STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

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VIA ELECTRONIC MAIL ONLY

City of Las Cruces
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Re: Inspection of Public Records Act Complaints – Michael Hays

Dear Mr. Cabello:

Thank you for your response to our inquiry into the complaint filed with the Office of the Attorney General by Mr. Michael Hays, alleging that the City of Las Cruces (the "City") violated the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2019) ("IPRA"). As you know, Mr. Hays alleges that the City violated IPRA in responding to his public records requests dated March 5, 2020, and April 9, 2020. Although we have insufficient information to conclude definitively that the City violated IPRA as alleged, we nevertheless are concerned with its responses to both of these requests and we write to offer our perspective on several of the issues involved. We recommend that the City review its responses to Mr. Hays' requests so as to ensure that it fully complies with IPRA.

Background

In New Mexico, the people are entitled to "the greatest possible information" about governmental affairs pursuant to the Inspection of Public Records Act. 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."). To that end, IPRA specifically states that the public has the right to inspect and copy all "public records" with only limited and specifically enumerated exceptions. Section 14-2-1(A). All of IPRA's provisions must be interpreted in light of this public policy and 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. Hays submitted an IPRA request to the City on March 5, 2020. Specifically, this first request sought "any and all records in whatever media" related to both Mr. Hays' complaint about a police officer and the subsequent internal affairs investigation into his complaint. On March 11, 2020, three business days after the request was received by the City's records custodian, the City wrote back to Mr. Hays stating that the records responsive to his request were under review by the City Attorney. The City stated that it would respond further by March 13, 2020. On that date, the City responded substantively to Mr. Hays' request by providing a number of responsive records but withholding approximately eighteen (18) others on the basis of IPRA's so-called "matters of opinion exception," NMSA 1978, Section 14-2-1(C). Sometime shortly thereafter, Mr. Hays contacted the City to register his objection to its decision to withhold these eighteen records. To its credit, the City responded to Mr. Hays by reconsidering its decision and releasing an additional thirteen (13) records, while still withholding five (5) records. Once again, Mr. Hays objected, and on March 26, 2020, the City responded by releasing one additional document in its entirety and two documents partially redacted, while still withholding the two remaining records. Thus, the City ultimately withheld two documents in their entirety and redacted an additional two records on the basis of IPRA's matters of opinion exception.

Mr. Hays sent the City a second request on April 9, 2020, seeking information as to the two records withheld by the City. Specifically, he asked for the "name of the originator and the recipient(s), and the date and a summary of contents" of the two records. The City responded to this request on the same day by stating that it had no records responsive to the request. Mr. Hays then renewed this request on April 16, 2020, requesting again "the date, topic, author, and audience of the two withheld documents," and the City responded again by stating that it did not have a record responsive to the request and was not obligated to create one.

In his complaint to our Office, Mr. Hays challenges the denials of his requests. With respect to his first request, he argues that IPRA's matters of opinion exception did not authorize the City's redactions and withholdings, distinguishing between matters of opinion and "inferences drawn from facts and presented as findings." Additionally, Mr. Hays argues that his second request sought "data – dates, subjects, authors, and audiences – available by redacting the texts of the two withheld documents," and that this request did not require the creation of a new record. We address each of these issues in turn.

First Request: March 5, 2020

The primary point of contention between Mr. Hays and the City is whether IPRA's matters of opinion exception permitted the City to withhold two responsive records and redact another two. Preliminarily, we must preface our discussion of these records by stating that, as we have not reviewed these records in their full and un-redacted form, we cannot opine definitively as to

whether or to what extent they were subject to the matters of opinion exception. We therefore cannot say with any certainty whether the City did or did not violate IPRA as alleged. However, based on the circumstances of Mr. Hays' request and our review of the two redacted records, we have some concern as to the City's use of the matters of opinion exception.

IPRA's matters of opinion exception allows public bodies in New Mexico to withhold or redact "letters or memoranda that are matters of opinion in personnel files or students' cumulative files." Section 14-2-1(C). Our Supreme Court has previously suggested that the primary purpose of this exception is to protect public employees from reputational damage. See *State ex rel. Newsome v. Alarid*, 1977–NMSC–076, ¶ 12, 90 N.M. 790 (noting that "there would be critical material and adverse opinions in letters of reference, in documents concerning disciplinary action and promotions and in various other opinion information that might have no foundation in fact but, if released for public view, could be seriously damaging to an employee"), *superseded by statute as stated in Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2012–NMSC–026, 283 P.3d 853. In determining which documents were exempt from disclosure, the Court held that IPRA's personnel file exception applied to all "letters of reference, documents concerning infractions and disciplinary action, personnel evaluations, opinions as to whether a person would be re-hired or as to why an applicant was not hired, and other matters of opinion." *Id.* at ¶ 12.

Similarly, our Court of Appeals interpreted Section 14-2-1(C) in *Cox v. New Mexico Department of Public Safety*, 2010-NMCA-096, 148 N.M. 934. In that case, the plaintiff had requested copies of citizen complaints made against a particular law enforcement officer. *Cox*, 2010-NMCA-096, ¶ 2. The plaintiff had also requested documents detailing the agency's response to the citizen complaints and the findings of any related investigations. *Id.* When the agency denied the request, citing the personnel file exception, the plaintiff submitted a second records request, this time asking only for the citizen complaints. *Id.* The agency once again denied the request, citing IPRA's personnel file exception, and the plaintiff sued the agency for the right to inspect the citizen complaints. *Cox*, 2010-NMCA-096, ¶ 2. The Court of Appeals held that the personnel file exception did not extend to citizen complaints, reasoning that the information contained in the complaints was in the possession of the citizen who had filed the complaint and not just the government agency. *Id.* at ¶ 25. The location of the file itself (whether in an employee's personnel file or not) was not determinative; rather, the critical factor was the content of the file itself. *Id.* at ¶ 21. The Court also noted the following:

> Construing Section 14–2–1(A)(3) in a manner that gives effect to the presumption in favor of disclosure, we conclude 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, 2010-NMCA-096, ¶ 21.

Our Office has interpreted the matters of opinion exception in our IPRA Guide. There, we explain 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." OMA Guide, p. 9. Importantly, our Guide also states that the exception should be used primarily to redact information rather than withhold records in their entirety:

> Requested documents that contain significant factual information in addition to opinion should be provided with the opinion information blocked out or otherwise redacted. The presence of protected opinion information in a document does not exempt the remainder of the document from inspection.

OMA Guide, p. 10.

Mr. Hays and the City offer differing interpretations of the matters of opinion exception. Mr. Hays asserts that the exception does not apply either to "inferences drawn from facts" or to records not literally contained inside of a personnel file. He also argues that a "findings and conclusions" section in a document is not automatically exempt from disclosure in its entirety merely because it consists partially of matters of opinion. By contrast, the City cites to both *Newsome* and *Cox* to argue that it may redact and withhold all opinion information "regarding the employer/employee relationship such as internal evaluations." *Cox*, 2010-NMCA-096, ¶ 21. It further cites to an unpublished Court of Appeals decision, *Leirer v. New Mexico Department of Public Safety*, No. 35,154, mem. op. (N.M. Ct. App. June 7, 2016) (non-precedential), as having established that where "the documents in question were created for the purpose of conducting internal disciplinary proceedings," this alone is sufficient to withhold the documents in their entirety. *Leirer*, No. 35,154, mem. op. at 4. We disagree in part with both of these interpretations.

In our view, the matters of opinion exception permits public bodies, consistent with IPRA, to disallow inspection of those portions of records that contain the subjective opinion of the employer as to a personnel matter involving a particular employee. While statements of fact contained within a record are clearly not covered by the exception, inferences drawn from those facts may very well be exempt, since a particular inference may well be the subjective opinion of the employer and two individuals interpreting the same set of facts may draw differing inferences. *See generally Snyder Ranches, Inc. v. Oil Conservation Comm'n of State of N.M.*, 1990-NMSC-090, ¶ 5, 110 N.M. 637, 639 (observing that, "[w]e may have arrived at a different result than the Commission or the district court if we were the fact finders in this case," but nevertheless concluding that the administrative agency's decision was supported by substantial evidence). Similarly, Mr. Hays is clearly incorrect in his position that the exception applies to only those records literally located in a personnel file; the Court of Appeals in *Cox* plainly rejected that interpretation. *See Cox*, 2010-

NMCA-096, ¶ 21 (holding that "the location of a record in a personnel file is not dispositive of whether the exception applies; rather, the critical factor is the nature of the document itself").

We further disagree with the City's suggestion that merely establishing the fact that "the documents in question were created for the purpose of conducting internal disciplinary proceedings" is sufficient to withhold those documents irrespective of their contents. *Leirer*, No. 35,154, mem. op. at 4. To the extent that this position is supported by *Leirer* (and we recognize that it is), we would simply note that decision was unpublished and therefore of no precedential value. More importantly, IPRA itself specifies that records containing both exempt and nonexempt information must be redacted rather than withheld in their entirety.[1] *See* § 14-2-9(A) ("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 same conclusion also necessarily leads us to agree with Mr. Hays that a "findings and conclusions" section in a document is not automatically exempt from disclosure in its entirety on the basis that it consists in part of statements of opinion. In this respect, the label of a section of a document is comparable to the document's physical location: not in and of itself "dispositive of whether the exception applies." *Cox*, 2010-NMCA-096, ¶ 21. To be sure, statements of opinion contained within the "findings and conclusions" would certainly be subject to the exception – likely even inferences drawn from facts – but not necessarily the entire section.

In light of our view of the scope of IPRA's matters of opinion exception, we are concerned about the City's decision to entirely withhold two records and redact two others that were responsive to Mr. Hays' request. Our review of the two redacted records indicates that the City redacted nearly all of the "Findings and Conclusions" sections of both records, leaving only one short clause intact in one of the records. That clause stated, "Animal Control SOP 2017-1: Follow-Ups (B3 states," which may indicate that the memorandum then went on to quote the City's standard operating procedures. At a minimum, if our inference is correct, then the City overly redacted at least that particular record. In our view, the City's redactions and withholdings in this case would only be permissible if all of the information withheld and redacted constituted matters of opinion. As that strikes us as a dubious proposition at best, we have some concern as to how the City processed Mr. Hays' request.[2]

Second Request: April 9, 2020

[1] Our Supreme Court stated as much in a recent (published) opinion regarding IPRA's law enforcement records exception. *See Jones v. Dep't of Pub. Safety*, 2020-NMSC-013, ¶ 39, 470 P.3d 252 ("Section 14-2-9(A) provides that requested law enforcement records containing both exempt and nonexempt information cannot be withheld in toto.").
[2] This is to say nothing of the fact that the City's interpretation of Section 14-2-1(C) apparently led it to initially withhold approximately eighteen records in their entirety, as mentioned previously.

The only issue we must resolve with respect to Mr. Hays' second request is whether it effectively requested or required the City to create a record. As the City repeatedly emphasized in responding to Mr. Hays, IPRA clearly states that public bodies are not required to create a record in order to satisfy a request. *See* § 14-2-8(B) ("Nothing in the Inspection of Public Records Act shall be construed to require a public body to create a public record."). If the record does not exist at the time of the request, the public body is not required to create it. Here, while the City argues that it does not have a record stating "the date, topic, author, and audience of the two withheld documents," as Mr. Hays requested, he responds by arguing that such a record is available simply by redacting large portions of the two withheld records.

It is possible that the dispute over Mr. Hays' request may be a matter of semantics. The City may be interpreting Mr. Hays' request as seeking one single record stating "the date, topic, author, and audience" of both of the records responsive to his first request that it withheld. To that extent, we do not find the City's interpretation of his request as unreasonable. However, in his complaint to our Office, Mr. Hays clearly stated that he is asking the City to redact the two withheld records so as to provide him with a record containing the requested information. We therefore recommend that the City reevaluate his request in line with this clarification.

More broadly, though, we cannot say definitively whether the City violated IPRA in its response to this second request because it is possible that the withheld records may not be as readily redactable as Mr. Hays suggests. Clearly, it would be easy enough to redact most memoranda so as to include only "the date, topic, author, and audience," but this may or may not be the case for the two records at issue here. However, if the records can be redacted as Mr. Hays has requested, then doing so would not require the substantive creation of a new record, meaning that the City would need to revise its response.

Conclusion

Because we have remaining concerns about the City's responses to Mr. Hays' requests dated March 5, 2020 and April 9, 2020, we strongly recommend that it reconsider both requests so as to ensure that it has fully complied with IPRA. The City should again scrutinize the two records it withheld and the two records it redacted. Most importantly, these records should only be redacted (or withheld) to the limited extent they contain matters of opinion, as we have previously explained. And, after conducting this review, if the City maintains that it has properly withheld those two records in their entirety, it should reevaluate whether they may be redacted so as to provide Mr. Hays with the records' "date, topic, author, and audience." If this is not possible, the City could, in the interest of transparency, nevertheless provide the requested information to Mr. Hays notwithstanding the fact that it is not legally obligated to do so.

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: Michael Hays