IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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

Plaintiffs/Appellants,

vs.

No. 28,473
Bernalillo County
No. D-202-CV-07-7606

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.

REPLY BRIEF

VICTOR R. MARSHALL & ASSOCIATES, P.C.
Victor R. Marshall, Esq.
12509 Oakland NE
Albuquerque, NM 87122
505-332-9400
505-332-3793 Fax
Counsel for Appellants

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This reply brief will concentrate on the legal errors and fallacies in defendants' answer brief.

1. By refusing to apply the common law of agency, the decision below is contrary to controlling case law, the Uniform Jury Instructions, and NMSA 1978, § 38-1-3. In their reply brief, the defendants are unable to cite any authority to support their argument that the common law of agency is somehow inapplicable to this case. In this case, the district court refused to apply and follow the most basic rule of law concerning agency, which is set forth in UJI 13-402 NMRA ("the principal is liable for the acts of his agent"). There is "a presumption that the instructions are correct statements of law." *State v. Wilson*, 116 N.M. 793, 796, 867 P.2d 1175, 1178 (1994). Defendants simply ignore the UJIs on agency.

The district court decision also departs from the universal rule established by the New Mexico Supreme Court, that the acts of the agent are deemed to be the acts of the principal, even for purposes of a statute. *Smith v. Walcott*, 85 N.M. 351, 356, 512 P.2d 679, 684 (1973) ("an agency may be created for the performance of any lawful act, including acts done under the authority of a statute") (quoting *Coldwater Cattle Co. v. Portales Valley Project, Inc.*, 78 N.M.41, 45, 428 P.2d 15, 19 (1967)).

Not only does the decision below depart from the UJI and Supreme Court precedent, it also violates a statute:

> § 38-1-3. [Common law is rule of practice and decision.]
>
> In all the courts in this state the common law as recognized in the United States of America, shall be the rule of practice and decision.
>
> History: Laws 1875-1876, ch. 2, § 2; C.L. 1884, § 1823; C.L. 1897, § 2871; Code 1915, § 1354; C.S. 1929, § 34-101; 1941 Comp., § 19-303; 1953 Comp., § 21-3-3.

In this statute, the Legislature has directed the courts to follow the common law, which certainly includes the common law of agency. This statute makes it absolutely and explicitly clear that the courts are to apply the common law of agency when construing and enforcing IPRA.

2. It is error to rely on FOIA cases, because the Legislature wrote IPRA to overcome the defects and weaknesses in FOIA and FOIA case law. The defendants make the astounding argument that the New Mexico Inspection of Public Records Act ("IPRA") is substantially the same as the federal Freedom of Information Act ("FOIA"), 5 U.S.C. §§ 551-59. [AB 15-17] Even the quickest glance at the two statutes will show that they are quite

different. In making this argument, the defendants are willfully refusing to read the plain text of IPRA.

The text of IPRA bears no resemblance whatsoever to the convoluted text of FOIA. It is important to read and compare the black letters of the two statutes. The text of the IPRA is entirely different than FOIA, because the New Mexico Legislature deliberately wrote a much stronger statute. If the New Mexico Legislature had intended to follow FOIA, it would have xeroxed the federal statute into the New Mexico statute books. But FOIA proved to be relatively ineffectual, so the New Mexico Legislature took a different tack. It drafted a much stronger statute which is intended to avoid the pitfalls, quibbles, and obstructionism that have characterized FOIA. The Legislature also strengthened the New Mexico statute to override many of the picayune federal court decisions that have hobbled the FOIA, like the decisions cited by defendants. It should be noted that Congress has expressed bipartisan dissatisfaction with the operation of FOIA, and the cramped interpretations which the federal courts have given it. Thus it appears increasingly likely that Congress will rewrite FOIA to override federal court decisions like the ones defendants have cited, after the Bush administration leaves office.

Therefore, it is plain legal error to follow federal FOIA cases that limit public access to government records, since New Mexico wrote a different statute in order to strengthen the public's right to know. For example, under IPRA, there is a presumption of openness. NMSA 1978, § 14-2-1 ("Every person has a right to inspect public records of this state . . . ."). By contrast, the Bush administration eliminated any such presumption under FOIA, and prevented that presumption from being included in the FOIA reform bill in 2007. "The [Senate bill] does not include a provision which I thought was a key one establishing a presumption that government records should be released to the public unless there is a good reason to keep them secret." Floor debate for S. 2488, OPEN Government Act, 153 Cong. Rec. H16791 (Dec. 18, 2007) (statement of Rep. Waxman).

As another example the New Mexico statute explicitly provides a purpose provision which declares its public policy. NMSA 1978, § 14-2-5 ("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"). FOIA has no such statement of purpose.

Since IPRA mandates that "all persons are entitled to the greatest possible information," any legal analysis under IPRA must pose the question: Is it possible for the defendants to provide documents to a lawyer who is acting for a client, without forcing the lawyer to identify the client? Of course it is. The defendants had no difficulties turning over documents to the requesting attorney, until the documents proved to be extremely embarrassing to the State Engineer, KNME, and the Interstate Stream Commission. At that point the defendants stopped producing documents and declared that it was impossible to give documents to a lawyer.

3. **The district court decision forces an attorney to disclose his client, and a reporter to identify his newspaper or television station.** This is a plain violation of § 14-2-8(C) of IPRA, which provides that "[n]o person requesting records shall be required to state the reason for inspecting the records." After turning over some documents, which proved embarrassing, the defendants decided to keep these public documents secret. The lawyers for the defendants belatedly raised the argument that an attorney cannot obtain public documents unless he is forced to disclose the identity of his client. AB 18-21. This argument is a plain violation of IPRA, because an attorney who is forced to disclose the identity of his client is being forced to disclose why he is

requesting the documents. Likewise, if a news reporter is required to disclose that she is working for The Albuquerque Journal, or KOAT-TV, then she is being required to state why she is asking for the records. This flies in the face of the express statutory provision that persons cannot be required to explain the reasons for their request. The district court decision simply negates and violates the express command found in the second sentence of § 14-2-8(C) of IPRA.

This provision –"Ask No Questions" – appears in the text of the New Mexico statute, but not in FOIA. *Compare* NMSA 1978, §§ 14-2-4 to -12 *with* 5 U.S.C. §§ 551-59. This is one reason why it is legal error to rely on FOIA cases, rather than reading the plain text of IPRA. IPRA includes a very specific prohibition that FOIA lacks. The New Mexico Legislature included this provision in order to eliminate this kind of obstructionism by state agencies. It is common knowledge that attorneys (and news reporters) almost always act on behalf of others, so the statute makes it impermissible for agencies to ask any questions about why the requester is making the request, such as: "Are you an attorney? Are you a reporter? Who are you working for? Why are you interested in these records? Who wants to know?" All of these questions inquire into the reasons why the request is being made, so they

are specifically outlawed by § 14-2-8(C). The legally correct answer to these inquiries is: "Don't even ask. Under IPRA, that's none of your business. I don't have to tell you any of the reasons why I'm asking."

Defendants try to draw a non-existent distinction [AB 9]: they argue that asking a lawyer to name his client is not asking him to disclose the reason for his request. This is nonsense. If a lawyer is required to state, "I am asking for these records because I represent John L. Smith," the lawyer is being forced to disclose the reason for his request. Likewise, if a reporter is required to give the name and address of his newspaper. Likewise, if a citizen is forced to disclose that she is asking for records on behalf of a whistleblower who is afraid of retaliation in his government job if his identity is known. Likewise, if a requester is required to disclose that she works for the Sierra Club, or Mothers Against Drunk Driving, or Obama for President.

4. IPRA requires a name, address and phone number simply to expedite the production of public records. Defendants argue that the first sentence of § 14-2-8(C) calls for the requester to provide a name, address, and telephone. From this, the defendants draw the erroneous conclusion that the statute requires the requester to identify the principal for whom the requester is acting. This is absurd, because the obvious purpose of this provision is to

provide contact information so that the agency will know where to respond. The very next subsection, § 14-2-8(D), requires an initial written response from the agency within three days, and it is impossible to mail a written response without a name and address. Additionally, the contact information is needed by the agency in order to send a written notice if additional time is needed, *see* § 14-2-10, or a written explanation if the request is denied, *see* § 14-2-11(B). A telephone number is needed so that the agency can contact a person to make arrangements to produce the documents, or to clarify what documents are being requested.

Obviously, the purpose of the provision for name, address, and telephone number is to facilitate the inspection of public documents, not to obstruct it. Yet the District Court reads this provision, which appears in the first sentence of § 14-2-8(C), as nullifying the very next sentence, which says that a requester cannot be required to disclose the reasons for his request.

In this particular instance, the law firm provided its name, address and telephone number, which is all the agency needs to comply with the request. The agency does not need to know whether the attorney is acting for himself or a client, or the identity of the client.

Moreover, in this case the defendants' argument is entirely pretextual, because the identity of the client was disclosed in the complaint itself – San Juan Agricultural Water Users Association. *See* Complaint ¶ 2 [RP 1]. Even if the defendants were entitled to know the identity of the client, which they are not, the defendants have long known the client's identity, and yet the defendants still refuse to produce the documents.[1]

5. IPRA does not presume that public officials have acted correctly. Defendants argue that this case should be decided in their favor because public officials are presumed to have acted correctly. [AB 10-11] This seems to be the favorite argument of every public official who has something to hide. This presumption is most decidedly not the operative policy behind the Inspection of Public Records Act, because the main purpose of IPRA is to expose nonfeasance, malfeasance, and incompetence by state agencies, officials, and employees. If the Legislature had really believed in the presumption that public employees act correctly, then the statute would have

[1] In this instance, the complaint could have been brought on behalf of "John Doe, who wishes to remain anonymous," because one of the purposes § 14-2-8(C) is to allow citizens to ask for public documents without fear of intimidation or retaliation, and without disclosing the reasons for making the request. This is one very good reason that a person might decide to use a lawyer to file the request.

been unnecessary, and the Legislature would not have enacted the statute in the first instance.

Likewise, the Constitutions of the United States and New Mexico do not indulge this presumption. To the contrary, they operate on the principle that governments have an inherent tendency to abuse their power, and to act in their own self interest rather than the interest of the public. This skepticism about government is built into the very structure of our state and federal constitutions, hence the separation of powers, checks and balances, and the Bill of Rights.

Even in other areas, where the presumption of official correctness has some operation, the courts have often ruled that the presumption is not dispositive. *See, e.g., Jaramillo v. State ex rel. Bd. of County Comm'rs of Sandoval County*, 32 N.M. 20, 30-31, 250 P. 729, 733 (1926) ("it is presumed as a matter of law that an officer has correctly performed his duties . . . . But this presumption does not carry the conclusion claimed for it by relator."); *Herrera v. Zia Land Co.*, 51 N.M. 390, 391-92, 185 P.2d 975, 976 (1947) ("the law presumes that public officials perform their duties until the contrary is shown").

6. Plaintiffs had a right to amend their complaint under Rule 15.

[The following point provides additional grounds for reversing the district court, as a matter of procedure, but it is irrelevant to the IPRA analysis.] The defendants argue plaintiffs cannot challenge the district court's refusal to allow the complaint to be amended to add the law firm as a plaintiff. [AB 21-22] Defendants erroneously argue that plaintiffs were required to move to amend the complaint before the Court ruled on the motion to dismiss. This is mistaken, because there is no rule that requires plaintiffs to move to amend before the Court rules on a motion to dismiss. Such a rule would be counterproductive and wasteful, because the motion to dismiss might be denied. And if the motion to dismiss is granted, the normal rule is that the dismissal is without prejudice to an amendment to cure the defect. *See* Rule 1-015(A), NMRA (" leave [to amend] shall be freely given").

Indeed, one of the main purposes of Rule 15 is to allow things to be amended so that cases are decided on the underlying merits, not the pleadings themselves. 6 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice & Procedure* § 1473, at 521 (2d ed. 1990) ("Rule 15(a) therefore reinforces one of the basic policies of the federal rules – that pleadings are not an end in themselves but are only a means to assist in the presentation of a case

to enable it to be decided on the merits.") (citing *Foman v. Davis*, 371 U.S. 178 (1962)); *id.* § 1474, at 523 ("Perhaps the most common use of Rule 15(a) is by a party seeking to amend in order to cure a defective pleading."). Amendments under Rule 15(A) include the addition of new parties. *Id.* § 1474, at 549-52 ("a party may make a Rule 15(a) amendment to add . . . parties to the action").

At the hearing, the plaintiffs stated that they might amend the complaint to add the law firm as a plaintiff if the court were to grant the motion to dismiss. Yet the district court slammed the door on any amendment by unexpectedly dismissing the case with prejudice. The Court refused to allow amendment, even though the amendment would have cured the defect perceived by the Court. "Ideally, if it is at all possible that the party against whom the dismissal is directed can correct the defect in the pleading or state a claim for relief, the court should dismiss with leave to amend." *Id.* § 1483, at 587. Under these circumstances, Rule 12-216(A) NMRA comes into play:

> formal exceptions are not required . . . . Further, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

The district court's decision is contrary to the decisions of New Mexico's appellate courts in *Malone v. Swift Fresh Meats Co.*, 91 N.M. 359, 361-62, 574 P.2d 283, 285-85 (1978); *Buhler v. Marrujo*, 86 N.M. 399, 402, 524 P.2d 1015,

1018 (Ct. App. 1974); and *Martinez v. Research Park, Inc.*, 75 N.M. 672, 680, 410 P.2d 200, 205 (1965). In *Martinez*, the court reversed the district court for denying leave to amend when it granted a motion to dismiss, because plaintiffs had the right to amend without leave of court under rule 15(a), because a motion to dismiss does not cut off the right to amend. The plaintiffs did not need leave to amend the complaint, "since a motion to dismiss is not a responsive pleading."

7. Defendants' other arguments are legally irrelevant. In their answer brief, defendants raise some miscellaneous arguments which are legally irrelevant, and which demonstrate defendants' disdain for IPRA.

A. Defendants make much of the fact that Steve Cone and Electors Concerned About Animas Water were not represented by the undersigned firm when the request was filed. The undersigned firm disclosed this fact to the district court, and in any event this fact is legally irrelevant to the decision of the question on appeal, since the law firm did represent the appellant San Juan Agricultural Water Users Association. Steve Cone and Electors Concerned About Animas Water are environmental groups that have a vital interest in obtaining the documents that are being withheld by defendants, so they joined in the lawsuit. Their objective is to obtain key

documents that will demonstrate that the Navajo settlement would be an environmental and ecological disaster for New Mexico, and to debunk the government propaganda which KNME put forward as a legitimate news program. These are legitimate purposes that are furthered by IPRA and the First Amendment.

B. Defendants argue that the dismissal should be upheld because otherwise defendants will have to pay attorneys fees and a one-hundred dollar a day penalty. This cannot be a reason for denying the request, since IPRA itself provides for attorneys fees and the penalty, to encourage citizens to inspect public records, whether or not they use an attorney. *See* NMSA 1978, §§ 14-2-11(C)(2) and -12(D) and *Board of Comm'rs v. Las Cruces Sun-News*, 2003-NMCA-102, ¶ 37, 134 N.M. 283, 76 P.3d 36. Without these provisions, public officials would have every incentive to stonewall, and to stonewall as long as possible, as they have done here.

C. Defendants make the astounding argument that this Court should not create "an open invitation for lawyers to pepper state agencies with records requests" lest the agencies get bogged down in litigation. [AB 20] Let us hope, for the sake of good government, that citizens (and their lawyers) do pepper state agencies with public records request, because "a representative

government is dependent on an informed electorate." NMSA 1978, § 14-2-5. As for the defendants' lament that they might be bogged down with IPRA requests, they are willfully disregarding IPRA's statutory mandate 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." *Id.*

CONCLUSION

In *Martinez*, 75 N.M. at 677, 410 P.2d at 203-04, although the case did not involve IPRA, the Supreme Court cited some familiar rules of statutory construction which also apply to this case.

> [S]tatutes are to be interpreted with reference to their manifest object, and "if the language is susceptible of two constructions, one which will carry out and the other defeat such manifest object, it should receive the former construction." 2 Sutherland, Statutory Construction, § 4704. . . . A statute should be construed, if possible, to give effect to all of its provisions and so that one part will not destroy another. 2 Sutherland, Statutory Construction, § 4705; *Reed v. Styron*, 69 N.M. 262, 365 P.2d 912.

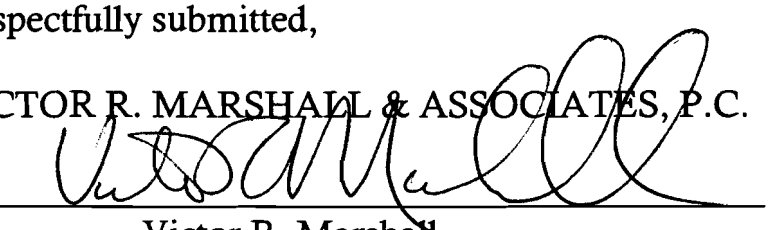
In the case at bar, the "manifest object" of the Inspection of Public Records Act is to promote and facilitate the public's right to prompt inspection of public records held by state and local agencies, so the courts must interpret the name/address /telephone number provision as an aid to the prompt

production of records, not as an obstacle. Furthermore, the name/address/phone number provision cannot be construed to destroy the provision which appears in the very next sentence, that "no person requesting records shall be required to state the reason for inspecting the records." These provisions are easily reconciled by a ruling that a requester must provide his name/address/telephone number, but the requester cannot be required to disclose the person for whom he might be acting. Applying the universal rules of agency, the act of the Association's attorney is deemed to be the act of Association itself, so the Association can bring suit to enforce its records request under IPRA. Likewise a news reporter is an agent for his or her employer, so the employer can bring suit if the documents are withheld.

The district court ruling must be reversed, because it violates the common law of agency, the basic rules of statutory construction, and the plain text and purpose of IPRA itself.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By 

Victor R. Marshall
Attorneys for Plaintiffs/Appellants
12509 Oakland NE
Albuquerque, New Mexico 87122
505-332-9400 / 505-332-3793 FAX

I hereby certify that, according to the word count provided by WordPerfect Version X3, the body of the foregoing brief contains 3,531 words, exclusive of those parts excepted by Rule 12-213(F)(1). The text of the brief is composed in a 14-point proportionally-spaced typeface (Calisto MT).

I further certify that a true and correct copy of the foregoing was mailed to the following on December 12, 2008.

John B. Pound, Esq.
Mark T. Baker, Esq.
Long, Pound & Komer, PA.
PO Box 5098
Santa Fe, NM 87502

New Mexico Foundation for Open Government As *Amicus*
Leonard J. DeLayo, Jr.
Executive Director, N.M. FOG
817 Gold Avenue SW
Albuquerque, NM 87102

Charles R. Peifer, Esq.
Matthew R. Hoyt, Esq.
Peifer, Hanson & Mullins, P.A.
PO Box 26245
Albuquerque, NM 87125