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ENDORSED
First Judicial District Court

OCT 19 2007

Santa Fe, Rio Arriba &
Los Alamos Counties
PO Box 2288
Santa Fe, NM 87504-2288



STATE OF NEW MEXICO
FIRST JUDICIAL DISTRICT COURT
SANTA FE COUNTY

NEW MEXICO ENVIRONMENT DEPARTMENT,

Plaintiff,

vs.

No. DO101CV20072626

CITIZEN ACTION NEW MEXICO,
a New Mexico organization,

Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff New Mexico Environment Department ("Department") seeks a declaratory judgment from the Court that, under the countervailing public policy doctrine, executive privilege represents an exemption to the public records disclosure requirements in the Inspection of Public Records Act ("IPRA"), NMSA 1978, §§ 14-2-1 to 14-2-12. More specifically, the Department seeks a declaratory judgment that a certain document, prepared by a contractor to the Department, is part of the deliberative process of the executive and, therefore, is protected from disclosure under IPRA under the countervailing public policy doctrine.

Parties, Jurisdiction and Venue

1. The Department is an executive agency charged with administering and enforcing various laws relating to protection of the environment. NMSA 1978, §§ 9-7A-3 to 9-7A-9. The Department has offices at 1190 St. Francis Drive, Santa Fe, New Mexico 87502.

2. Defendant Citizen Action New Mexico ("Citizen Action") is a New Mexico organization.

3. This Court has subject matter jurisdiction over this matter pursuant to N.M. Const. art. VI, § 13 and NMSA 1978, § 44-6-2, and personal jurisdiction over the defendant

pursuant to NMSA 1978, § 38-1-16.

4. Venue in this Court is proper under NMSA 1978, § 38-3-1(A).

Factual Allegations

5. On November 3, 2005, Sandia National Laboratories (“SNL”) submitted to the Department for approval a proposed Corrective Measures Implementation Plan (“CMI Plan”) for the SNL Mixed Waste Landfill (“MWL”). Appendix E of the CMI Plan, entitled “Probabilistic Performance-Assessment Modeling of the Mixed Waste Landfill at the Sandia National Laboratories,” proposed a fate and transport model of contaminants from the MWL.

6. The Department was to review the proposed CMI Plan and to provide a written evaluation of SNL’s proposal. The Department’s technical staff reviewed the entire CMI Plan, including the proposed fate and transport model.

7. TechLaw, under contract with the Department, assisted the Department in its review, and specifically conducted a preliminary technical review of the proposed fate and transport model. On January 31, 2006, TechLaw submitted its technical review and comments on the fate and transport model (“TechLaw Preliminary Review”) to the Department.

8. In preparing its final evaluation of SNL’s proposed CMI Plan, the Department used the TechLaw Preliminary Review. The Department’s final evaluation included some of TechLaw’s comments from its Preliminary Review, modified some of TechLaw’s comments, and did not include some of TechLaw’s comments. As well, the Department added its own comments on SNL’s proposed fate and transport model.

9. The Department’s final evaluation is set forth in a Notice of Disapproval (“NOD”), dated November 20, 2006, identifying deficiencies to be corrected in SNL’s proposed CMI Plan. The NOD included the Department’s final evaluation of the SNL’s proposed fate and

transport model.

10. Subsequently, on December 15, 2006 and January 19, 2007, SNL submitted responses to the NOD. SNL's responses are presently under review by the Department.

11. Citizen Action has requested a copy from the Department of the TechLaw Preliminary Review pursuant to IPRA.

12. The Department has not made the document available for inspection to Citizen Action because, in the Department's view, the TechLaw Preliminary Review is exempt from disclosure because it is protected under executive privilege and because it is a draft document and therefore not a "public record" under IPRA subject to disclosure. The Department has made available to Citizen Action the final evaluation of the CMI Plan, as set forth in the NOD.

13. Citizen Action filed a complaint with the Office of the Attorney General ("AGO") alleging that the Department had violated IPRA by not making the TechLaw Preliminary Review available.

14. Prior to not disclosing the TechLaw Preliminary Review, the Department contacted the AGO to confirm the Department's understanding that the document was not subject to disclosure under IPRA. The AGO advised the Department that it did not have to disclose the document under IPRA.

15. However, in response to a complaint filed by Citizen Action with the AGO, the AGO determined that the TechLaw Preliminary Review was subject to disclosure under IPRA. The Department has sought reconsideration of that determination from the AGO, which is currently pending before the AGO. Citizen Action continues to seek a copy of the TechLaw Preliminary Review from the Department.

16. As such, there is an actual controversy between the Department and Citizen

Action.

Claims

17. The Department seeks a declaration from the Court that:
- a. Executive privilege, which is a privilege based on the New Mexico Constitution, constitutes an exemption to IPRA’s disclosure requirements under the countervailing public policy doctrine;
 - b. Documents prepared as part of the executive’s “deliberative process” are protected by executive privilege;
 - c. Documents prepared for the executive by a contractor to the executive also are protected by executive privilege; and
 - d. The TechLaw Preliminary Review is a document prepared as part of the executive’s deliberative process and is protected from disclosure under IPRA.

18. The Department seeks a declaration from the Court that the TechLaw Preliminary Review is not a “public record” under IPRA because it is a draft document and, therefore, it is not subject to disclosure.

Requested Relief

Based on the foregoing, the Department requests the Court to:

- a. Issue a declaration that the TechLaw Preliminary Review is protected by executive privilege and is therefore exempt from disclosure under IPRA under the countervailing public policy doctrine;
- b. Issue a declaration that the TechLaw Preliminary Review is not a public record under IPRA because it is a draft document and, therefore, it is not subject to disclosure; and
- c. Order any other relief the Court deems just.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT

Handwritten signature of Tannis L. Fox in black ink, written over a horizontal line.

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