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**Thomas  
J. Cole**



## Dear Attorney General: the Records, Please

By [Thomas J. Cole](#)

*Journal Staff Writer*

A letter to state Attorney General Gary King:

This is a request under the state Inspection of Public Records Act to inspect certain records provided to the Attorney General's Office.

The records relate to the lawsuits filed by former state official Frank Foy alleging that taxpayers were defrauded by pay-to-play schemes at the State Investment Council and the Educational Retirement Board.

On the days those complaints were filed, Foy was required by state law to provide you with "written disclosure of substantially all material evidence and information" that he possessed.

It is that "written disclosure" that I am seeking to inspect under the state's open-records law.

You might recall that Gregg Fallick, an attorney for former Educational Retirement Board Chairman Bruce Malott, made the same request under the Inspection of Public Records Act in December 2009.

Your office hasn't provided the records. It also hasn't provided Fallick with a written explanation for withholding the records, as required under the Inspection of Public Records Act.

Fallick could — but has decided not to — seek damages of \$100 per day from the Attorney General's Office for the lack of an explanation. (That would amount to more than \$50,000.)

Instead of providing the records or the required explanation to Fallick, your office filed a motion in the Foy lawsuits seeking to nullify the attorney's request for the documents.

The motion says some of the records "may be protected from public disclosure by the attorney-client and work product privileges." It adds, "The AGO lacks sufficient information to make a determination as to whether those privileges would apply."

Your office also argues in the motion that giving the records to Fallick would appear to violate court orders that have stayed discovery in the Foy lawsuits. (Those orders prevent parties from obtaining information from each other, at least for now.)

That is the same argument that your office used in withholding records from an attorney for three female lawyers in the Attorney General's Office who have filed a pay-equity lawsuit.

But a couple months ago, state District Judge Beatrice Brickhouse in Albuquerque ruled your office had violated the Inspection of Public Records Act by not allowing access to the payroll and other records.

Brickhouse dismissed your argument that a court order that stays discovery allows the AG's Office to withhold records that otherwise would be available under the open-records law.

The Brickhouse ruling caused a stir because your office is supposed to enforce the Inspection of Public Records Act and advises other government agencies on how to comply.

Your compliance guide for the act even says a public agency can't refuse to turn over records just because the requester is involved in a lawsuit against the agency or has asked for the same records in discovery.

Given the Brickhouse ruling, I recently called your office to see if it was reconsidering its refusal to give Fallick the records. The answer, in short, was "no." Your office wants Brickhouse to reconsider her decision.

In her ruling, the judge said the Inspection of Public Records Acts provides a right for a person to inspect government documents and that the right is independent of discovery rules in lawsuits.

That's why I'm writing this letter.

You can continue, despite Brickhouse's ruling, to use the discovery argument in not giving the records to Fallick, but I'm not involved in a lawsuit.

I do understand that you may assert some other reason for not giving me access to the records. If you do, provide the legal basis. And, please, do it in writing within the 15 days required by the Inspection of Public Records Act.

*UpFront is a daily front-page news and opinion column. Comment directly to Thom Cole at [tcollection@abqjournal.com](mailto:tcollection@abqjournal.com) or (505) 992-6280 in Santa Fe. Go to [www.abqjournal.com/letters/new](http://www.abqjournal.com/letters/new) to submit a letter to the editor.*

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