

April 28, 2015

Office of Attorney General Hector Balderas
Civil Division
PO Drawer 1508
Santa Fe, NM 87504-1508
lroller@nmag.gov
by postal service and email

Re: Advisory opinion / complaint re Violation of the Inspection of Public Records Act

Dear Attorney General Balderas,

A possible violation of the Inspection of Public Records Act (IPRA) has come to our attention in the Village of Corrales, and we seek guidance and opinion from your office. A document that was produced on instructions by the Mayor, using the paid time of multiple Village employees, and initiated and completed during his current term of office has been declared by the Mayor's administration to not be a public Village document. We seek the Attorney General's opinion on the status of the document, and we seek the document's release.

On March 4, 2014, Scott Kominiak was elected Mayor of Corrales. On March 11, he took the oath of office. At about this time, Mayor Kominiak assembled a group of citizens known as "the transition team" whose purpose was to interview various department heads and produce a report describing the state of the Village. It was described as a means to assist Mayor Kominiak in planning priorities and adjustments during his term of office.

The interviews were conducted with staff during normal business hours over the first two weeks of Mayor Kominiak's administration. The Mayor then very briefly referred to the report, as he held it in his hand to demonstrate its existence, during a public Village Council meeting held April 8, 2014, as documented in the approved minutes of that meeting. A copy of the approved minutes is attached, and the relevant excerpt is quoted here:



"Mayor Kominiak, confidential report was an asset to get to know what's going on in the village, departments, employees, and zero in on areas of improvement."

On March 24, 2015, Ms. Allen submitted an IPRA request to the Village of Corrales in order to view the Transition Team Report; a copy of the request is attached. On April 6, 2015, Ms. Allen received an email from the Corrales Village Clerk, Jennifer Hise, who stated the following: "I do not have the 'Transition Team Report' in my possession. It is not a Village document." A copy of that email is also attached.

Specifically we request the Attorney General's opinion as to whether or not the work product of a committee, whose membership has remained secret, which contains information directly pertinent to the operation of the Village and which was produced using Village staff time and after Mayor Kominiak took office, meets the definition of a public document as provided in IPRA 14-2-6.G. If it is a public document, we seek its immediate release.

Our contact information is provided below should you require follow-up with us.

Yours truly,

| | |
|-------------|----------------|
| Chris Allen | John Alsobrook |
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Attorney General Of New Mexico

HECTOR H. BALDERAS
Attorney General

ELIZABETH A. GLENN
Chief Deputy Attorney General

December 30, 2015

Jennifer A. Hise
Village Clerk
Village of Corrales
4324 Corrales Rd
Corrales, NM 87048

Dear Ms. Hise:

This determination addresses a complaint filed by John Alsobrook and Chris (Christina) Allen alleging the Village of Corrales ("Village") may have violated the Inspection of Public Records Act ("IPRA" or the "Act"), NMSA 1978 §§ 14-2-1 to -12 (1993, as amended through 2013) by denying Ms. Allen's written request for certain records. Based on the documentation provided to this Office, we have determined that the Village failed to comply with several provisions of the Act when handling Ms. Allen's request to inspect public records, as described in more detail below.

On March 24, 2015, Ms. Allen submitted her request to the Village for the following records:

The report of the transition team assembled by Mayor Kominiak which Mayor Kominiak showed the public at the first meeting (council) in April 2014. The team was composed of Mike [illegible]... plus possibly others.

According to the documentation submitted by Ms. Allen and Mr. Alsobrook in support of their complaint, by email dated April 6, 2015 you, on behalf of the Village, denied their request stating in relevant part as follows:

I do not have the 'Transition team report' in my possession. It is not a Village document. Thank you for your patience and understanding during this process.

As we understand it from the documentation you provided, the Village's position is that the report is not subject to IPRA because it was not physically in the possession of the custodian, the report was drafted by citizens, no Village funds were expended in preparing the report, and the report was not written or prepared at the direction or behest of the Village or the Mayor. This position reflects a misunderstanding of the Act's requirements regarding the duties of a custodian and what is a "public record."

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Three Day Letter

Section 14-2-8(D) of the Act states that “[a] custodian receiving a written request shall permit the inspection immediately or as soon as practicable under the circumstances, but not later than fifteen days after receiving a written request.” If the inspection is not permitted within three business days, the custodian shall explain in writing when the records will be available for inspection or when the public body will respond to the request. *Id.* This letter is commonly known as a “three day letter.”

As part of this Office’s investigation of the complaint, we asked the Village to provide copies of all responses to Ms. Allen’s IPRA request. The Village provided a copy of its April 6, 2015 response to Ms. Allen, but not a copy of the three day letter. In the absence of any documentation regarding a three day letter, we therefore we conclude that the Village did not send a three day letter to Ms. Allen, thus violating the Act on this basis. For future reference, the Village should review the sample three day letter appearing in the Inspection of Public Records Act Compliance Guide (“IPRA Guide”), 8th Ed., 2015, at page 46.

Timely Written Denial

Section 14-2-11(B) of the Act states that “[i]f a written request has been denied, the custodian shall 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.” For inspection requests that are denied, the custodian must mail or deliver a notice to the requester within 15 days of receiving the request. *See*, Section 14-2-11(A) (“[u]nless a written request has been determined to be excessively burdensome or broad, a written request for inspection of public records that has not been permitted within fifteen days of receipt by the office of the custodian may be deemed denied.”); and IPRA Guide, page 39.

On April 6, 2015, thirteen days after it had received Ms. Allen’s written inspection request, the Village sent an email to Ms. Allen informing her that her request was denied. Accordingly, the denial notice was timely because it was delivered within 15 days after the Village received the inspection request. Although the Village timely informed Ms. Allen that her inspection request was denied, the April 6 email nevertheless failed to comply with the Act because it did not set forth the names and titles or positions of each person responsible for the denial as required by Section 14-2-11(B). For future reference, the Village should review the sample “denial letter” in the IPRA Guide, page 49.

Reasons for Denial

Next, we turn to the two explanations you gave as to why Ms. Allen’s inspection request was denied: (1) that you “do not have the “Transition team report” in [your] possession”; and (2) that

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Village Clerk, Village of Corrales
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“It is not a Village document.” As explained in more detail below, neither explanation complies with the Act.

Your first explanation – that you did not have the report in your possession – seems to suggest that the report exists, but you did not have it in hand or in your possession and so for that reason inspection was denied. In her inspection request, Ms. Allen stated that the Mayor showed the report to the public at the April 8, 2014 council meeting. The final minutes of the April 8, 2014 council meeting mention the report, stating as follows on page 2:

Mayor Kominiak, confidential report was an asset to get to know what’s going on in the village, department, employees, and zero in on areas of improvement.

A public body is required to designate at least one custodian of public records. § 14-2-7. The Act specifies several duties of the records custodian, such as receiving requests, including electronic mail and facsimile requests, to inspect public records (§ 14-2-7(B)) and providing proper and reasonable opportunities to inspect public records (§ 14-2-7(C)). “Custodian” is defined under the Act to mean “any person responsible for the maintenance, care or keeping of a public body’s public records, *regardless of whether the records are in that person’s actual physical custody and control.*” § 14-2-6(A) (emphasis added). Accordingly, even though you may not have had the transition report physically in your possession, as records custodian for the Village you were required to conduct reasonable and good faith efforts to collect responsive records which may be in the custody or control of other Village departments or personnel, including documents which may be in the custody or control of the Mayor.

It is unclear to this Office what you meant in your second explanation – that the report is “not a Village document.” You provided additional explanation in your June 23, 2015 letter to this Office, which provides in relevant part as follows:

Additional Information: (Statement from Mayor Scott A. Kominiak, SAK)

As a candidate for Mayor, it was suggested to me that should I be elected, it would be useful to have a transition team canvass Village staff and ancillary contractors to quickly assess the “lay of the land” and get me up to speed on organization, functionality, pending urgent matters, as well as what was working well and what was not (in the eyes of the staff). This effort was initiated immediately following the election (before I took office) by a group of volunteer citizens. They simply made appointments with members of the administration where available (as is routinely done with Village citizens) and conducted brief interviews. The results were compiled into a brief for my personal use as a learning tool. As such, a copy was not provided to the Village. This was not an official undertaking of the Village and no Village funds were spent on the preparation of the report.

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The Mayor's position, as we understand it, is that the report is a personal document, not prepared for the Village or using Village funds, and therefore it is not a public record. As explained below, this view reflects a misunderstanding of "public record" under the Act.

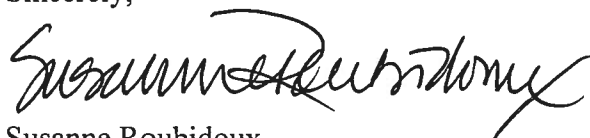
Section 14-2-1 of the Act provides that every person has a right to inspect any public records of the state except those that are specifically protected. The Act defines "public records" to mean "all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless 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, whether or not the records are required by law to be created or maintained.* NMSA 1978, § 14-2-6(G) (2013) (emphasis added).

As an initial matter, we note that there is nothing in the Act that limits the definition of "public record" to documents that are prepared pursuant to request by the public body, or that are prepared using public money. Thus it is irrelevant under the Act that the record at issue was drafted by private citizens using private funds. Secondly, according to the Mayor's description of the report in the June 23, 2015 letter, the report contained information regarding the Village "organization, functionality, pending urgent matters, as well as what was working well and what was not ...". Thus, the report appears to pertain to public business and accordingly may be considered a "public record." Moreover, the Mayor's description of the report and the reference to the report in the April 8, 2014 council minutes fit squarely within the Act's definition of "public record". Although neither the Village nor the Mayor created the report, the report was "... *received, maintained or held by or on behalf of any public body and relate[s] to public business...*" (emphasis added).

Finally, this Office expresses no opinion as to whether the transition report Ms. Allen requested was a "public record" as defined under the Act during the period after the election of Mayor Kominiak and prior to his taking office.

The Attorney General is charged with authority to enforce to enforce IPRA. NMSA 1978, § 14-2-12(A)(1) (1993). Accordingly, this Office directs the Village to provide Ms. Allen with a copy of all records covered by her request that are held or maintained by the Village or any Village official or employee as soon as practicable.

Sincerely,



Susanne Roubidoux
Assistant Attorney General

cc: Ms. Chris Allen
Mr. John Alsobrook