

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

HUMAN RIGHTS DEFENSE CENTER,

Plaintiff,

v.

Case No. D-101-CV-2021-01620

**CENTURION CORRECTIONAL HEALTHCARE
OF NEW MEXICO, LLC, et al.,**

Defendants.

ORDER REGARDING CROSS-MOTIONS FOR SUMMARY JUDGMENT

THIS MATTER was heard by the Court on Cross-Motions for Summary Judgment filed by the parties. Each motion was fully briefed. The Court considered the parties' briefing and held a hearing on the matter on August 19, 2024. The Court, having reviewed the arguments and hearing from the parties, **FINDS, CONCLUDES AND ORDERS:**

1) Plaintiff filed an action against Centurion Correctional Healthcare of New Mexico, LLC (CCHNM), Brian Fitzgerald, Kevin L. Nault and The New Mexico Corrections Department (NMCD).

2) This case involves a public records request under the New Mexico Inspection of Public Records Act, "IPRA". Plaintiff submitted back in August of 2020 to the New Mexico Corrections Department and its medical services contractor, CCHNM.

3) The request sought settlement agreements in cases in which CCHNM paid more than \$1,000 in response to any claim, and copies of the civil complaints or demands associated with those settlements.

4) The cross motions for summary judgment raise issues concerning whether CCHNM is a public body, were they properly served with the records request, and are the records requested public records.

5) The parties have indicated to the court that it is appropriate to decide these issues based on the briefing presented to the court.

6) Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. NMRA Rule I-056(C); *Roth v. Thompson*, 1992-NMSC-011, ¶ 17, 113 N.M. 331, 334, 825 P.2d 1241, 1244. "The movant need only make a prima facie showing that he is entitled to summary judgment." *Roth*, ¶ 17, 113 N.M. at 334, 825 P.2d at 1244.

7) Should pleadings, depositions, answers to interrogatories and admissions on file together with affidavits, if any, show that there is no genuine issue as to any material fact, moving party is entitled to judgment as matter of law. Rules of Civil Procedure, rule 56(b, c). *Nix v. Times Enterprises, Inc.*, 1972, 83 N.M. 796, 498 P.2d 683.

Was CCHNM served with the Records Request?

8) CCHNM argues that they were never properly served with the complaint because the complaint was sent to Centurion Managed Care at an address in Virginia. The Plaintiff argues that this was the address that was included on the contract between NMCD and CCHNM.

9) When the Plaintiff served the complaint, he submitted it to the Records Custodian at NMCD and to Centurion Managed Care.

10) Both complaints were the same, and requested to inspect settlement records, verdicts and complaints related to the care of New Mexico's prisoners.

11) Plaintiff asked the recipient of the Centurion IPRA to forward the request to the appropriate records custodian if the recipient was not the custodian of the requested records.

12) In the NMCD IPRA, Plaintiff asked NMCD to promptly forward the request to the appropriate records custodian if the recipient, Kevin Nault, was not the custodian of the requested records.

13) On August 19, 2020, Mr. Nault notified Plaintiff that NMCD forwarded the IPRA request to Centurion, but Centurion declined to provide any records in response.

14) CCHNM does not dispute that they in fact received the request, they just argue that they, CCHNM, was not served directly and therefore was an “improper defendant.”¹

15) NMSA §14-2-8(E) provides: “In the event that a written request is not made to the custodian having possession of or responsibility for the public records requested, the person receiving the request shall promptly forward the request to the custodian of the requested public records, if known, and notify the requester. The notification to the requester shall state the reason for the absence of the records from that person’s custody or control, the records’ location and the name and address of the custodian.”

16) Mr. Nault complied with the first part of the statute by forwarding the request by forwarding the request.

17) As set forth in Plaintiff’s Exhibit 8 to the Plaintiff’s Motion, and Plaintiff’s Supplemental Exhibit 9, the correspondence between Mr. Nault, Kayla Tolbert and Kristen Robinson (Litigation Supervisor at Centurion) is informative.

¹ CCHNM’s First Motion for Summary Judgment on the issue of service to the proper party was denied.

18) Mr. Nault e-mailed Ms. Tolbert:

The New Mexico Corrections Department received the attached request for Centurion records. As an initial matter, please let me know if you're the correct person to correspond with, or if there's someone else I should be talking to about this.

My question is whether Centurion would like to locate these records and send them to NMCD to respond, or whether you would prefer that we refer the request directly to someone at your company, removing NMCD from the process. Please provide the records not later than August 25, or let us know how long locating them will take or what alternative method you would like to use no later than August 21.

19) Ms. Tolbert forwarded Mr. Nault's request to Ms. Robinson, who responded as follows to Mr. Nault:

We are in receipt of your email regarding HRDC's IPRA request for Centurion's settlement documents. While we believe we are not obligated to respond to the request directed at NMCD specifically, we have since received the same request from HRDC directed to Centurion. We intend to provide a response to this request.

20) Clearly CCHNM received the request and intended to respond in 2020 when this request was submitted. Therefore, it is disingenuous for CCHNM to now claim that they were an "improper party" that failed to receive service.

What was CCHNM's Obligation Regarding the Records?

21) IPRA specifically requires that each New Mexico public body shall designate at least one custodian of public records who shall be responsible for receiving and responding to IPRA requests. See § 14-2-7.

22) The designated records custodian is the only official who is assigned IPRA compliance duties, see § 14-2-7, and is the only official who statutorily "is subject to an

action to enforce” IPRA, see § 14-2-11(C). See, *Pacheco v Hudson*, 2018-NMSC-022, ¶157, 415 P.3d 505.

23) In this case, the NMCD designated Kevin Nault as the records custodian.²

24) NMCD did not include any provision related to IPRA compliance in its medical services agreement with CCHNM and has no actual possession, custody, or legal control over the requested records.

25) It is undisputed that CCHNM *does* have the records but has declined to respond to the Plaintiff’s IPRA request and has refused to produce the requested records to Plaintiff, or to NMCD.

26) In *State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, ¶ 13, 287 P.3d 364 (alteration in original), the Court recognized that it is possible for a public body to involve a private entity in conducting governmental business and subject the otherwise private entity’s records relating to that governmental activity to IPRA requirements. New Mexico precedent applies nine nonexclusive factors in a totality-of-factors test to determine whether a private entity has acquired such a role:

- 1) the level of public funding;
- 2) commingling of funds;
- 3) whether the activity was conducted on publicly owned property;
- 4) whether the services contracted for are an integral part of the public agency’s chosen decision-making process;
- 5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform;
- 6) the extent of the public agency’s involvement with, regulation of, or control over the private entity;
- 7) whether the private entity was created by the public agency;
- 8) whether the public agency has a substantial financial interest in the private entity; and
- 9) for who[se] benefit the private entity is functioning.

State ex rel. Toomey v. City of Truth or Consequences, 2012-NMCA-104, ¶ 13, 287 P.3d 364.

² NMCD was also a named defendant in this action, and has settled with the Plaintiff.

27) The Attorney for NMCD stipulated at the deposition of the Rule 30(B)(6) witness that the under *Toomey* and *Corizon*³ that under the terms of the agreement between CCHNM and NMCD, that the relationship materially satisfied the tests set forth in those cases.

28) Mr. Waldhart⁴ further indicated that it was their position that “nonetheless, the records custodian at the time undertook all reasonable efforts to respond to the underlying IPRA requests under the circumstances, and the response is not in violation of IPRA. But we are not in dispute that there was a close contractual relationship between Centurion and NMCD.”⁵

29) NMCD sent an email to Plaintiff on August 19, 2020 that “The New Mexico Corrections Department has no records responsive to your request. Your request was forwarded to Centurion, but they declined to provide any records to NMCD in response. The Department has responded to your request as we understand it, and it is now considered closed. Any denial herein is the responsibility of records custodian Kevin L. Nault.”⁶

30) No response to Plaintiff’s request was received from CCHNM.

31) Certainly the spirit and intent of IPRA would be violated to just stop here and say that NMCD did all they could and they cannot force CCHNM to turn over the records.

³ *N.M. Found. for Open Gov’t v. Corizon Health*, 2020-18 NMCA-014, ¶ 26, 460 P.3d 43.

⁴ Carl J. Waldhart, Cuddy & McCarthy, LLP represented NMCD

⁵ Deposition of Sharon Alexander, pp. 23-24.

⁶ Exhibit 11, Plaintiff Motion for Summary Judgment.

32) In the recent case of *Franklin v Keefe Commissary Network, LLC*, 2024-NMCA-_____,⁷ No. A-1-CA-39416 (N.M. App. May 30, 2024), the court of appeals reaffirmed that private entities may be subject to an action to enforce IPRA. They stated:

In light of this reality we stated that “[t]o allow such [private] entities to circumvent a citizen’s right of access to records by contracting . . . would thwart the very purpose of IPRA and mark a significant departure from New Mexico’s presumption of openness at the heart of our access law.” *Id.* [citing to *State ex rel. Toomey v. City of Truth or Consequences, supra*]

33) Most importantly, the court of appeals stated “we adopted a flexible approach ‘that favors access to records even when held by a private entity.’” *Id.* And that flexible approach was set out in the *Toomey* case and the factors are set out in ¶126, *supra*.

34) In *N.M. Found. for Open Gov’t v. Corizon Health*, 2020-18 NMCA-014, ¶ 26, 460 P.3d 43, the court of appeals held a private entity contracting with NMCD for the provision of medical services is subject to enforcement under IPRA.

35) In *Corizon*, the court of appeals concluded that, under IPRA, the private entity “ha[d] a clear legal duty to provide public records to [the p]etitioners,” because it “acted on behalf of a public entity [NMCD] by providing medical care to inmates at various New Mexico correctional and detention facilities.” *Corizon, at.* ¶ 26

36) In *Franklin*, at ¶13, the court of appeals held:

Based on the aforementioned relevant law, we conclude that to plead an action for enforcement of IPRA against a private entity, a plaintiff must simply allege (1) that the records sought are public records, *see* § 14-2-1 (stating that “[e]very person has a right to inspect public records of this state”); (2) arising out of the private entity’s performance of a public function, *see Corizon Health, 2020-NMCA-*

⁷ Plaintiff served both CCHNM and NMCD with their request for records whereas the Plaintiff in *Keefe* only served NMCD.

014, ¶¶ 17, 21; and (3) that the private entity has failed to comply with IPRA via the manner outlined in either Section 14-2-11(C) or -12(D). See *Derringer v. State*, 2003-NMCA-073, ¶ 10, 133 N.M. 721, 68 P.3d 961 (stating a right to enforce IPRA attaches only “if the public body does not comply[, c]onversely, then, once the custodian complies, the public body is no longer subject to an enforcement action”).

37) As stated above, counsel for NMCD stipulated that under *Toomey* and *Corizon* the relationship between CCHNM and NMCD satisfied the tests set forth in those case.⁸

38) If the records are determined to be public records and not covered by any exemption, then CCHNM has the obligation to turn them over. Ideally, Mr. Nault, the NMCD records custodian, should have obtained them from CCHNM and turned them over.⁹

Are the Requested Records Public Records, or are the Records Exempt?

39) The request for records seeks settlement agreements in cases in which CCHNM paid more than \$1,000 in response to any claim, and copies of the civil complaints or demands associated with those settlements.

40) “Every person has a right to inspect public records of this state except” when a public record falls into an enumerated exception. NMSA 1978, Section 14-2-1(A) (2023). IPRA defines public records as:

all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained[.]

⁸ Even without the stipulation, the court finds that the *Toomey* factors have been met to determine that CCHNM was conducting governmental business and subject the otherwise private entity’s records relating to that governmental activity to IPRA requirements. This is clearly set out in the Plaintiff’s undisputed facts.

⁹ This would counter CCHNM’s argument of having private entities appoint records custodians. When NMCD contracts with private entities, the records custodian would remain the records custodian and the private entity would be obligated to provide the NMCD records custodian with the records requested.

NMSA 1978, Section 14-2-6(H) (2023).

41) Whether the records requested in this case are public records subject to disclosure is answered by *New Mexico Foundation for Open Government v. Corizon Health*, 2020-NMCA-014, 460 P.3d 43.¹⁰

42) In *Corizon*, a strikingly similar request was made of Corizon Health, the medical provider predecessor to CCHNM and the same arguments were presented by Corizon that CCHNM is now presenting to this court.

43) The *Corizon* court construed IPRA in light of its language and purpose to ascertain whether the Legislature intended for settlement agreements, entered into by third-party entities and arising from the third-party's performance of the public function, to be public documents available under IPRA.

44) The court of appeals had to determine if such settlement agreements were “used, created, received, maintained or held by or on behalf of [the NMCD,] and relate to public business[.]” Section 14-2-6(H).

45) The court of appeals used Section 14-2-6(G)¹¹ to plainly guide the determination that the settlement agreements are public records subject to production under IPRA.

46) The court of appeals¶ found that Respondent Corizon performed a governmental function that NMCD would otherwise have performed itself, and argued that even if Respondent

¹⁰ *Corizon* was an appeal of the grant of a writ of mandamus, as opposed to the case before the court, which is a motion for summary judgment. This court had before it evidence that was discovered during the proceedings in this case that was not before the mandamus court in *Corizon*.

¹¹ When *Corizon* was decided, the language cited was found in NMSA §14-2-6(G), however now it is found in NMSA §14-2-6(G).

had settlement autonomy in the context of civil lawsuits, such alone did not recharacterize Respondent's central function from that of a public entity subject to IPRA.

47) Like *Corizon*, in this case, the "settlement agreements related to [Respondent's] performance of this public function are public records subject to disclosure under IPRA[.]" reasoning that "[Respondent] cannot contract away the public's right to IPRA disclosure through various contractual provisions in the settlement agreements themselves and such provisions are void as against public policy [Respondent] operating in settlement agreements th[r]ough an insurance company does not otherwise eviscerate the requirements of IPRA." *Corizon*, at ¶18.

48) This court, guided by *Corizon*, finds that regardless of whether Respondent was a third-party private entity, the settlement agreements at issue arose from allegations resulting from Respondent's performance of a public function—providing medical care to inmates—and as such, the settlement agreements resulted from the medical care provided to New Mexico inmates while under contract with the State.

49) The records requested by the Petitioners are public records and should be disclosed to the Petitioners with proper redactions agreed to by the parties.

IT IS THEREFORE ORDERED AS FOLLOWS:

- I. The Plaintiff's Motion for Summary Judgment is GRANTED. CCHNM is ORDERED to produce the responsive records within ten (10) days of this order.
- II. Defendant CCHNM's Second Motion for Summary Judgment is DENIED.
- III. The Court will determine at a later time what statutory penalties and/or attorney fees will be awarded.

IT IS SO ORDERED.



HONORABLE KATHLEEN MCGARRY ELLENWOOD
District Court Judge, Division X 8-30-2024

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing order was served on the attorneys listed below on the date of filing via e-file and serve and any pro se party by regular US Mail.

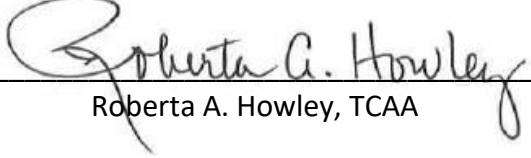
IVES & FLORES, P.A.

Adam C. Flores
Laura Schauer Ives
Alyssa D. Quijano
Henry A. Jones
Martha E. Mulvany
925 Luna Cir. NW
Albuquerque, NM 87102
(505) 364-3858
adam@nmcivilrights.com
laura@nmcivilrights.com
alyssa.g@nmcivilrights.com
henry@nmcivilrights.com
martha@nmcivilrights.com

Attorneys for Plaintiff

PARK & ASSOCIATES, LLC
Geoffrey D. White
Alfred A Park
gwhite@parklawnm.com
apark@parklawnm.com

*Attorney for Defendant Centurion Correctional
Healthcare of New Mexico, LLC*


Roberta A. Howley, TCAA