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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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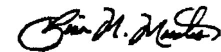

SAN JUAN AGRICULTURAL
WATER USERS ASSOCIATION;
ELECTORS CONCERNED ABOUT
ANIMAS WATER; and STEVE CONE,

Plaintiffs/Appellants,

vs.

Ct. App. No. 28,473
Appeal from Second Judicial
District Court
Judge Nan G. Nash
No. D-202-CV-2007-7606

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.

NMFOG'S BRIEF AS *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFFS-APPELLANTS

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New Mexico Foundation for Open Government ("NMFOG") appears in this case as *amicus curiae* in support of Appellants to address two arguments adopted by the district court which would, if accepted by this Court, severely curtail citizens' rights and ability to obtain public records from their government under the Inspection of Public Records Act, NMSA 1978, §§ 14-2-1 *et seq.* ("IPRA").

The first argument – that an entity cannot enforce its rights under IPRA when the request is made by one of its agents – would severely hinder the ability of the news media, public interest organizations, and other private entities to remedy denied IPRA requests made by their editors, reporters, members, and staff. The second argument – that jurisprudence established under the federal Freedom of Information Act ("FOIA") [5 U.S.C. § 552] governs the application of IPRA – improperly curtails the expansive rights afforded by IPRA, since FOIA is much more limited in the rights it provides to citizens.

The district court accepted Respondents' argument that Appellants cannot enforce an IPRA request made by one of its agents. The lower court dismissed the suit by Appellants because the records request had been made by their attorneys. In reaching this conclusion, the lower court apparently relied on federal cases construing FOIA, even though IPRA is quite different from FOIA. By design, IPRA was written to favor the public more strongly than FOIA, and to eliminate

many of the obstructions in FOIA. The district court's ruling contradicts the specific terms of IPRA, and thwarts the express purpose of that statute. The decision of the lower court should be reversed.

INTEREST OF NMFOG AS AMICUS

NMFOG is an educational and charitable organization dedicated to assisting New Mexico citizens with understanding, exercising and preserving their rights under the federal and New Mexico Constitutions, the New Mexico Open Meetings Act [NMSA 1978, §§ 10-15-1 *et seq.*], the Inspection of Public Records Act [NMSA 1978, §§ 14-2-1 *et seq.*], and the Arrest Record Information Act [NMSA 1978, §§ 29-10-1 *et seq.*], as well as their rights under the federal Freedom of Information Act [5 U.S.C. § 552]. NMFOG regularly assists citizens and news organizations in obtaining documents and information from government sources and has a vital interest in the matters at issue in this litigation, because the district court improperly limited the ability of the Appellants to enforce their IPRA request. If adopted, this interpretation of IPRA would result in inappropriate restrictions, and have a chilling effect on IPRA requests made by other persons or entities in New Mexico. NMFOG thus appears as *amicus curiae* in this matter to inform the Court of the broader implications of imposing these limitations on the enforcement of IPRA requests.

ARGUMENT

The IPRA declares that 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 the further 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 (1993). Thus, under the IPRA, citizens have "a fundamental right to have access to public records." *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 797, 568 P.2d 1236, 1243 (1977). "The citizen's right to know is the rule and secrecy is the exception." *Id.*

The district court's interpretation of the Appellants' right to enforce an IPRA request curtails citizens' "fundamental right" to access government open records. First, barring a principal from enforcing the IPRA request of its agent discourages requests for public records made on behalf of an organization. Second, relying on federal jurisprudence interpreting FOIA to interpret IPRA is inappropriate, because these statutes afford different sets of rights and limitations on access to government records.

I. BARRING A PRINCIPAL FROM ENFORCING AN IPRA REQUEST BROUGHT BY ITS AGENT WOULD CHILL MEDIA AND NON-PROFIT ORGANIZATIONS' USE OF IPRA.

The Legislature has expressly prohibited a government agency from inquiring as to the reasons for a public records request as a condition to permit inspection of records. *See* NMSA 1978, § 14-2-8(C) (1993) ("no person requesting records shall be required to state the reason for inspecting the records."). The district court's ruling that a requester under IPRA must disclose his or her identity and cannot use an agent to request public records, if affirmed by this Court, would contravene this provision in the statute, and lead to untenable results in many situations, threatening the enforceability of IPRA.

A. Requiring an IPRA Requester to Identify Themselves Could Divulge the Motives Behind the Request in Contravention of IPRA.

Clearly, there are instances where requiring the requester to reveal his or her identity would disclose the reasons for the request. For example:

- An investigative reporter, on assignment from her employer, a daily newspaper, tenders a request for public records to a state agency seeking e-mails between an elected official and a cabinet secretary due to her suspicions that the official's personal relationship with the secretary is influencing her vote on funding for the secretary's agency.

The reporter makes the request in her name only so as not to tip off either the official or the secretary that they are being investigated by the media.

- A member of a public interest non-profit group tenders a request on behalf of the group seeking documents regarding whether a state land management agency has preserved adequate habitat for an endangered animal species under state and federal endangered species protection laws. Concerned that the agency will delay the request due to the notoriety of her organization, the volunteer makes the request in her own name and withholds the identity of the organization on whose behalf she is making the request.
- Despite his objections, a government employee is ordered to award a contract to a family member of the head of his agency. The employee wants to reveal to the press this suspicious and potentially illegal transaction. Concerned, however, that he will be labeled a whistleblower and retaliated against by his superiors, he instructs his attorney to make a public records request on his behalf, but in the attorney's name.
- A candidate for public office wishes to inspect the travel records of

her opponent, the elected incumbent head of a government agency, to employ them in her campaign as proof for her assertion that the incumbent has abused the agency's travel budget. To avoid revealing the reasons for the request by giving her own identity, one of the employees of her campaign makes the request in his name, but on behalf of the candidate.

If, in any of these hypothetical situations, the requester were required to reveal their identity, they would be forced to reveal the reasons for the request, which could hinder, or at least discourage, the enforcement of their rights under IPRA. In *Rio Grande Sun v. Department of Public Safety*, First Judicial Dist. Ct. cause no. CIV 2005-06554, a recent New Mexico case in which NMFOG, along with members of the news media, sought to enforce IPRA rights, NMFOG's attorneys learned in discovery that the Department of Public Safety, a New Mexico executive branch agency, treated IPRA requests from the news media differently than those from private citizens. Indeed, NMFOG learned that, in at least one instance, a request for records involving a police shooting from a private citizen's attorney was granted, but a request from the news media for exactly the same records was denied.

The district court's ruling facilitates this type of discrimination. Although

IPRA requires a government agency receiving a written request to "permit the inspection [of the public records requested] immediately or as soon as is practicable under the circumstances[,]" it also permits the agency to wait for up to 15 days to produce the records or deny the request. *See* NMSA 1978, § 14-2-8(D). Furthermore, if the agency "determines that a written request is excessively burdensome or broad, an additional reasonable period of time shall be allowed to comply with the request." NMSA 1978, § 14-2-10. Were an agency to know the reason for a request, it may delay or improperly deny it, especially where revelation of the information contained in the requested documents could lead to embarrassment, reprimand, or civil or criminal penalties for the agency or its head. Presumably concerned about such a result, the Legislature forbids government agencies from inquiring as to the reasons for an IPRA request as a condition to granting it. *See* NMSA 1978, § 14-2-8(C) ; *see also Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771, 109 S. Ct. 1468, 1481, 103 L. Ed. 2d 774, 794 (1989) (noting that, even under the more restrictive FOIA, a requesters' identity can have "no bearing upon the merits of his or her FOIA request"). The Legislature never intended to require a requester to reveal his or her identity, and potentially reveal the reasons behind the request, when it enacted IPRA.

B. Eliminating Agency Principles from IPRA Would Discourage the Press and the Public from Making Requests on Behalf of their Organizations.

It is black letter law that "[i]n an agency relationship, whatever an agent does in the lawful prosecution of the transaction the principal has entrusted to him or her is the act of the principal." 3 Am. Jur. 2d *Agency* § 2 (2007). Nothing in IPRA abolishes or limits the common law principles of agency. *See Sims v. Sims*, 1996-NMSC-078, ¶¶ 23-29, 122 N.M. 618, 930 P.2d 153 (statute supplements the common law rather than abolishing it); *see also* UJI 13-401 NMRA ("An agent is a person who, by agreement with another called the principal, represents the principal in dealings with third persons or transacts some other business, manages some affair or does some service for the principal . . . ."). Thus, a requester might be interested in the records in her own right, as a principal, or as an agent for her employer, or a combination of the two. No matter what, IPRA does not require that a requester identify him or herself to obtain public records.

Persons acting as agents for an IPRA requester would be discouraged from making IPRA requests in such a capacity, because, if the request is improperly denied, the burden of filing a lawsuit to enforce the request would fall on the agent, rather than the organization on behalf of which they made the request. In NMFOG's experience, reporters and non-profit volunteers often do not have the

time, or do not wish to expend personal resources, to engage in litigation with well-represented and funded government agencies over the denial of an IPRA request. Indeed, because news media and public interest organizations can experience high turnover rates, the person who made the request may not remain with the organization long enough to pursue an IPRA lawsuit. The organization would be precluded from bringing a lawsuit to enforce its rights in this situation if the district court's interpretation of IPRA is adopted.[1]

IPRA must be interpreted in light of its stated purpose to provide "all persons . . . the greatest possible information regarding the affairs of government and the official acts of public officers and employees." NMSA 1978, §14-2-5 (1993). A restrictive approach to IPRA enforcement that raises a technical barrier for organizations and institutions that do not regularly make IPRA requests is not the result the Legislature envisioned when it enacted IPRA.

II. CASES DECIDED UNDER THE FEDERAL FREEDOM OF INFORMATION LAWS ARE INAPPLICABLE.

The Court should not rely on federal law decided under FOIA when interpreting New Mexico's statute. Because IPRA is much stronger than FOIA in key respects, employing FOIA case law to interpret IPRA would dilute the rights

[1] Under the IPRA, the definition of "person" includes "any individual, corporation, partnership, firm, association or entity." NMSA 1978, § 14-2-6(C) (1993).

afforded New Mexicans under their state open records law. NMFOG is concerned that reliance on federal case law in this case will lead to an unduly restrictive interpretation of IPRA that the New Mexico Legislature did not intend.

There are two reasons why this Court should not accept FOIA precedent to interpret IPRA:

A. The IPRA is Not FOIA.

New Mexico courts do not rely on federal case law to interpret our statutes, our rules, or our Constitution, where the federal counterparts are different. *See, e.g.*, *Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Comm'n*, 2006-NMCA-115, ¶ 37, 140 N.M. 464, 143 P.3d 502 ("there may be reasons, such as differences in statutory language, that may make federal law or law from other jurisdictions inapplicable or inappropriate in New Mexico"); *State v. Badoni*, 2003-NMCA-009, ¶ 16, 133 N.M. 257, 62 P.3d 348 ("fundamental differences between federal and New Mexico's rules of pleading make federal case law on the issue of notification distinguishable"); *State v. Cardenas-Alvarez*, 2001-NMSC-017, 130 N.M. 386, 25 P.3d 225 (prolonged checkpoint stop was not illegal under federal border search law but illegal under state constitution); *New Mexico Dep't of Labor v. A.C. Elec., Inc.*, 1998-NMCA-141, ¶ 31, 125 N.M. 779, 965 P.2d 363 ("the New Mexico [minimum wage act] does not track the language of the federal

statute. . . . Clearly, the New Mexico Legislature chose a different test from that imposed by federal law.") (Hartz, J., dissenting).

The IPRA contains provisions that are not found in FOIA. For example, the IPRA includes an express legislative mandate that it be construed liberally and in favor of disclosure. Section 14-2-5 declares it 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. It is the further 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." FOIA does not include such a strong statement of purpose and public policy. In addition, IPRA expressly permits the recovery of monetary damages of $100 for every day that an agency fails to make required disclosure, to spur the agency to make full and prompt disclosure. *See* NMSA 1978, § 14-2-11(C) (providing for penalties for non-compliance), § 14-2-12 (enforcement provision); *Board of Comm'rs v. Las Cruces Sun-News*, 2003-NMCA-102, ¶¶ 35-41, 134 N.M. 283, 76 P.3d 36. By contrast, FOIA does not provide daily damages when a government agency delays full disclosure. Because of such differences, reliance on FOIA case law to interpret IPRA is inappropriate.

B. Other Courts Have Rejected the Notion that Their States' Open Records Laws Are Interpretable Through FOIA Case Law.

Courts in other states have refused to interpret their public records inspection statutes in accord with federal interpretations of FOIA. *See, e.g.*, *Graham v. Alabama State Employees Ass'n*, 2007 Ala. Civ. App. LEXIS 724, *20-21 (Ala. Civ. App. 2007) (finding that court was not required to apply FOIA's requirement of a balance between privacy interests against the need for disclosure to public where state public records statute included no such language); *Magic Valley Newspapers, Inc. v. Magic Valley Regional Medical Center*, 59 P.3d 314, 316-17 (Idaho 2002) (finding that FOIA did not apply to case brought under state public records law); *Bowers v. Shelton*, 453 S.E.2d 741, 743 (Ga. 1995) (finding that "[b]ecause the Georgia [open records] Act materially differs from the FOIA," case law interpreting the federal statute "is inapplicable"); *State ex rel. Thomas v. Ohio State Univ.*, 643 N.E.2d 126, 129 (Ohio 1994) (rejecting FOIA's privacy-public interest balancing test for Ohio Public Record Act because "FOIA does not apply here, and [the Ohio Act] contains no similar personal-privacy exception"). This Court should likewise not entertain the lower court's notion to rewrite IPRA to impose the defects of FOIA on the citizens of New Mexico.

CONCLUSION

The district court's ruling imposes new obstacles to the enforcement of IPRA by many of the organizations likely to seek government records and imports limitations from the federal law that are not contained in IPRA itself. The district court's ruling should be reversed as inconsistent with the text and policy of IPRA.

Respectfully submitted,

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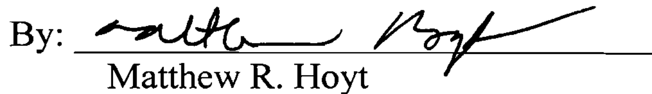
By: 
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