STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

HECTOR H. BALDERAS
ATTORNEY GENERAL

March 7, 2022

VIA ELECTRONIC MAIL ONLY

City of Rio Rancho
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Re: Inspection of Public Records Act Complaint – Argen Marie Duncan

Dear Mr. Lauer:

Thank you for your response to our inquiry into the complaint filed with the Office of the Attorney General by Ms. Argen Marie Duncan alleging that the City of Rio Rancho (hereinafter the "City") violated the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2019) ("IPRA"). As you know, Ms. Duncan alleges that the City violated IPRA in connection with two public records requests seeking documents pertaining to alleged criminal child abuse and crimes allegedly committed by juveniles, respectively. Having carefully considered the issues raised by Ms. Duncan's complaint, we conclude that the City likely violated IPRA in denying both of these requests. In the interests of both avoiding unnecessary litigation and providing the public access to "the greatest possible information" about governmental affairs, Section 14-2-5, we strongly recommend that the City take remedial action as soon as possible.

Background

Ms. Duncan's complaint to our Office alleges that the City's practice of responding to public records requests conflicts with a statement in our IPRA Guide indicating that "arrest records concerning juveniles" are not subject to an exception to disclosure. Attorney General's Inspection of Public Records Act Compliance Guide, p. 12 (8th ed. 2015) ("IPRA Guide"). Specifically, it appears that the City does not release any records involving children, citing in general to the Children's Code. Although Ms. Duncan's complaint notes that this practice has been "ongoing throughout the past year, approximately," she provided us two examples for our review.

In Ms. Duncan's first example, she requested public records from the City on October 12, 2020. This request sought records related to an individual charged with child abuse not resulting in death

or great bodily harm. The City appears to have received this request on October 19, 2020. Three days later, on October 22, 2020, the City denied the request in its entirety pursuant to "NMSA § 32A, the Children's Code." This denial explained that "all records" related to the case were exempt from disclosure.

The second example involves Ms. Duncan's public records request to the City on October 22, 2020. In this request, she asked for "[r]ecords of all arrests, court summons on criminal charges and non-traffic citations" from the City's police department within a particular date range. Two business days later, on October 26, 2020, the City responded by providing her all but one of the records responsive to her request. As to the single record it withheld, the City explained that "one record was excepted from disclosure" pursuant to "NMSA § 32A, the Children's Code."

Ms. Duncan alleges that both of these examples are illustrative of the City's public records practices, which she argues are unlawful because they conflict with the previously-mentioned statement in our IPRA Guide. She describes this as an "ongoing problem" that she has "repeatedly tried to resolve without success." For its part, the City responded to our inquiry by maintaining that it acted lawfully in denying each request.

Analysis

The Inspection of Public Records Act guarantees the people of the State of New Mexico access to "the greatest possible information" about governmental affairs. NMSA 1978, § 14-2-5; *see also Am. Civil Liberties Union of New Mexico v. Duran*, 2016-NMCA-063, ¶ 25 (noting that the purpose of IPRA is "to promote the existence of (1) an informed electorate and (2) transparency in governmental affairs"). IPRA specifically provides that individuals may inspect and copy all "public records," with only limited and specifically enumerated exceptions. Section 14-2-1(A). We interpret IPRA's various provisions in light of the "presumption in favor of the right to inspect." IPRA Guide p. 7.

With respect to the first example in Ms. Duncan's complaint, it does appear that the City violated IPRA by withholding records related to criminal charges of child abuse. The Abuse and Neglect Act provides that "[a]ll records or information concerning a party to *a neglect or abuse proceeding* . . . shall be confidential and closed to the public." NMSA 1978, Section 32A-4-33(A) (emphasis added). Under the Act, "a neglect or abuse proceeding" is a special, *civil* proceeding brought in Children's Court on behalf of children by the state that could result in the termination of parental rights. *See In re Pamela A.G.*, 2006–NMSC–019, ¶ 12, 139 N.M. 459, 134 P.3d 746 ("neglect and abuse proceedings are civil proceedings"); *see also* NMSA 1978, Section 32A-4-17 (requiring the summons in a neglect or abuse proceeding to "clearly state that the proceeding could ultimately result in termination of the respondents' parental rights"). Under Rule 10-121(B) NMRA, the parties to a neglect or abuse proceeding are the state; a parent, guardian, or custodian alleged to have abused or neglected a child; the child alleged to have been abused or neglected; and any other person made a party by the state.

By contrast, it is our understanding from Ms. Duncan's complaint and the response we received from the City that the records she requested pertained to a *criminal* case involving charges of child abuse not resulting in death, presumably brought under NMSA 1978, Section 30-6-1. Such

criminal prosecutions are *not* neglect or abuse proceedings under the Children's Code. Based on the facts, as we understand them, and to the extent the City relied on Section 32A-4-33(A) to withhold records responsive to Ms. Duncan's October 12, 2020 records request, it is our conclusion that the City violated IPRA in doing so.

As to Ms. Duncan's second example, Section 32A-2-32(A) of the Delinquency Act provides that "[a]ll records pertaining to the child . . . obtained by the juvenile probation office, parole officers and the juvenile public safety advisory board or in possession of the [Children, Youth, and Families] department, are confidential and shall not be disclosed directly or indirectly to the public." The City appears to interpret Section 32A-2-32(A) as applicable to juvenile law enforcement records in its possession, whereas we have long maintained that "[t]here is no law protecting arrest records concerning juveniles." IPRA Guide, p. 12 (emphasis added). We take this opportunity to affirm and explain our position.

As an initial matter, we note that, according to the New Mexico Juvenile Justice Handbook, a project of the Corinne Wolfe Children's Law Center and the New Mexico Judicial Education Center at the Institute of Public Law, New Mexico School of Law, "[Section 32A-3-32(A)] is generally interpreted to mean that [only] records obtained by probation, parole and the juvenile public safety advisory board or in the possession of CYFD are confidential." *New Mexico Juvenile Justice Handbook, A Legal Manual on Delinquency* (April 2011) at 285 (available at https://childlaw.unm.edu/assets/docs/Juvenile-Justice-Handbook-August-2011.pdf) (last visited Mar. 5, 2022). The Handbook acknowledges that "the position of the comma before "are confidential" suggests the possibility of reading the sentence as: 'All records pertaining to the child … are confidential and shall not be disclosed directly or indirectly to the public.'" *Id.* This ambiguity notwithstanding, the Handbook clarifies that "the statute is not being construed to include legal records, such as pleadings, court orders, and transcripts." *Id.* This interpretation is consistent with the fact that all hearings in juvenile proceedings are generally open to the public. *See* NMSA 1978, Section 32-2-16(B).

As a whole, the provisions of the Delinquency Act reinforce our Office's interpretation of Section 32A-2-32(A). For one, while the statute contains a long list of specific examples of confidential records, it does not include arrest or other law enforcement records. While by no means determinative, this omission does inform our interpretation of the statute, because these types of records are explicitly mentioned elsewhere in the Delinquency Act. Specifically, Section 32A-2-33.1(A) of the Act prohibits law enforcement agencies from disclosing on their public access web sites "any information concerning . . . an arrest or detention of a child." Therefore, in drafting the Delinquency Act, the Legislature clearly knew how to prevent certain limited disclosures of juvenile law enforcement records (*i.e.*, public websites). This awareness signifies to us that the failure to explicitly provide broader confidentiality for such records under Section 32A-2-32(A) was intentional. In addition, Subsection (E) of Section 32A-2-33.1 prohibits the web site disclosure of "social records pertaining to a child *as provided in Section 32A-2-32*[.]" The fact that the Legislature referred to Section 32A-2-32 explicitly under Subsection (E), but omitted a similar reference under Subsection (A), appears to us an implicit acknowledgement that law enforcement records do not fall under Section 32A-2-32(A).

Next, under Section 32A-2-32(C), "[t]he records described in Subsection A of this section . . . shall be disclosed only to . . . (15) the child's parent, guardian or legal custodian when the disclosure of the information is necessary for the child's treatment or care and shall include only that information necessary to provide for the treatment or care of the child . . . [and] (17) the child, if fourteen years of age or older." It seems unlikely to us that the Legislature intended to deny access to arrest and other law enforcement records to both children under thirteen years of age *and* their parents.

Similarly, under Section 32A-2-26(A), the Children's Court has authority, "[o]n motion by or on behalf of a person who has been the subject of a delinquency petition," to seal "law enforcement files and records[.]" At the same time, under Rule 10-166(C)(6) NMRA, "records in delinquency proceedings protected by Section 32A-2-32(A)" are "confidential and shall be automatically sealed without motion or order of the court." If law enforcement files and records were indeed included under Section 32A-2-32(A), the provision in Section 32A-2-26(A) for the sealing of these same records "on motion" would be meaningless.

Finally, under Section 32A-2-32(E), "[w]hoever intentionally and unlawfully releases any information or records closed to the public pursuant to this section . . . is guilty of a petty misdemeanor." "Statutes defining criminal conduct should be strictly construed, and doubts about construction of criminal statutes are resolved in favor of lenity." *State v. Ogden*, 1994-NMSC-029, ¶ 25, 118 N.M. 234, 880 P.2d 845. We are cognizant of the fact that one of the goals of the Delinquency Act is to "remove from children committing delinquent acts the adult consequences of criminal behavior." Section 32A-2-2(A). To the extent this goal creates a persistent ambiguity notwithstanding our analysis above, such ambiguity must be subjected to the rule of lenity. As such, we feel compelled to interpret the Delinquency Act's confidentiality provision as *not* applicable to juvenile arrest and other law enforcement records. Therefore, to the extent the City relied on Section 32A-2-32(A) to withhold juvenile law enforcement records otherwise responsive to Ms. Duncan's second IPRA request, it is our position that the City violated IPRA.

Conclusion

Based on the information available to us, the City's claimed exceptions to disclosure do not appear to authorize it to withhold the records requested by Ms. Duncan on October 12, 2020 and October 22, 2020. Notwithstanding the City's expressed policy concerns with permitting inspection of these public records, its interpretation of both the Abuse and Neglect Act and the Delinquency Act appears untenable and unsupported by the statutes themselves. The City's denial of Ms. Duncan's requests therefore appears to be at odds with its statutory duty to provide the public access to "the greatest possible information" about its affairs, Section 14-2-5, while also representing a decision that may subject the City to unnecessary and potentially costly litigation. For these reasons, we urge the City to take prompt remedial action to provide Ms. Duncan the records she requested and, more generally, to alter its public records practices so as to comply with both IPRA and the Children's Code.

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,

Olga M. Serafimova
Senior Civil Counsel

Enclosure

cc: Argen Marie Duncan