IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

ANDREW JONES,

Plaintiff/Appellant,

No. D-202-CV-2014-03426
Court of Appeals No. 35,120

vs.

THE DEPARTMENT OF PUBLIC SAFETY
OF THE STATE OF NEW MEXICO

Defendant/Appellee.

DEFENDANT-APPELLEE'S ANSWER BRIEF

Appeal from the Second Judicial District Court, County of Bernalillo
The Honorable Denise Barela-Shepherd Presiding

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I. SUMMARY OF PROCEEDINGS

This appeal arises from the March, 2014 standoff and tragic shooting of a homeless camper, James Boyd, by officers from the Albuquerque Police Department (hereinafter "APD"). Officers from the New Mexico State Police were present during the standoff, and their "dash cam" recorders captured portions of audio between APD officers during the standoff preceding the shooting. The incident drew great scrutiny from the media, led to protests in downtown Albuquerque and the implementation of federal oversight over APD. The officers directly involved in the shooting were investigated by the Department of Justice for civil rights violations, and were criminally charged by the Bernalillo County District Attorney, in ongoing peripheral litigation, unrelated to the instant appeal.

As it relates to the instant appeal, the Federal Bureau of Investigation (hereinafter "FBI"), acting on behalf of the Department of Justice, began investigating the death of James Boyd, asking agencies (including Defendant/Appellees New Mexico State Police and APD) to preserve evidence, and to avoid disclosure of any evidence to the fullest extent of the law. The overwhelming media exposure posed a threat to the objectivity of any investigation. The release of additional material would only serve to further inflame the public, risking the improper influence of witnesses, and the potential contamination of a jury pool, if any charges related to civil rights violations were ever filed.

Appellee does not dispute that certain materials, requested by Appellant, were not provided. As discussed above, the FBI was investigating the death of Mr. Boyd, and had asked Appellee to avoid disclosure of certain investigatory materials to other parties, so as not to taint the investigation. Appellant has a statutory duty to cooperate with other investigatory agencies, including agencies like the FBI. (*See* §29-3-3 N.M.S.A. 1978, "[i]t shall be the duty of the New Mexico state police and it is hereby granted the power to cooperate with agencies of other states and of the United States having similar powers to develop and carry on a complete interstate, national and international system of criminal identification and investigation."). When approached with the public records request from Appellant, Appellee determined that, as part of "an ongoing criminal investigation" including evidence that implicated APD Officer Keith Sandy as someone "accused, but not charged with a crime", the materials were not public records. In turn, the materials were not subject to mandatory disclosure under the New Mexico Inspection of Public Records Act (hereinafter "IPRA"). Appellee sent a timely letter to Appellant, disclosing other materials, not requested by the FBI.

Plaintiff/Appellant Andrew Jones, as personal representative for the Estate of James Matthew Boyd, brought civil action against the City of Albuquerque, seeking a financial recovery for the wrongful death of James Boyd. Around the same time, Jones brought this action against the Department of Public Safety, pursuant to the

New Mexico Inspection of Public Records Act (hereinafter "IPRA"). Following service of the Complaint, Appellant immediately attempted to subpoena the disputed materials in both the IPRA action and the wrongful death action. In the IPRA litigation, Appellant withdrew his subpoena and in the wrongful death action, the Court granted Appellee's request for protective order. Nonetheless, these highly unusual procedural moves reflect the lengths to which Appellant would go to in order to obtain evidence for his civil case.

Regarding the instant IPRAlitigation, following a Motion for Summary Judgment, the District Court correctly ruled that the materials withheld were not public records, as they were excluded from IPRA under a statutory exception protecting law enforcement records from premature disclosure. In December 2014, the District Court ordered that, if the investigation was not concluded within the next five weeks (by January 15, 2015), then a privilege log must be produced. Coincidentally, the FBI had already concluded its investigation, and shortly after the ruling, informed cooperating agencies that there would be no charges, and the withheld materials were safe for disclosure. In compliance with the December 11, 2014 court order, Appellee **promptly** disclosed all materials that had been previously requested, on the grounds that there was no longer an ongoing criminal investigation.

Shortly after Appellee produced all responsive materials, Appellee filed for summary judgment. The Court, in grating summary judgment for Appellee, briefly reviewed previous discussion on the law enforcement exception to public records disclosure. However, the Court also held that Appellee had complied with the provisions of the December, 2014 Order and were permitted to withhold the materials, "as otherwise provided by law", in accordance with §14-2-1 (A)(8) N.M.S.A. 1978. Appellant now incorrectly asks this Court to overturn the September, 2015 order. Moreover, by focusing on the later order, Appellant also asks this Court to rule that a standing court order, protecting materials from disclosure, should no longer be permitted to rely on the "as otherwise provided by law" provision of IPRA.

Unable to contest the plain language of the statute, Appellant presents a sensational version of the facts above to argue that this Court should issue binding precedent, ordering that **any** investigation file is public record, regardless of the outcome, or whether the investigation is ongoing. Appellant relies on hyperbole about investigating public officials to create unsupported subjective tests. There is no language in the statute that provides such distinction. IPRA provides that investigatory materials pertaining to those "accused, but not charged" with a crime are exempt from disclosure. IPRA does not distinguish between accused government officials and everybody else. There is no heightened scrutiny regarding

exceptions, pertaining to government officials. Nonetheless, Appellant asks this Court to read into the statute such language, carving out a special niche that does not exist.

Looking through the hyperbole, it is clear that Appellant asks this Court to rule that those "accused of, but not charged with a crime" have no rights, and that any investigatory material should be immediately released. Appellant asks this Court to disregard the clear, statutory language of IPRA, such that trials against government officials may be conducted in the media, rather than before a fair and unprejudiced jury.

Simply put, the District Court correctly protected a defendant's right to a fair jury trial as described in the New Mexico Constitution. Moreover, the lower Court thoughtfully examined the clear statutory language crafted by the Legislature, finding that the requested materials were part of an ongoing criminal investigation. In turn, the Court ruled that the materials were not subject to disclosure at this time. This Court should affirm the District Court, and preserve the plain reading of the IPRA statutes.

A. Course of Proceedings

Plaintiff/Appellant Andrew Jones (hereinafter "Appellant") filed his initial complaint on May 16, 2014, demanding that the New Mexico Department of Safety ("Appellee") provide copies of all audio and/or video recordings pertaining to the

shooting death of Matthew Boyd. (RP 2 – 4). Appellant then sought to obtain the same documents from Appellee under subpoena on August 12, 2014. (RP 44). Appellant then filed a Motion for Summary Judgment, asking the District Court to order Appellee to produce the recordings. (RP 59). The Court heard oral argument on the matter on December 9, 2014. (RP 113).

The District Court denied Appellant's Motion for Summary Judgment, and an order was entered on December 11, 2014. (RP 126). The ruling recognized that the recordings in question (and any other investigatory materials) may be permissibly withheld from public inspection, pursuant to §14-2-1 (A)(4) N.M.S.A. 1978 (colloquially referred to as the "law enforcement exception"). (RP 127). Notably, the District Court made a narrow ruling recognizing that the permissible withholding of the investigatory materials was temporally limited, to expire on January 15, 2015. (RP 127). Specifically, on that date, Appellee was ordered to produce either the materials or a privilege log. This production was to be contingent upon the FBI's completion of their investigation. (RP 127).[1] Notably, this order was not appealed on an interlocutory basis, nor upon the Court's entry of a final judgment in 2015. (RP 201 – 206).

[1] Unbeknownst to the parties, the FBI was in the process of completing the investigation, and notified Appellee prior to the January 15 deadline imposed by the Court. Appellee then provided all requested records at that time.

Shortly after producing all responsive records, Appellee filed a Motion for Summary Judgment on April 15, 2015. (RP 129). The parties agreed that all responsive materials had been produced and there were no remaining issues of material fact. (RP 148). Oral argument was heard on the matter on May 21, 2015. (RP 195). The Court issued a written opinion on September 9, 2015. (RP 197). The District Court found that Appellee's withholding of the investigatory materials, subsequent to the December 11, 2014, was permitted under that Order and granted Summary Judgment for Appellee. (RP 197).

B. Statement of Facts

Although the facts are not in dispute, a cursory review would likely provide appropriate context to the issues before the Court:

Following the Boyd incident, Agent in Charge, Carol K. Lee, of the FBI contacted Chief Gordon Eden, of the Albuquerque Police Department on March 31, 2014 and notified him that the FBI was conducting a "full investigation" into the shooting of James Boyd. (RP 90). The FBI investigation was being coordinated with the United States Department of Justice - Criminal Section of the Civil Rights Division. (RP 90). The investigation was also being conducted in association with the New Mexico branch of the United States Attorney's Office. (RP 90). In that letter, the FBI also asked Eden to seal the records, if legally possible. (RP 90).

Like Chief Eden with APD, the FBI contacted the New Mexico State Secretary Designate for Public Safety, Gregory Fouratt, seeking to review all materials related to the shooting that the New Mexico State Police and the New Mexico Department of Public Safety had in its custody and control. (RP 91). The FBI also asked the Department of Public Safety to maintain the confidentiality of any materials related to the Boyd incident until after they had completed their investigation. (RP 91).

Appellant, through Counsel, sent a public records request to Appellee, the New Mexico Department of Public Safety, on April 8, 2014. (RP 13 – 14). Among the records requested were "lapel/belt audio and/or video" and "any/all reports written by [New Mexico State Police/Department of Public Safety] officers who were at the scene or any reports or supplemental reports regarding the shooting of James Boyd." (RP 13). At the time of the request, the Matthew Boyd shooting had been classified as an active investigation by the FBI. (RP 17). When responding to the request, Appellee provided some materials and also a detailed letter, regarding the request. (RP 16 – 17). In that letter, Appellee explicitly advised Appellant that the records were being withheld pursuant to the Inspection of Public Records Act. (RP 16 – 17). The letter advised Appellant that "[t]he premature public release of information would…permit potential witnesses, if they choose, to modify or tailor their version of events in light of information learned from a review of these

records." (RP 16 – 17). Appellant was also advised that the premature public release of information would "reveal to potential witnesses the strengths, weaknesses, and completeness of the investigation." (RP 16 – 17). All other materials that did not "jeopardize[] the law enforcement investigation" were released to Appellant. (RP 16 – 17).

On December 11, 2014, the District Court issued an order recognizing that the records sought by Appellant and withheld by Appellee were covered under the law enforcement exception to IPRA, enumerated at §14-2-1 (A)(4) N.M.S.A. 1978. (RP 126 – 127). The District Court's Order authorized Appellee to withhold the documents until at least January 15, 2015. (RP 127). In their Response to Appellee's Motion for Summary Judgment, Appellant failed to challenge the December 11, 2014 Order. (RP 150). The FBI concluded their investigation in early January, 2015. (RP 131).[2] Following the conclusion of the FBI investigation, all of the materials requested by Appellant were subsequently released. (See RP 131, 139 – 140, 151). Appellant's Notice of Appeal does not challenge the December 11, 2014 Order. (RP 201).

[2] Appellant in their Response to Appellee's Motion for Summary Judgment, failed to dispute this fact, and maintains that there are no disputed questions of material fact. Therefore, pursuant to Rule 1-056, this material fact was deemed admitted.

C. Standard of Review

Issues of statutory interpretation are reviewed *de novo*. *Ramirez v. State, Children, Youth & Families Dep't*, 2016-NMSC-016, ¶13. "[W]e look not only to the language used in the statute, but also to the purpose to be achieved and the wrong to be remedied." *In re Mahdjid B* , 2015–NMSC–003, ¶ 25, 342 P.3d 698 (internal quotation marks and citation omitted). "In doing so, we examine the plain language of the statute as well as the context in which it was promulgated, including the history of the statute and the object and purpose the Legislature sought to accomplish." *State v. Office of the Pub. Def. ex rel. Muqqddin*, 2012–NMSC–029, ¶ 13, 285 P.3d 622 (internal quotation marks and citation omitted). The Court should restrict their analysis to whether disclosure under IPRA may be withheld because of a specific exception contained within IPRA...*Republican Party of New Mexico v. New Mexico Taxation & Revenue Dep't*, 2012-NMSC-026, ¶16, 283 P.3d 853.

II. ARGUMENT

"When interpreting IPRA, New Mexico Courts err in favor of disclosure ***absent clear statutory language to the contrary***." *San Juan Agr. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶¶14-15, 150 N.M. 64. (emphasis added). However, Courts "should restrict their analysis to whether disclosure under IPRA may be withheld because of a ***specific exception contained within IPRA***..." *Edenburn v. New Mexico Dept. of Health*, 2013-NMCA-045, ¶¶7-8, 299 P.3d 424.

(emphasis added). The clear and specific exception, under which Appellee's material was rightfully withheld, states:

> "Every person has a right to inspect public records of this state except... law enforcement records that reveal confidential sources, methods, information or individuals accused but not charged with a crime. Law enforcement records include evidence in any form received or compiled in connection with a criminal investigation or prosecution by a law enforcement or prosecuting agency..."
>
> §14-2-1 (A)(4) N.M.S.A. 1978

Appellee agrees with Appellant, that, as a general rule, there are strong policy reasons favoring the disclosure of public records. However, beyond the broad rhetoric of transparent government lies limited restrictions to unfettered access. The public policy behind these restrictions is so strong, the legislature elected to codify these restrictions directly into the Inspection of Public Records Act (hereinafter referred to as "IPRA"). While Appellant constantly reminds the Court it should "err on the side of disclosure", Appellant ignores that there is no error when there is ***clear statutory language to the contrary***

Appellant's arguments regarding privilege, and the burden to establish it, are misplaced and have no bearing here. The issue before the Court is the statutory exceptions to IPRA. Contrary to Appellant's assertions and legal analysis in the lower court, these are not privileges subject to discretion. Simply put, the issue before the Court is one of statutory interpretation, and the public policy reasons for the narrowly crafted language of the law enforcement exception to IPRA.

Appellant relies heavily on case law regarding the supremacy clause, to create the illusion that the issue before the Court is a conflict between state and federal law. The plain language of the statute creates an exception to disclosure for "a law enforcement or prosecuting agency." §14-2-1 (A)(4) N.M.S.A. 1978. The law enforcement exception makes no reference or distinction between state and federal investigations and thus, one should not be read into the law. (*See City of Albuquerque v. Montoya,* 2012–NMSC–007, ¶ 12, 274 P.3d 108, "[i]n discerning the Legislature's intent, we are aided by classic canons of statutory construction, and [w]e look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended."). Absent plain language to the contrary, Appellant's argument regarding the conflict between State and Federal investigations is nothing more than an elegant distraction from the true issues before the Court.

The Legislature shrewdly crafted the law enforcement exception to preserve the integrity of all criminal investigations, and to protect the identity of all witnesses and uncharged suspects, regardless of the amount of publicity surrounding the subject of the investigation. As discussed below, there is a clear basis for the Legislature's creation of the law enforcement exception, and why this Court should preserve the legislative intent behind the law enforcement exception.

A. The District Court recognized the public policy concerns addressed by the legislature when drafting the Inspection of Public Records Act.

"The public's right of inspection is not without qualification...[e]ven where [an IPRA] request is made for a lawful purpose the public interest may require that the information be withheld. *State ex rel. Newsome v. Alarid,* 1977-NMSC-076, ¶17, 90 N.M. 790. "[I]nspect means to review all public records that are ***not*** excluded in Section 14-2-1 N.M.S.A. 1978." §14-2-6 (C) N.M.S.A. 1978. (emphasis added).

In *Newsome v. Alarid*, the New Mexico Supreme Court adopted the California Supreme Court's rationale, limiting public records when there is a public policy which would "undermine that sense of security for individual rights, whether of personal liberty or private property, which any citizen ought to feel has a tendency to be injurious to the public or the public good." *Newsome,* ¶29 (citing *Craemer v. Superior Court in and for Marin County,* 265 Cal.App. 2d 193 (Cal. 1968). As discussed *infra.*, *Craemer* was a California case, analogous to the facts here.

Admittedly, the New Mexico Supreme Court has recognized that *Newsome* is superseded by the statute now before the Court. (*See Republican Party of New Mexico v. Taxation and Revenue Department,* 2012-NMSC-026, ¶10, 283 P.3d 853). Nonetheless, when crafting the current IPRA statute, the Legislature preserved this previously recognized public interest, and developed specific, narrow limits to disclosure. (*See Shovelin v. Cent. N.M. Elec. Coop., Inc.*, 1993-NMSC-015, ¶26,

115 N.M. 293, "Every statute enacted by the legislature is in a sense an expression of public policy…").

The exception at issue here clearly designates that records surrounding ongoing criminal investigations and records that name those accused, but not charged, with a crime, should be excluded from disclosure. Certainly, there is a temptation to err in favor of disclosure. However, an analysis of the clear language of §14-2-1 (A)(4) N.M.S.A. 1978 shows a specific exception that applies here.

Appellant asks this Court to disclose materials that the Legislature clearly and specifically intended to protect from disclosure. Appellant does not ask this Court to interpret an ambiguous statute, or identify the contours of a statutory gap. Rather, Appellant asks this Court to completely ignore the language of IPRA. In essence, Appellant seeks to completely disregard the clear public interest embodied in the plain language of the statute.

B. The release of public records was reasonably limited to preserve the integrity of ongoing criminal investigations.

"[T]the public interest in New Mexico requires a comprehensive law enforcement privilege which provides some protection against unfettered disclosure of materials obtained by law enforcement during a criminal investigation." *Estate of Romero v. City of Santa Fe Police Dep't,* 2006-NMSC-028, ¶ 2, 139 N.M. 671. "[T]he legislature has expressed a matter of great public concern when it comes to the disclosure of materials pertaining to an on-going criminal investigation." *Estate*

of Romero, ¶15. "[W]e conclude that the IPRA exception for law enforcement records in a criminal investigation is illustrative of a vitally important public policy concern." *Estate of Romero,* ¶18. The New Mexico Supreme Court has previously held that where there is a matter of great public concern as expressed by the legislature, we "will not hesitate to exercise [our] power of superintending control to protect the confidentiality of . . . information against unwarranted disclosure." *In re Motion for a Subpoena Duces Tecum*, 1980-NMSC-010, ¶11, 94 N.M. 1.

When evaluating the law enforcement exception, the considerations of public policy are not merely esoteric or made in passing reference. In fact, the New Mexico Supreme Court has previously evaluated a similar set of facts. In *Estate of Romero v. City of Santa Fe Police Dep't,* 2006-NMSC-028, the New Mexico Supreme Court was asked to evaluate if criminal records pertaining to an open investigation were subject to subpoena power. The Court's analysis relied upon the public policy set forth by the Legislature in the Inspection of Public Records Act, and would eventually quash the subpoena.

In *Estate of Romero,* the parents of a missing child sued the Santa Fe Police Department for negligence in the handling of the case. *Estate of Romero,* ¶ 1. The missing child was never found, and, ***after six years had passed***, the Supreme Court was left to determine if the investigation files from the kidnapping were finally subject to subpoena power. *Estate of Romero,* ¶ 1. "This tragic backdrop makes

the conflicting interests in the *Romero* case, between the parents' natural desire to know the fate of their son and a police department's understandable need to protect confidential materials gathered in the course of a criminal investigation, ***all the more compelling and of substantial public interest.***" *Estate of Romero,* ¶ 1. (emphasis added).

The Supreme Court preserved its previous holdings where the Supreme Court has protected the confidentiality of investigatory information in light of a strong public concern, as expressed by the legislature. *Romero,* ¶15. In reaching this decision, the Court then looked to the language of IPRA,

> "[t]he exception germane to this case precludes the following from public inspection:
>
> law enforcement records that reveal confidential sources, methods, information or individuals accused but not charged with a crime. Law enforcement records include evidence in any form received or compiled in connection with a criminal investigation or prosecution by a law enforcement or prosecuting agency, including inactive matters or closed investigations to the extent that they contain the information listed in this paragraph."
>
> *Estate of Romero,* ¶17, citing § 14-2-1(A)(4) N.M.S.A. 1978.

The Supreme Court held this language in IPRA indicated a strong legislative intent to protect materials such as the materials Plaintiff requested here. ("Within IPRA the legislature has expressed its intent to protect from disclosure police investigatory materials in an ongoing criminal investigation." *Estate of Romero,* ¶17). This policy ensures both that investigations are not tainted or influenced by

outside parties, and, more importantly, any investigation of innocent parties should remain protected from public scrutiny. In the instant case, the premature release of the materials could have jeopardized the FBI's continuing investigation.

Estate of Romero provides this Court a strong basis for preserving the District Court's ruling. Notably, the contrast between the *Romero* facts and the instant facts should serve to strengthen this Court's reliance on *Estate of Romero*. In *Romero,* the young boy had been missing for over six years. In the instant case, the shooting investigation was less than six months old. Moreover, the *Romero* Court was attempting to use the IPRA statutes to determine how to identify a privilege. Through this analysis, the *Romero* Court clearly identified the public policy behind IPRA. This Court should rely on this analysis to interpret the clear language of the statute.

Appellant attempts to oversimplify the issues, contending that there was no threat to "the safety of the public or the officers involved" and "there was no possibility of [disclosure] endangering the investigation as the officer suspected of the crime was well aware of the content of the material." (*See Brief in Chief* at p.6). However, the plain language of the statute does not permit such subjective tests. As it applies here, the statute clearly protects from disclosure "evidence in any form received...in connection with a criminal investigation." Appellant contends that the records should not be exempt because "[t]he target of the investigation was well

aware of the withheld audio recording." (*See Brief in Chief* at p.6). Even if accepted as true, this argument fails to address the potential prejudice to the accused, threatened by the altered memories of witnesses or influence upon witnesses' narratives.

The statutory language is unequivocal. Instead, Appellant asks this Court to create new subjective tests, asking whether an investigatory target knows of potential evidence, or whether the investigatory target would be "threatened" by the release of the investigatory materials. (*See Brief in Chief* at p.6). These subjective tests are not in the statute and need not be considered by the Court.

Unable to refute the strong precedent in *Estate of Romero*, Appellant instead turns to *Cox v. New Mexico Department of Public Safety,* 2010-NMCA-096, 148 N.M. 934, to support his position. However, *Cox* is not analogous here and should not be persuasive to the Court. In *Cox,* the question was whether citizen complaints against law enforcement officers should be treated as public records. *Cox,* ¶10. This is distinctly different from the instant facts, where the materials exempt from disclosure were materials surrounding an ongoing criminal investigation. In fact, Appellant appears to concede this point in his Brief, where he cites the *Cox* Court's holding that "the information contained in [the complaints] originated from persons outside the purview of that agency. (*See* Appellant's Brief-in-Chief at p. 12, citing *Cox,* ¶25). This distinction is an important one, as the materials exempt from

disclosure here originated within the Appellant's agency, and were part of a criminal investigation, and not just internal citizen complaints.

Historically, New Mexico Courts have looked to other jurisdictions for consideration of the public policy implications of IPRA. Rather than make an analogy to *Cox,* this Court could look to other jurisdictions for more factually analogous cases. Consider the Washington case of *Newman v. King County,* 947 P.2d 712 (Wash. 1997). *Newman* was a case under Washington's Public Disclosure Act ("PDA"). *Newman,* 947 P.2d at 713. Like New Mexico's IPRA, the Washington PDA has an exception for non-disclosure of public records essential to law enforcement. (*See* RCW 42.17.310(1)(d), exempting from disclosure: "[s]pecific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.") A freelance journalist sought documents from a file investigating the murder of a local civil rights activist. *Newman*, 947 P.2d at 713. The local law enforcement agency, refused to release the records because the matter was an open case. *Id.*

The *Newman* Court's analysis provides an appropriate framework for the Court here. The *Newman* Court held that, "[t]he determination of the scope of the

[law enforcement] exemption requires a two-step analysis. The statute first requires the information be compiled by law enforcement." *Newman*, 947 P.2d at 715. "The second step in the analysis requires the document to be essential to effective law enforcement." *Newman*, 947 P.2d at 716. The Court then provided guidance as to how to determine if an investigation is essential to law enforcement, citing "(1) affidavits by people with direct knowledge and responsibility for the investigation..."; (2) whether resources are allocated to the investigation; and (3) whether enforcement proceedings are contemplated." *Id.* Later holdings would extend this application, "[w]hen an investigation is ongoing, the investigative records exemption provides a ***blanket exemption***." *Seattle Times Co.,* 243 P.2d at 925. (emphasis added)

When applying the *Newman* holding here, it is important to note that, similar to New Mexico's Supreme Court, the Washington Supreme Court held, "the [Public Disclosure Act] is a strongly worded mandate for broad disclosure of public records." *Newman,* 947 P.2d at 714. Despite recognizing a strong presumption of disclosure, as Plaintiff argues for here, the court found that the local investigatory department should be able to keep the documents sealed to protect the criminal investigation. *Newman*, 947 P.2d at 713.

To apply the *Newman* framework here, this Court should preserve the District Court's ruling. The first step of the *Newman* analysis is fulfilled, as Appellant failed

to provide any evidence that the records he seeks were not compiled by law enforcement. Moreover, the second step is fulfilled as well. Appellee provided the district court with evidence that clearly delineated that the investigation was ongoing and that the FBI has asked the records to be sealed. Moreover, Appellee provided evidence the FBI, in conjunction with the Department of Justice, has an ongoing criminal investigation and the FBI has asked, "in order to ***maintain the integrity of the investigation***, and to ***avoid tainting witness testimony***" the records remain sealed. (RP 90). Finally, Appellant failed to provide any evidence to counter these undisputed facts, and solely argued to the Court based on the ***unsupported assertions*** of Google, and the KRQE website Plaintiff asks this Court to rely on (RP 105 – 107).

Absent clear precedent, New Mexico Courts have looked to other states when balancing the fundamental rights involved in a public records request of records pertaining to an ongoing criminal investigation. While there are numerous Federal cases and state cases on this issue, the Washington framework delineates a clear test to balance these considerations. When applied here, the District Court did not err when recognizing that the investigatory materials were exempt from disclosure.

C. The release of public records was reasonably limited to protect the rights of those accused of, but not charged with a crime.

Law enforcement records include those that "reveal...individuals accused but not charged with a crime." §14-2-1 (A)(4) N.M.S.A. 1978. Any policy of law that favors disclosure of records relating to the functions of government must yield when

it impinges upon right of a criminally accused to a fair trial. U.S.C.A.Const. Amend. 5. The New Mexico Constitution guarantees every defendant a fair trial by an impartial jury. N.M. Const. art. II, § 14 (as amended 1994) (guaranteeing "an impartial jury"); N.M. Const. art. II, § 18 (as amended 1972) (due process and equal protection). The defendant's right to a fair trial outweighs any statutory or common law right of pretrial access to public records. *Craemer v. Superior Court*, 265 Cal.App.2d at pp. 226–227.

The right to a fair trial in criminal proceedings is a right that is conferred upon defendants under the Sixth and Fourteenth Amendments of the Federal Constitution and article 2, section 7 of the New Mexico Constitution. "The failure to accord an accused a fair hearing violates even the minimal standards of due process. *Irvin v. Dowd*, 366 U.S. 717, 742 (1961). "To safeguard the due process of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. *Seattle Times Co. v. Serko,* 243 P.3d 919, 926 (Wash. 2010) (recognizing a public disclosure request for records pertaining to ongoing law enforcements is "analogous to a motion for a change of venue due to pretrial publicity").

A defendant's trial may be prejudiced "if a community is so saturated by a barrage of inflammatory and biased publicity, close to the beginning of legal proceedings, that the trial inevitably takes place in an atmosphere of intense public

passion..." *State v. House*, 1999-NMSC-014, ¶58, 127 N.M. 151. "Under such circumstances there is a reasonable probability that prospective jurors were exposed to the sensational publicity, as well as the emotional atmosphere in the community, and that many of them are strongly predisposed for or against one of the parties in the case." *House*, ¶58.

The media attention surrounding the death of Mr. Boyd is similar to the attention surrounding Gordon House's DWI trial in 1994. Briefly, House was accused of driving the wrong way on an Interstate highway in Bernalillo County on Christmas Eve, 1992. *House*, ¶4. An accident occurred and Mr. House killed three children and their mother. *House*, ¶6. New Mexico as a whole was outraged. *House*, ¶8. The media was filled with editorials, and strong public opinion regarding the deaths. *House*, ¶10. The public outrage was so great that the Supreme Court would subsequently opine, "[s]o frenetic was the media attention that the prosecution eventually claims that even the State was having difficulty received a fair adjudication of the case." *House*, ¶1. House's criminal proceedings drug out through three trials following two change of venues, first from Bernalillo County to Taos County, and then to Dona Ana County, where House's trial was broadcast on national television. *House*, ¶21. Eventually, House's conviction would be appealed to the New Mexico Supreme Court, which was asked to address the volatile interaction of media publicity and the right to a fair trial. *House*, ¶23. Including

the final ruling by the Supreme Court, New Mexico Appellate Courts addressed at least six petitions or appeals. *House*, ¶¶18 - 24.

In their opinion, the Supreme Court recognized that in "extreme cases, media coverage can so sensationalize a crime that legal proceedings will be transformed and the objective of a fair trial will be compromised." *House,* ¶57, citing *Sheppard v. Maxwell* 384 U.S. 333, 356-57. (1966) As it pertains to the Defendant's right to a fair trial, "[p]rejudice may be established if a community is so saturated by a barrage of inflammatory and biased publicity, close to the beginning of legal proceedings, that the trial inevitably takes place in an atmosphere of intense public passion." *House*, ¶58. The form in which the publicity is disseminated can also be a factor in determining whether prejudice can be presumed to have overrun a community. *House*, ¶¶18 - 24.

Further consideration should be given that *House* was a state case, while the FBI investigation was for civil rights violations, a distinction which would only serve to strengthen Appellee's position. Federal courts consider both actual and presumed prejudice, both concepts that could have jeopardized an eventual trial of the officers involved. (*See House,* ¶46, contrasting the concepts of both actual prejudice to the jury panel and presumed prejudice against an entire community).

Appellant contends "the public's right to know is at its paramount when a public official is suspected of criminal activity." (*See Brief in Chief* at p. 6). This

conflicts with the New Mexico Constitution, whereby it recognized that the accused's right to a fair trial must be protected. In fact, the Supreme Court has recognized that threats to "individual rights, whether of personal liberty or private property" surpass the public's right to know. *Newsome,* ¶29. Appellee believes that Appellant's demand for materials from the FBI's civil rights investigation poses that very threat. As the media frenzy surrounding the eventual release of the materials would show, there were countless threats to Officer Sandy's individual rights, arising from the potentially premature disclosure of these materials.

More troubling, however, is Appellant's belief that his right to evidence for leverage in his civil litigation against APD trumps a potential criminal defendant's right to a fair trial. As clearly demonstrated, once the requested records were obtained, they were immediately released to the media for wide publicity and outrage in the community. Certainly, in the event there had been a trial for civil rights violations. Officer Keith Sandy's right to a fair trial was compromised by any publicity associated with the release of investigatory records. This publicity would be the very sort of "inflammatory and biased publicity" that the Supreme Court warned of in *State v. House*. In *House*, a similar "barrage of publicity" resulted in seven long years of litigation. The law enforcement exception was crafted by the Legislature for this very reason, to protect the due process rights of those that are accused, but not charged with a crime.

D. Appellant failed to challenge the District Court's Order, permitting the withholding of the requested materials, as otherwise provided by law.

The New Mexico Public Records Act also provides for exceptions, "as otherwise provided for law." § 14-2-1 (A)(8) N.M.S.A. 1978. This statutory exception renders Appellant's arguments regarding the law enforcement exception as moot, when the Court recognized that Appellee's actions withholding the records was "consistent with the Court's ruling". [RP 199].

Appellant's Notice of Appeal challenges the District Court's Order dated December 11, 2014. In that Order, the District Court recognized that the materials were exempt from IPRA, subject to the law enforcement exception, enumerated at §14-2-1 (A)(4) N.M.S.A. 1978. The District Court ruled the documents were within the law enforcement exception because of the ongoing FBI investigation and were not subject to disclosure at that time. Upon the completion of the FBI investigation, these materials were no longer protected by the law enforcement exception recognized by the District Court, and, any exception as "otherwise provided by law" in the December 11, 2014 order lapsed. Once the exception expires, the materials requested were considered to be public records, subject to the requirements of IPRA. At that time, Appellee immediately produced all public records requested by Appellant.

The denial of a Motion for Summary Judgment is interlocutory in nature. (*See* Rule 1-056(C) NMRA). Arguably, if Appellant disagreed with the Court's

December 11, 2014 application of the law enforcement exception, there were other avenues of relief available. Appellant's proper recourse was to file a Motion to Reconsider, file an interlocutory appeal, or to appeal the Court's December 11, 2014 Order. In fact, Appellant did none of these. Rather, the December 11, 2014 ruling remains undisturbed, and the period for appeal has lapsed. (*See* Rule 12-201, NMRA).

The Court of Appeals need not address issues not particularly raised or argued in a party's brief in chief. *Kreischer v. Armijo*, 1994-NMCA-118, ¶10, 118 N.M. 671. The Court will not address issues made below, which were not briefed on appeal. *Gomez v. Bernalillo Cty. Clerk's Office,* 1994-NMCA-102, ¶15, 118 N.M. 449. As discussed above, Appellee's actions following the entry of the December 11, 2014 Order were recognized to be "consistent" with this Order. This finding from the District Court, in the subsequent Order currently being appealed, shows that Appellee was acting "as otherwise provided by law", another statutory provision to IPRA. Appellant fails to address or challenge this finding by the District Court. Appellant's failure to challenge that Appellee's actions were permitted as "otherwise provided by law" obviates their other arguments, and, by itself, provides a sound basis for the District Court's Order.

Appellant's requested relief should be problematic for this Court. In essence, Appellant's decision to appeal the September 9, 2015 Order threatens to upend the

entire IPRA statute. IPRA clearly provides the appropriate process for litigating IPRA claims. However, Appellant now asks this Court to rule that public agencies are not permitted to obey the findings of the Court, and, even if public agencies were to prevail in an IPRA action, they may still be required to produce materials, irrespective of any Court Order protecting their actions. Instead of predictability and guidance, Appellant asks this Court to create new law which would lead to murky and unpredictable results for public agencies attempting to be compliant with IPRA. This was not the intended process for IPRA litigation, and this Court should preserve the lower Court's ruling.

III. CONCLUSION

The New Mexico Legislature created clear statutory language, exempting certain law enforcement records from public disclosure. However, Appellant asks this Court to ignore the plain language of the exceptions to IPRA. Instead, Appellant relies on the unfortunate circumstances surrounding the Matthew Boyd shooting to ask this Court to create a special exception, far broader than the Legislature intended.

Appellant contends that public interest is paramount when investigating the wrongdoing of public officials. This hyperbole betrays the United States and New Mexico Constitution. In fact, the public interest is at its zenith protecting the accused, but uncharged, from being victimized by the premature disclosure of law enforcement records while an investigation is ongoing. Similarly, the apex of the

public interest demands potential witnesses are not improperly influenced by the sources, methods, or evidence gathered by investigators. It is clear that the legislature shared this view when drafting the Inspection of Public Records Act.

The New Mexico legislature specifically protected premature disclosure of certain investigatory materials. There is no exception for the investigation of public officials, and this Court should not create one. Similarly, there is no need for the Court to "err on the side of disclosure" when there is a clear, statutory exception, as applicable here. The Court should affirm the lower Court's Order, recognizing the statutory exception for certain investigatory materials.

Respectfully Submitted,

DOUGHTY, ALCARAZ & deGRAAUW, P.A.

By: _____

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ORAL ARGUMENT STATEMENT

Appellee believes that Oral Argument is not necessary because the issue before the Court is a straight-forward question of clear statutory interpretation.

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

I CERTIFY that this brief uses proportionally-spaced type style (Times New Roman), contains 6,689 words in the body of the brief as defined by Rule 12-213 (F)(1) NMRA, and complies with the type limitation set forth in 12-213 (F)(3) NMRA. The word count set forth was obtained from the word processing program Microsoft Word 2016.

Jeffrey M. Mitchell

CERTIFICATE OF DELIVERY TO COURT AND PARTIES

Pursuant to Rule 12-306(D), NMRA, I hereby certify that on this 13th day of July, 2016, the original and the requisite number of true and correct copies of the foregoing brief were hand-delivered to:

Clerk of the Court
New Mexico Court of Appeals
Albuquerque Satellite Office
2211 Tucker NE
Albuquerque, NM 87131
505-841-4618

Further, I hereby certify that on this 13th day of July, 2016, a true and correct copy of the foregoing brief was forwarded by e-mail and first class mail to the following counsel for the Plaintiff/Appellant.

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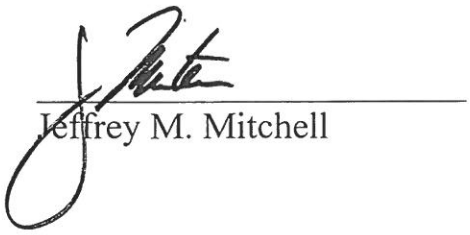

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