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August 24, 2016

Kevin Morrow
Assistant City Attorney
City of Albuquerque
P.O. Box 1293
Albuquerque, NM 87103

Re: **Inspection of Public Records Act Complaint – City of Albuquerque**

Dear Mr. Morrow:

Thank you for your response on behalf of the City of Albuquerque to our inquiry regarding Julia England's complaint alleging that the City violated the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 to -12 (2011) ("IPRA"). See letter to Dylan K. Lange, Assistant Attorney General from Kevin Morrow, Assistant City Attorney (May 20, 2016) ("City's Response"). Specifically, the complaint alleges that (1) the City failed to respond to Ms. England's requests to inspect public records and (2) the City's Planning Department did not post a notice of the right of any person to inspect public records, as required by IPRA.

As discussed below, based on our review of the complaint and the City's Response, we determine that (1) the City acted appropriately when it became clear that Ms. England intended to submit IPRA requests, but did not fully comply with IPRA's requirements for redirecting IPRA requests to the proper records custodian; and (2) the City did not violate IPRA's requirements for posting public notice of the right of any person to inspect public records.

Redirecting IPRA Requests to the Proper Custodian

According to the complaint, the City sued Ms. England in Metropolitan Court for alleged zoning violations. Ms. England states that, in February 2016, she submitted requests for production related to the lawsuit to two officials in the City's Planning Department and filed certificates of service with the court. The requests, copies of which are attached to the complaint, are styled as discovery requests; they each contain the caption for the case filed in Metropolitan Court, request admissions as well as the production of specified documents and information, and include a certificate of service. By all appearances, the requests for production and admissions are

discovery requests and do not contain any information suggesting that they were intended as requests to inspect public records.

The City's Response states that after the two zoning officials were served with the requests for production, Nicholas Bullock, the assistant city attorney representing the City, contacted Daniel Apodaca, Ms. England's attorney, and asked why Ms. England was sending "pleadings and discovery requests" to his witnesses. Mr. Apodaca responded that he had spoken to Ms. England and informed her that future proceedings in the case would be sent from his office. Mr. Apodaca and Mr. Bullock agreed that the City could disregard the discovery requests Ms. England had submitted and the case would proceed. *See* e-mail exchanges between Mr. Bullock and Mr. Apodaca dated Feb. 26 and Mar. 1, 2016 (attached as Exhibit A to the City's Response).

In an e-mail dated April 5, 2016, Ms. England informed Mr. Bullock that his failure to respond to her discovery requests violated IPRA, as well as the rules governing discovery. Mr. Bullock forwarded Ms. England's email to Mr. Apodaca. In response, Mr. Apodaca said that he had told Ms. England that he had instructed the City "not to worry about" her discovery requests and was addressing her questions in witness interviews. *See* e-mail exchanges between Mr. Bullock and Mr. Apodaca dated April 5, 2016 (attached as Exhibit B to the City's Response). Mr. Apodaca subsequently forwarded Ms. England an e-mail from Mr. Bullock, which asked Mr. Apodaca to inform Ms. England that "the discovery requests she filed in her pending case are distinct from IPRA requests. If she would like to make an IPRA request from the City, she may contact the City Clerk's office for details/procedure." E-mail from Nicholas Bullock to Daniel Apodaca (Apr. 6, 2016) (included in Ms. England's complaint).

From the information available to us at this time, it appears that until Ms. England informed Mr. Bullock on April 5 that the City's failure to respond to her discovery requests violated IPRA, the City was not aware that Ms. England was making an IPRA request. Before April 5, we believe the City reasonably treated Ms. England's requests as discovery requests, based on the form and title of the requests and the City's communications with Ms. England's attorney.

On April 6, the day after Ms. England notified Mr. Bullock that her discovery requests were also IPRA requests, Mr. Bullock informed Ms. England, through her attorney,¹ that she should direct her IPRA requests to the City Clerk's Office. Because it was not clear until April 5 that Ms.

¹ Ms. England's complaint suggests that the City violated IPRA because it communicated about Ms. England's requests with Mr. Apodaca rather than directly with her. Because Ms. England's requests directly related to the City's lawsuit with her, we believe the City appropriately limited its communications to Ms. England's attorney. In pertinent part, the Rules of Professional Responsibility provide:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Rule 16-402 NMRA (2008). This rule required the Mr. Bullock, who represented the City in the lawsuit with Ms. England, to communicate with Mr. Apodaca about the requests, even after Ms. England made clear that she viewed the requests as IPRA requests as well as discovery requests.

England's requests were IPRA requests, we believe Mr. Bullock's response on behalf of the City was timely under IPRA. Nevertheless, while Mr. Bullock correctly informed Ms. England that her IPRA requests would be handled by the City Clerk's Office, as the City's records custodian,² his direction to Ms. England to submit her IPRA requests to the City Clerk's Office violated IPRA. Under Section 14-2-8(E) of IPRA:

In the event that a written request is not made to the custodian having possession of or responsibility for the public records requested, the person receiving the request shall promptly forward the request to the custodian of the requested public records, if known, and notify the requester. The notification to the requester shall state the reason for the absence of the records from that person's custody or control, the records' location and the name and address of the custodian.

Under this provision, Mr. Bullock, upon learning that Ms. England's requests were IPRA requests, should have forwarded the requests to the City Clerk's Office and provided the required notification to Ms. England, through her attorney. Once it received the IPRA requests, the City Clerk's Office, as records custodian, would have been free to interact directly with Ms. England regarding the requests.

Notice of the Right to Inspect Public Records

Section 14-2-7(E) of IPRA requires the custodian of public records for a public body to "post, in a conspicuous location at the administrative office, and on the publicly available website" of the public body a notice describing the right to inspect the public body's records and the procedures for requesting inspection. The City Clerk's Office is the custodian of public records for the City of Albuquerque and its departments, including the Planning Department. The City Clerk's website includes the notice required by Section 14-2-7(E) and a detailed explanation of the procedures for requesting inspection of public records. *See* www.cabq.gov/clerk/public-records. IPRA does not require the Planning Department to post an IPRA notice in addition to that posted by the records custodian. Thus, we conclude that the City did not violate Section 14-2-7(E)'s requirement for a notice of the right to inspect public records.

As discussed above, we have determined that the City acted properly under IPRA except for its failure to fully comply with Section 14-2-8(E)'s procedures for redirecting requests to the proper custodian. If the City has not already done so, it should immediately respond to Ms. England's IPRA requests by providing the public records she sought or a written explanation for denying her requests. Otherwise, we do not intend to take further action in this matter. If you have any questions about our determination or about IPRA generally, please let me know.

² Based on the City's response, it does not appear that the City took the position that Ms. England was precluded by her discovery requests from making an IPRA request for the same information. At this time, IPRA does not contain an exception allowing a public body to deny a request to inspect public records because the requester is engaged in litigation with the public body or has asked for the same records in discovery. *See* Attorney General's Inspection of Public Records Act Guide, p. 33 (8th ed. 2015).

Mr. Kevin Morrow
August 24, 2016
Page 4

Sincerely,

A handwritten signature in black ink that reads "Tania Maestas". The signature is written in a cursive, flowing style.

Tania Maestas, Director
Open Government Division

cc: Julia England