

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

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July 20, 2021

**VIA ELECTRONIC MAIL ONLY**

Town of Bernalillo  
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**Re: Inspection of Public Records Act Complaint – Gloria King**

Dear Mr. Perez:

Thank you for your response to our inquiry regarding the complaint filed with the Office of the Attorney General by Ms. Gloria King alleging that Town of Bernalillo (hereinafter the “Town”) 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. King has alleged that the Town violated IPRA by withholding body camera video responsive to her requests dated January 30, 2020, February 5, 2020, March 10, 2020, and April 18, 2020. Having carefully reviewed this complaint and your response to our inquiry, we conclude that the copying fees charged by the Town were excessive and incompatible with IPRA, although we find no evidence to support Ms. King’s allegation that the Town withheld responsive records. We also have some concern as to the Town’s apparent lack of written correspondence with Ms. King. We recommend that the Town review its internal public records policies to ensure their compliance with IPRA.

**Background**

The Inspection of Public Records Act guarantees the people of the State of New Mexico access to “the greatest possible information” about governmental affairs. NMSA 1978, § 14-2-5. *See also Am. Civil Liberties Union of New Mexico v. Duran*, 2016-NMCA-063, ¶ 25 (noting that the purpose of IPRA is “to promote the existence of (1) an informed electorate and (2) transparency in governmental affairs”). IPRA specifically provides that individuals may inspect and copy all “public records” with only limited and specifically enumerated exceptions. Section 14-2-1(A). We interpret IPRA’s various provisions in light of the “presumption in favor of the right to inspect.”

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

Ms. King submitted a series of IPRA requests to the Town between January and April of 2020 seeking information regarding an incident on January 20, 2020 involving the Bernalillo Police Department. She sent the first of these requests on January 30, 2020, asking for body camera footage and the police report from the incident. The Town responded two business days later, on February 3, 2020, by providing Ms. King six (6) body camera videos on separate CD's and the requested incident report for a total copying fee of \$63.00. The Town's "Request for Records" form indicates that this copying fee was charged pursuant to a standard policy of \$10.00 per CD and "Initial Reports are \$3.00/additional pages are \$1.00 per page." It appears that the Town did not provide any written response or correspondence to Ms. King in connection with this request, instead writing in the details of her copying fee onto her original "Request for Records" form. Notably, the Town did not state that it was withholding or redacting any responsive records.

Deducing that additional responsive records had not been provided to her, Ms. King submitted a second records request to the Town on February 5, 2020. On the "Request for Records" form she completed for this second request, Ms. King stated, "I am missing one video of this incident." She was entirely correct in this statement, as the Town responded the following day, February 6, 2020, by providing her an additional five (5) body camera videos on separate CD's at a cost of \$50.00. We understand that these videos were responsive to her prior January 30, 2020 request. As with the prior request, the only written documentation of this request that the Town provided to Ms. King appears to have been the "Request for Records" form.

Ms. King sent her third request to the Town on March 10, 2020. She had apparently accidentally deleted one of the videos provided to her previously, so she requested a duplicate copy. Two days later, on March 12, 2020, the Town responded by providing her another copy of the video on a CD for a fee of \$10. This brought her total copying fees paid to \$123 for twelve videos on CD's and one incident report that appears to have been three (3) pages in length. Ms. King described these fees in her complaint to our Office as "outrageous."

Following her March 10, 2020 request, Ms. King continued to review the responsive video footage and became convinced that still more video had been withheld. Because some of the body cameras had not recorded constantly and the subsequent video had gaps, she determined that the Town had withheld additional video footage. Seeking this video which she felt should have existed, Ms. King submitted her fourth and final request to the Town on April 18, 2020. Her request stated that she was "requesting the body cam videos which were omitted" and added, "Sergeant Tim Tyler has adamantly denied over and over that there is no more video, but I knew it was a big, fat lie" (original capitalization omitted).

The Town responded to Ms. King's fourth and final request three business days later, on April 23, 2020, in an email sent by the Police Chief. In that email, the Police Chief denied that additional video existed and stated that "your public records requests have been fulfilled." The Police Chief also included a substantive response and explanation from Sergeant Tyler as to why additional

video did not exist. In relevant part, that response stated, “I searched both the body camera system and the dash camera system for any additional videos, none were located.” Sergeant Tyler also added, “I informed [Ms. King] that the department has provided her all information and videos from this incident. ... King is still requesting alternate videos from the incident and refuses to believe that she has been given everything.” As for the gaps in the video footage which had been provided to Ms. King, Sergeant Tyler explained, “During the incident officers came and left, or discontinued dealing with King and then going back to dealing with her, thus the reason for breaks at some points.” In response to our Office’s inquiry, the Town reiterated that no additional videos or records had been withheld from Ms. King.

We have identified three issues related to IPRA arising out of Ms. King’s public records requests. First, Ms. King continues to argue that additional body camera video responsive to her requests was withheld by the Town. Next, although Ms. King did not identify the copying fees charged by the Town as a violation of IPRA in her complaint, she did refer to them as “outrageous” and as such we will address whether they were consistent with IPRA. Finally, we will address the Town’s lack of written correspondence in connection with Ms. King’s complaints.

#### Missing Body Camera Video

As mentioned previously, Ms. King’s primary allegation against the Town is that it failed to provide all records responsive to her requests. Because she has found gaps in the body camera video footage provided to her by the Town, she has determined that the Town withheld at least one additional video. Because there is no evidence to support Ms. King’s assertion, we conclude that she has not identified a violation of IPRA in this respect.

In general, and without evidence to the contrary, our Office cannot contest a public body’s factual claim that no responsive records exist or that it has permitted inspection of all responsive records. We cannot speculate as to the existence of additional records, much less determine that they have been secretly withheld, without some evidence that such records exist. *See, e.g., Kozol v. Washington State Dep’t of Corrections*, 366 P.3d 933 (Wash. Ct. App. 2016) (noting that Washington State’s public records law only required access to records that existed, “not nonexistent records that one believes should exist”) and *Smith Butz, LLC v. Pennsylvania Dep’t of Env’tl. Prot.*, 142 A.3d 941, 945 (Pa. Commw. Ct. 2016) (observing that, without “competent evidence” that a public body “acted in bad faith or that the...records exist,” the court must accept as true the public body’s assertion that the public records do not exist). *See also Filippi v. Wallin*, No. A-1-CA-37195, mem. op. at ¶ 14-15 (N.M. Ct. App. Dec. 16, 2020) (non-precedential) (finding that there was evidence in the record to support the allegation that responsive records existed and were withheld by the public body, thus requiring further inquiry and *in camera* review on the part of the District Court).

The only evidence presented by Ms. King’s complaint that supports her assertion as to the existence of additional video footage is the gaps in the video already provided to her. Those gaps in the footage do exist and are uncontested; Sergeant Tyler of the Bernalillo Police Department acknowledged and attempted to explain them in his response to Ms. King’s fourth request.

However, gaps in previously provided video footage simply do not prove that another video exists. They prove only that the body cameras worn by the officers at the scene were either turned off at times during the incident or otherwise failed to record during those times. They do not show that the Town has (or had) an additional video in its possession but chose to withhold it, much less that the hypothetical video was withheld maliciously, as Ms. King suggests. Ms. King's complaint to our Office appears to recognize that there is no direct proof that an additional video exists, as she stated, "The only way the real truth will come out is if a computer forensic analyst is sent to check out the videos at the police station, if that's still possible. That's the only way that what actually happened can be reconstructed."

Although we find no evidence to support Ms. King's assertion that an additional video exists, her suspicion is not entirely surprising in light of the circumstances surrounding her complaint. After all, the Town did fail to provide five (5) videos responsive to her first request, providing them to Ms. King only in response to her second request. This demonstrates that, at a minimum, the Town's first search for responsive records was incomplete and far from thorough. In addition, Ms. King heavily emphasizes certain inconsistencies between what she was told by the Bernalillo Police Department (in a face-to-face conversation with one of its officers) and the video evidence which she later obtained. Given these circumstances, Ms. King's doubts as to the Town's compliance with IPRA are understandable.

#### Copying Fees

Although Ms. King's complaint did not identify the Town's copying fees as an IPRA violation, she nevertheless referred to them as "outrageous" and we are therefore compelled to consider whether those fees were consistent with IPRA. As explained previously, the Town charged her \$123 for twelve videos on CD's and one incident report of three (3) pages in length. It appears that the Town charges, as a standard fee, \$10 per CD for electronic records and \$3 for an "initial report," with any additional pages of printed records provided at a cost of \$1 per page. We do not think that this fee policy is consistent with IPRA, and our opinion is that the Town charged Ms. King excessive fees in connection with her requests.

IPRA expressly limits the ability of public bodies to charge fees in connection with public records requests. While in general IPRA provides that copying fees must be "reasonable," Section 14-2-9(C)(1), the maximum allowable fee amount differs significantly between printed and electronic records. For printed records, public bodies may charge copying fees up to \$1.00 per page. By contrast, where the requestor is provided electronic records, the public body may only charge its "actual costs" associated with downloading or transmitting the record, along with the cost of the storage device (such as a CD or a USB drive). *See* § 14-2-9(C) (providing that the public body may charge "the actual costs associated with downloading copies of public records to a computer disk or storage device, including the actual cost of the computer disk or storage device" as well as "the actual costs associated with transmitting copies of public records by mail, electronic mail or facsimile"). In the context of electronic records, our Office has repeatedly emphasized that IPRA permits the public body to charge only its "actual costs" associated with the particular request, rather than a uniform flat fee for all comparable requests. *See* 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”) and N.M. Att’y Gen. Letter to Dr. Ebubekir Orsun, Albuquerque School of Excellence, at 3 (May 3, 2019) (emphasizing that, where electronic records are concerned, IPRA “requires a case-specific accounting of the actual costs involved).

Here, the Town’s copying fees for the electronic records it provided to Ms. King apparently were not calculated based on its “actual costs.” As mentioned previously, the Town charged Ms. King a flat and uniform \$10 fee for each and every CD it provided her. The details of each CD appear to have been irrelevant to the \$10, as the fee was a flat \$10-per-CD. Such a method of calculating electronic copying fees by definition runs afoul of Section 14-2-9(C) because the specifics of each CD are rendered irrelevant. The Town would charge as much for a CD containing a 1 minute video as it would for a CD containing a 2-hour long video. As a result, because the Town’s electronic copying fees were unmoored from its “actual costs,” they were incompatible with IPRA.<sup>1</sup>

#### Written Correspondence

Finally, we also observed a distinct lack of written correspondence from the Town to Ms. King in reference to her four IPRA requests. It appears that, in responding to three out of four of her requests, the Town communicated in writing to her exclusively through annotating its “Request for Records” form, which Ms. King had previously filled out in order to submit her request. The Town only sent more detailed written correspondence in responding to her final request dated April 18, 2020. We cannot necessarily say that this represented a violation of IPRA, but failing to provide written correspondence is not a best practice.

Even where a public body’s response to a request is to provide all responsive records, we think that the general best practice is to simultaneously provide the requestor with some type of cover letter. Written correspondence serves the important purpose of documenting the public body’s handling of the request and explaining to the requestor the status of that request moving forward. It also greatly assists any entity (our Office, for instance, or a District Court) reviewing the public body’s response for compliance with IPRA. We therefore strongly advise the Town, going forward, to provide written communications to all requestors when fulfilling their requests.

#### Conclusion

Although there is no evidence to support Ms. King’s allegation that the Town withheld records responsive to her requests, our Office does nevertheless have some concern with both the copying fees charged to Ms. King and the Town’s lack of written correspondence with her. We recommend

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<sup>1</sup> The \$3.00 charged to Ms. King for the initial incident report was also the highest legally-permissible fee for printed records, as it amounted to \$1.00 per page. The Town should be aware that while IPRA states that public bodies may charge up to \$1.00 per page for all printed records, all copying fees under IPRA must still be “reasonable.” Section 14-2-1(C).

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that the Town reevaluate the \$123 copying fee it charged Ms. King and consider reimbursing her, if appropriate, in the event that it did not represent its "actual costs" as permitted by Section 14-2-9(C). More broadly, we also recommend that the Town reevaluate its internal public records policies to ensure that it both communicates adequately with requestors and charges only lawful and appropriate copying fees.

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: Gloria King