

STATE OF NEW MEXICO
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July 28, 2016

R. Daniel Castille
Cuddy & Friedman, LLP
Post Office Box 4160
Santa Fe, New Mexico 87502-4160

Re: Inspection of Public Records Act Complaint- Western New Mexico University

Mr. Castille:

We have reviewed a complaint submitted by Alfred Milligan alleging that Western New Mexico University ("WNMU") violated the Inspection of Public Records Act ("IPRA"), NMSA 1978, §§ 14-2-1 to -12 (as amended through 2013), and your response on behalf of WNMU to our inquiry regarding the complaint. *See* letter to Dylan K. Lange, Assistant Attorney General from R. Daniel Castille, Cuddy & McCarthy (Apr. 15, 2016) ("Response"). The complaint alleges that WNMU failed to provide records in response to Mr. Milligan's request to inspect public records. As discussed in more detail below, based on our review of the complaint, WNMU's response, and applicable law, we conclude that IPRA did not require WNMU to provide records that were not in its custody or control, but that WNMU violated IPRA by failing to respond to Mr. Milligan's inspection request within three business days. Additionally, we address issues raised by WNMU's Response regarding IPRA's applicability to Mr. Milligan's request.

WNMU's Response Was Untimely

According to the complaint, Mr. Milligan made the following request to inspect public records by email on February 16, 2016:

I would like a listing of all the expenditures from the Presidential Contingency Fund in the Foundation for the month of December 2015. I would like it to include date, to whom paid, description of expense and amount.

In an email message dated February 22, 2016, Julie Morales, Chief of Staff, Office of the President, responded to Mr. Milligan's request. In pertinent part, Ms. Morales stated: "The WNMU Foundation is a 501(c)(3) organization. The Foundation is not deemed a public entity and therefore is not subject to the New Mexico Inspection of Public Records Act."

IPRA requires a public body's records custodian to permit inspection:

immediately or as soon as practicable under the circumstances, but not later than fifteen days after receiving a written request. If 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.

NMSA 1978, § 14-2-8(B). A public body that cannot respond to a request to inspect public records within three business days must deliver the required written explanation on or before the third business day after the public body receives the request. *See* Attorney General's Inspection of Public Records Act Compliance Guide ("IPRA Guide"), p. 33 (8th ed. 2015). For purposes of the three-day deadline, the day the written inspection request is received is not counted. *Id.*

WNMU received Mr. Milligan's inspection request on Tuesday, February 16, 2016. This triggered the three-day response deadline under Section 14-2-8(B), which required WNMU to provide Mr. Milligan with a written response on or before the third business day after the request was received, or Friday, February 19, 2016. As set out above, the date of Ms. Morales' response to Mr. Milligan was Monday, February 22, 2016. Though only one business day late, the response violated IPRA's requirements for timely responding to written inspection requests.

Additional Issues Raised by WNMU's Response

Although we found only one clear violation of IPRA, WNMU's responses to Mr. Milligan's inspection request and to our inquiry regarding the complaint raise two additional issues that require clarification. First, we believe that Ms. Morales' initial explanation for denying Mr. Milligan's inspection request was not adequate. As quoted above, the reason Ms. Morales gave to Mr. Milligan for denying his request was that, as a 501(c)(3) organization, the WNMU Foundation "is not deemed a public entity" subject to IPRA. WNMU's Response elaborates, stating "the records of the UNMU-Foundation are expressly exempt from IPRA by NMSA 1978 § 6-5A-1(D). . .," and cites a previous IPRA determination issued by the Office of the Attorney General in 2007. *See* letter to Bruce R. Kite, General Counsel, New Mexico State University from Elizabeth A. Glenn, Assistant Attorney General (Nov. 27, 2007) (attached to WNMU's Response).

While it appears that WNMU's description of the Foundation's private status is accurate, that status has no bearing on WNMU's obligations under IPRA. IPRA gives "[e]very person" the "right to inspect public records of this state," with certain exceptions. NMSA 1978, § 14-2-1(A). "Public records" for purposes of IPRA are "all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials. . . that are used, created, received, maintained or held by or on behalf of any public body and relate to public business. . ." *Id.* § 14-2-6(G). Accordingly, if WNMU held, maintained or otherwise had custody of the records described in

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Mr. Milligan's request, those records would constitute "public records" subject to inspection, unless the records qualified for an exception.

Although the reason Ms. Morales provided for denying Mr. Milligan's inspection request was insufficient, WNMU's Response represents that "the information requested [by Mr. Milligan] is not a record created or maintained by WNMU, nor is it in WNMU's possession, custody or control, and it is not held by any other party on behalf of WNMU." As quoted above, Section 14-2-6(G) of IPRA obligates a public body to allow inspection of records that are "used, created, received, maintained or held by" the public body or on its behalf. If, as contended in WNMU's Response, the records described in Mr. Milligan's inspection request were not kept by or on behalf of WNMU, then WNMU's denial was proper. *See* also IPRA Guide, p. 26.

The second issue requiring clarification is raised in footnote 1 of WNMU's Response. There, WNMU suggests that, even if it were otherwise proper, Mr. Milligan's request "for a listing of ... expenditures" might have been denied because it asks WNMU to create a record. As support, WNMU's Response refers to Section 14-2-8(B) of IPRA, which states: "Nothing in [IPRA] shall be construed to require a public body to create a public record."

Contrary to the suggestion in footnote 1, we do not believe Section 14-2-8(B) would have provided an alternative reason to deny the request. IPRA requires a written inspection request to "identify the records sought with reasonable particularity." *Id.* § 14-2-B(C). Although WNMU was not obligated to create a list or other record in response to Mr. Milligan's request, the request included enough details about the information Mr. Milligan sought to enable WNMU to locate any records in its possession that contained the requested information. *See* IPRA Guide, Example 47 and accompanying text. In other words, Mr. Milligan described the records he requested "with reasonable specificity," which would have precluded WNMU from denying the request solely because it asked for a listing. *See Id.* Example 48 and accompanying text.

WNMU's email message on February 22 denying Mr. Milligan's inspection request violated IPRA's three-day deadline for a public body's initial response and we believe that it did not provide an adequate explanation for the denial. Nevertheless, the denial was made well within IPRA's fifteen-day deadline for denying written requests. *See* NMSA 1978, § 14-2-11(B). Based on this and WNMU's representation that it did not hold the requested records, we will not take further action in this matter.

We caution WNMU to adhere to IPRA's deadlines for responding to future inspection requests and to make sure that the reasons provided for denying requests are valid. This is particularly important given the limited exceptions to the right to inspect public records allowed under IPRA as applied by New Mexico courts. *See, e.g., Republican Party v. New Mexico Taxation and Revenue Dep't*, 2012-NMSC-026, 283 P.3d 853. If you have any questions regarding this determination, please let me know. A copy of the most recent edition of the IPRA Guide is enclosed for your reference.

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Sincerely,



Dylan K. Lange
Assistant Attorney General

Enclos.

cc: Alfred Milligan

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INSPECTION OF PUBLIC RECORDS ACT ("IPRA") COMPLAINT FORM
New Mexico Office of the Attorney General
Open Government Division

2015 MAR 10 AM 7:44
OFFICE OF THE ATTORNEY GENERAL

YOUR CONTACT INFORMATION:

First Name: Alfred Last Name: Milligan

Address: _____

City: _____ State: _____ Zip Code: _____

Phone Number: _____

Email: _____

IPRA REQUEST TO THE PUBLIC BODY:

Name of the Public Body that is the subject of this complaint (including city/town, county or region, if applicable): Western New Mexico University

Format of IPRA Request: Written Oral

Date IPRA Request was Submitted to the Public Body: Feb 16, 2016

Date of all Responses Received from the Public Body: Feb 22, 2016

ALLEGED VIOLATIONS OF IPRA BY THE PUBLIC BODY: Please select from the following list the violations you allege the public body committed. Check all that apply.

RECORDS:

- No records were provided.
- The agency provided some but not all of the records responsive to the request.
- Records were provided, but they were not responsive to the request.
- The public body does not have custody or responsibility for the records, and the records custodian did not forward the request to the proper custodian.
- The request was for records in electronic format and although the records are available in electronic format, the copies of the public records were not provided in an electronic format.

DENIED REQUESTS TO INSPECT PUBLIC RECORDS

- ___ Although some records were provided, the custodian did not include a written explanation for denying the production of exempt records or for redacting confidential information from records.

- ___ No records were provided and the records custodian did not deliver or mail a written explanation to the requester within fifteen (15) calendar days after receiving the request that included a description of the records sought, the names and titles of each person responsible for denying the request, and a description of the reasons for the denial.

NOTICE

- ___ Public body did not post in a conspicuous location at its administrative office or on the public body's website a notice setting forth: the rights of any person to inspect the public body's public records, the public body's responsibility to make public records available for inspection, the procedures for requesting inspection of public records, the procedures for requesting copies of public records, and/or reasonable fees for copying public records

DEADLINES (For purposes of deadlines imposed by the IPRA, the date the request is received is not counted)

- ___ Inspection was not allowed within three (3) business days and the public body did not timely send a written "three-day letter" to the requester explaining when the records would be available or when the public body would respond to the request.

- ___ The public body did not allow inspection or otherwise respond to the request within fifteen (15) calendar days from the date the custodian received the request.

FEES

- ___ The public body charged fees in excess of \$1.00 per printed page for documents 11"X17" or smaller, or charged fees that exceeded the actual costs to copy the records.

- ___ The public body did not provide a receipt upon request.

DETAILED EXPLANATION OF ALLEGED IPRA VIOLATIONS (Required): Please provide a description of the actions taken by the public body that violated the IPRA, including specific dates and why you believe the IPRA has been violated.

ADDITIONAL INFORMATION: Please provide a copy of your original inspection request (if written), and any documentation or evidence you have regarding the alleged IPRA violation.