



STATE OF NEW MEXICO

Educational Retirement Board

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May 29, 2009

Trip Jennings
New Mexico Independent

VIA E-MAIL: tjennings@newmexicoindependent.com

RE: May 15, 2009 IPRA Request for a Copy of Subpoenas

Dear Mr Massey:

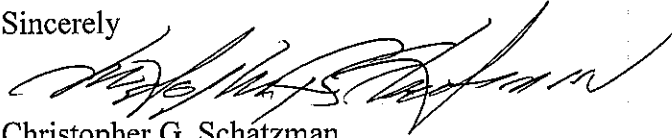
I am writing this letter on behalf of Clara Mares, the Educational Retirement Board's ("ERB") Records Custodian, who is not in the office today. This letter is the ERB's response to the request dated May 15, 2009 that you submitted pursuant to the Inspection of Public Records Act, NMSA 1978, §14-2-1 *et seq.* ("IPRA"), seeking a copy of any "subpoenas sent to the Educational Retirement Board by the U.S. Attorney's office related to investments." As of the date of this letter, the ERB has received two grand jury subpoenas issued by the United States Attorney, District of New Mexico (the "grand jury subpoenas").

After reviewing your request, the ERB had determined that your request should be denied based on established law restricting or limiting the inspection of public records relating to federal law enforcement proceedings. The basis for the ERB's decision is the exception provided by Section 14-2-1(A)(12) (exception to inspection of public records "as otherwise provided by law") and the guidance that the New Mexico Supreme Court has provided that there may be circumstances under which information in a public record can be justifiably withheld. *State ex rel. Newsome v. Alarid*, 90 NM 790, 797-98 (1977) ("*Alarid*"). Specially, the federal Freedom of Information Act ("FOIA") does not apply to records or information compiled for law enforcement purposes in certain instances. 5 U.S.C. §552(b)(7). Among the reasons such records may be exempt from FOIA is that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings. *Id.* at (b)(7)(A). This exemption from FOIA is intended "to prevent premature disclosure of investigatory materials that could be used in a federal law enforcement action." *FBI v. Abramson*, 456 U.S. 615, 621 (1982). Other state appellate courts have held that a local government or state agency that has received a federal grand jury subpoena is not required to release the subpoena in response to a public records request. *See e.g., Gannett New Jersey Partners, LP v. County of Middlesex*, 877 A.2d 330 (N.J. Super. Ct., Appellate Division 2005). The New Mexico appellate courts have not yet addressed the application of the exception provided by §14-2-1(A)(12) to the FOIA exemptions set forth under 5 U.S.C. §552(b)(7); however, the ERB believes that a NM court presented with this question would rule in a manner

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similar to the *Gannett New Jersey Partners, LP* court, supporting non-disclosure of a federal grand subpoena. The ERB does not want to interfere with the grand jury investigation through an action such as releasing the requested subpoenas. Having provided this response, the ERB will close its file on your May 15, 2009 request.

Sincerely

A handwritten signature in black ink, appearing to read "Chris G. Schatzman", written over a horizontal line.

Christopher G. Schatzman
General Counsel