

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

NEW MEXICO FOUNDATION FOR OPEN
GOVERNMENT, SANTA FE NEW MEXICAN,
and ALBUQUERQUE JOURNAL,

Petitioners,

v.

No. D-101-CV-2016-01742
Case assigned to Ortiz, Raymond Z.

CORIZON HEALTH,

Respondent.

VERIFIED PETITION FOR ALTERNATIVE WRIT OF MANDAMUS

Petitioners New Mexico Foundation for Open Government, the Santa Fe New Mexican, and the Albuquerque Journal (collectively "Petitioners") file this Verified Petition for Alternative Writ of Mandamus pursuant to 1978 NMSA, § 14-2-12 (the enforcement provision of the Inspection of Public Records Act) and §§ 44-2-1, et seq. (Mandamus statutes). Petitioners allege that Respondent has failed to comply with the New Mexico Inspection of Public Records Act ("IPRA") by refusing to produce or allow inspection of public records that each Petitioner had requested from Respondent.

PARTIES

1. Petitioner New Mexico Foundation for Open Government ("NMFOG") is an educational and charitable organization dedicated to assisting New Mexico citizens with understanding, exercising and preserving their rights under the federal and New Mexico Constitutions, the NM Inspection of Public Records Act, the NM Open Meetings Act, and other New Mexico open government laws. NMFOG has an office in Albuquerque and

members throughout New Mexico.

2. Petitioner Santa Fe New Mexican (“SFNM”) is a newspaper of general circulation published in Santa Fe, New Mexico.

3. Petitioner Albuquerque Journal (“ABQ Journal”) is a newspaper of general circulation published in Albuquerque, New Mexico.

4. Respondent Corizon Health (“Corizon”) is a Tennessee-based corporation doing business in New Mexico. Corizon was contracted to provide medical care services in prisons and other public correctional facilities in New Mexico during the relevant time period.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this case pursuant to 1978 NMSA, § 14-2-12 and §§ 44-2-1 to -14.

6. Venue lies in the District Court for Santa Fe County pursuant to 1978 NMSA, §§ 38-3-1.

STATEMENT OF THE CASE

7. At all times relevant to this Petition up until May 31, 2016, the State of New Mexico Department of Corrections (“DoC”) contracted with Corizon to provide onsite medical services for prisoners incarcerated in the following New Mexico correctional facilities: Penitentiary of NM, Western NM Correctional Facility, Central NM Correctional Facility, Souther NM Correctional Facility, Roswell Correctional Facility, Springer Correctional Facility, NM Women’s Correctional Facility, Lea County Correctional Facility, Northeast NM Correctional Facility, and Guadalupe County Correctional Facility.

8. The State of New Mexico’s contract with Corizon provided that Corizon would be paid \$37,500,000 per year for its services.

9. During the course of providing medical services to New Mexico prisoners, Corizon and the DOC were sued many times as a result of the alleged inadequacy of medical services provided by Corizon to New Mexico prisoners.

10. Corizon settled many of these lawsuits before the courts had adjudicated the plaintiffs' claims.

11. The lawsuits that are the basis for the settlements are public records. The settlements of these lawsuits are public records.

12. The lawsuits that are the basis for the settlements at issue here were filed by prisoners or former-prisoners, many of whom used pseudonyms such as John Doe or a person's initials. Petitioners do not object to the redaction from the requested settlements of the real names of anyone who filed their lawsuit using a pseudonym.

13. On May 6, 2016 NMFOG filed a written IPRA request with the DOC, requesting to inspect and copy: "Any and all settlement documents involving Corizon Health Inc. in its role as a contractor for the New Mexico Corrections Department whether or not the State of New Mexico is a party to the settlement." On May 20, 2016, the DOC responded to this IPRA request in relevant part as follows:

The Corrections Department has no documents responsive to your request. ... [T]he State is not involved in the settlement negotiation or settlement process because it is solely Corizon's alleged actions or inactions which are at issue in the lawsuit. Corizon alone pays all settlement amounts, pays its own attorneys to settle or try the case, and pays the inmate's attorney fees and any judgments or verdicts entered in these cases. Therefore, Corizon is the custodian of any such settlements, not the State and not the Corrections Department. Pursuant to Section 14-2-8 NMSA, I am copying Corizon attorney Maya Patel with this response and your request for her review and response.

See Exhibit 1, attached hereto.

14. On June 1, 2016 NMFOG filed a written IPRA request with Corizon, requesting to inspect and copy: "Any and all settlement documents involving Corizon Health Inc. in its

role as a contractor for the New Mexico Corrections Department whether or not the State of New Mexico is a party to the settlement.” On June 14, 2016 Corizon asked for more time to produce the requested documents. In its request for additional time Corizon’s attorney stated, in relevant part:

Per my telephone message my client is in the process of identifying documents that may be subject to your request and preparing the applicable disclosures. That being said, we do not believe we will have these documents available by the deadline of June 16, 2016 and would therefore ask for a two week extension. If this is acceptable to you please let us know.

In addition, we believe that some of the information you have requested is protected and therefore some of the documents you receive may be readacted [sic].

NMFOG agreed to Corizon’s request for additional time to produce the settlement agreements. See Exhibit 2, attached hereto.

15. On June 3, 2016 the SFNM filed a written IPRA request with the DoC, requesting to inspect and copy: “any and all legal settlements involving Corizon Health Inc.’s [sic] in its role as a contractor for the New Mexico Corrections Department.” On June 5, 2016, DoC responded to this IPRA request: “NMCD does not have the records you have requested, and is not the records custodian for those records. Corizon is the records custodian for its settlement documents. This is because Corizon is responsible for defending itself in any lawsuits filed and for any settlements of those lawsuits.” The DoC then provided a contact person and address for Corizon and concluded with this response:

I am also forwarding a copy of your request and this response to Corizon for its review and response. The Department has now fully responded to your request and is closing this matter.

See Exhibit 3.

16. On June 9, 2016 the SFNM filed a written IPRA request with Corizon, requesting to inspect and copy:

all settlements of lawsuits filed by New Mexico inmates against Corizon between 2007 and May 31, 2016. Please note that the Department of Corrections referred to Corizon as the proper custodian for these records, and as a contractor with the department during the requested time periods, we believe Corizon should be properly bound by IPRA to supply the requested records.

On or about June 14, 2016 Corizon asked the SFNM for more time to produce the requested documents and SFNM agreed to the requested two-week extension.

See Exhibit 4 and Exhibit 2 (pp.2-3), attached hereto.

17. On June 2, 2016 the ABQ Journal filed a written IPRA request with the DOC, requesting to inspect and copy: "Any and all settlement documents involving Corizon Health Inc. in its role as a contractor for the New Mexico Corrections Department whether or not the State of New Mexico is a party to the settlement." (Note this letter is misdated May 6, 2016.) On June 13, 2016, the DOC denied this IPRA request and referred ABQ Journal to Corizon, as it had NMFOG (see paragraph 13, above). See Exhibit 5, attached hereto.

18. On June 2, 2016 ABQ Journal filed a written IPRA request with Corizon, requesting to inspect and copy: "Any and all settlement documents involving Corizon Health Inc. in its role as a contractor for the New Mexico Corrections Department whether or not the State of New Mexico is a party to the settlement." (Note this letter is misdated May 6, 2016.) On June 14, 2016 Corizon asked for more time to produce the requested documents. In its request for additional time Corizon's attorney stated, in relevant part:

Because of our need to identify responsive documents and potentially redact some information, we discussed a two week extension to respond to the request.

ABQ Journal agreed to the requested two-week extension. See Exhibit 6 and Exhibit 2 (pp.2-3), attached hereto.

19. On June 28, 2016, instead of producing for inspection and copying the

requested settlement agreements, Corizon sent an email to all three Petitioners and attached a table that listed the settlement amounts that it claimed were from each of the settlements and the prison involved. Corizon stated that:

This information is being provided to you as a partial response to your respective IPRA requests. In regard to the actual settlement agreements, given the number of agreements at issue, we are still pulling each agreement out of our archives and redacting the names and identifying information for these individuals.

Corizon asked for an additional two-week extension to redact the names from the settlement agreements. Corizon also stated: "if you are going to object to the redaction of the names of the parties involved please let us know because that may require court intervention and would certainly require additional time to allow us to notify all opposing counsel of the impending disclosure of material previously designated as confidential...." Corizon ended its email to Petitioners: "Nevertheless, if you will all agree to provide us with an additional two weeks to complete the collection and redaction process we will be able to provide you with the settlement agreements with the names of the plaintiff's [sic] redacted." See Exhibit 7, attached hereto.

20. On June 30, 2016 Petitioners agreed to Corizon's request for an additional two-week extension of time to produce the settlement agreements with only the names of the plaintiffs redacted. See Exhibit 8, attached hereto.

21. On June 30, 2016 Corizon sent each Petitioner a letter reversing its position and refusing to produce any of the requested settlement agreements, stating: "it is Corizon's position that IPRA does not compel production of this information. Further, the confidentiality agreements executed by the parties prohibits [sic] disclosure of the requested information." See Exhibit 9, attached hereto.

22. Corizon has a non-discretionary duty under IPRA to produce the documents

requested by Petitioners. Petitioners seek mandamus because they have no plain, speedy or adequate remedy in the ordinary course of law.

ARGUMENT IN SUPPORT OF ISSUANCE OF WRIT

The law is clear that, although Corizon is a corporation, because it was providing all the medical services for New Mexico state prisoners at 10 facilities in New Mexico under contract with the state of New Mexico, for purposes of IPRA it stands in the shoes of the New Mexico DoC. In providing these medical services, Corizon was performing a public function and documents created in that capacity are public documents. In this capacity, Corizon is subject to with the disclosure requirements of IPRA and has no greater right to withhold records than the DoC would have under IPRA. This principle of law was set forth in *State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104 (holding that a private contractor performing a public function was acting “on behalf of” a public body and was therefore subject to all the requirements of IPRA).

IPRA defines “public records” as:

all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by *or on behalf of* any public body and relate to public business, whether or not the records are required by law to be created or maintained.

Section 14–2–6(F) (emphasis added). “IPRA's broad language defining public records is clear that, absent an express exemption from disclosure, public agencies must produce all records, even those held by or created by a private entity “on behalf of” the public agency.” *Twoomey*, at ¶ 10.

In *Twoomey*, the Court of Appeals adopted a “totality of factors” test to determine whether a private entity acting “on behalf of” a public body and is subject to IPRA’s

disclosure requirements. The relevant factors include: 1) the level of public funding; 2) the extent of commingling of funds; 3) whether the activity was conducted on publicly owned property; 4) whether the 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 whose benefit the private entity is functioning. *Id.*, ¶¶ 13 and 22. In applying these factors, the Court of Appeals stressed that:

no one factor is determinative, and all relevant factors need to be analyzed on a case-by-case basis. We emphasize, however, that IPRA should be construed broadly to effectuate its purposes, and courts should avoid narrow definitions that would defeat the intent of the Legislature.

Id., ¶ 22.

Here, Corizon is providing a critically important governmental function (prison medical services) on publicly owned property which the government would have to provide if it did not contract out this function. The contract with Corizon states that Corizon was paid a substantial amount of state funds – \$37,500,000 per year – by the DoC to provide these services. These medical services were an integral part of the State's operation of its prisons and the services provided by Corizon were solely for the benefit of the State of New Mexico and its prisoners. In light of these facts, Corizon had a non-discretionary duty to comply with the requirements of IPRA and records generated by a private entity in performing such a governmental function are public records. *Friedmann v. Corrections*, 2013 WL 784584 (Tenn. Ct. App.) (Settlement agreements entered into by private prison

operator, acting as functional equivalent of a governmental entity were public records). See also, *Memorial Hospital-West Volusia, Inc., v. News-Journal Corp.*, 729 So.2d 373 (Fla. 1999) (records generated by private non-profit in operating and maintaining hospital under lease agreement were public records); *B & S Utilities, Inc. v. Baskerville-Donovan, Inc.*, 988 So.2d 17 (Fla. 1st DCA 2008) (records generated by engineering company acting as City's representative in designing water distribution system improvements were public records subject to state's public records law.).

Since IPRA applies to Corizon, the next issue is whether settlement agreements of these lawsuits are public records. The settlements of lawsuits brought by prisoners based on their medical treatment while in a state prison are public records, *i.e.*, "documents ... that are used, created, received, maintained or held ... on behalf of any public body and relate to public business." 1978 NMSA, § 14-2-6(F). Indeed, based on the email correspondence with Corizon before it decided to withhold these records, Corizon's only concern was the production of the names contained in settlements of lawsuits brought by plaintiffs using pseudonyms to protect their privacy and that Corizon had agreed to include confidentiality provisions in these settlements. While Corizon cannot lawfully contract away the public's rights under IPRA through such confidentiality provisions, see discussion below, Petitioners do not object in this case to the redaction of the names of plaintiffs who sued using pseudonyms.

Corizon, nonetheless, continues to withhold these records and disavow its legal obligations under IPRA, because it contracted to keep these agreements confidential. That is, Corizon believes that the requirements of IPRA and the strong public policy of New Mexico are trumped by its voluntary agreement to keep the settlements confidential. This is not the law. "A public entity may not enter into enforceable promises of confidentiality

regarding public records.” *Tribune-Review Pub. Co. v. Westmoreland County Housing Authority*, 574 Pa. 661, 675 (2003) (collecting cases and holding further that “we believe that the confidentiality clause contained in this agreement is void as against public policy to the extent that it conflicts with the text and purpose of the Act.”). “With respect to public records statutes, the virtually unanimous weight of authority holds that an agreement of confidentiality cannot take precedence over a statute mandating disclosure.” *State of Hawai’i Organization of Police Officers v. Society of Professional Journalists*, 83 Hawai’i 378, 406 (1996) (holding that confidentiality provision in a collective bargaining agreement was unenforceable because it prevented the City from complying with the public records statute). See also, *Trombley v. Bellows Falls Union High School Dist. No. 27*, 160 Vt. 101, 107 (1993).

RELIEF SOUGHT

Petitioners request issuance of an Alternative Writ of Mandamus pursuant to 1978 NMSA, § 14-2-12 (the enforcement provision of IPRA) and §§ 44-2-1, *et seq.* (the Mandamus statutes) a proposed version of which is attached hereto, commanding, in the alternative:

1. That Respondent:
 - a. comply with its mandatory, non-discretionary duty to produce the requested settlement agreements,
 - b. pay Petitioners’ reasonable attorneys’ fees and costs for litigating this action, pursuant to 14-2-12 and NMSA 1978, § 44-2-1, and
 - c. return with certification that Respondent has done as commanded; and
2. That Petitioners be grant such other and further relief on behalf of Petitioners as


the Court deems proper;

or

3. That Respondent show cause as to why this writ should not be made permanent.

The date to file any responsive pleadings shall be 7 days after issuance of this writ, and the date for a hearing will be as soon as convenient for the Court after August 10, 2016.

Respectfully submitted,



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Attorneys for Petitioners

Verifications Attached hereto are paginated pp. 13, 14 and 15

VERIFICATION BY SUSAN BOE

STATE OF NEW MEXICO)
COUNTY OF SANTA FE)

I, Susan Boe, executive director of the New Mexico Foundation for Open Government, after being first duly sworn, depose and state that I have read the foregoing Verified Petition for Alternative Writ of Mandamus and that it is true and correct to the best of my knowledge, information and belief.

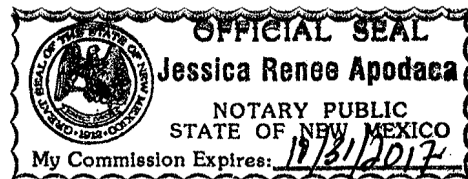
By *Susan Boe*
Susan Boe

The foregoing was subscribed, sworn to and acknowledged before me, a Notary Public, on this 18th day of July, 2016, by Susan Boe, on behalf of Petitioners.

Jessica Renee Apodaca
Notary Public

My License Expires:

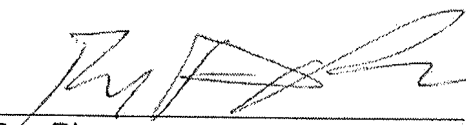
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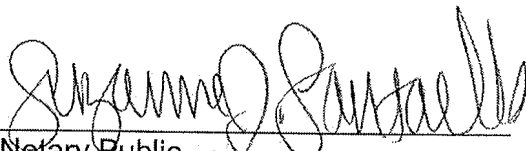
VERIFICATION BY RAY RIVERA

STATE OF NEW MEXICO)
COUNTY OF SANTA FE)

I, Ray Rivera, editor of the Santa Fe New Mexican, after being first duly sworn, depose and state that I have read the foregoing Verified Petition for Alternative Writ of Mandamus and that it is true and correct to the best of my knowledge, information and belief.

By 
Ray Rivera

The foregoing was subscribed, sworn to and acknowledged before me, a Notary Public, on this 18 day of July, 2016, by Ray Rivera, on behalf of Petitioners.


Notary Public

My License Expires:

Feb 9, 2020

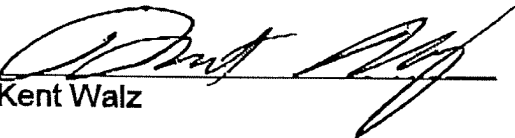


OFFICIAL SEAL
SUZANNE J. SANTAELLA
NOTARY PUBLIC - STATE OF NEW MEXICO
My Commission Expires: 2/9/20

VERIFICATION BY KENT WALZ

STATE OF NEW MEXICO)
COUNTY OF BERNALILLO)

I, Kent Walz, editor of the Albuquerque Journal, after being first duly sworn, depose and state that I have read the foregoing Verified Petition for Alternative Writ of Mandamus and that it is true and correct to the best of my knowledge, information and belief.

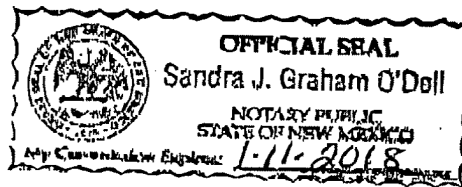
By 
Kent Walz

The foregoing was subscribed, sworn to and acknowledged before me, a Notary Public, on this 15th day of July, 2016, by Kent Walz, on behalf of Petitioners.


Notary Public

My License Expires:

1-11-2018



STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

NEW MEXICO FOUNDATION FOR OPEN
GOVERNMENT, SANTA FE NEW MEXICAN,
and ALBUQUERQUE JOURNAL,

Petitioners,

v.

No.

CORIZON HEALTH,

Respondent.

ALTERNATIVE WRIT OF MANDAMUS

To: Corizon Health
c/o Nicole Charlebois, Esq.
P.O. Box 92438
Albuquerque, NM 87199

YOU ARE HEREBY COMMANDED FORTHWITH EITHER TO:

- A.. Comply with your mandatory, non-discretionary duty to produce the settlement agreements requested by Petitioners and
- B. Pay Petitioners' reasonable attorneys' fees and costs for litigating this action, pursuant to NMSA 1978, §§ 14-2-12 and 44-2-1, et seq., and
- C.. return with certification that you have done as commanded.

This Court may also grant such other and further relief on behalf of Petitioners as the Court deems proper.

OR

Show cause as to why this writ should not be made permanent.

THE DATE TO FILE ANY RESPONSIVE PLEADINGS SHALL BE _____

(7 DAYS AFTER ISSUANCE OF THIS WRIT), AND THE DATE FOR A HEARING WILL

BE _____ (AFTER AUGUST 10, 2016).

A copy of Petitioners' Verified Petition for Alternative Writ of Mandamus is attached to this Writ which contain facts showing Respondent's obligation to do as commanded pursuant to NMSA 1978, §§ 14-2-12 and 44-2-1, et seq. and Rule 1-065 NMRA as Petitioners' "Exhibit A."

Approved:

First Judicial District Court Judge

Date: _____