

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

HAUSSAMEN PUBLICATIONS, INC.,

Plaintiff,

v.

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

James T. Martin

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

Defendant(s).

**CITY OF LAS CRUCES MOTION TO DISMISS  
OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT**

COMES NOW the Defendant the City of Las Cruces (hereafter "City"), by and through the Office of the City Attorney Robert G. Cates, Deputy City Attorney and Thomas Limon, Assistant City Attorney, and in response to the Plaintiff's Original Complaint moves to dismiss Plaintiff's Original Complaint and in the alternative asks this Court for Summary Judgment and as grounds for this Motion states as follows:

MOTION TO DISMISS FOR FAILURE  
TO STATE A CLAIM PURSUANT TO RULE 1-012(B)(6), NMRCP 1986

1. The Plaintiff's Original Complaint fails, pursuant to Rule 1-012(B)(6) NMRCP (1986), to state a cause of action upon which relief can be based.
2. Plaintiff sought the disclosure of documentation related to the City's search for a new City Manager, invoking its rights under the Inspection of Public Records Act (IPRA), Section 14-2-1 et seq., NMSA 1978.
3. All records in the possession of the designated Custodian of City public records were

delivered to Plaintiff in response to the IPRA request. Plaintiff in the current action claims City to be in violation of IPRA for failing to disclose records not yet received by the City but held by The Mercer Group, Inc., a contractor to the City. Plaintiff's Exhibit C.

4. IPRA applies to "public bodies" and defines the term in Section 14-2-6(F) NMSA 1978. "Public body" is "the executive, legislative and judicial branches of state and local governments and all advisory boards, commissions, committees, agencies or entities created by the constitution or any branch of government that receive any public funding, including political subdivisions, special taxing districts, school districts and institutions of higher education." Nowhere does it define "public bodies" as including the private independent contractors to the government.

5. The term "public record" is defined at Section 14-2-6(G) NMSA 1978 in that it "means all documents, papers, letters, books, maps, tapes, photographs, recordings or other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained."

6. In considering a motion to dismiss to failure to state a claim for which relief can be granted, all facts well pleaded must be accepted as true, and the motion may be granted only when it appear the plaintiff cannot be entitled to relief under any state of facts provable under the claim. Runyan v. Jaramillo, 90 NM 629, 567 P2d 478 (1977). A motion to dismiss a complaint for failure to state a claim upon the which relief can be granted merely tests the legal sufficiency of the complaint. McNutt v. New Mexico State Tribune Co. 88 NM. 162, 538 P2d 804 (Ct App) cert denied, 88 NM 318, 540 P2d 248 (1975)

7. Assuming facts most in the favor of the Plaintiff, there is no statement of facts that

would invoke IPRA on a non-public body or would require the public body to disclose public records not in its possession. The City contends that it has no obligation under IPRA to disclose records it does not have and has no guarantee of receiving. The City has no legal mechanism under IPRA to compel the divulging of private information held by an independent contractor, such as The Mercer Group, Inc., for purposes of fulfilling requests for disclosure of public information.

8. Plaintiff can cite no authority granting this Court jurisdiction to issue writs of mandamus to the City to divulge information not in its possession. The City has not violated its obligation under IPRA and no relief is available to the Plaintiff at this point in the City Manager search process, whether the relief sought is a writ to compel further disclosure or for attorney's fees or court costs incurred in this action. There is no mechanism under law that City could use to compel the disclosure of information it has not yet received from its contractor and therefore no failure by City to take legal action to acquire those records sought by the Plaintiff. Plaintiff cites no duty by City beyond the specific provisions of IPRA.

9. . Plaintiff cannot describe how it has a cause of action against a private corporation pursuant to IPRA. Plaintiff does not cite any legal means by which IPRA empowers the City of Las Cruces to compel the disclosure of records not in the City's possession. Plaintiff simply states that it desires the documentation in the possession of Mercer but cites no legal authority or other legal obligation under statute or common law that would require such information be provided to Plaintiff. As a result, the City of Las Cruces seeks the dismissal of the complaint pursuant to Rule 1-012(B)6 for its failure to state a claim upon which relief can be based.

WHEREFORE, the City asks for the order of this Court pursuant to Rule 1-012(B)(6)

NMRCP 1986 dismissing the Complaint by the Plaintiff and in particular its requests for injunctive and other relief pursuant to the Inspection of Public Records Act (IPRA).

#### MOTION FOR SUMMARY JUDGMENT IN THE ALTERNATIVE

10. In the alternative, the City seeks an Order granting its Motion of Summary Judgment on the undisputed facts of the case pursuant to Rule 1-056, NMRCP 1986.

#### BACKGROUND

11. . The general rule is that when matters outside of the pleadings are considered, a motion to dismiss is treated as a motion for summary judgment, pursuant to Rule 1-056, NMRCP (1986). DiMatteo v. County of Dona Ana ex rel . Bd. Of Cnty Commissioners, 109 NM 374, 785 P2d 285 (Ct. App. 1989).

12. IPRA provides a broad right to inspect public records, subject to twelve identified exceptions. These limited exceptions to the public's right to inspect public records, in conjunction with the broad definition for public records, furthers IPRA's purpose of ensuring that "all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees." Section 14-2-5; City of Farmington vs. The Daily Times, 210 P.3d 246 (N.M. Ct. App. 2009).

#### MATERIAL FACTS NOT IN DISPUTE

13. Plaintiff filed its IPRA request on May 4, 2016 and it was responded to in a timely manner by the City of Las Cruces which disclosed all documentation in its possession and received from The Mercer Group, including the services contract between Mercer and the City along with resumes of 11 persons recommended to the City to be interviewed for the position of City Manager. To date, no further information has been provided to the City. The City is obliged to respond to

public requests for records under IPRA and has met its obligations. In its Complaint, the Plaintiff asserts that Mercer has an obligation under IPRA to provide the names and documentation regarding an additional 40 persons who expressed interest in the position. Those additional persons have not had information presented to the City of Las Cruces.

#### APPLICABLE LAW

14. The New Mexico Court of Appeals adopted in Toomey v. City of Truth or Consequences, 2012-NMCA-104, 287 P.3d. 364 (2012) a nine-point test to evaluate whether the nature of the legal interactions between an entity subject to IPRA and a contractor could invoke the IPRA right of inspection to the documentation held by that contractor

15. In Toomey, the Court of Appeals re-stated the strong policy preference to the disclosure of public documents generated by or in the control of a public body. “We emphasize, however, that IPRA should be construed broadly to effectuate its purposes, and courts should avoid narrow definitions that would defeat the intent of the Legislature”, citing Cox v. N.M. Dep’t of Pub. Safety, 2010-NMCA-096, ¶ 4, 148 N.M. 934, 242 P.3d 501. To effect this policy, the Court found that courts would need to find that entities contracting with the State were not automatically, by the fact of that contract, also within the scope of IPRA obligations. In evaluating the approach of several other jurisdictions, the New Mexico Court of Appeals adopted the test developed by the State of Florida as expressed in News & Sun-Sentinel, Co. v. Schwab, Twitty & Hanser Architectural Group, Inc. 596 So.2d 1029 (Fla.1992). (hereafter “*Schwab*”) In adopting *Schwab*, The New Mexico Court of Appeals examined whether a contractor was “acting on behalf of a public agency” under the public records laws by examining the following factors:

1. The level of public funding;
2. Whether there is a commingling of funds;

3. Whether the activity was conducted on publicly owned property;
4. Whether the services contracted for are an integral part of the public agency's chosen decision-making process;
5. Whether the private-entity is performing a governmental function or a function the public agency otherwise would perform;
6. The extent of the public agency's involvement with, regulation of, or control over the private entity;
7. Whether the private entity was created by the public entity;
8. Whether the public agency has a substantial financial interest in the private entity; and
9. For whose benefit the private entity is functioning.

In applying the elements of the adopted test, the Court of Appeals emphasized the need to employ a "totality of factors" test to its examination of the nine-point test of the public/private entity contractual relationship and whether by that relationship the private entity could fairly be viewed as standing in the place of the public entity where IPRA was concerned.

16. The *Toomey* Court was posed with examining whether a cable television station had an obligation under IPRA to turn over copies of taped City Council meetings, by virtue of the fact the operation of the station within the City was predicated on its providing a public affairs channel that covered those meetings. In examining the relationship between the parties, it was determined that the cable company met all nine of the nine points of the test adopted from the Schwab opinion.

## ARGUMENT

17. Taking all those facts presented by the Plaintiff in its Complaint as true, supplemented by the facts contained in the Defense Affidavit of Robert Garza, (attached hereto as Defense Exhibit A and incorporated by this reference) and the Contract between the City and the Mercer Group, Inc., the facts of this case, construed in the light most favorable to the Plaintiff, would not result in the City's failing to meet its obligations under IPRA and does not amount to a transfer of IPRA obligations to The Mercer Group, Inc.

18. Applying the *Toomey* Test to these facts does not advantage the Plaintiff's case:

1. **The level of public funding;**

The contract was for a one-time fee of \$15,000 and payment of costs up to \$8,000. (City of Las Cruces contract with Mercer Group). There is no substantial and continuing public funding of The Mercer Group, Inc.

2. **Commingling of funds;**

The contract contemplates a straight fee for service with no commingling of funds. (City of Las Cruces contract with Mercer Group)

3. **Whether the activity was conducted on publicly owned property;**

No provision of the contract contemplates Mercer Group would have access to or use of public property in fulfilling its contractual obligations. (City of Las Cruces contract with Mercer Group)

4. **Whether the services contracted for are an integral part of the public agency's chosen decision-making process;**

The selection of a City Manager could fairly be viewed as an integral part of the City's mission to organize itself to carry out the directives of the elected City Council. (Affidavit of Robert Garza)

5. **Whether the private-entity is performing a governmental function or a function the public agency otherwise would perform;**

While the recruitment, vetting and selection for interview of candidates for City employment is a task normally carried out by the Human Resources Department within the City, the selection of the City Manager, supervisor to all other staff positions, however, creates a potential for conflict of

interest the City Council sought to avoid by contracting privately for those services. (Affidavit of Robert Garza).

6. **The extent of the public agency's involvement with, regulation of, or control over the private entity;**

The City exerts no direct regulation or control over The Mercer Group, a company not incorporated within the State of New Mexico or City of Las Cruces. (Affidavit of Robert Garza)

7. **Whether the private entity was created by the public entity;**

The City did not create the Mercer Group, Inc. It performs its services as an independent contractor. (Affidavit of Robert Garza)

8. **Whether the public agency has a substantial financial interest in the private entity;**

The City retains no financial interest in Mercer Group, Inc. (City of Las Cruces contract with Mercer Group, Affidavit of Robert Garza)

9. **For whose benefit the private entity is functioning.**

The Mercer Group would benefit the City only if its services result in the referral of a candidate ultimately acceptable to the City Council. There is no contractual obligation to hire any of the persons referred by Mercer Group, Inc. (City of Las Cruces contract with Mercer Group, Affidavit of Robert Garza).

19. The City submits that an examination of the totality of the circumstances results in the conclusion that of the nine-factor test adopted in *Toomey*, the contractor Mercer Group fulfills only two of those elements. The *Toomey* Court analyzed the extent to which IPRA would apply to entities created by a municipality to carry out City functions on its behalf, noting the proliferation



of public/private partnerships that municipalities were entering into. The Court was rightly concerned that the farming out of City functions to private entities could be used to thwart the rights of citizens to invoke IPRA. However, the *Toomey* Test does not direct trial courts to conclude that all parties that contract with the City under the umbrella of IPRA merely because of the fact they provide services. Instead, courts are to engage in a nine-point analysis, viewed through a totality of the circumstances analysis to determine if sufficient contacts between private entity and public entity exist such that the activity of one is necessarily the activity of the other

20. In response to the Plaintiff's IPRA request, the City of Las Cruces provided all documentation that it had received from the Mercer Group in connection with the City Manager job search. Additional documentation that comes into the possession of the City would likewise be subject to IPRA disclosure. The Contract between the City and Mercer was disclosed. Plaintiff alleges that the City of Las Cruces is obliged to disclose documents and records not yet in its possession and which may, in fact, never be in its possession. The Mercer Group is not a public body subject to the scope of IPRA. The mere fact of a contractual relationship between the Mercer Group and the City of Las Cruces is not in itself, enough to invoke IPRA obligations by Mercer. Plaintiff similarly fails to identify a legal mechanism by which the City of Las Cruces is authorized by IPRA to seize documents from contractors not currently in the City's possession as a means of satisfying IPRA requests.

WHEREFORE, the Defendant City of Las Cruces does ask for the Order of this Court dismissing the Plaintiff's Original Complaint for failure to state a claim for which relief can be granted, pursuant to Rule 1-012(B)(6) NMRCP (1986) or in the alternative, dismissal for the reasons of Summary Judgment pursuant to Rule 1-056 NMRCP (1986) on the applicable law of

the case and upon a finding that there are no facts in controversy and that the City of Las Cruces, and The Mercer Group, Inc. would prevail as a matter of law. Given the nature of this Motion it is presumed Plaintiff is opposed to the relief requested.

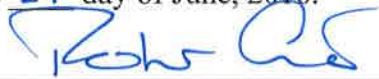
Respectfully submitted,



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Robert G. Cates, Deputy City Attorney  
for City of Las Cruces.  
P.O. Box 20000  
700 N. Main St., Suite 3200  
Las Cruces, NM 88004

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to all counsel of record in these proceedings on this the 29 day of June, 2016.



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STATE OF NEW MEXICO  
COUNTY OF DONA ANA  
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HAUSSAMEN PUBLICATIONS, INC.,

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Case Number: D-307-CV-2016-01220  
James T. Martin

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

Defendant(s).

AFFIDAVIT OF ROBERT GARZA

STATE OF NEW MEXICO    )

) ss.

COUNTY OF DONA ANA    )

I, ROBERT GARZA, the Affiant herein do hereby swear and affirm that the following statement of facts are true and accurate, to the best of my knowledge and belief as of the date executed,

1. I served as City Manager of the City of Las Cruces from 2010 to the date of my formal retirement on May 27, 2016 and as an employee of the City of Las Cruces from 1987.

2. As City Manager I participated in the process adopted by the City Council of the City of Las Cruces to retain an independent contractor for the purposes of evaluating, vetting and interviewing candidates to serve as the next City Manager of the City of Las Cruces. To achieve these goals the City Council retained the services of The Mercer Group, Inc.
3. As City Manager I approved and signed the contract for professional services between The Mercer Group and the City of Las Cruces. The terms of the agreement between the Mercer Group and the City were those of an independent contractor between the City and a provider of services not financially commingled with the City. The City of Las Cruces neither created the Mercer Group nor holds any financial interest in the Mercer Group.
4. The purposes of seeking independent counsel for the purposes of candidate recommendations to the City of Las Cruces included the following:
  - a. Identification of persons interested in the position of City Manager of Las Cruces.
  - b. Identification of persons with sufficient professional credentials and qualifications to meet the expectations of the City Council;
  - c. Confirmation of the accuracy of candidate statements (vetting) regarding their listed qualifications and references;
  - d. Evaluation of suitability of candidates for the unique local conditions inherent in accepting a professional position in the City of Las Cruces;
  - e. Evaluating the qualities of proposed candidates based upon the statements by cited professional references;
  - f. Referring those candidates for consideration by the City Council that, in the professional judgment of The Mercer Group, represent those candidates deemed to have skills and personality traits most closely aligned with the expectations of City Council;
  - g. The sorting of potentially dozens of candidates for the City Manager position requires significant dedication of time to the recruitment of qualified personnel,

evaluation of their interest in the particular location of Las Cruces, New Mexico, and investigation into the background of all persons expressing interest in the position.

5. In most cases in which professional staff are being recruited and hired by the City of Las Cruces, the task of recruiting and evaluation of candidates is a function of personnel of the respective Departments of the City in conjunction with input from the Human Resources office. It was determined by the City Council that this approach was inappropriate, in that it required employees of the City to engage in potential conflicts of interest by requiring participation in selection of their own future supervisor.
6. The Mercer Group may or may not disclose to the City of Las Cruces all personnel data or job applications that comes into its possession.
7. Under the City Charter, the City of Las Cruces is organized such that the City Manager serves as the only at-will and direct employee of the City Council of the City of Las Cruces and all other persons employed by the City are ultimately the supervisory responsibility of the City Manager.
8. The Mercer Group has not provided to the City of Las Cruces the names and applications of all candidates they have received. Their obligations are to refer to the City Council only those candidates the Mercer Group, in their professional judgment, determine to be suitable for the professional demands of the particular office of City Manager of the City of Las Cruces.

FURTHER AFFIANT SAYETH NAUGHT.

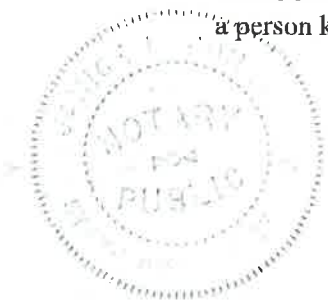


Robert Garza  
Affiant

SUBSCRIBED AND SWORN TO before me on this the 29<sup>th</sup> day of June, 2016 by Robert Garza, a person known to me or satisfactorily proven.



Notary Public



My Commission Expires:

11-03-19