



Attorney General Of New Mexico

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February 24, 2016

VIA EMAIL ONLY

Andrea Sundberg, Patient Services Manager
State of New Mexico Department of Health
1190 St. Francis Drive Suite S-3400
Santa Fe, NM 87502
andrea.sundberg@state.nm.us

RE: Inspection of Public Records Act Complaint against Department of Health

Ms. Andrea Sundberg:

This determination addresses the complaint filed with the Office of the Attorney General alleging that the Department of Health ("DOH") violated the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2013) ("IPRA"), in connection with Peter St. Cyr's October 14, 2015, IPRA request. The complaint alleges that DOH failed to provide non-redacted copies of the bylaws for the 12 non-profit producer applicants requested by Mr. St. Cyr. DOH stated that the information redacted from the bylaws was done so pursuant to Section 14-2-1(A)(8), "as otherwise provided by law," and 7.34.4.26 NMAC. I have reviewed the complaint, as well as DOH's response, and conclude that DOH has violated the IPRA by improperly withholding information.

DOH Improperly Withheld Copies of Non-Profit Applicants Bylaws

On November 12, 2015, DOH produced 95 documents consisting of the bylaws for the applicants for licensure as a non-profit medical cannabis producer. However, DOH redacted producer-applicant identifying information pursuant to Section 7.34.4.26 NMAC. This redaction was done in violation of IPRA for the confidentiality provisions of 7.34.4.26 NMAC are not authorized by statute or are otherwise inapplicable, and cannot be used to withhold inspection of public records.

The exception relied upon by DOH to prevent disclosure of the information contained in the bylaws under IPRA is “as otherwise provided by law.” NMSA 1978, Section 14-2-1(A)(8) (2011). The law further cited to for withholding the information is 7.34.4.26 NMAC. Part A of this Section does not apply to non-profit bylaws and refers to confidential files kept by DOH of persons and entities who have applied or received a license for the purpose of producing and distributing cannabis for medical use. Part B of the Section, specifically refers to non-profit producer applicants confidentiality. However, there is no statutory authority permitting DOH to create the confidentiality provision in Part B of 7.34.4.26 NMAC. Further, NMSA 1978, 53-8-15(B) (2003), states in pertinent part that “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.”

Therefore, 7.34.4.26 NMAC exceeds the statutory authority granted by statute to DOH or is otherwise inapplicable to the non-profit applicant bylaws that are public record. 7.34.4.26 NMAC does not carry the force of law, and as such, cannot be used to withhold inspection of public records under IPRA. *See, Endenburn 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 was to a regulation unsupported by statute and thus did not have the force of law).

DOH should bear in mind that when requests to inspect public records are wrongfully denied, there may be consequences for the public agency. *See, NMSA 1978, § 14-2-12(D)* (1993). To avoid additional liability, we encourage you to provide Mr. St. Cyr with the above-referenced non-redacted bylaws immediately. If you have questions about the specific matters addressed in this letter, or about the Inspection of Public Records Act in general, please let me know.

Regards,



Dylan K. Lange
Assistant Attorney General

cc: Peter St. Cyr

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: _____

City: _____ State: NM Zip Code: _____

Phone Number: _____

Email: _____

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. Cyr