

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

August 14, 2017

David Mathews, General Counsel
New Mexico Spaceport Authority
901 E. University Ave., Suite 965L
Las Cruces, NM 88001

Re: Inspection of Public Records Act Complaint – Spaceport Authority

Dear Mr. Mathews:

We have reviewed the complaint submitted by Patrick Hayes on June 1, 2017 alleging that the Spaceport Authority (“Authority”) violated the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 to -12 (as amended through 2013) (“IPRA”). We also have reviewed your response, on behalf of the Authority, to our inquiry regarding the complaint. See letter from David Mathews, General Counsel, New Mexico Environmental Development Department (June 30, 2017) (“Authority’s Response”). As discussed below, based on the information available to us at this time, we conclude that the Authority violated IPRA by improperly attempting to charge fees for inspecting public records, failing to provide copies of records requested and available in electronic format, prohibiting the use of personal phones, cameras and scanners to make copies of responsive public records, and denying a request without providing a written explanation.

Mr. Hayes’ Public Record Requests

According to the complaint, Mr. Hayes emailed a request to the Authority on April 7, 2017 for copies of the Authority’s contracts with six businesses and “documents or data used to support the statement made to lawmakers in September 2016 stating that the Spaceport had a \$20 million economic impact in FY 2016.” The Authority’s records custodian acknowledged the request on April 10, 2017. The acknowledgement notified Mr. Hayes that the Authority did not have contracts with two of the businesses named in the request, stated that the Authority expected the other four contracts would be available on April 17, 2017, and attached a copy of a PowerPoint presentation on the Spaceport’s economic impact. The Authority stated that “[c]opy fees will be \$247.00 that will need to be paid before the documents are prepared.”

By return email on April 10, 2017, Mr. Hayes asked whether there were digital copies of the documents he requested available at no cost and, if not, requested that the fees be waived. By email dated April 11, 2017, the Authority responded that it could not waive the

fees because “[y]our request will require redaction which necessitates making copies.” Mr. Hayes responded later the same day, and asked to set a time to inspect the documents. He stated, “I believe under IPRA I can inspect and take pictures of or scan the documents for free.”

On April 14, 2017, Mr. Hayes made a second records request to the Authority for “any emails and attachments sent in response to IPRA requests within the last 60 days.” The Authority’s records custodian responded on April 17. In that response, the Authority summarized Mr. Hayes’ two outstanding records requests and went on to state, in pertinent part: “Both of these requests require redaction. Unfortunately redacting documents requires copies and we have to charge a copy fee.... You would only be able to inspect documents in person free of charge if copies were not required for redaction.” Mr. Hayes replied that IPRA did not allow the Authority to charge for making the documents available for inspection and questioned whether the contracts were available in digital format.

On April 20, the Authority notified Mr. Hayes that it had documents responsive to his requests and asked him to schedule a time for inspection. The Authority stated that it kept its files “in paper form.” Contrary to its previous communications with Mr. Hayes,¹ the Authority stated that he could inspect the responsive documents without charge, but if he requested copies, the Authority would charge \$1.00 per page. The Authority informed Mr. Hayes that “[n]o phones, cameras, scanners, or other electronics are allowed in the room when you are viewing Spaceport America documents.” By email dated May 3, 2017, Mr. Hayes asked to inspect documents responsive to his requests the following week. By email dated June 27, 2017, David Mathews, General Counsel, New Mexico Economic Development Department, apologized to Mr. Hayes on behalf of the Authority for missing his May 3 email, and stated that the requested documents were ready for inspection.

IPRA Issues Raised by the Requests

The communications between Mr. Hayes and the Authority regarding his requests for public records raise the following issues:

1. The Authority’s requirement that Mr. Hayes pay a fee for inspecting printed copies of public records the public body made in order to redact exempt information.
2. The Authority’s failure to provide copies of public records requested and available in electronic format.
3. The Authority’s refusal to allow Mr. Hayes to use his own equipment, such as a camera or scanner, to make copies of responsive public records.

¹ The Authority’s Response states that the Authority’s April 11 email offered Mr. Hayes the option of inspection at no cost. That contention is contradicted by the April 11 email itself, which stated that the Authority could not waive fees for copies the Authority made in order to redact the records. The Authority’s April 14 email expressly stated, “You would only be able to inspect documents in person free of charge if copies were not required for redaction.”

4. The Authority's failure to provide a written explanation for denying Mr. Hayes access to information contained in public records responsive to his request.

1. Fees for Inspecting Redacted Copies of Public Records

Although the Authority evidently changed its position as of its April 20, 2017 email to Mr. Hayes, its earlier communications regarding Mr. Hayes' records request stated that Mr. Hayes would have to pay a fee to inspect responsive records the Authority copied in order to redact exempt information.

Under IPRA, "every person" has the right to inspect public records, with certain exceptions. § 14-2-1(A). "Inspect," for purposes of IPRA, "means to review all public records" that are not excepted by IPRA. § 14-2-6(C). "Requested public records containing information that is exempt and nonexempt from disclosure shall be separated by the custodian prior to inspection, and the nonexempt information shall be made available for inspection." § 14-2-9(A).

A records custodian may charge fees for making copies, as specified by IPRA. In pertinent part, IPRA provides that a records custodian may "charge reasonable fees for copying the public records ... [and] may require advance payment of the fees before making copies of public records...." § 10-14-9(C). IPRA expressly precludes a public body from "charg[ing] a fee for the cost of determining whether any public record is subject to disclosure." *Id.*

The provisions of IPRA quoted above require a public body to redact or otherwise separate out exempt information in a public record before inspection. IPRA permits a public body to charge a fee for copies of public records only when a requester asks for copies. IPRA does not authorize a public body to charge a fee for inspecting copies of public records the public body made in order to redact exempt information prior to inspection. *See* Attorney General's IPRA Compliance Guide ("IPRA Compliance Guide") (available online at www.nmag.gov), p. 37 (8th ed. 2015) (IPRA does not permit a records custodian to require payment for copies in advance of allowing inspection).

2. Electronic Copies

Based on the Authority's April 17 email, it appears that the Authority made printed copies of electronic records, specifically the "emails and attachments" Mr. Hayes requested on April 14, in order to redact exempt information from those records. Presumably, if Mr. Hayes asked for copies of the emails and attachments, the Authority intended to charge him for printed copies of those records.

Under IPRA, "[a] custodian shall provide a copy of a public record in electronic format if the public record is available in electronic format and an electronic copy is specifically requested." § 14-2-9(B). A records custodian is required to remove "[e]xempt information in an electronic document along with the corresponding metadata prior to disclosure by utilizing methods or redaction tools that prevent the recovery of exempt information from a redacted electronic document." § 14-2-9(A).

By their nature, the emails responsive to Mr. Hayes' records request were available in electronic format and we believe Mr. Hayes made clear his preference for electronic copies. Under these circumstances, Section 14-2-9(B) required the Authority to provide copies of the responsive emails in electronic format.²

IPRA does not condition a public body's obligation to provide electronic copies on whether the records contain exempt information. As quoted above, Section 14-2-9(A) requires a records custodian to remove exempt information in an electronic record using methods "that prevent the recovery of exempt information from a redacted *electronic* document" (emphasis added). IPRA contemplates that a public body will employ appropriate methods for removing exempt information in electronic records before allowing inspection of the electronic documents. IPRA does not except a public body that lacks or does not use the capability to redact exempt information from electronic records from IPRA's requirement that the public body provide electronic copies.

We assume that if the requested emails had not contained exempt information, the Authority would have provided Mr. Hayes with electronic copies, as required by IPRA, and, for its own convenience, printed the emails to comply with its responsibility for separating exempt and nonexempt information prior to inspection. Under these circumstances, by imposing a charge for printed copies of the emails, the Authority improperly shifted the burden or cost of separating exempt and nonexempt information to Mr. Hayes.

To properly handle requests to inspect and copy electronic records that contain exempt information, the Authority should use or obtain the necessary software or tools for redacting exempt information in those records, as contemplated by IPRA. If that is not possible, the Authority must refrain from charging requesters for printed copies of electronic public records.

3. Use of Requester's Equipment to Make Copies

As interpreted by the New Mexico Supreme Court, IPRA embodies "the fact that people in our democratic society have 'a fundamental right' to inspect public records. *San Juan Agric. Water Users Ass'n*, 2011-NMSC-011, ¶ 14, 257 P.3d 884 (quoting *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 797, 568 P.2d 1236 (1977)). "The right to inspect public records commonly carries with it the right to make copies thereof..." *Ortiz v. Jaramillo*, 1971-NMSC-041, ¶ 3, 483 P.2d 500. See also IPRA Compliance Guide, p. 29. IPRA requires public bodies to "provide proper and reasonable opportunities to inspect public records" and "reasonable facilities to make or furnish copies of public records during usual business hours." § 14-2-7(C), (D).

² IPRA does not entitle a requester to specify the format of a requested electronic record. Section 14-2-9(B) provides that "a custodian is only required to provide the electronic record in the file format in which it exists at the time of the request."

The “policy of the state” embodied by IPRA is that “all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees.” § 14-2-5. Providing “persons with such information is an essential function of a representative government and an integral part of the routine duties of public officers and employees.” *Id.*

The underlying purposes of IPRA are to facilitate the availability of and access to public records. While IPRA requires a public body to provide reasonable facilities to make or furnish copies of public records and permits a public body to charge reasonable fees for copying public records, it does not preclude a person from using other means to copy public records. Based on the letter and express policy of IPRA, we believe an absolute prohibition against a requester’s use of equipment such as a phone, camera or portable scanner, to copy public records violates the right to inspect and copy public records protected by IPRA.³ Because IPRA permits a fee only when a public body makes copies for a requester, a public body may not charge for copies requesters make with their own equipment. *See* § 14-2-9(C)

Although we found no reported New Mexico cases directly on point, our conclusion is supported by case law from other states addressing the issue. *See, e.g., Newman, Raiz & Shelmadine, LLC v. Brown*, 915 N.E.2d 782 (Ill. Ct. App. 2009) (circuit court clerk’s blanket prohibition against use of portable scanners was overly broad and interfered with an individual’s right to inspect and make copies of public records); *Land Title Guar. & Trust Co. v. Essex*, 368 N.E.2d 326 (Ohio Ct. App. 1977) (a person’s statutory right to inspect county records included right to copy using the person’s own camera equipment, subject to reasonable rules for preserving the records and the orderly administration of the county’s offices).

4. *Written Explanation of Denial*

When a written records request is denied in whole or in part, IPRA requires the records custodian to “provide the requester with a written explanation of the denial” within fifteen days after receiving the records request. § 14-2-11(B). The written explanation must include a reason for the denial, which must be authorized by IPRA or “as otherwise provided by” another law, court rule, or the U.S. or New Mexico constitution. § 14-2-1(A). *See also* IPRA Compliance Guide, p. 40.

The Authority’s email communications with Mr. Hayes regarding his records requests state that public records responsive to his request required redaction. According to the Authority’s Response, information in the responsive documents constituting trade secrets

³ Although a public body may not impose an absolute ban on use of personal cameras, phones and scanners, the public body may require reasonable measures to avoid disruption of the public body’s normal operations and to protect public records, such having an employee present while public records are being inspected and copied by a requester. *See* § 14-2-7(C), (D); IPRA Compliance Guide, pp. 28-29.

was properly redacted under the Supreme Court's Rules of Evidence.⁴ Nevertheless, as of the date of this determination, the Authority has yet to provide Mr. Hayes with a written explanation for denying disclosure of the redacted portions, which Section 14-2-11(B) required within 15 days of his requests.

Corrective Action

The Authority's email dated June 27, 2017, notifies Mr. Hayes that records responsive to his records requests are available for inspection. When Mr. Hayes arranges to inspect the records, the Authority may not charge Mr. Hayes a fee for inspecting copies of records the Authority made for purposes of redacting exempt information. The Authority must provide Mr. Hayes with a written explanation for any redactions in the responsive records, as required by Section 14-2-11(B). If Mr. Hayes requests copies of public records, the Authority may charge a reasonable fee for copying records the Authority maintains in printed format. Under Section 14-2-9(B), the Authority must provide electronic copies of responsive records that were available in electronic format at the time of Mr. Hayes' requests.

Finally, although the Authority may impose reasonable requirements to protect public records, it may not prohibit Mr. Hayes from using his own phone, camera or portable scanner to make copies of public records free of charge. If you have any questions about this determination or IPRA in general, please do not hesitate to contact our office.

Sincerely,



Dylan K. Lange
Assistant Attorney General

cc: Patrick Hayes
Zach De Gregorio, CPA

⁴ The Authority's Response also cites Section 14-2-1(A)(6) in support of the redactions. By its terms, that exception from disclosure applies only to "trade secrets ... of public hospitals discussed in a properly closed meeting." See also § 10-15-1(H)(9) (corresponding provision in Open Meetings Act permitting "committees or boards of public hospitals" to hold closed meetings to discuss "strategic and long-range business plans or trade secrets").