



Attorney General of New Mexico

GARY K. KING
Attorney General

ALBERT J. LAMA
Chief Deputy Attorney General

April 12, 2010

Marcie Maestas, Records Custodian
Governor's Office
State Capitol Building
Santa Fe, NM 87504

Re: Determination of IPRA Complaint – NMFOG

Dear Ms. Maestas:

This determination addresses the January 21, 2010 complaint filed with our office by Ms. Sarah Welsh, Foundation for Open Government, alleging that the Governor's Office may have violated the Inspection of Public Records Act ("IPRA"), NMSA 1978, Sections 14-2-1 to 14-2-12. The IPRA complaint alleges that the Governor's Office failed to provide documents identifying the fifty-nine (59) eliminated state positions that were referenced in your office's October 23, 2009 press release. We have reviewed the following: (1) Ms. Welsh's January 21, 2010 letter; (2) your February 4, 2010 response letter on behalf of the Governor's Office and accompanying approximately ninety-eight (98) pages of email documents; and (3) the IPRA. As described in more detail below and based on the information available to us at this time, we are concerned that your office violated the IPRA.

Ms. Welsh made her request on Thursday, January 7, 2010. According to the records provided, an acknowledgement letter was mailed Tuesday, January 12, 2010. This acknowledgement letter was sent within three business days in accordance with NMSA 1978, Section 14-2-8(D). The acknowledgment letter stated that a response letter would be provided with fifteen days. According to the records provided, the response letter with accompanying approximately ninety-eight (98) pages of email documents was mailed on January 22, 2010 in accordance with NMSA 1978, Section 14-2-8(D). Therefore, the Governor's Office complied with the necessary timing requirements of the statute.

Your response letter included approximately ninety-eight (98) pages of email documents. "The production of the 98 responsive pages is significant as it demonstrates that the Office of the Governor fully complied with the requirements of IPRA in responding to this particular request." Letter from Governor's Office to AGO, (Feb. 4, 2010).¹ We interpret this assertion to mean that the Governor's Office believes it has released all of the public records within its possession that were covered by Ms. Welsh's request.²

An agency is not required to create a new record that may be more responsive to a request to inspect public records. See NMSA 1978, § 14-2-8(B). See also N.M. Att'y Gen. Inspection of Public Records Compliance Guide, p. 36 (5th ed. 2008). If, as you assert, the Governor's Office has provided access to all of the public records described in the request, then one could argue that your office has complied with the document release requirements of the statute.

However, for two reasons, we cannot conclude at this time that all of the requested information was provided to Ms. Welsh. First, as discussed below, the information available to us at this time suggests the Governor's Office possessed additional records that were responsive to Ms. Welsh's request that were not released for inspection.

Second, Ms. Welsh requested "any state records" and stated "my request encompasses records which may be in the possession of other state agencies." Email from Ms. Sarah Welsh to Governor's Office (Jan. 7, 2010). An example of these documents would include a list of employees, separation or termination letters or even payroll records pertaining to the exempt employees and positions described in the request. The IPRA obligates a public body, such as the Governor's Office, that receives a request for records not in that body's possession to forward the request to the proper records custodian, if known, and notify the requester. See NMSA 1978, § 14-2-8(E). See also N.M. Att'y Gen. Inspection of Public Records Compliance Guide, p. 39 (5th ed. 2008) ("If, after reasonable inquiry, the initial recipient of the request is unable to determine where the records might be located...it would be permissible for the recipient to inform the requester that he ...does not have custody and to explain the efforts made to find their location and the result of those efforts."). The Governor's Office explained its failure to identify agencies that might have custody of the requested records as follows:

¹ We will assume this to be the Governor's Office's official position and will disregard prior office positions offered by staff members who are not the custodian for the office. See Email from Gilbert Gallegos, Deputy Chief of Staff to Kate Nash, Santa Fe New Mexican (Dec. 2, 2009) ("We are not identifying employees or positions.")

² You notated that the Governor's Office withheld one email that identified: "only one released employee...[t]he identify of the employee, coincidentally, had already been become public knowledge (by the voluntary and public disclosure of the information by the particular exempt employee)...." Letter from Governor's Office to AGO, (Feb. 4, 2010). Therefore, an analysis on whether this document was properly withheld is moot because the employee has already voluntarily provided his name to the media.

The timing of this particular request is also important to note. Ms. Welsh submitted her request on January 7, 2010. As stated in the Governor's press release, the contemplated employment separations were not effective until January 8, 2010. Any assumption that the Governor's Office might have made on that date as to which agency, if any, had documents that might be responsive to this particular request would have been speculative at best.

Letter from Governor's Office to AGO (Feb. 4, 2010). The problem with this argument is that it seems unlikely that the Governor's Office did not know which agency had custody of records responsive to Ms. Welsh's request. Even if it did not, the Governor's Office had more than enough time between the date it received the request and the date of its final response to make a reasonable effort to ascertain the state agency that maintained the public records Ms. Welsh requested.

We are also concerned about the fact that prior statements made in an October 23, 2009 press release appear to be inconsistent with the information provided in your response letter of February 4, 2010. The press release expressly stated: "In all, 59 exempt employees were notified by their supervisors this week of their ... separation from state government." It seems implausible that your office would make a formal announcement when it had no set of records to support its numerical assertion. It creates the impression that some staff member in Governor's Office possesses, contrary to your response letter's assertions, records pertaining to the 59 exempt employees requested by Ms. Welsh.

To resolve the questions remaining after the Governor's Office response to Ms. Welsh's request, we believe that the Governor's Office should re-evaluate its response in light of the preceding discussion of the IPRA's requirements. In particular, the Governor's Office should determine whether it has "public records"³ other than those it has already released that are responsive to Ms. Welsh's request. In addition, the Governor's Office should immediately make a reasonable inquiry as to which agencies may have the requested documents and either provide the requested documents or send an appropriate wrong custodian letter to Ms. Welsh.⁴ Please provide our office with a courtesy copy of your communications with Ms. Welsh within twenty (20) days of your receipt of this letter.

³ Please note that the definition of "public records" for purposes of the IPRA is quite broad. See NMSA 1978, § 14-2-6(E). A public body may hold public records that are exempt from disclosure, but must provide a requester with a written denial that explains the reasons for denying access to those records. *Id.* § 14-2-11. IPRA does not permit a public body to determine that a record it holds is not a "public" record and withhold it from disclosure with no explanation to the requester.

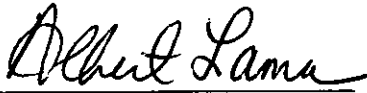
⁴ One could argue that your office has apparently already made such inquiries to other agencies based on the extensive numerical details provided regarding exempt employees found in the Governor's Blog dated February 9, 2010. <http://www.governor.state.nm.us/blog2010.php?mm=3s>

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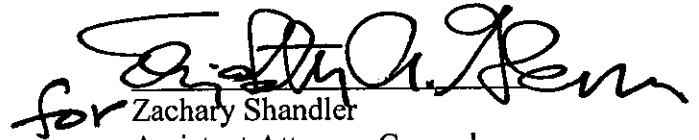
Your cooperation in this matter is particularly important given the enforcement provisions of the Act. A person whose request has been improperly handled may bring an enforcement action in district court and, if he or she prevails, is entitled to damages, costs and reasonable attorneys' fees that may be calculated per day from the date of violation. See NMSA 1978, § 14-2-12.

If you have questions about the specific matters addressed in this letter, or about IRPA in general, please let us know.

Sincerely,



Albert J. Lama
Chief Deputy Attorney General


for Zachary Shandler
Assistant Attorney General

cc: Sarah Welsh