

SECOND JUDICIAL DISTRICT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

No. D-202-CV-2015-00620

ALBUQUERQUE JOURNAL and KOB-TV,
LLC,

Plaintiffs,

vs.

BOARD OF EDUCATION OF
ALBUQUERQUE PUBLIC SCHOOLS and
RIGO CHAVEZ, in his capacity as custodian of
Records for Board of Education for Albuquerque
Public Schools,

Defendants.

THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court having listened to the testimony at the trial held on February 22 and 23, 2021, having reviewed the trial exhibits and having considered the proposed findings of fact and conclusions of law submitted by Plaintiffs and Defendants, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

Background

1. Plaintiff *Albuquerque Journal* ("the *Journal*") is a newspaper of regional and local circulation in New Mexico. Plaintiff KOB-TV, LLC, is a television station broadcasting throughout New Mexico. Both Plaintiffs are newsgathering organizations that report on the conduct of public officials and employees, including activities of Albuquerque Public Schools'

administration, employees, and students. [Final Pretrial Order, Uncontroverted Fact No. 4, at p. 3]

2. Defendant Board of Education of Albuquerque Public Schools is responsible for the governance of Albuquerque Public Schools. Albuquerque Public Schools is the largest public school district in New Mexico. Albuquerque Public Schools is governed by Defendant Board of Education of Albuquerque Public Schools, a seven-member, elected school board that sets policy and approves the annual budget. The board also hires and supervises a superintendent, who oversees the operations of the district. [Final Pretrial Order, Uncontroverted Fact No. 5, at pp. 3-4]

3. Defendant Rigo Chavez, at all times relevant, was the designated records custodian for Defendant Board of Education of Albuquerque Public Schools and Albuquerque Public Schools, pursuant to IPRA. [Final Pretrial Order, Uncontroverted Fact No. 7, at p. 4] Mr. Chavez was the person who responded on behalf of Defendants to the records requests at issue in this matter. [Chavez, Trial Day 1, p. 54] Except as noted otherwise, all references below to “APS” shall refer jointly to both Defendants.

Context of Records Requests: APS’s Termination of Superintendent Winston Brooks

4. Winston Brooks was hired as superintendent of Albuquerque Public Schools in July 2008. Under the terms of a subsequent extension of Mr. Brooks’ contract, he received a salary of \$250,000 and he was to remain as superintendent until June 2016. [Plaintiffs’ First Amended Complaint at ¶ 10; Defendants’ Answer at ¶ 10]

5. On July 16, 2014, the APS Board of Education voted to go into a closed session of a Board meeting to discuss Brooks’ performance improvement plan. [Ex. 22]

6. On August 7, 2014, Dr. Analee Maestas, who was the president of the APS Board of Education, provided a statement to Monica Armenta to be released to the media. [Ex. 22]

7. Ms. Maestas's statement reflected that during the July 16, 2014, closed session of the Board, "a serious item of concern to Board members was raised and discussed." The statement identified this issue as "a confidential personnel matter" but provided no other details. [Ex. 22]

8. The Statement went on to state as follows:

I felt we had a duty to get to the bottom of the matter in the best interest of the school district. I made the decision as Board President to contract with Agnes Padilla, a very reputable outside attorney. I did so only after conferring with the board's legal counsel to address the concerns raised during our executive session. Prior to doing so, I called each board member and advised them of the course of action I was taking. The same statement was read to each board member.

Each board member was contacted by 10:30 a.m. the same morning and consented to this course of action. Given that this is a personnel matter concerning Mr. Brooks, it was reasonable to pursue this course of action with consent of each board member. I then met with Mr. Brooks the same morning and read the exact same statement I had given to Board members. He asked for a copy and I sent it to him. I assured him he could be interviewed by the attorney about the areas of concern.

[Ex. 22]

9. On July 18, 2014, Ms. Maestas, acting on behalf of the Board, entered into a letter agreement with attorney Agnes Padilla to provide legal services to the Board. [Ex. 1; Padilla, Trial Day 2, 142-43; Ex. 24, Deposition of Annalee Maestas, p. 47].

10. The APS Board of Education and Mr. Brooks released a six-page document entitled "Resignation and Settlement Agreement" ("the Brooks Settlement Agreement") on August 15, 2014. At a meeting on that date, the Board voted unanimously to accept the terms of the Brooks Settlement Agreement. [First Amended Complaint ¶ 24; Defendants' Answer at ¶ 24]

APS's Policies and Procedures for Complying with IPRA

11. In 2014, Mr. Chavez was the APS Director of Communications. At the time of his retirement in 2016, Mr. Chavez had 17 years of experience handling public records requests. He had received training for responding to IPRA requests from the New Mexico Attorney General's office, the New Mexico Foundation for Open Government, and was familiar with the Attorney General's IPRA Compliance Guide [Chavez, Trial Day 1, pp. 53-55].

12. In 2014, APS's policy and procedure for handling the records requests was to "follow the statute" and to use the Attorney General's Compliance Guide as a Guide. [Chavez, Trial Day 1, pp. 55-56].

13. In responding to the public records requests at issue in this case, Mr. Chavez had access to APS's outside counsel for assistance and did in fact consult with counsel in responding to some of the requests. Regarding the requests that involved the APS Board, Mr. Chavez consulted with APS Board President Analee Maestas and Executive Director of Board Services Brenda Yager. [Chavez, Trial Day 1, pp. 74-76]

14. Furthermore, other APS officials were aware of both the records requests and APS's responses. Mr. Chavez provided copies of some of his responses to APS Interim Superintendent Brad Winter, APS Chief Operations Officer Ruben Hendrickson, APS Human Resources Director Karen Rudys, Ms. Armenta, and APS outside counsel Tony Ortiz and Art Melendres, as well as to Ms. Maestas and Ms. Yager. [Exs. 8, 9, 11,13, 23; Chavez, Trial Day 1, pp. 111-13]

Plaintiffs' Requests for Public Records

15. Following the termination of Winston Brooks, both the *Journal* and KOB submitted written records requests to APS, addressed to its records custodian, Rigo Chavez.

[Exs. 2, 16, 18]

16. On September 2, 2014, the *Journal*, through its counsel, sent a letter by email to Mr. Chavez submitting several requests. The pertinent requests are as follows:

- a. "All invoices or other billing records from Butt, Thornton & Baehr, P.C. since January 1, 2014";
- b. "All documents generated by or received by any member of the Albuquerque Public Schools Board of Education concerning the basis for the Board's decision to discuss terminating the employment of Winston Brooks"; and
- c. "All documents referencing any complaints or allegations of misconduct regarding Winston Brooks or Ann Brooks made to APS or any member of the APS Board of Education since January 1, 2014."

[Ex. 2]

17. On August 26, 2014, KOB-TV submitted its own requests, including requests for:

- a. "Any communication between an APS Board Member or employee and Agnes Padilla;" and
- b. "Any and all emails and documents to or from any APS Board Member or employee or representative in regards the investigation report [of Agnes Padilla]."

[Ex. 16]

18. On September 3, 2014, KOB-TV emailed an additional records request to APS for “all emails between Superintendent Winston Brooks and Communications Director Monica Armenta from the last 4 months of Winston Brooks employment.” [Ex. 18]

Responsive Public Records

A. Agnes Padilla’s billing records

19. APS received the *Journal*’s request (Ex. 2) for “all invoices or other billing records from Butt, Thornton & Baehr, P.C. since January 1, 2014” by email on September 3, 2014. [Ex. 4; Chavez, Trial Day 1, p. 63]

20. On September 9 and September 19, 2014, counsel for the *Journal* sent follow-up letters to APS regarding the status of the request. [Exs. 3 and 5; Chavez, Trial Day 1, p. 69]

21. APS first responded to the request via email on September 11, 2014, saying that a response would be forthcoming. [Ex. 4; Chavez, Trial Day 1, p. 65]

22. In delaying its first response until September 11, 2014, APS failed to either permit inspection of the records within three business days or to explain in writing when the records would be available for inspection or when APS would respond to the request. [Chavez, Trial Day 1, pp. 65-67]

23. APS did not respond substantively to the request for billing records until September 26, 2014. [Ex. 8; Chavez, Trial Day 1, pp. 70-71]

24. In its substantive response to the *Journal*’s request for billing records, APS said:

With regard to your request for “all invoices or other billing records from Butt, Thornton & Baehr, P.C., since January 1, 2014,” I asked APS Risk Management Office for any documents responsive to this request and they responded that they have not received any billings from Butt, Thornton & Baehr, P.C. since Jan. 1, 2014, therefore I have no records to provide. [Ex. 8]

25. APS did, however, have access to the billing records. Those billing records had been prepared by APS's agent (its attorneys) and were complete by September 16, 2014. [Ex. 7; Padilla, Trial Day 2, pp.155-56]

26. Mr. Chavez did not call Ms. Padilla to ask her if she had billing records but admits that he could have done so. [Chavez, Trial Day 1, pp.78-79]

27. If APS had requested a copy of the billing records, Ms. Padilla could have provided them any time after they were prepared on September 16, 2014. [Padilla, Trial Day 2, p. 156]

28. Furthermore, the billing records were hand-delivered by the law firm on September 25, 2014, to Ms. Maestas, before APS sent its letter on September 26 denying that it had any records. [Exs. 6, 7; Padilla, Trial Day 2, pp. 148-50]

29. Ms. Maestas was aware of the pending request for Ms. Padilla's records. [Chavez, Trial Day 1, pp. 77-78; Ex. 24, Deposition of Analee Maestas, at 92:7 – 93:8]. Mr. Chavez consulted with Ms. Maestas about the requests before sending the denial letter to the *Journal* on September 26. [Chavez, Trial Day 1, p. 77]

30. After denying the request for the billing records, Mr. Chavez became aware that APS in fact possessed the bills. Despite this, he did not produce them to the *Journal* or to KOB-TV. [Chavez, Trial Day 1, pp. 81-83]

31. APS's substantive response to the *Journal*, being issued September 26, came after expiration of the 15-day deadline for responding, thus failing to comply with the 15-day rule. [Chavez, Trial Day 1, pp. 70-72]

B. Statement of Analee Maestas to APS Board Members

32. APS received the *Journal's* request (Ex. 2) for "All documents generated by or received by any member of the Albuquerque Public Schools Board of Education concerning the basis for the Board's decision to discuss terminating the employment of Winston Brooks" by email on September 3, 2014. [Ex. 4; Chavez, Trial Day 1, p.63] The same request asked for "all documents referencing any complaints or allegations of misconduct regarding Winston Brooks or Ann Brooks made to APS or any member of the APS Board of Education since January 1, 2014." [Ex. 2].

33. On September 9 and September 19, 2014, counsel for the *Journal* sent follow-up letters to APS regarding the status of the request. [Exs. 3 and 5; Chavez, Trial Day 1, p. 69]

34. APS did not acknowledge receipt of the records request until September 11 (Ex. 4), more than three days following APS's receipt of the request.

35. APS did not respond substantively to the requests until September 26, more than 15 days after APS's receipt of the requests. [Chavez, Trial Day 1, pp. 84-85]

36. Before he responded to the requests on behalf of APS, Mr. Chavez provided the requests to Ms. Maestas and had asked her for responsive documents. The only responsive records that Ms. Maestas identified were those listed in Mr. Chavez's response. Mr. Chavez also asked for information from Karen Rudys, head of the APS Human Resources Department. [Ex. 8; Chavez, Day 1, 87-88, 106-07; Deposition of Analee Maestas, at 92:7 – 93:8]

37. When APS responded substantively to the requests on September 26, 2014, it identified as responsive records documents regarding a performance review of Mr. Brooks and documents prepared by Ms. Padilla and asserted that those documents were exempt from IPRA. APS's response failed to identify that APS also had in its possession another responsive

document, a typewritten statement prepared by Ms. Maestas and read to Board members on July 18, 2014. [Ex. 14; Ex 24, Deposition of Analee Maestas, at 11:23 – 13:6, 16:16-21]

38. Ms. Maestas had not provided this typewritten statement to Mr. Chavez when he asked her for responsive documents. [Chavez, Trial Day 1, p. 98]

39. APS did later produce the typewritten statement in response to a separate records request from the New Mexico Foundation for Open Government (“NMFOG”), in November of 2014, without any claim of exemption. Even after producing the statement to NMFOG, APS still did not produce it to the *Journal* or advise the *Journal* of its existence. [Ex. 26; Chavez, Trial Day 1, pp. 98-99, 104-05]

40. APS’s failure to substantively respond to the records request within 15 days (requiring two follow-up requests from the *Journal*’s counsel) was unreasonable. APS’s failure to identify the typewritten statement and the failure to produce it to the *Journal* within 15 days was also unreasonable.

C. Ethical Advocate Hotline Complaints dated June 22, 2014 and August 22, 2014

41. APS received the *Journal*’s September 2, 2014, request (Ex. 2) for production of “all documents referencing any complaints or allegations of misconduct regarding Winston Brooks or Ann Brooks made to APS or any member of the APS Board of Education since January 1, 2014” by email on September 3, 2014. [Ex. 4; Chavez, Trial Day 1, p. 63]

42. This request was also the subject of letters from counsel for the *Journal*, dated September 9 and 19, 2014, following up on the request and seeking a response. [Exs. 3 and 5; Chavez, Trial Day 1, p. 69]. APS’s first acknowledgement of the request was sent September 11, 2014, more than three days after APS’s receipt of the request. [Ex. 4.]

43. APS did not issue a written substantive response until September 26, 2014, more than 15 days following APS's receipt of the request. [Ex. 8]

44. Before providing APS's substantive response to the request, Mr. Chavez brought this records request to the attention of APS officials, including interim superintendent Brad Winter, Ms. Analee Maestas, Chief Executive Officer Ruben Hendrickson, Human Resources Director Karen Rudys, Senior Director of Internal Audit Peg Koshmider, Director of Communications Monica Armenta, and Ms. Yager, as well as outside counsel Art Melendres and Tony Ortiz. [Chavez, Trial Day 1, pp. 112, 118-120; Ex. 8]

45. In APS's substantive response, APS said that it possessed an "anonymous tip" from the Ethical Advocate line and that "the anonymous tip is exempt from disclosure," citing NMSA 1978, Section 14-2-1(3) ("letters or memorandums which are matters of opinion in personnel files"). The letter referenced only one anonymous tip. [Ex. 8, Chavez, Trial Day 1, pp. 107-10]

46. At the time of the response, APS had two separate complaints against Winston Brooks through the Ethical Advocate hotline. The first complaint was made on June 22, 2014, and the second on August 22, 2014 [Ex. 15, 21; Koshmider, Trial Day 1, pp. 217, 219] The information contained in the complaints (Exs, 15, 21) was provided by the complainant to Ethical Advocate. [Koshmider, Trial Day 1, pp. 219-20]

47. Both of the Ethical Hotline complaints were initiated outside of APS's Human Resources and employee review process, both were reported to and maintained by the Internal Audit Department, and both were catalogued in both physical files and a searchable electronic spreadsheet which was accessible to Ms. Koshmider, whom Mr. Chavez specifically asked for responsive documents [Koshmider, Trial Day 1, p. 213-215; Chavez, Trial Day 1, pp.118-119]

48. The Ethical Advocate process was separate from APS' Human Resources Department, and the complaints received from Ethical Advocate were separate from regular personnel records that relate to employee evaluations. [Koshmider, Trial Day 1, p. 218]

49. The person who submitted the June 22, 2014 complaint identified himself or herself as a public official. The person who submitted the August 22, 2014 complaint identified himself or herself as a student. [Ex. 15; Koshmider, Trial Day 2, pp. 27-28]. According to Ms. Koshmider, it was "impossible to know" if either complainant was an employee of APS. [Koshmider, Trial Day 2, p.30]

50. Mr. Chavez did not review the one anonymous tip he identified in his substantive response before contending that it was exempt from IPRA. His sole basis for that contention was what Ms. Maestas and Ms. Koshmider had told him. [Chavez, Trial Day 1, pp. 109-111, 120]

51. Mr. Chavez asked Interim Superintendent Brad Winter to ask Ms. Koshmider for a copy of the complaint. He also asked an attorney for the Modrall law firm to ask Ms. Koshmider for a copy of the complaint. Both of these actions were not common for Mr. Chavez in responding to IPRA requests. Despite these efforts, he did not receive a copy of the complaint. [Chavez, Trial Day 1, pp. 120-23, 181-83]

52. Mr. Chavez is not aware of any explanation from APS explaining its failure to identify or produce the second of the hotline complaints. [Ex. 15; Chavez, Trial Day 1, p. 116]

53. More than two years after APS received the *Journal's* IPRA request for the complaints, on October 14, 2016, APS produced the two complaints. [Ex. 21].

54. APS's failure to substantively respond to the *Journal's* records request within 15 days (requiring two follow-up requests from the *Journal's* counsel) was unreasonable. APS's

statement that that it only had one complaint when in fact it had two, and its decision to withhold the two complaints for more than two years, were also unreasonable.

D. APS's Report of Investigation of Hotline Complaint

55. In responding to the *Journal's* September 2, 2014 request for "all documents referencing any complaints or allegations of misconduct regarding Winston Brooks or his wife" (Ex. 2), APS failed to identify any documents gathered or generated regarding the two ethical hotline complaints. [Ex. 4]

56. At the time it responded to the September 2 request, APS had in its possession an audit report of an investigation which APS had conducted regarding the June 22, 2014 Ethical Advocate hotline complaint. [Koshmider, Trial Day 1, pp. 221-29]

57. Board President Analee Maestas was aware of the investigation. [Koshmider, Trial Day 1, pp. 223-24; Ex 24, Deposition of Analee Maestas, at 37:7-24] The investigation culminated in a written audit report prepared by Ms. Koshmider on or about July 3, 2014, which was kept in both hard copy and electronic form in APS's Internal Audit office. [Koshmider, Trial Day 1, pp. 224, 228]

58. APS's substantive response to the September 2 request, issued September 26, 2014, fails to identify the audit report and related documents as responsive to the *Journal's* requests or to explain that they were being withheld. [Chavez, Trial Day 1, pp. 123-24, 164-65]

59. APS never produced to the *Journal* either a denial or explanation as to why it was not producing the report. [Chavez, Trial Day 1, p. 124]

60. APS's failure to identify the report and explain why it was not producing it, was unreasonable.

E. Spreadsheet of Complaints, including Complaints Against Winston Brooks

61. When APS responded substantively to the *Journal's* September 2, 2014, request (Ex. 2) for production of “all documents referencing any complaints or allegations of misconduct regarding Winston Brooks or Ann Brooks made to APS or any member of the APS Board of Education since January 1, 2014” by email, APS failed to identify or to produce a copy of the electronic spreadsheet maintained in the Internal Audit Department that catalogued the two Ethical Hotline complaints concerning Mr. Brooks. [Koshmider, Trial Day 1, pp. 213-14, 217, 219]

62. APS’s decision to withhold the spreadsheet, and its failure to identify it was unreasonable.

F. Winston Brooks’ Performance Review and Related Documents

63. In responding to the *Journal's* September 2, 2014 request (Ex. 2) for complaints or allegations of misconduct regarding Winston Brooks or Ann Brooks, APS identified documents related to a performance review of Winston Brooks as being withheld as exempt. [Ex. 8; Chavez, Day 1, p. 88] APS’s response was reasonable.

G. Analee Maestas’s Letter Agreement with Agnes Padilla

64. APS received KOB-TV’s August 26, 2014, records request (Ex. 16) for APS’s communications with Agnes Padilla on or before August 28, 2014, when its records custodian, Mr. Chavez, acknowledged receipt of the request. [Ex. 16; Ex. 17]

65. APS did not substantively respond to the request until September 17, 2014, more than 15 days after APS received it. [Ex. 17; Chavez, Trial Day 1, pp. 125, 131-32]

66. Before responding to the request substantively, Mr. Chavez asked Ms. Maestas for responsive documents. [Chavez, Trial Day 1, pp. 125-126]; Ex 24 Deposition of Analee Maestas, at 47:22-48:15, 92:7-93:8]

67. APS's substantive response informed KOB-TV that APS had no records responsive to the request. [Ex. 17]

68. At the time of the September 17 response, APS in fact was in possession of a letter from Analee Maestas, the APS Board President, to Agnes Padilla, and signed by both, pursuant to which APS had hired Ms. Padilla to provide services including "research and inquiry into matters of concern to the Board and consultation with the Board President and members of the Board concerning the results of your work." [Ex. 1, Chavez, Trial Day 1, pp. 127-31, 177; Padilla, Trial Day 2, 142-43; Ex 24 Deposition of Analee Maestas, at 44:7-22, 46:17-22]

69. The letter agreement was entered into on July 18, 2014. [Ex 24 Deposition of Analee Maestas, at 44:7-22]. It was sent to Ms. Padilla via email or fax. [Padilla, Trial Day 2, p.144]. She returned it to APS outside counsel Art Melendres. [Padilla, Trial Day 2, p.145]

70. At trial, Mr. Chavez contended that though he was aware of the letter agreement, he made the conscious decision not to produce it to KOB-TV, on the basis that he considered it a "contract" and not a communication. [Chavez, Trial Day 1, pp. 177-80]

71. APS did not identify the letter agreement to KOB-TV, nor claim that the letter agreement was exempt from IPRA. [Chavez, Trial Day 1, pp. 127, 133]

72. APS's failure to substantively respond to KOB-TV's records request within 15 days was unreasonable. Its failure to identify the letter agreement, and to produce it to Plaintiff KOB-TV, was unreasonable.

H. Emails with APS Board Regarding Investigation

73. APS received KOB-TV's August 26, 2014 request (Ex. 16) for "any and all emails and documents to or from any APS Board Member or employee or representative in regards the investigation report," by August 28, 2014. [Ex. 17, Chavez, Trial Day 1, p.131]

74. APS did not produce emails responsive to the request until September 17, 2014, beyond the 15-day deadline for responding. [Ex. 17, Chavez, Trial Day 1, p. 131-32]

75. APS's failure to properly respond to the records request within 15 days was unreasonable.

I. Emails between Mr. Brooks and Monica Armenta

76. APS received KOB-TV's September 3, 2014 request for "all emails between Superintendent Winston Brooks and Communications Director Monica Armenta from the last 4 months of Winston Brooks employment" on September 3, 2014. [Ex. 18; Ex. 19; Chavez, Trial Day 1, pp. 133-34]

77. APS first responded to the request on September 11, 2014, after expiration of the three-day deadline. [Ex. 19; Chavez, Trial Day 1, pp. 133-34]

J. APS Did Not Consider the Requests Excessively Burdensome or Broad

78. In responding to the records requests from the *Journal* and KOB-TV, APS did not provide written notice to Plaintiffs that it would need additional time to respond to the requests because APS had determined that the requests were excessively burdensome or broad. [Exs. 4, 19; Chavez, Trial Day 1, pp. 72-73]

K. APS Did Not Put Plaintiffs on Notice of the "Effective Date" of its Responses.

79. In responding to the records requests from the *Journal* and KOB-TV, APS did not give notice to Plaintiffs that its responses were limited to records in APS's possession as of the

date of the records request, as opposed to the date of APS's response. [Chavez, Trial Day 1, p. 194]

CONCLUSIONS OF LAW

A. General

1. APS is a public school district pursuant to NMSA 1978, Section 22-5-4, and is subject to the New Mexico Inspection of Public Records Act ("IPRA").

2. Under IPRA, every person has a right to inspect public records. NMSA 1978, Section 14-2-1.

3. "IPRA contains a clear declaration of the public policy the Legislature intended to further by enacting IPRA." *Britton v. Office of Attorney Gen.*, 2019-NMCA-002, ¶ 29, 433 P.3d 320.

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.

Id., citing NMSA 1978, § 14-2-5.

4. IPRA must be construed in light of its purpose and 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. *San Juan Agric. Water Users Ass'n v. KNME-TV*, 2011-NMCA-011, ¶ 14, 150 N.M. 64, 257 P.3d 884; *New Mexico Found. for Open Gov't v. Corizon Health*, 2020-NMCA-014, ¶ 15, 460 P.3d 43.

5. “IPRA is intended to ensure that the public servants of New Mexico remain accountable to the people they serve.” *San Juan Agric. Water Users Ass’n*, 2011-NMSC-011, ¶ 16. “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.

6. Public records subject to IPRA include not just documents within the physical possession of the records custodian or the public entity, but also records “used, created, received, maintained or held by or on behalf of any public body.” NMSA 1978, § 14-2-6(G).

7. Public entities must designate a records custodian to receive records requests, to respond, and to provide opportunity to inspect the records. NMSA 1978 § 14-2-7.

8. A custodian is required to respond in the same medium, electronic or paper, in which the request was made. NMSA 1978 § 14-2-7(B).

9. “The expectation established by IPRA is that records custodians will diligently undertake their responsibility to process and fully respond to requests, including determining what public records are responsive to the request and what records or portions thereof may be exempt from disclosure, communicating the status of a request to the requester, and ultimately providing for inspection of all nonexempt records.” *Britton*, 2019-NMCA-002, ¶ 31.

10. A public entity claiming that a record fits within an exemption to IPRA bears the burden of establishing the applicability of the exception. *See Noll v. New Mexico Dep’t of Pub. Safety*, No. 35,981, 2019 WL 1615040, at *4 (N.M. Ct. App. Mar. 19, 2019) (“In an IPRA enforcement action, the burden is on the public entity to establish that the records requested are exempt from inspection,”), *citing City of Farmington v. The Daily Times*, 2009-NMCA-057, ¶¶

13-14, 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 (stating that the burden is on “the custodian of the records to demonstrate a reason for non-disclosure”). IPRA’s exemptions are “narrow,” *Cox v. N.M. Dep’t of Pub. Safety*, 2010-NMCA-096, ¶ 7, 148 N.M. 934, and should be construed in light of IPRA’s purpose and interpreted in a way that accomplishes the ends that the Legislature sought to be accomplished, *Jones v. City of Albuquerque Police Dep’t*, 2020-NMSC-013, ¶ 17.

11. When requested public records contain information that is exempt and information that is nonexempt from disclosure, the custodian shall separate the two prior to inspection, and the nonexempt information shall be made available for inspection. NMSA 1978 § 14-2-9(A). In such a case a public entity is required to separate the exempt information from the nonexempt information and make the nonexempt information available for inspection. *Id.* The case law indicates that an entire record falling within the confines of Section 14-2-1(C), is exempt from disclosure. *See e.g. State ex rel. Newsome v. Alarid*, 1977-NMSC-076, ¶ 12, 90 N.M. 790, 568 P.2d 1236, *superseded by statute on other grounds as stated in Republican Party of N.M. v. N.M. Taxation & Revenue Dep’t*, 2012-NMSC-026, 283 P.3d 853. (“*documents concerning infractions and disciplinary action...are...exempt from disclosure under the statute*”) (emphasis added).

12. “A public body that permits only partial inspection—i.e., inspection of some but not all nonexempt responsive records—plainly has not complied with its obligation to provide ‘the greatest possible information’ to the requester.” *Britton*, 2019-NMCA-002 ¶ 31.

13. IPRA has two private enforcement provisions, which were included in IPRA “to encourage compliance and facilitate enforcement.” *San Juan Agr. Water Users Ass’n*, 2011-NMSC-011, ¶ 12. The first, set forth in NMSA 1978 § 14-2-11, is for situations in which a

custodian fails to respond to a written request within 15 days or fails to provide a written explanation for denial within 15 days, or provides only an incomplete explanation of documents withheld. “Section 14-2-11 addresses the ‘wrong’ done *by* a public body, i.e., a public body’s failure to respond to a request, which . . . includes everything from a complete failure to respond at all, to failing to permit inspection of all nonexempt responsive records, to failing to issue an explanation of denial in conformance with Section 14-2-11(B) when records are being withheld from inspection.” *Britton*, 2019-NMCA-002, ¶ 35. Inadvertent failures to disclose responsive records can still be a basis for an IPRA enforcement action. *Id.* ¶ 39. Section 11 damages are available for incomplete or inadequate responses to a request to inspect public records. *Id.* ¶ 33.

14. When a public entity has committed such a wrong, “an award of statutory damages . . . is required when a public body’s failure to provide a timely explanation of denial is determined to be unreasonable.” *San Juan Agric. Water Users Ass’n v. KNME-TV*, No. 35,839, 2019 WL 2089540, at *8 (N.M. Ct. App. Apr. 16, 2019), citing *Britton*, 2019-NMCA-002, ¶ 38.

15. Whether an explanation of denial is reasonable is a factual determination to be made by the court. *Id.* The statutory damages are limited to \$100 per day and accrue from the day the public body is in noncompliance until a written denial is issued. NMSA 1978 § 14-2-11.

16. A second enforcement provision is set forth in NMSA 1978 § 14-2-12. That section is for situations in which a person’s written request for public records has been denied and that person is successful in a court action to enforce the provisions of IPRA. “Section 14-2-12 . . . is designed to correct the ‘wrong’ done to the requester when his or her right of inspection is improperly denied.” *Britton*, 2019-NMCA-002, ¶ 35. In these cases, a court shall award actual damages, costs and reasonable attorneys’ fees. NMSA 1978 § 14-2-12; *Faber v. King*, 2015-NMSC-015, ¶ 35.

17. It is possible for an IPRA enforcement action to proceed – and for an IPRA plaintiff to recover – under both Sections 14-2-11 and -12. *Britton*, 2019-NMCA-002, ¶ 35. “Indeed, an IPRA plaintiff who succeeds in an action based on a public body’s noncompliance, i.e., a Section 14-2-11-based action, necessarily also succeeds in proving the ‘wrong’ that Section 14-2-12 is intended to remedy and is, thus, eligible for the damages provided by both sections.” *Id.*

18. In addition to the provisions addressed above, a district court may issue a writ of mandamus or order an injunction or other appropriate remedy to enforce the provisions of IPRA. NMSA 1978 § 14-2-12(B) (authorizing mandamus); *Faber v. King*, 2015-NMSC-015, ¶ 32, NMSA 1978 § 44-6-2 (“In cases of actual controversy, district courts within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed.”).

19. However, at no time during the litigation of this matter did Plaintiffs properly invoke mandamus pursuant to NMSA 1978, Sections 44-2-1 through 44-2-14.

B. APS’s Violations of IPRA Based on Late Responses and Failure to Identify Records Being Withheld.

20. IPRA sets forth specific time requirements for records custodians to respond to records requests (often referred to as 3-Day and 15-Day rules), as follows:

A custodian receiving a written request shall permit the inspection immediately or as soon as is practicable under the circumstances, but not later than fifteen days after receiving a written request. If the inspection is not permitted within three business days, the custodian shall explain in writing when the records will be available for inspection or when the public body will respond to the request. The three-day period shall not begin until the written request is delivered to the office of the custodian.

NMSA 1978 § 14-2-8(D).

21. If a custodian determines that a written request is excessively burdensome or broad, an additional reasonable period of time is allowed to comply with the request. In such a case, the custodian shall provide written notification to the requester within fifteen days of receipt of the request that additional time will be needed to respond to the written request.

NMSA 1978 § 14-2-10.

22. A custodian who denies a request must provide a written explanation of the denial within 15 days after receipt of the written request. NMSA 1978 § 14-2-11(B). A request not granted within 15 days is deemed denied, unless the records custodian determines that the request is excessively broad or burdensome and provided written notice pursuant to NMSA 1978 §§ 14-2-10, 14-2-11(A).

23. The nature, extent and number of violations by APS of NMSA 1978 § 14-2-8(D) outlined at trial show that APS failed to meet its obligations under IPRA.

C. 3-Day Rule Violations

24. APS violated the 3-day rule contained NMSA 1978 § 14-2-8(D), as to each of the three IPRA requests sent by the *Journal* on September 2, 2014 (Ex. 2).

25. APS received the *Journal's* letter of September 2, 2014 (Ex. 2), on September 3, 2014 (Ex. 4).

26. APS's first response to those three requests was on September 11, 2014 (Ex. 4).

27. APS also violated the 3-day rule as to KOB-TV's IPRA request dated September 3, 2014 (Ex. 18).

28. APS received KOB-TV's request on September 3, 2014 (Ex. 19).

29. APS's did not give its initial response to KOB-TV's request until September 11, 2014 (Ex. 19).

30. The *Journal* and KOB-TV are entitled to judgment declaring that APS failed to comply with NMSA 1978 § 14-2-8(D) as set forth above.

D. 15-Day Rule Violations

31. APS committed nine violations of the 15-day rule contained NMSA 1978 § 14-2-8(D). Six of the violations relate to the *Journal*'s requests and three violations relate to KOB-TV's requests.

32. The *Journal*'s request for billing records from Butt, Thornton & Baehr (Ex. 2): APS violated the 15-day rule twice, once by not responding within the 15-day period and again by not identifying responsive records (the bills, Ex. 7), or explaining why they were not being produced, when it did respond (Ex. 8). Because APS's actions were unreasonable, the *Journal* is entitled to statutory damages, at the rate of \$50 per day, in the total amount of \$117,450. This sum represents statutory damages of \$400 for the period from September 18, 2014 (15 days after APS's receipt of the request) to September 26, 2014 (the date of APS's incomplete response, Ex. 8) for the delay in providing APS's response and an additional amount of \$117,050 representing damages for the period from September 26, 2014 (the date of APS's incomplete response) to February 22, 2021 (the date of trial), for the failure to produce or identify the records that were withheld.

33. The *Journal*'s request for documents generated or received by the Board concerning the basis for its decision to discuss terminating Mr. Brooks (Ex. 2). APS violated the 15-day rule twice, once by not responding within the 15-day period to the request and again by not identifying responsive records (the Maestas statement, Ex. 14), or explaining why it was not being produced, when it did respond (Ex. 8). Because APS's actions were unreasonable, the *Journal* is entitled to statutory damages, at the rate of \$25 per day, in the total amount of

\$58,725. This sum represents statutory damages of \$200 for the period from September 18, 2014 (15 days after APS's receipt of the request) to September 26, 2014 (the date of APS's incomplete response, Ex. 8) for the delay in providing APS's response and an additional amount of \$58,525 representing the period from September 26, 2014 (the date of APS's incomplete response) to February 22, 2021 (the date of trial), for the failure to produce or identify the records that were withheld.

34. The *Journal's* request for documents referencing complaints or allegations of misconduct against Mr. or Mrs. Brooks (Ex. 2). APS violated the 15-day rule twice, once by not responding within 15 days and again by not identifying responsive records (the second Ethical Hotline complaint, the Maestas statement, Ex. 14, Ms. Koshmider's investigative report, and the spreadsheet containing information about the complaints), or explaining why they were not being produced, when it did respond (Ex. 8). Because APS's actions were unreasonable, the *Journal* is entitled to statutory damages for these violations in the total amount of \$117,450. This sum represents statutory damages of \$400, at \$50 per day, for the period from September 18, 2014 (15 days after APS's receipt of the request) to September 26, 2014 (the date of APS's incomplete response, Ex. 8) for the delay in providing APS's response. In addition, it includes an additional \$37,450 at \$50 per day representing the period from September 26, 2014 (the date of APS's incomplete response) to October 14, 2016, the date on which APS produced the two Ethical Hotline complaints, and \$79,600 representing \$50 per day for the period from October 14, 2016 (production of the Hotline complaints) to the date of trial, February 22, 2021, for continuing damages related to the failure to identify the investigative report and identify and produce the spreadsheet containing information about the complaints.

35. KOB-TV's request for communications between a board member or employee and Agnes Padilla (Ex. 16). APS violated the 15-day rule twice, once by not responding within the 15-day period and again by not identifying responsive records (the letter agreement, Ex. 7), or explaining why it was not being produced, when it did respond (Ex. 8). Because APS's actions were unreasonable, KOB-TV is entitled to statutory damages, at the rate of \$50 per day, in the total amount of \$117,750. This sum represents statutory damages of \$250 for the period from September 12, 2014 (15 days after APS's receipt of the request) to September 17, 2014 (the date of APS's incomplete response, Ex. 17) for the delay in providing APS's response and an additional amount of \$117,500 representing the period from September 17, 2014 (the date of APS's incomplete response) to February 22, 2021 (the date of trial), for the failure to produce or identify the records that were withheld.

36. KOB-TV's request for emails to or from any board member or employee in regard to Ms. Padilla's report (Ex. 16). APS violated the 15-day rule by not producing responsive records within the 15-day period. Because APS's actions were unreasonable, KOB-TV is entitled to statutory damages, at the rate of \$50 per day, in the total amount of \$250. This sum represents statutory damages for the period from September 12, 2014 (15 days after APS's receipt of the request) to September 17, 2014 (the date of APS's production) for the delay in providing APS's response.

37. The Legislature has afforded the district courts broad discretion in determining the amount of the award for statutory damages. *Britton*, 2019-NMCA-002, ¶ 38. The Court has reduced the daily damages rate from the statutory maximum of \$100 because of the length of time over which the damages are being assessed.

**E. APS's Wrongful Failures to Produce Records (NMSA 1978 § 14-2-12)
Agnes Padilla's Billing Records**

38. The records of Butt, Thornton & Baehr, P.C.'s billing for legal work to APS (Ex. 7), are public records pursuant to NMSA 1978 § 14-2-6(G).

39. APS does not claim, nor did it meet its burden of proving that the bills were exempt from IPRA. The bills contained in Ex. 7 are not exempt from disclosure under IPRA. *See Schein v. N. Rio Arriba Elec. Co-op., Inc.*, 1997-NMSC-011, ¶ 19, 122 N.M. 800 (attorney billing records held not privileged; information about purpose for which an attorney is retained, the steps the attorney took in fulfilling obligations, and the nature and scope of an attorney's authority are not privileged).

40. The bills contained in Ex. 7 are responsive to the *Journal's* request (Ex. 2).

41. Nothing in IPRA states or implies that a records custodian need only make available for inspection those records that were in the public body's possession at the time of the request, as opposed to the time of the custodian's response, especially when the custodian fails to put the requestor on notice of such a limitation.

42. As of September 16, 2014, when Ms. Padilla's firm's bills were complete, they constituted records "used, created, received, maintained or held by or on behalf of" APS and thus APS was required to make them available for inspection as of that date. *See* NMSA 1978, § 14-2-6(G).

43. Alternatively, APS had actual possession of the bills on September 25, 2014, when they were hand-delivered to Ms. Maestas.

44. By either measure, APS's statement to the *Journal* on September 26, 2014 that it had no responsive records was thus false and a violation of IPRA.

45. It is not necessary for this Court to resolve the question whether a public body may refuse to produce documents coming into its possession after the date of a records request but before the public body's response to that request in circumstances where the custodian makes it plain that she or her is limiting the public body's response.

46. In this case, APS failed to indicate in its records response to the *Journal* that it was subject to any time limitation and so APS should have produced and identified documents in its possession at the time of its response. Interpreting APS's duties in this way aligns those duties with the purpose and intent of IPRA, which is to ensure that the public has "the greatest information possible" about the workings of government. *See* NMSA 1978, § 14-2-5

47. APS's failure to produce the billing records constitutes a wrongful denial of the request entitling both the *Journal* and KOB-TV to remedies under NMSA 1978 § 14-2-12.

Statement of Analee Maestas

48. Exhibit 14, the statement written by APS Board President Analee Maestas regarding a discussion she had with Board members regarding allegations of misconduct made against Winston Brooks, is a public record pursuant to NMSA 1978 § 14-2-6(G).

49. APS has not met its burden of proving that any portion of Exhibit 14 constitutes "letters or memorandums which are matters of opinion in personnel files" that would be exempt from IPRA pursuant to NMSA 1978 § 14-2-1(C). The record is a factual statement by Ms. Maestas as to what she had done and intended to do, and her reasons for doing so.

50. APS's argument that the statement is exempt as a matter of opinion is undercut by APS's decision to produce the record in 2014 to NMFOG in response to another records request, without any claim of exemption.

51. Exhibit 14 is responsive to the *Journal's* requests in Exhibit 2, for "all documents referencing any complaints or allegations of misconduct regarding Winston Brooks or Ann Brooks made to APS or any member of the APS Board of Education since January 1, 2014."

52. APS's failure to produce the Maestas statement to the *Journal* constitutes a wrongful denial of the request entitling the *Journal* to remedies under NMSA 1978 § 14-2-12.

Hotline Complaints

53. The two hotline complaints against Winston Brooks made through APS's Ethical Advocate hotline, dated June 22, 2014, and August 22, 2014, (Ex. 15) are public records pursuant to NMSA 1978 § 14-2-6(G).

54. APS has not met its burden of proving that any portion of Exhibit 15 constitutes "letters or memorandums which are matters of opinion in personnel files" that would be exempt from IPRA pursuant to NMSA 1978 § 14-2-1(C). The complaints were made through the Ethical Advocate hotline, which is open for use by the public, and the records of hotline complaints are kept separately from records maintained by APS' Human Resources department. As such, they are comparable to the citizen complaints against police officers which the New Mexico Court of Appeals ruled were not exempt from IPRA in *Cox v. N.M. Dep't of Pub. Safety*, 2010-NMCA-096, 148 N.M. 934.

55. The complaints in Exhibit 15 are responsive to the *Journal's* request in Exhibit 2.

56. APS's failure to make either of the hotline complaints available for inspection for a period of more than two years constitutes a wrongful denial of the *Journal's* request, entitling the *Journal* to remedies under NMSA 1978 § 14-2-12.

Report Concerning Ethical Advocate Hotline Complaint

57. APS's failure to identify the report and state that APS possessed the report constitutes a wrongful denial of the Journal's request, entitling the Journal to remedies under NMSA 1978, §41-2-12.

Winston Brooks' Performance Review and Related Documents

58. Winston Brooks' performance review, and related documents, are exempt from inspection NMSA 1978 § 14-2-1(C).

APS's Letter Agreement with Agnes Padilla

59. The July 18, 2014 letter agreement between Analee Maestas and Agnes Padilla of the Butt, Thornton & Baehr, P.C., law firm (Ex. 1) is a public record pursuant to NMSA 1978 § 14-2-6(G).

60. APS has not met its burden of proving that any portion of the letter agreement is exempt from disclosure under a claim of attorney-client privilege. First, APS did not provide evidence that it raised the claim of privilege at the time of its response, and thus has waived that claim. In addition, the letter on its face contains no confidential communications, nor legal advice, nor any other information protected by the attorney-client privilege. Engagement letters and retention agreements are typically not protected by the privilege. *See, e.g., Schein v. N. Rio Arriba Elec. Co-op., Inc.*, 1997-NMSC-011, ¶ 20 (information about the purpose for which an attorney is retained is not privileged). Although APS claimed that Ms. Maestas expected the letter agreement to be confidential, her subjective expectation of confidentiality, without more, would be insufficient to render the report either privileged or work product. Rules 11-503 and 1-026 NMRA. The mere fact that an attorney was involved in a communication does not automatically render the communication subject to New Mexico's

attorney-client privilege. *Anaya v. CBS Broadcasting, Inc.*, 251 F.R.D. 645, 650 (D.N.M. 2007).

61. In addition, APS's claim at trial that the letter is exempt as a confidential attorney-client communication is undercut by APS's production of the letter agreement to the *Journal* in response to a separate records request at almost the exact same time in 2014 in Ex 4.

62. The letter agreement is responsive to one of KOB-TV's requests in Ex. 16.

63. APS's failure to produce the letter agreement to KOB-TV within 15 days constitutes a wrongful denial of KOB-TV's request, entitling KOB-TV to remedies under NMSA § 14-2-12.

Spreadsheet of Complaints, including Complaints Against Winston Brooks

64. The searchable spreadsheet used by APS's Internal Audit department to record complaints made in regard to APS, which included complaints against Mr. Brooks, is a public record pursuant to NMSA 1978 § 14-2-6(G).

65. APS has not met its burden of proving that any portion of the spreadsheet is exempt from IPRA.

66. The spreadsheet is responsive to the *Journal*'s September 2, 2014, request (Ex. 2) for production of "all documents referencing any complaints or allegations of misconduct regarding Winston Brooks or Ann Brooks made to APS or any member of the APS Board of Education since January 1, 2014."

67. APS's failure to produce the spreadsheet to the *Journal* constitutes a wrongful denial of the request entitling the *Journal* to remedies under NMSA 1978 § 14-2-12.

68. APS shall produce the spreadsheet to Plaintiffs within ten (10) calendar days of the filing of these Findings of Fact and Conclusions of Law.

Summary of Damages Awarded and Records to be Produced

69. Plaintiff *Albuquerque Journal* is awarded statutory damages pursuant to NMSA 1978 § 14-2-11 in the total amount of \$293,625.

70. Plaintiff KOB-TV is awarded statutory damages pursuant to NMSA 1978 § 14-2-11 in the amount of \$118,000.

71. APS shall produce the spreadsheet to Plaintiffs within ten (10) calendar days of the filing of these Findings of Fact and Conclusions of Law.

72. Plaintiffs *Albuquerque Journal* and KOB-TV are entitled to costs and reasonable attorney fees pursuant to NMSA 1978 § 14-2-12(D). Pursuant to Rules 1-054(D) and (E), Plaintiffs may submit requests for costs and fees within 20 days of the entry of these findings.

73. The Court retains jurisdiction over claims for costs under Rule 1-054(D) NMRA and attorney fees pursuant to NMSA 1978 §14-2-12(D)

74. All requested findings of fact and conclusions of law not granted herein or inconsistent with these findings and conclusions are denied.


NANCY J. FRANCHINI
DISTRICT COURT JUDGE