

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

NATIONAL EDUCATION ASSOCIATION
OF NEW MEXICO,
Plaintiff,

v.

Case No. D-101-CV-2014-02120

NEW MEXICO PUBLIC EDUCATION
DEPARTMENT,
Defendant.

VERIFIED PETITION FOR WRIT OF MANDAMUS

COMES NOW, Plaintiff, the NATIONAL EDUCATION ASSOCIATION - NEW MEXICO, by and through her attorneys, JONES, SNEAD, WERTHEIM & CLIFFORD, P.A., petitions this Court to issue a Writ of Mandamus against the Defendant, the New Mexico Public Education Department, directing it to respond to a request under the Inspection of Public Records and to provide the public records requested therein pursuant to NMSA 1978, §14-2-12. Plaintiff states the following:

JURISDICTION OF THE COURT AND PURPOSE OF THE WRIT

Plaintiff brings this action pursuant to N.M. Const., art. VI, § 13, granting original jurisdiction in mandamus to the district court, pursuant to NMSA 1978, § 44-2-3, which also grants original jurisdiction in mandamus actions to the district court, and NMSA 1978, § 14-2-12(B), which grants district courts authority to issue writs of mandamus or orders of injunction to enforce the provisions of the Inspection of Public Records Act (NMSA 1978, § 14-2-1 through 14-2-12, hereinafter the "Inspection of Public Records Act"). This Petition is within the explicit statutory purpose of the writ of mandamus as a petition "to compel the performance of an act

which the law specially enjoins as a duty resulting from an office, trust or station” NMSA 1978, § 44-2-4.

II.

STATEMENT OF THE FACTS: THE PARTIES, STANDING, VENUE

1. Plaintiff, National Education Association – New Mexico (“NEA-NM”) is a professional and labor organization, engaged in representing employees of New Mexico public schools.

2. Plaintiff, NEA-NM is located in Santa Fe County, New Mexico.

3. Charles Goodmacher is employed by NEA-NM as the Research, Communication and Government Relations Uni Serv.

4. Defendant, New Mexico Public Education Department, is a public office of the State of New Mexico subject to mandamus by the district court.

5. On May 27, 2014, Mr. Goodmacher sent, via email, three Inspection of Public Records Requests to Beverly Friedman, Public Information Officer for PED, pursuant to NMSA 1978, Section 14-2-8 (2009). (Exhibit 1)

6. The first request, IPRA #14-094, requested:

“Any correspondence, emails, reports, research or summaries thereof regarding the P.E.D./Secretary Designate statement that 99% of teachers were evaluated as effective or meeting standards under the old State of New Mexico teacher evaluation system (i.e. prior to the new evaluation system implemented by regulation). We request any documents that state that figure as a fact, and we also specifically request access to the information used to calculate that percentage.

The 99% (ninety-nine percent) figure is often quoted as in this May 18, 2014 story published by the Associated Press on KRQE and other news media outlets:

‘We’ve taken a step from a broken system to a much improved system,’ Education Secretary-designate Hanna Skandera told KRQE News 13.

The old system took a pass-fail approach. Under it, more than 99 percent of teachers were found competent.

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7. The second request, IPRA #14-095, requested:

“Any correspondence, emails, reports, research or summaries thereof during 2013 and 2014 regarding the implementation and/or maintenance and effectiveness of the Teachscape software and it’s use in our statewide teacher evaluation system here in New Mexico.

We seek both internal P.E.D. documents (including by not limited to the list above) on this issue, and which were shared between any personnel or agent of the P.E.D. and any of New Mexico’s public school districts.

This request is inclusive of, but not limited to, any email correspondence on Public Education Department computers and devices or on personal e-mail accounts and devices. If any of the records are being held in electronic format, I wish to receive electronic copies at cgoodmacher@nea.org or, if that is not possible, on a blank compact disk.”

8. The third request, IPRA #14-096, requested:

“Any correspondence, emails, reports, research or summaries thereof during 2013 and/or 2015 regarding the implementation and/or maintenance and effectiveness of the Teachscape software and it’s use in our statewide teacher evaluation system here in New Mexico.

We seek both internal P.E.D. documents (including but not limited to the list above) on this issue, and which were shared between any personnel or agent of the P.e.D. and the Teachscape software service provider.

This request is inclusive of, but not limited to, any email correspondence on Public Education Department computers and devices or on personal e-mail accounts and devices. If any of the records are being held in electronic format, I wish to receive electronic copies at cgoodmacher@nea.org or, if that is not possible, on a blank compact disk.”

9. On May 28, 2014, Mr. Goodmacher received responses to all three requests from Ms. Friedman stating that the IPRA requests were received by her office and responses would be forthcoming within 15 days of her receipt of the requests (Exhibit 2)

10. On June 2, 2014, Mr. Goodmacher received an email from Ms. Friedman regarding IPRA #14-096, stating that due to the excessively burdensome nature of the request, a response would not be ready until Wednesday, August 27, 2014.

11. Mr. Goodmacher did not receive a response to the other requests, IPRA #14-094 or #14-095.

12. As of the date of this complaint, the PED has not provided the documents requested in any of the three IPRA requests.

III.

GROUNDS FOR ISSUANCE OF THE WRIT

Mandamus lies in this case because requiring the PED to respond to the request made under the Inspection of Public Records Act is an act of the Defendant clearly enjoined by law, and Plaintiff possesses no plain, speedy and adequate remedy at law or remedy by appeal. Mandamus lies to compel an act by a public official where "the duty to perform the act is clearly enjoined by law where there is no other plain, speedy and adequate remedy in the ordinary course of law." NMSA 1978, § 44-2-5; *El Dorado at Santa Fe, Inc. v. Board of County Commissioners of Santa Fe County*, 89 N.M. 313, 316, 551 P.2d 1360, 1363 (1976). Plaintiff also has no remedy by appeal; if they had such a remedy, it might prevent issuance of a writ of mandamus. *Montoya v. Blackhurst*, 84 N.M. 91, 92, 500 P.2d 176, 177 (1972). Section 14-2-8(D) of the Inspection of Public Records Act enjoins the Respondents to act, and the Plaintiff has no adequate remedy at law or by appeal to enforce that obligation to act if, as here, the Defendant chooses to ignore it. Mandamus should lie in this case.

A. The Defendant is Enjoined By Law To Respond to a Request Under the Inspection of Public Records Act.

The Defendant has refused to respond as required pursuant to Section 14-2-8 of the Inspection of Public Records Act. Such a failure to respond is deemed a denial of the request. NMSA 1978, § 14-2-11(A) (1993). A District Court may issue a writ of mandamus to enforce the provisions of the Inspection of Public Records Act. NMSA 1978, §14-2-12(B) (1993). Respondents have no legitimate reason to deny the request made by Plaintiff because none of the information requested is exempted from public inspection under Section 14-2-1 of the Inspection of Public Records Act, or “statutory or regulatory exceptions, or privileges adopted by this Court or grounded in the Constitution. *See Republican Party of New Mexico v. New Mexico Taxation and Revenue Dept.*, 2012-NMSC-026, ¶16. Plaintiff requested documents statements made by PED regarding the teacher evaluation system, and the Teachscape software and its use in the statewide teacher evaluation system. (Exhibit 1). Defendant possesses no discretion to refuse to respond to a request or to fail to provide the information requested under the Inspection of Public Records Act. Mandamus should issue against the Defendant to compel them to respond the request and to provide the requested documents.

Responding to requests for public information pursuant to the Inspection of Public Record Act is a nondiscretionary duty of the PED. The Defendant confirmed receipt of the three IPRA requests on May 28, 2014, but has failed to provide the requested information, an act that they are enjoined by law to perform. They have no discretion to ignore the law as they have done. The Defendant must heed the Inspection of Public Record Act, and mandamus will cause them to do so.

B. The Petitioners Possess No Other Plain, Speedy Or Adequate Remedy In The Ordinary Course Of Law Or Remedy By Appeal.

The Plaintiff has no plain, speedy or adequate remedy at law or remedy by appeal to enforce its rights to the public records requested. The Legislature specifically allowed for the issuance of writs of mandamus upon the failure of public officers to respond to requests for public records made under the Inspection of Public Records Act. NMSA 1978, § 14-2-12(C). In addition, the courts have repeatedly upheld such writs. *See Newsome v. Alarid*, 90 N.M. 790, 568 P.2d 1236 (1977); *City of Farmington v. Daily Times*, 2009-NMCA-057; *Board of Comm.'s of Dona Ana County v. Las Cruces Sun-News*, 2003-NMCA-102. There is no other action available to Plaintiff that will provide an adequate remedy.

The Plaintiff also has no remedy by way of an appeal. The requirement that a petitioner in mandamus have no remedy by appeal refers to statutory rights of appeal. *See State ex. rel. Pilot Development v. State Health Plan. & Development Bureau*, 1985-NMCA-050, ¶32, 102 N.M. 791 (mandamus not preempted by right to appeal because party opposing writ could not point to statute granting an appeal).

IV.
RELIEF SOUGHT

The Defendant has ignored its duty, enjoined by statute, to respond or otherwise provide the documents requested by Plaintiff, NEA-NM, pursuant to the Inspection of Public Records Act. This court should remedy the failure to perform this ministerial act through an Alternative Writ of Mandamus commanding Defendant to provide the information requested. 1985-NMCA-050, ¶33, 102 N.M. 791 (ministerial act subject to mandamus is one a public officer is required to perform by direction of law upon showing a given state of the facts).

In addition, Plaintiff requests damages in the amount of \$100 per day from the date Respondent was enjoined to respond to the request through the date Respondent provides the information requested pursuant to Section 14-2-11(C) of the Inspection of Public Records Act. Finally, NEA-NM requests costs and attorneys' fees pursuant to Section 14-2-12(D) of the Inspection of Public Records Act.

Respectfully submitted,
JONES, SNEAD, WERTHEIM
& CLIFFORD, P.A.
Attorneys for Plaintiff

By: /s/ Elizabeth C. Clifford
JERRY TODD WERTHEIM
ELIZABETH C. CLIFFORD
Post Office Box 2228
Santa Fe, New Mexico 87504-2228
(505) 982-0011
todd@thejonesfirm.com
betsy@thejonesfirm.com

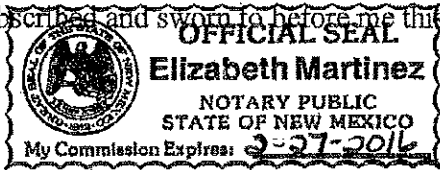
Verification

State of New Mexico)
) ss.
County of Santa Fe)

CHARLES GOODMACHER, being first duly sworn, under oath, deposes and states: that he is employed by the Plaintiff in this matter, that he has read, knows and understands the contents of the foregoing Petition For Writ of Mandamus, and knows the contents thereof to be true to the best of his knowledge, information and belief.

Charles Goodmacher
CHARLES GOODMACHER

Subscribed and sworn to before me this 25th day of September, 2014, by Charles Goodmacher.



Elizabeth Martinez
Notary Public

My commission expires:

2-27-2016

Request To Inspect Public Records

Date: May 27, 2014

TO: Beverly Friedman, Public Information Officer
NMPED Custodian of Records
300 Don Gaspar
Santa Fe, NM 87501

FROM: Charles Goodmacher, NEA-New Mexico,

Via email: Bev.Friedman@state.nm.us

This is a formal request under the New Mexico Inspection of Public Records Act, NMSA 1978, § 14-2-8(A) (1993).

I wish to inspect the following records:

Any correspondence, emails, reports, research or summaries thereof regarding the P.E.D. / Secretary Designate statement that 99% of teachers were evaluated as effective or meeting standards under the old State of New Mexico teacher evaluation system (i.e. prior to the new evaluation system implemented by regulation). We request any documents that state that figure as a fact, and we also specifically request access to the information used to calculate that percentage.

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If any of the records are being held in electronic format, I wish to receive electronic copies at cgoodmacher@nea.org or, if that is not possible, on a blank compact disk. Should I choose to make copies, I agree to pay reasonable copy fees according to the published fee schedule, but I prefer to be notified in advance if the total cost will exceed \$10.

Thank you for your prompt attention to this matter, and please contact me at the business address, phone number or e-mail listed below to discuss any aspect of this request.

Sincerely,

Exhibit 1

Charles Goodmacher ,
NEA-New Mexico
2007 Botolph Road
Santa Fe, NM 87505
(505) 450-3155 - mobile

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STATE OF NEW MEXICO
PUBLIC EDUCATION DEPARTMENT
300 DON GASPAR
SANTA FE, NEW MEXICO 87501-2786
Telephone (505) 827-5800
www.ped.state.nm.us

HANNA SKANDERA
SECRETARY OF EDUCATION

SUSANA MARTINEZ
GOVERNOR

May 28, 2014

This response was sent via email to: cgoodmacher@nea.org

Charles Goodmacher
NEA-New Mexico
2007 Botolph Road
Santa Fe, NM 87505
(505) 450-3155 – mobile

RE: IPRA #14-094

Dear Mr. Goodmacher:

Your request to inspect public records was received by me as the Records Custodian of the New Mexico Public Education Department (NMPED) on May 28, 2014. Your request to inspect public records sought in pertinent part:

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Exhibit 2

Letter: IPRA #14-094
Date: May 28, 2014
Page: 2

Pursuant to the Inspection of Public Records Act, a response will be forthcoming within 15 days of our receipt of the request.

Sincerely,

Beverly Friedman

Beverly Friedman
Custodian of Records



STATE OF NEW MEXICO
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300 DON GASPAR
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Telephone (505) 827-5800
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