STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

HECTOR H. BALDERAS
ATTORNEY GENERAL

July 20, 2021

VIA ELECTRONIC MAIL ONLY

Town of Edgewood
Samuel C. DeFillippo, Esq.
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Email: chris@roblesrael.com

Re: Inspection of Public Records Act Complaint – Cheryl Ann Huppertz

Dear Mr. DeFillippo:

Thank you for your response to our inquiry regarding the complaint filed with the Office of the Attorney General by Ms. Cheryl Ann Huppertz alleging that the Town of Edgewood (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. Huppertz's complaint alleges that the Town violated IPRA in connection with her two public records requests dated December 11, 2020. Having carefully reviewed both her complaint and your response to our inquiry, we are concerned that the Town may not have conducted a sufficiently thorough search for responsive records. We recommend that the Town conduct another search for records and then review its response to Ms. Huppertz.

Background

Ms. Huppertz sent two public records requests to the Town on December 11, 2020 seeking records from the personal email accounts of two members of the Town Council. In particular, she requested "all communication" from the email accounts of three particular individuals "between the dates of Nov. 2019 to present." The two Town councilors appear to have operated each of these accounts (at least primarily) in their private capacities outside of public service, and we understand that they also utilized official Town email accounts as well.

The Town's records custodian responded to each request separately in written letters dated December 16, 2020 and December 17, 2020,[1] respectively. In each of these written letters, the

[1] The Town conceded in its response to our inquiry that it had violated IPRA's Section 14-2-8(D) by failing to respond in writing to Ms. Huppertz within three business days of one of these requests.

Town's records custodian responded by stating that he had received Ms. Huppertz's request while adding that "I am not the custodian of record for that e-mail account." The Town's records custodian then stated in each letter that he had asked each councilor to "provide any responsive documents." One councilor stated that she had "no responsive documents," while the other stated that "she uses her Town e-mail to conduct business."

Our Office has received other documentation from both the Town and Ms. Huppertz that help to clarify the issues surrounding this dispute. In response to our inquiry, the Town stated that "the Town does not dispute Town email addresses are subject to review under IPRA." However, the Town argued, each of the personal email addresses involved were "not 'used, created, received, maintained or held by or on behalf of any public body,'" citing to IPRA's definition of a public record in Section 14-2-6(G). The Town claimed that it "has no reasons to suspect that [either councilor] utilized her personal email address for any official business." However, Ms. Huppertz has provided our Office with actual email documentation showing that, as a factual matter, both councilors indeed did use their private email accounts to conduct public business in several series of emails sent in 2018.

The sole allegation in Ms. Huppertz's complaint is that the Town improperly withheld records responsive to her requests. Although she has provided our Office with no direct evidence that the Town withheld any particular records, she has provided our Office with evidence that both of the respective Town councilors do occasionally utilize their private email accounts to conduct public business. She therefore concludes that, "I believe that they have additional records that they are withholding and they conduct Town business from their personal accounts." For its part, the Town maintains that it did not withhold any responsive records.

Analysis

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 (8th ed. 2015) ("IPRA Guide").

By its plain language, IPRA applies only to "public records." Section 14-2-1. This term is defined broadly in IPRA as inclusive of "all documents … regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business." Section 14-2-6(G). This definition itself clearly indicates that a record not literally held by a public body may nevertheless be a public record where it is held or used "on behalf of" the public body and relates to public business. *Id.* Our appellate courts in New Mexico have previously stated as much in previous decisions. *See New Mexico Foundation for Open Government v. Corizon Health*, 2020-NMCA-014, ¶ 21 (holding that records held by a private contractor related to its provision of services under a contract with the New Mexico Corrections

Department were public records for the purposes of IPRA); *see also Pacheco v. Hudson*, 2018-NMSC-022, ¶ 29, and *State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, ¶ 25.

Where a requested record is a "public record," as defined by Section 14-2-6(G), the public body either must provide it to the requestor, see generally Section 14-2-8(D), or otherwise account for it in a proper "written explanation of denial." Section 14-2-11(B). That a record is a public record does not automatically mean the public body must make it available for inspection; it simply means that IPRA's provisions apply to the record. *See generally Dunn v. N.M. Dep't of Game & Fish*, 2020-NMCA-026, ¶ 7 (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").

Applying these basic legal principles to Ms. Huppertz's complaint, we note preliminarily that we cannot say with certainty whether in fact the Town actually withheld responsive records. While we know that, notwithstanding the Town's contention to the contrary, the Town councilors have utilized their private email accounts to conduct public business in the past, this is not proof of the existence of other responsive records. Without such evidence, we simply cannot say that the Town withheld records. *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"); *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).

That being said, there are several indications that the Town either misapprehended its obligations under IPRA or conducted an inadequate search. First, the Town appears to have drawn an incorrect legal distinction between emails located on official Town-issued email accounts and emails located on the Town councilors' private email accounts.[2] For instance, the Town noted that it "does not dispute Town email addresses are subject to review under IPRA" while contending that a "Personal Email Address is Not a Public Record." To be clear, where a public officer or employee uses a personal or otherwise non-governmental email account to send an email related to public business in that officer or employee's official capacity, the record clearly would be a public record subject to IPRA. Thus, if either of the Town councilors at issue here sent an email in their capacity as a public official from their private email account, then the email was "used, created, received, maintained or held by or on behalf of" the Town for the purposes of IPRA. Section 14-2-6(G).

In addition, while the Town stated in response to our inquiry that it "has no reasons to suspect that [either councilor] utilized her personal email address for any official business," that much is factually incorrect, as evidenced by copies of the 2018 emails sent by or from both of the Town

[2] On a related note, the Town's records custodian appears to have misapprehended his responsibilities under IPRA insofar as he stated that, "I am not the custodian of record for that e-mail account." The Town may want to reconsider this position, since it would effectively mean that every public officer and employee of the Town is a records custodian unto themselves, personally subject to IPRA and enforcement actions insofar as they may hold text messages or emails on private accounts.

councilors' private email accounts Ms. Huppertz provided our Office. Those emails demonstrate, as Ms. Huppertz has alleged, that these Town officials have used their private email accounts to conduct public business, at least in the past. To be sure, this does not mean that all of the emails sent by or to the councilors from those accounts qualify as public records (to do so the records must both relate to public business and have been "used, created, received, maintained or held by or on behalf of" the Town). It does mean, though, that those accounts may hold responsive records.

Finally, we are unclear as to whether the Town councilors actually searched their private email accounts for records responsive to Ms. Huppertz's requests. The Town's responses to Ms. Huppertz stated that one of the councilors had affirmed that no responsive records existed, while the other simply noted that she used her official Town email account to conduct public business. Regardless, if the Town (through these councilors or otherwise) did not actually search for responsive records in these email accounts, it should do so as soon as possible.

Conclusion

We trust that this letter and Ms. Huppertz's requests have clarified any ambiguity on the part of the Town with respect to IPRA's potential applicability to emails sent to or from private email accounts. Due to the broad scope of IPRA's definition of the term "public record," we recommend that the Town educate all of its officers and staff on the implications of using private accounts or devices to conduct public business. Public officers in particular should be aware that their records related to public business are not immune from disclosure merely because of the account in which they are stored. To the extent that the Town may have misunderstood any of these principles of IPRA when responding to Ms. Huppertz, we recommend that it conduct another search for responsive records to ensure that it does not face any liability moving forward.

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

Sincerely,

John Kreienkamp
Assistant Attorney General

Enclosure

cc: Cheryl Ann Huppertz