

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

## Electronic Complaint Submission

### Submission Detail

ECS Reference Number NMOAG-ECS-20210616-970e

Final Submit Date 6/16/2021 9:58:13 AM

**Disclosure of your complaint:** This complaint is a public record, thus available under provisions of the NM Inspection of Public Records Act.

**Disclosure to other entities:** This complaint, its content, and other information may be disclosed to other law enforcement and regulatory agencies.

☒ I understand this complaint and any submitted documents are public record and may be shared with other law enforcement and regulatory agencies.

**DECLARATION:** By submitting this form, I attest that the information in this complaint is true and accurate to the best of my knowledge. I further understand that by submitting this form I may be called to testify as a witness in this matter.

☒ I understand declaration statement.

*The New Mexico Office of the Attorney General cannot give legal advice regarding this complaint and will not act as your personal attorney. If you have questions regarding your rights please contact a private attorney.*

*Submission of this complaint is not confirmation that an investigation will be initiated.*

## Complaint Detail

<b>Complaint Type</b>	Inspection of Public Records (IPRA) Complaint
<b>Retained Attorney</b>	<input type="checkbox"/>

## Parties

### Complainant

**Mr. Patrick Monroe Brenner**

Person

#### Address

400 Gold Ave SW, Suite 909  
Albuquerque, New Mexico 87102

#### Contact information

[pbrenner@riograndefoundation.org](mailto:pbrenner@riograndefoundation.org)  
(505) 377-6273

### Complaint against

**Governor Michelle Lujan Grisham**

Public Body (Government Entity)

#### Address

490 Old Santa Fe Trail Room 400  
Santa Fe, New Mexico 87501

#### Contact information

## Complaint Specifics

<b>Format of IPRA request:</b>	Written
<b>Date IPRA request was submitted to the public body:</b>	May 27, 2021
<b>Date of all responses received from the public body:</b>	June 1, 2021
<b>Records</b>	No records were provided.

## Transaction

## Documents



Attorney General IPRA Complaint.pdf

Complaint with attachments/exhibits

**Comments**

\*\*\* END OF COMPLAINT \*\*\*



**To:** New Mexico Attorney General Hector Balderas  
Open Government Division  
PO Drawer 1508  
Santa Fe, New Mexico 87504

**From:** Patrick Monroe Brenner  
Rio Grande Foundation  
400 Gold Ave SW, Suite 909  
Albuquerque, New Mexico 87102

**Subject:** Future of IPRA, Transparency, and Open Government in the State of New Mexico

**Date:** June 16, 2021

Mr. Balderas,

I am writing to inform you of what I believe to be an ongoing, widespread, and systemic circumvention of the Inspection of Public Records Act and what I see as a deliberate injection of confusion designed to allow a technical shortcut of transparency obligations.

I believe that the State of New Mexico, the Department of Information Technology, the Office of State Engineer, the New Mexico Department of Workforce Solutions, the Regulation and Licensing Department, the Department of Game and Fish, the Energy Minerals and Natural Resources Department, the Early Childhood Education and Care Department, the New Mexico Corrections Department, the Department of Military Affairs, the Economic Development Department, the Division of Vocational Rehabilitation, the Workers' Compensation Administration, the Aging and Long Term Services Department, the Department of Finance and Administration, the Taxation and Revenue Department, the General Services Department, the Department of Public Safety, the Department of Cultural Affairs, the Children Youth and Families Department, the State Records Center and Archives, and the Board of Nursing are denying the Citizens of New Mexico the opportunity to inspect records through the ongoing use of electronic messaging systems like "Slack", "Signal", and "Teams", by obfuscating the underlying definitions of what constitutes a public record, and by implementing alarmingly short document retention periods.

The use of "Slack", "Signal", and "Teams" gives users access to delete information, automatically delete messages after multiple messages, and automatically delete messages after predetermined periods of time have passed. Supervisors and managers of multiple departments are circumventing the state's open government laws and practices by requiring usage of these messaging systems over emails.

These instant messages are now being defined as messages which serve to convey information of temporary importance in lieu of oral communication. They are broadly categorized as “transitory” by default, with official guidance asserting that “every single text message that you send or receive likely qualifies as a ‘transitory record’”, a dangerous proposition. The definitions of “transitory” records and “non-records” are being expanded beyond their original intent to holistically restructure how governmental agencies respond to records requests by obfuscating the concept of what constitutes a “public record”. Massive amounts of public records are being autocratically defined as temporary in nature by the sole custodians of those records. This allows circumvention of the obligation of the responsive body to turn these records over for inspection by creating a justification for automatic deletion.

The Department of Information Technology implemented new policies for Teams chat messages on January 24th, 2021 to automatically delete all Teams chat messages after 24 hours for all government agencies and employees utilizing the Teams messaging platform. This automatic deletion policy is an optional feature of these messaging platforms, something that must be enabled within the platform’s configuration.

As these records might not otherwise qualify under an exception specifically laid out in the law, their relative importance is arbitrarily devalued by applying these definitions. Since “transitory” records and “non-records” are not qualified exceptions, these documents cannot be withheld from requesters. However, because these definitions are being applied so liberally, the qualification is used to justify their automatic deletion after the arguably short retention period. The right to inspect applies to any nonexempt public record that exists at the time of the request. Having been deleted, these records are no longer in existence and thus cannot be included in the scope of future requests that are submitted after the deletion has already taken place.

The retention periods prior to deletion are also being comprehensively reformulated. Emails, messages, and communications generally are being subjected to dangerously short retention periods. However, official guidance and policy recommend deletion of certain records after 24 hours and some information technology policies are enforced to automatically delete certain records after 24 hours.

Under the Inspection of Public Records Act, agencies are allowed up to 72 hours to acknowledge the receipt of records requests. But if a record only exists for 24 hours, it becomes increasingly difficult, if not impossible, to obtain access to records before their automatic deletion.

Your own guide addresses exceptions generally: “Because of the presumption in favor of the right to inspect, public bodies acquiring information should keep in mind that the records they keep generally are subject to public inspection.”

Furthermore: “‘public records’ means all documents, [...] 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, whether or not the records are required by law to be created or maintained.”

The implementation of these communications systems, the abuse of the definitions of “transitory” records and “non-records”, and the subject of automated deletion and retention policies demands a thorough investigation and a response from your office. While IPRA might not speak to the specifics of creation or retention, surely these trends portray a disturbing shift that undermines the intention of the law: the citizen’s right to know is the rule and secrecy is the exception.

Through the perspective lens of openness and transparency in government, these changes represent a fundamentally perilous shift. The Inspection of Public Records Act is designed to protect the people’s right to know, but the actions of these government agencies and the individuals who lead them severely cripple the people’s ability to ascertain information of their governing bodies. Our ability to shine the light is being rapidly diminished. If the people desire to keep a watchful eye on their government, how can they accomplish this when they have been blinded? The problems at issue are clearly contrary to the spirit of IPRA.

It is evident that we need an aggressive media and informed constituency to demand accountability in a system proven to produce abuses without. These abuses have never been more readily apparent. Unless you help me put a stop to this, we have begun an age where secrecy is the rule and the citizen’s right to know is the exception.

I implore that you review these concerns promptly and without bias.

Your friend in liberty,

A handwritten signature in black ink, appearing to read 'Patrick B', with a large, stylized initial 'P' and a large 'B' at the end.

Patrick Monroe Brenner  
Vice President

## DOCUMENT RETENTION GUIDANCE

The Legal Department is currently in the process of formulating comprehensive document retention policies for the Office of the Governor. In the meantime, here is some guidance regarding those emails, texts, and voice mails which should be kept and those which may be deleted.

If you have any questions or concerns regarding this guidance, please contact the Legal Department and we can discuss.

### Text Messages

- **The bottom line:** You may delete any text message that is a routine communication and is not “required to control, support or to document the operations of government.”
- **Explanation:** Every single text message that you send or receive likely qualifies as a “transitory record.” Transitory records are defined (under 1.21.2.7(H) NMAC) as “messages which serve to convey information of temporary importance in lieu of oral communication.” Such messages are “only required for a limited time to ensure the completion of a routine action or the preparation of a subsequent record.” They are also “**not required** to control, support or document the operations of government.” Practically speaking, this means that any conversation that you have with someone via text message that you could have had through a phone conversation is a transitory record. Transitory records are defined as “non-records” (1.21.2.7(E) NMAC), which are not required to be retained and may be regularly deleted. See 1.13.4.7(F), 1.13.4.11(D), 1.13.4.13(C) NMAC. The key question to ask yourself is whether the text message could have been conveyed via an in-person or phone conversation. If so, then you may delete it.
- **Recommendation regarding deletion of non-public records:** We recommend that you delete all text messages which are “transitory records” every ten days. You may delete them more often if you wish.

### Voicemails

- **The bottom line:** You may delete any voicemail that is a routine communication and is not “required to control, support or to document the operations of government.”
- **Explanation:** Much like text messages, nearly every single voicemail that you receive is a transitory record that may be deleted. Please consult the section on text messages above for an explanation of transitory records. Again, the key question to ask is whether the information conveyed over the voicemail could have been conveyed via an in-person or phone conversation. If so, then you may delete it.

- **Recommendation regarding deletion of non-public records:** We recommend that you delete all voicemails which are “transitory records” every ten days. You may delete them more often if you wish.

### **Emails/Documents**

Email retention presents a more complicated set of questions and the documents that you may delete and those that you should retain are therefore discussed in some detail below.

#### **Emails/documents that may be deleted**

**“Non-records”:** The following types of email messages, email attachments, and other documents on your computer are defined as “non-records” and may be deleted:

- personal correspondence and other materials not created in connection with the transaction of state business;
- extra copies of documents kept solely for convenience of reference;
- promotional material from vendors and similar materials that are publicly available to anyone;
- messages to or from email distribution lists (listserv) not directly related to agency business;
- duplicate messages and attachments;
- preliminary drafts of letters, reports and memoranda (**please note that draft or working versions of documents should be marked as such and any existing versions should be deleted once you have completed the document**);
- messages considered brainstorming or preliminary thought processes, reflecting the exchange of ideas preliminary to the development of a final decision or position;
- sample letters and forms;
- junk mail or spam; and
- media advisories, news and press releases sent for informational purposes (unless the employee drafted or created the documents).

**Transitory emails:** As discussed above, these are all messages and attachments that convey information of temporary importance in lieu of oral communication, are required only for a limited time to ensure the completion of a routine action or the preparation of a subsequent record and are not required to control, support or document the operations of government. However, you should be more careful in applying the “transitory” label to emails than to text messages and voice mails because emails are more frequently required to control, support, or document government operations. Examples of transitory email are announcements, transmittal messages, routine requests for information or publications and replies to those requests (e.g., “the address is...” or “the deadline is...” or “the proper agency to contact is...”), invitations to meetings and other work-related events, internal reminders and out-of-office replies.

#### **Emails that you should not delete**

##### **Public records**



You need to retain any emails that may be classified as public records.

Public records are defined as those “made or received by an agency in pursuance of law or in connection with the transaction of public business and preserved, or appropriate for preservation, by the agency as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the government or because of the materials’ informational and historical value.”

The safest approach is to retain any email that documents or memorializes any public business conducted by this Office. However, keep in mind that draft proposals and preliminary discussions of policies, decisions, operations, etc. are not public records and do not need to be retained.

Finally, if the contents of an email message include information classified as public records and information of a personal nature or other non-records or transitory email, the email message must be retained as a public record.

#### **Recommendation regarding email/document deletion**

We recommend that you delete all emails which qualify as non-records or transitory records (as described above) at least once every thirty days. You may delete them more often if you wish. You should mark any draft or working documents as such and delete any working/draft versions when they are no longer useful to you or as soon as you have completed a final version of the document.

[← REPLY](#)[↩ REPLY ALL](#)[→ FORWARD](#)[Mark as unread](#)

Narvaiz, Renee, DoIT

Thu 1/21/2021 3:42 PM

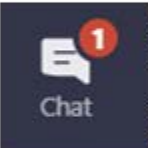
Inbox

• This message was sent with high importance.


Good Afternoon,

You are receiving this message because records show you have used the TEAMS application.

As some of you may be aware, the Executive Branch is preparing to migrate to the Office365 productivity suite. As part of that process, certain configuration changes will impact the TEAMS Chat functionality.

 Please note that as of 12:01 a.m. on Sunday, January 24, 2021, TEAMS Chat communications will only be retained for 24 hours from their creation or most recent modification. At the expiration of this 24-hour period, each TEAMS Chat communication will be deleted permanently and will not be subject to retrieval. A view of the icon can be seen on the left.

Any user who wishes to preserve a copy of a TEAMS Chat communication must do so outside of the TEAMS Chat environment. Users can either copy/paste the communication or take a screen shot.

 Please also note that “Posts” made within a “Team” are not subject to the 24-hour retention policy. A Team is a defined group of collaborators created under the function icon on the left.



Thank you.



## State of New Mexico

Michelle Lujan Grisham  
*Governor*

June 1, 2021

Patrick M. Brenner  
Vice President of Giving at  
the Rio Grande Foundation  
400 Gold Ave SW, Suite 909  
Albuquerque, NM 87102  
pbrenner@riograndefoundation.org

RE: Your Request for Public Records

Dear Mr. Brenner:

On May 27, 2021, the Office of the Governor received your request for the following records under the New Mexico Inspection of Public Records Act (NMSA 1978, §§ 14-2-1 to -12) ("IPRA"):

I am seeking to inspect all text messages sent from and received by Nora Sackett between and including April 1, 2021 and April 30, 2021.

I am seeking to inspect all Signal messages sent from and received by Nora Sackett between and including April 1, 2021 and April 30, 2021.

I am seeking to inspect all TEAMS chat messages sent from and received by Nora Sackett between and including April 1, 2021 and April 30, 2021.

We have conducted a search of records maintained or held by the Office of the Governor and we have located no records responsive to your request.

If you have any questions, please do not hesitate to contact us.

Kind Regards,

s/ Kyle P. Duffy

Kyle P. Duffy

Associate General Counsel

KPD/dh