

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

NANCY HENRY,
Plaintiff,

vs.

D-202-CV-2019-03381

OFFICE OF THE STATE AUDITOR, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on *Plaintiff's Motion for Summary Judgment*, filed November 11, 2019, and *Defendants' Motion for Summary Judgment*, filed December 30, 2019.¹ Both motions are **DENIED**. Neither party has established entitlement to judgment as a matter of law. Further proceedings are necessary to determine if Defendants properly denied Plaintiff's request to inspect public records.

I. FACTS AND BACKGROUND

This is an Inspection of Public Records Act (IPRA) case. The undisputed facts are that Plaintiff Henry submitted two IPRA requests to Defendant Office of the State Auditor (OSA).

The first request, sent April 5, 2019, asked for "All communications between the OSA and the NM Livestock Board (NMLB) pertaining to letters and investigations against them, and any and all matters, between March 25 and April 6, 2019." OSA responded that it had no documents responsive to this request because it "concerns an open, ongoing examination." [1st Am. Compl. Ex. 7.] The second request, sent April 9, 2019, asked for "all Response Letters from the NMLB since the last one dated March 21, 2019." OSA responded that there were no responsive documents and that an IPRA exemption applied. [Id. Ex. 3.] Henry filed this lawsuit

¹ The Court presumes Defendants' motion filed December 30, 2019 supersedes the motion filed May 30, 2019.

seeking mandamus to compel production of the requested documents and for damages under IPRA.

“Every person has a right to inspect public records of this state[.]” NMSA 1978, § 14-2-1 (2019). The right to inspect is subject to eight enumerated exceptions. *Id.*

The parties have filed cross-motions for summary judgment: Henry argues she has the right under IPRA to inspect the documents she has requested; OSA argues the documents are exempt from IPRA. Thus, the issue presented by these motions is whether an IPRA exception applies to the records Henry requested.

II. LEGAL STANDARD

“Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.” *Romero v. Phillip Morris Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280 (block quote omitted).

III. DISCUSSION

A. OSA is not exempt from IPRA

OSA first argues its records are exempt because OSA is in the practice of public accountancy. The provision OSA relies upon is contained in the 1999 Public Accountancy Act and states: “The state auditor and the state auditor’s auditing staff are considered to be in the practice of public accountancy.” NMSA 1978, § 61-28B-17(B) (2008). “Public accountancy” means “the performance of one or more kinds of services involving accounting or auditing skills, including the issuance of reports on financial statements, the performance of one or more kinds of management, financial advisory or consulting services, the preparation of tax returns or the furnishing of advice on tax matters[.]” NMSA 1978, § 61-28B-3(M) (2017).

The Court rejects this argument because it suggests OSA is exempt from IPRA by virtue of the nature of its work. IPRA provides no such blanket exception for any public body.

Although OSA is in the practice of public accountancy, it is first and foremost an institution of government. *See Thompson v. Legislative Audit Comm'n*, 1968-NMSC-184, ¶¶ 11–12, 79 N.M. 693 (state auditor is a government officer and independent representative of the people with authority to examine the activities of state officers who receive and expend public money). “[A]ll 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 (1993). OSA is no exception to the policy that it is “an integral part of the routine duties of public officers” to provide persons with information. *Id.* As a public body subject to IPRA, OSA’s records are available for inspection by the public unless an exception applies. *Republican Party of N.M. v. N.M. Taxation & Revenue Dep’t*, 2012-NMSC-026, ¶ 13 (the public’s right of inspection “is limited only by the Legislature’s enumeration of certain categories of records that are excepted from inspection”).

B. IPRA’s Catchall Exception

OSA claims the records Henry requested are exempted from IPRA under the eighth exception—“as otherwise provided by law”—also known as the catchall exception. NMSA 1978, § 14-2-1(H). The Court considers each source OSA claims qualifies under the catchall exception. *See Republican Party of N.M.*, 2012-NMSC-026, ¶ 16 (courts should restrict their analysis to whether disclosure under IPRA may be withheld because of a specific exception contained within IPRA, or statutory or regulatory exceptions, or privileges adopted by the New Mexico Supreme Court or grounded in the constitution).

1. Section 61-28B-17(B) and industry standards

OSA first points to Section 61-28B-17(B) of the 1999 Public Accountancy Act. “The purpose of the 1999 Public Accountancy Act is to protect the public interest by regulating the practice of public accountancy.” NMSA 1978, § 61-28B-2 (1999). The 1999 Public

Accountancy Act creates a public accountancy board, establishes qualifications for certification as a certified public accountant, makes it unlawful to engage in practice unless licensed, and sets forth enforcement and disciplinary procedures. *Id.* §§ 61-28B-4, -5, -8, -16, -17.

Section 61-28B-17(B) makes clear that OSA's auditing staff is not exempt from the enforcement provisions of the 1999 Public Accountancy Act. However, OSA has pointed to nothing within the provisions of the 1999 Public Accountancy Act that permits a public body to withhold documents under IPRA.

OSA argues the records Henry requested are exempt from IPRA because they are "working papers" related to OSA's investigation of the complaints Henry made against the NMLB. OSA claims that under industry standards that govern the accountancy profession it has sole discretion with regard to releasing confidential audit documents. OSA relies on standards issued by the American Institute of Certified Public Accountants (AICPA), in particular provisions that state:

Audit documentation is the property of the auditor, and some states recognize this right of ownership in their statutes. The auditor may make available to the entity at the auditor's discretion copies of audit documentation, provided such disclosure does not undermine the effectiveness and integrity of the audit process.

[Defs.' Ex. D (AU-C, § 230.02, A.25, AU-C, § 339.31).] OSA claims it has exercised its discretion not to release documents related to its investigation because disclosing them undermines the effectiveness, integrity, independence or validity of the audit process. [Defs.' Ex. A (Cordova Aff.), ¶¶ 6, 10, 14.]

The argument is without merit. IPRA does not operate in terms of discretion, nor does it recognize public policy exceptions such as OSA is asserting. *Republican Party of N.M.*, 2012-NMSC-026, ¶¶ 14–16 (disapproving "rule of reason" exceptions as having been obviated by IPRA's enumerated exceptions).

Furthermore, assuming the records at issue constitute “audit documentation” as defined by the AICPA, an issue the Court does not decide, OSA has provided no authority to suggest these industry standards qualify as regulations carrying force of law for purposes of IPRA. *Edenburn v. N.M. Dep’t of Health*, 2013-NMCA-045, ¶ 26 (regulation relied upon for withholding documents in the sphere governed by IPRA must have force of law). Therefore, they do not fall within IPRA’s catchall exception.

2. Section 38-6-6(C)

OSA next argues the statutory public accountant privilege exempts its records from IPRA. This privilege states:

In the courts of the state, no certified public accountant or public accountant shall be permitted to disclose information obtained in the conduct of any examination, audit or other investigation made in a professional capacity, or which may have been disclosed to said accountant by a client, without the consent in writing of such client or his, her or its successors or legal representatives.

NMSA 1978, § 38-6-6(C) (1973). According to OSA, the records at issue in this case fall within Section 38-6-6(C) because they were obtained in the conduct of an examination, audit, or other investigation made in a professional capacity by its Special Investigations Division.

The IPRA catch-all exception includes statutory and regulatory bars to disclosure as well as privileges established by the rules of evidence. *Republican Party of N.M.*, 2012-NMSC-026, ¶ 13. OSA has not directed the Court’s attention to any New Mexico state cases interpreting or applying the public accountant privilege in any context, let alone recognizing it as an IPRA exception; the Court, through its own research, also has found no authority. Whether Section 38-6-6(C) operates as an IPRA exception is a question of first impression.

The Court first notes the public accountant privilege was created by statute and does not appear to be a privilege that is otherwise recognized under the common law, by the Supreme Court, or the New Mexico Constitution. The Court therefore concludes that whether this

particular statutory privilege qualifies as a basis for withholding documents from public scrutiny under IPRA depends on the Legislature's intent.

The Court declines to recognize Section 38-6-6(C) as authorizing OSA to withhold documents in response to an IPRA request. First, the privilege appears directed to information obtained from clients. Although OSA obtained the information during the course of investigating the NMLB, OSA does not claim the NMLB is a client.

While not claiming the NMLB as a client, OSA nevertheless argues the accountant privilege must be grounded on the assumption that without such confidentiality, there would be a chilling effect on an agency's incentive to disclose information necessary to ensure the accountant properly performs his or her task. [Reply at 5.] OSA claims that letters related to its investigation of the NMLB were erroneously released to Henry by a prior administration and that the integrity of the investigation was compromised as a result.

Previous disclosures are not relevant to this lawsuit. The only matters at issue are the two IPRA requests Henry made in April 2019. What the requester does with the records also is not relevant. NMSA 1978, § 14-2-8(C) (2009) ("No person requesting records shall be required to state the reason for inspecting the records.").

Furthermore, the Court is not persuaded by arguments likening OSA's role to that of an accountant in private practice. As discussed above, OSA is a government institution and representative of the people. IPRA grants to the people access to certain information held by its representatives. OSA's argument also ignores that the agencies whose cooperation may be chilled by disclosure are themselves public bodies subject to IPRA.

Second, even if not strictly limited to client communications, the statutory accountant privilege applies "in the courts of the state." This language and its location—in Chapter 38,

Article 6 relating to witness competency—indicate that information falling within the scope of the privilege may not be used as evidence without the client’s consent. Restricting evidentiary use is not the same as shielding information from disclosure. In other words, the “privilege” goes to admissibility. Nothing in the language of Section 38-6-6(C) suggests the privilege is a bar to disclosure under IPRA.

3. Section 12-6-5(A)

OSA next points to the Audit Act, specifically, Section 12-6-5(A), which states:

The state auditor shall cause a complete written report to be made of each annual or special audit and examination made. Each report shall set out in detail, in a separate section, any violation of law or good accounting practices found by the audit or examination. Each report of a state agency shall include a list of individual deposit accounts and investment accounts held by each state agency audited. A copy of the report shall be sent to the agency audited or examined; five days later, or earlier if the agency waives the five-day period, the report shall become a public record, at which time copies shall be sent to: (1) the secretary of finance and administration; and (2) the legislative finance committee.

NMSA 1978, § 12-6-5(A) (2009).

This section of the Audit Act designates audit reports as public records five days after they are sent to the agency that was audited or examined, or earlier if the agency waives the five-day period. By implication, such records are not public records before that time. The Court therefore agrees that Section 12-6-5(A) permits OSA to withhold a written report of an annual or special audit in response to an IPRA request until five days after the report is released to the agency.

The IPRA exception provided by Section 12-6-5(A) for reports does not apply in this case, however. Henry did not request reports.

4. Administrative regulations

OSA cites two administrative regulations as grounds for withholding documents under IPRA: 2.2.2.10(M)(5) NMAC and 2.2.2.15(A)(5) NMAC. Both regulations are contained in the

administrative code part titled “Requirements for Contracting and Conducting Audits of Agencies.” 2.2.2 NMAC (03/30/2001, as amended through 03/10/2020).

The first regulation OSA relies upon states:

At all times during the audit and after the audit report becomes a public record, the IPA shall follow applicable standards and 2.2.2 NMAC regarding the release of any information related to the audit. Applicable standards include but are not limited to the AICPA Code of Conduct ET Section 1.700.001 and related interpretations and guidance, and GAGAS 6.53–6.55 and GAGAS 6.63–6.65. The IPA shall not disclose audit documentation if such disclosure would undermine the effectiveness or integrity of the audit process. AU-C 230.A29.

2.2.2.10(M)(5) NMAC. An IPA is an “independent public accountant.” 2.2.2.7(I)(1) NMAC. IPAs are firms qualified by OSA as eligible to compete for audit contracts. 2.2.2.8 NMAC.

2.2.2.10(M)(5) NMAC does not apply here. This regulation prohibits an IPA, a private firm presumably hired to perform an audit, from releasing information related to the audit it performs. The IPRA requests in this case were not directed to the IPA, they were directed to OSA. A regulation that restricts a private entity from releasing documents is not authority for OSA, a public body, to withhold documents under IPRA.

OSA also relies on 2.2.2.15 NMAC, the regulation pertaining to special audits or audits related to reports of fraud, waste and abuse. Henry made a report of fraud, waste and abuse against the NMLB. Her report was investigated by OSA and portions of it were referred to an IPA. [Cordova Aff. ¶¶ 5, 18.]

The regulation characterizes reports of fraud, waste and abuse, and records related to such reports as confidential. The regulation in effect at the time Henry made her IPRA requests states:

Confidentiality of files: A report alleging financial fraud, waste, or abuse in government that is made directly to the state auditor orally or in writing, or telephonically or in writing through the state auditor’s fraud hotline or website, any resulting special audit, performance audit, attestation engagement or forensic audit, and all records and files related thereto are confidential audit documentation and may not be disclosed prior to the

release of an audit report, except to an independent auditor, performance audit team or forensic audit team in connection with a special audit, performance audit, attestation engagement, forensic audit or other existing potential engagement regarding the financial affairs or transactions of an agency.

2.2.2.15(A)(5) NMAC (03/12/2019).

The Court concludes this regulation exempts from IPRA records related to reports of fraud, waste or abuse. However: The regulation states the records “may not be disclosed prior to the release of an audit report.”² This means they may be disclosed after the audit report is released.

The Court rejects OSA’s argument that the exception for records related to an audit report continues after the release of the report. The exemption is expressly tied to the release of the audit report. In other words, the IPRA exception this regulation affords for records related to the audit report—like the exception for the audit report itself—is limited in duration. Both the report and records related to the report become public records subject to disclosure under IPRA after the report is released to the agency.

OSA’s position that records may be withheld unless the Audit Act or the regulation permit disclosure turns IPRA on its head. IPRA makes clear it intends to normalize transparency in government. Disclosure, not secrecy, is the default: “The citizen’s right to know is the rule and secrecy is the exception.” *ACLU of N.M. v. Duran*, 2016-NMCA-063, ¶ 25 (quoting *State ex*

² The regulation has since been amended and now restricts only the agency from releasing documents: “Confidentiality of files: A report alleging financial fraud, waste, or abuse in government that is made directly to the state auditor orally or in writing, or telephonically through the state auditor’s fraud hotline or website, any resulting special audit, performance audit, attestation engagement or forensic audit, and all records and files related thereto are confidential audit documentation and *may not be disclosed by the agency*, except to an independent auditor, performance audit team or forensic audit team in connection with a special audit, performance audit, attestation engagement, forensic audit or other existing potential engagement regarding the financial affairs or transactions of an agency.” 2.2.2.15(A)(5) NMAC (03/20/2020) (italics added).

rel. Newsome v. Alarid, 1977-NMSC-076, ¶ 34, 90 N.M. 790, *superseded on other grounds as stated in Republican Party of N.M.*, 2012-NMSC-026, ¶¶ 14–16).

IV. CONCLUSION

The Court concludes 2.2.2.15(A)(5) NMAC (03/12/2019) temporarily or conditionally exempts from IPRA records and files related to reports alleging financial fraud, waste, or abuse in government. The exemption lasts until the audit report is released, after which time the records are no longer exempt from disclosure under IPRA. The summary judgment record is not sufficient to determine how or the extent to which this IPRA exception applies to the records Henry requested. The Court therefore reserves ruling on whether OSA properly responded to Henry's two IPRA requests.

IT IS SO ORDERED.

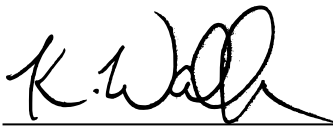
A handwritten signature in black ink, appearing to be 'CC', written over a horizontal line.

Clay Campbell
District Court Judge

I HEREBY CERTIFY that an endorsed copy of this form was E-SERVED to counsel of record on the date of filing.



KI WALKER
Trial Court Administrative Assistant



D-202-CV-2019-03381