

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

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November 18, 2020

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**RE: Inspection of Public Records Act Complaint – Deborah Horne**

Dear Mr. Kuhlmann:

This letter addresses the April 2019 complaint submitted to the Office of the Attorney General, Open Government Division (“OGD”) by Deborah Horne against New Mexico Corrections Department (“NMCD”), alleging violations of the Inspection of Public Records Act (“IPRA”), NMSA 1978, §§ 14-2-1 through -14-2-12. The complaint alleges that the NMCD failed to provide all responsive records to an IPRA request, failed to produce records with redaction of confidential information, failed to provide a written explanation for denying the production of exempt records, and failed to include a description of the records requested with names and titles of each person responsible for the denial. Based upon Ms. Horne’s complaint, as well as NMCD’s response and supporting documentation, we conclude that NMCD improperly denied Ms. Horne’s IPRA requests in violation of NMSA 1978, § 14-2-11(B).

In her complaint, Ms. Horne states that on “March 29, 2016”<sup>1</sup> [sic], she requested “four types of documents” from the NMCD. The two requests at issue in the complaint are “(1) all PREA complaints involving CO [Correctional Officer] T. Matson from 2017 to the present, and (2) a log from statewide disciplinary appeals from Officer Steve Madrid for Appeals out of WWCF [Western Women’s Correctional Facility] for 2016-2019.” On April 10, 2019, Catherine Ahring, IPRA Paralegal for NMCD, responded to Ms. Horne’s request (1) that “PREA complaints are confidential under Section 14-2-1(A)(8), more

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<sup>1</sup> The complaint states that the IPRA request was sent on March 29, 2016; however, the actual letter attached to the complaint gives the date March 26, 2019.

specifically under federal law. 28 CFR Sections 115.51(a) and 115.61(b) and 115.89(b) and (c). Your request in this regard is denied.” In response to request (2) that “no log is kept of the appeals; therefore, the Department has no documents responsive to your request.”

### **IPRA REQUEST #1**

Ms. Horne’s first request concerns inspection of complaints filed by inmates at the NMCD pursuant to the Prisoner Rape Protection Act (“PREA”). The PREA is a federal law that requires public agencies who contract for the confinement of its inmates with private agencies or other entities, including other government agencies, to adopt and comply with the PREA standards. PREA requires that:

- (b) Any new contract or contract renewal shall provide for agency contract monitoring to ensure that the contractor is complying with the PREA standards. 28 C.F.R. § 115.12.

The PREA defines “Agency” as “the unit of a State, local, corporate, or nonprofit authority, or of the Department of Justice, with direct responsibility for the operation of any facility that confines inmates, detainees, or residents, including the implementation of policy as set by the governing, corporate, or nonprofit authority.” 28 C.F.R. § 115.5.

The PREA was established, in part, to make the prevention of prison rape a top priority in each prison system; develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape, increase the accountability of prison officials who fail to detect, prevent, reduce and punish prison rape and protect the Eighth Amendment rights of Federal, State and local prisoners. 34 U.S.C.A. § 30302. To achieve that end, the Code of Federal Regulations require agencies to provide multiple internal ways for inmates to privately report sexual abuse and sexual harassment, retaliation by other inmates or staff for reporting sexual abuse and sexual harassment, and staff neglect or violation of responsibilities that may have contributed to such incidents. 28 C.F.R. § 115.51(a). Apart from reporting to designated supervisors or officials, staff shall not reveal any information related to a sexual abuse report to anyone other than the extent necessary, as specified in agency policy, to make treatment, investigation, and other security and management decisions. 28 C.F.R. § 115.61(b). The agency shall provide a method for staff to privately report sexual abuse and sexual harassment of inmates. 28 C.F.R. § 115.51(d).

Pursuant to 28 C.F.R. § 115.61(b), NMCD must develop policies and procedures for protecting the confidentiality of the reports made to NMCD pursuant to PREA. “Grievances are considered confidential communications. Sealed letters will not be opened for inspection by mailroom personnel if the letter is labeled “Grievance” and addressed to

the Grievance Officer, Deputy Warden or Warden.” CD-150501 (A)(11). “All correspondence marked “Grievance” and addressed to the Grievance Officer, Deputy Warden, Warden, or designee will be treated as strictly confidential. Records regarding the participation of an individual in legitimate grievance proceedings will be kept in a locked office or file cabinet and shall not be available to employees or other inmates, except to the extent necessary for clerical processing or legal defense. Only employees who are participating in the disposition of a legitimate grievance will have access to records essential to the resolution of the grievance. CD-150501(G).”

Further, PREA mandates the release of information collected by prisons concerning sexual abuse reports by releasing an annual report that includes aggregated sexual abuse data, from facilities under its direct control and private facilities with which it contracts. 28 C.F.R. §115.89(b). Before making aggregated sexual abuse data publicly available, the agency must remove all personal identifiers. 28 C.F.R. §115.89(c). PREA does not provide for the release of redacted individual complaints/reports to the public.

In most cases, a regulation or ordinance, by itself may not be used to deny access to public records because it is not a ‘law’ for purposes of the ‘otherwise provided by law’ exception. However, according to the New Mexico Supreme Court, a regulation making certain records private may be proper if the regulation is authorized by a statute and is necessary to carry out the statute’s purposes. *Edenburn v. N.M. Dept. of Health*, 2013-NMCA-045, ¶ 26, 299 P.3d 424 *citing City of Las Cruces v. Pub. Emp.*

NMCD developed policy based upon its obligation under PREA to protect sexual abuse reports/complaints from review by anyone other than persons necessary for treatment, investigation, and other security and management decisions. Therefore, it appears NMCD properly denied inspection of the complaints/reports involving CO [Correctional Officer] T. Matson pursuant to NMSA 1978, Section 14-2-1(A)(8), as otherwise provide by law.

## **IPRA REQUEST #2**

Ms. Horne’s second request asked to inspect the “[l]og from statewide appeals from Officer Steve Madrid for appeals out of WWCF for 2016 to 2019.” In its response to Ms. Horne’s request, NMCD stated “no log is kept of the appeals; therefore, the Department has no documents responsive to your request.” In response to our office’s inquiry, however, NMCD clarified that “WWCF” does not exist and that “the request was vague and therefore failed to describe the records sought with reasonable particularity. The fact that the Department does not have a ‘log’ of disciplinary appeals in the nature requested was explained to the requester.” NMCD went on to explain that Steve Madrid “does not

maintain a log”; it further acknowledged that while there are logs at the facilities, none are “made ‘from’ Steve Madrid” and the logs are not limited to appeals involving Steve Madrid. NMCD suggests an IPRA be filed requesting logs from the particular facility who maintains those types of logs.

NMCD’s initial denial of the second request that “no log is kept of the appeals; therefore, the Department has no documents responsive to your request” was both inaccurate and misleading. NMCD failed to provide information concerning why there were no responsive documents to the IPRA request. In fact, logs of appeals are kept at other facilities but they are not kept by Steve Madrid or at the particular facility identified in the request because that facility does not exist. IPRA requires a written explanation of the denial. NMCD’s inaccurate and misleading denial violates NMSA 1978, § 1-4-2-11(B). The denial also violates the purpose of IPRA “that “the intent of the legislature in enacting the Inspection of Public Records Act is to ensure . . . that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees.” NMSA 1978, § 14-2-5.

### **DENIAL OF IPRA REQUESTS**

When denying an IPRA request, the public body shall provide a written explanation of the denial that (1) describes the records sought; (2) set forth the names and titles or positions of each person responsible for the denial; and (3) be delivered or mailed to the person requesting the records within fifteen days after the request for inspection was received. NMSA 1978, § 14-2-11(B).

NMCD timely denied Ms. Horne’s first request in writing; however, the description of the records sought is inaccurate, and the name and title or position of the person responsible for the denial is absent, in violation of NMSA 1978, § 14-2-11(B).

NMCD also timely denied Ms. Horne’s second request in writing; however, the description of the records sought is inaccurate, the written explanation of the denial is inaccurate and misleading and the name and title or position of the person responsible for the denial is absent, in violation of NMSA 1978, § 14-2-11(B).

### **CONCLUSION**

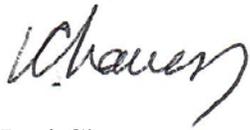
Because we have determined that NMCD violated IPRA by denying Ms. Horne’s request, we urge NMCD to take immediate remedial action. We recommend that NMCD issue written denials that include a description of the records sought and names and titles or

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positions of each person responsible for the denial. In addition, NMCD should provide a concise explanation for the denial of the second request. Section 14-2-11(B)(2).

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

Sincerely,



Lori Chavez  
Assistant Attorney General

cc: Deborah Horne  
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