

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MARCY BRITTON,

Plaintiff-Appellant,

v.

Ct. App. No. 35,346
Bernalillo County
D-202-CV-2012-00592

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

OCT 11 2016

Monte R. ...

OFFICE OF THE ATTORNEY
GENERAL OF NEW MEXICO,

Defendant-Appellee.

Appeal from the Second Judicial District Court,
Bernalillo County, New Mexico, The Honorable C. Shannon Bacon

**BRIEF OF AMICUS THE NEW MEXICO FOUNDATION FOR OPEN
GOVERNMENT IN SUPPORT OF PLAINTIFF-APPELLANT
MARCI BRITTON**

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

Denise M. Chanez

P.O. Box 1888

Albuquerque, NM 87103

Telephone: (505) 765-5900

Fax: (505) 768-7395

dchanez@rodey.com

TABLE OF CONTENTS

Table of Authorities.....	ii
Introduction/Interest of the Amicus	1
Argument.....	3
I. THE DISTRICT COURT’S DENIAL OF STATUTORY DAMAGES DOES NOT ADVANCE IPRA’S OVERALL PURPOSE OR THE POLICIES UNDERLYING IPRA’S DAMAGE PROVISIONS.....	3
II. AWARDING STATUTORY DAMAGES UNDER SECTION 14-2- 11 FURTHERS THE POLICIES UNDERLYING IPRA AND ITS DAMAGE PROVISIONS.....	9
Conclusion.....	12

TABLE OF AUTHORITIES

NEW MEXICO CASES

<i>ACLU of New Mexico v. Duran</i> , 2016-NMCA-063, ___ P.3d ___.	4, 8
<i>Faber v. King</i> , 2015-NMSC-015, 348 P.3d 173.	<i>passim</i>
<i>San Juan Agriculture Water Users Ass'n v. KNME-TV</i> , 2011-NMSC-011, 150 N.M. 64.	5, 9, 11
<i>State ex rel. Newsome v. Alarid</i> , 1977-NMSC-076, 90 N.M. 790, <i>overruled on other grounds by Republican Party v. New Mexico Taxation & Revenue Department</i> , 2012-NMSC-026, 283 P.3d 853	9

STATUTES, RULES, AND REGULATIONS

NMSA 1978, § 14-2-5 (1993).....	2, 9
NMSA 1978, § 14-2-11 (1993).....	<i>passim</i>
NMSA 1978, § 14-2-12 (1993).....	<i>passim</i>

Introduction / Interest of the Amicus¹

Amicus New Mexico Foundation for Open Government (“NMFOG”) submits its brief in support of Plaintiff-Appellant Marcy Britton’s (“Britton”) arguments for reversal of the district court’s decision to grant summary judgment on behalf of the Defendant-Appellee New Mexico Attorney General’s Office (“AG”).

This appeal concerns the appropriate damages available under the Inspection of Public Records Act (“IPRA”) when a government entity, without explanation, fails to disclose documents that are responsive to an IPRA request, or provides a partial response that discloses some, but not all, responsive documents. The district court ruled that statutory damages under Section 14-2-11 are not available in this situation because any timely response to the request, even if deceptively incomplete, removes the case from the scope of that section. Under the district court’s ruling, the only remedy for the nondisclosure of documents (other than attorneys’ fees and costs) is actual damages – of which, in many cases, there are none. *See* NMSA 1978, § 14-2-12 (1993).

The district court’s ruling encourages deceptive responses to IPRA requests and should be reversed. An incomplete response without an explanation of why

¹ This brief was not authored in whole or in part by counsel for any party, nor did a party, party counsel, or any other person besides those referenced in Rule 12-215(F) NMRA make a monetary contribution intended to fund the preparation or submission of the brief.

other responsive documents were withheld does not comply with IPRA and its denial procedures set forth in Section 14-2-11. Absent the deterrent effect of an award of statutory damages in situations like these, government entities have little incentive to behave openly and transparently by disclosing the existence of responsive documents. Interpreting IPRA's provisions in the way that the district court did fails to give effect to New Mexico's declared policy that all persons are entitled to the greatest possible information about government affairs and that to provide this information is "an integral part of the routine duties of public officers and employees." NMSA 1978, § 14-2-5 (1993). It also disserves the policies underlying the damage provisions of IPRA – policies that include prompt compliance and accountability. *Faber v. King*, 2015-NMSC-015, ¶ 29, 348 P.3d 173.

The troubling ramifications of the district court's ruling prompted NMFOG to file this amicus brief. NMFOG is a non-profit, nonpartisan educational organization committed to assisting New Mexico citizens, educators, public officials, media and legal professionals in understanding and exercising their rights under the free-speech provisions of the federal and New Mexico Constitutions, and under state and federal sunshine laws, including IPRA, the New Mexico Open Meetings Act, and the federal Freedom of Information Act. NMFOG regularly

helps citizens and media organizations obtain documents and information from government sources.

As required by Rule 12-215(B), all parties received timely notice of the intent of NMFOG to file this brief.

Argument

I. THE DISTRICT COURT'S DENIAL OF STATUTORY DAMAGES DOES NOT ADVANCE IPRA'S OVERALL PURPOSE OR THE POLICIES UNDERLYING IPRA'S DAMAGE PROVISIONS.

There are two sections of IPRA that provide for damages: Section 14-2-11 (“Procedure for denied requests”) and Section 14-2-12 (“Enforcement”). Only under Section 14-2-11 does IPRA authorize damages not to exceed one hundred dollars per day, which are also known as statutory damages. *See Faber*, 2015-NMSC-015, ¶ 14 (“Statutory damages are those available to a litigant without proof of actual injury because both the existence and the amount of the damages are established by statute.”). The statutory damages available under Section 14-2-11 apply when a public entity fails to respond to a request or to deliver a written explanation of the denial. *Id.* ¶ 16. When that happens, per diem statutory damages shall be awarded from the date the public entity is not in compliance until a written denial is issued. Section 14-2-11(C); *Faber*, 2015-NMSC-015, ¶ 16. The damages are paid from the public entity’s funds. Section 14-2-11(C). The

provisions of Section 14-2-11(C) exist to “promote prompt compliance” with IPRA. *Faber*, 2015-NMSC-015, ¶ 29.

IPRA’s other damages section, Section 14-2-12, applies after a request has been responded to but wrongfully denied. When a public entity wrongfully denies a request for documents, Section 14-2-12(D) promotes accountability for the wrongful denial by authorizing the recovery of compensatory damages, costs, and attorneys’ fees associated with the litigation. *Id.* ¶¶ 1, 29. Statutory damages are not available under Section 14-2-12. This “enforcement” provision of IPRA necessarily assumes that the public entity has responded to the request and provided a good-faith reason for the denial. *Id.* ¶ 31. The written explanation for the denial is a “valuable information-gathering tool.” *ACLU of N.M. v. Duran*, 2016-NMCA-063, ¶ 38, ___ P.3d ___.

Given this statutory scheme, the New Mexico Supreme Court has held that the “Legislature intended that the separate damages provisions in Sections 14-2-11 and 14-2-12 address separate issues concerning the overarching public policy behind IPRA.” *Faber*, 2015-NMSC-015. ¶ 29. Section 14-2-11’s per diem statutory damages provision is aimed at prompt compliance with IPRA while Section 14-2-12’s damages provision ensures that IPRA requests are not wrongfully denied. *See id.* The damages available under Section 14-2-12 (actual damages, costs and attorneys’ fees) ensure that a successful litigant will not have to

pay costs or attorneys' fees to enforce IPRA. *Id.* ¶ 31. Statutory damages are not allowed under Section 14-2-12 because an award of such damages could penalize a public entity even though it has timely responded to a request and provided a good-faith reason for denying the request. *Id.* As a whole, "IPRA's damage provisions are intended to encourage public entities' prompt compliance with records requests." *San Juan Agric. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶ 13, 150 N.M. 64. They also "ensure that the public servants of New Mexico remain accountable to the people they serve." *Id.* ¶ 16; *see also Faber*, 2015-NMSC-015, ¶ 28.

Although the New Mexico Supreme Court shed light on the issue of damages under IPRA in *Faber*, the court was not faced with the circumstances presented here – where a public entity timely, but incompletely, responds and fails to identify documents that it is withholding. Such incomplete responses to IPRA requests are especially troubling because they result in what appear to be complete responses and offer no basis on which to challenge those responses. Requesters may never know what other responsive documents existed but were never produced or expressly withheld. In this case, additional documents fortuitously came to light, but never through a complete response from the AG.

Even though this case is factually distinguishable from *Faber*,² the district court lumped it together with other cases under Section 14-2-12 by finding that the AG's timely response, while deceptively incomplete, met the requirements of Section 14-2-11. (RP 212.) In other words, the district court ruled that a timely response, regardless of its completeness, was sufficient under IPRA because it arguably met the policy of prompt compliance under IPRA. (05/04/16 Tr. 33:17-34:16.) The district court also ruled that any dispute over the adequacy of the response by the AG's office brought the case under Section 14-2-12, which does not provide for statutory damages. (*Id.*)

The district court's approach overlooked the fact that Section 14-2-11 required the AG to provide a timely written explanation of the denial of a request for the documents that it failed to produce. In fact, to this day, the AG has never provided an explanation and, as such, has not complied with IPRA. The district court's approach also made "prompt compliance" the overriding policy concern, discounting the other policies underlying IPRA, and failing to consider whether denying statutory damages actually advanced those policies.

In reality, the AG's incomplete response did not meet the policy of prompt compliance underlying Section 14-2-11. Although the AG timely responded and produced *some* documents, the AG did not identify *all* of the responsive documents

² *Faber* involved a complete response to an IPRA request – a comprehensive denial accompanied by a written explanation.

or provide a timely explanation for its de facto denial of the remainder of the request.³ See Section 14-2-11(C). The failure to do so constitutes non-compliance with Section 14-2-11's denial procedures. Had it not been for subsequent litigation years later, Britton would never have known that the AG's response to her IPRA request was incomplete or that there were other responsive documents that had been withheld. This surely could not have been the legislature's intent in enacting the statutory damages provision, which is designed to ensure prompt compliance. Even a timely response cannot salvage the damage done to the policy of "prompt compliance" when responsive documents are not identified or produced until years later and only by chance. By focusing on the AG's partial production of responsive documents rather than the AG's failure to produce other responsive documents, the district court eliminated the very damages that are intended to ensure prompt compliance with IPRA. See *Faber*, 2015-NMSC-015, ¶ 29 ("Section 14-2-11 and Section 14-2-8(D) promote prompt compliance by requiring the custodian of records to promptly respond to it in writing within fifteen days so that the requester is apprised of his or her request.").

Ruling that Section 14-2-12's damages are all that a requester can obtain in circumstances involving an incomplete response without an explanation does not

³ "Unless a written request has been determined to be excessively burdensome or broad, a written request for inspection of public records that has not been permitted within fifteen days of receipt by the office of the custodian may be deemed denied." Section 14-2-11(A).

meet the policy underlying Section 14-2-12 either. The supreme court has held that the damages available under Section 14-2-12, along with an order requiring production of the documents that were wrongfully withheld, are sufficient to hold public officials accountable and satisfy the objective of transparency in state government. *Id.* ¶¶ 31-32. Such a holding is premised on a scenario in which a public entity has already fully complied with the denial procedures set forth in Section 14-2-11, including providing a written explanation of the denial. *See id.* ¶¶ 12, 17, 29 (holding that Section 14-2-11 damages were not applicable because the AG timely answered the IPRA request by following the denial procedures set forth in Section 14-2-11). But that did not happen in this case. Britton did not get the benefit of receiving a “valuable information gathering tool,” *ACLU, 2016-NMCA-063*, ¶ 38; instead she was misled into a false satisfaction with the AG’s response. Given that actual damages are rare in cases like these, the end result of confining litigants to Section 14-2-12 damages would be to allow the public entity to avoid statutory damages, or any significant damages, despite the entity’s failure to produce responsive documents or a written explanation of its incomplete response. This outcome does not meet the purpose behind Section 14-2-12 of holding public officials accountable for wrongful denials.

For example, it is easy to imagine a situation in which a public entity could take advantage of the unavailability of statutory damages for incomplete responses.

The public entity could withhold documents that it does not want to produce without identifying them or without alerting the requester to their existence, even though no valid exemption applies. The public entity has all the incentive to chance the nonproduction of the documents because even if the documents are later discovered, there is no real risk of a significant damages award. Such an outcome is totally contrary to the purpose of holding public entities accountable under IPRA.

The district court's ruling also undermines the overarching policy behind IPRA. The legislature's intent in enacting IPRA is no secret. It is clearly and explicitly stated in the statute:

Recognizing that a representative government is dependent upon an informed electorate, the intent of the legislature in enacting the Inspection of Public Records Act ... is to ensure, and it is declared to be the public policy of this state, that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees.

Section 14-2-5. In short, IPRA is designed to promote transparency, access and disclosure of documents about state government and its officers and employees. Failing to identify documents responsive to an IPRA request without ever articulating a valid reason for withholding them undercuts the "fundamental right" of citizens to have access to public records. *State ex rel. Newsome v. Alarid*, 1977-NMSC-076, ¶ 34, 90 N.M. 790, *overruled on other grounds by Republican Party v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-026, 283 P.3d 853. "The citizen's

right to know is the rule and secrecy is the exception.” *Id.* As explained below, statutory damages are an essential tool to give effect to this important legislative purpose.

II. AWARDING STATUTORY DAMAGES UNDER SECTION 14-2-11 FURTHERS THE POLICIES UNDERLYING IPRA AND ITS DAMAGE PROVISIONS.

IPRA must be construed in light of its purpose. *San Juan*, 2011-NMSC-011, ¶ 14 (“A statute should be interpreted to mean what the Legislature intended it to mean, and to accomplish the ends sought to be accomplished by it.” (internal quotation marks & citation omitted)). Only one approach actually furthers IPRA’s purpose and the policies underlying IPRA’s damage provisions. That approach is to apply Section 14-2-11 and thus to make statutory damages available when a public entity fails to provide a complete response to an IPRA request and fails to explain why it did not provide a complete response. Awarding statutory damages is not a stretch because an incomplete response does not comply with IPRA and its denial procedures.

Making statutory damages available in situations like these meets the policy of prompt compliance under Section 14-2-11. It does so by requiring public entities to either identify and disclose *all* responsive documents or provide a written explanation of why other responsive documents were not produced. Incomplete responses that fail to identify any other responsive documents being

withheld are the most egregiously deceptive type of response because they appear complete, even though they are not, and the person requesting the documents has no way of knowing that anything has been withheld. Allowing for statutory damages for incomplete responses discourages this type of deceptive response.

Awarding statutory damages also meets the other purpose of the damage provisions – accountability for government officials. It does so in a meaningful way as opposed to the district court’s approach, which allowed the AG to avoid paying any real damages while at the same time shielding responsive documents for years. Instead of permitting public entities to get away with paying attorneys’ fees, costs, and actual damages that are often minimal or non-existent, the public entity is held accountable for prompt compliance and transparency by facing the prospect of a daily statutory damages award. While it may make sense to limit damages to attorneys’ fees, costs and actual damages for a public entity that has been forthright and open about denying a request for public records, it does not make sense to do so in cases involving deceptively incomplete responses. Imposing statutory damages on public entities that provide such misleading responses encourages forthright written explanations for an entity’s refusal to produce all requested documents. Those explanations, in turn, provide litigants with the information needed to challenge wrongful denials and hold government officials accountable.

Imposing statutory damages for deceptively incomplete responses also serves the overall policy of IPRA: transparency and protecting the public's fundamental right to inspect public records. *San Juan*, 2011-NMSC-011, ¶¶ 15-16. Cases involving what appear to be complete responses, like this one, threaten the very core of IPRA. These are not minor violations; the fact that there was some attempt by a public entity to provide a timely response does extenuate or excuse them. At least when a public entity utterly fails to respond, the requester knows that further follow-up is needed to obtain the documents. And, at least when a public entity denies the request and provides a written explanation of the denial, the requester has information from which to determine whether to challenge the denial. But where there is a partial response that appears complete coupled with no identification of other documents, the requester is fooled into believing that he or she has obtained everything that is responsive to the request. Permitting public entities to avoid statutory damages for these types of deceptive responses undermines everything for which IPRA stands.

Conclusion

By ruling that the AG's conduct in this case fell under Section 14-2-12's damages provision rather than Section 14-2-11's statutory damages provision, the district court encouraged deceptive responses to IPRA requests. It also endorsed conduct that would allow a public entity to escape statutory damages simply by

providing a timely but wholly inadequate response to an IPRA request and failing to identify any of the responsive documents withheld from the response. The best way to deter such responses is to treat such responses as denials under Section 14-2-11 and to award statutory damages for the failure to comply with IPRA's denial procedures. Taking this approach will give effect to the policies underlying the damages provisions – namely, prompt compliance and accountability – while at the same time promoting the overall policy of IPRA, which is transparency and protecting the public's fundamental right to inspect documents. The district court's ruling granting summary judgment in favor of the AG should be reversed, and this matter should be remanded to the district court with instructions to award statutory damages not to exceed one hundred dollars per day from the date of noncompliance to the date when compliance was finally complete.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN
& ROBB, P.A.

By 
Denise M. Chanez

P.O. Box 1888
Albuquerque, NM 87103
Telephone: (505) 765-5900
Fax: (505) 768-7395

*Attorney for New Mexico Foundation
for Open Government*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading was served upon the following by first class mail on this 11th day of October 2016.

John W. Boyd
Freedman Boyd Hollander Goldberg Urias & Ward, P.A.
20 First Plaza NW, Ste. 700
Albuquerque, NM 87102
Attorney for Plaintiff-Appellant Marcy Britton

Scott Fuqua
Fuqua Law & Policy, PC
P.O. Box 32015
Santa Fe, NM 87594
Attorney for Defendant-Appellee
Office of the Attorney General of New Mexico

/s/ Denise M. Chanez – Electronically Signed
Denise M. Chanez