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Corrections Department withholds investigation on former care provider Corizon

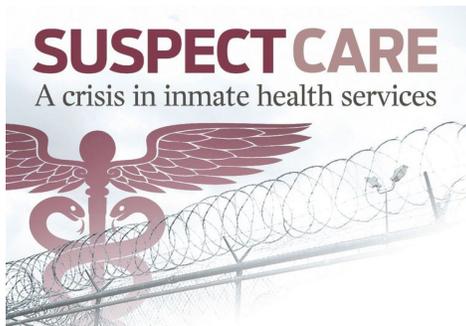
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By Phaedra Haywood
The New Mexican

The New Mexico Department of Corrections is refusing to release the results of an in-depth investigation the department conducted into Corizon Health, the company that formerly provided health care for most of the state's 7,000 inmates.

Jim Brewster, general counsel for the department, acknowledged that the report exists but said it was protected under attorney-client privilege and exempt from the state Inspection of Public Records Act because it was prepared in anticipation of litigation.

"There is a report on Corizon, but you can't see it," Brewster told *The New Mexican*.

Brewster said currently there is not any pending litigation related to the information in the report, "but the statute of limitations in which litigation could be filed has not expired."

It's not clear why the investigation was launched or when it was completed. According to a person with knowledge of the report but who had not read it, the investigation took more than a year and resulted in a report of several hundred pages. The person spoke on condition of anonymity because the person was not authorized to speak about the matter.

The Department recently chose not to renew its contract with Corizon Health after a six-month investigation by *The New Mexican*, published in April, revealed deep problems with inmate care provided by the company, and of the state's lax oversight of the company.



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Corizon, the nation's largest for-profit provider of inmate care, faced more than 150 lawsuits filed by some 200 inmates in the nine years it had the contract, a sharp increase in the rate of inmate filings during the 2004-07 tenure of the previous provider, Wexford Health Sources, which the state fired over concerns about the quality of its medical care.

In reporting that story, *The New Mexican* requested all documents related to the department's monitoring of the company. The department did not provide the report nor did it indicate it had withheld any documents that were relevant to the request.

When *The New Mexican* learned about the report recently and requested to see it, Brewster acknowledged it existed but said it was subject to attorney-client work privilege or, in the alternate, was not subject to disclosure under a rule that protects "work product" or information collected or prepared in anticipation of litigation.

Brewster said the report was compiled by the department's Office of Professional Services — a division tasked with investigating allegations of staff misconduct, identifying trends in misconduct and recommending training and policy changes.

Preparing reports in anticipation of litigation is not listed as one of the division's missions on the department website, but Brewster said when the office does its reports, "I'm the first person that gets them because they are basically providing information to me so I can use it to provide legal advice to my client."

Susan Boe, executive director of the New Mexico Foundation for Open Government, acknowledged that there is a "broad exception" under the Inspection of Public Records Act that would allow the the department to withhold the report, but said "we don't have enough facts to determine whether the report ... falls under the attorney-client privilege and particularly the work product exemption."

"Important questions to be asked include whether the report was prepared or was ordered by an attorney," Boe said. "Was it shown to non-attorneys? Was the report itself done by an attorney?"

Boe said that if the information is shown to a third party who is not part of the attorney-client privilege, then the argument can be made that the attorney-client privilege was waived.

"However, look at the Health and Human Services audit," Boe added, referring to a 2013 report that resulted in the shake-up of the state's behavioral health provider network that was initially kept from public view but later released. "That was not prepared in anticipation of litigation either civil or criminal, but once it was turned over to the Attorney General, the state claimed at the time that it was protected and no longer a public document."

At the very least, Boe said, the Corrections department should have disclosed the existence of the report on Corizon — if it was completed, when *The New Mexican* asked the department to produce evidence of its due diligence in monitoring the company, even if it didn't intend to produce the record.

"What they are doing is putting the burden on the requester to specifically identify documents even though [*The New Mexican's*] request would seem to have covered it," she said.

So what's to keep an agency from claiming anything its legal department reviews is exempt from the Inspection of Public Records Act?

"That's the problem, isn't it?" Boe said.

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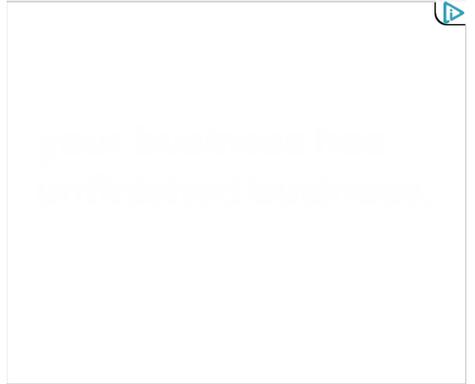
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