

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Sup. Ct. No. 32,524

REPUBLICAN PARTY OF NEW MEXICO, and
LYN OTT, individually and in her capacity as Help
America (HAVA) Director for the Republican Party,

Plaintiffs/Petitioners,

vs.

NEW MEXICO TAXATION AND REVENUE
DEPARTMENT, MOTOR VEHICLE DIVISION,
and LUIS CARRASCO, custodian of records for
Motor Vehicle Division,

Defendants/Respondents.

BRIEF OF NEW MEXICO FOUNDATION FOR OPEN GOVERNMENT
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS/PETITIONERS

On Appeal from the Second Judicial District Court, County of Bernalillo
Honorable Valerie A. Huling and Nan Nash, No. D-202-CV-2006-08812

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
INTEREST OF NMFOG AS AMICUS.....	1
SUMMARY OF PROCEEDINGS	2
ARGUMENT	4
I. IPRA’S HISTORY CONFIRMS THAT NOT ALL PRIVILEGES WERE INTENDED TO BE EXCEPTIONS TO THE RULE OF GREATEST POSSIBLE DISCLOSURE.....	4
II. JUDICIAL CREATION OF A DELIBERATIVE PROCESS EXCEPTION TO IPRA IS AN UNWARRANTED LIMITATION ON CITIZENS’ ABILITY TO ACCESS PUBLIC INFORMATION.....	9
A. IPRA’s Current Exceptions Provide Sufficient Limitations to the Rule of Greatest Possible Disclosure.....	9
B. The Deliberative Process Privilege Discourages Citizen Participation and Encourages Poor Government Decision Making.....	11
1. The deliberative process privilege is detrimental to citizen participation in government.....	11
2. The deliberative process privilege encourages poor government decision making.....	12
C. Judicial Creation of a Deliberative Process Exception to IPRA Invites Bureaucratic Abuse	14
III. JUDICIAL ADDITION OF A DELIBERATIVE PROCESS EXCEPTION TO IPRA PROMOTES LAWSUITS AND DELAYS ACCESS TO PUBLIC INFORMATION.....	20
CONCLUSION	22
CERTIFICATE OF SERVICE	24

TABLE OF AUTHORITIES

PAGE

NEW MEXICO STATUTES

New Mexico Inspection of Public Records Act
NMSA 1978, §§ 14-2-1 to -12 (1947, as amended through 2005)..... passim

New Mexico Driver’s Privacy Protection Act
NMSA 1978, § 66-2-7.1 (2007)..... 3

NMSA 1953, § 71-5-1 (1975)..... 6

STATUTES FROM OTHER JURISDICTIONS

Driver’s Privacy Protection Act
18 U.S.C. §§ 2721 to 2725 (2000)..... 3

NEW MEXICO CASES

Albuquerque Journal v. N.M. Dep’t of Transp.,
No. D-202-CV-2009-04248 18

Bd. of Comm’rs of Dona Ana County v. Las Cruces Sun-News,
2003-NMCA-102, 134 N.M. 283, 76 P.3d 36 12

City of Farmington v. Daily Times,
2009-NMCA-057, 146 N.M. 349, 210 P.3d 246 4

City of Las Cruces v. Pub. Employee Labor Relations Bd.,
1996-NMSC-024, 121 N.M. 688, 917 P.2d 451 4

Estate of Romero v. City of Santa Fe Police Dep’t,
2006-NMSC-028, 139 N.M. 671, 137 P.3d 611 8

Meridian Oil, Inc. v. N.M. Taxation & Rev. Dep’t,
1996-NMCA-079, 122 N.M. 131, 921 P.2d 327 5

Republican Party of N.M. v. N.M. Taxation & Revenue Dep’t,
2010-NMCA-80 3, 6

<i>Rio Grande Sun v. N.M. Dep't of Pub. Safety,</i> No. D-202-CV-2005-06554	18
<i>State ex rel. Attorney Gen. v. First Judicial Dist. Court,</i> 96 N.M. 254, 629 P.2d 330 (1981)	8, 9
<i>State ex rel. Newsome v. Alarid,</i> 90 N.M. 790, 568 P.2d 1236 (1977)	4, 6

CASES FROM OTHER JURISDICTIONS

<i>Assembly of Cal. v. United States Dep't of Commerce,</i> 968 F.2d 916 (9th Cir. 1992).....	16
<i>Barr v. Matteo,</i> 360 U.S. 564 (1959).....	11
<i>Birkett v. City of Chicago,</i> 705 N.E.2d 48 (Ill. 1998).....	13
<i>Brudwick v. Minor, No. 05-CV-00601-WYD-MJW,</i> 2006 U.S. Dist. LEXIS 51608 (D. Colo. July 13, 2006)	22
<i>Chevron U.S.A., Inc. v. United States,</i> 80 Fed. Cl. 340 (Ct. Cl. 2008).....	15, 16
<i>Coastal States Gas Corp. v. Dep't of Energy,</i> 617 F.2d 854 (D.C. Cir. 1980).....	16
<i>Elson v. Bowen,</i> 436 P.2d 12 (Nev. 1967).....	17
<i>Herbert v. Lando,</i> 441 U.S. 153 (1979).....	12
<i>In re Grand Jury Proceedings, No. 98-095, 98-096, 98-097,</i> 1998 U.S. Dist. LEXIS 7735 (D.D.C. May 26, 1998).....	18
<i>In re Sealed Case,</i> 121 F.3d 729 (D.C. Cir. 1997).....	6, 8, 17, 21

<i>J.M. v. N.M. Dep't of Health,</i> 2:07-CV-00604-RB-ACT, slip op. (D.N.M. Aug. 20, 2009)	19
<i>Kaiser Aluminum & Chem. Corp. v. United States,</i> 141 Ct. Cl. 38 (Ct. Cl. 1958).....	5
<i>Nixon v. Sirica,</i> 487 F.2d 700 (D.C. Cir. 1973).....	15
<i>NLRB v. Sears, Roebuck & Co.,</i> 421 U.S. 132 (1975).....	5
<i>Payne Enter., Inc. v. United States,</i> 837 F.2d 486 (D.C. Cir. 1988).....	20
<i>Rashad Ahmad Refaat El Badrawi v. Dep't of Homeland Sec.,</i> 583 F. Supp. 2d 285, 293 (D. Conn. 2008).....	21
<i>Ryan v. Dep't of Justice,</i> 617 F.2d 781 (D.C. Cir. 1980).....	21
<i>Sun-Sentinel Co. v. Dep't of Homeland Sec.,</i> 431 F. Supp. 2d 1258 (S.D. Fla. 2006).....	17
<i>Sw. Ctr. for Biological Diversity v. Dep't of Agric.,</i> 170 F. Supp. 2d 931 (D. Ariz. 2000)	17, 21
<i>United States v. Irvin,</i> 127 F.R.D. 169 (C.D. Cal. 1989).....	12
<i>Vill. of Lake Barrington v. Hogan,</i> 649 N.E.2d 1366 (Ill. App. Ct. 1995)	22

OTHER AUTHORITIES

C.A. Wright & K. Graham, <i>Federal Practice and Procedure: Evidence,</i> § 5680 (1992).....	14
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Executive Privilege (International Cooperation Administration), Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 86th Cong., 1st Sess. 340 (1959)	15
Eric A. Posner & Adrian Vermeule, <i>The Credible Executive</i> , 74 U. Chi. L. Rev. 865 (2007)	13
Gerald Wetlaufer, <i>Justifying Secrecy: An Objection to the General Deliberative Privilege</i> , 65 Ind. L.J. 845 (1990).....	11, 12, 13, 14
Kenneth Culp Davis, <i>The Information Act: A Preliminary Analysis</i> , 34 U. Chi. L. Rev. 761 (1966-67)	10, 11, 15
Michael Ray Harris, <i>Standing in the Way of Judicial Review: Assertion of the Deliberative Process Privilege in APA Cases</i> , 53 St. Louis L.J. 349, 351 (2009).....	14
Raoul Berger, <i>Executive Privilege: A Constitutional Myth</i> (1974)	14
Sisella Bok, <i>Secrets</i> (1983)	14
United States House of Representatives Committee on Government Reform - Minority Staff Special Investigations Division, <i>Secrecy in the Bush Administration</i> (September 14, 2004) http://www.fas.org/sgp/library/waxman.pdf	17

INTRODUCTION

The New Mexico Foundation for Open Government (“NMFOG”) appears in this case as *amicus curiae* in support of Plaintiffs/Petitioners to address the decisions by the district court and the Court of Appeals that create a deliberative process exception to New Mexico’s Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2005) (“IPRA”). In deciding the case below, the Court of Appeals fashioned a deliberative process exception to IPRA, despite the lack of any such exception in the language of IPRA as passed by the Legislature. The lower court opinions in this case ignore the specific language of IPRA and threaten the purpose and spirit of the Act. If affirmed by this Court, these decisions will erode the statutory protections that IPRA provides to citizens seeking information about their government. The decisions of the district court and Court of Appeals, at least to the extent they create a deliberative process exception to IPRA, should be reversed.

INTEREST OF NMFOG AS AMICUS

NMFOG is a charitable, educational association founded to assist New Mexico citizens in understanding and exercising their rights under the federal and New Mexico Constitutions, IPRA, the New Mexico Open Meetings Act, and the federal Freedom of Information Act (“FOIA”). NMFOG regularly assists citizens

and media organizations in obtaining documents and information from government sources.

NMFOG has a vital interest in the matters at issue in this case because the Court of Appeals' new IPRA exception threatens the ability of citizens to gain access to public records under the statute. This issue has far-reaching importance that goes beyond this case. If adopted by this Court, the deliberative process exception established by the Court of Appeals would limit the scope of IPRA, would invite abuse by government officials seeking to shield public records from disclosure, would allow government bureaucrats improperly to delay providing access to important public records in contravention of IPRA, and would discourage citizens from pursuing IPRA requests once rebuffed with deliberative process claims by public officials. NMFOG therefore appears as *amicus curiae* in this matter in support of the Republican Party of New Mexico and Lyn Ott on the issues related to the existence of a "deliberative process" exception to IPRA.

SUMMARY OF THE PROCEEDINGS

Lyn Ott, the Help America Vote Act Director for the Republican Party of New Mexico, requested certain documents pursuant to IPRA from the Motor Vehicle Division of the New Mexico Department of Taxation & Revenue ("MVD"). In response, MVD produced some records, but withheld other information on grounds of "executive privilege," citing as authority for doing so

IPRA exception 12, which allows government agencies to withhold information “as otherwise provided by law.” [RP 0024].¹ Ms. Ott and the Republican Party of New Mexico sued MVD seeking disclosure of the withheld information. The parties filed cross motions for summary judgment. [RP 0094-0129, 0143-0202, 0213-0221, 0222-0235, 0240-0257, 0258-0266]. The trial court granted summary judgment to Defendants, which Plaintiffs appealed. The Court of Appeals affirmed, in part based on the Court’s conclusion that the common law deliberative process privilege is an exception to IPRA “as otherwise provided by law.” *See Republican Party of N.M. v. N.M. Taxation & Revenue Dep’t*, 2010-NMCA-80, ¶ 36. Ms. Ott and the Republican Party of New Mexico then petitioned for a writ of certiorari, which this Court granted on August 30, 2010.

¹ MVD later indicated that certain requested personally identifying information was withheld pursuant to the federal Driver’s Privacy Protection Act, 18 U.S.C. Sections 2721 to 2725 (“DPPA”), and the New Mexico Driver’s Privacy Protection Act, NMSA 1978, 66-2-7.1 (2007) (“NMDPPA”). [RP 0077-0079]. NMFOG takes no position on the propriety of withholding information under DPPA and the NMDPPA.

ARGUMENT

I. **IPRA’S HISTORY CONFIRMS THAT NOT ALL PRIVILEGES WERE INTENDED TO BE EXCEPTIONS TO THE RULE OF GREATEST POSSIBLE DISCLOSURE.**

IPRA was first enacted over six decades ago by 1947 N.M. Laws, ch. 130, Section 1. In IPRA, the Legislature declared that it is New Mexico’s public policy “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. In enacting IPRA, the Legislature confirmed that providing citizens with the greatest possible access to public information “is an essential function of a representative government and an integral part of the routine duties of public officers and employees.” *Id.* Indeed, this right has been repeatedly described as “fundamental” and a “strong public policy.” *See State ex rel. Newsome v. Alarid*, 90 N.M. 790, 797, 568 P.2d 1236, 1243 (1977); *City of Las Cruces v. Pub. Employee Labor Relations Bd.*, 1996-NMSC-024, 121 N.M. 688, 917 P.2d 451. The governmental policy embodied in IPRA and articulated by our Courts is clear: “[t]he citizen’s right to know is the rule and secrecy is the exception.” *Newsome*, 90 N.M. at 797, 568 P.2d at 1243.

The fundamental right to disclosure is subject only to specific limited exceptions identified by the New Mexico Legislature. *See City of Farmington v. Daily Times*, 2009-NMCA-057, ¶ 7, 146 N.M. 349, 210 P.3d 246. Under the

express terms of IPRA, a government agency can withhold public records only if the records fall within one of the twelve enumerated exceptions to the disclosure requirement. *See* NMSA 1978, § 14-2-1(A); *Meridian Oil, Inc. v. N.M. Taxation & Rev. Dep't*, 1996-NMCA-079, ¶ 9, 122 N.M. 131, 921 P.2d 327 (“Even a cursory examination of [IPRA] discloses that the New Mexico Legislature enacted a multiple exception format following the initial and broad right to inspection of public records permitted under Section 14-2-1(F).”). Documents evidencing the government’s deliberative process are not mentioned as an exception. Instead, the lower courts in this case read that privilege into the twelfth legislatively approved exception, which applies to public records that are confidential “as otherwise provided by law.” NMSA 1978, § 14-2-1(A)(12).

Yet if exception 12 were indeed the source of judicial power to add privileges as exceptions to the statute, it would never be necessary for the Legislature to do so. This is particularly true regarding judicial addition of exceptions based on privileges that have existed for decades but were never added as an IPRA exception by the Legislature, such as the deliberative process privilege. *Kaiser Aluminum & Chem. Corp. v. United States*, 141 Ct. Cl. 38, 48 (Ct. Cl. 1958) (generally cited as seminal case identifying common law executive privilege; *e.g.* *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)). Indeed, as the Court of Appeals noted, “[s]ince the beginnings of our nation, executive

officials have claimed a variety of privileges to resist disclosure of information the confidentiality of which they felt was crucial to fulfillment of the unique role and responsibilities of the executive branch of our government.” *Republican Party of N.M.*, 2010-NMCA-080, ¶ 18, *citing In re Sealed Case*, 121 F.3d 729, 736 (D.C. Cir. 1997). Knowing, as it must have, that the deliberative process privilege has existed in federal common law for decades, the Legislature nevertheless has never chosen to add it to the list of IPRA exceptions.

Indeed, New Mexico’s original public records statute included only four exceptions. *See Newsome*, 90 N.M. at 793-94, 568 P.2d at 1239-40 (interpreting NMSA 1953, § 71-5-1 (1975)). In 1977, this Court lamented the lack of direction contained in IPRA, and as a result created a judicial “rule of reason” exception to the statute:

It would be helpful to the courts for the Legislature to delineate what records are subject to public inspection and those that should be kept confidential in the public interest. Until the Legislature gives us direction in this regard, the courts will have to apply the ‘rule of reason’ to each claim for public inspection as they arise.

Newsome, 90 N.M. at 797, 568 P.2d at 1243. Thereafter, in 1993, the Legislature accepted the Court’s invitation and amended IPRA to enumerate a more specific set of exceptions, with additional exceptions added through subsequent

amendments.² Yet for over six decades, the Legislature has declined to add an IPRA exception for documents falling within the common law deliberative process privilege. In light of the Legislature's quiescence, IPRA's exception 12 should not be employed to create a judicial deliberative process exception to IPRA when that common law privilege has existed for decades.

To the extent the "as otherwise provided by law" exception also incorporates the evidentiary privileges recognized by this Court, it cannot be read to incorporate the deliberative process privilege. This Court has refused to create exceptions to IPRA for common law privileges that have not been adopted through court rules.

This Court has explained that:

Clearly, the primary purpose of the IPRA is to provide access to public records rather than "to create an evidentiary shield behind which the government can hide." IPRA's exclusion of law enforcement records from public inspection does not purport to create an evidentiary privilege, nor does it contemplate use of law enforcement records in civil litigation. Instead, IPRA is used here to guide the court in appraising public policy concerns based on legislation enacted by the legislature pursuant to its general police powers.

² Given the Legislature's decision to amend IPRA following this Court's decision in *Newsome*, and given exception 12 to IPRA which incorporates existing statutory protections, constitutional protections and court evidentiary privileges, the case now before this Court provides an excellent opportunity for the Court to confirm that the "rule of reason" no longer applies in IPRA cases.

Estate of Romero v. City of Santa Fe Police Dep't, 2006-NMSC-028, ¶ 18, 139 N.M. 671, 678, 137 P.3d 611, 617 (2006). Thus, this Court recognizes only “such privileges [as] are required by the Constitution, or provided for in the rules of evidence or other court rules.” *See id.* ¶ 11, 139 N.M. 671, 137 P.3d 611. In keeping with this principle, the Court made clear, when previously identifying an “executive privilege,” that it was adopting that privilege only to the extent required under the New Mexico Constitution:

Executive privilege is a recognition by one branch of government, the judiciary, that another co-equal branch of government, the executive, has the right not to be unduly subjected to scrutiny *in a judicial proceeding where information in its possession is being sought by a litigant*. The legislative and judicial branches of state government enjoy similar privileges which are required to be recognized by this Court under our Constitution.

State ex rel. Attorney Gen. v. First Jud. Dist. Ct., 96 N.M. 254, 258, 629 P.2d 330, 334 (1981) (emphasis added). There is no constitutional basis, however, for the expansive deliberative process privilege identified by the Court of Appeals. *See In re Sealed Case*, 121 F.3d at 737 (noting that the deliberative process privilege “originated as a common law privilege”). This Court also has not adopted a rule of evidence recognizing the deliberative process privilege, nor has the Legislature identified that privilege in any statute.³ As a result, the “as otherwise provided by

³ In *State ex rel. Attorney Gen. v. First Jud. Dist. Ct.*, this Court recognized that constitutional separation of powers does not prevent the “executive privilege” from

law” exception cannot be judicially employed to incorporate the deliberative process privilege as an exception to IPRA.

Regardless of how important the Court of Appeals may feel the common law deliberative process privilege to be, the decision to add it to IPRA must be left with the Legislature. It should not be added judicially by an expansive reading of IPRA’s twelfth exception.

II. JUDICIAL CREATION OF A DELIBERATIVE PROCESS EXCEPTION TO IPRA IS AN UNWARRANTED LIMITATION ON CITIZENS’ ABILITY TO ACCESS PUBLIC INFORMATION.

A. IPRA’s Current Exceptions Provide Sufficient Limitations to the Rule of Greatest Possible Disclosure.

Under the current twelve exceptions to IPRA, New Mexico citizens face an uphill battle in accessing public records to which they are lawfully entitled.

Indeed, it is NMFOG’s experience that the public is encountering increasing resistance from public agencies that refuse to comply with IPRA. A number of lawsuits filed by citizens seeking access to public records are currently pending in New Mexico courts. These include: *San Juan Agric. Water Users Assoc. v. KNME-TV*, Sup. Ct. No. 32,139; *Rio Grande Sun v. Jemez Mountain Sch. Dist.*, Ct. App. No. 30,698; *Albuquerque Journal v. Office of the Governor of New Mexico*,

being circumscribed by the Legislature, stating “There is a difference between what is subject to discovery in a court of justice and what private citizens are able to discover under ‘Right to Know’ statutes.” 96 N.M at 260, 629 P.2d at 336.

Second Judicial Dist. Ct. No. D-202-CV-2010-06756 (filed June 3, 2010); *Albuquerque Journal v. New Mexico Dep't of Transp.*, Second Judicial Dist. Ct. No. D-202-CV-2009-04248 (filed Apr. 13, 2009); *Cooper v. Lincoln County*, Thirteenth Judicial Dist. Ct. No. D-1329-CV-2007-01364 (filed Oct. 15, 2007); *Foy v. New Mexico State Inv. Council*, Second Judicial Dist. Ct. No. D-202-CV-2009-01864 (filed Feb. 18, 2009); *Griego v. New Mexico Taxation & Rev.*, Second Judicial Dist. Ct. No. D-202-CV-2009-05196 (filed May 5, 2009); *Nat'l Educ. Ass'n of New Mexico v. Bd. of Educ. of San Juan College*, Eleventh Judicial Dist. Ct. No. D-1116-CV-20100-0734 (filed April 26, 2010); *Rio Grande Sun v. Bd. of Regents of N. New Mexico College*, First Judicial Dist. Ct. No. D-117-CV-2010-00327 (filed July 29, 2010).

Engrafting a judicially coined deliberative process privilege to the limited Legislative exceptions to IPRA only increases the likelihood of improper obstacles being placed in the path of citizens by recalcitrant public officials seeking to perform their work without public oversight. Indeed, the deliberative process privilege has consistently been criticized for its harmful impact on the citizens' right to obtain information, for its negative effect on the government's decision making ability, and for its frequent abuse by government officials. See Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761,

764 (1966-67) (“Issues about the extent of executive privilege have been numerous and complex”).

B. The Deliberative Process Privilege Discourages Citizen Participation and Encourages Poor Government Decision Making.

1. The deliberative process privilege is detrimental to citizen participation in government.

It is of paramount importance that citizens be informed of the actions of their government:

The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important.

Barr v. Matteo, 360 U.S. 564, 577 (1959) (Black, J., concurring). The refuge available to bureaucrats under the deliberative process privilege severely undermines this principle.

The deliberative process privilege limits the public information available to citizens. The information withheld under the shield of this privilege can be the most essential for citizens to obtain on important issues such as the operation of the executive branch, the character and competence of government officials, and the degree to which the government is meeting the needs of the public. Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*,

65 Ind. L.J. 845, 893 (1990). The paradox implicit in the deliberative process privilege is the idea that “so as to enable the government more effectively to implement the will of the people, the people are kept in ignorance of the workings of their government.” See *Herbert v. Lando*, 441 U.S. 153, 196 (1979) (Brennan, J., dissenting in part); *United States v. Irvin*, 127 F.R.D. 169, 172 n.4 (C.D. Cal. 1989) (“[t]he ironic premise of the deliberative process privilege appears to be that a democratic government functions more effectively when the electorate remains ignorant of how governmental decisions are actually reached”). This type of secrecy has a number of harmful effects on the power of citizens, disarming them of the information they need in order to effectively promote their interests. See Wetlaufer, *supra* at 892 (“Executive secrecy also has a number of effects, almost all bad, on the power and effectiveness of the citizens who we regard as sovereigns and on the possibilities that we might realize the ideals of democracy and self-government”); *Bd. of Comm’rs of Dona Ana County v. Las Cruces Sun-News*, 2003-NMCA-102, ¶ 29, 134 N.M. 283, 76 P.3d 36 (“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”).

2. The deliberative process privilege encourages poor government decision making.

The deliberative process privilege not only harms citizens, it also creates a shroud of secrecy that is damaging to our government. Impeding the greatest

possible disclosure of public records results in secrecy that leads to public animosity towards the government:

Secrecy operates to alienate—to create subjective distance between—the secret keeper and the one from whom the secret is kept. In the public sphere, such alienation between the governed and the governors tends toward hierarchy and away from democracy and citizen sovereignty.

Wetlaufer, *supra* at 886. Secrecy undermines the public trust in government by insinuating to citizens that government officials cannot be held responsible for their actions. *See, e.g., Birkett v. City of Chicago*, 705 N.E.2d 48, 52 (Ill. 1998); Wetlaufer, *supra* at 890 (“When a government keeps secret the processes by which its most ordinary decisions are reached . . . it uses up some of the respect, the legitimacy and the credibility on which rests its ability to govern”). On the other hand, a government that is transparent to its citizens increases confidence and credibility. *See* Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. Chi. L. Rev. 865, 903-05 (2007).

Moreover, excessive secrecy necessarily constricts the flow of information available to the decision maker, which deprives her of “access to an active, probing, testing, alternative-generating marketplace in ideas” and actually decreases the effectiveness of the executive decision making process. *See* Wetlaufer, *supra* at 889. “Decisions made in secret may be substantively inferior to those that would have been reached without the supposed benefit of secrecy but

with, instead, the benefit of a widened range of input and criticism.” *See id.* n.166 (citing S. Bok, *Secrets* at 26 (1983)).

C. Judicial Creation of a Deliberative Process Exception to IPRA Invites Bureaucratic Abuse.

Unlike the legislative exceptions to IPRA codified in the Act, a judicially created deliberative process exception to IPRA is amorphous, and invites the government to make improper, blanket assertions that the exception applies even in instances where it should not. Indeed, scholars repeatedly have recognized government abuse of the deliberative process privilege through its overly broad application. As noted by one scholar:

Given our want of an open and free government, the rather expansive use in recent years of the so-called deliberative process privilege to preclude disclosure of numerous government documents is quite surprising, if not downright shocking. . . . In practice, the privilege is routinely invoked by the government to excuse itself from the obligation to disclose information in civil litigation, in response to Freedom of Information Act requests, and to Congress.

Michael Ray Harris, *Standing in the Way of Judicial Review: Assertion of the Deliberative Process Privilege in APA Cases*, 53 St. Louis L.J. 349, 351 (2009).

See also C.A. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5680 at 148 (1992) (recognizing that the privilege “can be easily manipulated by careful selection of the ‘decision’ to which the opinion is supposed to be related”);

Raoul Berger, *Executive Privilege: A Constitutional Myth* 235-36 (1974)

(recognizing that the privilege is “often invoked for sheer trivialities or to block

exposure of administrative neglect or corruption”); Davis, *supra* at 795 (“The exemption [5 to the Freedom of Information Act] clearly serves [to avoid inhibiting frank discussion], but the implication that the exemption does not go beyond that is unsound. It clearly reaches memorandums or letters which have nothing to do with the process of arriving at positions”).

Government officials recognize that the privilege is subject to misuse. In 1959, the Acting Director of the International Cooperation Administration testified before Congress that “if ICA wanted to apply the ‘executive privilege’” then the General Accounting Office “would not see one thing because practically every document in our agency has an opinion or a piece of advice.” Executive Privilege (International Cooperation Administration), Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 86th Cong., 1st Sess. 340, 359 (1959). Similarly, Congress considered abuse of executive privilege as one of the driving forces when enacting the Freedom of Information Act. *See Nixon v. Sirica*, 487 F.2d 700, 766 (D.C. Cir. 1973).

The concern that government officials will seek to misuse the deliberative process privilege is far from hypothetical. Courts throughout the United States have determined that government agencies have improperly withheld information in a variety of circumstances where the privilege was inapplicable. For example:

- In *Chevron U.S.A., Inc. v. United States*, 80 Fed. Cl. 340, 351 (Ct. Cl. 2008), the plaintiff filed sought discovery of documents including those related to

ex parte contracts into which the government had entered. The government withheld hundreds of folders of documents containing factual content, claiming that these documents were protected by the deliberative process privilege. *Id.* at 361. The court rejected this argument and admonished the government: “In light of the absolute clarity of the applicable precedent, the court considers the Government’s continued assertion that factual content is subject to the deliberative process privilege to border on abuse.” *Id.* The government’s abuse of the privilege caused a one year delay in the plaintiffs receiving the documents to which they were entitled.

- In *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980), involved government interpretations of regulations that were never made public, thus creating an illegal body of “secret law.” The plaintiff sought documents including memoranda discussing the agency’s interpretation of its own regulations. The agency claimed deliberative process privilege. The court found it was “readily apparent that the memoranda in issue bear little resemblance to the types of documents intended to be protected under the deliberative process privilege.” The court stated that the government’s attempt to characterize the documents as predecisional was based upon “a serious warping of the meaning of the word.” Nevertheless, the government successfully delayed producing the documents for five years under its improper claim of privilege.
- The California assembly under FOIA sought an unofficial census report, which categorized the California population by race and age, for use in redistricting. *See Assembly of California v. United States Dep’t of Commerce*, 968 F.2d 916, 918-19 (9th Cir. 1992). The government denied access under the deliberative process privilege, arguing that the information might be used in making future decisions. *See id.* at 921. The Court of Appeals rejected this argument as “prov[ing] too much” because “any memorandum always will be ‘predecisional’ in reference to a decision that possibly may be made at some undisclosed time in the future.” *Id.* Thus, a year after the request was filed, the court ordered the documents produced.
- In October 2004, a Florida newspaper sought information from the Federal Emergency Management Agency regarding allegations of fraud and waste in disaster assistance provided to Florida residents. FEMA refused to produce, among other documents, emails from the FEMA Under Secretary related to FEMA’s approach to defending its disaster response, on grounds of privilege. In 2006, the court found that withholding the emails “would be

contrary to the primary objective of FOIA; namely, to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *Sun-Sentinel Co. v. Dep’t of Homeland Sec.*, 431 F. Supp. 2d 1258, 1278 (S.D. Fla. 2006).

- After the United States Fish and Wildlife Service refused to place a rare bird on the endangered species list, the plaintiffs sought raw data and the report primarily relied upon in reaching this decision. *Sw. Ctr. for Biological Diversity v. Dep’t of Agric.*, 170 F. Supp. 2d 931, 941 (D. Ariz. 2000). The court rejected the government’s claim that various research documents were exempt under the deliberative process privilege to FOIA because the requested information was purely factual and not pre-decisional. Unfortunately, the plaintiffs were denied access to their requested documents for two and one-half years prior to the court’s decision.
- The White House claimed deliberative process privilege when withholding documents from a grand jury subpoena *duces tecum* in *In re Sealed Case*, 121 F.3d 729, 740 (D.C. Cir. 1997). The subpoena, issued in 1994, sought documents related to the alleged improper receipt of gifts by the then-Secretary of Agriculture. The court reviewed the withheld documents and found that “several documents are either wholly factual or contain segregatable factual assertions that would not come under the deliberative process privilege.” The court’s opinion ordering production of the documents came nearly three years after the subpoena was originally issued.
- Plaintiffs in a class action sought discovery from the FBI in *Elson v. Bowen*, 436 P.2d 12, 13, 16 (Nev. 1967). FBI Agents refused to answer deposition questions regarding alleged illegal phone surveillance, claiming executive privilege. The court rejected the claim stating the “government should not be allowed to use the claims of executive privilege and departmental regulations as a shield of immunity for the unlawful conduct of its representatives.” *Id.* at 16.
- A Wilderness Society’s FOIA request seeking information about a settlement between the state of Utah and the Department of the Interior was met by a claim of deliberative process privilege. *See* United States House of Representatives Committee on Government Reform - Minority Staff Special Investigations Division, *Secrecy in the Bush Administration*, 23-24 (September 14, 2004), <http://www.fas.org/sgp/library/waxman.pdf>. Yet the claim was unfounded as the documents were not only factual but were

drafted weeks after the settlement was reached, making it impossible for them to have been predecisional.

- A White House official improperly asserted executive privilege in *In re Grand Jury Proceedings*, No. 98-095, 98-096, 98-097, 1998 U.S. Dist. LEXIS 7735, at *5-6 (D.D.C. May 26, 1998). The official refused to answer several questions before the grand jury. *See id.* The court found that this assertion was made “where it clearly does not apply.” *Id.*

Government agencies in this State have never been immune to using similar broad and inappropriate claims of executive privilege to refuse to release public information to citizens. Recent examples include:

- A list of state employees transferring from government exempt positions into non exempt positions, or “classified services” was leaked to Albuquerque’s KOB Television.⁴ Although the list includes only facts regarding transfer of position, and contains no evidence of predecisional deliberative policy recommendations, at the bottom of all three pages is a standard footer stating “Executive Privilege Working Draft.”⁵
- *Albuquerque Journal v. N.M. Dep’t of Transp.*, No. D-202-CV-2009-04248 (currently pending in the Second Judicial District). An Albuquerque Journal reporter made an IPRA request for records relating to negotiations between the New Mexico Department of Transportation (“NMDOT”) and Ben Lujan over an allegedly illegal billboard on Lujan’s property. NMDOT produced some documents, but never informed the reporter that other documents were being withheld. Through an independent source the reporter discovered that there might be additional responsive documents. When she approached NMDOT officials with this claim they asserted executive privilege as the basis for withholding these documents.
- *Rio Grande Sun v. N.M. Dep’t of Pub. Safety*, No. D-202-CV-2005-06554 (settled and dismissed, April 4, 2007). The Department of Public Safety

⁴ <http://www.kob.com/article/stories/S1846692.shtml?cat=500> (last visited November 23, 2010).

⁵ http://www.kob.com/kobtvimages/repository/cs/files/Govx_Classified_Service.pdf (last visited November 23, 2010).

asserted executive and other privileges in response to an IPRA request for a 911 transcript and police reports. In its summary judgment motion, the Rio Grande Sun addressed the privilege claim – “it would appear illogical that standard law enforcement records somehow contain privileged communications between the Governor, the Attorney General or other executive branch officials. There is no sound reason why the executive privilege would apply to such records.” Pls.’ Mem. in Supp. of Their Mot. for Partial Summ. J. at 43, filed Nov. 21, 2006.

- The court rejected the Department of Health’s claim of executive privilege in *J.M. v. N.M. Dep’t of Health*, 2:07-CV-00604- RB-ACT, slip op. at 13,15 (D.N.M. Aug. 20, 2009). The plaintiffs sought records related to former residents of state institutions to ensure that they were being properly protected by the State. The Governor’s Office claimed executive privilege applied to the results of an investigation regarding the former residents. *Id.* at 13. Judge Torgerson found, “the Governor’s Office has not demonstrated with ‘precise and certain reasons’ that the information requested is predecisional and relates to a deliberative process. The Governor’s Office has presented no facts to show that [the individuals involved in the investigation] were engaged in deliberations or discussions with the Governor to determine what policy the Governor should adopt. Accordingly this Court finds that the deliberative process privilege does not apply; however, even if the privilege did apply, as discussed *supra*, it would not extend to information that is factual in nature.” *Id.* at 14.

Whether legislatively or judicially created, the deliberative process privilege is subject to significant abuse by government officials. Yet if it is left to the Legislature to create a deliberative process exception to IPRA, at least the citizens of New Mexico will have an opportunity to be heard on the critical issue of whether and how their access to public documents should be limited - which also provides an opportunity through legislative compromise to limit any resulting privilege to avoid abuse. The legislative process increases the chances that a statutory exception will be carefully crafted and limited to avoid abuse, and does

so in a way that cannot be replicated by the judiciary. Indeed, the judicially created exception adopted by the Court of Appeals has none of these protections. Not only does a deliberative process exception to IPRA have the potential for abuse by the government, that “potential” has been realized in New Mexico and throughout the country. By adding this privilege as a judicial exception to IPRA, the Court of Appeals has erected a new and substantial barrier for citizens who seek access to public records under IPRA. That barrier, found nowhere in IPRA itself, should be removed by this Court.

III. JUDICIAL ADDITION OF A DELIBERATIVE PROCESS EXCEPTION TO IPRA PROMOTES LAWSUITS AND DELAYS ACCESS TO PUBLIC INFORMATION.

Time is of the essence for most IPRA requests. IPRA itself recognizes that delay in producing records compromises the ability of a citizen to investigate and, when necessary, correct the course of government. *See* NMSA 1978, § 14-2-8(D). In NMFOG’s experience, the claim by a government agency that a request seeks privileged information is often a delay tactic, and it is typically made when the public records wrongfully withheld are outside the scope of any IPRA exception. Because the information in records requested can become stale after several years, parties seeking IPRA access suffer significant harm while waiting for court review. *Cf. Payne Enter., Inc. v. United States*, 837 F.2d 486, 487, 494 (D.C. Cir. 1988) (holding that delay in disclosure of documents withheld by government’s wrongful

invocation of FOIA exception injured plaintiff's business, stating: "The fact that [Plaintiff] eventually obtained the information it sought provides scant comfort when stale information is of little value yet more costly than fresh information ought to be"); *Ryan v. Dep't of Justice*, 617 F.2d 781, 792 (D.C. Cir. 1980) (where plaintiffs sought records in order to monitor federal judicial appointments of women and minorities, the court recognized that any delay in responding to their request could easily render their request futile).

As confirmed by the cases cited above, delays of a year or more are common when the government claims protection under the deliberative process privilege. *See, e.g., Rashad Ahmad Refaat El Badrawi v. Dep't of Homeland Sec.*, 583 F. Supp. 2d 285, 293 (D. Conn. 2008) (plaintiff who was removed to Lebanon waited two years for a court to require ICE and other agencies to produce records explaining his visa revocation and removal from the U.S.); *Sw. Ctr. for Biological Diversity*, 170 F. Supp. 2d at 941 (plaintiffs seeking to ensure protection for rare bird by having it designated an endangered species waited two and one-half years to receive an investigatory report from the government); *In re Sealed Case*, 121 F.3d at 740 (three-year delay between filing a grand jury subpoena and receiving records necessary to investigate improper gifts made to an executive official). If this Court accepts the lower courts' deliberative process IPRA exception, lengthy delay will prevent many New Mexico citizens and media organizations from

seeking judicial enforcement of their access rights under IPRA when denied access to public records based on a claimed “deliberative process” exception to IPRA.

Additionally, judicial adoption of the deliberative process privilege as an exception to IPRA will only increase the likelihood of a citizen having to file lawsuits against the government in order to obtain records. The need to litigate operates to chill people’s assertion of their rights. *Cf. Brudwick v. Minor*, No. 05-CV-00601-WYD-MJW, 2006 U.S. Dist. LEXIS 51608, at *63-64 (D. Colo. July 13, 2006) (recognizing that the threat of protracted litigation might chill the full and free exercise of citizens’ First Amendment rights); *Vill. of Lake Barrington v. Hogan*, 649 N.E.2d 1366, 1376 (Ill. App. Ct. 1995) (“A threat of litigation can chill the constitutional right of access to the courts even if the threat was not successful”). Finally, the time, money and legal resources necessary to file IPRA suits simply are not available to many New Mexico citizens. The likelihood of litigation will be heightened by the amorphous nature of the deliberative process exception to IPRA fashioned by the Court of Appeals.

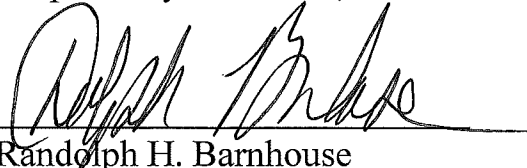
CONCLUSION

The lower court rulings create a new exception to IPRA, in abrogation of the rule of greatest possible disclosure. Inherent in this judicial IPRA exception is a significant danger of abuse by the government, and the likely deterrence of citizens

seeking access to the public's records. The district court and the Court of Appeals' rulings should be reversed as inconsistent with the letter and spirit of IPRA.

November 23, 2010

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Randolph H. Barnhouse", written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that on November 23, 2010, I caused a true and correct copy of the Brief of New Mexico Foundation for Open Government Brief of *Amicus Curiae* to be sent by first class U.S. mail to the following:

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