

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

TANIA MAESTAS
Deputy of Civil Affairs

SHARON PINO
Deputy of Criminal Affairs

CARLA MARTINEZ
Chief of Staff for Operations

SONYA CARRASCO-TRUJILLO
Chief of Staff for Policy & Public Affairs

August 19, 2016

Zachary Shandler
Assistant City Attorney
City of Santa Fe
P.O. Box 909
Santa Fe, NM 87504-0909

Re: Inspection of Public Records Act Complaint – Santa Fe Police Department

Dear Mr. Shandler:

We have reviewed the March 18, 2016 complaint submitted by Eric Griego alleging that the Santa Fe Police Department (“SFPD”) improperly denied his request to inspect public records in violation of the Inspection of Public Records Act, NMSA 1978, §§ 14-2-1 to -12 (as amended through 2013) (“IPRA”) and your response on behalf of SFPD to our inquiry regarding the complaint. *See* letter to Dylan Lange, Assistant Attorney General from Zachary Shandler, Assistant City Attorney, City of Santa Fe (Apr. 15, 2016) (“SFPD’s Response”). As discussed in more detail below, based on our review of the complaint, SFPD’s response and applicable law, we conclude that SFPD did not fully comply with IPRA’s procedures when responding to and denying requests to inspect public records.

February 25 Inspection Request

The inspection request that sparked Mr. Griego’s complaint was made on February 25, 2016, by email addressed to Greg Gurulé, SFPD’s Public Information Officer and Records Custodian. Mr. Griego’s request was for “all emails, to include attachments, between Linda Bilyeu and Det. Erika Montota (sic) and any others at SFPD.” By return email on the same date, Mr. Gurulé attached SFPD’s response to the request, which stated, in pertinent part: “I must deny your request based on the fact that this is still an active investigation.”

Mr. Griego’s February 25 request was the last in a series of requests Mr. Griego made to SFPD and the Department of Public Safety (“DPS”) for public records concerning a hiker who went

missing in January 2016. Because Mr. Griego's requests and related email communications with SFPD and DPS provide the backdrop to our determination regarding SFPD's compliance, we describe their pertinent details below.

Mr. Griego made the following three requests for SFPD records prior to his February 25 request:

1. On January 26, 2016, SFPD provided Mr. Griego with the original incident report in response to his "IPRA Request regarding Randall Bruce Bilyeu." (We were not provided with a copy of the inspection request to which SFPD responded on January 26.)

2. On February 10, 2016, Mr. Griego requested "any addendum(s) or new reports in regard to the missing hiker, Randy Bilyeu ... [and] the audio recording from the original phone call from Linda Bilyeu reporting Randy Bilyeu as missing." Mr. Gurulé responded on the same date, stating: "The State Police are handling the search and latest information on Mr. Bilyeu, we have no further information on that. I will request the recordings of the phone calls for you though." (According to SFPD's Response, SFPD provided Mr. Griego with the audio recording he requested on February 10.) Mr. Griego followed up, asking Mr. Gurulé for the date the case was transferred to State Police and the name of the detective handling the case. Mr. Gurulé responded that he did not have that information and referred Mr. Griego to the public information officers at State Police.

3. On February 12, 2016, Mr. Griego sent an email to Mr. Gurulé explaining that he had submitted an inspection request to the Department of Public Safety ("DPS"), which had referred Mr. Griego back to SFPD. Mr. Griego asked Mr. Gurulé to clarify which agency was handling the case and to provide him with the inventory of Randy Bilyeu's vehicle. Mr. Gurulé responded on February 16, stating "Please find attached the only document we have available at this time. We handled the missing person report, the State Police are your lead agency for the search." Mr. Griego replied on February 18. He asked for verification that SFPD had provided all available public records and, if not, the "specific provision under IPRA" that would justify withholding the records.

As indicated in Mr. Griego's email communications with SFPD, after being directed to DPS, Mr. Griego submitted an inspection request to DPS on February 11, 2016. On February 24, Mariah Solano, DPS' IPRA Clerk, sent Mr. Griego an email enclosing "your reports requested." Mr. Griego responded on the same date, requesting, in addition to the materials DPS provided, the inventory of Mr. Bilyeu's vehicle and public records containing information about items belonging to Mr. Bilyeu. Mr. Griego asked for the "relevant exception in IPRA" if DPS determined the requested records were not available for inspection. On February 25, Santana Nieto, DPS' IPRA Coordinator, responded and represented that "We have provided all the information we possess.... I believe you will need to direct your request to the Santa Fe Police Department. They are handling the investigation."

Ms. Nieto's response prompted Mr. Griego to send an email dated February 25, 2016 to both DPS and SFPD concerning the conflicting information they were providing "as to who is handling the investigation and who has documents relevant to the investigation." Mr. Griego

asked again for the public documents he had requested but not received from either agency and any IPRA provision justifying nondisclosure of the requested records. Mr. Gurulé responded on behalf of SFPD, reiterating that DPS “is in charge of any search that may be going on,” SFPD “are in charge of the Missing Person Investigation,” and “[t]he materials we have already sent you in your original IPRA requests is all that is available.” This was followed by Mr. Griego’s February 25 inspection request and SFPD’s response denying the request, discussed above.

Issues with SFPD’s Response to Mr. Griego’s Inspection Requests

1. Procedures for redirecting requests made to the wrong custodian

In pertinent part, IPRA provides that “[a] custodian receiving a written request shall permit the inspection immediately or as soon as is practicable under the circumstances, but not later than fifteen days after receiving a written request.” NMSA 1978, § 14-2-8(D). If the request is made to a records custodian who does not possess or is not responsible for the requested public records,

the person receiving the request shall promptly forward the request to the custodian of the requested public records, if known, and notify the requester. The notification to the requester shall state the reason for the absence of the records from that person’s custody or control, the records’ location and the name and address of the custodian.

Id. § 14-2-8(E).

The earliest of Mr. Griego’s public records requests made available to us was the February 10 email to SFPD, described above. In his response to Mr. Griego, Mr. Gurulé, on behalf of SFPD, represented that SFPD had provided all responsive records it possessed or controlled at that time and that DPS was handling the search and the latest information on the search. Except for his response to Mr. Griego’s February 25 request, Mr. Gurulé’s responses to Mr. Griego after February 10 uniformly stated that SFPD had provided all “available records” and referred Mr. Griego to DPS.

SFPD’s response to Mr. Griego’s February 10 request did not fully comply with IPRA’s procedures for requests made to a custodian without custody or control of the requested records. SFPD’s response to the February 10 request indicates that Mr. Gurulé knew that DPS might be the proper custodian for public records covered by Mr. Griego’s request. Accordingly, Mr. Gurulé should have “promptly” forwarded the request to DPS’ records custodian and, in his notification to Mr. Griego, stated “the reason for the absence of the records from [Mr. Gurulé’s] custody or control, the records’ location and the name and address of the custodian.” NMSA 1978, § 14-2-8(E).

Had SFPD followed IPRA’s requirements for redirecting inspection requests made to the wrong custodian, much of the subsequent confusion and miscommunication Mr. Griego encountered might have been avoided. The most significant misstep was SFPD’s omission in providing the

reason it did not have responsive records, as required by Section 14-2-8(E). Instead of clearly stating that it did not have the requested records and why, SFPD made vague assertions to Mr. Griego about “available” records and DPS’s responsibility for the search for the missing hiker. When Mr. Griego turned to DPS, that agency contradicted SFPD by informing Mr. Griego that SFPD, not DPS, was handling the investigation and directed Mr. Griego back to SFPD. Under these circumstances, SFPD’s ambiguous statements in its response to Mr. Griego may have caused SFPD to appear less than candid about its custody or control of records responsive to Mr. Griego’s requests.

2. Procedures for denying inspection requests

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.

NMSA 1978, § 14-2-11(B).

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 statute, court rule or the U.S. or New Mexico Constitution. *See id.* p. 40.

On February 25, Mr. Gurulé denied Mr. Griego’s request for emails between Linda Bilyeu and SFPD, because “this is still an active investigation.” The denial violated the requirements specified in Section 14-2-11(B) in two respects. First, the denial did not include “the names and titles or positions of each person responsible for the denial.” Second, and most importantly, SFPD did not sufficiently explain the reason for the denial.

As noted above, Section 14-2-11 requires a public body to explain the reason for denying a request to inspect public records. Permissible reasons for denial are limited to those set forth in IPRA, another law or a court rule. There is no provision in IPRA or other law that allows a public body, including SFPD, to deny access because of “an active investigation.”

SFPD’s Response indicates that, the language in SFPD’s denial notwithstanding, the reason for denying Mr. Griego’s February 25 request was IPRA’s exception for law enforcement records. That exception applies to: “law enforcement records that reveal confidential sources, methods, information or individuals accused but not charged with a crime.” NMSA 1978, § 14-2-1(A)(4).

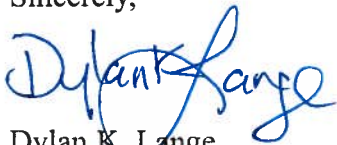
Covered law enforcement records “include evidence in any form received or compiled in connection with any criminal investigation or prosecution by any law enforcement or prosecuting agency ... to the extent that they contain the information listed above.” *Id.* Although public records protected by the law enforcement records exception may include records used or created in the course of a criminal investigation or prosecution, *see* IPRA Guide, pp. 10-13, a response to a requestor limited to explaining that the records relate to an “an active investigation” is insufficient pursuant to the requirements when denying records requests.

According to SFPD’s Response, the First Judicial District Attorney’s Office informed SFPD that the law enforcement records exception protected the email communications Mr. Griego requested in his February 25 request. Absent additional information suggesting otherwise, we have no reason at this time to doubt that the requested email communications fell within the parameters of the law enforcement records exception. SFPD should have provided an explanation that the law enforcement exception was the reason for denying access to the requested email communications initially, rather than simply stating “active investigation.” Had SFPD done so, Mr. Griego’s questions regarding the propriety of the denial could have been avoided.

In summary, because SFPD did not fully comply with IPRA’s requirements they contributed to the appearance that SFPD’s responses to Mr. Griego’s inspection requests were ambiguous and evasive. SFPD’s Response clarified the reasons SFPD denied Mr. Griego’s February 25 request, but to avoid questions and concerns about its compliance in the future, SFPD must review and, if necessary, improve its procedures and practices to ensure that inspection requests are handled consistent with IPRA’s requirements.

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

Sincerely,



Dylan K. Lange
Assistant Attorney General

Enclos.

cc: Eric Griego

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

YOUR CONTACT INFORMATION:

First Name: ERIC Last Name: GRIEGO
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): Santa Fe Police Department
Format of IPRA Request: Written Oral
Date IPRA Request was Submitted to the Public Body: 02/25/2016
Date of all Responses Received from the Public Body: 02/25/2016

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.

(over)

I requested, via email, all emails to and from a specific email address and individual to include attachments. The Record Custodian replied the same day stating, "I MUST DENY your request ON the fact that is still an active investigation." I immediately responded asking if the records were withheld on the basis this was/is a criminal investigation but I have received NO response.

ADDITIONAL INFORMATION: Please provide a copy of your original inspection request (if written), and any documentation or evidence you have regarding the alleged IPRA violation.

Previous requests to the SFPD for records (Audio recordings and a police report) relative to the same individual and case were provided previously.