

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

October 27, 2017

Elizabeth Trickey, General Counsel
New Mexico Department of Public Safety
Post Office Box 1628
Santa Fe, New Mexico 87504-1628

Re: Inspection of Public Records Act Complaint – NM Department of Public Safety

Dear Ms. Trickey:

We have reviewed Wheeler Cowperthwaite's complaint, dated February 17, 2017, alleging that the New Mexico Department of Public Safety ("DPS") violated the Inspection of Public Records Act ("IPRA"), NMSA 1978, § 14-2-1 to -12 (as amended through 2013), by failing to provide any records in response to his request to inspect public records. We also have reviewed your response, on behalf of DPS, to our inquiry regarding the complaint. *See* letter from Elizabeth Trickey, General Counsel, DPS (March 10, 2017) ("DPS's Response"). According to DPS's Response, DPS provided Mr. Cowperthwaite with all public records responsive to his request on March 10, 2017. While it appears that DPS has now complied with IPRA by making responsive records available to Mr. Cowperthwaite, we believe DPS's use of IPRA's procedures for burdensome requests amounted to an improper denial of Mr. Cowperthwaite's request, as discussed below.

According to his complaint, Mr. Cowperthwaite submitted his original request to inspect public records by email on February 18, 2015. That request was for "[a]ll reports, whether incident, supplemental or investigative, and investigative files generated by incident number 2011-11549." The requested records pertained to a triple homicide that occurred in 2011. By letter dated March 5, 2015, DPS provided Mr. Cowperthwaite with a copy of the original incident report, and stated, "Due to the over burdensome nature of the request, additional preparation time is required. We will keep you updated on the status of your request." One and a half years later, on September 8, 2016, Mr. Cowperthwaite requested

an update from DPS regarding his records request. DPS responded that “[t]his case is still on over burdensome status.”

On January 19, 2017, Mr. Cowperthwaite notified DPS that he was amending his February 18, 2015 request “to include all audio, video and audio/video recordings made, or attached to, in the case, including the E911 recording, recordings of interviews and recorded phone conversations.” Mr. Cowperthwaite further stated, “[s]ince the case has been adjudicated (with the recent guilty verdict), I was hoping to get an update on the request.” On March 10, 2017, more than two years after his original request, DPS provided Mr. Cowperthwaite with records responding to his request, as amended in January 2017. DPS explained that it redacted NCIC and personal identifier information in the responsive records that was protected by federal and state law.

Although DPS has now complied with its obligation under IPRA to provide responsive public records,¹ we believe that, as the complaint alleges, DPS’s failure to comply with Mr. Cowperthwaite’s records request within a reasonable period of time constituted an improper denial. The legislative purpose of IPRA is “freely allowed, *prompt* compliance” with the right to inspect public records. *Derringer v. State Livestock Board*, 2003-NMCA-073, ¶ 11, 133 N.M. 721 (emphasis added), *cert. denied*, 133 N.M. 727 (2003). IPRA requires a records custodian who receives a written request for public records to “permit the inspection immediately or as soon as is practicable under the circumstances, but not later than fifteen days after receiving [the] written request.” § 14-2-8(D). If the records custodian determines that the request is “excessively burdensome or broad,” IPRA provides that:

an additional reasonable period of time shall be allowed to comply with the request. The custodian shall provide written notification to the requestor within fifteen days of receipt of the request that additional time will be needed to respond to the written request. The requester may deem the request denied and may pursue the remedies available pursuant to [IPRA] if the custodian does not permit the records to be inspected in a reasonable period of time.

Section 14-2-10.

As discussed above, DPS responded to Mr. Cowperthwaite’s February 18, 2015 public records request by stating that DPS required additional time to comply because the request was “over burdensome.” DPS did not provide Mr. Cowperthwaite with a date by which it would respond to the records request, but stated that DPS would keep Mr. Cowperthwaite

¹ See *Derringer*, 2003-NMCA-073, ¶ 15 (a public body is not liable for damages under IPRA in an action brought after the public body has complied with IPRA).

Ms. Elizabeth Trickey

October 27, 2017

Page 3

“updated on the status” of the request. DPS still had not provided records responding to Mr. Cowperthwaite’s original records request when he submitted his complaint on February 17, 2017.

DPS essentially provides two justifications for its delay in complying with Mr. Cowperthwaite’s request. First, according to DPS’s Response:

Documents were not denied to Mr. Cowperthwaite. They were withheld under the law enforcement exception of IPRA because, in fact, this was a criminal matter under active investigation first by the New Mexico State Police ..., then the First Judicial District DA’s office, to protect confidential police methods ... and to avoid impeding the prosecution.

Whether or not the law enforcement records exception properly applied to the records Mr. Cowperthwaite requested, it did not justify DPS’s use of IPRA’s procedures for burdensome requests to delay its response to the request. By “withholding” responsive public records based on DPS’s belief that the records were protected from disclosure, DPS effectively denied Mr. Cowperthwaite’s request. Once DPS determined that records responsive to Mr. Cowperthwaite’s request were excepted from disclosure, it should have followed IPRA’s procedures for denied requests under § 14-2-11.

Second, DPS’s Response states that DPS was required to review “thousands of documents, plus audio and videotapes” before it could comply with Mr. Cowperthwaite’s request. IPRA recognizes that some requests may be “excessively burdensome or broad” and, under § 10-14-2, permits a public body to take a “reasonable” period of time beyond the usual 15-day response time to comply with those requests. The number of responsive records existing at the time of Mr. Cowperthwaite’s original request is unclear. According to DPS’s Response, DPS began collecting responsive records in December 2016, shortly after a conviction was obtained. Nevertheless, even assuming that all the responsive records existed at the time of Mr. Cowperthwaite’s original request, we believe the more than two years DPS took to respond justifiably led Mr. Cowperthwaite to conclude that DPS had “not permit[ted] the records to be inspected in a reasonable period of time” under § 14-2-10 and to deem his request denied.

To summarize, based on the information available to us at this time, it appears that DPS improperly denied Mr. Cowperthwaite’s public records request. While we appreciate that DPS must respond to numerous records requests with limited personnel and other resources, we conclude the two year delay between the request and DPS’s response was not “reasonable” and constituted a denial of the request under § 14-2-10. We also conclude that DPS’s failure to notify Mr. Cowperthwaite that some or all of the records he requested were law enforcement records excepted from disclosure violated § 14-2-11’s procedures for denied requests.

Ms. Elizabeth Trickey

October 27, 2017

Page 4

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

Sincerely,



Dylan K. Lange

Assistant Attorney General

cc: Wheeler Cowperthwaite

INSPECTION OF PUBLIC RECORDS ACT ("IPRA") COMPLAINT FORM

New Mexico Office of the Attorney General

Open Government Division

YOUR CONTACT INFORMATION:

First Name: Wheeler Last Name: Cowperthwaite

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 Department of Public Safety

Format of IPRA Request: Written Oral

Date IPRA Request was Submitted to the Public Body: Feb. 18, 2015

Date of all Responses Received from the Public Body: 2/19/2015; 3/5/2015; 9/13/2016

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 letter originally attached to this complaint. A copy will be reproduced and sent along with this complaint form.

Additionally, all documentation was provided with the original complaint letter.

ADDITIONAL INFORMATION: Please provide a copy of your original inspection request (if written), and any documentation or evidence you have regarding the alleged IPRA violation.



Salazar, Patricia <psalazar@nmag.gov>

Complaint Form

Wheeler Cowperthwaite <cowperthwaite@gmail.com>
To: "Salazar, Patricia" <psalazar@nmag.gov>

Wed, Feb 22, 2017 at 5:13 PM

Ms. Salazar,

I would like to add a document to my original complaint. It is attached to this email.

It is a summary of the 2007 settlement agreement DPS entered into with the Albuquerque Journal, Rio Grande SUN and New Mexico Foundation for Open Government.

(I haven't been able to scrounge up a copy of the actual agreement, or else I would have attached it as well).

The settlement agreement is binding on DPS for its interactions with members of the news media, of which I am a part.

In the agreement, paragraph 7 states that DPS must redact information rather than withholding entire records. DPS must also describe in "reasonable detail" why the records have been redacted.

DPS has violated both of these tenants in the de facto denial of my IPRA request.

In paragraph 11 of the agreement, the accused but not charges exception is addressed. DPS used this to delay, or otherwise withhold or deny my request. The documents in question deal with a man who was charged, tried and convicted. DPS has, therefore, violated the settlement agreement.

In paragraph 12, DPS is required every June and December to review any redactions or withholdings for the law enforcement exemption, and then produce those documents.

It's been two years and DPS never released a single new or old page, sans the incident report, which is exempt from the law enforcement exemption. This means DPS violated the agreement.

Thank you for adding the settlement agreement memo as well as my explanation of DPS's violations of the settlement agreement to my complaint.

Best,

-Wheeler

[Quoted text hidden]

 **Memo Summarizing 2007 DPS Settlement Agreement.pdf**
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