

STATE OF NEW MEXICO  
COUNTY OF BERNALILLO  
SECOND JUDICIAL DISTRICT COURT

DOUGLAS FINCHER,

Plaintiff,

v.

BOARD OF REGENTS OF THE UNIVERSITY  
OF NEW MEXICO,

DAVID J. SCHMIDLY,  
President of the University of New Mexico,

ANNE MURRAY,  
Associate University Counsel,  
Custodian of Public Records,  
University of New Mexico,

JOHN DOE 1,  
Office of the University Counsel,  
University of New Mexico,

Defendants.

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**CIVIL ACTION FOR DEPRIVATION OF CIVIL AND CONSTITUTIONAL RIGHTS,**  
**FOR PRODUCTION OF PUBLIC RECORDS, FOR MANDAMUS, DAMAGES,**  
**AND FOR DECLARATORY AND INJUNCTIVE RELIEF**

## **NATURE OF THE CASE**

1. Plaintiff brings action pursuant to the New Mexico Inspection of Public Records Act, NMSA 1978, § 14-2-1 et. seq. (1947, as amended through 2009) (“IPRA”) to compel the production of records and information created and controlled by the University of New Mexico (“UNM”), for declaratory and injunctive relief, and statutory penalties arising from the Defendant’s willful refusal to produce records and information.
2. Plaintiff brings further action through 42 USC § 1983 for declaratory relief, damages, punitive damages, and injunctive relief for the adverse consequences upon the Plaintiff’s Civil and Constitutional Rights arising from the Defendant’s willful refusal to produce records and information.
3. This complaint arises from the rejection of the Plaintiff’s application for admissions to the Master of Public Health Program at the University of New Mexico. Investigating the merit of that rejection and possible founding of a legal complaint, the Plaintiff submitted two requests under the IPRA to the Office of the University Custodian of Public Records. The requests sought policies, procedures, and de-identified artifacts of admissions processing. The Defendants largely denied the actionable content of those IPRA requests.
4. The Plaintiff alleges that the Defendants willfully denied, without comment, disclosure of documents and records that describe and direct its policies and procedures governing admissions processing at UNM, and requirements for document retention related to or arising from that process. Further, the Defendants, through incorrectly citing the IPRA, the Family Educational Rights and Privacy Act of 1974 (“FERPA”), and

unidentified University Policy, willfully refused to disclose de-identified applicant pool information reflecting Affirmative Action class characteristics of ethnicity and gender, age, and citizenship status. Plaintiff holds more concerns that some essential records and information related to those requests have been destroyed. Plaintiff asserts that all information denied is subject to disclosure under the IPRA, and is so claimed in Counts One and Two of this complaint.

5. The information requested and denied is essential to, and of obvious content for usage in, complaints of admissions discrimination. Specific to the Plaintiff, such complaints may be declared as violations of the Equal Protection clause of the 14<sup>th</sup> Amendment, Title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] (“Title VI”), Title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.] (“Title IX”), and the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.] (“ADA-75”). The New Mexico Human Rights Act [specifically NMSA 1978 § 28-1-7(F)] (“NMHRA”) may apply.
6. Through the denial of that information the Plaintiff, having suspicions about the merit of the admissions rejection, is effectively prevented from factually knowing that a suspected rights violation has actually occurred, and from taking effective action in response against the Defendants in the following ways:
  7. (A). Denial of the information is a direct obstruction of a “right to know” for an individual who has reason to question and investigate decisions of the University in an admissions rejection. The University’s admissions process is governed by Equal Protection rights and guarantees against discrimination provided by those State and

Federal Acts. The denial obstructs and chills the Plaintiff's investigation, and chills decisions to initiate complaints in pursuit of perceived violations of those rights and guarantees. The denial of that information may thus suppress protections and guarantees against discrimination provided by those Acts.

8. (B). Denial of the information cripples the formulation and execution of a factually founded and viable legal complaint alleging violations of Equal Protection rights or those State and Federal Acts applied to admissions processing. Initiating such a complaint using circumstantial belief, sparse fact, and hope is futile in the face of predictable motions for dismissal of the complaint as "frivolous", without grounds, without claim, or some other flaw in merit. Filing and failing pointlessly risks prejudice to the complaint.
9. (C). Denial of the information hinders the initiation of a motion for injunction seeking admissions on any basis while an admissions discrimination complaint proceeds. Part of the Plaintiff's burden in such a motion is to "demonstrate a likelihood of success on the merits" of the actual complaint in (B), using the same basis of fact as (B), and is equally crippled as (B) in the absence of the information denied.
10. (D). Denial of the information may hinder filing a viable complaint with the Department of Education, Office of Civil Rights ("DOE/OCR"), which provides an extra-judicial complaint mechanism to investigate allegations of violations of those Federal Acts. Per Federal statute, the decision on the part of the DOE/OCR to investigate a complaint is in part based on the factual merit of the allegations described in a complaint, and thus may be hindered as in (B) and (C) above.

11. Noting the above, this action alleges Constitutional torts arising from State action through alleged misuse or violation of a State law (IPRA). In structure it is believed to be an information-based forward-looking access-to-the-courts action (ref. Christopher v. Harbury) alleging deprivation of the Plaintiff's 1<sup>st</sup> Amendment Right to Petition interpreted to be the established Right to Sue, as incorporated through the 14<sup>th</sup> Amendment. A further deprivation or violation of the Equal Protection clause of the 14<sup>th</sup> Amendment is alleged. Both are claimed thru 42 USC § 1983 in Counts Three and Four of this complaint.
12. In this denial of access action the underlying complaint as noted in (8) above is here clearly stated as a blocked and crippled admissions discrimination complaint to be filed on the basis of violations of the Equal Protection clause of the 14<sup>th</sup> Amendment, one or more violations of Title VI, Title IX, and/or ADA-75, and if a Title VI complaint is lodged, violation of 42 USC § 1981. The New Mexico Human Rights Act may apply.
13. This action may further include a motion for injunction for admissions as described in (9) above that uses the same hindered informational basis as the underlying complaint (8), detailed in the "burden on the merits". It may be presented as statement to the relevance and importance of the information denied, and to the method and consequence of hindrance by the Defendants. This motion may further be presented as a form of injunctive relief, taken in the shadows of that hindrance, if so upheld.

## **VENUE AND JURISDICTION**

14. The main campus and primary offices of the University of New Mexico are located in Albuquerque, Bernalillo County, New Mexico. Plaintiff and Defendants are all patrons or officers of the University, and the events described occurred at the main campus of the University. Venue is appropriate for the Second Judicial District in the State of New Mexico Court, or United States District Court for the District of New Mexico in Federal Court.
15. In a State of New Mexico Court, jurisdiction is proper pursuant to the IPRA, NMSA 1978, §§14-2-1 to 12, and the venue statute, NMSA 1978, § 38-3-1(G). Jurisdiction over the Federal questions is invoked through 42 USC § 1983.
16. In a Federal Court, jurisdiction over the Federal questions is invoked through 28 USC § 1331, 28 USC § 1343(3), and 42 USC § 1983. Supplemental jurisdiction over the alleged violations of the New Mexico IPRA is invoked by 28 USC § 1367(a).

## **PLAINTIFF**

17. Plaintiff Douglas W. Fincher was and is US citizen, a long-term resident of the State of New Mexico, a non-traditional student and past graduate of UNM, and has been admitted in graduate non-degree status at UNM.

## **DEFENDANTS AND OTHERS**

18. Defendant Board of Regents of the University of New Mexico (“BR-UNM”), named in official capacity, is the governing board of UNM, established by statute of the State of

New Mexico for control and management of the University of New Mexico. The Board of Regents extends their statutory authority through policies governing the University, and has the authority to command the implementation of injunctive relief sought by this complaint.

19. Defendant David J. Schmidly, President of the University of New Mexico, named in official and individual capacity, was and is the official designated by the Defendant Board of Regents responsible for the implementation of the University Policies as derived from the Board of Regents' policies. The President has the authority to command the implementation of injunctive relief sought in this complaint.
20. Defendant Anne Murray ("Murray"), Associate University Counsel, named in official and individual capacity, was and is the individual designated as the University Custodian of Public Records for UNM ("UNM/CPR") under the IPRA and University Policy at the time of the events. In this capacity Murray is responsible for receiving, processing, and ensuring proper response for requests for inspection under the IPRA. Defendant Murray was directly involved in the denial of the information requested by the Plaintiff, and has the authority to release that information as a result of the injunctive relief sought by this complaint.
21. Defendant John Doe 1, named in official and individual capacity, by knowledge and information will be a legal official of the Office of the University Counsel, and possibly "The University Counsel". As confirmed by Murray, this Defendant participated with

Defendant Murray in the decision to withhold records and information responsive to the IPRA requests at issue in this complaint.

22. Kristine Tollestrup, PhD., MPH, (“Tollestrup”) is the Director of the Master of Public Health Program, Department of Family and Community Health, School of Medicine, University of New Mexico. Tollestrup is responsible for documents arising from the program’s admissions process. Not named as a defendant, yet.
23. Lynn Gentry (“Gentry”) is a paralegal to the Office of the University Custodian of Public Records, believed subordinate to, processing for, and under direction of the Defendant Murray. Not named as a defendant.

### **FACTUAL ALLEGATIONS**

#### **--- Foundations I: Parties, Legal Environment, Authority and Policies, IPRA, FERPA**

24. The Plaintiff Douglas Fincher is a US citizen, a long-term resident of the State of New Mexico, a non-traditional student and past graduate of UNM.
25. The University of New Mexico is an institution of higher education of the State of New Mexico.
26. The University of New Mexico receives Federal financial assistance.
27. Defendant Board of Regents of the University of New Mexico was created with statutory authority to govern and manage the University of New Mexico.
28. Under duties of Defendant Board of Regents as noted in Board of Regents Policy 1.1, “Responsibilities of the Board of Regents” (2004) is noted: “...Adopt Board of Regents’

policies for the governance of the University, and at least biennially, review the Regents' Policy Manual for compliance and revision, in addition to revisions submitted, as necessary, at any time.”

29. Under duties of Defendant Board of Regents as noted in Board of Regents Policy 1.1, “Responsibilities of the Board of Regents” (2004) is noted: “...Appoint a President of the University who serves as Chief Executive Officer; and delegate authority to the President for effective operation of the University”.
30. Defendant Board of Regents of the University of New Mexico Policy 3.1, “Responsibilities of the President”, states the responsibility of the University President, Defendant Schmidly, as it relates to policy: “...The President is responsible for implementing the policies adopted by the Board of Regents. The Board hereby delegates authority to the President to carry out his or her responsibilities to manage the University, as set forth generally in this policy, and to adopt administrative policies and procedures consistent with Regents' policies.”
31. The Inspection of Public Records Act, NMSA 1978, § 14-2-1 et. seq., applies to the University of New Mexico.
32. The Family Educational Rights and Privacy Act of 1974 (“FERPA”) [20 U.S.C. § 1232g.] and its regulations in 34 CFR 99 et. seq. apply to the University of New Mexico.
33. The Board of Regents of the University of New Mexico affirms support of the IPRA through its policy 2.17, “Public Access to University Records”, last amended in 2008.

34. The University of New Mexico states support for the IPRA, and implements operating policies and procedures in support of IPRA as mandated by Regents Policy 2.17, through UNM Policy 2300, "Inspection of Public Records", last amended in 2008.
35. The UNM Policy 2300 and the IPRA establish the need for and duties of the University Custodian of Public Records, and general procedures for the records policy.
36. Defendant Murray was designated as the University Custodian of Public Records, and so acted, at the time of the events described in this complaint.
37. Defendant Murray, Associate University Counsel, University Custodian of Public Records, is a board certified and licensed attorney in the State of New Mexico.
38. Per the IPRA and University Policy 2300, the University Custodian of Public Records, or their designee, is the sole source and point of distribution for the information under request by the Plaintiff.
39. University of New Mexico Policy 2300 "Inspection of Public Records", section (5), "Denial of Request", states "Before a determination is made to deny a request, the Custodian shall consult with the Office of University Counsel to determine whether denial of the request is permissible under IPRA and other University policies, including without limitation, "Public Access to University Records" Policy 2.17 RPM."
40. Defendants Board of Regents of the University of New Mexico establish the need for, the purpose of, and some duties of the University Counsel, and the office thereof, in the New Mexico Board of Regents Policy 2.16, "University Counsel". (2008)

41. Defendant John Doe 1, by UNM Board of Regents Policy 2.16, “University Counsel”, and through confirmation by Defendant Murray as the University Counsel” in (21), must be by statute, and by practice and effort, a legal professional.
42. Defendant Board of Regents of the University of New Mexico recognizes the possibility of suit against the University in the New Mexico Board of Regents Policy 2.16, “University Counsel”: “...The Office shall also defend, or arrange for defense, of the University and, in appropriate cases, its officers and employees, in legal proceedings...”
43. New Mexico Board of Regents Policy 2.16, “University Counsel”, states: “...The Office shall emphasize preventative strategies for avoiding legal difficulties.”

**--- Events I**

44. On February 1, 2010, the Plaintiff personally submitted a completed application package to the Master of Public Health Program, Department of Family and Community Medicine, School of Medicine, University of New Mexico, seeking admission to that program, to start the Fall of 2010.
45. As per published process in the university catalog and in the directions for the departmental applications package, Plaintiff subsequently submitted a second general application form and fee to the Office of Graduate Studies, University of New Mexico (“UNM/OGS”). Application was confirmed by letter from OGS dated February 10, 2010.

46. On April 1, 2010, the Plaintiff received a letter of rejection in response to his application for admission, signed by the Director of the Master of Public Health Program, Tollestrup. The letter stated that “Admissions for fall (sic) 2010 were very competitive. When the Admissions Committee judged all applications, your application did not fall within the range of those chosen for admission.”
47. No formal University administrative process for review of rejected admissions applications, as specific to this Plaintiff’s rejection, was in place at the time of the Plaintiff’s rejection notice. No reference to any review or appeal process was indicated on the Plaintiff’s admissions rejection letter.
48. On April 19, 2010, the Plaintiff, questioning the rejection, personally submitted the first of two written IPRA records requests to the Office of Custodian of Public Records at UNM. The first IPRA request sought identification and inspection of the complete framework of policies and procedures governing UNM’s admissions processes, including document retention requirements, to include the process governing the Plaintiff’s rejected admissions application.
49. On April 19, 2010, the Plaintiff, questioning the rejection, concurrently submitted the second of two written IPRA records requests to the Office of Custodian of Public Records at UNM. The second IPRA request sought end-result de-identified information about the Masters of Public Health Program’s applicant pool relevant to the Plaintiff’s admissions application. The request specified that personally identifying information was to be removed, and as collected and maintained by UNM/OGS.

50. On April 20, 2010, Lynn Gentry, a paralegal to the office of the Custodian of Public Records, returned via electronic mail acknowledgement and statement of the first submitted IPRA request, signed by the Defendant Murray, the Custodian of Public Records at UNM. This IPRA request concerning the policies and procedures of admissions processing at UNM had been assigned by their office number 3016 (“3016”). This response further indicated their intention to fill the request as soon as possible, but noted the statutory performance period of 15 days, to expire on the date of 4 May 2010.
51. On April 20, 2010, Gentry also returned via electronic mail acknowledgement and statement of the second submitted IPRA request, signed by the Defendant Murray, the Custodian of Public Records at UNM. The IPRA request concerning de-identified applicant pool information was assigned number 3017 (“3017”). This response further indicated their intention to fill the request as soon as possible, but noted the statutory performance period of 15 days, to expire on the date of 4 May 2010.
52. On May 6, 2010, 2 days after their noted suspense date of May 4, and in observation that there had been no further response concerning IPRA requests 3016 and 3017, the Plaintiff queried Lynn Gentry via electronic mail about the status of requests 3016 and 3017. Gentry noted that efforts had been underway to fill the requests.
53. Subsequently on May 6, 2010, Gentry forwarded via electronic mail UNM’s response to IPRA request 3017, the request for de-identified applicant pool information. Gentry explained the delay (facilities failure), and made passing note of ongoing efforts to obtain information from the Master of Public Health Program concerning IPRA request 3016,

but provided no other formal explanation concerning why request 3016 was unfilled by the suspense date of May 4, 2010, or when request 3016 might be completed.

54. UNM's response to 3017 contained a cover letter, a 3 page standardized tabular summary of applicant information entitled "Graduate Application/Admissions Status Report", and approximately 40 pages of variously-filled individual applicant's data presented in a single-page standard form entitled "Graduate Application Information".
55. Both the summary and individual reports in the response to request 3017 were generated on April 27, 2010, slightly more than a week before the delivery of the response.
56. The cover letter included in UNM's response to IPRA request 3017, signed by Defendant Murray, stated "...We have redacted, pursuant to FERPA, IPRA, and University Policy, Banner I.D. numbers, ethnicity, addresses, email addresses, and telephone numbers". No specific citations from IPRA or FERPA as applied were provided, nor was the specific identification of any applied University Policy provided.
57. As requested by the Plaintiff, and as noted by Defendant Murray, in UNM's response to 3017 the obvious personally identifying information and directory/contact information of the applicant pool were redacted on both the summary and individual reports.
58. Contrary to the needs and expectations of the Plaintiff, also redacted from both sets of reports for the response to request 3017 were the age, gender, ethnicity, and citizenship status information of each anonymous applicant represented in the reports.

59. In the cover letter for the response to request 3017, Defendant Murray provided no specific reason or citation for the redaction of age, gender, and citizenship information on the summary or individual reports as delivered in response to IPRA request 3017.
60. Subsequently on May 6, 2010, the Plaintiff initiated a follow-up electronic mail exchange with paralegal Gentry seeking to determine the specific identity of those individuals who made the decision to redact the age, ethnicity, gender, and citizenship information from 3017, the specific citations under FERPA, IPRA, or University Policy under which the redactions were made, and who in the University Counsel's office to query about the legitimacy of the redactions.
61. At the end of that discussion, the Plaintiff offered a citation from FERPA to Lynn Gentry, seeking to determine if one specific clause (34 CFR 99.3(e) – “A list of personal characteristics that would make the student's identity *easily traceable*; or”) was the specific reason why the age, gender, ethnicity, and citizenship information was redacted from the University's response to 3017. No answer to that question, or any further communications, was received from Gentry.
62. On May 7, 2010, in a final electronic mail response about the foregoing discussion between the Plaintiff and Gentry, Defendant Murray confirmed that the citation of FERPA requirement 34 CFR 99.3(e) *easily traceable* as the basis for the redactions.
63. The “easily traceable” test from 34 CFR 99.3(e) was superseded effective January 8, 2009, by the United States Department of Education, approximately 16 months prior to

the University's redacted response to request 3017 on that basis. [Federal Register 74806, 74829-74835, Tuesday December 9, 2008].

64. The "easily traceable" test was replaced with the so-called the "reasonableness test" [74831] that defines "personally identifying information" as (beyond obvious generic identifiers): "(f). Other information that, alone or in a combination, is linked or linkable to a *specific* student that would allow a *reasonable* person in the school *community*, who does *not* have personal knowledge of the relevant circumstances, to identify the student with *reasonable certainty*;" (34 CFR 99.3 Definitions – Personally Identifying Information (f))
65. In the same response of May 7, Defendant Murray indicated that the redactions of the age, gender, ethnicity, and citizenship information from the response to 3017 "were done on the advice of University Counsel", who is still unnamed. This individual is designated as Defendant John Doe 1.
66. In the same response of May 7, Defendant Murray indicated that the Director of the Masters in Public Health Program, Tollestrup, had informed her (Murray) that "the information for the application process is in the University Catalog, and she has no further information to provide you".
67. On Friday, May 7, 2010, in response to the Plaintiff's personal request to review the admissions rejection, Tollestrup confirmed Defendant Murray's statement that no other information was available (3016). Additionally, Tollestrup refused any discussion concerning the admissions rejection, stating that it "would be unproductive to meet."

68. As of the date of filing of this complaint, IPRA request 3016 for admissions policy and procedure remains unfilled. No further communications concerning the status of this request, including any formal statement for extension of performance due to burden, for forwarding of the request, for formal denial of the request, or any indication as to when the request might be fulfilled, as required under the IPRA and University Policy, was ever received by the Plaintiff.

**--- Foundations II – Records Disposition, Equal Protection, AA, and Legal Actions.**

69. University Policy 2300 “Inspection of Public Records” (5) “Denial of Request” states “...When a request is denied, the requested records must be retained until remedies under IPRA have been exhausted”.

70. Board of Regents Policy 2.9, “University Archives and Records” (1996) states: “...Any record bearing upon the activities and functions of the University that is produced or received by an employee of the University in the transaction of University business becomes University property. Such records may not be permanently removed from the University or destroyed without the prior approval of the University Archivist.”

71. The University Catalog publishes one set of publically visible admissions policies, admission requirements, and application procedures that are applicable to the Plaintiff’s admissions application.

72. The MPH program application form used for the Plaintiff’s application states: “The *admission procedure* for the Master of Public Health Program at the University of New

Mexico does not discriminate against any student on the basis of gender, ...race, color, ... age, ...”.

73. Defendant Board of Regents of the University of New Mexico establishes the need for and value of Equal Opportunity and Affirmative Action in the conduct of all University operations, including admissions, in Board of Regents Policy 2.3, “Equal Opportunity and Affirmative Action for Employees and Students”, as adopted September 12, 1996.
74. The Board of Regents Policy 2.3, “Equal Opportunity and Affirmative Action...”, cites a number of applicable Federal and State Acts and laws by references: “Title VI and VII of the Civil Rights Act of 1964; Title IX of the Educational Amendments of 1972; New Mexico Human Rights Act, § 28-1-1 *et seq.*, NMSA 1978; Americans with Disabilities Act; Executive Order 12,246 *Guidelines on Affirmative Action Programs from the Federal Equal Employment Opportunity Commission and the Office for Civil Rights; ...*”
75. The University of New Mexico implements Board of Regents Policy 2.3 through UNM Policy 3100, “Equal Opportunity & Affirmative Action”, last amended in 2007.
76. The University of New Mexico has a history of investigations conducted by the Department of Education, Office of Civil Rights with respect to complaints alleging violations of Title VI, Title IX, and/or ADA-75.

--- **Events II**

77. In belief that intermediate records arising from admissions processing have been destroyed (indirectly indicated in 66/67, 70 above), the Plaintiff submitted a third IPRA

request to the office of Defendant Murray on July 30, 2010, targeted to Tollestrup, seeking that information. The request was acknowledged on August 3, 2010, and only generally restated as request number 3072, with a due date of 28 August 2010.

78. The Plaintiff submitted a fourth IPRA request on July 30, 2010, seeking the Custodian's log entries as they relate to requests 3016 and 3017, to be kept as described as a duty of the Custodian of Public Records in University Policy 2300. The request was acknowledged and only generally restated, combined with request number 3072 as above.

#### **Plaintiff's Harm**

79. Admissions rejections are known to be reversible in the face of proof that the rejection was incorrect through some processing error, improper through some violation of law, or simple reconsideration. Such was a purpose of the information requested by the Plaintiff, and suspicions driving the underlying complaint remain. Because of the delay arising from the obstructive denials of the information requests, in all likelihood the admissions rejection won't be reversed before the start of the semester. The loss of at least one scholastic calendar year will occur, presuming the underlying complaint is upheld. Noting the age of the Plaintiff, such a delay is consequential, if not permanently disconnecting. The effort to investigate this issue may give rise to an antagonistic educational environment if the underlying complaint is upheld. Additional harm is incurred in the effort to investigate this claim in terms of time, effort, opportunity cost, and expense.

**COUNT ONE**  
**Violations of the Inspection of Public Records Act**  
**IPRA REQUEST #3016**

80. The Plaintiff incorporates by reference the claims, facts, and allegations set forth in the above paragraphs.
81. For IPRA request 3016, silently denied by the Defendants, the Plaintiff alleges that the Defendants have violated the IPRA in one or more of the following ways:
- (A). Defendants failed to produce the documents and information requested by the Plaintiff and as required by the IPRA.
  - (B). Defendants, if relying on any exception (NMSA 1978§ 14-2-1-A(1-12)) as a basis for withholding records, failed to issue a proper denial of the records requests using the denial procedure per NMSA 1978§ 14-2-11(B).
  - (C). Defendants, if determining that request 3016 was overly burdensome or broad, failed to so indicate as described in NMSA 1978§ 14-2-10.
  - (D). Defendants, if not in possession of the requested documents and information, but aware of other sources so in possession, failed to transfer the records request and/or failed to notify the requester per NMSA 1978§ 14-2-8(E).
  - (E). Defendants, if relying on a non-statutory exception to disclosure, failed to issue a proper denial of disclosure so stating as noted in (B).
82. There may exist an actual controversy between the Plaintiff and the Defendants whether the Defendant's conduct, as alleged above, constitutes violations of the IPRA and

whether the policies, procedures, and training provided to UNM employees is adequate to permit Defendants to comply with the IPRA.

83. Plaintiff is entitled to declaratory relief that Defendants have violated the IPRA, and that the Defendant's policies, procedures, and training are inadequate to permit compliance with the IPRA.

84. Pursuant to NMSA 1978, § 14-2-12(B), the Plaintiff is entitled to a writ of mandamus or injunction ordering the Defendants to produce all relevant documents in the Defendants possession, as specified in the Plaintiff's request.

85. The Plaintiff is entitled to recover penalties at up to \$100 per day per violation (Section 14-2-11-C-2), and damages, costs, and attorney's fees for pursuing this action per Section 14-2-12(D).

WHEREFORE, for Count One the Plaintiff prays that:

86. The Court declares that the Defendants have violated the IPRA by not responding to Plaintiff's records request number 3016.

87. The Court issue a writ of mandamus or injunction ordering the Defendants to produce the records and information requested without further delay.

88. The Court issue a writ or injunction ordering that the Defendants stop using de-facto "silent denials" of IPRA requests (see NMSA 1978 §14-2-11(A)), and enforce the use of the denial procedure defined at NMSA 1978 § 14-2-11(B), at a minimum.

89. The Court issue a writ of mandamus or injunction ordering the Defendants to adopt policies and procedures with training sufficient to correct the policies and practices that have resulted in the improper denials in this count.
90. The Court enter an order for such other relief as the Court sees fit, including but not limited to the maximum statutory penalties, damages, costs, and reasonable attorney's fees.

**COUNT TWO**  
**Violations of the Inspection of Public Records Act**  
**IPRA REQUEST #3017**

91. The Plaintiff incorporates by reference the claims, facts, and allegations set forth in paragraphs above.
92. For IPRA request 3017, The Defendants cited the IPRA exception to disclosure “as otherwise provided by law” (NMSA 1978 §14-2-1-A(12)), and used FERPA as the basis for that exception. Of specific controversy is the purposeful redaction of the otherwise de-identified applicant's age, gender, ethnicity, and citizenship as a type of “personally identifiable information” per FERPA. The Plaintiff alleges that the Defendants have violated IPRA in one or more of the following ways:
- (A). The Defendants failed to completely produce the documents and information, specifically the de-identified applicant's age, ethnicity, gender, and citizenship status, requested by the Plaintiff for request 3017, and as allowed by the IPRA, for the following reasons:

i. Plaintiff asserts that the redaction of de-identified age, gender, ethnicity, and citizenship information as “personally identifying information” from otherwise anonymous applicant pool data is an incorrect and obstructive interpretation of FERPA. Note is made of the “Reasonableness Standard” in 34 CFR 99.3.

ii. Plaintiff asserts that de-identification of applicant pool information, as defined by the removal of all other “personally identifying information” as defined in FERPA, produces data constructs that are no longer education records as described in FERPA. Such data constructs are thus not subject to protections against disclosure under FERPA.

iii. Plaintiff asserts that applicant pool information for those applicants not in the past or currently in attendance at the Defendant’s institution may not be subject to protection against disclosure under the attendance rule of FERPA. In light of (i) and (ii) above, this consideration may not be necessary if (i) or (ii) are upheld.

iv. Noting (i-iii), the argument to deny disclosure on the basis of FERPA is asserted by the Plaintiff to be incorrect, thus exception 12, “as otherwise provided by law” is not supported. No other specific cause for exception to disclosure under IPRA was specified.

(B). Defendant Murray confirmed that the decision to deny the information was made in conjunction with the Office of the University Counsel, per University of New Mexico Policy 2300 “Inspection of Public Records”, section (5), “Denial of Request”. Murray failed to identify that individual in the response per NMSA 1978 § 14-2-11-B(2).

93. The foundations for controversy and declaratory relief, injunctive relief, statutory penalties, damages, costs, and fees are as described for Count One.

WHEREFORE, for Count Two the Plaintiff prays that:

94. The Court declare that the Defendants have violated the IPRA by incompletely responding to Plaintiff's records request number 3017, and that the information at controversy: anonymous applicant's age, gender, ethnicity, and citizenship are subject to disclosure in the context of otherwise proper de-identification through removal of all other personally identifiable information.

95. Requested declaratory and injunctive relief, penalties, damages, and other costs are as described in Count One, extended and applied to the specifics of this count.

**COUNT THREE**  
**Violation of 42 USC § 1983**  
**Deprivation of 1<sup>st</sup> Amendment Right to Sue**

96. The Plaintiff incorporates by reference the claims, assertions, and allegations set forth in paragraphs noted above.

97. Plaintiff alleges that the Defendants have, through an obstructive misuse of the IPRA, improperly denied access to documents and artifacts related to the processing of admissions applications as they relate to the rejection of the Plaintiff's application for admissions. By doing so the Defendants have chilled and obstructed the Plaintiff's ability to consider and file effective complaints and actions against their institution in pursuit of the Plaintiff's right to Equal Protection under the 14<sup>th</sup> Amendment and State and Federal

Acts related to education, discrimination, and admissions. The Plaintiff therefore alleges that the Defendants, taking state action and acting under the color of law, have effectively deprived the Plaintiff of the fundamental Right to Sue as established from the Right To Petition under the 1<sup>st</sup> Amendment, incorporated through the 14<sup>th</sup> Amendment, and have violated 42 USC § 1983.

98. Under 42 USC § 1983 and other considerations, Plaintiff may be entitled to damages, punitive damages, and declaratory and injunctive relief.

WHEREFORE, for Count Three the Plaintiff prays that:

99. The Court finds that the Defendants have deprived the Plaintiff's fundamental Constitutional Right to Sue established from the Right To Petition under the 1<sup>st</sup> Amendment, as incorporated from the 14<sup>th</sup> Amendment, and have violated 42 USC § 1983.

100. The Court provides declaratory relief to the effect of Count Three, if upheld.

101. If upheld, the Plaintiff, on behalf of himself and for all those similarly situated in the past, present, or future, asks for injunctive relief to prevent recurrence of the denial of this and all related admissions processing information. This relief is sought to deter the adverse consequences of information denial upon one's fundamental Right to Sue, and chilling one's pursuit of Equal Protection and the guarantees against discrimination provided by State and Federal Acts as they relate to admissions processing. This relief supports a "right to know" implicit in the IPRA as it pertains to the inspection of government activity, and perhaps a personal "right to know" that a violation of one's

rights has indeed occurred. This relief reminds the Defendants and their institution that admissions processes and the execution thereof, bound by Equal Protection rights and State and Federal Acts that provide protections against discrimination, are indeed subject to individual, public, and judicial review. This complaint asserts that review by all such parties has been effectively thwarted by the actions of the Defendants in this case.

The Plaintiff would ask that the Court provide injunctive relief by compelling the Defendants to establish, make public, and execute a formal policy and process of *admissions transparency*. Such policy should make available all admissions policies, procedures, and all relevant admission processing artifacts, properly de-identified per *correct* interpretation of applicable privacy statutes (i.e. FERPA). Note that this information is normally present in existing process. This policy is a matter of formalized collection, retention, de-identification, availability, and presentation. Such information might (or might not) be limited to review by any individual with proper standing (i.e. having a rejected admissions application), and disclosure made quickly available without obstruction upon request using a formal IPRA request, or through this separate policy. The availability of such a policy and process should be specifically noted as part of the admissions rejection process, so stated in the written rejection. There are reasonable arguments for the public interest and perhaps legal cause to suggest that this policy should or must extend availability and access to this type of information to the general public.

Other remedy as the Court would see fit, and for the public interest to deter future rights violations, is requested.

102. If upheld, the Plaintiff may seek to have heard an accompanying injunction for admissions, used as evidence of the obstruction alleged in this complaint, to be heard with consideration of the shadows cast upon its content caused by the Defendant's denial of foundational information.

103. The Plaintiff would ask for penalties, damages, punitive damages, costs, and fees as the Court sees fit.

**COUNT FOUR**  
**Violation of 42 USC § 1983**  
**Deprivation of Equal Protection under the 14<sup>th</sup> Amendment**

104. The Plaintiff incorporates by reference the claims, assertions, and allegations set forth in paragraphs noted above.

105. Individuals have Equal Protection rights against obstructions to equal treatment. The denial of information through an obstructive misuse of the IPRA by the Defendants has deprived the Plaintiff of the ability to effectively pursue and exercise protections against discrimination guaranteed by State and Federal Acts relating education, admissions processing, and Equal Protection. Specifically deprived, as noted in the underlying complaint, are the protections against race, gender, and age discrimination afforded by Title VI, Title IX, and ADA-75, respectively. The Plaintiff therefore alleges that the Defendants, taking state action and acting under the color of law, have deprived

the Plaintiff of his right to Equal Protection of the law under the 14<sup>th</sup> Amendment, and have violated 42 USC § 1983.

106. Under 42 USC § 1983 and other considerations, Plaintiff may be entitled to damages, punitive damages, and declaratory and injunctive relief.

WHEREFORE, for Count Four the Plaintiff prays that:

107. The Court find that through their denial of information the Defendants have chilled and deprived the Plaintiff's right of Equal Protection under the 14<sup>th</sup> Amendment, and have chilled and deprived the Plaintiff's pursuit of guarantees against discrimination assured by Federal Acts implementing Equal Protection (Title VI, Title IX, ADA-75).

108. The Court provides declaratory relief to the effect of Count Four, if upheld.

109. The Court provides injunctive relief as described in Count Three, and as the Court would also see fit to deter future similar rights violations on behalf of the public interest.

110. The Plaintiff asks for penalties, damages, punitive damages, costs, and fees as the Court sees fit.

Respectfully submitted on this date: August 12, 2010

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STATE OF NEW MEXICO  
COUNTY OF BERNALILLO  
SECOND JUDICIAL DISTRICT COURT

DOUGLAS FINCHER,

Plaintiff,

v.

BOARD OF REGENTS OF THE UNIVERSITY  
OF NEW MEXICO,

DAVID J. SCHMIDLY,  
President of the University of New Mexico,

ANNE MURRAY,  
Associate University Counsel,  
Custodian of Public Records,  
University of New Mexico,

JOHN DOE 1,  
Office of the University Counsel,  
University of New Mexico,

Defendants.

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**List of Exhibits**

**Exhibits A-K**

STATE OF NEW MEXICO  
COUNTY OF BERNALILLO  
SECOND JUDICIAL DISTRICT COURT

DOUGLAS FINCHER,

Plaintiff,

v.

BOARD OF REGENTS OF THE UNIVERSITY  
OF NEW MEXICO,

DAVID J. SCHMIDLY,  
President of the University of New Mexico,

ANNE MURRAY,  
Associate University Counsel,  
Custodian of Public Records,  
University of New Mexico,

JOHN DOE 1,  
Office of the University Counsel,  
University of New Mexico,

Defendants.

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**List of Exhibits**

**Exhibits L-W**

