

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

August 30, 2019

VIA ELECTRONIC MAIL ONLY

Bernalillo County
W. Ken Martinez, Esq.
520 Lomas Blvd NW, Fl. 4
Albuquerque, NM 87102-2147
Email: kenmartinez@berncgo.gov

Re: Inspection of Public Records Act Complaint – Vincent Rodriguez

Dear Mr. Martinez:

This letter addresses the complaint submitted to the Office of the Attorney General by Mr. Vincent Rodriguez alleging that Bernalillo County (hereinafter the “County”) violated the Inspection of Public Records Act (“IPRA”), NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2019). Mr. Rodriguez alleges that the County charged an excessive fee in connection with Cary Schwanitz’s public records request dated June 19, 2019. Mr. Rodriguez otherwise does not allege that the County’s provision of records was incomplete. Nor does he claim that the County was untimely in responding to his request. Rather, his sole argument to our Office is that the County’s \$100 fee was unlawful under IPRA. The County did not respond to our June 26, 2019 inquiry letter into this matter. As explained in greater detail below, we agree with Mr. Rodriguez that the County violated IPRA by charging a fee in excess of its actual costs associated with providing him the requested records. We strongly advise the County to revise its fee policy and consider partially reimbursing Mr. Schwanitz.

Background

The Inspection of Public Records Act provides the public with access to “the greatest possible information” about their elected representatives and government. NMSA 1978, § 14-2-5. *See also Republican Party of New Mexico v. New Mexico Taxation & Revenue Dep’t*, 2012-NMSC-026, ¶ 38, 283 P.3d 853, 867 (observing “IPRA’s guiding purpose of promoting government transparency”). Accordingly, the statute is broadly written and interpreted in favor of transparency. Courts employ a “presumption in favor of the right to

inspect.” Attorney General’s Inspection of Public Records Act Compliance Guide, p. 7 (8th ed. 2015) (“IPRA Guide”).

Mr. Rodriguez’s complaint arises out of a public records request submitted by Mr. Cary Schwanitz to the County on June 19, 2019.¹ Specifically, Mr. Schwanitz sought a “video tape and reports” associated with a death that occurred in February 2019 at the Metropolitan Detention Center. To the County’s credit, it responded one day later, on June 20, 2019, offering to make all responsive records available (apparently without redacting or withholding any records). That email to Mr. Schwanitz stated that he could inspect the responsive records at the County’s offices, without obtaining a copy, free of charge. However, it also informed him that he would be required to pay a copying fee of \$100 in order to obtain electronic copies. This, the County stated, was the standard charge for “4 DVDs.” With respect to its fee policy, the County elaborated: “If you would like to purchase these items, the first 5 pages are provided free of charge, the remaining pages are .50¢ per page (hard copy or electronic) and/or \$25.00 per CD/DVD.” Mr. Schwanitz paid the \$100 required by the County and successfully obtained copies of the requested records, but Mr. Rodriguez now argues that this fee was excessive, citing to a previous opinion issued by our Office. *See* N.M. Atty. Gen. Letter to Mark A. Basham, Santa Fe Regional Emergency Communications Center (Apr. 11, 2019) (“Santa Fe RECC Determination”).

Fees for Electronic Records

Mr. Rodriguez has provided our Office with a copy of the County’s fee policy and we have independently obtained it online.² This policy confirms that the County charges a flat \$25.00 fee for any CD (and presumably DVD) containing records. In addition, the County charges requestors “\$0.50 per page” for copies of electronic files. The County’s fee policy does not suggest that these fees are related to the actual costs associated with particular records requests.

As we have observed on a multitude of occasions in the past, IPRA distinguishes between fees for printed and electronic records. *See, e.g.*, N.M. Atty. Gen. Letter to Dr. Ebubekir Orsun, Albuquerque School of Excellence, at 3 (May 3, 2019) (stating that “allowable fees differ between paper and electronic copies”), Santa Fe RECC Determination, at 2 (explaining that, “Under IPRA, fees for printed records are allowed to be more robust than those for electronic records.”), and N.M. Atty. Gen. Letter to Patrick Hart, University of New Mexico, at 5 (Sep. 6, 2018) (noting that, “IPRA takes significantly divergent approaches, though, to printed and electronic copies.”). While all copying fees must be “reasonable” regardless of the form of the records themselves, Section 14-2-9(C)(1), public bodies may charge up to \$1.00 per page for most printed records. *See* § 14-2-9(C) (providing that public bodies “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”). On the

¹ We assume without knowing that both Mr. Rodriguez and Mr. Schwanitz are associated with KOAT TV in Albuquerque.

² The County’s fee policy is available on its website at <https://www.bernco.gov/uploads/files/CountyManager/IPRA%20Administrative%20Instruction.pdf>.

contrary, for electronic records public bodies are only allowed to charge their “actual costs” associated with transmitting or downloading the records. *See id.* (authorizing public bodies to charge “the actual costs associated with downloading copies of public records to a computer disk or storage device, including the actual cost of the computer disk or storage device” and “the actual costs associated with transmitting copies of public records by mail, electronic mail or facsimile”).

It is clear that the County’s flat fee of “\$25.00 per CD/DVD” is invalid under IPRA’s Section 14-2-9(C). As Mr. Rodriguez correctly observed, we reached an identical conclusion several months ago about the Santa Fe Regional Emergency Communication Center’s proposed \$30.00 flat fee for all records produced on CD’s. *See Santa Fe RECC Determination*, at 3 (concluding that, “A flat \$30.00 fee, charged to all requestors and not varied dependent on the circumstances, is almost by definition a violation of Section 14-2-9(C).”). As in that situation, here the County’s fee is entirely unrelated to its “actual costs,” as is demonstrated by the fact that its \$25.00 fee does not vary depending on the type or volume of records involved, or the circumstances of individual cases. With respect to the cost of the DVD itself, we are persuaded by Mr. Rodriguez’s complaint (to which he attached a copy of an Amazon.com DVD sales listing), and for that matter common sense, that \$25.00 far exceeds “the actual cost of the computer disk or storage device.” Section 14-2-9(C)(3). There is no question, in other words, that the County’s \$25.00 fee for the production of DVD’s or CD’s is excessive given the limitations set forth by IPRA.

In the interest of clarifying this issue and ensuring that the public’s statutory rights are respected, we would also note that the County’s “\$0.50 per page” fee for copies of electronic files is also almost certainly invalid. As with its DVD fee, this per-page fee runs afoul of IPRA insofar as it is unmoored from the County’s actual costs. Unless a public body can prove that, with respect to a particular records request, the page count of an electronic record is inherently connected with the costs associated with transmitting or downloading it, the public body cannot charge a per-page fee. This too is a conclusion that our Office has reached before. *See N.M. Atty. Gen. Letter to Patrick Hart, University of New Mexico*, at 6 (Sep. 6, 2018) (concluding that a per-page fee for electronic records “is presumptively invalid”).

Conclusion

Because we have concluded that its public records fee policy is not consistent with IPRA, we strongly advise the County to take remedial action. Most importantly, the County should revise the policy so that it adheres to IPRA’s statutory limitations. This means that for electronic records the County is limited to its actual costs associated with downloading or transmitting the records. In particular, the County should revisit its (apparently) inflated CD and DVD fee as well as its per-page charge for electronic records. In addition to these broad steps, we also think that the County should recalculate the proper fee for Mr. Schwanitz’s request and reimburse him, if appropriate.

Bernalillo County

August 30, 2019

Page 4

For your reference, a copy of the IPRA Guide is available on the website of the Office of the Attorney General at www.nmag.gov. If you have any questions regarding this determination or IPRA in general, please let me know.

Sincerely,

A handwritten signature in blue ink, appearing to read "John Kreienkamp", is written over a light blue rectangular background.

John Kreienkamp
Assistant Attorney General

Enclosure

cc: Vincent Rodriguez
Cary Schwanitz