

**STATE OF NEW MEXICO
FIRST JUDICIAL DISTRICT
COUNTY OF SANTA FE**

NEW MEXICO ETHICS WATCH,

Plaintiff,

v.

No. _____

**LEGISLATIVE COUNCIL SERVICE, as Records
Custodian for the New Mexico Legislature,
and THE NEW MEXICO LEGISLATURE,**

Defendants.

**COMPLAINT TO ENFORCE THE INSPECTION OF PUBLIC RECORDS ACT
AND FOR INJUNCTIVE RELIEF AND DAMAGES**

1. This case challenges Defendant New Mexico Legislature's unlawful denial in substantial part of Plaintiff New Mexico Ethic Watch's written request under the New Mexico Inspection of Public Records Act ("IPRA") for 2021 appropriations-related records from the Legislature. The Legislative Council Service is the designated records custodian for the Legislature under NMSA 1978, §14-2-7. The records were requested to determine which individual legislators requested which appropriations.

2. IPRA was passed to provide transparency and accountability to the public regarding the performance of governmental functions. Plaintiff brings this action pursuant to IPRA, NMSA 1978, §§14-2-1 to -12. IPRA applies to the Legislature. §14-2-6(F) ("public body' means the executive, legislative and judicial branches of state and local governments"). Defendants unlawfully withheld public records responsive to Plaintiff's IPRA request, wrongly denied Plaintiff's IPRA request and wrongly asserted that withheld records are exempt from disclosure under IPRA under the "as otherwise provided by law"

exception set forth at §14-2-1(H). None of the legal bases cited by Defendants in their IPRA denial exempt the withheld records from disclosure under IPRA.

JURISDICTION AND VENUE

3. This Court has jurisdiction pursuant to NMSA §14-2-12.
4. Venue is proper pursuant to NMSA §38-3-1.

PARTIES

5. Plaintiff New Mexico Ethics Watch (“NMEW”) is a New Mexico non-partisan, non-profit organization dedicated to promoting ethics and accountability in government and public life in New Mexico.

6. Defendant New Mexico Legislature (“Legislature”) is a branch of the government of the State of New Mexico. The New Mexico Legislature is located in Santa Fe, New Mexico. The Legislature is a public body subject to IPRA under NMSA §14-2-6(F). In addition, all “advisory boards, commissions, committees, agencies or entities created by the constitution or any branch of government that receives any public funding” constitute a “public body” subject to IPRA under NMSA §14-2-6(F).

7. Defendant Legislative Council Service (“LCS”) is the designated Records Custodian for the New Mexico Legislature under NMSA §14-2-6(A). The LCS is located in Santa Fe, New Mexico. The LCS is a legislative agency created by statute to “assist and cooperate with the legislative Council and with any interim legislative committee or commission created by the legislature or appointed by the governor at their request.” NMSA §2-3-2. The LCS is a “public body” under NMSA §14-2-6(F).

FACTS PERTAINING TO NMEW’S DENIED IPRA REQUEST

8. On October 27, 2021, NMEW, through its attorneys, submitted a written public records request to the Legislature through the LCS for public records concerning the 2021 annual appropriations for the State of New Mexico. Specifically, NMEW requested the following records:

1) All memoranda and reports generated by the House Appropriation and Finance Committee (“HAFC”) and its subcommittees concerning House Bill 2 prior to the final vote on HB 2 on the floor of the House in the 2021 legislative session.

2) All proposed amendments to House Bill 2 submitted by individual senators to the Senate Finance Committee (“SFC”), Legislative Finance Committee (“LFC”) and/or their staffs during the 2021 legislative session.

3) All memoranda and reports generated by all SFC subcommittees in creating the Senate Finance Committee substitute (or amendments to House Bill 2) voted on by the SFC in the 2021 legislative session.

4) All requests for appropriations from House Bill 2 Junior submitted to the LFC, HAFC, or SFC in the 2021 legislative session by individual senators and representatives.

5) All requests for capital outlay expenditures submitted in the 2021 legislative session by individual senators and representatives which were agreed to by the legislative leadership and the Governor before the bill was introduced, as identified as “sponsored by: Statewide” in the document entitled “HB 285 Capitol Projects Publication by County with Sponsor” for 2021.

9. On November 3, 2021, Jon Boller, Senior Staff Attorney for LCS, confirmed receipt of NMEW’s IPRA request and stated that LCS would respond by November 10, 2021.

10. On November 10, 2021, the LCS produced four summary documents regarding the HAFC and SFC amended substitutes of House Bill 2 (“HB2”). These documents include: 1) HAFC presentation by David Abbey, Legislative Finance Committee Director, regarding general appropriations highlights and recommendations; 2) HAFC summary of HB2 Substitute, 3) Summary of proposed SFC amendments to HAFC Substitute for HB2,

and 4) Summary of final SFC amendments to HAFC Substitute for HB2. The LCS claimed that these four documents and the following website links regarding 2021 appropriations were responsive to Plaintiff's IPRA request (1)-(4), in ¶8 above. The seven website links related to the 2021 passage of HB2 and SB 377 (apparently SB 377 contained the "junior appropriations bill," commonly referred to as "House Bill 2 Junior"). The website links directed Plaintiff to the following information: 1) the fiscal impact report for the amended HAFC Substitute for HB2; 2) the HAFC recommendation to pass Substitute HB2 and 3(a), 3) the HAFC Substitute for HB2 and 3(a); 4) HAFC Substitute HB2 as amended by SFC; 5) the Legislature's website page containing the original HB2 text, the HAFC Substitute HB2, and the final version of HB2; 6) SFC recommendation to pass SFC Substitute SB 377; and 7) HAFC recommendation to pass SFC Substitute SB 377 as amended by HAFC.

11. None of these documents and links supplied the records requested by NMEW concerning appropriations sought by individual legislators.

12. As to requested records numbered (1)-(4), in ¶8 above, the LCS denied the bulk of Plaintiff's IPRA request on the following asserted bases:

All other memoranda, reports and requests by legislators or agencies that precede the introduction of the identified bills, substitutes, amendments or analyses are confidential and privileged communications that are integral to the deliberative process and are not subject to disclosure under the Inspection of Public Records Act. See Section 2-3-13 NMSA 1978, Joint Rule 12-1 and Article 4, Section 13 of the Constitution of New Mexico.

13. As to the records requested in item number (5), in ¶8 above, the LCS claimed "We have no records of requests by individual senators or representatives relating to the 'statewide' projects category for HB 285." The LCS then directed Plaintiff to the original introduced version of HB 285 and a searchable list of final capital outlay projects already identified by Plaintiff in its IPRA request. Again, LCS did not supply the specific

appropriations requested by individual legislators for those appropriations generically labeled by LCS as “statewide” in the searchable data base.

14. Defendants made no effort to identify whether LCS actually had in its possession or control responsive records that it was withholding or whether **all** the withheld records actually contained exempt information.

15. On November 23, 2021, Plaintiff’s attorneys asked LCS Senior Staff Attorney Jon Boller for clarification as to the number of withheld records, the specific basis for claiming each withheld record was exempt from disclosure under IPRA, and the identity of the person who determined both that the record was exempt and that it contained no severable non-exempt information. Plaintiff’s attorneys further sought clarification as to whether the LCS claimed to have no records in its possession, custody, or control concerning requests by individual senators or representatives relating to the “statewide” projects category for HB 285.

16. On December 17, 2021, the LCS Senior Staff Attorney responded to Plaintiff’s request for clarification. The LCS claimed that to review the withheld records would be an insurmountable burden and that it was not required to state how many records were being withheld, if any.

17. The LCS further clarified its IPRA denial as follows:

[A]ll memoranda, reports and requests by legislators or agencies that precede the introduction of the identified bills, substitutes, amendments or analyses are confidential and privileged communications and are integral to the deliberative process. As a result, those documents and [sic] are not subject to disclosure under the Inspection of Public Records Act. See Section 2-3-13 NMSA 1978, Joint Rule 12-1 and Article 4, Section 13 of the Constitution of New Mexico.

The LCS is also prohibited from disclosing "to any person outside of the service the contents or nature of any request or statement for service", and

the speech and debate clause further prohibits such disclosure. The documents that were released in response to your request are those that do not fall under the exception to IPRA.

As to Item 5, the LCS has no records responsive to your request.

FACTS PERTAINING TO THE PUBLIC'S INTEREST IN PUBLIC RECORDS CONCERNING THE CREATION OF THE STATE'S ANNUAL BUDGET

18. Formed in 2016, NMEW worked to establish the New Mexico State Ethics Commission. Working alongside legislators and other advocates, NMEW also played a role in the adoption of the Ethics Commission's complaint and resolution processes to meet the public's demand for fairness and transparency.

19. NMEW continues to serve as a watchdog over the Ethics Commission and all of New Mexico's public officials. NMEW advances its mission through research, policy advocacy, education, media outreach, and compliance actions such as the instant case.

20. Since 2017, NMEW has published multiple detailed reports regarding untimely, inconsistent, and incomplete mandatory financial disclosures provided by New Mexico's legislators. NMEW has also documented persistent problems with both the reporting and enforcement mechanisms used to ensure that individual legislators comply with these mandatory disclosures and to ensure that such disclosures serve their intended purpose of both preventing and revealing potential conflicts of interest and corruption. NMEW has also reported on the connection between campaign and other contributions and legislators' advocacy for legislation supported by these contributors.

21. The New Mexico Legislature has been the subject of a number of high profile scandals concerning legislators accused and/or found guilty of directly profiting from bills which they sponsored or for which they solicited bribes. Each of the following scandals has exposed critical gaps and deficiencies in the State of New Mexico's governmental ethics,

transparency and accountability provisions:

1) In 1992, then-State Representative Ron Olguin was censured by the Legislature for solicitation of a bribe. He was later convicted of soliciting a \$15,000 bribe in exchange for getting the Legislature to provide \$100,000 for a crime counseling program.

2) In 2008, Former Senate President Pro Tem Manny Aragon pleaded guilty to conspiracy and mail fraud in connection with receiving kickbacks from the construction of the Bernalillo County Metropolitan Courthouse for which he sponsored legislative appropriations.

3) In 2018, Former State Senator Phil Griego was convicted on charges of fraud, bribery and public corruption for his part in the sale of a state owned building, which required legislative approval and for which he received a \$50,000 commission as real estate agent for the sale.

4) In 2021, Former State Representative Sheryl Williams Stapleton was indicted for multiple counts of racketeering, fraud, and money laundering. She is accused of funneling money for goods and services, for which she secured legislative appropriations, into businesses and foundations from which she derived a direct financial benefit.

22. The instant case concerns Plaintiff NMEW's efforts to utilize the transparency and accountability mechanisms enacted by the New Mexico Legislature to curb, expose, and address public corruption in New Mexico, and the unlawful efforts of the Legislature to exempt its members from meaningful accountability under IPRA.

23. In 1993, the Legislature enacted extensive legislation to curb public corruption

and improve governmental transparency. First, IPRA was amended to state the public policy of New Mexico meant to be advanced by the statute:

Recognizing that a representative government is dependent upon an informed electorate, **the intent of the legislature 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 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.**

NMSA 1978, §14-2-5 (1993) (Emphasis added).

24. The Legislature further amended IPRA to ensure timely and meaningful compliance with IPRA requirements by including a broad definition of “public record,” §14-2-6(G); requiring that all non-exempt information must be separated and produced, §14-2-9(A); adding a process by which records custodians could take additional time to provide accurate IPRA responses, §14-2-10; requiring that the records custodian provide written explanations of denials, §14-2-11(B); and adding an enforcement provision for aggrieved IPRA requesters that includes a mandatory fee shifting provision for “any person whose written request has been denied and is successful in a court action to enforce the provisions of the Inspection of Public Records Act,” §14-2-12(D).

25. In 1993, the Legislature also enacted the Financial Disclosure Act, NMSA 1978 §§10-16A-1 to -8, to enable the Secretary of State, the Attorney General and the public to identify and investigate possible conflicts of interest and unlawful financial gain by public officials, including legislators.

26. That same year, the Legislature added criminal penalties to the Governmental Conduct Act, 1978 NMSA, §10-16-3(D) and §10-16-17. The Legislature was clearly intent

on curbing governmental misconduct and ensuring that public officers and employees are truly accountable to the public they serve.

27. Over 20 years later, New Mexico passed a ballot initiative to amend the Constitution establishing an independent ethics commission. In 2019, the Legislature enacted the enabling legislation to establish the New Mexico State Ethics Commission's structure and powers.

28. The NMEW was formed to facilitate the creation of the Ethics Commission, to arm the public (and the Commission) with the facts necessary to spotlight, prevent and investigate public corruption, and to strengthen New Mexico's ethics laws. One of the ways NMEW accomplishes its purpose is through annual reports which detail financial interests, discrepancies and deficiencies in the mandatory financial disclosures by individual legislators.

29. In 2021, the Legislature enacted a provision that requires the LCS to publish a searchable list of the sponsors of each capital outlay expenditure allocated in New Mexico's annual budget. 1978 NMSA, §2-3-19, The bill that introduced this requirement stated that "It is necessary for the public peace, health and safety that this act take effect immediately."

30. All of the records sought by NMEW in the instant action concern public appropriations requests by individual legislators to various legislative committees in the creation of the 2021 budget for the State of New Mexico. It is essential that the NMEW and the public have access to the requested public records "used, created, received, maintained or held" by the LCS on behalf of the Legislature to prevent, expose and rectify conflicts of interests and/or unlawful financial gain by New Mexico's legislators.

31. In addition, the searchable list of capital outlay expenditures allocated in the 2021 budget published by the LCS after the 2021 legislative session contains a large

number of community-specific capital outlay projects that identify the sponsor solely as “Statewide” without explanation or any identification of the individual legislator who submitted the initial request in violation of §2-3-19, the statute mandating that each capital project be associated with the legislator or the governor who requested it.

THE APPLICABLE LAW

32. The Legislature has declared that it is the public policy of the State of New Mexico “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.

33. Public records under IPRA include “all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained[.]” NMSA 1978, § 14-2-6(G).

34. Public bodies under IPRA include “the executive, **legislative** and judicial branches of state and local governments and **all advisory boards, commissions, committees, agencies or entities created by the constitution or any branch of government** that receives any public funding[.]” NMSA 1978, §14-2-6(F)(Emphasis added).

35. In the wake of the 1993 IPRA amendments, New Mexico appellate courts began to more narrowly apply IPRA disclosure exceptions to ensure “that there will be an opportunity to determine whether those who have been entrusted with the affairs of government are honestly, faithfully and competently performing their function as public servants.” *Cox v. Dep’t of Public Safety*, 2010-NMCA-096, ¶17.

36. In 2012, the New Mexico Supreme Court held that in providing in IPRA a broad

definition of public records and delineating a specific and limited list of exceptions, the Legislature rejected prior New Mexico case law that had added to IPRA an implied exception under the so-called “rule of reason” articulated in *State ex rel. Newsome v. Alarid*, 1977-NMSC-076 and its progeny. See *Republican Party of N.M. v. N.M. Tax and Rev.*, 2012-NMSC-026, ¶¶14-16. “[C]ourts 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.” *Id.* at ¶16.

37. “IPRA is intended to ensure that the public servants of New Mexico remain accountable to the people they serve. The citizen's right to know is the rule and secrecy is the exception.” *Id.* at ¶12 (Internal citation omitted). “IPRA should be construed broadly to effectuate its purposes, and courts should avoid narrow definitions that would defeat the intent of the Legislature.” *State ex rel. Toomey v. City of Las Cruces*, 2012-NMCA-104, ¶22.

38. “It is clear that *Republican Party II* expressly overruled cases in which the ‘rule of reason’ was endorsed and limited the scope of what documents are exempt from IPRA.” *Edenburn v. N.M. Dep’t of Health*, 2013-NMCA-045, ¶33. The *Edenburn* Court recognized that, in light of the rejection of the judicially created “rule of reason” and both the purpose and plain language of IPRA, draft documents “used, created, received, maintained or held by or on behalf of any public body” that relate to public business are discloseable public records under IPRA. *Id.*, ¶¶14-26.

39. In *Republican Party*, the Court also limited the application of privileges to those mandated by the New Mexico Constitution or formally adopted by the Court. *Republican Party* recognized only a **limited** executive communication privilege mandated by the New

Mexico Constitution. *Republican Party*, ¶¶43-48.

40. In the instant case, Defendants claim an overly broad and improper legislative privilege to unlawfully exempt the Legislature from complying with an otherwise valid law applicable to public bodies and their employees that by its plain terms applies to the Legislature, its subcommittees and administrative offices. Defendants improperly assert an unfounded legislator privilege that does not exempt the requested records from disclosure under IPRA “as otherwise required by law” and is far beyond the limited constitutionally required privileges held by the other coextensive branches of the government of the State of New Mexico.

CLAIM FOR VIOLATION OF THE INSPECTION OF PUBLIC RECORDS ACT

41. The Inspection of Public Records Act provides that “all persons are entitled to the greatest possible information regarding the affairs of government[.]” NMSA 1978, §14-2-5.

42. The records Plaintiff requested from Defendants constitute public records as defined by NMSA 1978, §14-2-6(G).

43. Defendants are public bodies subject to the requirements of IPRA under NMSA 1978, §14-2-6(F).

44. Under IPRA and the law discussed above, Defendants’ denial of the bulk of Plaintiff’s IPRA request was unlawful. None of the legal bases asserted by Defendants in their IPRA denial categorically exempt the withheld records from disclosure under IPRA.

45. The records custodian bears the burden of showing whether a specific IPRA exception or a recognized constitutional or evidentiary privilege exempts public records from disclosure. Defendants here failed to meet their burden to show that all of the withheld

records are exempt from disclosure “as otherwise provided by law” under §14-2-1(H).

46. Defendants violated IPRA when they failed to identify the number of responsive records they were withholding, the specific basis upon which Defendants claimed each withheld record was exempt from disclosure, and the person who made the determination that each withheld record was exempt. They failed to comply with their mandatory duty to explain their IPRA denial under NMSA 1978, §14-2-11(B).

47. Defendants further violated IPRA when they failed to identify whether each withheld record actually contained information they claimed was exempt from disclosure under IPRA. They failed to comply with their mandatory duty to produce non-exempt information under NMSA 1978, § 14-2-9(A).

48. Plaintiff is entitled to relief pursuant to NMSA 1978, §14-2-12.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

- A. Order injunctive relief, including but not limited to production of the requested public records;
 - B. Award compensatory damages, costs and reasonable attorneys’ fees to Plaintiff;
- and
- C. Grant such other and further relief as the Court deems proper.

Respectfully submitted,

/s/ Daniel Yohalem

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