STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

July 26, 2018

VIA ELECTRONIC MAIL

Melissa K. Force, General Counsel
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Las Cruces, NM 88001
Email: melissa.force@spaceportamerica.com

Re: Inspection of Public Records Complaint – Spaceport Authority

Dear Ms. Force:

We have reviewed complaints submitted by Heath Haussamen alleging violations of the Inspection of Public Records Act, NMSA 1978, ch. 14, art. 2 (as amended through 2013) ("IPRA") and the Open Meetings Act, NMSA 1978, ch. 10, art. 15 (as amended through 2013) ("OMA"), by the New Mexico Spaceport Authority ("Authority"). In particular, Mr. Haussamen alleges that the Authority:

(1) failed to provide all records responding to his March 12, 2017 request for documents supporting an analysis of the Authority's economic impact in fiscal year 2016;

(2) imposed improper fees for providing an electronic copy of lease agreements between the Authority and certain tenants at the Spaceport;

(3) improperly redacted information contained in the lease agreements;

(4) improperly denied his request for a copy of Twitter accounts blocked by the Authority;

(5) did not respond to his request for a copy of the Authority board's March 29, 2017 meeting minutes; and

(6) failed to prepare draft minutes within ten working days after the Authority board's March 29, 2017 meeting.

In addition to the complaints, we have reviewed David Mathews' response, on behalf of the Authority, to our inquiry regarding the complaints. *See* letter from David Mathews, General Counsel, New Mexico Environmental Development Department ("Authority's Response"). Based on our review, as discussed in detail below, we are unable to determine that the Authority failed to provide all records responsive to Mr. Haussamen's March 12, 2017 public records request or violated OMA by failing to prepare draft meeting minutes within ten working days of the Authority governing board's March 29 meeting. Otherwise, we conclude that the Authority violated IPRA as alleged.

1. Failure to Respond to March 12, 2017 Records Request

According to Mr. Haussamen,[1] he submitted a public records request on March 12, 2017, including a request for all documents supporting an analysis prepared by the Authority's CFO that showed that the Authority's economic impact in fiscal year 2016 was $20.8 million. The Authority responded that it did not have documents responsive to the request. Mr. Haussamen believes that, despite its denial, the Authority possesses records that respond to his request and should have been provided to him.

IPRA requires a records custodian who receives a written request for public records to "permit the inspection immediately or as soon as is practicable under the circumstances, but not later than fifteen days after receiving [the] written request." § 14-2-8(D). IPRA broadly defines "public records" as "all documents … 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…." *Id.* § 14-2-6(G). IPRA requires a public body to provide responsive public records in its custody at the time the request is made. IPRA does not require a public body to create a public record in response to a request. *Id.* § 14-2-8(B).

In general, a public body's assertion that it does not hold or possess a requested public record is accepted as true, absent evidence that the public body failed to conduct an adequate search or otherwise acted in bad faith. Speculation that responsive records exist or should exist, without more, is not sufficient evidence to question a public body's representation that it does not possess requested public records. *See, e.g., Smith Butz, LLC v. Pennsylvania Dep't of Envtl. Protection,* 142 A.3d 941, 945 (Pa. Commw. Ct. 2016) (without "competent evidence" that a public body "acted in bad faith or that the … records exist," the court will accept as true the public body's assertion that public records do not exist); *Kozol v. Washington State Dep't of Corrections*, 366 P.3d 933 (Wash. Ct. App. 2016) (public records law only required access to records that existed, "not nonexistent records that one believes should exist").

[1] Unless otherwise indicated, all references in this determination are to the complaints, including attachments, and the Authority's Response, including attachments.

Mr. Haussamen's belief that the Authority should have additional records supporting its economic impact analysis is not sufficient, by itself, to show that the Authority violated IPRA. Without additional evidence showing that the Authority acted in bad faith or with the intent to evade its obligations under IPRA, we are unable to conclude that the Authority failed to provide Mr. Haussamen with responsive records in its custody at the time of his request.

2. Fees for Electronic Records

Mr. Haussamen's March 12, 2017 records request included lease and other agreements between the Authority and certain tenants at the Spaceport. The Authority responded on March 27, stating that it had 290 pages of responsive lease documents. The Authority informed Mr. Haussamen that its fees for providing printed or electronic copies of the records would be $290.00, or $1.00 per page. Mr. Haussamen requested electronic copies and agreed to pay the $290.00 fee.

Although it is not clear from the Authority's Response, for purposes of this determination we assume that the Authority maintains the lease agreements covered by Mr. Haussamen's request solely in printed format and does not possess the agreements in electronic format. According to the Authority's IPRA policy, the Authority permits a person who submits a public records request to inspect the records at the Authority's offices without charge, obtain printed copies of the records at $1.00 per page, plus mailing charges, if applicable, and obtain digital copies at $1.00 per page to cover the "process of copying and scanning to create a digital file...." Authority Resolution No. 2016-001 (Dec. 7, 2016).

A records custodian may charge fees for making copies only as specified by IPRA. In pertinent part, IPRA provides that a records custodian:

> (1) may charge reasonable fees for copying the public records …;
>
> (2) shall not charge fees in excess of one dollar ($1.00) per printed page for documents eleven inches by seventeen inches in size or smaller;
>
> (3) may charge the actual costs associated with downloading copies of public records to computer disk or storage device, including the actual cost of the computer disk or storage device; [and]
>
> (4) may charge the actual costs associated with transmitting copies of public records by mail, electronic mail or facsimile....

§ 14-2-9(C).

Unless otherwise authorized by law, copying fees charged by a public body may reflect only the actual cost of copying public records. *See* Attorney General's IPRA Compliance

Guide, p. 36 (8th ed. 2015) ("IPRA Compliance Guide") (available at the Office of Attorney General's website at www.nmag.gov). Section 14-2-9(C) authorizes a public body to charge a fee of up to $1.00 per page for *printed* copies of public records. If a requester requests an electronic copy of a record the public body maintains in electronic format, the public body may charge the actual costs of downloading the copies, including the cost of the storage device. If the public body transmits the electronic copy to a requester by email, the public body may charge the actual costs of transmitting the copy.

Although IPRA requires a public body to provide an electronic copy of a public record only if the record is available in electronic format at the time of the request, Section 14-2-9(B), the Authority's IPRA policy gives a requester the option of obtaining copies of printed records in electronic format. While IPRA does not preclude a public body from providing that option, IPRA does not authorize a public body to charge a per page fee for converting a printed record to electronic format. IPRA permits the public body to charge a per page fee for printed copies only if the requester asks for printed copies. *See id.* § 14-2-9(C)(2). A public body may not charge a requester for copies of a printed record the public body makes in order to convert the record to electronic format,[2] redact exempt information or otherwise for its own purposes.

The provisions of the Authority's IPRA policy that impose a fee on requesters for copying and scanning printed records to create a digital file are not authorized under Section 14-2-9 and violate IPRA. Consequently, Mr. Haussamen should not have been charged for converting printed documents into electronic format. He should have only been charged the actual costs of downloading or transmitting the electronic record as permitted under Section 14-2-9(C)(3) and (4).

3. Redacted Information in Lease Agreements

In response to Mr. Haussamen's March 12, 2017 request, the Authority provided five lease agreements between the Authority and tenants at the Spaceport. Except for Virgin Galactic, the lessees requested that the Authority redact certain information in the leases before releasing them to Mr. Haussamen. The redacted information included lease terms covering security, the lessees' use of the leased premises, rental amounts, user fees charged by Authority for the lessee's use of the premises and insurance coverage required by the Authority. The Authority explained that the redactions were proper under the Supreme Court's Rules of Evidence, which allow a person to "refuse to disclose and ... prevent others from disclosing a trade secret owned by [the person]." Rule 11-508 NMRA.

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. *Id.* § 14-2-6(C). IPRA lists exceptions for specific

[2] In most cases, there should be no need to use a copy of a printed public record rather than the original record in order to scan and convert the record to electronic format.

categories of public records and a catchall exception for public records "as otherwise provided by law." *Id.* § 14-2-1(A)(8). The "otherwise provided by law" exception includes "statutory … bars to disclosure, … "constitutionally mandated privileges," and privileges established by court rules. *Republican Party v. New Mexico Taxation & Revenue Dep't,* 2012-NMSC-026, ¶ 13, 283 P.3d 853. A public body cannot agree or promise to keep a public record confidential unless IPRA excepts the record from public inspection. *See* IPRA Compliance Guide, p. 7.

If the redacted information in the leases constitutes "trade secrets" covered by Rule 11-508, the Authority may properly rely on the rule to deny access to that information in response to a public records request. The rule does not define "trade secret." For purposes of Rule 11-508, the New Mexico Supreme Court has adopted the definition of "trade secret" contained in the Uniform Trade Secrets Act, NMSA 1978, §§ 57-3A-1 to -7 (1989). *See Pincheira v. Allstate Ins. Co.*, 2008-NMSC-049, ¶ 18, 144 N.M. 601. Under that Act,

> "trade secret" means information, including a formula, pattern, compilation, program, device, method, technique or process, that:
>
> (1) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
>
> (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

NMSA 1978, § 57-3A-2.

A definitive conclusion regarding the Authority's application of the protection for trade secrets in Rule 11-508 would depend on a detailed examination of the facts and circumstances that is beyond the scope of this determination. Nevertheless, based on the information the Authority has provided, we question whether the rule properly applies to the lease terms for rental amounts, user fees and insurance coverage requirements.

Our doubts stem from two characteristics of those terms. First, as the New Mexico Supreme Court has observed, IPRA was enacted "to give practical effect to [the] principle" that "[o]ur democratic system of government necessarily 'assumes the existence of an informed citizenry.... Without some protection for the acquisition of information about the operation of public institutions ... the process of self-governance contemplated by the Framers would be stripped of its substance.'" *Republican Party*, 2012-NMSC-026, ¶ 1 (quoting *Houchins v. KQED, Inc.,* 438 U.S. 1, 31–32 (1978) (Stevens, J., dissenting)). *See also* NMSA 1978, § 14-2-5 ("all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees").

Records pertaining to a public body's finances, including expenditures and revenues, are

squarely within the category of "information about the operation of public institutions" that is accessible to the public under IPRA. Broad public access to those records plays an important role in discouraging wasteful spending of public funds and misconduct by government officials. By definition, provisions in a governmental lease agreement that relate to revenues collected by a public body and protection for taxpayer funds, such as rental payments, user fees and insurance coverage, are in the public domain. Those terms are "generally known to" and "readily ascertainable by proper means" to persons other than the lessee, which precludes them from constituting "trade secrets" protected by Rule 11-508.

Second, the terms describing required rental payments, user fees and insurance coverage are required by the public body. While the terms may be negotiated by the parties, they do not necessarily reveal any information provided by the lessee. This makes it difficult to understand how a party to a lease with a public body could claim that it "owned" the information reflected in the terms for rental payments, user fees and insurance coverage for purposes of preventing disclosure of those terms under Rule 11-508.

Although there appear to be no reported New Mexico cases directly on point, judicial opinions addressing the issue from other states generally hold that rental payments and similar terms in a government contract are not trade secrets for purposes of those states' open records laws. *See, e.g., Better Gov't Ass'n v. Village of Rosemont*, 82 N.E.3d 710 (Ill. Ct. App. 2017) (negotiated financial terms in a lease agreement between a private entity and a village, including rental amounts, were not obtained from the private entity and were not trade secrets exempt from public disclosure); *Newark Morning Ledger Co. v. New Jersey Sports & Exposition Auth.,* 31 A.3d 623 (N.J. Super. Ct. 2011) (financial terms negotiated by the state in promoter licensing agreements for use of a state-owned entertainment facility were not trade secrets or proprietary information excepted from public disclosure); *Providence Journal Co. v. Convention Center Auth.*, 824 A.2d 1246 (R.I. 2003) (terms of final contracts between a government agency and private parties, including rent charges for use of convention center, were subject to public's right of access).

Considering the New Mexico and other states' legal authorities discussed above, we believe it unlikely that a New Mexico court would conclude that terms in a lease agreement with a public body for rental payments, user fees, and insurance coverage, without more, qualify as trade secrets exempt from disclosure under IPRA. However, we are aware that the New Mexico Legislature passed an amendment to the Spaceport Development Act to include a provision exempting certain records from IPRA, NMSA 1978, Section 58-31-18. Our reading of Section 58-31-18 allows for some information in lease agreements to be redacted by the Authority. However, the lease agreement information currently withheld has not properly denied by the Authority, because of the Authority's reliance on the "trade secret" exception of Rule 11-508. More properly, if the Authority chooses to redact the lease information based on the Spaceport Development Act, the information would be redacted pursuant to the "otherwise provided by law" exemption of IPRA, with a citation to the

newly enacted Section 58-31-18. *See* § 14-2-1(A)(8) (Records covered by statutes that govern the confidentiality of records are not subject to the Act).

Going forward the OAG advises the Authority that the trade secret exemption of Rule 11-508 should not be cited when redacting similarly requested information from lease agreements in the future. The Authority should to cite to Section 58-31-18 specifically. At that point it is up to the Authority to properly articulate why the requested information is properly redacted under Section 58-31-18.

4. Blocked Twitter Accounts

Mr. Haussamen submitted a records request to the Authority on June 28, 2017, for a list of Twitter accounts the Authority had blocked from following the Spaceport's Twitter account. The Authority responded: "No such document exists. The Inspection of Public Records Act does not reference Twitter." Email to Heath Haussamen from Authority Records Custodian (June 29, 2017). The Authority's Response apparently concedes that Twitter accounts maintained by public bodies are "public records," but continues to maintain that "no list of blocked Twitter accounts exists" and would require the Spaceport to create a list.

The Authority's contention that no list of blocked Twitter accounts exists appears to be mistaken. According to the Twitter Help Center, a user is able to create, maintain and share a list of blocked accounts. *See* https://support.twitter.com/articles/20172663#. This means that if the Authority has blocked Twitter accounts, a list of those accounts is available to the Authority on twitter.com and is subject to public access under IPRA. *See also* Fla. Att'y Gen. Op., 2016 WL 3771076 (June 1, 2016) (if public official's tweets were public records, a list of accounts blocked from accessing those tweets would likely be a public record); Tex. Att'y Gen. Ltr. Ruling No. OR2017-20783, 2017 WL 4340796 (Sept. 12, 2017) (list of Twitter accounts blocked by lieutenant governor's official Twitter account were not excepted from public disclosure under Texas' Public Information Act).

Assuming the Authority has blocked certain accounts from following the Spaceport's Twitter account, the Authority is required to respond to Mr. Haussamen's request to inspect and copy its list of blocked accounts. As noted above, IPRA requires a public body to provide an electronic copy of a record available in electronic format if an electronic record is requested. *See* Section 14-2-9(B). Accordingly, the Authority must provide Mr. Haussamen with an electronic copy of its list of blocked Twitter accounts, by downloading the list, taking a screenshot or other appropriate means.

5. Failure to Respond to May 4, 2017 Records Request

By email dated May 4, 2017, Mr. Haussamen requested, among other records, a copy of the minutes of the Authority governing board's March 29, 2017 meeting. The Authority did not respond to Mr. Haussamen's request until he inquired about the request by

telephone on May 18, 2017. On May 19, the Authority provided Mr. Haussamen with a copy of the draft minutes for the March 29 meeting.

In pertinent part, IPRA provides:

> A custodian receiving a written request shall permit … inspection immediately or as soon as is 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…. The three-day period shall not begin until the written request is delivered to the office of the custodian.

§ 14-2-8(D).

As admitted in the Authority's Response, the Authority did not permit inspection of the March 29 meeting minutes within three business days of Mr. Haussamen's request and failed to provide a written explanation of when the records would be available for inspection, as required by Section 14-2-8(D). The Authority ultimately complied with its obligation to provide Mr. Haussamen with the minutes within fifteen days of the request. *See Derringer v. State Livestock Board*, 2003-NMCA-073, ¶ 15, 133 N.M. 721 (a public body is not liable for damages under IPRA in an action brought after the public body has provided responsive records), *cert. denied,* 133 N.M. 727 (2003). Nevertheless, the Authority's failure to provide Mr. Haussamen with a written response within three business days of his request violated IPRA.

6. Draft Meeting Minutes

OMA requires the governing board of a public body to keep written minutes of all open meetings. *See* NMSA 1978, § 10-15-1(G). Draft minutes "shall be prepared within ten working days after the meeting and shall be approved, amended or disapproved at the next meeting of a quorum." *Id.* All minutes, including draft minutes, "are open to public inspection." *Id. See also* Attorney General's Open Meetings Act Compliance Guide, p. 18 (8th ed. 2015) (available at the Office of Attorney General's website at www.nmag.gov).

As discussed above, Mr. Haussamen contacted the Authority on May 18, 2017 when he did not receive a response to his request for the minutes of the Authority board's March 29, 2017 meeting. According to Mr. Haussamen, he was told that draft minutes for the meeting were not yet ready. The Authority provided the draft minutes to Mr. Haussamen the next day, on May 19. From this, Mr. Haussamen concluded that the draft minutes had not been prepared within ten working days of the March 29 meeting, as required by OMA.

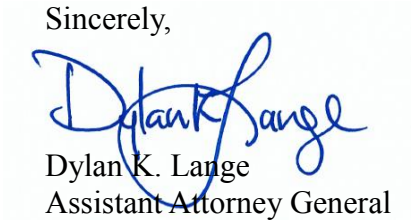
The Authority's Response explains that the Authority routinely prepares draft minutes within ten working days of a meeting but that, at the time of Mr. Haussamen's records request, the staff member who prepared the minutes kept them in his possession until the

governing board approved them. According to the Authority's Response, that staff member was absent when Mr. Haussamen asked about the draft minutes for the March 29 meeting, so the draft minutes were not immediately available. The Authority states that it has since changed its policy so that the staff member who prepares the draft minutes now sends them to other staff members immediately after they are prepared. This ensures that draft minutes are available for public inspection even when the staff member responsible for preparing the minutes is absent.

Although not entirely free from doubt, we believe the Authority has provided a plausible explanation for why the draft minutes of the Authority board's March 29 meeting were not available when Mr. Haussamen inquired about them on May 18, 2017. Without additional evidence, we are unable to conclude, as Mr. Haussamen contends, that the draft minutes were not available because the Authority failed to prepare them within ten working days of the March 29 meeting.

To summarize, we have determined that the Authority violated IPRA's provisions by failing to respond to a public records request within three business days, citing the wrong exemption to redact information contained in public records, and charging unauthorized fees for copies of public records. In conformity with this determination, please review and amend any deficient IPRA procures followed by the Authority to ensure the compliance with state law, and produce any records, improperly withheld or not produced. If you have any questions about this determination or IPRA in general, please let me know.

Sincerely,



Dylan K. Lange
Assistant Attorney General

cc: Heath Haussamen