IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO, ex rel.
DEBORAH TOOMEY,

Plaintiff/Appellant,

vs.

No. 30,795
Sierra County
CV-09-159

CITY OF TRUTH OR CONSEQUENCES,
MARY PENNER, SIERRA COMMUNITY
COUNCIL, JAY HOPKINS,

Defendants/Appellees.

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

On Appeal from the Seventh Judicial District Court, County of Sierra
Honorable Matthew G. Reynolds, No. D-0721-CV-2009-127

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

NEW MEXICO CASES

CASES FROM OTHER JURISDICTIONS

OTHER AUTHORITY

INTRODUCTION

The New Mexico Foundation for Open Government ("NMFOG") appears in this case as *amicus curiae* in support of Plaintiff/Appellant to request reversal of the district court's holding that documents in the possession of a government contractor are not subject to inspection under New Mexico's Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2011) ("IPRA"). IPRA's definition of public records includes documents *held on behalf of any public body* which *relate to public business*, regardless of whether the records are required to be created or maintained by law. NMSA 1978, § 14-2-6(F) (2011). The New Mexico Supreme Court, addressing this issue under the Open Meetings Act, has confirmed the application of that Act to private corporations. Courts in other jurisdictions have reached the same result in public records cases.

If allowed to stand, the district court's analysis will provide a mechanism by which government can avoid IPRA obligations simply by outsourcing government operations. This includes a host of matters subject to outsourcing, including prisons, animal control shelters, entertainment venues and similar operations that use public resources and expend public funds. Important policy considerations, and the legislature's mandate in IPRA that the public have "the greatest possible information regarding the affairs of government and the official acts of public

officers and employees," require that the district court's judgment be reversed. NMSA 1978, § 14-2-5 (1993).

INTEREST OF NMFOG AS AMICUS

NMFOG is a charitable, educational association founded to assist New Mexico citizens in understanding and exercising their rights under the federal and New Mexico Constitutions, IPRA, the New Mexico Open Meetings Act (NMSA 1978, §§ 10-15-1.1 to -1.4 (1953, as amended through 2009), and the federal Freedom of Information Act, 5 U.S.C. § 552 (as amended). NMFOG regularly assists citizens and media organizations in obtaining public records.

NMFOG has a vital interest in the matters at issue in this case because the district court's government contractor exception threatens the ability of citizens to gain access to public records under IPRA. This issue has far-reaching importance that goes beyond this case. If adopted by this Court, the exception established by the district court would limit the scope of IPRA, would invite abuse by government officials seeking to shield public records from disclosure, and would discourage citizens from pursuing IPRA requests once rebuffed with third party control claims by public officials. NMFOG therefore appears as *amicus curiae* in this matter in support of Deborah L. Toomey on the question of whether documents in the hands of a government contractor are subject to inspection under IPRA.

SUMMARY OF RELEVANT FACTS AND PROCEEDINGS BELOW

The City of Truth or Consequences, New Mexico granted a cable television franchise that requires the franchisee to provide the City one channel for public, educational and governmental use ("PEG channel"). The franchise also requires the franchisee to pay the City $3 per cable subscriber per year to fund the PEG channel. FOF 4, 5 and 7.[1]

The City contracted with a local non profit (SCC)[2] to manage the PEG channel, yet retained significant responsibility and control. Specifically, the City:

1. Committed to be responsible for PEG channel management, and to adopt rules, regulations and procedures for PEG channel use. FOF 6.

2. Agreed to provide funding, equipment and physical space (including utilities) to operate the PEG Channel. FOF 10, 18.

3. Retained the right to use any air-time it wishes for any public purpose, and the right to require SCC to produce at no additional cost to the City any programming that the City requires for a public purpose. FOF 12.

4. Required SCC to make available to the City all of SCC's records with respect to matters covered under the PEG channel agreement. FOF 16.

5. Allowed SCC to film and broadcast City Commission meetings at no additional charge to the City. FOF 18.

Plaintiff/Appellant Deborah Toomey requested copies of recordings of City Commission meetings from the City Clerk pursuant to IPRA. FOF 34. The City

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[1] Reference to Findings of Fact are to the district court's Amended Findings of Fact ("FOF"), Docket pages 377-389.

[2] Sierra Community Council, Inc. ("SCC").

Clerk did not reject the request, and instead accepted Ms. Toomey's IPRA request and directed it to SCC's Public Access Cable Project Director. FOF 20, 34, 36. In response, the Director indicted to the City Clerk that Ms. Toomey had "been advised on multiple occasions that we are unable to provide the material specified in her request." FOF 37.

Ms. Toomey wrote a letter to the City Clerk arguing that the recordings of City Commission meetings are public records under IPRA. FOF 38. The City Clerk wrote back to Ms. Toomey claiming in part that the City is "merely a 'go-between'" for the franchisee and the PEG channel operator. FOF 39. The City Clerk refused to provide Ms. Toomey access to any recordings of City Commission meetings. *Id.*

Ms. Toomey filed an IPRA complaint in district court. Docket at 1. Following trial, the district court entered findings of fact (Docket at 308) which it subsequently amended (Docket at 377). The district court dismissed the Complaint with prejudice, finding that SCC is not an agent, employee or department of the City, and is not a public body. Order, Docket at 349. The court also found that the requested documents "are not used, created, received maintained or held by the City, and no other entity held the same on behalf of [the] City." Docket at 396-97. Ms. Toomey timely appealed. Docket at 393.

ARGUMENT

I. IPRA Entitles The Public To Inspect Public Records In The Hands Of Government Contractors.

A. New Mexico's Inspection of Public Records Act.

IPRA was enacted over six decades ago by 1947 N.M. Laws, ch. 130, Section 1. The Legislature has since declared that it is New Mexico's public policy "that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees." § 14-2-5 (1993). In amending IPRA in 1993, the Legislature confirmed that providing citizens with the greatest possible access to public information "is an essential function of a representative government and an integral part of the routine duties of public officers and employees." *Id.* Indeed, this right repeatedly has been described as "fundamental" and a "strong public policy." *See State ex rel. Newsome v. Alarid*, 90 N.M. 790, 797, 568 P.2d 1236, 1243 (1977); *City of Las Cruces v. Pub. Employee Labor Relations Bd.*, 1996-NMSC-024, 121 N.M. 688, 917 P.2d 451. The governmental policy embodied in IPRA and articulated by our Courts is clear: "[t]he citizen's right to know is the rule and secrecy is the exception." *Newsome*, 90 N.M. at 797, 568 P.2d at 1243.

IPRA defines "public records" as:

> all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held

> by 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.

NMSA 1978, § 14-2-6(E). As this expansive definition confirms, to secure access to the greatest possible extent the legislature chose not to limit IPRA's coverage to records in the custody or control of a public body. Instead, the legislature specifically expanded IPRA's scope to include records maintained or held "on behalf of any public body." And the legislature did not limit IPRA's coverage to records required by law to be created or maintained. Instead, the legislature made certain that all records, including discretionary records, are subject to IPRA's requirements.

B. Legislative intent is the determining factor.

When legislative intent requires, New Mexico's courts have not hesitated to impose on private corporations statutory requirements legislatively placed on public bodies. *E.g., Mem'l Med. Ctr. v. Tatsch Constr., Inc.*, 2000-NMSC-030, ¶ 24, 129 N.M. 677, 12 P.3d 431 ("the question of whether [private corporation] must comply with the [Public Works Minimum Wage Act] and the [Procurement Code] is essentially one of legislative intent"); *Raton Pub. Serv. Co. v. Hobbes*, 76 N.M. 535, 539, 417 P.2d 32, 35 (1966) (corporation that operated municipal electric utility system, although not within the governmental body definition, was subject to the Open Meetings Act because it was within the object, spirit, and

meaning of the statute); *accord* Opinion 06-02, 2006 N.M. AG LEXIS 3 (N.M. AG 2006) (mutual domestic water associations "fall within the intent of" IPRA and other statutes).

That same approach must be adopted here. Although the City contracted with a non profit to oversee the PEG channel, the City agreed to be responsible for management of the PEG channel, and to adopt rules, regulations and procedures for PEG channel use. FOF 6. The City provides public funds for the PEG channel's operation, and provides the equipment and physical space (including utilities) necessary to operate the PEG Channel. FOF 10, 18. The City retained the right to use any air-time it wishes for any public purpose, and the right to require SCC to produce at no additional cost to the City any programming that the City requires for a public purpose. FOF 12.[3] SCC agreed to make available to the City all of its records with respect to matters covered under its agreement with the City to operate the PEG channel. FOF 16. SCC filmed and broadcast City Commission meetings at no additional charge to the City. FOF 18.

Given the City's retention of extensive control of the PEG channel, its use of public funds to pay for operation of the PEG channel, and its access to all of SCC's records regarding the PEG channel's operations, documents retained by SCC fall

[3] The City's claim that "[t]he City has no legal basis to insist that SCC [record City Commission meetings]" is contrary to this finding by the District Court. City's AB at 11.

within the scope of IPRA.

C. The corollary to the Newsome "rule of reason" requires that the public have access to public records in the hands of government contractors.

"Under IPRA, an agency may deny inspection of public records if they are protected by a 'countervailing public policy.'" *See Newsome*, 90 N.M. at 797, 568 P.2d at 1243. The "countervailing public policy" exception, also known as the "rule of reason," is a judicially created, "non-statutory confidentiality exception." *Bd. of Comm'rs v. Las Cruces Sun-News*, 2003-NMCA-102, ¶ 17, 134 N.M. 283, 76 P.3d 36. It applies when the harm to the public interest from allowing inspection outweighs the public's right to know. *See Newsome*, 90 N.M. at 798, 568 P.2d at 1244. The countervailing policy exception is unique to requests for public records under IPRA. 2008 N.M. AG LEXIS 31 (N.M. AG 2008).

The corollary to the Newsome "rule of reason" must be that the public's right to access is so significant, as confirmed by the legislature, that when there is any doubt regarding whether a record is a public record, the doubt must be resolved in favor of public access. *Mem'l Med. Ctr.*, 2000-NMSC-030, ¶ 34 ("when necessary, substance should prevail over form in order to effectuate the legislature's intent"); *cf. Armijo v. Dep't of Health & Env't*, 108 N.M. 616, 618, 775 P.2d 1333, 1335 (Ct. App. 1989) (remedial statutes must be interpreted in light of their intended purposes). Thus, it is the judiciary's obligation to read IPRA

broadly so as to effectuate the intent of the legislature.

The plain language of IPRA supports its application to private corporations such as SCC that use public funds to fulfill a public service when the funds and the service were obtained by the City under a contract granting a franchise to use other public resources. Yet even if this Court believes that the language of IPRA is vague on the issue, "cases manifesting . . . a willingness to depart from the literal wording of a statute also appear frequently in the caselaw of this state." *State ex rel. Helman v. Gallegos*, 117 N.M. 346, 351, 871 P.2d 1352, 1357 (1994). In interpreting statutes, New Mexico courts "seek to give effect to the legislature's intent and 'will not rest our conclusions upon the plain meaning of the language if the intention of the legislature suggests a meaning different from that suggested by the literal language of the law.'" *Mem'l Med. Ctr.*, 2000-NMSC-030, ¶ 27 (*citing Cummings v. X-Ray Assocs.*, 1996-NMSC-035, ¶ 45, 121 N.M. 821, 918 P.2d 1321).

In *Memorial Medical Center*, the Supreme Court discussed a number of New Mexico cases which the Court held "reflect[] the changing relationship between private corporations and government entities." *Mem'l Med. Ctr.*, 2000-NMSC-030, ¶ 29. These included *Tompkins v. Carlsbad Irrigation Dist.*, where this Court found that an irrigation district was a local public body under the Tort Claims Act because irrigation is a public use, and irrigation districts are organized

for the purpose of exercising a public function and not for private gain. 96 N.M. 368, 370, 630 P.2d 767, 769 (Ct. App. 1981).

The *Memorial Medical Center* Court also discussed *Raton Pub. Serv. Co.*, 76 N.M. at 539, 417 P.2d at 35, in which the Supreme Court considered whether a private utility system was "a governing body of a municipality, or a governmental board or commission of a subdivision of the state, supported by public funds" so as to be subject to the Open Meetings Act. *Raton Pub. Serv. Co.*, 76 N.M. at 537-38, 417 P.2d at 33. The Raton Public Service Company was a private corporation that operated the electric utility system in Raton. "The property making up the electric utility system [was] owned by the city." *Id.* The Court found that the company had to comply with the Open Meetings Act, holding that "[a] thing which is within the object, spirit and meaning of the statute is as much within the statute as if it were within the letter." *Raton Pub. Serv. Co.*, 76 N.M. at 539, 417 P.2d at 35-36.

II. The Cable Franchise Obligated Public Property And The Franchise Fees Are Public Funds.

The 1984 Cable Policy Act, 47 U.S.C. § 521 *et seq.*, established a national policy of vesting in local governing bodies authority to franchise and regulate cable communications, subject only to the Act's specified limitations. *Group W Cable, Inc. v. Santa Cruz*, 669 F. Supp. 954, 963 (N.D. Cal. 1987). Thus, although cable communications are federally regulated, the regulations provide significant

authority to local governing bodies over franchise rights in their communities. Indeed, as noted in another context, "the cable medium may depend for its very existence upon express permission from local governing authorities." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 628 (1994).

One of the powers granted local authorities is the right to require that franchise proposals submitted by aspiring cable operators contain assurances that a portion of their channel capacity will be designated for "public, educational, or governmental use." 47 U.S.C. § 531(c). "As their name reflects, so-called PEG channels are subject to a variety of local governmental controls and regulations that -- apart from any federal requirement -- may result either in a prohibition or a requirement that certain types of programs be carried." *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727, 772 (1996).

New Mexico municipalities have the statutory right to grant franchises for utilities. NMSA 1978, § 3-42-1(A) (1965). The term franchise "usually means a grant of the right to use highways, streets and alleys," which is distinctly different from the police power a municipality can utilize. *City of Roswell v. Mountain States Tele. & Tele. Co.*, 78 F.2d 379, 383-84 (10th Cir. 1935). The primary purpose of a franchise is to "entitle[] [a] utility to use the municipality's streets and rights of way to construct and operate its facilities and distribution system." *City of Albuquerque v. N.M. Pub. Serv. Comm'n*, 115 N.M. 521, 533, 854 P.2d 348, 360

(1993). Although the franchisee receives the right to use this public property, the city regulates that use through the franchise:

> the method by which a municipality imposes such regulations is through a franchise. A franchise is therefore a necessary element in the relationship between [the franchisee] and the City because the franchise alone gives [the franchisee] permission to use City property under the terms imposed by the City and delineates the specific obligations both parties must abide by.

Moongate Water Co. v. City of Las Cruces, 2009-NMCA-117, ¶ 21, 147 N.M. 260, 219 P.3d 517. The franchisee gave the City the PEG channel as part of the consideration for the franchisee's use of public assets. That makes the PEG channel itself a public asset subject to all of the oversight requirements applicable to management of any public asset.

Similarly, the funds paid to the City by the cable provider, and used to pay costs of the PEG channel, were public funds. *Accord State v. Hearne*, 112 N.M. 208, 212, 813 P.2d 485, 489 (Ct. App. 1991) ("In New Mexico, as a matter of law, funds made available to the university become public funds to be expended consistently with all of the regents' applicable legal duties, regardless of the criminal source of the funds. We conclude defendant may not rely on the source of the funds in this case to distinguish these funds from public funds"); *cf. Denver Area Educ.*, 518 U.S. at 762 ("Access channel activity and management are partly financed with public funds through franchise fees or other payments pursuant to the franchise agreement, or from general municipal funds").

Records of a public meeting of a city commission "relate to public business." § 14-2-6(F). Video recordings of a public meeting are perhaps the most accurate and substantive "information regarding the affairs of government and the official acts of public officers and employees." § 14-2-5. The district court recognized that these recordings would be public records if held "by" the city. Under IPRA, they did not lose their status as public records when in the hands of the government's contractor.

III. Courts In Other Jurisdictions Uniformly Have Held The Public Has A Right To Inspect Public Records In The Hands Of Government Contractors.

A. Florida.

Florida's policy of guaranteeing that public records are open for inspection contemplates the possibility that public records may sometimes be found in private hands:

> Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, *or persons acting on their behalf*, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.

Fla. Const. art. 1, § 24(a) (emphasis added). Indeed, Florida's Legislature has defined "agency" to include not only governmental units, but also any "business entity acting on behalf of any public agency." Fla. Stat. § 119.011(2) (2006). The Florida Public Records Act defines "public record" as:

> all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

Fla. Stat. § 119.011(12). The statute applies to "[e]very person who has custody of a public record." Fla. Stat. § 119.07(1)(a). The Act is to be construed liberally in favor of openness. *Woolling v. Lamar*, 764 So. 2d 765 (Fla. Dist. Ct. App. 2000), *review denied*, 786 So. 2d 1186 (Fla. 2001). When there is any doubt, a court should find in favor of disclosure. *City of St. Petersburg v. Romine*, 719 So. 2d 19, 21 (Fla. Dist. Ct. App. 1998).

In a string of cases, Florida's courts have confirmed that documents in the control of a government contractor are public records subject to public inspection. *Mem'l Hospital-West Volusia v. News-Journal Corp.*, 729 So. 2d 373, 381 (Fla. 1999) (noting "the distinction between providing materials or services to a public body to facilitate the public body's own performance of its public function and an agreement under which a private actor performs the public function in place of the public body. When the agreement transfers the actual public function, public access follows"); *Stanfield v. Salvation Army*, 695 So. 2d 501, 502 (Fla. Dist. Ct. App. 1997) (documents the Salvation Army generated in performing a contract to provide probationary services for misdemeanants held to be public records); *B & S Utils., Inc. v. Baskerville-Donovan, Inc.*, 988 So. 2d 17, 21 (Fla. Dist. Ct. App.

2008) (documents pertaining to a water distribution system built on public land were public records where, over a period of several years, City contracted with private firm for engineering services and furnished office space).

The Florida Court of Appeals interpreted the Act in *Dade Aviation Consultants v. Knight Ridder*, 800 So. 2d 302, 307 (Fla. Dist. Ct. App. 2001), holding that "when a private entity undertakes to provide a service otherwise provided by the government, the entity is bound by the Act, as the government would be." In that case, Dade County entered into a contract with a private joint venture to provide the management of engineering, architectural, and other technical support services necessary to assure orderly expansion and renovation of the Miami International Airport. The joint venture hired lobbyists as part of its "team." A newspaper submitted a public records request to the Director of the Dade County Aviation Department requesting access to documents including records pertaining to the lobbyists hired by the joint venture. The Director forwarded the letter to the joint venture which responded, supplied certain records, and withheld other records, particularly those pertaining to expenses associated with its lobbyists, asserting that they were not public records. The newspaper filed a lawsuit under Florida's Public Records Act.

In the litigation, the joint venture claimed it was not required to disclose any documents regarding lobbyist payments and other non-reimbursable expenses

because they were not public records. The trial court disagreed, and granted summary judgment to the newspaper. The Court of Appeals affirmed, holding that the contractor was subject to the statute as: (1) the project was publicly funded; (2) public funds were commingled with the contractor's funds; (3) the project was conducted on public property; (4) the contractor's services were part of governmental decision-making since the government would otherwise perform those services; (5) the contractor performed a governmental function; (6) the government's performance requirements gave it substantial control over the contractor; (7) the contractor was designed to fill a government-created position; (8) the government had a substantial financial interest in the venture; and (9) the contractor functioned for government benefit by providing services the government would otherwise perform. *See also Prison Health Servs. v. Lakeland Ledger Publ'g Co.*, 718 So. 2d 204, 205 (Fla. Dist. Ct. App. 1998) (private contractor "undertook to act on behalf of the Sheriff by providing these medical services and, therefore, 'all of its records that would normally be subject to the Public Records Act if in the possession of the public agency are likewise covered by that law, even though in the possession of PHS, a private corporation'").

B. New Jersey.

The New Jersey Open Public Records Act defines "government record" as:

> any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed

> document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

N.J. Stat. § 47:1A-1.1. Any limitations on the right of access "shall be construed in favor of the public's right of access." N.J. Stat. § 47:1A-1.

Just last month the New Jersey Supreme Court addressed the application of this statute to a third party in *Fair Share Hous. Ctr., Inc. v. New Jersey State League of Municipalities*, 2011 N.J. LEXIS 925, *9-10 (N.J. Aug. 23, 2011). The New Jersey State League of Municipalities is a nonprofit, unincorporated association representing all of New Jersey's municipalities. The League's governing board consists of various elected municipal officials, and its budget is partly financed through public funds. Part of the League's mission is to lobby for beneficial legislation and to file lawsuits furthering the interests of municipalities as a whole. Pursuing that mission, the League lobbied against proposed fair housing regulations.

A fair housing organization submitted an Open Public Records Act request to the League seeking documents related to the League's lobbying

against the regulations. The League refused to make the documents available, claiming it was not subject to the Act. The housing organization challenged the League's refusal.

The trial court concluded that under New Jersey's Act the League is not a public agency, primarily because it does not carry out any traditional governmental function. New Jersey's Appellate Division affirmed, reasoning that "to constitute a political subdivision, an entity must provide some governmental service, such as education, police protection, maintenance of roadways, sewage disposal, or urban renewal." *Fair Share Hous. Ctr., Inc. v. New Jersey State League of Municipalities*, 995 A.2d 865, 869 (N.J. Super. App. Div. 2010). The Appellate Division compared the League to "a private association such as the Chamber of Commerce."

The New Jersey Supreme Court reversed, holding that the League was an "instrumentality" subject to the Act, stating: "We have no authority, or reason, to erect artificial judicial hurdles for a citizen to gain access to a government record, particularly in light of OPRA' mandate that 'any limitations . . . shall be construed in favor of the public's right of access.'" *Fair Share Hous. Ctr., Inc.*, 2010 N.J. LEXIS 925 at *31 (citation omitted). *See also Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp.*, 874 A.2d 1064 (2005) (Community Development Corporation subject to

state Open Public Records Act).

C. Texas

The Texas Public Information Act defines "public record" as:

> information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:
>
> (1) by a governmental body; or
>
> (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Tex. Gov't Code § 552.002. The Texas Act also confirms the legislative intent to guarantee the maximum access possible:

> (b) This chapter shall be liberally construed in favor of granting a request for information.

Tex. Gov't Code § 552.001.

The Texas Court of Appeals interpreted the Act in *Baytown Sun v. City of Mont Belvieu*, 145 S.W.3d 268 (Tex. App. 2004). In that case, the City of Mont Belvieu entered a Management Agreement with a professional sports management company to manage and operate a recreation complex owned by the City. A City resident filed a Public Information Act request seeking information on salaries paid to employees of the third party contractor. Both the trial court and the Texas Attorney General opined that the information was not subject to the Act. The Court of Appeals disagreed, holding that because the City's contract granted it the right to access the salary information, that information was subject to inspection.

Id. at 271.

D. Wisconsin.

The Supreme Court of Wisconsin addressed the issue in *WIREdata, Inc. v. Vill. of Sussex*, 751 N.W.2d 741 (2008). There, three municipalities contracted with private, independent contractor assessors to complete their property assessments. WIREdata, a wholly owned subsidiary of the Multiple Listing Service, Inc., made a series of open records requests seeking information about these property assessments which it intended to market and resell to real estate agents and brokers. Following protracted litigation, three cases (one against each of the municipalities) were considered together by the Wisconsin Court of Appeals. The Court of Appeals held that the municipalities could not evade their duties under the state's open records law by having independent contractor assessors create and maintain their property assessment records. The Wisconsin Supreme Court affirmed. *Id.* at 757. *See also State ex rel. Blum,* 565 N.W.2d 140 (Ct. App. 1997) (an authority "may not avoid the public access mandate of [state public records law] by 'delegating both [a] record's creation and custody to an agent'"); *Journal/Sentinel, Inc. v. Shorewood Sch. Bd.*, 521 N.W.2d 165, 169-70 (Ct. App. 1994) (settlement memorandum in custody of private law firm was subject to disclosure under state Act).

IV. IPRA's Current Exceptions Provide Sufficient Limitations To The Rule Of Greatest Possible Disclosure.

The fundamental right to disclosure is subject only to specific limited exceptions identified by the New Mexico Legislature. *See City of Farmington v. Daily Times*, 2009-NMCA-057, ¶ 7, 146 N.M. 349, 210 P.3d 246. Under the express terms of IPRA, a government agency can withhold public records only if the records fall within one of the enumerated exceptions to the disclosure requirement. *See* NMSA 1978, § 14-2-1(A) (2011); *Meridian Oil, Inc. v. N.M. Taxation & Rev. Dep't*, 1996-NMCA-079, ¶ 9, 122 N.M. 131, 921 P.2d 327 ("Even a cursory examination of [IPRA] discloses that the New Mexico legislature enacted a multiple exception format following the initial and broad right to inspection of public records permitted under Section 14-2-1(F)").

The Supreme Court has refused to create exceptions to IPRA for common law privileges that have not been adopted through court rules, explaining:

> Clearly, the primary purpose of the IPRA is to provide access to public records rather than "to create an evidentiary shield behind which the government can hide." IPRA's exclusion of law enforcement records from public inspection does not purport to create an evidentiary privilege, nor does it contemplate use of law enforcement records in civil litigation. . . . Instead, IPRA is used here to guide the court in appraising public policy concerns based on legislation enacted by the legislature pursuant to its general police powers.

Estate of Romero v. City of Santa Fe Police Dep't, 2006-NMSC-028, ¶ 18, 139 N.M. 671, 137 P.3d 611 (citations omitted). Thus, the Supreme Court recognizes only "such privileges [as] are required by the Constitution, or provided for in the rules of evidence or other court rules." *See id.* ¶ 11.

Yet even under the limited exceptions to IPRA recognized by the Supreme Court, New Mexico citizens still face an uphill battle in accessing public records to which they lawfully are entitled. Indeed, it is NMFOG's experience that the public is encountering increasing resistance from public agencies that refuse to comply with IPRA. A number of lawsuits filed by citizens seeking access to public records currently are pending in New Mexico courts. These include: *Rio Grande Sun v. Jemez Mountain Sch. Dist.,* Ct. App. No. 30,698 (Notice of Appeal filed Aug. 16, 2010); *Albuquerque Journal v. Office of the Governor of New Mexico*, Second Judicial Dist. Ct. No. D-202-CV-2010-06756 (filed June 3, 2010); *Cooper v. Lincoln County*, Thirteenth Judicial Dist. Ct. No. D-1329-CV-2007-01364 (filed Oct. 15, 2007); *Foy v. New Mexico State Inv. Council*, Second Judicial Dist. Ct. No. D-202-CV-2009-01864 (filed Feb. 18, 2009); *Griego v. New Mexico Taxation & Rev.*, Second Judicial Dist. Ct. No. D-202-CV-2009-05196 (filed May 5, 2009); *Advantage Asphalt & Seal Coating v. Santa Fe County*, D-0101-CV-2011-02042 (filed June 23, 2011); *Daniel Faber v. Gary King*, D-202-CV-2010-10665 (filed September 7, 2010); *American Civil Liberties Union of NM v. Dianna Duran*, D-

202-CV-201107257 (filed July 20, 2011); *Republican Party of New Mexico vs. NM Tax. and Rev. Dep't*, Sup. Ct. No. 32,524 (Writ issued Aug. 30, 2010).

This need to litigate operates to chill people's assertion of their rights. *Cf. Brudwick v. Minor*, 2006 U.S. Dist. LEXIS 51608, at *63-64 (D. Colo. July 13, 2006) (recognizing that the threat of protracted litigation might chill the full and free exercise of citizens' First Amendment rights); *Vill. of Lake Barrington v. Hogan*, 649 N.E.2d 1366, 1376 (Ill. App. Ct. 1995) ("[A] threat of litigation can chill the constitutional right of access to the courts even if the threat was not successful"). And the time, money and legal resources necessary to file IPRA suits simply are not available to many New Mexico citizens

Unlike the legislative exceptions to IPRA codified in the Act, a judicially created government contractor exception is amorphous, and invites the government to contract out politically sensitive governmental functions. Engrafting a judicially coined government contractor exception to the limited Legislative exceptions to IPRA only increases the likelihood of improper obstacles being placed in the path of citizens by recalcitrant public officials seeking to perform the public's work without the public's oversight.

V. The Government Contractor Exception Discourages Citizen Participation and Encourages Poor Government Decision Making.

It is of paramount importance that citizens be informed of the actions of their government:

> The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important.

Barr v. Matteo, 360 U.S. 564, 577 (1959) (Black, J., concurring). The refuge available to government under the district court's government contractor exception severely undermines this principle. That is particularly significant in this case, given the increased importance of PEG channels in making government accessible to citizens.[4]

The district court's government contractor exception limits the public information available to citizens. The information withheld under the shield of this exception can be the most essential for citizens to obtain on important issues regarding outsourced governmental activities. This type of secrecy has a number of harmful effects on the power of citizens, disarming them of the information they need in order effectively to promote their interests. *Bd. of Comm'rs of Dona Ana County v. Las Cruces Sun-News*, 2003-NMCA-102, ¶ 29, 134 N.M. 283, 76 P.3d 36 ("People have a right to know that the people they entrust 'with the affairs of

[4] *See generally* J.H. Snider, *Making Public Media Accessible* (Jul. 2011), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2011/07_public_community_media_snider/07_public_community_media_snider.pdf (last accessed September 25, 2011)

government are honestly, faithfully and competently performing their function as public servants'").

Impeding the greatest possible disclosure of public records results in secrecy that leads to public animosity towards the government:

> Secrecy operates to alienate—to create subjective distance between—the secret keeper and the one from whom the secret is kept. In the public sphere, such alienation between the governed and the governors tends toward hierarchy and away from democracy and citizen sovereignty.

Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 Ind. L.J. 845, 886 (1990). Secrecy undermines the public trust in government by insinuating to citizens that government officials cannot be held responsible for their actions. *See, e.g., Birkett v. City of Chicago*, 705 N.E.2d 48, 52 (Ill. 1998); Wetlaufer, *supra* at 890 ("When a government keeps secret the processes by which its most ordinary decisions are reached . . . it uses up some of the respect, the legitimacy and the credibility on which rests its ability to govern"). On the other hand, a government that is transparent to its citizens increases confidence and credibility. *See* Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. Chi. L. Rev. 865, 903-05 (2007).

Excessive secrecy necessarily constricts the flow of information available to the decision maker, which deprives her of "access to an active, probing, testing, alternative-generating marketplace in ideas" and actually decreases the

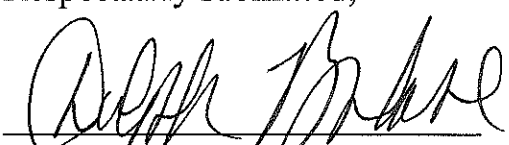
effectiveness of government decision making. *See* Wetlaufer, *supra* at 889.

CONCLUSION

The district court's ruling creates a new exception to IPRA, in abrogation of the rule of greatest possible disclosure. Inherent in this judicial IPRA exception is a significant danger of abuse by the government, and the likely deterrence of citizens seeking access to the public's records. The district court's ruling should be reversed as inconsistent with the letter and spirit of IPRA.

September 26, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on September 26, 2011, I caused a true and correct copy of the New Mexico Foundation for Open Government's Brief of *Amicus Curiae* to be sent by first class U.S. mail to the following:

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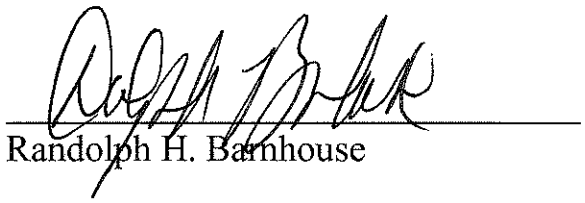

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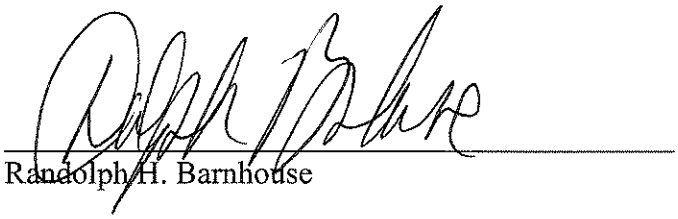

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