IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

LAUREL EDENBURN,

Plaintiff-Appellant,

v. No. 31,285

NEW MEXICO DEPARTMENT OF HEALTH and DEBORAH BUSEMEYER, Appointed Custodian of Records in the Department of Health,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
HONORABLE BARBARA J. VIGIL, DISTRICT JUDGE

AMICUS CURIAE BRIEF OF THE NEW MEXICO FOUNDATION FOR OPEN GOVERNMENT

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Statement of Compliance

Pursuant to Rule 12-213(A)(1)(c) NMRA and Rule 12-213(G) NMRA, the undersigned counsel hereby certifies that this brief complies with the type-volume limitations set forth in Rule 12-213(F)(3) NMRA. According to Microsoft Word 2003, the body of the brief contains 5918 words.

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The New Mexico Foundation for Open Government ("FOG") submits this amicus brief in accordance with the invitation contained in the Court's Order on Motion for Rehearing (Aug. 28, 2012), and in support of the position of Appellant Laurel Edenburn ("Ms. Edenburn"). In FOG's view, the Court's determination that draft documents are "public records" within the expansive embrace of the Inspection of Public Records Act ("IPRA") was entirely correct. Arguments to the contrary by Appellee New Mexico Department of Health ("the Department") are based on case law concerning a superseded version of IPRA, on a different statute altogether (the Public Records Act), and on "rule of reason" rationalizations that the supreme court's recent decision in Republican Party of New Mexico v. New Mexico Taxation & Revenue Department, 2012-NMSC-026, 283 P.3d 288, has relegated to the dustbin. Nor would "retroactive" application of this Court's decision – or of the supreme court's decision in Republican Party – implicate judicial concerns about the unfairness occasionally wrought by abrupt doctrinal change. Accordingly, FOG urges the Court to reaffirm its original ruling.

INTEREST OF THE AMICUS CURIAE

FOG is a nonprofit organization whose mission is to help the general public, students, educators, public officials, media professionals, and lawyers understand and exercise their rights under state and federal sunshine laws and the First Amendment. FOG takes a special interest in the proper interpretation of IPRA and

the Open Meetings Act. Whether as a party or as an amicus, FOG regularly participates in litigation posing important issues under one or both of these statutes.

"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." San Juan Agric. Water Users Ass'n v. KNME-TV, 2011-NMSC-011, ¶ 16, 150 N.M. 64, 257 P.3d 884. What public servants are doing in the public's name is only partially revealed by "formalize[d]" documents possessing a "degree of finality." Brief in Support of Motion for Rehearing at 8 (Aug. 15, 2012) [hereinafter Department's Brief]. Legislative bills, for example, are but drafts of actual statutes, yet no one doubts their status as public records. Notice-and-comment rulemaking, see, e.g., Livingston v. Ewing, 98 N.M. 685, 652 P.2d 235 (1982), hazardous-waste permitting, see, e.g., Citizen Action v. Sandia Corp. (In re Class 3 Permit Modification), 2008-NMCA-031, ¶ 7, 143 N.M. 620, 179 P.3d 1228 (filed 2007), zoning reclassification hearings, see, e.g., St. Bede's Episcopal Church v. City of Santa Fe, 85 N.M. 109, 110-12, 509 P.2d 876, 877-79 (1973) – all these governmental activities, and many more besides, depend for their efficacy on the public availability of draft proposals. A right-to-know law that reached nothing more than legislative and administrative end products would do nothing to advance the aims of a participatory democracy. To the contrary, it would compel New Mexicans to "rely solely on the representations of public

officials that they have acted appropriately." San Juan Agric. Water Users, 2011-NMSC-011, ¶ 33 (internal quotation marks omitted).

FOG's experience with open-government issues has led the organization to at least two conclusions about "draft" government papers. First, documents characterized as "drafts" often provide a vital window into the workings of government – exactly what IPRA is intended to accomplish. Consider, for example, the ways in which preliminary bid scoring sheets and early versions of contracts have recently informed the public's view of the procurement process. With tens and hundreds of millions of dollars at stake, taxpayers can hardly afford to content themselves with knowledge of the end result of the process; public insight into the intermediate steps provides a crucial check on corruption. See, e.g., James Monteleone, Regent Wants Explanation About Pit Bid Sheet Changes, Albuquerque J., Jan. 11, 2011, http://www.abqjournal.com/news/state/112316326576newsstate01-11-11.htm; Mike Gallagher, ValueOptions Heads to Court, Albuquerque J., Mar. 6, 2009, http://www.abqjournal.com/north06111830276north03-06-09.htm; Colleen Heild & Mike Gallagher, CDR Contract Mystery Deepens, Albuquerque J., Feb. 8, 2009, http://www.abqjournal.com/news/state/08103633state02-08-09.htm.

Second, the "draft" label in this context is highly manipulable and hopelessly subjective. Compare, e.g., Sanchez v. Bd. of Regents of E.N.M. Univ., 82 N.M. 672, 679, 486 P.2d 608, 615 (1971) (Stephenson, J., dissenting) ("The

action of the [Board of Regents] in approving the [proposed faculty salary] list represented final action on that subject ...."), with id. at 674, 486 P.2d at 610 (majority opinion) ("[This list] resulted in no contract to which ENMU or the State was a party. A contract could only come into being upon acceptance of the offer by the individual faculty member."). The know-it-when-I-see-it quality of the "draft" rubric invites abuse. Indeed, public bodies appear to have parked sensitive documents in draft form over extended periods of time for the very purpose of keeping them secret. See, e.g., Julie Ann Grimm, City Shields Police Spending Audit, Santa Fe New Mexican, Mar. 21, 2012, http://www.santafenewmexican.com/localnews/City-shields-audit-of-police-spending (observing that police department had refused to release "[in]complete" report about its finances before entering into salary negotiations with its employees, even though report had been sent to city manager and report's author had retired); Geoff Grammer & Julie Ann Grimm, City Officials Block Efforts to Obtain Public Records, Santa Fe New Mexican, Mar. 18, 2012, http://www.santafenewmexican.com/Sidebar/Officials-block-efforts-to-obtain-public-records (documenting city's repeated refusals, over nine-month period, to release "[un]finalized" audit of agency facing embezzlement allegations); Julie Ann Grimm, City Criticized over Timing of Annexation Report Release, Santa Fe New Mexican, Mar. 15, 2012, http://www.santafenewmexican.com/localnews/City-criticized-over-timing-of-annexation-report-s-release (noting that city had suppressed for several months a UNM report that could have had a

major impact on a municipal bond election, because the report was "still in draft form"); cf. also Jeff Proctor, Updated: Public Safety Chief Says Wife Had Medical Episode, Albuquerque J., July 11, 2011, http://www.abqjournal.com/main/2011/07/11/abqnewsseeker/white-took-wife-from-accident-scene.html (explaining that police report concerning Public Safety Director's wife's single-vehicle accident was still unavailable because police department had rejected original report "for grammatical errors").

Gamesmanship of this sort is the almost inevitable consequence of a rule that would exempt draft documents from the scope of IPRA. More importantly, however – and as FOG will explain below – no such rule can be squared with the language of the statute. It is for these reasons that FOG has consistently contested the notion that government's draft documents are immunized from public inspection.

ARGUMENT

I. IPRA Offers No Textual Support for the Theory That Draft Documents Are Beyond the Statute's Reach.

IPRA expressly incorporates the philosophy that "all persons are entitled to the greatest possible information regarding the affairs of government." NMSA 1978, § 14-2-5 (1993). In aid of that mandate, the statute defines "public records" as "all documents ... and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf

of any public body and relate to public business, whether or not the records are required by law to be created or maintained," id. § 14-2-6(F) (2011), and it provides that all such materials are available for public inspection unless they fall within one of eight listed exceptions, see id. § 14-2-1(A). "IPRA's broad language defining public records is clear that, absent an express exception from disclosure, public agencies must produce all records ...." State ex rel. Toomey v. City of Truth or Consequences, No. 30,795, slip op. ¶ 10 (N.M. Ct. App. July 26, 2012); see also, e.g., Republican Party, 2012-NMSC-026, ¶ 12 ("The citizen's right to know is the rule and secrecy is the exception." (internal quotation marks omitted)).

On the face of the statute, then, the Department's effort to withhold draft documents fails. As the Court observed in its original opinion: "IPRA's definition does not exclude draft documents. In addition, draft documents do not fall within one of the exceptions articulated by the Legislature. Thus, the draft letter in question here is a public record." Opinion ¶ 17. No further analysis should be necessary.

II. The Department's Arguments Against the Plain Language of the Statute Are Unavailing.

The Department offers three reasons for reexamination of the Court's conclusion that draft documents are subject to IPRA. None are persuasive.

A. Statutory amendments have rendered *Sanchez v. Board of Regents* untenable.

More than 40 years ago, a severely divided supreme court held that a state university's "preliminary" list of proposed faculty salaries could be shielded from public inspection. See Sanchez v. Bd. of Regents of E.N.M. Univ., 82 N.M. 672, 486 P.2d 608 (1971) (3-2 decision). The Department asserts that "Sanchez remains good law." Department's Brief at 7. The assertion is insupportable, quite apart from the substantial evolution that IPRA itself has undergone since 1971. See infra. For example, just six years after deciding Sanchez, the supreme court backed away from Sanchez's suggestion that IPRA should be viewed through the prism of the Public Records Act. Compare 82 N.M. at 674, 486 P.2d at 610 (quoting Public Records Act's definition of "public records"), with State ex rel. Newsome v. Alarid, 90 N.M. 790, 797, 568 P.2d 1236, 1243 (1977) ("Sanchez ... alluded to this statute but did not specifically rule that it applied ...."), overruled in part on other grounds by Republican Party, 2012-NMSC-026, ¶ 16. See generally infra pt. II(C). And the animating principle of the court's decision in Sanchez – that "[o]nly documents which present ultimate actions should be accessible to the public," 82 N.M. at 675, 486 P.2d at 611 (internal quotation marks omitted) – was never taken very seriously by the courts thereafter, even while the statute remained in its 1971 form. See, e.g., Newsome, 90 N.M. at 793-94, 797-99, 568 P.2d at 1239-40, 1243-45 (holding that requester was entitled to inspect employment

applications and other nonconfidential materials contained in personnel files); State ex rel. Blanchard v. City Comm'rs, 106 N.M. 769, 750 P.2d 469 (Ct. App. 1988) (holding that employment applications submitted by prospective public employees were public records).

But if Sanchez "remains good law," it is "law" only in the sense of staying authoritative about a version of IPRA that no longer exists. When Sanchez was decided in 1971, for example, the statute provided that public records could be inspected "for any lawful purpose." NMSA 1953, § 71-5-2 (1947). The supreme court therefore decided the case on the basis of its "belie[f]" that disclosure of the list of proposed salaries would serve "no useful purpose." 82 N.M. at 675, 486 P.2d at 611. Today, by contrast, IPRA declares that "[n]o person requesting records shall be required to state the reason for inspecting the records." NMSA 1978, § 14-2-8(C) (2009) (enacted in relevant part in 1993). Speculation about the purpose to be served by inspection of any particular draft document is quite beside the point.

When Sanchez was decided in 1971, the statute was silent about the time frame for inspection following a "lawful" request. See NMSA 1953, §§ 71-5-1 to -5-3 (1947). The supreme court therefore mused that "[i]t would not seem fair that the general public should know the contents of an offer of salary to an individual conceivably prior to the receipt of the offer by the contemplated employee." 82 N.M. at 675, 486 P.2d at 611. Today, the statute empowers custodians to allow

inspection either immediately or else "as soon as is practicable under the circumstances, but not later than fifteen days after receiving a written request." NMSA 1978, § 14-2-8(D) (enacted in relevant part in 1993). Inspection by the public before inspection by the intended recipient is no longer a realistic possibility.

Most significantly, the statute that the Sanchez court construed in 1971 contained no definition of "public records." See NMSA 1953, §§ 71-5-1 to -5-3 (1947). It was thus understandable that the court borrowed a definition of that term from an adjacent statute, the Public Records Act, see NMSA 1953, § 71-6-2(C) (1959), and held that the list of proposed salaries was unobtainable under IPRA because it was "not a document required by law to be prepared or preserved," Sanchez, 82 N.M. at 673, 486 P.2d at 609; see, e.g., id. at 675, 486 P.2d at 611 ("If the record is one that is not kept pursuant to law or as a part of the duty to be discharged by the officer, and is not required to be filed or recorded, it is not subject to public inspection." (internal quotation marks omitted)). But the Sanchez court's reasoning makes no sense under the modern-day IPRA, which makes clear that a public body's documents relating to public business are public records "whether or not the[y] ... are required by law to be created or maintained." NMSA 1978, § 14-2-6(F).

In short, when the legislature overhauled IPRA in 1993, it overthrew Sanchez. Not since 1988 has a New Mexico appellate court even cited Sanchez,

see Spadaro v. Univ. of N.M. Bd. of Regents, 107 N.M. 402, 405, 759 P.2d 189, 192 (1988) – and that case, like Sanchez, "applied a previous version of IPRA which ... did not contain a definition of 'public record,'" Cox v. N.M. Dep't of Pub. Safety, 2010-NMCA-096, ¶ 10, 148 N.M. 934, 242 P.3d 501. Any government agency that still uses Sanchez "to interpret [the agency's] obligations under ... IPRA," Department's Brief at 7, is failing to pay attention to the obligations themselves. Sanchez furnishes no ongoing justification for treating draft documents as nonrecords.

B. The Attorney General *Compliance Guide*'s discussion of "preliminary materials" is obsolete.

The Department additionally points to a passage from the Attorney General's IPRA Compliance Guide, which the Department describes as "harmonious with Sanchez." Department's Brief at 8. Obviously, however, the Compliance Guide is "not binding on this Court." Cox, 2010-NMCA-096, ¶ 28. The excerpt in question pertains to "notes and other materials prepared or collected by public employees solely for their own use," and it hypothesizes that such materials "may not be public records." N.M. Att'y Gen., Inspection of Public Records Act *Compliance Guide* 29 (6th ed. 2009) [hereinafter Compliance Guide]. It makes a "rule of reason" argument – to the effect that the public "could easily ... [draw] false conclusions about the public entity's business" from preliminary drafts, and that fear of disclosure could deter public employees from creating such

drafts in the first place. Id. While these particular conjectures have long struck FOG as profoundly wrong – because "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good," Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2671 (2011) (internal quotation marks omitted), and because the Compliance Guide's reasoning appears premised on a nonexistent privilege for the work product of nonlawyer public employees[1] – it suffices for present purposes to observe that the supreme court's decision in Republican Party forecloses all such arguments. The court not only repudiated the general idea that courts and public bodies are free to fashion exceptions to IPRA beyond the ones expressly decreed by the legislature, see 2012-NMSC-026, ¶¶ 15-16, but also specifically rejected the contention that cabinet agencies may assert a "predecisional" privilege to withhold "internal memoranda," id. ¶¶ 26, 47. "Allowing the executive to resist disclosure on the basis of a common law deliberative process privilege not otherwise recognized under our state's constitution would frustrate IPRA's guiding purpose of promoting government transparency," id. ¶ 38 – transparency that stands as "an

[1] Compare Compliance Guide at 29 ("An agency's effectiveness would be significantly undermined if its employees, worried that every scrap of paper recording their own impressions or notes could be disclosed publicly, limited what they wrote down in the course of performing their duties.") with Hickman v. Taylor, 329 U.S. 495, 511 (1947) ("Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten.... The effect on the legal profession would be demoralizing.").

essential feature of the relationship between the people and their government," id. ¶ 51.

C. The Public Records Act and regulations promulgated under it have no bearing on the definition of "public records" under IPRA.

Finally, the Department insists that "numerous regulations ... lend support to a public body's conclusion that draft materials are not public records." Department's Brief at 8-9. The regulations to which the Department refers were promulgated by the State Commission of Public Records under the Public Records Act, NMSA 1978, §§ 14-3-1 to 14-3-23 (2011). According to the Department, "over 50" such regulations "identify 'preliminary drafts' as a 'non-record.'" Department's Brief at 9-10.

The argument that the Public Records Act controls the construction of IPRA – and that the State Commission of Public Records, through its authority to promulgate regulations under the Public Records Act, has become the ultimate administrative arbiter of the public's right to inspect government documents – is plainly fallacious. The Public Records Act "deals with the subject of preservation and storage of public documents rather than the right of citizens to their inspection." Sanchez, 82 N.M. at 677, 486 P.2d at 613 (Stephenson, J., dissenting). Thus, in State ex rel. Newsome v. Alarid, the supreme court refused to apply § 14-3-2(G)'s definition of "public records" to an IPRA request, because

> [t]hat statute is part of the Public Records Act passed in 1959 to establish a system for preserving records. Section [14-2-1], our "right to know" law[,] was passed in 1947, and was amended in 1973. The two laws have no relationship to each other for purposes of decision in this case.

90 N.M. at 797, 568 P.2d at 1243 (citations omitted).

And if, after Newsome, there had been any lingering doubts about the Public Records Act's irrelevance to a public body's duties under IPRA, the legislature's 1993 amendments to IPRA would have sufficed to dispel whatever uncertainty remained. Consistently with its purpose of describing the kinds of documents that state agencies must archive, the Public Records Act defines "public records" as "all ... documentary materials ... made or received by an[] agency ... in connection with the transaction of public business and preserved, or appropriate for preservation." NMSA 1978, § 14-3-2 (2005) (emphasis added). But IPRA expressly declares its independence from this definition by providing that documents "used, created, received, maintained or held by or on behalf of" the agency are "public records" subject to inspection "whether or not the records are required by law to be ... maintained." Id. § 14-2-6(F) (emphasis added).

Thus, while the State Commission of Public Records has the power to determine whether a government document should be saved or shredded, see id. §§ 14-3-4(D), 14-3-9 (1959), the Commission has no power – by definition, see id. § 14-2-6(F) – to determine whether the document should be made available to a

person who requests it under IPRA. That the Commission, for example, regards as ephemeral any electronic messages that "do not set policy, provide directives, establish guidelines or procedures ... [or] certify transactions," 1.13.4.11(B) NMAC (6/30/08) – such as "preliminary drafts," 1.13.4.11(B)(3), or "messages ... reflecting the exchange of ideas preliminary to the development of a final decision," 1.13.4.11(B)(4) – has nothing to do with their status as "public records" under IPRA. See, e.g., Republican Party, 2012-NMSC-026, ¶¶ 26, 47 (rejecting "deliberative process" privilege for "predecisional" materials and "internal memoranda"). That a document may be destined for eventual destruction – or even earmarked for peremptory destruction without "the prior approval of the state records administrator," 1.13.30.14 NMAC (6/1/06), quoted in Department's Brief at 9 n.2 – does not determine whether the agency must produce the document if a person requests makes an IPRA request for it while it still exists. As this Court recently observed in an analogous IPRA context: "There is no evidence that the City ... w[as] required to keep the recordings of the City meetings for any time period. However, once Plaintiff filed a written request for the recordings that were kept on the ... computer [of the City's contractor], they were public records subject [to] inspection." State ex rel. Toomey v. City of Truth or Consequences, slip op. ¶ 28; see also Compliance Guide at 28 ("Until it is erased, a tape recording of a board meeting is used, maintained or held by or on behalf of the board and,

therefore, constitutes a public record. During this time, even if it is very short, the tape is subject to inspection.").

The Department's contention that dozens of regulations adopted under the Public Records Act exempt draft documents from IPRA "as otherwise provided by law," NMSA 1978, § 14-2-1(A)(8), falls apart for similar reasons.[2] According to the regulations in question, every agency in the State of New Mexico has the "sole responsibility" to determine whether any particular document in its custody "is a non-record or a public record." 1.13.30.14 NMAC (6/1/06), quoted in Department's Brief at 9 n.2. By the Department's logic, then, every agency is a "law" unto itself, enjoying unrestrained discretion to promulgate rules that exempt its documents from disclosure under IPRA. That cannot be what the legislature had in mind when it provided that documents would be immunized from inspection "as otherwise provided by law"; the exception would swallow the statute. Instead, "[w]hether a [regulation] has the force of law depends on whether the rule was

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[2] Even more unsound is the Department's suggestion that "court decisions," Department's Brief at 11 – i.e., Sanchez – and "the Attorney General's guidelines," Department's Brief at 12, constitute "other[] ... law" within the meaning of § 14-2-1(A)(8). See Department's Brief at 11-14. The Attorney General's "guidelines" have never had the force of law. See, e.g., Cox, 2010-NMCA-096, ¶ 28. As for Sanchez, the whole point of Republican Party was that "common law privileges [do not] provide a valid basis for withholding documents from public scrutiny." 2012-NMSC-026, ¶ 13. Rather, the "catch-all" exception set forth in § 14-2-1(A)(8) refers to "statutory and regulatory bars to disclosure," "constitutionally mandated privileges," and "privileges established by our rules of evidence." Id. The Department does not pretend that Sanchez's solicitude for draft documents has any basis in the constitution or the rules of evidence.

promulgated in accordance with the statutory mandate to carry out and effectuate the purpose of the applicable statute." City of Las Cruces v. Pub. Employee Labor Relations Bd., 1996-NMSC-024, 121 N.M. 688, 690, 917 P.2d 451, 453; see, e.g., id. at 691, 917 P.2d at 454 ("Regulation 1.17 effectuates the provisions of the [Public Employee Bargaining Act] to protect the rights of public employees to collective bargaining and to ensure that their choice to do so remains private."). The "applicable statute" in this case is the Public Records Act. Its sole purpose is to specify (or at least to delegate to the State Commission of Public Records the power to specify) the kinds of records that the State must preserve for posterity. It does not purport to make any classes of records confidential. Hence none of the regulations promulgated under it can reasonably be construed to remove documents from the ambit of IPRA.

Likewise, the fact that "the legislature has amended ... IPRA on numerous occasions during the last two decades but has not addressed the general consideration of drafts as non-records," Department's Brief at 12, is both unsurprising and uninformative. Drafts are deemed "non-records" under a different statute entirely. The legislature had no duty to clear up the misconception, particularly when the supreme court had already done its level best to set the matter straight. See Newsome, 90 N.M. at 797, 568 P.2d at 1243. Indeed, the legislature "is presumed to have been aware of and to have acted with full knowledge of relevant law," Department's Brief at 12-13 (emphasis added),

including Newsome. It could reasonably assume that after Newsome, there was no room for further confusion.

III. The Court Should Not Hesitate to Apply Its Own Decision Concerning Draft Documents, or *Republican Party*'s Abrogation of the Rule of Reason, Retrospectively.

The Department's parting shot is to request a remand to the district court "to develop evidence on factors supporting prospective application of any new decision concerning either the handling of draft materials or the elimination of the rule of reason." Department's Brief at 14-15. No such remand should be countenanced. Retrospective application of Republican Party and of this Court's decision is completely appropriate.

In New Mexico, as the Court's original decision observed, "there is a presumption of retroactivity for a new rule imposed by a judicial decision in a civil case." Opinion ¶ 6 (internal quotation marks omitted). Though the presumption is rebuttable, it rarely yields. And the presumption is all the more powerful with respect to Republican Party, because "we presume that our Supreme Court would have expressly indicated any reservations about applying its decision retroactively." Padilla v. Wall Colmonoy Corp., 2006-NMCA-137, ¶ 13, 140 N.M. 630, 145 P.3d 110.

None of the three factors that guide courts in determining the temporal reach of their decisions, see Department's Brief at 16, militate against retroactive application of the decisions involved here.

A. The Department and other public bodies did not reasonably rely on the rule of reason or on draft documents' asserted categorization as "nonrecords."

Courts considering a departure from the general rule of retroactive judicial decisionmaking first ask whether "the decision ... establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." Beavers v. Johnson Controls World Servs., Inc., 118 N.M. 391, 398, 881 P.2d 1376, 1383 (1994) (internal quotation marks omitted). There can be no doubt that Republican Party "establish[ed] a new principle of law," by overruling Newsome and its progeny to the extent that those cases permitted courts to indulge in rule-of-reason analysis under IPRA. See 2012-NMSC-026, ¶¶ 15-16. "That, however, does not end our evaluation of the first factor. There remains for consideration the subfactor of reliance – a factor that is so important in retroactivity analysis that ... it deserves recognition almost independent from the recognition given to the element of 'newness' in the first factor." Beavers, 118 N.M. at 399, 881 P.2d at 1384.

As an initial matter, the decision in Republican Party had been "clearly foreshadowed," Beavers, 118 N.M. at 398, 881 P.2d at 1383, ever since IPRA was extensively amended in 1993. Sixteen years before the amendments, in noting that IPRA lacked a definition of "public record," the supreme court had declared:

> It would be helpful to the courts for the Legislature to delineate what records are subject to public inspection and those that should be kept confidential in the public interest. Until the Legislature gives us direction in this regard, the courts will have to apply the "rule of reason" to each claim for public inspection as [it] arise[s].

Newsome, 90 N.M. at 797, 568 P.2d at 1243 (emphasis added). By defining "public records" and appending a laundry list of exceptions to the right of public inspection, the 1993 legislature "responded to the Court's request, obviating any need that existed for application of the 'rule of reason.'" Republican Party, 2012-NMSC-026, ¶ 16. The demise of the rule of reason has been readily predictable ever since.

In the second place, "[t]he reliance interest to be protected by a holding of nonretroactivity is strongest in commercial settings, in which rules of contract and property law may underlie the negotiations between or among parties to a transaction." Beavers, 118 N.M. at 399, 881 P.2d at 1384. "A similar concern [pertains to] the reliance interests of state and local governments in imposing taxes ...." Id. This case involves none of those things. Indeed, the "rule of reason" was not a "rule" at all – at least not in the sense of a bright line around which firm reliance interests could form. The Attorney General's Compliance Guide therefore warned state agencies not to overinvest in it:

> A note of caution: ... [IPRA] provides that a person denied access to public records who prevails in a subsequent judicial proceeding to obtain access is entitled to attorneys fees and costs. In light of this potential

> public expense and the strong preference in favor of disclosure, a public body's records custodian should be certain that any countervailing public policy relied on to deny access to public records applies under the circumstances, clearly outweighs the public's interest in inspecting the records and is likely to be recognized as valid by the courts.

Compliance Guide at 24-25.

What, then, was the strength of the particular "countervailing public policy" on which the Department based its denial of Ms. Edenburn's IPRA request? As FOG has argued, the Department's refusal to disclose draft documents had little to commend it. It was founded on a 40-year-old precedent construing an outmoded version of IPRA, and on a reckless conflation of IPRA with the Public Records Act – a conflation that the supreme court had long since condemned and that the 1993 amendments to the statute had rendered preposterous. See supra pts. II(A), (C). Regardless whether reliance on such reasoning was "widespread," Department's Brief at 17, it was objectively unreasonable. "IPRA ... was in effect prior to the initiation of this lawsuit .... [The Court's] opinion ... merely construe[d] [that] statute ...." Estate of Romero v. City of Santa Fe, 2006-NMSC-028, ¶ 22, 139 N.M. 671, 137 P.3d 611 (internal quotation marks omitted).

B. Retrospective application of *Republican Party* and of this Court's decision will advance the aims of both rulings.

The second factor for the Court to consider is "the prior history of the rule in question, its purpose and effect, and whether retrospective [application] will

further or retard its operation." Beavers, 118 N.M. at 398, 881 P.2d at 1383 (internal quotation marks omitted). The principal purpose of IPRA, and of any ruling recognizing the public's rights under it, is "to ensure that New Mexicans have the greatest possible access to their public records." San Juan Agric. Water Users, 2011-NMSC-011, ¶ 38. That purpose would plainly be furthered by application of Republican Party to the present case, and by application of the Court's opinion in the present case to concurrent cases. Sending Ms. Edenburn home empty-handed after more than three years of litigation, see Opinion ¶ 4, and allowing her to refile her IPRA request after some indeterminate cooling-off period, see Department's Brief at 19, would not serve the purpose nearly as well, if at all.

A secondary purpose of IPRA is to compensate persons whose records requests have been wrongfully denied. See NMSA 1978, § 14-2-12(D) (1993). That purpose, too, would be vindicated if the Court allowed its own decision and Republican Party to have their ordinary retroactive effect. Indeed, thwarting compensation of Ms. Edenburn and other similarly situated litigants appears to be the Department's chief objective in advocating prospectivity. See Department's Brief at 19. "When a member of the public has been wronged by some action or inaction of a government agent, the government's proper goal coincides with that of the injured citizen in uncovering and correcting the wrong, not the narrower interest in prevailing in a lawsuit." Bd. of Comm'rs v. Las Cruces Sun-News,

2003-NMCA-102, ¶ 30, 134 N.M. 283, 76 P.3d 36 (internal quotation marks and brackets omitted), overruled in part on other grounds by Republican Party, 2012-NMSC-026, ¶ 16.

Finally, any statute or doctrine that seeks to compensate for harm (other than those that provide compensation on a no-fault basis) has the related aim of deterring the conduct that led to the harm. Retroactive application of the decisions at issue here would promote that aim as well. Although it is too late to change the Department's response to Ms. Edenburn's 2007 IPRA request, see, e.g., Beavers, 118 N.M. at 401, 881 P.2d at 1386, holding the Department accountable for having withheld draft documents in the past will deter the Department and other agencies from asserting dubious privileges – and will encourage them to hew closely to the text of the statute – in the future.[3]

C. Retroactive application of the decisions will not lead to substantial inequity.

"Finally, [courts] weigh[] the inequity imposed by retroactive application, for where a [judicial] decision ... could produce substantial inequitable results if

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[3] The Department posits "maintain[ing] consistency among state agencies" as the purpose of this Court's determination that draft documents are subject to IPRA, and the Department argues that "[a]pplication of any new rule retroactively risks putting agencies in inconsistent positions with each other because some agencies may or may not have established internal mechanisms for retaining drafts." Department's Brief at 18. FOG does not comprehend the argument. Every agency remains at liberty to formulate its own retention policy under the Public Records Act, and nothing about the Court's decision in the present case commands "consistency" among such policies. This case concerns public bodies' obligations under IPRA rather than the Public Records Act. See supra pt. II(C).

applied retroactively, there is ample basis ... for avoiding the injustice or hardship by a holding of nonretroactivity." Beavers, 118 N.M. at 398, 881 P.2d at 1383 (internal quotation marks omitted). Regarding this factor, the Department complains that retroactive application of Republican Party and of the Court's decision in the present case "may ... place some agencies in the untenable position of facing claims that they erroneously responded to previous IPRA requests that they actually responded to appropriately and in good faith under prior law." Department's Brief at 18. The Department therefore worries that retroactivity will "create[] the potential for unforeseen liability for civil damages, attorney fees and costs going back several years." Id. at 19.

The concern is overblown. Consider the five possible categories of persons who have requested draft documents under IPRA in the past or who may do so in the future. One category consists of persons who will request draft documents – or, more broadly speaking, documents that an agency might be tempted to withhold under the old "rule of reason" – from the dates of the decisions forward. "Retroactivity" is no issue with respect to such persons, as the Department appears to concede. Department's Brief at 19-20; see Beavers, 118 N.M. at 392, 881 P.2d at 1377 (ruling is retroactive when it applies "to conduct occurring before [the] deci[sion]"). Future requesters are fully entitled to benefit from the new rule.

A second category consists of persons who have litigated such requests, lost, and exhausted or forgone their appellate remedies. The adverse judgments they

have suffered are claim-preclusive. While in theory the losing litigants might seek to reopen their judgments, see Rule 1-060(B)(5) to (6) NMRA, in reality the expense and uncertainty of such maneuvers would make them unattractive in comparison with the most direct solution to the problem – renewal of the IPRA requests. See Department's Brief at 19-20.

A third category consists of persons whose requests for documents were denied more than four years ago and who have not yet filed suit. They cannot file suit now. As the Department observes, their claims are time-barred. See NMSA 1978, § 37-1-4 (1880), cited in Department's Brief at 19.

A fourth category consists of persons whose requests for documents have been denied within the last four years and who have not yet filed suit. The Department and other agencies can prevent them from suing by the simple expedient of reversing course and fulfilling their requests now. Compliance with IPRA, no matter how belated, preempts any litigation that fails to beat the agency to the punch. See Derringer v. State, 2003-NMCA-073, ¶ 1, 133 N.M. 721, 68 P.3d 961 (holding that damages and attorneys' fees for IPRA violations "may [not] be awarded in a later action brought after the public body has complied with the Act"). Agencies that have disposed of requested documents within the limitations period may be unable to protect themselves in this fashion, but they have only themselves to blame. See State ex rel. Toomey v. City of Truth or Consequences, slip op. ¶ 28.

Only a single category of requesters remains – those (such as Ms. Edenburn) whose requests were denied and whose lawsuits are currently ongoing. It is difficult to believe that the category is very large. But in any event, under the regime of "modified prospectivity" adopted by at least one of the Department's cited authorities, see Montano v. Gabaldon, 108 N.M. 94, 96, 766 P.2d 1328, 1330 (1989), cited in Department's Brief at 20, the entire class should share in the doctrinal fruits of the present lawsuit and Republican Party, see Hicks v. State, 88 N.M. 588, 592, 544 P.2d 1153, 1157 (1975) ("the case at bar[and] all similar pending actions"). Purely prospective applications of judicial decisions (applications from which even the winning litigants themselves do not benefit) are reserved for situations of potentially massive and catastrophic liability, see Hicks v. State, 88 N.M. 588, 593-94, 544 P.2d 1153, 1158-59 (1976) (abolition of sovereign immunity); judicial decisions that are made prospective so as to benefit only the winning litigants typically involve reliance interests at the heart of the social order, see State ex rel. King v. Lyons, 2011-NMSC-004, ¶ 89, 149 N.M. 330, 248 P.3d 878 (land titles), cited in Department's Brief at 20. This case involves nothing of the sort. But even if the Department and other agencies were exposed to substantial expense, the Court should accord Republican Party and its own decision the usual retroactive effect – because

> [o]n balance, ... it [is] more equitable to let the financial detriments be borne by [the State, which was] in a better position to ensure meaningful compliance with the law,

> than to let the burdens fall on non-expert [requesters of documents], who are the Legislature's intended beneficiaries.

Jordan v. Allstate Ins. Co., 2010-NMSC-051, ¶ 29, 149 N.M. 162, 245 P.3d 1214.

CONCLUSION

For the foregoing reasons, the Court should reaffirm its original decision.

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