

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

June 8, 2017

Kristina M. Eckhart
Records Custodian
Office of the State Engineer
P.O. Box 25102
Santa Fe, NM 87504-5102

Re: IPRA Complaint by Richard Rose May 28, 2015

Dear Ms. Eckhart:

We have reviewed the May 28, 2015 complaint submitted by Richard Rose alleging that the Office of the State Engineer violated the Inspection of Public Records Act, NMSA 1978, §§ 14-2-1 to 14-2-12 (as amended through 2013) ("IPRA"). We also reviewed your response on behalf of the Office of the State Engineer by and through your IPRA attorney Mr. Paul Bossert. As discussed in more detail below, based on our review of the complaint, the Office of the State Engineer's response, and the applicable law, we conclude that the Office of the State Engineer failed to comply with IPRA's procedures for responding to and denying requests to inspect public records when it failed to produce the complaint of John Romero against Mr. Rose and other complaints regarding John Romero to Mr. Rose using as its grounds for denial NMSA 1978, § 14-2-1(A)(3) and Policy No. HR.08.35 (Complaint Resolution) of the OSE/ISC Policy & Procedures.

1. Review of Requests by Richard Rose and Responses by Office of the State Engineer:

On May 28, 2015 Mr. Rose requested the following documents:

- 1) Complaint filed by John Romero in November 2014 against me alleging harassment and filing a false police report;
- 2) Any reports or other documents prepared by the OSE Human Resource Bureau in response to the above complaint in whatever form they exist, draft or final;
- 3) Any and all emails, meeting notes, or other communications between Annette Wilder and Tom Blaine regarding the complaint or report between December 2014 and May 15, 2015;
- 4) All complaints, formal or informal, filed against John Romero from January 2010 to May 15, 2015.

On June 12, 2015 the Office of the State Engineer responded by email and denied Mr. Rose's request as to numbers 1, 2, 4, but the letter did not identify the person denying the request.

2. Review of Procedures for Allowing/Denying Inspection Requests

NMSA 1978, § 14-2-11(B) states that

When a public body denies a written request to inspect public records, IPRA requires the custodian to:

provide the requester with a written explanation of the denial. The written denial shall:

- (1) describe 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.

On June 1, 2015 after receiving Mr. Rose's request of May 28, 2015 to inspect public records, the Office of the State Engineer responded to Mr. Rose advising him that they had received his request and that they needed until June 12, 2015 to respond to his request. On June 12, 2015 the Office of the State Engineer responded by email and denied Mr. Rose's request as to numbers 1, 2, 4. And, as to number 3 the Office of the State Engineer stated that they were not in possession of the requested documents. In the denial letter, the records sought were identified, but the letter did not identify the person denying the request.

Because the denial letter failed to contain the name of the individual denying the request, the Office of the State Engineer violated IPRA. However, on July 25, 2015 the Office of the State Engineer sent another letter to Mr. Rose identifying the person who denied access to the requested records thus rectifying the deficiency.

3. Exempted Records under IPRA and Cox v. N.M. Dep't of Pub. Safety

Both Richard Rose and John Romero were employees of the Office of the State Engineer. In 2014 John Romero filed a complaint about Richard Rose alleging harassment and filing a false police report. Richard Rose wanted to see a copy of that complaint.

IPRA

Public records generally must be made available for inspection unless they are excepted by IPRA or "as otherwise provided by law." *Id.* § 14-2-1. *See also* Attorney General's Inspection of Public

Records Act Guide, pp. 8-20 (8th ed. 2015) (“IPRA Guide”). Accordingly, the reason provided for a denial must be authorized by IPRA, another law, court rule or the U.S. or New Mexico Constitution. *See id.* p. 40.

Cox v. N.M. Dep’t of Pub. Safety, 148 N.M. 934, 2010-NMCA-096

The issue before the Court of Appeals was whether the district court erred when it held that Plaintiff was not entitled to inspect citizen complaints concerning the on-duty conduct of a law enforcement officer. The Court of Appeals held the district court erred.

The Court of Appeals in *Cox* specifically addressed and discussed the IPRA exception “Matters of Opinion in Personnel Files” which is the IPRA exception upon which the Office of the State Engineer based their denial of Richard Rose’s request for inspection of records. The Court of Appeals concluded that:

The Legislature intended to exempt from disclosure “matters of opinion” that constitute personnel information of the type generally found in a personnel file, i.e., information regarding the employer/employee relationship such as internal evaluations, disciplinary reports or documentation; promotion, demotion, or termination information or performance assessments. *Id.* at 939.

Application of the law to Denial No. 1

- Denial No. 1 - Complaint filed by John Romero in November 2014 against me alleging harassment and filing a false police report;

Like the Plaintiff in *Cox*, Richard Rose did not request information that might contain the Office of the State Engineer’s opinions. The requested document was not a document which contained internal evaluations, disciplinary reports or documentation; promotion, demotion, or termination information or performance assessments. Mr. Rose asked only to see the complaint filed against him by John Romero in his request number 1. Furthermore, Policy No. HR.08.35 (Complaint Resolution) Section 9.0 of the OSE/ISC Policy & Procedures manual provides that employees who are the subject of the complaint may have access to this information. Therefore the Office of the State Engineer violated IPRA when it did not provide this document to Mr. Rose.

Application of the law to Denial No. 2

- Denial No. 2 - Any reports or other documents prepared by the OSE Human Resource Bureau in response to the above complaint in whatever form they exit, draft or final.

The Office of the State Engineer is not required to produce documents regarding the employer/employee relationship such as internal evaluations, disciplinary reports or documentation; promotion, demotion, or termination information or performance assessments relating to a Complaint. The Office of the State Engineer did not violate IPRA when it denied the request to produce the documents requested in request number 2 because *Cox* held that the legislature intended to exempt these documents from disclosure.

Application of the law to Denial No. 3

- Denial No. 3 - Any and all emails, meeting notes, or other communications between Annette Wilder and Tom Blaine regarding the complaint or report between December 2014 and May 15, 2015.

The Office of the State Engineer states that it is not in possession of the requested documents. Thus, there is no violation of IPRA.

Application of the law to Denial No. 4

- Denial No. 4 - All complaints, formal or informal, filed against John Romero from January 2010 to May 15, 2015.

Policy No. HR.08.35 (Complaint Resolution) Section 9.0 of the OSE/ISC Policy & Procedures manual provides that all materials submitted and conversations held concerning the complaint are confidential.

However, a public body cannot rely on a policy to withhold records under IPRA.

As stated previously, public records generally must be made available for inspection unless they are excepted by IPRA or "as otherwise provided by law."

Republican Party of New Mexico v. New Mexico Taxation and Revenue Department, 2012-NMSC-026, 283 P.3d 853, makes it clear that a public body may withhold a public record only if it is based on (1) a specific exception contained within the Act, (2) a statutory or regulatory exception, (3) a rule adopted by the New Mexico Supreme Court, or (4) a privilege protecting a record from disclosure that is grounded in the U.S. or state constitution.

And again, like the Plaintiff in *Cox*, Richard Rose did not request information that might contain the Office of the State Engineer's opinions. The requested documents were not documents which contained internal evaluations, disciplinary reports or documentation; promotion, demotion, or termination information or performance assessments. Mr. Rose asked only to see the complaints filed against John Romero.

4. Conclusion

We therefore conclude that the Office of the State Engineer violated IPRA's procedures for denying the inspection of records when it failed to produce the complaint of John Romero against Mr. Rose and other complaints regarding John Romero to Mr. Rose using as its grounds for denial IPRA 14-2-1(A)(3) and Policy No. HR.08.35 (Complaint Resolution) of the OSE/ISC Policy & Procedures.

We recommend that the complaint by Mr. Romero against Mr. Rose and other complaints against Mr. Romero be produced to Mr. Rose.

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

Sincerely,



Audrey K. McKee
Assistant Attorney General

Cc: Richard Rose

INSPECTION OF PUBLIC RECORDS ACT ("IPRA") COMPLAINT FORM
New Mexico Office of the Attorney General
Open Government Division

YOUR CONTACT INFORMATION:

First Name: Richard Last Name: ROSE

Address: [REDACTED]

City: [REDACTED] State: [REDACTED] Zip Code: [REDACTED]

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): Office of the State Engineer, Santa Fe, NM

Format of IPRA Request: Written Oral (email)

Date IPRA Request was Submitted to the Public Body: May 28, 2015 7:45 AM

Date of all Responses Received from the Public Body: June 1, 2015 email/letter notice of need for additional time
June 12, 2015 email/letter notice of denial of request

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.

DETAILED EXPLANATION OF ALLEGED IPRA VIOLATIONS

On May 28, 2015 I made a written IPRA request via email to the Office of the State Engineer (OSE) for the following items:

- Complaint filed by John Romero in November 2014 against me alleging harassment and filing a false police report.
- Any reports or other documents prepared by the OSE Human Resource Bureau in response to the above complaint in whatever form they exist, draft or final.
- Any and all emails, meeting notes, or other communications between Annette Wilder and Tom Blaine regarding the complaint or report between December 2014 and May 15, 2015.
- All complaints, formal or informal, filed against John Romero from January 2010 to May 15, 2015.

On June 1, 2015 I received an email from the Records Custodian, Kristina Eckhart, stating additional time, until June 12, 2015, would be needed to provide the requested documents.

On June 12, 2015 I received another email from Ms. Eckhart stating OSE had no emails or meeting notes between Ms. Wilder and Mr. Blaine and denying access to all the other records requested claiming they are excepted from inspection because they are letters or memorandum that are matters of opinion in personnel files per NMSA 1978, 14-2-1A(3) and further are confidential per 1.7.1.12 (C) NMAC. The correspondence did not specifically identify the person responsible for denial.

On May 21, 2015, the day before my employment ended, I met with Annette Wilder, Chief of the OSE Human Resource Bureau (HRB), to review my personnel files. I reviewed all the files she provided, but did not find the complaint John Romero filed against me in November 2014, nor any report prepared by HRB. I was shown the complaint in early December 2014, but was not allowed to keep a copy. When I asked about these documents, Ms. Wilder told me they were **not** placed in my personnel files. She refused to answer any questions or discuss the matter further.

1. **OSE claims exception to IPRA because the documents requested are matters of opinion in personnel files, yet the HRB chief has stated the documents are not placed in personnel files and the documents were not present in the personnel files I was given to review.**

- 2. When a complaint is filed, HRB is responsible for producing a report of facts and conclusions regarding the complaint. This goes beyond a matter of opinion, which according to the AG's compliance guide is aimed at protecting documents in an agency's personnel or student files that contain subjective rather than factual information about particular individuals, such as a letter of reference. Also the HRB report itself, is not a disciplinary action.**

- 3. I am aware of three female OSE employees that have filed some type of complaint against John Romero for harassment and intimidation. I have also heard that a constituent filed a complaint with the Governor's office against Mr. Romero for abusive behavior that was referred to the OSE for response and subsequently given to Mr. Romero to prepare the response. Mr. Romero is a high level public official in the OSE as the Director of the Water Rights Division that encompasses the entire state. Example #9 on page 9 of the AG's compliance guide specifically addresses a complaint against a deputy sheriff and noted the Complaint was not generated by the sheriff or at the sheriff's request in connection with the sheriff and deputy's employment relationship. The Romero complaints are similar in that they were not initiated by the State Engineer or at his request.**

From: **Richard Rose** r2rose2003@yahoo.com
Subject: **IPRA REQUEST**
Date: **May 28, 2015 at 7:45 AM**
To: dolores.baca1@state.nm.us
Bcc: consuelo.pena@state.nm.us

May 28, 2015

TO: Dolores Baca, Records Custodian

130 South Capitol Street
Concha Ortiz y Pino Building
P.O. Box 25102
Santa Fe, NM 87504-5102

FROM: Richard Rose

1333 Pacheco Street, Unit J
Santa Fe, NM 87505
505.620.5640

RE: IPRA REQUEST

Pursuant to Chapter 14, Article 2 NMSA 1978 (Inspection of Public Records Act), I would like to inspect and copy the following records:

LIST OF RECORDS

Complaint filed by John Romero in November 2014 against me alleging harassment and filing a false police report.

Any reports or other documents prepared by the OSE Human Resource Bureau in response to the above complaint in whatever form they exist, draft or final.

Any and all emails, meeting notes, or other communications between Annette Wilder and Tom Blaine regarding the complaint or report between December 2014 and May 15, 2015.

All complaints, formal or informal, filed against John Romero from January 2010 to May 15, 2015.

If your agency does not maintain these public records, please let me know who does, and include the proper custodian's name and address. I would prefer to obtain the records in electronic form, but agree to pay the applicable fees for copying and transmitting the records if need be. If the charges will exceed \$30, please call me to discuss. I understand that I may be asked to pay the fees in advance. In that case, please provide a receipt indicating the charges for each document.

Thank you for your prompt attention to this matter.

Signed

Richard P. Rose

From: **Eckhart, Kristina, OSE** Kristina.Eckhart@state.nm.us
Subject: **IPRA REQUEST Richard Rose**
Date: **June 1, 2015 at 4:14 PM**
To: r2rose2003@yahoo.com
Cc: **Ridgley, Greg C., OSE** greg.ridgley@state.nm.us

EK

Mr. Rose,

Please find attached a response to your IPRA Requested date May 28, 2015.

Thank you,

Kristina M. Eckhart
Assistant to the State Engineer
Office of the State Engineer
State of New Mexico
PO Box 25102
Santa Fe, NM 87504-5102
Phone: (505) 827-6091
Fax: (505) 827-3806
kristina.eckhart@state.nm.us



CONCHA ORTIZ Y PINO BUILDING, 130 SOUTH CAPITOL, SANTA FE, NM 87501
TELEPHONE: (505) 827-6091 FAX: (505) 827-3806

TOM BLAINE, P.E.
STATE ENGINEER

Mailing Address:
P.O. Box 25102
Santa Fe, NM 87504-5102

June 1, 2015

Via e-mail - r2rose2003@yahoo.com

Richard Rose
1333 Pacheco Street, Unit J
Santa Fe, NM 87505

Re: New Mexico Inspection of Public Records Act Request

Dear Mr. Rose:

This is in response to your email received May 28, 2015 to Dolores Baca in which you requested the following documents pursuant to NMSA 1978, Chapter 14, Article 2.

- Complaint filed by John Romero in November 2014 against me alleging harassment and

filing a false police report.

- Any reports or other documents prepared by the OSI Human Resource Bureau in response to the above complaint in whatever form they exist, draft or final.
- Any and all emails, meeting notes, or other communications between Annette Wilder and Tom Blaine regarding the complaint or report between December 2014 and May 15, 2015.
- All complaints, formal or informal, filed against John Romero from January 2010 to May 15, 2015.

This is to inform you that we need additional time until Friday, June 12, 2015 to provide inspection of the documents you requested

Sincerely,



Kristina M. Eckhart
Records Custodian, to the State Engineer

cc: Greg Ridgley, General Counsel, Office of the State Engineer

From: **Eckhart, Kristina, OSE** Kristina.Eckhart@state.nm.us
Subject: **IPRA REQUEST Richard Rose**
Date: **June 12, 2015 at 4:16 PM**
To: r2rose2003@yahoo.com
Cc: **Ridgley, Greg C., OSE** greg.ridgley@state.nm.us



Mr. Rose,

Please find attached a response to your IPRA Request dated May 28, 2015.

Thank you,

Kristina M. Eckhart
Assistant to the State Engineer
Office of the State Engineer
State of New Mexico
PO Box 25102
Santa Fe, NM 87504-5102
Phone: (505) 827-6091
Fax: (505) 827-3806
kristina.eckhart@state.nm.us



STATE OF NEW MEXICO
OFFICE OF THE STATE ENGINEER
CONCHA ORTIZ Y PINO BUILDING, 130 SOUTH CAPITOL, SANTA FE, NM 87501
TELEPHONE: (505) 827-6091 FAX: (505) 827-3806

TOM BLAINE, P.E.
STATE ENGINEER

Mailing Address:
P.O. Box 25102
Santa Fe, NM 87504-5102

June 12, 2015

VIA E-MAIL ONLY: -
r2rose2003@yahoo.com
Richard Rose
1333 Pacheco Street, Unit J
Santa Fe, NM 87505

Re: Request to Inspect Public Records

Dear Mr. Rose:

On May 28, 2015, we received your request to inspect the following records.

- 1) Complaint filed by John Romero in November 2014 against me alleging harassment and filing a false police report.
- 2) Any reports or other documents prepared by the OSF Human Resource Bureau in response to the above complaint in whatever form they exist, draft or final.
- 3) Any and all emails, meeting notes, or other communications between Annette Wilder and Tom Blaine regarding the complaint or report between December 2014 and May 15, 2015.
- 4) All complaints, formal or informal, filed against John Romero from January 2010 to May 15, 2015.

With regard to items one, two, and four, we cannot permit inspection of these records because they are excepted from the right to inspect under the Inspection of Public Records Act. Specifically, the records requested are letters or memoranda that are matters of opinion in personnel files. See §14-2-1(A)(3) NMSA 1978. Additionally, the records requested are confidential pursuant to 1.7.1.12(C) NMAC.

With regard to item three, the Office of the State Engineer is not in possession of emails, meeting notes, or other communications between Annette Wilder and Tom Blaine regarding the complaint or the report between December 2014 and May 15, 2015.

Sincerely,

A handwritten signature in black ink, appearing to read "Kristina", followed by a long horizontal flourish that extends to the right.

Kristina M. Eckhart
Records Custodian to the State Engineer

cc: Greg Ridgley, General Counsel, Office of the State Engineer