

STATE OF NEW MEXICO  
COUNTY OF BERNALILLO  
SECOND JUDICIAL DISTRICT COURT

FRANK C. FOY,

Plaintiff,

v.

No. D-202-CV-2009-01864

NEW MEXICO STATE INVESTMENT COUNCIL and  
GARY BLAND, State Investment Officer

Defendants.

**COMPLAINT FOR INSPECTION OF PUBLIC RECORDS,  
DAMAGES, AND DECLARATORY AND INJUNCTIVE RELIEF**

This is a complaint under the Inspection of Public Records Act, NMSA 1978, §§ 14-2-1 through -12 (“IPRA”), for inspection of public records identified in Exhibit 1.

Defendants have refused to produce any of these public records for inspection and/or copying, in violation of IPRA. This complaint also seeks damages and declaratory and injunctive relief under the Inspection of Public Records Act and other applicable law. In support of the complaint, plaintiff alleges and states:

1. Frank Foy is a citizen of New Mexico and a resident of Bernalillo County.
2. The State Investment Council (“SIC”) is an agency of the State of New Mexico, with its principal office in Santa Fe. The SIC is a “public body” as defined in § 14-2-6(D), and therefore subject to the Inspection of Public Records Act.
3. Gary Bland is the State Investment Officer, a public officer of the State of New Mexico. He was initially appointed, and reappointed, by Governor Bill Richardson. Under NMSA 1978, § 6-8-4, the State Investment Officer can only be removed from office for cause. However, upon information and belief, notwithstanding the statute, Mr. Bland

has provided Governor Richardson with a pre-signed letter of resignation, so Mr. Bland effectively serves at Governor Richardson's pleasure and sufferance.

4. On January 27, the SIC received a request for inspection of public records. A copy of the request is attached and incorporated as Exhibit 1 to this complaint.

5. On February 11, the SIC denied the request *in toto*. See Exhibit 2, attached and incorporated as part of this complaint.

6. Before denying the request *in toto*, the SIC made no attempt to confer with Mr. Foy or his counsel about the request, including ways in which the scope of the request might be limited, and ways in which the supposed burden of the request could be reduced.

7. On February 12, the plaintiff responded as set forth in Exhibit 3 hereto, asking the SIC whether it would produce any records at all, and offering to enter into a stipulation that a partial production of records would be without prejudice to its stated objections concerning other records.

8. On February 13, the SIC responded to Exhibit 3, refusing to allow inspection of any public records, even those records which could easily be retrieved. See Exhibit 4, attached.

9. On February 17, the plaintiff responded as set forth in Exhibit 5 hereto, reiterating his willingness to negotiate about a partial inspection of documents.

10. The SIC refuses to produce any records whatsoever, even public records which it has already provided to others.

11. The SIC's refusal to produce any records is a violation of IPRA. This refusal is dilatory and in bad faith.

12. The SIC is refusing to allow inspection of its public records in order to cover up wrongdoing at the agency. The SIC has denied the request in order to prevent the public from learning about malfeasance, nonfeasance, and incompetence at the SIC.

13. The SIC is trying to cover up activities at the SIC which might violate the criminal and civil laws of New Mexico and the United States, including but not limited to, possibly criminal activities by Gary Bland (and perhaps others).

14. Upon information and belief, the SIC's refusal to allow inspection of public documents was not authorized by the SIC's members.

15. Upon information and belief, the SIC's refusal to allow inspection of public documents was improperly influenced or procured by Mr. Bland (and perhaps others).

16. Mr. Bland has a disqualifying conflict of interest, because his primary concern is to conceal his wrongdoing and to protect himself from possible civil or criminal liability. Mr. Bland and all the members of the SIC are required to act as strict fiduciaries for the SIC and the beneficiaries of the funds managed by the SIC. As fiduciaries, Mr. Bland and the other members of the SIC are required to act solely in the interests of the State of New Mexico and the SIC, without regard to their own personal interests. Instead, Mr. Bland is acting to protect his own personal interest, which is at odds with the best interests of the SIC and the State. Mr. Bland is causing the SIC to do the same. This is a plain violation of the strict fiduciary duties owed by Mr. Bland, the members of the SIC, and the SIC itself.

17. As part of its cover-up, the SIC has offered several invalid reasons as pretexts for refusing to produce public documents.

18. The SIC has claimed that the request is overly broad, but under IPRA that is not a valid excuse for refusing to produce those records which can be readily identified and retrieved.

19. The SIC has claimed that the request is burdensome, but under IPRA that is not a valid excuse, because IPRA declares that providing information is “an integral part of the routine duties of public officers and employees.” § 14-2-5. Moreover, that is not a valid excuse for refusing to produce records which can be readily located.

20. The SIC refuses to allow inspection of public records because the SIC alleges that the reason for Mr. Foy’s request is so that he can use them in a lawsuit. The SIC’s refusal is directly contrary to the specific provisions of IPRA: “No person requesting records shall be required to state the reason for inspecting the records.” § 14-2-8(C). Under IPRA, any citizen can inspect public records for any reason, or no reason at all. Likewise, bloggers and news reporters can inspect public records for any reason, or no reason at all.

21. Furthermore, IPRA contains no provision allowing an agency to refuse inspection of public documents because the agency claims that the documents might be relevant to a lawsuit. The right to public inspection provided by IPRA is independent of a litigant’s right to conduct discovery under the rules of civil (or criminal) procedure. IPRA inspection serves different and broader purposes than the discovery rules. IPRA is subject to different rules and procedures and criteria. Whether or not Mr. Foy is entitled to some or all of these records through civil discovery, is a different question, to be decided by the judge presiding over that case, applying a different set of rules.

22. If a public agency can deny a citizen's right to inspect public documents because the documents might relate to a lawsuit, then the agency could draw a veil of secrecy around its records, as the SIC is attempting to do.

### **PRAYER FOR RELIEF**


Wherefore, plaintiff prays the Court:

- A. To enter an order compelling the SIC to produce all records that have been requested under IPRA;
- B. To oversee the production of records by defendants to ensure speedy and full compliance with the Inspection of Public Records Act;
- C. To declare that Gary Bland has a direct conflict of interest that disqualifies him from acting in this particular instance;
- D. To enter an injunction prohibiting Gary Bland from involving himself in this matter, or seeking to influence others about this matter, or seeking to obstruct the inspection of public records.
- E. To award damages as provided in the Inspection of Public Records Act;
- F. To award attorneys' fees and costs as provided in the Inspection of Public Records Act;
- G. To enter preliminary and permanent injunctive and declaratory relief to protect plaintiff's rights to inspect public records; and
- H. To grant such other and further relief as may be necessary.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By

A handwritten signature in black ink, appearing to read "Victor R. Marshall", written over a horizontal line.

Victor R. Marshall  
Attorneys for Plaintiff  
12509 Oakland NE  
Albuquerque, New Mexico  
505/332-9400  
505/332-3793 FAX

VICTOR R. MARSHALL & ASSOCIATES, P.C.

*Attorneys at Law*  
12509 Oakland NE  
Albuquerque, NM 87122  
(505) 332-9400 / Fax (505) 332-3793

January 27, 2009

**Via Hand-Delivery and Facsimile**

New Mexico State Investment Council  
Attn: Custodian of Records  
41 Plaza La Prensa  
Santa Fe, NM 87507

Dear Sirs:

This firm represents Frank Foy. Under the New Mexico Inspection of Public Records Act, Mr. Foy requests inspection of the following records:

Any and all records relating to:

1. Meetings of the Council, or actions by the Council, or any Council committee, including minutes, notes, recordings, etc. since January 1, 2000;
2. Meetings of any other committee or advisory group, or actions by them, including minutes, notes recordings, etc. since January 1, 2000;
3. Vanderbilt Capital Advisors or Vanderbilt Financial, LLC or Vanderbilt Financial Trust;
4. Pioneer Investment Group;
5. Bruce Malott; Meyners + Co; Gary Bland; Frank Foy;
6. Osbert M. Hood; Ron D. Kessinger; Robert P. Nault; James R. Stern; Patrick A. Livney; Stephen C. Bernhardt; Kurt W. Florian, Jr.; Anthony J. Koenig, Jr.; Mark E. Bradley; Pioneer Investment; Management, U.S.A., Inc.; Pioneer Global Asset Management S.P.A.; Unicredito Italiano, S.P.A.; Katten Muchin Rosenman, LLP; Richards, Layton & Finger, P.A.; Clifford Chance U.S., LLP; Ernst & Young, LLP; Price Waterhouse Coopers; Citigroup; Citigroup Global Markets Inc.; Bear, Stearns & Co., Inc.; UBS Investment Bank; UBS Securities LLC; Calyon Credit Agricole CIB; Jeffries Capital Management, Inc.; Fortis Securities LLC; ACA Management, LLC; JPMorgan Chase Bank, N.A.; ABN Amro, Inc.; Stone Castle Securities, LLC;



7. Robert Vigil (former State Treasurer); Mark Canavan; Jeff Riggs; Guy Riordan; Eric Serna; Maketa Investment Group; Hamilton Lane; Benchmark Plus; Deutsche Bank; Gottex; Austin Capital; HFV; TAG; Berean Capital; Thornberg Management or Thornberg Mortgage; Wells Capital Mangement; Northern Trust Company; Cabrera Capital; CDR; David Rubin; Robert Jacksha; Countrywide; Angelo Mozilo; Diane Denish; David Contarino; James Jimenez; Bill Richardson; Portfolio Advisors; New England Pension Consultants; Butch Maki; Brian Condit; Thomas Valenzuela; Valenzuela Capital; Lombardia Capital; Evelyn Hunemuller; Marc Correra; Anthony Correra; Psilos Group; Albert Waxman; Doug Brown; James Lewis; Anadelle Sanchez; Veronica Garcia; Paul Blanchard; R. D. Hubbard; Pete Daskalos; Wells Fargo Bank; Mary Lou Cameron; Delman Shirley; Polly Turner; Citigroup Global Markers; Aldus Capital; Bank of America; Scott Stovall.

**Note:** When any person or entity is identified, include the affiliates, agents, employees, officers, directors, intermediaries for that person or entity.

This request includes records in any form including electronic records like e-mails, cell phone messages, text messages, recordings, computer data, etc.

Here is the contact information to use:

Frank Foy  
c/o Victor R. Marshall & Associates, P.C.  
12509 Oakland NE  
Albuquerque, NM 87122  
505-332-9400 phone  
505-332-3793 fax

We would like to inspect these records as soon as possible, and we are willing to look at the documents in batches rather than waiting for all of them to be assembled.

Please acknowledge receipt by return fax, and contact me if you have any questions.

Sincerely,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By: 

Victor R. Marshall  
Attorneys for Frank Foy

VRM/sch

Received: \_\_\_\_\_ [the date and time] by \_\_\_\_\_



State of New Mexico  
**STATE INVESTMENT COUNCIL**

41 Plaza la Prensa  
Santa Fe, New Mexico 87507  
Phone: (505) 476-9500  
Fax: (505) 424-2510

**BILL RICHARDSON**  
GOVERNOR

**GARY B. BLAND**  
STATE INVESTMENT OFFICER

February 11, 2009

VIA FACSIMILE & MAIL

Victor R. Marshall, Esq.  
Victor R. Marshall & Associates PC  
12509 Oakland NE  
Albuquerque, NM 87122-2274

**Re: Foy Public Records Request – 15 day letter**

Dear Mr. Marshall:

On January 28, 2009, I received your request dated January 27, 2009, requesting, on behalf of Frank Foy, records pursuant to the New Mexico Inspection of Public Records Act (“IPRA”).

Please be advised that NMSIC respectfully denies the request pursuant to (1) *State Ex Re. Newsome v. Alarid*, 90 NM 790 (1977), which allows an agency not to disclose records based on legitimate public policy reasons; and (2) Section 14-2-1 (A) (12), which removes records from disclosures as “otherwise provided by law”. Here, the denial is founded on the well settled public policy and case law that freedom of information laws cannot be used to evade a court’s discovery process.

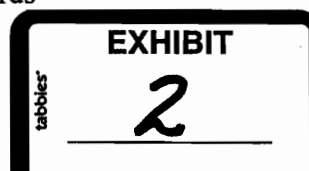
Federal courts have unanimously held that the federal Freedom of Information Act (“FOIA”) may not be used as a discovery tool to circumvent or supplement rules of discovery. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989); *United States v. Murdock*, 548 F.2d 599 (5<sup>th</sup> Cir. 1977); *Williams v. Internal Revenue Service*, 345 F.Supp. 591 (D.C. Del. 1972); *Dohse v. Potter*; 2006 WL 379901 (D. Neb. 2006). We have no reason to believe that a New Mexico state court would treat the IPRA differently. Indeed, state courts which have considered the issue have ruled that their state public records laws were not enacted to benefit private litigants by giving them an alternative to state discovery rules. *State ex rel. Perrysburg Township v. City of Rossford*, 148 Ohio App. 3d 72 (2002); *D’Alessandro v. Unemployment Appeal Board*, 392 N.Y.S. 2d 433 (1977).

In addition to the above, your request is overly broad and burdensome and some records that may be responsive to your request are likely protected from disclosure as executive privilege, attorney client privilege or confidential commercial information.

Please contact the undersigned should you have any questions concerning the foregoing.

Sincerely,

Charles Wollmann  
Public Information Officer / Custodian of Records  
New Mexico State Investment Council



VICTOR R. MARSHALL & ASSOCIATES, P.C.

*Attorneys at Law*  
12509 Oakland NE  
Albuquerque, NM 87122  
(505) 332-9400 / Fax (505) 332-3793

February 12, 2009

Via Facsimile and Email

Charles Wollman  
Public Information Officer/Custodian of Records  
New Mexico State Investment Council  
41 Plaza la Prensa  
Santa Fe, NM 87507

Re: Request for Inspection of Records to SIC

Dear Mr. Wollman:

I have received your letter dated February 11, 2009 in which the SIC completely denies Mr. Foy's request for inspection of public records.

At the outset, it should be noted that neither you nor anyone at the SIC made any attempt whatsoever to confer with me about the records request.

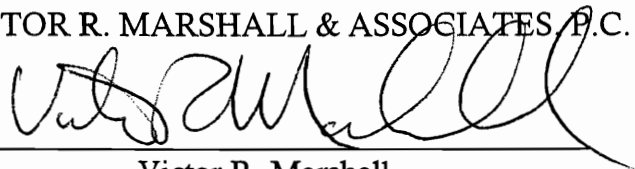
The SIC has no valid or good faith basis for refusing to produce any records, simply because it believes some of the requests are overly broad. The legal authorities you have cited are not relevant under New Mexico's Inspection of Public Records Act ("IPRA"). Further, please be advised that if the SIC makes a good faith partial production of records which we can inspect, no later than noon on February 16, we are agreeable to a stipulation that such production is without prejudice to SIC's objections on the other records.

Accordingly, please advise us, by fax or email, no later than 10:00 a.m., February 13, whether SIC will produce any of the records requested under IPRA. For example, will SIC produce its records relating to Vanderbilt, as requested in item 3?

Regards,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

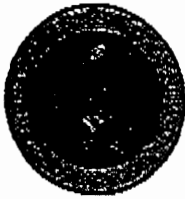
By



Victor R. Marshall

VRM/sch





State of New Mexico  
**STATE INVESTMENT COUNCIL**

41 Plaza La Prensa  
Santa Fe, New Mexico 87507  
Phone: (505) 476-9500  
Fax: (505) 424-2510

**BILL RICHARDSON**  
GOVERNOR

**GARY B. BLAND**  
STATE INVESTMENT OFFICER

Friday, February 13, 2009

VIA FACSIMILE & MAIL

Victor R. Marshall, Esq.  
Victor R. Marshall & Associates PC  
12509 Oakland NE  
Albuquerque, NM 87122-2274

*Re: Foy Public Records Request*

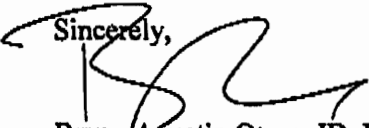
Dear Mr. Marshall:

Based upon your letter dated February 12, 2009, it appears that you misunderstood our denial to Mr. Foy's records request pursuant to the New Mexico Inspection of Public Records Act ("IPRA").

If you reread our response, you will see that the denial is based on well settled public policy and case law that freedom of information laws cannot be used to circumvent a court's discovery process. Your request to produce certain records outside of the discovery process would require us to violate established legal precedent. We cannot take such a course.

Due to its unreliability, we generally do not communicate via facsimile and this will be the last response sent through that medium.

Sincerely,

  
Bryan Agustin Otero, JD, LLM  
General Counsel



VICTOR R. MARSHALL & ASSOCIATES, P.C.

*Attorneys at Law*  
12509 Oakland NE  
Albuquerque, NM 87122  
(505) 332-9400 / Fax (505) 332-3793

February 17, 2009

**Via Facsimile and Email**

Charles Wollman  
Public Information Officer/Custodian of Records  
New Mexico State Investment Council  
41 Plaza la Prensa  
Santa Fe, NM 87507

Patricia J. Turner, Esq.  
Canepa & Vidal, P.A.  
Attorneys for the New Mexico Educational Retirement Board  
P.O. Box 8980  
Santa Fe, NM 87504

Re: **IPRA Requests**

Dear Mr. Wollman and Ms. Turner:

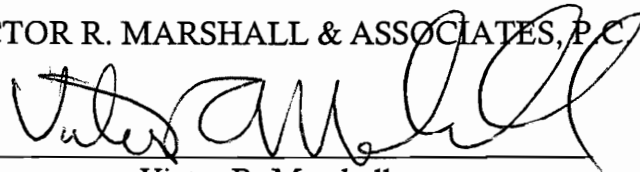
Last week, I inquired whether ERB or SIC would be willing to produce some documents under a reservation of rights. The response, or rather the non-response, is that ERB and SIC are unwilling to allow inspection of any of the documents requested by Frank Foy, even the ones that are easily retrievable.

However, our side continues to be willing at any time to discuss ways to facilitate the production of documents, refine the requests, and take other steps to work out our differences, with both sides reserving their respective positions. Our offer remains open, notwithstanding the IPRA litigation which we have been forced to file.

Yours very truly,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By



Victor R. Marshall

VRM/sch

