

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

June 11, 2021

VIA ELECTRONIC MAIL ONLY

Curry County
Stephen E. Doerr, Esq.
212 W 1st St.
Portales, NM 88130-5920
Email: steve@yucca.net

Re: Inspection of Public Records Act Complaint – Hayden Hodges

Dear Mr. Doerr:

Thank you for your response to our inquiry regarding the complaint filed with the Office of the Attorney General by Mr. Hayden Hodges alleging that Curry County (hereinafter the “County”) 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. Hodges alleges that the County proposed to charge him an excessive and unlawful copying fee in connection with his public records request dated April 9, 2021. Having thoroughly reviewed both his complaint and your response to our inquiry, we agree with Mr. Hodges that the copying fee proposed by the County was not consistent with IPRA, although we do appreciate that the County waived its fees upon receipt of our inquiry and provided Mr. Hodges the requested records.

Background

Mr. Hodges submitted an IPRA request to the County on April 9, 2021, seeking records regarding a number of inmates at the Curry County Detention Center. Three business days later, on April 14, 2021, the County responded by informing Mr. Hodges that it had located approximately 28 pages of responsive records and that it would provide him copies of these records through email upon payment of \$28.00. The County explained that, “pursuant to the New Mexico IPRA Statute, the Board of Curry County Commissioners has established a flat rate fee of \$1.00 per page for any and all documents requested.” Mr. Hodges responded the following day, on April 15, 2021, by expressing his view that IPRA required the County “to provide these records in the format in which they are requested, and unless you are printing them out, you need to email them to me without

fees.” He added: “You are only allowed to charge for physical copies, not digital records.” After the County replied again on April 16, 2021 by largely reiterating its “\$1.00 per page” fee policy, Mr. Hodges filed this complaint with our Office.

We wrote to the County on April 22, 2021 requesting its response to Mr. Hodges’ complaint, and this prompted another series of emails between the parties that effectively resolved his request. First, on April 23, 2021, Mr. Hodges emailed both our Office and the County to provide us a copy of a letter from our Office, dated May 31, 2019, which resolved an almost identical IPRA complaint against the County. In that letter, we explained that the County’s fee policy of “\$1.00 per page for each and every document produced pursuant to an IPRA request” was incompatible with IPRA because it was “wholly unrelated to the County’s ‘actual costs’” associated with downloading or transmitting electronic records. N.M. Att’y Gen. Letter to Stephen E. Doerr, Curry County, at 2 (May 31, 2019). Later that day, the County responded to our Office by stating that it would waive the fee it proposed to charge Mr. Hodges, while further clarifying that its fee policy for electronic copies of records was to charge a “\$1.00 fee for electronic pages that are provided individually, and \$50.00 for the documents that are downloaded and provided on a disc or other storage devise [sic].” The County explained that its fee policy represented its attempt to “try to establish, ‘actual costs’, for documents stored electronically and are provided through electronic format.” Several days later, on April 27, 2021, Mr. Hodges contacted our Office to state that he had received the records he had requested.

The sole contention in Mr. Hodges complaint is that the County’s “\$1.00 per page” fee policy for electronic records violates IPRA. Although he has now apparently received all of the records he requested, Mr. Hodges stated to our Office: “I am not withdrawing my complaint at this time because I think it is important for the Attorney General's Office to determine if this fee violates IPRA.” As for the County, it appears to concede that its fee policy is invalid under IPRA and has asked our Office for “any guidelines or any advice on how the fee for electronic documents is to be determined in a case-by-case basis.”

Analysis

The public policy behind New Mexico’s Inspection of Public Records Act is that the public is entitled 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”).

Preliminarily, although we appreciate Mr. Hodges’ request that our Office determine the validity of the County’s fee policy, we would respectfully note that we have already done so. Approximately two years ago, as Mr. Hodges pointed out, we wrote to Curry County to express our view that its fee policy of “\$1.00 per page for each and every document produced pursuant to

an IPRA request” was inconsistent with IPRA, at least as it pertained to electronic records. N.M. Att’y Gen. Letter to Stephen E. Doerr, Curry County, at 2 (May 31, 2019). As we explained then, IPRA permits a public body to charge only its “actual costs” associated with downloading or transmitting electronic records, while permitting per-page fees only for the “printed page.” Section 14-2-9(C). As a result, and just as was the case two years ago, a \$1.00 per page fee for electronic records is plainly inconsistent with IPRA and the \$28.00 fee proposed to Mr. Hodges in response to his request was unlawful.

With respect to the County’s request for our recommendations regarding electronic fee policies, we offer several. First and foremost, although the County has expressed its reluctance to “have to make a separate determination based upon each IPRA request,” this is precisely what IPRA mandates where electronic records are concerned. Section 14-2-9(C) permits public bodies to charge only their “actual costs” associated with downloading or transmitting electronic records, so this requires public bodies to determine their actual costs associated with each individual request. *See* N.M. Att’y Gen. Letter to Dr. Ebubekir Orsun, Albuquerque School of Excellence, at 3 (May 3, 2019) (explaining that IPRA “requires a case-specific accounting of the actual costs involved”). In addition, we would also remind the County that IPRA expressly permits it to charge the requestor “the actual cost of the computer disk or storage device,” so the County may be able to find its desired uniformity and predictability in that respect. Section 14-2-9(C)(3). Lastly, our IPRA Guide expresses our Office’s current view that public bodies may charge their personnel costs associated with providing copies to requestors.¹ *See* IPRA Guide, p. 36 (“This may include the actual costs to the public body for making and transmitting copies, including any personnel time involved.”).

We also noticed that, in response to our inquiry, the County suggested that its fee policy was partially based on its significant time spent reviewing and redacting records prior to release. To clarify, however, public bodies cannot include their time spent redacting or otherwise reviewing responsive records prior to disclosure as part of their calculations of copying fees (whether for printed or electronic records). This is evident from IPRA’s plain language, since the statute expressly provides that public bodies “shall not charge a fee for the cost of determining whether any public record is subject to disclosure.” Section 14-2-9(C)(6). In addition, IPRA permits only copying fees, not inspection fees, and all public bodies have the obligation to review responsive records and make appropriate redactions even when only permitting inspection of records. Thus, the County should not and cannot calculate its copying fees based on time spent reviewing and redacting records.

Conclusion

Although we appreciate that the County has now (by all appearances) provided Mr. Hodges the records he requested free of charge, we would express our displeasure with the fact that, two years

¹ Mr. Hodges has previously expressed his view that IPRA “does not allow you to charge staff time.” That is not, at least at present, an interpretation of IPRA that our Office shares, but we do recognize that it has some legal merit. *See* § 14-2-5 (“It is the further intent of the legislature, and it is declared to be the public policy of this state, that to provide persons with such information is an essential function of a representative government and an integral part of the *routine duties* of public officers and employees.”).

Curry County

June 11, 2021

Page 4

after explaining to the County that its copying fee policy was partially invalid, it continues to utilize that very same policy. To be very clear, IPRA does not permit public bodies to charge a \$1.00 per page fee (or, for that matter, any per page fee) for copies of electronic records. Public bodies are permitted by the plain language of Section 14-2-9(C) to charge only their “actual costs” associated with downloading or transmitting electronic records, and this requires a request-by-request determination. As we did two years ago, we urge the County to revise this fee policy so that it complies fully with IPRA’s plain language.

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: Hayden Hodges