

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

June 21, 2019

David Neal
42 County Road 84B
Santa Fe, NM 87506

RE: Inspection of Public Records Act Complaint – Jemez Mountains Electric Cooperative

Dear Mr. Neal:

This letter addresses the complaint you filed with the Office of the Attorney General alleging that the Jemez Mountains Electric Cooperative (“the Cooperative”) violated the Inspection of Public Records Act (“IPRA”), NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2013), in connection with your IPRA Request submitted on October 31, 2017. According to your complaint, the Cooperative violated IPRA in a number of respects but principally by failing to provide the documents you requested.¹ We have also reviewed the Cooperative’s response to our inquiry regarding the complaint. Based on our review, we conclude that no IPRA violation occurred, as the Cooperative is not a public body for the purposes of, nor is it subject to, IPRA.

The facts surrounding your complaint are summarized as follows: The Jemez Mountains Electric Cooperative is an entity that provides electrical power to its members across several rural New Mexico counties. It is wholly owned by its members and funded at least in part through government loans but, strictly speaking, it does not receive public funding. While it is regulated by the New Mexico Public Regulation Commission, no public body owns a financial interest in the Cooperative, nor was it created by any public body. On October 31, 2017, you submitted an IPRA request to the Cooperative, requesting “the individual complete US postal mailing addresses used to deliver the monthly bills for all JMEC members.” The Cooperative responded to your request on December 4, 2017, by denying that it constituted a governmental agency or a quasi-governmental agency and concluding that it was not subject to IPRA. You subsequently filed this complaint with our office, alleging a number of violations of IPRA.

The purpose of IPRA is to promote transparency in the conduct of governmental affairs. *See* § 14-2-5 (declaring that the public policy of the state is “that all persons are entitled to the greatest

¹ You have also raised a number of other issues related to shareholders’ rights to obtain information from the companies in which they own stock. As our review is strictly limited to IPRA, we do not address those issues.

possible information regarding the affairs of government and the official acts of public officers and employees”). *See also Am. Civil Liberties Union of New Mexico v. Duran*, 2016-NMCA-063, ¶ 25, 392 P.3d 181, 188 (noting that IPRA’s purpose is “to promote the existence of (1) an informed electorate and (2) transparency in governmental affairs”) and *Republican Party of New Mexico v. New Mexico Taxation & Revenue Dep’t*, 2012-NMSC-026, ¶ 38, 283 P.3d 853, 867 (observing “IPRA’s guiding purpose of promoting government transparency”). In order to promote transparency, IPRA is broadly written to give individuals the right to inspect all “public records” with only limited and specifically enumerated exceptions. *See* § 14-2-1(A).

Because IPRA’s aim is to promote governmental transparency and accountability, it applies to any “public body,” for which it provides a definition:

"[P]ublic body" means the executive, legislative and judicial branches of state and local governments and all advisory boards, commissions, committees, agencies or entities created by the constitution or any branch of government that receives any public funding, including political subdivisions, special taxing districts, school districts and institutions of higher education

Section 14-2-6(F). Every public body in New Mexico is subject to the requirements of IPRA. While generally speaking private actors are not subject to IPRA’s disclosure requirements, the statute does apply to private actors who hold records “on behalf of any public body.” Section 14-2-6(G).

Almost no New Mexico cases have analyzed the circumstances in which a private organization is subject to the requirements of IPRA. However, in *State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, the Court of Appeals considered the issue of whether a private organization which had contracted with a public body subsequently became subject to IPRA. In *Toomey*, the City of Truth or Consequences had entered into an agreement with a nonprofit corporation to manage the City’s public access television channel. *Toomey*, 2012-NMCA-104, ¶ 3. The plaintiff submitted an IPRA request to the company and the City, eventually filing a lawsuit to compel the production of the requested records. *Id.* at ¶ 5-6. Before the Court of Appeals, the dispositive issue was “whether a private actor that contracts with a governmental entity to perform a public function is subject to the provisions of IPRA.” *Id.* at ¶ 10. This was a case of first impression in New Mexico, forcing the Court of Appeals to consider the law in other states. *Toomey*, 2012-NMCA-104, ¶ 11. Looking to the State of Florida for guidance, the Court eventually adopted the non-exhaustive nine-factor test elucidated in *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Grp., Inc.*, 596 So. 2d 1029 (Fla. 1992), to settle the question before it. *Toomey*, 2012-NMCA-104, ¶ 13-14. Those factors were:

- 1) the level of public funding; 2) commingling of funds; 3) whether the activity was conducted on publicly owned property; 4) whether services contracted for are an integral part of the public agency's chosen decision-making process; 5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform;

6) the extent of the public agency's involvement with, regulation of, or control over the private entity; 7) whether the private entity was created by the public agency; 8) whether the public agency has a substantial financial interest in the private entity; and 9) for who's benefit the private entity is functioning

Schwab, 596 So. 2d at 1031; *Toomey*, 2012-NMCA-104, ¶ 22. The Court of Appeals emphasized that, going forward, New Mexican courts should use these factors in order to avoid a narrow construction of IPRA, and the test it adopted was “a flexible approach that favors access to records even when held by a private entity.” *Id.* at ¶ 26.

In applying this new test to the case before it, the Court in *Toomey* found that the nonprofit corporation was subject to IPRA, as it effectively operated ““on behalf of” the City.” *Toomey*, 2012-NMCA-104, ¶ 25. The decision emphasized a number of critical facts: the City provided all of the corporation’s funding, the corporation was performing a government function (the running of the cable channel), the corporation was entirely functioning for the benefit of the City, and the City enjoyed significant control over the corporation. *Id.* at ¶ 25. Given those facts, the corporation was subject to IPRA.

We also recognize the persuasive authority offered by the case cited by the Cooperative, *New Mexico Foundation for Open Government, et. al. v. Corizon Health*, Case No. D-101-CV-2016-01742 (R. Ortiz) (attached to Response as Exhibit A). While this is a district court case and is not binding on any New Mexican court, its analysis of the *Toomey* factors gives it some predictive value in terms of how courts approach the issue raised by your complaint. In *Corizon Health*, the Department of Corrections had contracted out its medical services to incarcerated felons to a private entity. *See Corizon Health*, p. 1-2. The private entity was paid by the Department more than \$37 million per year, and conducted its activities at correctional facilities on public land. *Id.* at p. 3. Emphasizing the fact that “Corizon was performing a public function and acting on behalf of the Department of Corrections in providing medical services to New Mexico inmates,” and finding that six of the nine *Toomey* factors weighed in favor of applying IPRA to the private entity, the District Court found that the private entity was subject to IPRA. *Id.* at p. 2.

However, the guidance offered by *Toomey* is limited by the circumstances in front of the Court at the time. The issue before the Court was “whether a private actor *that contracts with a governmental entity to perform a public function* is subject to the provisions of IPRA.” *Toomey*, 2012-NMCA-104, ¶ 10 (emphasis added). The decision does not stand for the proposition that any private actor is subject to IPRA if some or even most of the *Toomey* factors are satisfied. Instead, *Toomey* imposed its nine-factor test only on private actors who have contracted with a governmental entity to perform a public function.

Our own IPRA Guide speaks to this distinction. In discussing the term “public body,” we gave two examples of private actors and analyzed whether they were subject to IPRA. *See* Attorney General’s Inspection of Public Records Act Compliance Guide, p. 24 (8th ed. 2015) (“IPRA Guide”) (outlining Examples 30 and 31). The first of these, Example 30, involved a private, nonprofit community action agency that administered programs designed to reduce poverty. *Id.*

While this hypothetical agency did receive public funding, it was not created by the government, was not subject to governmental oversight, and was not apparently tied by contract to government. *See* IPRA Guide, p. 24. We concluded that this organization would not constitute a public body and was not subject to IPRA. *Id.* However, we arrived at a different conclusion in our Example 31. *Id.* In that hypothetical case, a county had leased its public hospital to a private, nonprofit organization which was then contractually obligated to operate and manage that hospital. *See* IPRA Guide, p. 24. The private actor received public funding, used government property, and was subject to governmental oversight. *Id.* Relying on these facts, we concluded that this private actor would be subject to IPRA. *See* IPRA Guide, p. 24. Of these two examples, *Toomey* would apply only to Example 31 because the private actor in that hypothetical had a contract with a public body to perform a public function. Example 30, by contrast, was simply a private actor with no contractual obligations to any public body, to whom the *Toomey* factors are inapplicable.

In your complaint (and your subsequent communications with our office), you made several arguments to the effect that the Cooperative was (or should be) subject to IPRA. The central thrust of your complaint is that the provision of electricity, a utility, is an essential government function. You also argue that a number of court decisions stand for the principle that private actors such as the Cooperative are public bodies in line with the spirit of IPRA, if not its text.

As to your first point, that electricity is a utility and an essential government service, the fact remains that New Mexico courts are bound by precedent and statutory provisions. The service provided by the actor, whether it is one that is traditionally provided by government or one of a strictly private nature, is not the critical factor under IPRA; instead, IPRA looks to the actor itself in order to determine whether its records are subject to disclosure. As a general rule, private actors are not subject to IPRA. *See* § 14-2-6(G). It is only when those private actors hold record on behalf of a public body that they become subject to IPRA. *Id.* As a result, the only pertinent issue with respect to the Cooperative is whether or not it is holding records on behalf of a public body.

In this instance, the Cooperative is a private actor. It is not holding, storing, or maintaining any records on behalf of a government agency. Additionally, there is no evidence to suggest that the Cooperative holds any contract with a public body to provide a public service. While they may very well be providing a public service (electrical power),² they are not contractually obligated to any public body to do so. *Toomey*, therefore, does not apply here. The Cooperative is a private agency that does not fit the definition of a public body under IPRA, so we must conclude that a court likely would find that it is not subject to the statute's requirements. *See* § 14-2-6(F).

However, even if a court were to apply the *Toomey* factors, the conclusion would not change. The first two factors – the amount of government funding and the degree of commingling of funds – weigh against a determination that the Cooperative is subject to IPRA, because the only public funding received by the Cooperative is in the form of loans. Similarly, the Cooperative indicates that its activities take place either on land it owns or has rights to use through an easement, meaning

² One case you brought to our attention, *Raton Public Service Company v. Hobbes*, 1966-NMSC-150, 76 N.M. 535, 417 P.2d 32, does indeed prove the point that some local government entities can and do provide electrical power to their citizens as a utility. However, to the best of our knowledge, no New Mexico court case has ever held that every company that provides electricity to customers is subject to IPRA.

that the third factor, “whether the activity was conducted on publicly owned property,” also weighs in their favor. *Schwab*, 596 So. 2d at 1031. The fourth factor is totally inapplicable because, as we already mentioned, there is no allegation here that the Cooperative has a government contract. As a result, this factor too suggests that the Cooperative is not subject to IPRA.

Toomey’s fifth factor, “whether the private entity is performing a governmental function or a function which the public agency otherwise would perform,” *Schwab*, 596 So. 2d at 1031, is complicated by the disagreement between yourself and the Cooperative as to whether the provision of electrical power is a governmental function. However, the Cooperative appears to be correct insofar as their assertion that electric power in New Mexico is provided “largely by private utility companies.” As a result, a court would probably not find that factor in favor of your position.

None of the remaining four factors weigh in favor of a determination that the Cooperative is subject to IPRA. With respect to the sixth factor, unlike the private entities at issue in *Toomey* and *Corizon Health*, the Cooperative does not have a contractual relationship with a public body that would enable government supervision or control over its activities. Finally, the Cooperative was not created by a public body, no public body has a financial interest in it, and it functions exclusively for the benefit of its members, meaning that factors seven, eight, and nine weigh identically to the other factors.

Because a court would likely find that all of the *Toomey* factors weigh against a conclusion that the Cooperative is maintaining records “on behalf of” a public body, even if it were to apply *Toomey* it would not change its result. While reasonable people may very well maintain that the provision of electric power is a government function, New Mexico courts are bound by the law.

We thank you for bringing a number of court cases to our attention, but none of the cases you have offered support a different conclusion than the one we have reached. The New Mexico Supreme Court decision in *Schein v. Northern Rio Arriba Electric Cooperative, Inc.*, 1997-NMSC-011, 122 N.M. 800, 932 P.2d 490, involved a shareholder’s right to inspect a corporation’s books and records. *See Schein*, 1997-NMSC-011, ¶ 1 (noting that the issue before the Court was whether the appellee, as a member of the corporation, had the right to access the corporation’s legal billing records). The decision did not address IPRA, nor is there any indication that the appellee in that case ever argued that the corporation was subject to IPRA. Along the same lines, *Schwartzman v. Schwartzman Packing Company*, 1983-NMSC-010, ¶ 1, 99 N.M. 436, 659 P.2d 888, also involved a shareholder’s complaint against a corporation. IPRA was not raised as an issue in that case. With respect to *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725, 81 S. Ct. 856, 862, 6 L. Ed. 2d 45 (1961), that case did indeed stand for the principle that, in some cases, the actions of private businesses and individuals can be considered government action for the purposes of the Fourteenth Amendment of the United States Constitution. That being said, the case did not involve public records and IPRA does not generally implicate federal constitutional rights.

For your reference, a copy of the IPRA Guide is available on the website of the Office of the Attorney General at www.nmag.gov. If you have any questions regarding this determination or IPRA in general, please let me know.

David Neal
June 21, 2019
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Sincerely,

A handwritten signature in blue ink, appearing to read "John Kreienkamp". The signature is stylized and cursive, with a large loop at the end.

John Kreienkamp
Assistant Attorney General

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

New Mexico Office of the Attorney General
Open Government Division

YOUR CONTACT INFORMATION:

First Name: David Last Name: Neal

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): Jemez Mountains Electric Cooperative, 19365 State Road 84-285, Hernandez, NM 87537

Format of IPRA Request: Written Oral

Date IPRA Request was Submitted to the Public Body: October 31, 2017

Date of all Responses Received from the Public Body: See attached documents.

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.

I fully understand that the Jemez Mountains Electric Cooperative (JMEC) is a quasi-government agency so the applicability of IPRA may be unclear. However, in view of the Schein v. Northern Rio Arriba Electric Cooperative, 1997-NMSC-011, 122 N.M. 800, it clearly shows that JMEC is required to comply with the "spirit" of IPRA and not necessarily the "letter of the law" of IPRA. Consequently, I request the NM Attorney General compel JMEC to provide the requested information.

Respectfully,



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.

Dave and Cris

Subject: FW: Inspection of Public Records Request
Attachments: IPRAComplaintForm.pdf; NMSCrulingInspectionOf ElectricCoopRecords.pdf

From: Dave and Cris [<mailto:losneals@gmail.com>]
Sent: Saturday, November 25, 2017 3:07 PM
To: 'Donna Montoya-Trujillo'
Cc: Bruce Duran Trustee; 'Nick Naranjo'; Nancy Long (nancy@longpoundkomer.com); Charles V. Garcia (cgarcia@cuddymccarthy.com)
Subject: RE: Inspection of Public Records Request

As of today, November 25th, I have not received any information regarding my October 31th request for information relating to the US postal mailing addresses of JMEC customers. It has been well beyond the 15 days cited in NMSA 14-2-8(D). As I noted in my November 8th email below, I intend to pursue whatever method is legally acceptable to obtain the requested information.

In view of the above, on December 30, 2017, I plan to submit a formal IPRA complaint with the NM Attorney General (see attached) if I have not received the information.

While there may be some question regarding the applicability of the NMSA 14-2-1 to the operation of the JMEC, it appears there is suffice reasoning for JMEC to comply with my request. See attached NMSC ruling.

I am not being represented by an attorney in this request, so I have taken the liberty to copy the present and future???? attorney for JMEC.

This lack of response to a member's request is so sad. I await your response soon.

Dave Neal
(505) 455-2175

-----Original Message-----

From: Donna Montoya-Trujillo [<mailto:dtrujillo@jemezcoop.org>]
Sent: Tuesday, November 14, 2017 8:09 AM
To: Dave and Cris
Subject: RE: Inspection of Public Records Request

Hi, yes I am in receipt of your message. I requested legal counsel opinion in providing the requested information. I will let you know of the outcome. I hope to hear back no later than week end. Thank you. Donna

Donna Montoya-Trujillo
Jemez Mountains Electric Cooperative
P.O. Box 128 | Espanola, NM 87532
Toll Free (888) 755-2105
Direct: (505) 367-1155
E-mail: dtrujillo@jemezcoop.org

-----Original Message-----

From: Dave and Cris [<mailto:losneals@gmail.com>]
Sent: Wednesday, November 8, 2017 3:01 PM

To: Donna Montoya-Trujillo
Subject: RE: Inspection of Public Records Request

I realize you are very busy nonetheless, would it be possible for you to acknowledge receipt of this request.

Please keep in mind that in addition to IPRA, there are other methods I may use to acquire this information. Please see attached.

Dave Neal
(505) 455-2175
losneals@gmail.com

From: Dave and Cris [<mailto:losneals@gmail.com>]
Sent: Tuesday, October 31, 2017 2:44 PM
To: "Donna Montoya-Trujillo Acting General Manager JMEC"
Subject: Inspection of Public Records Request

The 1948 Articles of Incorporation (attached) that organized Jemez Mountains Electric Cooperative (JMEC) were filed under ". the laws of the State of New Mexico ." pursuant to the Laws of 1939, Chapter 47 known as the Rural Electric Cooperative Act that has been replaced by NMSA 1978 Chapter 62, Article 15. Accordingly, JMEC is a New Mexico quasi-governmental agency for the "primary purpose of supplying electric power and energy and promoting and extending the use of electricity in rural areas" to the general public.

Under NMSA 1978 Chapter 14, Article 2 (Inspection of Public Records) I, David A. Neal, 42 County Road 84B, Santa Fe, NM 87506, (505) 455-2175, hereby request JMEC provide in electronic form, preferably an MS Excel spreadsheet, the individual complete US postal mailing addresses used to deliver the monthly bills for all JMEC members sorted by district and within district, by ward.

Pursuant to NMSA 1978 Chapter 14, Article 2, Section 10, please provide a status of this request within fifteen days of receipt of this email.

Respectfully,



Phone:
Española 505-753-2105
Cuba 575-289-3241
Jemez Springs 575-829-3550

Your Touchstone Energy® Cooperative 
The power of America's communities®

Electric Cooperative, Inc.
P.O. Box 128, Espanola, New Mexico, 87532

December 4, 2017

RE: Jemez Mountains Electric Cooperative, Inc.; Request for Member Addresses

Dear Mr. Neal:

This is in response to your request for information and your subsequent email of November 25, 2017.

The Inspection of Public Records Act (IPRA) is inapplicable to Jemez Mountains Electric Cooperative (JMEC). JMEC is not a governmental agency nor is it a quasi-governmental agency as you assert. Therefore, IPRA and its deadlines are inapplicable to your request.

Please be aware that JMEC Board Policy addresses member's access to JMEC's financial and management information and provides a form for members to complete when requesting information from JMEC. The form also requires that the requesting party designate the purpose of the request and the intended use of the information. Although you did not submit the required form, we are not requiring you do so in this instance since the information you have requested is considered protected and may not be disclosed pursuant to JMEC Board Policy No. 136. The policy provides that "[t]he names [and] addresses ... of the Cooperative's members" is "considered protected and may not be disclosed." Therefore, JMEC declines your request for member names and US postal mailing addresses for all JMEC members.

Sincerely,

Donna Montoya-Trujillo
JMEC Interim General Manager



Salazar, Patricia <psalazar@nmag.gov>

FW: Inspection of Public Records Request 0 Jemez Mountains Electric Cooperative

Dave and Cris <losneals@gmail.com>

Tue, Dec 5, 2017 at 10:21 AM

To: psalazar@nmag.gov

FYI.

Dave Neal

-----Original Message-----

From: Dave and Cris [mailto:losneals@gmail.com]

Sent: Saturday, November 25, 2017 3:07 PM

To: 'Donna Montoya-Trujillo'

Cc: Bruce Duran Trustee; 'Nick Naranjo'; Nancy Long

(nancy@longpoundkomer.com); Charles V. Garcia (cgarcia@cuddymccarthy.com)

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Dave Neal

[\(505\) 455-2175](tel:5054552175)

[Quoted text hidden]

2 attachments **IPRAComplaintForm.pdf**
41K **NMSCrulingInspectionOf ElectricCoopRecords.pdf**
50K



Salazar, Patricia <psalazar@nmag.gov>

FW: Inspection of Public Records Request 0 Jemez Mountains Electric Cooperative

Dave and Cris <losneals@gmail.com>

Tue, Dec 5, 2017 at 10:20 AM

To: psalazar@nmag.gov

Response from the Interim General Manager.

Dave Neal

-----Original Message-----

From: Donna Montoya-Trujillo [mailto:dtrujillo@jemezcoop.org]

Sent: Tuesday, November 14, 2017 8:09 AM

To: Dave and Cris

Subject: RE: Inspection of Public Records Request

Hi, yes I am in receipt of your message. I requested legal counsel opinion in providing the requested information. I will let you know of the outcome. I hope to hear back no later than week end. Thank you. Donna

Donna Montoya-Trujillo
Jemez Mountains Electric Cooperative
P.O. Box 128 | Espanola, NM 87532
Toll Free (888) 755-2105
Direct: (505) 367-1155
E-mail: dtrujillo@jemezcoop.org

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From: Dave and Cris [mailto:losneals@gmail.com]

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To: Donna Montoya-Trujillo

Subject: RE: Inspection of Public Records Request

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losneals@gmail.com

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Sent: Tuesday, October 31, 2017 2:44 PM

To: "Donna Montoya-Trujillo Acting General Manager JMEC"

Subject: Inspection of Public Records Request

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12/5/2017

The Office of New Mexico Attorney General Mail - FW: Inspection of Public Records Request 0 Jemez Mountains Electric Cooperative

and extending the use of electricity in rural areas" to the general public.

Under NMSA 1978 Chapter 14, Article 2 (Inspection of Public Records) I, David A. Neal, 42 County Road 84B, Santa Fe, NM 87506, (505) 455-2175, hereby request JMEC provide in electronic form, preferably an MS Excel spreadsheet, the individual complete US postal mailing addresses used to deliver the monthly bills for all JMEC members sorted by district and within district, by ward.

Pursuant to NMSA 1978 Chapter 14, Article 2, Section 10, please provide a status of this request within fifteen days of receipt of this email.

Respectfully,

SCHEIN V. NORTHERN RIO ARRIBA ELEC. COOP., 1997-NMSC-011, 122 N.M. 800, 932 P.2d 490

MAUREEN SCHEIN, Plaintiff-Appellee,

vs.

**NORTHERN RIO ARRIBA ELECTRIC COOPERATIVE, INC., a New
Mexico non-profit corporation, and EMERY MAEZ,
Defendants-Appellants.**

Docket No. 23,333

SUPREME COURT OF NEW MEXICO
1997-NMSC-011, 122 N.M. 800, 932 P.2d 490

January 16, 1997, Filed

APPEAL FROM THE DISTRICT COURT OF RIO ARRIBA COUNTY. Steve Herrera, District Judge.

Released for Publication February 3, 1997. As Corrected April 18, 1997.

COUNSEL

Carpenter, Comeau, Maldegen, Nixon & Templeman, Richard N. Carpenter, Esq., Michael R. Comeau, Esq., Santa Fe, NM, for Appellants.

Peter J. Holzem, Esq., Chama, NM.

Rodey, Dickason, Sloan, Akin & Robb, P.A. William S. Dixon, Charles K. Purcell, Albuquerque, NM, for Appellee.

JUDGES

JOSEPH F. BACA, Justice. WE CONCUR: GENE E. FRANCHINI, Chief Justice, RICHARD E. RANSOM, Justice

AUTHOR: JOSEPH F. BACA

OPINION

*{*801}* OPINION

BACA, Justice.

{1} Pursuant to Rule 12-102 NMRA 1996, Defendant-Appellant Northern Rio Arriba Electric Cooperative ("NORA"), seeks review of a decision from the First Judicial District Court. At trial, the district court decided in favor of Plaintiff-Appellee, Maureen Schein, granting her mandamus action and requiring that NORA allow Schein access to its legal billing records as a member of NORA. We review two issues on appeal: 1) whether the trial court erred in permitting access to the records, and 2) whether the resulting writ exceeded the permissible scope of mandamus. As to the first issue, we affirm the trial court's decision, holding that the trial court did not err in allowing Schein access to the records. However, regarding the second issue, we reverse the trial court's decision, finding that the writ issued by the court exceeded the permissible scope of mandamus.

{*802} I.

{2} NORA is a non-profit corporation organized under the Rural Electric Cooperative Act, NMSA 1978, § 62-15-1 (Repl. Pamp. 1993). It provides electricity and electric utility service to the public in northern Rio Arriba County and has its principal place of business in Chama, New Mexico. Appellant Emery Maez, is the general manager of NORA.

{3} Schein resides within Rio Arriba County, New Mexico, and within the territorial limits of the area served by NORA. Schein is a member in good standing with NORA and purchases her power from NORA. Schein is also employed by the Rio Grande Sun newspaper, a news periodical published in Espanola, New Mexico, which reports on and serves northern New Mexico. For several years Schein has attended NORA Board meetings. During this time, she has requested and received business information on NORA such as copies of contracts, annual budgets, financial statements, audit reports, vendor invoices, bank statements, reconciliations, check registers, board minutes, expense account information, and management salary data. Some of this information has been used in stories for the **Rio Grande Sun**.

{4} Prior to the current claim, NORA and Schein had disagreed over Schein's access to some of NORA's corporate information. In 1992, Schein brought a mandamus action against NORA seeking access to seven years of financial information which NORA had declined to make available. Schein dismissed the suit when NORA surrendered the documents voluntarily. Subsequently, in 1994, Schein requested copies of NORA's 1994 budget materials. Copies were forthcoming; however, NORA did not include one page of the report in the materials offered. Eventually, Schein obtained the excluded page after her counsel sent a demand letter to NORA's attorney.

{5} Also in 1994, Schein sought disclosure of the salary amounts of all NORA employees. NORA refused to reveal the compensation paid to anyone other than the cooperative's management positions. Schein then brought her second mandamus action seeking this payment information and also requesting present and future access to budgetary records. Testimony from the trial indicated that Schein's litigation costs were being covered by the **Rio Grande Sun** and that the information sought might be published in the **Sun** if it were deemed newsworthy. The trial court dismissed the mandamus action, reasoning primarily that the salary information, if disseminated, might infringe on the privacy interests of employees of NORA. Nonetheless, the trial court indicated that materials such as financial records, books, and reports should be accessible to Schein.

{6} The conflict which eventually led to the current mandamus claim began on February 20, 1995. In a letter sent to Maez, Schein requested copies of certain bills submitted to NORA by the two law firms that had defended NORA in the two prior mandamus proceedings. NORA provided the requested attorney fee bills to Schein in redacted form. The bills disclosed the total amount of fees charged to NORA, but narrative portions of the bills which detailed the services performed and time spent were omitted. When it became apparent that NORA would not release

any more information from the bills, Schein filed the current mandamus action against NORA.

{7} At a hearing in October of 1995, the trial court examined the redacted information on the bills in camera. At the conclusion of the hearing, the court announced that it would grant the writ and compel disclosure of the withheld portions of the billing statements. It found that the sections were not protected by privilege. The trial court also adopted the proposed form of the writ which granted Schein access to all NORA books and records in the future upon reasonable request for inspection. Furthermore, the court retained jurisdiction in the event that NORA, in good faith, believes that any item requested in the future should not be disclosed.

{8} On appeal, we address two primary issues: 1) whether the trial court erred in permitting Schein access to the specifics of NORA's legal billing statements, and 2) whether the trial court's declaration of continuing jurisdiction over future disputes between {803} the parties exceeded the permissible scope of mandamus. We uphold the trial court's decision permitting access to the redacted portions of NORA's legal bills. However, we reverse the trial court's decision regarding the issued writ, finding it exceeded the permissible scope of mandamus.

II.

{9} We find that the trial court correctly granted Schein access to the narrative portions of NORA's legal billing statements because Schein had a proper purpose in requesting the information and the narrative portions sought were not protected by the attorney-client privilege.

A.

{10} Schein was not motivated by an improper purpose in requesting the data from NORA's legal billing records. This Court supports a policy which grants generous access to corporate information by shareholders/members. **Schwartzman v. Schwartzman Packing Co.**, 99 N.M. 436, 439, 659 P.2d 888, 891 (1983) (holding that shareholders possess the right, at reasonable times and places, to inspect corporation's books and records for proper purposes). Such a policy recognizes the possessory or membership interests held by these individuals in the corporate entity. 5A William M. Fletcher et al., **Fletcher Cyclopedia of the Law of Corporations** § 2213, at 336 (perm. rev. ed. 1995); see also **William Coale Dev. Co. v. Kennedy**, 121 Ohio St. 582, 586, 170 N.E. 434, 435 (Ohio 1930) (permitting shareholder access to corporate records and recognizing the shareholder's proprietary interest in the corporation). It also affirms the shareholder's/member's right to know how his agents, the corporation's decision-makers, are conducting the affairs of the organization. **Shaw v. Agri-Mark**, 663 A.2d 464, 467 (Del. 1995).

{11} Consistent with this policy of allowing generous access, the majority common-law rule, and the rule adopted by this Court, places the burden on the corporation to show improper purpose in denying shareholder access to corporate data. Fletcher, **supra**, § 2253.10, at 535; **Kalanges v. Champlain Valley Exposition, Inc.**, 160 Vt. 644, 632 A.2d 357, 359 (Vt. 1993); **Curkendall v. United Fed'n of Correction Officers, Inc.**, 107 A.D.2d 935, 483 N.Y.S.2d 872, 873-74 (App. Div. 1985) (finding that nonprofit corporation resisting attempts by shareholder to

inspect books has burden to show bad faith and improper purpose on part of party seeking inspection). Placement of the burden of proof in this manner requires that a corporation demonstrate strong and articulable reasons for denying a shareholder/member access to information regarding his § 2213, at 336; **see also Kennedy**, 170 N.E. at 435.

{12} In New Mexico, shareholders have the right to inspect, at reasonable times and places, a corporation's books and records for proper purposes. NMSA 1978, § 53-11-50 (Repl. Pamph. 1993); **Schwartzman Packing Co.**, 99 N.M. at 439, 659 P.2d at 891. This right generally extends to members of nonstock, nonprofit corporations. **See Fleisher Dev. Corp. v. Home Owners Warranty Corp.**, 272 U.S. App. D.C. 367, 856 F.2d 1529, 1530 (D.C. Cir. 1988) (finding that where member of non-stock, for-profit mutual corporation had proper purpose for inspection, he should receive access to corporation's books); **Bill Reno, Inc. v. Rocky Mountain Ford Dealers' Adver. Ass'n**, 151 Colo. 406, 378 P.2d 206, 207 (Colo. 1963) (stating that member of nonprofit corporation is entitled to information regarding corporation's business activities and has right to inspect corporate books); **State v. St. Cloud Milk Producers' Ass'n**, 200 Minn. 1, 273 N.W. 603, 605-06 (Minn. 1937) (upholding corporate records access rights for member of cooperative); **cf. Shaw v. Agri-Mark, Inc.**, 67 F.3d 18, 19 (2d Cir. 1995) (per curiam).

{13} The determination of what constitutes improper purpose in requesting corporate information is an issue of first impression in New Mexico. Accordingly, we look to other jurisdictions which have made judicial determinations of the propriety of shareholder purpose. Furthermore, we look to jurisdictions where decisions of corporate law policy are consistent with a policy of open access for legitimate shareholder concerns. Shareholder access to corporate information {804} should be limited to information reasonably related to the legitimate interests of the shareholder. **See, e.g., Davey v. Unitil Corp.**, 133 N.H. 833, 585 A.2d 858 (N.H. 1991); **Shaw v. Hurst**, 135 Pa. Commw. 635, 582 A.2d 87, 89 (Pa. Commw. Ct. 1990); **Advance Concrete Form v. Accuform, Inc.**, 158 Wis. 2d 334, 462 N.W.2d 271, 275 (Wis. Ct. App. 1990) (finding shareholder's request for information about corporation's investments reasonably germane to status as shareholder). A proper purpose is not harmful to the corporation or its shareholders. **Davey**, 585 A.2d at 860. A proper purpose can be surmised where the shareholder's purpose in requesting the information bears some reasonable relationship to the interest that the shareholder wants to protect by seeking inspection. **Shaw**, 663 A.2d at 467. Generally, shareholders are entitled to full information as to the management of the corporation and the manner of expenditure of its funds, and to inspection in order to obtain information. Fletcher, **supra**, § 2223, at 393. A proper purpose can include a desire to place a monetary value on stock interests and to evaluate the conduct of officers and directors. **See, e.g., Tatko v. Tatko Bros. Slate Co.**, 173 A.D.2d 917, 569 N.Y.S.2d 783, 784 (App. Div. 1991) (holding that shareholder seeking to sell his stock had proper purpose in requesting access to corporate records); **Uldrich v. Datasport, Inc.**, 349 N.W.2d 286, 288 (Minn. Ct. App. 1984) (allowing shareholder access to corporate records based upon shareholder's good faith concern of potential corporate officer misconduct). Suitable subject matter for proper shareholder oversight also

extends to efforts by the shareholder to determine the value of his stock and to determine the financial condition of the corporation. **Carter v. Wilson Constr. Co.**, 83 N.C. App. 61, 348 S.E.2d 830, 832 (N.C. Ct. App. 1986). Reasonable purpose can also include inspection of corporate records to ensure that a nonprofit is managed properly. **Sto-Rox Focus on Renewal Neighborhood Corp. v. King**, 40 Pa. Commw. 640, 398 A.2d 241, 243 (Pa. Commw. Ct. 1979). The propriety of such access is premised primarily on the rationale that a stockholder has the right to know corporate information that might affect his losses or gains, affecting the shareholder's ability to protect himself. **State ex rel. Kennedy v. Continental Boiler Works, Inc.**, 807 S.W.2d 164, 166 (Mo. Ct. App. 1991). In addition, such access allows for discovery and deterrence of abuses by corporate directors and officers. **Guthrie v. Harkness**, 199 U.S. 148, 154-55, 50 L. Ed. 130, 26 S. Ct. 4 (1905).

{14} In beginning the analysis of this case, we reject NORA's contention that Schein needed to possess some basis for suspecting illegal or improper behavior on the part of NORA to warrant the request for information. Such a proposition would thwart efforts of oversight by shareholders, making abuses of corporate power more likely. Moreover, it would deny owners their proprietary right of monitoring and safeguarding their interests.

{15} Schein offered a motive for her desire to obtain access to NORA's legal billing statements that was reasonably related to her role as a member of NORA. Schein argued, and the trial court recognized, three primary purposes for seeking access to the narrative portions of NORA's legal bills: 1) to inform herself of the contents of the bills, 2) to inform other members of the cooperative of the contents, and 3) to notify the general public and members of NORA, through the **Rio Grande Sun**, about any information in the billing records which might be newsworthy. Schein asserted that her desire to obtain access to the legal records was premised on her desire to investigate the nature and quality of the legal advice given to the cooperative. In addition, Schein contended that she wanted the legal bills so that she might investigate whether NORA's decision-makers were spending resources on over-priced legal representation, information which might be relevant to NORA's capital accounts.

{16} Schein's motivation to investigate NORA's use of resources and the nature and quality of the legal advice given to it was reasonably related to her role as a member. Like any business choice, the selection of legal services and a determination of the value of services received are relevant inquiries to a party concerned about his investment in the entity; as an owner of a proprietary interest in NORA, Schein has a legal right to be informed as to the management of {*805} the cooperative property by the Board in charge of that property. Such information would indicate whether the legal and financial choices being made by NORA were sound; also, such decisions would directly impact the capital accounts of NORA. Shareholders generally are entitled to monitor the activities of their agents. **Meyer v. Board of Managers of Harbor House Condominium Ass'n**, 221 Ill. App. 3d 742, 583 N.E.2d 14, 18, 164 Ill. Dec. 460 (Ill. App. Ct. 1991) (allegation that entity was incurring excessive attorney fees established good faith fear that organization was mismanaging its financial matters, establishing a proper purpose to inspect corporate records); cf. **Belth v. American Risk & Ins. Ass'n**, 141 Wis. 2d 65, 413

N.W.2d 654 (Wis. Ct. App. 1987). We find that these grounds are premised upon concerns reasonably related to Schein's role as a member of NORA.

{17} As noted previously, in addition to demonstrating a reasonable relationship, the information sought cannot be used for purposes harmful to the corporation or its shareholders. **Davey**, 585 A.2d at 860. We do not believe that Schein's stated intention of sharing newsworthy information from the bills would be harmful to NORA in this instance. The most probative evidence of the absence of potential for harm stems from the district court's review of the redacted bills. The court found that the bills did not contain any improper or harmful information. Furthermore, we believe that the district court is in a better position to weigh fairly the competing needs and interests of parties affected by the disclosure of corporate documents. **Seattle Times v. Rhinehart**, 467 U.S. 20, 36, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984). For this reason, we are inclined to defer to the district court's ruling regarding the potential for damage to NORA in this instance.

{18} We are not willing to hold, as Schein urges, that a shareholder's secondary motives do not matter where that shareholder has demonstrated some proper purpose in requesting corporate information. Instead, this Court recognizes that even where a shareholder has demonstrated a reasonable relationship to his role as shareholder and the information requested, the acquisition of requested data can still be thwarted where the corporation can demonstrate the harmfulness of allowing access. In the present case, however, NORA has failed to demonstrate either that Schein's request was unreasonable or that the information posed potential harm to NORA if made public.

B.

{19} Finally, we reject NORA's contention that the redacted information contained in the legal bills is protected by the attorney-client privilege. Under Rule 11-503 (A)(4) NMRA 1996

a communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

Corporate documents that are subject to the attorney-client privilege may be withheld from shareholders. **Cf. Riser v. Genuine Parts Co.**, 150 Ga. App. 502, 258 S.E.2d 184, 186 (Ga. Ct. App. 1979) (affirming denial of request for attorney's opinions and sheets of data). However, the privilege does not preclude discovery of the instructions given to the attorney by the client, nor does the privilege bar discovery of the nature and scope of an attorney's authority. **Diversified Dev. & Inv., Inc. v. Heil**, 119 N.M. 290, 296, 889 P.2d 1212, 1218 (1995).

{20} Furthermore, we agree with Schein's contention that despite testimony by NORA officials that the billing information was "sensitive" and "intended to be confidential," the

information requested falls outside of the attorney-client privilege. Information about the purpose for which an attorney is retained or the steps an attorney took in fulfilling his obligations are not protected. **Colton v. United States**, 306 F.2d 633, 636 (2d Cir. 1962) (no privilege where date and general nature of legal services performed by attorney is sought); **In re LTV Sec. Litig.**, 89 F.R.D. 595, 603 (N.D. Tex. 1981). Inquiries into the general nature of legal services provided do not violate the attorney-client privilege because they involve no confidential information. **Westhemeco Ltd. v. [*806] New Hampshire Ins. Co.**, 82 F.R.D. 702, 707 (S.D.N.Y. 1979); **see also Cohen v. Uniroyal, Inc.**, 80 F.R.D. 480, 483 (E.D. Pa. 1978) (finding that privilege does not attach where documents reveal only dates that services were rendered, time allotted, and nature of work performed). Appellant contends that under the statute, testimony by NORA officials that the redacted information was considered sensitive warrants granting it privileged status. However, this interpretation goes against the weight of case law which does not protect all types of ministerial information associated with legal communication, such as the information requested here. Furthermore, the trial court examined the redacted information in camera and found no indicia of confidentiality. Finally, if this Court allowed the information here to be shielded by the privilege merely because NORA officials stated that it was sensitive, it would allow organizations to protect any type of data from outside access by making a bald assertion of its intended private nature. We believe that some further showing of the data's confidentiality is necessary. NORA failed to convince the trial court of the sensitive nature of the information, and we are inclined to agree with their assessment. For these reasons, we hold that the requested information was not sought for an improper purpose, nor was it protected by the attorney-client privilege.

III.

{21} The second issue on appeal involves whether the writ issued by the trial court exceeded the permissible scope of mandamus. The writ grants Schein and other NORA members access to NORA documents in the future on a "prompt and reasonable basis" following a reasonable request. NORA contends that mandamus is not an appropriate remedy for compelling performance of a future duty. Additionally, NORA argues that the writ is ambiguously phrased and puts the cooperative at an unreasonable risk of receiving a contempt citation whenever it seeks to withhold production of requested information on the basis of privilege or other confidentiality considerations. We agree. Therefore, we reverse the trial court's decision and limit the scope of the writ of mandamus to the information in the immediate dispute only.

{22} Other jurisdictions have conclusively held that mandamus is unsuited to compel the performance of a future duty. **See, e.g., Barnhart v. Bertron**, 356 S.W.2d 390 (Tex. Civ. App. 1962); **see also Cleveland v. County of Jack**, 802 S.W.2d 906, 908 (Tex. App. 1991) (procedural difficulties in having to appear before court with respect to alleged successive failures to perform does not justify continuing writ of mandamus). Where a duty to perform is not yet due, it cannot be subject to a writ. **Id.** Relevant rights and duties must be established before a writ of mandamus can issue. **Board of Educ. of Sch. Districts, Etc. v. Cronin**, 54 Ill. App. 3d 584, 370 N.E.2d 19, 21, 12 Ill. Dec. 396 (Ill. App. Ct. 1977).

{23} In accordance with these principles, we find that the writ issued by the district court exceeded the permissible scope of mandamus, and therefore, we limit the reach of the writ in this instance to the information requested from NORA's legal billing records. In the writ's present form, NORA's duty to produce information to Schein arises when she makes a "reasonable request." As such, the writ has potential application to documents that are not in existence at this time, and this could involve information about parties that are not even NORA members at the present. Such a situation necessarily would involve rights and duties that have not yet been established. They are not part of the permissible scope of mandamus but were included in this particular writ.

{24} Schein cites **State ex rel. Newsome v. Alarid**, 90 N.M. 790, 798-99, 568 P.2d 1236, 1244-45 (1977), for the contention that mandamus under New Mexico law affords a broader remedy than is permitted in other jurisdictions. Appellee uses the case to suggest that mandamus is appropriate for compelling performance of a future duty. Appellee's reliance is incorrect. **Alarid** involved a student newspaper reporter at a university who sought an alternative writ of mandamus permitting him access to the university's nonacademic staff personnel records. **Id.** at 792, {*807} 568 P.2d at 1238. The trial court quashed the writ because it was overly broad in the information sought, seeking access to all personnel records with no recognition of statutory exemptions. **Id.** This Court held on review that the trial court should not have denied the petitioner all access to the records but only to confidential files. **Id.** at 799, 568 P.2d at 1245. Thus, the mandamus action was permitted but it was limited in scope. We do not agree with Schein that **Alarid** suggests that mandamus is appropriate for compelling performance of future duties. On the contrary, **Alarid** suggests that mandamus should be narrowly tailored.

{25} Schein also urges this Court to allow for prospective access to NORA information for the sake of judicial efficiency and because of NORA's alleged history of denying access to information sought by Schein. However, we do not find arguments of judicial economy or of NORA's alleged intransigence compelling in this instance. Nor do we believe that either of these arguments, without more, should overshadow the significant body of case law limiting mandamus to actions compelling present duties. Therefore, we find that the writ issued exceeded the permissible scope of mandamus, and we limit the writ to the information requested by Schein involving the legal billing records requested in this instance.

IV.

{26} In conclusion, we hold that access to NORA's legal billing statements was properly granted. However, we also find that the district court's writ exceeded the permissible scope of mandamus. We therefore limit the scope of the writ to allow for access by the Appellee to only the information contained in the redacted portions of the legal bills in question. **{27 IT IS SO ORDERED.**

JOSEPH F. BACA, Justice

WE CONCUR:

GENE E. FRANCHINI, Chief Justice

RICHARD E. RANSOM, Justice

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