

**STATE OF NEW MEXICO  
COUNTY OF BERNALILLO  
SECOND JUDICIAL DISTRICT COURT**

**NANCY HENRY,**

**Petitioner,**

**v.**

**D-202-CV-2020-04707**

**NEW MEXICO LIVESTOCK BOARD, and  
MARY CATEY, Records Custodian,**

**Respondents.**

**PETITIONER'S MOTION FOR SUMMARY JUDGMENT**

Petitioner Nancy Henry respectfully moves this Court pursuant to Rule 1-056 NMRA to enter summary judgment in her favor on the issue of liability in this case, as Respondents New Mexico Livestock Board and Mary Catey, Records Custodian (collectively “NMLB”) have failed to comply with the requirements of the New Mexico Inspection of Public Records Act (“IPRA”), NMSA 1978, Sections 14-2-1 to -12 (1941, as amended 2019), as a matter of law. Respondents’ actions are in blatant violation of IPRA and undermine the New Mexico Legislature’s stated purpose in enacting IPRA – to ensure that public bodies of New Mexico and their officials remain accountable to the people they serve. § 14-2-5. *See San Juan Agric. Water Users Ass’n v. KNME-TV*, 2011–NMSC– 011, ¶ 16, 150 N.M. 64.

#### **STANDARD OF REVIEW**

Under Rule 1-056, summary judgment is appropriate when there are “no genuine issues of material fact and the movant is entitled to judgment as a matter of law.” *See HSBC Bank USA v. Wiles*, 2020-NMCA-035, ¶ 8, 468 P.3d 922 (affirming summary judgment when defendant failed to establish a genuine issue of material fact). The purpose of summary judgment is to expedite litigation by determining whether a party possesses competent evidence to support his pleadings to raise a genuine issue of material fact and, if he has not, then to dispose of the matter. *Goffe v. Pharmaseal Labs., Inc.*, 1976-NMCA-123, 90 N.M. 764, rev’d in part on other grounds, 1977-NMSC-071, 90 N.M. 753. “When the facts are not in dispute, a court’s only task is to determine the legal effect of [those] facts.” *Fed. Nat. Mortg. Ass’n v. Trissell*, No. A-1-CA-37395, ¶ 6, --- P.3d ---, 2021 WL 2190428 (N.M. Ct. App. May 24, 2021) (slip opinion) (internal quotations and citation omitted). Summary judgment may be proper even though disputed issues remain, if those issues are not material. *Tapia v. Springer Transf. Co.*, 1987-NMCA-089, ¶ 8, 106 N.M. 461.

## STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Respondent New Mexico Livestock Board is an agency of the State of New Mexico. Resp'ts' Answer to V. Pet. For Writ of Mandamus ("Answer") ¶ 1.
2. Respondent Mary Catey, was the records custodian of the New Mexico Livestock Board, and she has since been replaced by Julie Gauman as records custodian. Answer ¶ 1; Ex. A.
3. On approximately April 15, 2020, NMLB was notified that a horse had been "dumped" at a location in Eddy County, New Mexico. Pet'r's Resp. in Opposition to Resp'ts' Mot. to Set Aside Writ of Mandamus ("Pet'r's Resp.") Ex. 1.
4. On approximately April 17, 2020, the NMLB traveled to the reported location in Eddy County, located the horse, and took possession of the horse. Pet'r's Resp. Exs. 1, 2.
5. No owner of the horse was identified by NMLB. Pet'r's Resp. Ex. 1.
6. After taking possession of the horse, NMLB contacted South Springs Animal Hospital and requested an appointment for the horse to receive veterinary services. Pet'r's Resp. Exs. 1, 3; Resp'ts' Mot. to Set Aside Writ of Mandamus ("Resp'ts' Mot.") Ex. B (Gammill Aff. ¶ 5).
7. NMLB transported the horse to South Springs Animal Hospital. Pet'r's Resp. Exs. 1, 3; Resp'ts' Mot. Ex. B (Gammill Aff. ¶ 5).
8. Dr. Bruce Gammill, a veterinarian employed at South Springs Animal Hospital, met with NMLB when NMLB arrived with the horse. Resp'ts' Mot. Ex. B (Gammill Aff. ¶¶ 7-8); Pet'r's Resp. Exs. 1, 3.
9. Dr. Gammill provided veterinary services on the horse. Resp'ts' Mot. Ex. B (Gammill Aff. ¶¶ 7-8); Pet'r's Resp. Exs. 1, 3.

10. Dr. Gammill euthanized the horse as part of the veterinary services he provided. Resp'ts' Mot. Ex. B (Gammill Aff. ¶¶ 7-8); Pet'r's Resp. Exs. 1, 3.
11. NMLB then transported the body of the horse to the City of Roswell Solid Waste facility for disposal. Pet'r's Resp. Ex. 4.
12. NMLB employee Barry Allen paid a fee of \$10.45 for the disposal of the horse, for which Mr. Allen was reimbursed by the State. Pet'r's Resp. Ex. 4.
13. NMLB employs the State Veterinarian along with field veterinarians. Ex. A.
14. The veterinarians employed by NMLB perform veterinary services, such as examination of horses, and at times, euthanization of horses. Pet'r's Resp. Exs. 5, 6.
15. On June 2, 2020, Ms. Henry submitted an IPRA request to NMLB for "all records pertaining to: horses, wild horses, donkeys, goats and pigs, taken up by the [New Mexico Livestock Board] and not advertised for ownership" between March 31, 2020 and June 3, 2020 and "[v]eterinarian records of any kind, including euthanasia, if any..." as well as "[d]ocumentation pertaining to the final disposition of the animal." Answer ¶ 9.
16. NMLB identified Ms. Henry's IPRA request as "Request ID No. 2348," and responded on June 16, 2020, with records regarding three separate incidents, including what NMLB identified as: "Incident #127-1001 Horse." V. Pet. For Writ of Mandamus ("V. Pet.") Ex. 2 at 7-8.
17. The records provided by NMLB regarding "Incident #127-1001 Horse" were limited to a Uniform Incident Report, a Supplemental Report, and three photos of the horse. V. Pet. Ex. 2; Pet'r's Resp. Exs. 1, 2.
18. After NMLB provided these documents, it affirmatively concluded its response to Request ID No. 2348. V. Pet. Ex. 2 at 7-8.

19. The Supplemental Report for “Incident #127-1001 Horse” stated that at South Springs Animal Hospital “the decision was made to euthanize” the horse. Pet’r’s Resp. Ex. 1.

20. NMLB did not identify any records that it was denying Ms. Henry under IPRA as part of Request ID No. 2348. V. Pet. Ex. 2 at 7-8.

21. On June 17, 2020, Ms. Henry wrote to NMLB reiterating her original request for “[v]eterinarian records of any kind, including euthanasia, if any...” as well as “[d]ocumentation pertaining to the final disposition of the animal” for “Incident #127-1001 Horse.” V. Pet. Ex. 2 at 6-7.

22. NMLB treated Ms. Henry’s June 17, 2020, communication regarding “Incident #127-1001 Horse” as a new IPRA request, which it labeled “Request ID No. 2360.” V. Pet. Ex. 2 at 6.

23. On June 19, 2020, NMLB informed Ms. Henry that it required additional time until June 26, 2020, to respond to Request ID No. 2360. V. Pet. Ex. 2 at 6.

24. Also on June 19, 2020, the Deputy Director of NMLB transmitted an email to an employee of South Springs Animal Hospital in which he directed that “the invoice for the examination and euthanasia” of the horse in “Incident #127-1001 Horse” be sent to Animal Protection of New Mexico, and further directed the South Springs Animal Hospital employee to attach the NMLB report number for the incident, *i.e.* “127-1001,” to the invoice. V. Pet. Ex. 6.

25. The invoice for veterinary services is referred to as “the final invoice” and is “the only document that broadly lists the procedures performed on the horse.” Resp’ts’ Mot. Ex. B (Gammill Aff. ¶ 10).

26. On June 24, 2020, NMLB responded to “Request ID No. 2360” by providing Ms. Henry with additional records regarding “Incident #127-1001 Horse” including records from

South Springs Animal Hospital and records concerning the disposal of the horse at the City of Roswell Solid Waste facility. V. Pet. Ex. 2 at 3-4; Pet'r's Resp. Exs. 3, 4.

27. NMLB closed Request ID No. 2360. V. Pet. Ex. 2 at 3-4.

28. NMLB did not identify any records that it was denying Ms. Henry under IPRA as part of Request ID No. 2360. V. Pet. Ex. 2 at 3-4.

29. After NMLB closed Request ID No. 2360, Ms. Henry informed NMLB that the final invoice from "Incident #127-1001 Horse" continued be improperly withheld. V. Pet. Exs. 2, 5.

30. NMLB did not respond to Ms. Henry's follow-up correspondence, nor did NMLB otherwise issue a written denial concerning the final invoice. V. Pet. Exs. 2, 5.

31. NMLB has never provided Ms. Henry with the final invoice for the veterinary services from "Incident #127-1001 Horse." Answer ¶ 15; Order on Show Cause and Resp'ts' Mot. To Set Aside Writ of Mandamus ¶ 4.

## LEGAL ARGUMENT

### **I. The State Violated IPRA by Not Providing Ms. Henry with the Responsive "Final Invoice," Nor Identifying a Reason for its Denial.**

#### **A. The Invoice Denied to Ms. Henry is a Public Record.**

IPRA defines "public records" as "all 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." § 14-2-6(G) (emphasis added). In a recent opinion, *Dunn v. N.M. Dep't of Game and Fish*, the New Mexico Court of Appeals interpreted the statutory language "*relat[ed] to public business*" to mean "simply that the requested records are connected to governmental affairs or official

actions[.]” 2020-NMCA-026, ¶ 9, 464 P.3d 129. The Court in *Dunn* noted the absence of “any limiting language” in holding that it made no difference whether the records were related to substantive decision making or kept solely for administrative purposes. *Id.* ¶ 8. The Court of Appeals has also recently analyzed the “*on behalf of*” language in *N.M. Found. for Open Gov’t v. Corizon Health*, 2020-NMCA-014, 460 P.3d 43. In that case, particularly relevant here, the Court was asked to determine whether records held by a private entity working with a public entity were public records subject to IPRA. In holding that there was “no distinction between [the private entity] and a public entity” the Court highlighted the fact the third party performed what was otherwise a public function that the government was required to provide. *Id.* ¶ 21. Similar analysis was conducted by the Court of Appeals in *State ex rel. Toomey v. City of Truth or Consequences*, which identified whether a private entity was directly subject to IPRA by considering factors such as “for who[se] benefit the private entity is functioning.” 2012-NMCA-104, ¶ 13, 287 P.3d 364.

Here, the undisputed facts establish that the “final invoice” – even if “used, created, received, maintained or held” by Dr. Gammill and not a NMLB-employed veterinarian – “relates to public business” and is held “on behalf” of NMLB. NMLB even appears to agree, having provided other records from South Springs Animal Hospital concerning “Incident #127-1001 Horse” – including a letter written by Dr. Gammill on South Springs Animal Hospital letterhead concerning the exact same incident. Pet’r’s Resp. Ex. 3. There is no reason why NMLB would provide Ms. Henry with one responsive record from Dr. Gammill’s office and not the other.

The undisputed facts demonstrate why NMLB understands records from Dr. Gammill’s veterinary services performed that day meet the definition of public records under IPRA. Because no owner was identified by the NMLB, the horse in “Incident #127-1001” was

considered by NMLB to be an “estrays” under the Livestock Code, NMSA 1978, Chapter 77, Articles 2 through 18 (1967, as amended 1999). And, because the horse was an “estrays” there are certain legal provisions that apply under the Livestock Code – all of which solely provide NMLB – and no one else – with authority over the estrays. §§ 77-13-1 to -10. In fact, for anyone other than NMLB to take up an estrays and retain possession of the estrays as stated under the Livestock Code is unlawful. § 77-13-1. Per the general rule, title to an estrays “passes to the state in trust for the true owner, who may regain it by proving ownership.” ESTRAYS, Black’s Law Dictionary (11th ed. 2019). Thus, part of the statutory obligation of NMLB is to determine the true owner of the estrays, which includes providing the public notice for five days. §§ 77-13-3 to -5. “If an estrays is not claimed within five days after the last publication of notice,” NMLB may sell the estrays which is to be evidenced by a bill of sale from NMLB to the purchaser. § 77-13-5. Specifically, regarding the custody and control of estrays, the Livestock Code establishes that the NMLB is the only entity that has authority to direct the control, impoundment, and disposition of estrays livestock. § 77-13-3 to -9. Indeed, under Section 77-13-2(B) of the Livestock Code, only the NMLB has the exclusive authority to dictate the disposition of the horse. (“[T]he estrays shall be turned over to an inspector for disposition as the board may direct according to law.”) And, unless expressly provided for, “[i]t is unlawful for a person other than an inspector to impound or retain possession of an estrays.” § 77-13-8. *See* 21.30.2.8(A) NMAC (describing removal of animals from the custody of NMLB).

Thus, at all times, all actions with regard to the estrays horse in “Incident #127-1001 Horse” were done under the authority of NMLB, causing the final invoice to be a public record. This aligns with the undisputed facts. For example, after having been notified of the “dumped” horse in “Incident #127-1001 Horse,” NMLB traveled to the horse’s location, retrieved the horse,



and loaded the horse for transport. NMLB requested veterinary services for the horse from South Springs Animal Hospital, and under NMLB's custody, Dr. Gammill provided veterinary services. Because Dr. Gammill was acting at the request of the NMLB and pursuant to NMLB's authority, his services were performed in connection with governmental affairs – both “side by side” with NMLB and in an “intertwined fashion” with NMLB. *Corizon Health, 2020-NMCA-014*, ¶ 6. NMLB then caused and paid for the disposal of the estray horse's remains. NMLB also controlled the invoice – including who the invoice was to be delivered for payment – and directed that the invoice be assigned the same NMLB incident number – #127-1001. For the NMLB to withhold the invoice – a record so clearly related to NMLB actions – is a violation of IPRA.

Information regarding the veterinary services performed on estray livestock in the custody of NMLB is exactly the type of public information that IPRA contemplates must be disclosed to the public in order to hold its government accountable. This is especially true if the owner of an estray cow, horse or other livestock animal comes forward or is able to be identified; any action taken by NMLB that effects the estray livestock – or in this case destroys the estray livestock – is an effect on the true owner and their property interest. If an invoice for veterinary services requested and approved by NMLB for an estray horse in NMLB's custody is found not to be a public record because the agency chooses a private veterinarian rather than one of its own, public bodies would be able to circumvent IPRA simply by delegating their statutory duties to a private entity. Such a finding “would thwart the very purpose of IPRA and mark a significant departure” from express holdings by the courts of this State. *State ex rel. Toomey, 2012-NMCA-104*, ¶ 26.

**B. Respondents Did Not Produce the “Final Invoice” in Response to Ms. Henry's IPRA Request as Required Under IPRA.**

Any request under IPRA “starts with the presumption that public policy favors the right of inspection.” *Cox v. N.M. Dep’t of Pub. Safety*, 2010-NMCA-096, ¶ 17, 148 N.M. 934 (internal quotations and citation omitted). This is because in enacting IPRA, the Legislature declared that 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 [and]...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.” § 14-2-5.

Although NMLB produced certain records related to “Incident #127-1001 Horse” – including another record from South Springs Animal Hospital – it did not include the final invoice despite knowledge of its existence. In fact, it was only through Ms. Henry’s careful review of the records that were provided that she became aware that the “final invoice” existed. NMLB cannot deny that the “final invoice” was responsive to Ms. Henry’s IPRA request, and thus was required to provide it for inspection. § 14-2-9. When Ms. Henry restated her IPRA request for any veterinary – including euthanasia – records, specifically for “Incident #127-1001 Horse”, NMLB treated it as a new IPRA request, ignoring that Ms. Henry had previously requested the exact same records. Ms. Henry’s objection to this error notwithstanding, this designation ostensibly gave NMLB a second chance to fulfill their statutory duty to produce the final invoice. Instead of providing the invoice to Ms. Henry, NMLB provided one record from South Springs Animal Hospital and consciously omitted the invoice – which NMLB had worked with South Springs Animal Hospital to produce and arrange payment for a mere two days after Petitioner’s “second” IPRA request. NMLB’s production of one record from South Springs Animal Hospital and not the other does not absolve NMLB from liability. *Britton v. Off. of the*

*Att’y Gen.*, 2019-NMCA-002, ¶ 33, 433 P.3d 320 (“[W]hen a public body provides an incomplete or inadequate response to a request to inspect public records, that body is not in compliance with IPRA.”)

**C. Respondents Did Not Issue a Written Denial to Petitioner’s IPRA Request as Required Under Section 14-2-11.**

If a public body elects to deny public records to a requester, Section 14-2-11(B) of IPRA requires the records custodian – who had specific duties under IPRA, *see* Section 14-2-7 – to provide the requester with a written explanation of the denial which includes: (1) the record(s) that are being denied and (2) the name of the person responsible for the denial. This procedure is in place because “[d]enials are valuable information-gathering tools ... the absence of either (1) production of responsive records or (2) a conforming denial based upon a valid IPRA exception sends a strong message to the requester that no responsive public record exists.” *Am. Civ.*

*Liberties Union of N.M. v. Duran*, 2016-NMCA-063, ¶ 38, 392 P.3d 181.

In the present case, NMLB never provided Ms. Henry with written notice denying her records requests for “Incident #127-1001” despite NMLB’s own email correspondence to South Springs Animal Hospital proving NMLB not only knew of the invoice’s existence but helped create and control it. This knowledge, combined with the NMLB’s complete refusal to respond to Ms. Henry’s repeated written requests to provide the invoice, establish that the failure to issue a written denial of Petitioner’s written request as required by Section 14-2-11(B) was not an unintentional error, but rather a premeditated decision to hinder Ms. Henry’s statutory and democratic right to an open government.

**CONCLUSION**

For the reasons set forth above, Petitioner Nancy Henry is entitled to summary judgment as a matter of law in this case on the issue of liability.

Dated: November 19, 2021

Respectfully submitted,

BARNHOUSE KEEGAN SOLIMON & WEST LLP

*/s/ Michelle T. Miano* \_\_\_\_\_

Michelle T. Miano

7424 4th Street NW

Los Ranchos de Albuquerque, NM 87107

Telephone: (505) 842-6123

Fax: (505) 842-6124

mmiano@indiancountrylaw.com

*Attorney for Petitioner*

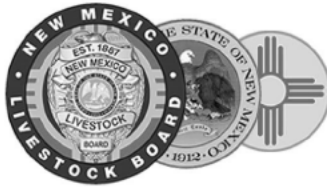
**CERTIFICATE OF SERVICE**

I hereby certify that on November 19, 2021, I caused a true and correct copy of the foregoing to be served via filing with the *Odyssey E-File and Serve* on the following:

Scott P. Hatcher, Esq.  
Hatcher Law Group, P.A.  
150 Washington Ave., Suite 204  
Santa Fe, NM 87501  
shatcher@hatcherlawgroupnm.com  
*Attorneys for Respondents*

/s/ Michelle T. Miano  
Michelle T. Miano

# EXHIBIT A



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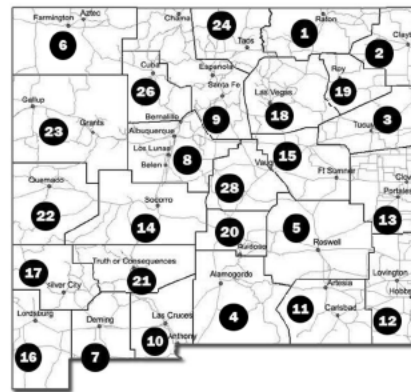
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2105 Osuna Rd NE Building South  
 Albuquerque, NM 87113-3203

**Phone:** 505-841-6161

**Fax:** 505-841-6160



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## NMLB Administration

Name	Title	Phone	Email
Belinda Garland	Executive Director	505-841-6161	belinda.garland@state.nm.us
Shawn Davis	Deputy Director	505-508-8734	shawn.davis@state.nm.us
Ralph Zimmerman, DVM	State Veterinarian	505-414-2811	ralph.zimmerman@state.nm.us

**Approvals**

**Links and Documents**

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Andrew Silva	CFO	841- 6173	andrewm.silva@state.nm.us
Stephanie Lujan	HR Manager	505- 362- 6150	stephanie.lujan@state.nm.us
Julie Gauman	CIO/Records Manager	505- 362- 1565	julie.gauman@state.nm.us

### NMLB Staff

Name	Department	Phone	Email
Bobby Hernandez	Sys Admin 1	505- 841- 6161	bobby.hernandez@state.nm.us
Barbara Hoffmann	Brand Department	505- 841- 6151	barbara.hoffmann@state.nm.us
Jerry Miller	Office Staff	505- 841- 6166	jerryd.miller@state.nm.us
Rebecca Valencia	Receptionist	505- 841- 6152	becky.valencia@state.nm.us
Alexandra Eckhoff, DVM	Field Veterinarian	505- 225- 4723	alexandra.eckhoff@state.nm.us
Kreg Evetts, DVM	Field Veterinarian	505- 252- 1843	kreg.evetts@state.nm.us
Marcella Torres	Accounting	505- 841- 6136	marcella.torres@state.nm.us
Mary Ann Marquez	Accounting	505- 841- 6157	maryann.marquez12@state.nm.us
Margaret Rivera	Veterinary Admin Assistant	505- 841- 6170	margaret.rivera@state.nm.us



	ASSISTANT	OFFICE	
		505-	
Tracey Kitts	Field Services Coordinator	841-	tracey.kitts@state.nm.us
		6161	
		505-	
Curt Henderson	System Administrator II	841-	curt.henderson@state.nm.us
		6161	
		505-	
Jessica Baca	IPRA/Public Outreach Coordinator	841-	jessica.baca@state.nm.us
		6161	
		505-	
Kelli Garcia	Vet Contractor	841-	nmlb.vetasst@state.nm.us
		6161	

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