

STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT COURT

SANTA FE COUNTY  
FILED IN THE CLERKS OFFICE  
OF DISTRICT COURT

9.13.13

Case No. D-0101-CV- 2013-02436

The STATE OF NEW MEXICO, ex rel. THE  
NEW MEXICO FOUNDATION FOR OPEN  
GOVERNMENT,

Petitioner,

v.

RICHARD RUSSELL, and  
JONNI LU POOL,

Respondents.

**PETITION FOR ALTERNATIVE WRIT OF MANDAMUS**

Pursuant to the Inspection of Public Records Act ("IPRA"), NMSA 1978, §§ 14-2-1 *et seq.*, Petitioner, the New Mexico Foundation for Open Government ("NMFOG") respectfully requests that the Court issue the Alternative Writ of Mandamus, attached hereto as Exhibit A, against Respondents Jonni Lu Pool, Public Records Custodian for the Human Services Department ("HSD") and Richard Russell, Public Records Custodian for the Attorney General's Office ("AGO"), compelling them to either produce for inspection the unredacted Behavioral Health Audit report ("Report") described herein or show cause why they should not, by producing information sufficient to justify their redactions.

## **JURISDICTION AND VENUE**

The Court has jurisdiction in this action pursuant to NMSA 1978, §§ 14-2-12 (1993) and 44-2-3 (1884). Because the Respondents are state officers with their offices located in Santa Fe, venue is appropriate in the First Judicial District pursuant to NMSA 1978, § 38-3-1(G) (1988).

## **PARTIES**

1. Petitioner NMFOG is a charitable, educational association founded to assist New Mexico citizens in understanding and exercising their rights under the federal and New Mexico Constitutions, IPRA, the New Mexico Open Meetings Act, and the federal Freedom of Information Act. NMFOG regularly assists citizens and media organizations in obtaining documents and information from government sources.
2. Respondent Jonnie Lu Pool is the Public Records Custodian for HSD.
3. Respondent Richard Russell is the Public Records Custodian for the AGO.

## **BACKGROUND**

4. On February 5, 2013, HSD entered into a contract with Public Consulting Group, Inc. ("PCG"). A copy of the contract is attached hereto as Exhibit B. The scope of work is defined as:

serv[e] as project manager in coordinating audits and analysis of the Medicaid managed care organization (MCO) network(s) of providers. This shall include, but is not limited to

- (1) preparing audit teams,
- (2) establishing standards for financial and IT/Policy audit;
- (3) leading audit teams;
- (4) coordinating audits with MCO and/or State staff;
- (5) leading interviews of provider staff and/or others, as appropriate; and
- (6) producing final audit reports.

Ex. B at 17.

5. PCG is not a law enforcement agency.

6. The scope of work does not include criminal investigation. *Id.* Nor does any other part of the contract.
7. The scope of work does not include the rendering of legal advice. *Id.* Nor does any other part of the contract.
8. The scope of work does not state that PCG's tasks are to be performed in anticipation of litigation. *Id.* Nor does any other part of the contract.
9. Pursuant to this contract, PCG performed an audit of New Mexico's behavioral providers and generated the Report, presumably detailing its findings.
10. The Report has not been released to the public, despite the fact that it is a document created on behalf of a public body, received, held and used by public bodies, and relating to public business.
11. As a result of the audit, HSD suspended Medicaid payments to 15 behavioral health providers in New Mexico. *See* Mem. From E. Apodaca to All MCO Program Integrity Directors, June 24, 2013 (attached hereto as Exhibit C).
12. On August 28, 2013, NMFOG sent a request to Respondent Russell, asking to inspect "the complete and final report of the audit of New Mexico's behavioral health providers that was performed earlier this year by Public Consulting Group, Inc., of Boston." The request is attached hereto as Exhibit D.
13. Respondent Russell responded the same day, providing Sections 1, 2, and 3 of the Report—18 pages, comprising the Executive Summary, the Background, and the "Audit Approach." None of the substance of the Report was produced. Mr. Russell stated: "Pursuant to NMSA 1978 § 14-2-1(B) we have redacted protected personal identifier information from each file. Under the attorney-client and work product

privilege pursuant to NMSA 1978, § 14-2-1 (A)(B) [sic], The Undersigned and Jody Curran Assistant Attorney General, are responsible for this limited denial.” Letter from Richard Russell to Terry Schleder (attached hereto as Exhibit E). While the scope and statutory justification for the limited denial are not entirely clear from the letter, it appears that Respondent Russell redacted the bulk of the Report pursuant to the attorney-client privilege and the work product doctrine.

14. Upon information and belief, the Report is approximately 400 pages long; Respondent Russell apparently withheld over 95% of the Report, disclosing only summary and preliminary material. Despite the keen public interest in this matter, Mr. Russell withheld nearly all of the report, denying the public the opportunity to examine the document and its conclusions.
15. On August 28, NMFOG sent an identical request to Respondent Pool (attached hereto as Exhibit F).
16. Respondent Pool also responded the same day, providing only Sections 2 and 3 of the Report. In the accompanying letter, Ms. Pool stated: “A large part of the document you have requested is not permitted to be disclosed under 14-2-1.A(4) NMSA 1978, which states in part, ‘. . . law enforcement records that reveal . . . information or individuals accused but not charged with a crime . . . records include evidence in any form received or compiled with any criminal investigation . . .’” Letter from Jonni Lu Pool to Terry Schleder (attached hereto as Exhibit G). Although Ms. Pool purported to produce “the portion of the PCG audit that the New Mexico Attorney General has authorized for release,” *id.*, she provided even less of the Report than did Respondent Russell.

17. Later on August 28, 2013, Respondent Pool distributed to NMFOG a copy of a letter to another requester, providing additional documents not requested by NMFOG and stating, "Information exempt from disclosure in yesterday's response was redacted with assistance from Nathan Adams, Assistant General Counsel." A copy of the letter is attached hereto as Exhibit H.

18. Upon information and belief, HSD has no independent objection to producing the audit. Up to this point, HSD has withheld the audit at the request of the Attorney General's Office.

### ARGUMENT

NMFOG brings this Petition under IPRA, which provides that a person whose written request has been denied may bring a mandamus action against the person denying the request. NMSA 1978, § 14-2-12. Respondents have wrongfully denied NMFOG its right to inspect the Report. Even if the exceptions asserted by Respondents are valid, Respondents have not provided sufficient information for NMFOG to ascertain the validity of the denial.

Consequently, NMFOG respectfully requests that this Court issue an Alternative Writ of Mandamus compelling Respondents to perform their ministerial duty and either produce the unredacted Report, or show cause why they should not, by producing information sufficient for the Court and NMFOG to be satisfied that the asserted exceptions apply.

#### **I. MANDAMUS IS APPROPRIATE TO COMPEL INSPECTION OF PUBLIC RECORDS.**

Mandamus is the appropriate vehicle for relief in this case. First, IPRA specifically provides that a person whose written request has been denied may bring an enforcement action under the statute, NMSA 1978, § 14-2-12(A)(2), and that the Court "may issue a writ of mandamus" to enforce IPRA, NMSA 1978, § 14-2-12(B). In addition, mandamus generally lies

“to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station.” NMSA 1978, § 44-2-4 (1884).

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By statute, the Court “has exclusive jurisdiction in all cases of mandamus, except where such writ is to be directed to a district court or a judge thereof in his official capacity . . . .” NMSA 1978, § 44-2-3.

Respondents, under IPRA, have a non-discretionary duty to permit inspection of public records. “Every person has a right to inspect public records of this state,” subject to limited exceptions. NMSA 1978, § 14-2-1(A) (2011). “Each public body shall designate at least one custodian of public records who shall” process IPRA requests by, *inter alia*, receiving and responding to requests and providing “proper and reasonable opportunities to inspect public records.” NMSA 1978, § 14-2-7 (2011). Crucially, “[a] custodian receiving a written request shall permit the inspection immediately or as soon as is practicable under the circumstances, but not later than fifteen days after receiving a written request.” NMSA 1978, § 14-2-8(C) (2009). Respondent Russell is the public records custodian for the AGO. Ex. E. Respondent Pool is the public records custodian for HSD. Ex. F.

NMFOG seeks an alternative writ because while Respondents may have valid grounds for withholding at least some of the Report from public inspection, they have not provided sufficient information to support those grounds. The proposed alternative writ commands Respondents either to produce the unredacted Report or else to show why their massive redactions are appropriate.

An alternative writ shall:

state concisely the facts showing the obligation of the defendant to perform the act, and his omission to perform it, and command him, that immediately after the receipt of the writ, or at some other specified time, he do the act required to be performed, or show cause before the court out of which the writ issued, at a

specified time and place, why he has not done so; and that he then and there return the writ with his certificate of having done as he is commanded.

NMSA 1978, § 44-2-6 (1884). By rule, the petition is annexed to the writ for the purpose of showing the facts. *See* Rule 1-065(E) NMRA (specifying that the writ shall be in lieu of summons and “shall direct the respondent or respondents to serve and file a responsive pleading within a time specified in the writ” and shall “further state in concise form the relief sought, but other matters set forth in the petition, copy of which is annexed to the writ, need not be included in the writ”).

Here, the facts set forth above, combined with IPRA, establish a ministerial duty subject to enforcement by mandamus. *See Perea v. Baca*, 1980-NMSC-079, ¶¶ 9-10, 94 N.M. 624, 614 P.2d 541 (ministerial duty subject to enforcement by mandamus). Because Respondents are the custodians, and because custodians have a ministerial duty to permit inspection of public records, mandamus lies against them to compel inspection of the Report. The alternative writ permits the Respondents to show cause why they should not produce the entire report, in which case they must produce for inspection a copy of the Report with such redactions as are proper under law. *See State ex rel. Newsome v. Alarid*, 1977-NMSC-076, ¶ 1, 90 N.M. 790, 568 P.2d 1236 (affirming in part and reversing in part quashing of alternative writ where statutory exceptions limited the records subject to inspection), *overruled on other grounds by Republican Party v. N.M. Taxation & Revenue Dep’t*, 2012-NMSC-026, 283 P.3d 853.

## II. THE STATE OF NEW MEXICO’S PUBLIC POLICY STRONGLY FAVORS DISCLOSURE OF DOCUMENTS.

IPRA provides that the public policy of New Mexico is one of maximum disclosure. *See* NMSA 1978, § 14-2-5 (1993) (“[I]t is declared to be the public policy of this state, that all persons are entitled to the greatest possible information regarding the affairs of government and

the official acts of public officers and employees.”). New Mexico courts have routinely recognized the importance of this policy. *See, e.g., Republican Party*, 2012-NMSC-026, ¶ 1

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(“Our democratic system of government necessarily ‘assumes the existence of an informed citizenry. . . . Without some protection for the acquisition of information about the operation of public institutions . . . the process of self-governance contemplated by the Framers would be stripped of its substance.’”) (quoting *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (Stevens, J., dissenting)); *Cox v. N.M. Dep’t of Pub. Safety*, 2010-NMCA-096, ¶ 6, 148 N.M. 934, 242 P.3d 501 (“Our courts have long recognized and acknowledged IPRA’s core purpose of providing ‘access to public information and thereby encourag[ing] accountability in public officials.’”) (quoting *Bd. of Comm’rs of Doña Ana Cnty. v. Las Cruces Sun-News*, 2003-NMCA-102, 134 N.M. 283, 76 P.3d 36). Consequently, there is a “strong presumption that the public has a right to inspect” the sought-after documents. *See Las Cruces Sun-News*, 2003-NMCA-103, ¶ 16.

### **III. RESPONDENTS HAVE NOT SHOWN THAT THE ATTORNEY-CLIENT PRIVILEGE APPLIES TO THE REPORT.**

The Court should reject the AGO’s naked assertion that the Report is protected from disclosure by the attorney-client privilege. First, the privilege protects communications, not facts. Second, Respondent Russell’s response does not contain information sufficient to support the assertion of the privilege. For these reasons, the Court should compel Mr. Russell to either produce the full Report or produce sufficient information to validate the AGO’s assertion that the Report is protected by the privilege.

On its face, the Report does not appear to be protected by attorney-client privilege, because it is not a communication with counsel for the purpose of obtaining legal advice. *See* Rule 11-503(B) NMRA. The Report was created by PCG under contract with HSD. The contract neither states nor implies that lawyers commissioned the work, or that the Report would

be communicated to HSD or its lawyers in confidence, or that PCG would conduct the audit or write the Report to facilitate the rendition of legal services. The mere fact that HSD ultimately provided the Report to the AGO does not render it privileged. *See Anaya v. CBS Broad., Inc.*, 251 F.R.D. 645, 650 (D.N.M. 2007) (“Information is not privileged simply because it comes from an attorney. Channeling work through a lawyer rather than having non-legal personnel perform it does not provide a basis for claiming attorney-client privilege.”) (quotations and citations omitted). Even if HSD provided the Report to the AGO for the purpose of seeking legal advice, that does not render the information contained in the Report privileged. The attorney-client privilege should “only be applied to protect communications—not facts.” *State ex rel. State Highway Comm’n v. Steinkraus*, 1966-NMSC-134, ¶ 4, 76 N.M. 617, 417 P.2d 431; *see, e.g., State ex rel. State Highway Comm’n v. Taira*, 1967-NMSC-180, ¶ 9, 78 N.M. 276, 430 P.2d 773 (“The surveys have for their purpose the ascertainment of facts which are in no sense privileged. . . . [W]e perceive no reason why the commission should object to the disclosure of the data obtained when the cost will be paid for with public funds.”). If the AGO is asserting the attorney-client privilege because HSD provided the Report to the AGO for the purpose of seeking legal advice, that may protect the communication, but it does not protect the Report itself.

Indeed, the AGO’s own correspondence demonstrates that no privilege applies. As the AGO has recognized, HSD ordered the audit in compliance with federal regulations that require it to “investigate when it receives information that billing irregularities are occurring in the context of any provider billing for medical services.” Letter from Albert J. Lama to Ray Mensack and Larry Hyeck at 1 (July 22, 2013) (attached hereto as Exhibit I); *see* 42 C.F.R. § 455.14. The purpose of any such investigation is to “determine[] whether or not the

information received rises to the level of a credible allegation of fraud as referenced in [42 C.F.R. §] 455.23.” Ex. I, at 1; *see* 42 C.F.R. § 455.15. Without any help from the AGO—before the matter had even been referred to the AGO—HSD used the audit report to conclude that the allegations of fraud were indeed credible. *See* Ex. I at 1. And it did so pursuant to federal regulations that neither compel nor prohibit the release of the Report. *See* 42 C.F.R. § 455.23(b)(2)(ii) (“The notice [of suspension of Medicaid payments] must . . . [s]et forth the general allegations as to the nature of the suspension action, but need not disclose any specific information concerning an ongoing investigation.”). “This limited interaction with counsel at the beginning and end of an otherwise attorney-free [audit] is an insufficient basis to support application of the attorney-client privilege.” *United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121, 132 (D.D.C. 2012); *see also id.* (“[T]he respondent had a clear business motivation to conduct the internal investigation and prepare the Audit Report: it had a contractual obligation to return any overpayments to the Government. . . . Th[is] fact . . . further militates in favor of concluding that the privilege does not apply . . . .” (internal quotation marks omitted)).

Second, Respondent Russell’s letter does not provide any information to show that the Report is privileged. “[A] communication protected by the attorney-client privilege must have been made in confidence between privileged persons.” *Santa Fe Pac. Gold Corp. v. United Nuclear Corp.*, 2007-NMCA-133, ¶ 22, 143 N.M. 215, 175 P.3d 309. The AGO’s denial simply asserts the privilege, providing no basis at all for NMFOG to evaluate the validity of the assertion.

We do not know who the parties to the communication were, and thus whether it qualifies for privileged treatment. Requiring a requester of public records first merely accept a claim of

privilege as valid, without the records custodian affirmatively justifying withholding a particular record, runs counter to the strong public policy favoring disclosure. Further, the privilege belongs to the client. *See, e.g., Santa Fe Pac. Gold Corp.*, 2007-NMCA-133, ¶ 13 (“A client may claim attorney-client privilege to refuse to disclose confidential communications . . . .”) (emphasis added). In this case, a privilege could only belong to HSD—but HSD has never claimed it. Only the AGO has asserted attorney-client privilege. “The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client.” Rule 11-503(C) NMRA.

Respondent Russell has not demonstrated that the attorney-client privilege applies to the Report. Consequently, the privilege may not be used as a basis for withholding the Report unless and until Mr. Russell provides sufficient information to validate his assertion of the attorney-client privilege. For the reasons explained above, however, it is difficult to imagine any state of facts that would justify that assertion.

#### **IV. RESPONDENTS HAVE NOT SHOWN THAT THE WORK PRODUCT DOCTRINE APPLIES TO THE REPORT.**

Similarly, Respondents have not shown that the work product doctrine applies to the Report. Although the Report was generated not by the AGO, but by PCG under contract with HSD, it is the AGO—not HSD—that has asserted work product protection. The doctrine does not apply to the Report. And in any event, Respondent Russell has failed to provide sufficient information to evaluate his assertion that the doctrine applies.

First, the Report is not work product. While the work product doctrine is not explicitly identified among the exceptions to IPRA, *see* NMSA 1978, § 14-2-1(A), it appears to fall within the “as otherwise provided by law” exception. *See* NMSA 1978, § 14-2-1(A)(8); *see also Richards v. N.M. Developmental Disabilities Planning Council*, No. 30,796, 2011 N.M. App.

Unpub. LEXIS 170, at \*2 (Ct. App. Apr. 13, 2011) (citing Rule 1-026(B)(5) NMRA). Because IPRA does not address the work product doctrine, the Court must look to the law that “otherwise provides” for withholding of attorney work product.

The work product doctrine protects “[t]rial preparation materials,” Rule 1-026(B)(5) NMRA – materials “prepared in anticipation of litigation or for trial by or for another party or that party’s representative (including the party’s attorney, consultant, surety, indemnitor, insurer or agent),” *id.* No such materials are involved here. Nothing in the scope of work of PCG’s contract with HSD provides for the anticipation of litigation or trial. *See* Ex. B, at 17. No identified litigation is pending as a result of the Report, save for this action and suits by others brought to compel production of the Report under IPRA. *See New Mexico in Depth v. N.M. Human Serv. Dep’t*, No. D-307-CV-201302025 (N.M. 3d Judicial Dist. Ct. Dona Ana Cnty filed Aug. 27, 2013). The Report could not have been prepared “in anticipation of” a fraud prosecution, because a prosecution was nowhere close to materializing at the time. *See* Ex. I, at 1 (audit was performed in response to report of “billing irregularities,” and it triggered referral to AGO for “an investigation to determine whether or not fraud is [occurring] or has occurred”); *cf. Helena Chem. Co. v. Uribe*, 2012-NMSC-021, ¶¶ 17-18, 281 P.3d 237 (statements are made “in anticipation of litigation” if they are “made at a time when litigation [is] seriously and in good faith being contemplated”). And at any rate, the work product doctrine does not apply to the anticipation of *criminal* actions except to the limited extent that the Rules of Criminal Procedure exempt a prosecutor’s file materials from disclosure to the defendant. *See State ex rel. Brandenburg v. Blackmer*, 2005-NMSC-008, ¶ 19, 137 N.M. 258, 110 P.3d 66. None of those exemptions would embrace the Audit Report. *See* Rule 5-501(F) NMRA; *infra* pt. V.

Second, Respondent Russell has not provided a sufficient basis to conclude that the work product doctrine applies to the Report. Under the work product doctrine, as under IPRA, the withholding party bears the burden of establishing that any particular document is protected. *See Hartman v. Texaco*, 1997-NMCA-032, ¶ 20, 123 N.M. 220, 937 P.2d 979 (“The party asserting the work product immunity under NMRA 1-026(B)(4) bears the burden of establishing for each document that the rule applies.”).

Mr. Russell has produced nothing more than the bare assertion that the Report is protected work product. As discussed above, there are no generally known facts external to the denial that would support work product immunity for the Report—all that the Court and NMFOG have to go on is Mr. Russell’s assertion. This is insufficient.

Because Mr. Russell has not provided any basis to show that the Report is not protected by the work product doctrine, the work product doctrine cannot justify withholding the Report unless and until Mr. Russell provides information sufficient to establish protection under the doctrine. For the reasons explained above, however, it is difficult to imagine any state of facts that would substantiate that position.

**V. NEITHER HSD NOR THE AGO HAS SHOWN THAT THE LAW ENFORCEMENT EXCEPTION TO IPRA APPLIES TO THE REPORT.**

Neither of the Respondents has provided sufficient information to show that the Report may be withheld pursuant to the law enforcement exception. The law enforcement exception to IPRA permits the withholding of “law enforcement records that reveal confidential sources, methods, information or individuals accused but not charged with a crime.” NMSA 1978, § 14-2-1(A)(4). Under New Mexico law, the party seeking to preclude disclosure of law enforcement records “has the burden of proving the information sought to be protected is confidential.”

*Estate of Romero v. City of Santa Fe*, 2006-NMSC-028, ¶ 19, 139 N.M. 671, 137 P.3d 611.

First, neither HSD nor PCG is a law enforcement agency. Second, disclosure of the Report would not reveal confidential sources, methods, information, or individuals accused but not charged with a crime. Third, to the extent that disclosure of the Report would reveal such information, more limited redactions could address this issue.

First, although only Respondent Pool asserted this exception, *see* Exs. E and F, neither HSD nor PCG is a law enforcement agency. PCG is, of course, not an agency at all, but a private contractor. And while HSD has the power to investigate violations of the Medicaid Fraud Act and bring *civil* actions to enforce the Act, the power to prosecute *criminal* violations of the Act is limited to the AGO, district attorneys, “and those attorneys who are employees of the unit to whom the attorney general or district attorney has, by appointment made through a joint powers agreement or other agreement for that purpose, delegated criminal prosecutorial responsibility.” NMSA 1978, § 30-44-3 (1991).

The duties “performed primarily determine . . . whether an agency is a law enforcement agency.” *Serrano v. Dep’t of Alcoholic Beverage Control*, 1992-NMCA-015, ¶ 6, 113 N.M. 444, 827 P.2d 159 (citing *Anchondo v. Corrections Dep’t*, 1983-NMSC-051, 100 N.M. 108, 666 P.2d 1255). In *Serrano*, the Department of Alcoholic Beverage Control was held to be a law enforcement agency because it engaged “in the prevention and detection of crime, and . . . enforce[d] numerous *penal* provisions of” the Liquor Control Act. *Id.* (emphasis added). In *Anchondo*, the court looked “at the character of the *principal* duties involved, those duties to which employees devote the majority of their time.” 1983-NMSC-051, ¶ 10 (emphasis added). In *Romero*, the records sought were police investigatory materials. *See Romero*, 2006-NMSC-028, ¶ 5. Here, the record in question is the report of an audit performed by a third party under contract with an agency primarily devoted to administering social services.

The majority of HSD's time is not devoted to enforcement of the Medicaid Fraud Act. The majority of its time is instead devoted to administering various social services. HSD's mission—to “reduce the impact of poverty on people living in New Mexico by providing support services that help families break the cycle of dependency on public assistance”—does not mention law enforcement. About Us, *available at* <http://www.hsd.state.nm.us/about.html> (last visited Sept. 9, 2013). (By contrast, for example, the mission statement for the Department of Public Safety provides that it “protects human life and property through the detection and prevention of criminal activity and enforcement of state laws and regulations.” Dep't of Pub. Safety home page, *available at* <http://www.dps.nm.org/> (last visited Sept. 9, 2013)). It is the Medicaid Fraud Division of the AGO—not HSD—that enforces the Medicaid Fraud Act. *See* Medicaid Fraud and Elder Abuse, *available at* [http://www.nmag.gov/the\\_office/medicaid-fraud-elder-abuse](http://www.nmag.gov/the_office/medicaid-fraud-elder-abuse) (“The Medicaid Fraud and Elder Abuse Division is a criminal law enforcement unit of the Attorney General's Office that enforces the Medicaid Fraud Act. . . . The Division investigates and prosecutes Medicaid providers who commit fraud and/or resident abuse, neglect and exploitation in long-term care facilities”) (last visited Sept. 9, 2013). Here, the fact that HSD referred the Report to the AGO shows that it is the AGO—not HSD—that is a law enforcement agency.

Second, as to HSD (and even as to the AGO, which did not assert the law enforcement exception in its response to NMFOG), disclosure of the Report will not reveal confidential sources, methods, information or individuals accused but not charged with a crime. HSD has not asserted that disclosure will reveal confidential sources; in the event that it might, that concern can be addressed by targeted redactions—not wholesale withholding of hundreds of pages. HSD, not the AGO, contracted with PCG to perform the audit and produce the Report. Because

neither HSD nor PCG is a law enforcement agency, disclosure of the Report will not reveal confidential law enforcement methods; it will only reveal PCG's methods. And it will not even "reveal" those methods, because the AGO has already voluntarily disclosed the "Audit Approach," which details the audit protocols. Similarly, disclosure will not reveal confidential law enforcement information; it will only reveal information obtained by PCG—not a law enforcement agency.

Third, disclosure will not reveal individuals accused but not charged with a crime. The cat has been out of the bag for several months on the identities of the 15 providers that have been suspended. See Deborah Baker & Jackie Jadrnak, *Big Names in Health Care Audit Released*, Albuquerque Journal, June 26, 2013, available at <http://www.abqjournal.com/214653/news/big-names-in-health-care-audit-released.html> (last visited Sept. 9, 2013), attached hereto as Exhibit J (naming the 15 providers). Nor has public disclosure been limited to entities. See Deborah Baker, *HSD Audit Targeted TeamBuilders' Business Dealings*, Albuquerque Journal, Aug. 4, 2013, available at (<http://www.abqjournal.com/241977/news/hsd-audit-reviewed-nonprofit.html> (last visited Sept. 9, 2013)), attached hereto as Exhibit K (quoting portions of the audit not provided to NMFOG: "PCG considers this significant because more than \$1M per year in Teambuilders (sic) assets is diverted to its officers and their families."). The August 4 article further identifies TeamBuilders' CEO and clinical director by name, and again quotes a portion of the audit not provided to NMFOG: "Combined with estimated income from related transactions, this family's income from the nonprofit is estimated as high as \$1.5M per year." *Id.*

Assuming that these quotes are accurate, to the extent that HSD is concerned about "revealing individuals accused but not charged with a crime," the exception has been waived, at

least to the identified entities and persons, as they have already been revealed. Because much of the information about potential targets and the investigation is already public knowledge, continued withholding is not permissible under IPRA, because the Report will not “reveal confidential sources, methods, information or individuals not charged with a crime.”

Finally, HSD does not have any independent objection to the release of the Report. Up to this point, it has withheld the Report at the request of the AGO. But the AGO does not independently assert the law enforcement exception, relying exclusively on the attorney-client privilege and the work product doctrine. *See* Ex. E. If the AGO believed that the law enforcement exception applied, it should have said so in its response to NMFOG’s IPRA request.

**VI. ANY VALID EXCEPTIONS CAN BE ADDRESSED BY TARGETED REDACTION.**

Even if the exceptions asserted by HSD and the AGO are valid, there can be no conceivable justification for Respondents’ decision to withhold the vast bulk of the document. Under IPRA, “Requested public records containing information that is exempt and nonexempt from disclosure shall be separated by the custodian prior to inspection, and the nonexempt information shall be made available for inspection.” NMSA 1978, § 14-2-9(A) (2013). For example, if personnel documents containing matters of opinion are sought, “Requested documents that contain significant factual information in addition to opinion should be provided with the opinion information blocked out or otherwise redacted.” New Mexico Attorney General’s Office Inspection of Public Records Act Compliance Guide, at 9 (7th ed. 2012).

**CONCLUSION**

Respondents have failed to carry their burden to demonstrate the applicability of the exceptions they use to withhold the Report. HSD has not shown that the law enforcement exception applies. Nor has the AGO shown that the attorney-client privilege or work product

doctrine applies. Because Respondents have failed to carry their burden, and because New Mexico has a strong policy in favor of disclosure, Petitioner NMFOG respectfully requests that the Court issue the attached Alternative Writ of Mandamus, compelling Respondents to either produce the unredacted report or provide sufficient information for the Court and NMFOG to determine the applicability of the exceptions Respondents assert.

Respectfully submitted,

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STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT COURT

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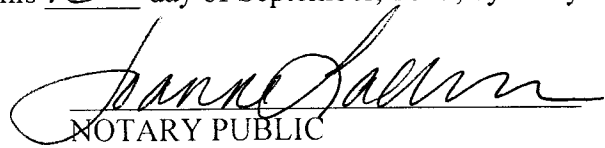
**VERIFICATION**

STATE OF NEW MEXICO        )  
  ) ss.  
COUNTY OF BERNALILLO     )

I, Terry Schleder, being first duly sworn, upon my oath state that I am a resident of the County of Bernalillo, State of New Mexico; that I have read the foregoing; that I know the contents thereof and the statements therein made, and the matters and things therein set forth, to be true of my own knowledge and belief or, if I do not know of any matter of my own knowledge, then I believe the statement to be true.

  
\_\_\_\_\_  
TERRY SCHLEDER

SUBSCRIBED AND SWORN TO before me this 13<sup>th</sup> day of September, 2013, by Terry Schleder.

  
NOTARY PUBLIC

My commission expires:

\_\_\_\_\_



JOANNE LADISA  
NOTARY PUBLIC-STATE OF NEW MEXICO

My commission expires: 8/23/14

STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT COURT

Case No. D-0101-CV-\_\_\_\_\_

The STATE OF NEW MEXICO, ex rel. THE  
NEW MEXICO FOUNDATION FOR OPEN  
GOVERNMENT,

Petitioner,

v.

RICHARD RUSSELL, and  
JONNI LU POOL,

Respondents.

**ALTERNATIVE WRIT OF MANDAMUS**

This Alternative Writ of Mandamus is hereby issued to Respondents Jonni Lu Pool, Public Records Custodian for the Human Services Department (“HSD”) and Richard Russell, Records Custodian for the Attorney General’s Office (“AGO”).

The Court has jurisdiction over this matter pursuant to NMSA 1978, §§ 14-2-12 and 44-2-3. Venue is appropriate in this Court under NMSA 1978, § 38-3-1(G).

Petitioner, the New Mexico Foundation for Open Government (“NMFOG”), has come before the Court and submitted the attached verified Petition, setting forth grounds sufficient for issuance of this alternative writ.

Petitioner seeks production under Inspection of Public Records Act, §§ 14-2-1, *et seq.* (“IPRA”), of the unredacted report created by Public Consulting Group, Inc. of its audit of New



Mexico behavioral health providers. Under IPRA, public officers have a non-discretionary duty to permit inspection of public records. NMSA 1978, § 14-2-8(D).

Respondents have withheld the lion's share of the sought-after document, asserting the law enforcement exception to IPRA, NMSA 1978, § 14-2-1(A)(4), Ex. G to Pet., the attorney-client privilege, and the attorney work product doctrine. Ex. E to Pet. In denying the Petitioner's requests, they did not make a showing that the asserted exceptions apply.

IPRA states that the public policy of this State is "that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees." NMSA 1978, § 14-2-5. Based on NMFOG's showing in the Verified Petition, it appears that Respondents have not hewed to this policy. While Respondents' withholding of the sought-after materials may be justified in whole or in part under the exceptions to IPRA that they assert, they have not provided sufficient information for the Court or NMFOG to accept that determination.

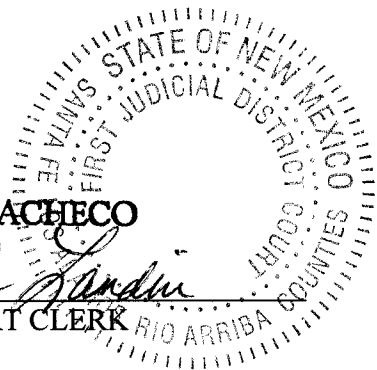
It is therefore ORDERED that Respondents shall either:

1. Produce for NMFOG's inspection the full, unredacted report created by Public Consulting Group, Inc. of its audit of New Mexico behavioral health providers; or
2. Show cause why the full, unredacted report is excepted from inspection under the Inspection of Public Records Act, §§ 14-2-1, *et seq.* This showing must include providing information sufficient for the Court and NMFOG to determine whether the asserted exceptions apply; or
3. Show cause why each redacted part of the Report is excepted from inspection under the Inspection of Public Records Act, §§ 14-2-1, *et seq.* This showing must include

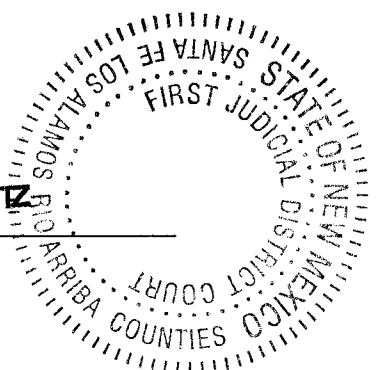
providing information sufficient for the Court and NMFOG to determine whether the asserted exceptions apply.

4. Respondents shall either produce the full, unredacted Report or information sufficient to determine that the asserted exceptions apply within 30 days of the issuance of this writ.

**STEPHEN T. PACHECO**  
*Monica C. Gordon*  
DISTRICT COURT CLERK



**RAYMOND Z. ORTIZ**  
DISTRICT COURT JUDGE



Date Issued 9-13-13

STATE OF NEW MEXICO

**HUMAN SERVICES DEPARTMENT  
PROFESSIONAL SERVICES CONTRACT**

THIS AGREEMENT is made and entered into by and between the State of New Mexico, **Human Services Department**, hereinafter referred to as the "HSD," and **Public Consulting Group, Inc.**, hereinafter referred to as the "Contractor," and is effective upon the last signature of either of the Parties.

IT IS AGREED BETWEEN THE PARTIES:

1. **Scope of Work.**

The Contractor shall perform all services detailed in Exhibit A, Scope of Work, attached to this Agreement, and in accordance with the New Mexico State Price Agreement # 30-630-13-23826.

2. **Compensation.**

A. The HSD shall pay to the Contractor in full payment for services satisfactorily performed pursuant to the Price Agreement referenced above, such compensation not to exceed three million dollars (\$3,000,000), including gross receipts tax, if applicable. This amount is a maximum based on services to be provided under Exhibit A, Scope of Work and is not a guarantee that the work assigned to be performed by the Contractor under this Agreement shall equal the amount stated herein. The parties do not intend for the Contractor to continue to provide services without compensation when the total compensation amount is reached. Contractor is responsible for notifying the HSD when the services provided under this Agreement reach the total compensation amount. In no event will the Contractor be paid for services provided in excess of the total compensation amount without this Agreement being amended in writing prior to those services in excess of the total compensation amount being provided.

B. Payment is subject to availability of funds pursuant to the Appropriations Paragraph set forth below and to any negotiations between the parties from year to year pursuant to Paragraph 1, Scope of Work. All invoices **MUST BE** received by the HSD no later than fifteen (15) days after the termination of the Fiscal Year in which the services were delivered. **Invoices received after such date WILL NOT BE PAID.**

C. Contractor must submit a detailed statement accounting for all services performed and expenses incurred. If the HSD finds that the services are not acceptable, within thirty days after the date of receipt of written notice from the Contractor that payment is requested, it shall provide the Contractor a letter of exception explaining the defect or objection to the services, and outlining steps the Contractor may take to provide remedial action. Upon certification by the HSD that the services have been received and accepted, payment shall be tendered to the Contractor within thirty days after the date of acceptance. If payment is made by mail, the payment shall be deemed tendered on the date it is postmarked. However, the agency shall not



incur late charges, interest, or penalties for failure to make payment within the time specified herein.

3. **Term.**

THIS AGREEMENT SHALL NOT BECOME EFFECTIVE UNTIL SIGNED BY the HSD. This Agreement shall terminate on December 31, 2013, unless terminated pursuant to paragraph 4 (Termination), or paragraph 5 (Appropriations). In accordance with Section 13-1-150 NMSA 1978, no contract term for a professional services contract, including extensions and renewals, shall exceed four years, except as set forth in Section 13-1-150 NMSA 1978.

4. **Termination.**

A. **Grounds.** The HSD may terminate this Agreement for convenience or cause. The Contractor may only terminate this Agreement based upon the HSD's uncured, material breach of this Agreement.

B. **Notice; HSD Opportunity to Cure.**

1. Except as otherwise provided in Paragraph (4)(B)(3), the HSD shall give Contractor written notice of termination at least thirty (30) days prior to the intended date of termination.

2. Contractor shall give HSD written notice of termination at least thirty (30) days prior to the intended date of termination, which notice shall (i) identify all the HSD's material breaches of this Agreement upon which the termination is based and (ii) state what the HSD must do to cure such material breaches. Contractor's notice of termination shall only be effective (i) if the HSD does not cure all material breaches within the thirty (30) day notice period or (ii) in the case of material breaches that cannot be cured within thirty (30) days, the HSD does not, within the thirty (30) day notice period, notify the Contractor of its intent to cure and begin with due diligence to cure the material breach.

3. Notwithstanding the foregoing, this Agreement may be terminated immediately upon written notice to the Contractor (i) if the Contractor becomes unable to perform the services contracted for, as determined by the HSD; (ii) if, during the term of this Agreement, the Contractor is suspended or debarred by the State Purchasing Agent; or (iii) the Agreement is terminated pursuant to Paragraph 5, "Appropriations", of this Agreement.

C. **Liability.** Except as otherwise expressly allowed or provided under this Agreement, the HSD's sole liability upon termination shall be to pay for acceptable work performed prior to the Contractor's receipt or issuance of a notice of termination; provided, however, that a notice of termination shall not nullify or otherwise affect either party's liability for pre-termination defaults under or breaches of this Agreement. The Contractor shall submit an invoice for such work within thirty (30) days of receiving or sending the notice of termination. THIS PROVISION IS NOT EXCLUSIVE AND DOES NOT WAIVE THE AGENCY'S OTHER LEGAL RIGHTS AND REMEDIES CAUSED BY THE CONTRACTOR'S DEFAULT/BREACH OF THIS AGREEMENT.

D. **Termination Management.** Immediately upon receipt by either the HSD or the Contractor of notice of termination of this Agreement, the Contractor shall: 1) not incur any further obligations for salaries, services or any other expenditure of funds under this Agreement without written approval of the HSD; 2) comply with all directives issued by the HSD in the notice of termination as to the performance of work under this Agreement; and 3) take such action as the HSD shall direct for the protection, preservation, retention or transfer of all property

titled to the HSD and records generated under this Agreement. Any non-expendable personal property or equipment provided to or purchased by the Contractor with contract funds shall become property of the HSD upon termination and shall be submitted to the agency as soon as practicable.

5. **Appropriations.**

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the Legislature of New Mexico for the performance of this Agreement. If sufficient appropriations and authorization are not made by the Legislature, this Agreement shall terminate immediately upon written notice being given by the HSD to the Contractor. The HSD's decision as to whether sufficient appropriations are available shall be accepted by the Contractor and shall be final. If the HSD proposes an amendment to the Agreement to unilaterally reduce funding, the Contractor shall have the option to terminate the Agreement or to agree to the reduced funding, within thirty (30) days of receipt of the proposed amendment.

6. **Status of Contractor.**

The Contractor and its agents and employees are independent contractors performing professional services for the HSD and are not employees of the State of New Mexico. The Contractor and its agents and employees shall not accrue leave, retirement, insurance, bonding, use of state vehicles, or any other benefits afforded to employees of the State of New Mexico as a result of this Agreement. The Contractor acknowledges that all sums received hereunder are reportable by the Contractor for tax purposes, including without limitation, self-employment and business income tax. The Contractor agrees not to purport to bind the State of New Mexico unless the Contractor has express written authority to do so, and then only within the strict limits of that authority.

7. **Assignment.**

The Contractor shall not assign or transfer any interest in this Agreement or assign any claims for money due or to become due under this Agreement without the prior written approval of the HSD.

8. **Subcontracting.**

The Contractor shall not subcontract any portion of the services to be performed under this Agreement without the prior written approval of the HSD. No such subcontract shall relieve the primary Contractor from its obligations and liabilities under this Agreement, nor shall any subcontract obligate direct payment from the Procuring Agency.

9. **Release.**

Final payment of the amounts due under this Agreement shall operate as a release of the HSD, its officers and employees, and the State of New Mexico from all liabilities, claims and obligations whatsoever arising from or under this Agreement.

**10. Confidentiality.**

Any confidential information provided to or developed by the Contractor in the performance of this Agreement shall be kept confidential and shall not be made available to any individual or organization by the Contractor without the prior written approval of the HSD.

**11. Product of Service - Copyright.**

All materials developed or acquired by the Contractor under this Agreement shall become the property of the State of New Mexico and shall be delivered to the HSD no later than the termination date of this Agreement. Nothing developed or produced, in whole or in part, by the Contractor under this Agreement shall be the subject of an application for copyright or other claim of ownership by or on behalf of the Contractor.

**12. Conflict of Interest; Governmental Conduct Act.**

A. The Contractor represents and warrants that it presently has no interest and, during the term of this Agreement, shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance or services required under the Agreement.

B. The Contractor further represents and warrants that it has complied with, and, during the term of this Agreement, will continue to comply with, and that this Agreement complies with all applicable provisions of the Governmental Conduct Act, Chapter 10, Article 16 NMSA 1978. Without in anyway limiting the generality of the foregoing, the Contractor specifically represents and warrants that:

1) in accordance with Section 10-16-4.3 NMSA 1978, the Contractor does not employ, has not employed, and will not employ during the term of this Agreement any HSD employee while such employee was or is employed by the HSD and participating directly or indirectly in the HSD's contracting process;

2) this Agreement complies with Section 10-16-7(A) NMSA 1978 because (i) the Contractor is not a public officer or employee of the State; (ii) the Contractor is not a member of the family of a public officer or employee of the State; (iii) the Contractor is not a business in which a public officer or employee or the family of a public officer or employee has a substantial interest; or (iv) if the Contractor is a public officer or employee of the State, a member of the family of a public officer or employee of the State, or a business in which a public officer or employee of the State or the family of a public officer or employee of the State has a substantial interest, public notice was given as required by Section 10-16-7(A) NMSA 1978 and this Agreement was awarded pursuant to a competitive process;

3) in accordance with Section 10-16-8(A) NMSA 1978, (i) the Contractor is not, and has not been represented by, a person who has been a public officer or employee of the State within the preceding year and whose official act directly resulted in this Agreement and (ii) the Contractor is not, and has not been assisted in any way regarding this transaction by, a former public officer or employee of the State whose official act, while in State employment, directly resulted in the HSD's making this Agreement;

4) this Agreement complies with Section 10-16-9(A) NMSA 1978 because (i) the Contractor is not a legislator; (ii) the Contractor is not a member of a legislator's family; (iii) the Contractor is not a business in which a legislator or a legislator's family has a substantial interest; or (iv) if the Contractor is a legislator, a member of a

legislator's family, or a business in which a legislator or a legislator's family has a substantial interest, disclosure has been made as required by Section 10-16-9(A) NMSA 1978, this Agreement is not a sole source or small purchase contract, and this Agreement was awarded in accordance with the provisions of the Procurement Code;

5) in accordance with Section 10-16-13 NMSA 1978, the Contractor has not directly participated in the preparation of specifications, qualifications or evaluation criteria for this Agreement or any procurement related to this Agreement; and

6) in accordance with Section 10-16-3 and Section 10-16-13.3 NMSA 1978, the Contractor has not contributed, and during the term of this Agreement shall not contribute, anything of value to a public officer or employee of the HSD.

C. Contractor's representations and warranties in Paragraphs A and B of this Article 12 are material representations of fact upon which the HSD relied when this Agreement was entered into by the parties. Contractor shall provide immediate written notice to the HSD if, at any time during the term of this Agreement, Contractor learns that Contractor's representations and warranties in Paragraphs A and B of this Article 12 were erroneous on the effective date of this Agreement or have become erroneous by reason of new or changed circumstances. If it is later determined that Contractor's representations and warranties in Paragraphs A and B of this Article 12 were erroneous on the effective date of this Agreement or have become erroneous by reason of new or changed circumstances, in addition to other remedies available to the HSD and notwithstanding anything in the Agreement to the contrary, the HSD may immediately terminate the Agreement.

D. All terms defined in the Governmental Conduct Act have the same meaning in this Article 12(B).

**13. Amendment.**

A. This Agreement shall not be altered, changed or amended except by instrument in writing executed by the parties hereto and all other required signatories.

B. If the HSD proposes an amendment to the Agreement to unilaterally reduce funding due to budget or other considerations, the Contractor shall, within thirty (30) days of receipt of the proposed Amendment, have the option to terminate the Agreement, pursuant to the termination provisions as set forth in Article 4 herein, or to agree to the reduced funding.

**14. Merger.**

This Agreement incorporates all the Agreements, covenants and understandings between the parties hereto concerning the subject matter hereof, and all such covenants, Agreements and understandings have been merged into this written Agreement. No prior Agreement or understanding, oral or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

**15. Penalties for violation of law.**

The Procurement Code, Sections 13-1-28 through 13-1-199, NMSA 1978, imposes civil and criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for illegal bribes, gratuities and kickbacks.

**16. Equal Opportunity Compliance.**

The Contractor agrees to abide by all federal and state laws and rules and regulations, and executive orders of the Governor of the State of New Mexico, pertaining to equal employment opportunity. In accordance with all such laws of the State of New Mexico, the Contractor assures that no person in the United States shall, on the grounds of race, religion, color, national origin, ancestry, sex, age, physical or mental handicap, or serious medical condition, spousal affiliation, sexual orientation or gender identity, be excluded from employment with or participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity performed under this Agreement. If Contractor is found not to be in compliance with these requirements during the life of this Agreement, Contractor agrees to take appropriate steps to correct these deficiencies.

**17. Applicable Law.**

The laws of the State of New Mexico shall govern this Agreement, without giving effect to its choice of law provisions. Venue shall be proper only in a New Mexico court of competent jurisdiction in accordance with Section 38-3-1 (G) NMSA 1978. By execution of this Agreement, Contractor acknowledges and agrees to the jurisdiction of the courts of the State of New Mexico over any and all lawsuits arising under or out of any term of this Agreement.

**18. Workers Compensation.**

The Contractor agrees to comply with state laws and rules applicable to workers compensation benefits for its employees. If the Contractor fails to comply with the Workers Compensation Act and applicable rules when required to do so, this Agreement may be terminated by the HSD.

**19. Records and Financial Audit.**

The Contractor shall maintain detailed time and expenditure records that indicate the date; time, nature and cost of services rendered during the Agreement's term and effect and retain them for a period of five (5) years from the date of final payment under this Agreement. The records shall be subject to inspection by the HSD, the Department of Finance and Administration and the State Auditor. The HSD shall have the right to audit billings both before and after payment. Payment under this Agreement shall not foreclose the right of the HSD to recover excessive or illegal payments.

**20. Indemnification.**

The Contractor shall defend, indemnify and hold harmless the HSD and the State of New Mexico from all actions, proceeding, claims, demands, costs, damages, attorneys' fees and all other liabilities and expenses of any kind from any source which may arise out of the performance of this Agreement, caused by the negligent act or failure to act of the Contractor, its officers, employees, servants, subcontractors or agents, or if caused by the actions of any client of the Contractor resulting in injury or damage to persons or property during the time when the Contractor or any officer, agent, employee, servant or subcontractor thereof has or is performing services pursuant to this Agreement. In the event that any action, suit or proceeding related to the services performed by the Contractor or any officer, agent, employee, servant or subcontractor under this Agreement is brought against the Contractor, the Contractor shall, as soon as

practicable but no later than two (2) days after it receives notice thereof, notify the legal counsel of the HSD and the Risk Management Division of the New Mexico General Services Department by certified mail.

**21. New Mexico Employees Health Coverage.**

A. If Contractor has, or grows to, six (6) or more employees who work, or who are expected to work, an average of at least 20 hours per week over a six (6) month period during the term of the contract, Contractor certifies, by signing this agreement, to have in place, and agree to maintain for the term of the contract, health insurance for those employees and offer that health insurance to those employees if the expected annual value in the aggregate of any and all contracts between Contractor and the State exceed \$250,000 dollars.

B. Contractor agrees to maintain a record of the number of employees who have (a) accepted health insurance; (b) declined health insurance due to other health insurance coverage already in place; or (c) declined health insurance for other reasons. These records are subject to review and audit by a representative of the state.

C. Contractor agrees to advise all employees of the availability of State publicly financed health care coverage programs by providing each employee with, as a minimum, the following web site link to additional information: <http://insurenwemexico.state.nm.us/>.

**22. Employee Pay Equity Reporting.**

Contractor agrees if it has ten (10) or more New Mexico employees OR eight (8) or more employees in the same job classification, at any time during the term of this contract, to complete and submit the PE10-249 form on the annual anniversary of the initial report submittal for contracts up to one (1) year in duration. If contractor has (250) or more employees contractor must complete and submit the PE250 form on the annual anniversary of the initial report submittal for contracts up to one (1) year in duration. For contracts that extend beyond one (1) calendar year, or are extended beyond one (1) calendar year, contractor also agrees to complete and submit the PE10-249 or PE250 form, whichever is applicable, within thirty (30) days of the annual contract anniversary date of the initial submittal date or, if more than 180 days has elapsed since submittal of the last report, at the completion of the contract, whichever comes first. Should contractor not meet the size requirement for reporting at contract award but subsequently grows such that they meet or exceed the size requirement for reporting, contractor agrees to provide the required report within ninety (90) days of meeting or exceeding the size requirement. That submittal date shall serve as the basis for submittals required thereafter. Contractor also agrees to levy this requirement on any subcontractor(s) performing more than 10% of the dollar value of this contract if said subcontractor(s) meets, or grows to meet, the stated employee size thresholds during the term of the contract. Contractor further agrees that, should one or more subcontractor not meet the size requirement for reporting at contract award but subsequently grows such that they meet or exceed the size requirement for reporting, contractor will submit the required report, for each such subcontractor, within ninety (90) days of that subcontractor meeting or exceeding the size requirement. Subsequent report submittals, on behalf of each such subcontractor, shall be due on the annual anniversary of the initial report submittal. Contractor shall submit the required form(s) to the State Purchasing Division of the General Services Department, and other departments as may be determined, on behalf of the

applicable subcontractor(s) in accordance with the schedule contained in this paragraph. Contractor acknowledges that this subcontractor requirement applies even though contractor itself may not meet the size requirement for reporting and be required to report itself.

Notwithstanding the foregoing, if this Contract was procured pursuant to a solicitation, and if Contractor has already submitted the required report accompanying their response to such solicitation, the report does not need to be re-submitted with this Agreement.

**23. Invalid Term or Condition.**

If any term or condition of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall not be affected and shall be valid and enforceable.

**24. Enforcement of Agreement.**

A party's failure to require strict performance of any provision of this Agreement shall not waive or diminish that party's right thereafter to demand strict compliance with that or any other provision. No waiver by a party of any of its rights under this Agreement shall be effective unless express and in writing, and no effective waiver by a party of any of its rights shall be effective to waive any other rights.

**25. Notices.**

Any notice required to be given to either party by this Agreement shall be in writing and shall be delivered in person, by courier service or by U.S. mail, either first class or certified, return receipt requested, postage prepaid, as follows:

To the HSD: Larry Heyeck, Esq., Program Manager  
New Mexico Human Services Department  
Office of General Counsel  
P.O. Box 2348  
Santa Fe, NM 87504-2348  
[Larry.heyeck@state.nm.us](mailto:Larry.heyeck@state.nm.us)

To Contractor: Thomas Aldridge  
148 State Street, 10th Floor  
Boston, MA 02109  
[taldridge@pcgus.com](mailto:taldridge@pcgus.com)

**26. Authority.**

If Contractor is other than a natural person, the individual(s) signing this Agreement on behalf of Contractor represents and warrants that he or she has the power and authority to bind Contractor, and that no further action, resolution, or approval from Contractor is necessary to enter into a binding contract.

**27. Debarment and Suspension**

A. Consistent with either 7 C.F.R. Part 3017 or 45 C.F.R. Part 76, as applicable, and as a separate and independent requirement of this PSC the Contractor certifies by signing this PSC, that it and its principals, to the best of its knowledge and belief: (1) are not debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any

Federal department or agency; (2) have not, within a three-year period preceding the effective date of this PSC, been convicted of or had a civil judgment rendered against them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, state, or local) contract or subcontract; violation of Federal or state antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property; (3) have not been indicted for, or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with, commission of any of the offenses enumerated above in this Paragraph A; (4) have not, within a three-year period preceding the effective date of this PSC, had one or more public agreements or transactions (Federal, State or local) terminated for cause or default; and (5) have not been excluded from participation from Medicare, Medicaid or other federal health care programs pursuant to Title XI of the Social Security Act, 42 U.S.C. § 1320a-7.

B. The Contractor's certification in Paragraph A, above, is a material representation of fact upon which the HSD relied when this PSC was entered into by the parties. The Contractor's certification in Paragraph A, above, shall be a continuing term or condition of this PSC. As such at all times during the performance of this PSC, the Contractor must be capable of making the certification required in Paragraph A, above, as if on the date of making such new certification the Contractor was then executing this PSC for the first time. Accordingly, the following requirements shall be read so as to apply to the original certification of the Contractor in Paragraph A, above, or to any new certification the Contractor is required to be capable of making as stated in the preceding sentence:

(1) The Contractor shall provide immediate written notice to the HSD's Program Manager if, at any time during the term of this PSC, the Contractor learns that its certification in Paragraph A, above, was erroneous on the effective date of this PSC or has become erroneous by reason of new or changed circumstances.

(2) If it is later determined that the Contractor's certification in Paragraph A, above, was erroneous on the effective date of this PSC or has become erroneous by reason of new or changed circumstances, in addition to other remedies available to the HSD, the HSD may terminate the PSC.

C. As required by statute, regulation or requirement of this PSC, and as contained in Paragraph A, above, the Contractor shall require each proposed first-tier subcontractor whose subcontract will equal or exceed \$25,000, to disclose to the Contractor, in writing, whether as of the time of award of the subcontract, the subcontractor, or its principals, is or is not debarred, suspended, or proposed for debarment by any Federal department or agency. The Contractor shall make such disclosures available to the HSD when it requests subcontractor approval from the HSD. If the subcontractor, or its principals, is debarred, suspended, or proposed for debarment by any Federal, state or local department or agency, the HSD may refuse to approve the use of the subcontractor.

**28. Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions**

A. The applicable definitions and exceptions to prohibited conduct and disclosures contained in 31 U.S.C. § 1352 and 45 C.F.R. Part 93 or Subparts B and C of 7 C.F.R. Part 3018, as applicable, are hereby incorporated by reference in subparagraph (B) of this certification.

B. The Contractor, by executing this PSC, certifies to the best of its knowledge and belief that:

(1) No Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress on his or her behalf in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment or modification of any Federal contract, grant, loan, or cooperative agreement; and

(2) If any funds other than Federal appropriated funds (including profit or fee received under a covered Federal transaction) have been paid, or will be paid, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress on his or her behalf in connection with this solicitation, the offeror shall complete and submit, with its offer, OMB standard form LLL, Disclosure of Lobbying Activities, to the Contracting Officer.

C. The Contractor shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

D. This certification is a material representation of fact upon which reliance is placed when this PSC is made and entered into. Submission of this certification is a prerequisite for making and entering into this PSC imposed under 31 U.S.C. § 1352. It shall be a material obligation of the Contractor to keep this certification current as to any and all individuals or activities of anyone associated with the Contractor during the pendency of this PSC. Any person who makes an expenditure prohibited under this provision or who fails to file or amend the disclosure form to be filed or amended by this provision, shall be subject to: (1) a civil penalty of not less than \$10,000 and not more than \$100,000 for such failure; and/or (2) at the discretion of the HSD, termination of the PSC.

**29. Non-Discrimination**

A. The Contractor agrees to comply fully with Title VI of the Civil Rights Act of 1964, as amended; the Rehabilitation Act of 1973, Public Law 93-112, as amended; and the Americans With Disabilities Act of 1990, Public Law 101-336; in that there shall be no discrimination against any employee who is employed in the performance of this PSC, or against any applicant for such employment, because of age, color, national origin, ancestry, race,

religion, creed, disability, sex, or marital status.

B. This provision shall include, but not be limited to, the following: employment, promotion, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training including apprenticeship.

C. The Contractor agrees that no qualified handicapped person shall, on the basis of handicap, be excluded from participation or be denied the benefits of, or otherwise be subjected to discrimination under any program or activity of the Contractor. The Contractor further agrees to insert similar provisions in all subcontracts for services allowed under this PSC under any program or activity.

D. The Contractor agrees to provide meaningful access to services for individuals with Limited English Proficiency (LEP) in accordance with Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency."

### 30. Drug Free Workplace

A. Definitions. As used in this paragraph—

"Controlled substance" means a controlled substance in schedules I through V of section 202 of the Controlled Substances Act, 21 U.S.C 812, and as further defined in regulation at 21 CFR 1308.11 - 1308.15.

"Conviction" means a finding of guilt (including a plea of *nolo contendere*) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes.

"Criminal drug statute" means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, possession, or use of any controlled substance.

"Drug-free workplace" means the site(s) for the performance of work done by the Contractor in connection with a specific contract where employees of the Contractor are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

"Employee" means an employee of a contractor directly engaged in the performance of work under a Government contract. "Directly engaged" is defined to include all direct cost employees and any other contractor employee who has other than a minimal impact or involvement in contract performance.

"Individual" means an offeror/contractor that has no more than one employee including the offeror/contractor.

B. The Contractor, if other than an individual, shall:

(1) Publish a statement notifying its employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the Contractor's workplace and specifying the actions that will be taken against employees for violations of such prohibition;

(2) Establish an ongoing drug-free awareness program to inform such employees about:

- (i) The dangers of drug abuse in the workplace;
- (ii) The Contractor's policy of maintaining a drug-free workplace;
- (iii) Any available drug counseling, rehabilitation, and employee assistance programs; and
- (iv) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(3) Provide all employees engaged in performance of the PSC with a copy of the statement required by subparagraph B(1);

(4) Notify such employees in writing in the statement required by subparagraph (B)(1) of this clause that, as a condition of continued employment on this PSC, the employee will:

- (i) Abide by the terms of the statement; and
- (ii) Notify the employer in writing of the employee's conviction under a criminal drug statute for a violation occurring in the workplace no later than five (5) days after such conviction;

(5) Notify the HSD Program Manager in writing within ten (10) days after receiving notice under (B)(4)(ii) of this paragraph, from an employee or otherwise receiving actual notice of such conviction. The notice shall include the position title of the employee;

(6) Within thirty (30) days after receiving notice under B(4)(ii) of this paragraph of a conviction, take one of the following actions with respect to any employee who is convicted of a drug abuse violation occurring in the workplace:

- (i) Taking appropriate personnel action against such employee, up to and including termination; or
- (ii) Require such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency; and

(7) Make a good faith effort to maintain a drug-free workplace through implementation of B(1) through B(6) of this paragraph.

C. The Contractor, if an individual, agrees by entering into this PSC not to engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance while performing this contract.

D. In addition to other remedies available to the HSD, the Contractor's failure to comply with the requirements of subparagraph B or C of this paragraph will render the Contractor in default of this PSC and subject the Contractor to suspension of payments under the PSC and/or termination of the PSC in accordance with paragraph 4, above.

**31. Findings and Sanctions**

A. The Contractor agrees to be subject to the findings and sanctions assessed as a result of the HSD audits, federal audits, and disallowances of the services provided pursuant to this PSC and the administration thereof.

B. The Contractor will make repayment of any funds expended by the HSD, subject to which an auditor with the jurisdiction and authority finds were expended, or to which appropriate federal funding agencies take exception and so request reimbursement through a disallowance or deferral based upon the acts or omissions of the Contractor that violate applicable federal statues and/or regulations, subject to sufficient appropriations of the New Mexico Legislature.

C. If the HSD becomes aware of circumstances that might jeopardize continued federal funding, the situation shall be reviewed and reconciled by a mutually agreed upon panel of Contractor and the HSD officials. If reconciliation is not possible, both parties shall present their view to the Director of the Administrative Services Division who shall determine whether continued payment shall be made.

**32. Performance**

In performance of this PSC, the Contractor agrees to comply with and assume responsibility for compliance by his or her employees with the following requirements:

A. All work will be performed under the supervision of the Contractor or the Contractor's responsible employees.

B. Any Federal tax returns or return information (hereafter referred to as returns or return information) made available shall be used only for the purpose of carrying out the provisions of this PSC. Information contained in such material shall be treated as confidential and shall not be divulged or made known in any manner to any person except as may be necessary in the performance of this PSC. Inspection by or disclosure to anyone other than an officer or employee of the Contractor is prohibited.

C. All returns and return information will be accounted for upon receipt and properly stored before, during, and after processing. In addition, all related output and products will be given the same level of protection as required for the source material.

D. No work involving returns and return information furnished under this PSC will be subcontracted without prior written approval of the Internal Revenue Service (IRS).

E. The Contractor will maintain a list of employees authorized access. Such list will be provided to the HSD and, upon request, to the IRS reviewing office.

F. The HSD will have the right to void the PSC if the Contractor fails to provide the safeguards described above.

**33. Criminal/Civil Sanctions**

A. Each officer or employee of the Contractor to whom returns or return information is or may be disclosed shall be notified in writing by such person that returns or return information disclosed to such officer or employee can be used only for a purpose and to the extent authorized herein, and that further disclosure of any such returns or return information for a purpose or to an extent unauthorized herein constitutes a felony punishable upon conviction by a fine of as much as \$5,000 or imprisonment for as long as five (5) years, or both, together with the costs of prosecution. Such person shall also notify each such officer and employee that any such unauthorized future disclosure of returns or return information may also result in an award of civil damages against the officer or employee in an amount not less than \$1,000 with respect to each instance of unauthorized disclosure. These penalties are prescribed by Internal Revenue Code (IRC) Sections 7213 and 7431 and set forth at 26 CFR 301.6103(n)-1.

B. Each officer or employee of the Contractor to whom returns or return information is or may be disclosed shall be notified in writing by such person that any returns or return information made available in any format shall be used only for the purpose of carrying out the provisions of this PSC. Information contained in such material shall be treated as confidential and shall not be divulged or made known in any manner to any person except as may be necessary in the performance of this PSC. Inspection by or disclosure to anyone without an official need to know constitutes a criminal misdemeanor punishable upon conviction by a fine of as much as \$1,000 or imprisonment for as long as one (1) year, or both, together with the costs of prosecution. Such person shall also notify each such officer and employee that any such unauthorized inspection or disclosure of returns or return information may also result in an award of civil damages against the officer or employee [United States for Federal employees] in an amount equal to the sum of the greater of \$1,000 for each act of unauthorized inspection or disclosure with respect to which such defendant is found liable or the sum of the actual damages sustained by the plaintiff as a result of such unauthorized inspection or disclosure plus in the case of a willful inspection or disclosure which is the result of gross negligence, punitive damages, plus the costs of the action. The penalties are prescribed by IRC Sections 7213A and 7431.

C. Additionally, it is incumbent upon the Contractor to inform its officers and employees of the penalties for improper disclosure imposed by the Privacy Act of 1974, 5 U.S.C. 552a. Specifically, 5 U.S.C. 552a(i)(1), which is made applicable to contractors by 5U.S.C. 552a(m)(1), provides that any officer or employee of a contractor, who by virtue of his/her employment or official position, has possession of or access to the HSD records which contain individually identifiable information, the disclosure of which is prohibited by the Privacy Act or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than \$5,000.

D. Granting a contractor access to Federal Tax Information (FTI) must be preceded by certifying that each individual understands the HSD's security policy and procedures for safeguarding IRS information. The Contractors must maintain their authorization to access FTI through annual recertification. The initial certification and recertification must be documented and placed in the HSD's files for review. As part of the certification and at least annually afterwards, contractors should be advised of the provisions of IRC Sections 7431, 7213, and


7213A (see Exhibit 6, *IRC Sec. 7431 Civil Damages for Unauthorized Disclosure of Returns and Return Information* and Exhibit 5, *IRC Sec. 7213 Unauthorized Disclosure of Information*). The training provided before the initial certification and annually thereafter must also cover the incident response policy and procedure for reporting unauthorized disclosures and data breaches (See IRS Publication 1075, *Tax Information Security Guidelines*). For both the initial certification and the annual certification, the Contractor should sign, either with ink or electronic signature, a confidentiality statement certifying their understanding of the security requirements.

**34. Inspection**

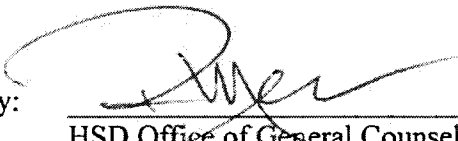
The IRS and the HSD shall have the right to send its officers and employees into the offices and plants of the Contractor for inspection of the facilities and operations provided for the performance of any work under this PSC. On the basis of such inspection, specific measures may be required in cases where the Contractor is found to be noncompliant with contract safeguards.

**The remainder of this page intentionally left blank.**


IN WITNESS WHEREOF, the parties have executed this Agreement as of the date of signature by the Human Services Department below.

By:   
HSD Cabinet Secretary

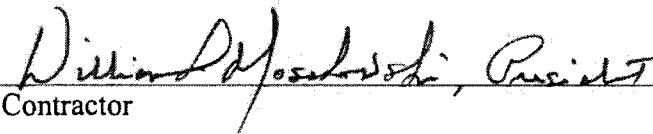
Date: 2/5/13

By:   
HSD Office of General Counsel

Date: 2/5/13

By:   
HSD Chief Financial Officer


Date: 2/5/13

By:   
Contractor

Date: 2/1/13

The records of the Taxation and Revenue Department reflect that the Contractor is registered with the Taxation and Revenue Department of the State of New Mexico to pay gross receipts and compensating taxes.

ID Number: 03-176534-00-3

By:   
Taxation and Revenue Department

Date: 2/10/13

**Exhibit A**

**Scope of Work**

The Contractor shall assist HSD by serving as project manager in coordinating audits and analysis of the Medicaid managed care organization (MCO) network(s) of providers. This shall include, but is not limited to

- (1) preparing audit teams,
- (2) establishing standards for financial and IT/Policy audit;
- (3) leading audit teams;
- (4) coordinating audits with MCO and/or State staff;
- (5) leading interviews of provider staff and/or others, as appropriate; and
- (6) producing final audit report(s).



HUMAN SERVICES  
DEPARTMENT

MEDICAL ASSISTANCE DIVISION  
PROGRAM POLICY AND INTEGRITY BUREAU

MEMORANDUM

TO: All MCO Program Integrity Directors

FROM: Everet Apodaca, Program Policy and Integrity Bureau

SUBJECT: Provider Check Withhold

DATE: June 24, 2013

The Program Policy & Integrity Bureau has been notified that there is a credible allegation of fraud for which an investigation is pending. Therefore, PPIB requests that ALL Medicaid payments be suspended this includes any claims that are pending or in queue to be processed for the following Providers and ALL associated Tax Identification Numbers:

PROVIDER	TIN
TEAMBUILDERS, INC.	
PARTNERS IN WELLNESS, INC.	
PRESBYTERIAN MEDICAL SERVICES, INC	
HOGARES, INC.	
YOUTH DEVELOPMENT, INC.	
PATHWAYS, INC.	
BORDER AREA MENTAL HEALTH	
COUNSELING ASSOCIATES	
FAMILIES AND YOUTH, INC.	
SOUTHWEST COUNSELING CENTER	
THE COUNSELING CENTER	
VALENCIA COUNSELING SERVICE	
SOUTHERN NEW MEXICO HUMAN DEVELOPMENT	
EASTER SEALS EL MIRADOR	
SERVICE ORGANIZATION FOR YOUTH, INC.	

EXHIBIT  
C

**The check withhold is effective immediately and must remain in place until further notice from HSD/PPIB.**

**Please call me if you have any questions with this request, 505-827-3135. Thank you for your attention to this matter.**

From: Terry Schleder <director@nmfog.org>  
Subject: IPRA Request: Complete Behavioral Health audit  
Date: August 28, 2013 12:48:53 PM MDT  
To: IPRArequestrecords@nmag.gov

Greetings, Records Custodian-

On behalf of the New Mexico Foundation for Open Government, I am requesting the complete and final report of the audit of New Mexico's behavioral health providers that was performed earlier this year by Public Consulting Group, Inc., of Boston.

Thank you,

Terry Schleder, Executive Director

New Mexico Foundation for Open Government  
115 Gold Ave. SW  
Albuquerque, NM 87102  
[www.nmfog.org](http://www.nmfog.org)  
(505) 764-3750  
(888) 843-9121  
(505) 401-1328 cell



From: "Russell, Richard" <rrussell@nmag.gov>  
Subject: Re: your IPRA request  
Date: August 28, 2013 1:28:04 PM MDT  
To: director@nmfog.org

Terry Schleder, Executive Director

New Mexico Foundation for Open Government  
115 Gold Ave. SW  
Albuquerque, NM 87102

Dear Mr. Schleder:

Attached to this email you will find documents and redacted documents responsive to your request.

Pursuant to NMSA 1978 § 14-2-1(B) we have redacted protected personal identifier information from each file. Under the attorney-client and work product privilege pursuant to NMSA 1978, § 14-2-1 (A)(B), The Undersigned and Jody Curran Assistant Attorney General, are responsible for this limited denial.

Sincerely,

Richard Russell

--

Richard Russell  
Office of the Attorney General  
Administrative Assistant  
P. O. Drawer 1508  
Santa Fe, New Mexico 87504-1508  
Phone: 505-827-1244

CONFIDENTIALITY NOTICE: The information in this e-mail and in any attachment may contain information that is legally privileged. It is intended only for the attention and use of the named recipient. If you are not the intended recipient, you are not authorized to retain, disclose, copy or distribute the message and/or any of its attachments. If you received this e-mail in error, please notify sender at the New Mexico Attorney General's Office and delete this message. Thank-you.

Fax: 505-827-5826

RRussell@nmag.gov



From: Terry Schleder <director@nmfog.org>  
Subject: IPRA Request: Complete Behavioral Health audit  
Date: August 28, 2013 12:51:17 PM MDT  
To: Jonni.Pool@state.nm.us

Greetings, Ms. Pool-

On behalf of the New Mexico Foundation for Open Government, I am requesting the complete and final report of the audit of New Mexico's behavioral health providers that was performed earlier this year by Public Consulting Group, Inc., of Boston.

Thank you,

Terry Schleder, Executive Director

New Mexico Foundation for Open Government  
115 Gold Ave. SW  
Albuquerque, NM 87102  
[www.nmfog.org](http://www.nmfog.org)  
(505) 764-3750  
(888) 843-9121  
(505) 401-1328 cell



August 28, 2013

Terry Schleder, Executive Director  
New Mexico Foundation for Open Government

Via email to: [director@nmfog.org](mailto:director@nmfog.org)  
Original will not follow

**Re: New Mexico Inspection of Public Records Act Request**

Dear Terry Schleder:

In response to your request under the Inspection of Public Records Act, in which you stated:

On behalf of the New Mexico Foundation for Open Government, I am requesting the complete and final report of the audit of New Mexico's behavioral health providers that was performed earlier this year by Public Consulting Group, Inc., of Boston.

A large part of the document you have requested is not permitted to be disclosed under 14-2-1.A(4) NMSA 1978, which states in part, "...law enforcement records that reveal...information or individuals accused but not charged with a crime...records include evidence in any form received or compiled in connection with any criminal investigation...". In response to your request, we are forwarding the portion of the PCG audit that the New Mexico Attorney General has authorized for release.

Thank you,



Jonni Lu Pool  
Public Records Custodian  
[Jonni.pool@state.nm.us](mailto:Jonni.pool@state.nm.us)  
505.476.6866



August 28, 2013

Bryant Furlow  
Medical Journalist

Via email to: [bryant.furlow@gmail.com](mailto:bryant.furlow@gmail.com)  
Original will not follow

**Re: New Mexico Inspection of Public Records Act Request  
Behavioral Health provider audit status reports and communications**

Dear Mr. Furlow:

This is an additional response to the IPRA request you sent on August 12, in which you stated that you wanted:

- 1) Any and all versions of behavioral health audit status reports and status updates dated 2013.
- 2) Any and all versions of behavioral health audit communication plans.

Attached are documents in color which were inadvertently sent to you in black and white yesterday. Information exempt from disclosure in yesterday's response was redacted with assistance from Nathan Adams, Assistant General Counsel.

Thank you.



Jonni Lu Pool  
Public Records Custodian  
[jonni.pool@state.nm.us](mailto:jonni.pool@state.nm.us)  
505.476.6866





## Attorney General of New Mexico

**GARY K. KING**  
Attorney General

**ALBERT J. LAMA**  
Chief Deputy Attorney General

July 22, 2013

Ray Mensack, General Counsel  
Larry Hyeck, Deputy General Counsel  
Human Services Department  
2009 Pacheco Street  
P.O. Box 2348  
Santa Fe, NM 87504

Dear Ray and Larry:

I am writing to express my thanks to your office for the extended cooperation between our respective agencies, regarding the recent behavioral health referrals.

We are actively investigating each of the providers you have referred to us as a result of the recent audit completed by Public Consulting Group. As required by the regulations governing New Mexico's participation in the Medicaid Program, the U.S. Health and Human Services Department has mandated that HSD impose a payment suspension on any Medicaid Provider when HSD has determined that there is a credible allegation of fraud.

As I understand the payment suspension process, HSD must first investigate when it receives information that billing irregularities are occurring in the context of any provider billing for Medicaid services. The Department then determines whether or not the information received rises to the level of a credible allegation of fraud as referenced in CFR 455.23. In the instant case, I understand that the Department's determination of a credible allegation of fraud was based on the audit conducted by PCG. When a determination of a credible allegation of fraud exists the Department must impose a payment suspension on the Medicaid provider which in turn triggers a mandatory referral to the Medicaid Fraud Control Unit of the Attorney Generals Office. That referral occurred on or about June 21, 2013. To clarify, the acceptance by the Attorney General's Office of the referral is not a confirmation of any of the findings of the referral, but merely a condition by which the Medicaid Fraud Control Unit opens an investigation to determine whether or not fraud is or has occurred. Finally, regulations also provide reasons for not imposing a payment suspension even when a credible allegation of fraud is found and the matter has been referred the Medicaid Fraud Control Unit. CFR 455.23 (e). We understand that, the Human Services Department has exercised its discretion in



July 22, 2013  
Page 2 of 2

"lifting" payment suspensions on several Medicaid providers contained in the referral based on this "good cause" exception.

It is my understanding that this process as developed by our respective agencies has facilitated the orderly flow of referrals for investigation. In this regard your continued cooperation has been and will continue to be essential to the success of our investigations.

As you know it is not our policy to release specific information about any investigation, however, I would like you to know that additional resources have been dedicated to these investigations. It is our desire to complete these investigations as soon as is possible under the circumstances.

Please contact me if you have any questions or concerns regarding this matter.

Sincerely,



ALBERT J. LAMA  
Chief Deputy Attorney General

cc: Gary K. King, Attorney General, AGO  
Jody Curran, Medicaid Fraud Division Director, AGO  
David Abbey, Director of Legislative Council Services

## Big names in health care audit released

Deborah Baker and Jackie Jadrnak / Journal staff writers

Wed, Jun 26, 2013

### Some providers say state not forthcoming on alleged problems

*Copyright © 2013 Albuquerque Journal*

SANTA FE – Fifteen nonprofits whose payments were suspended after an audit the state Human Services Department said showed widespread mismanagement and possible fraud include some of the biggest New Mexico players in behavioral health.

On the list is TeamBuilders Inc., run by a Santa Fe couple; Presbyterian Medical Services Inc.; and seven southern New Mexico providers that are associated with Rio Grande Behavioral Health Services.

The list was provided by the Human Services Department following a public records request from the **Journal** for the names of the nonprofits whose funding was halted.

Several of the 15 providers, which serve the mentally ill and substance abusers, complained Tuesday that they have not been given information by HSD about their alleged shortcomings.

“We’re at a loss,” said Steven Hansen, chief executive officer of Santa Fe-based Presbyterian Medical Services. “Obviously, we’re not perfect; there’s always room for improvement. But if they think we owe money back, we want to know how much and why.”

He added, “We don’t know what our error rate was. We were not given any details on what we were audited on.”

PMS and TeamBuilders – along with another two of the 15 providers, Hogares Inc. in Albuquerque and Families and Youth Inc. in Las Cruces – were among the top 10 behavioral health providers, in terms of payments to them, on a list the **Journal** obtained in 2011 from HSD. No updated version of that list was available Tuesday.

The others on the list of 15 are Partners in Wellness Inc. in Albuquerque; Youth Development Inc. in Albuquerque; Pathways Inc. in Albuquerque; Easter Seals El Mirador in Santa Fe; Service Organization for Youth Inc. in Raton; and the following nonprofits associated with Rio Grande Behavioral Health Services: Border Area Mental Health, Counseling Associates in Roswell; Southwest Counseling Center; The Counseling Center in Alamogordo; Valencia Counseling Service; and Southern New Mexico Human Development.

The providers get about 80 percent of their funding from Medicaid and the rest from other federal and state funds, according to HSD.

An audit done by a Boston firm for HSD identified more than \$36 million in overpayments to the 15 nonprofits from 2009 to 2012, and HSD turned over the audit results to the New Mexico attorney general’s Medicaid fraud unit last week.

Although HSD stopped their funding as of Monday, providers continued to see clients. They can ask HSD for an exemption from the payment freeze, and some have done so.

TeamBuilders, which Shannon and Lorraine Freedle of Santa Fe grew from a tiny operation in Tucumcari to a giant provider of services to more than 3,000 children and families, said its doors will stay open.

“We are absolutely committed to continuing to provide services for all those that rely on us, most of whom live



in rural and frontier areas and would not have access to behavioral health services without us," Shannon Freedle said in an email.

He said that TeamBuilders hadn't received individual audit results but that "we have faith in the process and intend to work with the state" to address concerns. He declined to comment on HSD's allegations of widespread mismanagement.

TeamBuilders has over 600 employees and serves 24 counties. As of the 2011 information from HSD, it was being paid more than any other individual behavioral health provider – nearly \$42.5 million for the period from July 2009 to August 2011.

Roque Garcia, CEO of Southwest Counseling Center in Las Cruces, said he hadn't been given details of any allegations against the nonprofit. Garcia also is CEO of Rio Grande Behavioral Health Services.

"Everyone appears to have been painted with the same brush," he said.

"We're still trying to work through this whole thing. ... Hopefully, we can get this taken care of soon."

HSD Secretary Sidonie Squier said Monday that the agency contracted for the audit after OptumHealth, which oversees the behavioral health system, installed a new software system designed to catch errors and abuse.

Patsy Romero, chief operations officer of Santa Fe-based Easter Seals El Mirador, one of the 15 providers, said she has had personal experience working in oversight of behavioral health organizations and criticized what she said was the lack of audits and supervision under Optum Health.

"How do you manage a system of care if you don't do monitoring?" she said.

"I'm just very, very concerned about the way it all went down," Romero said of the way Human Services handled the audits and their results. "We're being treated like criminals. ... I've been doing behavioral health in New Mexico for 30 years. ... I would never do anything to jeopardize care. ... It's not in my DNA."

She said there had been no indication from Optum of any concerns about the nonprofit's operation.

"They (HSD officials) said they were so egregious they turned (the audits) over to the Attorney General's Office," she continued. "I'm struggling in the dark trying to figure out, what did we do wrong?"

Romero said the agency, which serves Santa Fe, Rio Arriba, Taos, Colfax and Union counties, has had "a very difficult year," has no available reserves and would have a tough time continuing services.

Romero's operation and PMS asked HSD on Tuesday to restore their funding.

PMS's Hansen said his agency provides a range of medical services beyond the behavioral health services that were the target of the audit and will have all of its Medicaid funds withheld by HSD. "That's around 11 to 15 percent of our cash revenue," he said, adding that PMS has adequate reserves to continue supporting services during this time. "We're telling the staff that our patients come first and we are moving forward with business as usual."

Overall, PMS serves about 60,000 clients a year in 17 counties around New Mexico, 30 percent of whom are reimbursed by Medicaid, he said.

## HSD audit targeted TeamBuilders' business dealings

Deborah Baker / Journal Staff Writer

Sun, Aug 4, 2013

### Nonprofit's operators take in an estimated \$1.5 million a year

*Copyright © 2013 Albuquerque Journal*

A couple who run a Santa Fe-based nonprofit providing Medicaid-funded services to children and families make as much as \$1.5 million a year in salaries and other income, according to a recent audit of New Mexico behavioral health providers.

Shannon and Lorraine Freedle, operators of TeamBuilders Counseling Services Inc., derived much of that income from leases paid by the nonprofit to holding companies owned in full or in part by the Freedles and other TeamBuilders officers, according to a state-commissioned audit.

The audit of 15 behavioral health providers, including TeamBuilders, was commissioned by the Human Services Department and conducted by the Public Consulting Group of Boston. The department has refused to release the 400-page audit of the providers at the request of Attorney General Gary King, whose office has said it has 17 staffers reviewing the material.

The law requires HSD to forward what it determines to be "credible allegations of fraud" to the attorney general.

According to a summary of audit findings and recommendations obtained by the **Journal**, the nonprofit made lease payments of more than \$3.3 million from 2006 through 2011 to limited liability companies owned in full or part by the Freedles and other TeamBuilders' officers.

"While prosperous from its state contracts, Teambuilders (sic) does not own a single piece of real estate that it occupies. Teambuilders (sic) has essentially built a sizable real estate portfolio for its officers," says the audit commissioned by HSD.

An attorney for TeamBuilders called information from the audit, relayed to him by the **Journal**, "grossly inaccurate."

The lawyer, Gregory Richards of Kerrville, Texas, repeated the nonprofit's complaint that it has not been able to defend itself against state accusations, because the state has refused to provide the audit to TeamBuilders.

TeamBuilders is among the nonprofits whose Medicaid funding was cut off by HSD in late June. The agency said the audit of 15 providers showed overpayments totaling \$36 million, mismanagement and possible fraud. It turned the findings on all of them over to the state attorney general and federal authorities.

According to HSD, management of TeamBuilders' operations is scheduled to be taken over on Aug. 17 by Agave Health Inc., one of the providers the HSD brought in from Arizona to assist or run the New Mexico nonprofits.

The PCG audit recommended that the lease payments to the limited liability companies be reviewed for conflict of interest, and that officers and directors of TeamBuilders be evaluated for conflict of interest and whether the transactions violate federal regulations or law.



Lorraine R. Freedle of Team Builders. (Courtesy of Team Builders)

Because the extent of the officer ownership of the LLCs wasn't fully disclosed in the documents PCG reviewed, it's possible that some unrelated parties also got part of that rental income, the audit said.

### **Audit challenged**

Richards, the Freedles' lawyer, told the **Journal** that TeamBuilders has been refused access to the audit by Human Services Secretary Sidonie Squier, despite "the fact that even the most rudimentary due process requires that the accused be allowed to see the accusations brought against him or her."

Richards said the audit findings relayed to him by the **Journal** "are grossly inaccurate and call into question the validity of the audit and the secretary's actions."

"TeamBuilders has always operated with integrity and transparency," Richards said in an email. "In fact, its financial information, including information regarding the compensation of its officers, has been publicly available for years."

"The audit information you have cited contradicts or misrepresents the publicly available information," Richards continued. "TeamBuilders hopes it will eventually receive the detailed audit results so it can respond to them in a meaningful manner and demonstrate the integrity of its actions and the quality of its operations."

Richards said the publicly available information he cited are TeamBuilders' federal tax returns for a tax-exempt organization, often called "990s."

### **Real estate and compensation**

According to the audit, TeamBuilders leases property in Clovis, Clayton, Santa Fe, Tucumcari, Las Vegas and Taos from limited liability companies that are owned in whole or in part by the Freedles or for which Shannon Freedle is listed as the organizer.

In Ruidoso, the nonprofit leases from an LLC for which TeamBuilders' chief operations officer was the organizer, the audit said. TeamBuilders has lease commitments of \$1.57 million from 2011 to 2021 for the property, which was purchased by the LLC for \$322,000 in 2011, according to the audit.

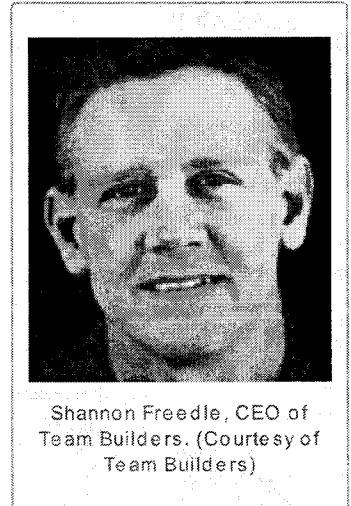
"TeamBuilders had sufficient capital to purchase this property outright in 2011," and would have saved \$1.25 million in lease payments had it done so, the audit said.

The audit said it is "noteworthy" that TeamBuilders invested in land for expansion in Quay County with the intention of building a facility, but continues to hold the land, and instead entered into leases and construction contracts "with related property holding companies to develop property that it would never own."

"PCG considers this significant because more than \$1M per year in Teambuilders (sic) assets is diverted to its officers and their families," the audit says.

Shannon Freedle is TeamBuilders' CEO, and Lorraine Freedle, a pediatric neuropsychologist, is its clinical director. According to the audit, in the fiscal year 2012, Shannon Freedle got a 71 percent raise, increasing his compensation to \$252,000, while Lorraine Freedle got a 46 percent raise, bringing her compensation to \$203,000.

"Combined with estimated income from related transactions, this family's income from the nonprofit is estimated as high as \$1.5M per year," the audit said.



## › **Services for children**

TeamBuilders, which operates in 23 New Mexico counties, has over 700 employees and foster parents, and 3,000 active clients, according to Shannon Freedle. It focuses on “wraparound” services for children, which are individualized, community-based and emphasize family involvement.

The Freedles told the **Journal** for an article in 2011 that TeamBuilders has hard-to-find space requirements and that, while it owned small buildings in some communities, its board didn’t want to make big capital investments or saddle the nonprofit with long-term debt for larger or more specialized spaces.

So the Freedles, other TeamBuilders employees and outside investors started the real estate companies, the couple said.

Their lawyer, Richards, said in October 2011 the Freedles hadn’t gotten any income yet from those companies except to cover tax liability.

Shannon Freedle said in the same **Journal** story that the nonprofit was “very conservative and cautious,” making sure everything it did was both legal and ethical.

According to an executive summary from the Human Services Department, the PCG audit had three main components: a review of case file documentation, a review of billing systems, and an “enterprise audit” that reviewed the providers’ key stakeholders, third party contracts and other stakeholder relationships.