EIGHTH JUDICIAL DISTRICT COURT
COUNTY OF UNION
STATE OF NEW MEXICO

LEVON SINK,

Plaintiff,

v. **No. D-818-CV-2011-00005**

BOARD OF COUNTY COMMISSIONERS OF UNION COUNTY, Consisting of JUSTIN BENNETT, VAN ROBERTSON and WALTER HALL, UNION COUNTY ASSESSOR'S OFFICE, FRANKIE ARAGON, ASSESSOR LEWIS TRUJILLO, DEPUTY ASSESSOR and FORMER UNION COUNTY ASSESSOR,

Defendants.

MOTION TO DISMISS

The Board of County Commissioners of Union County, the Union County Assessor's Office, Union County Assessor Frankie Aragon, and Union County Deputy Assessor Lewis Trujillo (collectively "County Defendants"), by and through their counsel, Robles, Rael & Anaya, P.C. (Marcus J. Rael, Jr., Esq.) hereby files this Motion to Dismiss pursuant to Rule 1-012(B)(6) NMRA. Plaintiff is an employee of Union County and as such is not entitled to use the Inspection of Public Records Act against Union County, his employer.

FACTS

For the purposes of this motion, County Defendants accept all the factual statements made in Plaintiff's Complaint. The key facts are as follows:

1. Plaintiff is employed by Union County as E911 Project Manager. Complaint, ¶ 2.

2. The Union County Assessor's office maintains digital GIS ownership data on parcels of land within Union County. Complaint, ¶ 2.

3. On January 12, 2009, Levon Sink sent a letter on Union County letterhead to the Union County Assessor's Office requesting "updated Cad ownership file [from] the Assessor's office." The letter did not state that Sink was making an IPRA request. Plaintiff, Sink, sent the letter in his official capacity as E911 Project Manager for Union County. Complaint, ¶ 6, Exhibit A.

4. On November 30, 2010, Plaintiff sent another letter on Union County letterhead to the Union County Assessor's Office. That letter did not state that Sink was making an IPRA request. Sink sent the letter in his official capacity as E911 Project Manager for Union County. Complaint, ¶ 8, Exhibit B.

5. Though Union County has made available hard-copy records responsive to Sink's request, Union County has not supplied the digital data requested by Sink in the digital form that it is stored.

STANDARD OF REVIEW

In reviewing a motion to dismiss for failure to state a claim under Rule 1-012(B)(6) NMRA the Court will take the well-pleaded facts alleged in the Complaint as true and test the legal sufficiency of the claims. Envtl. Control, Inc. v. City of Santa Fe, 2002-NMCA-003, ¶ 6, 131 N.M. 450, 38 P.3d 891. However, the Court should not take as true the legal conclusions in the Complaint, or any "legal conclusion couched as a factual allegation." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007). The Court should evaluate, in light of the allegations and law, "whether the plaintiff[s] might prevail under any state of facts provable under the claim." N.M. Life Ins. Guar. Ass'n v. Quinn & Co., 111 N.M. 750, 753, 809 P.2d 1278, 1281 (1991).

ARGUMENT

Plaintiff's basic allegation is that he has requested electronic copies of Union County databases maintained by the Union County Assessor's Office, and that his requests were made

pursuant to the Inspection of Public Records Act ("IPRA"), NMSA 1978 §§ 14-2-1 through 14-2-12 (1993).

Given Plaintiff's own factual allegations in the Complaint, his requests for Union County records were made in his capacity as a Union County employee. Therefore his requests fell outside the scope of IPRA. Because he is not the class of person that IPRA intended to benefit, his Complaint must therefore be dismissed.

Additionally, Plaintiff's two request letters did not specify that they were IPRA requests. Because Plaintiff was a Union County employee, to constitute valid IPRA requests instead of routine intra-County correspondence, the letters would have needed to identify themselves explicitly as IPRA requests. Since the letters were not valid IPRA requests, no valid claim under IPRA is presented to this Court and the Complaint must therefore be dismissed.

Plaintiff, Sink, lacked the authority to make an IPRA request on behalf of Union County. Therefore there is no valid IPRA request in this case, and Sink's Complaint must be dismissed.

Finally, Plaintiff, Sink, lacks authorization to sue on behalf of Union County and certainly cannot sue Union County on behalf of Union County. For this reason the Complaint must be dismissed.

I. IPRA Does Not Apply to Intra-County Records Requests.

IPRA does not and was not meant to apply to intra-governmental requests for documents. Plaintiff is correct that none of the exceptions to IPRA in § 14-2-1 apply, but that is because IPRA itself does not apply. County Defendants do not have to prove an exception to IPRA if IPRA itself was not meant to apply to communications and document requests within a government entity.

There are multiple reasons for concluding that IPRA does not mean that one County employee must always comply with a records request from another County employee, made in

an official capacity. First, construing IPRA to interfere with County management of its employees and their records would in no way further the purposes of IPRA. The purposes of IPRA are to create an "informed electorate" and to make available "the greatest possible information regarding the affairs of government and the official acts of public officers and employees." Section 14-2-5. Forcing a County to make copies of its records to give to its employees in no way helps to inform the electorate or make information available to the public. In fact, by interfering with County record-keeping, it would tend to make information less available to the public. Under IPRA's definition of public record, as soon as Sink obtains a copy of the database, that copy is also a public record. *See* § 14-2-6(E). Since separate databases maintained by different County employees all must be provided under IPRA, allowing employees to create database copies under IPRA would multiply the expense to the County and the difficulty to the public of access. IPRA therefore actually counsels against allowing County employees to use IPRA against each other.

Second, IPRA states that public records must be made available to "persons." While the definition of "person" in IPRA is broad, it does not include governments or political subdivisions, or their agents. Section 14-2-6(C) states that "person" means any "individual, corporation, partnership, firm, association or entity." In contrast, where other New Mexico statutes wish to include governments and political subdivisions in the definition of person, they expressly do so. *See* NMSA 1978 § 2-11-12(H) (1994); § 3-60A-4(R) (2000); § 7-1-3(O) (2009); § 7-2A-2(K) (1999); and at least sixty-one other statutes. The broad reference to "entity" does not need to be interpreted as including governments. At least four New Mexico statutes define "person" in a way that shows that "entities" were not understood to include governments. NMSA 1978 § 7-13A-2(F) (1997) states that "person" means "an individual or *any other legal entity*," but it then adds "'[p]erson' *also* means, to the extent permitted by law, any federal, state

or other government or any department, agency or instrumentality of the state, county, municipality or any political subdivision thereof." Emphasis added. NMSA 1978 § 7-9C-2(H) (2002) defines person as "any individual, estate, trust, receiver, cooperative association, club, corporation, company, firm, partnership, limited liability company, joint venture, syndicate *or other entity*; the United States or any agency or instrumentality of the United States; or the state of New Mexico or any political subdivision of the state." Emphasis added. NMSA 1978 § 7-16B-3(I) (1997) also defines "person" as "an individual or *any other legal entity*" but also adds that a "person" can *also* be a government. Emphasis added. NMSA 1978 § 74-1-13(G)(1) (1997) also states that "person" means "an individual or *any other legal entity*" but also adds that a "person" can *also* be a government. Emphasis added. In each of these statutory sections, a definition of a person as an "entity" does not include governments, as the governments are defined separately. County Defendants do not mean to state that "entity" cannot refer to governments in *any* statute. County Defendants are merely arguing that "entity" does not always refer to governments, and in fact does not refer to governments in the IPRA definition of person in § 14-2-6(C).

There is one published case where a government brought suit under IPRA. City of Las Cruces v. Pub. Employee Labor Relations Bd., 1996-NMSC-024, 121 N.M. 688, 917 P.2d 451. Whether governments were "persons" under IPRA was never raised or addressed in that suit. Cases are not precedents for issues not decided. Further, no case has involved or allowed an intra-governmental IPRA suit.

Further, it is well settled that no statute should be interpreted "in a way that will produce an absurd result." State v. Gutierrez, 115 N.M. 551, 552, 854 P.2d 878, 879 (Ct. App. 1993). IPRA would be absurd if it prohibited the County and other state and local governments and government subdivisions from deciding which of its employees kept copies of which records,

and in which format. But that is the point of Sink's suit – he contends that Union County cannot decide that it does not want one of its employees maintaining a second copy of a county database as part of his employment. It is absurd to believe that IPRA was intended to fundamentally alter the nature of public employment. It is absurd to believe that IPRA was intended to strip governments of their ability to manage their record-keeping. This Court may decline to reach such an absurd result.

Since IPRA does not apply to Sink's records requests, his Complaint has no basis in law and must be dismissed.

II. In the Alternative, if IPRA Could be Construed to Apply to Governments, A Rule of Reason Exception Should Apply.

In the past, where a literal application of IPRA would damage other important public policies, the New Mexico courts have recognized a "rule of reason" exception. See State ex rel. Newsome v. Alarid, 90 N.M. 790, 798-99, 568 P.2d 1236, 1244-45 (1977) (balancing the public policies favoring disclosure under IPRA and favoring confidentiality). Under the rule of reason, if IPRA does apply, then County Defendants have the burden of showing that some countervailing public policy outweighs the public's interest in disclosure. City of Farmington v. The Daily Times, 2009-NMCA-057, ¶ 1, 146 N.M. 349, 210 P.3d 246.

County Defendants do meet that burden. County Defendants are not arguing that the Union County Assessor's Office should be able to withhold data from every member of the public, so the public interest in disclosure is weak. Conversely, for the reasons discussed above, the public policy interest in Union County being able to make its own decisions about where and how it keeps its records is strong. An employee should not be able to decide to create a second official copy of a database and force the County to accept that. The public policy interest in efficient county administration that is not conducted in the courts is also strong.

The public policy interest in governmental ability to control and direct government employees is also strong. For these reasons, if this Court finds that IPRA literally applies in this case, this Court should find that a rule of reason exception protects New Mexico governments from intra-governmental records requests.

Policy exceptions with regard to governmental employees are usual. Government employees do not enjoy free speech protections identical to the general public. See Garcia-Montoya v. State Treasurer's Office, 2001-NMSC-003, ¶ 23, 130 N.M. 25, 35, 16 P.3d 1084, 1094 (explaining that the *Pickering* balancing test applies to government employee free-speech claims). Government employees do not enjoy the same protections against discrimination that the general public enjoys. See Engquist v. Oregon Dept. of Agr., 553 U.S. 591 (2008) (prohibiting government employees from bringing class-of-one discrimination claims). These are but two examples in which the relations of the government employees to the government necessarily differ from the relations of the public to the government. If this Court decides that IPRA applies to a governmental employee's request for records pursuant to the employee's employment, this Court should also decide that the rule of reason creates an exception, and dismiss the Complaint.

III. Plaintiff's Letters Were Not Validly Identified as IPRA Records Request.

IPRA states that a valid IPRA request must meet several specific requirements. *See* § 14-2-8. Generally, the New Mexico courts have not imposed additional requirements beyond these. Specifically, they have not required that IPRA requests *state* that they are IPRA requests.

However, Sink's requests were not ordinary IPRA requests. They were what appeared to be ordinary requests for information from another department within Union County, a routine intra-organizational request. Under the circumstances, it would be absurd to expect Union County to recognize that an IPRA request was being made unless the requests actually stated.

IPRA exposes governments to considerable liability if they do not comply. *See* § 14-2-11 (authorizing a penalty of $100 per day), § 14-2-12 (authorizing damages, costs, and attorneys' fees). If every department of Union County had to treat any written request from another department as an IPRA request, the expense and burden would be considerable.

It is only reasonable to require intra-governmental IPRA requests to state that they are IPRA requests. Because Sink's letters did not so state, they should not be treated as valid IPRA requests. Because Sink has made no valid IPRA requests, he has no basis for suit under IPRA and his Complaint must be dismissed.

IV. Sink was not Authorized to Make His IPRA Requests.

As Sink admits, he made his IPRA requests in his official capacity as an employee of Union County and pursuant to that employment. Union County never authorized him or directed him to make IPRA requests on its behalf. Union County is entitled to make these determinations, absent a specific collective bargaining agreement to the contrary. As stated in NMSA 1978 § 10-7E-6(A) (2003), Union County has the power to "direct the work of . . . public employees."

It is tautological that an agent cannot act for his principal beyond the scope of the power given him. Sink could not therefore validly make an IPRA request without authorization. But the very nature of the IPRA request shows that it was not authorized – for if Union County approved transferring the data to Sink, he would not have needed to make an IPRA request to get it! Union County certainly never authorized Sink to undertake a course of action that would make Union Count potentially liable for damages, penalties, and attorneys' fees.

To the extent that Sink's unauthorized actions may have provisionally bound County Defendants even though they were unauthorized, Union County hereby repudiates them and makes them of no effect. Upon acquiring knowledge of the agent's unauthorized act, the

principal should promptly repudiate the act. See Grandi v. LeSage, 74 N.M. 799, 810, 399 P.2d 285, 293 (1965) (stating that a principal has the power to repudiate an agent's unauthorized acts).

Because the IPRA requests were unauthorized and have now been repudiated, they were and are invalid. Without any valid IPRA requests, Sink has no basis for his suit, which must therefore be dismissed.

V. Sink is not Authorized to Sue on Behalf of Union County.

Because Sink made his IPRA request in an official capacity, and therefore on behalf of Union County, his suit to vindicate that request is also a suit on behalf of the County.

Sink is not authorized to sue on behalf of the County. Only the Board of County Commissioners has the power to sue and be sued on behalf of Union County. New Mexico law gives the Union County Board of County Commissioners to the power "[t]o represent the county and have . . . the management of the interest of the county in all cases where no other provision is made by law." NMSA 1978 § 4-38-18 (1876). This is a serious power. It has never been delegated to Sink. Therefore his suit is invalid and must be dismissed.

Further, NMSA 1978 § 4-46-1 (1876) states that all suits in the County's behalf must be brought in the name of the Board of County Commissioners of the County of Union. This suit was not.

In any case, there could be no authorization from Union County to sue Union County on behalf of Union County.

Finally, to the extent Sink had or has any authority, apparent or real, to sue on behalf of Union County, Union County repudiates and revokes it. Sink has no authority to prosecute this suit, which must therefore be dismissed.

WHEREFORE, County Defendants respectfully request that the Motion to Dismiss be granted and that the Petition for Writ of Mandamus and Judgment for Costs, Fees, and Damages be dismissed with prejudice.

Respectfully submitted:

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I hereby certify that a true and correct copy of the foregoing was faxed and mailed to opposing counsel on this 22nd day of February, 2011:

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