



State of New Mexico

Michelle Lujan Grisham
Governor

February 22, 2023

VIA EMAIL

Christopher Atencio
Deputy General Counsel
New Mexico Environment Department
Office of General Counsel
121 Tijeras Ave. NE
Albuquerque, NM 87102

RE: Executive Privilege Claim for Behrens IPRA Request

Dear Mr. Atencio:

I am writing to inform you that executive privilege has been invoked over **1** record responsive to a request filed on February 2, 2023, by Larry Behrens with the New Mexico Environment Department under the New Mexico Inspection of Public Records Act (NMSA 1978, §§ 14-2-1 to -12) ("IPRA"), and therefore this record must be withheld from production.

The Separation of Powers Clause in the New Mexico Constitution creates "a limited form of executive privilege," which is "similar in origin, purpose, and scope to the presidential communications privilege recognized by federal courts and the executive communications privilege recognized by some other state high courts." *Republican Party v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-026, ¶ 43, 283 P.3d 853. The purpose of executive privilege is to preserve candor, openness, and genuine deliberation in the Governor's decision-making processes and in her communications with her advisers as part of that process. *See Pacheco v. Hudson*, 2018-NMSC-022, ¶ 41, 415 P.3d 505 ("[T]he Constitution requires an executive privilege protecting the confidentiality of the Governor's decision-making through processes in order to protect the full and independent functioning of the executive branch, despite the fact it is not spelled out in a statute or court rule."); *Republican Party*, 2012-NMSC-026, ¶ 44 (observing that executive privilege exists to protect the executive's access to candid advice).

The Governor may claim executive privilege if the document in question meets the following three criteria: (1) it is "communicative in nature;" (2) it "concerns the Governor's decisionmaking in the realm of her core duties;" and (3) it is a communication "to or from individuals in very close organizational and functional proximity to the Governor," meaning that it was "authored, or

solicited and received, by either the Governor or an immediate adviser, with broad and significant responsibility for assisting the Governor with . . . her decisionmaking.” *Republican Party*, 2012-NMSC-026, ¶¶ 44-46 (internal quotation marks and citations omitted).

The withheld record meets the above criteria because it was authored or received by individuals in very close organizational and functional proximity to the Governor and concern the Governor’s decisionmaking in the realm of her core duties of advocating for priority legislation. For these reasons, executive privilege has been invoked over this record.

If you have any questions about your request or this letter, please do not hesitate to contact us.

Sincerely,



Kyle P. Duffy
Deputy General Counsel
Office of Governor Michelle Lujan Grisham