

Group: 'Drafts' Public

The New Mexico Court of Appeals got it right the first time when it said drafts are public documents under state law that must be available for public inspection.

So says the Foundation for Open Government in arguing that the court should affirm its July ruling in a case with broad implications for the public and news organizations, *Edenburn v. the New Mexico Department of Health*.

The health department did not prevail in its argument that drafts should be kept secret and asked the court for a rehearing.

The court granted the request, but also asked FOG and the Attorney General's Office to file amicus briefs if they wished. FOG's friend-of-the-court brief explains the importance of draft documents prepared by government agencies for alerting the public about policy changes and problems uncovered.

The Santa Fe New Mexican, for instance, used draft documents to write about a police spending audit, and the Albuquerque Journal obtained drafts under the Inspection of Public Records Act to expose questionable bids involving the UNM Pit construction and to probe potential corruption in the issuance of contracts for state bonds, the FOG brief notes.

FOG's argument supports the court's July ruling in the case of a woman who obtained some records with an IPRA request, but was denied others, regarding use of an Abstinence Education Block Grant program managed by Department of Health.

Laurel Edenburn first sought the documents in August 2007 and filed suit in Santa Fe in 2009 to enforce provisions of the Inspection of Public Records Act. She also sought attorney fees and costs and up to \$100 a day until the department came into compliance with IPRA.

District Judge Barbara Vigil granted summary judgment in favor of the Health Department in April 2011, saying in part that "public policy protects drafts such as this document from disclosure." Edenburn appealed.

The Appeals Court opinion by Judge Michael Bustamante looked to precedents in other public records cases from the New Mexico Supreme Court, including one decided earlier this year. The Supreme Court ordered lower courts to "restrict their analysis to whether disclosure under IPRA may be withheld because of a specific exception contained within IPRA, or statutory or regulatory exceptions."

The Supreme Court also said communications that may be withheld are only those “connected to the chief executive’s decisionmaking, as opposed to other executive branch decisionmaking.”

“The overriding message of (the earlier ruling),” the appeals court said, “is that ‘every citizen has a fundamental right to have access to public records.’”

The court reversed Vigil and sent the case back to her for further proceedings, but the Department of Health asked for a rehearing.

FOG said its experience with open-government issues led the organization to certain conclusions about “draft” documents. Drafts provide “a vital window into the workings of government,” FOG attorneys argue.

Putting drafts off limits would make the term “hopelessly subjective” and open to manipulation, FOG said.

“The know-it-when-I-see-it quality of the ‘draft’ rubric invites abuse,” FOG said. “Indeed, public bodies appear to have parked sensitive documents in draft form over extended periods of time for the very purpose of keeping them secret.”

It said gamesmanship is almost an inevitable occurrence if there’s a rule that exempts “draft” documents. And the rule cannot be squared with the language of the law, FOG said, urging the court to reaffirm its original decision.

— This article appeared on page C10 of the Albuquerque Journal

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