

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

February 3, 2020

VIA ELECTRONIC MAIL ONLY

Mr. Kyle Brian Land
P. O. Box 790
Española, NM 87532
Email: rgsedreporter@gmail.com

Re: Inspection of Public Records Act Complaint – Northern New Mexico College

Dear Mr. Land:

Thank you for submitting your complaint to the Office of the Attorney General alleging that Northern New Mexico College (hereinafter the “College”) violated the Inspection of Public Records Act (“IPRA”), NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2019). More specifically, you allege that the College failed to comply with IPRA in connection with your public records request dated June 18, 2019. Having carefully considered both your complaint and the College’s response to our inquiry into this matter, we conclude that the college has not violated IPRA, as alleged.

Background

In New Mexico, the people are entitled to “the greatest possible information” about governmental affairs pursuant to the Inspection of Public Records Act. NMSA 1978, § 14-2-5. *See also San Juan Agr. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶ 16 (noting that, “IPRA is intended to ensure that the public servants of New Mexico remain accountable to the people they serve.”). To that end, IPRA specifically states that the public has the right to inspect and copy all “public records” with only limited and specifically enumerated exceptions. Section 14-2-1(A). All of IPRA’s provisions must be interpreted in light of this public policy and the “presumption in favor of the right to inspect.” Attorney General’s Inspection of Public Records Act Compliance Guide, p. 7 (8th ed. 2015) (“IPRA Guide”).

We understand that on June 18, 2019 you submitted to the College a request seeking, “All Title IX complaint investigations conducted by Northern New Mexico College from January 1, 2009 to June 18, 2019.” The College initially responded to your request on the same day, June 18, 2019, by sending you a brief acknowledgment email. It then responded again two business days later, on June 20, 2019, by stating that it had received your request and would respond again by July 3, 2019 (fifteen calendar days after the College had received your request). On that day, you and the College’s attorney appear to have spoken on the phone and then exchanged several emails in which you disagreed as to the legality of the College’s need for more time to respond, until July 31, 2019. Through its attorney, the College also sent you a more formal letter on July 3, 2019, effectively stating that your request was excessively burdensome or broad and that it required until July 31, 2019, to respond.

On July 31, 2019, the College responded to your request in full. It appears to have provided you with all of the records you requested, although it did make a number of redactions pursuant to the Federal Educational Rights and Privacy Act, 20 U.S.C. Section 1232g (“FERPA”).¹ The College stated in response to our inquiry that these records were provided to you in electronic form despite the fact that they did not exist in electronic form at the time of your request. In addition, the College provided you with an index of the responsive records (which presumably also did not exist at the time of your request).

Your complaint, which was submitted on July 3, 2019, prior to the College’s final response on July 31, 2019, alleges that the College failed to provide you with any records responsive to your request. Although that particular allegation is moot in light of the fact that the College later provided you with all of the responsive records, see generally *Derringer v. State*, 2003-NMCA-073, ¶ 15 (holding that IPRA “does not provide for damages pursuant to an action brought after a public body has complied with the Act”), we interpret it instead as an allegation that the College failed to comply with IPRA’s deadlines. In other words, the issue we must review is whether the College was permitted to delay its response beyond the fifteen calendar-day deadline it originally announced to you.

Excessively Burdensome or Broad

As explained previously, we interpret your complaint as a challenge to the timeliness of the College’s ultimate production of the records you requested. The College did not provide you those records until July 31, 2019, approximately 28 days beyond the standard fifteen calendar-day window within which IPRA requires public bodies to respond to most requests. *See* § 14-2-8(D) (providing that public bodies must permit inspection “immediately or as soon as is practicable

¹ Having not reviewed the unredacted records ourselves, we cannot opine definitively on whether or not the College’s redactions were consistent with FERPA or IPRA. While a District Court could potentially compel the College to produce the responsive records so that it could conduct an in camera review, the Office of the Attorney General does not, at present, possess this authority. *See American Civil Liberties Union of New Mexico v. Duran*, 2016-NMCA-063, ¶ 45 (explaining that “IPRA jurisprudence contemplates in camera review in circumstances in which the applicability of a disclosure exception is in question”). As a result, while we certainly recognize that FERPA provides a valid basis to redact and occasionally withhold records under IPRA, we cannot say whether the College either did or did not violate IPRA by redacting the records in this case.

under the circumstances, but not later than fifteen days after receiving a written request”). Instead, the College designated your request as excessively burdensome or broad and stated that it required until July 31, 2019, to respond. We conclude that this was permitted by IPRA as a reasonable extension of time.

Although a public body in receipt of an IPRA request must generally provide the responsive records within fifteen calendar days, see Section 14-2-8(D), the statute specifically grants a public body additional time to respond to a request that is designated by the public body to be “excessively burdensome or broad.” *See* § 14-2-10. This designation must be made in writing, and the public body must inform the requestor of the amount of additional time it needs to respond. *See id.* (providing that “The custodian shall 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.”).

For such a request and where the statutorily-mandated communication has been provided to the requestor, the public body has an additional “reasonable” amount of time to respond. Section 14-2-10. As we note in our IPRA Guide, the amount of time that is considered reasonable will necessarily vary depending on the circumstances. *See* IPRA Guide, p. 38 (explaining that “what will constitute a ‘reasonable time’ for inspection will vary according to the request”). Those circumstances include whether the request requires the custodian “to locate and review a large number of records” and whether the requested records “are difficult to locate or obtain,” among other relevant considerations. *Id.*

It is also worth noting that public bodies and records custodians are likely entitled to a degree of deference in their determination that a records request is excessively burdensome or broad. Critically, IPRA itself provides that this determination is made by the custodian. *See* § 14-2-10 (providing that, “If a custodian determines that a written request is excessively burdensome or broad, an additional reasonable period of time shall be allowed to comply with the request.”). *See also* IPRA Guide, p. 38 (explaining that IPRA “does not define ‘excessively burdensome, or broad,’ but leaves it to the determination of the custodian”). While this does not mean that a public body’s determination that a request is excessively burdensome or broad is unreviewable or beyond question, it does mean that we tread cautiously in conducting such a review.

In light of this modest deference, we think it is abundantly clear that the College complied with IPRA in both designating your request to be excessively burdensome or broad and in requiring until July 31, 2019, to respond. Most importantly, your request sought “[a]ll Title IX complaint investigations” conducted by the College over a ten-year period, which we think supports the College’s assertion that this required careful and time-consuming review on the part of its attorneys and staff (in order to comply with the obligatory requirements of FERPA). We also take the College at its word that this involved the review of a large number of responsive records. In addition, the College has indicated to us that it received approximately three other public records requests from you between June 18 and July 8, 2019, and that responding to all four of your requests required “two attorneys and one paralegal [spending] approximately 150 hours reviewing documents provided by NNMC and providing responses.” This too, we think, clearly supports the

College's determination that your request was excessively burdensome or broad. Given these circumstances, a relatively short delay until July 31, 2019, was reasonable.

Conclusion

Although we can appreciate your frustration with the delay you experienced in obtaining the records responsive to your June 18, 2019, request, we conclude that the College acted reasonably and in compliance with IPRA in responding on July 31, 2019. Under the totality of the circumstances, the College's determination that your request was excessively burdensome or broad was not a violation of the statute. Given that the College has now provided you with all of the responsive records, we consider this matter closed. However, we greatly appreciate you bringing this matter to our attention and will gladly consider any future complaint you choose to submit.

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

Sincerely,



John Kreienkamp
Assistant Attorney General

Enclosure

cc: M. Karen Kilgore, Esq.
kkilgore@cuddymccarthy.com

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

Electronic Complaint Submission

Submission Detail

ECS Reference Number	NMOAG-ECS-20190703-1866
Final Submit Date	7/3/2019 11:34:16 AM

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

Kyle Brian Land

Person

Address

[REDACTED]

Contact information

[REDACTED] m
[REDACTED]

Complaint against

Northern New Mexico College

Public Body (Government Entity)

Address

921 N. Paseo de Oate
Española, New Mexico 87532

Contact information

ipra@nmc.edu
(505) 747-2191
<https://nmc.edu/home/about-northern/public-records/>

Complaint Specifics

Format of IPRA request:	Written
Date IPRA request was submitted to the public body:	June 18, 2019
Date of all responses received from the public body:	Receipt of request - June 18, 2019 Three day response - June 20, 2019 Extension request - July 3, 2019
Records	No records were provided.

Transaction

Documents



Screen Shot 2019-07-03 at 11.15.57 AM.png

Initial IPRA request on June 18, 2019

Comments



Screen Shot 2019-07-03 at 11.16.16 AM.png

Receipt of request on June 18, 2019

Comments



Screen Shot 2019-07-03 at 11.16.52 AM.png

Three day response to IPRA request

Comments

College said they would fulfill IPRA request no later than July 3, 2019.



Screen Shot 2019-07-03 at 11.17.18 AM.png

Extension request to IPRA on July 3, 2019

Comments

College's attorneys, Cuddy and McCarthy, said the request could not be fulfilled by the deadline and needed an extension until July 31, 2019, 28 days after the original request.



Screen Shot 2019-07-03 at 11.17.38 AM.png

Email exchange between Kyle Land and Karen Kilgore

Comments

Emails reflecting a phone conversation between the requestor and the College's attorney, highlighting that attorneys had 15 days to compile, scan and redact all the related documents. The attorney responded once again by saying that the request would not be fulfilled until no later than July 31, 2019.

*** END OF COMPLAINT ***

Office of the Vice President for Finance & Administration

NORTHERN New Mexico College



June 20, 2019

VIA EMAIL

rgsedreporter@gmail.com

Kyle Land
Rio Grande Sun
P.O. Box 790
123 N. Railroad Avenue
Española, NM 87532

Dear Mr. Land,

On June 18, 2019 at 11:30AM, Northern New Mexico College received your request to inspect certain records. In order to completely and accurately fulfill your request we need additional time to respond. We will respond by July 3, 2019.

Respectfully,


Ricky A. Bejarano, CPA, CGMA
Vice President for Finance & Administration

Kyle Land <rgsedreporter@gmail.com>

10:57 AM (19 minutes ago)



to kkilgore, rgsun, Yolanda ▾

Karen,

We spoke today regarding my IPRA requests that I sent to Northern New Mexico College on June 18, 2019. You told me there was no possible way to send me all the documents I asked for electronically by the due date, July 3, 2019. You said this was because the documents were not in electronic format nor had they been compiled.

Until today, Northern New Mexico College has had 15 days to fulfill all of my IPRA requests sent on June 18, which are 15 days that could have been spent redacting, scanning and compiling all related documents. I told you during our phone call that I would file a IPRA violation complaint with the New Mexico Attorney General's Office if my requests is not fulfilled today. I still plan on doing so.

...

M. Karen Kilgore

10:59 AM (17 minutes ago)



to Ricky, me, Yolanda ▾

Mr. Land: Pursuant to our telephone conversation just now, I will provide you with a specific date next week for production of extensive document in response to your IPRA requests for Donna Castro's emails and personnel file. We will have those reviewed and produced in electronic form by Wednesday, July 10, 2019. As we discussed regarding the IPRA request for the Title IX investigation files for the last ten years, these documents are not in an electronic form and may or may not be completely compiled at this point. Those documents will be compiled, reviewed and produced no later than July 31, 2019. Of course, I will attempt to provide these documents as soon as possible in any event. Thank you.

M. Karen Kilgore, Esq.

Cuddy & McCarthy, LLP

1701 Old Pecos Trail

Santa Fe, New Mexico 87505

505-988-4476

1-888-977-3814 (facsimile)

[*kkilgore@cuddymccarthy.com*](mailto:kkilgore@cuddymccarthy.com)

NNMC IPRA

Jun 18, 2019, 3:29 PM



to me ▾

Mr. Land,

We are in receipt of your request and will respond by close of business - June 21, 2019.

Ricky A. Bejarano, CPA, CGMA

Vice President for Finance & Administration

505-747-5050



Note to recipient: This is an unsecured email service which is not intended for sending confidential or highly sensitive information. Confidential or highly sensitive information includes, but is not limited to, payment card information, social security numbers, and account numbers.

RGS IPRA Title IX reports from 10 years

Inbox x



Kyle Land <rgsedreporter@gmail.com>

to NNMC ▾

Jun 18, 2019, 11:30 AM



June 17, 2019

Kyle Land

(925) 437-4061

P.O Box 790

123 N. Railroad Ave.

Española, NM 87532

This is a formal request under the New Mexico Inspection of Public Records Act. I wish to inspect the following, in their native electronic format if possible:

1. All Title IX complaint investigations conducted by Northern New Mexico College from January 1, 2009 to June 18, 2019.

I prefer to receive further communication on this matter electronically, as it has been sent to you, the custodian. I further formally request that a copy of all further communication is, at minimum, transmitted electronically, as it is stated in the IPRA law, as a responsibility of the custodian "(to) respond to requests in the same medium, electronic or paper, in which the request was made in addition to any other medium that the custodian deems appropriate."

I prefer to receive records electronically, and would be happy to provide a computer disk (CD) or USB drive for copying.

Please contact me with any questions or to schedule an appointment when the documents are available for inspection or copying. My telephone number is 925-437-4061 and my fax number is 505-753-2140.

Sincerely,

Kyle Land

**CUDDY
&
McCARTHY**
A Limited Liability Partnership

*JOHN F. MCCARTHY, JR.
M. KAREN KILGORE
SANDRA J. BRINCK
PATRICIA SALAZAR IVES
AARON J. WOLF
REBECCA DEMPSEY
JACQUELYN ARCHULETA-STAEHLIN
JULIE A. WITTENBERGER
PATRICK T. ORTIZ
CHARLES V. GARCIA
JAMES S. RUBIN
CHARLOTTE H. HETHERINGTON
R. DANIEL CASTILLE*

*CAROL S. HELMS
K. STEPHEN ROYCE
JULIE S. RIVERS
DAVID A. MAESTAS
YOUNG-JUN (JUN) ROH
—
SAM W. MINNER
MARLOW B. HOOPER
—
OF COUNSEL:
JOHN F. KENNEDY*

REPLY TO SANTA FE OFFICE

July 3, 2019

Kyle Land
Rio Grande Sun
P.O. Box 790
Española, NM 87532

**Via Email: rgsedreporter@gmail.com
and U.S. Mail**

Re: Northern New Mexico College IPRA Request

Dear Mr. Land:

As you know, this firm represents Northern New Mexico College. We are handling the requests for records under the Inspection of Public Records Act (IPRA), dated June 18, 2019.

Pursuant to NMSA 1978 Section 14-2-10, if a written request is excessively burdensome or broad, an additional reasonable period of time shall be allowed to comply with the request. We require additional time to review, and possibly redact, the documents in response to your IPRA requests, because they are extensive. We estimate that our compilation and review of the requested documents will be complete no later than July 31, 2019; however, I anticipate being able to provide you some of the documents next week.

Sincerely,


M. KAREN KILGORE