

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

October 27, 2017

Kim Bannerman
General Counsel
New Mexico Interstate Stream Commission
Post Office Box 25102
Santa Fe, NM 87504-5102

Re: Inspection of Public Records Act Complaint – Interstate Stream Commission

Dear Ms. Bannerman:

We have reviewed the complaint submitted by Laura Paskus alleging that the Interstate Stream Commission (“ISC”) violated the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 to -12 (as amended through 2013) (“IPRA”), and your response on behalf of ISC to our inquiry regarding the complaint. *See* letter from ISC General Counsel (Sept. 29, 2016) (“ISC’s Response”). The complaint alleges that ISC (1) did not provide all records responding to Ms. Paskus’ request to inspect public records within the time required by IPRA, and (2) did not e-mail the responsive records as Ms. Paskus requested. Based on our review, as discussed below, we conclude as follows.

Request for Public Records

According to the information provided to us, on August 3, 2016, Ms. Paskus submitted to Sonia Salazar, ISC’s records custodian, a request for:

Mr. Craig Roepke’s presentation from the June 21, 2016 NMCAPE [New Mexico Central Arizona Project Entity] workshop/meeting in Albuquerque. This was a short ... presentation he gave at the beginning of the meeting and referred to as a “general rough cut estimates of water needs.” I’m also requesting the spreadsheets, sources, or other resources he relied upon to develop those numbers.

E-mail from Laura Paskus to Sonia Salazar, et al. (Aug. 3, 2016).

Ms. Paskus asked to receive the records “in electronic format” and asked that they be sent by e-mail or, if the files were too big to e-mail, that ISC “copy them to a blank CD or DVD; if it’s easier, I can bring in a USB drive.” *Id.* Ms. Salazar acknowledged Ms. Paskus’ request on the

same day. *See* letter to Laura Paskus from Sonia E. Salazar (Aug. 3, 2016) (delivered via e-mail). Ms. Salazar explained:

Mr. Roepke states that, on June 21, 2016, he did not make a presentation of his own, but made some remarks during AECOM's presentation. He spoke regarding slides 5 through 9 of the AECOM PowerPoint presentation.

Ms. Salazar provided Ms. Paskus with a link to the presentation on ISC's "AWSA website" and informed her that ISC was gathering "additional background documents" and would contact her on August 8, 2016 regarding those documents. *Id.*

On August 5, 2016, Ms. Salazar notified Ms. Paskus that documents responsive to her request were available for review. *See* letter to Laura Paskus from Sonia E. Salazar (Aug. 5, 2016) (delivered via e-mail). Ms. Salazar stated that the documents:

are in electronic format and can be provided to you one of two ways: you can either sit at one of our computers and review the files to choose which documents you would like to copy on your own USB key, or, you can pick up a flash drive with all of our responsive documents. The flat rate fee for a flash drive is \$13.00. Please let me know when you will come by our office to inspect the documents.

Id.

Ms. Paskus arranged to review the responsive documents in person and make a copy to her own flash drive. According to Ms. Paskus, ISC located only four documents that responded to her request.

Subsequently, Ms. Paskus e-mailed Ms. Salazar and explained that after reviewing the four responsive documents she was unable to understand how Mr. Roepke "could have come up with the exact numbers he presented regarding the area's water needs to the NMCAPE...." E-mail from Laura Paskus to Sonia Salazar (Aug. 24, 2016, 9:33 AM). Ms. Salazar asked whether there were "additional documents that show how Mr. Roepke came up with those numbers" and requested an explanation from ISC staff regarding "where this water needs data came from and/or how that data was analyzed." *Id.* Ms. Salazar responded by stating that she "was exploring options to get your questions answered." E-mail to Laura Paskus from Sonia Salazar (Aug. 24, 2016, 2:20 PM). On August 25, Melissa Doshier-Smith, ISC's public information officer, responded to Ms. Paskus "[i]n regards to your question to Sonia yesterday," and provided Ms. Paskus with additional information and clarification regarding the water needs data. E-mail from Melissa Doshier-Smith, ISC Public Information Officer to Laura Paskus (August 25, 2016).

Provision of Responsive Records

IPRA requires a written request to inspect public records to "identify the records sought with reasonable particularity." § 14-2-8(C). In most cases, the records custodian for a public body must "permit inspection immediately or as soon as practicable..., but not later than fifteen days after receiving a written request." *Id.* § 14-2-8(D). IPRA obliges a public body to provide responsive nonexempt records that exist at the time of the request. *See* Attorney General's

Inspection of Public Records Act Compliance Guide, p. 32 (8th ed. 2015) (available on the Office of the Attorney General's website at www.nmag.gov). Whether a particular record is "responsive" to a request and subject to inspection depends on "whether the IPRA request identified the record 'with reasonable particularity.'" *ACLU of New Mexico v. Duran*, 2016-NMCA-063, ¶ 27, ___ P.3d ___.

The complaint alleges that ISC should have provided documents, notes or other records supporting the information Ms. Doshier-Smith conveyed to Ms. Paskus on August 24, 2016 in response to Ms. Paskus' August 3, 2016 inspection request. As quoted above, the records identified in that request were Mr. Roepke's presentation on June 21, 2016 and any spreadsheets or other resources Mr. Roepke relied on to develop "rough cut estimates of water needs." Similarly, Ms. Paskus' August 24 follow-up e-mail to Ms. Salazar asked for any additional documents showing how Mr. Roepke came up with the numbers. ISC's Response asserts that ISC provided all records responsive to Ms. Paskus' August 3 request and did not withhold or redact any responsive records.

Ms. Doshier-Smith's response to Ms. Paskus' August 24 e-mail appears to have been a good faith effort to clarify and explain the estimates Mr. Roepke discussed at the June 21 meeting. This does not mean, necessarily, that Ms. Doshier-Smith's explanation was based on records Mr. Roepke relied on for the estimates, which were the records Ms. Paskus specified in her August 3 request, or that additional records responding to her August 3 request existed. Although ISC might have expressly confirmed to Ms. Paskus that there were no additional responsive records, it was not required to do so by IPRA. Consequently, based on the information available to us at this time, we are unable to conclude, without more, that ISC failed to provide Ms. Paskus with all records responding to her August 3 inspection request.

Provision of Public Records by E-Mail

IPRA provides "[e]very person" with the "right to inspect public records of this state." § 14-2-1(A). As interpreted by the New Mexico Supreme Court, "[t]he right to inspect public records commonly carries with it the right to make copies thereof..." *Ortiz v. Jaramillo*, 1971-NMSC-041, ¶ 3, 483 P.2d 500, 501. Among other responsibilities, a records custodian is required to provide "proper and reasonable opportunities to inspect public records" and "reasonable facilities to make or furnish copies of public records." § 14-2-7(C), (D). The records custodian may charge "reasonable fees" for copying public records and "the actual costs of transmitting copies of public records by mail, electronic mail or facsimile." *Id.* § 14-2-9(C)(1)-(4). The custodian may require advance payment of the fees before making copies of public records. *Id.* § 14-2-9(C)(5).

As outlined above, Ms. Paskus asked ISC to e-mail any records responsive to her August 3 request, unless the files were too large. ISC ignored Ms. Paskus' request to have the records e-mailed to her and asked that she come to ISC's offices and make her own copy of the documents or purchase a flash drive containing the documents. ISC claims that it was not required to e-mail the responsive records and relies on Section 14-2-9(C) of IPRA, which requires a custodian to provide copies of public records in electronic format, if available. *See* ISC Response at 1, note 1.

IPRA requires a public body that receives a request to inspect public records to locate and make available responsive public records for inspection and copying. Once responsive public records

are available, the person who made the request may inspect and obtain copies of the records in person or request copies of the responsive records without inspecting them. The right to inspect and the right to copies of responsive public records are independent. IPRA does not require a requester to inspect records as a condition to receiving copies of them. IPRA contemplates that a public body will provide copies, upon request, by mail, e-mail or facsimile, in exchange for the copying and transmission fees permitted by IPRA. This is consistent with IPRA's purpose of facilitating "every person[s]" access to public records, including persons located outside the state or for whom it would otherwise be difficult or inconvenient to inspect public records onsite.

Ms. Paskus asked ISC to transmit copies of records responding to her request by e-mail, unless the files were too big to e-mail. Instead of e-mailing the responsive records, ISC improperly required Ms. Paskus to come to its offices to inspect the records and obtain copies. As noted above, ISC located only a few responsive records and nothing suggests that ISC was unable or prevented from transmitting the records to Ms. Paskus by e-mail.¹ Absent additional information suggesting otherwise, it appears that ISC's failure to transmit the responsive records by e-mail may have been unreasonable.

To avoid violating IPRA in the future, we advise ISC to review its procedures for handling requests to inspect and copy public records and make sure they are consistent with IPRA's requirements. In particular, IPRA does not require a person to inspect responsive public records before making or obtaining copies of them. Provided a person agrees to pay the applicable fee, if any, in advance, ISC must comply with the person's request that copies of responsive public records be transmitted by mail, e-mail or facsimile, unless ISC has a justifiable reason for requiring the person to make or obtain copies at ISC's office.

If you have any questions regarding this determination or IPRA in general, please let me know.

Sincerely,



Dylan K. Lange
Assistant Attorney General

cc: Laura Paskus

¹ ISC's reliance on Section 14-2-9(B) is misplaced. That provision requires a public body to provide copies of public records in electronic format, if available. It does not address the transmission of electronic copies of public records to a requester.

INSPECTION OF PUBLIC RECORDS ACT ("IPRA") COMPLAINT FORM
New Mexico Office of the Attorney General
Open Government Division

YOUR CONTACT INFORMATION:

First Name: Laura Last Name: Pastus
Address: [REDACTED]
City: [REDACTED] State: [REDACTED] Zip Code: [REDACTED]
Phone Number: [REDACTED]
Email: [REDACTED]

IPRA REQUEST TO THE PUBLIC BODY:

Name of the Public Body that is the subject of this complaint (including city/town, county or region, if applicable): NM Interstate Stream Commission

Format of IPRA Request: Written Oral

Date IPRA Request was Submitted to the Public Body: Aug 3, 2016

Date of all Responses Received from the Public Body: Aug 5, Aug 10, Aug 24, Aug 25, Aug 30

ALLEGED VIOLATIONS OF IPRA BY THE PUBLIC BODY: Please select from the following list the violations you allege the public body committed. Check all that apply.

RECORDS:

- No records were provided.
- The agency provided some but not all of the records responsive to the request.
- Records were provided, but they were not responsive to the request.
- The public body does not have custody or responsibility for the records, and the records custodian did not forward the request to the proper custodian.
- The request was for records in electronic format and although the records are available in electronic format, the copies of the public records were not provided in an electronic format.

DENIED REQUESTS TO INSPECT PUBLIC RECORDS

- Although some records were provided, the custodian did not include a written explanation for denying the production of exempt records or for redacting confidential information from records.
- No records were provided and the records custodian did not deliver or mail a written explanation to the requester within fifteen (15) calendar days after receiving the request that included a description of the records sought, the names and titles of each person responsible for denying the request, and a description of the reasons for the denial.

NOTICE

- Public body did not post in a conspicuous location at its administrative office or on the public body's website a notice setting forth: the rights of any person to inspect the public body's public records, the public body's responsibility to make public records available for inspection, the procedures for requesting inspection of public records, the procedures for requesting copies of public records, and/or reasonable fees for copying public records

DEADLINES (For purposes of deadlines imposed by the IPRA, the date the request is received is not counted)

- Inspection was not allowed within three (3) business days and the public body did not timely send a written "three-day letter" to the requester explaining when the records would be available or when the public body would respond to the request.
- The public body did not allow inspection or otherwise respond to the request within fifteen (15) calendar days from the date the custodian received the request.

FEES

- The public body charged fees in excess of \$1.00 per printed page for documents 11"X17" or smaller, or charged fees that exceeded the actual costs to copy the records.
- The public body did not provide a receipt upon request.

DETAILED EXPLANATION OF ALLEGED IPRA VIOLATIONS (Required): Please provide a description of the actions taken by the public body that violated the IPRA, including specific dates and why you believe the IPRA has been violated.

Please see attached letter, timeline and documents

Laverne Roller

From: Laura Paskus
Sent: Sunday, September 04, 2016 2:36 PM
To: lroller@nmag.gov
Cc: Trip Jennings
Subject: IPRA complaint re: NMISC
Attachments: paskus ag complaint isc 9-3-16.pdf; Paskus letter - AG IPRA compliant - NMISC 9-3-16.pdf; FW_ ISC IPRA request - 1.pdf; Gmail - (no subject) Doshier-Paskus.pdf; Gmail - IPRA Request - NMCAPE Workshop - email corr up to aug 24 2016.pdf; Mail.pdf; OSE survey.pdf; paskus ag complaint isc 9-3-16.pdf; Re_ FW_ ISC IPRA request - 2.pdf

Dear Ms. Roller,

I've attached documents related to an IPRA complaint I am filing regarding the New Mexico Interstate Stream Commission. I have also pasted a copy of the letter that accompanies my complaint form below.

I will mail the paper copies on Tuesday.

Please let me know if you have any questions -- or require additional information.

Thank you!

best wishes,
Laura

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September 3, 2016

Dear employees of the Open Government Division,

I write to ask your help with an IPRA request I filed for records that would aid my work for New Mexico In Depth and its media partners. As always, the purpose of this work is to inform the public about the workings of its government.

I believe the New Mexico Interstate Stream Commission has violated the Inspection of Public Records Act.

Copies of all the relevant documents are attached. The timeline below focuses solely on the portions of the email conversations relevant to my IPRA request.

TIMELINE

August 3, 2016: I requested information from the ISC's public information officer, Melissa Doshier, concerning a presentation given by an ISC employee at a public meeting of the New Mexico Central Arizona Project Entity. I was seeking the presentation itself and background data and documentation that underpinned it.

Later that day, I realized it would be more appropriate to request the information under IPRA and take advantage of the law's response requirements. I sent the IPRA request to the ISC's public records custodian, Sonia Salazar, as well as to the chair of the NMCAPE, Darr Shannon.

I sent the request to Shannon as a courtesy; even though it was a NMCAPE meeting, the presentation was given by an ISC staff member. Ms. Shannon replied right away that she had no responsive documents.

That same day, the ISC's Salazar responded. She included a link to the presentation on the agency's website and said the agency was "in the process of gathering additional background documents." She said she would contact me on August 8, regarding those documents.

August 5, 2016: I received an emailed letter saying the documents were ready and I could receive them one of two ways: come to the Santa Fe office, sit at one of the agency's computers, and review the files I wished to copy; or pick up a flash drive with all the responsive documents and pay the flat rate of \$13.00.

My IPRA request specifically stated that I would like to receive the documents via email unless the files were too large to send electronically.

I interpreted the agency's response to mean that there were many responsive documents and made an appointment to visit with Salazar.

August 16, 2016: I visited Santa Fe and asked Salazar to copy the documents onto a USB drive I provided. Upon reviewing the documents, there were only four small files of one or two pages each.

August 24, 2016: Upon reviewing those documents and sharing them with two experts in the field, I was unable to see how the ISC staffer could have reached conclusions presented to the NMCAPE. I followed up with Salazar, who passed the request on to other staff members.

August 25, 2016: The ISC PIO responded via email to me, explaining where the presentation numbers came from (additional documents, conversations, etc.)

August 30, 2016: I asked why those documents and notes were not included as responsive documents to my original IPRA request. The PIO said she would talk with appropriate staff and get back to me.

Even if the documents are eventually provided to me, I believe the ISC has violated IPRA by not providing them in response to my August 3 IPRA request. Clearly the records described in the ISC's August 25 correspondence — records that still have not been provided, seven days after the 15-day deadline laid out in IPRA — are responsive to my request.

Further, there's no reason the four documents ISC did provide couldn't have been emailed, rather than provide by way of reviewing the documents on an agency computer or paying \$13 for the files to be copied onto a USB drive.

I would like to note that I appreciate that work Ms. Salazar does for the ISC. I do not believe fault rests with her for not providing all the responsive documents or for not emailing the initial four documents. I believe it's the result of poor agency policy and/or advice from other staffers within the agency, most or all of whom likely outrank Ms. Salazar.

I am happy to answer any questions you might have. Thank you so much for your time — and for your critical work in this state.

Best wishes,

Laura Paskus

CC: NMID executive director, Trip Jennings

--

Laura Paskus

independent reporter

call or text: 505.217.5136

<http://southwestreporter.com/>

<http://nmindepth.com/series/new-mexico-climate/>

August 3, 2016

New Mexico Interstate Stream Commission

Via email:

Sonia.Salazar@state.nm.us
kristina.eckhart@state.nm.us

CC:

Melissa.Dosher@state.nm.us
darrshannon52@gmail.com

Dear ISC staffers,

I'm writing today to ask for your help in accessing some public records. Pursuant to the Inspection of Public Records Act, I would like to inspect the following public records:

Mr. Craig Roepke's presentation from the June 21, 2016 NMCAPE workshop/meeting in Albuquerque. This was a short a presentation he gave at the beginning of the meeting and referred to as a "general rough cut estimates of water needs." I'm also requesting the spreadsheets, sources, or other resources he relied upon to develop those numbers.

This includes, but is not limited to, any email correspondence on state computers and devices or on personal e-mail accounts and devices. If no dates are specified above, this request also includes any relevant records that may be created between now and when this request is completely fulfilled.

As these records are held electronically, I would like to receive them in electronic format, as the law requires. Please send them via email to laura.paskus@gmail.com. If the files are too big to email, please copy them to a blank CD or DVD; if it's easier, I can bring in a USB drive.

If the records are not available electronically, please let me know when they will be available for inspection and/or copying.

If you deny any part of this request, please let me know why you're withholding the records by citing specific exceptions to IPRA. If a document contains some protected information I trust you will appropriately redact the protected information before producing the document. If you do redact the documents, please explain why and cite the exception that allows it.

As the presentation itself was presented to the NMCAPE and public at the June 21, 2016 meeting, I request that you send that, as the law states "as soon as is practicable under the circumstances," even if the background documents require additional time to assemble.

I understand that ISC employee Roepke made this presentation at a meeting of the New Mexico CAP Entity, but as the records were produced by and are held by the ISC, I'm

requesting them from your agency.

Thank you for your prompt attention to this matter. Please don't hesitate to call or email me if you have any questions. As always, I appreciate your help.

Sincerely,
Laura Paskus

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Laura Paskus
independent reporter
call or text: 505.217.5136
<http://southwestreporter.com/>
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I am happy to answer any questions you might have. Thank you so much for your time – and for your critical work in this state.

Best wishes,

Laura Paskus

CC: NMID executive director, Trip Jennings