

INSPECTION OF PUBLIC RECORDS ACT ("IPRA") COMPLAINT FORM

New Mexico Office of the Attorney General

Open Government Division

YOUR CONTACT INFORMATION:

First Name: Peter Last Name: St. Cyr

Address: [REDACTED]

City: [REDACTED] State: [REDACTED] Zip Code: [REDACTED]

Phone Number: [REDACTED]

Email: [REDACTED]

IPRA REQUEST TO THE PUBLIC BODY:

Name of the Public Body that is the subject of this complaint (including city/town, county or region, if applicable): New Mexico Department of Health - Medical Cannabis Program (Santa Fe)

Format of IPRA Request: Written Oral

Date IPRA Request was Submitted to the Public Body: October 14, 2015

Date of all Responses Received from the Public Body: October 20, 2015 - Three Day Letter
Medical Cannabis Program Manager Andrea Sundberg notified me the request was burdensome
and she plans to redact information that is required by statute 53-8-12B to be provided to the public.

ALLEGED VIOLATIONS OF IPRA BY THE PUBLIC BODY: Please select from the following list the violations you allege the public body committed. Check all that apply.

RECORDS:

- No records were provided.
- The agency provided some but not all of the records responsive to the request.
- Records were provided, but they were not responsive to the request.
- The public body does not have custody or responsibility for the records, and the records custodian did not forward the request to the proper custodian.
- The request was for records in electronic format and although the records are available in electronic format, the copies of the public records were not provided in an electronic format.

DENIED REQUESTS TO INSPECT PUBLIC RECORDS

- ___ Although some records were provided, the custodian did not include a written explanation for denying the production of exempt records or for redacting confidential information from records.
- ___ No records were provided and the records custodian did not deliver or mail a written explanation to the requester within fifteen (15) calendar days after receiving the request that included a description of the records sought, the names and titles of each person responsible for denying the request, and a description of the reasons for the denial.

NOTICE

- ___ Public body did not post in a conspicuous location at its administrative office or on the public body's website a notice setting forth: the rights of any person to inspect the public body's public records, the public body's responsibility to make public records available for inspection, the procedures for requesting inspection of public records, the procedures for requesting copies of public records, and/or reasonable fees for copying public records

DEADLINES (For purposes of deadlines imposed by the IPRA, the date the request is received is not counted)

- ___ Inspection was not allowed within three (3) business days and the public body did not timely send a written "three-day letter" to the requester explaining when the records would be available or when the public body would respond to the request.
- ___ The public body did not allow inspection or otherwise respond to the request within fifteen (15) calendar days from the date the custodian received the request.

FEES

- ___ The public body charged fees in excess of \$1.00 per printed page for documents 11"X17" or smaller, or charged fees that exceeded the actual costs to copy the records.
- ___ The public body did not provide a receipt upon request.

DETAILED EXPLANATION OF ALLEGED IPRA VIOLATIONS (Required): Please provide a description of the actions taken by the public body that violated the IPRA, including specific dates and why you believe the IPRA has been violated.

Nonprofit organizations in New Mexico are required by 53-8-12(B) to provide their organizations bylaw on request. We want to review the bylaws of 12 nonprofits who were offered the chance to receive a state license. The health department has physical custody of their bylaws, but says it will redact identifying information already required in 53-8-12(B), because of their own administrative rule: 7.34.4.26, which is not based on any statute.

The nonprofit cannabis producers applicants' bylaws were an element in their state license packets. While we have sued in state court to change the NMDOH's privacy rule, that case could take a long period of time. I contend the bylaws are already required to be provided to the public, and should not be redacted.

We would request the bylaws directly from the nonprofit applicants, but the NMDOH unlawful rules shield their names.

With the public interest in mind, we request the AG investigate and order the NMDOH to provide the bylaws, which lawmakers deemed a public record when they wrote 53-8-12(B).

ADDITIONAL INFORMATION: Please provide a copy of your original inspection request (if written), and any documentation or evidence you have regarding the alleged IPRA violation.

See attached three-day letter and original IPRA request.

53-8-12B: The initial bylaws and any subsequent bylaws whether by amendment, repeal or new adoption shall be executed by two authorized officers of the corporation. The bylaws in effect for the corporation shall be maintained at the corporation's principal office in New Mexico and shall be subject to inspection and copying by the public. If the most recently adopted bylaws are so maintained, they shall not be void, notwithstanding any requirements of prior law. The corporation may charge a reasonable fee for copying its bylaws, not to exceed one dollar (\$1.00) per page.

NMDOH Rule 7.34.4.26B: A pending application for licensure as a non-profit producer shall be confidential and not subject to disclosure." Pursuant to the Inspection of Public Records Act at NMSA Section 14-2-1, "Every person has a right to inspect public records of this state except ... as otherwise provided by law".

Peter St. Cys





Attorney General Of New Mexico

HECTOR H. BALDERAS
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Chief Deputy Attorney General

December 31, 2015

Andrea Sundberg, Patient Services Manager
Medical Cannabis Program
New Mexico Department of Health
P.O. Box 26110
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Santa Fe, NM 87502-6110

Dear Ms. Sundberg:

In 2015, the Department of Health promulgated the current 7.34.4.26 NMAC, a regulation providing for the confidentiality of producer applications for licensure for the purpose of producing and distributing cannabis for medical use and stating that the files containing producer names, addresses, and telephone numbers are confidential and not subject to disclosure. It is our understanding that in response to a Complaint to Enforce the Inspection of Public Records Act, *Peter St. Cyr and New Mexico Foundation for Open Government v. New Mexico Department of Health and Daniel M. Jacobs*, D-202-CV-2015-05674, the Department of Health has agreed to amend the aforementioned regulation. The rule hearing scheduled for January 6, 2016 proposes to change that regulation to maintain a confidentiality provision for personal production licenses and changes subsection B to keep pending non-profit producer applications for initial licensure confidential and not subject to disclosure, until the closure of the applications period. We write to express concern with these regulations in light of the Inspection of Public Records Act ("IPRA"), NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2013). We believe that this regulation not only exceeds the Department of Health's statutory authority to promulgate rules, but also circumvents the mandates and intent of the IPRA.

The public policy stated in the IPRA is "that all persons are entitled to the greatest possible information regarding the affairs of government . . . to provide persons with such information is an essential function of a representative government . . ." NMSA 1978, § 14-2-5 (1993). Unless records are subject to an exception found in the IPRA, public records must be provided to a person requesting them. It seems that the issue of concern here is not whether these license applications are public record, but rather, whether there is an exception preventing their disclosure. The definition of public record covers "all documents . . . that are used, created, received, maintained or held by or on behalf of any public body and relate to public business . . ." NMSA 1978, § 14-2-6(G). Applications submitted to the Department of Health for a license would certainly fall under this definition.

The exception relied upon by the Department of Health to prevent the disclosure of these public records is NMSA 1978, Section 14-2-1(A)(8), “as otherwise provided by law.” Of the other exceptions to the IPRA, only Section 14-2-1(A)(2) might apply, letters of reference for licensing or permits, or perhaps if the applications contain information related to the applicants health, Section 14-2-1(A)(1) might permit withholding that specific portion. The Department of Health has relied upon the “as otherwise provided by law” exception to withhold records, citing to 7.34.4.26 NMAC. However, we find no statutory authority permitting the Department of Health to create a confidentiality provision for non-profit producer applications, whether in initial licensure or after the close of the applications period. We commend the Department of Health for rewriting this regulation to amend the confidentiality provision to state that “non-profit producer applications for initial licensure shall cease to be confidential upon the closure of the applications period”; however, we do not believe this cures the issues with 7.34.4.26 NMAC.

The current 7.34.4.26 NMAC regulation exceeds the Department of Health’s statutory authority. The Lynn and Erin Compassionate Use Act, NMSA 1978, Sections 26-2B-1 to -7 (2007), specifically provides for the confidentiality of names and addresses of persons applying for or in receipt of a registry identification card. NMSA 1978, § 26-2B-7(G) (2007). However, the Act contains no such provision regarding confidentiality of *producer* applications. The Legislature has vested the Department of Health with the authority to promulgate rules to implement the purpose of the Act, but the Department is not permitted to create regulations and take actions beyond those authorized by the statute. “An administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority.” *Int’l Chiropractors Ass’n v. New Mexico Bd. of Chiropractic Examiners*, 2014-NMCA-046, ¶ 8, 323 P.3d 914 (citing *Rivas v. Bd. of Cosmetologists*, 1984-NMSC-076, ¶ 3 101 N.M. 592). The express inclusion in Section 26-2B-7 of a provision for confidentiality of applications for a registry identification card, with no correlating provision related to producer applications, demonstrates a legislative intent to permit public inspection of producer applications; had the Legislature intended to permit the Department of Health to withhold information on producer applications, it would have included it. *See State v. Greenwood*, 2012-NMCA-017, ¶ 38, 271 P.3d 753 (finding that the “Legislature knows how to include language in a statute if it so desires” *Id.* (citations omitted)). Although the IPRA permits the Department of Health to withhold records “as otherwise provided by law,” 7.34.4.26 NMAC, in its current form and in the proposed regulation with respect to pending applications, exceeds the statutory authority granted, so does not carry the force of law, and as such, this provision cannot be used to circumvent the IPRA and withhold public records from disclosure. *See Edenburn v. New Mexico Dep’t. of Health*, 2013-NMCA-045, ¶ 26, 299 P.3d 424 (finding that documents had to be released under the IPRA because the only law cited to was a regulation unsupported by statute and thus did not have the force of law); *City of Las Cruces v. Public Employee Labor Relations Bd.*, 1996-NMSC-024, ¶ 5, 121 N.M. 688 (“We hold that ‘as otherwise provided by law’ . . . contemplates a regulation properly promulgated to further the legislative intent behind the [Act].” *Id.* ¶ 5)

We note that the IPRA provides for the redaction of personal identifier information from public records for disclosure. This information is limited to: “(1) all but the last four digits of a: (a) taxpayer identification number; (b) financial account number; or (c) driver’s license number; (2) all but the year of a person’s date of birth; and (3) a social security number.” NMSA 1978, § 14-2-6(E). We also would note the differences here than in *Cox v. The N.M. Dep’t of Safety*, 2010-NMCA-096, where the court determined that when a request was made to review all citizen complaints against a law enforcement officer, “personal information about the citizen complainant such as home address,

phone number or the citizen's social security number . . . [was] not directly related to the complaint submitted by the citizen but is instead sensitive personal information related to the citizen complaint." *Id.* ¶ 30 ("Because the personal information of the complainant is not necessary to the public's inspection of the substance of the complaints, [the agency] should consider redacting such personal information prior to permitting public inspection of the documents. *Id.* ¶ 31). We specifically bring this to your attention because though there might be cases where personal information should not be provided, much of the information provided in the producer applications is certainly necessary to the public's inspection of the substance of the applications.

In conclusion, it is our position that the Department of Health exceeded its authority in promulgating 7.34.4.26 NMAC and would mitigate only part of the issue with the proposed rule changes. The importance of maintaining an open and accessible government is essential to the function of democracy. A public agency cannot unilaterally determine that it will withhold records by creating a confidentiality regulation, unsupported by Legislative authority, to bypass the IPRA; such a possibility would undermine the very purpose of the IPRA. Because the confidentiality of producer applications is not provided for by statute, the regulation as proposed does not carry the force of law and cannot be used to withhold documents under the IPRA.

Respectfully,



Hector H. Balderas
Attorney General