

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

October 31, 2017

Brazos Mutual Domestic Water Consumer Association
John Hoffman, President
P O Box 92945
Albuquerque, NM 87199
Email: hoffmanselectric@aol.com

Re: Inspection of Public Records Act Complaint – Carolyn Stafford

Dear Mr. Hoffman:

We have reviewed the complaint submitted by Carolyn Stafford alleging that the Brazos Mutual Domestic Water Consumers Association, Inc. (“BMDWCA”) violated the Inspection of Public Records Act (“IPRA”), NMSA 1978, Sections 14-2-1 to -12 (as amended through 2013) (“IPRA”) and your response on behalf of the BMDWCA to our inquiry regarding the complaint. In summary, the complaint alleges that the BMDWCA (1) provided some but not all the records responsive to the request; (2) records were provided, but they were not responsive to the request; (3) failed to properly deny inspection of public records; (4) failed to properly post a notice setting forth rights of any person to inspect the public body’s records; and (5) failed to meet deadlines for responding to an IPRA request. Based upon our review, as discussed below, we conclude that the BMDWA violated the IPRA by withholding responsive documents to the IPRA request without a legal basis for denial, failing to properly post the Notice of person’s rights to inspect records and failing to timely respond to the IPRA request.

BMDWCA Denial of Certain Requested Documents

In the response to our request, the information provided to our office confirms that Ms. Stafford submitted an IPRA request to the BMDWCA on September 2, 2016. The request asked for the list of Board of Directors for the BMDWCA and a list for all BMDWCA’s members with contact information. Ms. Stafford requested that the information be provided in electronic format, but if not possible, a hard copy of the lists. Initially an issue was raised concerning the production of the Board Directors’ list, however, it appears that the issue has been resolved. The remaining issue pertains to the BMDWCA’s member list. The request specifically asked for the “[l]ist of all Barzos Mutual Domestic Water consumers Association members with their contact information.” The BMDWCA provided its member list, but denied the request for member contact information. The

denial relies upon the IPRA exception provided under NMSA 1978, Section 14-2-1(A)(8) as “otherwise protected by law” and cites to the “Customer Propriety Networks Information” (“CPNI”) under the federal Telecommunications Act as the basis for denial. This analysis is limited to the BMDWCA’s denial of the membership contact information.

The Telecommunications Act, 47 U.S.C.A. Section 151, established the Federal Communications Commission to regulate interstate and foreign commerce in communication by wire and radio to make available efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex. The Act applies to:

- a) . . . all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A. 47 U.S.C.A. Section 152.

The Telecommunications Act provides protection from disclosure of certain customer information by entities as defined by the Act pursuant to 47 U.S.C.A. Section 222.

The BMDWCA is a mutual domestic water consumer association incorporated under the New Mexico Sanitary Projects Act and is governed by Articles of Incorporation, By-Laws, and Rules and Regulations. www.bmdwca.org. The Telecommunications Act does not include mutual domestic water associations as entities subject to the requirements under the Act. Any protections from disclosure of certain customer information provided by the Act does not apply to the BMDWCA. The BMDWCA does not cite to any other legal authority protecting disclosure of its members’ contact information, therefore, it is presumed no other legal authority protects the requested information. Without any other legal protection from disclosure BMDWCA is required to provide the information. Failure to provide the information is a violation of the IPRA, § 14-2-1.

The Time Frame When Responding to the Request

The IPRA request was received by the BMDWCA on September 2, 2016. Ms. Stafford acknowledges receipt of the list of directors. The request for a list of membership names with contact information was denied on or about October 12, 2016. There does not appear to be any intervening three day letter notifying Ms. Stafford when the records would be

available and the BMDWCA did not allow inspection of the records within fifteen calendar days after the request. BMDWCA explains the failure to respond in a timely manner as due to a change of address and that no one was checking the old post office box for incoming mail. The change of address was not posted on the BMDWCA's website. The old address still appears on the BMDWCA's website. Therefore, it appears that BMDWCA did not respond to or permit inspection of records in a timely manner in violation of § 14-2-8(D).

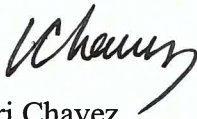
Posting of Notice of the Right to Inspection

Despite requesting information concerning BMDWCA's posting the Notice of person's right to inspect, BMDWCA's letter dated November 23, 2016 does not address that question. Therefore, it is presumed that BMDWCA does not have the notice properly posted, and therefore, is in violation of § 14-2-7(D).

Based upon the information provide to our office, the OAG has determined that BMDWCA has violated the IPRA, § 14-2-1, 14-2-8(D) and 14-2-7(D). It is recommended that the BMDWCA immediately provide a member list with contact information to Ms. Stafford, post a Notice of person's rights to inspect and to review and implement procedures to ensure that the BMDWCA receives and timely process future IPRA requests.

If you have any questions regarding this determination or the IPRA in general, please let me know.

Sincerely,



Lori Chavez
Assistant Attorney General
Open Government Division

cc: Brazos Mutual Domestic Water Consumers Association, Inc.
Carolyn Stafford

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

New Mexico Office of the Attorney General

Open Government Division

YOUR CONTACT INFORMATION:

First Name: Carolyn Last Name: Stafford

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): Brazos Mutual Domestic Water Consumers Assoc., Inc. Tierra Amarilla, Rio Arriba County, NM; mailing address: P.O. Box 92945, Albuquerque, NM 87199

Format of IPRA Request: Written Oral

Date IPRA Request was Submitted to the Public Body: September 2, 2016

Date of all Responses Received from the Public Body: Sept 7, 2016 - received incomplete list of Board of Directors; Sept 25, 2016 - verbally told they would contact their attorney; Oct 2, 2016 - short email saying response tomorrow.

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.

see attached

DETAILED EXPLANATION OF ALLEGED IPRA VIOLATIONS

I am a member in good standing of the Brazos Mutual Domestic Water Consumers Association, INC (BMDWCA). The BMDWCA is a "Public Body Corporate," they receive public funds and are governed by the Sanitary Projects Act, The Inspection of Public Records Act and The Open Meetings Act. I am requesting a list with contact information of my fellow Association members and a list with contact information for the Board of Directors. I sent the official request via e-mail and US Post Office on September 2, 2016 (copy attached). I did not hear from the Board of Directors until September 7, 2016 (copy attached). I received an incomplete list of the Board of Directors. I sent an email on September 7, 2016 stating the records were incomplete. No response until September 25, 2016 when I attended the Board meeting. I was told (verbally) they would contact their attorney on Monday, September 26 and to give them 2 days. No response. On October 2 (copy attached), I received an email stating they would have a response for me in the morning (Oct. 3). No further response from anyone.

I believe the Board of Directors has violated the IPRA:

1. They provided 1 item requested and it was erroneous and incomplete.
2. I have received nothing in writing explaining why records have not been provided.
3. It has now been 39 days with no explanation.
4. Public body does not have a notice of the IPRA in a conspicuous location or on the website (pretty much inactive at this time).
5. Inspection was not allowed within 3 business days and the BMDWCA did not send a written "three-day letter" to me.
6. The BMDWCA did not allow inspection or otherwise respond to the request within 15 calendar days except for an erroneous and incomplete list of their Board of Directors.

ADDITIONAL INFORMATION

Attached documentation or evidence:

1. Original inspection request (Stafford to Board of Directors) September 2, 2016
2. Email with partial information (Hoffman to Stafford) September 7, 2016. Incorrect address and missing one Board member.
3. Email requesting complete information (Stafford to Hoffman) September 7, 2016
4. Email regarding a response (Hoffman to Stafford) October 2, 2016
5. Letter Brett Olsen, P.C. to Brazos Mutual Domestic Water Consumers Association, Inc dated 3/7/2006 confirming they are a Public Body Corporate and subject to Sanitary Projects Act and Inspection of Public Information Act and Open Meetings Act.

Carolyn Stafford
10-11-2016

From: Carolyn Stafford <carolyn.stafford@verizon.net>

To: hoffmanselectric <hoffmanselectric@aol.com>; jim <jim@palmer-walker.com>; jaymason-ahr <jaymason-ahr@live.com>

Bcc: rbrazos <rbrazos@att.net>

Subject: Records Request under the New Mexico Inspection of Public Records Act

Date: Fri, Sep 2, 2016 1:09 pm

Attachments: August 1 Formal Request for Records BMDWCA.docx (17K)

Gentlemen:

The attached letter was mailed today, with return receipt requested, to the Secretary or Records Custodian for the Brazos Mutual Domestic Water Consumers Association. Please refer to the New Mexico Inspection of Public Records Act for instructions and deadlines to respond to this request.

I look forward to hearing from you within 3 days of receipt of this request.

Thank you,

Carolyn Stafford
carolyn.stafford@verizon.net

9549 2222 1000 0160 9101 7016

**U.S. Postal Service™
CERTIFIED MAIL® RECEIPT**
Domestic Mail Only

For delivery information, visit our website at www.usps.com®.

OFFICIAL USE

Certified Mail Fee	\$ 3.30
Extra Services & Fees (check box, add fee)	\$ 2.17
<input type="checkbox"/> Return Receipt (hardcopy)	\$
<input type="checkbox"/> Return Receipt (electronic)	\$
<input type="checkbox"/> Certified Mail Restricted Delivery	\$
<input type="checkbox"/> Adult Signature Required	\$
<input type="checkbox"/> Adult Signature Restricted Delivery	\$
Postage	\$.47
Total Postage and Fees	\$ 6.47

Sent To
Brazos Mutual Domestic Water Consumers Assoc
Street and Apt. No. or PO Box No.
AC 75, Box 178
City, State, ZIP+4
Chama NM 87520

PS Form 3800, April 2015 PSN 7530-02-000-0047 See Reverse for Instructions

TIERRA MARILLA NM
SEP - 2 2016
Postm
Hei

g
sept
August 1, 2016

Secretary or Records Custodian
Brazos Mutual Domestic Water Consumers Association
HC75, Box 178
Chama, NM 87520

Via email: John Hoffman
Jim Walker
Jay Mason

Gentlemen:

As a Mutual Domestic Water Consumers Association, you are governed by the Sanitary Projects Act and deemed a "Public Body Corporate." This means your responsibilities include adhering to the NM Open Meetings Act and the NM Inspection of Public Records Act.

This is a formal request under the New Mexico Inspection of Public Records Act. I request a copy of the following records:

1. List of Board of Directors for the Brazos Mutual Domestic Water Consumers Association with their contact information.
2. List of all Brazos Mutual Domestic Water Consumers Association members with their contact information.

If any of the records are being held in electronic format, I wish to receive electronic copies at carolyn.stafford@verizon.net or, if that is not possible, I request a hard copy mailed to my home address. I agree to pay reasonable copy fees according to the New Mexico Inspection of Public Records Act, not to exceed \$1.00 per page. I prefer to be notified in advance if the total cost will exceed \$20.00.

Per the New Mexico Inspection of Public Records Act, I look forward to hearing from you within 3 days of receipt of this request.

Thank you for your prompt attention to this matter, and please contact me at the address, phone number or e-mail listed below.

Sincerely,

Carolyn Stafford
HC75, Box 181
Chama, NM 87520
505-470-7970
carolyn.stafford@verizon.net

From: Hoffmanselectric <hoffmanselectric@aol.com>

To: carolyn.stafford <carolyn.stafford@verizon.net>

Subject: Re: Records Request under the New Mexico Inspection of Public Records Act

Date: Wed, Sep 7, 2016 2:35 pm

Attachments: Brazos.docx (47K)

John C. Hoffman

Hoffman's Electric, Inc.

1521 Cerro Vista Rd SW

Albuquerque, NM 87105

505-250-0209

Brazos Mutual Domestic Water

Consumers Association

Board of Directors

As of June 2016

President

John Hoffman

**1521 Cerro Vista Rd. SW
Albuquerque NM 87105
Cell (505) 250-0209
Office (505) 247-4669**

Director

Richard Dramer

**P.O. Box 90997
Albuquerque NM 87199**

Vice President

Jim Walker

**29 Sandia Hts. Dr. NE
Albuquerque NM 87122**

Director

Curtis Goodfellow

**P.O. Box 93790
Albuquerque NM 87199**

Secretary

Marco Lucero

**2339 46th Street
Los Alamos NM 87544**

Director

David Oelschlegel

**1808 Neat Lane SW
Albuquerque NM 87105**

Treasurer

Jay Mason

**7632 Arroyo del Oso NE
Albuquerque NM 87109**

Director

Tom Coombs

**1808 Neat Lane SW
Albuquerque NM 87105**

From: Carolyn Stafford <carolyn.stafford@verizon.net>
To: hoffmenselectric <hoffmenselectric@aol.com>
Cc: goodfellowinc <goodfellowinc@aol.com>; jim <jim@palmer-walker.com>; swells5502 <swells5502@aol.com>; jaymason-ahr <jaymason-ahr@live.com>; troutford <troutford@msn.com>; Marco.lucero <Marco.lucero@lacnm.us>
Subject: Re: Records Request under the New Mexico Inspection of Public Records Act
Date: Wed, Sep 7, 2016 2:32 pm

Thank you very much for your reply and the list of the Board of Directors and their contact (very limited) information. As you can tell I have almost completed finding e-mail addresses and some phone numbers for them. This is all public information. I also noticed that Arch Wells is not on the list. I look forward to receiving his information as well as a copy of the full membership list for the BMDWCA.

A list with full contact information should be posted on the community bulletin board. This is necessary—people do not know how to contact their board members. What if they have an emergency?

Thank you.

Carolyn Stafford
carolyn.stafford@verizon.net

From: Hoffmanselectric <hoffmanselectric@aol.com>

To: carolyn.stafford <carolyn.stafford@verizon.net>

Subject: Re: Request under Inspection of Public Records Act

Date: Sun, Oct 2, 2016 5:58 pm

Carolyn I will have a response for you in morning.

John C. Hoffman

Hoffman's Electric, Inc.

1521 Cerro Vista Rd SW

Albuquerque, NM 87105

505-250-0209

Brett J. Olsen, P.C.

812 Marquette Avenue NW
Albuquerque, New Mexico 87102
Phone: 505-924-1800
Fax: 505-247-1954
Email: brettolsen@peoplepc.com

March 7, 2006

Via U.S. Mail and Email

J. Tom McWilliams, President
Brazos Mutual Domestic Water
Consumers Association, Inc.
1521 Cerro Vista Rd. SW
Albuquerque, NM 87105-3005

Re: Brazos Mutual Domestic Water Consumers Association

Dear Mr. McWilliams:

This letter follows up on my January 9, 2006, meeting with you and other members of the Board of Directors ("Board") of the Brazos Mutual Domestic Water Consumers Association ("Brazos"), and specifically addresses topics discussed during our meeting, as well as questions raised in the Statement of Work you provided in October 2005.

I. WHAT IS A MUTUAL DOMESTIC WATER CONSUMERS ASSOCIATION?

Mutual Domestic Water Consumers Associations ("Mutual Domestic") are organized under the authority of the New Mexico Sanitary Projects Act ("SPA" or the "Act"), NMSA 1978, § 3-29-1 *et seq.* The SPA is codified as part of the New Mexico Municipal Code which is a series of enabling statutes related to cities, villages and other municipal entities. Because Mutual Domestic are organized and incorporated under the Municipal Code, they are considered quasi-municipal entities akin to incorporated acequia or ditch associations.

Mutual Domestic are also corporate bodies. Sections 3-29-15 through 3-29-17.1 of the SPA authorize the incorporation of Mutual Domestic. Section 3-29-20 of the Act provides for the reorganization of cooperative associations as Mutual Domestic. As corporations, Mutual Domestic are governed by the general body of corporate law (case law and statutes) applicable to New Mexico corporations or foreign corporations doing business in New Mexico. For example, Mutual Domestic must adopt and file Articles of Incorporation with the New Mexico Public Regulation Commission ("PRC"), and adopt bylaws. They may also choose to issue shares or simply have members.¹

¹ Brazos has chosen not to issue capital stock. See Article VI of Brazos' Articles of Incorporation.

Accordingly, a Mutual Domestic is a unique municipal/corporate hybrid which could best be described as a 'public corporation.'

II. IS A MUTUAL DOMESTIC A PUBLIC UTILITY?

1. What Is A Public Utility?

Under New Mexico law, a public utility is an individual or entity that holds itself out "expressly or impliedly as engaged in the business of supplying its product or service (e.g., gas, water or electrical service) to the public, as a class," as opposed to holding itself out as ready to serve only particular individuals. See *Morningstar Water Users Assoc. v. Pub. Util. Comm'n*, 120 N.M. 579, 904 P.2d 28 (1995). In other words, public utilities are characterized by an interest in service to the public at large, or a willingness to extend service to an indefinite public without restricting service to privileged individuals.

Public utilities are regulated by the PRC. They must obtain Certificates of Public Convenience and Necessity, and their proposed rate increases, changes in rate structure, implementation of surcharges, or changes in service area, must be approved by the PRC.

2. A Mutual Domestic Is Presumptively Not A Public Utility.

In the *Morningstar* case, the New Mexico Supreme Court held that while Mutual Domestic may provide the same or similar services as public utilities, they are not presumed to be public utilities subject to the PRC's regulation under the Public Utilities Act. The Supreme Court has also confronted the issue of whether a Mutual Domestic may act in such a manner as to bring itself within the PRC's jurisdiction by operating as if it were a public utility. In *El Vadito De Los Cerillos Water Assoc. v. Pub. Serv. Comm'n*, 115 N.M. 784, 858 P.2d 1263 (1993), the Court addressed the question of whether a particular Mutual Domestic became a public utility by selling water to a limited number of non-member water haulers in the area around Cerillos, New Mexico. The Court held that the Mutual Domestic was not holding itself out as ready to serve an indefinite public by the act of selling water to these individuals who lived outside the Mutual Domestic's designated service area, and was not operating as a public utility.

Brazos is not holding itself out as a public utility. It has a designated service area, and only provides water to members within that service area who pay a membership fee. It does not provide water service to non-members. Consequently, it is not required to obtain a Certificate of Public Convenience and Necessity from the PRC, or submit its rates and fees for PRC approval.

III. AUTHORITY GOVERNING BRAZOS' OPERATIONS

Brazos' operations are governed by a tripartite system of legal authority. First, because Brazos is organized pursuant to the provisions of the SPA, actions taken by the Board or its agents must comply with the Act. Second, because Brazos is a quasi-municipal entity, its actions are deemed 'state action' subject to: (1) the limitations and protections of the equal

protection and due process clauses of the Fourteenth Amendment to the United States Constitution; and (2) other state laws applicable to government or public entities. In particular, Brazos must comply with the requirements of the New Mexico Inspection of Public Records Act, NMSA 1978, § 14-2-1 et seq., and the Open Meetings Act, NMSA 1978, § 10-15-1 et seq. Finally, because Brazos is a corporate body, its actions must not contravene or exceed the authority of its own articles of incorporation, bylaws, and rules and regulations.

1. Limits Imposed By The Sanitary Projects Act

Several sections of the SPA are material to the questions raised by Brazos concerning the current membership classes and rate structure.

- a. Mutual Domestics are not authorized to provide water for non-domestic uses.

The SPA was enacted to assist unincorporated rural communities in constructing and maintaining adequate “sanitary domestic water supplies.” § 3-29-3 (emphasis added). Accordingly, the Act authorizes the incorporation of Mutual Domestics for the exclusive purpose of developing and maintaining water systems to provide water for domestic uses within these rural communities.

The Office of the State Engineer has jurisdiction over diversion and beneficial use of the public waters of the State of New Mexico, and has defined domestic water use as those uses incident to normal household purposes such as drinking, food preparation, bathing, washing clothes and dishes, flushing toilets, evaporative cooling, watering lawns and non-commercial gardens, and non-commercial livestock watering. See OSE Technical Report No. 51. It is critical to note, however, that the State Engineer considers the foregoing kinds of uses incident to operation of a commercial enterprise to fall within the compass of domestic use. Thus, a restaurant’s use of water for washing dishes, toilets, serving drinking water, etc., is considered domestic use.

The SPA’s only express exclusion of a particular kind of water use is found in § 3-29-7(A), which prohibits the State from extending funds to Mutual Domestics for the development of water supplies intended to serve commercial crop irrigation or commercial stock watering. However, given the SPA’s limited and express purpose of facilitating the development of water supplies for sanitary domestic use, in conjunction with Brazos’ own articles of incorporation (e.g., Article IV, Sec. 1, which tracks the language of § 3-29-3 of the SPA), it is my opinion that Brazos lacks the authority to provide water for industrial or non-domestic, commercial purposes.

- b. Recommendations – Industrial and Commercial Use

Because Brazos may only provide water for domestic uses, as a matter of law, it cannot provide water for industrial uses. Accordingly, the Rules and Regulations should be amended to eliminate the “Industrial Membership” classification and related rate schedule.

It may not be necessary to change Brazos' definition of "Commercial Use of Water" because it expressly references the domestic use of water incident to a commercial enterprise. However, as an alternative the Board may wish to compress "Residential Use of Water" and "Commercial Use of Water" into a single definition of "Domestic Use" which identifies the various kinds of domestic use by a household or business.

- c. The SPA prohibits discrimination against a particular class of user within the community.

The SPA was enacted to improve the public health of rural New Mexicans by establishing sanitary domestic water facilities to serve that population. See § 3-29-3. Toward that end, § 3-29-11 of the Act requires that all persons within the community be given the opportunity to become members of a Mutual Domestic upon compliance with its rules and regulations.

In the *Vadito* case, the New Mexico Supreme Court held that the SPA obligates a Mutual Domestic to afford an equal opportunity to persons in the community to become members. It is critical to note that the *Vadito* case only addressed the question of whether rural water haulers in the area surrounding Cerillos, New Mexico were persons within the particular "community" served by the Vadito Mutual Domestic Water Consumers Association. *Vadito* did *not* address the question of whether the right to equal access prohibits a Mutual Domestic from defining different classes of membership with different fees and rates applicable to those classes.

In reviewing the SPA, I found some guidance on this issue in § 3-29-12(C) of the Act. That section authorizes a Mutual Domestic's board of directors to recover funds by assessing members in "an amount sufficient to provide for the proper operation and maintenance" of the water system or related facilities. Concomitantly, § 3-29-12(D) of the Act empowers the board to "do all things necessary" in the administration of facilities subject to the limitation of the SPA.

Boiling all of this down, both case law and the language of the SPA indicate that Brazos must afford any person or entity in the community seeking water for domestic uses the opportunity to become a member. However, this obligation does not prevent the Board from adopting different membership categories, annual fee schedules, or rates, which are necessary to meet the goal for which Brazos was incorporated - construction, and maintenance and operation of facilities to meet the domestic water needs of its members within its designated service area. Obviously, there are a number of considerations material to meeting that goal, including but not limited to maintaining: sufficient water rights, an adequate water supply (wells and related infrastructure), and sufficient funds to acquire additional water rights or repair water infrastructure. Encouraging conservation by members is another way to meet Brazos' primary goal of maintaining and delivering water for domestic uses. Consequently, if the Board finds that one way to meet the goal of maintaining an adequate, reliable and safe supply of water for domestic uses in the community is to assess certain membership classes (e.g., commercial rentals) a higher annual fee than other classes (e.g., residential), then the Board is likely acting within its statutory authority under the SPA.

2. Constitutional Restraints on Brazos' Rulemaking Authority

Because Brazos is a quasi-municipal entity, action by the Board in promulgating or amending rules and regulations is considered 'state action' subject to the limitations of the 14th Amendment to the U.S. Constitution.² Simply put, the Equal Protection Clause of the 14th Amendment prohibits Brazos from adopting or enforcing rules with the intent to discriminate against a particular member of the community or class of persons. The key to equal protection analysis is intent. It is insufficient to simply prove the discriminatory effect of a particular action. Rather, to prove an equal protection violation, a person challenging Brazos' action must show a discriminatory intent.

Consequently, it is not difficult for Brazos to pass 14th Amendment scrutiny in the adoption of rules and regulations. If a particular action is rationally related to a legitimate interest of the Association, then there is no violation. So, for example, if the adoption of a particular rate schedule which differentiates between different classes of users is rationally related to the legitimate – and primary – interest of providing an adequate and reliable supply of domestic water to the membership, then the rate schedule likely passes constitutional muster.

Please do not hesitate to call with any questions or comments concerning the topics addressed in this letter.

Very truly yours,

Brett J. Olsen

² The 14th Amendment protects individuals' right to due process and equal protection of the laws of the State of New Mexico.

October 11, 2016

OFFICE OF THE
ATTORNEY GENERAL

2016 OCT 17 AM 9:29

Office of the Attorney General
Open Government Division
P. O. Drawer 1508
Santa Fe, NM 87504-1508

Sir/Madam:

The enclosed is my claim against the Brazos Mutual Domestic Water Consumers Association, Inc. for what I believe are violations of the Inspection of Public Records Act. I have continued to contact them for the information I requested, only to be met with their stone-walling. I even sent them records from a previous action (2005) against them that was settled out of court in favor of the claimant.


I am a member in good standing of this Association. My husband and I live at the Brazos for 5 months (May to October) each year. I wish to have a list of my fellow Association members and am being denied access to this information.

The Brazos Mutual Domestic Water Consumers Association, Inc. is governed by the Sanitary Projects Act, the Open Meetings Act, and the Inspection of Public Records Act and they accept public funds.

The only action left to me is to file this claim.

Thank you for your attention to this matter.

Sincerely,



Carolyn Stafford
728 Kimbro Ave.
Argyle, Texas 76226
505-470-7970