ENDORSED
First Judicial District Court

FEB 08 2011

Santa Fe, Rio Arriba & Los Alamos Counties
PO Box 2268
Santa Fe, NM 87504-2268

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICAL DISTRICT

STATE OF NEW MEXICO, ex rel.
DEPARTMENT OF PUBLIC SAFETY and
REGINA CHACON, in her official capacity
as Records Custodian,

Plaintiffs,

v.

THE RIO GRANDE SUN and
BACH & GARCIA LLC

Defendants.

D 101 CV 2011 00432

No._____

COMPLAINT FOR DECLARATORY JUDGMENT

1. Plaintiff Department of Public Safety ("DPS") is an executive agency of the New Mexico State Government created pursuant to NMSA 1978, Sections 19-9-1 *et seq.*

2. Plaintiff Regina Chacon is the Records Custodian for DPS for the purposes of the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 *et seq.*

3. Defendant *Rio Grande Sun* is a newspaper of regional and local circulation in city of Rio Arriba County, with its principal place of business located in Espanola, New Mexico.

4. Upon information and belief, Defendant Bach & Garcia LLC is a New Mexico Limited Liability Company whose members practice law.

5. This court has jurisdiction over this action under the Declaratory Judgment Act, NMSA, Sections 44-6-1 et seq. and Inspection of Public Records Act, NMSA 1978, Sections 14 -2-1 et seq. Venue is proper under NMSA 1978, Section 38-3-1.

6. An actual controversy exists between plaintiffs and defendants concerning the parties' respective duties and rights under the Inspection of Public Records Act due to

conflicting, unresolved decisions in *Cox v. The New Mexico Department of Public Safety, et al.*, COA No. 28,658.

7. On April 18, 2008, the First Judicial District Court entered a summary judgment in favor of DPS and against plaintiff Charles Cox in connection with a request under the IPRA for citizen complaints against a DPS officer. *See* Judgment entered in *Cox v. The New Mexico Department of Public Safety*, Case No. D-0101 CV 20061415. (Exhibit A) The District Court determined that citizen complaints concerning governmental employees are exempt from disclosure under the IPRA based on the New Mexico Supreme Court's holding in *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 586 P.2d 1236 (1977).

8. Cox appealed, and on August 16, 2010, the New Mexico Court of Appeals issued its opinion in *Cox v. The New Mexico Department of Public Safety, et al.*, COA No, 28,658.

9. The Court of Appeals stated that "citizen complaints regarding a police officer's conduct while performing his or her duties as a public official are not the type of material from personnel files-that the Legislature intended to excluded from disclosure in Section 14-2-1 (A)(3). *Cox* at ¶27. The Court stated: "We, too, agree that it would be against IPRA's stated public policy to shield from public scrutiny as "matters of opinion in personnel files" the complaints of citizens who interact with the police officers. *Id.* at ¶29 [emphasis added].

10. In dicta the Court of Appeals suggested that government protect certain information about the complainants.

11. Within in days of the issuance of the *Cox* opinion, the Rio Grande Sun requested to inspect, *inter alia*, "[a]ny complaints and letters of reprimand or commendation for all officers in the District 7 office of the State Police from January 2008 to present." (Exhibit B) This request is pending.

12. On January 12, 2011, Mathew L. Garcia, an attorney practicing with Bach and Garcia LLC submitted a request seeking, inter alia, "all citizen complaints filed against New Mexico State Police Officer Freddy De La O." (Exhibit C) This request is pending.

13. DPS petitioned the New Mexico Supreme Court for certiorari in part on the grounds that the Court of Appeals decision conflicts with the Supreme Court's earlier decision in *Newsome v. Alarid.* (*See* Petition attached as Exhibit D) On October 18, 2010, the Supreme Court granted the Department's petition and issued a Writ to the Court of Appeals to proceed no further in the cause pending further order of the Supreme Court. (A copy of the Writ is attached as Exhibit E)

14. As of October 18, 2010 no mandate had issued from the Court of Appeals; the Supreme Court's order prohibits the Court of Appeals from issuing a mandate.

15. The Court of Appeals opinion does not constitute a final decision on this issue and the grant of certiorari suspends implementation of a decision about whether citizen complaints are exempt from disclosure under the IPRA. *See State v. Montoya*, 94 N.M. 704, 705 (1980) ("The decision of the Court of Appeals to that effect is final, certiorari having been denied and a mandate issued.").

16. The Supreme Court's grant of certiorari in the *Cox* case casts doubt on the parties' duties and rights under IPRA.

17. The confidentiality and privacy rights of the DPS employees as well as citizen complainants who did not anticipate these documents to be made public will be irreparably harmed if DPS releases the documents requested by the plaintiffs and the Supreme Court later overrules the Court of Appeals opinion and reinstates the decision by the District Court.

18. DPS desires a judicial determination of the rights and duties as to its response to the IPRA requests of the defendants and a declaration of those rights and duties in light of existing and future authority from the New Mexico Supreme Court.

19. DPS further seeks a judgment declaring that production of the requested materials is presently not practicable due to the uncertainty of the outcome of the Supreme Court's review of the *Cox* appeal. *See* NMSA 1978, § 14-2-8(D).

WHEREFORE, DPS prays this court for a judicial determination of its rights and duties under IPRA with respect to the requests made by defendants and such other and further relief as the Court may deem just and proper.

LONG, POUND & KOMER, P.A.
Attorneys for Plaintiffs

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505-982-8513 (FAX)

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

CHARLES COX,

Plaintiff,

v.

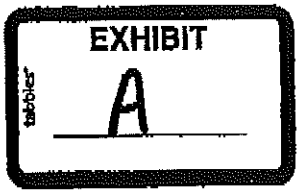
Case No. D-0101 CV 2006 1415

THE NEW MEXICO DEPARTMENT OF PUBLIC SAFETY; JOHN DENKO, in his individual capacity and in his official capacity as Secretary of the New Mexico Department of Public Safety; CARLOS MALDONADO, in his individual capacity and in his official capacity as Deputy Secretary of the new Mexico Department of public Safety; MATTHEW MURRAY, in his individual capacity and in his official capacity as Director, Motor Transportation Division; MARK ROWLEY, in his individual capacity and in his official capacity as Deputy Director, Motor Transportation Division; LAWRENCE. HALL, individually; and PETER OLSON, in his capacity as Communications Director of the New Mexico Department of Public Safety,

Defendants.

JUDGMENT

This matter came before the Court on a remand from the United States District Court for the District of New Mexico following entry of summary judgment on Counts I, II and III of the Plaintiff's Complaint. This Court heard the Motions for Summary Judgment filed by the Plaintiff and Defendants covering Count IV of the Plaintiff's Complaint, which asserts a claim under the New Mexico Inspection of Public Records Act. The Court reviewed the briefs filed by the parties and conducted a hearing on April 11, 2008 on the motions. The Court finds that



Defendants' motion for summary judgment, as it concerns the New Mexico Inspection of Public Records Act, is well taken and should be granted.

It is therefore ORDERED that JUDGMENT be and hereby is entered in favor of the Defendants and against the Plaintiff on Count IV of the Plaintiff's Complaint and that this action is dismissed with prejudice.

JAMES A. HALL

HON. JAMES A. HALL
District Judge

Submitted by:

LONG, POUND & KOMER, P.A.
Attorneys for Defendants

MARK E. KOMER
2200 Brothers Road
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Santa Fe, NM 87502-5098
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Approved by:

CINDI L. PEARLMAN, P.C.
Attorney for Plaintiff

Telephonically approved 04/14/2008
CINDI L. PEARLMAN
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RIO GRANDE SUN

NEWS FROM THE HEART OF NEW MEXICO COUNTRY

P.O. Box 790, Española, N.M. 87532 (505) 753-2126

Aug. 23, 2010

To:
Record Custodian
Department of Public Safety

From: Bill Rodgers
Staff Writer
Rio Grande SUN

This is a formal request under the New Mexico Inspection of Public Records Act. I wish to inspect any complaints and letters of reprimand or commendation for all officers in the District 7 office of the State Police from Jan. 2008 to the present. The state appeals court recently upheld a ruling that these documents do not fall under the "matters of opinion" exception to the public records law.

Please feel free to call me at 330-831-3274 with any questions regarding my request. Thank you.

Sincerely -

Bill Rodgers

EXHIBIT
B

Bach & Garcia LLC
Attorneys at Law

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[City], [State] 87102
Phone: (505) 899-1030
Facsimile: (505) 899-1051
E-Mail: matt@bach&garcia.com
www.bachandgarcia.com

New Mexico State Police Headquarters
Public Information Officer
4491 Cerrillos Road
Santa Fe, NM 87507-9721

- VIA FIRST CLASS MAIL -

January 12, 2011

To Whom It May Concern:

Pursuant to the Inspection of Public Records Act, NMSA §§ 14-2-1 et seq. and Cox v. New Mexico Dept. of Pub. Safety et al., 2010-NMCA-28,658, 2010 N.M. App. LEXIS 101,[1] I am writing to request all citizen complaints filed against New Mexico State Police Officer Freddy DeLao. In making this request I am seeking all pertinent "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 [your agency]" irrespective of whether such records "are required by law to be created or maintained." NMSA § 14-2-6 (1993).

In the event that this request is not made to the custodian having possession of or responsibility for the public records requested herein, I ask that you "promptly forward the request to the custodian of the requested public records, if known, and notify the requester." NMSA 1978, § 14-2-8 (1993).

Please do not hesitate to contact me with any questions or comments. I will be happy to provide whatever assistance we can in fulfilling this request, and will of course pay for the copies. Thank you very much for your prompt attention to this matter.

Sincerely,

Matthew L. Garcia

[1] In Cox, the New Mexico Court of Appeals has recently held that citizen complaints against officers are public records and do not fall within any of the exceptions enumerated in the Inspection of Public Records Act.

EXHIBIT
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IN THE SUPREME COURT
FOR THE STATE OF NEW MEXICO

No. _____

CHARLES COX,

Plaintiff-Respondent,

v.

THE NEW MEXICO DEPARTMENT OF PUBLIC SAFETY; and PETER OLSON, in his capacity as Communications Director of the New Mexico Department of Public Safety,

Defendants-Petitioner.

Court of Appeals No. 28,658
On Appeal/First Judicial Dist.
James A. Hall, District Judge
No. D-0101-CV-2006-01415

PETITION FOR WRIT OF CERTIORARI

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1. **Date of the Entry of Decision**

The date of the Court of Appeals' decision is August 16, 2010.

2. **Question Presented for Review**

Whether external documents containing opinion about a State employee's job performance are exempt from disclosure under the Inspection of Public Records Act, NMSA 1978, §§ 14-2-1 to 14-2-12 ("IPRA").

3. **Facts Material to the Question Presented**

The Plaintiff-Respondent, Charles Cox, is a former Captain with Defendant-Petitioner, the New Mexico Department of Public Safety ("DPS"). DPS terminated Cox for violations of DPS's anti-discrimination policy.

Following an investigation, DPS determined that Cox had made an inappropriate racial comment about a subordinate officer, who is African American. (*See generally*, RP 115-124 and supporting exhibits) Other evidence indicated that Cox was targeting the officer with racially-motivated complaints about his job performance. (*Id.*) DPS also determined in a second investigation that Cox had sexually harassed and discriminated against a female officer. (*See* RP 123 and supporting exhibits) As a result, DPS terminated Cox on October 28, 2005. (RP 159)

After his termination, Cox initiated requests under the IPRA, seeking complaints and Internal Affairs investigation files pertaining specifically to the

officer who was the target of Cox's racially-motivated comment. (*See* RP 129-130 and supporting exhibits; *see also*, Sealed Document[1] at 2-3) These requests are the subject of the present appeal. DPS denied the requests because they sought personnel file information involving matters of opinion exempted from disclosure by Section 14-2-1 of the IPRA. (*Id.*)

On June 29, 2006, Cox filed a lawsuit in State Court asserting civil rights claims based on his termination. (RP 1) Cox also included a claim under the IPRA based on DPS's denial of the IPRA requests. (RP 9-10) During the course of the case, Cox narrowed his IPRA claim, focusing solely on external citizen complaints against the officer; Cox did not pursue the broader part of his IPRA claim that sought the actual investigatory materials or internal complaints.

After removal of the case to Federal Court (RP 53), the parties conducted discovery that included production of the complaints about the officer that Cox targeted. (*See* RP 130 at ¶ 57; *see also* Sealed Document, Exhibits 2-10) Thus, Cox received through discovery all of the documents that are the subject of his IPRA requests, subject to a stipulated confidentiality order. (*Id.*)

Following the close of discovery, DPS moved for summary judgment on all claims (RP 115), and Cox filed a cross-motion for partial summary judgment on

[1] The Sealed Document filed in the Court of Appeals on June 10, 2009 is the Defendant's Response to Plaintiff's Motion for Partial Summary Judgment and attached exhibits.

the IPRA claim. (RP 538) The Federal Judge granted summary judgment for DPS on Cox's Federal claims, and remanded the IPRA claim to State court, which then came before Judge James A. Hall. (RP 72-74).

Judge Hall determined that this Court's holding in *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 586 P.2d 1236 (1977) applied to Cox's IPRA claim and read directly from that opinion in announcing his decision:

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

(Tr. 21) (quoting *Newsome*, 90 N.M. at 794, 568 P.2d at 1240).

Judge Hall held that the documents Cox sought "fit within the parameters of documents concerning infractions and disciplinary actions, opinions that might have no foundation in fact, but if it released from public view could be seriously damaging to an employee." (*Id.* 21-22) Accordingly, Judge Hall entered summary judgment for DPS on the remaining IPRA claim. (RP 587)

Cox appealed, and the Court of Appeals reversed Judge Hall's decision. The core holding of the appellate court's opinion is a new interpretation that the IPRA exception pertaining to "letters or memorandums which are matters of opinion in

personnel files" only includes documents "generated by an employer or employee in support of the working relationship between them." (Op. at 12) Therefore, the Court determined that external documents, such as citizen complaints that originate outside the agency, do not fall within the IPRA exceptions. (*See* Op. at 12-14) DPS seeks review of this decision by writ of certiorari.

4. **Basis for Granting the Writ**

This case presents a question of substantial public interest. Though the case arises from requests targeting a DPS officer, the breadth of the Court of Appeals' decision implicates all governmental employees in New Mexico subject to the IPRA. The decision to limit certain IPRA exceptions to internal documents significantly changes an interpretation that has existed since the 1970s. Not surprisingly, the lower court's decision has triggered a stream of requests seeking comments and disciplinary records of State employees. (*See, e.g.*, Exh. A)

The opinion's distinction between internal and external documents is not consistent with the plain language in the IPRA. It is contrary to this Court's decision in *Newsome* and unnecessarily overbroad. The opinion also makes little meaningful effort to accommodate State employees' privacy interests in their personnel records, contrary to this Court's approach in prior decisions such as *State ex rel. Barber v. McCotter*, 106 N.M. 1, 738 P.2d 119 (1987). The Court's new interpretation also injects unnecessary uncertainty and ambiguities for agencies

handling IPRA requests. Beyond these issues, the fact that this Court has not reviewed these provisions of the IPRA for many years supports this Court's grant of certiorari.

5. Argument

As this Court observed in *Newsome*, "a statute should be interpreted to mean what the Legislature intended it to mean" and "to accord with common sense and reason." 90 N.M. at 794, 568 P.2d at 1240. Contrary to the Court of Appeals' interpretation, the plain language of the IPRA does not distinguish between internally or externally generated documents in the applicable exceptions:

> Every person has a right to inspect public records of this state except:
>
> . . .
>
> (2) Letters of reference concerning employment, licensing or permits;
>
> (3) Letters or memorandums which are matters of opinion in personnel files . . .

NMSA 1978, §14-2-1(A). In holding that the exception for "letters or memorandums" applies only to internally-generated documents, the Court of Appeals has not "interpreted" the plain language of the Act; the Court has simply rewritten it.

If the Legislature intended to limit these exceptions to internally-generated materials, it could have said so. Instead, the Act states simply that the exception

applies to any "letters or memorandums" without regard to their source. The Legislature also did not define "opinion" to mean only those held by employees of the governmental entity. Likewise, the Act says only that the material must be contained "in personnel files," again without referring to its origin.

Thus, the Court of Appeals' novel interpretation of these exceptions does not comport with the plain language of the IPRA or decades of practice. Utilizing a new interpretation of the Act, the court simply relabeled the materials as external to avoid application of the exceptions. As explained below, the appellate court's new interpretation is not consistent with the Legislature's intent and conflicts with decisions of this Court.

A. The Court of Appeals Decision Conflicts with this Court's Decision in *Newsome*

The material Cox sought through the IPRA – *i.e.*, citizen complaints – resulted in disciplinary investigations and, in some cases, a finding by DPS that there has been an infraction. (*See* RP 314-315) This is precisely the type of document that this Court, in *Newsome*, determined is exempt from disclosure under the IPRA exemptions at issue in this case. In discussing the Legislature's intent, this Court explained that the exemption for "documents concerning infractions and disciplinary action" and "various other opinion information" addresses the fact that such materials "might have no foundation in fact, but if released for public view, could be seriously damaging to an employee." *Newsome*, 90 N.M. at 794, 568

P.2d at 1240. Thus, according to this Court's interpretation in 1977, shortly after the Legislature enacted these exceptions in 1973, the exemptions do not depend on whether the document's source is internal or external but whether it is in a personnel file and contains opinion.

Significantly, the request in *Newsome* was for entire personnel files, which include disciplinary proceedings as well as the internal and external complaints that initiate them. Yet, this Court did not base the applicability of the exemptions on whether the material was internal or external. Rather, this Court observed that all such material "***clearly*** falls within the exemptions allowed by the statute." *Id.* [emphasis added]. As with the Legislature, had this Court discerned that the applicability of these exceptions depended upon whether the documents had an internal or external author, it would have said so.

Although attitudes and values about issues such as the breadth of public records disclosure may change over time, the courts should "defer to the legislature for such a drastic departure from current policy." *Akins v. USW, Local 187*, 2010 N.M. LEXIS 321 (2010) (citing *Berlangieri v. Running Elk Corp.*, 2003-NMSC-024, 134 N.M. 341, 76 P.3d 1098 ("courts are generally less well-equipped to address complex policy issues than Legislatures.")). It is the Legislature's role to weigh competing interests such as the role of civilian oversight against the confidentiality of records such as citizen complaints. *See Berkeley Police Assn. v.*

City of Berkeley, 167 Cal. App. 4th 385, 405-406, 84 Cal. Rptr. 3d 130, 145-146 (Cal. Ct. App. 2008) (holding that citizen complaints are exempt from disclosure as personnel records).

The Court of Appeals asserts that its new interpretation is consistent with *Newsome*, stating that documents listed in *Newsome* as exempt "are all . . . generated by an employer or employee in support of the working relationship between them." (Op. at 12) This assertion is simply incorrect. Again, *Newsome* did not hinge on the source of the documents; therefore, the proposition that *Newsome* provided a list of documents to signal, implicitly, that the exception applies only to employer-employee generated material is dubious at best. In fact, *Newsome* did not provide a discrete list of documents subject to the exception. The opinion provides some examples, but also more broadly mentions "various other opinion information" without limitation. *Newsome*, 90 N.M. at 794, 568 P.2d at 1240.

Furthermore, *Newsome* repeatedly mentions "letters of reference" (which routinely originate externally and are not documents exclusively generated by the employer or employee) as being specifically exempted from disclosure under IPRA. *Id.* The Court of Appeals steers clear of this point, stating that a letter of reference is "generally considered to be a statement of support for an applicant" that assists in evaluation of the applicant and that such a letter is "typically

solicited" by the employer or employee. (Op. at 11) Here again, contrary to the Court of Appeals' statement, *Newsome* recognized that letters of reference are not necessarily "supportive." This Court stated that "there would be ***critical materials and adverse opinions in letters of reference. . . .***" *Id.* [emphasis added]. Thus, consistent with Judge Hall's approach, this Court also focused on the fact that the material contained opinions, not on the author of the material or who may have solicited it.

The Court of Appeals' opinion also observes that the "complaints at issue relate solely to the officer's official interactions with a member of the public and do not contain personal information regarding the officer other than his name and duty location." (Op. at 14) The Court asserts that the officers should not have an expectation of privacy in external complaints because a citizen could express the same information elsewhere. (*Id.*) But both points are equally true of internal complaints, such as those initiated by co-workers. The Court of Appeals ventures no explanation why the Legislature would have chosen to treat internal complaints differently from external ones. This lack of explanation is a glaring omission, given the overriding interest to protect employees from baseless opinions that might be "seriously damaging." *Newsome*, 90 N.M. at 794, 568 P.2d at 1240. Such material can be found in both internal and external complaints.

Nor does the Court of Appeals reconcile its interpretation with the express legislative intent to protect employee privacy. To the contrary, the lower court all but dismisses this concern, stating that the "fact that citizen complaints may bring negative attention to the officers is not a basis under this statutory exception for shielding them from public disclosure." (Op. 14) However, this statement again contradicts this Court's explanation that the "Legislature ***quite obviously anticipated*** that there would be critical material and adverse opinions" in such material and that the exemption exists to shield employees from "opinion information that might have no foundation in fact" and "could be seriously damaging." *Newsome*, 90 N.M. at 794, 568 P.2d at 1240 [emphasis added].

Acknowledging that its interpretation will result in disclosures of baseless accusations that may indeed "be seriously damaging to an employee," the Court of Appeals "suggests" that agencies respond to requests for complaints by not only disseminating the complaints but also the results of the investigations of those complaints. (Op. at 14-15) In practice, this "suggestion" is just a backhanded way of eliminating these exceptions entirely. It forces employees, not the agency,[2] to relinquish confidentiality rights under the Act to mitigate the partial disclosure of "damaging information." Imposing this choice on rank and file employees is really

[2] The State Personnel Rules prohibit agencies from releasing confidential disciplinary materials without written permission from the employee. *See* NMAC 1.7.1.12(B).

no choice at all; it also undermines the confidentiality interests that the Act intended to vitiate by shielding such disciplinary materials from disclosure in the first place.

In sum, the Court of Appeals' decision is a dramatic departure from the plain language of the Act and intent of the Legislature as expounded on in *Newsome*. Moreover, the decision over-reaches as the court could have vitiated the public's interests and "right to know" through a far more circumspect approach.

B. The Court of Appeals Decision is Overly Broad and Conflicts with this Court's decision in *Barber v. McCotter*

Even when materials may not be exempted by the Act, the courts still have an obligation to balance the public's interest in governmental activities with employees' privacy interests in opinion material that may be "seriously damaging." The Court of Appeals failed entirely to do this.

One approach that strikes a balance between the interests at issue in this case is to permit inspection of materials with redaction of sensitive information. *See, e.g., The Rake v. Gorodetsky*, 452 A.2d 1144 (R.I. 1982) (reports concerning civilian complaints subject to disclosure after the names of citizen complainants and the police officers were deleted). Redaction eliminates the danger of "seriously damaging" the employee by taking identifying information out of the equation.

When redaction is not available to protect the privacy interests of employees, non-disclosure may be necessary. For example, in *Barber v. McCotter*, a newspaper sought the names of state employees terminated due to positive drug tests. While the Court recognized that names ordinarily are public information, it upheld a decision not to disclose the names of the employees. *McCotter*, 106 N.M. at 2, 738 P.2d at 120. This Court recognized "the public interest in access to information" but also explained that it "must also preserve the privilege of personnel proceedings." *Id.* Accordingly, because the Court found that divulgence of the names would also amount to divulgence of the discipline taken against them, the names could not be disclosed. *Id.*

Here, as in *McCotter*, Cox's request targets personnel materials of a specific employee. The facts in this case also raise a legitimate concern about the requested material being used to retaliate against and to further victimize the subordinate officer – the exact concerns that *Newsome* cautions about. The Court of Appeals should have weighed these concerns against the public's interest, in light of the overall facts of the case. Significantly, Cox already received the requested material in discovery, subject to a confidentiality order that protected the targeted subordinate officer from use of the material outside the litigation. Because further disclosure of the materials, even if redacted, would be tantamount to disclosure of disciplinary matters against a specific, identifiable employee, the balance here, as

in *McCotter*, weighs against dissemination of the information beyond the scope of the confidentiality order.

Rather than focusing on the specific facts of this case, the Court of Appeals issued a sweeping change to the IPRA that extends to virtually all government entities and employees. This decision is worthy of certiorari to consider the full ramifications of this new interpretation, whether it is even necessary – let alone consistent with existing case law – and whether there are more appropriate ways of vitiating the public interest without wholly disregarding an employee's privacy interests.

C. The Court's New Interpretation Unnecessarily Creates Confusion and Uncertainties

By changing the interpretation of Sections 14-2-1(A)(2)-(3) of the IPRA, the Court of Appeals creates unnecessary ambiguities in handling routine requests for information. The decision now places agencies in the position of having to adjudicate the "status" of the author of the material to determine whether these exceptions apply. Consider the following examples of opinion comments that customarily find their way into personnel files:

- A citizen sends the agency a "letter of reference" recommending against promoting an employee for a specific job based on a complaint about the employee's conduct in a prior incident.

- A coworker, acting outside of official duties, makes a complaint about a co-employee.
- An employee leaves the agency and then makes a complaint about a co-employee based on events that occurred when the departed employee was still working for the agency.
- Employees complain of conduct by a coworker who is off duty.
- An employee from an agency complains about the conduct of an employee who works for a different agency.
- A citizen emails a comment about an employee and asks that it be kept "confidential."

Under the plain language of the Act and existing practice, this type of material would typically fall within the exemptions for letters of reference, disciplinary or infraction information or other opinion information in personnel files. The Court of Appeals' new interpretation requires an agency responding to requests to delve into needless inquiries about the motivations of the author, whether the comment concerns and arises out of the course and scope of the employment relationship, whether the author as well as the subject of the complaint were acting in the course and scope, and so on. Accordingly, the Court's decision will not facilitate administration of the IPRA; it will lead to more disputes and inconsistent results.

6. **Relief Requested**

For all these reasons, the Petitioner seeks a writ of certiorari for this Court to review the decision of the Court of Appeals with an opportunity for further briefing by the parties.

LONG, POUND & KOMER, P. A.
Attorneys for Defendants/Appellees

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Certificate of Service

I hereby certify that on this 15th day of September, 2010, a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed first class, postage prepaid, to the following counsel of record:

Cindi L. Pearlman, Esq.
Cindi L. Pearlman, P.C.
P. O. Box 370
Tijeras, NM 87059

MARK E. KOMER

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

October 18, 2010

NO. 32,604

CHARLES COX,

Plaintiff-Respondent,

v.

NEW MEXICO DEPARTMENT OF PUBLIC SAFETY and PETER OLSON, in his capacity as Communications Director of the New Mexico Department of Public Safety,

Defendants-Petitioners.

WRIT OF CERTIORARI

TO: New Mexico Court of Appeals

GREETINGS:

WHEREAS, petitioners did apply to this Court on September 15, 2010, for review of an opinion issued by the New Mexico Court of Appeals on August 16, 2010, in cause numbered 28,658 captioned *Cox v. New Mexico Department of Public Safety*;

WHEREAS, the Supreme Court gave notice to the New Mexico Court of Appeals on September 15, 2010, in compliance with Rule 12-502(H) NMRA of the Rules of Appellate Procedure, that a petition for writ of certiorari had been

EXHIBIT
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filed in the above entitled cause;

WHEREAS, a copy of the petition for writ of certiorari has been served on respondent in the above entitled cause.

NOW, THEREFORE, the writ of certiorari hereby is issued and the New Mexico Court of Appeals hereby is ordered to proceed no further in cause numbered 28,658 pending further order of this Court.

IT IS SO ORDERED.

WITNESS, Honorable Charles W. Daniels, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 18th day of October, 2010.

(SEAL)

Kathleen Jo Gibson

Kathleen Jo Gibson, Chief Clerk of the Supreme Court of the State of New Mexico