



Attorney General of New Mexico

GARY K. KING
Attorney General

ALBERT J. LAMA
Chief Deputy Attorney General

November 27, 2007

Bruce R. Kite, General Counsel
New Mexico State University
P.O. Box 30001
Las Cruces, NM 88003-8001

Re: Open Meetings Act and Inspection of Public Records Act Complaints – New Mexico State University

Dear Mr. Kite:

The above-referenced complaints allege that New Mexico State University (“NMSU”) violated the Open Meetings Act, NMSA 1978, §§ 10-15-1 to -4 (“OMA”), and the Inspection of Public Records Act, NMSA 1978, §§ 14-2-1 to -14 (“IPRA”). See e-mail from Diana M. Alba, Sun-News Reporter to New Mexico Attorney General’s Office (July 27, 2007); e-mails from Heath Haussamen, Haussamen Publications, Inc. to New Mexico Attorney General’s Office (July 26, July 30 & Aug. 6, 2007). The complaints raise the following questions under OMA and IPRA:

1. Did the Board of Regents violate OMA when, in the face of questions about the availability of the agenda, the Board continued with its regular meeting on July 17, 2007, but delayed action until a subsequent meeting on July 23?
2. Does NMSU’s policy of not responding to e-mail requests to inspect public records violate IPRA?
3. May NMSU deny inspection of a document approved, but not signed, by the Board of Regents?
4. May NMSU deny inspection of records containing the identities of donors who made contributions to the NMSU Foundation?
5. May NMSU deny inspection of e-mail messages regarding the NMSU Foundation sent from, received by or copied to a NMSU e-mail address?

We have reviewed the complaints, your response on behalf of NMSU and the applicable law. Based on our review, as discussed in more detail below, we conclude that NMSU violated OMA at its July 17 meeting, as alleged in the complaints, but did not violate IPRA.

1. Violation of OMA at July 17, 2007 Regular Meeting

OMA applies to “[a]ll meetings of a quorum of members of any board ... of any state agency ... held for the purpose of formulating public policy, ... discussing public business or for the purpose of taking any action....” NMSA 1978, § 10-15-1(B). Meetings may be held only after reasonable notice is provided to the public, NMSA 1978, § 10-15-1(D), and meeting notices must include:

an agenda containing a list of specific items of business to be discussed or transacted at the meeting or information on how the public may obtain a copy of such an agenda. Except in the case of an emergency, the agenda shall be available to the public at least twenty-four hours prior to the meeting.

NMSA 1978, § 10-15-1(F).

A regular meeting of the Board of Regents was scheduled on July 17, 2007. The agenda for the meeting was posted, but evidently there was some question as to whether it was posted 24 hours before the meeting. Consequently, the Board determined that the July 17, 2007 meeting would be “informational only.” Minutes of July 17, 2007 Meeting, p. 1. At a subsequent meeting held on July 23, the Board voted on the items discussed but not acted on at the July 17 meeting.

Because the agenda for the July 17 meeting was not available to the public 24 hours before the meeting, as required by Section 10-15-1(F), the Board should have cancelled the meeting. Limiting the meeting to informational matters did not address the OMA violation. The agenda requirements of OMA are a prerequisite to any meeting of the Board where a quorum is present, including meetings where the Board merely discusses public business and does not take action.

Although the July 17 meeting violated OMA, further action by this office does not appear warranted. The minutes of the July 17 meeting reveal that the Board knew it was obliged to comply fully with OMA’s requirements and genuinely believed that, by not taking action, it avoided any violation. Under these circumstances, the Board’s public acknowledgement of OMA’s requirements and postponement of action until the July 23 meeting constitute sufficient corrective measures for purposes of OMA. *See* NMSA 1978, § 10-15-3(B) (allowing a public body to correct OMA violations).

2. E-Mail Requests to Inspect Public Records

IPRA provides:

Any person wishing to inspect public records may submit an oral or written request to the custodian. However, the procedures set forth in this section shall be in response to a written request. The failure to respond to an oral request shall not subject the custodian to any penalty.

NMSA 1978, § 14-2-8(A).

Both complaints allege that, in response to e-mail requests to inspect public records, NMSU asserted that it does not treat e-mail requests to inspect public records as valid. According to your response, NMSU's legal position is that e-mail requests are not "written" for purposes of IPRA, but, in practice, NMSU generally treats e-mail requests as written.

The Attorney General's Office has determined that, absent a statutory definition of "written," the proper treatment of e-mail requests to inspect public records is not clear. *See* Attorney General's IPRA Compliance Guide ("IPRA Guide"), p. 35 (4th ed. Jan. 2004). There are valid legal, policy and practical arguments on both sides of the issue. While, in our view, the best policy is to treat e-mail requests as written, we have concluded that each public body should review the competing arguments and adopt policies it finds appropriate for handling e-mail requests. *Id.*

3. Request to Inspect Unsigned Document

At its July 23, 2007 meeting, the Board of Regents approved an agreement between NMSU and the NMSU Foundation. According to the complaints, Ms. Alba made a request to inspect the agreement on the day of the meeting and her request was denied because the agreement had not been signed. It is unclear whether Ms. Alba's request was made verbally, in writing or by e-mail. In any event, your response represents that a copy of the agreement was provided to Ms. Alba on July 27.

IPRA provides that, with certain exceptions, "[e]very person has a right to inspect any public records of this state...." NMSA 1978, § 14-2-1(A). "Public records" for purposes of IPRA, are documents and other materials "that are used, created, received, maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained." NMSA 1978, § 14-2-6(E). A public body has 15 days after receiving a written request to permit or deny inspection of public records. NMSA 1978, §§ 14-2-8(D), 14-2-11(B).

NMSU allowed Ms. Alba access to the agreement within 15 days of receiving her request. Had inspection not been allowed in a timely manner, we would have determined

that NMSU violated IPRA. The agreement was a public record subject to IPRA, and we are not aware of an exception allowing a public body to deny access to a public record for the sole reason that it has not been signed.

4. Access to Donor Lists

Mr. Haussamen alleges that NMSU improperly denied his request for information about the identity of donors who made contributions to the NMSU Foundation. According to your response, NMSU denied access to the donor information because that information was a confidential record of the Foundation, a private non-profit organization.

As discussed above, IPRA requires public bodies, including NMSU, to allow inspection of public records they hold unless the records are covered by a legally recognized exception. Absent an exception, inspection of a public record may not be denied because the record was provided to the public body by an entity not covered by IPRA or under a promise of confidentiality, *see* IPRA Guide, p. 7. Accordingly, NMSU may not deny access to donor records it obtained from the Foundation unless there is a law, court rule or clear countervailing policy supporting nondisclosure.

The NMSU Foundation is subject to NMSA 1978, Section 6-5A-1(1992), which applies to private, non-profit organizations “whose principal and authorized purpose is to complement, contribute to and support, aid the function of or forward the purposes of a single agency through financial support, the contribution of services, goods, data or information that help or aid the agency in carrying out its statutory purpose and goals....” *Id.* § 6-5A-1(A)(2). An “agency” for purposes of the provision, includes “any public post-secondary educational institution.” *Id.* § 6-5A-1(A)(1). Covered organizations are not subject “to the provisions of the Open Meetings Act,” and their records, “other than the annual audit required under this section,” are not “public records” under IPRA.¹ *Id.* § 6-5A-1(D).

The annual audit referred to in Section 6-5A-1(D) is included in the written agreements between agencies and organizations required under Section 6-5A-1(B). An agreement must be entered into before an agency accepts property or funds from an organization and must include requirements that the organization:

if its gross annual income exceeds one hundred thousand dollars (\$100,000), have a financial accounting system considered adequate under customarily and currently accepted accounting standards and that the financial affairs of the organization be audited annually in accordance with

¹ Section 6-5A-1 does not refer to IPRA by title, but instead cites NMSA 1978, Sections 14-2-1 through 14-2-3. In 1992, when Section 6-5A-1 was enacted, Sections 14-2-1 through 14-2-3 constituted the law now known as the Inspection of Public Records Act. In 1993, IPRA was substantially amended to include, among other things, its current title. *See* 1993 N.M. Laws, ch. 258.

generally accepted governmental auditing standards by an independent professional auditor who would be required to furnish to the agency copies of his annual audit, which, *exclusive of any lists of donors or donations*, shall be a public record....

NMSA 1978, § 6-5A-1(B)(4)(a) (emphasis added).

Section 6-5A-1 provides that lists of donors or donations included in an organization's annual audit report are not public records even after the report is given to a governmental agency subject to IPRA. Apparently, the legislature intended to preserve the confidentiality of donor information maintained by organizations subject to Section 6-5A-1, regardless of who has custody of the information. We believe that this gives NMSU sufficient authority to deny requests to inspect records that reveal the identities of donors who make contributions to the NMSU Foundation.

5. E-Mail Messages Regarding the NMSU Foundation

Mr. Haussamen states that NMSU denied his request for all e-mail messages regarding the NMSU Foundation sent from, received by or copied to Rebecca Dukes' NMSU e-mail address from January 1, 2007 to July 31, 2007. We understand that Ms. Dukes is a vice president of NMSU and the Foundation's director. According to your response, the request was denied because the e-mails, although sent from and delivered to a NMSU e-mail address, were the Foundation's property.


For purposes of IPRA, "public records" include e-mail messages that are "used, created, received, maintained or held by or on behalf of any public body and relate to public business." NMSA 1978, § 14-2-6(E). The messages Mr. Haussamen requested arguably were held by NMSU, but we understand that they concerned only the Foundation, a private non-profit organization, not NMSU or NMSU business. We have not reviewed the e-mail messages in question, but if, as alleged, they relate exclusively to the Foundation's business, the messages do not "relate to public business" and are not "public records" subject to inspection for purposes of IPRA. *See, e.g., Griffis v. Pinal County*, 156 P.3d 418, 422 (Ariz. 2007) (e-mails generated or maintained on a government-owned computer system are not public records subject to disclosure if they relate solely to personal matters).

New Mexico courts have not addressed the status under IPRA of personal e-mail messages generated and received using an e-mail system owned by a state agency or university. Particularly here, where there is a close relationship between the Foundation and NMSU, it is possible that a New Mexico court would reach a different conclusion than we have regarding the public availability of Ms. Dukes' e-mail messages. For this reason, among others, NMSU officers and employees should be cautious about using

state university-owned information technology resources for personal matters they wish to remain private.²

Although we have determined that NMSU did not violate IPRA as alleged, the complaints raise interesting issues regarding the relationship between NMSU and the NMSU Foundation.³ In particular, had the requested donor information not been protected from disclosure under Section 6-5A-1 or the subject matter of the requested e-mail messages not related solely to the Foundation, the allegations in the complaints would have presented a much closer question. If you have any questions about the conclusions reached in this letter or about OMA and IPRA in general, please let us know.

Sincerely,


ELIZABETH A. GLENN
Assistant Attorney General
Director, Civil Division

cc: The Honorable Mary Helen Garcia, State Representative
The Honorable Nathan P. Cote, State Representative
The Honorable Jeff Steinborn, State Representative
The Honorable Mary Kay Papen, State Senator
Mr. Heath Haussamen
Ms. Diana M. Alba

² In general, it is not appropriate for public employees to use e-mail accounts provided by their employers for personal and other business unrelated to their public employment, unless it is occasional or incidental. *See, e.g.*, 1.12.10 NMAC (2004) (Information Technology Commission rule governing Internet, intranet, e-mail and digital network usage by state agencies and employees). For purposes of this letter, we assume that Ms. Dukes' use of her NMSU e-mail address to receive and send e-mail messages concerning the Foundation was otherwise appropriate and consistent with NMSU policies regarding its employees' use of university information technology resources, including e-mail, for purposes other than NMSU business.

³ In his complaints, Mr. Haussamen suggests that, based on judicial decisions from other states and other legal authorities, the NMSU Foundation should be considered a public body subject to IPRA. *See, e.g.*, Scott Reinardy & Charles N. Davis, "A Real Home Field Advantage: Access to Public University Foundation Records," 34 *Journal of Law & Education* 389 (July 2005). It was not necessary for us to address this issue because, as discussed in the text, NMSA 1978, Section 6-5A-1 expressly exempts the Foundation from OMA and IPRA.