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FACSIMILE COVER SHEET

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FROM: Nancy L. Simmons

RE: *NMED v. Citizen Action New Mexico,* No. 07-2626

DATE: October 8, 2008

TIME:

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MESSAGE

Attached is the **Order** of 10/7/08 for the above referenced matter.

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

No. D-0101-CV-2007-02627

NEW MEXICO ENVIRONMENT DEPARTMENT,

Plaintiff,

vs.

CITIZEN ACTION NEW MEXICO,
a New Mexico organization,

Defendant,

and

THE ATTORNEY GENERAL OF NEW MEXICO,

Intervenor.

ORDER DENYING
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND
ORDER DISMISSING COMPLAINT FOR DECLARATORY JUDGMENT
AS A MATTER OF LAW

THIS MATTER comes before the Court upon the New Mexico Environment Department's Motion for Summary Judgment on its Complaint for Declaratory Judgment, and the Court, having reviewed the pleadings and heard argument, finds and determines as follows:

A. The TechLaw Report does not constitute "thought processes" and is a public document under the Right to Inspect Public Records Act.

1. Under the Right to Inspect Public Records Act (or "Act"), Section 14-2-1, NMSA 1978 (2005), thought processes are not public records. *Sanchez v. Board of Regents*, 82 N.M. 672, 675, 486 P.2d 608, 611 (1971).

2. In *Sanchez*, the Court reasoned:

> [W]e must determine whether we should give legal character to the demands of the curious who cannot patiently await the final result of a salary contract negotiation. We would deny the right to inspect these records of the Board of Regents on the subject of salary contract negotiations before the task was completed. It would not seem fair that the general public should know the contents of an offer of salary to an individual conceivably prior to the receipt of the offer by the contemplated employee. As indicated in the *MacEwan* case . . . we would not take away the right of the Petitioners to know about salary matters, but would merely suspend or defer the privilege of inquiry until the Board of Regents reaches its final conclusion, *i.e.*, the culmination of the contract between the board and the individual.

82 N.M. at 675-76, 486 P.2d at 611-12.

3. The Court distinguished *MacEwan v. Holm*, 359 P.2d 413 (Or. 1961), stating:

> In *MacEwan*, . . . the defendant sought to inspect data relating to nuclear radiation sources collected by the Oregon State Board of Health. The Oregon Supreme Court held that the data involved were 'public records' for purposes of inspection by the public. This case can be readily distinguished from the instant case inasmuch as scientific data obtained is the result of testing of at least one facet of the over-all purpose of the research. In *MacEwan* . . . , this phase of the research had been completed, whereas in our case we only have an offered contract with no finality attached to it.

Sanchez, 82 N.M. at 674-75, 486 P.2d at 610-11.

4. In *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 795, 568 P.2d 1236, 1241 (1977), the Court quoted the following excerpt from *MacEwan*:

> "Writings coming into the hands of public officers in connection with their official functions should generally be accessible to members of the public so that there will be an opportunity to determine whether those who have been entrusted with the affairs of government are honestly, faithfully and competently performing their function as public servants. 'Public business is the public's business. The people have the right to know. Freedom of information (about public records and proceedings) is their just heritage. . . . Citizens . . . must have the legal right to . . . investigate the conduct of (their) affairs.'"

(Internal citations omitted) (alterations in original).

5. Having conducted an *in camera* review of the TechLaw Report, and accepting the Department's factual assertions in the light most favorable to the Department, even though the Department is the moving party, this Court finds that the situation before it is more akin to that of *MacEwan* than to that presented in *Sanchez*. The Report is an expert, objective, scientifically-oriented assessment rather than evolving thought processes preliminary to actions like contract negotiations; scientific analyses and conclusions are at least one facet of the overall purpose of the report; and TechLaw's function as an objective expert was complete when it submitted its Report and the Report has sufficient finality attached to it. *See Sanchez*, 82 N.M. at 674-75, 486 P.2d at 610-11 (distinguishing *MacEwan*); *cf. State ex rel. Blanchard v. City Comm'rs of Clovis*, 106 N.M. 769, 771, 750 P.2d 469, 471 (Ct. App. 1988) (rejecting the opportunity to expand the "thought processes" exception set forth in *Sanchez* so as to exclude from public inspection employment applications, resumes, and references received for a government position that the government argued were part of a preliminary employment negotiation process).

6. This matter involves more than individuals' impatient curiosity in the salaries of publicly-paid employees. *Compare Sanchez*, 82 N.M. at 675, 486 P.2d at 611. Instead, it implicates the public's confidence in whether its government is acting in accordance with its statutory obligations, with its publicly-held positions, and with objective, expert assessments.[1] *See Newsome*, 90 N.M. at 795, 568 P.2d at 1241 (quoting *MacEwan*, 359 P.2d at 418).

7. Rather than pointing to the type of preliminary negotiating data at issue in *Sanchez*, it appears that the Department is essentially attempting to use this case to establish a general

[1] Nothing in this Order should be read to suggest that the TechLaw Report contains any indication that the Environment Department is not acting in the public's interests or pursuant to its statutory authority.

principle. *See* Mem. in Support of Mtn. at, e.g., 12, 27. An agency should not fear revelation of the objective technical information provided by the experts it has retained, and the Department's general concerns that "'dissemination could easily lead to misinformation or false conclusions about the [Department's] business'" can be readily addressed by the Department explaining to the public its reasons for the choices it makes, thereby deterring the speculation and presumption of improper motives that secrecy engenders and allowing the public to judge for itself whether the Department is acting in accordance with its statutory obligations. *See id.* at 12. As noted by our Supreme Court, "'[p]ublic business is the public's business.'" *Newsome*, 90 N.M. at 795, 568 P.2d at 1241 (internal citations omitted).

8. Under the Act, the TechLaw Report is a public document and not merely thought processes.

B. Non-disclosure is not justified by "countervailing public policies."

1. "[A] citizen has a fundamental right to have access to public records. The citizen's right to know is the rule and secrecy is the exception. Where there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed." *Newsome*, 90 N.M. at 797, 568 P.2d at 1243.

2. The rationale and analyses set forth in paragraphs 4 through 7 of subpart A, as well as subpart C, of this Order are also pertinent to weighing "the benefits to be derived from non-disclosure against the harm which may result if the records are not made available." *See Newsome*, 90 N.M. at 797, 568 P.2d at 1243. The harm that may result from secrecy is depriving the public of the the "opportunity to determine whether those who have been entrusted with the affairs of government are honestly, faithfully and competently performing their function as public servants."

Id. The Department's fear of inhibiting intra-agency candor and confusing the public does not outweigh the potential harm to the public caused by nondisclosure in that the Department can explain to the public the way the Report would be used and its reasons for its choices.

3. The TechLaw Report is markedly different from the type of information at issue in *Newsome*. There, the government had solicited personal information from individuals that was vital to the government entity's employment procedure, the entity had promised the individuals that the information would remain confidential, and the promise of confidentiality coincided with a reasonable public policy justification. *See id.* at 798, 568 P.2d at 1244. The Court concluded that divulging that information would not have been in the public interest, presumably because it would jeopardize the public's trust rather than promote it. *See id.* Here, secrecy would jeopardize the public trust. The Department's general concern about protecting intra-agency candor is not a countervailing public policy that outweighs the potential harm from non-disclosure or the benefits to be derived from disclosure. *Cf. id.* at 797, 568 P.2d at 1243.

C. Executive privilege is an exception to disclosure under the Act's "otherwise provided by law" provision, but executive privilege does not justify nondisclosure of the TechLaw Report.

1. The "as otherwise provided by law" exception contained in Section 14-2-1.A(12) did not create, but necessarily encompasses judicially-recognized constitutional privileges. *Cf. State ex rel. Attorney General v. First Judicial Dist. Court*, 96 N.M. 254, 257, 629 P.2d 330, 333 (1981) (indicating that although "[n]either the Rules of Evidence nor other rules of this Court provide for an executive privilege, . . . recognition of an executive privilege is required by the Constitution of the State of New Mexico").

2. Privileges based on the constitutional separation of powers cannot be legislatively

eradicated. *Cf. Estate of Romero v. City of Santa Fe*, 2006-NMSC-028, ¶¶ 16-17, 139 N.M. 671, 677, 137 P.3d 611, 617; *First Judicial Dist. Ct.*, 96 N.M. at 258, 629 P.2d at 334. The Act gives no indication that the Legislature intended to require disclosure of constitutionally privileged information. The Legislature ostensibly included the catchall exception in the Act in order to provide for exceptions required by other sources of law, which include valid statutes, regulations, constitutional provisions, and case law.

3. This Court will not interpret the executive privilege under the Act's "otherwise provided by law exception" any more broadly or narrowly than the privilege has been defined by the appellate courts of this State. *Cf. Blanchard*, 106 N.M. at 771, 750 P.2d at 471 (foregoing opportunity to expansively interpret recognized exception).

4. While Defendant has requested access to the TechLaw Report pursuant to the Act and not through discovery or evidentiary rules, this Court finds guidance in the Supreme Court's executive-privilege analysis set forth in *First Judicial District Court*. *Compare Romero*, 2006-NMSC-028, at ¶ 18, 139 N.M. at 678, 137 P.3d at 618 (indicating that rather than finding that the Act's exclusions created evidentiary privileges, the Court was using the Act "to guide [it] in appraising public policy concerns based on legislation enacted by the legislature pursuant to its general police powers").

5. A member of the executive branch of state government enjoys the right to claim executive privilege, but the right is not absolute. *Cf. First Judicial Dist. Court*, 96 N.M. at 258, 629 P.2d at 334. More specifically:

> The mere fact . . . that the executive department holds information and claims executive privilege does not of itself render the information exempt from judicial process. Nor does the fact that the privilege is of constitutional origin make the

> privilege absolute. An absolute privilege would conflict with the constitutional duty of the courts to do justice in matters brought before it.

Id.

6. "[W]hen this privilege comes into confrontation with other values or interests which are also protected by law, a balancing of the protected interests must be undertaken by the courts." *First Judicial Dist. Court*, 96 N.M. at 258, 629 P.2d at 334.

7. The primary purpose of the Act is to provide access to public records. *See Romero*, 2006-NMSC-028, at ¶ 18, 139 N.M. at 677, 137 P.3d at 617; *accord Newsome*, 90 N.M. at 795, 568 P.2d at 1241 (quoting *MacEwan*, 359 P.2d at 418). The Department reaffirms that purpose, indicating that the statute's purpose is "disclosure to the public of the workings of government." Mem. in Support of Mtn, at 1. The Supreme Court has referred to a citizen's right to have access to public records as "fundamental," and has said that "[t]he citizen's right to know is the rule and secrecy is the exception." *Newsome*, 90 N.M. at 797, 568 P.2d at 1243.

8. Although the Environment Department is within the executive branch, the Department is a legislatively-created entity with legislatively-determined functions, and the Department's executive privilege claim must be balanced with other interests that are also protected by law. *See generally Romero*, 2006-NMSC-028, at ¶ 16, 139 N.M. at 677, 137 P.3d at 617; *First Judicial Dist. Court*, 96 N.M. at 258, 629 P.2d at 334; *Newsome*, 90 N.M. at 795, 568 P.2d at 1241 ("Writings coming into the hands of public officers in connection with their official functions should generally be accessible to members of the public so that there will be an opportunity to determine whether those who have been entrusted with the affairs of government are honestly, faithfully and competently performing their function as public servants"); *cf.* NMSA 1978, § 9-7A-3

(1991) ("The purpose of the Department of Environment Act is to establish a single department to administer the laws and exercise the functions relating to the environment formerly administered and exercised by the health and environment department."); NMSA 1978, § 9-7A-4 (2005) ("There is created in the executive branch the 'department of environment'. The department shall be a cabinet department . . . .").

9. Assuming that TechLaw should be viewed as an employee of the Department for purposes of this analysis, this Court balances the general interests of the Department and of the public in promoting intra-governmental candor against Defendant's interest as a member of the public in assessing whether the Department is acting in accordance with its statutory obligations, the Defendant's interest in having confidence in the Department's use of objective, expert findings, and against the policy reasons behind the Act as well as the statutes creating the Environment Department. *Cf. First Judicial Dist. Court*, 96 N.M. at 258, 629 P.2d at 334. The means by which an agency's legislatively-directed action is tested is by members of the public having access to information that will enable them to evaluate and challenge that action. *Cf. Newsome*, 90 N.M. at 795, 568 P.2d at 1241 (quoting *MacEwan*, 359 P.2d at 418). The Legislature created the Department in order to administer the laws it enacts, the public's access to the type of report at issue here is an interest protected by law, and allowing access to the scientifically-based final report respects the separation of powers. *Cf. First Judicial Dist. Court*, 96 N.M. at 257-58, 629 P.2d at 333-34. The Department points to no information that would harm the public if disclosed but only to a general concern over protecting the Department's "business."

10. This Court concludes that the balancing favors disclosure of the TechLaw Report to Defendant. *Cf. First Judicial Dist. Court*, 96 N.M. at 258, 629 P.2d at 334.

IT IS THEREFORE ORDERED that the New Mexico Environment Department's Motion for Summary Judgment on the issue of disclosing the TechLaw Report is **DENIED.**

IT IS FURTHER ORDERED that the Department's Complaint for Declaratory Judgment is **DISMISSED AS A MATTER OF LAW.**

ENTERED this 6th day of October, 2008.

DANIEL A. SANCHEZ, District Judge
Division VII

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