

FIRST JUDICIAL DISTRICT COURT  
COUNTY OF SANTA FE  
STATE OF NEW MEXICO

STATE OF NEW MEXICO, *ex rel.*  
THE NEW MEXICO FOUNDATION  
FOR OPEN GOVERNMENT,

Plaintiff,

vs.

CASE NO. D-101-CV-2013-02436

RICHARD RUSSELL and  
JONNI LU POOL,

Defendants.

**ORDER REGARDING DISCLOSURE OF BEHAVIORAL HEALTH AUDIT REPORT**

THIS MATTER came before the Court on October 22, 2014 for a hearing on Petitioner's *Supplemental Motion for Order to Show Cause Why Respondents Should Not Produce the Full Behavioral Health Audit Report and Memorandum in Support* ("Motion"). After hearing arguments of counsel, reviewing the prehearing briefing, post-hearing briefing and other relevant briefing, and conducting an *in camera* review of PCG NEW MEXICO HUMAN SERVICE DEPARTMENT BEHAVIORAL HEALTH PROVIDER AUDIT, (Final Report June 21, 2013) ("Report"), the Court finds as follows.

Petitioner seeks disclosure of the Report pursuant to the Inspection of Public Records Act ("IPRA"), NMSA 1978 §§14-2-1, *et seq.*, from the Public Records Custodian for the Human Services Department ("HSD") and the Public Records Custodian for the Attorney General's Office ("AGO"). Portions of the Report had been disclosed prior to the time of the hearing.<sup>1</sup>

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<sup>1</sup> Specifically, pages 1 to 11 were produced without redaction; pages 12 to 63 were produced with redactions; pages 107 to 121 were produced without redaction; pages 296 to 313 were produced without redaction; pages 64 to 106, 122 to 295, and 314 to 355 were withheld entirely. In addition, the section cover page before page 64 was withheld.

The Report was prepared for HSD by Public Consulting Group, Inc. (“PCG”), which audited fifteen behavioral health providers. The AGO is conducting its own investigation to determine whether any of the providers audited by PCG have committed Medicaid fraud.

On September 13, 2013, Petitioner filed a petition for writ of mandamus seeking disclosure of the Report. In an order dated December 5, 2013, the Court (through the Honorable Sarah M. Singleton) determined, after an *in camera* review of the Report, that the “law enforcement exception” to disclosure in Section 14-2-1(A)(4) NMSA, applied and that it would not be possible to make more limited redactions. The Court accordingly did not compel Respondents to permit further inspection but left this matter open for six months to allow the Petitioner to reapply for a writ if the circumstances changed such that the law enforcement exception was no longer viable. Since the Court’s December 5, 2013 Order, the AGO has cleared two of the 15 providers and released those portions of the Report pertaining to these providers. In addition, HSD permitted Presbyterian Medical Services (“PMS”) to review the portion of the Report pertaining to PMS in conjunction with settlement negotiations between HSD and PMS.<sup>2</sup> Petitioner’s renewed request to compel disclosure of the full Report is now before the Court.

**Portion of the Report Pertaining to PMS**

The Court finds that the portion of the Report pertaining to PMS (pages 193 to 216) was voluntarily disclosed to PMS, one of the targets of the AGO’s independent investigation.

Voluntary disclosure of a document may trigger waiver of an exception under open records laws.

*See, e.g., Mobil Oil Corp. v. U.S. E.P.A.*, 879 F.2d 698, 700-01 (9th Cir. 1989) (citing cases);

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<sup>2</sup> HSD and the AGO do not contest that the portion of the Report pertaining to PMS was shown to PMS. (*Respondents’ Supplemental Briefing Concerning Potential Waiver of the Law Enforcement Exception* (“Resps. Suppl. Brief”), filed 10/31/2014, at 1.) PMS was not permitted to keep a copy of this portion of the Report. (*Id.*)

*Cooper v. Dep't of Navy of United States*, 594 F.2d 484, 487-88 (5th Cir. 1979); *State of North Dakota ex rel. Olson v. Andrus*, 581 F.2d 177, 181-82 (8th Cir. 1978). In this case, HSD voluntarily disclosed the PMS portion of the Report to PMS. Cf. *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 491 (D.C. Cir. 1980) (finding no waiver of confidentiality where cooperating agency to investigation did not make disclosure and continued to maintain confidentiality). Given the AGO's stated explanation for asserting the law enforcement privilege over the Report—"namely that a target could sanitize files and coordinate false testimony with potential witnesses or arrange for their unavailability," (Respondents' *Response to Motion*, filed 07/03/2014, at 3)—disclosure to PMS diminishes the credibility of the AGO's claim of law enforcement exception with respect to PMS. See *Olson v. Andrus*, 581 F.2d at 181 (finding that disclosure of documents in separate litigation rendered government's assertion that communications were confidential substantially less credible). The Court, accordingly, finds that the law enforcement exception has been waived with respect to the portion of the Report pertaining to PMS *only* (pages 193 to 216).<sup>3</sup>

**Remainder of the Report Not Yet Disclosed**

After *in camera* review of the Report, the Court finds that those portions of the Report that have not yet been made public (or disclosed to PMS) are subject to the law enforcement exception found in NMSA 1978, § 14-2-1(A)(4). As the Court (through Judge Singleton) previously held, "[t]he Court's review of the [Report] confirms that the withheld portions discuss

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<sup>3</sup> Respondents argued that only the AGO can waive the law enforcement privilege. The cases cited by Respondents for this proposition do not support this contention. (See Resps. Suppl. Brief at 5-6 (citing *Blaikie v. Borden Co.*, 47 Misc. 2d 180 (N.Y. Sup. Ct. 1965) (finding that employees cannot waive privilege of entity); *Gilbertson v. State*, 236 N.W. 539 (Wis. 1931) (same)).) The Report was prepared for HSD by PCG. HSD withheld the Report at the request of the AGO, (*Response to Alternative Writ of Mandamus*, filed 10/18/2013, at 2). HSD voluntarily disclosed a portion of the Report to PMS, a target of the AGO's investigation.

confidential methods used during the audit, contain confidential information in the discussion and in the findings, and identify potential witnesses, some of whom may be sources and some of whom may be charged with a crime or accused at a future date . . . and the Court has determined that it would not be possible to make more limited redactions.” (Order, filed 11/21/2013, at 2.) The Court concurs in these findings and adopts them again herein. Disclosure of the remaining portions of the Report could harm the AGO investigation. This conclusion is not altered by the fact that the AGO voluntarily disclosed portions of the Report pertaining to the two providers that were cleared by the AGO or that HSD voluntarily disclosed the portion of the Report pertaining to PMS. *See, e.g., Cooper*, 594 F.2d at 484 (finding that waiver of portion of report did not amount to waiver of entire report); *Mobil Oil Corp.*, 879 F.2d at 701 (finding waiver limited to specific documents released). Therefore, the Court finds that the law enforcement exception continues to apply to those portions of the Report that have not yet been made public (or disclosed to PMS) and the Court will not compel disclosure.

IT IS THEREFORE ORDERED that Petitioner’s Motion is GRANTED IN PART AND DENIED IN PART;

IT IS FURTHER ORDERED that Petitioner’s request for disclosure of the portion of the Report pertaining to PMS (pages 193 to 216) is GRANTED and Respondents shall disclose this portion of the Report (pages 193 to 216) to Petitioner; and

IT IS FURTHER ORDERED that Respondents’ request for disclosure of the portions of the Report that have not yet been made public or disclosed to PMS is DENIED.

  
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JENNIFER L. ATTREP  
District Judge, Division IX