

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

FRANK C. FOY,

Plaintiff,

v.

No. D-202-CV-2009-1587

NEW MEXICO EDUCATIONAL
RETIREMENT BOARD; BRUCE MALOTT;
and GARY BLAND,

Defendants.

**MOTION BY NEW MEXICO FOUNDATION FOR OPEN GOVERNMENT
FOR LEAVE TO FILE *AMICUS* BRIEF**

The New Mexico Foundation for Open Government (“NMFOG”) respectfully moves the Court for leave to file the attached *amicus* brief. As explained in the brief, NMFOG believes that it can assist the Court by offering a broader perspective on the issues in this case.

Defendants have been notified of this motion, but have not yet responded.

Respectfully submitted,

s/Daniel Yohalem

Daniel Yohalem

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Attorney for the NM Foundation for Open Government

I hereby certify that a true and correct copy of the foregoing was emailed to counsel of record this 9th day of December, 2009.

s/Daniel Yohalem

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AMICUS BRIEF OF
THE NEW MEXICO FOUNDATION FOR OPEN GOVERNMENT

INTEREST OF THE *AMICUS*

The New Mexico Foundation for Open Government (“NMFOG” or “FOG”) is an educational and charitable organization dedicated to assisting New Mexico citizens with understanding, exercising and preserving their rights under the federal and New Mexico Constitutions, the Inspection of Public Records Act (“IPRA”), the New Mexico Open Meetings Act, and the Arrest Record Information Acts, as well as their rights under the federal Freedom of Information Act. NMFOG has an office in Albuquerque and members throughout New Mexico. NMFOG maintains a website with information and resources on open records, at www.NMFOG.org. NMFOG also operates a toll-free hotline at (888) 843-9121 to assist citizens, journalists, and public officials who need help in protecting openness in government.

NMFOG has a vital interest in the matters at issue in this litigation, because some of the arguments made by Defendants, if adopted by the Court, would limit the ability of citizens to enforce IPRA requests and have a chilling effect on IPRA requests made to

public agencies by other persons or entities in New Mexico. These issues have an importance that transcends this case. As *amicus*, NMFOG would like to present a broader perspective to the Court, by emphasizing that the denials, delays and obstacles in this IPRA case are all too typical and undermine the important purposes behind the IPRA. In NMFOG's experience, public agencies and officials who do not want to comply with IPRA will delay or deny IPRA requests through a variety of means. Even though IPRA is strongly written, NMFOG encounters dogged resistance, over and over again, from public agencies that refuse to comply with IPRA. Unfortunately, it is often the case that public officials are motivated not to comply with IPRA because they fear that compliance will reveal information which will embarrass or incriminate them. NMFOG thus seeks to appear as *amicus curiae* in this matter, in support of Mr. Foy, in order to inform the Court and to ensure that IPRA's stated purpose becomes a reality in this case, and in all cases: 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 1978, § 14-2-5. [emphasis added].

COMMENTS BY NMFOG

For ease of reference, NMFOG will refer to the issues as numbered by Mr. Foy in his Motion for Additional Preliminary Relief and Sanctions. NMFOG will confine its remarks to the issues that have the greatest effect beyond this case.

Issue #1 – Defendants' prolonged refusal to produce records. Although the records were requested by Mr. Foy in January 2009, more than 10 months have passed without complete production. The IPRA requires that records must be made available quickly –

within 15 days – precisely because the statute recognizes that delay can make public documents so stale that they will be of little use in revealing and, when necessary, correcting the course of government. Although IPRA includes monetary penalties for delay, those penalties are no substitute for prompt access to and inspection of public records.

Unfortunately, it has been NMFOG’s experience that public officials will often claim that a request is too burdensome, or that it seeks confidential, privileged or draft records, as a tactic to delay inspections as long as they possibly can, even when the records are clearly public. Ten months is surely a long enough period for the state agencies in Mr. Foy’s case to have addressed all their objections. Moreover, the agencies should have acted to expedite the process after the Court this case in July 2009 issued an Order apparently directing a process for production of the requested documents. It has been NMFOG’s experience in other cases that when the Court has ordered production, the public agencies then usually comply rapidly.

Issue #6 – electronic copies. New Mexico citizens should be able to obtain electronic copies of public records, when the records already exist in electronic form. Where public information exists in electronic form, making an electronic copy is much less expensive, both for the citizen and for the public agency. Technology is a great equalizer for the ordinary citizen who wants to cull through government records, because the citizen or journalist can use electronic search engines to zero in on “the needle in haystack.”

There are instances in which public records only exist on paper, but even in those instances it may be cheaper to produce a digital copy rather than a paper copy. Most modern copiers use a digital scanner to capture a digital image before printing it on paper.

Therefore, even when paper documents must be run through a “copier,” the IPRA inspector should have the option to choose an electronic copy rather than a paper copy.

Issue #7 – \$1.00 per page. A charge of \$1.00 per page for paper copies is excessive and unreasonable. It discourages citizens from exercising their IPRA rights by making copies prohibitively expensive. The IPRA specifically does not allow public agencies to recoup the expenses of assembling the records, as opposed to just obtaining reimbursement for the actual cost of copying them. § 14-2-9(b) (1) and (4). This is also contrary to IPRA’s express mandate “that to provide persons with such [the greatest possible] information is an essential function of a representative government and an integral part of the routine duties of public officers and employees.” § 14-2-5.

If a citizen wants paper copies of paper records, then the paper copies should be provided at actual cost, based upon competitive prices from commercial copy shops. If a citizen wants electronic copies of paper documents, then these electronic copies should also be provided at actual cost, based upon competitive prices from commercial copy shops, which are willing and able to provide electronic copies in standard formats like Adobe PDF, with or without OCR (optical character recognition). Citizens and journalists also have the right to use their own technology to make notes, or to make copies. If a journalist comes across a public record which contains some very interesting text, plainly he or she can transcribe the passage into a notebook by hand, old-style, or take a picture of the public record with his cell phone.

Issue #8 – Clawback. Apparently the agencies in this case are insisting on a “clawback” provision, to recover documents under certain circumstances after they are

produced. After 10 months of review of the requested documents and this Court's orders there is no justification for this novel proposal. Once a government record has been provided to a citizen, it is *ipso facto* a public document, so the government cannot control or censor its subsequent use.

Issue #9 – Government surveillance of record inspections. Government agencies have no right to demand to know what documents a citizen – or a journalist – might find interesting nor how the citizen intends to use the documents. The IPRA specifically does not require that a citizen justify or explain in any way a request for public documents. The only legitimate inquiry is whether the document requested is a public document within the meaning of the IPRA. If so, there can be no further inquiry regarding the purpose of the request or the use to which the document may be made. In addition, if a journalist or a citizen looks at a document and transcribes part of it in his notebook, the government has no right to see his notes. The same rule applies if the citizen journalists use a digital camera or scanner.

Issue # 10 – Who is making the decision not to comply with IPRA? This ought to be a simple question to answer, but in NMFOG's experience it is not. In many cases the decision of the records custodian concerning non-production of documents has been directed by officials higher up in government. It has also been FOG's experience that senior public officials will often try to conceal the fact that they, rather than the records custodian for the agency, are making the decision to refuse an IPRA request. In these instances, it may be necessary to conduct discovery to find out who is actually making the decisions, and why. As long as the real decision makers can hide behind their records custodians, "public

information officers” and lawyers, the courts may not be able to determine the merits and motives of production objections. When this happens, citizens have had to rely on the courts to break down the stonewall.

The inquiries and complaints that NMFOG has received over the last eight years indicate that this pattern of obstruction and concealment has been more prevalent under the current administration. Political reporter Jackie Jadrnak of the Albuquerque Journal summed up the closed climate of the executive branch in a column published November 22, 2009. Jadrnak described the communications changes instituted when Governor Bill Richardson took office:

“PIOs [Public Information Officers] from throughout state government were rounded up and given their marching orders. Any news media inquiries had to be reported to the communications operation in the Governor's Office. The nooks and crannies of government were ordered to stay “on message.” . . . and if you wanted written records from any of the agencies? File an open records request, which then would be funneled through the gatekeepers in Richardson's office.”

See Exhibit 1 hereto.

In this atmosphere, many of the IPRA refusals are ludicrous. As an example, *see* Exhibit 2 hereto, an IPRA request for public salary information by Kate Nash, a reporter for The Santa Fe New Mexican. Nash requested a listing of salary increases for employees at the State Personnel Office since January 2008, but the agency refused to disclose this information: “Since the legislatively approved salary increase is performance based and performance can potentially be related to discipline, I cannot individually list employees who did/did not receive that increase.”

Thus, under the current administration, the public is often deprived of public information unless individual requestors are willing to seek enforcement of IPRA through the courts. Fortunately, the Courts have been vigorous defenders of the IPRA and citizens' rights to access to documents.

CONCLUSION

As *amicus*, NMFOG respectfully requests that the Court exercise its authority to ensure that the IPRA is enforced and citizen's access to public documents is ensured. Ten months of delay in the production of documents and the imposition of costly and onerous conditions on production does not further the purposes of this law and its policy of government in the sunshine.

Respectfully submitted,

s/Daniel Yohalem

Daniel Yohalem

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Albuquerque Journal
Sunday, November 22, 2009

Transparency Is Thing of the Past

By Jackie Jadrnak
Of the Journal

When Bruce King was elected to his third term as governor, seasoned New Mexico journalists warned me that I had no idea what I was in for.

They chuckled gleefully as they said it.

It didn't take too long to discover why they were snickering.

Trying to wrangle a clear, succinct sound bite out of the man was impossible. Pinning him down to specifics was akin to a greenhorn trying to lasso a wily, tough cow fond of the open range.

He'd talk your ear off, but darned if you could figure out exactly what he just said.

But while politicians today promise "transparency" in government and deliver opacity instead, King — who never would have bothered with such fancy words — sure walked the talk.

I don't think I wrote a single open records request in the four years I covered King as one of the Journal's state government reporters. Now if you ask a member of the current administration what time it is, they'll probably tell you to send them a written request for information and they'll get back to you.

Under King, a reporter could walk into any state agency, call just about any state worker, and people would answer your questions openly and fearlessly. Give them a few minutes to gather things up, and they'd hand over the documents you wanted.

I often wandered into the state's budget office and chatted with analysts about how the money was being spent. If I asked for a copy of some numbers, they often handed it to me on the spot.

When I wanted information about how the Medicaid program was working, I talked to the people who ran it, calling them directly.

If I wanted to understand tax policy, I called the Taxation and Revenue Department's research office and had the analysts lead me through the ins and outs of an issue. That might sound boring, but it yielded an understanding of how easy it is to dodge a tax, whose wallet ends up getting hit the hardest, and who (by category, not individuals) has enjoyed exemption from paying their share over the years.

Did you want to hear about caseloads for welfare workers? Give a call to a local office, and people would talk. Did you want to learn about illnesses hitting New Mexicans? Call the state or local public health office, and people would give the rundown.

King never insisted on being the center of attention. He let his department heads and employees talk about what they were doing within state government. He didn't mind them being quoted or getting their faces on TV.

Government wasn't all about him. It was about what state government was doing for its citizens.

Oh, that's not to say there still wasn't a certain reluctance to share some information.



I remember asking King's budget folks for a rundown of the tax increases during his third term when he was running for his fourth. Every time I called to check on the status of my request, they were "working on it."

Well, so was I.

So I called again on a Friday, said I had come up with my own list, was writing a story to run that weekend, and that I would really like to check my list against theirs. Their list was hand-delivered within a couple of hours.

A chill set in after King left office, though. More and more often, people in government would say they needed approval from their public information officer (PIO) before they could talk to reporters.

Then Bill Richardson swept into office. PIOs from throughout state government were rounded up and given their marching orders. Any news media inquiries had to be reported to the communications operation in the Governor's Office. The nooks and crannies of government were ordered to stay "on message."

Suddenly news releases from different departments prominently mentioned Richardson's name, giving him credit for just about anything that happened — as long as it had a positive spin.

As for the announcements coming out of the Governor's Office itself, reporters started making jokes about how many times "bold" and "innovative" showed up in the news releases.

State government news that might make the front page and cast a favorable light on the state — the improvement in childhood immunization rates, for example — was announced through Richardson's office, often with a live news conference featuring the Big Guy himself.

Less favorable developments were handled through the departments and agencies, always with an upbeat list of ways they were going to make things better. (When the state's ranking in immunization rates slipped again, we learned about it through a short written news release from the Department of Health.)

And if you wanted written records from any of the agencies? File a written open records request, which then would be funneled through the gatekeepers in Richardson's office.

Modern communications people would argue they simply were restoring discipline, making sure the news media — and you, the public — were getting information that was accurate and complete.

But it also meant information was going through a political filter, delivered by people who owed their jobs to the current administration.

Think about it. How often do you read or see someone quoted who is a longtime expert on a program, a classified employee whose tenure has run through several administrations of both parties?

King let them talk. And we were all the smarter for it.

-----Original Message-----

> From: Kate Nash [mailto:knash@sfnewmexican.com]

> Sent: Tuesday, September 22, 2009 2:59 PM

> To: Zamora, Sheila, SPO

> Subject: records request

>

> Hi Shelia,

>

> As per the state's Inspection of Public Records Act, I'd like a list of
> the salary increases paid to any and all employees in the SPO since Jan.
> 1, 2008.

>

> Thanks for your prompt attention to my request.

>

>

> Kate Nash

> Reporter, Santa Fe New Mexican

> Blog: www.greenchilechatter.com

> Twitter: www.twitter.com/thenewmexican

> Desk: 505.986.3036

> Cell: 505.470.1478

> Fax: 505.982.1609





BILL RICHARDSON
GOVERNOR

MARY LOU CAMERON
BOARD CHAIR

RAY CAMP

October 6, 2009

Kate Nash
202 East Marcy Street
Santa Fe, NM 87501

Dear Ms. Nash,

I am writing this in response to your request received by this office on September 22, 2009 requesting a list of the salary increases paid to any and all employees at the State Personnel Office since January 1, 2008.

The State Personnel Office has given the legislatively appropriated salary increase to employees at the State Personnel Office who received a satisfactory employee performance rating for the year of 2008. No other salary increases were given.

Yours truly,

Sheila Zamora
Public Records Custodian

New Mexico
State Personnel Board
State Personnel Office

Post Office Box 26127
2600 Cerrillos Road
Santa Fe, New Mexico 87505-0127
(505) 476-7759

SANDRA K. PEREZ
DIRECTOR

REESE FULLERTON
DEPUTY DIRECTOR

----- Original Message -----

From: Zamora, Sheila, SPO
[mailto:Sheila.Zamora@state.nm.us]
To: Nash, Kate
[mailto:knash@sfnewmexican.com]
Sent: Wed, 14 Oct 2009 10:02:57
-0600
Subject: RE: records request

> > Kate,
> > You stated that you'd like a list of the salary increases paid to any
> > and all employees in the State Personnel Office since Jan. 1, 2008.
> >
> > The State Personnel Office has not approved any salary increases for
> > State Personnel Office employees since January 1, 2008.
> >
> > However, to answer your question, the NM Legislature approved a 2.9%
> > increase to all state employees, which includes the State Personnel
> > Office, and that increase is based on employees who had a satisfactory
> > or greater performance rating.
> >
> > Since the legislatively approved salary increase is performance based
> > and performance can potentially be related to discipline, I cannot
> > individually list employees who did/did not receive that increase.
> >
> > For the purpose of inspection of public records under Subsection B of
> > 1.7.1.12 NMAC, the following material shall be regarded as confidential:
> > records and documentation pertaining to physical or mental examinations
> > and medical treatment of persons, including those confined to any
> > institution; records and documentation maintained for purposes of the
> > Americans with Disabilities Act [42 U.S.C. Section 101 et seq.]; letters
> > of reference concerning employment, licensing, or permits; records and
> > documentation containing matters of opinion; documents concerning
> > infractions and disciplinary actions; performance appraisals; opinions
> > as to whether a person should be re-employed; college transcripts;
> > military discharge, if other than honorable; information on the race,
> > color, religion, sex, national origin, political affiliation, age, and
> > disability of employees; and laboratory reports or test results
> > generated according to the provisions of 1.7.8 NMAC.
> >
> > I am considering this request complete.
> > Sheila Zamora
> >
> >
> >
> >