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JUN 03 2010

Quinn M. Dwyer
CLERK DISTRICT COURT

GERA GONZALEZ

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

ALBUQUERQUE JOURNAL and COLLEEN
HEILD, as a reporter for the Albuquerque Journal,

Plaintiffs,

vs.

THE OFFICE OF THE GOVERNOR OF NEW
MEXICO and MARCIE MAESTAS, custodian of
records for the Office of the Governor, and
JOHN DOES 1-3,

Defendants.

Case No. **CV 2010 06756**

**COMPLAINT FOR PRODUCTION OF PUBLIC RECORDS, FOR MANDAMUS,
DAMAGES, AND FOR DECLARATORY AND INJUNCTIVE RELIEF**

The Plaintiffs, Albuquerque Journal (“Journal”) and Colleen Heild (“Heild”), by and through their undersigned counsel, state:

NATURE OF THE CASE

1. Plaintiffs bring this action pursuant to the New Mexico Inspection of Public Records Act, NMSA 1978, § 14-2-1 *et. seq.* (2010) (“IPRA” or “the Act”) to compel the production of public records maintained or controlled by the Office of the Governor of New Mexico (“OOG”), to compel the OOG to comply with the Act in referring records requests to other government records custodians whom the OOG has reason to believe are in possession of documents responsive to the records requested, and for injunctive relief and damages arising from the Defendants’ willful failure and refusal to produce public records and to make referrals as required by law. As detailed in this Complaint, Defendants or others in the employ of OOG have attempted to keep secret the names of

approximately 59 political appointees -- all public employees -- who were identified by the OOG as having had their positions terminated effective January 8 at a claimed savings to the taxpayer of more than \$8.2 million. Upon information and belief, the OOG has unlawfully withheld records that would identify the names and titles of individuals whose positions were eliminated, has withheld records that would show the savings claimed, and has failed to refer the requests for such records to other state records custodians whom the OOG knew, or had reason to know, were in the possession of responsive documents. By means of these IPRA violations, the OOG has successfully thwarted the Plaintiffs' efforts to verify the claimed job eliminations or the claimed taxpayer savings, and has made it impossible to conduct timely reporting on the impact that the announced terminations will have on the operation of government and the ability of state agencies to provide governmental services. The IPRA violations have also thwarted media inquiries concerning (1) the potential that some of the 59 "terminated" employees were in fact not terminated because they subsequently became employed at other agencies or in other positions and (2) whether or not the OOG may have engaged in the creation of unnecessary patronage jobs in the early years of its administration.

PARTIES, JURISDICTION, AND VENUE

2. The Albuquerque Journal is a newspaper of general circulation in New Mexico, with its principal place of business in Bernalillo County. As a newsgathering organization, the Journal investigates and reports on the conduct of public officials and employees, and on the operation of state government generally and of the OOG specifically.

3. Plaintiff Colleen Heild is an investigative reporter employed by the Journal. As part

of her duties, she investigates and reports on matters of public concern.

4. Defendant OOG is operated as a separate department of state government, comprising the executive office of the Governor and his immediate advisors and deputies. It has a separate budget and separate staff from cabinet agencies.

5. Defendant Marcie Maestas is the individual designated as the official Custodian of Records for OOG. In this capacity, Ms. Maestas is responsible for receiving, processing, and ensuring the proper response to requests for inspection under the IPRA.

6. Defendants John Doe 1-3 are the officials employed by OOG who willfully and knowingly participated in the decision to withhold records responsive to the records requests at issue in this case and who have the authority to implement the declaratory and injunctive relief sought by this Complaint.

7. Jurisdiction and venue are proper pursuant to the IPRA, NMSA 1978, §§ 14-2-1 to -12 (2010) and the venue statute, NMSA 1978, § 38-3-1(G) (2010).

8. There exists an actual controversy between the parties regarding the Defendants' duties under the IPRA. Accordingly, an action for declaratory relief is authorized under NMSA 1978, §§ 44-6-2 and 44-6-4 (2010).

FACTUAL ALLEGATIONS

9. In the fall of 2009, amidst a drastic reduction in state tax revenues, the Governor called a special session of the New Mexico Legislature for the Legislature to consider measures to bring government spending in line with the anticipated reduction in state revenues.

10. In October 2009, the Legislature passed a bill that, among other things, would have

required the Governor to eliminate the positions of 102 exempt state employees under the control of the Governor and to reduce budgets under his control by more than 7%. Within the OOG, the bill was known as “House Bill 17” or “HB 17.”

11. In a veto message issued November 12, 2009, the Governor vetoed the provisions of HB 17 that required the Governor to eliminate 102 positions and to reduce his budget by more than 7%. Instead, the Governor announced at a press conference that he would eliminate himself 84 exempt positions and would order cabinet departments to make various expenditure reductions. To these ends, the Governor issued a press release, an executive order, and a veto message, all of which are attached collectively as Exhibit A.

12. On December 2, 2009, the OOG issued a press release announcing that 59 “exempt” state employees were notified by their supervisors, the week before, that they were being separated from state government employment. The same press release claimed that, with those separations, there would be a total of 106 exempt positions eliminated because 47 positions were already vacant. The claimed cuts, if made, would exceed by four positions the cuts that would have been required under the portions of the bill vetoed by the Governor. The press release announced that the separations occurred “in an effort to save about \$8.3 million dollars and help balance the state budget.”

13. When the OOG issued the December 2, 2009 press release, it drew immediate attention from major news organizations, including the Albuquerque Journal.

14. After receiving the press release, Albuquerque Journal reporter Dan Boyd emailed Gilbert Gallegos, the Deputy Chief of Staff for OOG, and the person identified on the release to

contact for further information.

15. Boyd's email asked Gallegos whether there was a list available of the positions affected or a breakdown by agency.

16. Gallegos responded the same afternoon, saying "we will not identify employees who are affected."

17. Boyd also asked Gallegos in another email the same day how the positions that were cut were identified (i.e. what criteria was given to cabinet secretaries).

18. Gallegos responded, saying "I'm not going to discuss the process that Cabinet Secretaries went through to identify employees."

19. On February 24, 2010, Colleen Heild, in her capacity as a reporter for the Albuquerque Journal, sent an IPRA request to Marcie Maestas, in which Heild asked to inspect and copy "any and all records, including but not limited to correspondence, emails, notes, meeting minutes, and complaints that relate in any way to the decision to eliminate 59 exempt positions effective Jan. 8, 2010; and the subsequent implementation of that decision." The records request included, but was not limited to:

1. Any and all records compiled, culled, used, related to or relied on in any way in the preparation of a written public statement authored by Deputy Chief of Staff Gilbert Gallegos entitled "Several Exempt Positions to be Eliminated." The document appears to have been emailed to reporters and others on Dec. 2, 2009. If you do not have a copy, I can provide one to you.

2. Any and all records used or relied on in the public statement that the

positions were being “eliminated...in an effort to save about \$8.3 million” or that were used to calculate or estimate the savings.

3. Any and all communications from the governor’s office to cabinet secretaries, cabinet departments and executive agencies or executive agency heads or other state officers or employees informing them which exempt positions and employees were being eliminated as described in the public statement described above. This includes a request for any records of any kind generated in connection with efforts to comply with DFA policy ESPP 40.a that says “all transactions involving exempt employees appointed by the governor must be approved by the office of the governor.”

4. Any analysis prepared for the governor’s office dealing with which positions and personnel should be eliminated and any document reflecting the Governor’s or his office’s final determination regarding which positions and personnel should be eliminated.

5. Any and all documents that identify the persons informed before Jan. 8, 2010 that their positions would be discontinued as described in the above public statement from the governor’s office, including any notices to the employees selected for termination.

6. All emails and other communications from Gilbert Gallegos or any of his representatives to state executive agencies and cabinet offices regarding how to respond to news media inquiries relating to the elimination of the 59 exempt

positions/employees.

7. Any and all emails or other forms of correspondence from any cabinet offices or agency heads sent to Mr. Gallegos in response to his instructions regarding how to respond to news media inquiries relating to the elimination of the exempt positions/employees.

20. The request specifically excluded “all correspondence from the news media and to the news media by the governor’s office regarding the decision to eliminate the position.”

21. The request also notified OOG that, “[a]s required by state law, if you are aware of the existence of any responsive documents not in your possession but maintained by another agency you must forward this request to that agency’s records custodian. Kindly inform us if you make any such referrals.”

22. The request also asked “[w]ith regard to any document responsive to this request that existed at one time but no longer does please make available for inspection any record of any kind that explains the disposition of the document(s) whether by destruction, deletion, transfer, loss, or otherwise.”

23. On March 1, 2010, the OOG acknowledged receipt of Ms. Heild’s records request.

24. On March 11, 2010, the OOG told Ms. Heild that OOG needed additional time to respond to the request “due to the broad and burdensome nature of” the request.

25. On April 5, 2010, the OOG finally responded to the request and wrote to Colleen Heild, saying that she could come and review and, at \$0.50 per page, copy certain records being produced.

26. The 80 pages that the OOG produced (most of them email chains) all or virtually all relate to media records requests sent to other executive agencies, and most are either transmittal emails of records requests sent to those agencies, or proposed responses of those agencies to other media records requests.

27. None of the documents produced by the OOG appear to be responsive to categories 1-4 of the February 24, 2010 records request and very few are responsive to category 5 of that request. Among the 80 pages produced, only a handful of exempt employees are identified and those who are identified are only identified because some agency other than the OOG identified them in a document produced pursuant to a separate document request. The OOG produced no list of the 59 positions eliminated, no list or identification of the positions eliminated, no calculation of the \$8.3 million in cost savings claimed, and no source documents supporting the factual assertions made in the December 2, 2009 press release.

28. At no time did the OOG properly invoke any exemption under the IPRA to the production of responsive records.

29. Upon information and belief, the OOG never referred the February 24, 2010 records request to any other records custodian to produce records that would have been responsive to the records request.

30. OOG never informed Heild that it was referring the records request to another custodian.

31. Upon information and belief, the OOG has failed to produce documents responsive to the February 24 request and failed to refer the records requests to other agencies that had records

responsive to the requests. This belief is based on the following facts and circumstances:

- a. The employees whose departures were announced December 2 were all exempt employees “under the control of the Governor.” Within the OOG, such employees are known as Governor-exempt employees, or “Gov-ex” employees. Pursuant to Department of Finance and Administration policy ESPP 40.a, “all transactions involving exempted employees appointed by the governor must be approved by the office of the governor.” Pursuant to DFA policy, therefore, the OOG had to have approved the termination of the 59 Gov-ex employees.
- b. The OOG press release issued on December 2 indicated that the employees being separated were informed the week before by their supervisors. To make such a claim, the OOG had to have known that someone within the chain of command of the Governor had a list of such employees, if only so that the supervisors could be alerted to inform the subordinates that they were losing their jobs.
- c. If the OOG had no records supporting the factual assertions contained in the December 2 press release, then such records probably do exist at, or were returned to, some other agency, such as the Department of Finance and Administration or the state personnel office.
- d. The personnel in the OOG who prepared and authorized the press release either did know or should have known that, if the OOG had no documents responsive to the request for records identifying the 59 employees and their positions, that other agencies’ records custodians likely did have such records.

THE INSPECTION OF PUBLIC RECORDS ACT

32. NMSA 1978, § 14-2-6(E) (2010) broadly defines the records to which the public is entitled to access: “all documents, papers, letters, books . . . and other materials . . . that are used, created, received, maintained or held by or on behalf of any public body and relate to public business”

33. Further, it is 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 further the 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.

NMSA 1978, § 14-2-5 (2010).

34. The IPRA provides a specific procedure for a custodian of public records to follow upon the receipt of a written request to inspect public records:

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.

NMSA 1978, § 14-2-8(D) (2010).

35. The IPRA requires that “[i]n the event that a written request is not made to the custodian having possession of or responsibility for the public records requested, the person receiving the request shall promptly forward the request to the custodian of the requested public records, if known, and notify the requester. The notification to the requester shall state the reason

for the absence of the records from that person's custody or control, the records' location and the name and address of the custodian. NMSA 1978, § 14-2-8(E) (2010)

36. The IPRA requires a custodian who denies a public records request to provide the requester with a written explanation of the denial and requires that the denial: (1) describe the records sought; (2) set forth the names and titles or positions of each person responsible for the denial; and (3) be delivered or mailed to the person requesting the records within fifteen days after the request for inspection was received. NMSA 1978, § 14-2-11(B) (2010).

37. The IPRA requires the custodian to separate exempt from nonexempt information when responding to public records requests so that all nonexempt information shall be made available for inspection. NMSA 1978, § 14-2-9(A) (2010).

COUNT ONE

Violations of the Inspection of Public Records Act

38. The Plaintiffs incorporate by reference the foregoing allegations.

39. The Defendants have violated the IPRA in the following ways:

- a. The Defendants failed to produce the documents requested by the Plaintiffs and as required by IPRA.
- b. If the Defendants are relying on any exemption as a basis for withholding records, then Defendants failed, when withholding documents responsive to the records requests, to issue a proper denial of the records requests or to explain the basis for the denial.
- c. Defendants failed to refer the records request to other custodians having

possession of responsive documents and to notify Heild of the referral.

40. The Plaintiffs are entitled to recover damages, at up to \$100 per day per violation, and their costs and attorneys' fees in pursuing this action pursuant to Section 14-2-12(D).

COUNT TWO

Declaratory Relief

41. The Plaintiffs incorporate by reference the foregoing allegations.

42. There exists an actual controversy between the Plaintiffs and the Defendants whether the Defendants' conduct, as alleged above, constitutes violations of the IPRA and whether the policies, procedures, and training provided to OOG employees is adequate to permit Defendants to comply with the IPRA.

43. Plaintiffs are entitled to declaratory relief that Defendants have violated the Act, and that the Defendants' policies, procedures, and training are inadequate to permit compliance with IPRA.

COUNT THREE

Injunctive Relief and Mandamus

44. The Plaintiffs incorporate by reference the foregoing allegations.

45. Pursuant to NMSA 1978, § 14-2-12(B) (2010), the Plaintiffs are entitled to a writ of mandamus or injunction ordering the Defendants to produce all relevant documents in the Defendants' possession, as provided in Plaintiffs' request.

WHEREFORE, the Plaintiffs pray that:

1. the Court declare that the Defendants have violated IPRA in responding to Plaintiffs'

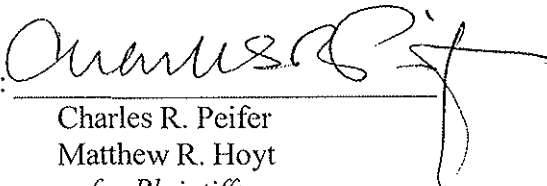
records requests;

2. the Court issue a writ of mandamus or injunction ordering the Defendants to produce the records and information requested without further delay, and to produce all similar such documents in the future and to adopt policies and procedures and training sufficient to correct the policies and practices that have resulted in the improper denials in this case; and

3. the Court enter an order for such other and further relief as the Court deems just and proper, including but not limited to damages, costs and reasonable attorneys' fees.

Respectfully submitted,

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