STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

PETER ST. CYR and NEW MEXICO
FOUNDATION FOR OPEN GOVERNMENT,

Plaintiffs,

v. No. D-202-CV-2015-05674

NEW MEXICO DEPARTMENT OF HEALTH and
DANIEL M. JACOBS,

Defendants.

COMPLAINT TO ENFORCE THE INSPECTION OF PUBLIC RECORDS ACT

Plaintiffs Peter St. Cyr ("St. Cyr") and New Mexico Foundation for Open Government ("NMFOG"), for their complaint against Defendants New Mexico Department of Health ("DOH") and Daniel M. Jacobs ("Jacobs"), allege and state as follows:

Introduction

1. This case concerns the validity of an administrative regulation, 7.34.4.26 NMAC ("the Regulation"), promulgated by Defendant DOH under the purported authority of the Lynn and Erin Compassionate Use Act ("the Medical Cannabis Statute"). The Regulation provides in pertinent part that "the names, addresses and telephone numbers of the persons or entities who have either applied for or received a [DOH] license for the purpose of producing and distributing cannabis for medical use" "shall be confidential and not subject to disclosure" except to certain DOH employees, to state and local regulators, and to "authorized" representatives of state and local law enforcement who seek to verify the legitimacy of a producer's license.

2. Plaintiffs believe that secreting the identities of medical-marijuana producers distorts the market for the medicine, deprives New Mexicans of important information about their neighborhoods, and has the potential to promote cronyism and corruption in the awarding of valuable state licenses. But regardless whether the Regulation reflects sound public policy, it lacks any legal basis. Executive agencies cannot exempt their records from the Inspection of Public Records Act ("IPRA") by administrative fiat. Because the Medical Cannabis Statute does not contemplate the Regulation, IPRA prohibits it. Plaintiffs therefore seek a declaratory judgment that the Regulation is invalid except to the extent that it keeps confidential the identities of patients who produce medical marijuana for their own use, and an order compelling DOH to comply with Plaintiffs' IPRA requests for the identities of all other producer licensees and license applicants.

Parties

3. Plaintiff St. Cyr is an independent journalist and a longtime advocate of open government. He has been investigating and reporting on New Mexico's medical marijuana program since 2007. He resides in Bernalillo County.

4. Plaintiff NMFOG is a New Mexico nonprofit, nonpartisan organization whose mission is to help individuals, businesses, students, educators, journalists, lawyers, and other engaged citizens understand, obtain, and exercise their rights under IPRA, the Open Meetings Act, the Arrest Record Information Act, the federal Freedom of Information Act, and the First Amendment, as well as to help public officials understand and discharge their obligations under those statutes and constitutional provisions. NMFOG has its principal place of business in Bernalillo County.

5. Defendant DOH is an executive-branch agency of New Mexico state government and thus a "public body" within the meaning of IPRA, NMSA 1978, § 14-2-6(F) (2013). It administers the state's Medical Cannabis Program under the Medical Cannabis Statute.

6. Defendant Jacobs is the designated custodian of DOH's public records.

Jurisdiction and Venue

7. The Court has jurisdiction over the parties and subject matter of the action under NMSA 1978, § 38-3-1.1 (1988), as well as under IPRA and other applicable statutes.

8. Venue is proper under NMSA 1978, § 38-3-1(G) (1988).

General Allegations

9. IPRA declares that "all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees" and that "provid[ing] persons with such information is an essential function of a representative government." NMSA 1978, § 14-2-5 (1993). Under IPRA, "[t]he citizen's right to know is the rule and secrecy is the exception." Republican Party of N.M. v. N.M. Taxation & Revenue Dep't, 2012-NMSC-026, ¶ 12, 283 P.3d 953.

10. On or about May 4, 2015, Plaintiff St. Cyr submitted a written IPRA request to Defendant DOH for the following records:

> 1. All licensed Non Profit Producer licensure applications submitted by or on behalf of every person or entity for the purpose of producing and distributing cannabis for medical use under the auspices of the Medical Cannabis Program, a public health program managed by [DOH], between March 01, 2015 and May 01, 2015.
>
> 2. [A]ny and all licenses granted to any person or entity in the state's Medical Cannabis Program since 2007.

11. On or about May 4, 2015, Plaintiff NMFOG submitted a written IPRA request to DOH for the following records:

> 1. The most recent licensure applications submitted by or on behalf of every person or entity that has ever applied for or received a license for the purpose of producing and distributing cannabis for medical use under the auspices of the New Mexico Medical Cannabis Program.
>
> 2. Every license ever granted to producers in the program.

12. On or about May 19, 2015, DOH informed St. Cyr that it was "unable to fulfill" either of his requests because the Regulation prohibited DOH from doing so. (DOH additionally cited 7.34.3.18 NMAC in explaining why it was withholding "personal production" licenses – licenses held by patients who produce medical marijuana strictly for their own use – a decision that Plaintiffs do not challenge.)

13. On or about May 19, 2015, in response to NMFOG's request, DOH provided application materials submitted by persons seeking licensure as "non-profit" producers (as distinguished from "personal" producers) from the inception of the Medical Cannabis Program through 2014. Citing the Regulation, however, DOH redacted names, addresses, and telephone numbers from the license applications, withheld all pending applications, and declined to provide any issued licenses. (DOH additionally cited 7.34.3.18 NMAC in explaining why it was withholding "personal production" licenses, a decision that Plaintiffs do not challenge.)

14. DOH has refused to reconsider these responses.

COUNT I –
VIOLATIONS OF THE INSPECTION OF PUBLIC RECORDS ACT

15. Plaintiffs incorporate the foregoing allegations of their complaint as if the same were fully set forth herein.

16. The Regulation, entitled "Licensed Producer and Producer-Applicant Confidentiality," provides as follows:

> A. [DOH] shall maintain a confidential file containing the names, addresses, and telephone numbers of the persons or entities who have either applied for or received a license for the purpose of producing and distributing cannabis for medical use. Individual names of producers and producer-applicants shall be confidential and not subject to disclosure, except:
>
> (1) to authorized employees or agents of [DOH] as necessary to perform the duties of [DOH] pursuant to the provisions of this rule and the [Medical Cannabis Statute];
>
> (2) to state or local regulatory agencies and entities, for purposes related to those agencies' or entities' duties under applicable law;
>
> (3) to authorized employees of state or local law enforcement agencies, but only for the purpose of verifying that a person is lawfully in possession of the license to produce, or as otherwise expressly permitted in this rule; and
>
> (4) as provided in the federal Health Insurance Portability and Accountability Act of 1996.
>
> (B) A pending application for licensure as a non-profit producer shall be confidential and not subject to disclosure.

7.34.4.26 NMAC.

17. IPRA gives "[e]very person … a right to inspect public records of this state" except for seven specified categories of records – none of which are at issue here – and except "as otherwise provided by law." NMSA 1978, § 14-2-1(A)(8) (2011).

18. A regulation "otherwise provide[s]" for confidentiality under IPRA "only when it has the force of law." Edenburn v. N.M. Dep't of Health, 2013-NMCA-045, ¶ 26, 299 P.3d 424 (filed 2012). "Whether a rule has the force of law depends on whether the rule was promulgated in accordance with the statutory mandate to carry out and effectuate the purpose of the applicable statute," City of Las Cruces v. Pub. Emp. Labor Relations Bd., 1996-NMSC-024, ¶ 5, 121 N.M. 688, 917 P.2d 451 – in other words, whether the rule was "statutorily authorized," id. ¶ 7.

19. The "applicable statute" in this case is the Medical Cannabis Statute, whose purpose is "to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments." NMSA 1978, § 26-2B-2 (2007).

20. The statute sets forth the rights and responsibilities of four kinds of actors in such a "regulated system" – "qualified patient[s]," their "primary caregiver[s]," "practitioner[s]" who certify patients as appropriate candidates for the use of medical marijuana, and the "licensed producer[s]" who "produce, … distribute and dispense" the medication. Id. § 26-2B-3(D) to (G).

21. The Medical Cannabis Statute authorizes DOH to "promulgate rules … to implement the purpose of the [statute]." Id. § 26-2B-7(A). With respect to "qualified patients" and "primary caregivers," the statute provides that DOH's rules "shall … govern the manner in which [DOH] will consider applications for registry identification cards for qualified patients and primary caregivers," id. § 26-2B-7(A)(1), but the statute adds:

> [DOH] shall maintain a confidential file containing the names and addresses of the persons who have either applied for or received a registry identification card. Individual names on the list shall be confidential and not subject to disclosure, except:
>
> (1) to authorized employees or agents of [DOH] as necessary to perform the duties of [DOH] pursuant to the provisions of the [Medical Cannabis Statute];
>
> (2) to authorized employees of state or local law enforcement agencies, but only for the purpose of verifying that a person is lawfully in possession of a registry identification card; or
>
> (3) as provided in the federal Health Insurance Portability and Accountability Act of 1996.

Id. § 26-2B-7(G).

22. By contrast, with respect to "licensed producers," the statute states only that DOH's rules must

> identify requirements for the licensure of producers and cannabis production facilities and set forth procedures to obtain licenses; [and]
>
> develop a distribution system for medical cannabis that provides for:
>
> (a) cannabis production facilities within New Mexico housed on secured grounds and operated by licensed producers; and
>
> (b) distribution of medical cannabis to qualified patients or their primary caregivers to take place at locations that are designated by [DOH] and that are not within three hundred feet of any school, church or daycare center ….

Id. § 26-2B-7(A)(5) to (6).

23. The statute contains no confidentiality provision for licensed producers comparable to the privacy afforded to qualified patients and primary caregivers by § 26-2B-7(G). Instead, DOH has conjured up producer confidentiality out of thin air.

24. "It is well settled that an agency may not create a regulation that exceeds its statutory authority." Marbob Energy Corp. v. N.M. Oil Conservation Comm'n, 2009-NMSC-013, ¶ 5, 146 N.M. 24, 206 P.3d 135 (internal quotation marks and brackets omitted). "Separation of powers principles are violated when an administrative agency goes beyond the existing New Mexico statutes … it is charged with administering and claims the authority to … create new law on its own." Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio, 2012-NMSC-039, ¶ 13, 289 P.3d 1232 (internal quotation marks omitted). Consequently, "[a] regulation adopted by an administrative agency creating an exemption not contemplated by the

act or included within the exemption specified therein is void." State ex rel. McCulloch v. Ashby, 1963-NMSC-217, ¶ 17, 73 N.M. 267, 387 P.2d 588.

25. The Regulation "creat[es] an exemption [from IPRA] not contemplated by the [Medical Cannabis Statute] or included within the exemption specified therein." McCulloch, 1963-NMSC-217, ¶ 17. It is therefore "void." Id. Because the Regulation is void, it does not have "the force of law," Edenburn, 2013-NMCA-045, ¶ 26, and it cannot serve as "other[] … law," NMSA 1978, § 14-2-1(A)(8), sufficient to justify DOH's denial of the IPRA requests described above.

26. The acts of Defendants described above violated IPRA.

Prayer for Relief

WHEREFORE, Plaintiffs St. Cyr and NMFOG pray that the Court enter judgment in Plaintiffs' favor and against Defendants for the following relief:

A. a judgment under the Declaratory Judgment Act, NMSA 1978, §§ 44-6-1 to -6-15 (1975), declaring the Regulation contrary to IPRA and therefore invalid except to the extent that it keeps confidential the identities of patients who produce medical marijuana for their own use;

B. an order directing Defendants to satisfy the above-described IPRA requests in full except to the extent that the requests would encompass "personal production" licenses or applications for such licenses;

C. an award of damages, costs, and reasonable attorneys' fees under IPRA, NMSA 1978, § 14-2-12(D) (1993); and

D. such other relief as the Court deems just and proper.

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