IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

CHARLES COX,

Plaintiff / Appellant,

Ct. App No. 28658
Appeal from the First Judicial District Court
Santa Fe County
Judge James A. Hall
No. D-101-CV-2006-1415

v.

THE NEW MEXICO DEPARTMENT OF PUBLIC SAFETY, JOHN DENKO, in his individual capacity and in his official capacity as Secretary of the New Mexico Department of Public Safety; CARLOS MALDONADO, in his individual capacity and in his official capacity as Deputy Secretary of the New Mexico Department of Public Safety; MARK ROWLEY, in his individual capacity and in his official capacity as Deputy Director, Motor Transportation Division; and LAWRENCE HALL, individually and PETER OLSON, in his capacity as Communications Director of the New Mexico Department of Public Safety.

Defendants/Appellees.

APPELLANT'S BRIEF IN CHIEF

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Nature of the Case

This is a direct appeal from the Judgment of the First Judicial District Court (the Honorable James A. Hall) granting summary judgment to the appellees on the appellant's claims under the New Mexico Inspection of Public Records Act ("IPRA").

Course of Proceedings

In April of 2006, the appellant mailed a request to inspect public records to the Department of Public Safety ("DPS") Motor Transportation Division's ("MTD") Custodian of Records asking to inspect and to copy complaints filed against an MTD patrolman, as well as DPS' responses to the complaints. RP000298. DPS (through appellee Olson) denied the request on the grounds that all of the information sought was "matters of opinion" and "privileged." RP000299.

The appellant then modified his request to include only copies of citizen complaints regarding the conduct of the same patrolman. RP0003001, RP000541-542. DPS denied the modified request on the same grounds although the appellant no longer sought materials related to DPS' response to the complaints. RP000302.

The appellant subsequently filed a civil rights lawsuit in the First Judicial District Court on issues arising out of his termination from DPS. RP000001. He

included a count brought under the IPRA challenging the appellees' refusal to provide him with copies of citizen complaints regarding the on-duty conduct of a DPS patrolman. RP 000009-RP000010.

The appellees removed the entire case to federal court. RP 000051. After discovery, they filed a motion for summary judgment on all of the appellant's claims. RP000115-RP000157, esp. RP000154-RP000157. The appellant filed a motion for partial summary judgment with respect to his IPRA claims only. RP000538- RP000559.

In his motion for summary judgment, the appellant argued that the IPRA grants every citizen a fundamental right to inspect public records unless the records fall squarely within one of the enumerated exceptions to the IPRA. RP000552. He contended that the appellees' refusal to allow him to inspect copies of citizen complaints regarding the on-duty conduct of a DPS patrolman denied him his right to inquire whether the people he has entrusted with the affairs of government are honestly, faithfully and competently performing their function as public servants. RP000553 . He argued that the citizen complaints at issue are not personnel matters, are not included in the patrolman's personnel files, are not "matters of opinion in personnel files," and fall within no exception to the disclosure requirements of the IPRA. RP000553-RP000557.

The appellees responded that DPS considers citizen complaints regarding employee misconduct to be personnel materials, that the subject matter of such complaints are personnel matters and that the complaints the appellant sought to inspect contain the citizens' opinions about the patrolman. ***Response to Plaintiff's Motion for Summary Judgment*** at pp. 3-4 and Exhibits 3-10 thereto.[1]

In reply, the appellant pointed out that only some citizen and employee complaints regarding officer misconduct are placed in an employee's personnel file or referred to internal affairs for investigation, and that none of the complaints he requested were contained in the officer's personnel file. RP000562, RP000572-RP000580; RP000568-569. He argued that a records custodian cannot insulate public records from disclosure by placing them into an officer's personnel or internal affairs file or by giving them a particular label. RP000563-RP000565.

The appellees also sought summary judgment on the appellant's IPRA claims, contending that citizen complaints are "personnel matters" relating to infractions and potential disciplinary actions and are thus the "types of documents" exempt from disclosure under New Mexico case law. RP000155-RP000156. In response, the appellant again pointed out that the possibility that a

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[1] Appellees' Response to Plaintiff's Motion for Summary Judgment and all exhibits thereto are sealed and are not included in the Record Proper, but are available for review by this Court.

complaint might lead to an internal affairs inquiry or disciplinary action cannot transform it into a personnel record within the meaning of the IPRA. RP000316; RP000350-RP000351. The appellees replied that the citizen complaints are "personnel materials" containing information about the patrolman's job performance and the citizens' opinions about his job performance. RP000356.

The federal court granted summary judgment to the appellees on the claims related to the appellant's termination, but remanded the IPRA claims to state court. RP 000072.

The district court reviewed the briefs and the exhibits thereto and heard oral argument on the cross-motions for summary judgment on the IPRA claims. RP 000113; RP000586. At oral argument, the appellant made the arguments summarized above and additionally argued that the New Mexico constitution requires that DPS' requested expansion of an exception to the IPRA be enacted by the Legislature, and not by the judiciary. TR 10.

The district court granted summary judgment for the appellees. RP000591-RP000592. In so ruling, the court found that there were no material facts in dispute (TR 19) and that the issue before the court was one of statutory construction in which it was required to determine whether the Legislature

intended that these types of complaints fell "within the protection of the act and not be disclosed." TR 19-20.

The court reasoned that this decision was required by the New Mexico Supreme Court's decision in *State ex rel. Newsome v. Alarid,* 90 N.M. 790, 797, 568 P.2d 1236, 1243 (1977), and that *Newsome* compelled a finding that the citizen complaints fell within the exception to the IPRA barring disclosure of matters of opinion contained within personnel files. It said:

> . . . clearly, citizen complaints, although they may contain underlying factual information, represent opinions that would fit within the parameters of documents concerning infractions and disciplinary actions, opinions that might have no foundation in fact, but if released to public view could be seriously damaging to an employee. To some extent they implicate personnel evaluations. The Supreme Court notes letters of reference. This is slightly different from that, but I think the purpose behind the Supreme Court's decision, really, is the same as it relates to citizen complaints.

TR 21-22.

Issue Presented

Whether the district court erred when it ruled that the IPRA does not require the disclosure of citizen complaints regarding the on-duty conduct of a law enforcement officer.

The appellant preserved this issue in his motion for summary judgment and reply to the appellees's response thereto, in his response to the appellees' motion

for summary judgment and in oral argument on the cross-motions for summary judgment.

ARGUMENT

I. APPLICABLE STANDARD OF REVIEW.

An appeal from the grant of a motion for summary judgment presents a question of law and is reviewed *de novo*. *Stennis v. City of Santa Fe*, 176 P.3d 309, 313 (N.M.2008); *Cain v. Champion Window Co. of Albuquerque, LLC,* 142 N.M. 209, 213, 164 P.3d 90, 94 (N.M.App. 2007); *Self v. United Parcel Serv., Inc.*, 126 N.M. 396, 970 P.2d 582 (1998).

II. THE DISTRICT COURT ERRED WHEN IT RULED THAT THE IPRA PROTECTS CITIZEN COMPLAINTS REGARDING THE ON-DUTY CONDUCT OF A PATROLMAN FROM PUBLIC INSPECTION.

A. Introduction

This appeal presents an issue of great importance to the citizens of New Mexico. The question before this Court is whether the exception to the broad disclosure requirements of the Inspection of Public Records Act (IPRA), §§ 14-2-1 to 12 (1947, as amended through 2005)("IPRA") exempting letters or memorandums that are matters of opinion in personnel files allows a state agency to withhold citizen complaints about the on-duty misconduct of a state law

enforcement officer, depriving citizens of the right to review the conduct of these public servants.

In ruling that these public records are exempt from disclosure, the district court erroneously extended the holding in *Newsome* to bar the disclosure of the very type of records that the IPRA mandates be open to public inspection.

Citizen complaints do not fall within any exception to the IPRA. The public records the district court allowed the appellees to conceal do not pertain to disciplinary action and are not contained in an employee's personnel file. These citizen complaints pertain to a patrolman's relationship with the public he is required to serve, rather than to his relationship with his employer. The IPRA requires disclosure.

B. Access to Public Records Is a Fundamental Right.

It has long been recognized that the First Amendment embodies a "common core purpose of assuring freedom of communication on matters relating to the functioning of government . .." *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980) (plurality opinion). The New Mexico Legislature codified this purpose in the IPRA, declaring that the citizens' right to inspect the conduct of public officials through open access to public records is the public policy of this state:

> Recognizing that a representative government is dependent upon an informed electorate, the intent of the legislature in enacting the Inspection of Public Records

> Act is to ensure, and 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. It is the further intent of the legislature, and it is declared to be the public policy of this state, that to provide persons with such information is an essential function of a representative government and an integral part of the routine duties of public officers and employees.

NMSA 1978, § 14-2-5 (1993). In accord with this policy, the IPRA gives public records a broad definition. *Gordon v. Sandoval County Assessor*, 130 N.M. 573, 576, 28 P.3d 1114, 1117 (Ct.App. 2001).

The IPRA mandates that, with few exceptions, every "citizen has a fundamental right to have access to public records." *State ex rel. Newsome v. Alarid,* 90 N.M. 790, 797, 568 P.2d 1236, 1243 (1977), noting that "[t]he citizen's right to know is the rule and secrecy is the exception."

The exceptions to the full disclosure requirements are very narrowly construed:

> . . . when an exception to IPRA is invoked, each inquiry starts with the presumption that public policy favors the right of inspection. To overcome this presumption, a public entity seeking to withhold public records bears the burden of proving why their disclosure would be prejudicial to the public interest.

Board of Commissioners of Dona Ana County v. Las Cruces Sun News, 134 N.M. 283, 76 P.3d 36, 2003-NMCA-102, *quoting Newsome* 90 N.M. 790 at 796, 798, 568 P.2d at 1242, 1244.

A custodian's decision to deny access to records that do not clearly fall within an exception to the IPRA thwarts the core purpose of the IPRA:

> . . to provide access to public information and thereby encourage accountability in public officials and employees. Public business is the public's business. People have a right to know that the people they entrust with the affairs of government are honestly, faithfully and competently performing their function as public servants.

134 NM at 292, 76 P.3d at 45, quoting *Newsome,* 90 N.M. at 795, 568 P.2d at 1241. It is not the purpose of the IPRA to provide "protection" or justification for withholding any public documents. The intent of the legislature was to codify all persons' fundamental right to review public documents and to provide a mechanism for enforcing that right. The courts are directed to start with the presumption that all public documents are open to inspection and to construe the exceptions to disclosure very narrowly – not to stretch those exceptions to provide "protection" for documents a court thinks might be damaging if released.

The appellees' refusal to provide the appellant with copies of citizen complaints regarding the on-duty conduct of a DPS patrolman was counter to the legislature's express language and its intent and denied the appellant his

fundamental right to inquire whether people he has entrusted with the affairs of government are honestly, faithfully and competently performing their function as public servants. The trial court's decision to uphold the refusal to allow inspection of documents not expressly excepted from disclosure was likewise counter to the express language and purpose of the IPRA.

C. Citizen Complaints Are Not Within the Scope of the Holding in *Newsome.*

§14-2-1 (A)(3) excepts "letters or memorandums that are matters of opinion in *personnel files* or students' cumulative files" from the full disclosure requirements of the IPRA (emphasis added). Construing this provision, the *Newsome* court held that "letters of reference, documents concerning infractions and disciplinary action, personnel evaluations, opinions as to whether a person would be re-hired or as to why an applicant was not hired, and other matters of opinion" in a university's personnel records are exempt from disclosure. 90 N.M. at 794, 568 P.2d at 1240. No New Mexico case, including *Newsome,* has expanded this exception to include documents that set forth complaints of persons not connected to a state employee's employment regarding the employee's conduct towards members of the public he is required to serve.

None of the complaints at issue in this matter were placed in the patrolman's personnel file, nor were they the basis for disciplinary proceedings.

No New Mexico case has expanded the exception on which DPS based its denial to include such materials. The district court's ruling was not controlled by case law. Rather, it was a sharp departure from precedent.

As the New Mexico Supreme Court has explained, the two New Mexico cases on which the appellees based their refusal to produce the citizen complaints addressed only personnel documents contained in personnel files and directly related to the employee's relationship with his state employer:

> In *State ex rel. Barber v. McCotter,* for example, we held that Section 14-2-1(C)[2] (excepting from public inspection "letters or memorandums which are matters of opinion in ***personnel files***") protected from public inspection the ***personnel files*** of five former public employees who had been terminated for disciplinary reasons. . . . We reasoned that the privilege belonged to the terminated employees and that their own privacy would be compromised if the files were opened to the public. . . *see also Newsome,* 90 N.M. at 794, 568 P.2d at 1240 (recognizing that Legislature anticipated release of certain information from ***personnel file*** could seriously damage employee).

City of Las Cruces v. Public Employee Labor Relations Bd. 121 N.M. 688, 691, 917 P.2d 451, 454 (N.M.1996) (emphasis added), citing *State ex rel. Barber v. McCotter* 106 N.M. 1, 1-2, 738 P.2d 119, 119-20 (N.M.,1987) and *Newsome,* 90 N.M. at 794, 568 P.2d at 1240

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[2] This exception is now codified in § 14-2-1(A)(3).

In contrast, the appellant did not seek the release of materials from the patrolman's personnel file, and explicitly modified his original request to exclude materials that might pertain to any disciplinary action or that might otherwise address the patrolman's employment relationship with DPS. *Newsome* and its progeny are inapplicable to a request for information pertaining to a patrolman's relationship not with his employer, but with the public he is sworn to serve.

Unlike the documents in question in *Newsome*, the citizen complaints at issue in this matter are not "letters or memorandums," are not "in personnel files,"and do not pertain directly to a public employee's relationship with his or her employer. The citizen complaints sought by the appellant pertain instead to a public servant's actions in carrying out the duties entrusted to that public servant, exactly the types of documents the legislature intended should be open to public scrutiny. *Newsome,* 90 N.M. at 795, 568 P.2d at 1241. The district court erred when it stretched *Newsome* beyond recognition to rule that these documents should be hidden from the public.

It should also be noted that although the IPRA does not contain a definition of personnel matters, a parallel statute does set forth a definition. In the Open Meetings Act, the legislature explained that "personnel matters" pertain only to an employee's relationship with his or her employer:

> . . . for purposes of this act, "personnel matters" means the discussion of hiring, promotion, demotion, dismissal, assignment or resignation of or the investigation or consideration of complaints or charges against any individual public employee . .. .

NMSA 1978, §10-15-1(E)(2), quoted in *Kleinberg v. Albuquerque Pub. Sch.*, 107 N.M. 38, 42, 751 P.2d 722, 726 (Ct. App. 1988) (noting that the purpose of that Act "is to open the conduct of the business of government to the scrutiny of the public. . .") (citing *Gutierrez v. City of Albuquerque,* 96 N.M. 398, 400, 631 P.2d 304, 306 (1981)).

The purpose of the IPRA is the same, providing no basis for a conclusion that "personnel matters" are far more inclusive under that statute. Although an agency's consideration of citizen complaints about an employee may be personnel matters, the complaints themselves are not.

D. Citizen Complaints are not Exempt from Disclosure Because a Public Agency Considers Them to be "Personnel Matters."

The appellees argued that "[c]itizen complaints about Baker's job performance are personnel matters and led to internal affairs inquiries for *possible* disciplinary actions and infractions." RP 000155 (emphasis added). It was not disputed that far from all citizen complaints against a DPS officer lead to either internal affairs investigations or agency disciplinary actions. RP 000572-579 (although complaints lead to administrative inquiries, only serious allegations lead

to internal affairs investigations: complaints do not necessarily lead to disciplinary action).

The complaints the appellant requested did not lead to disciplinary action. The mere possibility that a citizen complaint might lead to disciplinary action is entirely insufficient to transform such a complaint into "letters or memorandums which are matters of opinion in personnel files." A public agency cannot shield a citizen's complaint about an officer's conduct from public inspection by calling it "privileged" and burying it in file containing privileged information.

As a general principle, this rule is very well established See, *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) ("Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had").

Courts that have faced this issue have squarely held that a police department may not withhold citizen complaints regarding an officer's conduct by means of a label. See, e.g., *Worcester Telegram and Gazette Corporation v. Chief of Police of Worcester*, 58 Mass.App.Ct. 1, 787 N.E.2d 602 (2003) (holding that records in the possession of a police department regarding a citizen's complaint of police brutality were not "personnel records" exempt from disclosure under the Massachusetts Public Records Law regardless of where they were held or what the agency called them).

Furthermore, even if some of the complaints the appellant sought had led to disciplinary action, the IPRA directs the custodian to separate privileged and non-privileged documents and to produce those that do not fall within a clear exception to the IPRA. See, NMSA 1978, § 14-2-9 (A) (" Requested public records containing information that is exempt and nonexempt from disclosure shall be separated by the custodian prior to inspection, and the nonexempt information shall be made available for inspection"). A custodian may not simply refuse to allow inspection where a citizen's request seeks both exempt and non-exempt documents but must allow inspection of the information not exempt under the IPRA. *Newsome*, 90 N.M. at 797, 568 P.2d at 1243. If some of the complaints had led to disciplinary action, it was DPS' duty under the IPRA to separate any disciplinary action documents that might have been premised on the complaints (such as notices of proposed and final action and the like) and to produce the complaints themselves. The IPRA does not permit the agency to withhold all citizen complaints because it is possible that a few might lead to disciplinary action.

E. Courts Reject Claims That Citizen Complaints Regarding Law Enforcement Officers Are Personnel Materials That Should Be Shielded from Public Inspection.

As in New Mexico, legislatures across the country have recognized that democracy only works when government is transparent such that citizens may monitor the conduct of their elected officials and their public servants. Claims that

a public agency may evade disclosure by calling citizen complaints exempt have been repeatedly rejected across the nation because such evasion thwarts the purpose of public records laws.

For example, in *The Rake v. Gorodetsky*, 452 A.2d 1144 (RI 1982), the Rhode Island Supreme Court refused to allow the police department to conceal citizen complaints because:

> . . . this court does not consider the reports to be personnel records simply because the police department regards them as such or because the personnel bureau conducts and arranges the hearings. If the court allowed the above factors to be determinative of whether or not the reports are personnel records, the purpose of the statute could easily be circumvented. A governmental agency could label all of its records personnel records, leaving nothing accessible to the public. Clearly this is not a result hoped for by those who drafted the legislation.

452 A.2d at 1147-48, holding that police department reports concerning civilian complaints of police brutality were not exempt from disclosure under the Rhode Island Access to Public Records Act pursuant to the personnel records exception or the investigatory records exception of that Act. See, also, *Palmer v. Diggers*, 60 S.W.3d 591,599 (KY App. 2001) (denying a police officer's request that citizen complaints regarding his on-duty misconduct not be provided to the press because the complaint presented a matter of public interest and reasoning that "[a]t the time of the complaint, Palmer was an Owensboro police officer, who was sworn to

protect the public. The complaint charged specific acts of misconduct by Palmer while he was on duty. . .").

Under the New Mexico IPRA, complaints regarding the on-duty misconduct of police officers do not become disciplinary actions of the agency or "matters of opinion in personnel files" even if they are deposited in such files. NMSA 1978 § 14-2-1(A)(3). By excepting "letters or memorandums that are matters of opinion in personnel files," the legislature made it clear that it was excepting only documents that pertain directly to an employee's suitability for employment with the agency such as "letters of reference, documents concerning infractions and disciplinary action, personnel evaluations, opinions as to whether a person would be re-hired or as to why an applicant was not hired . ." *Newsome,* 90 N.M. at 794, 568 P.2d at 1240. If the Legislature had wanted also to except documents pertaining to an employee's relationship with the public he is sworn to serve, it would have done so. Instead, the IPRA mandates disclosure of this type of information.

The trial court's decision to allow DPS to conceal such complaints deprives New Mexico citizens of "the greatest possible information regarding the affairs of government and the official acts of public officers and employees" in derogation of the letter, spirit and intent of the IPRA. NMSA 1978, § 14-2-5. Complaints regarding misconduct of on-duty police officers are indisputably of great interest to

the public, and allow the public to monitor the official acts of public employees. The possibility that they might also affect the officer's relationship with his state employer does not render complaints about an officer's misconduct a secret to be concealed from the public.

Likewise, citizen complaints describing specific acts of misconduct by a patrolman are not transformed into "matters of opinion in personnel files" because the citizen states that, for example, the patrolman was "rude and arrogant" when he grabbed the citizen or forced him to disrobe. See, e.g., appellees' exhibits 8 and 10 to their Response to the appellant's Motion for Partial Summary Judgment. The public is entitled to know about such conduct by a public official, and the IPRA makes this very clear.

III. A NEW EXCEPTION TO THE IPRA MUST BE ENACTED BY THE LEGISLATURE AND NOT THE COURTS.

A. Only the Legislature May Make Substantive Law.

In ruling that citizen complaints regarding the on-duty conduct of a DPS patrolman are subject to "protection" from public inspection under the IPRA, the district court nonetheless acknowledged that these are not in fact personnel materials and are different from the letters of reference in personnel files the *Newsome* court found to be exempt from disclosure, stating that "[t]o some extent

[the complaints] implicate personnel evaluations. The Supreme Court notes letters of reference. This is slightly different from that . . ". TR 21-22.

By its plain terms, the IPRA specifically requires that excepted documents actually be "letters or memorandums that are matters of opinion in personnel files." § 14-2-1 (A)(3). DPS' argument that the IPRA excepts citizen complaints about the conduct of state employees is essentially an argument for the creation of a new exception to the IPRA, a legislative act beyond the constitutional powers of the judiciary.

The New Mexico Constitution provides, in pertinent part, that:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others . . .

NM Const. Art. 3, § 1.

Our system of government rests on this separation of powers. "This provision articulates one of the cornerstones of democratic government: that the accumulation of too much power within one branch poses a threat to liberty." *State ex rel. Taylor v. Johnson,* 125 N.M. 343, 349, 961 P.2d 768, 774 (N.M.1998), citing *Gregory v. Ashcroft,* 501 U.S. 452, 458-59 (1991); *The Federalist* No. 47, at 332 (James Madison) (M. Walter Dunne 1901) (discussing Montesquieu). Within

this system, "only the legislative branch is constitutionally established to create substantive law." 125 N.M. at 349, 961 P.2d at 774, citing *State ex rel. Sofeico v. Heffernan,* 41 N.M. 219, 230-31, 67 P.2d 240, 246 (1936) (only the Legislature constitutionally "can create substantive law"); *State v. Armstrong,* 31 N.M. 220, 255, 243 P. 333, 347 (1924) (the Legislature possesses the sole power of creating law). See, also, V*aros v. Union Oil Co. of California*, 101 N.M. 713, 715, 688 P.2d 31, 33 (N.M.App.,1984) (" It is the province of the legislature to make changes in the provisions of statute law") (citing *Sanchez v. Bernalillo County,* 57 N.M. 217, 257 P.2d 909 (1953)).

The creation of a new exception to the IPRA is the creation of substantive law and is within the exclusive province of the legislature. Only the Legislature can determine that the disclosure requirements of IPRA do not apply to complaints by citizens that pertain directly to the patrolman's relationship with the public but only indirectly (and only possibly) to his relationship with his employer, and that may (or may not) lead to disciplinary action by the creation or re-writing of an exception to the disclosure requirements of the IPRA.

B. The Courts May Not Read Language Into a Statute that is Not There.

Even if a court believes that it would be appropriate or proper or good policy to interpret a statute in a way that expands its provisions, the courts "are not

permitted to read into a statute language which is not there . . " *State ex rel. Barela v. New Mexico State Bd. of Ed.* 80 N.M. 220, 222, 453 P.2d 583, 585 (N.M. 1969), declining to extend the plain language of a statute regarding the consolidation of school districts "with no small amount of regret" and noting that it could not expand the scope of the statute even where for years prior to the consolidation it found was not permitted by the statute, "there has been a clear legislative policy to encourage and foster consolidations." 80 N.M. at 223, 453 P.2d at 586. The *Barela* court understood that it is constitutionally impermissible to rewrite a statute even where to do so would further clear public policy. This principle is underscored here, where judicially rewriting the IPRA to allow an agency to hide its workings from public view is counter to the IPRA's express policy of transparency.

Over and over again, the New Mexico appellate courts have ruled that only the Legislature, and not the courts, may expand a statute – even where policy reasons in favor of expansion seem compelling. See, *Burroughs v. Board of County Com'rs of Bernalillo County,* 88 N.M. 303, 306, 540 P.2d 233, 236 (N.M. 1975) (reiterating that "the court will not read into a statute or ordinance language which is not there . . "); *State v. Gardner*, 112 N.M. 280, 282, 814 P.2d 458, 460 (N.M.App.,1991) ("[w]here the state seeks to broaden the application of the statute beyond the plain wording of the act, the appropriate remedy, however, involves

legislative therapy and not judicial surgery") (internal citations omitted); *Duran v. Xerox Corp.*, 105 N.M. 277, 280, 731 P.2d 973, 976 (N.M.App.1987) ("This court should not add language to statutes that the legislature has seen fit to omit.") (citations omitted); *State v. Frawley*, 172 P.3d 144, 155 (N.M.2007), *quoting United States v. Nat'l Treasury Employees Union,* 513 U.S. 454, 479 & n. 26 (1995) (recognizing that courts have an "obligation to avoid judicial legislation" and therefore "refus [ing] to rewrite the statute" at issue in the case).

C. The Decision to Make Policy is For the Legislature.

The district court ruled that even though citizen complaints regarding the on-duty conduct of a DPS patrolman are not really personnel materials subject to the exception pertaining to matters of opinion in personnel files, they should be "protected" from public disclosure because they represent "opinions that might have no foundation in fact, but if released from [sic] public view could be seriously damaging to an employee." TR 21. The ruling was essentially a policy decision that the citizens' right "to know that the people they entrust with the affairs of government are honestly, faithfully and competently performing their function as public servants" is outweighed by the patrolman's right to be free from the possible damage of an unfounded opinion. *Board of Com'rs of Dona Ana County,* 134 N.M. at 292, 76 P.3d at 45 (quoting *Newsome,* 90 N.M. at 795, 568 P.2d at 1241)).

This is not the policy decision made by the legislature, which has instead mandated that transparency in government and the citizens' right to know is the public policy of the state. "As we have recognized, it is the particular domain of the legislature, as the voice of the people, to make public policy." *Cockrell v. Board of Regents of New Mexico State University*, 132 N.M. 156, 163, 45 P.3d 876, 883 (N.M.,2002), quoting *Torres v. State,* 119 N.M. 609, 612, 894 P.2d 386, 389 (1995) (noting that "[t]he judiciary ... is not as directly and politically responsible to the people as are the legislative and executive branches of government").

The courts of other jurisdictions agree that the decision to expand the exceptions to their public records acts to include documents law enforcement agencies would rather not disclose can only be made by the state's legislature. See, *Bolm v. Custodian of Records of Tucson Police Dept.*, 193 Ariz. 35, 40, 969 P.2d 200, 205 (Ariz.App.1998) ("If the City believes that certain law enforcement agency records should not be open to public inspection, a remedy must be sought with the legislature") (citing *City of Grand Forks v. Grand Forks Herald, Inc.*, 307 N.W.2d 572, 578 (N.D.1981) ("If the City and Knutson believe that municipal personnel records are not open to public inspection, a remedy must be sought with the Legislature); *Lewiston Daily Sun v. City of Lewiston*, 596 A.2d 619, 622 (Me.1991) ("It is the function of the legislature, and not of the courts, to resolve the conflict that exists between the public interest in open access to governmental

records, on the one hand, and the public interest in protecting the integrity of criminal investigations and in preventing unfair prejudice to public employees, on the other.").

Moreover, the ruling provides citizen complaints about a patrolman submitted to DPS with more "protection" than citizen complaints about a patrolman filed in state or federal court. Not only are opinions that may have no basis in fact and might be seriously damaging to a patrolman a matter of public record if contained in a complaint filed in a judicial proceeding, but such opinions are absolutely privileged, even if they have no foundation in fact. See, *Superior Const., Inc. v. Linnerooth*, 103 N.M. 716, 719, 712 P.2d 1378, 1381 (N.M.1986) ("If the defamatory matter is revealed during the course of the judicial proceeding, and it is relevant or material to the subject of inquiry, then no action of defamation will lie-regardless of how false or malicious the defamatory statement might be") (citing *Penny v. Sherman,* 101 N.M. 517, 519-520, 684 P.2d 1182, 1184 - 1185 (N.M.App. 1984) and the *Restatement of Torts* § 586 (1977)).

Shielding citizen complaints about the conduct of a public employee vis a vis the public is squarely counter to the IPRA's express purpose "to ensure . . . . that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees." NMSA 1978, § 14-2-5 (1993). "The IPRA unquestionably sets a policy of citizen entitlement to

access to public records." *Crutchfield v. New Mexico Dept. of Taxation and Revenue,* 137 N.M. 26, 32, 106 P.3d 1273, 1279 (N.M.App.2004), citing § 14-2-5; *State ex rel. Newsome v. Alarid;* and *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 597 (1978). Withholding documents because of speculative concerns that disclosure might have a negative impact is impermissible, and "overlooks the core purposes of IPRA to provide access to public information and thereby encourage accountability in public officials and employees. " *Board of Com'rs of Dona Ana County,* 134 N.M. at 292, 76 P.3d at 45.

In short, the decision that a patrolman's interest in avoiding the dissemination of perhaps erroneous opinions made by the public outweighs the public's right to know how he carries out his obligations to the public was a policy decision based on speculation, was counter to the core purpose of the IPRA and violated constitutional limitations on the power of the judiciary.

CONCLUSION

The IPRA expressly recognizes that democracy requires an informed electorate, emphasizing that its purpose is to ensure that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees. It declares transparency in government to be the public policy of New Mexico, and that "[p]ublic business is the public's business." *Newsome,* 90 N.M. at 795, 568 P.2d at 1241. Under the

IPRA, all persons are entitled to request and receive copies of all public documents unless the document falls squarely within one of the act's exceptions. The exceptions are narrowly construed , and any request starts with a presumption of disclosure.

The appellees' refusal to provide the appellant with copies of citizen complaints regarding the on-duty conduct of a DPS patrolman was counter to the IPRA's express language and purpose, and denied the appellant his fundamental right to inquire whether people he has entrusted with the affairs of government are honestly, faithfully and competently performing their function as public servants. The district court erred when it upheld DPS' denial of the appellant's request to inspect citizen complaints and justified the denial by creating a new or expanded exception to the IPRA in violation of the constitutional requirement of separation of powers and a long line of New Mexico cases prohibiting judicial legislation.

For the foregoing reasons, the grant of summary judgment to the appellees must be reversed, and an order entered directing that the appellant's motion for partial summary judgment should be granted. The appellant is entitled to an order permanently enjoining the appellees from refusing to release citizen complaints regarding the conduct of DPS officers. The appellant should be awarded his costs and attorneys fees incurred in connection with this matter together with statutory penalties.

Respectfully submitted by:

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I hereby certify that a true and correct copy of the foregoing was mailed to Mark Komer, counsel for appellees, this 9th day of March, 2009.

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