

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

September 3, 2021

VIA ELECTRONIC MAIL ONLY

Albuquerque Public Schools
John A. Rodriguez, Records Compliance Officer
P. O. Box 25704
Albuquerque, NM 87125-0704
Email: john.rodriguez@aps.edu

Re: Inspection of Public Records Act Complaint – Kathleen Hager

Dear Mr. Rodriguez:

Thank you for your responses to our inquiries regarding the complaint filed with the Office of the Attorney General by Ms. Kathleen Hager alleging that the Albuquerque Public Schools (hereinafter 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 know, Ms. Hager alleges that the District violated IPRA in responding to her public records request dated April 6, 2021. Having carefully reviewed both her complaint and your response to our inquiry, we find that the District effectively violated IPRA by failing to provide Ms. Hager records held on the District’s behalf by the Albuquerque Teachers Federation (“ATF”). We recommend that the District work with ATF to respond properly to Ms. Hager’s request.

Background

We understand the District uses what it calls the Career Pathway System (“CPS”) to facilitate professional development and allow its employees to earn promotions and greater salaries without changing employers.¹ It appears that CPS is used to promote and set salaries for many professionals within the District, including counselors, social workers, nurses, physical therapists, and others. It also appears that CPS, itself the product of

¹ The negotiated agreement between the District and ATF states, with respect to CPS, that “the opportunity to move to a new educational role and remain in APS benefits both the employer and the employee.”

negotiations between the District and ATF, is effectively run by ATF. The District explained this in response to our inquiry:

As part of the negotiated agreement between APS & the ATF. [sic] School counselors that want to advance their pay must complete a dossier portfolio, and have it approved by the ATF. The ATF then contacts APS's Employee Data Center to confirm advancement of pay. APS does not receive the dossier portfolio at any point during this process, APS only receives a notice to advance an employees [sic] pay.

Internal emails from within the District confirm that the District itself “does not assist the Ancillary staff with advancement, that would be the [sic] ATF Office.” Ms. Hager has provided our Office with further documentation confirming that certain District employees seeking promotion must file portfolios with ATF, not the District, and sign a “submission form” agreeing that “the portfolio is now the property of the ATF union.”²

Ms. Hager, who we understand is a District employee, submitted a public records request to the District's records custodian on April 6, 2021. Specifically, she requested records containing certain statistical information on CPS, such as “[t]he number of APS Counselors who submitted portfolios for promotion ... in 2020, 2019, and 2018” and “[t]he number of counselors who passed their portfolios in order to be promoted ... in 2018, 2019, and 2020.” More than three weeks later, having received no reply whatsoever from the District, Ms. Hager emailed the records custodian a second time, adding that she was aware that CPS “is run on the behalf of APS through the Albuquerque Teachers Federation” and that the records should be “open to public inspection since they are working on the behalf of APS which is a public entity.”

Three days later and approximately 24 days after receiving Ms. Hager's request,³ on April 30, 2021, APS responded in writing for the first time. This email stated, in relevant part, that “it has been determined that the records you are seeking are not maintained by APS.” Instead, the District explained, “[t]he records are maintained by the ATF Office.” In turn, the District stated that ATF was “not subject to IPRA requests” because “[t]hey are not a

² Moreover, a presentation saved on the District's website on CPS appears to confirm ATF's managerial role: “ATF employs a CPS Coordinator to provide the infrastructure management of the Portfolio process much like the PED's role in the Dossier process for teachers. E&RSE's submit their Portfolio to the CPS Coordinator to be scored by trained readers. The CPS Coordinator follows strict protocols hiring and calibrating readers as well as maintaining confidentiality.” See https://www.aps.edu/human-resources/labor-relations/negotiated-agreement-documents/the-aps-atf-career-pathway-system/at_download/file.

³ In recent months, our Office has repeatedly chided the District for its consistent and nearly unbroken pattern of failing to respond timely to public records requests. Suffice it to say, failing to respond to a public records request for approximately 24 calendar days is a violation of IPRA. 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.”). We would again emphasize to the District that its conduct runs a real risk of litigation and severe financial penalties.

government agency nor are they a public body.” The District therefore declared Ms. Hager’s request “closed.”

ATF appears to have steadfastly maintained that its records related to CPS are not subject to disclosure through IPRA. For instance, responding to APS’s records custodian through email, the ATF President maintained that “ATF and the ATF Teacher Leadership Foundation are not subject to IPRA requests” and that “[t]his request should go to APS HR.” Similarly, on May 3, 2021, Ms. Hager emailed her request directly to ATF, which responded that it would bring the matter before its “executive council” at a May 18, 2021 meeting. We understand that the records and information were never provided to Ms. Hager.

The central legal question presented by Ms. Hager’s complaint is whether the records she requested constitute “public records” subject to disclosure through IPRA. The District has stated definitively that these records exist, but it defends its response to Ms. Hager by stating that only ATF has access to the records and therefore the District itself “did not deny Mrs. Hager’s request.” For its part, ATF appears to argue that its records are not subject to IPRA because ATF is not itself a governmental agency.

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 (8th ed. 2015) (“IPRA Guide”).

It is well-established in New Mexico that governmental agencies cannot avoid transparency by utilizing the private sector to store records or perform governmental services. To the contrary, our Court of Appeals has in the past explained that allowing public bodies “to circumvent a citizen’s right of access to records by contracting ... would thwart the very purpose of IPRA and mark a significant departure from New Mexico’s presumption of openness at the heart of our access law.” *State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, ¶ 26. For this reason, IPRA itself defines the term “public records” as inclusive of not only those records literally held by the public body, but also all records held on its behalf. *See* § 14-2-6(G) (defining the term “public records” as including all records “that are used, created, received, maintained or held by or *on behalf of* any public body and relate to public business”) (emphasis added). IPRA is very clear in this respect: a record held on behalf of a public body by a private entity is a public record if the record relates to public business.

In *Toomey*, our Court of Appeals considered the issue of the applicability of IPRA to a private organization contracting with a public body. There, the City of Truth or Consequences had entered into an agreement with a nonprofit corporation to manage the City's public access television channel. *Toomey*, 2012-NMCA-104, ¶ 3. The plaintiff submitted an IPRA request to the company and the City, eventually filing a lawsuit to compel the production of the requested records. *Id.* at ¶ 5-6. Looking to the State of Florida for guidance, the Court eventually adopted the non-exhaustive nine-factor test elucidated in *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Grp., Inc.*, 596 So. 2d 1029 (Fla. 1992), to settle the question before it. *Toomey*, 2012-NMCA-104, ¶ 13-14. Those factors were:

- 1) the level of public funding;
- 2) commingling of funds;
- 3) whether the activity was conducted on publicly owned property;
- 4) whether services contracted for are an integral part of the public agency's chosen decision-making process;
- 5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform;
- 6) the extent of the public agency's involvement with, regulation of, or control over the private entity;
- 7) whether the private entity was created by the public agency;
- 8) whether the public agency has a substantial financial interest in the private entity; and
- 9) for who's benefit the private entity is functioning

Schwab, 596 So. 2d at 1031; *Toomey*, 2012-NMCA-104, ¶ 22. The Court of Appeals emphasized that, going forward, New Mexican courts should use these factors in order to avoid a narrow construction of IPRA, and the test it adopted was “a flexible approach that favors access to records even when held by a private entity.” *Id.* at ¶ 26.

Applying this new test to the case before it, the Court in *Toomey* found that the nonprofit corporation was subject to IPRA, as it effectively operated ““on behalf of” the City.” *Toomey*, 2012-NMCA-104, ¶ 25. The decision emphasized a number of critical facts: the City provided all of the corporation's funding, the corporation was performing a government function (the running of the cable channel), the corporation was entirely functioning for the benefit of the City, and the City enjoyed significant control over the corporation. *Id.* at ¶ 25. Given those facts, the corporation was subject to IPRA.

The Court of Appeals recently revisited this issue in *New Mexico Foundation for Open Government v. Corizon Health*, 2020-NMCA-014. In that case, the Court held that certain settlement agreements entered into by a private company providing services on behalf of a public body constituted “public records” for the purposes of IPRA. *See id.* at ¶ 21. As the Court explained, “the settlement agreements were plainly created and maintained in relation to a public business, here, the medical care and personal safety of the inmates held by the NMCD.” *Id.* at ¶ 18. Because the records existed pursuant to the services provided

by the private entity on behalf of the public body, they were “public records” subject to IPRA.

Applying these principles to Ms. Hager’s request and the responsive CPS records, we conclude that these records are clearly “public records” for the purposes of IPRA. These are records held quite literally “on behalf of” the District, since ATF runs CPS to manage the promotion and salary scales of the District’s employees (effectively managing a significant part of the District’s personnel system and functioning as a quasi-human resources department). Indeed, notwithstanding the fact that these are District employees, the District itself has indicated to our Office that its only role in CPS is to be instructed by ATF “to advance an employees [sic] pay.” Insofar as ATF is effectively managing the District’s personnel, is clear that in one sense ATF is operating for the “benefit” of the District. *Schwab*, 596 So. 2d at 1031. This is “a function which the public agency otherwise would perform,” as well as “an integral part of the public agency’s chosen decision-making process.” *Id.* Like the provision of medical services to prison inmates in *Corizon*, ATF is providing governmental services on behalf of a public body, and therefore its records related to those services are “public records” subject to disclosure through IPRA in the absence of an exception.⁴

As for the District and ATF’s defenses of their collective refusal to satisfy Ms. Hager’s request, these arguments are entirely unavailing. Preliminarily, ATF’s contention that it is not a “public body” subject to IPRA is irrelevant: what matters is that it is holding records on the District’s behalf. Similarly, the District’s argument that it did not itself hold the records responsive to Ms. Hager’s request is equally specious, since it is responsible for providing all public records it holds or are being held on its behalf. *See* § 14-2-6(G). To the extent that the District might struggle to obtain records from its employees or contractors, we would simply note that there are remedies available in law to compel such entities to comply with their non-discretionary duties.

Conclusion

New Mexico law is clear that public bodies cannot avoid transparency by utilizing the services of a private entity to perform public services or store public records. For this reason, we agree with Ms. Hager that the records held by ATF related to CPS are “public records” for the purposes of IPRA, subject to disclosure in the absence of an applicable exception. To be clear, it is our opinion that Ms. Hager has thus far been denied her legal right to inspection on entirely unlawful grounds. It is not enough for the District to refer Ms. Hager to ATF or to reiterate ATF’s contention as to its status as a non-governmental entity. The District must contact ATF as soon as possible to retrieve these public records

⁴ On a practical level, if we reached the contrary conclusion, this would effectively place the entirety of CPS and the District’s personnel system beyond the scope of IPRA, thereby “mark[ing] a significant departure from New Mexico’s presumption of openness at the heart of our access law.” *Toomey*, 2012-NMCA-104, ¶ 26.

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and then provide Ms. Hager either copies of those records or a “written explanation” of the exceptions in law authorizing the District to withhold them. If it does not do so, it runs the risk that Ms. Hager may file an enforcement action in District Court and obtain financial damages pursuant to IPRA. *See generally* § 14-2-11 and § 14-2-12.

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: Kathleen Hager

Albuquerque Teachers Federation