

**STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT**

SOUTHWEST PUBLIC POLICY INSTITUTE,

Plaintiff,

No.: D-202-CV-2024-07328

v.

CITY OF ALBUQUERQUE and
ETHAN WATSON (in his official capacity as Records Custodian),

Defendants.

**PLAINTIFF’S RESPONSE IN OPPOSITION TO
DEFENDANTS’ MOTION TO QUASH SUBPOENA**

Denial of Defendants’ Motion to Quash Subpoena (“Motion”) is supported for multiple reasons. First, the public records sought by Plaintiff’s subpoena are the public records that Defendants have denied to it on the basis of allegedly not maintaining, not having a copy of, or not even having access to. Second, while the public records are held by a third-party known as CivicPlus, such records are Defendant City’s property and CivicPlus will not release the records without consent by the City, or apparently an order from the Court. Third, and lastly, Defendants’ Motion does not provide a legally sound objection to the subpoena supported by Rule 1-045(C)(3) NMRA as the objection runs afoul of established IPRA case law.

I. Relevant Case History

In support of its mission, and to monitor the actions of the City of Albuquerque, on December 26, 2022, Plaintiff, through its corporate officer Patrick M. Brenner, submitted an IPRA request via email to Defendant City. In the IPRA request, Plaintiff sought the following public records, essentially seeking information regarding IPRA requests processed by the City:

“1. The PostgreSQL database (or database) from nextrequest.cabq.gov which contains information from all public records requests submitted between January

1, 2019 to December 1, 2022 with no redactions unless covered by a specific and express exemption. In other words, I am seeking the database (managed by the NextRequest Document and Records Management Application) which contains all requests for public records submitted to the City of Albuquerque, including all departments and affiliates. This database should include subsequent notes, entries, internal messages, and external messages, encompassing the entirety of the processing of the request from the original submission of the request to the last entry, regardless of whether the request produced responsive documents.

2. If the database referenced above does not include subsequent notes, entries, internal messages, and external messages, encompassing the entirety of the processing of the request from the original submission of the request to the last entry, regardless of whether the request produced responsive documents, these public documents are hereby requested: all public records requests (from January 1, 2019 to December 1, 2022) including but not limited to all subsequent notes, entries, internal messages, and external messages, encompassing the entirety of the request from the original submission of the request, regardless of whether the request produced responsive documents.”

See Complaint, **Ex. 1**, p.1.

Following submission of the IPRA request, over the period of December 27, 2022, through August 16, 2024, Defendant Watson’s office corresponded with Mr. Brenner offering various representations regarding the request. After acknowledging receipt of the request on the same day it was received, on January 3, 2023, Defendant Watson’s office determined that the request was “excessively burdensome and broad.” *Id.*, p. 7. Then on January 27, 2023, Defendant Watson’s office asserted that regarding the database, they had “searched for responsive records and not been able to locate or identify records responsive to number 1 listed above. The City of Albuquerque does not maintain this database, nor does it have a copy of the database or access to the hosted database files.” *Id.*, p. 6. Mr. Brenner responded on February 2, 2023, and reaffirmed he sought the database.¹ *Id.*

On August 6, 2023, Defendant Watson’s office responded to Mr. Brenner and reaffirmed their contentions about the database and denied its production. *Id.*, p. 5. Mr. Brenner and

¹ As detailed in the NextRequest communication thread, Mr. Brenner relieved the City of producing records as detailed in section 2 of his request.

Defendant Watson's office continued with this back and forth into 2024, with Defendant Watson himself entering into the dialogue whereby he asserted on August 16, 2024, that regarding the database, "[w]e had previously noted, however, that we do not have this record or that creating it would require us to create a record. We are now closing this request." *Id.*, p 4.

With Defendant Watson closing Plaintiff's IPRA request on August 16, 2024, and not producing the sought after database, Plaintiff filed its IPRA enforcement action on September 16, 2024. Following unfruitful meet and confer efforts between counsel for the parties regarding the database, on November 6, 2024, CivicPlus was served with a subpoena from Plaintiff's counsel wherein the following was sought:

"The PostgreSQL database (or database) from nextrequest.cabq.gov which contains information from all public records requests submitted between January 1, 2019 to December 1, 2022."

See **Ex. 1** attached.

When the topic of the subpoena was addressed between counsel for the parties on October 31, 2024, Defendants' counsel did not oppose the issuance of the subpoena when advised that the subpoena would be issued to obtain the database from the CivicPlus, however later that same day Defendants changed their posture and asserted the subpoena was opposed. When asked for the basis by which the subpoena was opposed, Defendants' theory was they wanted to "make sure that no privileged materials are released." Following receipt of the subpoena, on November 12, 2024, Jennifer Dasenbrock, CivicPlus's general counsel, emailed Plaintiff's counsel a letter providing a variety of details about the database sought by Plaintiff's subpoena. *See* **Ex. 2** attached. In Ms. Dasenbrock's letter, she confirmed that the database sought by the subpoena contained "data owned by the City of Albuquerque[.]" *Id.* Ms. Dasenbrock further confirmed that her company acts as a "data custodian for its customers" and that CivicPlus could not share the

data without consent from the City of Albuquerque as it had “not consented to CivicPlus sharing the Database.” *Id.*

II. Legal Authority and Argument Supporting Denial of Defendants’ Motion

A. Rule 1-045 NMRA Standards

All discovery, including discovery obtained through the subpoena power contained in Rule 1-045 NMRA, follows Rule 1-026 NMRA, which provides for the acquisition of information “regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action.” Rule 1-026(B)(1) NMRA. Rule 1-045 NMRA governs the issuance of subpoenas to third parties. Where a given subpoena seeks privileged or protected information or otherwise subjects a person to undue burden, the court may quash or modify the subpoena. Rule 1-045(C)(3)(a) NMRA. No mechanism to obtain non-party discovery is available except as contemplated by this rule. “Discovery of non-parties must be conducted by subpoena pursuant to Fed. R. Civ. P. 45” *Landry v. Swire Oilfield Services, LLC*, 323 F.R.D 360-390-90 (D.N.M. 2018) (citing *Myers v. Andzel*, No. 06-14420, 2007 WL 3256879, at *1 (S.D.N.Y. 2007).

B. Argument Supporting the Denial of Defendants’ Motion.

1. The database record sought by Plaintiff’s subpoena is relevant to the claims and defenses of the parties in this case.

The database and the City’s representations concerning it are of primary relevance to the claims of the parties in this matter. In its denial of Plaintiff’s IPRA request, Defendants omitted any contentions that the database was not a public record but focused instead on a myriad of arguments opposing production of the database that essentially boil down to the notion that they didn’t have access to the database and couldn’t produce it. In order to investigate this material issue, a subpoena was issued in recognition that, “[r]elevance is a broad standard.” *Wishneksi v. Dona Ana County*, 2011 WL 13285437, at *4 (D.N.M. June 23, 2011). “The question of relevancy should be construed ‘liberally and with common sense’ and the discovery should be

allowed unless the information has no conceivable bearing on the case.” *Soto v. City of Concord*, 162 F.R.D. 603, 610 (N.D. 1995) (internal citation omitted).

Here, Ms. Dasenbrock’s November 12, 2024, letter conflicts with the representations by Defendant Watson. First, not only is the database as sought by Plaintiff’s subpoena property “owned by the City of Albuquerque” but also CivicPlus would not release a copy of the database to Plaintiff without the City’s consent. Accordingly, it is proper to conclude that any argument offered by Defendants that the database is irrelevant to this matter as the database *is* the public records that sits at the heart of this controversy. Further, argument asserting the database is not relevant to the parties claims because the record is simply held by a third-party is not supported. Though CivicPlus is the data custodian for the City, the database is the City’s property, and the City retains consent over whether CivicPlus releases the database or not.

2. Defendants have not met their burden to quash the subpoena.

Defendants’ mere speculation that the database contains information subject to exclusion under IPRA fails to satisfy the standards supporting the quashing of the subpoena. Further, even assuming as true that the database contains information that is subject to exclusion, established caselaw simply burdens Defendants with the task of redacting that information from the public records subject to production to Plaintiff.

Defendants rely on one aspect of Rule 1-045(C)(3)(iii) NMRA in support of their argument which provides that upon motion, the court shall quash or modify a subpoena if it: (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies. Here the thrust of Defendants argument is that the records sought by Plaintiff “would contain information that would need to be redacted and privileged information that is properly withheld under the provisions of IPRA.” *See* Motion, p. 2. However, neither Defendants nor Ms. Dasenbrock, have offered specific or particularized information that confirms there *is* information in the database

that is privileged or otherwise subject to redaction. Given that Plaintiff's IPRA request sought the database which contained, "notes, entries, internal messages, and external messages, encompassing the entirety of the processing of the request from the original submission of the request to the last entry" of all IPRA requests process by the City over a given time period" it is difficult to imagine how the database would have any information that falls within the theory presented by Defendants. *See also Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145 N.M. 451 200 P.3d 104 (citing *Wall v. Pate*, 104 N.M. 1, 3, 715 P.2d 449, 451 (1986); *Henning v. Rounds*, 2007-NMCA-139, ¶ 2, 142 N.M. 803, 171 P.3d 317, concluding that assertions and arguments of counsel is not evidence). Even assuming *arguendo* that information that is subject to exclusion exists in the database, a variety of mechanisms exist to address such information the least of which would be issuance of a protective order by the Court. This too was offered as a workaround to Defendants' objections to the issuance of the subpoena but was also declined by them.

Finally, Defendants' analysis of *Henry v. Gauman*, 2023-NMCA-078, 536 P.3d 498, is entirely misplaced. In that case, the issue before the New Mexico Court of Appeals concerned whether a given document that is subject to complete exclusion from an IPRA request under Section 14-2-1(C) should be partially produced with only the exempt information in that document withheld. Unlike the document in the *Henry* case, the public record sought by Plaintiff in this matter is most definitely not "letters or memoranda that are matters of opinion in personal files or students' cumulative files." Despite the fact that Defendants' presentation that there might be information subject to exclusion in the database, even assuming it that is true, as the New Mexico Court of Appeals confirmed in *Henry*, "[w]hen an exemption applies only to certain portions of a document or certain types of information within a document, then separating the exempt from non-exempt material demands redaction of the exempt material." *Id.*, ¶ 20. That

the City is presenting this argument is disturbing as it has already been addressed and rejected by the New Mexico Supreme Court. *See Jones v. City of Albuquerque Police Dep't*, 2020-NMSC-013, ¶ 39, 470 P.3d 252 (holding that “when requested public records contain a mix of exempt and nonexempt information, the ‘exempt and nonexempt [information] ... shall be separated by the custodian prior to inspection, and the nonexempt information shall be made available for inspection.”). Here, the Defendants’ notion that public records that are otherwise subject to production are somehow subject to being quarantined from the public because they might contain information exempt from production turns IPRA’s goal of maximum transparency on its head and should not be embraced by the Court.

3. Defendants’ reliance upon the Court of Appeals case *Toomey v. City of Truth or Consequences et al.* is misplaced and inapplicable.

In *Toomey v. City of Truth or Consequences et al.*, 2012-NMCA-10, 287 P.3d 364, the New Mexico Court of Appeals held that under certain circumstances a private entity that contracts with a government entity is subject to IPRA. *Id.*, ¶ 25. While Defendants confirm in their motion that CivicPlus is subject to IPRA, that issue is not before the Court. CivicPlus is merely a custodian of data for the City much like Evidence.com houses police officer lapel camera video data for the City. The distinguishing difference between the two is that the City regularly provides IPRA requesters with access to Evidence.com to obtain police videos whereas in this matter, the City refused to provide Plaintiff with the sought after database record.

III. Conclusion and Request for Relief.

As a matter of public policy, the New Mexico Legislature drafted IPRA as a device to compel governmental entities and its agents to provide “the greatest possible information regarding the affairs of government and the official acts of public officers and employees[.]” NMSA 1978, § 14-2-5. Here, Plaintiff’s December 26, 2022, IPRA request seeks public records in support of that noble objective by seeking public records which provide Plaintiff with the

ability to assess Defendants very actions with respect to their processing of IPRA requests over a given period of time. Accordingly, Plaintiff requests that the Court deny Defendant's Motion and issue an order:

1. Denying Defendant's Motion and directing CivicPlus to produce the sought after database within five (5) business days of issuance of the order.
2. Such further relief the Court deems just and proper.

Respectfully submitted,

/s/Thomas R. Grover

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this document was electronically filed with the Court's Odyssey system on December 6, 2024, which caused an electronic version of the foregoing to be served on the below:

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