

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

July 22, 2021

VIA ELECTRONIC MAIL ONLY

Human Services Department
Paul R. Ritzma, Esq.
1474 Rodeo Rd.
Santa Fe, NM 87505-6142
Email: paul.ritzma@state.nm.us

Re: Inspection of Public Records Act Complaint – Douglas Michel

Dear Mr. Ritzma:

This letter addresses the complaint submitted to the Office of the Attorney General Mr. Douglas Michel alleging that the Human Services Department (hereinafter the “Department”) violated the Inspection of Public Records Act (“IPRA”), NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2019). As you know, Mr. Michel alleges that the Department violated IPRA in connection with his public records requests dated May 5, 2021 and June 2, 2021. Having reviewed Mr. Michel’s complaint and the limited documentation available to us at the present time, we conclude that the Department violated IPRA by failing to respond to either of these requests. We urge the Department to respond to both of these requests as soon as possible, since its failure to do so exposes the Department to an unnecessary risk of litigation and severe financial penalties.

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. Michel's complaint to our Office involves two public records requests he sent to the Department on May 5, 2021 and June 2, 2021, respectively. The first of these requests sought "[a]ll contracts related to the Medicaid Management Information System Replacement (MMISR)," while the second requested a "list of IPRA requests received by HSD from Jan 1, 2020 through May 31, 2021 to include requester, date, subject, and date request was completed or that it is still incomplete." Although the Department has apparently communicated in writing with Mr. Michel to acknowledge its receipt of several of his other public records requests,¹ it has not responded at all to his requests dated May 5, 2021 and June 2, 2021. That is, Mr. Michel has received no written communication whatsoever from the Department with respect to either request.

We contacted you, on behalf of the Department, on June 23, 2021, requesting certain records and responses to a number of informational questions regarding Mr. Michel's complaint. Although we asked you to respond no later than July 16, 2021, we did not receive a response by this deadline. After we contacted you again on July 20, 2021 requesting a response by the close of business that day, you responded with a brief email attaching four three-day letters from the Department to Mr. Michel that were unrelated to his complaint.² (These letters appeared to be responsive to four of his other public records requests.) Notwithstanding the fact that you did not provide us either the documentation we requested or answers to our questions, we understand your response to effectively acknowledge that the Department has not responded to Mr. Michel's requests dated May 5, 2021 and June 2, 2021. (Mr. Michel subsequently clarified this, stating to us that "[f]or the two IPRA's in the complaint, I received no responses.")

Given that the Department did not respond to Mr. Michel's requests, it clearly violated IPRA. The statute specifically requires that public bodies must respond in writing within three business days of any request and allow for inspection within fifteen calendar days unless the request is broad and burdensome. *See* § 14-2-8(D) and § 14-2-10. It also requires that public bodies provide the requestor a "written explanation of denial" whenever denying a request in whole or in part. *See* § 14-2-11(B). Where, as here, the public body simply disregards a request and fails to respond, IPRA specifies that the request "may be deemed denied" and further authorizes the requestor to "pursue the remedies provided in the Inspection of Public Records Act." Section 14-2-11(A). Thus, there is no question that the Department violated IPRA by failing to respond to either of Mr. Michel's requests.

The Department should be aware that violations of IPRA can carry steep financial penalties, at least where the requestor chooses to seek judicial relief. Specifically, the statute allows for damages up to "one hundred dollars (\$100) per day" calculated "from the day the public body is in noncompliance," which in this case was quite some time ago. Section 14-2-11(C)(2). In addition, requestors are also entitled to "costs and reasonable attorneys' fees" when public bodies are found (by courts) to have violated IPRA. Section 14-2-12(D). Given that these financial

¹ We have no evidence that the Department has fulfilled these other requests, only that it sent Mr. Michel three-day letters to acknowledge receipt. *See* § 14-2-8(D) ("If the inspection is not permitted within three business days, the custodian shall explain in writing when the records will be available for inspection or when the public body will respond to the request.").

² To clarify, this was not an adequate response to our inquiry.

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penalties are expressly “payable from the funds of the public body,” it is imperative that the Department take seriously its potential liability under IPRA. Section 14-2-11(C)(4).

Although we appreciate the Department’s role in combatting the ongoing COVID-19 pandemic in New Mexico, it nevertheless is obligated by law to provide the public with access to “the greatest possible information” regarding its affairs. Section 14-2-5. IPRA further states that this obligation is “an essential function of a representative government and an integral part of the routine duties of public officers and employees.” *Id.* Although the COVID-19 pandemic may frequently cause delays in the ultimate production of public records to a requestor, it is not an excuse for failing to communicate timely with the records requestor, much less does it excuse a public body’s wholesale failure to respond at all to a request. We therefore implore the Department to respond as soon as possible to both of Mr. Michel’s requests and, more generally, to revise 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: Douglas Michel