

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

August 25, 2020

VIA ELECTRONIC MAIL ONLY

Village of Corrales
Samuel C. DeFillippo, Esq.
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Re: Inspection of Public Records Act Complaints – Curt Flora and Suzanne Huff Flora

Dear Mr. DeFillippo:

Thank you for your response to our inquiry into the three complaints filed with the Office of the Attorney General by Curt Flora and Suzanne Huff Flora (hereinafter the “Floras”) alleging that the Village of Corrales (the “Village”) violated the Inspection of Public Records Act (“IPRA”), NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2019). Specifically, the Floras allege that the Village did not comply with IPRA in responding to two public records requests dated August 21, 2018 and August 29, 2018. Although we have insufficient information to conclude that the Village violated IPRA in its response to the earliest of these requests, we conclude that the Floras have correctly identified a violation of IPRA with respect to their August 29, 2018 request. We recommend that the Village take remedial action as appropriate and thoroughly review its IPRA policies to ensure that it fully complies with the statute moving forward.

Background

In New Mexico, the people are entitled to “the greatest possible information” about governmental affairs pursuant to the Inspection of Public Records Act. NMSA 1978, § 14-2-5. *See also San Juan Agr. Water Users Ass’n v. KNME-TV*, 2011-NMSC-011, ¶ 16 (noting that, “IPRA is intended to ensure that the public servants of New Mexico remain accountable to the people they serve.”). To that end, IPRA specifically states that the public has the right to inspect and copy all “public records” with only limited and specifically enumerated exceptions. Section 14-2-1(A). All of IPRA’s provisions must be interpreted in light of this public policy and 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”).

The Floras' three complaints¹ allege that the Village responded inadequately to three individual public records requests. Preliminarily, we note that our review of these complaints was potentially inhibited by the fact that we have not been provided, either from the Village or the Floras, any written communications sent from the Village to the Floras in connection with these records requests. However, it appears from the complaint and the Village's response to our inquiry that this may be due to the fact that Village actually sent the Floras no written communications responding to their public records requests. We assume, in reviewing these complaints, that we have been provided copies of all relevant documentation.

The Floras hand-delivered the first of their three requests on August 21, 2018. This first request sought a copy of the resignation letter written by a former Planning and Zoning commissioner. Two days later, on August 23, 2018, the Village called the Floras on the telephone to tell them that the resignation letter was ready to be picked up. Upon reviewing the letter, however, and showing it to the former Planning and Zoning commissioner who wrote it (or who at least is alleged to have written it), the Floras determined that it was fraudulent and not the actual letter of resignation. The Floras allege that they later obtained the real letter of resignation directly from the former Planning and Zoning commissioner. For its part, the Village maintains that it was not in possession of this second and allegedly-missing letter.

The second request was hand-delivered by the Floras to the Village on August 29, 2018. This request sought the "Village Attorney Denial Letter for Subdivision Huff Flora on Attorney letter head." The Floras allege that they never received any response from the Village as to this request, and the Village's response to our inquiry confirms this. The Village explained its response to this second request as follows:

This request presented a number of concerns for the Village: first, the request is vague and unclear; second, this request seems to be suggesting for the Village to create a document—which is not permitted under the IPRA statute; and third, should such a letter exist from the Village's attorney, it is likely protected under the attorney client privilege. As a result of these problems, the Village did not provide a response to this specific request; instead, the Village provided the Floras the letter dated August 2, 2018 mentioned within the Floras' IPRA complaint.

August 21, 2018 Request

Based on our review of the relevant documentation surrounding the August 21, 2018 request, we are unable at the present time to conclude that the Village either did or did not violate IPRA as alleged. The only issue presented for our review is whether the Village violated the statute by withholding the allegedly-correct letter of resignation written by, and obtained by the Floras from, the former Planning and Zoning commissioner. On the one hand, the existence of the letter does suggest that the Village failed to properly account for all responsive records. On the other, the Village maintained in response to our inquiry that it did not possess that letter and so was unable

¹ One of these three complaints was a duplicate of another, so in actuality the Floras have filed two complaints with our Office alleging that the Village improperly handled three separate IPRA requests. The Floras have subsequently communicated with our Office and have stated that they "are not pursuing" their allegations regarding their IPRA request dated September 10, 2018, so we will not address those allegations in this letter.

to provide it to the Floras. This is a factual dispute we cannot resolve, so we simply note that we are unable to reach a conclusion either that the Village did or did not violate IPRA as alleged by the Floras.

We would, however, take the opportunity to remind the Village that records held on its behalf by private entities such as individual employees or contractors are indeed potentially subject to IPRA to the extent that they relate to public business. *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). To the extent that the Village may have misapprehended this legal principle when conducting its search for records responsive to the Floras' request, we would remind it that a record effectively held on its behalf by an employee or officer is still a public record subject to IPRA when it relates to public business. Although we do not have evidence to suggest that this potential misunderstanding caused the Village to be unable to locate the resignation letter requested by the Floras, the Village should keep it in mind and reevaluate its response to the Floras' request if needed.

August 29, 2018 Request

The second request made by the Floras of the Village presents a simpler issue if only because it is uncontested, as stated by the Village in response to our inquiry, that "the Village did not provide a response to this specific request." Although the Floras specifically sought the "Village Attorney Denial Letter for Subdivision Huff Flora on Attorney letter head," the Village provided neither this record, a written explanation of why it was being withheld, or a written statement that the record itself did not exist. The Floras have alleged that they never received a response to this request and, notwithstanding the Village's decision to provide them with a different record that was apparently unresponsive to the request, this allegation has proven to be correct. As a result, we also conclude that the Village did indeed violate IPRA in its handling of the Floras' IPRA request dated August 29, 2018.

In reviewing these complaints, we noticed a troubling lack of communication from the Village to the Floras, and with respect to the request dated August 29, 2018, this lack of adequate communication constituted a violation of IPRA. Upon receipt of the Floras' request, the Village was obligated to respond in writing within three business days, either by providing the requested record or by "explain[ing] in writing when the records will be available for inspection or when the public body will respond to the request." Section 14-2-8(D). This communication was never sent. Even more importantly, the Village was obligated to send another written communication within fifteen calendar days: either permitting inspection of the record, see Section 14-2-8(D), declaring the request excessively burdensome or broad, see Section 14-2-10, or denying the request and providing a written explanation. *See* § 14-2-11. The Village failed to abide by this deadline too.

To be sure, some of the concerns the Village asserted it had with the Floras' request are potentially valid issues. Although we do not agree that the request was vague, to the extent that it would have required the Village to create a record, this would have been a valid reason to deny the request. *See* § 14-2-8(B) ("Nothing in the Inspection of Public Records Act shall be construed to require a public body to create a public record."). Similarly, to the extent that a responsive record would

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have been exempt from disclosure pursuant to an exception to disclosure under IPRA, see generally Section 14-2-1, this too would have been a reason to deny inspection. However, these issues were (apparently) never communicated to the Floras in writing, so we cannot consider them. To have asserted these issues, the Village would have needed to convey them in writing to the Floras, and this was never done.

Conclusion

Because we have concluded that it did not comply with IPRA in at least its handling of the Floras' request dated August 29, 2018, we strongly recommend that the Village take remedial action and belatedly comply with its statutory obligations. The Village should promptly reopen the Floras' request and determine whether it possessed a record responsive to the request on the date of the request itself: if not, this information should be conveyed to the Floras, and if so, the Village should either provide the record or provide a full "written explanation of the denial" as required by IPRA. Section 14-2-11(B). Lastly, the Village should consider also reevaluating its response to the August 21, 2018 request to ensure that it fully accounted for all records either held by or on its behalf by its employees, officers, and contractors.

More importantly, we strongly advise the Village to overhaul its IPRA policies to ensure that future requests are handled properly. The Village simply must provide statutorily-mandated communications to records requestors. It cannot sidestep these IPRA requirements by substituting written communications with phone calls. We also recommend that the Village train its employees and officers on IPRA, possibly by attending one of our Office's virtual trainings.

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 Curt Flora and Suzanne Huff Flora