

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

ENERGY POLICY ADVOCATES,

Plaintiff,

v.

Case No. _____

NEW MEXICO OFFICE OF
THE ATTORNEY GENERAL,

Defendant.

COMPLAINT TO ENFORCE THE INSPECTION OF PUBLIC RECORDS ACT

COMES NOW Energy Policy Advocates (“Plaintiff”), by and through counsel, Eric Neal Cornett and Pat Rogers, pursuant to NMSA 1978, § 14-2-12, who hereby respectfully brings this Complaint to enforce the Inspection of Public Records Act, NMSA 1978, § 14-2-1 to -12 (“IPRA”), and to further award Plaintiff damages, attorney’s fees and costs for this bringing this action. Plaintiff states and alleges as follows:

PARTIES

1. Plaintiff Energy Policy Advocates (“EPA”) is a nonprofit organization incorporated in the State of Washington dedicated to transparency and open government. EPA uses state and federal open records laws to shed light on—and thereby inform and educate the public about—private influences on government policymaking and the use or misuse of public office. Part of EPA’s effort has been the record requests at issue in this matter and similar requests made of attorneys general offices nationwide.

2. Defendant Office of the Attorney General (“OAG”) is the Office of the Attorney General for the State of New Mexico and is subject to the IPRA. NMSA 1978, § 14-2-6. The

OAG has significant responsibilities under the IPRA, including the role of an enforcing party. NMSA 1978 § 14-2-12. The OAG published the Inspection of Public Records Act Compliance Guide, which states “[t]he law requires public access to virtually all public records” and encourages public officials to “be reasonable in providing public access and to honor all legitimate requests for records.”¹

JURISDICTION AND VENUE

3. This Court has jurisdiction pursuant to NMSA 1978, § 14-2-12.
4. Venue is proper before this Court pursuant to NMSA 1978, § 38-3-1(G).

STATEMENT OF FACTS

5. The IPRA was enacted “to ensure...that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees... provid[ing] 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.” NMSA 1978 § 14-2-5.

6. The instant matter originates from six (6) IPRA requests submitted to OAG by the Plaintiff in March and April 2020. The requests concern certain purported “common interest agreements” entered into by OAG, alternately declared in their text to be “confidentiality agreements,” and correspondence with outside parties OAG is shielding by citing to, e.g., those purported agreements.

7. These purported agreements and any correspondence between and among parties to the agreements are of tremendous public importance. OAG’s reticence to disclose any

¹ New Mexico Inspection Of Public Records Act Compliance Guide, Eighth Edition 2015, available at <https://www.nmag.gov/uploads/files/Publications/ComplianceGuides/Inspection%20of%20Public%20Records%20Compliance%20Guide%202015.pdf>

correspondence and even the agreements themselves is remarkable reversal from prior statements for public consumption, insisting that the Office has nothing to hide.²

The March 27, 2020 IPRA Request

8. On March 27, 2020, Plaintiff requested electronic certain described correspondence of three OAG employees with an employee of the New York State Office of Attorney General as well as correspondence over a particular period of time that included the names “Bachmann” and/or “Goffman”. **(Exhibit 1)**.

9. On April 1, 2020, OAG provided a “three day letter” confirming receipt of the request and providing an estimated date for production.³

10. On May 22, 2020, Defendant provided three (3) pages of responsive records and stated in the accompanying letter that “[e]nclosed are documents maintained by the Office of the New Mexico Attorney General, responsive to your request and available for inspection. If you have any questions about your request or this Office’s response, please let me know.” **(Exhibits 2 & 3)**.

11. Defendant did not indicate whether it produced all responsive records or withheld some in full.

12. Plaintiff inquired about this lack of detail, and Defendant did not respond.

² Dan McKay, “Outside Attorneys in AG’s Office face criticism,” Albuquerque Journal, July 15, 2019, available at <https://www.abqjournal.com/1340423/outside-attorneys-in-ags-office-face-criticism-ex-two-lawyers-funded-by-nyu-school-of-law-focus-on-clean-energy-climate-and-environment.html>. See also, Editorial, “NM AG’s staff must serve public, not special interests,” Albuquerque Journal Editorial Board, July 19, 2019, available at <https://govoversight.org/wp-content/uploads/2020/06/AJ-AGO-oped.pdf>.

³ The issuance of a “three day letter” is standard practice in OAG and the failure to receive such a letter led to Plaintiff resubmit the “April 1, 2020” request, which Plaintiff first submitted on March 16, 2020. Plaintiff otherwise received such letters for this and all IPRA requests described, *infra*.

The April 1, 2020 IPRA Request

13. On March 16, 2020, by electronic mail Plaintiff requested all common interest agreements entered into by OAG from 2017 through 2020. **(Exhibit 4)**.

14. On April 1, 2020, Plaintiff, having not received the standard “three day letter”, inquired if Defendant had received the request. Defendant stated it had not received the request. Plaintiff resubmitted the request that day and Defendant confirmed receipt. **(Exhibit 5 & 6)**.

15. Defendant provided redacted copies of certain such agreements on May 1, May 15, and May 29, 2020. In each letter accompanying the redacted records, OAG stated the redactions were made pursuant to NMSA 1978, § 14-2-1(A)(4) and Rule 1-026(B)(4) NMRA as the agreements constituted attorney work-product.⁴ **(Exhibits 7, 8, 9, 10, 11, & 12)**.

16. Each time, Defendant also wrote that while it anticipated all records would be ready at each date it responded, it required additional extensions for search and review.

17. On June 1, 2020, Plaintiff wrote to OAG about, *inter alia*, narrowing the universe of potentially responsive documents to only those signed by OAG employees William Grantham, Anne Minard, and/or Robert Lundin.⁵ **(Exhibit 13)**.

18. Ms. Minard and Mr. Lundin, as indicated in Footnote 4, were and possibly are both New York University School of Law State Energy and Environmental Impact Center employees “seconded” to OAG as “legal fellows.” This peculiar arrangement has already

⁴ NMSA 1978, § 14-2-1(A)(4) no longer exists. The 2019 amendments to the IPRA re-designated former paragraphs A(1) through A(8) as subsections A through H, respectively. NMSA 1978, § 14-2-1(D) excludes certain categories of law enforcement records. The application to the requests or responses was not explained. Rule 1-026(B)(4) concerns the scope of discovery related to insurance agreements.

⁵ Plaintiff uses the term “employee” colloquially here, as it is not clear that Ms. Minard or Mr. Lundin are OAG “employees.” Public records indicate they came to the Office in fact hired by a private entity that was created for this purpose of placing private attorneys in OAGs as “Special Assistant Attorneys General” to pursue energy and environment priorities of the organization’s creator, activist Michael Bloomberg, then “seconded” to OAG.

drawn attention from New Mexico media outlets⁶ and any secrecy or purported “common interest” agreement to shield public records from the public signed by either raises further, serious issues about the influence of donors and private entities on the Office of the Attorney General.

19. On June 12, 2020, Defendant provided redacted copies of fifty-one (51) pages of common interest agreements, again citing NMSA 1978, § 14-2-1(A)(4) and Rule 1-026(B)(4) NMRA in the accompanying letter. The first, third and fourth of four such purported contracts nominally provided were redacted in their entirety, from the title, through the subject and scope, the boilerplate and all signatures and dates thereof. **(Exhibits 14 & 15)**

The April 7, 2020 IPRA Request

20. On April 7, 2020, Plaintiff requested all electronic correspondence of three OAG employees containing the phrase “Multistate AG Coordination Call” on six specific dates in 2019. **(Exhibit 16)**.

21. On April 22, 2020, Defendant provided a single email and notice that further review and search was needed. **(Exhibit 17 & 18)**.

22. On May 7, 2020, Defendant provided a closing letter stating it had found no further records. **(Exhibit 19)**.

23. Public records obtained from other offices demonstrate that Defendant’s response is incomplete.

The April 12, 2020 IPRA Request

24. On April 12, 2020, Plaintiff requested similarly described correspondence of a single employee for three separate dates. Plaintiff also sought all correspondence over a

⁶ Editorial, “NM AG’s staff must serve public, not special interests,” Albuquerque Journal Editorial Board, July 19, 2019, available at <https://govoversight.org/wp-content/uploads/2020/06/AJ-AGO-oped.pdf>.

several month period of the same individual that included the phrases “affirmative climate” or “GHG emissions affirmative legislation”. **(Exhibit 20)**.

25. On April 27, 2020, Defendant provided a single email and stated in the accompanying letter that “[e]nclosed are documents maintained by the Office of the New Mexico Attorney General, responsive to your request and available for inspection.” **(Exhibit 21 & 22)**.

26. Defendant did not indicate whether it produced all responsive records or withheld some records in full.

27. Public records obtained from other offices demonstrate that Defendant’s response is incomplete.

The April 17, 2020 IPRA Request

28. On April 17, 2020, Plaintiff requested all notices of, cancellations of, and/or invitations to participate in a multistate call sent to a named OAG employee by either of two employees of Oregon’s Department of Justice. The request also sought all correspondence received by the OAG official from either of those two Oregon Department of Justice employees on three days in July 2019. **(Exhibit 23)**.

29. On May 1, 2020, Defendant provided six pages of redacted responsive records and notice that further review and search was needed. Defendant redacted these records, again pursuant to the nonexistent statute and inapplicable rule, NMSA 1978, § 14-2-1(A)(4) and Rule 1-026(B)(4) NMRA as protected attorney work-product. **(Exhibit 24 & 25)**.

30. On May 29, 2020, Defendant wrote to Plaintiff stating it had found no further records. **(Exhibit 26)**.

The April 28, 2020 IPRA Request

31. On April 28, 2020, Plaintiff requested all correspondence of a named OAG employee containing both “complaint” and any of the following: “criteria pollutant”, “greenhouse gas”, or “GHG”. Plaintiff also requested all notices sent or received, pursuant to any common interest agreement, of any public records request or lawsuit submitted by Plaintiff Energy Policy Advocates and/or individuals associated with Energy Policy Advocates. **(Exhibit 27)**.

32. On May 28, 2020, Defendant provided 133 pages of mostly redacted responsive records. In the accompanying letter, Defendant cited NMSA § 14-2-1(A)(4) and Rule 1-026(B)(4) NMRA as grounds for redactions, alleging the communications constituted “protected attorney work-product and Common Interest Agreements.” **(Exhibit 28 & 29)**.

33. Defendant redacted the majority of the information in the correspondence with outside parties, including the dates of certain correspondence; the attachments, and titles of attachments, including when those attachments were public records requests which are non-exempt public records; the identities of records requesters including the Plaintiff, EPA; and the identities of all of the corresponding parties.

34. The withheld information in and attached to these public records is purely factual, non-exempt information that cannot be legally withheld.

35. Defendant wrote, *inter alia*, “Enclosed are records responsive to your request and available for inspection, however partial information of these records are being withheld by redactions pursuant to NMSA 1978, Section 14-2-1(A)(4) and Rule 1-026(B)(4) NMRA as they constitute protected attorney work-product and Common Interest Agreements. If you have any questions about your request, or this Office’s response, please let me know.”

Plaintiff's Subsequent Request for Clarification of Responses

36. On May 29, 2020, Plaintiff wrote to Defendant, noting its word choice in responding to four of the IPRA requests did not specify whether all records were produced in some form, or whether instead some were withheld in full under some claim of exemption. Plaintiff specifically inquired as to whether any responsive records to any requests were withheld in their entirety. **(Exhibit 30)**.

37. On June 1, 2020, Plaintiff also wrote to Defendant inquiring if any records responsive to the April 28, 2020 request had been withheld in their entirety. **(Exhibit 31)**.

38. On June 2, 2020, Defendant replied to Plaintiff's May 29, 2020 email stating, "I am looking into this matter." **(Exhibit 32)**.

39. On June 5, 2020, Plaintiff again wrote to Defendant for clarification on withholdings in response to the five requests seeking correspondence, and to confirm that subsequent searches for common interest agreements would be limited to those signed by Mr. Grantham, Mr. Lundin, and/or Ms. Minard. **(Exhibit 33)**.

40. To date, Defendant has not responded to the requests for clarification or otherwise confirmed whether any records were withheld in full, nor has Defendant provided any response affirming that subsequent searches for agreements would be limited to those signed by Mr. Grantham, Mr. Lundin, and/or Ms. Minard. In fact, Defendant's most recent production of 51 almost entirely redacted pages provides no indication that the search has been narrowed, redacting all signatories including those previously released.

COUNT I: VIOLATION OF THE INSPECTION OF PUBLIC RECORDS ACT

(Injunctive Relief for Improperly Redacted Records)

41. Plaintiff incorporates by reference the allegations set forth above.

42. Pursuant to NMSA 1978, § 14-2-1, Defendant has violated the New Mexico Inspection of Public Records Act by failing to provide the requested public records.

43. Defendant's failure to properly explain the applicability of the cited exemptions justifying the redaction of certain requested records violates NMSA 1978, § 14-2-11(B) by failing to provide sufficient written explanation of its denials.

44. Defendant has provided no explanation for the application of any of the asserted exemptions. Instead, Defendant has only provided conclusory statements asserting portions of public records are exempt material.

45. Further, Defendant's heavy-handed use of redactions violates the IPRA as the purely factual information withheld from public records and related correspondence, including senders and recipients, the names of IPRA requesters and copies of the requests, and even dates of certain correspondence cannot be considered exempt under any of the cited statutory exemptions.

46. Defendant's failure to provide a sufficient written explanation of the denials was unreasonable and in violation of IPRA.

47. Defendant's unlawful redactions entitle Plaintiff to an injunction ordering Defendant to provide unredacted copies of all requested records or, in the alternative and following an *in camera* review, copies of the records with only any limited, properly exempt portions and information redacted.

COUNT II: VIOLATION OF THE INSPECTION OF PUBLIC RECORDS ACT

(Injunctive Relief for Improperly Withheld Records)

48. Plaintiff incorporates by reference the allegations set forth above.

49. Pursuant to NMSA 1978, § 14-2-1, Defendant has violated the New Mexico Inspection of Public Records Act by failing to provide the requested public records.

50. Defendant's failure to provide a proper response as described above, declining to inform Plaintiff whether Defendant withheld any information in full in response to the above-described requests, violates NMSA 1978, § 14-2-11(B) by failing to provide sufficient written explanation of its denials.

51. Defendant's claimed exemptions – attorney work-product, law enforcement records, common interest agreements, and insurance agreements – do not permit the exclusions of entire records from public inspection. NMSA 1978, § 14-2-9(A) provides that “public records containing information that is exempt and nonexempt from disclosure shall be separated by the custodian prior to inspection, and the nonexempt information shall be made available.”

52. Defendant's failure to provide a sufficient written explanation of the denial was unreasonable and in violation of IPRA.

53. Defendant's unlawful withholdings of requested records and refusal to confirm that this had been done entitles Plaintiff to an injunction ordering Defendant to provide unredacted copies of all requested records, or in the alternative and following an *in camera* review, copies of the records with only any limited, properly exempt portions and information redacted.

COUNT III: VIOLATION OF THE INSEPCION OF PUBLIC RECORDS ACT

(Statutory Damages)

54. Plaintiff incorporates by reference the allegations set forth above.

55. Pursuant to NMSA 1978, § 14-2-11(B), Defendant has violated the IPRA by failing to provide a sufficient explanation of its denial. Defendant has failed to “set forth the names and titles or positions of each person responsible for the denial”, as required by statute and failed to provide a sufficient explanation for why certain records were withheld in full or redacted. NMSA 1978, § 14-2-11(B)(2).

56. Defendant’s failure to provide a sufficient written explanation of the denial was unreasonable.

57. Pursuant to NMSA 1978, § 14-2-11(C), Plaintiff is entitled to damages of up to one hundred dollars (\$100) per day accruing from the date Defendant failed to comply with the statute.

58. Pursuant to NMSA 1978 § 14-2-12(D), Plaintiff is entitled to damages, costs, and reasonable attorney’s fees.

WHEREFORE, pursuant to the IPRA, Plaintiff respectfully requests that this Court exercise its jurisdiction and grant the following relief:

- A. Order Defendant to produce copies of the records responsive to Plaintiff’s requests, or in the alternative and following an *in camera* review, copies of the records with the limited, properly exempt portions and information redacted.
- B. Award statutory damages pursuant to NMSA 1978 § 14-2-11(C).
- B. Award damages, costs, and attorney’s fees to Plaintiff.
- C. Grant such other and further relief as the Court deems proper.

Respectfully submitted this 15th day of June 2020.

ENERGY POLICY ADVOCATES
By Counsel

/s/ Eric Neal Cornett

Eric Neal Cornett
Kentucky State Bar. No. 96266
Application to appear *Pro Hac Vice* to follow
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