

# COPY

STATE OF NEW MEXICO

COUNTY OF BERNILILLO

SECOND JUDICIAL DISTRICT COURT

Case No. D-0202-CV-2007-07606

SAN JUAN AGRICULTURAL, WATER USERS  
ASSOCIATION; ELECTORS CONCERNED  
ABOUT ANIMAS WATER; and STEVE CONE,

Plaintiffs,

v.

KNME-TV; BOARD OF EDUCATION OF  
ALBUQUERQUE PUBLIC SCHOOLS;  
REGENTS OF THE UNIVERSITY OF NEW  
MEXICO; JOHN D'ANTONIO, NEW MEXICO  
STATE ENGINEER; OFFICE OF THE NEW  
MEXICO STATE ENGINEER; NEW MEXICO  
INTERSTATE STREAM COMMISSION; and  
OFFICE OF THE GOVERNOR OF NEW  
MEXICO

Defendants.

**NEW MEXICO FOUNDATION FOR OPEN GOVERNMENT'S  
MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE  
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

The New Mexico Foundation for Open Government ("NMFOG"), through its undersigned counsel, respectfully moves the Court for leave to appear in this matter as *amicus curiae* and file the brief in opposition to the Defendants' Motion to Dismiss the Plaintiffs' complaint in this case (filed October 5, 2007) attached as Exhibit A to this Motion. NMFOG

also respectfully requests that it be provided an opportunity to be heard as *amicus curiae* the hearing on the Defendants' Motion currently scheduled for February 12, 2008 at 9:30 a.m.

NMFOG sought the concurrence of counsel for parties to this Motion; counsel for Plaintiff does not oppose this Motion, and counsel for the Defendants opposes this Motion.

Respectfully submitted,

PEIFER, HANSON & MULLINS, P.A.

By: 

Charles R. Peifer

Lauren Keefe

Matthew R. Hoyt

Attorneys for New Mexico Foundation for Open  
Government

Post Office Box 25245

Albuquerque, New Mexico 87125-5245

Telephone: (505) 247-4800

We hereby certify that a copy of the foregoing was served by facsimile and first-class mail to counsel of record:

Mark T. Baker  
Long, Pound & Komer, P.A.  
2200 Brothers Road  
P. O. Box 5098  
Santa Fe, NM 87502-5098  
Telephone: (505) 982-8405

Victor R. Marshall  
Victor R. Marshall & Associates, P.C.  
12509 Oakland NE  
Albuquerque, NM 87122-2274  
Telephone: (505) 332-9400

on this 8<sup>th</sup> day of February, 2008.

PEIFER, HANSON & MULLINS, P.A.

By:

  
Matthew R. Hoyt

STATE OF NEW MEXICO

COUNTY OF BERNILILLO

SECOND JUDICIAL DISTRICT COURT

Case No. D-0202-CV-2007-07606

SAN JUAN AGRICULTURAL WATER USERS  
ASSOCIATION; FLECTORS CONCERNED  
ABOUT ANIMAS WATER; and STEVE CONE,

Plaintiffs,

v.

KNME-TV; BOARD OF EDUCATION OF  
ALBUQUERQUE PUBLIC SCHOOLS;  
REGENTS OF THE UNIVERSITY OF NEW  
MEXICO; JOIN D'ANTONIO, NEW MEXICO  
STATE ENGINEER; OFFICE OF THE NEW  
MEXICO STATE ENGINEER; NEW MEXICO  
INTERSTATE STREAM COMMISSION; and  
OFFICE OF THE GOVERNOR OF NEW  
MEXICO

Defendants.

**NMFOG'S BRIEF AS AMICUS CURIAE**  
**IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

New Mexico Foundation for Open Government ("NMFOG") seeks to appear in this case as *Amicus Curiae* because two arguments made by the Defendants in their Motion to Dismiss would, if accepted by the Court, severely curtail citizens' rights and ability to obtain records from



their government under the Inspection of Public Records Act, NMSA 1978, § 14-2-1 *et seq.* ("IPRA").

The first argument -- that an entity cannot enforce their rights under IPRA when the request is made by one of its agents -- would severely hinder the ability of the news media and other public interest organizations to remedy denied IPRA requests made by their editors, reporters and staff. The second argument -- that jurisprudence established under the federal Freedom of Information Act ("FOIA") governs the application of IPRA -- would artificially curtail the expansive rights afforded by IPRA, since FOIA is much more limited in the rights it provides to citizens. The Defendants' motion to dismiss the Plaintiffs' Complaint should not be granted on such grounds.

#### INTEREST OF THE AMICUS

NMFOG is an educational and charitable organization dedicated to assisting New Mexico citizens with understanding, exercising and preserving their rights under the federal and New Mexico Constitutions, the New Mexico Open Meetings Act, the Inspection of Public Records Act, and the Arrest Record Information Acts, as well as their rights under the federal Freedom of Information Act. NMFOG has a vital interest in the matters at issue in this litigation, because the State Defendants, through their Motion to Dismiss, seek to place improper limits on the ability of the Plaintiffs in enforcing their IPRA request, which would in turn result in inappropriate restrictions, and a chilling effect, on IPRA requests made by other persons or entities in New Mexico. NMFOG thus seeks to appear as *amicus curiae* in this matter to inform the Court and

ensure that IPRA's stated purpose 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, is not hindered.

### ARGUMENT

#### **I. DEFENDANTS' POSITION THAT A PRINCIPAL CANNOT ENFORCE AN IPRA REQUEST BROUGHT BY ITS AGENT WOULD CHILL MEDIA AND NON-PROFIT ORGANIZATIONS' USE OF IPRA REQUESTS.**

The Defendants' position that a requestor under IPRA must disclose his or her identity and cannot use an agent to request government records, if sanctioned by this Court, would lead to untenable results in many situations, threatening the enforceability of IPRA. For example, suppose an investigative reporter tenders a request for public records to a state agency in her own name because she does not want to disclose that she is investigating on assignment from a newspaper. If her request is denied by the agency, under the defendants' argument her newspaper would be precluded from filing a lawsuit to obtain the records, leaving the burden on the individual reporter to bring a lawsuit in her name rather than by her news organization. Similarly, an individual member of a non-profit government watchdog group who tenders an IPRA request in her own name because she does not wish to disclose the identity of her organization would be forced to either bring her own lawsuit or abandon her request if it is denied. In either case, Defendants' position would chill the news media's and public interest groups' use of IPRA to obtain information from their government.

Such a result was clearly not envisioned by the New Mexico Legislature when it mandated under § 14-2-8(C) of IPRA that no requestor “shall be required to state the reason for inspecting the records.” Indeed, as the Defendants’ argument makes clear, a primary reason that the federal courts have ruled that an attorney may not bring suit under FOIA on behalf of an undisclosed client is because the court would be unable to determine “anything about the nature of the plaintiff’s interest in the records if her identity is undisclosed.” Reply in Support of Motion To Dismiss at 5 (quoting *Burka v. United States Dep’t of Health and Human Servs.*, 142 F.3d 1286, 1291 (D.C. Cir. 1998)). This inquiry is expressly prohibited by IPRA, presumably to avoid the very results that could occur above under Defendants’ reading of the statute.

Furthermore, it is black letter law that “[i]n an agency relationship, whatever an agent does in the lawful prosecution of the transaction the principal has entrusted to him or her is the act of the principal.” 3 Am. Jur. 2d *Agency* § 2 (2007). Nothing in IPRA abolishes or limits the common law principles of agency, which are stated in the Uniform Jury Instructions. See *Sims v. Sims*, 1996-NMSC-078, ¶¶ 23-29, 122 N.M. 618, 930 P.2d 153 (statute supplements the common law rather than abolishing it); see also UJI 13-401, NMRA 2007 (“An agent is a person who, by agreement with another called the principal, represents the principal in dealings with third persons or transacts some other business, manages some affair or does some service for the principal . . .”). The Court should not entertain the Defendants’ attempt to impose improper and artificial limits on IPRA.

**II. CASES DECIDED UNDER THE FEDERAL RECORDS LAWS ARE INAPPLICABLE.**

In addition, the Court should not accept the Defendants' invitation to rely on federal law decided under FOIA when interpreting New Mexico's statute. IPRA is much stronger than FOIA in key respects, and employing FOIA case law to interpret IPRA would water down the rights afforded New Mexicans under their state open records law. NMFOG is concerned that reliance on federal case law in this case will set a precedent that, if followed by other New Mexico courts, would lead to an unduly restrictive interpretation of IPRA that the New Mexico legislature did not intend.

The IPRA contains a number of specific provisions that are not found in FOIA. Indeed, in this specific instance, FOIA provides that "an individual whose name does not appear on a FOIA request cannot bring suit under that statute," while the IPRA, in contrast, expressly provides that a requestor need not give the reasons for requesting the records. Thus, the Defendants' reliance on federal case law in this case is misplaced.

In addition, IPRA contains an express legislative mandate that it be construed liberally and in favor of disclosure. *See* NMSA 1978, § 14-2-5 (declaring it to be "the public policy of this state, that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees.) It is the further intent of the legislature, and it is declared to be the public policy of this state, that to provide persons with such information is an essential function of a representative government and an integral part of the routine duties of public officers and employees." FOIA does not include such a strong statement of purpose. Finally, in addition to mandatory attorneys' fees, IPRA also provides for



the recovery of \$100 for every day that an agency fails to make required disclosure, to spur the agency to make full and prompt disclosure. See NMSA 1978, § 14-2-11(C) (providing for penalties for non-compliance), § 14-2-12 (enforcement provision); *Board of Comm'rs v. Las Cruces Sun-News*, 2003-NMCA-102, ¶¶ 35-41, 134 N.M. 283, 76 P.3d 36. By contrast, FOIA does not provide daily damages when a government agency delays full disclosure.

Second, there is no New Mexico precedent for relying on federal interpretations of a materially different federal statute to interpret a New Mexico statute. Indeed, the New Mexico courts will not rely on federal case law to interpret our statutes, our rules, or our constitution, where the federal counterparts are different. See, e.g., *Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Comm'n*, 2006-NMCA-115, ¶ 37, 140 N.M. 464, 143 P.3d 502 ("there may be reasons, such as differences in statutory language, that may make federal law or law from other jurisdictions inapplicable or inappropriate in New Mexico"); *State v. Badoni*, 2003-NMCA-009, ¶ 16, 133 N.M. 257, 62 P.3d 348 ("fundamental differences between federal and New Mexico's rules of pleading make federal case law on the issue of notification distinguishable"); *State v. Cardenas-Alvarez*, 2001-NMSC-017, 130 N.M. 386, 25 P.3d 225 (prolonged checkpoint stop was not illegal under federal border search law but illegal under state constitution); *New Mexico Dep't of Labor v. A.C. Elec., Inc.*, 1998-NMCA-141, ¶ 31, 125 N.M. 779, 965 P.2d 363 ("the New Mexico [minimum wage act] does not track the language of the federal statute. . . . Clearly, the New Mexico Legislature chose a different test from that imposed by federal law.") (Hartz, J., dissenting).

Furthermore, courts in other states have refused to interpret their public records inspection statutes in accord with federal interpretations of FOIA. See, e.g., *Graham v. Alabama State Employees Ass'n*, 2007 Ala. Civ. App. LEXIS 724, at \*20-21, 2007 WL 3407529 (Ala. Civ. App. Nov. 16, 2007) (finding that court was not required to apply FOIA's requirement of a balance between privacy interests against the need for disclosure to public where state public records statute included no such language, *Magic Valley Newspapers, Inc. v. Magic Valley Regional Medical Center*, 59 P.3d 314, 316-17 (Idaho 2002) (finding that FOIA did not apply to case brought under state public records law. This Court should likewise not entertain the Defendants' invitation to rewrite IPRA to impose the limitations of FOIA to requests for state government records.

#### CONCLUSION

The Defendants' attempt to erect obstacles to the full and prompt disclosure of public records, in the guise of a motion to dismiss this lawsuit, should not be permitted by this Court, because more is at stake than IPRA requests tendered by the Plaintiffs in this case. The Defendants' motion should be denied.

Respectfully submitted,

PEIFER, HANSON & MULLINS, P.A.

By: \_\_\_\_\_  
Charles R. Peifer  
Matthew R. Hoyt  
Attorneys for New Mexico Foundation for Open  
Government  
Post Office Box 25245  
Albuquerque, New Mexico 87125-5245  
Telephone: (505) 247-4800

We hereby certify that a copy of the  
foregoing was served by facsimile  
and first-class mail to counsel of  
record:

Mark T. Baker  
Long, Pound & Komer, P.A.  
2200 Brothers Road  
P. O. Box 5098  
Santa Fe, NM 87502-5098  
Telephone: (505) 982-8405

Victor R. Marshall  
Victor R. Marshall & Associates, P.C.  
12509 Oakland NE  
Albuquerque, NM 87122-2274  
Telephone: (505) 332-9400

on this \_\_\_ day of February, 2008.

PEIFER, HANSON & MULLINS, P.A.

By: \_\_\_\_\_  
Matthew R. Hoyt