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Andrea Sundberg, Patient Services Manager
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Dear Ms. Sundberg:

In 2015, the Department of Health promulgated the current 7.34.4.26 NMAC, a regulation providing for the confidentiality of producer applications for licensure for the purpose of producing and distributing cannabis for medical use and stating that the files containing producer names, addresses, and telephone numbers are confidential and not subject to disclosure. It is our understanding that in response to a Complaint to Enforce the Inspection of Public Records Act, *Peter St. Cyr and New Mexico Foundation for Open Government v. New Mexico Department of Health and Daniel M. Jacobs*, D-202-CV-2015-05674, the Department of Health has agreed to amend the aforementioned regulation. The rule hearing scheduled for January 6, 2016 proposes to change that regulation to maintain a confidentiality provision for personal production licenses and changes subsection B to keep pending non-profit producer applications for initial licensure confidential and not subject to disclosure, until the closure of the applications period. We write to express concern with these regulations in light of the Inspection of Public Records Act ("IPRA"), NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2013). We believe that this regulation not only exceeds the Department of Health's statutory authority to promulgate rules, but also circumvents the mandates and intent of the IPRA.

The public policy stated in the IPRA is "that all persons are entitled to the greatest possible information regarding the affairs of government . . . to provide persons with such information is an essential function of a representative government . . ." NMSA 1978, § 14-2-5 (1993). Unless records are subject to an exception found in the IPRA, public records must be provided to a person requesting them. It seems that the issue of concern here is not whether these license applications are public record, but rather, whether there is an exception preventing their disclosure. The definition of public record covers "all documents . . . that are used, created, received, maintained or held by or on behalf of any public body and relate to public business . . ." NMSA 1978, § 14-2-6(G). Applications submitted to the Department of Health for a license would certainly fall under this definition.

The exception relied upon by the Department of Health to prevent the disclosure of these public records is NMSA 1978, Section 14-2-1(A)(8), “as otherwise provided by law.” Of the other exceptions to the IPRA, only Section 14-2-1(A)(2) might apply, letters of reference for licensing or permits, or perhaps if the applications contain information related to the applicants health, Section 14-2-1(A)(1) might permit withholding that specific portion. The Department of Health has relied upon the “as otherwise provided by law” exception to withhold records, citing to 7.34.4.26 NMAC. However, we find no statutory authority permitting the Department of Health to create a confidentiality provision for non-profit producer applications, whether in initial licensure or after the close of the applications period. We commend the Department of Health for rewriting this regulation to amend the confidentiality provision to state that “non-profit producer applications for initial licensure shall cease to be confidential upon the closure of the applications period”; however, we do not believe this cures the issues with 7.34.4.26 NMAC.

The current 7.34.4.26 NMAC regulation exceeds the Department of Health’s statutory authority. The Lynn and Erin Compassionate Use Act, NMSA 1978, Sections 26-2B-1 to -7 (2007), specifically provides for the confidentiality of names and addresses of persons applying for or in receipt of a registry identification card. NMSA 1978, § 26-2B-7(G) (2007). However, the Act contains no such provision regarding confidentiality of *producer* applications. The Legislature has vested the Department of Health with the authority to promulgate rules to implement the purpose of the Act, but the Department is not permitted to create regulations and take actions beyond those authorized by the statute. “An administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority.” *Int’l Chiropractors Ass’n v. New Mexico Bd. of Chiropractic Examiners*, 2014-NMCA-046, ¶ 8, 323 P.3d 914 (citing *Rivas v. Bd. of Cosmetologists*, 1984-NMSC-076, ¶ 3 101 N.M. 592). The express inclusion in Section 26-2B-7 of a provision for confidentiality of applications for a registry identification card, with no correlating provision related to producer applications, demonstrates a legislative intent to permit public inspection of producer applications; had the Legislature intended to permit the Department of Health to withhold information on producer applications, it would have included it. *See State v. Greenwood*, 2012-NMCA-017, ¶ 38, 271 P.3d 753 (finding that the “Legislature knows how to include language in a statute if it so desires” *Id.* (citations omitted)). Although the IPRA permits the Department of Health to withhold records “as otherwise provided by law,” 7.34.4.26 NMAC, in its current form and in the proposed regulation with respect to pending applications, exceeds the statutory authority granted, so does not carry the force of law, and as such, this provision cannot be used to circumvent the IPRA and withhold public records from disclosure. *See Edenburn v. New Mexico Dep’t. of Health*, 2013-NMCA-045, ¶ 26, 299 P.3d 424 (finding that documents had to be released under the IPRA because the only law cited to was a regulation unsupported by statute and thus did not have the force of law); *City of Las Cruces v. Public Employee Labor Relations Bd.*, 1996-NMSC-024, ¶ 5, 121 N.M. 688 (“We hold that ‘as otherwise provided by law’ . . . contemplates a regulation properly promulgated to further the legislative intent behind the [Act].” *Id.* ¶ 5)

We note that the IPRA provides for the redaction of personal identifier information from public records for disclosure. This information is limited to: “(1) all but the last four digits of a: (a) taxpayer identification number; (b) financial account number; or (c) driver’s license number; (2) all but the year of a person’s date of birth; and (3) a social security number.” NMSA 1978, § 14-2-6(E). We also would note the differences here than in *Cox v. The N.M. Dep’t of Safety*, 2010-NMCA-096, where the court determined that when a request was made to review all citizen complaints against a law enforcement officer, “personal information about the citizen complainant such as home address,

phone number or the citizen's social security number . . . [was] not directly related to the complaint submitted by the citizen but is instead sensitive personal information related to the citizen complaint." *Id.* ¶ 30 ("Because the personal information of the complainant is not necessary to the public's inspection of the substance of the complaints, [the agency] should consider redacting such personal information prior to permitting public inspection of the documents. *Id.* ¶ 31). We specifically bring this to your attention because though there might be cases where personal information should not be provided, much of the information provided in the producer applications is certainly necessary to the public's inspection of the substance of the applications.

In conclusion, it is our position that the Department of Health exceeded its authority in promulgating 7.34.4.26 NMAC and would mitigate only part of the issue with the proposed rule changes. The importance of maintaining an open and accessible government is essential to the function of democracy. A public agency cannot unilaterally determine that it will withhold records by creating a confidentiality regulation, unsupported by Legislative authority, to bypass the IPRA; such a possibility would undermine the very purpose of the IPRA. Because the confidentiality of producer applications is not provided for by statute, the regulation as proposed does not carry the force of law and cannot be used to withhold documents under the IPRA.

Respectfully,



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