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 REPLY BRIEF

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ARGUMENT

1. Introduction

This appeal presents one issue: whether the IPRA's exception for "letters or memorandums that are matters of opinion in personnel files" should be construed expansively to include complaints citizens file with the Department of Public Safety ("DPS") about the on-duty conduct of its officers.

The appellees argue that such complaints should be considered "personnel materials" because they may lead to disciplinary action and could affect the officer's relationship with his public employer. They urge that the IPRA's strong policy 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 is not material to this issue and should not be considered.

Their argument ignores both the applicable principles of statutory construction and the dual roles of the DPS officer, who is simultaneously an employee, with a duty to act in accord with his employer's rules and expectations, and a public servant, with a duty to conduct himself in a manner that justifies the confidence of the public. Citizen complaints relate primarily to the officer's duty to the public, and DPS' refusal to disclose the complaints requires the public to rely solely on the representations of public officials that they have acted appropriately,

counter to the intent and purpose of the IPRA. The IPRA mandates their disclosure

2. Citizen Complaints are not Personnel Materials

Realizing that the public policy codified in the IPRA will not help them, the appellees contend – albeit somewhat equivocally – that citizen complaints about the on-duty conduct of a police officer are not just similar to personnel records, they are, or "appear to be," personnel records because they pertain to a public employee's relationship with his employer. Answer Brief at p. 10. To so find would "render the statute's application absurd or unreasonable and [would] defeat the object of the Legislature. *State ex rel. Newsome v. Alarid,* 90 N.M.790, 794, 568 P.2d 1236, 1240 (NM 1977). A citizen's complaint about the on duty conduct of a DPS officer is far more than an opinion as to whether the officer is complying with the employing agency's rules and standards.

A DPS officer is simultaneously an employee, with a duty to his employer to comply with the employer's reasonable expectations, and a public servant who owes a duty to the public he serves to ethically discharge the responsibilities of public service and to maintain the integrity of his office:

> Legislators, public officers and employees shall conduct themselves in a manner that justifies the confidence placed in them by the people, at all times maintaining the integrity and discharging ethically the high responsibilities of public service.

§ 10-16-3 N. M. S. A. 1978.

A public officer/employee owes a statutory duty to "the people," as well as to his or her employer. Members of the public have a right to expect DPS officers to conduct themselves in a manner that justifies the confidence placed in them and a right to know if they are not doing so. The IPRA provides a mechanism for exercising these rights.

The public's right to know requires a meaningful ability to review the conduct of public officers. An agency's insistence on concealing citizen complaints that a public officer/employee is not conducting himself in a manner that justifies the confidence placed in him by the people defeats the purpose of the statute, requiring citizens to rely solely on the representations of the agency. This is contrary to New Mexico's policy of open government, as this Court recently emphasized. ". . . New Mexico's policy of open government is intended to protect the public from having to rely solely on the representations of public officials that they have acted appropriately." *City of Farmington v. The Daily Times*, 210 P.3d 246 (N.M. Ct. App. 2009), citing NMSA 1978 § 14-2-5 and *City of Las Cruces v. Public Employee Labor Relations Bd.*, 121 N.M. 688, 691, 917 P.2d 451, 454 (NM 1996).

The appellant does not dispute that the public employee/officer also owes a

duty to his or her employer to act in accord with the employer's legitimate interests, and the employer is entitled to take corrective action if s/he does not[1]

However, the officer's duty to his employer can not negate his simultaneous duty to the public. In many circumstances, a public employee may be disciplined for conduct that also forms the basis of a citizen complaint. This does not make a complaint which addresses the officer/employee's relationship with the public exclusively or even primarily a personnel matter. Such complaints are not "personnel matters" because they arise in the context of the other side of the public servant's dual role and directly concern his relationship to the public.

Moreover, as the appellant has previously argued, the fact that it is possible that a complaint may lead to some sort of disciplinary action does not justify sequestering all complaints. See, RP 000155, where appellees argue that "[c]itizen complaints about Baker's job performance are personnel matters and led to internal affairs inquiries for *possible* disciplinary actions and infractions[2]." (Emphasis

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[1] See, NM ADC 1.7.11.8 (1) (A): "The primary purpose of discipline is to correct performance or behavior that is below acceptable standards, or contrary to the employer's legitimate interests, in a constructive manner that promotes employee responsibility."

[2] Appellees submit no evidence that any of the complaints the appellant sought in the IPRA requests before this Court led to disciplinary action.

added). As this Court has repeatedly ruled, speculative arguments are insufficient to overcome the public's interest in disclosure. *City of Farmington*, citing *Board of Com'rs of Dona Ana County v. Las Cruces Sun-News,* 134 N.M. 283, 76 P.3d 36 (NM Ct. App. 2003)..

Oddly, despite their concern about "red herrings," the appellees argue throughout their Answer Brief that complaints of any kind about any person are simply not public records.[3] Answer Brief at pp. 11, 15-16, relying on *Spadaro v. University of New Mexico Bd. of Regents*, 107 N.M. 402, 403, 759 P.2d 189, 190 (N.M.1988). Spadaro was a non-employee who had advertised with the University of New Mexico and whose advertising was canceled because of student complaints against him.

Applying an earlier version of the IPRA, the New Mexico Supreme Court agreed that student complaints against a non-employee were not documents that UNM was required to maintain and that it could not hold that they were public records because, at that time, the IPRA did not define "public records." It urged "that a definition of 'public records' for the purposes of the New Mexico Inspection of Public Records Act would be helpful to the courts in deciding what records

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[3] This argument was not raised below.

should be disclosed, but it is for the legislature to provide the definition." 107 N.M. at 404, 759 P.2d at 191.

The legislature subsequently did so, and it is now beyond dispute that the complaints the appellant sought herein are public records for purposes of the IPRA. See, N. M. S. A. 1978, § 14-2-6(E):

> "public records" means all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained.

Compare, Answer Brief at p. 16, arguing that the legislature has "nowhere" mandated that documents become public records when received by an agency.

3. The Appellees Misstate the Nature of the Documents at Issue.

Throughout their answer brief, the appellees repeatedly state or imply that the documents the appellant sought included materials relating to DPS' investigation or consideration of the complaints and/or its response to the citizen complaints. See, Answer Brief at pp 2, 3, 12. As the appellant has repeatedly pointed out (e.g., BIC at pp. 5, 16) although the appellants' first request sought DPS' responses to the complaints (RP000298), he then modified his request to include ***only*** copies of the

citizen complaints regarding the conduct of the same patrolman.[4] RP000301, RP000541-542. Compare, Answer Brief at p. 6. Documents pertaining to any DPS investigation or other response to the complaints are not at issue in this appeal. The issue before Judge Hall and this Court concerns only the citizen complaints themselves.

The appellees' erroneous assertion that a request for documents relating to DPS' investigation or consideration of the citizen complaints is at issue in this appeal forms the basis for its argument that the definition of personnel matters set forth in the Open Meetings Act, NMSA 1978, §10-15-1(E)(2) is inapplicable to this appeal. Answer Brief at p. 12.

The only documents the appellant sought – citizen complaints – would be excluded from "personnel matters" for purposes of that Act. Only "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 . . ." are considered personnel matters. All of these matters pertain

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[4] Appellees argue that there is "no evidence" that they received the appellant's amended response dated May 3, 2006. Not only does the amended response itself bear a stamp indicating receipt by the agency (RP 000547), but appellees sent the appellant a form letter on May 11, 2006 acknowledging receipt. RP 000545-546.

primarily to the public employee's relationship with his employer.

The definition does not include the complaints or charges being investigated or considered because, like the IPRA, the purpose of the Open Meetings Act "is to open the conduct of the business of government to the scrutiny of the public. . ." *Kleinberg v. Albuquerque Pub. Sch.*, 107 N.M. 38, 42, 751 P.2d 722, 726 (Ct. App. 1988), citing *Gutierrez v. City of Albuquerque,* 96 N.M. 398, 400, 631 P.2d 304, 306 (1981).

In light of that purpose, the legislature decided that only the agency's investigation and consideration of complaints against an employee are personnel matters, and it did not include the complaints in the definition. It is incongruous to suggest that the definition of "personnel matters" is entirely different and far broader under the IPRA.

4. Citizen Complaints are not Letters or Memorandums that are Matters of Opinion in Personnel Files

Excerpting select comments from what are otherwise primarily descriptive factual complaints about Officer Baker's conduct,[5] the appellees argue that "the authors' versions of events, though stated factually, may very well be a matter of

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[5] See, Exhibits 3-10 to Sealed Document.

opinion or impression . . . " Answer Brief at p. 14, citing *Newsome*, 90 NM at 794, 568 P.2d at 1240. Again, this argument relies on speculation.

Citizen complaints simply do not fit within the category of documents the *Newsome* court held are exempt from disclosure: "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. 90 N.M. at 794, 568 P.2d at 1240. Such documents all pertain to an employee's relationship with his public employer and his or her performance as an employee .

It may well be a personnel matter for a former employer to opine that an applicant for state employment did his job well or failed to meet expectations. It is not a personnel matter for a citizen to complain that a DPS officer forced a suspect to disrobe in public (Exhibit 10 to Sealed Document) or grabbed a person from behind (Exhibit 8 to Sealed Document) and the like. These complaints, whether "garden variety" (Answer Brief at p. 7) or not, are matters that relate to a public servant's discharge of his duties to the public.

5. Privacy Concerns do Not Outweigh the Public's Interest in Government Transparency

Despite their earlier argument that policy concerns are "tangential or immaterial to the present appeal" (Answer Brief at p. 8), the appellants ask this Court to weigh the privacy interests of the DPS officer and the citizens who file the complaints. See, Answer Brief at pp. 14-17, arguing that both the public employee and the citizen authors of the complaints have privacy interests that disclosure would infringe. They did not raise this issue below.

The appellees' concerns that citizens may want their complaints "to remain confidential for privacy reasons" (Answer Briefs at p. 15) is entirely speculative and devoid of any foundation in the record. A review of the complaints attached to the Sealed Document indicates that it is far more likely that these citizens want their complaints to be publicly disclosed and shared. At any rate, any speculative interest in privacy the citizens may have is outweighed by the public's stronger interest in government transparency.

Indeed, "motions to compel the disclosure of citizen complaints against police officers named in federal civil rights litigation have been consistently granted by our federal courts." *Scaife v. Boenne* 191 F.R.D. 590, 595 (N.D.Ind. 2000), citing *Soto v. City of Concord,* 162 F.R.D. 603 (N.D.Cal. 1995); *King v. Conde,* 121 F.R.D. 180

(E.D.N.Y.1988); *Scouler v. Craig,* 116 F.R.D. 494 (D.N.J.1987). Ruling on a request that the court compel production of citizen complaints lodged against police officers named as defendants in a civil rights action, one court concluded:

> A request for citizen complaints against police officers must be evaluated against the backdrop of the strong public interest in uncovering civil rights violations and enhancing public confidence in the justice system through disclosure. Accordingly, this Court finds that neither the defendant-officers' privacy interests nor the citizen complainant's privacy interests outweigh the need for disclosure of the requested records of complaints lodged against Defendants.

Soto v. City of Concord, 162 F.R.D. at 621.

Allowing the release of citizen complaints filed against defendant officers, another court reasoned that ["t]he privacy interest in this kind of professional record is not substantial, because it is not the kind of 'highly personal' information warranting constitutional safeguard . .. " *King v. Conde,* 121 F.R.D. 180, 191 (E.D.N.Y.,1988), citing *Whalen v. Roe,* 429 U.S. 589, 598-600, 97 S.Ct. 869, 875-76, 51 L.Ed.2d 64 (1977); *Barry v. City of New York,* 712 F.2d 1554, 1562 (2d Cir.), *cert. denied,* 464 U.S. 1017, 104 S.Ct. 548, 78 L.Ed.2d 723 (1983); *Nixon v. Administrator of General Services,* 433 U.S. 425, 457, 97 S.Ct. 2777, 2797, 53 L.Ed.2d 867 (1977) (public official's privacy interest is in "matters of personal life unrelated to any acts done by them in their public capacity").

Neither the officer's nor the citizens' privacy interests outweigh the strong interest in government transparency codified in the IPRA.

6. The Purpose of the IPRA is Central to the Issue on Appeal

Perhaps the most puzzling assertion in the Answer Brief is the appellees' complaint that the appellant and Amicus inappropriately "repetitively assert" policy reasons for disclosure and discuss "tangential" and "immaterial" "broad subjects" they call "red herrings." Answer Brief at p. 8, implying that the purpose of the IPRA is not pertinent to this Court's analysis. They ask that this Court assume, as they do, that the citizen complaints at issue in this appeal are unambiguously "letters or memorandums that are matters of opinion in personnel files" and unquestionably exempt from disclosure under §14-2-1 (A)(3), a ruling that was not made below. They argue that statutory construction is not necessary because the complaints "plainly *appear to be* personnel materials." Answer Brief at p. 10 (emphasis added).

Despite the appellees' urging that he do so, Judge Hall did not find that the citizen complaints at issue are plainly personnel materials. Instead, he found that the issue before him was one of statutory construction in which he was required to determine whether the Legislature intended that "these types of citizen complaints"

fall "within the protection of the act and not be disclosed." TR 19-20. He observed that the complaints only "implicate" personnel evaluations and are "different from" letters of reference. Id. He concluded, however, that he was required to hold that the complaints should not be disclosed because "the purpose behind the Supreme Court's decision, really, is the same as it relates to citizen complaints." TR at 21-22, citing *State ex rel. Newsome v. Alarid.*

The purpose of the IPRA is not tangential or immaterial to this inquiry, nor is it a "red herring." It is central:

> A statute should be interpreted to mean what the Legislature intended it to mean, and to accomplish the ends sought to be accomplished by it.. The entire statute is to be read as a whole so that each provision may be considered in its relation to every other part. A construction must be given which will not render the statute's application absurd or unreasonable and which will not defeat the object of the Legislature.

Newsome, 90 N.M. at 794, 568 P.2d at 1240, citing *Burroughs v. Board of County Comm'ners*, 88 N.M. 303, 540 P.2d 233 (1975); *Winston v. New Mexico State Police Bd.*, 80 N.M. 310, 454 P.2d 967 (1969); *State v. Nance*, 77 N.M. 39, 419 P.2d 242 (1966), cert. denied, 386 U.S. 1039 (1967).

This Court very recently reaffirmed these principles in a case that required it to determine whether the City of Farmington could refuse to disclose documents that did not fit within one of the exceptions stated in the IPRA under the "rule of

reason."[6] See, *City of Farmington v. The Daily Times*, reiterating that "[i]n interpreting statutes, we seek to ascertain legislative intent . . ." It emphasized that the legislature's intent and purpose in enacting the IPRA was 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." Id. at 2, quoting NMSA 1978 § 14-2-5. A court reviewing the denial of a request for public records must consider this purpose and intent.

Whether deciding whether a particular document fits into a statutory exception or is subject to the rule of reason, "it is still the responsibility of our courts to give effect to the strong public policy favoring access to public records." Id., quoting *City of Las Cruces v. Pub. Employee Labor Relations Bd.,* 121 N.M. at, 691, 917 P.2d at 451. To do so, the courts must "begin each inquiry with the presumption that public policy favors the right of inspection." Id, quoting *Bd. of Comm'rs of Doña Ana County v. Las Cruces Sun-News (Doña Ana).*

These principles are not tangential and they are not "red herrings." They are core principles that a court must apply where, as here, it is required to determine whether a particular document or category of documents fits within an exception to

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[6] This question as it might apply to the citizen complaints at issue herein was not raised below and is not before this Court.

the broad disclosure requirements of the IPRA such that citizens may be denied the right of inspection.

7. The Appellant's Reason for his IPRA Request is Immaterial

The appellees acknowledge that the parties agreed that the only matter at issue herein is a question of law regarding whether an exemption in the IPRA is applicable to the citizen complaints the appellant requested (Answer Brief at pp. 4-5). Nonetheless, they devote a significant portion of their brief to a recitation of factual contentions that are both distorted and immaterial to the issue on appeal.

For example, at pp. 1 through 2, they speculate as to the reason the appellant requested the documents, presumably for the purpose of reciting DPS' justification for his termination and painting the appellant in a highly unfavorable light. DPS' purported justification was hotly contested in federal court (e.g., RP at 000316-330), although Judge Parker declined to act as a super personnel department and to second-guess DPS' business decisions. Memorandum Opinion and Order in Civ. No. 06-656 JP/CG filed on July 23, 2007 at p. 16, quoting *Santana v. City and County of Denver*, 488 F.3d 860 (10th Cir. 2007). The appellees' allegations were never conclusively established.

DPS' assertion that "Cox unsuccessfully challenged his termination with the

New Mexico State Personnel Board" is likewise misleading. The appellant's appeal to the SPB was dismissed because his appeal from his termination was misdirected due to a clerical error and was not timely received by the SPB. It was not decided on the merits. RP 000124, 000167. In effect, there was no challenge to the SPB.

The appellant's reason for his public records request is immaterial. See, NMSA § 14-2-8 (C) ("No person requesting records shall be required to state the reason for inspecting the records"). The appellees' gratuitous recitation of the allegations on which they based the appellant's termination serves no legitimate purpose in this appeal and appears to have been done for the purpose of humiliating and embarrassing the appellant in the event this Court's decision is published.

8. Conclusion

The IPRA declares transparency in government to be the public policy of New Mexico. Under the IPRA, it is the responsibility of our courts to give effect to the strong public policy favoring access to public records. The citizen's right to know is the rule, and secrecy is the exception.

Accordingly, the exceptions to the IPRA are narrowly construed and any request starts with a presumption of disclosure. Nonetheless, the appellees urge an

unprecedented expansion of the exception for letters or memorandums that are matters of opinion in personnel files to include citizen complaints regarding the on-duty conduct of a DPS patrolman on the grounds that these "appear to be" personnel materials, pertaining only to the patrolman's relationship with his employer, and seek a ruling that the public may not review such complaints .

This argument ignores that the patrolman's role as a public servant, with a duty to conduct himself in a manner that justifies the confidence of the public. Citizen complaints provide the public with an opportunity to review the officer's performance of his duty to the public, and a refusal to disclose the complaints requires the public to rely solely on the representations of public officials that they have acted appropriately, counter to the intent and purpose of the IPRA. The IPRA mandates their disclosure

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 30 day of June, 2009.

_____

Cindi L. Pearlman