

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

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February 5, 2020

**VIA ELECTRONIC MAIL ONLY**

New Mexico Department of Transportation  
Aaron Frankland, Deputy General Counsel  
P.O. Box 1149  
Santa Fe, NM 87504-1149  
Email: [Aaron.Frankland@state.nm.us](mailto:Aaron.Frankland@state.nm.us)

**Re: Inspection of Public Records Act Complaint – Stephanie Herrera**

Dear Mr. Frankland:

This letter addresses the complaint submitted to the Office of the Attorney General by Ms. Stephanie Herrera on April 16, 2019 alleging the New Mexico Department of Transportation (“NMDOT”) violated the Inspection of Public Records Act (“IPRA”), NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2018). Specifically, Ms. Herrera alleges the NMDOT provided both untimely and incomplete production of records in response to her IPRA requests submitted on January 13, 2019 and January 29, 2019. Ms. Herrera further alleges the NMDOT failed to provide a written explanation why certain materials were redacted or not provided. We are in receipt of your response on behalf of the NMDOT to our Office’s inquiry regarding this matter, wherein you denied that the NMDOT violated IPRA. Additionally, in response to our inquiry, you provided copies of the extensive materials belatedly provided to Ms. Herrera. Having reviewed the documentation and facts surrounding this matter, we conclude that the NMDOT violated the Inspection of Public Records Act in its handling of Ms. Herrera’s request, and we urge the NMDOT to review and revise its internal procedures, with an emphasis on staff training, to ensure that the NMDOT fully complies with its IPRA obligations moving forward.

**Background**

Ms. Herrera submitted an IPRA request, in email form, to two NMDOT employees on January 13, 2019. Neither email recipient was a NMDOT records custodian. Ms. Herrera titled the subject line of her email “IPRA: Traffic analysis report on State Road 369 Middle

San Pedro.” Ms. Herrera requested her email be construed as a formal request for the report, and for additional documents regarding traffic analysis and correspondence regarding, *inter alia*, safety analysis.

The January 13, 2019 email indicates Ms. Herrera had prior voicemail communications with one of the recipients, a traffic engineer, regarding the report. The NMDOT traffic engineer responded to Ms. Herrera on January 14, 2019, advising the report would be available after it was finalized, and further advising he was forwarding Ms. Herrera’s email to the District Administrator, who would manage the sharing of information.

There were no further communications between Ms. Herrera and the NMDOT until Ms. Herrera emailed the District Administrator on January 29, 2019 to express concern at the lack of acknowledgement or response. Ms. Herrera reiterated her desire for records other than the yet-to-be-completed report. Ms. Herrera apparently attempted to copy her email to the NMDOT’s records custodian, incorrectly typing the email address as “IPRA.Request@staye.nm.us.”

On March 26, 2019 the District Administrator forwarded Ms. Herrera’s emails to the NMDOT’s records custodian. On the same date, the traffic engineer who had received the January 13, 2019 request provided Ms. Herrera a copy of the final report via email, and explained to Ms. Herrera he had assumed Ms. Herrera would be submitting her request directly to the records custodian.

A NMDOT records custodian contacted Ms. Herrera by email on May 16, 2019 to advise her that information responsive to her January 13, 2019 and January 29, 2019 requests was placed on a CD and mailed to her mailing address. The information included not only the traffic analysis report, but supporting documentation and email communications.

The NMDOT responded to our inquiry by acknowledging records were not provided to Ms. Herrera within fifteen days of her request, and not within fifteen days of the March 26, 2019 receipt of her request by the records custodian. The NMDOT also acknowledged there was no denial letter provided to Ms. Herrera within fifteen days. The NMDOT states it has not violated IPRA because the time limits for production imposed by IPRA are triggered only by written requests made to the records custodian. The NMDOT also states it has provided all documents responsive to Ms. Herrera’s request, without any redactions.

#### The Inspection of Public Records Act

New Mexicans “are entitled to the *greatest possible information* regarding the affairs of government and the official acts of public officers and employees.” Section 14- 2-5. *See also Republican Party of New Mexico v. New Mexico Taxation & Revenue Dep’t*, 2012-NMSC-026, ¶ 38, 283 P.3d 853, 867 (observing “IPRA’s guiding purpose of promoting government transparency”). This vital public policy is embodied by the Inspection of

Public Records Act, which affords individuals the right to inspect all “public records” with only limited and specifically enumerated exceptions. *See* § 14-2-1(A) (identifying eight exceptions to disclosure). Consistent with IPRA’s purpose, courts employ a “presumption in favor of the right to inspect.” Attorney General’s Inspection of Public Records Act Compliance Guide, p. 32 (8<sup>th</sup> ed. 2015) (“IPRA Guide”).

### The NMDOT’S Untimely Response

The NMDOT believes it did not violate IPRA’s deadlines or notification requirements because Ms. Herrera did not submit a written request for production directly to the agency’s records custodian. The NMDOT points to the plain language of IPRA, stating the time limits of § 14-2-8(D) are triggered by the records custodian’s receipt of a written request.

All legitimate requests, whether oral or written, should be handled timely. IPRA Guide, p. 32. IPRA anticipates that individuals might not submit their requests to a records custodian. § 14-2-8(E). Accordingly, IPRA places an affirmative burden on the person receiving an IPRA request to promptly forward that request to the custodian of the requested records, if known, and to notify the requestor of, *inter alia*, the record custodian’s contact information. § 14-2-8(E).

The NMDOT’s position appears to be inconsistent with its administrative procedures, which expressly state that IPRA requests submitted by email are considered written requests, and must be immediately forwarded by an employee receiving such requests to the records custodian. NMDOT AD 117, 5.01(b). The same provision states the deadline for responding to any written request, including email requests, is fifteen calendar days from the date of receipt by the records custodian. *Id.*

The NMDOT’s Administrative Directive 4.05 is consistent with § 14-2-8(E) in requiring employees who are not records custodians to immediately forward written requests for public records to the agency’s records custodian. *See* NMDOT AD 117, 4.05. NMDOT permits only its designated records custodian, or employees working in coordination with designated records custodians, to respond directly to IPRA requests. *Id.*, 4.00c. The oversight of communications by NMDOT records custodians makes it all the more imperative that NMDOT employees immediately forward IPRA requests. As the NMDOT indicated in its response to our office, if Ms. Herrera’s request had been directed to the records custodian, NMDOT would have been afforded opportunity to seek clarification from Ms. Herrera as to precisely which correspondence she was seeking. The confusion reportedly experienced by the NMDOT engineer as to which version of the traffic safety report Ms. Herrera was seeking also could have been resolved by prompt action by the records custodian.

Ms. Herrera’s complaint does not identify which records she believes were withheld or redacted, and nothing in our review has indicated records were withheld or redacted.

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We urge the NMDOT to undertake a thorough review of its IPRA policies, procedures and training to ensure NMDOT staff adequately understand IPRA's requirements, as well as those NMDOT policies and procedures implementing IPRA. All NMDOT staff members should be regularly trained on their obligation to promptly forward IPRA requests, regardless of format, to the agency's records custodian, and to ensure that proper and timely notification regarding the forwarding of requests is being provided to parties making IPRA requests. Further, staff training should emphasize IPRA's mandatory deadlines for the disclosure of records or the service of denial letters by records custodians. It is the responsibility of every public body not only to maintain procedures to timely and fully answer all IPRA requests, but to ensure those procedures are being followed.

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,



Marah deMeule  
Assistant Attorney General

Enclosure

CC: Stephanie Herrera

STATE OF NEW MEXICO  
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## Electronic Complaint Submission

### Submission Detail

**ECS Reference Number** NMOAG-ECS-20190416-8590

**Final Submit Date** 4/16/2019 8:55:59 PM

**Disclosure of your complaint:** This complaint is a public record, thus available under provisions of the NM Inspection of Public Records Act.

**Disclosure to other entities:** This complaint, its content, and other information may be disclosed to other law enforcement and regulatory agencies.

**I understand this complaint and any submitted documents are public record and may be shared with other law enforcement and regulatory agencies.**

**DECLARATION:** By submitting this form, I attest that the information in this complaint is true and accurate to the best of my knowledge. I further understand that by submitting this form I may be called to testify as a witness in this matter.

**I understand declaration statement.**

*The New Mexico Office of the Attorney General cannot give legal advice regarding this complaint and will not act as your personal attorney. If you have questions regarding your rights please contact a private attorney.*

*Submission of this complaint is not confirmation that an investigation will be initiated.*

## Complaint Detail

**Complaint Type** Inspection of Public Records (IPRA) Complaint

**Retained Attorney**

## Parties

### Complainant

**Stephanie Herrera**

Person

#### Address

P.O. Box 1964  
Santa Cruz, New Mexico 87567

#### Contact information

[herrera31@windstream.net](mailto:herrera31@windstream.net)  
(505) 929-3039

## Complaint against

### NM DOT

Public Body (Government Entity)

#### Address

1120 Cerrillos Road  
Santa Fe, New Mexico 87504-1149

#### Contact information

An email was sent to Matthew Grush and Paul Grasher and Lawrence Martinez, all NMDOT employees on January 13, 2019 and again on January 29, 2019 requesting a copy of a traffic analysis report that corresponds to a permit sought by a developer to construct a Sonic along State Hwy 84/285 and State Hwy 369. In addition, the IPRA request included any and all correspondence related to how the requirements under 18.31.6.7 NMAC were met to include meeting notes held with the developer or permittee. It was not until March 26, 2019 when only the traffic analysis was provided. No information or communication was received before or after March 26th.

## Complaint Specifics

<b>Format of IPRA request:</b>	Written
<b>Date IPRA request was submitted to the public body:</b>	1/13/2019 and 1/29/19
<b>Date of all responses received from the public body:</b>	1/14/19 and 3/26/2019
<b>Records</b>	The agency provided some but not all of the records responsive to the request.
<b>Denied requests to inspect public records</b>	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.

## Transaction

## Documents

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\*\*\* END OF COMPLAINT \*\*\*

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