

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

ERIC GRIEGO and THE GRIEGO AGENCY, L.L.C.,

Plaintiffs,

vs.

No. D-202-CV-2009-05196

SECRETARY OF TAXATION AND
REVENUE DEPARTMENT FOR THE
STATE OF NEW MEXICO, THE TAXATION
AND REVENUE DEPARTMENT OF THE
STATE OF NEW MEXICO, AND CUSTODIAN
FOR THE RECORDS OF THE TAXATION AND
REVENUE DEPARTMENT OF THE STATE OF
NEW MEXICO,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

COME NOW Plaintiffs Eric Griego and The Griego Agency, LLC (herein collectively referred to as "Plaintiffs") by and through their attorney Michael L. Danoff of Michael L. Danoff & Associates, P.C. and files this Memorandum of Law in support of their simultaneously filed Motion for Summary Judgment under Rule 1-056 NMRA 2007 in their favor and against Defendants on grounds that Defendants' (hereinafter referred to as "TRD") violated the Inspection of Public Records Act, NMSA § 14-2-1 et seq. (hereinafter the "Act") for failure to permit Plaintiffs to inspect public records contemplated by the Act and to timely comply with Plaintiffs' requests for inspection of public records set forth in the Complaint.

I. STANDARD FOR REVIEW

The standard of review for summary judgment is well settled in New Mexico.

Summary judgment should be granted if there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. *Koenig v. Perez*, 104 N.M. 664, 665, 726 P.2d 341, 342 (1986). "If the facts are undisputed and only a legal interpretation of the facts remains, summary judgment is the appropriate remedy." *Bd. of County Comm'rs v. Risk Mgmt. Div.*, 120 N.M. 178, 179, 899 P.2d 1132, 1133 (1995).

II. UNDISPUTED MATERIAL FACTS

1. From October 30, 2006 through November 22, 2008, Plaintiffs sent various letters to TRD requesting public records pursuant to the Act. (See Plaintiffs' Complaint and attached Exhibits.)
2. TRD did not respond to Plaintiffs requests in a timely manner in accordance with the Act and in some instances did not respond at all to Plaintiffs requests. (See Plaintiffs' Complaint and attached Exhibits.)
3. Plaintiffs made two (2) written requests to the TRD under the ACT for public records on October 30, 2006. (See Plaintiffs' Exhibits 2 and 3 attached to the Complaint.)
4. Plaintiffs made a written request to the TRD under the ACT for public records on April 5, 2007. (See Plaintiffs' Exhibit 1 attached to the Complaint.)
5. Plaintiffs made a written request to the TRD under the ACT for public records on December 11, 2007. (See Plaintiffs' Exhibit 5 attached to the Complaint.)
6. Plaintiffs made a written request to the TRD under the ACT for public records on November 22, 2008. (See Plaintiffs' Exhibit 4 attached to the Complaint.)

7. From October 30, 2006 TO September 1, 2009, plaintiffs requested approximately 62 IPRA requests from TRD. (See Plaintiffs' Complaint and attached Exhibits.)
8. Plaintiffs' requests included public records requests for delinquency property tax records, names of TRD employees that had accessed Eric and Kellie Griego's personal and business tax records, and payment vouchers.
9. The Plaintiffs have for several years made requests pursuant to the Public Records Act and are familiar with making such requests and made these requests in accordance with the statutory provisions.
10. Plaintiffs followed all applicable procedures for requests pursuant to the Act and have been denied information, which they are entitled to receive. (See Plaintiffs' Complaint and attached Exhibits.)
11. Plaintiffs rely on access to public records information for business purposes and are entitled to this information pursuant to NMSA 1978 § 14-2-12 of the New Mexico Public records Act.
12. NMSA 1978 § 14-2-1 of the New Mexico Public Records Act states that every person has the right to inspect public records of this State with certain exceptions and the exceptions and the requests made herein by Plaintiffs have not come under any of those exceptions.
13. That pursuant to NMSA 1978 Section 14-2-10 and NMSA 14-2-11, the Plaintiffs are entitled to statutory damages and attorney's fees for failure to comply with the requests made pursuant to the New Mexico Public Records Act.

III. ARGUMENT

A. The Records Requested by Plaintiffs Are Public Records and Not Subject to Exemption Under the Act as a Matter of Law

The records requested by Plaintiffs in Exhibits 1-5 to the Complaint are public records as defined by the Act and the TRD violated the Act by refusing to allow Plaintiffs to inspect the requested documents. The documents requested by Plaintiffs are prepared and compiled by the TRD in the course of the TRD's responsibility of maintaining records for the sale of properties subject to delinquent property taxes. These records clearly fall as public records under the Act and Plaintiffs had a statutory right to be able to inspect these public records upon written request.

Every citizen has a fundamental right to have access to public records. Board of Com'rs of Dona Ana County v. Las Cruces Sun-News, 2003, 134 N.M. 283, 76 P.3d 36.

NMSA 1978, § 14-2-5 (1993) establishes the public policy and intent of the Act. Section 14-2-5 states:

Recognizing that a representative government is dependent upon an informed electorate, the intent of the legislature in enacting the Inspection of Public Records Act [this article] is to ensure, and it is declared to be the public policy of this state, that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees. It is the further intent of the legislature, and it is declared to be the public policy of this state, that to provide persons with such information is an essential function of a representative government and an integral part of the routine duties of public officers and employees.

In cases involving the disclosure of public records, when there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed. *City of Farmington v. The Daily Times*, 2009, 146 N.M. 349, 210 P.3d 246.

There are no contrary statutes or countervailing public policy with regard to the public records that Plaintiffs requested in the instant case. In accordance with the intent and public policy of the Act, and the Court's holding in the *City of Farmington*, Plaintiffs were entitled to have access to the requested public records. Therefore, as a result of TRD's violation of the Act in not providing access to the requested public documents, Plaintiffs are entitled to statutory damages.

B. The TRD Violated the Act as a matter of law by failing to timely respond and/or deny Plaintiffs' Requests for information and for failing to follow the Procedures for denial

The TRD has repeatedly either continued to stall Plaintiffs request for public records without an explanation or refused to provide Plaintiffs with any response to their requests for public records. In a case regarding disclosure of requested public records, the burden is on the custodian of the records to demonstrate a reason for nondisclosure. *City of Farmington v. The Daily Times*, 2009, 146 N.M. 349, 210 P.3d 246. The TRD has clearly violated the Act and Plaintiffs are entitled to statutory damages.

Plaintiffs made several written requests for public records to the TRD in accordance with the Act. NMSA, 1978, § 14-2-8 describes the procedure for requesting public records from the TRD. In addition, NMSA, 1978, § 14-2-8 provides the procedure for the TRD to follow in responding to written request for public information. NMSA, 1978, § 14-2-8 states in relevant part:

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

C. A written request shall provide the name, address and telephone number of the person seeking access to the records and shall identify the records sought with reasonable particularity. No person requesting records shall be required to state the reason for inspecting the records...

D. 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. The three-day period shall not begin until the written request is delivered to the office of the custodian...

NMSA, 1978, 14-2-10 provides that if a custodian determines in writing that a written request is excessively burdensome or broad, an additional reasonable period of time shall be allowed to comply and the custodian must inform the requester within fifteen days of the date of receipt that additional time is needed to comply.

Concerning Exhibit A-1 of the Complaint, the TRD never even bothered to respond to Plaintiff's written request dated April 5, 2007 until after the filing of this Complaint.

With respect to Exhibits A-2 and A-3 of the Complaint, on October 30, 2006, Plaintiffs made a written request to the TDR for a detailed fax log and detailed telephone record for Taxation and Revenue Department fax number (505) 827-1759. On November 1, 2006, TRD responded to Plaintiffs in a written letter that acknowledged receipt of the request and stated that TRD would need additional time to research the records responsive to the request. On November 16, 2006, TRD responded again to Plaintiffs stating that Plaintiffs' "request has been deemed excessively burdensome." The TRD went on to state that the records were not maintained by TRD and had been requested from the General Services Department.

TRD went on to explain, "We have not received the records from that agency. The records will be forwarded to you upon their receipts."

NMSA, 1978, § 14-2-10 provides that if a custodian determines that a written request is excessively burdensome or broad, an additional reasonable period of time shall be allowed to comply and the custodian must inform the requester within fifteen days of the date of the receipt that additional time is needed to comply. Although Plaintiffs do not contest the fact that TRD was in partial compliance with NMSA, 1978, § 14-2-10 by informing Plaintiffs that they needed additional time to fulfill the request, the TRD still violated the Act in that TRD has still not produced or provided access to the public records more than three (3) years after the original requests. Section 14-2-10 specifically states, "... an additional reasonable period of time shall be allowed to comply." As of December 13, 2007, more than a year after Plaintiffs original request, Plaintiffs had still not received any further correspondence from TRD or any records per Plaintiffs' request from the TRD. The significant amount of time Plaintiffs waited for the public records and/or correspondence from the TRD far exceeded the "reasonable time" contemplated by the Act. The TRD failed to provide the public records requested by Plaintiffs within a *reasonable* amount of time as described in the Section 14-2-10. Thus, the TRD directly violated the Act and Plaintiffs are entitled to statutory damages.

Exhibit A-4, dated November 22, 2008, is a written request from Plaintiffs to the TRD requesting DT-19 reports for a list of twenty-three (23) specific account numbers. The TRD responded to Plaintiffs in a letter dated December 4, 2008, stating that their search for the requested records had been completed and enclosed a

copy of all responsive records. TRD also indicated that several of the requested accounts had not been processed yet and the records custodian had enclosed a copy of Plaintiffs' request that had been marked to show which accounts had not been processed. Of the twenty-three (23) requested accounts requested by Plaintiffs, the TRD only produced four (4) records. As of the date of this Motion, eighteen (18) months after the original request, the TRD had still not provided the remaining nineteen (19) records requested by Plaintiffs. This information was received on May 11, 2009 which is after the lawsuit was filed. Once again, the TRD is in clear violation of the Act by failing to provide public records that Plaintiffs are entitled to receive upon written request under the Act.

Finally, Exhibit A-5 is a written request from Plaintiffs to TRD, dated December 11, 2007, requesting the names of TRO employees and others who had accessed the personal income tax records of Eric Griego, Kellie A. Griego, and the gross receipt reports for The Griego Agency, LLC, since January 1, 2005 to December 11, 2007. On December 13, 2007, TRD's records custodian responded to Plaintiffs and informed them that additional time was needed to fulfill the request. On December 24, 2007, TRD's custodian of records responded again, this time stating that, "The Department does not have any public records responsive to your request." Plaintiffs assert that the TRD's failure to produce the requested documents is in retaliation against Plaintiffs for his participation in a previous case against the TRD for not providing access to public records. Plaintiffs believe that the TRD refuses to produce these records in an effort to conceal illegal activities carried out by TRD employees. As a result of the unreasonable delay in refusing to produce these

emphasizing the serious nature of obligations a public body owes to all persons who inquire about “the affairs of government” and the official acts of public employees.

The New Mexico Court of Appeals has noted that a Plaintiff who is successful in a court action to enforce IPRA rights is entitled to “mandatory costs, fees and damages...” *Derringer v. State*, 133 N.M. 721, 68 P.3d 961, 2003 NMCA – 073 Section 10 (N.M. App. 03/07/2003).

The purpose of this act and the reason there are statutory damages is to be sure that the greatest amount of information concerning the affairs of government and the activities of government officers and employees are provided to various parties, Section 14-2-5 NMSA 1978. It is of interest to note that the Plaintiffs were successful in prior litigation involving similar issues before Judge Huling, and this is even more significant because this statute is to preclude denying access to public records.

IV. CONCLUSION

The TRD has continued to violate the Act by refusing to allow Plaintiffs to access to public records, not providing any explanation of why records had not been produced after significant periods of time, and failing to comply with statutory requirements of the Act as a matter of law. There are no material facts in dispute with respect to the TRD’s conduct and Plaintiffs are entitled to Summary Judgment against the TRD as a matter of law. Due to the violation of the Defendant of the Public Inspection Act, the Plaintiffs are entitled to statutory damages as well as attorney's fees.

WHEREFORE, Plaintiffs pray the Court to grant Plaintiffs Summary Judgment against the TRD, to award statutory damages, costs, attorney's fees, and for such other relief as the Court deems necessary and just.

Respectfully submitted,

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I hereby certify that a true copy of the foregoing pleading was faxed on this ____ day of July, 2010 to:

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