s law enforcement records exception amended in 2019. The correct citation is Section 14-2-1(D), and given that all of the events in question occurred in 2021, we rely only on today’s statute.

all responsive 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). *See also 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).

Ms. Eiler also contends that "Senate Bill 8" (from the 2020 1st Special Legislative Session), which is today codified at NMSA 1978, Section 29-1-18, prohibits the County from redacting or withholding video footage obtained from body-worn cameras. As she interprets this statute, all body-worn camera footage must necessarily be provided upon request regardless of its contents. However, that is incorrect. Nothing in Section 29-1-18 (or, to clarify, Senate Bill 8) operates as such a requirement and, while body-worn camera footage does constitute a public record for the purposes of IPRA, this does not mean that such video records cannot be exempt from disclosure under IPRA pursuant to a valid exception. We therefore disagree with Ms. Eiler that video footage cannot be redacted or withheld in response to an IPRA request.

Turning to the specific records redacted and withheld by the County, the redactions made by the County on the basis of medical records were almost certainly valid. While we have not reviewed the unredacted video for ourselves and therefore cannot speak with certainty as to whether the redactions made by the County were entirely valid, it is clear that public bodies may redact from public records medical or health information identifying a particular individual as a patient. IPRA itself contains such an exception, see Section 14-2-1(A), and NMSA 1978, Section 14-6-1 contains a similar exception.² *See* § 14-6-1(A) (providing that "[a]ll health information that relates to and identifies specific individuals as patients is strictly confidential and shall not be a matter of public record or accessible to the public even though the information is in the custody of or contained in the records of a governmental agency or its agent").

The legal basis for the one record withheld in its entirety by the County is slightly less clear. As mentioned previously, the County withheld one video record from Ms. Eiler, which we understand was a video of an interview conducted by a law enforcement officer with an individual who has been accused but not charged with a crime. In its response to our inquiry, the County justified its decision to withhold this record as follows:

A second video of an interview between a Socorro County Sheriff's Deputy and an individual has been temporarily withheld. The legal authority for the withholding is NMSA 1978, Section 14-2-1 (A) (4) (2019) because it is a law enforcement records [sic] that reveals the information about and the identity of an individual

² Because HIPAA provides for confidentiality of medical records in the possession of a "covered entity," it is less clear whether it too would extend to the County. Given other exceptions in law applicable to medical and health information, however, this is something of a moot point.

accused but not charged with a crime as well as law enforcement methods. Once the District Attorney either charges the individual or determines there will be no charges filed the video will be made available for inspection.

Looking to the specific language of IPRA's law enforcement records exception, IPRA specifically exempts only a narrow class of information, "names, address, contact information, or protected personal identifier information," with respect to individuals who have been accused but not charged with a crime. This class of information would generally not include entire records. In addition, the exception plainly states that "the presence of such information on a law enforcement record does not exempt the record from inspection." Section 14-2-1(D). In light of this language, healthy skepticism is likely in order for any public body's decision to entirely withhold a record on the grounds that its release would disclose the identity of an individual accused but not charged.

However, in light of the express language of the law enforcement records exception, we acknowledge limited circumstances may exist where public bodies may withhold video records in their entirety to shield the identities of individuals accused but not charged with a crime from public disclosure. Given that the purpose of the law enforcement records exception is to permit public bodies to keep those identities confidential, where withholding a video is the only way to preserve the confidentiality sought by Section 14-2-1(D)(2), then the video may lawfully be withheld. On the other hand, if the video can be redacted or altered in such a way as to keep the individual's identity confidential, then it cannot, consistent with Section 14-2-1(D)(2), be withheld in its entirety.

Here, we have not viewed the video record withheld by the County so as to be able to opine definitively, but it appears that the withholding was lawful. As we understand it, the withheld video consists entirely of an interview between a County sheriff's deputy and an individual accused but not charged with a crime. If the County were to release the video without blurring out the image of the individual suspect and likely even altering his voice, it is possible that the release of the video would reveal the identity of an individual accused but not charged with a crime. Therefore, we conclude that the County's decision to withhold this video was likely consistent with Section 14-2-1(D)(2).

Written Correspondence

Outside of the issues raised by Ms. Eiler, we also observed several other potential issues connected to her complaint. First, it appears that the County did not entirely abide by IPRA's specified deadlines in corresponding with her. In particular, the County neither responded substantively to Ms. Eiler nor declared her request excessively burdensome or broad until she reached out to the County on January 22, 2021, three days after IPRA's fifteen-day deadline had expired. 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.") and § 14-2-10 ("The custodian shall provide written notification to the requester within fifteen days of receipt of the request that additional time will be needed to respond to the written request."). (For what it is worth, the County itself acknowledged the January 19, 2021 deadline in an email to Ms. Eiler on January 10, 2020.) Like Ms. Eiler, we do not appreciate the

County's shifting explanations about when the records would be available and the cost associated with obtaining copies.

Hence, we would encourage the County to be clearer in its written correspondence with records requestors. This is more of a best practice than a legal requirement, but a number of the letters sent to Ms. Eiler appear to have created some confusion. For instance, on January 8, 2021, the County's records custodian informed Ms. Eiler that the custodian possessed the records Ms. Eiler had requested and that there would be a copying fee of \$14.00 for the records. The custodian omitted, however, that the records were not available for inspection at that time because they were still under review. (They remained under review for another three weeks.) Similarly, when the County Manager informed Ms. Eiler that the records were available for a fee of \$6.00 on January 29, 2021, this apparently did not include a required mailing charge and the two parties then went back and forth discussing that change. Given that we ourselves found these communications very confusing, we would suggest that future letters and emails from the County to records requestors should include more detail.

Conclusion

Having carefully reviewed the documentation provided to us, we would strongly encourage the County to revisit its internal public records practices to ensure that its responses to future records requestors are both timely and clear. The repeatedly-shifting messages given to Ms. Eiler by the County – for instance, informing her that the records had been retrieved by the custodian before later clarifying that they were still under review and then even later declaring the request excessively broad and burdensome – were not optimal. They clearly caused a significant amount of confusion on Ms. Eiler's part, and that alone is reason to consider whether they could have been more artfully worded. We trust that the County will take this letter under advisement and improve the clarity of its written communications going forward.

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: Cynthia L. Eiler