

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

ENDORSED
FILED IN MY OFFICE THIS
FEB 12 2009

FRANK C. FOY,

Plaintiff,

Juanita M. Duran
CLERK DISTRICT COURT

v.

No. CV 200901587

NEW MEXICO EDUCATIONAL RETIREMENT BOARD;
BRUCE MALOTT; and GARY BLAND,

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, plaintiffs allege and state:

1. Frank Foy is a citizen of New Mexico and a resident of Bernalillo County.
2. The Educational Retirement Board (“ERB”) is an agency of the State of New Mexico, with its principal offices in Albuquerque and Santa Fe. The ERB is a “public body” as defined in § 14-2-6(D), and therefore subject to the Inspection of Public Records Act.
3. Bruce Malott is a Trustee of the ERB, and the Chairperson of the ERB.
4. Gary Bland is a Trustee of the ERB.

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

6. On February 10, the ERB denied the request *in toto*. See Exhibit 2, attached and incorporated as part of this complaint.

7. Before denying the request *in toto*, the ERB 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.

8. On February 11, the plaintiff responded as set forth in Exhibit 3 hereto, asking the ERB 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.

9. The ERB did not respond to Exhibit 3.

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

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

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

13. The ERB is trying to cover up activities at the ERB which might violate the criminal laws of New Mexico and the United States, including but not limited to, possible criminal activities by its Trustees Bruce Malott and Gary Bland (and perhaps others).

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

15. Upon information and belief, the ERB's refusal to allow inspection of public documents was improperly influenced or procured by Mr. Malott and Mr. Bland.

16. Both Mr. Malott and Mr. Bland have a disqualifying conflict of interest, because their primary concern is to conceal their wrongdoing and to protect themselves from possible civil or criminal liability. As Trustees of the ERB, Mr. Malott and Mr. Bland (as well as other Trustees) are required to act as strict fiduciaries for the ERB and the retired educators who depend on the ERB for their retirement benefits. As fiduciaries, Mr. Malott and Mr. Bland, and the other Trustees, are required to act solely in the interests of the ERB and its retirees, without regard to their own personal interests. Instead, Mr. Malott and Mr. Bland are acting to protect their own personal interests, and causing the ERB to do the same. This is a plain violation of the strict fiduciary duties which the ERB Trustees and staff owe to the ERB retirement fund and the retired educators who depend on it.

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

18. The ERB 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 ERB 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 ERB refuses to allow inspection of public records because the ERB alleges that the reason for Mr. Foy’s request is so that he can use them in a lawsuit. The ERB’s refusal is directly contrary to a specific provision 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 ERB is attempting to do.

PRAYER FOR RELIEF

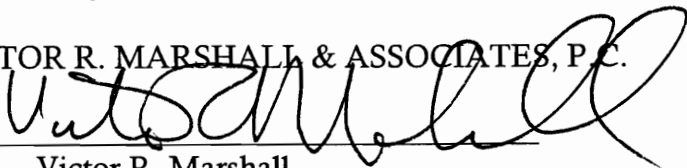
Wherefore, plaintiff prays the Court:

- A. To enter an order compelling the ERB 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 Bruce Malott and Gary Bland have a direct conflict of interest that disqualifies them from acting as Trustees for the ERB in this particular instance;
- D. To enter an injunction prohibiting Bruce Malott and Gary Bland from involving themselves 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 plaintiffs' 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



Victor R. Marshall
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(505) 332-9400 / Fax (505) 332-3793

January 27, 2009

Via hand-delivery and facsimile

New Mexico Educational Retirement Board
Attention: Records Custodian
Post Office Box 26129
Santa Fe, New Mexico 87502

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 Board, or actions by the Board, or any Board committee, including Board 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 _____

CANEPA & VIDAL, P.A.

Attorneys and Counselors At Law

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Joseph F. Canepa
Timothy Vidal

Patricia J. Turner, Of Counsel
James E. Riley, Of Counsel

*Also admitted in Massachusetts

February 10, 2009

Victor R. Marshall, Esq.
Victor R. Marshall & Associates, P.C.
12509 Oakland NE
Albuquerque, New Mexico 87122

RE: Mr. Foy's Request for Inspection of Public Records

Dear Mr. Marshall:

This firm has been retained to represent the New Mexico Educational Retirement Board (hereinafter, the "ERB") in response to both your request on behalf of Mr. and Mrs. Foy to access and inspect documents pursuant to the Inspection of Public Records Act, made by letter dated January 27, 2009 (hereinafter, the "Request") and a subpoena for production or inspection of the same documents (hereinafter, the "Subpoena") issued in *State of New Mexico, ex rel. Frank C. Foy and Suzanne B. Foy v. Vanderbilt Capital Advisors, LLC, et al.*; Case No. D-101-CV-2008-1895 on January 28, 2009 (hereinafter, the "Litigation").

In response to the Request, be advised that the ERB has determined that the Request is excessively burdensome and broad and is denied. The ERB can not determine from the Request the types of "records" sought or the time period covered. The Request is so uncertain in its scope that it raises questions as to whether it is intentionally drafted in such a manner as to make it difficult if not impossible for the ERB comply or is intended to divert agency resources from fulfilling its statutory duties. Clarification, limitation and specificity of your Request are required in order for the ERB to make a good faith effort to provide records for inspection. Furthermore, the Request: (1) is an effort to avoid the applicable rules of procedure governing discovery in the Litigation, contrary to law; (2) seeks pre-filing discovery from the ERB, against which the Litigation threatens suit (para. 78 and 82 of the Complaint); and, (3) duplicates the Subpoena. The ERB joins its objections to the Request with a Motion to Quash the Subpoena to be timely filed in the Litigation.



The ERB notes that some of the information requested may be available to you on the Board's website at <http://www.nmerb.org/>.

Sincerely,

Canepa & Vidal, P. A.

By: 

Patricia J. Turner, Of Counsel

VICTOR R. MARSHALL & ASSOCIATES, P.C.

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(505) 332-9400 / Fax (505) 332-3793

February 11, 2009

Via Facsimile and Email

Patricia J. Turner, Esq.
Canepa & Vidal, P.A.
P.O. Box 8980
Santa Fe, NM 87504

Re: Request for Inspection of Records to ERB

Dear Ms. Turner:

I have received your letter dated February 10, 2009 in which the ERB completely denies Mr. and Mrs. Foy's request for inspection of public records

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

The ERB has no valid or good faith basis for refusing to produce any records, simply because it believes some of the requests are overbroad. Further, please be advised that if the ERB makes a good faith partial production of records which we can inspect, no later than noon on February 13, we are agreeable to a stipulation that such production is without prejudice to ERB's objections on the other records.

Accordingly, please advise us, by fax or email, no later than 10:00 a.m., February 12, whether ERB will produce any of the records requested under IPRA. For example, will ERB produce its records relating to Vanderbilt, as requested in item 3 ?

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By



Victor R. Marshall

VRM/sch

