IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

SAN JUAN AGRICULTURAL WATER USERS ASSOCIATION; ELECTORS CONCERNED ABOUT ANIMAS WATER; and STEVE CONE,

Plaintiffs/Appellants,

vs.

KNME-TV; BOARD OF EDUCATION OF THE ALBUQUERQUE PUBLIC SCHOOLS; REGENTS OF THE UNIVERSITY OF NEW MEXICO; JOHN D'ANTONIO, NEW MEXICO STATE ENGINEER; OFFICE OF THE NEW MEXICO STATE ENGINEER; NEW MEXICO INTERSTATE STREAM COMMISSION; and OFFICE OF THE GOVERNOR OF NEW MEXICO,

Defendants/Appellees.

Case No. 28,473
Bernalillo County
(D.C. No. D-0202-CV-2007-07606)

ANSWER BRIEF OF DEFENDANTS-APPELLEES

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SUMMARY OF PROCEEDINGS

Nature of the Case

The issue in this appeal is whether a private party can bring a claim under the Inspection of Public Records Act, NMSA 1978, §§ 14-2-1 to 14-2-12 ("IPRA"), when it did not submit the written request for public records upon which that claim is grounded and was not otherwise identified in that request. Two of the Plaintiffs-Appellants, Electors Concerned About Animas Water and Steven Cone, admit they did not play any role at all in submitting the records requests at issue in this case. They only became interested in filing suit after Defendants-Appellees provided what they viewed as an inadequate response to those requests. The third Plaintiff-Appellant, San Juan Agricultural Water Users Association, now contends that its attorney submitted the requests on the association's behalf, but it never disclosed itself as the requesting party to Defendants-Appellees.

The district court found that a private party only can sue under the IPRA if a written request for public records identifies that party as the requester. Because the records requests at issue did not identify any of the Plaintiffs-Appellants, the court determined that they lacked standing and dismissed their claims. That ruling is based on the plain language of the IPRA, is supported by federal case law governing standing under the Freedom of Information Act, 5 U.S.C. § 552

("FOIA"), and serves the essential function of limiting IPRA claims to an identifiable class of plaintiffs. This Court should affirm.

Statement of Facts and Procedural History

Plaintiffs-Appellants filed this lawsuit based on allegations that KNME-TV, the University of New Mexico, Albuquerque Public Schools,[1] the Office of the State Engineer, State Engineer John D'Antonio, the New Mexico Interstate Stream Commission, and the Office of the Governor of New Mexico violated the IPRA by not fully responding to public records requests Victor R. Marshall submitted on June 12, 2007. All of Marshall's requests relate to a documentary KNME-TV broadcast about people living on the Navajo Reservation who do not have regular access to water. The title of the documentary was "The Water Haulers." Although none of the three Plaintiffs-Appellants submitted the public records requests they

[1] Undersigned counsel does not represent the Albuquerque Public Schools, and APS has not participated in the proceedings to date.

filed this lawsuit to enforce or were identified in those requests, they claim they are entitled to bring such a claim under the IPRA.[2]

The public records requests at issue were submitted by Victor Marshall alone. [RP 15.] He sent them on letterhead from his firm, Victor R. Marshall & Associates, P.C., and indicated that the firm wanted to inspect the responsive documents. The San Juan Agricultural Water Users Association contends in this litigation that it was using Marshall to submit the requests on its behalf anonymously. Neither Electors Concerned About Animas Water nor Steven Cone played any role in submitting the requests. [RP 88-89.] In fact, they were not even Marshall's clients when he submitted those requests to Defendants-Appellees. [*Id.*] These strangers to the records requests nevertheless claim the right to sue under the IPRA.

Defendants-Appellees responded to the complaint with a motion to dismiss. Through that motion, they asked the district court to follow the plain language of

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[2] Plaintiffs-Appellants include in their opening brief a lengthy attack on the substance of "The Water Haulers" documentary and the manner in which they allege it was produced. Because this appeal involves a narrow standing question in a lawsuit that does not even purport to deal with anything beyond the production of public records, Defendants-Appellees have not responded to Plaintiffs-Appellants' accusations about the documentary. This brief instead is limited to the issue that actually is before the Court: Whether any of the Plaintiffs-Appellants have the right to sue under the IPRA based on records requests they did not submit and that did not otherwise identify them as the statute requires.

the IPRA, which specifies who has the right to bring suit and claim damages for an alleged violation of the statute.[3] The New Mexico Foundation for Open Government joined Plaintiffs-Appellants in opposing the motion in the district court as *amicus curiae*, and Defendants-Appellees consented to their request to file a brief in this appeal.

The district court granted Defendants-Appellees' motion and dismissed the case in an order dated February 15, 2008. [RP 146-48.] In holding that Plaintiffs-Appellants could not pursue their claims under the IPRA, the court first noted that Electors Concerned About Animas Water and Steven Cone were not proper parties because neither was involved in submitting the public records requests at issue. [RP 147.] Finding that "[t]he plain language of IPRA Section 14-2-8 requires disclosure of the name, address and telephone number of the person seeking access to the records at the time the request is made," the district court went on to hold that the San Juan Agricultural Water Users Association also could not pursue the claims.

Plaintiffs-Appellants argue for the first time on appeal that the district court should have given them leave to amend their complaint to add Marshall or his firm

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[3] Defendant-Appellee John D'Antonio also moved for dismissal of the claims against him, because, as the State Engineer, he is not a proper individual defendant in an IPRA action. The district court did not reach this issue.

as a proper plaintiff. The district court was never asked to do so. Plaintiffs-Appellants did not seek leave to amend in the briefing on Defendants-Appellees' motion to dismiss, and their attorney did not ask the Court for such relief during the hearing on that motion. Instead, Marshall made one passing reference during that hearing to the possibility that Plaintiffs-Appellants ***might*** seek leave to amend if the motion to dismiss was granted and, in his next breath, specifically said he was "not committing to what we might do" in that situation. [Tr. 31.] That was the end of the discussion.

ARGUMENT

This Court should affirm the district court's decision in its entirety. There is no plausible argument that Electors Concerned About Animas Water or Steven Cone could properly pursue the claims in this case, and allowing the San Juan Agricultural Water Users Association to do so would be inconsistent with the plain language of the IPRA. The statute expressly provides that an IPRA claim only can be brought based on written records requests that identify the requester, limits standing to file a private right of action to the requester, and only allows the requester to recover damages. Here, the San Juan Agricultural Water Users Association was not identified as the requester and therefore also is not the proper party to bring this case.

I. THE INSPECTION OF PUBLIC RECORDS ACT LIMITS STANDING TO THE PERSON OR ENTITY IDENTIFIED AS THE REQUESTER IN A WRITTEN RECORDS REQUEST.

A. The District Court's Decision Gives Effect to the Plain Language of the IPRA.

Unlike many other laws, the IPRA specifies in clear terms what is required before a claim can be filed to enforce it and who can pursue that claim. First, the statute provides that its enforcement procedures are only triggered where a written request for public records is submitted and mandates that "[a] written request ***shall provide the name, address and telephone number of the person seeking access to the records***[.]" NMSA 1978, § 14-2-8(A) and (C) (emphasis added). Building on this requirement, Section 14-2-12(A) specifies that the attorney general, the district attorney, and the "person whose written request has been denied" are the only people who can bring an action to enforce the IPRA. From there, every reference to a claim under the statute includes language limiting the right to pursue relief to the requester of the public records. *See* NMSA 1978, § 14-2-10 ("***The requester*** may deem the request denied and may pursue the remedies available pursuant to the [IPRA] if the custodian does not permit the records to be inspected within a reasonable period of time."); NMSA 1978, § 14-2-11(A) (authorizing "***[t]he person requesting the public records***" to pursue the remedies available under the IPRA if the custodian does not timely permit inspection of public records that are the subject of a reasonably narrow request).

The New Mexico Legislature used similarly clear language to limit the right to recover damages under the IPRA to the identified requester. *See* NMSA 1978, § 14-2-11(C) ("A custodian who does not deliver or mail a written explanation of denial within fifteen days after receipt of a written request for inspection is subject to an action to enforce the provisions of the [IPRA] and ***the requester*** may be awarded damages."); NMSA 1978, § 14-2-12(D) ("The court shall award damages, costs and reasonable attorneys' fees to any ***person whose written request has been denied*** and is successful in a court action to enforce the provisions of the Inspection of Public Records Act.") (emphasis added). The statute thus requires disclosure of the requester and then limits the rights it creates to that identified person or entity.

The district court's order dismissing this case gives effect to these provisions of the IPRA. Because none of the Plaintiffs-Appellants were identified as the person requesting the records at issue here, they are not the proper party to bring suit. This is a jurisdictional issue, and the district court reached the correct result. *See ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-45, ¶ 9 n.1, 188 P.3d 1222, 1226 ("When a statute creates a cause of action and designates who may sue, the issue of standing becomes interwoven with that of subject matter jurisdiction.

Standing then becomes a jurisdictional prerequisite to an action.") (internal quotations omitted).[4]

B. The IPRA Allows Parties to Use An Agent to Request Public Records.

The district court's decision does not prevent people and entities from submitting public records requests through an agent. It instead recognizes that the IPRA presents a choice to those who decide to do so. The first option is to have the agent identify the principal as the actual requester in the written records requests. Principals who do this are then free to bring suit under the IPRA in their own name if they believe they have a claim under the statute. The second option is for the principal to remain anonymous and have the records request submitted in the agent's name alone. Principals who take this approach are still free to act through their agent. But having made the choice to remain anonymous, they cannot change horses mid-stream and become the named plaintiff in litigation challenging whether the public body complied with the IPRA.

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[4] The fact that the IPRA requires disclosure of the requester and then limits the private rights it creates to that person also distinguishes the statute from NMSA 1978, § 48-10-12(A). Plaintiffs-Appellants cite that section of the Deed of Trust Act, NMSA 1978, § 48-10-1 to 48-10-21, because it requires a person who wants notice of a sale pursuant to a deed of trust to identify himself. That, however, is where the statute's similarity to the IPRA ends. Section 48-10-12 is purely a vehicle for obtaining notice, and the Deed of Trust Act neither creates any right in the person beyond notice nor authorizes that person to bring suit under the statute.

Plaintiffs-Appellants and *amicus curiae* nevertheless argue that it is inappropriate to require people to identify themselves as the requester of public records in any way before they can file an IPRA action. Relying on the second sentence of NMSA 1978, § 14-2-8(C), they contend that requiring disclosure of ***who*** is requesting information is the same as demanding to know ***why*** the request was made. The two sentences codified as Section 14-2-8(C), however, expressly distinguish between these two fundamentally different questions. The first sentence requires the person who is making the request to identify himself by name, address, and telephone number, while the second prohibits public bodies from requiring the identified requester to "state the reason for inspecting the records." NMSA 1978, § 14-2-8(C). There is no contention in this case that any Defendant-Appellee demanded to know why Marshall wanted to inspect the records he requested.

It is clear from the plain language of Section 14-2-8(C) that identifying the requester is mandatory. And this remains true regardless of whether it may be possible for a records custodian to discern from that requester's identity why he is seeking records. Requiring disclosure of the true requester even when the request is submitted by an agent simply is not the same as improperly demanding to know why the records are being sought. The Legislature included the identification requirement in the first sentence of Section 14-2-8(C) without caveat, and there is

no basis for reading an exception into the statute to allow anonymity in the face of this plain language.

C. Interpretation of the IPRA Must Be Guided By the Presumption that Government Officials Act in Good Faith.

Plaintiffs-Appellants and *amicus curiae* otherwise build their briefs around speculative concerns that one or more of the Defendants-Appellees would retaliate against them for asking to inspect records, and hypothetical scenarios involving reporters, public interest groups, and whistleblowers. That entire discussion from the two briefs ignores the fact that, as noted above, a party who wants to submit public records requests anonymously is free to submit them through an agent. The statute simply dictates that, having made that choice, the agency relationship must continue with the agent serving as the plaintiff if a lawsuit is later filed under the IPRA.

The hypotheticals and talk of retaliation also are wrongly premised on the notion that public bodies will ignore or violate their obligations under the IPRA if they know who is requesting public records. This is an obvious effort to convince the Court to interpret the IPRA based on a presumption that state government officials will act in bad faith. It is well-established, however, that courts presume the opposite – officials are deemed to have acted in good faith absent clear evidence to the contrary. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (stating that "good faith on the part of a university is presumed absent a showing to

the contrary") (internal quotations omitted); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."); *T&M Distribs., Inc. v. United States*, 185 F.3d 1279, 1285 (Fed. Cir. 1999) ("[G]overnment officials are presumed to act in good faith, and it requires well-nigh irrefragable proof to induce a court to abandon the presumption of good faith dealing.") (internal quotations omitted); *Marine Shale Processors v. EPA*, 81 F.3d 1371, 1385 (5th Cir. 1996) (same). Recognition of this good faith presumption dates back to territorial days in New Mexico. *See Territory ex rel. Wade v. Ashenfelter*, 4 N.M. 93, 147-48 (1887) ("[I]n what has been said upon the law of this case, there has been no wish or purpose to cast the least imputation on the motives of the executive. The same presumption of good faith and honest desire to act within legal and constitutional limits are accorded to him as to either of the co-ordinate branches of the government, and his motives are not the subject of criticism.") (internal quotations omitted). It cannot be swept aside in favor of a rule that assumes improper government action.

D. Plaintiffs-Appellants and *Amicus Curiae* Have Not Come Forward With Any Authority That Actually Supports Their Interpretation of the IPRA.

Neither Plaintiffs-Appellants nor *amicus curiae* have cited any authority that supports allowing an anonymous principal to bring suit under a statute that, like the IPRA, only creates rights in individuals who have identified themselves to a government agency. Instead, the primary authority on which they rely is an unremarkable case in which the New Mexico Supreme Court recognized that a disclosed landowner-principal could use a disclosed agent to submit applications to transfer water rights under the state statutes that govern such transfers. *See Coldwater Cattle Co. v. Portales Valley Project, Inc.*, 78 N.M. 41, 44-45, 428 P.2d 15, 18-19 (1967). The opinion in *Turley v. State*, 96 N.M. 579, 580-81, 633 P.2d 687, 688-89 (1981), similarly addressed whether a disclosed principal could exercise a right conferred by a statute through a disclosed agent. And the decision in *Smith v. Walcott*, 85 N.M. 351, 355-56, 512 P.2d 679, 683-84 (1973), recognizes nothing more than that a client can be bound by the language of a pleading her attorney files in district court on her behalf. Because a disclosed principal is free to request public records through an agent under the IPRA, the district court's ruling here is consistent with each of those decisions.

The other authority Plaintiffs-Appellants and *amicus curiae* cite comes no closer to resolving the issue this case raises. Instead, they rely exclusively on (1)

general jury instructions regarding agency and the general agency cases upon which those instructions are based; (2) cases recognizing that attorneys can act as agents; and (3) cases recognizing that statutes generally supplement, rather than supplant, the common law. None of this supports ignoring the express language in the IPRA limiting claims under the statute to those based on a written records request that identifies the person making it. *See* NMSA 1978, § 14-2-8(C). Nor does it open the door for this Court to ignore the legislative determination that recovery under the IPRA must be limited to the requester. *See* NMSA 1978, § 14-2-10 to -12.

II. THE DISTRICT COURT'S DECISION IS CONSISTENT WITH STANDING REQUIREMENTS UNDER THE FREEDOM OF INFORMATION ACT.

A. Standing Under the FOIA is Limited to the Parties Identified in A Request for Information.

The district court's determination that Plaintiffs-Appellants lack standing to bring this case also is consistent with the way federal courts across the country have dealt with the same issue under the FOIA. In fact, every federal court that has considered the issue has ruled that an individual whose name does not appear on a FOIA request cannot bring suit under that statute. *See, e.g., Burka v. United States Dep't of Health & Human Servs.*, 142 F.3d 1286, 1290-91 (D.C. Cir. 1998); *McDonnell v. United States*, 4 F.3d 1227, 1236-39 (3d Cir. 1993); *Mahtesian v. U.S. Off. of Personnel Mgmt.*, 388 F.Supp.2d 1047, 1048 (N.D. Cal. 2005); *Three*

Forks Ranch Corp. v. Bureau of Land Management, 358 F.Supp.2d 1, 3 (D.D.C. 2005); *Unigard Ins. Co. v. Department of Treasury*, 997 F.Supp. 1339, 1342 (S.D. Cal. 1997); *United States v. Trenk*, Civil Action No. 06-1004 (MLC), 2006 U.S. Dist. LEXIS 84970, at **25-29 (D.N.J. Nov. 20, 2006) (reconsideration granted on other issues at 2007 U.S. Dist. LEXIS 4273 (D.N.J. Jan. 22, 2007). This rule has been enforced even where: (1) the attorney who submitted the request referred to the client who later tried to sue under the FOIA by name in the written request but did not indicate that the request was made on that client's behalf, *Three Forks Ranch*, 358 F. Supp. 2d at 2; (2) the FOIA requests were made by a lawyer the federal agency knew represented the party that tried to bring suit, *Unigard*, 997 F.Supp. at 1342; and (3) the client alleged his lawyer kept his identity secret because he was involved in contentious litigation with the agency from whom the records were sought and wanted to remain anonymous, *Mahtesian*, 388 F.Supp.2d at 1048 n.2.

This case involves a plain vanilla application of the rule. Two of the parties that tried to sue here had nothing to do with the records requests at all, and the third plaintiff chose to remain entirely anonymous until the complaint was filed. The only identifiable requester was Marshall, and he was not a named plaintiff.

B. The FOIA and the IPRA are Alike in Every Area Relevant to Determining Standing.

Plaintiffs-Appellants and *amicus curiae* try to sidestep the consistent approach federal courts have taken to resolving the very problem this cases raises by arguing that the FOIA and the IPRA are different. The obvious flaw in that argument, however, is that the two statutes track each other in every area relevant to the issue of standing.

First, like the IPRA, the language of the FOIA focuses on the person who actually requests records from an agency. The United States Court of Appeals for the Third Circuit gave that language great weight in ruling that a person only can bring a claim if he is identified in a FOIA request. *See McDonnell*, 4 F.3d at 1236-39. The *McDonnell* court first focused on the requirement under 5 U.S.C. § 552(a) that, after receiving a FOIA request, a federal agency must notify "***the person making such request***" whether it will comply within ten days. 4 F.3d at 1236-37 (quoting 5 U.S.C. § 552(a)(6)(A)(i); emphasis in original opinion). The court then turned its attention to passages from the legislative history of the FOIA addressing the duties a federal agency owes to, and the obligations of, "***the persons requesting records***" and "***the person making the request.***" *Id.* (quoting H.R. Rep. No. 1497, 89th Cong. 2d Sess., reprinted in 1966 U.S.C.C.A.N. 2418, 2426) (emphasis in original opinion). Based on these consistent references in the statute and legislative history to the person who requests information, the court concluded

that an individual who was not identified in a FOIA request lacks standing to sue under that statute. *Id.* at 1238. The district court's order dismissing Plaintiffs-Appellants' claims here gives similar effect to even clearer language in the IPRA requiring that the person requesting records be identified in writing and limiting the rights under the statute to that person. *See* NMSA 1978, § 14-2-8 (A), (C); § 14-2-10 to -12.

Second, agencies are not permitted to demand to know why a person is requesting information under either the FOIA or the IPRA. *See Nat'l Archives & Records Admin. v. Favish*, 547 U.S. 157, 172 (2004) ("[A]s a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information."). The United States Court of Appeals for the District of Columbia emphasized this in its decision limiting standing to the person identified in a FOIA request:

> A FOIA request can be made by "any person." 5 U.S.C. § 552(a)(3). As a result, Burka had standing to bring this suit when his FOIA request was denied; ***he was not required to demonstrate that he had any particular need for the information.*** Therefore Burka, not his undisclosed client, is the real party-in-interest to this suit. Any arrangements Burka had with a third party are legally irrelevant for the purposes of his FOIA request. They are equally irrelevant here.

Burka, 142 F.3d at 1290-91.

Third, the IPRA and the FOIA both were enacted to serve the same public interests. Like the policy statement the Legislature included in Section 14-2-5 of

the IPRA, the FOIA has long been recognized as a statute that was passed "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny[.]" *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). In order to further that policy, the federal statute created "a broad right of access to official information." *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 772-73 (1989) (internal quotations omitted). While the FOIA and the IPRA contain exceptions from the duty to release information, they both are construed against the backdrop of the same general policy favoring disclosure.

C. The Decisions from Other States Declining to Follow FOIA Precedent that *Amicus Curiae* Cites Were Based on Clear Differences Between the FOIA and the State Statutes At Issue.

The authority from other states *amicus curiae* contends supports ignoring federal precedent addressing standing under the FOIA involved situations where courts refused to apply federal rules because the controlling state public records law did not contain the statutory language upon which those federal rules were based. Three of the cited cases turned on the fact that, unlike the FOIA, the state statutes under consideration did not have a provision requiring agencies to balance an individual's privacy interests against the need for disclosure to the public before disclosing records. *See Graham v. Ala. State Emples. Ass'n*, 2007 Ala. Civ. App. LEXIS 724, **19-21 (Ala. Civ. App. Nov. 16, 2007); *Magic Valley Newspapers, Inc. v. Magic Valley Reg'l Med. Ctr.*, 59 P.3d 314, 317 (Idaho 2002); *State ex rel.*

Thomas v. Ohio State Univ., 643 N.E.2d 126, 129 (Ohio 1994). In the only other case *amicus curiae* cites, the state court refused to follow precedent related to the federal bar against FOIA claims intended to enjoin an agency from producing documents because the state statute clearly contemplated such claims. *See Bowers v. Shelton*, 453 S.E.2d 741, 743 (Ga. 1995). There is no similar basis for distinguishing the IPRA from the FOIA here.

A person seeking access to government documents stands in the same position under the IPRA and the FOIA in every way that relates to determining standing. The district courts' ruling tracks the well-reasoned federal rule on this issue, and there is no reason for New Mexico to reject that rule.

III. BY REQUIRING DISCLOSURE OF THE PERSON OR ENTITY REQUESTING RECORDS, THE IPRA CREATES A LIMITED AND IDENTIFIABLE CLASS OF POTENTIAL PLAINTIFFS.

The IPRA allows private plaintiffs to recover up to $100 a day in damages from a public body if the custodian of records does not timely provide written notice that a request has been denied, with the daily damages accruing until the denial is issued. *See* NMSA 1978, § 14-2-11(C). These damages are in addition to the exposure to attorney fees claims from plaintiffs who prevail in an IPRA action. *See* NMSA 1978, § 14-2-12(D).[5] The resulting potential liability for the state

[5] Plaintiffs-Appellants include a sentence in the conclusion of their brief asking the Court to award them attorney fees if they prevail in this appeal. Because NMSA

makes it critical for public bodies to know who has the right to bring suit based on a particular records request.

Even under the FOIA, which does not include a damages remedy, courts have noted that "[t]he dangers inherent in recognizing an 'undisclosed' client as the real plaintiff are obvious." *Burka*, 142 F.3d at 1291. First among those dangers is the inability to determine the real party-in-interest to a case where anonymous principals are involved. *Id.; see also, L. R. Property Management v. Grebe*, 96 N.M. 22, 23, 627 P.2d 864, 865 (1981) (finding that the real party in interest to a lawsuit under Rule 1-017(A) NMRA must be "the owner of the right being enforced and...in a position to discharge the defendant from the liability being asserted in the suit"). With the prospect of monetary relief added to the equation, those concerns spike dramatically.

1978, § 14-2-12(D) only authorizes an award of attorney fees to a person "whose written request has been denied and is successful in a court action to enforce the provisions of the [IPRA]," however, that request is grossly premature. The narrow standing question before the Court does not call for a determination of whether any of the Defendants-Appellees actually denied Plaintiffs-Appellants' records requests or did so improperly, and even a ruling in one or more of the Plaintiffs-Appellants' favor would only result in the case returning to district court. That party then would have to prevail on the merits before it could establish that it was successful in enforcing the provisions of the IPRA. *See generally, Hewitt v. Helms*, 482 U.S. 755, 760 (1987) (rejecting claim for attorney fees based on interlocutory ruling that complaint should not have been dismissed and stating that such rulings are "not the stuff of which legal victories are made").

This case illustrates the problem. Even if the history here is as they describe it, Steven Cone and Electors Concerned About Animas Water are strangers to the records requests at issue. It is clear from the affidavit Victor Marshall filed with the district court that these two parties were not represented by him at the time he submitted those records requests and did not play any role in submitting them to Defendants-Appellees. [RP 88-89.] It therefore is undisputed that, at most, only one of the three parties that brought this lawsuit actually had a role in seeking the records at issue. Although the other two came along after the fact, they chose not to acknowledge this in the complaint. Instead, they filed the case as if the fact that they had nothing to do with the records requests was an immaterial technicality.

Preventing public bodies from identifying who holds the rights the IPRA creates on the front end would create an open invitation for lawyers to pepper state agencies with records requests first, and, in the event a public body makes a misstep in responding, later find people to sue on those requests with the promise of recovering damages and attorney fees. The IPRA was enacted to allow people to look inside state government, not to bog the government down in litigation brought by people who did not request access to records in the first place. And there is no other area of the law where the government is subject to liability for damages and attorney fees from multiple, unconnected, previously anonymous plaintiffs like the group that filed this suit. By requiring that public records

requests include the name, address, and telephone number of the person making the requests, the IPRA creates an identifiable class of potential plaintiffs who can sue to enforce it, and avoids the potential misuse of the statute illustrated by Steven Cone's and Electors Concerned About Animas Water's attempt to pursue this case.

IV. PLAINTIFFS-APPELLANTS NEVER SOUGHT LEAVE FROM THE DISTRICT COURT TO AMEND THE COMPLAINT TO ADD A PROPER PLAINTIFF AND CANNOT RAISE THE ISSUE NOW.

Despite the fact that Plaintiffs-Appellants did not ask the district court for leave to amend their complaint to add a proper plaintiff, they now claim that the court committed reversible error by not letting them do so. Their failure to preserve the issue bars them from raising this argument on appeal. *See State v. Varela*, 1999-NMSC-45, ¶ 25, 128 N.M. 454, 462 (1999) ("In order to preserve an error for appeal, it is essential that the ground or grounds of the objection or motion be made with sufficient specificity to alert the mind of the trial court to the claimed error or errors, and that a ruling thereon then be invoked.") (internal quotations and citations omitted).

There is only one reference in the record to amending the complaint. In the course of arguing the district court should brush aside Defendants-Appellees' motion to dismiss because it would not dispose of the merits of the case, Plaintiffs-Appellants' attorney stated that "this case is not going to go away if the Court were to dismiss this action. We would simply amend to add either me or my

firm as an additional Plaintiff. Or let's assume that's a reasonable possibility, ***I'm not committing to what we might do***, but let's suppose that happens, then we get the next set of obstacles, that is, do they try to depose me?" [Tr. 31 (emphasis added).] The only thing that is clear from this ambiguous statement is that Plaintiffs-Appellants carefully avoided requesting leave to amend. It is inappropriate for these same parties to now blame the trial judge for not giving them relief they never sought.

Plaintiffs-Appellants' suggestion that the district court found that Victor Marshall and his law firm also would not be proper plaintiffs similarly is not supported by the record. The district court dismissed the case because the plaintiffs who filed it did not have standing to sue. It was not called on to determine who else might be a proper party to file the claim.

CONCLUSION

The district court properly dismissed this case for lack of standing. An action only can be brought under the IPRA by a person or entity identified in writing as the party requesting records. Two of the Plaintiffs-Appellants concede they were not involved in submitting the records requests that were the subject of this lawsuit, and the third was not identified in those requests in any way.

Finally, the Court should not consider Plaintiffs-Appellants' argument that the district court erred by refusing to let them add a proper plaintiff. The record

demonstrates that Plaintiffs-Appellants never sought leave to amend, and it is unreasonable to fault the district court for failing to grant a request that was never made.

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of November, 2008, I mailed the foregoing **Answer Brief of Defendants/Appellees** first class mail, postage prepaid addressed as follows:

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