IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

SANTA FE REPORTER NEWSPAPER, Plaintiff-Appellant, v. THE CITY OF SANTA FE and GREG GURULE, in his official capacity as a Records Custodian for the City of Santa Fe, Defendants-Appellees and Cross-Appellants.	No. A-1-CA-39337 Santa Fe County Judge Bryan Biedscheid (D-101-CV-2019-00661)

BRIEF OF *AMICI CURIAE* THE NEW MEXICO FOUNDATION FOR OPEN GOVERNMENT, *ALBUQUERQUE JOURNAL*, *SANTA FE NEW MEXICAN*, KOB-TV, LLC, KOAT-TV, AND NEW MEXICO PRESS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLANT SANTA FE REPORTER NEWSPAPER

Respectfully submitted,

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EXHIBIT
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STATEMENT OF COMPLIANCE

The body of the *Amici Curiae* brief for the New Mexico Foundation for Open Government ("NMFOG"), *Albuquerque Journal*, *Santa Fe New Mexican*, KOB-TV, LLC, KOAT-TV, and New Mexico Press Association uses a proportionally-spaced typeface (Times New Roman – 14 pt font), contains 4,714 words, as counted by Microsoft Word, Version 2010 (Build 13328.20292 Click-to-Run), and thus complies with the limitations of Rule 12-320(E) NMRA and Rule 12-504(G)(3).

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Amici Curiae New Mexico Foundation for Open Government ("NMFOG"), *Albuquerque Journal*, *Santa Fe New Mexican*, KOB-TV, LLC, KOAT-TV, and New Mexico Press Association submit this brief in support of Appellant-Plaintiff Santa Fe Reporter Newspaper's Brief in Chief.[1]

STATEMENT OF INTEREST

NMFOG is a non-profit, nonpartisan organization committed to helping citizens, students, educators, public officials, media and legal professionals in New Mexico understand, obtain and exercise their rights and responsibilities under New Mexico's "sunshine laws," including the Inspection of Public Records Act ("IPRA") and the Open Meetings Act. In pursuit of these purposes, NMFOG has participated in judicial proceedings, either as a party or as *amicus curiae*, where access to public records and information is at stake. *See, e.g., Jones v. City of Albuquerque*, 2020-NMSC-013 (amicus); *New Mexico Foundation for Open Government v. Corizon Health*, 2020-NMCA-14 (party); *San Juan Agr. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, 150 N.M. 64; *Palenick v. City of Rio Rancho*, 2013-NMSC-029 (amicus); *Edenburn v. New Mexico Dep't of Health*, 2013-NMCA-045 (amicus); *Republican Party of New Mexico v. New Mexico Taxation & Revenue Dep't*, 2012-NMSC-026 (amicus).

[1] In accordance with Rule 12-320(C) NMRA, *amici* state that no counsel for any party authored this brief in whole or in part, nor made a monetary contribution intended to fund the preparation of submission of the brief.

The *Albuquerque Journal* and *Santa Fe New Mexican* are newspapers of regional and local circulation in New Mexico. KOB-TV, LLC and KOAT-TV are television stations broadcasting throughout New Mexico. Each is a newsgathering organization that reports on the conduct of public officials and employees in New Mexico, including state law enforcement entities. New Mexico Press Association is an association of newspapers throughout New Mexico whose mission includes ensuring transparency in government.

Pursuant to Rule 12-320(D)(1) NMRA, *amici* provided notice of their intent to seek leave to file this brief on April 14, 2021.

ARGUMENT

I. INTRODUCTION

Amici urge this Court to reverse the district court's ruling that public records containing the fact of discipline of public employees are exempt from IPRA under NMSA 1978, Section 14-2-1(C) (2019), which bars public inspection of "letters or memoranda that are matters of opinion in personnel files." The district court's ruling was in error. The fact of discipline is plainly not a matter of opinion, and thus the exemption does not apply. The legislative policy of transparency underlying IPRA requires that public entities may not use Section 14-2-1(C) to hide factual information about governmental conduct from public view.

The Court should also take this opportunity to make clear that in enacting

Section 14-2-1(C), the Legislature did not intend to exempt all records of discipline, assessment or evaluation of public employees. The Legislature's intent to exempt a far narrower portion of personnel records is apparent from the explicit language in Section 14-2-1(C) limiting the exemption to matters of opinion, and from its declaration of policy that the purpose of IPRA is to provide the greatest possible information to the public. *See* NMSA 1978, § 14-2-5 (1993).

In doing so, the Court should clarify dicta in *Cox v. New Mexico Dept. of Pub. Safety*, 2010-NMCA-096, ¶¶ 21-22, 148 N.M. 934, that has led some district courts and public records custodians to improperly interpret Section 14-2-1(C) to encompass more than matters of opinion. Only one type of public record, citizen complaints against police officers, was at issue in *Cox*. The issue of whether disciplinary, assessment or evaluative records were exempt from IPRA was not before the Court. As a result, language in *Cox* as to whether public records other than citizen complaints are exempt from inspection is not binding on this Court, the district courts, or any records custodian. The Court should make this clear, and hold that regardless of the nature of a record of public employment, only matters of opinion contained in the record are exempt, and non-opinion material contained in the record must be made available to the requestor.

II. INTERPRETING IPRA TO CARRY OUT THE INTENT OF THE LEGISLATURE REQUIRES A NARROW READING OF "MATTERS OF OPINION"

A judicial interpretation of Section 14-2-1(C) that swells the meaning of "matters of opinion" to include all records of discipline, assessment or evaluation of public employees, where the Legislature has not provided such an expansive definition, contradicts the Legislature's explicit intent.

A. IPRA's exemptions must be interpreted narrowly, in a manner that carries out the Legislature's explicit policy of transparency.

This Court recently set forth the procedure for interpreting a provision of IPRA:

> The starting point for any court tasked with resolving an IPRA challenge is to place into statutory context the particular arguments made vis-à-vis the Legislature's declared purpose in enacting IPRA. Unlike many statutes, for which the Legislature has provided no express statement of intent, IPRA contains a clear declaration of the public policy the Legislature intended to further by enacting IPRA. Section 14-2-5 provides:
>
> > Recognizing that a representative government is dependent upon an informed electorate, the intent of the [L]egislature in enacting the Inspection of Public Records Act is to ensure, and it is declared to be the public policy of this state, that *all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees*. It is the further intent of the [L]egislature, 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.*

Britton v. Office of Attorney Gen., 2019-NMCA-002, ¶ 29 (emphasis in decision). Following this legislative directive, the New Mexico Supreme Court has held that IPRA must be construed in light of its purpose and that statutory provisions under IPRA should be interpreted to mean what the Legislature intended it to mean, and to accomplish the ends sought to be accomplished. *New Mexico Found. for Open Gov't v. Corizon Health*, 2020-NMCA-014, ¶ 15, citing *San Juan Agric. Water Users Ass'n v. KNME-TV,* 2011-NMSC-011, ¶ 14, 150 N.M. 64. The Supreme Court has further stated that IPRA is intended to ensure that the public servants of New Mexico remain accountable to the people they serve. *San Juan Agric. Water Users*, 2011-NMSC-011, ¶ 16.

The Supreme Court has also relied on the Legislature's statement of policy in interpreting IPRA's exemptions narrowly. Most notably, in *Republican Party of New Mexico v. New Mexico Taxation & Revenue Dept*., 2012-NMSC-026, ¶ 16, the Supreme Court held that courts interpreting IPRA must restrict their analysis to whether disclosure under IPRA may be withheld because of a specific exception contained within IPRA, or statutory or regulatory exceptions, or privileges adopted by this Court or grounded in the constitution, specifically overruling years of prior cases in which courts had applied a "rule of reason" to all of the enumerated IPRA exemptions. More recently, in *Jones v. City of Albuquerque Police Dep't*, 2020-NMSC-013, ¶¶ 1, 38, the Supreme Court rejected a district court's interpretation of

another IPRA exemption, NMSA 1978, Section 14-2-1(A)(4) (2019), that expanded the exemption beyond its plain language ("the district court certainly did not apply the plain language of Section 14-2-1(A)(4) … Section 14-2-1(A)(4) does not create a blanket exception from inspection for law enforcement records relating to an ongoing criminal investigation").[2]

B. The legislative policy of transparency, and the plain language of Section 14-2-1, requires that the exemption be interpreted to exclude only "matters of opinion."

With this backdrop of legislative intent, this Court can then consider the plain language of Section 14-2-1(C). *See, e.g., Gen. Motors Acceptance Corp. v. Anaya*, 1985-NMSC-066, 103 N.M. 72, ¶ 15 ("[t]he plain language of a statute is the primary indicator of legislative intent"); *Jones*, ¶¶ 37-39 (the plain language rule applies to the interpretation of IPRA exemptions). A plain reading of the phrase "matters of opinion in personnel files" in Section 14-2-1(C), taken in the context of the express legislative policy of providing the greatest possible information to the public, demonstrates the Legislature's intent to exempt only matters of opinion, and not matters of fact.

Material that does not constitute matters of opinion is thus subject to IPRA. Section 14-2-1(C) contains no language indicating that the Legislature intended the

[2] The exemption now contained in NMSA 1978 Section 14-2-1(D) (2019) was, at the time of the *Jones* decision, codified as NMSA 1978, Section 14-2-1(A)(4) (2011).

exemption to encompass non-opinion information, much less all records of discipline, assessment or evaluation of public employees. The Legislature's inclusion of Section 14-2-1(C) in IPRA demonstrates that it specifically considered the issue of personnel records; the narrow language of the exemption shows that the Legislature intended only a very limited subsection of these records to be hidden from the public. Had the Legislature intended more than "matters of opinion" to be exempt, it could have enacted the exemption to do so; for a court to infer that the Legislature intended to exempt additional records contradicts a basic principle of statutory construction. *See State v. Trujillo*, 2009-NMSC-012, ¶ 11, 146 N.M. 14 ("[w]e will not read into a statute any words that are not there, particularly when the statute is complete and makes sense as written." (internal citation omitted). As a result, any judicial ruling that expands the exemption to encompass all records of discipline, assessment or evaluation of public employees is erroneous.

This interpretation of Section 14-2-1(C) aligns with the IPRA Compliance Guide issued by the New Mexico Attorney General, who is charged with statutory authority to seek enforcement of IPRA. NMSA 1978, § 14-2-12(A)(1) (1993). *See Cox v. New Mexico Dept. of Pub. Safety*, 2010-NMCA-096, ¶ 28, 148 N.M. 934 ("While not binding on this Court, we find the New Mexico Attorney General's (NMAG) guidance [in its Compliance Guide] on this

general subject to be persuasive."). The Compliance Guide states that the limited exemption for matters of opinion in personnel files "is aimed at protecting documents in an agency's personnel or student files rather than factual information about particular individuals." NMAG Compliance Guide, Eighth Edition, at 9.[3]

III. THE COURT SHOULD CLARIFY THAT NO NEW MEXICO APPELLATE DECISION, INCLUDING *COX VS. NMDPS*, PERMIT PUBLIC BODIES TO WITHHOLD DISCIPLINARY RECORDS

Despite the explicit language of Section 14-2-1(C) exempting only matters of opinion contained in personnel files, and the policy of openness underlying IPRA, some district courts have felt compelled to bar inspection of additional records of public employees, thus improperly expanding the exemption beyond its plain language. In doing so, these courts have relied on dicta in *Cox v. New Mexico Dept. of Pub. Safety*, 2010-NMCA-096, 148 N.M. 934. The Court should take this opportunity to make clear that neither *Cox* nor any other New Mexico appellate decision permits district courts to interpret Section 14-2-1(C) in this manner.

Cox is a pro-transparency IPRA decision. The public records at issue were citizen complaints against a law enforcement officer. *Cox*, 2010-NMCA-096, ¶ 2. This Court rejected the district court's findings that the citizen complaints were

[3]https://www.nmag.gov/uploads/files/Publications/ComplianceGuides/Inspection%20of%20Public%20Records%20Compliance%20Guide%202015.pdf.

"matters of opinion" under Section 14-2-1(C).[4] In doing so, noting its mindfulness of the public policy in favor of openness in public records, the Court "[began its] analysis with the strong presumption that the public has a right to inspect the citizen complaints at issue." *Id.* ¶ 16. Rejecting the law enforcement agency's policy-based argument that disclosure of the complaints might bring negative attention to the officer, *id*. ¶ 26, the Court held that citizen complaints "are not the type of 'opinion' material the Legislature intended to exclude from disclosure." *Id.* ¶ 27. The Court further stated that "it would be against IPRA's stated public policy to shield from public scrutiny as 'matters of opinion in personnel files' the complaints of citizens who interact with police officers." *Id*. ¶ 29. The Court thus reversed the district court's order of summary judgment in favor of the law enforcement agency. *Id*. ¶ 32.

The Court did not hold that any other records were exempt from IPRA, including records of discipline. In fact, the Court was very clear that other records were not at issue, noting that the plaintiff's IPRA requests did not seek "information regarding DPS's investigatory processes, disciplinary actions, or internal memoranda that might contain DPS opinions (in its capacity as the officer's employer)." *Id.* ¶ 24. The only records that the Court was considering

[4] The exemption now contained in Section 14-2-1(C) was, at the time of the *Cox* decision, codified as NMSA 1978, Section 14-2-1(A)(3) (2011). The language of the current Section 14-2-1(C) is identical to that in the prior version.

were citizen complaints; exemption of any other records of discipline was not before it.

The subsequent confusion at the district court level arises from the following paragraph:

> At the outset, we agree with the district court's assessment that the location of a record in a personnel file is not dispositive of whether the exception applies; rather, the critical factor is the nature of the document itself. To hold that any matter of opinion could be placed in a personnel file, and thereby avoid disclosure under IPRA, would violate the broad mandate of disclosure embodied in the statute. Construing Section 14-2-1(A)(3) in a manner that gives effect to the presumption in favor of disclosure, **we conclude that the Legislature intended to exempt from disclosure "matters of opinion" that constitute personnel information of the type generally found in a personnel file, i.e., information regarding the employer/employee relationship such as internal evaluations; disciplinary reports or documentation; promotion, demotion, or termination information; or performance assessments.**

Id. ¶ 21 (emphasis added).

As discussed above, the Court in *Cox* was not asked to address whether any records other than citizen complaints were exempt from IPRA. This paragraph was thus unnecessary to resolution of the specific issue before the Court, and is not binding on any court or public entity charged with responding to IPRA requests. *State v. Santiago*, 2010-NMSC-018, ¶ 29, 148 N.M. 144 (Maes, J., specially concurring) (citation omitted) ("It is well established that legal conclusions unnecessary to the decision of the issues before the court constitute

dicta, which is not binding as a rule of law."). Furthermore, it does not accurately construe Section 14-2-1(C). As set forth above, any interpretation of this exemption that serves to bar access to any portion of a public record that is something other than a matter of opinion contradicts the intent of the Legislature and the plain language of the exemption.[5]

No other New Mexico appellate decision mandates that Section 14-2-1(C) be read to prevent inspection of employment records that are not matters of opinion. This includes two older Supreme Court decisions, *State ex rel. Newsome v. Alarid*, 1977-NMSC-076, 90 N.M. 790, and *State ex rel. Barber v. McCotter*, 1987-NMSC-046, 106 N.M. 1, which some public entities have relied upon in barring access to employment records.

Newsome addressed a broad request by a student reporter for "personnel records" of University of New Mexico employees. *Newsome*, ¶ 1. In holding that the reporter was entitled to some but not all of the records requested, the Supreme Court included the following paragraph:

> Letters of reference are specifically exempt from disclosure under Section B of the statute as are letters or memorandums which are

[5] As Cox is not binding on this Court, neither is an unpublished opinion of this Court, *Leirer v. New Mexico Dep't of Pub. Safety*, No. 35,154, 2016 WL 3958959 (N.M. Ct. App. June 7, 2016). In that case, brought by a pro se plaintiff, this Court upheld the district court's denial of the plaintiff's request for production of "the contents of a personnel file and an internal affairs file," citing *Cox*. *Id*., at *1 The Court of Appeals designated its ruling as non-precedential under Rule 12-405(A). Furthermore, the same arguments set forth above regarding the limitations of *Cox* similarly applies to this opinion.

> matters of opinion as noted in Section C. The Legislature quite obviously anticipated that there would be ***critical material and adverse opinions*** in letters of reference, in documents concerning disciplinary action and promotions and in various ***other opinion information that might have no foundation in fact*** but, if released for public view, could be seriously damaging to an employee. We hold that letters of reference, documents concerning infractions and disciplinary action, personnel evaluations, opinions as to whether a person would be re-hired or as to why an applicant was not hired, ***and other matters of opinion*** are also exempt from disclosure under the statute.

Id. ¶ 12 (emphasis added).

This brief discussion cannot be read to permit public bodies to withhold ***all*** records regarding discipline or evaluation of employees. The Supreme Court's specific and repeated reference to opinion material demonstrates that it was attempting to carry out the Legislature's intent to protect only that information, and not factual material. Furthermore, this Court, in *Cox*, has itself questioned whether an expansive reading of this language in *Newsome* is proper, noting that the Legislature has not acted to adopt the Supreme Court's interpretation of the exemption:

> In light of this observation, the *Newsome* Court held that the list of documents set forth in Section 14-2-1(A)(2), (3) encompassed "letters of reference, documents concerning infractions and disciplinary action, personnel evaluations, opinions as to whether a person would be re-hired or as to why an applicant was not hired, and other matters of opinion." *Newsome,* 90 N.M. at 794, 568 P.2d at 1240.
>
> In light of IPRA's exceedingly broad definition of public records set forth in the 1977 version of the Act, the *Newsome* Court commented that 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." *Id.* at 797, 568 P.2d at 1243. **The New Mexico Legislature has amended IPRA several times since *Newsome* was decided. Among the amendments, the Legislature has added specific statutory exemptions for some of the documents that were at issue in *Newsome, e.g.* military discharge records. However, we observe that the Legislature has not chosen to codify the expanded interpretation suggested by the *Newsome* Court regarding the letters of reference and matters of opinion in personnel files exceptions at issue in the present case.** Additionally, a definitions section has been added to the statute, however, the Legislature did not include definitions of "letters of reference," "matters of opinion," or "personnel files" within that section. Section 14-2-6.

Cox, ¶¶ 13-14 (emphasis added).

Similarly, *State ex rel. Barber v. McCotter* does not bind this Court on the issue before it. In *Barber*, after it was publicly revealed that five public employees had been terminated, a records requestor sought to review personnel records "for the express purpose of ascertaining the identity of the five." *Barber*, 1987-NMSC-046, ¶ 5. The Supreme Court, acknowledging that the case presented unusual circumstances. *Id.* ¶¶ 2, 11-12, barred access to the records. The Supreme Court's decision, under this particular set of facts, relied on the language from *Newsome* quoted above, as well as what the Supreme Court referred to as a "privilege of personnel proceedings" arising in part out of a regulation promulgated by the State Personnel Board, apparently in response to *Newsome*. *Barber*, ¶ 8. *Newsome* did not expressly recognize such a privilege, and in light of the Supreme Court's ruling

in *Republican Party of New Mexico v. New Mexico Taxation & Revenue Dept*., 2012-NMSC-026, ¶ 35, that "for a privilege to exist in New Mexico, it must be recognized or required by the Constitution, the Rules of Evidence, or other rules of this Court," it seems unlikely that it would find the existence of such a privilege. Because *Newsome* cannot be interpreted to exclude all records regarding discipline or evaluation of employees, as addressed above*, Barber*'s reliance on *Newsome* thus is similarly non-binding on this Court.

In considering *Newsome* and *Barber*, this Court should recognize that the Legislature has made two significant amendments to IPRA since those decisions were issued, and although neither of those amendments rewrote the "matters of opinion" exemption, they both demonstrate the Legislature's resolve to ensure that IPRA provides nearly unfettered access to public records. First, in 1993, the Legislature enacted Section 14-2-5, in which it provided its explicit statement of intent that all persons are entitled to the greatest possible information about the workings of government. NMSA 1978, § 14-2-5 (1993). At the same time, the Legislature added Section 14-2-9, which required that "Requested public records containing information that is exempt and nonexempt from disclosure shall be separated by the custodian prior to inspection, and the nonexempt information shall be made available for inspection." NMSA 1978, § 14-2-9 (1993). Both

amendments emphasized the Legislature's intent that IPRA's exemptions must be narrowly interpreted to ensure public access to records.

In accordance with that legislative mandate, judicial interpretation of IPRA has steadily evolved in the direction of transparency. Two recent Supreme Court decisions demonstrate the current approach to IPRA. First, in *Republican Party*, the Supreme Court overruled its own holding in *Newsome* (and years of subsequent decisions relying on *Newsome*) that permitted courts to apply a policy-based "rule of reason" to interpreting IPRA, holding that "courts now should restrict their analysis to whether disclosure under IPRA may be withheld because of a specific exception contained within IPRA, or statutory or regulatory exceptions, or privileges adopted by this Court or grounded in the constitution." *Republican Party*, 2012-NMSC-026, ¶ 16. Second, in *Jones v. City of Albuquerque Police Dep't*, 2020-NMSC-013, the Supreme Court reversed a district court's expansive interpretation of another IPRA exemption, NMSA 1978, Section 14-2-1(D) (2019). The Supreme Court rejected the district court's finding of a "broad exception from inspection for law enforcement records relating to an ongoing criminal investigation" where the Legislature had not included such language in the exception itself. *Jones*, ¶ 36. The Supreme Court noted that the decision of the district court was thus "overbroad and incongruent with the plain language" of the exemption. *Id.* ¶39.

Republican Party and *Jones* make clear the directions from the Supreme Court: courts may not expand IPRA exemptions beyond their plain language, and any interpretation of IPRA must carry out the Legislature's explicit policy of transparency. This Court, accordingly, should overturn the ruling of the district court which blocked access to materials that are not matters of opinion.

IV. POLICY CONSIDERATIONS, TO THE EXTENT THIS COURT MAY CONSIDER THEM, FAVOR PUBLIC ACCESS TO RECORDS OF DISCIPLINE.

To the extent that Defendants/Appellees ask this Court to consider the policy implications of permitting access to disciplinary records of public employees, the Court should use caution in doing so, as the Legislature has already explicitly expressed a policy of transparency underlying IPRA. But should the Court consider doing so, public policy heavily favors public access to such records.

Policy is the province of the Legislature. "Our role is to construe statutes as written and we should not second guess the legislature's policy decisions. We adhere to the principle that a statute must be read and given effect as it is written by the Legislature, not as the court may think it should be or would have been written if the Legislature had envisaged all the problems and complications which might arise in the course of its administration." *State v. Maestas*, 2007-NMSC-001, ¶ 14, 140 N.M. 836 (citations omitted). "Unless a statute violates the Constitution, we will not question the wisdom, policy, or justness of legislation

enacted by our Legislature." *U.S. Xpress, Inc. v. New Mexico Taxation & Revenue Dept.,* 2006-NMSC-017, ¶ 11, 139 N.M. 589 (citations omitted).

Matters of opinion in a personnel file might include a hiring committee's subjective views of a job applicant's potential, a previous employer's appraisal of an applicant's strength and weaknesses, a supervisor's assessment of a current employee's job performance, an employee's evaluation of his or her own work, etc. After weighing the carious policy concerns, the Legislature determined that these portions of records should be kept confidential. It likely did so that public employers may make candid assessments of employees and potential employees and thus better carry out the employers' public function. But the Legislature stopped there. Even though other policy considerations might have led the Legislature to expand the exemption to factual matters, it did not. Most relevant to the present case, the Legislature did not enact an exemption that covered all disciplinary materials, including the fact of discipline of a public employee, the facts underlying such discipline, the information gained in any investigation, etc. The Legislature has specifically addressed access to employment records, and has decided not to issue a blanket exemption for all records of discipline, evaluation and assessment of all records of public employees. In other words, the Legislature has already weighed the various policy considerations. This Court may not substitute its own judgment.

Jones v. City of Albuquerque Police Dep't is particularly relevant in this context. The defendant in that case argued that Section 14-2-1(A)(4), which addresses law enforcement records, should be interpreted to prevent disclosure of investigatory materials in an ongoing criminal investigation even though the exemption did not specifically say so, because such disclosure could result in a threat to the investigation. *Jones*, 2020-NMSC-013, ¶ 8. The Supreme Court rejected this argument, holding that when the Legislature enacted Section 14-2-1(D), it had addressed the public policy concerns related to IPRA requests for law enforcement records. The Court refused to second-guess the Legislature's action.

If the Court is inclined to consider additional policy issues regarding access to employment records, those policy issues favor providing the public with access to records of discipline, evaluation and assessment of public employees. New Mexico's policy of open government is intended to protect the public from having to rely solely on the representations of public officials that they have acted appropriately. *City of Farmington v. The Daily Times*, 2009-NMCA-057, ¶ 17, 146 N.M. 349, *overruled on other grounds by Republican Party of N.M. v. N.M. Tax. and Rev. Dept*., 2012-NMSC-026, ¶ 16. Every public employee, regardless of his or her job duties, has a responsibility to act in the public's interest. When an employee commits wrongdoing, or requires discipline, or otherwise fails to meet the requirements or expectations of the job, the public has the right to access

records of such actions. Limiting access gives public employers a method of keeping the public in the dark regarding negligence, waste or incompetence. Of course, such a lack of transparency is especially harmful in the area of law enforcement, where officers have responsibility for public safety and where there have been numerous incidents in which wrongdoing by police officers, often with tragic results, has been hidden from the public. *Amici* adopt the arguments of Plaintiff-Appellant on this issue.

V. CONCLUSION

Amici respectfully request that the Court, in issuing its decision, hold as follows:

1. The decision of the district court finding that public records containing the fact of discipline of public employees are exempt from IPRA under Section 14-2-1(C), which bars public access to "matters of opinion in personnel files," is reversed. The district court should enter an order requiring Defendants-Appellees to produce those portions of the requested records that do not constitute matters of opinion.
2. In accordance with the Legislature's stated intent in enacting IPRA to ensure the greatest possible access to records of government, and the plain language of Section 14-2-1(C), a records custodian may only withhold from inspection that portion of employment records that

constitute matters of opinion. The term "matters of opinion" must be construed narrowly to effectuate the intent of the Legislature, and does not include facts, including facts of discipline.

3. Section 14-2-1(C) does not provide a blanket exemption for records of discipline; information regarding promotion, demotion, or termination; performance assessments; or any other record of discipline, evaluation or assessment of public employees. Any holding or implication to the contrary in any of the Court's prior decisions, including *Cox v. New Mexico Dept. of Pub. Safety*, 2010-NMCA-096, is overruled.
4. When a records custodian receives a request for a public record that contains both matters of opinion in a personnel file that is exempt under § 14-2-1(C) and material that does not constitute matters of opinion and is thus not exempt, the custodian must separate the exempt and non-exempt material prior to inspection, and the nonexempt information shall be made available for inspection.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2021, I filed this pleading electronically through the e-filing system, which caused all counsel of record to be served by electronic means, as more fully reflected in the Notice of Electronic Filing.

PEIFER, HANSON, MULLINS, & BAKER. P.A.

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