

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

NANCY HENRY,

Plaintiff,

vs.

No. D-202-CV-2019-03381

**OFFICE OF THE STATE AUDITOR,
BERNADET MARTINEZ, Records Custodian,**

Defendant.

**AMENDED COMPLAINT FOR PRODUCTION OF PUBLIC RECORDS,
DAMAGES, AND WRIT OF MANDAMUS**

COMES NOW, Nancy Henry, by and through counsel of record Western Agriculture, Resource and Business Advocates, LLP (A. Blair Dunn, Esq.), with her Complaint for Production of Public Records, Damages, and Writ of Mandamus against Office of the State Auditor, and states the following:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Nancy Henry is a resident of Bernalillo County, State of New Mexico.
2. Defendants Office of the State Auditor and Records Custodian Bernadet Martinez (hereinafter "OSA" or "Defendants") is an elected constitutional office in the executive branch responsible for authorizing, performing, and supervising audits of state agencies and state and local entities with its principal office located in Santa Fe, County of Santa Fe, State of New Mexico.
3. Defendant is a "public body" as defined in NMSA §14-2-6(F) and is, therefore, subject to the Inspection of Public Records Act ("IPRA") and to a suit to enforce the law through its Records Custodian, Bernadet Martinez.
4. The incidents that are the subject of this action took place in the State of New Mexico.

5. This action arises under IPRA, NMSA §§14-2-1 through 14-2-12.
6. Jurisdiction and venue in this Court are proper.

BACKGROUND

7. This action arises out of violations by Defendant (OSA) of Plaintiff's (Nancy Henry) requests to inspect public records pursuant to IPRA, NMSA §§14-2-1 through 14-2-12.

8. Plaintiff is a citizen journalist, and equine/public advocate who advocates for members of the public, horses and wild horses, and had reported the NM Livestock Board for 9 cases of *Waste, Fraud or Abuse* to the OSA in 2018.

9. An OSA Special Investigator, Chelsea Martin, performed *Fact Finding Procedures and Investigations*, not *Audits*, leading to the writing of 9 letters to the NM Livestock Board (NMLB) pertaining to those findings and closed the investigations in 2018. There were no *Designated Letters of Audit* to the NMLB.

10. The NMLB and their Chief Legal Counsel, Joseph Holloway, spoke out, in and around the NMLB office, and at their Board Meetings that they disagreed with the findings. Their Executive Director, Robert Alexander, also complained to the OSA as Wayne Johnson was leaving office and was told to speak with Brian Colon after he took office.

11. Joseph Holloway became General Counsel to State Auditor Brian Colon in early 2019, upon information and belief, Attorney Holloway ordered Investigator Chelsea Martin to get with the NMLB on all 9 letters so the NMLB could respond, apparently to appease them, or, to change the outcomes. Those cases were closed in 2018.

12. Based upon Plaintiff's research, this scenario is unethical and most likely unprecedented. *See* Research, attached hereto as **Ex. 1**.

13. Plaintiff began requesting public records from the OSA and found an email wherein Natalie Cordova, Deputy State Auditor, met with the NMLB's CFO, Andrew Silva, and emailed that she is looking forward to "collaborating" with them. *See* Email, attached hereto as **Ex. 2**.

14. Upon information and belief, it appears the new OSA was working against Plaintiff, Investigator Chelsea Martin, and the fact findings investigations. The OSA had worked diligently on those investigations throughout year 2018 under the previous administration, as did Plaintiff.

15. Plaintiff requested what was being referred to as the "Response Letters" from the NMLB to the OSA. These responses are public record, as the fact-finding investigations were closed. The records were voluntary free will communications.

16. Plaintiff did receive responsive records from the OSA before the agency became unresponsive.

17. The "Response Letters" were improperly denied under the guise of the *Audit Act*, NMSA 1978 12-6-5 because that statute does not apply here as there was and is no audit, and the fact-finding procedures and investigations were signed off on and closed in 2018. *See* Research, attached hereto as **Ex. 1**.

18. The OSA also refused to provide the requested and required "Denial Letter" with names and titles of who was denying the records. Therefore, a violation of the statute by improper denial of records under NMSA § 1978 14-2-11.

19. This Complaint seeks production of certain public records Plaintiff has requested from the OSA and for which the OSA still has not fulfilled its obligations of inspection, or properly denied.

20. This Complaint also seeks damages for the OSA's violations of IPRA, as well as requesting a writ of *mandamus* and/or injunctive relief under IPRA and applicable law.

RELEVANT FACTS

21. On April 9, 2019, the Plaintiff emailed an IPRA request to the OSA, requesting more “Response Letters” from the NMLB. On April 10, 2019 the Defendant (OSA) responded there were no responsive records claiming, “The records requested fall under the IPRA exemption 14-2-1(A)(8).” *The Audit Act*. On April 10, 2019 Plaintiff responded that there is no ongoing investigation, not an audit, and requested a Denial Letter with names and titles of who was denying the request. On April 11, 2019 there had been no response, therefore Plaintiff asked again for the records or the Denial Letter. On April 12, 2019 Plaintiff emailed again reminding the Defendant of their responsibilities under the IPRA to be responsive. There was no response. Plaintiff emailed again on April 14, 2019 and included State Auditor Brian Colon, quoting the IPRA regarding Denial Letters, and again on April 16, 2019 asking that the Defendant fulfill their statutory obligations to her. There was no response. *See* email string, attached hereto as **Ex. 3**.

22. On April 17, 2019, the Plaintiff received a letter, via email, from Jesse Gallegos, OSA Deputy Chief of Staff. Plaintiff found the letter to be threatening, also an attempt to chill her speech, right to free speech (Social Media News) and to end her attempts to continue to pursue the records and the Denial Letter with names and titles. Mr. Gallegos resorted to false and defamatory statements about Plaintiff in his letter. *See* Letter, attached hereto as **Ex. 4**.

23. On April 18, 2019, the Plaintiff emailed a *new* IPRA request for the same records and any new records since the last attempt, as her prior request was “closed.” On the same day the Defendant responded with the same type of response relying on the Audit Act and did not provide the required Denial Letter. Plaintiff responded on the same day, breaking down the request and pointing out the issues with their response. There was no response. *See* email string, attached hereto as **Ex. 5**.

24. Plaintiff had exchanged emails earlier that day with Assistant Attorney General/Director of the Open Government Division, Sally Malave, who concurred that the OSA is not exempt from the IPRA's requirement for a public body to provide a 3-day Denial Letter. *See* email string, attached hereto as **Ex. 6**.

25. Plaintiff also conferred via telephone with Peter St. Cyr, the Director of Open Access NM, who concurred.

26. On April 5, 2019, Plaintiff requested records pertaining to various communications between the NMLB and OSA between March 25, 2019 and April 6, 2019. On April 8, 2019 the OSA responded that the request was broad and burdensome and needed until April 22, 2019 to fulfill the request.

27. On April 22, 2019 the OSA did not provide the records and responded, "*At this time, the Office of the State Auditor (OSA) has no responsive documents since this concerns an open, ongoing examination.*"

28. On April 22, 2019, the Plaintiff responded reminding the OSA they had fulfilled the same request, different date ranges, of March 8, March 24 and March 30, 2019. The OSA response was a *blanket denial* with no explanation as to which or how many records were being withheld under the guise of the Audit Act, nor was the required Denial Letter describing the records sought and names/titles of who was denying the request provided. On April 22, 2019, the Plaintiff responded that this same request had been fulfilled prior a few times and asked for a proper and required Denial Letter. There was no response. *See* email string, attached hereto as **Ex. 7**.

29. On April 15, 2019 Plaintiff via email requested records pertaining to various communications between NMLB and OSA between April 6 and April 16, 2019. OSA responded that the request was excessively burdensome or broad and additional time was necessary to

respond, until April 30, 2019.

30. On the morning of May 1, 2019, Plaintiff emailed Defendant that they were past their requested extended deadline of April 30, 2019.

31. Via email on May 1, 2019 Defendant responded denying any responsive documents to this request and informed Plaintiff that the request would be closed. Attached to the response was the April 17, 2019 threatening letter from Jesse Gallegos, which is in no way responsive to the request, nor is it a proper denial. *See Ex. 4.*

32. On May 1, 2019, Plaintiff responded to the OSA's denial informing them that the information in the response not responsive and of the inappropriateness of their denial.

33. To date, Defendant has failed to provide to Plaintiff a formal letter of denial or the responsive records which do exist.

34. Plaintiff diligently pursued all records and this matter before seeking relief from the Court. The records Plaintiff seeks were voluntary free will communications.

**RELEVANT PROVISIONS OF THE
INSPECTION OF PUBLIC RECORDS ACT (IPRA)**

35. IPRA declares it is the public policy of the State of New Mexico that "all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees." NMSA §14-2-5.

36. IPRA gives every person the right to inspect the public records of the State. NMSA §14-2-1.

37. IPRA defines public body as "the executive, legislative and judicial branches of state and local governments and all advisory boards, commissions, committees, agencies or entities created by the constitution or any branch of government that receives any public funding...." NMSA §14-2-6(F).

38. IPRA defines public records as “all documents, papers, letters, books, maps, tapes, photographs, recordings 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...” NMSA §14-2-6(G).

39. IPRA states that “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 days after receiving a written request. 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...” NMSA §14-2-8(D)

40. Under IPRA, a written request includes requests made by email. NMSA §14-2-8(F).

41. Under IPRA, “If a custodian determines that a written request is excessively burdensome or broad, an additional reasonable period of time shall be allowed to comply with the request. 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. The requester may deem the request denied and may pursue the remedies available pursuant to the Inspection of Public Records Act if the custodian does not permit the records to be inspected in a reasonable period of time.” NMSA §14-2-10.

42. Under IPRA, “Unless a written request has been determined to be excessively burdensome or broad, a written request for inspection of public records that has not been permitted within fifteen days of receipt by the office of the custodian may be deemed denied. The person requesting the public records may pursue the remedies provided in the Inspection of Public Records Act.” NMSA §14-2-11(A).

43. Under IPRA, “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 Inspection of Public Records Act and the requester may be awarded damages. Damages shall: (1) be awarded if the failure to provide a timely explanation of denial is determined to be unreasonable; (2) not exceed one hundred dollars (\$100) per day....” NMSA §14-2-11(C).

44. Under IPRA, an action to enforce IPRA can be brought by a person whose request has been denied. NMSA §14-2-12(A).

45. Under IPRA, “A district court may issue a writ of mandamus or order an injunction or other appropriate remedy to enforce the provisions of the Inspection of Public Records Act.” NMSA §14-2-12(B).

46. Exhaustion of administrative remedies is not required under IPRA. NMSA §14-2-12(C).

47. Under IPRA, “The court shall award damages, costs and reasonable attorneys’ fees to any person whose written request has been denied and is successful in a court action to enforce the provisions of the Inspection of Public Records Act.” NMSA §14-2-12(D).

COUNT I
VIOLATIONS OF THE INSPECTION OF PUBLIC RECORDS ACT (IPRA)

48. Plaintiff hereby incorporates by reference all of the foregoing facts and allegations contained in her Complaint.

49. Plaintiff has made numerous requests to inspect public records pursuant to IPRA for which requested records have yet to be produced or denied via letter.

50. IPRA requires public agencies like the OSA to allow inspection of public records pursuant to a written IPRA request.

51. Defendant has failed to produce public records requested by the Plaintiff as required by IPRA.

52. Denials were unlawful as the requested records are a matter of public record.

53. Pursuant to NMSA §14-2-12(B), Plaintiff is entitled to a writ of mandamus or an injunction ordering the Defendant to produce all relevant documents in the Defendant's custody or control as provided in the Plaintiff's requests.

54. Plaintiff is further entitled to injunctive relief enjoining the Defendant from withholding documents requested, as well as similar documents requested in the future, and further that Defendant adopt policies and procedures sufficient to correct the policies and practices that resulted in the improper denials in this case.

55. Plaintiff is further entitled to recover her attorney fees, costs and damages in pursuing this action, pursuant to NMSA §14-2-12(D).

WHEREFORE, Plaintiff prays as follows:

A. The Court issue a writ of mandamus compelling Defendant to produce all requested records and/or injunctive relief ordering the Defendant to produce all outstanding records requested, and ensuring speedy and full compliance by Defendant of future records requests under IPRA;

B. Award statutory damages as provided in the Inspection of Public Records Act;

C. Award attorney fees and costs as provided in the Inspection of Public Records Act;

and

D. Such other and further relief as may be just and proper.

Respectfully Submitted,

WESTERN AGRICULTURE, RESOURCE
AND BUSINESS ADVOCATES, LLP

/s/ A. Blair Dunn

A. Blair Dunn, Esq.
400 Gold Ave SW, Suite 1000
Albuquerque, NM 87102
(505) 750-3060
abdunn@ablairdunn-esq.com

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing on May 3, 2019 via the New Mexico e-filing system, and served a copy on the Defendants via facsimile and USPS as follows:

Office of the State Auditor
2540 Camino Edward Ortiz, Suite A
Santa Fe, NM 87507
Fax: (505) 827-3512

Bernadet Martinez
2540 Camino Edward Ortiz, Suite A
Santa Fe, NM 87507
Fax: (505) 827-3512

/s/ A. Blair Dunn

A. Blair Dunn, Esq.

EXHIBIT 1

RESEARCH

Emailed to Brian Colon and the OSA

1. Per my diligent research, when you “work with” someone you create an interest in the outcome which is an impairment of the auditors independence. You can contact the *NM Accountancy Board* for more on this and have a look at the AICPA code of conduct on page 5/6, here is the link:

<https://www.aicpa.org/content/dam/aicpa/research/standards/codeofconduct/downloadabledocuments/2014december15contentasof2016august31codeofconduct.pdf>

Integrity on page 5 and **Objectivity and Independence** on page 6.

2. It's not proper for an auditor to “work with” someone for an outcome. There can be discussions regarding audits but audits shouldn't be negotiations and it's improper for the Auditor (you) to direct one of your auditors to “work with” an auditee for a mutually agreed upon outcome.

3. Audited entities don't have to agree with the outcome and are given a chance to state their differences or disagreements. **But at the end of the day** the audit and/or letter regarding findings are the opinion of the CPA who signs them. “Working with” an auditee appears to be a violation of a CPA's code of ethics and certainly an impairment of their independence.

4. Apparently, it's inappropriate for the Auditor or any of the executive staff to direct an auditor to restate their opinion. There are most certainly ethical problems here.

EXHIBIT 2

From: Natalie Cordova
Sent: Thursday, February 21, 2019 1:01 PM
To: 'Silva, Andrew, NMLB' <AndrewM.Silva@state.nm.us>
Subject: RE: Status of issues discussed

Thank you Andrew. We very much appreciate the visit and **look forward to collaborating**. I left you a voicemail a few minutes ago. Once you have a moment, please call me and **we can connect on steps forward**.
Sincerely, Natalie

From: Silva, Andrew, NMLB <AndrewM.Silva@state.nm.us>
Sent: Thursday, February 21, 2019 12:23 PM
To: Natalie Cordova <Natalie.Cordova@osa.state.nm.us>
Subject: Status of issues discussed

Hi Natalie,

Thanks again for the opportunity to meet with you yesterday. Please keep me informed on the status of the 9 issues we discussed yesterday.

Thanks again.

Andrew Silva, CFO
NM Livestock Board
(505) 841-6161

EXHIBIT 3

From: nlhenry@mindspring.com <nlhenry@mindspring.com>

Sent: Tuesday, April 16, 2019 5:09 PM

To: 'IPRA@osa.state.nm.us' <IPRA@osa.state.nm.us>

Cc: 'Brian Colon' <Brian.Colon@osa.state.nm.us>

Subject: RE: COMPLAINT - FW: IPRA - Response Letters of NMLB

This is still an outstanding issue. Please fulfill your statutory obligations to me and properly respond. ~ Nancy Henry

From: nlhenry@mindspring.com <nlhenry@mindspring.com>

Sent: Sunday, April 14, 2019 5:59 AM

To: 'IPRA@osa.state.nm.us' <IPRA@osa.state.nm.us>

Cc: 'Brian Colon' <Brian.Colon@osa.state.nm.us>; 'Natalie Cordova' <Natalie.Cordova@osa.state.nm.us>

Subject: IPRA VIOLATION - RE: COMPLAINT - FW: IPRA - Response Letters of NMLB

Importance: High

Dear Brian Colon, et al.,

Despite my repeated request asking **who** was **denying** the records I requested, I received no response. You have violated the Inspection of Public Records Act. You have also violated the public's trust.

Although I had received the same type of records, NMLB Response Letters, **suddenly** they were being denied. There is no ongoing investigation or audit. Those 9 investigations were signed off on and closed months ago. You and your records custodian failed at 1 and 2 below. I do need a proper denial letter and **name/title** of **who** is denying the records.

I have since received the records from the NMLB (*they* do not want to be sued a 3rd time) and provided my rebuttal to those Response Letters as well to all that receive my rebuttal's at the OSA, NMLB, and Governor's office. Again, proving NMLB wrong, and where they were lying and misleading the OSA.

B. If a written request has been denied, the custodian shall provide the requester with a written explanation of the denial. The written denial shall:

(1) describe the records sought;

(2) set forth the names and titles or positions of each person responsible for the denial; and

(3) be delivered or mailed to the person requesting the records within fifteen days after the request for inspection was received.

Nancy L. Henry

Lead Administrator & Equine/Public Advocate

NM for Equine Rights & Open Government

<https://www.facebook.com/NewMexicoAgainstHorseSlaughter/>

505.250.9457, PO Box 56644, ABQ NM, 87187

From: nlhenry@mindspring.com <nlhenry@mindspring.com>
Sent: Friday, April 12, 2019 3:52 PM
To: 'IPRA@osa.state.nm.us' <IPRA@osa.state.nm.us>
Cc: 'Brian Colon' <Brian.Colon@osa.state.nm.us>
Subject: COMPLAINT - FW: IPRA - Response Letters of NMLB
Importance: High

Dear all, this constitute is due an answer, and no one is doing their job... see April 10th for what the issue is. Ignoring an IPRA request or a challenge on a response is a violation of the IPRA...

From: nlhenry@mindspring.com <nlhenry@mindspring.com>
Sent: Thursday, April 11, 2019 3:44 PM
To: 'Bernadet Martinez' <Bernadet.Martinez@osa.state.nm.us>
Cc: 'Brian Colon' <Brian.Colon@osa.state.nm.us>
Subject: FW: IPRA - Response Letters of NMLB

From: nlhenry@mindspring.com <nlhenry@mindspring.com>
Sent: Thursday, April 11, 2019 5:17 AM
To: 'Bernadet Martinez' <Bernadet.Martinez@osa.state.nm.us>
Cc: 'Chelsea Martin' <Chelsea.Martin@osa.state.nm.us>
Subject: RE: IPRA - Response Letters of NMLB

Bernadette Martinez, you do owe me a response as I am challenging your improper IPRA denial. ~ Nancy Henry

From: nlhenry@mindspring.com <nlhenry@mindspring.com>
Sent: Wednesday, April 10, 2019 8:44 AM
To: 'Bernadet Martinez' <Bernadet.Martinez@osa.state.nm.us>
Cc: 'Chelsea Martin' <Chelsea.Martin@osa.state.nm.us>
Subject: RE: IPRA - Response Letters of NMLB

Not an ongoing investigation these investigations were closed many months ago. These response letters are the NMLB being allowed to pontificate. Please provide the requested records. If you continue to deny these records, you must provide a denial letter, and WHO/TITLE is refusing the records.

From: Bernadet Martinez <Bernadet.Martinez@osa.state.nm.us>
Sent: Wednesday, April 10, 2019 8:26 AM
To: nlhenry@mindspring.com
Subject: RE: IPRA - Response Letters of NMLB

Good morning,

This IPRA concerns an open, ongoing investigation, the OSA has no responsive documents to provide at this time. This concludes this IPRA request which is now closed.

The records requested fall under the IPRA exemption 14-2-1(A)(8):

A. Every person has a right to inspect public records of this state except:

(8) as otherwise provide by law.

In this case applicable law is NMSA 1978, Section 12-6-5(A) Reports of Audits, which states that:

The state auditor shall cause a complete written report to be made of each annual or special audit and examination made. Each report shall set out in detail, in a separate section, any violation of law or good accounting practices found by the audit or examination. Each report of a state agency shall include a list of individual deposit accounts and investment accounts held by each state agency audited. A copy of the report shall be sent to the agency audited or examined; five days later, or earlier if the agency waives the five-day period, the report shall become a public record, at which time copies shall be sent to:

- (1) the secretary of finance and administration; and
- (2) the legislative finance committee.

Under NMSA 1978, Section 12-6-5(A) no special audit report becomes a public record until five days after the audit or examination is finished and a complete report is made, unless the five day period is waived by the agency being audited. The Special Investigations Division of the Office of the State Auditor has initiated an investigation pursuant to the Audit Act NMSA 1978, Sections 12-6-1 through 12-6-14, and therefore any reports or documents related to that investigation are not public record at this time and as such are exempt from the Inspection of Public Records Act until five days after the special audit report is complete unless the five-day period is waived by the agency being audited.

Moreover, under 2.2.2.15(A)(4) and (5) NMAC confidential sources related to Special Audits are to remain confidential and the report itself is to remain confidential until the completion of the audit the public release of the special audit report.

2.2.2.15(A)(5) NMAC states:

Confidentiality of files: A report alleging financial fraud, waste, or abuse in government that is made directly to the state auditor orally or in writing, or telephonically or in writing through the state auditor's fraud hotline or website, any resulting special audit, performance audit, attestation engagement or forensic audit, and all records and files related thereto are confidential audit documentation and may not be disclosed prior to the release of an audit report, except to an independent auditor, performance audit team or forensic audit team in connection with a special audit, performance audit, attestation engagement, forensic audit or other existing or potential engagement regarding the financial affairs or transactions of an agency.

Thank you,

Bernadet R. Martinez
Management Analyst
Records Custodian



NM Office of the State Auditor
2540 Camino Edward Ortiz, Suite A
Santa Fe, NM 87507
(505) 476-3838 (Office)
bernadet.martinez@osa.state.nm.us

To report fraud, waste, or abuse in any public entity in New Mexico: Report online: www.saonm.org
Hotline: 1-866-OSA-Fraud

From: nlhenry@mindspring.com

Sent: Tuesday, April 9, 2019 5:08:33 AM (UTC-07:00) Mountain Time (US & Canada)

To: IPRA OSA

Cc: Chelsea Martin

Subject: IPRA - Response Letters of NMLB

Dear OSA and Records Custodian,

I am requesting all **Response Letters** from the NMLB since the last one dated March 21st 2019.

I need these as soon as possible for my rebuttal to the OSA and Governor's office.

Nancy L. Henry

Lead Administrator & Equine/Public Advocate

NM for Equine Rights & Open Government

<https://www.facebook.com/NewMexicoAgainstHorseSlaughter/>

505.250.9457, PO Box 56644, ABQ NM, 87187

"... there will be an opportunity to determine if those who have been entrusted with the affairs of government are honestly, faithfully and competently performing their function as public servants." ~ NM Supreme Court

Brian S. Colón, Esq.
State Auditor



Natalie Cordova, CPA
Deputy State Auditor

State of New Mexico
Office of the State Auditor

EXHIBIT 4

April 17, 2019

Via E-mail (nlhenry@mindspring.com)

Nancy L. Henry
PO Box 56644
Albuquerque, NM 87187

Re: Inspection of Public Records Act (IPRA) Request dated April 9, 2019

Dear Ms. Henry:

I am writing in follow-up to your e-mails dated April 14, 15, and 16, 2019 to State Auditor Colón and members of his staff. As a preliminary matter, based on the available correspondence, the Office of the State Auditor (OSA) has timely and properly responded to each of your IPRA requests. Additionally, the OSA did not deny your IPRA request dated April 9, 2019 ("Request") as you have alleged. Instead, as indicated in records custodian Bernadet Martinez' e-mail to you dated April 10, 2019, the Request was closed because the OSA does not have any public records responsive to your Request due to the ongoing examination of NMLB. There was no denial of your Request, the OSA has no public records responsive to the Request, and any letters responsive to the Request are not part of the OSA's public records until five days after the OSA's report of its NMLB examination is released so the Request was closed.

To further clarify the OSA's position, any responsive letters to your Request are not public records of the OSA because of an exception to the IPRA, while based on the allegations in your recent correspondence to the State Auditor, you seem to be focused solely on the statutory rule. The IPRA clearly provides for exceptions, stating in relevant part "[e]very person has a right to inspect public records of this state except ... as otherwise provided by law." NMSA 1978, § 14-2-1(A)(8). With respect to the Request, the statutory authority at issue for the particular exception to the IPRA is at NMSA 1978, Section 12-6-5, which states "[r]eports of agency audits and examinations by the state auditor do not become public until five days after the report is sent to the agency audited or examined." This exception to the IPRA remains applicable. Significantly, with respect to your recent correspondence, as stated in NMSA 1978, Section 14-2-8(B) of the IPRA, "[n]othing in the Inspection of Public Records Act shall be construed to require a public body to create a public record." Your Request attempts to require the OSA to create a public record.

I have highlighted the statutory rule at issue in the IPRA as well as the applicable exception to that rule to clarify any misunderstanding. Additionally, while the OSA's Special Investigations Division (SID) previously closed certain complaints you submitted, the OSA has not released any report in connection with its examination of NMLB to date. The OSA's examination of NMLB remains ongoing, and therefore any responsive letters to the Request are not part of the OSA's public records.

Office of the State Auditor

Nancy L. Henry

April 17, 2019

Page 2

The OSA is committed to continuing to uphold its statutory duties while maintaining the highest standards of ethics and integrity and will always work with constituents to foster public trust while fighting fraud, waste, and abuse.

You have also indicated you received responsive letters from NMLB, and I am pleased to hear that you have received the records you were seeking. However, I want to clarify that just because any responsive letters may have been public records of NMLB does not make the same responsive letters public records of the OSA, as the OSA's examination of NMLB remains ongoing, and the statutory exception provided in NMSA 1978, Section 12-6-5 applies. You have made a number of strong allegations that entirely lack support.

Finally, with respect to your e-mail to the OSA's records custodian dated April 15, 2019, asking why the OSA produced a letter to the NMLB, which letter was dated September 26, 2018, the OSA has some flexibility and discretion with respect to records that are not part of the OSA's public records. Although the IPRA excepts certain matters from the right to inspect, the IPRA does not always require those matters to be kept confidential. There are circumstances where the OSA may release a record covered by an exception to the IPRA when the OSA determines that release would be appropriate and not in violation of any other law that specifically requires that the record be kept confidential.

You have taken a threatening and harassing tone in much of your correspondence with the OSA while misunderstanding or misinterpreting both the law and the OSA's position, compelling the OSA to respond only as required by law rather than as demanded by you. I request that you refrain from making statements on social media that could be deemed libel and help the OSA help you. I believe any misunderstandings underlying your miscommunications with the OSA can be clarified. I am confident we can work toward a more productive relationship between you and the OSA with better mutual understanding. In any event, the OSA will continue to serve the public in accordance with its duties and ethics.

I appreciate your passion and dedication to transparency and open government. I am happy to work with you to better understand your concerns so that the OSA can continue to properly and timely address the issues. Please feel free to contact me with any questions.

Sincerely,

/s/ Jesse D. Gallegos, Esq.

Attorney-at-Law

Deputy Chief of Staff

EXHIBIT 5

From: nlhenry@mindspring.com <nlhenry@mindspring.com>
Sent: Thursday, April 18, 2019 4:32 PM
To: 'Bernadet Martinez' <Bernadet.Martinez@osa.state.nm.us>; 'Brian Colon' <Brian.Colon@osa.state.nm.us>
Cc: 'IPRA@osa.state.nm.us' <IPRA@osa.state.nm.us>; 'Chelsea Martin' <Chelsea.Martin@osa.state.nm.us>
Subject: RE: IPRA - Response Letters of NMLB - Since March 21st 2019

Dear all, here we go again. Let's break it down:

1. See attached, you provided this type of record prior, this example was provided for you.
2. *"Has no responsive documents"* however you have provided the same prior and I also received the same from the NMLB
3. *"Since this concerns an open, ongoing examination."* Well, there is no "ongoing examination" nor is there an "audit." I have researched this and the records I am requesting are indeed public record. These NMLB "Response Letters" are way after the fact, the investigation is closed and signed off on. The auditor cannot restate her opinion. The statutes you quote do not apply, the Audit Act.
4. **So**, are you relying on "no responsive records" **or** "*an open, ongoing examination*" see the confusion? Either way I do not agree and need a denial letter.

If there are responsive "Response Letters" which there are, I have it from another source, **please provide a proper denial letter with name and title** of **who** is denying the records. **I just got off the phone with the Open Government Division.** You are not exempt from this.
~ Nancy Henry

From: Bernadet Martinez <Bernadet.Martinez@osa.state.nm.us>
Sent: Thursday, April 18, 2019 3:26 PM
To: nlhenry@mindspring.com
Subject: RE: IPRA - Response Letters of NMLB - Since March 21st 2019

Good afternoon,

Thank you for your IPRA request dated April 18, 2019. At this time, the Office of the State Auditor (OSA) has no responsive documents since this concerns an open, ongoing examination.

Under NMSA 1978, Section 12-6-5(A) no special audit report becomes a public record until five days after the audit or examination is finished and a complete report is made, unless the five day period is waived

by the agency being audited. The Special Investigations Division of the Office of the State Auditor **has initiated an investigation** pursuant to the Audit Act NMSA 1978, Sections 12-6-1 through 12-6-14, and therefore **any reports or documents related to that investigation are not public record at this time and as such are exempt from the Inspection of Public Records Act** until five days after the special audit report is complete unless the five-day period is waived by the agency being audited.

This **completes and closes the OSA response** to your IPRA request.

Thank you,



Bernadet R. Martinez
Management Analyst
Records Custodian
NM Office of the State Auditor
2540 Camino Edward Ortiz, Suite A
Santa Fe, NM 87507
(505) 476-3838 (Office)
bernadet.martinez@osa.state.nm.us

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Hotline: 1-866-OSA-Fraud

From: nlhenry@mindspring.com

Sent: Thursday, April 18, 2019 2:48:44 PM (UTC-07:00) Mountain Time (US & Canada)

To: IPRA OSA

Cc: Chelsea Martin

Subject: IPRA - Response Letters of NMLB - Since March 21st 2019

Dear OSA and Records Custodian,

I am requesting all “**Response Letters**” from the NMLB since the last one dated March 21st 2019. If what I am requesting is not clear, please respond and ask for clarification. I have attached an example of such that you sent me prior.

Nancy L. Henry

Lead Administrator & Equine/Public Advocate

NM for Equine Rights & Open Government

<https://www.facebook.com/NewMexicoAgainstHorseSlaughter/>

505.250.9457, PO Box 56644, ABQ NM, 87187

“... there will be an opportunity to determine if those who have been entrusted with the affairs of government are honestly, faithfully and competently performing their function as public servants.” ~ NM Supreme Court

EXHIBIT 6

From: Malave, Sally <smalave@nmag.gov>
Sent: Friday, April 19, 2019 9:13 AM
To: Nancy Henry <nhenry@mindspring.com>
Subject: Re: IPRA Question - Denials

Good morning, Ms. Henry.

I am not aware of any provision in the Audit Act that exempts the agency from complying with the requirements of the Inspection of Public Records Act, including requirement for 3-day denial letter. Only one provision authorizes limited delay of disclosure. See below. Perhaps the Office of the State Auditor can identify the provision they are relying on. Thanks.

§ 12-6-5. Reports of audits

Currentness

A. The state auditor shall cause a complete written report to be made of each annual or special audit and examination made. Each report shall set out in detail, in a separate section, any violation of law or good accounting practices found by the audit or examination. Each report of a state agency shall include a list of individual deposit accounts and investment accounts held by each state agency audited. A copy of the report shall be sent to the agency audited or examined; **five days later, or earlier if the agency waives the five-day period, the report shall become a public record, at which time copies shall be sent to:**

- (1) the secretary of finance and administration; and
- (2) the legislative finance committee.

B. The state auditor shall send a copy of reports of state agencies to the department of finance and administration.

C. Within thirty days after receipt of the report, the agency audited may notify the state auditor of any errors in the report. If the state auditor is satisfied from data or documents at hand, or by an additional investigation, that the report is erroneous, the state auditor shall correct the report and furnish copies of the corrected report to all parties receiving the original report.

Sally Malavé
Assistant Attorney General
Director, Open Government Division
NM Office of the Attorney General
PO Drawer 1508
Santa Fe, New Mexico 87504-1508
(505) 490-4851 office
(505) 717-3600 fax
<http://www.nmag.gov/>

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On Fri, Apr 19, 2019 at 5:48 AM <nlhenry@mindspring.com> wrote:

Hello Sally Malave,

I am hoping to obtain an answer today from anyone at the OGD regarding the following.

I have requested records from the State Auditor. Long story short, not an audit, closed investigation and letters went out months ago. Anyhow, I am being told I cannot have the records and they are using the Audit Act as an excuse which does not apply.

I have challenged their IPRA response and asking for a denial letter with name and title of who is denying the records. They say they do not have to comply with that, a denial letter name/title, and that I do not understand the IPRA.

Does the OGD think a denial letter should be provided? Trying not to burden the OGD w/ a submitted Complaint.

Thanks!

Nancy L. Henry

Lead Administrator & Equine/Public Advocate

NM for Equine Rights & Open Government

<https://www.facebook.com/NewMexicoAgainstHorseSlaughter/>

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“... there will be an opportunity to determine if those who have been entrusted with the affairs of government are honestly, faithfully and competently performing their function as public servants.” ~ NM Supreme Court

EXHIBIT 7

From: nlhenry@mindspring.com <nlhenry@mindspring.com>
Sent: Monday, April 22, 2019 3:43 PM
To: 'Bernadet Martinez' <Bernadet.Martinez@osa.state.nm.us>
Cc: 'IPRA@osa.state.nm.us' <IPRA@osa.state.nm.us>
Subject: RE: IPRA - NMLB Communications March 25 - April 6 2019
Importance: High

Bernadette Martinez and OSA, please note that you have fulfilled the same request a few times prior, different date range, and never quoted the Audit Act.

These requested records are responses to closed fact finding investigations, with the responses being allowed to appease the NMLB. The Audit Act does not apply here.

Your response is a **blanket denial** however my request stated “pertaining to letters and investigations against them, **and any and all matters**, between March 25 and April 6 2019...” On April 8th you wrote that the request was “excessively burdensome or broad and we need additional time to respond, until April 22, 2019.”

I do not agree with the withholding of the requested records and the blanket denial. Please provide a Denial Letter describing the records sought and the names/titles of who is denying the records, as required under the IPRA. ~ Nancy Henry

From: Bernadet Martinez <Bernadet.Martinez@osa.state.nm.us>
Sent: Monday, April 22, 2019 3:17 PM
To: nlhenry@mindspring.com
Subject: RE: IPRA - NMLB Communications March 25 - April 6 2019

Good afternoon,

Thank you for your IPRA request dated April 5, 2019. At this time, the Office of the State Auditor (OSA) has no responsive documents **since** this concerns an open, ongoing examination.

Under NMSA 1978, Section 12-6-5(A) no special audit report becomes a public record until five days after the audit or examination is finished and a complete report is made, unless the five day period is waived by the agency being audited. The Special Investigations Division of the Office of the State Auditor has initiated an investigation pursuant to the Audit Act NMSA 1978, Sections 12-6-1 through 12-6-14, and therefore any reports or documents related to that investigation are not public record at this time and as such are exempt from the Inspection of Public Records Act until five days after the special audit report is complete unless the five-day period is waived by the agency being audited.

This completes and closes the OSA response to your IPRA request.

Thank you,



Bernadet R. Martinez
Management Analyst
Records Custodian
NM Office of the State Auditor
2540 Camino Edward Ortiz, Suite A
Santa Fe, NM 87507
(505) 476-3838 (Office)
bernadet.martinez@osa.state.nm.us

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From: Bernadet Martinez
Sent: Monday, April 8, 2019 12:10 PM
To: 'nlhenry@mindspring.com' <nlhenry@mindspring.com>
Subject: FW: IPRA - NMLB Communications March 25 - April 6 2019

Ms. Henry,

I corrected date of email to April 8.

Thank you,



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Santa Fe, NM 87507
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bernadet.martinez@osa.state.nm.us

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From: Bernadet Martinez
Sent: Monday, April 8, 2019 12:06 PM
To: 'nlhenry@mindspring.com' <nlhenry@mindspring.com>
Subject: RE: IPRA - NMLB Communications March 25 - April 6 2019

[Via Email](#)

April 8, 2019

Nancy L. Henry
PO Box 56644
Albuquerque, NM 87187

Re: Request to Inspect Public Records

Dear Ms. Henry:

On Friday, April 5, 2019, the Office of the State Auditor (OSA) received your request to inspect certain records. We believe that your request is excessively burdensome or broad and we need additional time to respond, until April 22, 2019.

Thank you,



Bernadet R. Martinez
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From: nlhenry@mindspring.com [<mailto:nlhenry@mindspring.com>]

Sent: Friday, April 5, 2019 5:53 AM

To: Bernadet Martinez <Bernadet.Martinez@osa.state.nm.us>

Cc: Chelsea Martin <Chelsea.Martin@osa.state.nm.us>

Subject: IPRA - NMLB Communications March 25 - April 6 2019

Dear Records Custodian and OSA,

I am requesting the following records.

All **communications** between the OSA and the NM Livestock Board (NMLB) pertaining to letters and investigations against them, and any and all matters, between March 25 and April 6 2019 I do not need the investigation letters sent to them by Chelsea Martin as I have those. I am looking for **other** communications, not the initial emails that went out w/ the letters attached. **Most likely their complaining about those letters, etc.**

1. All **emails** and **texts** between anyone at the OSA (such as Wayne Johnson, Brian Colon, Chelsea Martin, Joseph Holloway or other in legal at OSA, anyone at the OSA) and NMLB's
 - a. **Andrew Silva**
 - b. Shawn Davis
 - c. Joseph Holloway
 - d. Robert (Bob) Alexander
 - e. Priscilla Pena-Johnson
 - f. Julie Gauman
 - g. William (Bill) Sauble
 - h. Or any other NMLB staff or board members

2. All **letters or faxes** (I do not need the investigation letters sent to them by Chelsea Martin as I have those. I am looking for **other** communications) between anyone at the OSA (such as Wayne Johnson, Brian Colon, Chelsea Martin, legal department, anyone at the OSA) and NMLB's
- i. **Andrew Silva**
 - j. Shawn Davis
 - k. Joseph Holloway
 - l. Robert (Bob) Alexander
 - m. Priscilla Pena-Johnson
 - n. Julie Gauman
 - o. William (Bill) Sauble
 - p. Or any other NMLB staff or board members
3. All recorded meetings (in person or telephone) I need a copy of the **audio or video**

Nancy L. Henry

Lead Administrator & Equine/Public Advocate

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“... there will be an opportunity to determine if those who have been entrusted with the affairs of government are honestly, faithfully and competently performing their function as public servants.” ~ NM Supreme Court

EXHIBIT 8

From: nlhenry@mindspring.com <nlhenry@mindspring.com>
Sent: Wednesday, May 1, 2019 4:08 PM
To: 'Bernadet Martinez' <Bernadet.Martinez@osa.state.nm.us>
Cc: 'IPRA@osa.state.nm.us' <IPRA@osa.state.nm.us>; 'Jesse Gallegos' <Jesse.Gallegos@osa.state.nm.us>
Subject: RE: PAST DUE - FW: IPRA - NMLB Communications - April 6 2019 and April 16 2019
Importance: High

Bernadet Martinez and OSA,

That letter is not an appropriate response to this IPRA, or any IPRA request. You also wrote below “response to your IPRA dated March 15, 2019.” This IPRA is dated April 15th, 2019, see the email header below:

From: nlhenry@mindspring.com
Sent: Monday, **April 15, 2019 1:16:59 PM** (UTC-07:00) Mountain Time (US & Canada)
To: IPRA OSA
Subject: IPRA - NMLB Communications - April 6 2019 and April 16 2019

I need a proper response to this IPRA. Also, your response is a **blanket denial** however my request stated “pertaining to letters and investigations against them, **and any and all matters, amongst other requested records, between April 6 2019 and April 16 2019...**”

On April 16th you wrote that the request was “excessively burdensome or broad and we need additional time to respond, until April 30, 2019.” No response was received to this IPRA on April 30th. You were notified today, May 1st, that you failed to respond.

It is also unclear as to if you are stating there are no records, or they are being withheld for some reason, which is also not clear. However there are indeed responsive records.

The author of that letter, Jesse Gallegos, is not the Records Custodian, nor is he legal counsel for the OSA, he is the Deputy Chief of Staff. This is why proper Denial Letters are required under the IPRA.

I do not agree with the withholding of the requested records and the blanket denial. Please provide a Denial Letter describing the records sought, and the names/titles of who is denying the records, as required under the IPRA. ~ Nancy Henry

From: Bernadet Martinez <Bernadet.Martinez@osa.state.nm.us>
Sent: Wednesday, May 1, 2019 3:37 PM
To: nlhenry@mindspring.com
Subject: RE: PAST DUE - FW: IPRA - NMLB Communications - April 6 2019 and April 16 2019

Ms. Henry,

Attached is the letter which is in response to your IPRA dated March 15, 2019 which was emailed to you by the Office of the State Auditor (OSA) on April 17, 2019. The OSA has no responsive documents, this IPRA is closed and complete.

Thank you,



Bernadet R. Martinez
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NM Office of the State Auditor
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bernadet.martinez@osa.state.nm.us

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From: IPRA OSA
Sent: Wednesday, May 1, 2019 5:31 AM
To: Bernadet Martinez <Bernadet.Martinez@osa.state.nm.us>; Frank Valdez <Frank.Valdez@osa.state.nm.us>; Joseph Holloway <Joseph.Holloway@osa.state.nm.us>; Chris Catechis <Chris.Catechis@osa.state.nm.us>; Jesse Gallegos <Jesse.Gallegos@osa.state.nm.us>
Subject: FW: PAST DUE - FW: IPRA - NMLB Communications - April 6 2019 and April 16 2019

From: nlhenry@mindspring.com
Sent: Wednesday, May 1, 2019 5:31:14 AM (UTC-07:00) Mountain Time (US & Canada)
To: Bernadet Martinez
Cc: IPRA OSA
Subject: PAST DUE - FW: IPRA - NMLB Communications - April 6 2019 and April 16 2019

Dear Bernadet Martinez and OSA, on April 16th, 2019, more time was requested to fulfill this request, until April 30th. Please note this request is now past due and in violation of the IPRA. Please provide the records and a response, as required by law ~ Nancy Henry

From: Bernadet Martinez <Bernadet.Martinez@osa.state.nm.us>
Sent: Tuesday, April 16, 2019 11:00 AM
To: nlhenry@mindspring.com
Subject: RE: IPRA - NMLB Communications - April 6 2019 and April 16 2019

[Via Email](#)

April 16, 2019

Nancy L. Henry
PO Box 56644
Albuquerque, NM 87187

Re: Request to Inspect Public Records

Dear Ms. Henry:

On Monday, April 15, 2019, the Office of the State Auditor (OSA) received your request to inspect certain records. We believe that your request is excessively burdensome or broad and we need additional time to respond, until April 30, 2019.

Thank you,



Bernadet R. Martinez
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From: IPRA OSA
Sent: Monday, April 15, 2019 1:17 PM
To: Bernadet Martinez <Bernadet.Martinez@osa.state.nm.us>; Frank Valdez <Frank.Valdez@osa.state.nm.us>; Joseph Holloway <Joseph.Holloway@osa.state.nm.us>; Chris Catechis <Chris.Catechis@osa.state.nm.us>
Subject: FW: IPRA - NMLB Communications - April 6 2019 and April 16 2019

From: nlhenry@mindspring.com
Sent: Monday, April 15, 2019 1:16:59 PM (UTC-07:00) Mountain Time (US & Canada)
To: IPRA OSA
Subject: IPRA - NMLB Communications - April 6 2019 and April 16 2019

Dear Records Custodian and OSA,

I am requesting the following records:

All **communications** between the OSA and the NM Livestock Board (NMLB) pertaining to letters and investigations against them, and any and all matters, **between April 6 and April 16 2019** I do not need the investigation letters sent to them by Chelsea Martin as I have those. I am looking for **other** communications, not the initial emails that went out w/ the letters attached. Most likely their complaining about those letters, etc.

1. All **emails** and **texts** between anyone at the OSA (such as Brian Colon, Chelsea Martin, Natalie Cordoava, Chris Catechis, Joseph Holloway or other in legal at OSA, anyone at the OSA) and NMLB's
 - a. **Andrew Silva**
 - b. Shawn Davis
 - c. Joseph Holloway
 - d. Robert (Bob) Alexander
 - e. Priscilla Pena-Johnson
 - f. Julie Gauman
 - g. William (Bill) Sauble
 - h. Or any other NMLB staff or board members
2. All **letters or faxes** (I do not need the investigation letters sent to them by Chelsea Martin as I have those. I am looking for **other** communications) between anyone at the OSA (such as Wayne Johnson, Brian Colon, Chelsea Martin, legal department, anyone at the OSA) and NMLB's
 - i. **Andrew Silva**
 - j. Shawn Davis
 - k. Joseph Holloway
 - l. Robert (Bob) Alexander
 - m. Priscilla Pena-Johnson
 - n. Julie Gauman
 - o. William (Bill) Sauble
 - p. Or any other NMLB staff or board members

3. All recorded meetings (in person or telephone) I need a copy of the **audio or video**

Nancy L. Henry

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