

## **\$9 Million Lawsuit Filed against Education Department for 232 Violations of IPRA Law**

Press Release: September 6, 2017

Contact: Barbe Awalt, LPD Press/Rio Grande Books, 505/344-9382, [PaulLPD@aol.com](mailto:PaulLPD@aol.com)

Los Ranchos book publisher, Barbe Awalt, Senior Partner of LPD Press/Rio Grande Books, has filed a third lawsuit against the New Mexico Public Education Department and NMPED Custodian of Records, Beverly Friedman, for \$9,427,800. The lawsuit, filed in the Second Judicial District Court in Albuquerque, asserts that New Mexico Public Education Department (NMPED) and Beverly Friedman, violated the Inspection of Public Records Act (IPRA) in 199 "3-day" letters by putting the wrong wording on the letters and 33 letters that were completely missing. The wording is very specific by law – NMSA 1978, 14-2-8, that specifies 15 days or calendar days must be used. NMPED used 15 business days from March 10, 2016, to October 7, 2016, even though for years NMPED had used the correct wording for years and changed back in October of 2016, when Ms. Awalt pointed out to NMPED, numerous times, that NMPED was using the wrong wording. Using the business days wording gives NMPED extra days to fulfill IPRA requests that violates the IPRA law and gives extra time to fulfill IPRA requests by NMPED.

IPRA law states that a penalty for violating the IPRA law is up to \$100 per day per violation that is 199 letters. Letters included in the legal action include: the Albuquerque Journal, Santa Fe New Mexican, Santa Fe Reporter, Las Vegas Optic, The Associated Press (AP), New Mexico Political Report, KOB TV4, New Mexico Foundation for Open Government, CBS News, NAACP, in addition to many law offices, students, teachers, organizations, businesses, and data collectors.

According to records obtained by Ms. Awalt through IPRA, NMPED and Ms. Friedman have a pattern of violating IPRA with IPRA Complaints that the Office of the Attorney General (OAG) has warned about many times and are on the OAG website. Ms. Friedman has given workshops on the IPRA law and Awalt contends that Ms. Friedman knows what the IPRA law entails and Ms. Friedman has handled IPRA requests for NMPED for 17 years. The Office of the Attorney General also publishes free information for individuals and government agencies, an IPRA Guideline Compliance book so mistakes are not made.

According to Dylan Lange, Assistant Attorney General at OAG, "we recommend that PED review its procedures for responding to public records requests and take any measures needed to ensure that it consistently responds to the three-day response requirement of Section 14-2-8(D)." Ms. Awalt asserts that the violations are a serious matter and have, in fact, broken the IPRA law. Dylan Lange's opinion is being used in the lawsuit by verifying the wrong wording was used and IPRA was also violated by not including documents requested by Awalt – also in the lawsuit. There are 33 documents that still haven't surfaced.

Mr. Lange says that using that wrong wording wasn't used to mislead anyone even though it was done for over seven months. Mr. Lange doesn't say how he knows the wording wasn't meant to mislead anyone. The wording was not an accident and had to be changed and changed back by design. Awalt asserts that the law is specific about what can be done and NMPED gets away with not following IPRA law. The IPRA law does not allow for "accidents" or "not misleading." Awalt asked who at NMPED ordered that the wording be changed but NMPED refused to give the information. Awalt says, "Who ordered the change and who ordered the wording to be changed back will be asked for at trial so we all know who did the deeds." Robert McEntyre, spokesperson at NMPED, said that Awalt was, "retaliating" and "trying to settle the score" by using IPRA. Awalt asserts that using IPRA is a right all citizens have by law and is not retaliation or settling the score.

Barbe Awalt is not a crack-pot or serial lawsuit filer. Her first lawsuit in 2016, was for other IPRA violations and that suit had a monetary settlement through Mediation. The second lawsuit is for Breach of Contract - why NMPED used \$200,000 of state tax money to buy books in the 2016 Governor's First Grade Book Initiative when three New Mexico publishers bid unsuccessfully and two New Mexico publishers had lower bids than the winning books from out-of-state. It is the Initiative that unearthed the IPRA documents and violations. LPD Press/Rio Grande Books is the largest, independent book publisher in New Mexico. In 2014, 2015, and 2017, LPD Press/Rio Grande Books won a part of that year's Initiative contract while the majority of the Initiative contracts went to an out-of-state publishers.

According to Awalt, "The interesting thing about this IPRA lawsuit is that if I am successful in my lawsuit, anyone can request the same documents and use my lawsuit as precedent. There is the potential that the actions of NMPED may bankrupt New Mexico to the tune of millions of dollars. This is very sad and shows how NMPED does not take IPRA seriously or that NMPED is not fair and welcoming to New Mexico citizens. I wonder what else violates the IPRA law."

This summer, The Albuquerque Police Department lost an IPRA lawsuit for thousands of dollars. The Plaintiff and his lawyer were awarded damages by the same Court.

Awalt asserts, "If we, as citizens, violated any law, we would have to take responsibility and pay the price. It seems NMPED has someone looking out for them and allows them to break the IPRA law. This is a clear case of a double standard." Awalt has still more IPRA violations to act upon.

STATE OF NEW MEXICO  
COUNTY OF BERNALILLO  
SECOND JUDICIAL DISTRICT COURT

BARBE AWALT, *pro se*  
Petitioner

v.

NEW MEXICO PUBLIC EDUCATION DEPARTMENT (NMPED)  
And BEVERLY FRIEDMAN, Custodian of Records NMPED  
Respondents

**VERIFIED PETITION FOR WRIT OF MANDAMUS FOR PRODUCTION  
OF PUBLIC RECORDS AND MONETARY DAMAGES OF \$9,427,800**

COMES NOW, Plaintiff Barbe Awalt, *pro se*, files this Petition against the New Mexico Public Education Department (NMPED) and Beverly Friedman, Custodian of Records of NMPED, for violation of the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 to -12, (1947, as amended through 2013).

Petitioner alleges that:

**PARTIES, JURISDICTION, AND VENUE**

1. The Petitioner is a resident of Bernalillo County and is entitled to inspect public records by NMSA 1978, Section 14-2-5 (A, C, D, F, G).
2. Respondent New Mexico Public Education Department (NMPED) is located in Santa Fe and is a government agency of New Mexico.
3. Respondent Beverly Friedman is the Custodian of Public Records for the New Mexico Public Education Department (NMPED).
4. Respondent NMPED is a “public body” as defined pursuant to the Inspection of Public Records Act (IPRA), and is, therefore, subject to IPRA Section 14-2-6(F).

5. Respondent Beverly Friedman is the designated records custodian for NMPED. In this capacity, Ms. Friedman is responsible for receiving, processing, and ensuring the proper response for inspection under IPRA.
6. The denial of access of public records and violation of IPRA occurred in Santa Fe County to a Bernalillo County business owner and tax-payer requesting IPRA records, therefore venue and jurisdiction is properly before this court.
7. The Petitioner does not request a jury trial and is open to Mediation to save the Court time and money. The Petitioner requests a speedy trial. Petitioner requests recording.
8. In transparency, Respondent Friedman husband's photo and quote appear in one of Petitioner's book publications.

#### **FACTUAL ALLEGATIONS**

9. On December 20, 2016, Petitioner Barbe Awalt emailed an IPRA request to Beverly Friedman (NMPED). Attached hereto as **Exhibit A**.
10. The December 20, 2016, Inspection of Public Records Act (IPRA) #16-345 request sought all the three-day letters regarding IPRA compliance from NMPED and Ms. Friedman from January 1, 2016 to December 18, 2016.
11. The IPRA #16-345 request sought "ALL, EVERY, EACH" three-day letters in response to IPRA requests sent by Beverly Friedman and NMPED from January 1, 2016 to December 18, 2016.
12. On December 30, 2016, Ms. Friedman sent a response re: IPRA #16-345, regarding requested three-days letters sent as per IPRA. The response contained a listing of three hundred forty seven (347) IPRA requests during

the time period but NMPED only provided three hundred and fourteen (314) letters. The response was missing thirty three (33) letters. Petitioner sent an email to Ms. Friedman on January 23, 2017, alerting her to the missing letters. At no time did NMPED and Ms. Friedman assert that the request was burdensome or denied. NOTE: These thirty-three (33) records have not been produced to date by NMPED or Ms. Friedman; the request is now outstanding and unfulfilled for over two hundred forty-five (245) days. The thirty- three (33) records have been substantiated by the Office of the Attorney General (Dylan Lange Letter, June 8, 2017). **Attached hereto Exhibit B, C.**

13. The Table of Contents of the December 30, 2016, NMPED computer disc response from Ms. Friedman and NMPED for IPRA #16-345, indicates that there were 347 IPRA requests between January 1, 2016 and December 21, 2016, but only three hundred fourteen (314) records were provided: thirty-three (33) records were missing. Attached hereto **Exhibits D, E, F, G, H.** It was explained by the Assistant Attorney General Dylan Lange in a letter June 8, 2017 to Dawn Mastalir – Acting Chief Counsel of NMPED, that for the thirty three (33) records in question there were no three-day letters. But Lange’s letter of June 8, 2017, to Mastalir, states, “ For the remaining seven (7) requests, PED acknowledges that it failed to send three-day letters in response to four (4) of the requests and states that it sent burdensome letters instead of three-day letters in response to three (3) of the requests.” “PED failed in seven (7) instances to meet the three-day response requirement of Section 14-2-8(D).” Therefore, NMPED failed or denied an

explanation of the seven (7) letters denied in response to the Petitioner.

Petitioner has no idea about the subjects or the people requesting the seven (7) letters. Because the Petitioner has not been made whole by the fulfillment of these documents, NMPED and Ms. Friedman are in violation of the IPRA.

14. Petitioner filed a Complaint with the Attorney General's Office for the missing Letters and violating "business" v "calendar or days." on January 23, 2017 in IPRA #16-345. Attached hereto **Exhibit I**.

15. Petitioner asserts (and is supported by Dylan Lange, Assistant Attorney General) that NMPED never gave the Petitioner the seven (7) letters in question. The letters in question should have be revealed to the Petitioner when the Attorney General's Office was investigating the Complaint of #16-345 from January 24, 2017 to June 8, 2017, either from the OAG or NMPED. They were not. In fact, the seven (7) letters still have not surfaced.

16. On June 27, 2017, Petitioner filed another Complaint to the Attorney General's Office against NMPED and Acting Attorney General Dylan Lange.

17. On Wednesday, August 9, 2017, an un-named assistant from the Attorney General's Office called the Petitioner and said NMPED was allowed to violate IPRA by not furnishing all documents. She further stated that NMPED did not violate IPRA by writing fifteen (15) business days as opposed to the lawful language of fifteen (15) days or calendar days on three-day letters specified by IPRA law – NMSA 1978, Section 14-2-8D. One hundred ninety nine (199) letters had the wrong wording on the three-day letters – "business" and not "days" or "calendar days." The letters were changed to the wrong wording on

March 10, 2016, and back to the correct wording on October 7, 2016. NMPED and Ms. Friedman were told by email of the incorrect wording on July 27, 2016, by the Petitioner. NMPED was also told about the errant wording in case: D 202 CV 2016-04221 (July 10, 2016). Attached hereto **Exhibit J**.

18. The OAG assistant also stated that a male attorney (un-named) from OAG would call either August 9 or 10, and he was very busy being “compartmentalized.” He has never called. Petitioner has no idea what being compartmentalized means.

19. August 15, 2017, the Petitioner sent a letter by email and snail mail to Patricia Salazar OAG, Dylan Lange Assistant Attorney General, Attorney General Hector Baldaras, Dawn Mastalir NMPED, Beverly Friedman NMPED, outlining violations to IPRA that occurred and why Dylan Lange’s letter of June 8, 2017, was in error. The footnote in Lange’s letter of June 8, 2017, states, “PED did not intend to mislead requesters...” Petitioner asserts that NMPED was told in writing and verbally, before December 20, 2016, that they were using the wrong wording. Additionally, NMPED was using the correct wording until March 10, 2016, and then changed it to the wrong wording and NMPED made no effort to correct this for over five hundred forty-one (541) days. The change did not happen by accident and NMPED will not divulge who ordered the change. The wording was then changed again on October 7, 2016, back to the correct wording. The letter outlined: violations of Section 14-2-8D, the mission of the OAG to enforce IPRA from OAG’s IPRA Compliance Guide, and Beverly Friedman’s presentation of IPRA

workshops even though she has been cited many times. Attached hereto

**Exhibit K, L. M.**

20. Petitioner requested the documents to support case: D-202-CV-2016-05643 that deals with irregularities in the NMPED bid process and why Petitioner's company, LPD Press/Rio Grande Books, was not awarded any part of the taxpayer \$200,000 contract in the 2016 Governor's First Grade Reading Initiative and why all of the contracts were awarded to out-of-state publishers. LPD Press/Rio Grande Books was awarded partial bids in 2014 and 2015. LPD Press/Rio Grande Books submitted lower bids than the winning publishers. The Petitioner attempted to find out the logic behind NMPED negating their own deadline and requirements for certain publishers.
21. Although Dylan Lange's letter asserts that, "The complaint also contends that PED violated IPRA by stating in its three-day letters that PED would respond within 15 "business' days rather than "calendar" days. PED's response states that PED did not intend to mislead requesters and responded to public records requests within 15 calendar days as required by Section 14-2-8(D)." Petitioner asserts that the Lange letter was indeed wrong. The wording on three-day letters was correct for many years prior and changed on March 10, 2016. Petitioner asked through IPRA who ordered the change and was not given the information. NMPED was aware that the wording was wrong. The wording in error was used until October 7, 2016, and was changed back to comply. The change had to be manually typed in and was not an accident. Petitioner also told NMPED in writing of the error: July 5, 2016,

July 10, 2016, July 27, 2016. Petitioner asserts that the change was intentional and could result in as many as eight (8) additional days to comply to IPRA requests but the eight (8) days violates IPRA. Respondents also used the wording in error on three-day letters used for evidence in D 202 CV 201604221. Ms. Friedman gave IPRA workshops explaining that the correct wording is “calendar or days” not “business.” Attached hereto **Exhibits N**. Ms. Friedman knew that a change would violate IPRA law. Dylan Lange also asserts that NMPED, “responded to public records requests within fifteen (15) calendar days,” whereas in fact, Petitioner has several of her own IPRA requests that were not responded to in fifteen (15) calendar days. Attached herein Petitioner, again, tried to get the missing thirty three (33) letters in IPRA request #17-056 and they were still not available. Attached hereto **Exhibit O**.

22. Petitioner’s IPRA requests were even sent to Paul Rhetts (September 5, 2016) and not to the Petitioner who actually submitted the request. Attached hereto **Exhibit P, Q**.

23. NMPED has failed to file other’s IPRA requests. Attached hereto **Exhibit R**.

#### **THE INSPECTION OF PUBLIC RECORDS ACT**

24. Every person has a right to inspect public records of New Mexico. Section 14-2-1.

25. The public is entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees, Section 14-2-5.

26. It is the intent of the legislature and the public policy of the State of New Mexico, that to provide the public with such information is an essential function of a representative government and an integral part of the routine duties of public officers and employees. Section 14-2-5.
27. IPRA defines a “public body” as the “executive, legislative and judicial branches of state and local governments and all advisory board commissions, committees, agencies, or entities created by the constitution or any branch of government that receives any public funding, including political subdivisions, special taxing districts, school districts and institutions of higher education.” Section 14-2-6(F)
28. IPRA defines “public records” as “as documents, papers, letters... 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.” Section 14-2-6(G)
29. “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.” Section 14-2-8(D).
30. Upon receiving a written request, a records custodian shall permit the inspection immediately or as soon as practicable under the circumstances, but not later than fifteen (15) days after receiving a written request. Section 14-2-8(D).
31. A records custodian may take additional time if the custodian determines

that a request is excessively broad or burdensome. In all circumstances, however, the custodian must allow inspection within a “reasonable period of time.” Failure to allow inspection within a reasonable period of time is a violation. The custodian shall provide written notification to the requester within fifteen days of receipt of the request that additional time will be needed to respond to the written request. Section 14-2-10. NOTE: On July 27, 2017, Second Judicial District Court Judge Nancy Franchini, found in case D 202 CV 201700970, that the Albuquerque Police Department (APD) violated IPRA for failing to produce documents for 124 days. She stated, “A reasonable period of time for APD to produce the requested documents was 90 days, not seven months (October 28, 2016 to May 30, 2017). IPRA #16-345 has not been filled as requested for more than seven (7) months, (December 30, 2016 to present).

32. An action to enforce IPRA can be brought by a person whose request has been denied. Section 14-2-12(A). NOTE: Respondents have not provided the seven (7) missing records and that constitutes a denial of access of those records for over two hundred forty-five (245) days.
33. When denying a request for public records a records custodian must provide a written explanation of the denial that: “(1) describe(s) the records sought; set(s) forth the names and titles or positions of each person responsible for the denial, and (3) (deliver or mail) to the person requesting records within fifteen days after the request for inspection was received.” Section 14-2-11(B). NOTE: Petitioner has not received any explanation from Ms. Friedman

or NMPED as to the denial of access to the seven (7) records for over two hundred forty-five (245) days.

34. A custodian who does not deliver or mail, a written explanation of denial within fifteen days after receipt of a written request for inspection is subject to an action to enforce the provisions of the IPRA and the requester may be awarded damages. Damages shall: “(1)be awarded if the failure to provide a timely explanation of denial is explanation of denial is determined to be unreasonable; (2)not exceed one hundred dollars (\$100) per day...” Section 14-2-12(B).
35. IPRA provides that a district court may issue a writ of mandamus or order an injunction or other appropriate remedy to enforce the provisions of IPRA. Section 14-2-12 (B).
36. IPRA law states, “A custodian receiving a written request shall permit the inspection immediately or as soon as is practicable under the circumstances, but not later than fifteen (15) days after receiving a written request.” Section 14-2-8(D) Page 33 D, of the IPRA Compliance Guide from OAG states, “Inspection should be allowed no later than fifteen (15) calendar days after the custodian receives the request.” The IPRA law does not say business days and only says “days” or “calendar days”. The IPRA law does not say that a government agency should “generally” comply for “most public records requests it receives, PED complies”, and PED should take any measures “needed to ensure that it consistently responds.” (Lange letter June 8, 2016) This statement by Dylan Lange in the Attorney General’s Office, is offering

excuses for NMPED not following IPRA to the fullest intent of the law.

37. The Inspection of Public Records Act is a law and should be followed all the time, not “generally” as in Dylan Lange’s letter. Government agencies have to be “consistent” when following IPRA and NMPED needs to “properly provide records responsive to requests.” The OAG is advocating IPRA law not be followed in regards to the thirty-three (33) letters not provided by NMPED and the seven (7) letters that NMPED failed to provide three-day letters in addition to using the wrong wording. This is an unusual stance for an Assistant Attorney General in regards to following the law.

**COUNT ONE: VIOLATION OF IPRA**

38. Petitioner hereby incorporates by reference all of the foregoing facts and allegations contained in its Petition.

Respondents have violated IPRA by:

- A. Failure to produce all the responsive records requested to Petitioner Barbe Awalt as required by IPRA. Thirty three (33) records were not provided by Respondents for over two hundred forty-five (245) days.
- B. Not allowing the inspection or otherwise responding to the entire Request (burdensome, denial) within fifteen (15) calendar days from the date the custodian received the request. Thirty three (33) records for over two hundred forty-five (245) days were not provided.
- C. Failing to allow for the inspection of all responsive records to Petitioner Barbe Awalt in a reasonable period of time. Thirty three (33) records not provided for two hundred forty-five (245) days.

- D. Failure to issue a proper written denial or otherwise properly explain the basis of their denial for documents not provided.
- E. Failing to rely on a recognized exception to withhold any responsive records or otherwise failing to articulate their reliance on such exception. None of the records requested fall under this exemption.
- F. Failing to comply with the spirit and intent of the law by using wording contrary to IPRA law, therefore misleading the public. One hundred ninety nine (199) letters were worded wrong between Three hundred thirty (330) and five hundred forty-one (541) days even after NMPED and Ms. Friedman were informed of the incorrect language for the first time on July 10, 2016. Ms. Friedman and NMPED used intent to change the wording. Ignorance of the law is not an excuse and the law applies to everyone.

**WHEREFORE,** Petitioner requests that this Court:

1. Declare the Respondents have violated IPRA by failing to respond to Petitioner Barbe Awalt's records request as required by law and subject to the fees and damages required by the law. Violations of IPRA include: (1) non-provided records thirty three (33) times, by \$100 for each, by two hundred forty-five (245) days = \$808,500 and; (2) erroneous wording violating IPRA one hundred ninety nine (199) times, by \$100 for each, between three hundred thirty (330) and five hundred forty-one (541) days = \$8,619,300 total equaling \$9,427,800;
2. Issue a writ of mandamus compelling Respondents to produce and identify

- all requested records without further delay, NMPED produce all similar documents in the future, and ensure that future requests to Respondent under IPRA are completed in a timely manner and with full compliance;
3. Hold Respondents to the intent and letter of IPRA for its violations to the fullest extent of the law by ordering any other relief that the Court deems just and proper, including but not limited to money damages and cost of case. Further, it is suggested to the Court, that Respondents be ordered to train or retrain the Custodian of Public Records or hire a more experienced person to deal with and process requests since NMPED has such a pattern of behavior as documented by OAG.

### **CONCLUSION**

It is thought that NMPED could understand how to follow the Inspection of Public Records Act. It isn't a new law and the OAG publishes a Compliance Guide for IPRA. It is also strange that a government agency, the New Mexico Public Education Department, can't read, understand, and follow the rules. It is sad that Dylan Lange doesn't understand that someone in NMPED made the decision to change the wording after years, physically wrote "business" and decided to change the wording back to comply with the IPRA law. This is the definition of "intent" and someone in the OAG should know that. Dylan Lange presents no evidence in his letter of June 8, 2017, that he was aware of the mindset of Ms. Friedman wanting to mislead or not mislead many IPRA requesters. Almost at the same time, Dylan Lange found the Spaceport violated IPRA for denying documents. It calls into question that students in

New Mexico are not being told to follow rules if NMPED can't do it themselves. Petitioner has, many times, brought up the problems of NMPED's non-compliance with the IPRA law and it has fallen on deaf ears. If the Petitioner is successful with this action, anyone can also bring suit for the same violations of IPRA and use this case as precedent, costing New Mexico millions of dollars. This was irresponsible on the part of Ms. Friedman and NMPED to allow these violations of IPRA to happen. Almost 60% of 3-days IPRA letters had the wrong wording and Petitioner alleges this was misleading to citizens who attempted to follow IPRA law. IPRA is "not an ax to grind" or "settling the score." Petitioner tried to avoid the trial process. Attached hereto **Exhibits S**.

Respectfully Submitted:

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Barbe Awalt  
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I hereby certify that Respondents Beverly Friedman & New Mexico Public Education Dept. were sent this lawsuit/subpoena on September 1, 2017.

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Barbe Awalt

NMPED  
c/o Dawn Mastalir – Chief Counsel  
300 Don Gaspar  
Santa Fe, New Mexico 87501

Beverly Friedman  
Custodian of Records NMPED  
300 Don Gaspar  
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STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

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June 8, 2017

Dawn Mastalir  
Acting General Counsel  
Public Education Department  
300 Don Gaspar  
Santa Fe, NM 87501-2786

**Re: Inspection of Public Records Act Complaint – Public Education Department**

Dear Ms. Mastalir:

We have reviewed the complaints dated January 23 and January 24, 2017 submitted by Barbe J. Awalt alleging that the Public Education Department (“PED”) violated the Inspection of Public Records Act (“IPRA”), NMSA 1978, Sections 14-2-1 to -12 (as amended through 2013), and your response on behalf of PED to our inquiry regarding the complaints. *See* letter from Dawn Mastalir, PED Acting General Counsel (Feb. 28, 2017) (“PED’s Response”). The complaints allege that PED violated IPRA by (1) failing to provide an explanation for denying inspection of certain public records requested by Mrs. Awalt and (2) failing to acknowledge Mrs. Awalt’s requests for public records within three business days. Based on our review, as discussed below, we conclude that PED’s handling of Mrs. Awalt’s public records requests generally complied with IPRA. Nevertheless, as discussed below, it appears that PED has not consistently followed IPRA’s requirements for acknowledging public requests within three business days.

January 23, 2017 Complaint

The complaint dated January 23, 2017 alleges that PED did not allow inspection or acknowledge four public records requests made on January 9, 2017 (#17-021, #17-029, #17-030 and #17-032) within three business days, as required by Section 14-2-8(D). From PED’s Response, it appears that, as the complaint alleges, PED did not provide a written acknowledgement of the four requests within three business days. Instead, PED responded to the requests within 15 calendar days and explained that because the requests were burdensome, PED would require additional time to respond, as allowed under Section 14-2-10.

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.” Section 14-2-8(D). 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.” *Id.* If a records custodian determines that a request is “excessively burdensome or broad,” the records custodian must “provide written notification to the requester within fifteen days of receipt of the request that additional time will be needed to respond to the written request.” *Id.* Section 14-2-10.

Section 14-2-8(D) requires a public body to respond to a written request for public records within three business days either by allowing inspection or by providing a written explanation of when the public body will respond to the request. IPRA’s notification requirements under Section 14-2-10 for requests that are deemed excessively burdensome or broad are independent of and do not replace Section 14-2-8(D)’s requirement for a response within three business days. Because PED did not provide records responsive to Mrs. Awalt’s requests or explain when PED would respond within three business days of receiving the requests, we conclude that PED violated IPRA.

#### January 24, 2017 Complaint

According to the complaint dated January 24, 2017, Mrs. Awalt made a written request (#16-345) on December 20, 2016 for “all 3-day letters” PED sent in 2016. The complaint alleges that PED responded to Mrs. Awalt’s request by providing three-day letters for 317 of 347 public records requests made in 2016 and did not explain why PED failed to provide three-day letters for the other 30 requests.<sup>1</sup>

In response to our inquiry regarding the complaint, PED thoroughly researched the details of its response to Mrs. Awalt’s records request #16-345. PED determined that it had not provided 33 three-day letters in response to Mrs. Awalt’s request. The letters were not provided because PED did not send three-day letters in response to 33 records requests it received in 2016. From PED’s Response, it appears that 26 of the 33 requests did not require three-day letters, primarily because PED provided access to responsive records, if any, within three days of receiving the requests.<sup>2</sup> For the remaining seven requests, PED acknowledges that it failed to send three-day letters in response to four of the requests and states that it sent burdensome letters instead of three-day letters in response to three of the requests.

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

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<sup>1</sup> The complaint also contends that PED violated IPRA by stating in its three-day letters that PED would respond within 15 “business” days rather than “calendar” days. PED’s Response states that PED did not intend to mislead requesters and responded to public record requests within 15 calendar days, as required by Section 14-2-8(D). Absent additional information suggesting otherwise, we believe that PED’s reference to “business days” in the three-day letters was inadvertent and did not, by itself, violate IPRA.

<sup>2</sup> PED’s Response shows that PED provided responsive records within three days of receiving 24 of the requests. The other two requests did not require a response because PED was not the proper custodian of records for one of the requests and the other request was withdrawn by the requester.

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.* Section 14-2-8(B). *See also* Attorney General's IPRA Compliance Guide, p. 32 (8<sup>th</sup> ed. 2015) ("IPRA Compliance Guide") (available online at [www.nmag.gov](http://www.nmag.gov)).

IPRA requires a public body to provide only those records that exist and respond to a public records request. PED properly responded to Mrs. Awalt's request #16-345 by providing her with access to all three-day letters it sent in response to public records requests in 2016. Contrary to the complaint's allegations, PED did not deny inspection of responsive public records. The three-day letters the complaint contends PED omitted did not exist at the time of Mrs. Awalt's request. Because PED did not deny inspection of responsive records, PED was not required to provide Mrs. Awalt with a written explanation. *See* Section 14-2-11 (requiring a records custodian to provide a requester with "a written explanation of the *denial*" of a request to inspect public records (emphasis added)).

While we conclude that PED did not violate IPRA by denying inspection of public records responsive to Mrs. Awalt's records request, PED's Response shows that, as with the inspection requests at issue in the January 23 complaint, PED failed in seven instances to meet the three-day response requirement of Section 14-2-8(D). As discussed above, that provision requires PED to provide responsive records, if any, or a written explanation of when PED will respond within three business days of receiving a public records request.

It appears that for most public records requests it receives, PED complies with its obligations under IPRA, including the three-day response required under Section 14-2-8(D). Even in the few instances where PED failed to send a three-day letter, PED properly provided records responsive to Mrs. Awalt's requests within fifteen days or, for burdensome requests, within the additional time PED requested for response. Although, the PED has generally complied with the requirements of IPRA, we recommend that PED review its procedures for responding to public records requests and take any measures needed to ensure that it consistently responds to the three-day response requirement of Section 14-2-8(D).

If you have any questions regarding this determination or IPRA in general, please let me know.

Sincerely,



Dylan K. Lange  
Assistant Attorney General

cc: Barbe J. Awalt