

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

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August 16, 2021

**VIA ELECTRONIC MAIL ONLY**

Taos County  
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**Re: Inspection of Public Records Act Complaint – Amanda Arellano**

Dear Mr. DeFillippo:

Thank you for your response to our inquiry regarding the complaint filed with the Office of the Attorney General by Ms. Amanda Arellano alleging that Taos County (hereinafter the “County”) violated the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2019) (“IPRA”). As you know, Ms. Arellano’s complaint alleges that the County violated IPRA in responding to her public records request dated April 22, 2021. Having carefully reviewed both her complaint and your response to our inquiry, we conclude that the County likely acted lawfully in redacting most of the responsive records but nevertheless violated IPRA by failing to properly explain to Ms. Arellano the legal bases for its redactions. We recommend that the County take remedial action by sending Ms. Arellano a proper “written explanation of denial,” as mandated by IPRA. Section 14-2-11(B).

**Background**

The declared public policy of the State of New Mexico is that “all persons 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. Pursuant to this public policy, the Inspection of Public Records Act provides that the public has the right to inspect all public records held by or on behalf of government agencies except as provided by law. *See generally* § 14-2-1. In construing IPRA and its various provisions, New Mexico’s appellate courts consistently interpret the statute in light of its purpose of facilitating transparency and accountability in government. *See New Mexico Found. for Open Gov’t v. Corizon Health*, 2020-NMCA-014, ¶ 15 (explaining that “IPRA must be construed in light of its purpose”). *See also* Attorney General’s Inspection of Public Records Act

Compliance Guide, p. 1 (8<sup>th</sup> ed. 2015) (“IPRA Guide”) (observing that “courts interpreting the Act have established a clear presumption in favor of access”).

We understand that Ms. Arellano was an applicant for employment with the County in April 2021. As part of this process, she submitted a written application and interviewed with County staff, as did two other applicants. Apparently unsuccessful in this application, she sent a public records request to the County on April 22, 2021 seeking records related to the applicants and interviews for the vacant position. Specifically, Ms. Arellano stated that she sought the following records:

1. Interview questions with scoring for each candidate by each panelist
2. Scoresheet for the position
3. Each candidate’s application such as a resume, application form, qualifications and certifications
4. Panelist’s qualifications to be on the panel

The County’s records custodian responded to this request on the following day, April 23, 2021, by stating in relevant part that “[a]dditional time is needed until on or before May 7, 2021.”

The County responded substantively to Ms. Arellano’s request in an email dated May 7, 2021. This email stated that the County was providing a number of records to Ms. Arellano for a cost of “\$29.00 and the convenience fee of \$0.65,” while attaching approximately 58 pages of records. The County had redacted most (but not all) of these pages. Based on our review of the redacted records, it is apparent that the County redacted information conveying the respective applicant’s scores on interview questions and in overall evaluations by the interview panelists (which appear to have been on a 0 to 5 point scale, with more points constituting a higher score). These scores appear to have been subjective, depending on the opinion of the interviewer. It is also visually apparent that the County redacted the applicants’ phone numbers, email addresses, and all but the last four digits of driver’s license numbers as well as the phone numbers of the applicants’ personal references. The County stated in response to our inquiry that it did not withhold any responsive records.

Notwithstanding the fact that the County redacted most of the responsive records, it did not explain to Ms. Arellano the legal bases for these redactions. Apparently, the County’s records custodian drafted such a letter on May 6, 2021 but forgot to send it to Ms. Arellano. It did, however, send our Office a copy of this draft letter, which explained the redactions in full as follows:

The information you requested has been reviewed and redacted pursuant to exemption 14-2-1 B3 as stated in IPRA. This exemption relates to information considered matters of opinion.

The letter also would have explained that “[t]here is a charge of .50 cents per page for a total of \$29.00” and that “[t]he information can be sent to you via email or by USPS with an additional

charge for postage.”<sup>1</sup> Regardless, it appears that the County has still not sent Ms. Arellano this letter or any other written explanation of its redactions, although it did state in response to our inquiry that it “strives to avoid errors such as this and will continue to do so in the future.”

Ms. Arellano’s complaint to our Office alleges that the County violated IPRA in two respects. First, she appears to take issue with the County’s redactions, specifically its redaction of the three applicants’ interview and evaluation scores. We understand her to argue that the County should have provided her the records in full and without redaction. In addition, however, irrespective of whether the redactions were legally permissible, Ms. Arellano also argues that the County did not provide her a written explanation as to why it redacted the records as it did. We will address each of these issues in turn.

### Redactions

The most important allegation in Ms. Arellano’s complaint is that the County violated IPRA by redacting certain information from the records responsive to her request. As explained previously, the County provided our Office with copies of the redacted records it provided Ms. Arellano, and it is apparent that it redacted the three applicants’ interview and evaluation scores as well as information such as phone numbers, email addresses, and all but the last four digits of driver’s license numbers. Although we have not reviewed the un-redacted records in full so as to be able to opine definitively, we have sufficient information to find that most of these redactions appear to be legal and consistent with IPRA.

Preliminarily, subjective interview and evaluation scores of applicants for employment are almost certainly subject to IPRA’s exception for “letters or memoranda which are matters of opinion in personnel files or students’ cumulative files.”<sup>2</sup> Section 14-2-1(C). Although this exception perhaps more commonly applies to records pertaining to current or former public employees, our Supreme Court has previously held that it extends to applicants for government employment as well. *See State ex rel. Newsome v. Alarid*, 1977-NMSC-076, ¶ 12, 90 N.M. 790, 794 (holding that IPRA’s “matters of opinion” exception applies to “opinions ... as to why an applicant was not hired”), *overruled on other grounds by Republican Party of New Mexico v. New Mexico Tax’n & Revenue Dep’t*, 2012-NMSC-026, ¶ 16. Looking even more specifically to the redactions at issue here, the subjective score of an applicant’s answers to interview questions and overall suitability for an employment position clearly represents the opinion of the interviewer or panelist scoring the applicant. Unlike, say, an applicant’s previous history of employment, the score is not factual

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<sup>1</sup> Ms. Arellano did not contest the County’s copying fee, but we would note that IPRA does not generally permit public bodies to charge per page fees for electronic copies of records. *See* § 14-2-9(C); *see also* N.M. Att’y Gen. Letter to Stephen E. Doerr, Curry County, at 2 (May 31, 2019) (concluding that an electronic copying fee of \$1.00 per page was unlawful under IPRA because it was “wholly unrelated to the County’s ‘actual costs’ for downloading or transmitting the electronic records”). In addition, it is unclear what the County meant by a “convenience fee of \$0.65,” but that too gives us cause for concern.

<sup>2</sup> Although Section 14-2-1(C) literally exempts only “letters or memoranda,” our Court of Appeals has previously rejected this more narrow interpretation. *See Cox v. New Mexico Dep’t of Pub. Safety*, 2010-NMCA-096, ¶ 21, 148 N.M. 934, 939 (holding that “the location of a record in a personnel file is not dispositive of whether the exception applies; rather, the critical factor is the nature of the document itself”).

information. *See* IPRA Guide, p. 9 (“Requested documents that contain significant factual information in addition to opinion should be provided with the opinion information blocked out or otherwise redacted.”). The County therefore likely acted lawfully in redacting the applicants’ scores from the requested records pursuant to Section 14-2-1(C).

The County also clearly did not violate IPRA by redacting all but the last four digits of driver’s license numbers. This information is expressly within IPRA’s definition of “protected personal identifier information,” see Section 14-2-6(E), and Section 14-2-1.1 specifically states that public bodies may redact such information “before inspection or copying of a record.” As it appears that the County literally redacted only “all but the last four digits,” there appears to be no question that these redactions were lawful.

We reach a different conclusion with respect to the County’s decision to redact personal phone numbers and email addresses from the responsive records. Although the County defended this decision in response to our inquiry by citing to language in our IPRA Guide and *dicta* from *Cox*, 2010-NMCA-096, ¶ 30-31, the New Mexico Court of Appeals recently held that “these are not among the exceptions listed or recognized by our Supreme Court” to disclosure through IPRA. *Dunn v. New Mexico Department of Game and Fish*, 2020-NMCA-026, ¶ 12. This recent appellate decision almost certainly invalidates the language in our IPRA Guide cited by the County in support of its redactions of personal phone numbers and email addresses. *See id.* ¶ 11 (concluding that “the email addresses NMDGF collected in connection with its licensing system constitute ‘public records’ that are subject to disclosure under IPRA in the absence of an applicable exception”). As a result, unless the County can cite a real exception to disclosure as its authority for these redactions, it should provide this information to Ms. Arellano.

#### Written Explanation of Denial

Even if the County acted lawfully in redacting these responsive records, though, it was still obligated to explain its redactions to Ms. Arellano. Whenever a public body denies a request in whole or in part, IPRA specifically requires it to provide the requestor a “written explanation of denial” (more commonly called a “denial letter”). Section 14-2-11(B). This written communication must identify the legal basis for the denial, describe the records originally sought by the requestor, and “set forth the names and titles or positions of each person responsible for the denial.” Section 14-2-11(B); *see also* IPRA Guide, p. 40. As our Court of Appeals has previously observed, denial letters provide important information to records requestors and therefore are a critical component of IPRA’s statutory operation. *See Am. Civil Liberties Union of New Mexico v. Duran*, 2016-NMCA-063, ¶ 38 (“While information can come in the form of tangible documents, it can also be gathered based upon an agency’s denials.”).

Here, as the County itself appears to concede, Ms. Arellano is clearly correct that the County violated Section 14-2-11(B) by failing to provide her a “written explanation of denial.” Although the County’s records custodian drafted a letter along these lines, we understand that she never sent it. Even today, after receiving our Office’s inquiry, it appears that the County still has not sent this letter. Moreover, this draft denial letter itself was noncompliant with IPRA. Most importantly, the letter did not explain all of the redactions insofar as it stated only that it was redacting “matters of

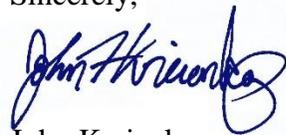
opinion,” omitting any reference to the County’s redactions of protected personal identifier information. More plainly, the draft letter also failed to “describe the records sought” and to “set forth the names and titles or positions of each person responsible for the denial.” Section 14-2-11(B). To comply with IPRA, then, the County should heavily amend this letter and then send it to Ms. Arellano.

### Conclusion

Although most of the County’s redactions to the records responsive to Ms. Arellano’s request appear to have been lawful, she is nevertheless correct that the County failed to comply with IPRA in several respects. In the absence of a lawful exception to disclosure, the County could not lawfully redact personal phone numbers and email addresses and, in any case, it plainly did not provide Ms. Arellano a “written explanation of denial.” Section 14-2-11(B). We therefore recommend that the County take prompt remedial action to correct these violations, including both reconsidering its redactions of personal phone numbers and email addresses as well as sending Ms. Arellano a written explanation of all of its redactions. More broadly, the County should review its internal public records policies to ensure both that it abides by its statutory obligations and that it provides the public “the greatest possible information” about its affairs. Section 14-2-5.

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

Enclosure

cc: Amanda Arellano