

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
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**VIA ELECTRONIC MAIL ONLY**

Office of the Medical Investigator  
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**Re: Inspection of Public Records Act Complaint – Robert Trapp**

Dear Mr. Sauder:

Thank you for your response to our inquiry regarding the complaint submitted to the Office of the Attorney General by Mr. Robert Trapp alleging that the Office of the Medical Investigator (hereinafter “OMI”) violated the Inspection of Public Records Act (“IPRA”), NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2018). As you know, Mr. Trapp alleges that OMI violated IPRA by both failing to provide a number of records responsive to his request and by failing to handle his request in a timely manner. Having reviewed his complaint and your response to our inquiry, we conclude that OMI did violate IPRA as alleged but has since pledged to take remedial action. In response to the question posed to us by both OMI and Mr. Trapp, we also conclude that OMI’s public business, for the purposes of IPRA, includes its work as a consultant for tribes and the federal government.

**Background**

The Inspection of Public Records Act is designed to provide the public with access to “the greatest possible information” about governmental affairs. 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 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 exceptions to disclosure are construed narrowly and courts employ a strong “presumption in favor of the right to inspect”

when interpreting IPRA's various provisions. Attorney General's Inspection of Public Records Act Compliance Guide, p. 7 (8<sup>th</sup> ed. 2015) ("IPRA Guide").

Amanda Martinez, a Staff Writer at the *Rio Grande Sun*, submitted a public records request to OMI on January 15, 2019. Specifically, she sought all autopsy reports "conducted at the request of the Jicarilla Apache Nation, Bureau of Indian Affairs and other federal agencies" involving deaths occurring between January 1, 2017, and January 15, 2019. Although OMI did not provide us with the documentation surrounding this complaint (which we specifically requested), Mr. Trapp's complaint to our Office indicates that OMI did not respond to Ms. Martinez's request until January 23, 2019, at which time it told her that the records would be available within thirty to thirty-five business days. Almost two months later, having not heard back, Ms. Martinez emailed OMI again and was subsequently allowed to inspect records on April 3, 2019. However, upon reviewing the records on that date, Ms. Martinez discovered that they were not responsive to her request. OMI at that time also notified her orally that the records she had originally sought "were not public record because they were paid for by either the Jicarilla Apache Nation or a federal agency."

Mr. Trapp, the Editor of the *Rio Grande Sun*, submitted his complaint to our Office on April 23, 2019. We contacted OMI in writing soon thereafter and inquired as to its handling of the complaint, posing a number of specific questions and requesting "all documentation sent to or received from Ms. Martinez in connection with this records request." OMI responded to our inquiry by acknowledging that it did not originally treat Ms. Martinez's request as an IPRA request and therefore did not comply with IPRA's timelines. Significantly, it also pledged to take corrective action.

We must resolve two issues in connection with this complaint.<sup>1</sup> First, and most importantly, there is an open question as to what constitutes OMI's "public business" for the purposes of IPRA. Section 14-2-6(G). Because OMI has, as far as we can tell, continued to deny Ms. Martinez access to the records she requested solely on the basis of what it considers to be its public business, our resolution of this question almost entirely resolves the complaint itself. Additionally, however, we will briefly address Mr. Trapp's allegation, to which OMI has admitted, as to IPRA's specified timelines.

### Public Business

The dispute surrounding Ms. Martinez's records request arises out of ambiguity as to OMI's "public business." Section 14-2-6(G). In short, OMI is responsible for responding to and investigating "all sudden, unexpected or unexplained deaths," among other varied duties. 7.3.2.8 NMAC. *See also* § 24-11-3(G) (providing that OMI "shall maintain records of the deaths occurring within this state which are investigated by either state or district medical investigators"). OMI conducts these investigations across New Mexico through appointed "district medical investigators." Section 24-11-3(C). However, it also performs these investigations on tribal and

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<sup>1</sup> While OMI requested that our Office opine on a number of other exceptions to disclosure as they relate to autopsy records, at this present time they do not appear to be germane to Mr. Trapp's complaint.

military land through contractual agreements. Because it has operated under the understanding that only its work on state land constitutes its public business, but not its work on tribal and military land, OMI in this case did not provide Ms. Martinez the records she requested. Both parties now effectively have requested our Office's opinion as to whether OMI's "investigative consultant" work on tribal and military lands constitutes its public business for the purposes of IPRA.

The statutes governing OMI's operations, NMSA 1978, Sections 24-11-1 to -10 (1971, as amended through 2012), do not specifically address OMI's contractual work with tribes or the federal government. While Section 24-11-6.1 does address autopsies and deaths of members of "a federally recognized Indian nation, tribe or pueblo," it does not specifically address OMI's operations on tribal or military land. Similarly, Section 24-11-3(E) authorizes OMI to "enter into agreements for services to be performed by persons in the course of medical investigations," but this statute does not appear to contemplate OMI contracting to perform services on behalf of a tribe or the federal government. (If we were to interpret Section 24-11-3(E) as explicit statutory authorization for OMI to perform such services, then we would also immediately conclude that they were its public business.)

However, while its statute may not provide a detailed description of OMI's jurisdiction, the agency's administrative rules do:

The OMI will respond and take custody of a body in those reportable deaths that occur within the state of New Mexico, excluding Indian reservations and military installations. On Indian reservations and military installations, the OMI will respond as investigative consultants when so invited and when reimbursed for the service as defined in a legal contract or by agreement.

7.3.2.10(D) NMAC. OMI relies on this rule to support its distinction between the work that it conducts on state land, which it considers its public business, and the work that it performs on tribal and federal land.

To analyze this issue, we begin by observing that all of IPRA's provisions, whether they be related to deadlines, exceptions, or other requirements, apply to "public records." Section 14-2-1(A). As defined by IPRA, "public record" is an extremely broad term, covering "virtually all documents generated or maintained by a public entity." IPRA Guide, p. 26. However, in order to be a public record for the purposes of IPRA, the material at issue must "relate to public business." Section 14-2-6(G). If the material is unrelated to public business, then it is not a public record and IPRA does not require the public body to make it available for inspection.

Our Supreme Court recently addressed this issue, albeit briefly, in *Pacheco v. Hudson*, 2018-NMSC-022. In that case, the requestor had sought information from a District Court judge's Facebook page, among other communications. *Pacheco*, 2018-NMSC-022, ¶ 6. The Supreme Court held, with respect to the information on social media, that this material did not constitute a public record. *Id.* at ¶ 36. In reaching that holding, the Court heavily emphasized that there was no evidence that the social media page was "acting on behalf of the First Judicial District Court or any other public body, or that any government funding was involved in maintenance of the

Facebook site or any of its activities, or that Judge Wilson conducted public business through the site.” *Id.* at ¶ 32.

Although *Pacheco* did not fully elaborate on the meaning of the term “public business” for the purposes of IPRA, it is abundantly clear that the District Court judge’s Facebook page in that case is a poor parallel to records related to OMI’s work on tribal and military lands. For one, unlike a District Court judge, who as an individual functions in both a public capacity and a private one, OMI is a statutorily-created state agency. Therefore, regardless of which services or work OMI may be performing at any given time, it is still a state agency. Additionally, while 7.3.2.10(D) NMAC provides that OMI must receive financial compensation from tribal or federal governments for performing work on their lands, it is also indisputable that some amount of state resources is still being used when performing such services, not least of which is the time and dedication of state employees. These considerations strongly suggest that OMI’s work on tribal or federal land is still its “public business.”

We also observe that OMI apparently engages in its work on tribal and federal land only when being reimbursed pursuant to “a legal contract or... agreement.” 7.3.2.10(D) NMAC. These contracts and agreements, to which OMI is a party, are certainly public records given that they inherently involve public expenditures and receipts. To then simultaneously conclude that the work OMI – again, a state agency – does pursuant to those contracts and agreements is not its public business and therefore beyond the realm of the public’s right to inspect would be at least somewhat contradictory. And, were we to reach that conclusion, it would seemingly allow all other government agencies to perform contractual services (either for other government entities or private ones) and then decline to provide any information about those services to the public on the basis of a narrow interpretation of “public business.” This would serve to only inhibit government transparency.

As our Supreme Court noted in *Pacheco*, we interpret IPRA in light of its statutory purpose. *See Pacheco*, 2018-NMSC-022, ¶ 25. IPRA’s purpose is clear: to shed light on “the affairs of government.” Section 14-2-5. That purpose requires us, as we have already stated, to interpret the statute broadly “in favor of the right to inspect.” IPRA Guide, p. 7. This includes our interpretation of the definition of a public record in Section 14-2-6(G): the public policy of New Mexico is that the public has a right to know the affairs of its government, and so we must interpret both of the terms “public record” and “public business” broadly and in favor of transparency. For this reason, we conclude that OMI’s consultant work on tribal and federal land is included in its “public business,” at least for the purposes of IPRA.

To be clear, our conclusion that OMI’s work on tribal and federal land is its public business does not necessarily mean that all of its records relating to this work must therefore be provided to all requestors. It does, however, mean that OMI must handle a request for such records in accordance with IPRA’s provisions and timelines. Given that this was not done in this case and Ms. Martinez has been provided neither the records she requested nor a “written explanation of the denial,” it is our opinion that OMI must take remedial action. Section 14-2-11(B).

IPRA's Timelines

As for Mr. Trapp's contention that OMI did not comply with IPRA's required timelines, both we and OMI agree. We appreciate the fact that, in response to our inquiry, OMI acknowledged that it had failed to provide both "the required three-day letter acknowledging receipt of the request" and a substantive response within fifteen days. Given that OMI also outlined substantive remedial steps that it intended to take in response to our inquiry, we are satisfied that it understands its error. That being said, we strongly advise OMI to follow through on its pledge to train its employees and develop improved policies so that future records requests are handled completely and timely. IPRA represents the "public policy" of the State of New Mexico, and as a public body, OMI must comply fully with the statute. Section 14-2-5.

Conclusion

We have concluded here that OMI's "public business," for the purposes of IPRA, includes the contractual services it performs for tribal entities and the federal government. We have also necessarily concluded that, in handling Ms. Martinez's records request dated January 15, 2019, OMI did not comply with IPRA insofar as it failed to account for responsive records and respond in a timely manner. Beyond our exhortation for the agency to deliver on its promise to improve its IPRA policies and training, we also must direct OMI to take remedial action as to Ms. Martinez's request as soon as possible. This should involve, in the short term, communicating with Ms. Martinez to inform her that it has reopened her request and to provide her a reasonable estimate of the time within which she may expect to receive the records that she has requested. Then, as soon as possible, OMI should either provide her the records she has requested or a detailed explanation (conforming fully to the specifications of Section 14-2-11) as to why those records have been redacted or withheld.

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

cc: Robert Trapp