

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

November 18, 2020

VIA ELECTRONIC MAIL ONLY

Albuquerque Public Schools
Raquel Reedy, Superintendent
P.O. Box 25704
Albuquerque, NM 87125-0704
Email: superintendent@aps.edu

Re: Inspection of Public Records Act Complaint – Patrick Hayes

Dear Ms. Reedy:

This letter addresses two complaints submitted to the Office of the Attorney General by Mr. Patrick Hayes on December 12, 2018, both alleging the Albuquerque Public Schools (“APS”) violated the Inspection of Public Records Act (“IPRA”), NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2018). Specifically, Mr. Hayes alleges that APS failed to provide records in response to his requests made on November 15, 2018 and December 12, 2018. We are in receipt of the response submitted by APS Records Custodian Jeannie Chavez on behalf of APS to our Office’s inquiry regarding this matter, wherein she denied that APS violated IPRA. Having reviewed the documentation and facts surrounding this matter, we conclude that APS did not comply with all relevant provisions of the Inspection of Public Records Act in its handling of Mr. Hayes’ request. Specifically, we note an apparent misunderstanding of IPRA’s requirements regarding time limits imposed by IPRA, and seek to address this misunderstanding.

Background

Mr. Hayes submitted an emailed request for records, expressly citing IPRA, on November 15, 2018. The email described with specificity the materials he sought: copies of all EEOC complaints received by the district since January 1, 2015; and any complaints received in regards to Mary Eastin.

APS responded, via an email sent by Records Custodian Jeannie Chavez, on December 5, 2018. Ms. Chavez stated the requested EEOC complaints could not be released pursuant to the Section 14-2-1(A)(8) “Other Laws” exception of IPRA and the federal Code of Regulations, 29 C.F.R. § 1611.13. Ms. Chavez stated the complaints against Mary Eastin could not be released in compliance with Section 14-2-1(A)(8) of IPRA and the federal Family Educational Rights and Privacy Act (“FERPA”) 20 U.S.C. 1232g(b)(2)(A). Ms. Chavez stated FERPA prohibited release of student education records only with the written consent of a student over eighteen years or the written consent of a minor student’s parents.

On December 3, 2018, Mr. Hayes submitted his second records request. The request was again submitted via email, and also expressly cited IPRA. The request described with specificity the materials sought: any and all district police reports associated with Mary Eastin.

Ms. Chavez responded to Mr. Hayes by email on December 5, 2018. She stated the “law enforcement records” were excepted from release pursuant to IPRA’s Section 14-2-1A(3) “Matter of Opinion”; Section 14-2-1A(7) “Law Enforcement Records”; and Section 14-2-1A(8) “Other Laws”; as well as FERPA, specifically 20 U.S.C. 1232g(b)(2)(A).

On December 12, 2018 Mr. Hayes filed two complaints with the Office of the Attorney General (“OAG”). On the same day, the AOG contacted APS Superintendent Raquel Reedy via email, requesting a response to the concerns raised by Mr. Hayes. A written response was provided by APS Records Custodian Jeannie Chavez on December 20, 2018.

The Inspection of Public Records Act

New Mexicans “are entitled to the *greatest possible information* regarding the affairs of government and the official acts of public officers and employees.” Section 14- 2-5. *See also Republican Party of New Mexico v. New Mexico Taxation & Revenue Dep’t*, 2012-NMSC-026, ¶ 38, 283 P.3d 853, 867 (observing “IPRA’s guiding purpose of promoting government transparency”). This vital public policy is embodied by the Inspection of Public Records Act, which affords individuals the right to inspect all “public records” with only limited and specifically enumerated exceptions. *See* § 14-2-1(A) (identifying eight exceptions to disclosure). Consistent with IPRA’s purpose, courts employ a “presumption in favor of the right to inspect.” Attorney General’s Inspection of Public Records Act Compliance Guide, p. 32 (8th ed. 2015) (“IPRA Guide”).

The legislature chose to define what constitutes “public records” broadly:

“[P]ublic records” means all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and related to public business, whether or not the records are required by law to be created or maintained.

Section 14-2-6(G); *see also* Section 14-2-5 (declaring purpose of act and public policy of IPRA); *and* *ACLU v. Duran*, 2016-NMAC-063, ¶ 25, 392 P.3d 181, 188 (stating IPRA’s purpose of promoting an informed electorate and government transparency is documented within IPRA itself and in the appellate case law of New Mexico).

The purpose of IPRA is not merely to make “tangible documents” publically available, but to make “the greatest possible *information* available.” *ACLU v. Duran*, ¶ 25 (emphasis in the original)(internal citations omitted). Information comes not only in the form of tangible documents, but can also be gathered based on an agency’s denials. *Id.* The Court of Appeals describes agency denials as “valuable information-gathering tools” because the absence of either (1) production or (2) a conforming denial based on a valid IPRA exception serves as a “strong message” that no responsive public records exist. *Id.*, ¶ 25 (emphasis added). The Court identified production or a denial based on a valid exception are alternatives, not as mutual possibilities. *See id.*

IPRA provides for multiple means of responding to written requests when production of the requested records is not made immediately. “Three day” letters addressing situations when access is not provided within three days, denial letters, and letters explaining requests are unduly burdensome all have their own specific requirements, both in terms of their content and in terms of time limits. *See* Sections 14-2-8(D), 14-2-10, & 14-2-11(B).

APS’ Response

Complaint Regarding the November 15, 2018 Request

As a preliminary matter, we note that Mr. Hayes’ request was submitted on November 15, 2018. The denial was delivered on December 5, 2018. While Mr. Hayes did not complain about the timeliness of the denial, it was sent outside the fifteen day time limit from the receipt of his request. IPRA permits fifteen days from the receipt of a request for the issuance of a denial. *See* § 14-2-11(C)(stating a records custodian must deliver or mail a written explanation of denial within fifteen days of receipt of written request). A failure to timely issue a denial

letter, if determined to be unreasonable, is the basis for an award of damages. *See* § 14-2-11(C)(1) to (4).

APS responded to Mr. Hayes on November 19, 2018, indicating the appropriate parties had been contacted and would search to determine if the records existed and if they could be inspected pursuant to law. APS further advised Mr. Hayes that it would communicate with him on or before December 3, 2018 about the status of the records. The letter was neither a “three day” letter, nor a letter regarding an unduly broad or burdensome request stating when the records would be made available. Instead of providing Mr. Hayes disclosure on or before December 3, 2018, APS sent him a denial, by email, on December 5, 2018.

APS is strongly encouraged to review its policies and procedures and to ensure its communications with parties requesting public records comply with IPRA’s requirements as to “three day” letters, denial letters, and letters regarding unduly burdensome requests. The fact that APS was closed during several of the intervening days does not negate its obligation to comply with the limits imposed by IPRA. APS risks exposing itself to potential claims for damages when it fails to timely and appropriately respond to records requests. APS argues that it complied with all relevant time frames because it responded to Mr. Hayes on November 15, 2018. But this response did not relieve APS of its obligations to, ultimately, either timely produce the records or timely deny the request.

APS denies it violated IPRA because any requested EEOC complaints were exempt from disclosure pursuant to 29 C.F.R. § 1611.13 and the “other laws” exemption of Section 14-2-1A(8) of IPRA. *December 20, 2018 Letter from Jeannie R. Chavez*, p. 5. APS also denies it violated IPRA in regards to any complaints as to Mary Eastin pursuant to FERPA and the “other laws” exemption provided in IPRA. *Id.*

Having not reviewed the records we cannot say, definitively, whether the denials were lawful or not. Based on the law, we are skeptical of the broad justifications provided by APS. A public body may rely on other laws to support an exemption from IPRA. *See* § 14-2-1(A)(8)(exempting from disclosure materials which are not expressly exempted by IPRA but which are exempt “as otherwise provided by law”). However, the other laws relied upon by a public entity must provide valid and relevant legal authority for non-disclosure.

APS cites to federal provisions such as FERPA to support its denial. The purpose of FERPA is to protect privacy of student educational records other than directory information. The protected information must **directly relate** to a student, and be must be maintained by an educational agency or institution. 20 U.S.C.A. § 1232g(4)(a)(emphasis added). Further, Congress expressly exempted criminal investigation reports from those education records protected by FERPA, and did not intend to treat criminal investigation and incident reports as

education records. *Bauer v. Kincaid*, 759 F.Supp. 575, 590 (1991). If the relevant record or information is not **directly related** to a student, then FERPA does not operate to prohibit disclosure. *See Baker v. Mitchell-Waters*, 826 N.E.2d 894, 899, 2005-Ohio-1572, ¶ 29 (Ohio Ct. App. 2005) (holding that “documents, relating to allegations of abuse or neglect of students by teachers, are not protected from discovery by FERPA, because the requested documents do not contain information directly relating to students”); *see also Easton Area Sch. Dist. v. Miller*, 191 A.3d 75, 77 (Pa. Commw. Ct. 2018) (holding that a video depicting “a school teacher roughly disciplining a student on the school bus” was not an “education record” for the purposes of 20 U.S.C. § 1232g because it did not contain information directly related to a student), *appeal granted in part*, No. 530 MAL 2018 (Pa. 2019). Here, it is clear that Mr. Hayes was seeking information relating to a teacher – not to a student.

APS also relies on the provisions of the federal Code of Regulations governing EEOC charge and complaint files. *December 20, 2018 Letter from Jeannie R. Chavez*, p. 5. However, this provision governs EEOC files maintained by federal agencies. It does not appear relevant authority on the issue of whether materials received and maintained by a public school are subject to disclosure under New Mexico’s IPRA.

Based on the information available to us, we think APS should, at a minimum, reevaluate the legal bases for the denials it made in this case. As noted above, 20 U.S.C. Section 1232g does not allow an educational institution to withhold any record or redact any information it desires; rather, it shields particular information and records that relate to individual students. While it may be that some records responsive to Mr. Hayes’ request directly related to a particular student, there may be records which do not. Further, the policy of IPRA is to encourage redaction where necessary, while disclosing the nonexempt portions of a public record. *See* § 14-2-9(A). We strongly advise APS to scrutinize its records to ensure they are not subject to disclosure, or subject to disclosure in a redacted form.

Complaint Regarding the December 3, 2018 Request

APS denies it violated IPRA as to Mr. Hayes’ second request for records, the request for “any and all district police reports associated with Mary Eastin.” *December 20, 2018 Letter from Jeannie R. Chavez*, p. 3. APS cites, as authority FERPA, the “other laws” exception of IPRA, as well as two express exceptions contained within IPRA: the exception for matters of opinion, and the exception for law enforcement records. *Id.*

APS argues that when it responded to Mr. Hayes it was unsure if the APS Police Department officers’ investigation “would turn out to be a criminal investigation or a personnel investigation.” *Id.* APS argues that no charges were actually filed, and the records therefore

should be understood to be matters of opinion in a personnel file. *Id.* APS further states that APS Police Officers, who are commissioned law enforcement officers, investigate complaints about APS employees concerning infractions and document which disciplinary actions to take. *Id.*, pp. 2-3.

As discussed above, criminal investigations are not excepted from disclosure under FERPA. Nor is IPRA's law enforcement exception a blanket exclusion from disclosure. IPRA's law enforcement records exception does not extend to **all** records possessed by law enforcement agencies, or even all records pertaining to ongoing investigations. The exception, under the version of IPRA which was in effect at the time, is far narrower, extending only to "confidential sources, methods or information" and records revealing "information or individuals accused but not charged with a crime." § 14-2-1(A)(4)(as amended through 2011). APS argues that Mary Eastin was not charged with a crime, and accordingly no records could be disclosed.

Whether citing the law enforcement records exception or any other provision of law, all public bodies *must* carefully review each record to determine whether the claimed exception actually applies. *See* § 14-2-9(A) (providing that "Requested public records containing information that is exempt and nonexempt from disclosure shall be separated by the custodian prior to inspection, and the nonexempt information shall be made available for inspection."). This obligation was illustrated recently in our New Mexico Court of Appeals' unpublished decision in *Noll v. New Mexico Department of Public Safety*, No. A-1-CA-35981 (N.M. Ct. App. Mar. 19, 2019) (non-precedential). In that case, several law enforcement agencies had withheld a variety of records pursuant to IPRA's law enforcement records exception but had never actually "conducted a document-by-document review of the records." *Noll*, No. A-1-CA-35981, mem. op. at 18. Accordingly, the Court of Appeals held that the agencies had not satisfied their obligations under IPRA, stating, "Nothing in the plain language of IPRA authorizes a blanket denial of public access to records, express or implied, solely because those records are the subject of an ongoing criminal investigation." *Id.* ¶ 20.

It is unclear to us, based on the information provided, if there may have been records which might have been subject to disclosure even under the law enforcement exception. APS concedes that "[i]n the case of Mr. Hayes' request, APS PD had done an investigation, but we were not sure whether or not it would turn out to be a criminal investigation or a personnel investigation." *December 20, 2018 Letter from Jeannie R. Chavez*, p. 3. Notably, Mr. Hayes' request was broadly worded: he did not request police reports involving criminal allegations **against** Mary Eastin, but "any and all" reports "**associated** with Mary Eastin." (emphasis added). It is unclear if APS conducted a search to encompass all police reports associated with Mary Eastin, and then determined whether disclosure or redaction was appropriate, or limited itself only to searching for records where Mary East was accused of a crime, but not charged.

IPRA's exception for matters of opinion contained in personnel files is also not a blanket

exception. As determined by *Cox v. N.M. Dept. of Public Safety*, the protected matters of opinion must concern the employee-employer relationship. *Cox v. N.M. Dept. of Public Safety*, 2010-NMCA-096, 148 N.M. 934, 939, 242 P.3d 501. The exception encompasses documents generated by an employer or employee in support of their working relationship, including, for example, “documents concerning infractions and disciplinary action, personnel evaluations, opinions as to whether a person would be rehired or as to why an applicant was not hired.” *Cox*, ¶ 22. If, as indicated by APS, the APS PD prepared materials specifically concerning infractions and disciplinary actions as to Mary Eastin, such materials would properly fall within the exception from disclosure under IPRA.

For your reference, a copy of the 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,

Marah deMeule

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Assistant Attorney General

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