

**STATE OF NEW MEXICO
COUNTY OF RIO ARRIBA
FIRST JUDICIAL DISTRICT COURT**

TABITHA CLAY,

Petitioner,

No.: D-117-CV-2020-00280

v.

**CITY OF ESPANOLA and
TYLER DOMINGUEZ (in his official capacity
as Records Clerk),**

Respondents.

**TABITHA CLAY’S REPLY IN SUPPORT OF HER MOTION AND BRIEF
SUPPORTING SUMMARY JUDGMENT**

Granting Petitioner’s Motion and Brief for Summary Judgment (“Motion”) is supported because pursuant to Rule 1-056(D) NMRA, Respondents fail to sufficiently dispute or controvert Petitioner’s proffer of undisputed material facts (thus admitting them) or otherwise admit the balance of offered facts. Accordingly, a determination by the Court to rule in favor of Petitioner’s claims as a matter of law is supported as it is undisputed Respondents violated the state’s Inspection of Public Records Act (“IPRA”) by not only denying public records to Petitioner but because a City of Espanola public official’s refusal, at best, to produce records ordered to do so by the Court.

In their Response, Respondents present three arguments supporting the denial of Petitioner’s Motion: (1) the sought-after text messages as contained on then city attorney A.J. Salazar’s city cell phone are not public records and thus not subject to production for an IPRA request; (2) Respondent City acted in good faith when responding to Petitioner’s IPRA request; and (3) Respondent City acted in good faith to comply with this Court’s September 22, 2020, Order. As further explained below, the City’s arguments are insufficient to deny the granting of Petitioner’s Motion.

I. Relevant Case Summary and Law Supporting Summary Judgment Against Respondents

Upon being informed by counsel for Respondents that in October of 2020 A.J. Salazar returned his phone to the City of Espanola with all of its data and text messages deleted, Petitioner commenced an investigation into the usage history of Salazar's city issued cell phone. Petitioner thereafter brought this matter before the Court in her June 6, 2021, Motion, wherein the undisputed material facts show that:

- a. Salazar's phone contained as many as 293 responsive text messages to Petitioner's October 5, 2019, IPRA request;
- b. Salazar's phone had been utilized in the time period following the Court's September 10, 2020, Mandamus hearing and its September 22, 2020, Order of Mandamus;
- c. Salazar returned the phone to the City of Espanola in a "reset" state with all its data and text messages deleted.

In their Response, Respondents fail to dispute nearly all of Petitioner's proffered material facts in her Motion and offer no additional evidence to rebut Petitioner's prima facie showing of entitlement to the relief requested as required by Rule 1-056 NMRA. The law is clear under such circumstances. Summary judgment should be granted when no genuine issue of material fact exists that requires a jury trial. *FDIC v. Alto Constr. Co.*, 1989-NMSC-075, 109 N.M. 165, 783 P.2d 475. Where the facts are not in dispute and all that remains is the legal effect of the facts, summary judgment is proper. *Lovato v. Duke City Lumber Co.*, 1982-NMCA-021, 97 N.M. 545, 641 P.2d 1092.

Importantly, Rule 1-056(D) NMRA provides where the party responding to a summary judgment motion does not specifically dispute facts set out in the motion, *those facts are deemed admitted. Id.*; See also *Cordova v. New Mexico Taxation & Revenue Dep't.*, 2005-NMCA-009, 136 N.M. 713, 104 P.3d 1104 (emphasis added). Where facts set forth in affidavits and supporting documents are uncontroverted, the facts must be taken as true in support of a motion for summary judgment. *State ex rel. Bardacke v. New Mexico Fed. Sav. & Loan Ass'n*, 1985-NMSC-045, 102 N.M.

673, 699 P.2d 604. Tellingly, Respondents' disputations of Petitioner's undisputed material facts rest mostly on argument by counsel, unsupported denials, or simply non-answers. Such responses are insufficient to adequately dispute any of the material facts proffered by Petitioner's Motion. Pursuant to Rule 1-056(E) NMRA:

“[A]n adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.”

Id.

II. Respondents' Responses to Proffered Undisputed Material Facts (UMFs) are Insufficient and Their Proposed Undisputed Materials Facts are Irrelevant

Respondents do not dispute UMFs Nos. 1-3, 6-9, and 11-15, and they fail to sufficiently dispute UMFs No. 10 and 16 thus deeming them undisputed going forward. To the extent that any response by Respondents to these material facts is couched or otherwise reframes facts (without being denied), such argument is deficient as they are *not* specifically disputed as is required by Rule 1-056(D) NMRA (“[a]ll material facts set forth in the statement of the moving party shall be deemed admitted unless specifically controverted.”). Pursuant to *Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145 N.M. 451 200 P.3d 104 (citing *Wall v. Pate*, 104 N.M. 1, 3, 715 P.2d 449, 451 (1986); *Henning v. Rounds*, 2007-NMCA-139, ¶ 2, 142 N.M. 803, 171 P.3d 317), assertions and arguments of counsel is not evidence and are insufficient to dispute proffered material facts with respect to the standards required by Rule 1-056 NMRA. Thus, what is left to address is Respondents' denials of UMFs Nos. 5, 17-18, and their proffered Additional Material Facts (“AMFs”) 1-10.

UMF No. 5 states that Respondents failed to acknowledge Petitioner's October 5, 2019, IPRA request until *after* she sent a follow up email on June 22, 2020. In their denial of this UMF, Respondents rely on Espanola's City Clerk's responses to prior IPRA requests as identified in Response exhibits A-F but absent from their exhibits are any documents showing that the City personnel responded to Petitioner's October 5, 2019, IPRA request. Accordingly, a determination that

Respondents' "denial" of UMF No. 5 is not sufficiently disputed because Respondents do not address the October 5, 2019, IPRA request is supported.

UMF No. 17 states that following the Court's September 10, 2020, order, Salazar still possessed the cellphone and sent at least one text message. In support of this contention, Petitioner relied upon a usage report produced by Salazar's cell phone provider (Motion, Ex. #10). Though Respondents dispute this UMF, not only do they fail to provide records disputing the Verizon usage report, but their own evidence (Exhibit H, Attachment 1) confirms that Salazar possessed the phone and was going to refuse compliance with the Court's order unless the City provided him with resources to return it as he would "not use my personal funds to send it back." *See* Response, Exhibit H, Attach. 1. Accordingly, a determination that Respondents' "denial" of UMF No. 17 is not sufficiently disputed because Respondents' own evidence confirm Salazar still possessed the phone on September 24, 2020, and they fail rebut the Verizon usage report is supported.

UMF No. 18 states that no records responsive to Petitioner's October 5, 2019, IPRA request have been produced to her because of Salazar's action of resetting his city cell phone. In their denial of this contention, Respondents assert that the City made efforts to obtain the cell phone from Salazar as evidenced by Attachment 1 of their Exhibit H. Further, Respondents state that they "were unable to review Salazar's text messages." The implication is that no records were produced to Petitioner and that the absence of such records is because of Salazar's conduct of resetting his city phone. Accordingly, a determination that Respondents' "denial" of Petitioner's contention in UMF No. 18 is non-responsive at best and fails to sufficiently rebut Petitioner's contention in UMF No. 18 is supported.

Finally, Respondents proffer AMFs Nos. 1-10 which assert, generally, that: Petitioner previously submitted six (6) prior IPRA requests for text messages that were thereafter denied "on the grounds of privilege and confidentiality," the circumstances by which Salazar was on leave from his

position as City Attorney, and his subsequent resignation. Petitioner's responses are as follows:

AMF 1(a)-(f). Petitioner admits she submitted the listed IPRA requests however the requests were not entirely denied as Respondents contend. As Respondents' own exhibits show, though Respondents denied production of text messages to Petitioner, they did produce other records sought by Petitioner in those IPRA requests: redacted billing statements for each of the six (6) IPRA requests. Additionally, the records custodian did not make the determination that the text messages were subject to exclusion, rather (and as in this case) that determination was made by A. J. Salazar himself. This contention is evidenced by Salazar's own email to Espanola's City Clerk which was produced to Petitioner on July 21, 2021, by Respondents and is attached as Exhibit #3 to Petitioner's attached declaration. As detailed in Salazar's September 19, 2019, email to the City Clerk, not only does Salazar confirm he conducts city business on his city cell phone, but he threatens Petitioner with litigation if she persists with her IPRA request as to whether he also conducts city business on his personal phone. *Id.*

AMF 2. Petitioner denies this AMF in that she did not submit an IPRA request on October 4, 2019, nor did the city respond to her October 5, 2019, IPRA request until she followed up on it on June 22, 2020. Response, Exhibits #2 and #3. Additionally, the six (6) prior IPRA requests sent by Petitioner were from her work email address when she was a reporter at the *Rio Grande Sun* (rgsuncrimebeat@gmail.com) whereas the October 5, 2019, IPRA request was submitted by Petitioner in her capacity as a private citizen from her personal email address (tabithamclay@gmail.com). Response, Exhibits A-F; Motion, Exhibits #2-#3. Accordingly, a determination that Respondents' AMF 2 is sufficiently disputed is proper and supported.

AMFs 3-10. Petitioner does not dispute these AMFs. However, Petitioner contests the relevancy of these proffered facts as they are not dispositive of the claims presented by Petitioner's Motion for Summary Judgment.

III. Respondents Fail to Rebut Petitioner’s Showing of Entitlement to Summary Judgment.

In their Response, Respondents fail to acknowledge that “[t]he movant need only make a prima facie showing (of entitlement) to summary judgment.” *Roth v. Thompson*, 1992-NMSC-011, ¶ 17, 113 N.M. 331, 334-35. Once the movant makes that showing, the burden shifts to the party opposing the motion to demonstrate the existence of specific evidentiary facts which would require trial. *Id.* Here, Petitioner, through testimony, admissible exhibits, and undisputed material facts supported by documentation *and* not adequately controverted by Respondents, is entitled to partial summary judgment by determining as a matter of law Respondents violated IPRA. *See* UMF Nos. 1-18.

A. Text Messages Can Be Public Records Under the IPRA

Pursuant to Section 14-2-6(G) of the IPRA, public records are defined as:

“[A]ll documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained.”

Id.

Thus, at the outset in determining whether a given record, such as a text message (or its contents) are a public record, the analysis begins with whether the record relates to public business and not the “physical form” of the record. Though such an analysis can be challenging *if* the records are unavailable (as they are in this case), Salazar confirms in his own email September 19, 2019, email to the City Clerk that the text messages on his phone are public records by stating, “I do use this phone EXCLUSIVELY for business.” *See* Declaration of Tabitha Clay, Exhibit #3. Accordingly, it is undisputed that the records that *were* on Salazar’s phone were public records because by his own admission they relate to city business. Nothing has been presented by Respondents to support their argument that the text messages were “transitory” or otherwise not relating to public business. Furthermore, in past IPRA requests, the City has produced responsive text messages to other IPRA requests submitted by Petitioner so to contend now that such records are not public records is

inconsistent with the City's own practices. Attached as Exhibit #1 to Petitioner's declaration is a text thread by Salazar and Louis Carlos, the former Chief of the Espanola Police Department from 2018 into 2019. Therein Salazar and Carlos talk about various public business such as police activities and discussion about the city's mayor. Accordingly, a determination that the records sought by Petitioner in this matter were public records as defined by the IPRA, and that the City's practice has been to recognize text messages as public records is supported and proper.

B. Respondents Failed to Act in Good Faith by the Acts of City Official A. J. Salazar

In this matter, Respondents only took action when it suited their interests. Their records custodian never obtained records from Salazar even after Petitioner filed her action on July 29, 2020. Following the Court's verbal order on September 10, 2020, and its Order of Mandamus on September 22, 2020, the City's efforts to comply with those orders were frustrated by the acts of one of its own city official: City Attorney A. J. Salazar. Pursuant to City of Espanola city ordinances, the City Attorney is recognized as a Public Official. *See* § 40-02, Definitions of the City of Espanola Ordinances. As evidenced by Salazar's own communications with city personnel, not only did he obstruct in the production of public records to the city's records custodian to determine whether there were records responsive to IPRA requests (and threaten to sue Petitioner if she persisted with such claims), he was dilatory in returning a city cell phone he possessed while on leave (see Response, Exhibit H, Attach. 1), and he ultimately defied a Court directives by resetting the phone thus deleting the text messages to be reviewed by Respondent Dominguez. Accordingly, a determination that the City acted in good faith when their own public official took such actions in contravention to the Court and IPRA is not supported.

C. Respondents Violated NMSA 1978, 14-2-8(D) in Not Producing the Public Records within Three (3) or Fifteen (15) Days of Petitioner's IPRA Requests.

Pursuant to NMSA 14-2-8(D), Respondents were required to produce the records sought by Petitioner within three (3) business days after receipt of her IPRA request or at the very latest, within

fifteen (15) days. *Id.* Here, Petitioner submitted her IPRA request on October 5, 2019, and thereafter Respondents failed to acknowledge it. UMFs 2-3, and 5. Thereafter, on June 22, 2020, Petitioner sent an email in follow up to her October 5, 2019, IPRA request and Respondent Dominguez denied it. UMFs 5-6. In response to the IPRA request, Respondent Dominguez asserted that the records were subject to exclusion however he had not seen the records and this exclusion was asserted by Salazar. UMFs 6-7. The City's IT manager himself had no opportunity to extract messages from Salazar's phone because Salazar refused to provide him with the phone. UMF 4. Between 103 and 293 text messages existed on Salazar's phone during the relevant time period of Petitioner's October 5, 2019, IPRA request. UMFs 15-16. No records have been produced to Petitioner. UMF 18. The reason no records have been produced to Petitioner is because Salazar's phone had been reset and the messages deleted while he was in possession of the phone. UMFs 13 and 17. Such actions by Salazar occurred following Petitioner's commencement of litigation in this matter and following the Court's verbal and written directives concerning Salazar's phone. UMFs 8 and 11. Pursuant to Section 14-2-1 of the IPRA, "[e]very person has a right to inspect public records of this state except" those records subject to identified exclusions. Here however, Respondents cannot assert any exclusions because of their own City Attorney's actions regarding the text messages on his phone. Accordingly, a finding that Respondents violated NMSA 1978, 14-2-8(D) and 14-2-11(B) in their denial of otherwise responsive public records is supported and proper.

D. Respondents Violated NMSA 1978, 14-2-11(C) in Not Delivering or Mailing a Written Explanation of Their Denial within Fifteen (15) Days of Petitioner's IPRA Requests.

"It is when the custodian fails to respond to a request or deliver a written explanation of the denial that the public entity is subject to Section 14-2-11 damages." *Faber v. King*, 2015-NMSC-015, ¶ 16, 340 P.3d 173. When a public entity, such as Respondent City of Espanola, wrongfully denies an IPRA request, they are subject to the remedies provided by NMSA 1978, 14-2-12(D). "[W]hen an agency wrongfully denies a request for documents, Section 14-2-12(D) states that '[t]he Court shall

award damages, costs, and reasonable attorneys' fees to any person whose written request has been denied." *Faber v. King*, 2015-NMSC-015, ¶ 1, 349 P.3d 173.

In this matter, Respondents improperly withheld responsive records *without* ever having reviewed the records to see if any exclusions applied. UMFs 4 and 6. However, as is evident by the Verizon usage reports, between 103 and 293 responsive records existed. UMFs 15-16. As Respondents fail to sufficiently controvert these asserted facts as required by Rule 1-056(E) NMRA, a determination by the Court that Respondents have violated the IPRA and are subject to the statutory damages and remedies of Sections 14-2-11(C) and 14-2-12(D) of the IPRA is supported and proper.

E. Sanctions for the Undisputed Misconduct in this Case are Warranted

"If a party's litigation abuses fall outside the sanction authority expressly set forth in our procedural rules, "the court may rely on its 'inherent powers' to impose sanctions." *Gonzales v. Surgidev Corp.*, 1995-NMSC-047, ¶ 23, 120 N.M. 151; see also *Rest. Mgmt. Co. v. Kidde-Fenwal, Inc.*, 1999-NMCA-101, ¶¶ 13, 20, 24, 127 N.M. 708 (recognizing the district court's authority to dismiss claims in the exercise of its inherent power). "In determining the appropriate punishment for civil contempt, courts are authorized to exercise their inherent discretion. In doing so, a court considers the character and degree of harm threatened by continued contemptuous acts and whether contemplated sanctions will cause compliance with the Court's order." *State of New Mexico ex. Rel. et al v. Hon. Gary Johnson, et. al.*, 1998-NMSC-015 ¶59, 125 N.M. 343. "Courts consider the seriousness of the consequences of continued contemptuous behavior, the public's interest in ending defendants' defiance, and the importance of avoiding future defiance." (*Id.* citing *Case v. State*, 103 N.M. 501, 502, 709 P.2d 670, 671 (1985).

An award of civil contempt sanctions attempts to "compensate the complainant for losses sustained." *State ex rel. Apodaca v. Our Chapel of Memories of New Mexico, Inc.*, 74 N.M. 201, 204, 392 P.2d 347, 349 (1964). "The orderly process of law demands that respect and compliance be given

to orders issued by courts possessed of jurisdiction of the persons and of the subject matter and one who defies the order of a court having jurisdiction does so at his peril.” *Id.* In awarding sanctions, the court must “insure that a determination of a case on the merits is made only after a full, good faith disclosure of all relevant facts” in order “to preserve the integrity of the judicial process.” *Id.* Accordingly, sanctions in the form of monetary compensation for the loss of information that Ms. Clay has sustained, in addition to statutory sanction provided under IPRA, are warranted. The records Ms. Clay sought have been purposefully destroyed and the Court’s Order of Mandamus has been purposefully and intentionally defied which supports meaningful sanctions that will deter such conduct in the future. Without an award of extreme sanctions in this case, the Court would inadvertently be emboldening public entities that destruction of records is an avenue by which they can avoid production of such records.

IV. Conclusion and Request for Relief.

“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 rel. Newsome v. Alarid*, 197-NMSC-076, ¶ 34, 90 N.M. 790). The timeline and facts of this matter are straight forward and not subject to genuine dispute. Respondents violated the IPRA by failing to produce public records sought by Petitioner by excluding without any basis, or incorrectly applying blanket exclusions, public records as set forward in the Act and thereafter deleted the records from the device which held the records. Accordingly, a determination that Respondents violated Sections 14-2-8(D) and 14-2-11(C) is supported and proper in this matter as the relevant material facts are not in dispute.

Wherefore, Petitioner requests that the Court grant this Motion and issue an order finding:

1. Respondents violated Sections 14-2-8(D) and 14-2-11(C);
2. Determine Respondents are subject to the statutory damages and penalties as provided for under Sections 14-2-11(C) and 14-2-12(D) at an amount calculated of \$100/per day from

October 8, 2019 to at least October 22, 2020, for each of the 293 text messages that were on Salazar's cell phone.

3. Determine Respondents are subject to additional penalties by the Court inherent in its equitable authority to deter conduct as committed by Salazar;
4. Such further relief the Court deems just and proper.

Respectfully submitted,

/s/Thomas R. Grover

Thomas R. Grover

GROVER LAW, LLC

9400 Holly NE, Bldg. 4

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this document was electronically filed with the Court's Odyssey system on July 26, 2021, which caused an electronic version of the foregoing to be served on the below:

Christina L. G. Brennan
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/s/ TRG

**STATE OF NEW MEXICO
COUNTY OF RIO ARRIBA
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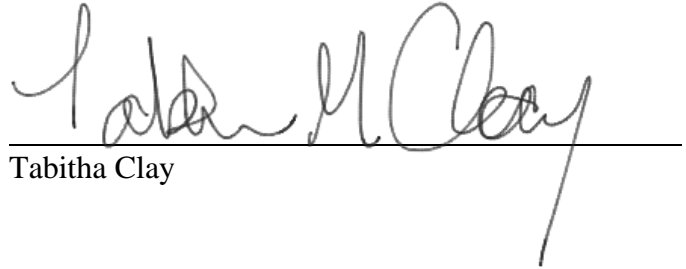
DECLARATION OF TABITHA CLAY

TABITHA CLAY hereby submits the following written sworn statement affirmed under penalty of perjury pursuant to Rule 1-011(B) NMRA:

1. I am over the age of eighteen (18), am competent to testify to the facts asserted herein, and have personal knowledge of these facts.
2. I am the Petitioner in the above captioned case.
3. On previous occasions I have submitted IPRA requests to the City of Espanola seeking text messages by and between former City Attorney A.J. Salazar and former Chief of Espanola Police Louis Carlos. Such text messages have been produced to me in the past and attached as Exhibit #1 is an example of such production of text messages by the City.
4. On June 4, 2021, I submitted an IPRA request to the City of Espanola seeking various records by and to A.J. Salazar, the former city attorney for the City of Espanola. A copy of that IPRA request is attached as Exhibit #2.
5. On July 21, 2021, the records custodian for the city of Espanola produced records responsive to my June 4, 2021, IPRA request. Among the records produced to me were was a September 19, 2019, email by A.J. Salazar to Melissa Velasquez which addresses IPRA requests concerning records on his City of Espanola cell phone. *See* Exhibit #3.
6. In this email, A.J. Salazar:
 - a. Admits that his government cell phone is used “exclusively for business.”
 - b. Asserts that any and all communication records on the phone, including text messages, are subject to the Attorney-Client privilege.

- c. Asserts that if the IPRA requester further persists in scrutinizing his claim that records on his personal phone are not subject to IPRA, “the media should expect immediate legal action to be filed in State District Court against them, and they should expect a request for punitive damages as a result.”

Executed this 22nd day of July, 2021.



Tabitha Clay

24 Dec 2018 5:10 AM

Bro. Are you up??

24 Dec 2018 5:11 AM

Did Javier give us "off" from work or just for the meeting??

24 Dec 2018 7:7 AM

Just meeting

24 Dec 2018 1:58 PM

Was everything OK with the Jefe??

Simon... all good ese

24 Dec 2018 2:14 PM

[EMOJI][EMOJI]

26 Dec 2018 4:53 PM

Austin Fisher
Rio Grande Sun
Phone: +16205219792

02 Jan 2019 1:58 PM

I need to know what that acronym stands for in order to approve the policies you sent me. OAPM

02 Jan 2019 2:26 PM

Ok stand by. In a meeting with tabitha

02 Jan 2019 3:6 PM

OAPM??

02 Jan 2019 3:8 PM

Simple question. But I don't know what you are referring to.

02 Jan 2019 3:9 PM

Sorry bro... operational administrative policy manual.

08 Jan 2019 6:13 PM

Speed Enforcement Van!

Or a "decoy" unit

08 Jan 2019 6:15 PM

No way on speed van. Rather have a traffic unit. Matter if fact. Sfpd jus disbanded their program. Considered revenue generating initiatives

15 Jan 2019 3:0 PM

I can't talk right now. I'll call you back shortly.

23 Jan 2019 11:40 AM

Hey bro. Can you send me the contract for the jail? Can we discuss some issues I have with it.

28 Jan 2019 9:36 AM

At the stoplight on Riverside and 84/285. You know the intersection which says "no turn on red "

Literally 20 cars turned on the red. They made the turn from the right lane as I was in the left lane.

They didn't even stop at the red

That's my fishing hole

[EMOJI]

28 Jan 2019 9:37 AM

Well, it's freshly stocked

29 Jan 2019 11:58 AM

Dude. 912

911!!!

Come see me at court

I'm in a meeting bro..q pasa

35

29 Jan 2019 12:5 PM

Public svc ASAP

Can you talk?

31 Jan 2019 1:43 PM

Give me a call when you get a chance please

31 Jan 2019 2:14 PM

98

31 Jan 2019 2:52 PM

Roger

Pls get to City clerk ASAP

From: NNM Indy <northernnewmexicoindependent@gmail.com>
Sent: Friday, June 4, 2021 5:10 PM
To: IPRA <IPRA@espanolanm.gov>
Subject: AJ Salazar Emails

6/4/21

Dear Records Custodian,

This is a formal request under the New Mexico Inspection of Public Records Act. I wish to inspect the following, in their native electronic format if possible:

1. Any and all emails sent or received by former city attorney AJ Salazar. (It is believed that the IT department previously performed a search and that records of those emails were provided to Española Mayor Javier Sanchez.)

I prefer to receive further communication on this matter electronically, as it has been sent to you, the custodian.

Thank you,
Tabitha Clay
719-468-3608

Northern New Mexico Independent
www.nnmindy.com

From: AJ Salazar
Sent: Thursday, September 19, 2019 12:19 PM
To: Melissa Velasquez <MVelasquez@espanolanm.gov>
Cc: Xavier B. Martinez <XMartinez@espanolanm.gov>
Subject: ATTORNEY-CLIENT CONFIDENTIAL COMMUNICATION: AJS CELL PHONE USAGE
Importance: High

Melissa:

I spoke with you a few minutes ago regarding the IPRA requests (several of them) which have come in from the Press regarding my City-issued Cell phone and its usage. I do not maintain the records from this phone, however I do use this phone EXCLUSIVELY for business.

The responses to these requests should be as follows:

City Cell phone:

My city cell phone number is: 505-470-8498 and I was issued this phone in early April, 2019 as I lost the phone which was issued to me. The date of its issue should be available from the IT Department. This telephone is used EXCLUSIVELY for City Business and within the scope of my duties as City Attorney. Any and all communications are thus subject to the Attorney-Client privilege of New Mexico Law, pursuant to New Mexico Rule Annotated Rule #: 11-503, which states, "A Client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications between himself and his lawyer, and between other specified persons, made to facilitate the rendition of professional legal services to the client."

As all of my communications on my City-issued cell phone have been used in the furtherance and within the scope of my duties as Espanola City Attorney, ALL communications, including text messages fall within this category. The City as a whole is my client, and thus any and all communications are privileged.

Additionally, as a licensed attorney in the State of New Mexico, I am barred from the Rules of Professional Conduct from disclosing any such confidential communication(s) in the form of phone calls and text messages which I have sent/received/made from my City-issued cell phone. See New Mexico Rule Annotated Rule 16-106, which states:

Rule 16-106 Confidentiality of Information

A. Disclosure of Information Generally. A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in Paragraphs B, C and D.

B. Disclosure to Prevent Harm to Others. To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, a lawyer should reveal such information to the extent the lawyer reasonably believes necessary:

C. Disclosure to Prevent Financial or Property-Related Harm. To prevent the client from committing a criminal act that the lawyer believes is likely to result

in substantial injury to the financial interest or property of another, a lawyer may reveal such information to the extent the lawyer reasonably believes necessary.

D. Disclosure in Lawyer-Client Controversy. To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client, a lawyer may reveal such information to the extent the lawyer reasonably believes necessary.

My personal Cell phone:

I do have a personal cell phone which is used EXCLUSIVELY for personal matters. I DO NOT, NOR HAVE I EVER utilized my personal cell phone for City Business. I will NOT consent to, nor will I authorize disclosure of ANY material, data or information from my personal cell phone. Thus, I will accordingly not provide my personal cell phone number, nor will I subject my personal cell phone to inspection or scrutiny.

If there is any persistence in this request, the media should expect immediate legal action to be filed in State District Court against them, and they should expect a request for punitive damages as a result.

Please let me know what you need from me in this regard.

Thank you,
AJS

AJ SALAZAR
City Attorney
City of Espanola
405 N. Paseo de Oñate
Espanola, NM 87532
O) 505.747.6063
C) 505.470.8498

“On any team, in any organization, all responsibility for success and failure rests with the leader. The leader must own everything in his or her world. There is no one else to blame. The leader must acknowledge mistakes and admit failures, take ownership of them, and develop a plan to win.”

**-Jocko Willink-
Extreme Ownership**

The unauthorized disclosure or interception of e-mail is a federal crime. See 18 U.S.C. § 2517(4). This e-mail is intended only for the use of those to whom it is addressed and may contain information which is privileged, confidential and exempt from disclosures under the law. If you have received this e-mail in error, do not distribute or copy it. Return it immediately with attachments, if any, and notify me by telephone at (505) 747-6063. Thank you.