STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

HECTOR H. BALDERAS
ATTORNEY GENERAL

October 27, 2021

The Honorable William F. Lang, Chair
State Ethics Commission
800 Bradbury Dr. SE, Ste. 215
Albuquerque, NM 87106

Re: Opinion Request – Public Records Requests Made by the State Ethics Commission

Dear Judge Lang,

You have requested our opinion as to whether the State Ethics Commission (hereinafter the "Commission") may submit public records requests to other government entities pursuant to the Inspection of Public Records Act ("IPRA"), NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2019). Specifically, you pose the following three questions related to a public records request submitted by the Commission to the New Mexico Human Services Department ("HSD"):

1. Is a state agency, or an employee or officer of a state agency acting in an official capacity, a "person" under Section 14-2-6(D)?

2. If the Commission is a "person" eligible to request records through IPRA, does the Electronic Communications Privacy Act (the "ECPA"), NMSA 1978, Sections 10-16F-1 through -6 (2019, as amended through 2020), or the fact that the Commission may request a subpoena from a district court exempt emails in a mailbox owned by a state agency from disclosure pursuant to IPRA's "as otherwise provided by law" exception in Section 14-2-1(H)?

3. Does IPRA permit a state agency to deny a public records request orally or through written correspondence sent by an officer or employee not the agency's designated records custodian?

As explained in greater detail below, based on the applicable statutory provisions and other legal authorities, we reach the following conclusions to your questions:

1. Yes. A state agency is a "person" for the purposes of IPRA and Section 14-2-6(D), as is an employee or officer of a state agency acting in an official capacity.

2. No. Neither the ECPA nor the fact that the Commission may request a subpoena from a district court exempts emails in a mailbox owned by a state agency from disclosure to the Commission through IPRA.

3. No. IPRA provides that a public records request may only be denied in writing by the public body's designated records custodian.

Background

Your request to our Office arises out of a public records request sent by the Commission's General Counsel to HSD on August 12, 2021. We understand that the Commission sent this request as part of its investigation into a "complaint of an alleged ethics violation," NMSA 1978, Section 10-16G-10(A) (2019, as amended through 2021), within its statutory jurisdiction, as provided by the State Ethics Commission Act, NMSA 1978, Sections 10-16G-1 to -16 (2019, as amended through 2021). In its request, the Commission asked HSD to provide copies of certain emails from several named employees. Through its general counsel, HSD appears to have denied this request outright on two distinct legal bases. First, HSD claims that the Commission, itself a "public body" for the purposes of IPRA, is not a "person" entitled to request records through IPRA. Second, HSD argues that, even if the Commission can request records through IPRA, the ECPA operates as an exception to disclosure through IPRA, effectively forcing the Commission to obtain a subpoena or a court order to access the requested emails.

Analysis

Several basic assumptions necessarily frame our analysis of this issue. First, we assume for the purposes of this opinion that the emails in question are indeed "public records" as defined by IPRA, see Section 14-2-6(G), meaning that they are held by or on behalf of HSD and relate to HSD's public business. We also assume that no law, other than the ECPA, as HSD purports, exempts the requested emails from disclosure. In addition, we understand that HSD's denial of the request is conditioned entirely on the identity of the Commission as a public body and government entity. That is, if the Commission were a nongovernmental organization, or if any other entity outside government submitted this request, then neither of HSD's legal bases for denying the request would apply.

Finally, when interpreting IPRA and the ECPA, we rely on the basic principles of statutory construction. Most importantly, the purpose of this exercise is to "determine and effectuate the intent of the legislature." *State v. Ogden*, 1994-NMSC-029, ¶ 24, 118 N.M. 234. Although a statute's legislative purpose is most often found from its plain language, it is well-settled that "courts must exercise caution in applying the plain meaning rule." *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 23, 117 N.M. 346. Where "legitimate (i.e., nonfrivolous) differences of opinion concerning the statute's meaning" exist, "it is part of the essence of judicial responsibility to search for and effectuate the legislative intent—the purpose or object—underlying the statute." *Id.* Accordingly, courts will "look beyond the four corners of the statute" in cases where "the literal meaning leads to conclusions that are unjust or nonsensical." *Inv. Co. of the Sw. v. Reese*, 1994-NMSC-051, ¶ 13, 117 N.M. 655.

IPRA's Definition of a "Person"

With respect to whether IPRA permits one public body to request public records from another public body, the plain language of the statute demonstrates that public bodies can indeed submit public records requests to other public bodies. IPRA provides that "[a]ny person wishing to inspect public records may submit an oral or written request," NMSA 1978, Section 14-2-8(A), and defines the word "person" broadly to include "*any* individual, corporation, partnership, firm, association, or entity." NMSA 1978, § 14-2-6(D) (emphasis added). Public bodies fall within the scope of this definition at least twice: the word "individual," which is not textually restricted to individuals operating in their personal or private capacities, and the word "entity," which indisputably includes government agencies in its scope. *See Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/entity (last visited October 6, 2021) (including one definition of the word "entity" as "an organization (such as a business or *governmental unit*) that has an identity separate from those of its members") (emphasis added). Indeed, even the ECPA itself reinforces this conclusion, referring to a public body or government agency as a "government *entity*." Section 10-16F-2(I) (emphasis added). Because a public employee acting in his official capacity is still an "individual" and a public body is an "entity," the plain meaning of IPRA's text leaves no doubt that public bodies may submit public records requests to other public bodies.[1] Section 14-2-6(D).

Additionally, our Supreme Court's decision in *San Juan Agricultural Water Users Association v. KNME-TV*, 2011-NMSC-011, 150 N.M. 64, is also instructive on this point. There, the Court held that, notwithstanding IPRA's textual requirement that a person requesting records must provide the public body with a "name, address, and telephone number," Section 14-2-8(C), the statute does not preclude even an unnamed and "undisclosed principal" from enforcing a request "made through an agent." *San Juan Agr. Water Users Ass'n*, 2011-NMSC-011, ¶ 36. Explaining its holding, the Supreme Court emphasized that "IPRA makes it clear that all public entities must furnish records without regard to who is requesting the records," id. at ¶ 30, and that public bodies "have a statutory duty to respond diligently to all records requests, *regardless of who makes the request*." *Id.* at ¶ 36 (emphasis added). Although this decision did not consider the question of whether one public body may request public records from another public body, its import is clear: IPRA must be construed broadly so as to "encourage disclosure of public documents," and distinctions with respect to the identity of the requestor[2] are immaterial to the public body's statutory responsibilities. *San Juan Agr. Water Users Ass'n*, 2011-NMSC-011, ¶ 36.

Ultimately, even if IPRA's text were unclear on this issue (and it is not), New Mexico's declared "public policy" of governmental transparency is served only by permitting public bodies to submit public records requests to other public bodies. Section 14-2-5. IPRA is not intended to inhibit access to public records by drawing arbitrary distinctions with respect to the identity of the requestor. Indeed, its declared purpose is that "*all* persons are entitled to the greatest possible

[1] Our Office reached a similar conclusion in a 2008 Attorney General opinion, where we noted that the Legislative Finance Committee "could" but "does not have to" utilize IPRA as a means of obtaining information from other state agencies. N.M. Att'y Gen. Opinion Letter to David Abbey, Legislative Finance Committee (Nov. 24, 2008). This opinion did not consider in great detail the issue of whether a public body could submit IPRA requests, appearing to accept this proposition as settled law.

[2] The requestor's motivation for seeking records through IPRA is equally irrelevant. *See* § 14-2-8(C) ("No person requesting records shall be required to state the reason for inspecting the records.").

information regarding the affairs of government and the official acts of public officers and employees." Section 14-2-5 (emphasis added). All of IPRA's provisions, including its definition of the word "person" in Section 14-2-6(D), must be interpreted broadly in accordance with this purpose. Indeed, IPRA is intended to promote transparency and accountability in government,[3] not to prohibit public bodies from obtaining access to otherwise public records held by other public bodies. As a result, based on both the statute's text and its legislative purpose, IPRA clearly does not prohibit public bodies from submitting public records requests to other public bodies.

Exceptions to Disclosure

Your second question asks whether the ECPA exempts from disclosure emails in a mailbox owned by a state agency pursuant to IPRA's "as otherwise provided by law" exception.[4] Section 14-2-1(H). Alternatively, you ask whether the Commission is precluded from obtaining the requested records through IPRA because the Commission may obtain the requested records through a subpoena. The short answer is no.

Preliminarily, the Commission's ability to obtain public records through a subpoena does not mean that it is unable to seek the same records through IPRA. Just as "IPRA and discovery are separate and distinct methods to obtain information" and "citizens' involvement in litigation alone does not deprive them of their ability to obtain public records under IPRA," *Dunn v. Brandt*, 2019-NMCA-061, ¶ 14, so too are IPRA and the process through which the Commission may petition a district court for a subpoena. *See* § 10-16G-10(J). Moreover, the State Ethics Commission Act itself appears to contemplate the Commission obtaining records without the use of a subpoena, authorizing the subpoena process to commence only "[i]f the general counsel determines that a subpoena is *necessary* to obtain … the production of books, records, documents, or other evidence." *Id.* (emphasis added). In any case, nothing in the State Ethics Commission Act prohibits the Commission from requesting or obtaining records through IPRA, nor does it contain any provision that would operate as an exception to disclosure in the context of the Commission's request to HSD.

Next, the ECPA does not exempt from disclosure the records requested by the Commission. Rather, the ECPA, originally enacted in 2019, see 2019 N.M. Laws, ch. 39, §§ 1-6, restricts the ability of a "government entity" to access "electronic communications information" and "electronic device information." Section 10-16F-3(A). We summarized these restrictions in a recent Attorney General opinion as follows:

[3] Although the identity of the requestor is not relevant to a public body's public records responsibilities, the fact that these requests are from the SEC throws into sharp relief IPRA's purpose of accountability and transparency in government. *See San Juan Agr. Water Users Ass'n*, 2011-NMSC-011, ¶ 16 (emphasizing that IPRA's purpose is "to ensure that the public servants of New Mexico remain accountable to the people they serve" and "'to determine whether those who have been entrusted with the affairs of government are honestly, faithfully and competently performing their function'"), *quoting State ex rel. Newsome v. Alarid*, 1977-NMSC-076, ¶ 16, 90 N.M. 790 (*superseded by statute as stated in Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-026, ¶ 16).

[4] This exception to IPRA has been described by our Supreme Court as a "catch-all" exception, *Pacheco v. Hudson*, 2018-NMSC-022, ¶ 39, effectively incorporating all "statutory or regulatory exceptions, or privileges adopted by [the Supreme] Court or grounded in the constitution" as valid exceptions to disclosure through IPRA. *Republican Party of N.M.*, 2012–NMSC–026, ¶ 16.

> [The ECPA] is most restrictive with respect to government entities compelling "the production of or access to electronic communication information from a service provider" or "the production of or access to electronic device information from a person other than the authorized possessor of the device," requiring a warrant or wiretap order in either situation. Section 10-16F-3(B). Similarly, where a government entity seeks to "access electronic device information by means of physical interaction or electronic communication with the device," the Act requires a warrant, wiretap order, consent from the device's owner or authorized possessor, or more unique circumstances involving a "lost, stolen or abandoned" device or emergency. Section 10-16F-3(C).

N.M. Att'y Gen. Opinion Letter to The Honorable William R. Rehm, New Mexico State Representative, at 2 (Aug. 19, 2021).

Nothing in the ECPA's text suggests that the Legislature intended the statute to operate as an exception to disclosure through IPRA. The central purpose of the ECPA – to protect the individual privacy interests associated with electronic devices and accounts[5] – is simply not implicated by public records requests, since public employees in New Mexico have no reasonable expectation of privacy in their government-issued email accounts and other information technology resources.[6] *Compare* 1.12.10.8(F) NMAC ("Users shall have no expectations of privacy with respect to state IT resource usage.") *with* N.M. Att'y Gen. Opinion Letter to The Honorable William R. Rehm, New Mexico State Representative, at 2 ("As evidenced by the title of the Act itself and these restrictive provisions, the purpose of the Act is clearly to protect the individual privacy interests associated with electronic devices and electronic communications."). Moreover, the ECPA's extensive data reporting requirements strongly suggest that, far from being intended to limit public access to information about its government, transparency was one of the statute's primary objectives. *See* § 10-16F-6; *see also* N.M. Att'y Gen. Opinion Letter to The Honorable William R. Rehm, New Mexico State Representative, at 2 (observing that "the Act also appears to be intended to promote transparency with respect to governmental access to electronic information"). Finally, the ECPA expressly states that it "shall not be construed" as prohibiting government entities from compelling their employees to return their electronic devices to their employers, directly undermining HSD's apparent contention that the statute somehow vests public employees with new privacy protections. Section 10-16F-3(P).

We also find it difficult to reconcile HSD's interpretation of the ECPA with the statute's text. For one, when requesting public records from a public body pursuant to IPRA, the requestor is not seeking to "compel the production of or access to electronic device information *from a person other than the device's authorized possessor*," Section 10-16F-3(A)(2) (emphasis added), since

[5] Although New Mexico does not have a "state-sponsored system of recording the legislative history of particular enactments" and courts will "not attempt to divine what legislators read and heard and thought at the time they enacted a particular item of legislation," *Regents of Univ. of New Mexico v. New Mexico Fed'n of Teachers*, 1998-NMSC-020, ¶ 30, 125 N.M. 401, it is nevertheless unsurprising that the Fiscal Impact Report for the original version of the ECPA noted that "the act is designed to increase each individual's expectations of privacy in our electronic device information." Fiscal Impact Report for SB199, Electronic Communications Privacy Act (Jan. 17, 2019).

[6] Similarly, public employees in New Mexico also have no expectation of privacy in records related to their public business when stored on behalf of their employer (the government), because IPRA provides that all records "that are used, created, received, maintained or held by or on behalf of any public body and relate to public business" are public records available for inspection in the absence of an applicable exception. Section 14-2-6(G).

the public employee is literally the "device's authorized possessor." *See* § 10-16F-2(B) (defining "authorized possessor" as "a natural person who owns and possesses an electronic device or a natural person who, with the owner's consent, possesses an electronic device"). And, in this instance, the Commission acting as the requestor is seeking access from the device's authorized possessor (the public employee), who has a nondiscretionary legal obligation to facilitate inspection or copying of all public records except as otherwise provided by law. *See* § 14-2-1. It is also doubtful that requesting copies of public records through IPRA is synonymous with the act of "compel[ling] … the production of or access to electronic communication information" as contemplated by Section 10-16F-3, as IPRA clearly contemplates that providing copies of public records on request is "an integral part of the routine duties of public officers or employees." Section 14-2-5. Where a public body is facilitating access to public records, it is being compelled to do so (if at all) by IPRA, not the requestor.

Similarly, even if we were to agree that HSD is a "service provider" for the purposes of the ECPA,[7] that Act provides that a service provider may "voluntarily disclose electronic communication information or subscriber information if the law otherwise permits that disclosure." Section 10-16F-3(F). And, IPRA clearly permits (and indeed *requires*) such disclosure. While HSD counters with Section 10-16F-3(H), which provides that information obtained through a service provider's voluntary disclosure must be sealed, that same provision goes on to state that the information is not required to be sealed where the government entity "has or obtains the specific consent of the sender or recipient of the electronic communication about which information was disclosed." Section 10-16F-3(H)(1). The ECPA defines "specific consent" as inclusive of "consent provided when the government entity is the addressee, the intended recipient or a member of the intended audience of an electronic communication." Section 10-16F-2(K)(2). Obviously, a government entity is the intended audience of emails sent to or by public employees; in this instance, however, a governmental entity also is the owner of said emails. See 1.12.10.6 NMAC (The purpose of the state's Internet, Intranet, Email and Digital Network Usage policy is "to provide state of New Mexico staff with guidance on the proper use of the *state's* information technology resources, including but not limited to the internet, the intranet, *email*, and the state's digital network and supporting system.") (emphasis added). As a textual matter, then, even if we were to agree that public bodies may be service providers, the ECPA would still require disclosure of the records because the public body effectively is required by IPRA to consent to the disclosure.

Interpreting IPRA and the ECPA *in pari materia* and beginning with the presumption that "the legislature did not intend to enact a law inconsistent with existing law," we believe a court would likely conclude that the ECPA does not render public records exempt from disclosure merely because they have been requested by a government entity. *State ex rel. Quintana v. Schnedar*, 1993-NMSC-033, ¶ 4, 115 N.M. 573. The ECPA was not intended to shield the public records of public employees from disclosure through IPRA, and interpreting it as such would lead only to absurd results contrary to the purposes of both statutes.

[7] We are skeptical that the Legislature intended to include government entities within the term "service provider," see Section 10-16F-2(J), since government entities generally do not offer electronic communications services to the general public. In any event, HSD itself would almost certainly not constitute a service provider.

Denials of Public Records Requests

Your third and final question asks whether a state agency may deny a public records request orally or through written correspondence sent by an officer or employee not the agency's designated records custodian. IPRA's plain language speaks for itself and leaves no doubt as to the proper answer. A public body cannot, consistent with IPRA, deny a public records request orally, and any "written explanation of denial" must be sent by the public body's designated records custodian. Section 14-2-11(B).

IPRA contains a specific provision governing denials of written public records requests. *See* § 14-2-11. In particular, the statute provides that, "If a written request has been denied, the custodian shall provide the requester with a written explanation of the denial." Section 14-2-11(B). This language is clear that denials must be in writing[8] and sent by the public body's designated records custodian. Similarly, the subsequent subsection provides for damages and enforcement actions against any "custodian who does not deliver or mail a written explanation of denial within fifteen days after receipt of a written request for inspection." Section 14-2-11(C). Interpreting this provision of IPRA in the past, our Supreme Court observed that "[t]he designated records custodian is the *only* official who is assigned IPRA compliance duties … and is the *only* official who statutorily 'is subject to an action to enforce' IPRA." *Pacheco v. Hudson*, 2018-NMSC-022, ¶ 57 (*quoting* Section 14-2-11(C)) (emphasis added). Thus, IPRA is clear that a public body cannot orally deny a public records request and that the custodian, not another employee, must send the "written explanation of the denial." Section 14-2-11(B).

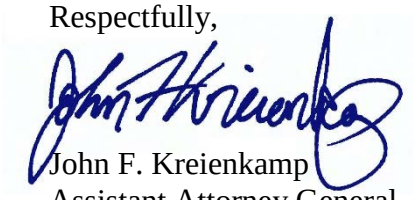
Conclusion

As explained previously, and based on the applicable legal authorities and the rules of statutory interpretation, nothing in IPRA, the ECPA, or the State Ethics Commission Act prohibits the Commission from obtaining access to emails in a mailbox owned by a state agency through a public records request. The Commission, as a government entity, is a "person" eligible to request records through IPRA. Section 14-2-6(D). Furthermore, neither the ECPA nor the fact that the Commission may petition a district court for a subpoena operates as an exception to disclosure pursuant to IPRA's "as otherwise provided by law" exception. Section 14-2-1(H). Lastly, IPRA's plain language is clear that a public body cannot orally deny a public records request and that its designated records custodian, not another employee, must send the "written explanation of the denial." Section 14-2-11(B).

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

[8] Denial letters, which have previously been described by our Court of Appeals as "valuable information-gathering tools," *American Civil Liberties Union of New Mexico v. Duran*, 2016-NMCA-063, ¶ 38, must "describe the records sought" by the requestor, "set forth the names and titles or positions of each person responsible for the denial," and identify the exceptions in law authorizing the denial. Section 14-2-11(B); *see also* Attorney General's Inspection of Public Records Act Compliance Guide, p. 41 (8th ed. 2015).

Respectfully,



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Enclosure

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