STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

HECTOR H. BALDERAS
ATTORNEY GENERAL

July 20, 2021

VIA ELECTRONIC MAIL ONLY

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

Re: Inspection of Public Records Act Complaint – Ricky Kottenstette

Dear Mr. Elder:

This letter addresses the complaint filed with the Office of the Attorney General by Mr. Ricky Kottenstette alleging that 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 may know, Mr. Kottenstette alleges that the District violated IPRA in connection with his public records request dated March 2, 2021. Having carefully reviewed the documentation provided to us by Mr. Kottenstette and the District, we conclude that the District violated IPRA by withholding records without adequate legal justification, failing to respond timely, and failing to provide an adequate "written explanation of denial." Section 14-2-11(B). Once again, we strongly recommend that the District take action to both remedy these IPRA violations and overhaul its internal public records process.

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").

Mr. Kottenstette submitted a public records request to the District on March 2, 2021 seeking "the time sheets for requested time off, sick days, excused absences, and unexcused absences" for his son's teachers at a particular public school. The District's records custodian initially responded to the request on the same day, March 2, 2021, by asking him to provide the District his son's student identification number as well as a list of the relevant teachers. This initial response did not state when Mr. Kottenstette could expect a further response, although it did state that the District would contact "[t]he appropriate APS departments" to "determine a time frame to gather the records." The next morning, on March 3, 2021, Mr. Kottenstette responded by providing the records custodian all of the information he had asked for, including both his son's student identification number and the names of the relevant teachers.

The District did not respond again to Mr. Kottenstette until March 23, 2021, approximately 21 days after receiving his request. On that date, after initially sending him an email stating that the District would respond "by 5 p.m. tomorrow," the District's records custodian emailed Mr. Kottenstette to state that "[t]he available records cannot be provided to you because they are exempt from release in compliance with … [the] Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rules." This email did not identify the individual at the District who was responsible for this decision to withhold the responsive records. Mr. Kottenstette responded to this denial on the same day by stating that he wanted to resubmit his request with the removal of "the sick days request." However, the District's records custodian, responding later that day, replied via email stating, "We are assuming that you are referring to the same teachers as was requested in the previous IPRA request … There are no records that are responsive to this revised request."

Mr. Kottenstette's request to the District and complaint to our Office effectively raises a number of issues related to IPRA. First, and most importantly, he argues that the District lacked the legal justification to withhold all of the responsive "time sheets." In addition, aside from the question of whether the District *could* have properly withheld the responsive records is the question of whether it actually did so through a proper "written explanation of denial." Section 14-2-11(B). Finally, we will address the District's noncompliance with IPRA's specified deadlines. We will consider each of these issues in turn.

Withheld Records

The main allegation in Mr. Kottenstette's complaint to our Office is that the District lacked the legal justification to withhold the responsive records. As mentioned previously, the District provided Mr. Kottenstette no records whatsoever, withholding all records and citing to HIPAA as the applicable exception to disclosure. For a number of reasons, we conclude that the District violated IPRA by withholding the requested records as it did.

Preliminarily, HIPAA does not operate as an exception to disclosure for these records in these circumstances. Although this is a finer point that appears to be a significant source of confusion for public bodies throughout New Mexico, the confidentiality conferred by HIPAA applies only to "protected health information" held by a "covered entity," 45 CFR § 164.512, both of which are legal terms that plainly do not apply to the District in these circumstances. Most importantly, the District is not a "covered entity" subject to HIPAA.[1] *See* 45 CFR § 160.103 (defining the term "covered entity" as a "health plan," "health care clearinghouse," or "health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter"). In addition, even if the District were a "covered entity" subject to HIPAA, the time sheets at issue here would not constitute "protected health information" because that term is defined so as to exclude "individually identifiable health information" that is "[i]n employment records held by a covered entity in its role as employer." 45 CFR § 160.103. In other words, HIPAA clearly does not apply to the District and the records responsive to Mr. Kottenstette's request, much less render those same records confidential.

Notwithstanding the fact that HIPAA was the only exception cited by the District, we note that there are other sources of law that *might* render information about employee sick leave exempt from disclosure. This includes IPRA itself, which, as we discuss in our Guide, specifically exempts health information from disclosure. *See* § 14-2-1(A) (exempting from disclosure "records pertaining to physical or mental examinations and medical treatment of persons confined to an institution"); *see also* IPRA Guide, p. 9 (explaining that the New Mexico Supreme Court had previously held "that the exception protected employee records pertaining to illness, injury, disability, inability to perform a job task and sick leave"), *citing to State ex rel. Newsome v. Alarid*, 1977–NMSC–076, 90 N.M. 790, *superseded by statute as stated in Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2012–NMSC–026. In addition, NMSA 1978, Section 14-6-1 creates a non-discretionary exception for "health information that relates to and identifies specific individuals as patients." We do not further address this issue because the District did not cite either of these exceptions in its communications with Mr. Kottenstette.

However, the District did not merely redact certain health information from the responsive records; instead, it withheld *all records* in their entirety, apparently due to the fact that at least one of the employees used sick leave at one point in time. That is, the District not only withheld the time sheets of those employees who used sick leave, but also withheld the time sheets of those who did not. The District explained in response to our inquiry that, "If the records would have been provided with or without redaction, the requester could have determined which employees used sick leave records, creating a violation of HIPAA."

[1] The U.S. Department of Health and Human Services discusses this issue on its website, explaining that, "In most cases, the *HIPAA* Privacy Rule does not apply to an elementary or secondary school because the school either: (1) is not a *HIPAA* covered entity or (2) is a *HIPAA* covered entity but maintains health information only on students in records that are by definition "education records" under *FERPA* and, therefore, is not subject to the *HIPAA* Privacy Rule." *See* https://www.hhs.gov/hipaa/for-professionals/faq/513/does-hipaa-apply-to-an-elementary-school/index.html (emphasis in original).

Based on the information available to us, the District's action to withhold all responsive records was plainly unlawful. No exception to disclosure permits public bodies to withhold all time sheets from requestors on the basis that some employees may have used sick leave. To the contrary, IPRA specifically provides 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." Section 14-2-9(A). Public bodies may, consistent with Section 14-2-1(A) and Section 14-6-1, redact sick leave information from within particular time sheets, but they cannot withhold all time sheets of all employees.

Finally, it appears that the District was dishonest in responding to Mr. Kottenstette's second and more limited request dated March 23, 2021, when he attempted to limit the scope of his request by excluding "the sick days request." In responding to this second request, the District's records custodian stated to Mr. Kottenstette that, "There are no records that are responsive to this revised request." This statement effectively conveyed that the only time sheets that the District held responsive to his previous request were those containing sick leave, since the District was stating that no responsive records existed that did not contain sick leave. By contrast, in responding to our Office, the District did not claim that no records existed, instead it stated that, "If the records would have been provided with or without redaction, the requester could have determined which employees used sick leave records, creating a violation of HIPAA." Given this discrepancy, we would remind the District that violations of IPRA carry steep civil penalties. *See* § 14-2-11(C). If, as it appears, the District was dishonest to Mr. Kottenstette, it could face a significant financial penalty in the event of a lawsuit.

Written Explanation of Denial

Beyond the substantive basis for the District's decision to withhold responsive records, IPRA also obligates the District to provide Mr. Kottenstette a "written explanation of denial." Section 14-2-11(B). IPRA requires such a written letter (which is more commonly called a "denial letter") whenever "a written request has been denied." *Id.* Any denial letter must identify the legal basis for the denial, a description of the records originally sought by the requestor, 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. As our Court of Appeals has previously observed, denial letters convey important information to a records requestor, such as the legal reason why the request has been denied or the identity of the individual who made the decision to deny the request. *See generally*, *Duran*, 2016-NMCA-063, ¶ 38 ("While information can come in the form of tangible documents, it can also be gathered based upon an agency's denials.").

Here, the District did not provide Mr. Kottenstette a proper "written explanation of denial." Section 14-2-11(B). Most glaringly, the District never "set forth the names and titles or positions of each person responsible for the denial." Section 14-2-11(B)(2). Although the District's records custodian signed the email to Mr. Kottenstette which explained that HIPAA rendered all of the records exempt from disclosure, nothing in the email stated that she was "responsible for the denial." Strictly speaking, this "written explanation of denial" was non-compliant with IPRA.

Deadlines

Finally, we must address the District's failure to abide by IPRA's specified deadlines. As we have previously explained in our determinations of prior complaints against the District, public bodies must respond to public records requests in a timely manner. *See Faber v. King*, 2015-NMSC-015, ¶ 11 (noting that, "[w]hen a state agency receives a written IPRA request, IPRA requires the agency's custodian of records to timely respond") and *San Juan Agr. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶ 38 (observing that IPRA provides for damages "when a records custodian fails to respond to a request in a timely fashion"). First and foremost, IPRA requires that, where the requested records are unavailable immediately, the public body must send the requestor a written acknowledgment of the request and an explanation of "when the records will be available for inspection or when the public body will respond to the request" within three business days. *See* § 14-2-8(D). Even more importantly, within fifteen calendar days of the custodian's receipt of the request, the public body must either provide the requested records, see Section 14-2-8(D), explain to the requestor in writing as to why the request is being denied, see Section 14-2-11(A), or designate the request in writing to be excessively burdensome or broad. *See* § 14-2-10. Where the request is excessively burdensome or broad, the public body then has "an additional reasonable period of time" within which it must process the request. *Id.*

Here, we find that the District violated IPRA by failing to respond timely to Mr. Kottenstette's request. First, the District failed to provide him a proper three-day letter as required by Section 14-2-8(D). Although the District did effectively acknowledge receipt of the request on the same day, March 2, 2021, in an email seeking additional information from Mr. Kottenstette, the District provided no information as to when it would respond again. *See id.* (requiring all three-day letters to state "when the records will be available for inspection or when the public body will respond to the request"). More importantly, the District plainly did not respond substantively to Mr. Kottenstette within fifteen days, waiting until March 23, 2021, approximately 21 days after receipt of the request, to deny his request. In fact, Mr. Kottenstette received nothing from the District at all from March 3, 2021 until March 23, 2021. It is therefore clear that the District was violated IPRA's applicable deadlines.

Conclusion

Based on the documentation available to us, our opinion is that the District violated IPRA. By withholding records without lawful authority, failing to provide a proper "written explanation of denial," Section 14-2-11(B), and failing to respond to his request in a timely manner, it is apparent – yet again – that the District has fallen far short of its statutory responsibility of providing the public with access to "the greatest possible information" about its affairs. Section 14-2-5. The District should remedy this statutory noncompliance as quickly as possible, both by reopening Mr. Kottenstette's request and promptly providing him access to all "nonexempt information," Section 14-2-9(A), and by overhauling its internal public records process to provide for greater professionalism and responsiveness.

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: Ricky Kottenstette