

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

July 20, 2021

**VIA ELECTRONIC MAIL ONLY**

New Mexico Public Education Department  
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**Re: Inspection of Public Records Act Complaint – Michelle Jenson**

Dear Mr. Rodriguez:

Thank you for your response to our inquiry regarding the complaint filed with the Office of the Attorney General by Ms. Michelle Jenson alleging that the New Mexico Public Education Department (hereinafter the “Department”) violated the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2019) (“IPRA”). As you know, Ms. Jenson’s complaint alleges that the Department violated IPRA in connection with her public records request dated December 16, 2020. Having carefully reviewed both the complaint and your response to our inquiry, although we agree that the Department substantially complied with IPRA, we conclude that it was not fully compliant with the statute’s specified deadlines. We also find that it failed to provide a statutorily-compliant “written explanation of denial” to Ms. Jenson. Section 14-2-11(B). We therefore recommend that the Department review its internal public records policies to ensure that similar errors do not occur in the future.

**Background**

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 (8<sup>th</sup> ed. 2015) (“IPRA Guide”).

Ms. Jenson submitted a public records request to the Department<sup>1</sup> on December 16, 2020, seeking records containing a wide array of statistical data and information as to public school registration, grades, and remote learning at Albuquerque Public Schools. She sent this request to the Department's "HelpDesk," not its records custodian, and on the following day, December 17, 2020, the HelpDesk responded by instructing Ms. Jenson to "complete an IPRA" through a link on the Department's website which contained the custodian's contact information. She thereafter received no response from the Department until December 28, 2020, when the Department's records custodian contacted Ms. Jenson to explain that "a response and documents/records will be sent to you within 15 days of our receipt of the request or sooner." The records custodian further explained that it was only on that same day that she had received Ms. Jenson's request.

On January 14, 2021, 17 calendar days after the records custodian had (apparently) received Ms. Jenson's request, the Department responded again by sending a letter declaring Ms. Jenson's request to be "burdensome and broad." The records custodian stated that Ms. Jenson could expect another response on or before January 20, 2021. That day came and went, but on January 22, 2021, the Department's records custodian emailed Ms. Jenson to again explain that the request was "deemed burdensome and broad" and that the Department would respond again on or before January 29, 2021.

The Department responded substantively to Ms. Jenson's request beginning on January 29, 2021. On that date, the Department contacted Ms. Jenson and provided her "[c]opies of the documents in the custody or control of the Public Education Department (PED) that appear responsive," while also stating that the Department was still reviewing one other record and would respond to her again on or before February 5, 2021. When that day arrived, the Department's records custodian provided Ms. Jenson the additional record, explaining that the Department had redacted this record on the basis of the federal Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. Regarding records and data it had not provided to Ms. Jenson, the Department stated, "To the extent that your request is for anything beyond what has been provided or referenced here, the PED would request reasonable particularity pursuant to NMSA 1978, Section 14-2-8(C), which may provide better clarification regarding your request or might assist with your request." Since this February 5, 2021 email, Ms. Jenson has not received a further response from the Department.

We have identified two issues related to IPRA arising out of Ms. Jenson's complaint. First, Ms. Jenson argues that the Department effectively withheld responsive records insofar as she received no records containing "data on students with failing grades." Secondly, we observed a number of deficiencies in the Department's written correspondence with Ms. Jenson, including both late responses and one substantive omission. We will address each of these issues separately.

#### All Responsive Records

Ms. Jenson's sole allegation against the Department is that it improperly withheld records responsive to her request. In particular, we understand her to argue that the Department violated

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<sup>1</sup> Ms. Jenson also submitted this request simultaneously to Albuquerque Public Schools and Rio Rancho Public Schools.

IPRA by failing to send her records containing “data on students with failing grades.” For its part, the Department has maintained that Ms. Jenson’s request lacked reasonable particularity as to the specific information or records she sought related to students with failing grades, while simultaneously noting that “the PED does not track an amount of failing grades, and does not utilize progress reports or semesters as reporting periods.” We do not find that the Department has violated IPRA in this respect.

Preliminarily, we disagree with the Department’s contention that Ms. Jenson’s request lacked “reasonable particularity” as required by Section 14-2-8(C). *See id.* (requiring all written requests to “identify the records sought with reasonable particularity”). Ms. Jenson’s request stated that she sought “all records regarding ... [h]ow many [f]ailing grades were reported by New Mexico Public Schools at the middle and high school levels” in 2019 and 2020. We think this was reasonably particular: Ms. Jenson clearly indicated that she sought records containing aggregate data on failing grades reported to the Department by individual public schools. IPRA’s “reasonable particularity” standard is a low threshold, and we think Ms. Jenson clearly satisfied it. *See* IPRA Guide, p. 33 (“By ‘reasonable particularity’ the Act does not mean that a person must identify the exact record needed, but the description provided should be sufficient to enable the custodian to identify and find the requested record.”).

However, notwithstanding the Department’s claim that Ms. Jenson’s request was lacking in particularity, we have insufficient evidence to conclude that the Department actually withheld any responsive records. At the outset, the Department denied that it had withheld any records and we have no evidence to contradict this claim. *See Smith Butz, LLC v. Pennsylvania Dep’t of Env’tl. Prot.*, 142 A.3d 941, 945 (Pa. Commw. Ct. 2016) (observing that, without “competent evidence” that a public body “acted in bad faith or that the...records exist,” the court must accept as true the public body’s assertion that the public records do not exist) and *Filippi v. Wallin*, No. A-1-CA-37195, mem. op. at ¶ 14-15 (N.M. Ct. App. Dec. 16, 2020) (non-precedential) (finding that there was evidence in the record to support the allegation that responsive records existed and were withheld by the public body, thus requiring further inquiry and *in camera* review on the part of the District Court). More importantly, though, the Department emphasized in response to our inquiry that “the PED does not track an amount of failing grades, and does not utilize progress reports or semesters as reporting periods.” We understand this to mean that the Department does not maintain the data sought by Ms. Jenson and therefore lacked records containing this data. Since it is well-settled in New Mexico that public bodies are not required to create new records in response to a request, see Section 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.”), we conclude that the Department could not have violated IPRA by failing to provide data it did not possess.

#### Written Correspondence

In reviewing the documentation provided to us, we also noticed a number of deficiencies in the written correspondence provided by the Department to Ms. Jenson. Most notably, the Department was repeatedly late in responding to Ms. Jenson’s request. IPRA sets forth a number of deadlines that public bodies must satisfy in responding to public records request, but it does not appear that the Department complied with these in responding to Ms. Jenson. In addition, it appears that the Department did not provide a legally-sufficient “written explanation of denial” to Ms. Jenson

explaining the redactions it made to the responsive records. Section 14-2-11(B). We will review these issues in the interest of thoroughly advising the Department on its statutory obligations.

All public bodies must respond to public records requests in accordance with IPRA's specified deadlines. *See Faber v. King*, 2015-NMSC-015, ¶ 11 (noting that, "[w]hen a state agency receives a written IPRA request, IPRA requires the agency's custodian of records to timely respond") and *San Juan Agr. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶ 38 (observing that IPRA provides for damages "when a records custodian fails to respond to a request in a timely fashion"). First and foremost, "In the event that a written request is not made to the custodian having possession of or responsibility for the public records requested, the person receiving the request shall promptly forward the request to the custodian of the requested public records, if known, and notify the requester." Section 14-2-8(E). Once the request is received by the custodian, IPRA requires the public body to send the requestor a written acknowledgment of the request and an explanation of "when the records will be available for inspection or when the public body will respond to the request" within three (3) business days, assuming the requested records are not available immediately. *See* § 14-2-8(D). Even more importantly, within fifteen calendar days of the custodian's receipt of the request, the public body must either provide the requested records, see Section 14-2-8(D), explain to the requestor in writing as to why the request is being denied, see Section 14-2-11(A), or designate the request in writing to be excessively burdensome or broad. *See* § 14-2-10. Where the request is excessively burdensome or broad, the public body then has "an additional reasonable period of time" within which it must process the request. *Id.*

Here, we noticed a number of missed deadlines. Most glaringly, when the Department's HelpDesk received Ms. Jenson's request, it did not promptly "forward the request to the custodian of the requested public records" along with a notification to Ms. Jenson. Section 14-2-8(E). To the contrary, it instructed Ms. Jenson to herself direct her request to the Department's custodian, and apparently waited approximately eleven days (from December 17, 2020 to December 28, 2020) to abide by Section 14-2-8(E) and forward Ms. Jenson's request along to the records custodian. In addition, once the Department's records custodian received Ms. Jenson's request, it did not respond within fifteen calendar days of this receipt, instead responding seventeen days later (and two days late). Finally, after declaring Ms. Jenson's request "burdensome and broad" on January 14, 2021 and pledging to respond on or before January 20, 2021, the Department did not respond until January 22, 2021, when it requested still more time.

We would be remiss if we failed to emphasize to the Department the real importance of sending written communications to records requestors in accordance with the deadlines set by IPRA. Most importantly, these statutorily-mandated communications periods are critical mechanisms through which IPRA guarantees the public has access to "the greatest possible information" about governmental affairs. Section 14-2-5. In addition, though, IPRA specifically permits records requestors to seek judicial enforcement – and damages, costs, and attorney's fees – of any "written request for inspection of public records that has not been permitted within fifteen days." Section 14-2-11(A). For both of these reasons, it is imperative that the Department implement adequate internal policies to ensure timely written responses to all future records requests.

In addition, we also have one concern as to the "written explanation of denial" the Department provided to Ms. Jenson in explaining the redactions it made to one of the responsive records.

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Section 14-2-11(B). Any such written explanation (which is more commonly called a “denial letter”) must identify the legal basis for the denial, a description of the records originally sought by the requestor, and “the names and titles or positions of each person responsible for the denial.” *Id.*; see also IPRA Guide, p. 40. Here, the Department’s email to Ms. Jenson dated February 5, 2021, which explained that it had redacted one responsive record, did not “set forth the names and titles or positions of each person responsible for the denial.” Section 14-2-11(B)(2). The Department’s records custodian explained only that “[w]e redact” records akin to the one provided to Ms. Jenson and that “[i]t is the practice of NM-PED” to make similar redactions, but this was plainly not an identification of which individual was responsible for those redactions. Strictly speaking, it was not legally compliant with Section 14-2-11(B). In light of the role of denial letters in conveying information to records requestors in line with the purpose behind IPRA, we would advise the Department to take greater care in drafting similar communications in the future. See generally *Duran*, 2016-NMCA-063, ¶ 38 (“While information can come in the form of tangible documents, it can also be gathered based upon an agency’s denials.”).

### Conclusion

Although it appears likely that the Department did substantially comply with IPRA by providing Ms. Jenson all of the responsive records in its possession, we remain concerned by the deficiencies in its written correspondence to Ms. Jenson. The Department should review its internal public records practices to ensure that it responds to all requests in a timely manner, including both forwarding requests to the records custodian “promptly” and abiding by IPRA’s more specific deadlines. See § 14-2-8. In addition, any future “written explanation of denial” must, as specifically mandated by IPRA, “set forth the names and titles or positions of each person responsible for the denial.” Section 14-2-11(B)(2). We trust that the City will take these suggestions under advisement as it handles future requests.

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](http://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: Michelle Jenson