

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

June 8, 2017

Dawn Mastalir
Acting General Counsel
Public Education Department
300 Don Gaspar
Santa Fe, NM 87501-2786

Re: Inspection of Public Records Act Complaint – Public Education Department

Dear Ms. Mastalir:

We have reviewed the complaints dated January 23 and January 24, 2017 submitted by Barbe J. Awalt alleging that the Public Education Department (“PED”) violated the Inspection of Public Records Act (“IPRA”), NMSA 1978, Sections 14-2-1 to -12 (as amended through 2013), and your response on behalf of PED to our inquiry regarding the complaints. *See* letter from Dawn Mastalir, PED Acting General Counsel (Feb. 28, 2017) (“PED’s Response”). The complaints allege that PED violated IPRA by (1) failing to provide an explanation for denying inspection of certain public records requested by Mrs. Awalt and (2) failing to acknowledge Mrs. Awalt’s requests for public records within three business days. Based on our review, as discussed below, we conclude that PED’s handling of Mrs. Awalt’s public records requests generally complied with IPRA. Nevertheless, as discussed below, it appears that PED has not consistently followed IPRA’s requirements for acknowledging public requests within three business days.

January 23, 2017 Complaint

The complaint dated January 23, 2017 alleges that PED did not allow inspection or acknowledge four public records requests made on January 9, 2017 (#17-021, #17-029, #17-030 and #17-032) within three business days, as required by Section 14-2-8(D). From PED’s Response, it appears that, as the complaint alleges, PED did not provide a written acknowledgement of the four requests within three business days. Instead, PED responded to the requests within 15 calendar days and explained that because the requests were burdensome, PED would require additional time to respond, as allowed under Section 14-2-10.

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.” Section 14-2-8(D). If “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.” *Id.* If a records custodian determines that a request is “excessively burdensome or broad,” the records custodian must “provide written notification to the requester within fifteen days of receipt of the request that additional time will be needed to respond to the written request.” *Id.* Section 14-2-10.

Section 14-2-8(D) requires a public body to respond to a written request for public records within three business days either by allowing inspection or by providing a written explanation of when the public body will respond to the request. IPRA’s notification requirements under Section 14-2-10 for requests that are deemed excessively burdensome or broad are independent of and do not replace Section 14-2-8(D)’s requirement for a response within three business days. Because PED did not provide records responsive to Mrs. Awalt’s requests or explain when PED would respond within three business days of receiving the requests, we conclude that PED violated IPRA.

January 24, 2017 Complaint

According to the complaint dated January 24, 2017, Mrs. Awalt made a written request (#16-345) on December 20, 2016 for “all 3-day letters” PED sent in 2016. The complaint alleges that PED responded to Mrs. Awalt’s request by providing three-day letters for 317 of 347 public records requests made in 2016 and did not explain why PED failed to provide three-day letters for the other 30 requests.¹

In response to our inquiry regarding the complaint, PED thoroughly researched the details of its response to Mrs. Awalt’s records request #16-345. PED determined that it had not provided 33 three-day letters in response to Mrs. Awalt’s request. The letters were not provided because PED did not send three-day letters in response to 33 records requests it received in 2016. From PED’s Response, it appears that 26 of the 33 requests did not require three-day letters, primarily because PED provided access to responsive records, if any, within three days of receiving the requests.² For the remaining seven requests, PED acknowledges that it failed to send three-day letters in response to four of the requests and states that it sent burdensome letters instead of three-day letters in response to three of the requests.

IPRA broadly defines “public records” as “all documents ... and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business....” *Id.* § 14-2-6(G). IPRA requires a public body

¹ The complaint also contends that PED violated IPRA by stating in its three-day letters that PED would respond within 15 “business” days rather than “calendar” days. PED’s Response states that PED did not intend to mislead requesters and responded to public record requests within 15 calendar days, as required by Section 14-2-8(D). Absent additional information suggesting otherwise, we believe that PED’s reference to “business days” in the three-day letters was inadvertent and did not, by itself, violate IPRA.

² PED’s Response shows that PED provided responsive records within three days of receiving 24 of the requests. The other two requests did not require a response because PED was not the proper custodian of records for one of the requests and the other request was withdrawn by the requester.

to provide responsive public records in its custody at the time the request is made. IPRA does not require a public body to create a public record in response to a request. *Id.* Section 14-2-8(B). *See also* Attorney General's IPRA Compliance Guide, p. 32 (8th ed. 2015) ("IPRA Compliance Guide") (available online at www.nmag.gov).

IPRA requires a public body to provide only those records that exist and respond to a public records request. PED properly responded to Mrs. Awalt's request #16-345 by providing her with access to all three-day letters it sent in response to public records requests in 2016. Contrary to the complaint's allegations, PED did not deny inspection of responsive public records. The three-day letters the complaint contends PED omitted did not exist at the time of Mrs. Awalt's request. Because PED did not deny inspection of responsive records, PED was not required to provide Mrs. Awalt with a written explanation. *See* Section 14-2-11 (requiring a records custodian to provide a requester with "a written explanation of the *denial*" of a request to inspect public records (emphasis added)).

While we conclude that PED did not violate IPRA by denying inspection of public records responsive to Mrs. Awalt's records request, PED's Response shows that, as with the inspection requests at issue in the January 23 complaint, PED failed in seven instances to meet the three-day response requirement of Section 14-2-8(D). As discussed above, that provision requires PED to provide responsive records, if any, or a written explanation of when PED will respond within three business days of receiving a public records request.

It appears that for most public records requests it receives, PED complies with its obligations under IPRA, including the three-day response required under Section 14-2-8(D). Even in the few instances where PED failed to send a three-day letter, PED properly provided records responsive to Mrs. Awalt's requests within fifteen days or, for burdensome requests, within the additional time PED requested for response. Although, the PED has generally complied with the requirements of IPRA, we recommend that PED review its procedures for responding to public records requests and take any measures needed to ensure that it consistently responds to the three-day response requirement of Section 14-2-8(D).

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

Sincerely,



Dylan K. Lange
Assistant Attorney General

cc: Barbe J. Awalt

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

New Mexico Office of the Attorney General

Open Government Division

YOUR CONTACT INFORMATION:

First Name: Mrs. Barbe J. Awalt Last Name: _____

Address: [REDACTED] _____

City: _____ State: _____ Zip Code: _____

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): NMPED

Format of IPRA Request: Written Oral

Date IPRA Request was Submitted to the Public Body: _____

 multiple / see attached

Date of all Responses Received from the Public Body: _____

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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.

See 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.

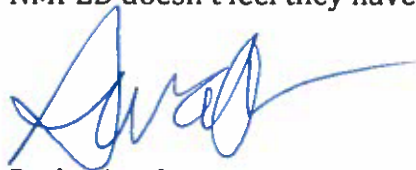
Barbe Awalt
LPD Press/Rio Grande Books

[REDACTED]
[REDACTED]
January 23, 2017

Dear Ms. Salazar,

I am well aware I have a lawsuit on violations of IPRA but these violations are new and not covered in the lawsuit.

What does a person have to do to get NMPED to comply with the IPRA law? I thought OAG was supposed to oversee that government agencies comply. Obviously, NMPED doesn't feel they have to.



Barbe Awalt



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PUBLIC EDUCATION DEPARTMENT
300 DON GASPAR
SANTA FE, NEW MEXICO 87501-2786
Telephone (505) 827-5800
www.ped.state.nm.us

HANNA SKANDERA
SECRETARY OF EDUCATION

SUSANA MARTINEZ
GOVERNOR

January 23, 2017

This response was sent via email to: paulld@aol.com

Barbe Awalt

IPRA #17-032

Dear Ms. Awalt:

Your request to inspect public records was received by me as the Records Custodian of the New Mexico Public Education Department (NMPED) on January 9, 2017. Your request to inspect public records sought in pertinent part:

I want ALL - EVERY response from a school AFTER receiving the books in the 2016 Governor's First Grade Reading Initiative. Letters, emails, thank you's, sent to Anthony Burns or someone else.

Regarding your IPRA records request received by the Public Education Department (PED) on January 9, 2017, we have determined that your request is burdensome. Pursuant to Section 14-2-10, NMSA 1978, PED will require additional time to respond. We anticipate having this information on Wednesday, February 1, 2017.

Sincerely,

Beverly Friedman

Beverly Friedman
Custodian of Records



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SANTA FE, NEW MEXICO 87501-2786
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HANNA SKANDERA
SECRETARY OF EDUCATION

SUSANA MARTINEZ
GOVERNOR

January 23, 2017

This response was sent via email to: paulld@aol.com

Barbe Awalt

IPRA #17-029

Dear Ms. Awalt:

Your request to inspect public records was received by me as the Records Custodian of the New Mexico Public Education Department (NMPED) on January 9, 2017. Your request to inspect public records sought in pertinent part:

In this IPRA I want ALL - every personnel file, license, employment history, job titles, and complaints about Anthony Burns. This is to include any information NMPED has on past employment/schools.

Regarding your IPRA records request received by the Public Education Department (PED) on January 9, 2017, we have determined that your request is burdensome. Pursuant to Section 14-2-10, NMSA 1978, PED will require additional time to respond. We anticipate having this information on Wednesday, February 1, 2017.

Sincerely,

Beverly Friedman

Beverly Friedman
Custodian of Records



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HANNA SKANDERA
SECRETARY OF EDUCATION

SUSANA MARTINEZ
GOVERNOR

January 23, 2017

This response was sent via email to: paulld@aol.com

Barbe Awalt

IPRA #17-030

Dear Ms. Awalt:

Your request to inspect public records was received by me as the Records Custodian of the New Mexico Public Education Department (NMPED) on January 9, 2017. Your request to inspect public records sought in pertinent part:

You had to know this was coming!

January 9, 2017

I want every - all information NMPED has on personnel, job history, job titles, training, complaints, past schools, job performance, on Beverly Friedman.

Regarding your IPRA records request received by the Public Education Department (PED) on January 9, 2017, we have determined that your request is burdensome. Pursuant to Section 14-2-10, NMSA 1978, PED will require additional time to respond. We anticipate having this information on Wednesday, February 1, 2017.

Sincerely,

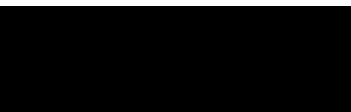
Beverly Friedman

Beverly Friedman
Custodian of Records

January 19, 2017

This response was sent via email to: paulld@aol.com

Barbe Awalt



IPRA #17-021

Dear Ms. Awalt:

Your request to inspect public records was received by me as the Records Custodian of the New Mexico Public Education Department (NMPED) on January 5, 2017. Your request to inspect public records sought in pertinent part:

I want to see any print books submitted for the 2014 - not 2015 or 2016 - Governor's First Grade Reading Initiative.

Regarding your IPRA records request received by the Public Education Department (PED) on January 5, 2017, we have determined that your request is burdensome. Pursuant to Section 14-2-10, NMSA 1978, PED will require additional time to respond. We anticipate having this information on Thursday, January 26, 2017.

Sincerely,

Beverly Friedman

Beverly Friedman
Custodian of Records

Beverly Friedman
PED Liaison to the PEC
Custodian of Record
New Mexico Public Education Department
300 Don Gaspar
Santa Fe, NM 87501
505-827-6661 office
505-795-0180 cell
Bev.Friedman@state.nm.us