

STATE OF NEW MEXICO  
COUNTY OF DOÑA ANA  
THIRD JUDICIAL DISTRICT

STATE OF NEW MEXICO, *ex rel.*  
HECTOR BALDERAS, NEW MEXICO  
ATTORNEY GENERAL,

Plaintiff,

v.

Case No. \_\_\_\_\_

NEW MEXICO STATE UNIVERSITY,

Defendant.

**COMPLAINT TO ENFORCE THE INSPECTION OF PUBLIC RECORDS ACT**

COMES NOW Hector Balderas, New Mexico Attorney General (hereinafter "Plaintiff"), by and through counsel, Assistant Attorneys General John F. Kreienkamp and Miguel A. Lozano, pursuant to NMSA 1978, Section 14-2-12, who hereby respectfully brings this Complaint to enforce the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2019) ("IPRA"), and to further award Plaintiff damages, attorney's fees and costs for bringing this present action. As grounds for this Complaint, Plaintiff states the following:

**PARTIES**

1. The State, in its *parens patriae* capacity, and by and through its Attorney General, Hector Balderas, brings this action to enforce the laws of the State and to protect the health and well-being of the citizens of New Mexico.
2. Attorney General Balderas is the "attorney for the State of New Mexico." *State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.*, 1973-NMSC-087, ¶ 5, 85 N.M. 521. His office and authority are recognized in Article V, Section 1 of the New Mexico Constitution. The Attorney General is authorized to initiate and prosecute civil actions on behalf of the State when, as true

here, he has a reasonable belief that the interest of the State requires such an action. NMSA 1978, § 8-5-2; *State ex rel. Attorney Gen. v. Reese*, 1967-NMSC-172, ¶ 14, 78 N.M. 241, 245.

3. Plaintiff Hector Balderas is the duly elected Attorney General for the State of New Mexico, authorized by statute to both enforce IPRA generally and to enforce the statute with respect to his own public records requests specifically. *See* § 14-2-12(A) (providing that an action to enforce IPRA may be brought by “the attorney general” and by “a person whose written request has been denied”).

4. Defendant New Mexico State University is a state educational institution, confirmed by the New Mexico Constitution, see N.M. Const. art. XII, § 11, and subject to IPRA. *See* § 14-2-12(F) (defining the term “public body” as “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, including political subdivisions, special taxing districts, school districts and institutions of higher education”).

### **JURISDICTION AND VENUE**

5. This Court has personal and subject matter jurisdiction over the parties and the subject matter of this suit.

6. Venue is proper before this Court.

### **STATEMENT OF FACTS**

7. Plaintiff reasserts the allegations set forth in Paragraphs 1 through 7 as if stated herein.

8. The Office of the Attorney General initiated an investigation after receiving several complaints from multiple parents and student athletes concerning the health, safety, and welfare

of students at Defendant New Mexico State University<sup>1</sup>. The complaints allege abusive and threatening conduct related to player injuries, scholarship management and disparate treatment by personnel of Defendant New Mexico State University.

9. Plaintiff wrote to Defendant on or about December 5, 2019, by and through his Chief Deputy Attorney General Tania Maestas, requesting a written response and additional documentation responsive to the underlying allegations no later than December 20, 2019.

10. On or about December 9, 2019, Defendant New Mexico State University responded to Plaintiff in part by stating that it had hired an outside investigator to investigate the various complaints involving its student athletes. This letter to Plaintiff also requested a reasonable extension of the response deadline.

11. Following various other communications between the parties, Defendant New Mexico State University wrote to Plaintiff on January 15, 2020. *See* Exhibit A. Its letter stated, in relevant part, that Defendant had hired an outside law firm to conduct an investigation so as to “obtain the most objective and expeditious fact finding.” Defendant stated that the investigation was not yet complete, but it anticipated that this would occur by the end of the following week. Defendant also provided Plaintiff with a “preliminary executive summary of our investigation into the football program” and suggested that Plaintiff would need a subpoena in order to inspect the final investigative report pursuant to the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (“FERPA”).

12. On February 3, 2020, Plaintiff submitted a written request to Defendant for a copy of the final investigative report, stating in relevant part that “we are respectfully requesting that you

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<sup>1</sup> *See* Jason Groves, Albuquerque Journal, *Aggies coach targeted with more complaints to AG* (December 27, 2019) (<https://www.abqjournal.com/1404766/aggies-coach-targeted-with-more-complaints-to-ag.html>).

provide the final investigative report.” Exhibit B. This letter also stated the name of the Attorney General as well as a telephone number and mailing address.

13. Plaintiff’s February 3, 2020 request addressed Defendant’s previous suggestion that a subpoena was necessary in order to inspect the final investigative report by stating that “this issue may be resolved with the requisite notification and/or appropriate redaction of protected information.” Exhibit B.

14. On February 10, 2020, Defendant responded to Plaintiff’s request by refusing to provide a copy of the final investigative report and by providing, as an alternative, “an updated executive summary of our investigation into the football program.” Exhibit C. It asked Plaintiff to reconsider Defendant’s earlier request that Plaintiff obtain a subpoena in order to inspect the final investigative report, stating, “Because this investigation’s findings reveal information that depends upon access to student and employee records that are the subject of applicable privacy law protections, considerable portions would be missing from those findings after redaction.” Exhibit C. Defendant cited to FERPA and IPRA’s Section 14-2-1(A)(3) as a justification for this denial.

15. Although Defendant’s February 10, 2020 letter was signed by its general counsel, the letter did not “set forth the names and titles or positions of each person responsible for the denial” of Plaintiff’s request. Section 14-2-11(B)(2).

16. To date, Plaintiff has not been provided a copy of or permitted to inspect the final investigative report requested on February 3, 2020, whether redacted or unredacted.

17. Plaintiff has credible information that other parents and students have also attempted to obtain a copy of the final investigate report and have not been permitted inspection, whether redacted or unredacted.

## COUNT I: VIOLATION OF THE INSPECTION OF PUBLIC RECORDS ACT

18. Plaintiff incorporates by reference the claims, facts, and allegations set forth in the above Statement of Facts.

19. Pursuant to NMSA 1978, Section 14-2-1, Defendant has violated the New Mexico Inspection of Public Records Act by failing to provide the requested public record (the final investigative report).

20. Even if Defendant's claimed exceptions – FERPA and IPRA's matters of opinion exception – do render certain information in the requested public record unavailable for inspection or copying, Defendant was obligated by IPRA to redact such limited information and permit inspection of the remainder of the record. *See* NMSA 1978, § 14-2-9(A) (providing that “[r]equested public records containing information that is exempt and nonexempt from disclosure shall be separated by the custodian prior to inspection, *and the nonexempt information shall be made available for inspection*”) (emphasis added).

21. IPRA's matters of opinion exception in NMSA 1978, Section 14-2-1(C) permits a public body to withhold only “letters or memoranda that are matters of opinion in personnel files or students' cumulative files.” The exception does not exempt facts from disclosure, nor does it operate as a blanket personnel or educational matter exception. *See generally Cox v. New Mexico Department of Public Safety*, 2010-NMCA-096, ¶ 25, 148 N.M. 934. It therefore does not permit Defendant to withhold the requested record in its entirety.

22. Although FERPA prohibits disclosure by an educational institution of education records and personally identifiable information of its student or students, see 20 U.S.C. § 1232g(b), it permits the disclosure of education records when the information within the record can be redacted such that the student or students cannot be identified or linked to the record itself. *See* 34 C.F.R. §

99.31(b)(1); *see also Osborn v. Board of Regents of Univ. of Wisc. Syst.*, 647 N.W.2d 158, 168-69 (Wis. 2002); *State v. ex rel. ESPN v. Ohio State Univ.*, 970 N.E.2d 939, 947-48 (Ohio 2012). It therefore does not require Defendant to withhold the requested record in its entirety.

23. Because Defendant has violated IPRA by entirely withholding the requested record without a valid legal exception to disclosure, Plaintiff is entitled to an injunction ordering Defendant to provide Plaintiff a copy of the requested record, or in the alternative following an *in camera* inspection, a copy of the requested record with the limited exempt information redacted.

## **COUNT II: VIOLATION OF THE INSPECTION OF PUBLIC RECORDS ACT**

24. Plaintiff incorporates by reference the claims, facts, and allegations set forth in the above Statement of Facts.

25. Pursuant to NMSA 1978, Section 14-2-11(B), Defendant has violated the New Mexico Inspection of Public Records Act by failing to provide a sufficient written explanation of its denial of Plaintiff's records request. Specifically, Defendant failed to "set forth the names and titles or positions of each person responsible for the denial," as required by statute. Section 14-2-11(B)(2).

26. Defendant's failure to provide a sufficient written explanation of the denial was unreasonable under the circumstances.

27. Because Defendant has violated IPRA by failing to provide a sufficient written explanation of denial, and because such failure was unreasonable under the circumstances, pursuant to Section 14-2-11(C) Plaintiff is entitled to damages of up to one hundred dollars (\$100) per day, accruing from the date Defendant failed to comply with the statute.

WHEREFORE, pursuant to the Inspection of Public Records Act, Plaintiff respectfully requests that this Court exercise its jurisdiction and grant the following relief:

- A. Order Defendant to produce a copy of the record responsive to Plaintiff's request dated February 3, 2020, or, in the alternative and following an *in camera* inspection, a copy of the record with the limited exempt portions and information redacted.
- B. Award damages, costs, and attorney's fees to Plaintiff.
- C. Grant such other and further relief as the Court deems proper.

Respectfully Submitted,

HECTOR BALDERAS  
ATTORNEY GENERAL

/s/ John F. Kreienkamp  
John F. Kreienkamp  
Miguel A. Lozano  
Assistant Attorneys General  
New Mexico Office of the Attorney General  
408 Galisteo Street  
Santa Fe, NM 87501  
505-490-4873  
jkreienkamp@nmag.gov  
mlozano@nmag.gov  
*Attorneys for Plaintiff*

# Exhibit A





University General Counsel  
P.O. Box 30001  
MSC 3UGC  
Las Cruces, New Mexico 88003  
Telephone: 575-646-2446  
FAX: 575-646-3012

January 15, 2020

Tania Maesta, Chief Deputy Attorney General [tmaestas@nmag.gov](mailto:tmaestas@nmag.gov)  
Office of the Attorney General  
408 Galisteo St.  
Santa Fe, NM 87501

*Re: Response from NMSU to your December 2019 Inquiries*

NMSU took very seriously the allegations described in your letter dated December 5, 2019 to President John Floros. To obtain the most objective and expeditious fact finding, we enlisted external investigating assistance from the Carrillo law firm. We appreciated your grant of an extension of time from December 20 to January 15, especially because the university was closed between December 23, 2019 through Jan 1, 2020, impeding our ability to interview witnesses, even before and after those dates.

Enclosed via an accompanying email transmittal is the full report of investigation results pertaining to allegations that donations for the Fine Arts Building were solicited based on false information; these allegations were not substantiated.

Also enclosed via that accompanying email transmittal is a preliminary executive summary of our investigation into the football program. This executive summary is intended to demonstrate NMSU's good faith in immediately initiating a confidential internal investigation into alleged employee misconduct and proceeding the investigation toward closure.

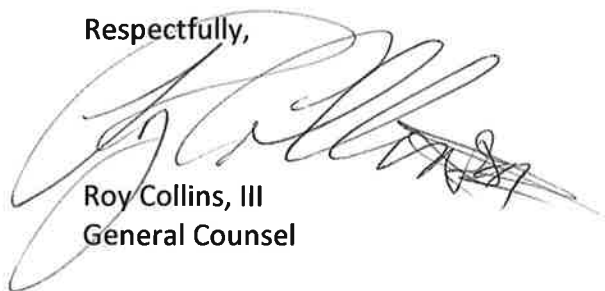
Unfortunately, the football-program investigation is not yet complete because several witnesses, including one key witness have not been able to be scheduled for interview. A broad range of allegations pertain to the football program, and many witnesses have been interviewed, while several more remain scheduled. A final investigative report is anticipated to be completed by the end of next week.

We anticipate that once the investigation has been finalized, the report will contain confidential student information for which the Family Educational Rights Privacy Act (FERPA) requires NMSU to obtain a lawful subpoena before its disclosure. FERPA further requires NMSU upon receiving that subpoena to notify each affected student of the subpoena, and to allow that student ten days (NMSU's interpretation of reasonable notice) to take action on the student's own behalf. If your office considers that notice to the students to hinder its investigation, FERPA provides an exception to the notice requirement under a circumstance that the lawfully issued subpoena contains language instructing NMSU not to give that notice.

Additionally, because this is an internal investigation into alleged employee misconduct the investigation report is confidential and privileged under New Mexico law.

If you have any questions, please let me know. Thank you.

Respectfully,

A handwritten signature in black ink, appearing to read 'Roy Collins, III', with a stylized flourish at the end.

Roy Collins, III  
General Counsel

cc: Dan Arvisu, NMSU Chancellor  
John Floros, NMSU President

# Exhibit B

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

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February 3, 2020

*Via Email*

Roy Collins, III  
General Counsel  
New Mexico State University  
P.O. Box 30001  
Las Cruces, NM 88003  
[collins0@ad.nmsu.edu](mailto:collins0@ad.nmsu.edu)

Dear Mr. Collins,

Thank you for your continued cooperation and correspondence regarding our inquiry of allegations brought to the attention of the Office of the Attorney General. In your most recent response on January 15, 2020, you provided a preliminary executive summary of your investigation into the football program. You further provided that you anticipated a final investigative report would be forthcoming, presumably toward the end of January. As such, we are respectfully requesting that you provide the final investigative report. We are receptive to your concerns regarding information that may be protected by the Family Educational Rights Privacy Act (FERPA). However, we feel that this issue may be resolved with the requisite notification and/or appropriate redaction of protected information.

We look forward to your response and please contact me if you have any questions regarding this matter.

Sincerely,

A handwritten signature in cursive script that reads "Tania Maestas".

Tania Maestas  
Chief Deputy Attorney General

# Exhibit C



Office of the General Counsel

MSC 3UGC  
New Mexico State University  
P.O. Box 30001  
Las Cruces, NM 88003-8001  
575-646-2446, fax: 575-646-3012

February 10, 2020

Tania Maestas, Chief Deputy Attorney General [tmaestas@nmag.gov](mailto:tmaestas@nmag.gov)  
Office of the Attorney General  
408 Galisteo St.  
Santa Fe, NM 87501

**Re: Follow-Up Response from NMSU to your December 2019 Inquiries**

Dear Ms. Maestas:

This letter's purpose is to follow up from our January 15, 2020 letter to your attention, which indicated our intent to provide further input reflecting the findings from an external investigation that NMSU obtained from the Carrillo law firm.

Enclosed via an accompanying email transmittal is an updated executive summary of our investigation into the football program. That summary represents a substantially-complete investigation that includes input from a key witness who was unable to be scheduled for interview in time for that letter.

Please reconsider our earlier request for obtaining a lawful subpoena in connection with the full report in the interest of your office's diligent review of the investigation findings, as an alternative to your office's proposal for redacting nonessential identifying information. Because this investigation's findings reveal information that depends upon access to student and employee records that are the subject of applicable privacy law protections, considerable portions would be missing from those findings after redaction. As mentioned previously:

- the report contains confidential student information for which the Family Educational Rights Privacy Act (FERPA) restricts NMSU from disclosing without having been presented with a lawful subpoena;
- FERPA further requires NMSU upon receiving that subpoena to notify each affected student of the subpoena, and to allow that student ten days (NMSU's interpretation of reasonable notice) to take action on the student's own behalf;
- if your office considers that notice to the students to hinder its investigation, FERPA provides an exception to the notice requirement under a circumstance that the lawfully issued subpoena contains language instructing NMSU not to give that notice; and
- because this investigation focuses upon allegations of employee misconduct, the investigation report is confidential and privileged under applicable law including, without limitation: Section 14-2-1.A(3) of the New Mexico Statutes.

If you have any questions, please let me know. Thank you.

Respectfully,

A handwritten signature in black ink, appearing to read "Roy Collins, III".

Roy Collins, III

cc: Dan Arvizu, NMSU Chancellor  
John Floros, NMSU President