

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

HAUSSAMEN PUBLICATIONS, INC.,

Plaintiff,

v.

Case #: D-307-2016-CV-01220
JUDGE MARTIN

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

Defendant(s).

PLAINTIFF'S RESPONSE TO DEFENDANT CITY OF LAS CRUCES'S
MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

COMES NOW Plaintiff, by and through undersigned counsel, and hereby enters the following response to Defendant City of Las Cruces's Motion to Dismiss or In the Alternative for Summary Judgment:

BACKGROUND

Plaintiff filed this action to enforce provisions of the New Mexico Inspection of Public Records Act (hereinafter "IPRA"), NMSA 1978 § 14-2-1, et. seq., following a refusal by Defendant City of Las Cruces and its private contractor Defendant Mercer Group to disclose applications for the position of Las Cruces City Manager pursuant to a contract entered into between Defendant City of Las Cruces and Defendant Mercer Group. Plaintiff made a written request to inspect public records by Plaintiff on Defendant City of Las Cruces. These applications were never delivered to Defendant City of Las Cruces by Defendant Mercer Group, but were submitted by prospective applicants for the position of Las Cruces City Manager and were received and are being maintained and held by Defendant Mercer Group on behalf of Defendant City of Las Cruces. Defendant City of Las Cruces filed its motion to dismiss or in the

alternative for summary judgment on June 29, 2016. For the following reasons, Defendant City of Las Cruces's motion is without merit and should be denied.

I. PLAINTIFF'S COMPLAINT STATES A COGNIZABLE CLAIM UNDER LAW FOR WHICH RELIEF CAN BE GRANTED AND DEFENDANT IS NOT ENTITLED TO DISMISSAL.

LEGAL STANDARD FOR DISMISSAL PURSUANT TO NMRA 1-012(b)6

"A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint, not the factual allegations which, for purposes of ruling on the motion, the court must accept as true." *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 2, 134 N.M. 43, 905 P.2d 184.

"A Rule 12(b)6 motion is *only* proper when it appears that plaintiff can neither recover nor obtain relief under any state of facts provable under the claim." *Envtl. Improvement Div. v. Aguayo*, 99 N.M. 497, 499, 660 P.2d 587, 589 (1983). "Dismissal on 12(B)(6) grounds is appropriate only if the plaintiff is not entitled to recover under any theory of the facts alleged in their complaint." *Callahan v. N.M. Fed'n of Teachers-TVI*, 2006-NMSC-010, ¶ 4, 139 N.M. 201, 131 P.3d 51.

ARGUMENT

Accepting as true the allegations of Plaintiff's original complaint ("POC"), a cause of action exists and relief can be granted. The New Mexico Inspection of Public Records Act was created by the New Mexico Legislature to "ensure, and it 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. It is the further intent of the legislature, and it is declared to be the public policy of this state, that to provide persons with such information is an essential function of a representative government and an integral part of

the routine duties of public officers and employees.” NMSA 1978 § 14-2-5. The New Mexico Legislature also created enforcement provisions for IPRA and provided that the Attorney General and/or “any person whose written request has been denied” to file suit to enforce the law. NMSA 1978 § 14-2-12. “IPRA includes remedies to encourage compliance and facilitate enforcement.” *San Juan Agric. Water Users Ass’n*, 2011-NMSC-011, ¶ 13, 150 N.M. 64, 257 P.3d 884. IPRA specifically provides mandamus as a remedy. NMSA 1978 § 14-2-12(B). IPRA also has a provision for damages, costs, and attorneys fees for prevailing party whose written IPRA request has been unlawfully denied. NMSA 1978 § 14-2-12(D).

Plaintiff’s original complaint alleges that a written IPRA request was made upon Defendant City of Las Cruces for disclosure of “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” and that Defendant City of Las Cruces disclosed to Plaintiff eleven (11) applications and refused to disclose the remaining applications, which are purportedly being held or maintained on behalf of Defendant City of Las Cruces. See POC, ¶¶ 13-15. Furthermore, Defendant City of Las Cruces has not claimed that any of IPRA’s enumerated exceptions prevent it from disclosing the applications. See NMSA 1978 § 14-2-1(A)1 through 14-2-1(A)8.

As a threshold matter, this court should find and declare that the applications for Las Cruces City Manager are public records as defined by IPRA, NMSA 1978 § 14-2-6(G). The New Mexico Court of Appeals has already decided that city manager applications are public records and subject to IPRA’s disclosure requirements. In *City of Farmington v. The Daily Times*, 2009-NMCA-057, 146 N.M. 349, 210 P.3d 246 (N.M. App. 2009), the City of Farmington, through its mayor and city council, initiated a search for applicants to replace Farmington’s outgoing city manager. The City of Farmington received ninety-one applications

for the position. *Id.*, ¶ 2. The Daily Times, a media organization, made an IPRA request on the City of Farmington for the release of all applications for Farmington’s city manager position and the City of Farmington refused to disclose the applications, arguing that the applicants’ privacy outweighed IPRA’s open government policy. *Id.*, ¶ 3. The media organization filed suit and the District Court rejected Farmington’s privacy interest argument and issued a Writ of Mandamus to enforce IPRA. *Id.*, 4. An appeal ensued. The New Mexico Court of Appeals was not swayed by Farmington’s privacy argument and affirmed the District Court’s decision, noting that “Disclosing the names and applications of applicants allows interested members of the public, such as the newspapers here, to verify the accuracy of the representations made by the applicants, and to seek additional information which may be relevant to the selection process.” *Id.*, ¶ 18 (quoting *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316 (Alaska 1982)). The Court of Appeals also stated that the “Applicants are seeking high government positions. Public officials must recognize their official capacities often expose their private lives to public scrutiny....” *Id.*

Defendant City of Las Cruces by its own action of disclosing some city manager applications and refusing to disclose others has essentially waived any assertion that the undisclosed applications are not public records, but would rather focus the Court’s attention on the fact that the City is not actually in possession of the undisclosed applications and therefore cannot disclose what it does not have and that the undisclosed applications are beyond its reach because they are in the possession of its private contractor, Defendant Mercer Group.

A similar argument was attempted, and failed, by the City of Truth or Consequences and its private contractor, Sierra Community Council, Inc., when it refused to disclose recordings of city commission meetings (and a workshop conducted by the city) to an IPRA requestor in

Toomey v. City of Truth or Consequences, 2012-NMCA-104, 287 P.3d 364 (N.M. App. 2012).

In this case, an individual made a written IPRA request on the Truth or Consequences city clerk to compel disclosure of the recordings made by Sierra Community Council, Inc. (identified as “SCC”), a not-for-profit corporation, on behalf of the City of Truth or Consequences. The city clerk refused to disclose the recordings and stated that the city was not required to maintain the recordings of the meetings and therefore no recordings were in the city’s or SCC’s possession. The requestor filed suit and the District Court declared in its findings of fact and conclusions of law that one recording of a city commission meeting was on SCC’s computer, but found as a matter of law that the contract between the City of Truth or Consequences and SCC did not require SCC to create, maintain, or hold recordings on behalf of the city and that the requestor was not entitled to release of the recording. *Id.*, ¶¶ 5-6.

The New Mexico Court of Appeals disagreed and reversed the ruling of the District Court. “The dispositive question is whether SCC’s recordings of the City meetings were made on behalf of the City so as to constitute public records within the meaning of IPRA.” *Id.*, ¶ 8. In rendering its decision, the Court of Appeals adopted a nine factor totality test found in *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Gr., Inc.*, 596 So.2d 1029 (Fla.1992). Plaintiff will discuss the application of the *Schwab* factors *infra* in section II of this response, but the New Mexico Court appeals applied the factors and found that SCC, a private corporation, was acting on behalf of the City of Truth of Consequences so as to render it subject to IPRA. *Id.*, ¶ 25. Because the District Court in *Toomey* had found at least one recording existed and was in the possession of SCC, the requestor was entitled to disclosure under IPRA, even though the recording was in the possession of a private contractor, and the Court of Appeals remanded the matter to the District Court to award the requestor costs and attorneys fees. *Id.*, ¶¶ 28-29. “We

reject the assertion by the City and NMML that IPRA does not apply when a public entity contracts out its services to an independent contractor [W]e therefore continue to utilize a flexible approach that favors access to records even when held by a private entity.” *Id.*, ¶ 26.

Furthermore, this Court should take judicial notice of the New Mexico Attorney General’s IPRA compliance guide, which also supports Plaintiff’s argument that IPRA applies to private entities acting on behalf of state government and that IPRA provides a remedy. *See* Office of the New Mexico Attorney General, *Inspection of Public Records Act Compliance Guide* 25-26 (8th ed.2015)¹.

Plaintiff has sufficiently pled facts in its complaint that (1) Plaintiff made a written IPRA request for disclosure of all applications for Las Cruces city manager in the possession of Defendants, and (2) Defendants have refused to disclose the applications pursuant to Plaintiff’s IPRA request, and (3) Defendant Mercer Group is acting on behalf of Defendant City of Las Cruces. *See* POC, ¶¶ 13, 14, 17, 18, 19, 20. Applying the reasoning in *City of Farmington and Toomey*, that the undisclosed city manager applications are public records as defined by IPRA and that through IPRA, Plaintiff can compel disclosure of public records even in the possession of a private entity, Plaintiff has made a sufficient legal claim for which relief can be granted. Therefore, Defendant City of Las Cruces is not entitled to dismissal pursuant to NMRA 1-012(b)6 and its motion to dismiss should be denied.

II. DEFENDANT CITY OF LAS CRUCES IS NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

¹ available at <http://www.nmag.gov/uploads/files/Publications/ComplianceGuides/Inspection%20of%20Public%20Records%20Compliance%20Guide%202015.pdf>

LEGAL STANDARD FOR SUMMARY JUDGMENT PURSUANT TO NMRA 1-056

“Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.” *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. “All reasonable inferences are construed in favor of the non-moving party.” *Portales Nat’l Bank v. Ribble*, 2003-NMCA-093, ¶ 3, 134 N.M. 238, 75 P.3d 838. “Summary judgment is an extreme remedy that should be imposed with caution.” *Ocana v. Am. Furniture Co.*, 2004-NMSC-018, ¶ 22, 135 N.M. 539, 91 P.3d 58.

The only material facts upon which Defendant City of Las Cruces is relying for its motion for summary judgment is that it is undisputed that it disclosed to Plaintiff eleven (11) city manager applications forwarded to it by Defendant Mercer Group. Plaintiff agrees that the facts stated in the motion to dismiss are undisputed, but for the reasons set forth below, Defendant City of Las Cruces’s reasoning is incorrect and it is not entitled to summary judgment as a matter of law.

ARGUMENT

A. THIS COURT SHOULD FIRST APPLY THE “DELEGATION OF FUNCTION” TEST BEFORE CONSIDERING THE *SCHWAB* TOTALITY TEST. UNDER THE “DELEGATION OF FUNCTION TEST,” DEFENDANT CITY OF LAS CRUCES IS NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

Defendant City of Las Cruces argues that the *Schwab* factors (adopted by *Toomey*) do not favor the Plaintiff, but this Court does not even have to utilize the *Schwab* analysis to reject Defendant City of Las Cruces’s argument. Instead, this Court should first apply the “Delegation of Function” test before proceeding to the *Schwab* factors adopted in *Toomey*. “The factor by factor analysis outlined in *Schwab* is not necessary when the delegation of governmental responsibility is clear and compelling.” *Putnam Cty. Humane Soc., Inc. v. Woodward*, 740 So.2d 1238, 1239 (Fla. 5th DCA 1999). Florida first utilized the “delegation of function” test in

Stanfield v. Salvation Army, 695 So.2d 501 (Fla. 5th DCA 1997), finding where there was a complete assumption of a governmental obligation by a private entity, Florida's version of IPRA would apply to the private entity's documents concerning that government function.

In *Stanfield*, a Florida county contracted with the Salvation Army to provide probationary services for misdemeanants pursuant to the County's obligation to supervise under Florida law. A citizen, Stanfield, requested records from the Salvation Army regarding two probationers with whom she was involved in an automobile accident. The Salvation Army argued that it was not a public agency and refused to disclose the records and Stanfield sued. Stanfield argued that the Salvation Army was "acting on behalf of" the Florida county in performing the probation services and, therefore, its records were subject to Florida's version of IPRA. Stanfield lost her lawsuit to compel disclosure and appealed. *Id.*, 695 So.2d at 502.

On appeal, the Florida Fifth District Court of Appeal reversed the trial court. The court acknowledged that a private entity does not "act on behalf of" a public agency merely by entering into a contract to provide professional services to the government, but that the Salvation Army had done "more than enter into a contract to provide professional services to Marion County. Pursuant to both a statute and a contract, it took over the county's role as the provider of probation services." It found that the Salvation Army had made a complete assumption of a governmental obligation. "Rather than providing services to the county, the Salvation Army provided services in place of the county." *Id.* at 502-503. The court in *Stanfield* also noted that the *Schwab* court had broadly defined "agency" so as "to ensure that a public agency cannot avoid disclosure under the Act by contractually delegating to a private entity that which otherwise would be an agency responsibility." *Id.* at 503.

The Las Cruces City Charter provides that “All powers of the city shall be vested in the council, except as otherwise provided by law or this Charter, and the council shall provide for the exercise thereof and for the performance of all duties and obligation imposed on the city by law.”

Las Cruces, New Mexico, City Charter, Art. II, Sec. 2.04. On the subject of Las Cruces City Manager, the charter provides:

Art. III, Sec. 3.01(a) *Appointment*. The council shall appoint a city manager by a vote of at least four (4) members of the council and fix the manager’s compensation. A citizen committee which may be selected to advise the council on the appointment of a city manager must be comprised of members who are qualified voters residing within the city. The council may at its own discretion seek professional advice in the appointment of a city manager.

In other words, the Las Cruces City Council is legally obligated under its charter to appoint a city manager, but it is also legally required by the charter to conduct the search for candidates and is authorized to seek advice. This is also recognized in the affidavit attached by Robert Garza, the previous city manager. “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...”

Affidavit of Robert Garza, ¶ 7. Furthermore, the agreement between Defendant City of Las Cruces and Defendant Mercer Group (Exhibit A of Plaintiff’s Original Complaint) goes beyond merely “providing advice” and was entered into for the sole purpose of Defendant Mercer Group conducting an executive search for applicants for Las Cruces city manager, a government function that otherwise would be performed by the Las Cruces City Council as required by the Las Cruces City Charter. It should be noted that Defendant Mercer Group has also filed a motion to dismiss on July 8, 2016, and attached to its motion its “City of Las Cruces, New Mexico, Proposal for Executive Search Services for the Position of City Manager” as Exhibit 1. Plaintiff hereby incorporates that document in its entirety by reference. This proposal further describes and explains the services Defendant Mercer Group would provide to Defendant City of

Las Cruces and demonstrates that Defendant Mercer Group is actually going beyond “providing advice” and Defendant Mercer Group is actually executing city government power and authority at the delegation of Defendant City of Las Cruces in conducting the city manager candidate search. But for the contract between the Defendants, the Las Cruces City Council would have performed and directed the candidate search, which is exactly what the Mayor of Farmington did at the behest of the Farmington City Council in the *City of Farmington* case. See *City of Farmington*, 2009-NMCA-057, ¶ 2.

Because Defendant Mercer completely assumed a governmental function otherwise reserved exclusively for the Las Cruces City Council, this Court can apply the “delegation of function” test and need not engage in the *Schwab* totality analysis. In applying the “delegation of function” test, this Court should rule that Defendant City of Las Cruces is not entitled to summary judgment as a matter of law. If not, then this Court must apply the *Schwab* totality analysis.

B. UNDER THE SCHWAB TOTALITY TEST, DEFENDANT MERCER GROUP WAS ACTING ON BEHALF OF THE CITY AND DEFENDANT CITY OF LAS CRUCES IS NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

In enacting IPRA, the New Mexico legislature intended that IPRA apply not only to public agencies, but to the private entities acting on behalf of New Mexico government. IPRA defines public records as “all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained.” NMSA 1978 § 14-2-5(G). While the New Mexico legislature never defined “on behalf of” in the statute, the New Mexico judiciary has interpreted the statutory language and provides guidance.

In *Toomey v. City of Truth or Consequences*, 2012-NMCA-104, the New Mexico Court of Appeals adopted the totality test declared in a Florida case, *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Gr., Inc.*, 596 So.2d 1029. The *Schwab* totality test consists of nine factors this Court must consider in determining whether a private corporation is “acting on behalf of any public agency” and is subject to IPRA’s disclosure requirement:

“1) the level of public funding; 2) commingling of funds; 3) whether the activity was conducted on publicly owned property; 4) whether the services contracted for are an integral part of the public agency’s chosen decision making process; 5) whether the private entity is performing a governmental function or a function which the public agency would otherwise perform; 6) the extent of the public agency’s involvement with, regulation of, or control over the private entity; 7) whether the private entity was created by the public agency; 8) whether the public agency has a substantial financial interest in the private entity; and 9) for whose benefit the private entity is functioning.”

Toomey, 2012-NMCA-104, ¶ 13 (quoting *Schwab*).

The *Toomey* opinion holds “that our courts should consider the types of factors set forth in *Schwab* in deciding whether private entities are subject to IPRA’s disclosure requirements. In applying these factors, we reiterate that no one factor is determinative, and all relevant factors need to be analyzed on a case-by-case basis. We emphasize, however that IPRA should be construed broadly to effectuate its purposes, and courts should avoid narrow definitions that would defeat the intent of the legislature.” *Id.* at ¶ 22. In other words, no one factor is controlling, but this Court must analyze this issue by favoring disclosure over secrecy because the legislature’s intent in enacting IPRA is that providing information about the actions of state government “is an essential function of a representative government and an integral part of the routine duties of public officers and employees.” *Cox v. N.M. Dept. of Pub. Safety*, 2010-NMCA-096, ¶ 5, 148 N.M. 934, 242 P.3d 501 (N.M. App. 2010).

Accordingly, Plaintiff argues the *Toomey* factors as follows:

1. The Level of Public Funding

Defendant Mercer Group is being paid \$15,000 and has an expense budget of up to \$8,000. These funds are entirely public in nature and had not Defendant City of Las Cruces contracted with Defendant Mercer Group, the funds would have been available for some other public use or benefit for the citizens of Las Cruces.

2. Commingling of Funds

It does not appear that the Defendants are commingling funds.

3. Whether the Activity Was Conducted on Publicly Owned Property

While Defendant City of Las Cruces argues that Defendant Mercer Group would have no access to public property in conducting its search based on the language of the agreement between Defendants, the Proposal for Executive Search Services for the Position of City Manager, referenced above and attached as Exhibit 1 to Defendant Mercer Group's motion to dismiss, directly contradicts this assertion. Part of the \$8,000 expenses contemplates three trips by Defendant Mercer Group personnel to Las Cruces, presumably to meet on public property. Additionally, Defendant Mercer Group, in conducting an analysis of the Las Cruces City Manager position, will have "extensive consultation" with the Mayor, City Council, City Manager and City Attorney and will "initiate individual interviews" with the Mayor, City Council, City Manager and City Attorney, department heads and key staff, and others. Again, presumably, these meetings would take place on public property. Because Plaintiff has been unable to engage in formal discovery (depositions, interrogatories, requests for production, and requests for admissions), Plaintiff is unable to present evidence on this factor, but the documents speak for themselves.

4. Whether the Services Contracted For Are an Integral Part of the Public Agency's Chosen Decision Making Process

Defendant City of Las Cruces admitted in its motion that the selection of a City Manager is an integral part of the City's decision making process. Plaintiff has demonstrated *supra* that this is mandated by the Las Cruces City Charter.

5. Whether the Private-Entity Is Performing a Governmental Function or a Function the Public Agency Otherwise Would Perform

While Defendant City of Las Cruces attempts gloss over and to deflect the Court's attention away from this factor by trying to frame the factor as avoiding a potential conflict of interest, the conflict of interest argument and the Affidavit of Robert Garza is a red herring. Defendant City of Las Cruces cannot deny that but for its delegation of responsibility and authority to conduct a candidate search, established in its own city charter, the Las Cruces City Council and Mayor would otherwise be performing the search, just like the candidate search the Farmington Mayor and City Council performed in the *City of Farmington* case before refusing to disclose city manager applications. This is directly opposite of the facts in *Schwab* in which the private contractor was an architectural firm providing architectural services, which is not something that the school board in that case would undertake and not an integral part of its governmental function. *Schwab*, 596 So.2d at 1032.

6. The Extent of Public Agency's Involvement With, Regulation Of, or Control Over the Private Entity

Again, while Defendant City of Las Cruces attempted to deflect the Court's attention regarding this factor, a review of the Proposal for Executive Search Services for the Position of City Manager (Exhibit 1 to Defendant Mercer Group's motion to dismiss) indicates that Las Cruces City officials and employees (such as the Mayor, City Council, City Manager, City

Attorney and others) will have direct involvement and “extensive consultation” in assisting Defendant Mercer Group in its search.

7. Whether the Private Entity Was Created by the Public Entity

Defendant Mercer Group is a private corporation and was not created by Defendant City of Las Cruces.

8. Whether the Public Agency Has a Substantial Financial Interest in the Private Entity

It is apparent that Defendant City of Las Cruces has no financial interest in Defendant Mercer Group as the latter is a private corporation.

9. For Whose Benefit the Private Entity Is Functioning

According to Robert Garza, the contract between Defendants was to rely on the expert judgment and abilities of Defendant Mercer Group in conducting the search. By having Defendant Mercer Group conduct the search, Defendant City of Las Cruces did not have to devote personnel and resources in doing the search itself. See *Affidavit of Robert Garza*, ¶ 4A-G. In its Proposal for Executive Search Services for the Position of City Manager, Defendant Mercer Group touts its “extensive experience” in conducting city manager searches. Undoubtedly, the sole beneficiary of Defendant Mercer Group’s services is Defendant City of Las Cruces, which is a municipal corporation formed pursuant to the laws of the State of New Mexico and operating for public benefit and specifically for the citizens of Las Cruces.

In applying the *Toomey* factors and keeping in mind that no one factor is dispositive or controlling, this Court must come to the conclusion that Defendant Mercer Group is acting on behalf of Defendant City of Las Cruces and that the undisclosed applications are public records subject to IPRA’s disclosure requirements. Particularly compelling and weighing heavily in favor of Plaintiff’s argument that Defendant Mercer Group was acting “on behalf of” Defendant

City of Las Cruces are factors four, five and nine. Ultimately, the Defendants are unable to argue that the undisclosed applications would otherwise have been received, held or maintained by Defendant Mercer Group had this agreement not been made between the Defendants.

C. PLAINTIFF INVOKES NMRA 1-056(F) AND DEMANDS AN OPPORTUNITY TO CONDUCT DISCOVERY TO DEVELOP THE EVIDENCE NECESSARY TO PROPERLY RESPOND

Because Defendant City of Las Cruces has alternatively moved for summary judgment at such an early stage of the proceeding, Plaintiff is disadvantaged and has been unable to identify evidence which would establish a genuine issue of material fact. In particular, Plaintiff would seek discovery on several of the *Toomey* factors, such as what activity under Defendants' contract took place on public property and the involvement of public officials with Defendant Mercer Group in the preparation, planning and carrying out of the applicant search. See *Affidavit of Heath Haussamen*, attached hereto as Exhibit A.

NMRA 1-56(F) provides that "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his position, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Plaintiff, through the Haussamen Affidavit, has made a sufficient showing and this Court should either refuse the application for summary judgment or continue the issue to give Plaintiff time to engage in formal discovery to make a showing of genuine issue of material fact related to the *Toomey* factors.


CONCLUSION

Based on the foregoing, this Court should deny Defendant City of Las Cruces's motion to dismiss and alternative motion for summary judgment. Additionally, under NMRA 1-056(F), this Court should permit Plaintiff to conduct discovery in order to present evidence which would create a genuine issue of material fact on the *Toomey* factors.

This Court must never lose sight of the legislative intent of IPRA, that citizens are entitled to the greatest possible information on the activities of New Mexico government, and *Toomey* is clear that just because public records may be held by a private corporation, those records are still within the purview of IPRA. If this Court sides with Defendants in this case, it will encourage state government to hide public records in the hands of private entities, which is not what the New Mexico legislature intended in passing IPRA.

Respectfully Submitted,

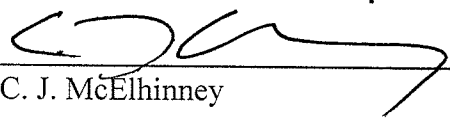
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing response was delivered via email to Robert Cates (rcates@las-cruces.org), Assistant City Attorney for the City of Las Cruces, and to Cody Rogers (crogers@mstlaw.com), Attorney for Defendant Mercer Group, on this 14th day of July, 2016.



C. J. McElhinney

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

HAUSSAMEN PUBLICATIONS, INC.,

Plaintiff,

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JUDGE MARTIN

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

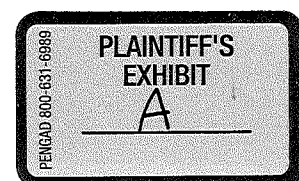
Defendant(s).

AFFIDAVIT OF HEATH HAUSSAMEN

STATE OF NEW MEXICO)
)
)ss.
)
COUNTY OF DONA ANA)

I, Heath Haussamen, 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 am the President of Haussamen Publications, Inc., which is the Plaintiff in this action.
2. I am submitting this affidavit in support of Plaintiff's response to Defendant City of Las Cruces's motion to dismiss or in the alternative for summary judgment, specifically pursuant to NMRA 1-056(F).
3. Because Plaintiff in this action has not been able, by and through its attorney, to engage in formal discovery, Plaintiff is unable to present evidence in opposition to Defendant City of Las Cruces's alternative motion for summary judgment and therefore justify its position.



4. If given the opportunity to engage in formal discovery in this case, Plaintiff would be able to develop and eventually present evidence to counter Defendant's City of Las Cruces's motion.

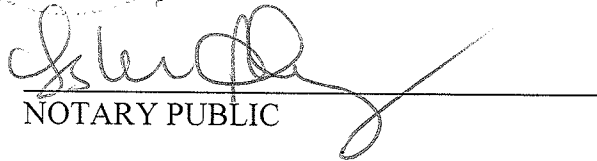
5. I have been informed and advised by my attorney that Plaintiff should engage in formal discovery processes such as depositions, written interrogatories, requests for production and requests for admissions and I would authorize my attorney to do so if given the opportunity. As I stated above, Plaintiff has been unable to engage in any discovery in this case and therefore is prejudiced in being unable to properly respond and oppose Defendant City of Las Cruces's motion for summary judgment.

FURTHER AFFIANT SAYETH NAUGHT.


Heath Haussamen
Affiant



SUBSCRIBED TO AND SWORN BEFORE ME on this 14th day of July, 2016, by Heath Haussamen, a person known to me or satisfactorily proven.


NOTARY PUBLIC