

STATE OF NEW MEXICO
COUNTY OF DONA ANA
THIRD JUDICIAL DISTRICT COURT

HAUSSAMEN PUBLICATIONS, INC.,

Plaintiff,

v.

Cause Number: D-307-CV-2016-01220

CITY OF LAS CRUCES and
THE MERCER GROUP, INC.,

Martin, James T.

Defendant(s).

PLAINTIFF'S ORIGINAL COMPLAINT TO ENFORCE THE NEW
MEXICO INSPECTION OF PUBLIC RECORDS ACT AND FOR WRIT OF MANDAMUS

COMES NOW Plaintiff, by and through undersigned counsel, and hereby complains
against Defendants as follows:

PARTIES

1. Plaintiff Haussamen Publications, Inc. (hereinafter "Plaintiff"), is a corporation formed pursuant to the laws of the State of New Mexico and whose principal place of business is in Dona Ana County, State of New Mexico.
2. Defendant City of Las Cruces (hereinafter "Defendant CLC") is a municipal corporation formed pursuant to the laws of the State of New Mexico and is located in Dona Ana County, State of New Mexico.
3. Defendant The Mercer Group, Inc. (hereinafter "Defendant Mercer Group"), is a foreign corporation formed pursuant to the laws of the State of Georgia and with a registered agent located in Santa Fe County, State of New Mexico.

JURISDICTION AND VENUE

4. Plaintiff hereby incorporates in their entirety paragraphs 1 through 3 as set forth above and by reference make said paragraphs a part hereof as if fully set forth herein.

5. This cause of action seeks to enforce the provisions of the New Mexico Inspection of Public Records Act, NMSA 1978 § 14-2-1, et. seq.

6. Jurisdiction in the District Court is proper pursuant to NMSA 1978 § 38-3-1.1.

7. Venue in the Third Judicial District Court of New Mexico is proper pursuant to NMSA 1978 § 38-3-1, as Plaintiff and Defendant CLC are both located in Dona Ana County, State of New Mexico.

FACTUAL ALLEGATIONS

8. Plaintiff hereby incorporates in their entirety paragraphs 1 through 7 as set forth above and by reference make said paragraphs a part hereof as if fully set forth herein.

9. On or about September 23, 2015, Defendant CLC entered into a contract with Defendant Mercer Group for the purpose of Defendant Mercer Group to undertake an executive search for a new City Manager for the City of Las Cruces due to the impending retirement of then City Manager Robert Garza. The contract between Defendant CLC and Defendant Mercer Group is attached hereto as Exhibit A.

10. Defendant Mercer Group, on behalf of and by direction of Defendant CLC, conducted a nationwide search for candidates for the City Manager position.

11. Pursuant to Exhibit A, Defendant CLC paid Defendant Mercer Group a fee of fifteen thousand dollars (\$15,000.00) and the Mercer Group was given an expense budget of eight thousand dollars (\$8000.00) to conduct the executive search.

12. Upon information and belief, Defendant Mercer Group gathered at least fifty-one (51) applications on behalf of Defendant CLC for the Las Cruces City Manager position.

13. On May 4, 2016, Plaintiff, by and through its President, Heath Haussamen, delivered a written request to Defendant CLC pursuant to the New Mexico Inspection of Public Records Act and demanded that Defendant CLC disclose “all applications received by the City of Las Cruces and/or its hired search firm, The Mercer Group, for the position of Las Cruces City Manager.” A copy of the written request is attached hereto as Exhibit B.

14. On May 13, 2016, Defendant CLC disclosed to Plaintiff eleven (11) applications for the Las Cruces City Manager and refused to disclose the remaining applications. A copy of the Defendant’s response is attached hereto as Exhibit C.

15. As of the date of the filing of this cause of action, Defendant CLC has not disclosed or permitted inspection of the remaining applications for the Las Cruces City Manager position as demanded by Plaintiff pursuant to its Inspection of Public Records Act request made on May 4, 2016.

COUNT I

NEW MEXICO INSPECTION OF PUBLIC RECORDS ACT (NMSA 1978 § 14-2-1, et. seq.)

16. Plaintiff hereby incorporates in their entirety paragraphs 1 through 15 as set forth above and by reference make said paragraphs a part hereof as if fully set forth herein.

17. NMSA 1978 § 14-2-12 creates a cause of action for any person or entity to whom disclosure or inspection of public records is denied.

18. All applications for the Las Cruces City Manager position are public records as defined by the Inspection of Public Records Act (see NMSA 1978 § 14-2-6(G)).

19. Defendant Mercer Group received all applications for the Las Cruces City Manager position at the direction of and on behalf of Defendant CLC.

20. Defendant Mercer Group is in possession of the undisclosed applications and is holding the undisclosed applications on behalf of Defendant CLC.

21. Defendant CLC has not claimed that any exception to the New Mexico Inspection of Public Records Act prevents the disclosure of the applications for Las Cruces Manager (see NMSA 1978 § 14-2-1(a)).

COUNT II

WRIT OF MANDAMUS OR ALTERNATE RELIEF

22. Plaintiff hereby incorporates in their entirety paragraphs 1 through 21 as set forth above and by reference made said paragraphs a part hereof as if fully set forth herein.

23. A Writ of Mandamus should issue to Defendant CLC to obtain the undisclosed Las Cruces City Manager applications from Defendant Mercer Group and to compel disclosure of the undisclosed applications to Plaintiff as provided by the New Mexico Inspection of Public Records Act (see NMSA 1978 § 14-2-12(B)).

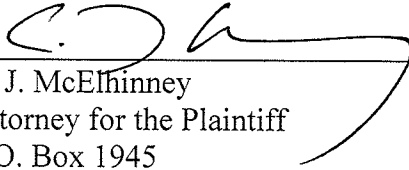
24. In the alternative, Defendant Mercer Group should be ordered by this Court to disclose to Plaintiff all applications for the position of Las Cruces City Manager (see NMSA 1978 § 14-2-12(B)).

WHEREFORE Plaintiff prays for a judgment against Defendants on all counts, that the Court order that Plaintiff be permitted to inspect all applications for Las Cruces City Manager obtained by Defendant Mercer Group on behalf of Defendant CLC, that a Writ of Mandamus or alternate relief issue to enforce the provisions of the New Mexico Inspection of Public Records Act, that the Court award damages, attorneys fees, and costs as provided by the New Mexico

Inspection of Public Records Act, NMSA 1978 § 14-2-1, et. seq., pre and post judgment interest,
and for any other relief that this Court deems just and proper.

Respectfully Submitted,

McELHINNEY LAW FIRM LLC

A handwritten signature in black ink, appearing to read 'C. J. McElhinney', is written over a horizontal line. The signature is stylized and extends to the right of the line.

C. J. McElhinney
Attorney for the Plaintiff
P.O. Box 1945
Las Cruces, NM 88004
(575) 288-1989
(575) 556-9388 (FAX)
cjm@cjmlawfirm.com

AGREEMENT

This AGREEMENT, made as of this 23rd day of September, 2015, by and between **THE MERCER GROUP, INC.** and the **CITY OF LAS CRUCES, NEW MEXICO**, a public corporation.

WITNESSETH:

WHEREAS, the City of Las Cruces (hereinafter referred to as the "City") is interested in hiring an executive search firm to assist the City by conducting an executive search for a new City Manager for the City of Las Cruces; and

WHEREAS, The Mercer Group, Inc. (hereinafter referred to as "Mercer") has responded to the City's request for proposal for a professional services firm to conduct a search for a City Manager; and

WHEREAS, the City has selected Mercer's proposal dated August 12, 2015, as the proposal which best meets its needs and the City desires to hire Mercer to assist the City by conducting an executive search for City Manager; and

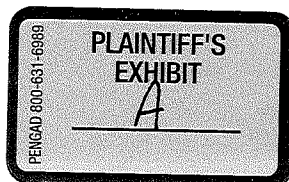
WHEREAS, Mercer desires to assist the City by conducting an executive search for City Manager.

NOW THEREFORE, in consideration of the following mutual covenants and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged by all parties hereto, Mercer and the City hereby agree as follows:

1. Mercer agrees to conduct a "turn-key" executive search for the new City Manager for the City in accordance with Mercer's proposal to the City dated August 12, 2015. Mercer's proposal to the City dated August 12, 2015, is attached to this proposed Agreement as Attachment A and, is hereby incorporated and made a part of this Agreement by reference.
2. The discounted compensation to be paid to Mercer by the for the completion of the searches is as follows:

\$15,000 professional services fee for the City Manager search.
Not-to-exceed expenses of \$8,000 for the City Manager search.
3. Payment terms to Mercer are as follows:

1/3 at the beginning of each search process.
1/3 at the time of presentation to the City of semi-finalist candidates.



Agreement, continued:

1/3 at the time of presenting a final report to the City of finalist candidates.

Applicable expenses as identified in Mercer's scope of work for the search processes will be billed to the City by Mercer on a monthly basis and will be accompanied by appropriate receipts and documentation.

4. The City's liability to Mercer for services rendered under this Agreement will not exceed the agreed upon price unless an increase is authorized by the City in writing.
5. Mercer will comply with all applicable laws, rules and regulations of federal, state and local government entities.
6. Mercer's ability to carry out the work required by the City under this Agreement will be heavily dependent upon its past experience in providing similar services to others, and it expects to continue such work in the future. Mercer will, to the degree possible, preserve the confidential nature of any information received from the City or developed during the work in accordance with its professional standards.
7. Mercer assures the City that it will devote its best efforts to carrying out this Agreement. The results obtained, recommendations and any written material provided to the City by Mercer will represent Mercer's best judgment based upon the information available to Mercer. Mercer's liability to the City, if any, will not be greater than the amount paid Mercer for the services rendered to the City.
8. The City and Mercer both agree that this Agreement shall be governed by the laws of the State of New Mexico.
9. The City and Mercer both agree that in the event that any dispute arises between the parties, the complaining party shall promptly notify the other of the dispute in writing. Each party shall respond to the other party in writing within ten (10) working days of receipt of such notice.
10. The City and Mercer both agree that any amendments to this Agreement shall be made in writing and executed by both parties. No proposed amendment which is not in writing and executed by both parties shall effect the terms of this Agreement.

Agreement, continued:

11. The parties shall have the right at either party's convenience to terminate this Agreement following ten (10) days written notice to the affected party. Should either party terminate this Agreement, the City shall only be obligated to pay Mercer for those services already provided.

CITY OF LAS CRUCES, NEW MEXICO

BY: *Deb Smith*
Deb Smith
Purchasing Manager

THE MERCER GROUP, INC.

BY: *[Signature]*
James A. Mercer, President/CEO
Certified Management Consultant (CMC)

APPROVED AS TO FORM:

[Signature]

City Attorney



C. J. McElhinney <cjm@cjmlawfirm.com>

Fwd: IPRA request

----- Forwarded message -----

From: **Heath Haussamen** <heath@haussamen.com>

Date: Thu, May 5, 2016 at 12:16 PM

Subject: IPRA request

To: Linda Lewis <llewis@las-cruces.org>, David Aguayo <davida@las-cruces.org>

Hi Linda,

Please consider this email a formal request under the state's Inspection of Public Records Act to inspect all agreements between the City of Las Cruces and the search firm, The Mercer Group, related to the current Las Cruces city manager search.

Please let me know if you have any questions. Thanks.

--

Heath Haussamen
Editor and publisher
NMPolitics.net

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Facebook: /haussamen
haussamen.com

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Heath Haussamen
Editor and Publisher
NMPolitics.net

RE: Response to IPRA Request.

Dear Mr. Haussamen:

In response to your IPRA request of May 4, 2016, please find attached a redacted copy of material received by the City Council from the Mercer Group used in the interview of various applicants regarding the current search for a City Manager for the City of Las Cruces; an email submitted by the Mercer group with various resumes and related documents submitted by applicants; and the City's contract with the Mercer Group. The redacted material involves copyrighted material. There are no other documents held by the City that are responsive to your request.

With respect to documents held by the Mercer Group involving other applicants, it is the opinion of the City Attorney that the Mercer Group itself is a private entity and not a public entity that is subject to IPRA. The private documents gathered by Mercer in the fulfillment of their contract are not public records until they are delivered to the City.

The New Mexico Court of Appeals in Toomey v. City of Truth or Consequences, 2012-NMCA-104, 287 P.3d 364, 2012 N.M. App. LEXIS 76, 40 Media L. Rep. 2202 (N.M. Ct. App. 2012) adopted a nine-point test for courts to use in determining whether a private entity is performing public entity functions to such a degree that IPRA requirement apply to their activities. In reviewing the relationship between City of Las Cruces and the Mercer Group, the City Attorney found insufficient evidence to conclude that Mercer Group meets the Toomey test.

Please feel free to contact me if you have any questions.

Sincerely,

David Aguayo
Senior Office Assistant
City Clerk's Office

