IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ANDREW JONES,

Plaintiff-Appellant,

v.

THE DEPARTMENT OF PUBLIC SAFETY
OF THE STATE OF NEW MEXICO,

Defendant-Appellee.

Appeal No. 35,120
District Court No. D-202-CV-2014-03426

APPELLANT'S REPLY BRIEF

Appeal from the Honorable Denise Barela-Shepherd, District Judge
(District Court Cause No. D-202-CV-2014-03426)
Bernalillo County, New Mexico

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

New Mexico Supreme Court Cases

Other State Cases

New Mexico State Statutes

Other State Statutes

INTRODUCTION

Defendant-Appellee, the New Mexico Department of Public Safety ("DPS"), repeatedly criticizes Andrew Jones ("Jones"), the Appellant, for seeking records in furtherance of litigation in Defendant-Appellee's Answer Brief ("Answer Brief"). This criticism is cruel. Jones was forced to litigate his claims to hold the City of Albuquerque ("city") and the city officers who killed his brother accountable. He would have preferred that the city have done so on its own accord. He would far prefer that his brother still be alive.

In officer involved shooting cases, the city's practice is to immediately proclaim the shooting justified and demonize the deceased in the press. [RP0153.] The city does this to escape both criminal and civil liability. Generally, this quick, one-sided trial results in a community-wide, not-guilty verdict for the shooting officers. The Albuquerque Police Department's ("APD") chief, Chief Gordon Eden ("Chief Eden"), miscalculated the public's response, however, when he attempted to do the same to avoid scrutiny of the killing of James Matthew Boyd ("Mr. Boyd")—a homeless, mentally ill, camper—by two APD officers in April of 2014.[1] Days following the incident, he disclosed the involved officers. He disclosed Mr. Boyd's identity. He disclosed the video capturing the shooting. He

[1] Officers from the New Mexico State Police Department were on scene, but they did not use any force against Mr. Boyd.

said it was justified. [RP0106.] He did this to protect the city and the officers. Soon thereafter, an unidentified officer told one of the APD officers who killed Mr. Boyd, Keith Sandy ("Sandy"), that a New Mexico State Police officer had recorded Sandy stating his intent to shoot Mr. Boyd, who he also called a lunatic, without having met Mr. Boyd or assessing the situation. [RP0172-0177.] Like Chief Eden, the unknown officer also sought to protect Sandy.

After the city revealed the details of the killing, the public disagreed with Chief Eden's assessment that the shooting was justified and demanded justice for Mr. Boyd. [RP0107, FN15.] Jones sought justice for his brother, too. In pursuit thereof, he retained counsel to investigate the shooting and file claims against the city if cognizable. [RP0008.] To that end, undersigned counsel sent a request for public records related to the shooting pursuant to New Mexico's Inspection of Public Records Act ("IPRA"), NMSA 1978 §§ 14-2-1 to –12 (1947, as amended through 2016), to the two involved agencies, APD and DPS. [RP0010-11 and RP0013.]

Both agencies initially refused disclosure, but APD disclosed the records soon after Jones filed the above-captioned case to enforce IPRA; DPS did not. [RP0016.] Though the details of the shooting had already been made public and disclosure of the records did not "reveal" confidential sources, information, or persons accused of, but not charged with, a crime, DPS claimed it was prohibited

from releasing the records because the United States Federal Bureau of Investigation ("FBI") and the Department of Justice's Civil Rights Division ("DOJ") had requested the agencies not release records to the extent permitted by state law while it determined whether the officers had violated federal, civil rights laws. [RP0090.] The FBI also asked DPS to maintain the confidentiality of any materials related to the officers killing Mr. Boyd. [RP0130.] Insistent on withholding every document directly related to the shooting, DPS did not attempt to produce documents with redaction or explain in a privilege log why all of the documents were not public records under IPRA. Ultimately, DPS produced the records when the district court ordered the agency to either do so or file a privilege log if the FBI had not concluded its investigation by January of 2015. [RP0126.] DPS produced the records even though a state criminal investigation of the officers was ongoing. See Answer Brief at 1. DPS has never offered explanation of what, if any, information had not been revealed to the public or the suspect officers prior to the disclosure.

There are two questions before the Court, and DPS did not provide sufficient response to either in its answer. First, can DPS withhold documents pursuant to the law enforcement exception to IPRA, Section 14-2-1(A)(4), when disclosure would not "reveal" either the person suspected of, but not yet charged with, a crime or additional information? Instead of responding to this question, DPS reads

"reveal" out of the statute, ignores the facts of this case, and relies on purported public policy to support its withholding of public records. This is inadequate. DPS must demonstrate to the Court how disclosure would have revealed either a person suspected of a crime or information that would have been unknown to the accused, who, in this case, are two APD officers who shot and killed a homeless camper while on duty. Given the facts—that this case involves public actors, performing public duties; the identities of the officers were already known to the public because Chief Eden had released the video of the killing and proclaimed the shooting justified; another officer had already revealed critical details to Sandy; and, the accused were well aware of the evidence and witnesses in the case—there simply is no cause to prevent the public (or the family of the deceased) from discerning whether the officers acted lawfully when they killed Mr. Boyd and whether the government was taking necessary steps to investigate the case. In fact, without release, there was little chance that the officers would ever be held accountable for their actions.

Second, DPS must demonstrate how the FBI's request to withhold documents consistent with state law overrides New Mexico's clear preference for disclosure of public records. This question is particularly pertinent because, as DPS acknowledges, a state, criminal investigation of the officers continued after the FBI indicated it had concluded its investigation. Still, DPS released the records

following word that the FBI had done so and narrows its concern to ongoing investigations of civil rights violations and not the criminal investigation of the officers, generally. Thus, DPS's claims that it withheld the public records for any reason other than the FBI's request fall flat. And, instead of addressing the legitimate, federalism question at issue, DPS points only to the general justifications it provided for withholding and a statute that requires cooperation between local law enforcement and federal authorities.

DPS also attempts to distract from these questions, alleging that there is procedural barrier to Jones's appeal and the issues addressed in his opening brief are not properly before the Court. This argument also fails. Below, Jones responds first to the procedural question before turning to the substantive questions.

I. The district court's final order encompasses its determination that the records Jones sought were protected by IPRA's law enforcement exception.

DPS claims that there are procedural issues in this case preventing the Court from determining whether the subject records were properly withheld pursuant to Section 14-2-1(A)(4) and/or the FBI's request. However, those questions are properly before the Court. Undersigned counsel requested public records from DPS related to the killing of Mr. Boyd on behalf of Jones. DPS refused to disclose documents in its possession, citing the law enforcement exception, Section 14-2-

1(A)(4). Jones, Mr. Boyd's brother, filed a complaint to enforce IPRA and for related attorney's fees on May 16, 2014. [RP0001.] In September of 2014, Jones filed a motion for summary judgment. [RP0059.] In December of 2014, the district court denied that motion, finding both that there were disputes of material fact and that the law enforcement exception to IPRA protected the requested documents from disclosure. [RP0126-127.] In addition, the court ordered DPS to produce a privilege log if the FBI had not completed its investigation by January 15, 2015; and, at that time, Jones could challenge any asserted privilege. [Id.] Prior to that date, DPS produced the documents. [RP0131.]

Because the December order was not a final order, DPS filed its own motion for summary judgment on April 15, 2015. [RP0129-0137.] In that briefing, DPS argued that the records were exempt from disclosure during the FBI's investigation of civil rights violations under IPRA's law enforcement exception. [RP0134-0136.] The district court granted DPS summary judgment, finding that DPS had properly withheld the materials because the materials were protected by the law enforcement exception and the court's December ruling finding the same. [RP0199-0200.] The court also refused to award fees accrued before its December ruling and after because the subject records were not public pursuant to the law enforcement exception and its December order. [RP02000.] Thus, the district court's December ruling is necessarily incorporated into April's, and the question

of whether the withheld documents are public record or not under IPRA is squarely before this Court.

Still, DPS insists that Jones should have appealed the district court's initial denial of summary judgment in December of 2014 and points to the word "interlocutory" in NMRA 1-056 in support of its argument. See Answer Brief at 26, 27. This language does not require Jones to have appealed the December order. In fact, it means just the opposite. Interlocutory orders "leave something remaining to be decided or done by the court entering the order and to proceed further therewith" and are "those which only settle some intervening matter relating to the suit." Otto-Johnson Mercantile Co. v. Garcia, 1918-NMSC-050, ¶ 3, 24 N.M. 356, 174 P. 422, 422. In this instance, the district court's order was, indeed, interlocutory. The district court found there were material disputes of fact, without defining those disputes, and also ordered DPS to provide Jones a privilege log if DPS continued to withhold the requested records. In order for Jones to appeal the district court's December 2014 order as a matter of right, that order would have to have been final and disposed of all the issues in the case. See, e.g. B.L. Goldberg & Associates, Inc. v. Uptown, Inc., 1985-NMSC-084, 103 N.M. 277, 278, 705 P.2d 683, 684 ("For purposes of appeal, an order or judgment is not considered final unless all issues of law and fact have been determined and the case disposed of by the trial court to the fullest extent possible."). There were

plainly ongoing issues, including the question of fees addressed in the district court's second order.

Thus, the district court's determination that Jones was not entitled to attorney's fees either before or after its December order is necessarily dependent on whether the district court's determination that the law enforcement exception to IPRA permitted DPS's withholding in this case is correct. And, the rules of civil and appellate procedure do not require Jones to have appealed the district court's interlocutory, December order. Consequentially, this Court can and should reach the merits of Jones's appeal.

II. The plain Language of IPRA required DPS to disclose the documents Jones requested and public policy and the FBI's request to withhold records in accord with state law does not somehow change that language.

DPS withheld the requested records pursuant to the law enforcement exception to IPRA—Section 14-2-1(A)(4)—and because the FBI asked it to do so. See Answer Brief, at 11. DPS asks this Court to "restrict [its] analysis to whether disclosure under IPRA may be withheld because of a specific exception contained within IPRA" in accord with Republican Party of New Mexico v. New Mexico Taxation and Revenue Dep't, 2012-NMSC-026, ¶ 16, 283 P.3d 853; see Answer Brief, at 10. Jones agrees. Notwithstanding, DPS then goes on to ignore the plain language of IPRA and seeks an interpretation based in alleged public policy and an out-of-jurisdiction case interpreting very different statutory language.

A. The plain language of Section 14-2-1(A)(4) permits withholding of only those law enforcement records that reveal confidential information.

Section 14-2-1(A)(4) provides: "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." And, "[w]hen a statute's plain language is clear and unambiguous, [the Court] must give effect to that language and refrain from further statutory interpretation." San Juan Agr. Water Users Ass'n v. KNME-TV, 2011-NMSC-011, ¶ 17, 150 N.M. 64, 257 P.3d 884, 888. In other words, the Court should not look to public policy unless a statute is ambiguous. See Chatterjee v. King, 2012-NMSC-019, 280 P.3d 283, 287 (internal citations omitted) ("When a statute is ambiguous, this may include an assessment of how its construction implicates public policy."). By its own terms, IPRA only protects records that reveal confidential sources, methods, information or individuals accused but not charged with a crime.

While demanding that Jones acknowledge IPRA's clear language, DPS continually ignores the terms "reveal" and "confidential" as they appear in the law enforcement exception in its briefing and requests that this Court exempt all investigatory materials that identify witnesses and those suspected of, but not charged with, a crime. See, e.g., Answer Brief at 4. ("IPRA provides that

investigatory materials pertaining to those 'accused, but not charged' with a crime are exempt from disclosure."); See Answer Brief at 12 ("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."); and, Answer Brief at 14 ("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.") In reading "reveal" and "confidential" out of the law enforcement exception, DPS argues for broad power to withhold records when those records name those accused of a crime, whether that information is already known to the public or not.

DPS relies on Estate of Romero ex rel. Romero v. City of Santa Fe, 2006-NMSC-028, 139 N.M. 671, 137 P.3d 611, in support of its broad reading. However, Romero in fact supports Jones's argument. In that case, parents of a missing child sought investigative materials related to their missing son from the City of Santa Fe in the course of civil discovery. Id. at ¶ 1. The investigation into their son's disappearance was ongoing and unsolved. The City of Santa Fe argued that the materials were privileged pursuant to the "law enforcement privilege." Id. at ¶ 2. The New Mexico Supreme Court found that there was no such privilege,

but looked to Section 14-2-1(A)(4) as a reflection of New Mexico public policy to define the scope of discovery to which the parents would be entitled. Id. at ¶¶ 13, 17, and 18. In acknowledgement of the language of Section 14-2-1(A)(4), the Court narrowed its focus to those records that disclosed confidential materials. See, e.g., id. at ¶¶ 10, 15. Indeed, the Romero city defendants had "presented testimony describing an investigatory report containing identities of confidential informants, confidential investigative methods, information about individuals accused but not charged with a crime, and information only the perpetrator would know." Id. at ¶ 15.

In contrast, DPS has not directed this Court or the district court to any records that would have revealed any confidential information related to the killing of Mr. Boyd. Though subject to an ongoing investigation, the shooting officers in this case knew the identity of the witnesses to the shooting. In addition, to further its interests, the city took to the airwaves immediately, disclosing the identities of the officers and Mr. Boyd and releasing the only video capturing the shooting. Chief Eden proclaimed the shooting justified. And, shortly thereafter, an unknown officer disclosed to Sandy, one of the shooting officers, that a New Mexico State Police Department officer had recorded Sandy stating that he intended to shoot Mr. Boyd prior to encountering him and calling Mr. Boyd a lunatic.

Whereas, the anonymous citizen who may have been the focus of investigation in Romero did not know there was an investigation into alleged criminal activity. They may not have known the witnesses and evidence against them. And, significantly, there was information in the file that only the perpetrator would have known. Clearly, to disclose the information sought in Romero would harm both the investigation and any person who had been investigated, but not charged. Public knowledge of an unproven allegation against a citizen could also destroy that citizen's life. But, as in the instant case, an officer who has killed on the job knows they are the subject of an investigation; so does the public. And, again, DPS has not pointed to any information in the investigatory files of which the shooting officers were not aware.

Given Section 14-2-1(A)(4)'s plain terms and DPS's failure to demonstrate how the sought records would have jeopardized the investigation by revealing any confidential materials, Jones should prevail in this appeal. But DPS persists, in essence arguing that this Court find IPRA's terms ambiguous and, therefore, consult public policy to interpret its terms. This attempt also fails.

B. Public policy does not support withholding the records in this case.

Because the plain language of IPRA does not support its argument, DPS turns to public policy to justify withholding records, contending that any information relating to an ongoing investigation should be protected and the

shooting officers' right to a fair trial would be impacted by disclosure. The Court should not consider public policy in interpreting Section 14-2-1(A)(4) because its terms and application in this case are clear. See, e.g., San Juan Agr. Water Users Ass'n, 2011-NMSC-011, ¶ 17. But if the Court reaches this question, public policy and New Mexico case law favor Jones, not DPS.

1. Public policy does not support a blanket law enforcement exception to IPRA.

DPS first directs this Court to an out-of-jurisdiction case to justify a blanket exception to records that relate to an ongoing investigation. In Newman v. King Cty., 133 Wash. 2d 565, 571, 947 P.2d 712, 715 (1997), the Supreme Court of Washington State held that its public records act provided a blanket exemption to any materials related to an ongoing, criminal investigation. The Newman case is not instructive for two reasons. The language of Washington's public record statute is very different from New Mexico's. And, despite that very different language, Newman has since been narrowed, not expanded as DPS claims. See Answer Brief at 20 ("Later holdings would extend this application…")

The Washington public records statute at issue in Newman excludes from disclosure: "Specific 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." RCW 42.17.310(1)(d). Whereas the New Mexico Legislature elected to only exclude from disclosure those records "that reveal confidential sources, methods, information or individuals accused but not charged with a crime." NMSA 1978 § 14-2-1(A)(4). The difference in the language of the two statutes is self-evident. New Mexico defined the records that may impede investigation by law enforcement and are therefore exempted from disclosure; Washington did not.

But even in the face of that much broader language, Newman's

> all-or-nothing approach was later limited in Cowles Publishing Co. v Spokane Police Department, 139 Wash.2d 472, 477-78, 987 P.2d 620 (1999), in which a newspaper requested information related to a crime which an individual had been arrested and the matter referred to the prosecutor for a charging decision. Because the matter was before the prosecutor for a charging decision, the risk of inadvertently disclosing sensitive information that might impede apprehension of the perpetrator no longer exists...and any potential danger to effective law enforcement [did not] warrant *categorical* nondisclosure of all records in the police investigative file.

Seattle Times Co v. Serko, 170 Wash. 2d 581, 593–94 (2010), citing Cowles, 139 Wash.2d 472, 477-78 (internal quotations omitted). Under this narrowed approach, "application of [the law enforcement] exemption requires a record-by-record analysis, with the requested records subject to an in camera review by the court." Serko, 170 Wash. 2d 581.

Here, the FBI was acting as a charging agency in coordination with the DOJ as DPS awaited a determination of whether the FBI would charge the officers.

Thus, Cowles's rationale is more applicable than Newman's. Further, DPS has never offered record-by-record justification for nondisclosure in this case and released the records before it was ordered to provide a privilege log. Therefore, the out-of-jurisdiction case upon which DPS relies does not, in fact, further its argument and is suggestive that IPRA's law enforcement exception does not protect the documents in the instant case.

2. Public policy does not protect disclosure of public records to prevent strong, public opinion regarding officer involved shootings.

DPS also expresses concern that the public's interest in the killing of Mr. Boyd justifies non-disclosure because disclosure would have implicated the officers' right to a fair trial. However, the sincerity of this concern is very much at issue. It is unclear why DPS retained the records in the face of federal investigation of the shooting officers, but not the ongoing state investigation and subsequent prosecution. Notwithstanding, DPS points, primarily, to two cases in support of this argument: Serko, 170 Wash. 2d 581, and State v. House, 1999-NMSC-014, 127 N.M. 151.

In Serko, 170 Wash. 2d 581, 585, 596, however, the court rejected the argument that disclosure of public records related to a criminal case involving the killing of four police officers would unduly implicate the criminal defendant's

right to a fair trial. Instead, given the importance of public discourse the court stated,

> as this court observed in a case involving a challenge to a trial courts considering suppression of publicity should also inquire as to the availability of alternatives to the suppression of publicity, including more searching voir dire, clear and emphatic cautionary instructions, a change of venue, continuance of the trial date, and sequestration of the jury.

Id. The court also found that,

> a trial court that orders the withholding of public records based on protecting a fair trial right must find with particularity that it is more probable than not that unfairness or prejudice will result from the pretrial disclosure, and must consider alternatives to withholding the records. In applying this standard, a defendant's constitutional right to a fair trial does not compel categorical nondisclosure of police investigative records.

Id. In this case, the trial court made no such finding.

In the House case, the second case upon which DPS relies, the defendant was accused of vehicular homicide as a result of a car accident that killed three young children and their mother on Christmas Eve. House, 1999-NMSC-014, ¶ 3. There was feverish media surrounding the case, and both the defendant and the state moved for changes of venue at different times. Id. at ¶ 2. The House Court addressed whether it was an abuse of discretion for the trial judge to have changed the venue of House's criminal trial from Taos, NM to Dona Ana County, NM following two mistrials in Taos. Id. at ¶ 25. But, it is unclear how the court's determination of venue in House applies to this case.

If the House facts and resulting law are at all relevant, this Court should instead look to Twohig v. Blackmer, 1996-NMSC-023, ¶ 1, 121 N.M. 746, 747, 918 P.2d 332, for statement of public policy. In that case, despite the frenzied media involving the same incident, the Court held a universal gag order on the lawyers unconstitutional without finding of facts demonstrating the ban was necessary to meet a clear and present danger of infringing House's and the State's right to a fair trial. Id. Thus, the right to speech (and, arguably, the right to public records) does not easily yield when public discourse is at stake. This should be especially true when the discourse involves a serious government act.

Here, officers summarily killed a citizen while on duty, and the city immediately sought to sway public opinion and protect the shooting officers from scrutiny. Chief Eden proclaimed the shooting justified and demonized Mr. Boyd, hoping for a trial by media. No one forced Chief Eden to do this. That the trial by media did not go as planned is not Jones's fault, but it was fortunate. The officers' may never have had to answer for their actions if the chief had held the investigation and his hasty determination that the shooting was justified in confidence.

IPRA does not and should not protect against strong, public opinion. Indeed, open records exist to facilitate public awareness regarding government acts. The New Mexico Supreme Court has recognized that "[o]ur democratic

system of government necessarily assumes the existence of an informed citizenry.... Without some protection for the acquisition of information about the operation of public institutions ... the process of self-governance contemplated by the Framers would be stripped of its substance. To give practical effect to this principle, our Legislature enacted [IPRA]." Republican Party of New Mexico, 2012-NMSC-026, paragraph 1 (internal citations and quotations omitted). To give meaningful effect to IPRA, public policy does not support a blanket exception for investigatory, law enforcement records.

C. The DOJ and FBI's request to withhold records consistent with state law should not overcome the plain language of IPRA.

Though the district court relied on the law enforcement exception to withhold the requested records and DPS focuses on this question in its brief, the FBI's request, alone, appears to have controlled DPS's nondisclosure. When DPS finally produced the records, there was still an ongoing, state investigation.

As well-addressed in Jones's opening brief, the federal government cannot force the state to violate its own laws. The federal standard for government secrecy is substantially different than the state standard. However, IPRA, not the FBI and not federal law, governs disclosure of public records in New Mexico. And a blanket, unsubstantiated contention that the records may interfere with the investigation is not enough to justify withholding under IPRA. DPS has not provided any explanation to Jones, the district court, or this Court as to how the

investigation would have been impeded by disclosure. DPS has not because it cannot. The target officers knew the evidence and witnesses against them.

There is no greater use of power than an officer killing a citizen. And when an officer does so, there is no more important occasion for informed, public discourse. Our legislature enacted IPRA to ensure just that.

CONCLUSION

For the foregoing reasons, we respectfully request this Court reverse the district court's decision.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Jones requests oral argument in this case.

Respectfully submitted,

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RULE 12-213(F) NMRA STATEMENT OF COMPLIANCE

As required by Rule 12-213(F)(2) NMRA, I hereby certify that this brief is a total of 21 pages. As required by Rule 12-213(F)(3) NMRA, I hereby certify that the body of this brief contains 4,390 words and was prepared using a proportionally spaced type style or typeface, Times New Roman. In reaching this total, I relied upon my word-processing program WORD Version 13.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served by U.S. First Class mail on this 16th day of August, 2016 to:

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