

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

January 25, 2021

VIA ELECTRONIC MAIL ONLY

Albuquerque Bernalillo County Water Utility Authority
Peter S. Auh, Esq.
P. O. Box 568
Albuquerque, NM 87103-0568
Email: pauh@abcwua.org

Re: Inspection of Public Records Act Complaint – Anthony Aranda

Dear Mr. Auh:

Thank you for your response to our inquiry into the complaint submitted to the Office of the Attorney General by Mr. Anthony Aranda alleging that the Albuquerque Bernalillo County Water Utility Authority (hereinafter the “Water Authority”) violated the Inspection of Public Records Act (“IPRA”), NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2019). We are issuing this determination as part of an internal audit of unresolved IPRA complaints. Specifically, Mr. Aranda’s complaint alleged that the Water Authority violated IPRA in its response to his records request dated October 26, 2018. Having carefully considered both Mr. Aranda’s complaint and your response, we do not have sufficient information to conclude that the Water Authority violated IPRA by withholding and redacting records. However, we would take the opportunity to express our modest concerns as to the written explanation of denial the Water Authority provided to Mr. Aranda, as well as the Water Authority’s conclusion that it was not technologically equipped to redact audio recordings. While these allegations occurred in 2018, we believe it is in the interests of all parties to clearly set out IPRA’s requirements and memorialize these issues for final closure.

Background

In New Mexico, the people are entitled to “the greatest possible information” about governmental affairs pursuant to the Inspection of Public Records Act. NMSA 1978, § 14-2-5. *See also San Juan Agr. Water Users Ass’n v. KNME-TV*, 2011-NMSC-011, ¶ 16 (noting that, “IPRA is intended to ensure that the public servants of New Mexico remain accountable to the people they serve.”). To that end, IPRA specifically states that the public has the right to inspect and copy all “public records” with only limited and specifically enumerated exceptions. Section 14-2-1(A). All of

IPRA's provisions must be interpreted in light of this public policy and 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").

Mr. Aranda's complaint arises out of the public records request he submitted to the Water Authority on October 26, 2018. He specifically sought an investigation report and a number of audio recordings of interviews conducted with employees related to an apparent employment dispute between Mr. Aranda and the Water Authority. The Water Authority did not respond in writing to this request until November 14, 2018, approximately nineteen (19) calendar days later, when it sent him a redacted copy of the requested investigation report. This correspondence did not mention the audio recordings, although it did state that the investigation report had been redacted pursuant to IPRA's matters of opinion exception. Mr. Aranda responded on the same day, requesting further clarification as to the redactions made by the Water Authority and an explanation as to why he had not been provided copies of the audio recordings. Five days later, on November 19, 2019, you responded to Mr. Aranda on behalf of the Water Authority and, in relevant part, stated the following:

As for the audio recordings that were not provided to you, they also contain the same expressions of opinion stated by the persons interviewed which were documented by the investigator in her written report. Since we cannot "redact" an audio recording, I made the decision to withhold the audio rather than pay a certified court reporter to transcribe the recording and then redacting the transcript.

Based on Mr. Aranda's complaint, we have discerned several alleged violations of IPRA that we must resolve.¹ First, we will address Mr. Aranda's allegation that the Water Authority lacked the legal justification to redact and withhold the records responsive to his complaint. This allegation requires us to consider the Water Authority's assertion that it was authorized by IPRA to withhold the responsive audio recordings because the Water Authority lacked the technological capacity to make redactions. In addition, we will review Mr. Aranda's allegation that the Water Authority failed to provide him a proper "written explanation of denial," as required by IPRA. Section 14-2-11(B).

Substantive Basis for the Water Authority's Partial Denial

The primary allegation in Mr. Aranda's complaint is that the Water Authority lacked the legal justification to redact and withhold the records responsive to his complaint. Unfortunately, we are not able to definitively opine on this issue – with respect to either the investigative report or the audio recordings – because we have not reviewed those records in their full and unredacted form

¹ Although Mr. Aranda did not raise this issue in his complaint to our Office, our review of the correspondence related to his records request showed that the Water Authority was not fully compliant with IPRA's specified deadlines. In particular, the Water Authority failed to provide Mr. Aranda with a written acknowledgment of his request within three business days or provide him with the responsive records within fifteen calendar days. See § 14-2-8. The Water Authority acknowledged in response to our inquiry that it did not comply with these deadlines. In light of this admission and the Water Authority's statement that it is "fully aware of the time requirements" set forth by IPRA, we will not further belabor this issue.

ourselves. While a District Court could potentially compel the Water Authority to produce the responsive records so that it could conduct an in camera review, the Office of the Attorney General does not, at present, possess this authority. *See American Civil Liberties Union of New Mexico v. Duran*, 2016-NMCA-063, ¶ 45 (explaining that “IPRA jurisprudence contemplates in camera review in circumstances in which the applicability of a disclosure exception is in question”). As a result, without reviewing the unredacted records ourselves, we cannot determine whether the Water Authority was justified in redacting and withholding them. We would, however, recognize that IPRA does indeed contain a specific exception allowing public bodies to redact and at times entirely withhold records as matters of opinion. *See* § 14-2-1(C) (providing an exception for “letters or memoranda that are matters of opinion in personnel files or students’ cumulative files”).

We do not agree with Mr. Aranda’s argument that IPRA’s matters of opinion exception is inapplicable to investigative reports or audio recordings of interviews. New Mexico’s appellate courts have repeatedly held that the exception is applicable to “personnel information of the type generally found in a personnel file” irrespective of the literal location of the information or record. *Cox v. New Mexico Department of Public Safety*, 2010-NMCA-096, ¶ 21. *See also Leirer v. New Mexico Department of Public Safety*, No. 35,154, mem. op. at 4 (N.M. Ct. App. June 7, 2016) (non-precedential) (concluding that the matters of opinion exception applied to the records in question because they “were created for the purpose of conducting internal disciplinary proceedings”). Thus, to the extent that an investigative report or audio recording contained opinion information related to a particular employee, we think it is likely that a court would conclude that the matters of opinion exception would authorize the redaction or withholding of the record.

With that being said, we would express a note of caution to the Water Authority as to its statement that it was not technologically equipped to redact the responsive audio recordings. Although we do not have the factual basis to contest this assertion (and would not go nearly so far as to conclude that the Water Authority violated IPRA in this respect), it would behoove the Water Authority to obtain the necessary technology to redact recordings so that this issue does not recur. In this day in age, the technological ability to edit audio recordings is, we think, widespread and quite common, and it would be most unwise to debate this issue in a court of law with IPRA’s damages, costs, and fees on the line.

Written Explanation of Denial

The remaining issue we must resolve is Mr. Aranda’s allegation that the Water Authority failed to provide him a proper “written explanation of denial,” as required by IPRA. Section 14-2-11(B). Whenever a public body withholds or redacts a record, IPRA requires it to provide the requestor with a “written explanation of the denial.” Section 14-2-11(B). This written explanation, which is more commonly called a denial letter, must contain three pieces of information: the specific exception in law justifying the denial, a description of the records sought, and “the names and titles or positions of each person responsible for the denial.” Section 14-2-11(B); *see also* IPRA Guide, p. 40 (stating that a denial letter must “describe the records sought to be inspected, set forth the names and titles or positions of each person responsible for the denial, and explain the reason for the denial”). As our Court of Appeals has emphasized, denial letters convey vital information to the requestor and are therefore critical to the operation of IPRA. *See Duran*, 2016-NMCA-063, ¶

38 (stating that, “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.”).

In this case, the “written explanation of the denial” that the Water Authority provided to Mr. Aranda on November 14, 2018, was insufficient because it did not identify the records sought or the individual responsible for the decision to redact and withhold the responsive records. Although counsel to the Water Authority later clarified to Mr. Aranda that he was the individual responsible for the denial, this information should have been provided previously and, in any case, the November 14 communication was required by IPRA to identify the records specifically sought by Mr. Aranda. We bring this issue to the attention of the Water Authority so that it may craft its IPRA policies and procedures to more closely adhere to its statutory obligations.

Conclusion

Based on our review of the allegations in Mr. Aranda’s complaint, we would advise the Water Authority to continue to be mindful of its statutory obligations. Although the issues we have identified in this complaint are relatively minor, the Water Authority should, we think, continue to analyze its IPRA policies and procedures so as to ensure that it provides the public with access to “the greatest possible information,” as required by IPRA. 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

cc: Mr. Anthony Aranda