IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

SAN JUAN AGRICULTURAL WATER USERS ASSOCIATION,

Plaintiff/Appellant,

v.

KNME -TV; BOARD OF EDUCATION OF THE ALBUQUERQUE PUBLIC SCHOOLS; REGENTS OF THE UNIVERSITY OF NEW MEXICO; JOHN D'ANTONIO, NEW MEXICO STATE ENGINEER; OFFICE OF THE NEW MEXICO STATE ENGINEER; NEW MEXICO INTERSTATE STREAM COMMISSION; and OFFICE OF THE GOVERNOR OF NEW MEXICO,

Defendants/Appellees.

No. 35,839
Bernalillo County
No. D-202-CV-2007-07606

BRIEF OF *AMICUS CURIAE* NEW MEXICO FOUNDATION FOR OPEN GOVERNMENT IN SUPPORT OF PLAINTIFF/APPELLANT'S BRIEF IN CHIEF

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INTRODUCTION / INTEREST OF THE *AMICUS*[1]

Amicus New Mexico Foundation for Open Government ("NMFOG") submits its brief in support of Plaintiff/Appellant San Juan Agricultural Water Users Association's Brief in Chief.

This case concerns the awarding of attorneys' fees, costs and damages under the New Mexico Inspection of Public Records Act, NMSA 1978, § 14-2-1, *et seq.* (1993) ("IPRA"). Even though Plaintiff/Appellant was a successful litigant, and IPRA mandates an award of damages, costs, and reasonable attorneys' fees to successful litigants, the district court improperly limited its award to Plaintiff/Appellant.

Plaintiff/Appellant litigated this case for several years, including a drawn-out and ultimately successful appeal on an issue of standing to file suit. Eventually, Defendants/Appellants produced additional public records. However, the district court declined to award attorneys' fees costs, and compensatory damages associated with this subsequent production. Most notably, the district court improperly denied attorneys' fees and costs in part because it believed Defendants/Appellants' initial denial of certain records had been "reasonable."

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[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 12-320(C) NMRA make a monetary contribution intended to fund the preparation or submission of the brief.

Nothing in IPRA permits a court to consider the reasonableness of the original records denial and then to use that "reasonableness" determination as a basis to deny attorneys' fees and costs. In fact, a recent decision of this Court, *Am. Civil Liberties Union of New Mexico v. Duran*, 2016-NMCA-063, ¶ 45, holds that although a governmental entity is not required to produce records that it in good faith believes to be unresponsive, if such records are subsequently determined to be responsive, these records may become the basis for an award of attorneys' fees. The same analysis applies here. To hold otherwise would create a burden on successful records requestors to demonstrate that the governmental entity acted unreasonably or in bad faith in denying the records in order to obtain attorneys' fees and costs. IPRA does not require this, and in fact such a requirement would directly undermine IPRA's purpose of ensuring the greatest possible access to public records.

The importance of the issues in this matter 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 obtain documents and information from government sources. NMFOG submits this brief to assist the Court in its resolution of the issues presented in this case.

As required by Rule 12-320(D)(1) NMRA, all parties received timely notice of the intent of NMFOG to file this brief.

ARGUMENT

I. IPRA MUST BE INTERPRETED TO FURTHER THE POLICY OF OPEN GOVERNMENT, INCLUDING ITS FEE-SHIFTING AND DAMAGE PROVISIONS.

The starting point in any consideration of an IPRA case is recognition of this state's long-standing policy that the public should have the greatest possible access to public records. Our Legislature enacted IPRA specifically to ensure citizen access to public records. In doing so, it stated New Mexico's policy in favor of openness clearly:

> Recognizing that a representative government is dependent upon an informed electorate, the intent of the legislature in enacting the Inspection of Public Records Act is to ensure, and ***it is declared to be the public policy of this state, that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees***. It is the further intent of the legislature, and it is declared to be the public policy of this state, that to provide persons with such information is an essential function of a representative government and an integral part of the routine duties of public officers and employees.

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

Our appellate courts have followed the Legislature's lead, repeatedly ruling that access to public records is a right that must be protected. *See, e.g., Faber v. King*, 2015-NMSC-015, ¶ 28 (in recognition of the stated public policy in Section 14-2-5, "we have long held that the public's right to inspect documents is paramount"); *San Juan Agr. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶ 16, 150 N.M. 64 ("In order for government to truly be of the people and by the people, and not just for the people, our citizens must be able to know what their own public servants are doing in their name"); *Republican Party of New Mexico v. New Mexico Taxation & Revenue Dep't*, 2012-NMSC-026, ¶ 51 ("Transparency is an essential feature of the relationship between the people and their government. This foundational principle far predates IPRA, New Mexico's statehood, and even George Washington's first term as our nation's President"); *State ex rel. Newsome v. Alarid*, 1977-NMSC-076, ¶ 34, 90 N.M. 790, *overruled on other grounds by Republican Party of New Mexico*, 2012-NMSC-026, ¶ 16 ("The citizen's right to know is the rule and secrecy is the exception.").

In order to ensure that IPRA's purpose is carried out, the Legislature included provisions that 1) permit records requestors to bring lawsuits against public entities (Section 14-2-12(A); and 2) require that successful litigants be awarded damages, costs and attorneys' fees (§ 14-2-12(D)). Our courts have made clear that these provisions are central to IPRA, and must be enforced to

ensure that the public policy of open government is effectuated. *See, e.g., Rio Grande Sun v. Jemez Mountains Pub. Sch. Dist.*, 2012-NMCA-091, ¶ 9 (given IPRA's purpose, its provision mandating an award of damages, costs, and attorney fees to a successful litigant is an example of fee shifting – i.e., the imposition of the cost of litigation on the party who unsuccessfully resists a statutorily-compelled, socially beneficial action); *see also Am. Civil Liberties Union of New Mexico v. Duran*, 2016-NMCA-063, ¶ 42 ("[t]he purpose of IPRA's enforcement provision is to promote 'compliance and accountability' from governmental entities.... [t]he provision effectively amounts to a 'fee-shifting statutory scheme[ ]' that 'encourages individuals to enforce IPRA on behalf of the public' and 'ensure[s] that the entire process is virtually costless to a successful litigant'"), *citing Faber v. King*, 2015-NMSC-015, ¶¶ 28, 31-32. In other words, in order to further the public policy underlying IPRA, the Legislature has determined that the cost of an enforcement proceeding is to be borne by the government agency that violated the statute by refusing to release a document that rightfully belongs in the public domain.

In an earlier appeal in this very case, the New Mexico Supreme Court held that IPRA's remedies provisions are designed "to encourage compliance and facilitate enforcement" and that, "[b]y giving enforcement power to any person whose written request has been denied, IPRA's provisions create 'private

attorneys general' for 'more effective and efficient enforcement' of IPRA than would be possible if only the attorney general or district attorney could enforce the statute." *San Juan Agricultural Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶ 12, 150 N.M. 64 (quoting the Office of the New Mexico Attorney General, *Inspection of Public Records Compliance Guide* 41 (6th ed. 2009)).[2]

Furthermore, a fee-shifting provision within a public records statute serves to

> encourage public agencies to voluntarily comply with the requirements ..., thereby ensuring that the state's general policy is followed. If public agencies are required to pay attorney's fees and costs to parties who are wrongfully denied access to the records of such agencies, then the agencies are less likely to deny proper requests for documents. Additionally, persons seeking access to such records are more likely to pursue their right to access beyond an initial refusal by a reluctant public agency.

New York Times Co. v. PHH Mental Health Services, Inc., 616 So. 2d 27, 29 (Fl. 1993). Accordingly,

> the proper implementation of the fee-shifting provisions [in public record statutes] is necessary to the Legislature's determination that ... government records should be readily accessible to the public. Successful litigation of a case brought under this act vindicates this important public interest. The Legislature in its wisdom has recognized the practical fact that the right to obtain unprivileged public documents will often be empty without the promise of

[2] The current edition of the Attorney General's IPRA Compliance Guide (8th Edition, 2015), includes the same language.

> recompense contingent on success in court. For the ordinary person, it is the fee-shifting provision that opens the courthouse door.

New Jerseyans for a Death Penalty Moratorium v. New Jersey Dep't of Corrections, 850 A.2d 530, 533 (N.J. Super. Ct. 2004) (internal citation omitted). The rights created and protected by IPRA include the right of "access to public information . . . thereby encouraging accountability in public officials." *Cox v. New Mexico Dept. of Public Safety*, 2010-NMCA-096, ¶ 6, *overruled on other grounds by Republican Party of New Mexico v. New Mexico Taxation & Revenue Dep't*, 2012-NMSC-026. "Under IPRA's 'enforcement' provision, an award of attorney fees is mandatory when (1) the request has been denied, and (2) the requester is successful in a court action to enforce the Act." *Board of Commissioners of Dona Ana County v. Las Cruces Sun-News*, 2003-NMCA-102, ¶ 37, 134 N.M. 283, overruled on other grounds by *Republican Party of New Mexico, supra*. These provisions provide an incentive to challenge the wrongful denial of an IPRA request and a government's effort to keep hidden information that rightfully belongs to the public. Decisions limiting attorneys' fees put the cost of an IPRA violation on the requestor instead of the government, and discourage private parties from taking action to rectify a wrongful denial, as few citizens will have the resources to bear the cost of litigating an IPRA claim. *See* Katrina G. Hull, *Disappearing Fee Awards and Civil Enforcement of Public*

Records Laws, 52 Kan. L. Rev. 721, 725 (2004) ("The unlikelihood or uncertainty of recovering attorney fees fosters both selective and limited enforcement [of state and federal public records laws] because only those with adequate finances can afford to litigate openness.").

II. THE DISTRICT COURT ERRED IN ITS NARROW DEFINITION OF THE TIME FRAME FOR WHICH PLAINTIFF/APPELLANT IS ENTITLED TO ATTORNEYS' FEES AND COSTS.

Even though Plaintiff/Appellant was required to file a lawsuit to obtain public records (a lawsuit that was not resolved for several years), the district court limited its award of attorneys' fees and costs to a very narrow window of time. Specifically, the district court limited the award of attorneys' fees for the time period from June 27, 2007 through October 5, 2007 (as to defendants OSE/ISC) and for June 28, 2007 through December 19, 2007 (as to defendants UNM/KNME). It did so even though Defendants/Appellees produced numerous records over the subsequent years, including as late as during trial. The district court based its limitation on its determination that records produced after November 2007 were either 1) withheld "reasonably" until two appellate decisions made clear that certain documents were not exempt from IPRA; or 2) not responsive to the original IPRA requests. This limitation was in error.

A. The District Court Improperly Denied the Requests for Attorneys' Fees Based on the "Reasonableness" of Defendants/Appellees' Initial Denial, which Is an Impermissible Consideration.

The district court found that on October 31, 2013, Defendants/Appellees provided documents which had been requested by Plaintiff/Appellant but had not previously been produced (4 RP 840, FOF 370). Defendants/Appellees had refused to produce these records ever since the original IPRA requests were made several years earlier, and it took Plaintiff/Appellant's lawsuit to compel the production. These facts alone required the district court to award attorneys' fees and costs to Plaintiff/Appellant as successful litigants.

Nevertheless, the district court declined to award attorneys' fees and costs in regard to those records, apparently because it believed that Defendants/Appellees "acted reasonably" in refusing to produce the records before that point. (4 RP 848, COL 24-25). Specifically, the district court noted that Defendants/Appellees had released the records after the release of two appellate decisions, *Republican Party of New Mexico v. New Mexico Taxation & Revenue Dep't*, 2012-NMSC-026, and *Edenburn v. New Mexico Dep't of Health*, 2013-NMCA-045, which the district court found to be reasonable.

As a starting point, the release of these two appellate decisions did not relieve Defendants/Appellees of their responsibilities to have produced the

documents when they were first requested. Both *Republican Party* and *Edenburn* were rejections of attempts by governmental entities to restrict IPRA by grafting on exemptions based on executive or deliberative process privileges that neither IPRA nor any other law created. *See Republican Party* at ¶ 49; *Edenburn* at ¶¶ 21-22. These decisions did not "erase" previously-existing IPRA exemptions; they confirmed that they had never existed. Therefore, just as the governmental entities in *Republican Party* and *Edenburn* had improperly relied on such defenses in withholding public records, so had Defendants/Appellees in the present case.

Furthermore, the *Edenburn* decision specifically rejected a request by the defendant not to apply *Republican Party* retroactively, noting that *Republican Party* did not announce a new rule as to deliberative process privilege, because such privilege had never existed. *Edenburn*, ¶¶ 30-31. Thus, this Court did what the district court should have done in the present case, which was to reject the contention that the governmental entity could rely on *Republican Party* (and now *Edenburn*) to excuse the original failure to produce the public records.

But, regardless of the issuance of the *Edenburn* and *Republican Party* decisions, the district court's consideration of the reasonableness of Defendants/Appellees' original denial for purposes of awarding attorneys' fees was improper. Reasonableness of the original denial is not relevant to the issue of whether attorneys' fees and costs should be awarded to a prevailing party.

This was made clear in *Am. Civil Liberties Union of New Mexico v. Duran*, 2016-NMCA-063, ¶ 45:

> But to be clear, this opinion does not hold that a governmental entity is required to produce records that it, in good faith, believes to be unresponsive. However, when such withheld records are subsequently revealed and determined to be responsive, those records may become the basis for an award of attorney fees in IPRA litigation.

Under this holding, the reasonableness of Defendants/Appellees's original assessment of the records was not a proper basis for the district court to deny attorneys' fees.

The district court's consideration of reasonableness may have been based on a somewhat unclear section of the Supreme Court's decision in *Faber v. King*, 2015-NMSC-015, ¶¶ 29-31, in which that court referenced a governmental entity's "good faith basis" for originally denying the records request. But that section cannot be read to mean that a district court can deny a request for attorneys' fees to a successful IPRA litigant based on whether its original denial was "reasonable."

First, the discussion in ¶¶ 29-31 of *Faber* is in the context of how damages under Section 14-2-12 of IPRA should be calculated; it does not specifically analyze attorneys' fees and costs, which were not at issue in *Faber*. Second, those paragraphs make clear that a successful IPRA litigant is entitled to costs and attorneys' fees to "ensure that the entire process is virtually costless to a successful

litigant." *Id.*, ¶ 31. Furthermore, the court goes on in the very next paragraph to emphasize the importance of the attorneys' fee-shifting provision of IPRA:

> Section 14–2–12 allows for a writ of mandamus, an injunction, actual damages, costs, and attorneys' fees. ***We find costs and attorneys' fees particularly important.*** In *State ex rel. N.M. State Hwy. and Transp. Dep't v. Baca,* 1995–NMSC–033, ¶¶ 21–22, 25, 120 N.M. 1, 896 P.2d 1148, this Court concluded that awarding attorneys' fees, which are punitive *and* compensatory, did not conflict with *Torrance* because a court's inherent authority to "control the parties and the litigation before it" outweighed the possible depletion of public revenues. In *Rio Grande Sun v. Jemez Mountains Pub. Sch. Dist.,* 2012–NMCA–091, ¶ 19, 287 P.3d 318, the Court of Appeals held that, "***[a]s with other fee-shifting statutory schemes, IPRA's fee requirement encourages individuals to enforce IPRA on behalf of the public.***" *See, e.g., Lucero v. Aladdin Beauty Colls., Inc.,* 1994–NMSC–022, ¶ 4, 117 N.M. 269, 871 P.2d 365 (noting that "one of the policies embodied in the [Human Rights] Act is to encourage lawyers to take cases involving alleged violations of the Act" by providing for the award of attorney fees). ***We hold that attorneys' fees, along with costs and actual damages, are sufficient incentives for New Mexico public officials to "remain accountable to the people they serve.***" *San Juan,* 2011–NMSC–011, ¶ 16, 150 N.M. 64, 257 P.3d 884.

Faber, ¶ 32 (emphasis added).

Read as a whole, *Faber* simply cannot be read for the proposition that a district court can consider the reasonableness of the original denial in assessing attorneys' fees to a successful IPRA litigant. To the contrary, *Faber* stresses the importance of the fee-shifting provisions of IPRA to its efficacy. Nothing in IPRA itself, nor in any other appellate decision in New Mexico, stands for the proposition that reasonableness should be a factor in considering an award

attorneys' fees. In fact, *Am. Civil Liberties Union of New Mexico*, decided by this Court ***after Faber***, holds otherwise. To consider reasonableness would completely undermine the fee-shifting provisions, and would be absolutely contrary to the fundamental policy underlying IPRA, which is to give the public the greatest possible access to public records. It would, in effect, require that a records requestor demonstrate not only an entitlement to the public records, but also that the governmental entity acted unreasonably or in bad faith in not producing them. This requirement is nowhere in IPRA and should not be grafted onto it.

B. The District Court Erred in Ruling That Certain Video Recordings Ultimately Produced by Defendants/Appellees Were Not Part of Plaintiff/Appellant's IPRA Requests.

The district court held that an eight-minute version of "The Water Haulers" was not within the scope of Plaintiff/Appellant's IPRA request. (4 RP 841-42, FOF 43-49; 4 RP 847, COL 14-15). It also held that master video recordings for "The Water Haulers" were not within the scope of the IPRA request. (4 RP 841, FOF 39-42; 4 RP 850, COL 31, 32, 35). For that reason, even though these records were eventually produced by Defendants/Appellees, the district court held that Plaintiff/Appellant was not entitled to any fees, costs or damages associated with the initial denial. *Id.*

The IPRA request stated as follows:

1. All documents relating to the program "The Water Haulers," which was broadcast by KNME-TV. The exact date of the initial broadcast is not known to us, but it was broadcast on various dates in January, 2007.

2. All documents relating to the website "The Water Haulers." This website can currently be accessed at the following link: http://www.knmetv.org/water/index.php. This request includes all of the related pages or documents included in or linked with this website. We are willing to have this copied in electronic form, such as a DVD.

(1 RP 15). The district court erred in ruling that the requested records did not fit within these requests. Certainly, both the eight-minute version of "The Water Haulers" and the master video recordings for "The Water Haulers" "relate to the program 'The Water Haulers.'" A records requestor should not be required to identify with exact specificity the public records he would like to examine, because in many, if not most cases, the requestor will not know the exact records exist. If the district court was relying on the requestor's use of the term "documents" in making its determination (and that is not clear from the record), then this distinction was improper. IPRA defines "public records" very broadly to include "all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, ***regardless of physical form or characteristics***." NMSA 1978 § 14-2-6(G) (1993) (emphasis added). And if there was any

question about the scope of the request, it was made clearer in Plaintiff/Appellant's Complaint.

Again, courts must interpret IPRA in a way that supports the public policy underlying the statute. In determining whether a record fits within a request, a court should read the request expansively, with doubts being resolved in favor of the requestor. Such a process ensures that the public will have the greatest possible access to public records, which is the explicit purpose of IPRA. In this case, the records eventually produced were clearly within the scope of the request, and thus Plaintiff/Appellant was entitled to an award of attorneys' fees and costs associated with this request.

C. The District Court Erred in Ruling That Plaintiff/Appellant Was Not Entitled to Recover for Its Fees and Costs Incurred on the First Appeal.

It is an undisputed matter of law that under IPRA, a successful litigant is entitled to fees and costs incurred not only at the district court level, but on appeal as well. *See Rio Grande Sun v. Jemez Mountains Pub. Sch. Dist.*, ¶ 28 (IPRA allows the award of reasonable attorney fees on appeal, citing NMSA 1978 14-1-12(D) and Rule 12–403(B)(3) NMRA). It appears the district court denied Plaintiff/Appellant's request for attorneys' fees and costs incurred on the first appeal of this case because, by November 15, 2007, Defendants/Appellees had produced all records that would eventually be deemed responsive to

Plaintiff/Appellant's IPRA requests; the requests for records produced after that date had been "reasonably denied" or were not responsive to the IPRA requests.

As set forth above, Plaintiff/Appellant was in fact successful in obtaining public records long after November 15, 2007. As a result, Plaintiff/Appellant should be entitled to all of the fees associated with the appeal. The district court had granted Defendants/Appellees' motion to dismiss with prejudice, thus dismissing all of Plaintiff/Appellant's claims. For Plaintiff/Appellant's case to continue, it had to seek appellate relief. It was granted such relief, when the Supreme Court reversed the district court's dismissal and remanded the case to the district court for further proceedings. This permitted the case to continue, which allowed Plaintiff/Appellant to obtain the public records which had been denied. Plaintiff/Appellant is thus entitled to an award of attorneys' fees and costs associated with the appeal.

CONCLUSION

Amicus Curiae New Mexico Foundation for Open Government respectfully requests that the Court overturn the decision of the district court and remand for further award of attorneys' fees, costs and damages.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that on the 24th day of March, 2017, a copy of the foregoing Brief was served upon all counsel of record via email as follows:

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