

**TWELFTH JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF OTERO**

Human Rights Defense Center,
Plaintiff,

v.

**Board of County Commissioners
for the County of Otero,
Sylvia C. Tillbrook,
Michael Eshleman
John Doe(s) 1-5,**
Defendants.

Cause No. D-1215-CV-2018-00864

Blankinship, Steven

**COMPLAINT FOR PRODUCTION OF PUBLIC RECORDS,
FOR MANDAMUS, DAMAGES, AND DECLARATORY AND
INJUNCTIVE RELIEF**

COMES NOW the Human Rights Defense Center, by and through undersigned counsel, and hereby brings the following causes of action to enforce the New Mexico Inspection of Public Records Act.

I. INTRODUCTION

1. Public transparency is a key part of the foundation of a strong democracy.
2. The Human Rights Defense Center, a nonprofit journalism and advocacy organization, brings this action pursuant to the New Mexico Inspection of Public Records Act, NMSA 1978, § 14-2-1, *et seq.*, (“IPRA”) to compel production of records maintained or controlled by Otero County, and for injunctive relief and damages arising from the Otero County’s willful failure and refusal to produce public records as required by law.

II. PARTIES, JURISDICTION, AND VENUE

3. The Human Rights Defense Center is a non-profit organization, incorporated in the state of Washington, with headquarters in Lake Worth, Florida and offices in Nashville, Tennessee, Washington, DC, and Seattle, Washington. It is a “person” as defined by IPRA.
4. Defendant Board of County Commissioners for the County of Otero (“Otero County”) is a duly authorized governmental agency under the laws of the State of New Mexico. Under NMSA 1978, § 4-46-1, all suits against a county are to be brought in the name of the board of county commissioners of that county. As such, the county may sue or be sued in its name. Defendant Board of County Commissioners for the Otero County is a “public body” as defined by IPRA.
5. Defendant Sylvia C. Tillbrook, named in her official capacity, is the official designated by Otero County as the Records Custodian and, as such, is responsible for the maintenance, care or keeping of Otero County’s public records.
6. Defendant Michael Eshleman, also named in his official capacity, participated in and issued the decision rejecting Plaintiff’s records requests and was responsible for withholding records and information responsive to IPRA requests at issue in this complaint.
7. Upon information and belief, John Doe Defendants are or were officials employed by Otero County who participated in the decision or were responsible for denying the inspection of records responsive to Plaintiff’s records request.
8. Jurisdiction and venue are proper pursuant to IPRA and the general venue statute NMSA 1978, § 38-3-1(G).

9. There exists an actual controversy between the parties regarding the Defendants' duties under IPRA. Accordingly, an action for declaratory relief is authorized under NMSA 1978, § 44-6-2 and § 44-6-4.

III. FACTUAL ALLEGATIONS

10. IPRA creates a foundation for an open, functioning democracy. It is the

public policy of this state, that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees. It is further the intent of the legislature, and it is declared to be the public policy of this state, that to provide persons with such information is an essential function of a representative government and an integral part of the routine duties of public officers and employees.

NMSA 1978, § 14-2-5.

11. IPRA broadly defines the records to which the public is entitled to access: "all documents ... 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." NMSA 1978, § 14-2-6(G).
12. On June 19, 2018, The Human Rights Defense Center sent a request to Pamela S. Heltner, Otero County Manager. A copy of the request is attached as Exhibit A.
13. That request sought records, in electronic format or if not possible, in hard copy, related to claims or lawsuits made against Otero County Sheriff's Office, its agents, and its employees in which there was a payment made of \$1,000 or more to resolve the claim or lawsuit. The request was limited to documents created after January 1, 2010.
14. For each described claim or lawsuit, the Human Rights Defense Center requested the instigating and closing documents, for example, a Complaint and a Settlement Agreement.

15. On July 2, 2018, Michael Eshleman, Otero County Attorney, replied on behalf of Otero County, outlining reasons for the County's refusal to produce any records. A copy of the letter is attached as Exhibit B.
16. On August 3, 2018, The Human Rights Defense Center sent a second request to the records custodian at the Otero County Detention Center. A copy of the request is attached as Exhibit C.
17. This second request sought records, in electronic format or if not possible, in hard copy, related to claims or lawsuits made against Otero County Detention Center, its agents, and its employees in which there was a payment made of \$1,000 or more to resolve the claim or lawsuit. The request was limited to documents created after January 1, 2010.
18. For each described claim or lawsuit, the Human Rights Defense Center requested the instigating and closing documents, for example, a Complaint and a Settlement Agreement.
19. On August 7, 2018, Michael Eshleman, Otero County Attorney, replied on behalf of Otero County, outlining reasons for the Detention Center's refusal to produce any records. A copy of the letter is attached as Exhibit D.
20. The second letter was substantially identical to the first letter from Mr. Eshleman, and provided the same reasons for refusal to produce any records.
21. The reasons provided for the refusal to produce records in response to both requests were:
 - a. Claims and litigation against Otero County are handled by outside defense counsel, who maintain the case files, and that therefore, these records are not "public records."
 - b. The process of contacting outside counsel would inherently create new records.

- c. Complying with the request would require creation of a database.
- 22. Nowhere in the refusal to produce records related to litigation does it indicate that documents were withheld pursuant to any exception under IPRA.
- 23. In New Mexico, as in every American jurisdiction, legal files belong to, and must be accessible to, the client.
- 24. In New Mexico, as in every American jurisdiction, payment of a lawyer by a third party does not limit a lawyer's obligations to his or her client.
- 25. Under IPRA, the records custodian is "responsible for the maintenance, care or keeping of a public body's public records, regardless of whether the records are in the [custodian's] actual physical custody and control[.]" NMSA 1978, § 14-2-6(B).
- 26. A governmental body's choice to create new public records, for example by communicating via email instead of by phone or keeping internal progress notes instead of relying on human memory, does not alter its obligations under IPRA.

COUNT ONE:

VIOLATIONS OF THE INSPECTION OF PUBLIC RECORDS ACT

- 27. The Plaintiff incorporates by reference the foregoing allegations.
- 28. The Defendants have violated IPRA in the following ways:
 - a. The Defendants failed to produce the documents requested by the Plaintiff and as required by IPRA; and

- b. If the Defendants are relying on any exemption as a basis for withholding records, then Defendants failed, when withholding documents responsive to the records requests, to issue a proper denial of the records requests.
29. The Plaintiff is entitled to recover damages, at up to \$100 per day per violation, and its costs and attorneys' fees in pursuing this action pursuant to Section 14-2-11(C) and Section 14-2-12(D) of IPRA.

COUNT TWO:

DECLARATORY RELIEF

30. The Plaintiff incorporates by reference the foregoing allegations.
31. There exists an actual controversy between the Plaintiff and the Defendants whether the Defendants' conduct, as alleged above, constitutes violations of IPRA and whether the Otero County can refuse to retrieve public records from its attorneys.
32. Plaintiff is entitled to declaratory relief that Defendants have violated IPRA, and that Defendants must provide the requested records to Plaintiff, even if the records are currently in the possession of Defendants' attorneys.

COUNT THREE:

INJUNCTIVE RELIEF AND MANDAMUS

33. The Plaintiff incorporates by reference the foregoing allegations.
34. Pursuant to NMSA 1978, § 14-2-12(B) (2010), Plaintiff is entitled to a writ of mandamus or injunction ordering the Defendants to produce all relevant public records, as provided in Plaintiff's request.

Wherefore, the Plaintiff prays that:

1. the Court declare that the Defendants have violated IPRA in responding to Plaintiff's records requests;
2. the Court issue a writ of mandamus or injunction ordering the Defendants to produce the records and information requested without further delay, to produce all similar such documents in the future, and to adopt policies and procedures and training sufficient to correct the policies and practices that have resulted in the improper denials in this case; and
3. the Court enter an order for such other and further relief as the Court deems just and proper, including but not limited to damages, costs, and reasonable attorneys' fees.

Date:

Respectfully Submitted:

/s/ Mark H. Donatelli

Mark H. Donatelli
Caroline "KC" Manierre
Rothstein Donatelli, LLP
P.O. Box 8180
Santa Fe, NM 87504
Tel: (505) 988-8004
mhd@rothsteinlaw.com
cmanierre@rothsteinlaw.com

/s/ Deborah M. Golden

Deborah M. Golden
Pro Hac Vice affidavit forthcoming
Human Rights Defense Center
316 F Street NW, #107
Washington, DC 20002
Tel: (202) 543-8100
Mobile: (202) 630-0332
dgolden@humanrightsdefensecenter.org



Human Rights Defense Center

DEDICATED TO PROTECTING HUMAN RIGHTS

June 19, 2018

Otero County Manager
Attn: Pamela Heltner
1101 New York Ave., Room #106
Alamogordo, NM 88310

Re: Request for Settlements and Verdicts Records

Dear Ms. Heltner,

The Human Rights Defense Center (HRDC) makes this request pursuant to the New Mexico Inspection of Public Records Act, N.M. Stat. Ann. § 14-2-1, *et seq.*

HRDC is seeking records related to all claims or lawsuits brought against the Otero County Sheriff's Office and/or any of its agents or employees in which the Otero County Sheriff's Office (or any agent, insurer, or entity acting on its behalf) made Payments totaling \$1,000 or more to resolve such claims or lawsuits (each a "Relevant Claim"). For the purposes of this request:

- The relevant time period is January 1, 2010 to the present.
- "Payments" includes, without limitation, settlements, damages, attorneys' fees, and sanctions.
- Records shall be produced in electronic native format where possible, and otherwise in electronic format. To the extent production in electronic format is not possible, records may be produced in hard copy.

For each Relevant Claim, HRDC requests records sufficient to show:

1. the name of all parties involved;
2. the date of resolution;
3. the amount of money paid to resolve the claim;
4. the person or entity to whom the money was paid;
5. for those Relevant Claims that did not result in litigation:

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206-257-1355 | mdillon@prisonlegalnews.org



- a. the claim form or other document that describes the claim; and
 - b. the final agreement resolving the claim; and
6. for those Relevant Claims that resulted in litigation:
- a. the docket number;
 - b. the jurisdiction in which the action was brought (*e.g.*, US District Court for the District of New Mexico, New Mexico Supreme Court, etc.);
 - c. the complaint and any amendments thereof; and
 - d. the verdict form, final judgment, settlement agreement, consent decree, or other document that resolved the case.

If any of these requests, or any portion thereof, is denied in whole or in part, please provide an accounting of each record being withheld, and the specific exemption being invoked for such record. In addition, to the extent the Otero County Sheriff's Office or any other party claims that any portion of a record is confidential or otherwise protected from disclosure, please redact the allegedly confidential or protected portion and produce the redacted record. By making this request, HRDC does not waive, but rather expressly reserves, its right to challenge a claim that any portion of a record is confidential or otherwise protected from disclosure.

Please contact me via email, mdillon@prisonlegalnews.org, should you require any additional information. My phone number is 206-257-1355. Thank you for your time and attention in this matter.

Sincerely,

HUMAN RIGHTS DEFENSE CENTER



Michelle Dillon
Public Records Manager

ADMINISTRATION
1101 NEW YORK AVENUE
ALAMOGORDO, NM 88310



WWW.CO.OTERO.NM.US
☎ (575) 437-7427
☎ (575) 443-2928

July 2d, 2018

Michelle Dillon, M.L.S.,
Public Records Manager
Human Rights Defense Center
1605 Pacific Building
720 Third Avenue
Seattle, Washington 98104

Via U.S. Mail and e-mail to mdillon@prisonlegalnews.org

Re: Public Records Request for Settlements and Verdicts Records

Dear Ms. Dillon:

This is to respond to your letter of June 19th addressed to Pamela S. Heltner, Otero County Manager. In it you request "records related to all claims or lawsuits brought against the Otero County Sheriff's Office and/or any of its agents or employees in which the Otero County Sheriff's Office (or any agent, insurer, or entity acting on its behalf) made payments totaling \$1,000 or more to resolve such claims or lawsuits."

You further ask for the names of the parties, the date of resolution, the amount of money paid to resolve, to whom the money was paid. You also ask for claim forms, agreements resolving the claim, docket numbers, court locations, copies of complaints, and documents resolving the case.

The handling of claims and litigation against Otero County is handled by outside defense counsel retained by Otero County's insurers. The insurers and the defense counsel keep the case files, not Otero County. Otero County does not have in its possession the sort of files you seek. Therefore, we do not have "public records" of these case files within the definition of N.M.S.A. 1978 § 14-2-6(G).

Even assuming for the sake of argument that files held by our insurers and attorneys are public records, it would not be possible to comply. The Inspection of Public Records Act does not require a government agency to create a record. N.M.S.A. 1978 § 14-2-8(B). Otero County does not have a database of claims and litigation from which it could identify claims against any particular office or person. To comply with your request, Otero County would need to contact its insurers to identify these claims

1



and then contact multiple attorneys. That process would involve creating new records, which we are not required to do.

Complying with your request for details on claims and litigation, docket numbers, etc., would also require Otero County to compile a database of litigation and claims. This is something we do not have and we are not required to create. Most, if not all, of that information is available online from the websites of the state and Federal courts.

Through the website of the New Mexico Courts, located at <https://caselookup.nmcourts.gov/caselookup/>, you can run searches and identify cases, docket numbers, and court locations. Most state cases against Otero County will be filed in the Twelfth Judicial District, which encompasses Lincoln and Otero Counties. Documents from Twelfth District cases can be obtained from:

Hon. Katina M. Watson,
Court Clerk,
Twelfth Judicial District Court
Otero County Courthouse
1000 New York Avenue
Alamogordo, New Mexico 88311
(575) 812-5080
aladkmw@nmcourts.gov

This same information for Federal cases can be found on the Federal courts' docket website, PACER, <https://pacer.login.uscourts.gov/csologin/login.jsf>. PACER also allows users to download documents from the website. Generally, lawsuits in Federal court would be filed against Otero County in the United States District Court for the District of New Mexico. Records in those cases would be held by:

Hon. Mitchell R. Elfers,
Acting Clerk of Court,
U.S. District Court for the District of New Mexico
Pete V. Domenici U.S. Courthouse
333 Lomas Boulevard, N.W.
Albuquerque, New Mexico 87102
(505) 348-2000

Pursuant to N.M.S.A. 1978 § 14-2-8(E), I am sending a copy of your request and this letter to the Clerks of the Twelfth Judicial District Court and the United States District Court for the District of New Mexico.

You ask for claims made against the Sheriff's Office that did not result in litigation. Under the Tort Claims Act, a party must give notice to the county of a claim before suit can be filed. The party has two years from the date of his injury to file suit. Sylvia C. Tillbrook, our records custodian, tells me that she has only the last three years of tort claim notices. She does not have records going back to 2010, as you requested.

These claims are filed chronologically as received and are not sorted by the office or person they pertain to. I believe it would be burdensome under N.M.S.A. 1978 § 14-2-11 to go through these claim forms and separate out those related to the Sheriff's Office. However, the entire file of these forms is available for your inspection at our

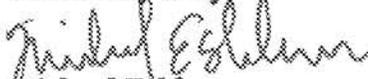
office. If you telephone Mrs. Tillbrook at the number above, she can arrange a time for you to inspect the file.

Except for the file of notices of tort claim, which is available for your inspection, I am denying the other parts of your request as you (1) request documents not in the possession of Otero County and (2) require Otero County to create new public records.

You can contact me at the telephone number above or via e-mail at meshleman@co.otero.nm.us.

With warm regards, I am,

Yours very truly,



Michael Eshleman,
Otero County Attorney

cc: Sylvia C. Tillbrook, Records Custodian
Hon. Katina M. Watson
Hon. Mitchell R. Elfers



Human Rights Defense Center

DEDICATED TO PROTECTING HUMAN RIGHTS

August 3, 2018

RECEIVED

Otero County Detention Center
Attn: Public Records Officer
1958 Dr. Martin Luther King Jr. Drive
Alamogordo, NM 88310

AUG 07 2018

Re: Request for Settlements and Verdicts Records

To the Public Records Officer:

The Human Rights Defense Center (HRDC) makes this request pursuant to the New Mexico Inspection of Public Records Act, N.M. Stat. Ann. § 14-2-1, *et seq.*

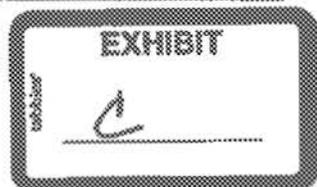
HRDC is seeking records related to all claims or lawsuits brought against the Otero County Detention Center and/or any of its agents or employees in which the Otero County Detention Center (or any agent, insurer, or entity acting on its behalf) made Payments totaling \$1,000 or more to resolve such claims or lawsuits (each a "Relevant Claim"). For the purposes of this request:

- The relevant time period is January 1, 2010 to the present.
- "Payments" includes, without limitation, settlements, damages, attorneys' fees, and sanctions.
- Records shall be produced in electronic native format where possible, and otherwise in electronic format. To the extent production in electronic format is not possible, records may be produced in hard copy.

For each Relevant Claim, HRDC requests records sufficient to show:

1. the name of all parties involved;
2. the date of resolution;
3. the amount of money paid to resolve the claim;
4. the person or entity to whom the money was paid;
5. for those Relevant Claims that did not result in litigation:

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- a. the claim form or other document that describes the claim; and
 - b. the final agreement resolving the claim; and
6. for those Relevant Claims that resulted in litigation:
- a. the docket number;
 - b. the jurisdiction in which the action was brought (e.g., US District Court for the District of New Mexico, New Mexico Supreme Court, etc.);
 - c. the complaint and any amendments thereof; and
 - d. the verdict form, final judgment, settlement agreement, consent decree, or other document that resolved the case.

If any of these requests, or any portion thereof, is denied in whole or in part, please provide an accounting of each record being withheld, and the specific exemption being invoked for such record. In addition, to the extent the Otero County Detention Center or any other party claims that any portion of a record is confidential or otherwise protected from disclosure, please redact the allegedly confidential or protected portion and produce the redacted record. By making this request, HRDC does not waive, but rather expressly reserves, its right to challenge a claim that any portion of a record is confidential or otherwise protected from disclosure.

Please contact me via email, mdillon@prisonlegalnews.org, should you require any additional information. My phone number is 206-257-1355. Thank you for your time and attention in this matter.

Sincerely,

HUMAN RIGHTS DEFENSE CENTER



Michelle Dillon
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ADMINISTRATION
1101 NEW YORK AVENUE
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WWW.CO.OTERO.NM.US
☎ (575) 437-7427
☎ (575) 443-2928

August 7th, 2018

Michelle Dillon, M.L.S.,
Public Records Manager,
Human Rights Defense Center
1605 Pacific Building
720 Third Avenue
Seattle, Washington 98104

Via U.S. Mail and e-mail to mdillon@prisonlegalnews.org

Re: Public Records Request for Settlements and Verdicts Records
Addressed to Otero County Detention Center

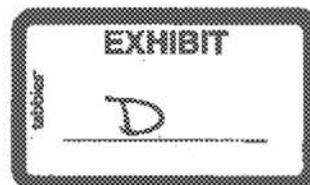
Dear Ms. Dillon:

This is to respond to your letter of August 3d addressed to the Otero County Detention Center. In it you request "records related to all claims or lawsuits brought against the Otero County Detention Center and/or any of its agents or employees in which the Otero County Detention Center (or any agent, insurer, or entity acting on its behalf) made payments totaling \$1,000 or more to resolve such claims or lawsuits" from 2010 to the present.

You further ask for the names of the parties, the date of resolution, the amount of money paid to resolve, to whom the money was paid. You also ask for claim forms, agreements resolving the claim, docket numbers, court locations, copies of complaints, and documents resolving the case.

The handling of claims and litigation against Otero County is handled by outside defense counsel retained by Otero County's insurers. The insurers and the defense counsel keep the case files, not Otero County. Otero County does not have in its possession the sort of files you seek. Therefore, we do not have "public records" of these case files within the definition of N.M.S.A. 1978 § 14-2-6(G).

Even assuming for the sake of argument that files held by our insurers and attorneys are public records, it would not be possible to comply. The Inspection of Public Records Act does not require a government agency to create a record. N.M.S.A. 1978 § 14-2-8(B). Otero County does not have a database of claims and litigation from which it could identify claims against any particular office or person, nor can we identify



cases by the payment amount. To comply with your request, Otero County would need to contact its insurers to identify these claims and then contact multiple attorneys. That process would involve creating new records, which we are not required to do.

Complying with your request for details on claims and litigation, docket numbers, etc., would also require Otero County to compile a database of litigation and claims. This is something we do not have and we are not required to create. Most, if not all, of that information is available online from the websites of the state and Federal courts.

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U.S. District Court for the District of New Mexico
Pete V. Domenici U.S. Courthouse
333 Lomas Boulevard, N.W.
Albuquerque, New Mexico 87102
(505) 348-2000

Pursuant to N.M.S.A. 1978 § 14-2-8(E), I am sending a copy of your request and this letter to the Clerks of the Twelfth Judicial District Court and the United States District Court for the District of New Mexico.

You ask for claims made against the Detention Center that did not result in litigation. Under the Tort Claims Act, a party must give notice to the county of a claim before suit can be filed. The party has two years from the date of his injury to file suit. Sylvia C. Tillbrook, our records custodian, tells me that she has only the last three years of tort claim notices. She does not have records going back to 2010, as you requested.

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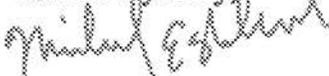
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Except for the file of notices of tort claim, which is available for your inspection, I am denying the other parts of your request as you (1) request documents not in the possession of Otero County and (2) require Otero County to create new public records.

You can contact me at the telephone number above or via e-mail at meshleman@co.otero.nm.us.

With warm regards, I am,

Yours very truly,



Michael Eshleman,
Otero County Attorney
(M.L.S., Indiana University '15)

cc: Sylvia C. Tillbrook, Records Custodian
Carolyn Barela, Otero County Detention Center Director
Hon. Katina M. Watson
Hon. Mitchell R. Elfers