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ENDORSED
FILED IN MY OFFICE THIS
MAR 16 2011

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

DANIEL M. FABER,

Plaintiff,

CV-2010-10665

v.

GARY K. KING, ATTORNEY GENERAL,

Defendant.

OPINION AND ORDER AND WRIT OF MANDAMUS

Plaintiff Daniel M. Faber moved the Court for judgment on the pleadings ("Motion") under Rule 1-012(C) NMRA. Defendant Gary K. King, Attorney General of New Mexico, filed a Response to Plaintiff's Motion for Judgment on the Pleadings and Motion to Dismiss or, Alternatively, Motion for Summary Judgment ("Response and Cross-Motion").[1] The Court **GRANTS IN PART** and **DENIES IN PART** Plaintiff's Motion and **DENIES IN PART** and **GRANTS IN PART** Defendant's Cross-Motion.

I. Standard of Review

Rule 1-012(C) NMRA provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." A motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 1-012(B)(6) NMRA "tests the legal sufficiency of the complaint, accepting all well-pleaded factual allegations as true." Derringer v. State, 2003-NMCA-073, ¶ 5, 133 N.M. 721, 68 P.3d 961.[2]

[1] Defendant's Response (to the extent it was only a response) was untimely filed. Plaintiff filed his Motion on October 13, 2010. Defendant's Response was due by November 1, 2010. Defendant filed his Response on November 18, 2010.

[2] Although Plaintiff complains that Defendant did not assert any affirmative defenses in his Answer, Defendant has

When matters outside the pleadings are considered by the Court in support of either a motion for judgment on the pleadings or a motion to dismiss, the motions shall be treated as motions for summary judgment pursuant to Rule 1-056 NMRA. See Rule 1-012(B), (C). The court considers Exhibit 1 to Defendant's Response and Cross-Motion as it establishes the presence of the stay in the federal court in the related litigation; Exhibit 2 as it is Plaintiff's actual Inspection of Public Records Act ("IPRA"), NMSA 1978, §§ 14-2-1 to -12 (1947, as amended through 2009), request to the Attorney General; and Exhibit 3, the Attorney General's denial. Plaintiff does not dispute that the stay exists and existed at all times material to his Complaint for Damages and Petition for Writ of Mandamus ("Complaint"). Nor does Plaintiff complain that the letters should not be considered by this Court in the resolution of his Motion. The Court also considers at Plaintiff's request at the hearing the affidavits by two of the plaintiffs in the federal litigation. Under Rule 1-056, "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

II. Discussion

No one appears to dispute any of the facts material to these Motions. On March 23, 2010, Plaintiff mailed to Defendant's custodian of records an IPRA request for copies of public records. Defendant complied with the March 23, 2010 request. [Complaint ¶¶ 9-10; Answer ¶¶

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filed a motion to dismiss/motion for judgment on the pleadings/motion for summary judgment. Rule 1-012(B) ("Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . . A motion making any of these defenses shall be made before pleading if a further pleading is permitted."). "A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 1-019 NMRA and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 1-007, or by motion for judgment on the pleadings, or at the trial on the merits." Rule 1-012(H)(2).

9-10] On August 23, 2010, Plaintiff mailed to Defendant's custodian of records a second IPRA request for copies of public records. In a letter dated August 26, 2010, Defendant's custodian of records denied that request and explained: "[T]hese records involve a current lawsuit and appear to circumvent the discovery process and the current Order Staying Discovery (attached)." This letter did not contain the names and titles or positions of each person responsible for the denial. After a letter from Plaintiff requesting the names and titles or positions of each person responsible for the denial, Defendant stated in a letter dated September 1, 2010 that "Albert J. Lama, Chief Deputy Attorney General was responsible for the denial." [Complaint ¶¶ 11-14; Answer ¶¶ 11-14]

On September 9, 2010, two of the plaintiffs in the federal litigation were permitted to review the contents of their personnel files. [Affidavit of Mary H. Smith, Esq., filed January 28, 2011, ¶¶ 5-8; Affidavit of Melanie Carver, filed January 28, 2011, ¶¶ 5-8] Defendant neither objected to the request nor mentioned the discovery stay. [Id.]

No one disputes that between the first and second IPRA requests, the federal court entered a stay of all proceedings in a related lawsuit. The stay stayed all discovery but did not stay "initial disclosures, the submission of a Joint Status Report, or the Rule 16 scheduling conference." [Exhibit 1 p.4]

A. Denial of Plaintiff's August 23, 2010 IPRA request

Defendant does not dispute that it denied Plaintiff's August 23, 2010 IPRA request. The denial did not identify which IPRA exception Defendant was invoking, but rather indicated only: "[T]hese records involve a current lawsuit and appear to circumvent the discovery process and the current Order Staying Discovery (attached)." Defendant asserts that the denial did not violate IPRA because, as Plaintiff sought documents concerning certain employment information

related to federal lawsuit, the stay of discovery in that lawsuit satisfies the "as otherwise provided by law" exception. Section 14-2-1(A)(12). Defendant also argues that the rule of reason (countervailing public policy) supports the non-disclosure. The Court disagrees.

The purpose of IPRA

> is to ensure, and it is declared to be 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. It is the further intent of the legislature, and it is declared to be the public policy of this state, that to provide persons with such information is an essential function of representative government and an integral part of the routine duties of public officers and employees.

Section 14-2-5. IPRA provides that "[e]very person has a right to inspect public records" except in twelve enumerated situations. Section 14-2-1(A). "In addition to these statutory exceptions, our Supreme Court crafted a non-statutory confidentiality exception known as the 'rule of reason.'" Cox v. N.M. Dep't of Pub. Safety, 2010-NMCA-096, ¶ 7, 148 N.M. 934, 242 P.3d 501 (quoting State ex. rel. Newsome v. Alarid, 90 N.M. 790, 797, 568 P.2d 1236, 1243 (1977)), cert. granted, 2010-NMCERT-010, 149 N.M. 65, 243 P.3d 1147 (October 18, 2010 No. 32,604). "The rule of reason analysis is applicable only in those cases where a public entity seeks to withhold public records that do not fall within one of the statutory exceptions contained in Section 14-2-1(A)." Id.

Without citation to any authority directly on point, Defendant argues that the federal stay of discovery operates to foreclose Plaintiff's rights under the IPRA exception "as otherwise provided by law." As Defendant does not provide the Court with any legal support for his argument, the Court assumes none exists. See In re Adoption of Doe, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (providing that when party fails to cite authority in support of argument, court will presume that none exists).

In New Mexico, the Courts have recognized application of this exception where records are made confidential based on statute or regulation. See City of Farmington v. Daily Times, 2009-NMCA-057, ¶ 11, 146 N.M. 349, 210 P.3d 246 ("The twelfth exception has generally been interpreted as referring to exceptions contained in other statutes and properly promulgated regulations."); City of Las Cruces v. Pub. Emp. Labor Relations Bd., 1996-NMSC-024, 121 N.M. 688, 690, 917 P.2d 451, 453. In City of Las Cruces, the Supreme Court considered whether this exception incorporated a regulation promulgated by the PELRB, requiring that a petition be kept confidential. See id. The Court determined that a regulation had the force of law as it was promulgated in accordance with the statutory mandate to carry out and effectuate the purpose of the applicable statute. See id.

Defendant does not direct this Court to any statute or regulation prohibiting the disclosure of these records. Defendant has not even asserted that the records he is withholding are confidential or otherwise in need of protection in any way. The federal stay is not a statute or a regulation that makes certain public records confidential. The Court concludes that this exception does not apply.

Application of the "rule of reason" (countervailing public policy) does not compel a different conclusion. The "rule of reason" is a non-statutory exception that "requires the district court to balance the fundamental right of all citizens to have reasonable access to public records against countervailing public policy considerations which favor confidentiality and nondisclosure." City of Farmington, 2009-NMCA-057, ¶ 8 (internal quotation marks and quoted authority omitted). "The balancing test is intended to supplement IPRA by providing a mechanism for addressing claims of confidentiality that have not yet been specifically addressed

by our Legislature." Id. The Court is to remain mindful that a "citizen's right to know is the rule and secrecy is the exception." Newsome, 90 N.M. at 797, 568 P.2d at 1243.

The "rule of reason" is not applicable here. The presumption is that public policy in New Mexico favors the right of inspection. City of Farmington, 2009-NMCA-057, ¶ 10. "A public entity seeking to overcome this presumption bears the burden of demonstrating that a countervailing public policy exists." Id. The public entity bears the burden of proving "why . . . disclosure would be prejudicial to the public interest, or, in other words, what benefit is derived from non-disclosure." Id. (quoted authority and internal quotation marks omitted). Defendant has not met his burden.

Defendant has made no claim that he is protecting confidential information. Defendant has made no claim that disclosure would be prejudicial to the public interest. The only benefit derived from non-disclosure is to Defendant. Moreover, the stay itself does not rise to the level of a countervailing public policy, and Defendant cites no authority that it does. IPRA provides a statutory right independent of the federal rules of discovery. Defendant has not explained why the conduct of federal litigation or a stay of discovery is sufficient to overcome the public policy evinced by IPRA itself. See, e.g., Am. Bank v. Menasha, 627 F.3d 261, 265 (7th Cir. 2010) ("The case law uniformly refuses to define requests for access to federal or state public records under public-records laws (such as the federal Freedom of Information ace and state public records laws—including Wisconsin's) as discovery demands, even when as in this case the request is made for the purpose of obtaining information to aid in a litigation and is worded much like a discovery demand."); Gilbert v. Summit County, 821 N.E.2d 564 (Ohio 2004) (concluding that attorney could use public records act to request public records related to pending federal civil lawsuit after expiration of discovery deadline in lawsuit). Moreover, the

rules governing discovery, be they federal or state, are not the exclusive method by which a litigant may investigate his case or obtain information from an opposing party. See, e.g., Noland v. City of Albuquerque, No. CIV-08-56 JB/LFG, slip op. at 5 (D.N.M. October 27, 2009).

Defendant has violated IPRA by denying Plaintiff's August 23, 2010 IPRA request. The Court issues a writ of mandamus ordering Defendant to comply with Plaintiff's August 23, 2010 IPRA request. The Court shall consider an award pursuant to Section 14-2-12(D) upon appropriate motion at a later date.

B. Identification of person responsible for the denial

Section 14-2-11(B)(2) requires an agency denying a request to "set forth the names and titles or positions of each person responsible for the denial." Section 14-2-11(C) provides that "[a] custodian who does not deliver or mail a written explanation of denial within fifteen days after receipt of a written request for inspection is subject to an action to enforce the provisions of [IPRA] and the requester may be awarded damages." Defendant argues that he did not violate this statutory mandate as he provided the name of the person responsible for the denial in a timely manner. The Court agrees.

Plaintiff mailed to Defendant's custodian of records the IPRA request at issue on August 23, 2010. Three days later, the custodian of records denied the August 23, 2010 request stating only: "[T]hese records involve a current lawsuit and appear to circumvent the discovery process and the current Order Staying Discovery (attached)." The custodian did not identify the name, title, or position of whoever authorized the denial. Plaintiff then sent a letter requesting that information. On September 1, 2010, Defendant responded that "Albert J. Lama, Chief Deputy Attorney General was responsible for the denial." [Complaint ¶¶ 11-14; Answer ¶¶ 11-14]

Defendant has complied with this statutory requirement. Although Defendant did not initially identify Mr. Lama, he did so within the fifteen-day response period. "[O]nce the custodian complies, the public body is no longer subject to an enforcement action." Derringer, 2003-NMCA-073, ¶ 10. The Court grants Defendant's Cross-Motion that he has not violated IPRA on this claim and, as such, similarly denies Plaintiff's Motion.

III. Conclusion

For the above-stated reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiff's Motion for Judgment on the Pleadings and **DENIES IN PART** and **GRANTS IN PART** Defendant's Motion to Dismiss or, Alternatively, Motion for Summary Judgment.

IT IS SO ORDERED.

BEATRICE BRICKHOUSE
DISTRICT JUDGE
3/14/11

I hereby certify that on the 15th day of March 2011, a true copy of the foregoing was mailed to the following:

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