

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

February 16, 2021

VIA ELECTRONIC MAIL ONLY

Albuquerque Public Schools
Scott Elder, Interim Superintendent
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Albuquerque NM 87125-0704
Email: superintendent@aps.edu

Dr. David E. Peercy, President, Board of Education
P.O. Box 25704
Albuquerque NM 87125-0704
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Re: Inspection of Public Records Act Complaint – Albuquerque Journal

Dear Messrs. Elder and Peercy:

This letter addresses the complaint filed with the Office of the Attorney General by the Albuquerque Journal (hereinafter the “Journal”) alleging that Albuquerque Public Schools (the “District”) violated the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2019) (“IPRA”). As you may or may not be aware, the Journal has alleged that the District violated IPRA in connection with eight public records requests submitted between January and November of 2020. Having reviewed the Journal’s complaint and the District’s response to our inquiry, we find that the District violated IPRA in its handling of each public records request identified by the Journal’s complaint. Compounding these repeated violations of IPRA, at least five of these eight requests appear to be unresolved.

Background

The Journal complains to our Office of the District’s responses to and handling of eight requests submitted in 2020. Those requests were dated January 28, 2020, February 19, 2020, February 24, 2020, February 25, 2020, February 26, 2020, June 11, 2020,¹ and November 2, 2020. For

¹ The Journal submitted two requests to the District on June 11, 2020, neither of which received any response from the District, as we discuss in greater detail below.

organizational purposes, we will address these requests by month: January, February, June, and November, respectively. We will summarize the facts of each request individually alongside our analysis of whether the District complied with IPRA.

Before addressing each of the Journal's requests, though, it is necessary to begin by outlining general principles of IPRA. First and foremost, the Inspection of Public Records Act provides that the people of New Mexico are entitled to "the greatest possible information" about governmental affairs. 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."). The statute states that the public has the right to inspect and copy all "public records" except as otherwise provided by law. Section 14-2-1(A). This means that public records requests may only be denied, consistent with IPRA, "because of a specific exception contained within IPRA, or statutory or regulatory exceptions, or privileges adopted by [the Supreme] Court or grounded in the constitution." *Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-026, ¶ 8.

A public body's response to a public records request is subject to several timeframes set forth by IPRA. The statute mandates that, if the requested records are not available within three business days, the public body's records custodian must "explain in writing when the records will be available for inspection or when the public body will respond to the request." Section 14-2-8(D). Subsequently, inspection must be permitted within fifteen calendar days, see *id.*, unless the request is designated to be excessively burdensome or broad. *See generally* § 14-2-10. Both of these applicable timeframes – three business days and fifteen calendar days – are calculated from the date on which "the written request is delivered to the office of the custodian." Section 14-2-8(D). They both, however, are critical: if a public body does not acknowledge the request with a proper three-day letter within three business days, or if a public body fails to send one of the required communications within fifteen calendar days, that public body has violated IPRA.

January 28, 2020 Request

The Journal sent the first of its eight relevant requests to the District on January 28, 2020. That request sought "records relating to the Eighty-six Activity Fund Audits" referenced in a document that appears to be connected to a meeting of the District's Audit Committee. The District responded the following day, on January 29, 2020, by acknowledging receipt of the request and stating that it would respond again on or before February 12, 2020. That deadline passed, and the District responded the following day, on February 13, 2020. Through that response, the District provided a number of records to the Journal which the District heavily redacted. The District explained that these redactions were based IPRA's "matters of opinion" exception in Section 14-2-1(C). The Journal, which also requested records related to each of the eighty-six (86) individual audits, objected to the redactions made by the District on the grounds that Section 14-2-1(C) did not apply to those records. After a handful of communications back and forth, the District apparently stopped responding to the Journal, which never received many of the records it sought.

Preliminarily, with respect to this first request, we agree with the Journal that Section 14-2-1(C) – which the District cited as the sole basis for its redactions – does not appear to apply to the records

in question. Although we might not be able to say that definitively without reviewing the unredacted records ourselves, IPRA's Section 14-2-1(C) applies to "letters or memoranda that are matters of opinion in personnel files or students' cumulative files." In our IPRA Guide, our Office expresses our view that the exception "is aimed at protecting documents in an agency's personnel or student files that contain subjective rather than factual information about particular individuals." IPRA Guide, p. 9. This is consistent with a published decision from our Court of Appeals which held that "the Legislature intended to exempt from disclosure 'matters of opinion' that constitute personnel information of the type generally found in a personnel file, i.e., information regarding the employer/employee relationship such as internal evaluations; disciplinary reports or documentation; promotion, demotion, or termination information; or performance assessments." *Cox v. New Mexico Department of Public Safety*, 2010-NMCA-096, ¶ 21. A matter of opinion regarding a particular employee, though, is a far cry from the audit results of a school's "activity fund account." Whereas IPRA's Section 14-2-1(C) is geared towards opinions related to personnel matters, the audit results at issue appear to have looked to the performance of certain financial accounts of schools and District departments. Based on this information, then, we agree with the Journal that the District's redaction of these audit documents was likely unlawful.

It also appears that the District failed to provide other records that were responsive to the Journal's request. The Journal has indicated to our Office that it requested other records connected to these eighty-six individual audits and that these additional records were never provided. Given that the only record provided to our Office by the District in connection with this request was a four-page heavily-redacted list of audit compliance ratings, it would appear that the Journal's statement that "[t]he records were never given to the Journal" is correct.

Lastly, we also conclude that the District violated IPRA's applicable deadlines in responding to this first request. That is, the District responded to the Journal on February 13, 2020, one day later than it had said it would respond and one day after IPRA's fifteen-day deadline had passed. *See* § 14-2-8(D). Normally, such a slight error would not be particularly concerning, but given the other seven requests discussed below, it is clear that this missed deadline is part of a consistent pattern of noncompliance with IPRA. It also is a factual matter that the District did not abide by this timeline, to say nothing of the documents which, more than a year later, have still not been provided.

February Requests

The Journal's IPRA second request was dated February 19, 2020, and it sought a number of records: "audio recordings of the February 12, 2020 Board of Education Policy and Instruction Committee meeting, Any records of surveys done by the APS Principal Association Middle School Task Force about a new magnet middle school, [and] Any other records of a proposed, new non-traditional teach middle school." Although the District sent an auto-reply to this request stating that the Journal's request "will be reviewed for response [sic]," it did not substantively respond until February 25, 2020, five business days later. On that date, the District acknowledged the Journal's request and stated that it would respond again on or before March 5, 2020. Suffice it to say, the District did not respond to this request until July 27, 2020, more than five months after the

District had received the request and one day after the Journal ran a news article about the District's compliance with IPRA.

The District handled the Journal's third request similarly. This request, dated February 24, 2020, sought records related to "visits or attempted visits by ICE agents to any and all APS schools and/or facilities." The District did not respond to this request until March 5, 2020, eight business days later, when it finally acknowledged receipt and stated that the Journal could expect a response March 13, 2020. Again, the District did not respond until July 28, 2020, more than five months after it had received the request by directing the Journal to records available on the District's website and stating that no other responsive records existed. In handling this third request, we note that the District once again ignored the Journal's request for a status update before responding.

The fourth request identified in the Journal's complaint to our Office was dated February 25, 2020, when the Journal requested records related to an investigation into a particular educational assistant at Sandia High School. The District did not respond to this request until March 10, 2020, ten business days later, when it told the Journal that it could expect another response on or before March 17, 2020. We understand the Journal has never received a response of any kind.

The Journal also received no response of any kind to its fifth request dated February 26, 2020. That request sought records between APS officials and the Department of Homeland Security between 2018 and 2020. While the District did send a (late) three-day letter in response to the earlier requests in February 2020, it offered the Journal no response whatsoever in response to its request dated February 26, 2020. Even after being notified by our Office of the Journal's complaint, the District still has not responded, instead stating, "Records were not withheld; efforts on this request are still in progress."

Looking to the District's responses, there is no question that the District violated IPRA in responding to all four of the Journal's February 2020 requests. For instance, the District failed to send a timely three-day letter, sending that communication five, eight, and ten business days later, respectively, before failing to send one at all in response to the February 26, 2020 request. *See* § 14-2-8(D). More importantly, the District also failed to substantively respond within fifteen calendar days to all four requests. For the February 19, 2020 and February 24, 2020 requests, the District did not respond until the end of July 2020, after the Journal had run an article about the District's IPRA noncompliance. For the remaining two requests, dated February 25, 2020 and February 26, 2020, it appears almost a year later that the District has never responded substantively, in direct and repeated violation of IPRA.

June Requests

The Journal's two June 11, 2020 requests, seeking records related to polling done of APS personnel, parents, families, or students as to distance learning, also have not been either acknowledged or fulfilled. Once again, the District stated in response to our inquiry, "Records were not withheld; efforts on this request are still in progress." However, notwithstanding this statement suggesting that "efforts" are being made, the District has never, in the eight months that have elapsed since it received these requests, sent the Journal an acknowledgement letter or an

excessively broad and burdensome letter. IPRA plainly requires public bodies to send such letters whenever they require time to respond beyond fifteen calendar days. *See* § 14-2-10. It is therefore clear that the District violated, and continues to violate, IPRA in its handling of these requests.

November 2, 2020 Request

The Journal sent the District its eighth and final public records request on November 2, 2020, requesting “records of surveying or polling conducted in 2020 by APS regarding mill levy or bond issues.” Once again, the District did not abide by IPRA’s specified deadlines. It was required to send a three-day letter by November 5, 2020, and a substantive fifteen-day response by November 15, 2020, and it apparently failed to send either one. Although we take the Journal at its word that the District may have responded in writing sometime around December 14, 2020, the only evidence we have is that the District failed to respond until January 28, 2021, almost three months after receiving the request. (On that date, it stated it had no responsive records.)

Conclusion

Based on its conduct and handling of the Journal’s requests, it is clear that the District repeatedly and flagrantly violated IPRA in responding to the eight IPRA requests identified in the Journal’s complaint. This includes failures to send timely communications, provide responsive records, and in some cases to respond at all. As mentioned previously, the District completely ignored three requests in their entirety even after receiving our Office’s inquiry letter. Engaging in such conduct, the District runs an extreme and real risk of litigation and financial penalties stemming from its statutory noncompliance. *See* § 14-2-12(D) (“The court shall award damages, costs and reasonable attorneys' fees to any person whose written request has been denied and is successful in a court action to enforce the provisions of the Inspection of Public Records Act.”). We would note that the explanations offered by the District, namely the COVID-19 pandemic and staff shortages, do not excuse its failure to communicate timely with the Journal or its failures to fulfill five requests more than eight months later.

The coda to this situation was the District’s failure to respond to our Office as we investigated the Journal’s complaint. Our Office wrote to the District on December 29, 2020, seeking records and information with a requested response date of January 29, 2021. In response, we received the District’s auto-reply (which it apparently sends to all public records requests sent through email) but otherwise received nothing even after the requested deadline of January 29, 2021, had passed. We again contacted the District on February 8, 2021, seeking information as to when the District might respond to our inquiry, again receiving no reply. It was not until February 11, 2021, after we stated that we would wait no longer than the close of business that day, that the District finally sent us a response.

We recommend that the District address all of this noncompliance as quickly as possible. As a start, it must take immediate action to fulfill the Journal’s outstanding five requests, those being the ones dated January 28, 2020, February 25, 2020, February 26, 2020, and June 11, 2020 (both requests). It is imperative that the District communicate with the Journal about when it can expect a response to its requests, search for any responsive records quickly and thoroughly, and then

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provide those records to the Journal. Given the age of these requests, they must be prioritized and fulfilled as rapidly as possible. In addition, and perhaps more importantly, the District should also overhaul its approach to public records requests in general, given that it is apparent that the District's noncompliance with IPRA is a systemic problem.

Finally, IPRA states that all public bodies, including Albuquerque Public Schools, have a fundamental obligation to provide the public with "the greatest possible information" about governmental affairs, further declaring that this is "an essential function of a representative government and an integral part of the routine duties of public officers and employees." Section 14-2-5. The statute is clear: providing access to public records is one of the jobs and one of the missions of the District.

Please be advised that our Office will not tolerate these types of glaring failures to respond to and otherwise properly handle public records requests. Should the District continue to disregard its obligations under IPRA, we may take further action in our capacity as the agency charged with the enforcement of IPRA.

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: Albuquerque Journal

Monica Armenta