

**STATE OF NEW MEXICO
BERNALILLO COUNTY
SECOND JUDICIAL DISTRICT**

RIO GRANDE FOUNDATION,

Plaintiff,

v.

No. D-202-CV-2019-06337

**LAWRENCE SANCHEZ Designated Records
Custodian for Bernalillo County,**

Defendant.

***EMERGENCY* PETITION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION WITH BRIEF IN SUPPORT**

COMES NOW, Plaintiffs, by and through undersigned counsel Western Agriculture, Resource and Business Advocates, LLP (A. Blair Dunn, Esq.) and pursuant to Rule 1-066 NMRA, moves this Court for a temporary restraining order and preliminary injunction and states the following:

BACKGROUND

Before this Court is the very important issue of whether the Defendant's denial of New Mexico citizens their statutory right to inspect public records related to pending legislation potentially drastically affecting their lives denies them of the meaningful opportunity to participate in their government by denying them critical information. As set forth herein, along with the Complaint for Declaratory Relief, it is the Plaintiff's position that the Bernalillo County Commission is acting unlawfully via their records custodian to intentionally withhold records critical to the citizens meaningful and informed participation in their government, and that allowing the Bernalillo County Commission, the public body responsible for the records

custodian and ultimately the violations of NMSA 1978 §14-2-1 *et seq.* (IPRA), to proceed with their proposed action to adopt legislation on the sick leave ordinance that is the subject of the records sought by Plaintiff on August 20, 2019 (*See Exhibit 1*),¹ if not enjoined by this Court, will irreparably harm Plaintiff and other Bernalillo County citizens by denying them due process of law.

Both the United States and New Mexico Constitutions provide that no person may be deprived of their liberty without due process of law. *See* Const. amend. XIV, NM Const. Art. 2, § 18. Thus, it is understood that a person that may be deprived of their liberties only by regulation that is narrowly tailored to serve a compelling government interest, that such infringement is subject to the strict scrutiny by judicial review and that before they are deprived of that liberty that they be given *meaningful* notice and *meaningful* opportunity to be heard. *See Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965).² In New Mexico jurisprudence it is well understood that Due Process attaches to the actions of a local government and that the local government must allow their citizens due process of law participation in the legislative process. Unquestionably this means that “[t]he essence of due process is notice and an opportunity to be heard at a meaningful time and in a meaningful manner.” *State ex rel. Children Youth & Families Dep’t v. Maria C.*, 2004–NMCA–083, ¶ 26, 136 N.M. 53, 94 P.3d 796 (internal quotation marks and citation omitted). Hence, much like in the context of litigation, a citizen that wishes to participate in the Bernalillo County government process must be given a meaningful opportunity to be heard which is understood to mean that they be given “an opportunity to review and present evidence” *State of N.M. ex rel. CYFD v. William M.*, 2007-

¹ Ironically, the effort an opaqueness by the public body is so thorough that, upon information and belief, they have concealed the fact that proposed sick leave ordinance is the issue to be discussed at item No. 10 on the agenda.

² As noted above, the Bernalillo County Commission also fails to provide due process by denying the citizens meaningful notice by inexplicably concealing their intentions to take action on the ordinance at issue from the agenda. *See Exhibit 1*)

NMCA-055, ¶ 37, 141 N.M. 765, 774, 161 P.3d 262, 271. Therefore, when Bernalillo County as a public body withholds the records they are in this instance, they are denying the evidence needed and deemed by our Legislature to be essential to our representative government. *See* NMSA 1978 § 14-2-5 (Recognizing that a representative government is dependent upon an informed electorate, the intent of the legislature in enacting the Inspection of Public Records Act is to ensure, and it is declared to be 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.) The Bernalillo County Commission's action to proceed to a vote on proposed legislation affecting the citizens after having improperly denied those citizens the essential records to be informed will irreparably harm the public by denying them meaningful opportunity to be heard and therefore denying them Due Process.

DISCUSSION

I. Plaintiff is Entitled to Preliminary Injunctive Relief.

A preliminary injunction is appropriate if "(1) the plaintiff will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any damages the injunction might cause the defendant; (3) issuance of the injunction will not be adverse to the public's interest and (4) there is substantial likelihood plaintiff will prevail on the merits." *Key v. Chrysler Motors Corp.*, 119 N.M. 267, 274, 889 P. 2d 875, 882 (Ct. App. 1995) (quoting *LaBalbo v. Hymes*, 115 N.M. 314, 318, 850 P.2d 1017, 1021 (Ct. App. 1993)). Plaintiff can establish each of these elements.

1. Irreparable Harm.

If the Court does not enter the requested injunction, Plaintiffs and the citizens of Bernalillo County will suffer irreparable injury. The citizens of Bernalillo County and the

members of Plaintiff will be deprived of their due and owing Due Process rights. It is well understood that “the loss of [constitutional] freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,” *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir.2003) (internal quotation marks omitted). Here, the Bernalillo County Commission acting as the public body to deprive citizens of their constitutionally protected right to proper due process, by denying them the records needed to meaningfully participate that they enjoy a statutorily protected right to inspect, is a clear cut example of causing irreparable harm if they are not enjoined from acting on the ordinance until the records which were unlawfully withheld and denied are provided to them.

The preliminary injunction relief is intended to restrict the parties from altering the status quo until the merits of their disputes may be resolved. *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070–71 (10th Cir.2009)

2. Balance of Hardship.

The Court's grant of a temporary restraining order and preliminary injunction will impose no hardship on Defendant. In balancing the hardship, the courts typically look at whether the requested injunction preserves or alters the status quo, and whether it seeks the full relief the plaintiff requested in his complaint. *See Phillips v. Fairfield University*, 118 F.3d 131, 133 (2nd Cir. 1997); *Dorftmann v. Boozer*, 414 F.2d 1168, n.13 (U.S. App. D.C. 1969). The balance of hardships will usually weigh in favor of the plaintiff if the status quo is preserved and if she is not seeking the full relief requested in her complaint. *See id.* Here Plaintiff is not seeking an injunction for the relief requested in their Complaint; they are asking the Court to hold the status quo until the full relief requested in the complaint can be resolved.

The balance of hardship in this case weighs heavily in Plaintiffs' favor. There is no

hardship in requiring the Bernalillo County Commission as a public to delay the vote on an ordinance until they have satisfied their obligation to provide records to the public regarding the matter at issue in the ordinance. Further, “when [a] law ... is likely unconstitutional, the [] interests [of those the government represents, such as voters] do not outweigh [a plaintiff’s interest] in having [its] constitutional rights protected.” *Awad v. Ziriya*, 670 F.3d 1111, 1131–32 (10th Cir.2012). Here, adopting an ordinance without allowing for due process would result in the adoption of the sick leave ordinance being nullified as being unconstitutionally adopted.

3. Public Interest.

The Court’s entry of a temporary restraining order and preliminary injunction in this case is certainly not adverse to the public interest; indeed it is in the public interest. In fact, it “is always in the public interest to prevent the violation of a party’s constitutional rights,” *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1132 (10th Cir. 2013), *aff’d sub nom.*. The public interest regarding access to information on the affairs of government is recognized as essential and “[o]ur democratic system of government necessarily ‘assumes the existence of an informed citizenry.... Without some protection for the acquisition of information about the operation of public institutions ... the process of self-governance contemplated by the Framers would be stripped of its substance.’” *Republican Party of New Mexico v. New Mexico Taxation & Revenue Dept.*, 2012-NMSC-026, ¶ 1, 283 P.3d 853, 856; *citing Houchins v. KQED, Inc.*, 438 U.S. 1, 31–32, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978) (Stevens, J., dissenting). Beyond question, ensuring that the electorate has the “greatest possible information regarding” the proposed sick leave ordinance before it is adopted is critical to having an informed electorate and is therefore in the public’s interest. NMSA 1978 § 14–2–5.

4. Likelihood of Success.

In a case involving constitutional rights, “the likelihood of success on the merits will often be the determinative factor.” *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013), *aff’d sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014); *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 589 (7th Cir.2012), *cert. denied*, — U.S. —, 133 S.Ct. 651, 184 L.Ed.2d 459 (2012). Plaintiff is likely to succeed on the merits in this matter. In the present case, the Defendant, acting on behalf of the public body, denied Plaintiff’s request for text messages. Text messages are public records under NMSA 1978 § 14-2-6 which states that public records are “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.” Further, Defendant demonstrated that the public body was capable of searching and finding the remainder of the records requested by Plaintiff in a timely fashion, but have inexplicably failed to provide those records in violation of IPRA in an obvious attempt to shield them from public scrutiny before the vote by the County Commission. Plaintiff is likely to prevail in determining that the public body has violated IPRA and will ultimately be provided the documents lawfully requested and not exempt from disclosure.

However, even if the Court finds a less likely chance that Plaintiffs will succeed on the merits, the other three factors discussed above are established, thereby providing strong grounds for the Court to issue the temporary restraining order and preliminary injunction. While the Court must normally be satisfied that the movant has a substantial likelihood of success on the merits, when the movant can establish the other three factors, this last factor is “relaxed to require only that the movant raise 'questions, substantial, difficult, and doubtful as

to make them a fair grounds for litigation and this for more deliberate inquiry.” *Longstreth v. Maryland*, 961 F.2d 895, 903 (10th Cir. 1992). Here, Plaintiffs are likely to succeed on the merits, and at the very least raise issues as to due process, to require more “deliberate inquiry” and the need for the court to grant the preliminary injunction.

In assessing this crucial factor, courts “do not require that the right to a final decision after trial be wholly without doubt.” *Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 131 (3d Cir. 2017). Rather, a movant “need only show a reasonable probability of success” on the merits. *Id.* If the Court agrees that one significant outcome is the likely deprivation of the fundamental liberty of due process, then the most significant prong reviewed is the likelihood of the movant's success on the merits. *Am. Ass'n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1192–93 (D.N.M. 2010), *on reconsideration in part*, No. CIV 08-0702 JB/WDS, 2010 WL 3834049 (D.N.M. July 28, 2010).

“[A]ll fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.” *Planned Parenthood v. Casey*, 505 U.S. 833, 846–47, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (quotation omitted). The doctrine of substantive due process extends protections to fundamental rights “in addition to the specific freedoms protected by the Bill of Rights.” *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997); *see also Casey*, 505 U.S. at 848, 112 S.Ct. 2791 (“Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.”). To qualify as “fundamental,” a right must be “objectively, deeply rooted in this Nation's history and tradition ... and implicit in the*1209 concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed.” *Glucksberg*, 521

U.S. at 720–21, 117 S.Ct. 2258(quotations omitted). *Kitchen v. Herbert*, 755 F.3d 1193, 1208–09 (10th Cir. 2014).

II. The Court Should Not Require Bond.

Rule 1-066 (C) NMRA makes clear that a court need not impose a bond when granting preliminary injunction relief. The rule provides “that for good cause shown and to be recited in the order made, the court or judge may waive the furnishing security.” *See e.g., Doctor's Association, v. Stuart*, 85 F.3d 975 (2nd Cir. 1996) (affirming district court's not to require a bond). A bond is particularly inappropriate when, like Defendant, the person sought to be enjoined will suffer no harm. *See 6001, Inc. v. City of Albuquerque*, No. 02-CV-97 MCA/DJS (D.N.M. 2002), at 17-18.

In the present case, even if the Defendant were to prevail, the public body would not be entitled to any monetary relief.

CONCLUSION

For the forgoing reasons, this Court should grant Plaintiffs a temporary restraining order and preliminary injunction and thereby preserve the status quo by prohibiting the Bernalillo County Commission from voting on the proposed sick leave ordinance until the public body has satisfied its obligations under IPRA, thereby preserving the status quo and protecting the public’s right to Due Process, during the pendency of this action.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of August 2019, I filed the foregoing via the New Mexico E-filing system and caused a copy to be served upon Defendant.

/s/ A. Blair Dunn

A. Blair Dunn, Esq.