



**For the Future:
The New Mexico Foundation
for Open Government
Legal Initiative Campaign**

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For the Future: The New Mexico Foundation for Open Government Legal Initiative Campaign

The pretty high school senior sits by the window in a sparkly gown and white corsage waiting for a limousine that will never come. Her date is not inconsiderate. She is not a bad student or a spoiled brat or a troublemaker.

She is alone instead of dancing because the school superintendent said regulations prohibit charter school students from attending school activities. When asked to allow inspection of the newly revealed regulations, the superintendent ignores the request further clouding the decision in secrecy and subterfuge.

The horses were hungry and cold, their coats dull, and their mouths covered in sores.

It was easy to see that they were once beauties of the prairie, yet neglect, poor food and inadequate water left them emaciated.

A glimmer of hope was their rescue and placement in a four-legged friend sanctuary. But that glimmer faded when a request for public records revealed instead of a safe haven, the horses were subjected to a new level of hell.

What links these two widely different situations? Two separate requests to inspect public records, and the lawsuits, settlements, and convictions that followed when the requests were denied.

For the past 31 years, FOG has played a vital role in protecting New Mexicans' right to know— from providing advice on open records to supporting ongoing litigation. But now the need is greater than ever, so it is time to advance and fully fulfill FOG's mission by adding a full-time FOG staff attorney, which will be a game changer for open government in New Mexico.

The New Mexico Foundation for Open Government Transparency and Accountability in State Government

Throughout our history, FOG has been on the front lines leading the fight for transparency and accountability. What you don't know will hurt you! FOG has been instrumental in the development and protection of the Inspection of Public Records ("IPRA") and Open Meetings ("OMA") laws—both legislatively and in the courts. This has occurred thanks to an outstanding panel of six volunteer lawyers—pro bono attorneys who have remained tireless and tenacious in their pursuit of government accountability, and a team now ready to train a full-time FOG lawyer. On countless occasions throughout the year, this panel—which collectively would cost FOG at least \$1,200 per hour—convenes on conference calls or participates in email threads in high-level discussions concerning open government situations in New Mexico.

The strategy to retain a staff attorney is a sound investment for any individual, foundation or other donor who cares about transparency because the position will be self-sufficient within two to three years.

Since its inception FOG has faithfully followed and fulfilled its mission to **educate, advocate, and litigate** for open government. We believe that the addition of an attorney will allow FOG to become more aggressive in shining a light on government's actions as well as more strategic in pursuing a litigation strategy for bringing more sunshine to New Mexico. We should be afraid of the dark!

Why Transparency Is Essential to Democracy

Freedom of information is not just for policy geeks. It is a fundamental right recognized by The Universal Declaration of Human Rights, which placed it firmly within the body of universal human rights laws. ***The heart of a democratic society is access to information.***

Political pundits warn that the United States now is considered a vulnerable democracy. At the same time, under-resourced democracy-preserving institutions, like FOG, urgently need support. Though millions of dollars pour into political campaigns, there is a big difference between influencing the outcome of a democratic process and making the process more democratic by rehabilitating democracy.

FOG has long recognized that transparency is more than a buzzword. As recent events have illustrated, our democracy hangs by a thread. It requires constant vigilance, well-informed citizens and a robust press using the tools of public documents and public meetings. How else can government officials be held accountable and responsive to the people they serve?

FOG's Current Programs Lead the Way to Increased Transparency

Faithful to its mission of transparency, FOG **educates** journalists, citizens, public employees, government officials and even other attorneys about their rights and responsibilities under OMA and IPRA. This is done primarily by the FOG executive director.

ADVOCATE FOR TRANSPARENCY AND ACCOUNTABILITY

As an advocate for Open Government, FOG each year answers hundreds of calls on the Hotline—calls from journalists, citizens, and occasionally government officials on how best to follow the state's Sunshine laws. On a typical day, FOG answers concerns ranging from exorbitant fees charged for public documents (which is not allowed), to records requests not completed on time, to questionable behavior by elected officials, to timing requirements for posting notices of a meeting agenda, to advice on how to obtain copies of police lapel videos.

Every winter when the state legislature sits, FOG is at the Roundhouse advocating for important transparency legislation:

- FOG helped to pass legislation in 2011 to guarantee access to **electronic versions** of public records, a long-overdue modernization of the Inspection of Public Records Act.
- In 2013, FOG helped pass **legislation requiring public bodies to post public meeting agendas 72 hours in advance.**
- In 2016, FOG worked to encourage lawmakers to oppose bills allowing the expungement of records, a bill that would add another exemption to the Inspection of Public Records Act.
- In 2018, FOG persuaded lawmakers to oppose bills that would have increased fees for records such as adding costs to transmit electronic records.
- In 2020, FOG supported a successful bipartisan measure that provides for immediate public release of settlement agreements in damage claims against state agencies.
- In 2021, FOG helped block a bill that would have kept secret the names of applicants for high level government jobs and at the same time worked to reform the state's capital outlay appropriations by supporting House Bill 55 which provides for a searchable list identifying the projects sponsored by each

legislator, and how much funding each legislator allocated to each project—information that for many years was kept secret.

Not only does FOG work to promote accountability and transparency, but a call to the organization is often the first step records requesters make when they have reached a roadblock. They seek FOG’s advice, tips for obtaining information as well as help in contacting public officials.

EDUCATE CITIZENS ON THEIR RIGHTS AND ENABLING CITIZEN ENGAGEMENT

At FOG we enable citizen engagement every day through educating citizens about their rights in regard to obtaining public records and attending public meetings. At IPRA/OMA bootcamps, FOG offers training to promote transparency and accountability at the local and state level. Recently, the training has been presented to the New Mexico Municipal League, members of several law enforcement agencies throughout the state (including the top command of the New Mexico State Police), University of New Mexico law students, the staff of the Public Regulation Commission, the City of Española, as well as a host of other local, city, county, and state employees.

FOG annually sponsors continuing legal education seminars aimed at providing updates to attorneys, public employees, and members of the public concerning changes in open government legislation and recent case law involving the state’s Sunshine laws. The seminars also give tips and techniques for records requestors. Past presenters have included then-New Mexico Supreme Court Chief Justice Judith Nakamura as well as other distinguished New Mexico attorneys.

LITIGATE TO ENFORCE THE LAW

Along with advocacy and education, FOG is focused on litigation, which is reserved as a final step - but a crucial one. Our friend of court (amicus) briefs filed in the New Mexico Court of Appeals and Supreme Court have been instrumental in shaping transparency law in the state. When FOG speaks, the appellate courts listen.

- In 2011, New Mexico appellate courts supported FOG’s position in three landmark open-government cases—concerning the **right to request public records** through an agent, the right to see **citizen complaints against police officers**, and the **enforcement** of Open Meetings Act violations.

- In 2014, FOG sued the New Mexico Human Services Department and the Attorney General’s Office to require **disclosure of an audit report concerning the state’s Medicaid-funded behavioral health providers**. Eventually, the information was released.

In its 31-year history, FOG has prevailed in all but one case. FOG typically is unable to take a case at the district court level because of its reliance on volunteer lawyers and done most of its work at the appellate level by filing amicus briefs. Having a dedicated FOG attorney in New Mexico would provide invaluable, quick assistance to all journalists and other transparency advocates in the state who need same-day strategic phone calls or “lawyer letters.” Such an attorney will be positioned to nip access problems in the bud, avoid time-consuming litigation and allow journalists to meet deadlines, which ultimately benefits the public.

A full-time FOG attorney is critical to rounding out the third prong of FOG’s mission—litigation.

How FOG Arrived at This Juncture

Collaboration in 2019 with the Society for Professional Journalists, the New Mexico Press Association, the New Mexico Broadcast Association and others provided FOG an even clearer picture of the need for this position. We know that New Mexico journalists, publishers and broadcasters have been awarded Pulitzer Prizes and Emmy statues for their work holding elected officials accountable and shining a light on government. A century after publisher [Carlton Cole "Carl" Magee](#) founded the *New Mexico Star Tribune* and brought the Tea Pot Dome scandal to light, journalists, citizens, and others in the nation’s poorest state continue to face legal challenges and retaliation for speaking truth to power.

While New Mexico’s Sunshine Laws are considered to be some of the most robust in the country, responses to public information requests can be slow and tortuous. Public information does not belong to the bureaucrats.

Most public servants understand that providing public information is an essential democratic function and have made responses a part of their daily job routine. Still, not all agencies have adopted a culture of transparency. For example, the state’s school districts are some of the worst violators of the open records law, often wrongly hiding behind the FERPA laws, personnel confidentiality, and contrived loopholes. A FOG attorney would have wide-ranging benefits for students, parents, teachers, and support staff.

In 2015, the [Center for Public Integrity](#) gave New Mexico an F grade for the public’s access to government information. The national report cited a wide enforcement gap for the failing grade.

... the State Integrity Investigation found that New Mexico has pretty muscular laws guaranteeing the public's right to know. But there is no hard deadline to produce records, and the attorney general's office (which provides legal representation to public bodies) historically hasn't made enforcement a priority. The AG's office rarely levies fines, instead relying on members of the public to hire lawyers and sue. And so, the government can effectively skirt the law simply by repeatedly ignoring requesters and delaying their responses.

Two years later, the Society of Professional Journalists bestowed its [6th Annual Blackhole Award](#) on the New Mexico Interstate Stream Commission for its tendency to act in secret.

The New Mexico Interstate Stream Commission has refused to explain the source of water use data, insisting that numbers were accurate without any supporting evidence. Its transparency with spending has been questioned, leading to the bipartisan bill proposing required legislative authorization before money can be spent. The utter lack of open government efforts includes refusal to comment on the U.S. Supreme Court case involving Texas and New Mexico's fight over the Rio Grande.

Open government advocates and journalism groups have lobbied lawmakers to provide state and county prosecutors additional funding to close the enforcement gap, but no additional resources have been provided. In 2018, the New Mexico attorney general reported receiving 188 open government complaints but resolving only 59 of the complaints. Without criminal sanctions in the Inspection of Public Records Act, the Attorney General Open Government Division relies on voluntary compliance, which can take years. For journalists working on topical stories the months-long delays force news organizations and freelancers to retain private counsel or in some cases to walk away from an important story.

New Mexico's tourism ads promote 300 days of sunshine in the Land of Enchantment, but shining a light on public entities can be challenging as bureaucrats willfully disregard their statutory obligations; state lawmakers conduct budget meetings behind closed doors; political subdivisions enact their own disclosure policies and ignore state laws; untrained records custodians are often political hires who are not required to earn continuing education credits; and access to attorneys with open government litigation experience is hit or miss outside the state's largest cities.

Further compounding issues with access to information, residents in eight of the state's 33 counties live in a news desert. With no newspapers operating in their villages and towns, public officials impose copy fees that exceed state rules and create barriers to watchdog journalism. In 2015, a legislative work study group determined New Mexico's \$1 a page maximum copy fee was already double the fees charged in other states.

Recently, the New Mexico Chapter of the American Civil Liberties Union took steps to defend the constitutional free press rights of a local journalist who faced retaliation by a local sheriff after reporting a deputy's questionable use of force at a local high school. The ACLU's tort claim notification expressed concerns about the reporter's ability to obtain routine information and ability to enter a courthouse with reporting equipment after months of doing so.

In addition, New Mexico First conducted a series of focus groups in 2019, and its research showed that transparency is indeed the key to good government. The report highlighted the efforts of *The Jal Record*, an advocate for open government and transparent decisions, saying the paper uncovered a \$1.3 million dollar loss due to how water credits were administered. When asked about the role *The Jal Record* played in bringing this issue to light over the course of a two-year effort, the owner of the newspaper, lifetime resident Gregg Fulfer, stated, "The paper served its function. A local paper is really needed to shed light on what government is doing. Without a local newspaper, you have worldwide and statewide news, but not the local news, and it's so important." Fulfer spent approximately \$400,000 in his effort to obtain the records, an amount most publishers would consider outside of their financial ability to pursue.

During her 2018 campaign, New Mexico Gov. Michelle Lujan Grisham pledged to put more government information online. "Knowledge," she said, "is power," but state lawmakers have still not adopted an Open Data Act and data catalogs commonly published in other states are still not available in New Mexico

FOG's History of Accomplishments

Addition of a full time FOG lawyer would allow us to add to on the solid foundation the organization has built over 31 years. Here is a look at a handful of FOG's many accomplishments.

Environment

The Interstate Commerce Commission refused to release the data upon which it was relying to dam the Gila River, the last free-flowing river in New Mexico. FOG was instrumental in forcing the commission to release the data and assisting the citizen advocate, who worked tirelessly at great expense to himself, to oppose the plan. As a result, after a multi-year conflict, the water project was abandoned, and the Gila River remains a wilderness jewel.

Education

Two parents wanted information from the Gallup-McKinley County School District about plans to revoke the charter of Gallup's Middle College High School (GMCHS) and the restrictions imposed on charter school students (including prohibition from participation in extracurricular activities) when the initial

revocation efforts failed. The mothers of students at GMCHS were caught in what can only be termed a personal vendetta against them by the school district. They reached out, learned their rights as citizens with the guidance of FOG, and exercised those rights to successfully sue the district and force it to increase transparency and accountability within their community.

Animal Rights

One New Mexico resident has spent several years fighting on behalf of horses, cattle and other livestock, working to shine a spotlight on the New Mexico Livestock Board. The New Mexico Foundation for Open Government's Hotline was instrumental in providing information she needed to win a determination letter from the Attorney General that exposed multiple violations of IPRA by the Livestock Board.

Another animal welfare activist over a 10-year period sought records from the state in connection with enforcement actions that resulted in the inhumane and unnecessary killing of animals. Although she ultimately received the records, FOG filed an amicus brief to help the activist receive statutory damages.

Secret Settlements

In 2016, FOG and the state's largest two newspapers sued to obtain certain settlement documents with prisoners who allegedly had been sexually abused by the state's third-party medical provider. After summary judgment for FOG and the newspapers in the district court, the Court of Appeals held that a state cannot contract away its duties under IPRA and that a third-party vendor performing essential state functions must comply with the state's open government laws. Also, settlements cannot be kept secret, even when paid by a third party standing in the government's shoes.

Law Enforcement

In 2020, FOG's amicus brief was instrumental in a ruling that limited the "law enforcement" exception under IPRA that government officials routinely stretched to hide public documents. In this case, video lapel footage and other documents that showed police shooting an unarmed homeless man was withheld from the deceased's family members under the pretense that the matter was subject to an ongoing criminal investigation. The New Mexico Supreme Court rejected that argument and narrowed the circumstances when such public records can be withheld simply because the matter is still being investigated.

Meeting the Need

While no one believes that additional legal backing will address all of the open government challenges facing New Mexico, we know from past efforts that legal intervention has been instrumental in shaping the state's transparency laws and focusing attention on compliance. The FOG attorney would be a strong ally in this fight and give muscle to our voice.

Democracy requires engaged citizens, an active press and government officials committed to conducting the public's business in the sunshine. The time is right for FOG to have a dedicated fulltime FOG attorney. **Over three decades, FOG has conducted its important work with a bare-bones budget.** While millions of dollars are dedicated to political candidates, good government groups are forced to make do with limited funds.

This is a chance for philanthropists to help rehabilitate democracy by directing their donations to the hiring of an attorney dedicated to government transparency.

What it Costs To Protect the Public's Right To Know

Over the next 12-18 months, FOG hopes to raise at least \$300,000 to hire an attorney based upon the following analysis.

According to a comparable nonprofit in New Mexico, we should be able to hire an attorney, including benefits, for \$100,000-\$110,000/year. The \$300,000 will fund an attorney for two years, with the remainder saved in a designated reserve account. Within about two years, the attorney is expected to become self-sustaining through the courts' awards of attorney fees and other costs or settlement negotiations. IPRA provides that attorney fees can be awarded, and New Mexico judges are not reluctant to award such amounts. In one recent 12-month period, successful IPRA litigants received more than \$1.2 million. In addition, FOG will develop a panel of attorneys to whom cases can be referred. The attorneys in turn would agree to donate 25 percent of any proceeds from such referred litigation to FOG.

We will simultaneously approach both individuals and foundations for the \$300,000 in "seed" money. In this "capital" campaign, donors can divide their contributions into two installments—the first due by the end of 2021 and the second by June 30, 2022.

How You Can Invest in a Better New Mexico - Donor Guidelines

Please join the 25 members of the FOG board and contribute to the seed money to launch FOG's Legal Initiative.

You can make a one-time gift or divide your donation into installments for each of the next two years. This support will form the core of financial support for the effort.

To assist in making your decision, please consider the following levels:

- Naming rights for the attorney position: \$75,000
- IPRA Guardian: \$10,000+ per year for two years (\$834 per month)
- IPRA Defender: \$5,000+ per year for two years (\$417 per month)
- IPRA Advocate: \$1,000 per year for two years (\$84 per month)
- IPRA Supporter: \$500 per year for 2 years (\$42 per month)
- IPRA Friend: one-time donation of \$100
- or donate at whatever level you feel is appropriate.

Pledges to the New Mexico Foundation for Open Government Legal Initiative may be paid on a monthly, quarterly, yearly or paid with a one-time contribution.

Monthly online giving always is available. Or checks may be made to:
New Mexico Foundation for Open Government (please designate the funds for the Legal Initiative)

Address: 2333 Wisconsin Street NE
Albuquerque, NM 87110

Please contact the FOG office for more information.

The Foundation for Open Government is a nonprofit 501(c)(3) corporation serving every corner of New Mexico. Your contribution is tax deductible to the extent allowed by the law.

The FOG taxpayer identification number is 85-0379183.