IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

ALBUQUERQUE JOURNAL
And KOB-TV, LLC,

Plaintiffs-Appellants/Cross-Appellees,

v. **No. S-1-SC-40671**

BOARD OF EDUCATION OF
ALBUQUERQUE PUBLIC SCHOOLS,
And RIGO CHAVEZ, in his capacity as
Custodian of Records for Board of
Education for Albuquerque Public Schools,

Defendants-Appellees/Cross -Appellants.

DEFENDANT-APPELLEES/CROSS APPELLANTS' ANSWER TO PLAINTIFFS-PETITIONERS' BRIEF IN CHIEF

ORAL ARGUMENT REQUESTED

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I. SUMMARY OF PROCEEDINGS

A. The Relevant Underlying Facts

Petitioners' appeal arises from a series of record requests by the Plaintiffs in August and September, 2014, pursuant to the New Mexico Inspection of Public Records Act, NMSA 1978 Section 14-2-1 et seq. ("IPRA"). **[RP at 499-514]** The Petitioners' requests related to an investigation of then Superintendent Winston Brooks of Albuquerque Public Schools ("APS"). **[RP at 1492-1493]** The APS Board had hired an attorney, Ms. Agnes Padilla of the law firm Butt, Thornton & Baehr, P.C., to investigate internal complaints against Mr. Brooks. ***Id.; see also*** **[RP 75, 90-94]** The Petitioners' each then requested, *inter alia*, a copy of Attorney Padilla's report to the Board (the "Padilla Report"). The Plaintiffs also requested the billing records or contracts associated with Attorney Padilla's work, any communications to or from APS Board members regarding the Report, and any complaints of misconduct by either Mr. Brooks or his wife. ***Id***.

In a series of responses in September 2014, APS Records Custodian, co-Defendant Rigo Chavez, provided documents responsive to some of the requests, but denied the request for the Padilla Report. **Plaintiffs' Exhibit 8**. The denial asserted that the Padilla Report was subject to attorney-client, attorney work-product privileges, and also that it was a matter of opinion held in a personnel file under the exceptions to IPRA. ***Id***.

The Padilla Report

Dr. Analee Maestas was the Albuquerque Public Schools Board President at all times relevant to the claims made in this appeal. **[RP 4-5]** While serving as Board President, Dr. Maestas became aware of allegations of misconduct leveled against the superintendent. **[RP 4-5]** In her capacity as Board President, she sought legal counsel for the Board, contacting Ms. Agnes Padilla, an attorney with Butt, Thornton & Baehr, P.C. **[RP 90]** Attorney Padilla is an employment lawyer who regularly investigates, reviews, and provides legal advice for clients on employment matters. **[RP 93]** Those attorney services involve assisting clients in understanding how particular occurrences and testimony may impact legal exposure in anticipation of litigation. **[*Id.*]** Dr. Maestas' full expectation was that her communications with Attorney Padilla were entirely confidential and that any feedback that Attorney Padilla would provide similarly would be privileged. **[RP 90]** Dr. Maestas hired Attorney Padilla specifically in her capacity as an attorney, which was termed as "attorney services" in the letter of hire. **[RP 91]** Attorney Padilla was hired to provide legal services and to prepare a report assessing a legal matter in anticipation of litigation arising out of allegations against Superintendent Winston Brooks. ***Id.; see also*** **[RP 863-869]** It was Attorney Padilla's intention and understanding throughout the representation that her communication with the Board and the communication requested by the Board would be privileged and confidential. **[RP**

94] Once the report was completed, Attorney Padilla hand-delivered one hard copy to President Maestas. **[RP 863-870, 871-882]**

The Settlement Agreement

After the Report was created, Albuquerque Public Schools and Superintendent Brooks ultimately decided to settle, with APS buying out some portion of the remainder of his contract. [**RP 101]** APS's settlement with Winston Brooks was reviewed and approved by the Second Judicial District Court, concluding that the agreement was fair to the school district. **[RP 95]** After court approval, the New Mexico Public Education Department, through its Secretary, Hannah Skandera, also approved the settlement agreement as meeting the requirements of the law and as demonstrating fairness to the District. [**RP 110-111**] The Settlement Agreement was approved and made public after meeting all requirements of New Mexico Administrative Code § 6.20.3.8, which is designed to ensure the safekeeping and correct use of public funds in such settlements.

B. The Relevant Legal Proceedings Below

On January 27, 2015, Plaintiffs filed their complaint in the Second Judicial District Court. [**RP 1-41**] It alleged that Defendants' denials of their requests violated IPRA. ***Id.*** It sought "a writ of mandamus or injunction" requiring production of the withheld documents, Plaintiffs' actual damages, statutory damages, their reasonable attorney fees incurred, and their costs. ***Id***.

After a timely answer, Defendants responded by filing a motion for summary judgment on April 7, 2015. [**RP 53-61**, **73-111**] It asserted that the Padilla Report was properly withheld as subject to attorney-client privilege, work-product privilege, and the exception at NMSA 1978 § 14-2-1(C) of IPRA for "letters or memoranda that are matters of opinion in personnel files..." [**RP 73-111**] In response, Plaintiffs moved under Rule 1-056(F) NMRA for additional discovery, arguing that the dispositive motion was premature. [**RP at 261**] The District Court, Honorable Nancy Franchini presiding, granted Plaintiffs' request for additional discovery. [**RP at 557-559**]

Plaintiffs then moved to compel testimony from Mr. Brooks' attorney, Maureen Sanders, regarding communications she had with APS' counsel. [**RP 388-447**] Plaintiffs argued that such communications may have waived any privileges associated with the Padilla Report. ***Id***. The District Court granted Plaintiffs' motion on September 7, 2016. [**RP at 562-565**] That decision prompted an unsuccessful interlocutory appeal by Ms. Sanders, A-1-CA-35864, followed by a petition for writ of certiorari by Ms. Sanders, filed on September 22, 2016. *Albuquerque J. v. Bd. of Educ. of Albuquerque Pub. Sch.*, 2019-NMCA-012, ¶ 1, 436 P.3d 1. After an ultimately, unsuccessful appeal by Ms. Sanders, the District Court continued further proceedings requiring Ms. Sanders to answer some of the discovery questions sought by Plaintiffs. [**RP at 666-697**]

After further discovery, six years after Defendants had filed for summary judgment, the District Court granted Defendants' Motion for Partial Summary Judgment and denied Plaintiffs' request for an *in camera* review in two separate orders dated January 6, 2021. **[RP at 1207-1224]** The Court found that Defendants properly withheld the Padilla Report as subject to attorney-client privilege and was further exempt from disclosure under IPRA as a matter of opinion within Mr. Brooks' personnel file pursuant to Section 14-2-1(C) of IPRA. **[RP at 1209-1224]**

The Court of Appeals[1] upheld the rulings of the trial court that the Padilla Report was exempt from disclosure under IPRA as both a matter of opinion within a personnel file and an attorney-client privileged communication. NMSA 1978, § 14-2-1(C) and NMSA 1978, § 14-2-1 (G). *Albuquerque J. v. Bd. of Educ. of Albuquerque Pub. Sch.*, No. A-1-CA-40172, 2024 WL 4661678, at *4 (N.M. Ct. App. Oct. 30, 2024), cert. granted sub nom., 2025-NMCERT-002, ¶ 13, 564 P.3d 874. Specifically, the court of appeals held that

> The Padilla Report in its entirety, including factual information set forth therein, is sufficiently related to Padilla's professional legal services that it is excepted from inspection under IPRA on the basis of attorney-client privilege . . . [t]he Padilla Report's inclusion of separate factual and legal sections is alone insufficient to strip the former of its

[1] After briefing and oral argument in the Court of Appeals, that court issued an Order of Limited Remand, directing the district court to conduct an *in camera* review of the Padilla Report. Order of Limited Remand in Case No. A-1-CA-40172 (May 3, 2024). The *in camera* review did not change the district court's previous ruling; that the entirety of Padilla Report was exempted from disclosure pursuant to NMSA 1978, Sections 14-2-1(C) and (G).

> privileged status or otherwise divorce it from the whole, which was a report produced as a part of professional legal services provided by Padilla to the Board.

Id. ¶¶ 13-14 (internal citations omitted). The Court of Appeals rejected the application of NMSA 1978, Section 14-2-9(A), which requires a records custodian to separate exempt from non-exempt information. In doing so, the court of appeals rejected Petitioners holding that 14-2-9(A) does not "impose on public bodies a general obligation to sift through a document that has been successfully established as privileged in its entirety, and parse what may be properly withheld. The definition of "public records" as provided by the Act and the nature of the attorney-client privilege itself contract such an interpretation." *Id.* ¶ 16.

Noting that the Petitioners argument with regard to Section 14-2-1(C) was essentially the same as their argument with regard to 14-2-1(G) (the attorney-client privilege exception), the court rejected Petitioners' argument that the Padilla Report, or portions of it, were improperly withheld as a matter of opinion. *Id.* ¶¶ 25-31. The court of appeals again held that the entirety of the Padilla Report was exempted from disclosure pursuant to 14-2-1(C) and that 14-2-9(A) did not require or permit a records custodian to parse through the Report to separate exempt and non-exempt material.

Sitting by designation, Retired Justice Bosson concurred in part but dissented specifically to the majority's holding that the Padilla Report was exempted from disclosure in its entirety. *Id.* ¶¶ 73-101.

II. STANDARD OF REVIEW

This Court reviews an order granting summary judgment *de novo*. *Jones v. City of Albuquerque Police Dept*, 2020-NMSC-013, ¶ 16, 470 P.3d 252. Also, application of IPRA privileges are questions of law reviewed de novo. *Cox v. N.M. Dept of Pub. Safety, 2010-NMCA-096*, ¶ 4, 148 N.M. 934, 242 P.3d 501.

III. ARGUMENT

Both the trial court and the court of appeals had more than enough evidence before them (respectively) to determine that the Padilla Report was attorney-client privileged communication and also that it was exempt from disclosure pursuant to IPRA, Section 14-2-1(C). This is especially true when both courts reviewed the Padilla Report *in camera*. Despite Petitioners' claim that Respondents did not "meet [their] burden" of establishing that the Padilla Report was protected and/or exempt from disclosure pursuant to attorney-client privilege and NMSA Section 1978, Sections 14-2-1(C) and 14-2-1(G), Defendant's clearly met their burden, both pursuant to *S.F. Pac. Gold Corp. v. United Nuclear Corp.*, 2007-NMCA-133, ¶ 14, 143 N.M. 215, 175 P.3d 309 and *Cox v. N.M. Dep't of Pub. Safety*, 2010-NMCA-

096, 148 N.M. 934, 242 P.3d 501. Consequently, both the trial court and the court of appeals correctly determined that the Padilla Report was properly withheld.

a. In Accordance with this Court's Jurisprudence on the "Matters of Opinion" and "Attorney-Client Privilege" IPRA Exceptions, the Lower Courts Correctly Withheld the Padilla Report in its Entirety.

NMSA 1978, Section 14-2-1 (A) (3) states, "Every person has a right to inspect public records of this state except: . . . (3) letters or memoranda that are matters of opinion in personnel files or students' cumulative files." And the New Mexico Court of Appeals has made it clear that disciplinary and evaluative employee information is protected from public inspection. *Cox v. New Mexico Dept. of Public Safety*, 148 NM 934, 939 (2010) ("[W]e conclude that the Legislature intended to exempt from disclosure "matters of opinion" that constitute personnel information of the type generally found in a personnel file, i.e., information regarding the employer/employee relationship such as internal evaluations; disciplinary reports or documentation; promotion, demotion, or termination information; or performance assessments.") This Court should begin the IPRA exception analysis recognizing the clear protections IPRA affords employer/employee information, particularly regarding discipline and evaluation data.

Petitioners dedicate three pages of their brief writing about IPRA generally, and how its purpose is transparency. (See BIC at 12-14) Respondents do not dispute that point generally, but such grants are not without significant limitation. The

legislature has already expressly provided IPRA exceptions exempting "matters of opinion" and "attorney-client privileged information." *See* NMSA 1978, § 14-2-1(C) and NMSA 1978, § 14-2-1 (G). Moreover, this Court has further provided explicit guidance on the legislative intent with regard to these specific IPRA exemptions.

In *State ex rel. Newsome v. Alarid*, 1977-NMSC-076, ¶ 12, 90 N.M. 790, 568 P.2d 1236 (overruled on other grounds), the New Mexico Supreme Court expressly held that "letters of reference, documents concerning infractions and disciplinary action, personnel evaluations, opinions as to whether a person would be rehired or as to why an applicant was not hired, and other matters of opinion" may be justifiably withheld from public inspection, and are exempt under the Inspection of Public Records Act. *Id.* In that case, a student newspaper reporter sought access to the personnel files of non-academic staff at the University of New Mexico. *Id.*, ¶ 1. In reversing a lower court order allowing the reporter unlimited access to the personnel files, the Court relied heavily on the specific exception in the statute for "letters of reference concerning employment," and "letters or memorandums which are matters of opinion in personnel files or students' cumulative files." *Id.*, ¶ 12; *see* §14-2-1(C). The court noted that by including these specific exceptions:

> [t]he Legislature quite obviously anticipated that there would be critical material and adverse opinions in letters of reference, in documents concerning disciplinary action and promotions and in various other opinion information that might have no foundation in fact but, if released for public view, could be seriously damaging to an employee.

Id., ¶ 12. Based on this reasoning, the Court held that documents regarding infractions and disciplinary actions are exempt from the disclosure requirements of the public records law. *Id.* To the extent that records of investigations contain documents regarding infractions, disciplinary actions, and opinion regarding the employee that could be false, according to *Newsome*, they are exempt from disclosure.

In *State ex rel. Barber v. McCotter*, 1987-NMSC-046, ¶¶ 1-5, 106 N.M. 1, 1 (1987), a newspaper filed an IPRA request to obtain the personnel records of five employees of a state correctional facility who were placed on administrative leave and later fired for drug use. In the alternative, the request sought access to all the personnel files at the facility, in order to ascertain the names of the five employees. *Id.*, ¶ 5. The Supreme Court upheld the right of the correctional facility to deny access to the records. *Id.*, ¶ 12. In so doing, the Court first noted *Newsome*'s holding that documents concerning disciplinary actions and infractions are exempt under the Inspection of Public Records Act. *Id.*, ¶ 9. While recognizing the "public interest in access to information," and acknowledging that ordinarily the names of public employees are public record, the Court stated that it "must preserve the privilege of personnel proceedings." *Id.*, *citing Newsome*, *supra*. The Court further reasoned that since it was already widely known that five employees had been dismissed on drug charges, the only way to protect the privacy of the disciplinary proceedings as

to those five individuals was to deny access to the personnel files. *Id.*, ¶ 12. Thus, the Court further supported a public entity's right to deny IPRA inspection of documents that could surrender associated personnel rights of the employee. *Id.* Importantly, that holding demonstrated that even seemingly tangential or indirect data that might surrender personnel data should be protected by the IPRA exception.

The Court of Appeals opinions regarding the "matters of opinion" and "attorney-client privilege" exception are consistent with this Court's guidance. In *Cox v. New Mexico Dep't of Pub. Safety*, 2010-NMCA-096, 148 N.M. 934, the New Mexico Court of Appeals considered the request of Plaintiff Cox to inspect and copy citizen complaints filed against a specifically named Department of Public Safety law enforcement officer. The *Cox* court held that the citizen complaints were subject to disclosure because they are distinguishable from "DPS's investigatory processes, disciplinary actions, or internal memoranda that might contain DPS opinions (in its capacity as the officer's employer)", which are not subject to disclosure. *Id.*, ¶¶ 23-24, 27. The Court reasoned "that the Legislature intended to exempt from disclosure 'matters of opinion' that constitute personnel information of the type generally found in a personnel file, i.e., information regarding the employer/employee relationship such as **internal evaluations**; **disciplinary reports or documentation**; promotion, demotion, or termination information; or performance assessments." *Id.* (emphasis added). Thus, to the extent that investigation records contain information regarding

infractions or matters of opinion in the context of the employer/employee relationship, those specific documents are exempt from disclosure.

Similarly, in *Tawater v. Board of Commissioners for County of Sandoval*, 2023-NMCA-052, 534 P.3d 272, the Court of Appeals held that two email communications label "Attorney-Client Privileged" and which summarized conversations between the public information officer and attorneys for the county were properly withheld. *Id.* ¶ 22. Dismissing the argument that discussions and concerns about the privileged legal advice, which were contained within the same emails, should be disclosed, the Court of Appeals reasoned "it would be difficult to reveal this material without also revealing the substance of the privileged legal advice summarized in these emails." To begin, our review indicates that it would be difficult to reveal this material without also revealing the substance of the privileged legal advice summarized in these emails." *Tawater v. Bd. of Commissioners for Cnty. of Sandoval*, 2023-NMCA-052, ¶ 23, 534 P.3d 272; *see also Henry v. N.M. Livestock Bd.*, 2023-NMCA-082, ¶¶ 17, 21, 538 P.3d 102 ("[C]ommunications themselves . . . even communications concerning facts, are privileged so long as they were made in confidence for the purpose of obtaining legal advice or legal service."). In *Henry*, the court of appeals held specifically that communications with public agency line staff can sometimes be subject to attorney client privilege if the communication is made in furtherance of the provision of legal services. *Id.* ¶ 36.

The court also held that the withholding of a report prepared by the county's attorney was appropriate pursuant to NMSA 1978, Section 14-2-1(C) despite it containing "factual" detailed accounts of interviews with Board employees. *Id.* ¶ 39.

Curiously, Petitioners cite *Republican Party of New Mexico v. New Mexico Taxation and Revenue Dept.*, 2012-NMSC-026, ¶ 16 to support their position that the Padilla Report should be exempted. (BIC at page 14) However, Petitioners acknowledge *Republican Party* held "that courts interpreting IPRA must restrict their analysis to whether a record may be withheld because of a specific exception contained within IPRA, statutory or regulatory exceptions, or privileges adopted by this Court or grounded in the constitution." (BIC at 14) Respondents agree to the extent that NMSA 1978, Sections 14-2-1(C) and (G) *are specific exceptions contained within IPRA*. Said another way, the holdings of *Republican Party* do not conflict with what was done in this case by the district court or the Court of Appeals.

b. Petitioners Proposed Remedy – Seemingly to Overrule *Newsome* and *Cox* – is Not Warranted and Would Provide an Unworkable Standard for Record Custodians Throughout the State.

The IPRA "personnel matters" exception clearly permitted APS to deny inspection of the Padilla Report. As established by deposition testimony in this case, the APS Board had become aware of allegations of possible misconduct and disciplinary concern regarding Mr. Brooks. The Padilla Report was an *internal evaluation* of those allegations and potential disciplinary matters. The Board's

refusal to release that document squares precisely with the reasoning in *Newsome* and *Cox* because the Board sought to protect the employee from allegations and opinions which "could be seriously damaging to the employee."

This Court must reject Petitioners' argument that one must intuit the legislative intent behind Section 14-2-1(C) and, in doing so, overrule *Newsome* and *Cox*. (BIC at pg. 21-32) IPRA has undergone significant amendment since first enacted. The Legislature has had ample opportunity to amend Section 14-2-1(C) since *State ex rel. Newsome v. Alarid*, 1977-NMSC-076, ¶ 12, 90 N.M. 790, 568 P.2d 1236 was decided almost fifty (50) years ago and *Cox v. New Mexico Dep't of Pub. Safety*, 2010-NMCA-096, 148 N.M. 934, was decided over a decade ago. Despite every opportunity to amend Section 14-2-1(C), the Legislature has made no significant changes to the exception since its enactment. Consequently, the Legislature's intent can be gleaned from its decision not to amend Section 14-2-1(C) either to clarify some other intent, or to adjust to the decisions of this Court and the Court of Appeals.

Moreover, any argument that the Legislature has not changed Section 14-2-1 because it wanted it to remain narrow should be rejected. First, the Legislature knows how to amend laws. *See State v. Ramirez*, 2018-NMSC-003, ¶ 53, 409 P.3d 902, 917 ("[T]he Legislature knows how to include language in a statute if it so desires."). With respect to IPRA, the Legislature recently amended Section 14-2-1

extensively. NMSA 1978, Section 14-2-1(J) was added, which includes specific guidance on what information technology system information is exempt and which is not. *See* Section 14-2-1(J) ("[T]his subsection shall not be used to restrict requests for . . ."). The Legislature is aware that Section 14-2-1(C) has been cited to exempt critical material and adverse opinions in letters of reference, in documents concerning disciplinary action and promotions and in various other opinion information, personnel records, information regarding the employer/employee relationship such as internal evaluations; disciplinary reports or documentation, promotion, demotion, or termination information, or performance assessments. To date, the Legislature has taken no action whatsoever to limit the types of "matters of opinion" that can be withheld under this exception.

Like the inference that can be drawn from Section 14-2-1(J), Legislative intent can be inferred from the plain language of NMSA 1978, Section 14-2-1(D), which states "portions of law enforcement records." (Emphasis added). In 2023, NMSA 1978, Section 14-2-1.2 was enacted and specifically states "[l]aw enforcement records are public records, except as provided by law and this subsection, and provided that the presence of nonpublic information *may be redacted* from a written record or digitally obscured in a visual or audio record." *Id.* (emphasis added) The statute goes on to provide exactly what type of information in a law enforcement record must be redacted before producing those records in response to an IPRA

request. See NMSA 1978 §14-2-1.2. Had the legislature intended a records custodian to separate facts from legal analysis or opinions in an exempt "personnel matters" document, it would have made that clear. *New Mexico Found. for Open Gov't v. Corizon Health*, 2020-NMCA-014, ¶ 15, 460 P.3d 43 ("In discerning the Legislature's intent, we are aided by classic canons of statutory construction, and we look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended."); *see also Key v. Chrysler Motors Corp.*, 1996-NMSC-038 ¶ 14, 121 N.M. 764 ("In ascertaining legislative intent, we must read all provisions of a statute together."). Again, the Legislature knew what it was doing when it amended 14-2-1(D), enacted 14-2-1.2, and chose not to amend Section 14-2-1(C).

Despite the lack of action by the Legislature, Petitioners are asking this Court to overrule *Newsome, Barber, Cox, Santa Fe Reporter Newspaper, Hall, Henry, and Gauman*. Specifically, with respect to *Henry v. Gauman*, 2023-NMCA-078, ¶ 18, 536 P.3d 498, 504, Petitioners are asking this Court to hold "that when a letter or memoranda in a personnel file contains some opinion material and some non-opinion material, a records custodian should redact the opinion material and allow inspection of the remaining material." (BIC at 31) Prior to *Gauman*, New Mexico's appellate courts had never expressly addressed the question of separating "factual" material from "opinion material." None of the seminal IPRA cases rejecting

inspection under the personnel exception required partial inspection or that redacted portions be provided, again sustaining the notion that IPRA does not provide for the type of remedy Petitioners are seeking. While Petitioners argue that the caselaw supports their position that facts can be separated from legal analysis in internal investigations, they cite no New Mexico appellate cases to support their argument.

However, the question was directly before the Court of Appeals in *Gauman*. The plaintiff in *Gauman* asked the court of appeals the same question Petitioners now ask of this Court; to hold that Sections 14-2-1(C) and 14-2-9(A) require state subdivisions and agencies to separate "matters of fact" from "matters of opinion" and produce the matters of fact for inspection. However, *Henry v. Gauman*, 2023-NMCA-078, ¶ 18, 536 P.3d 498, 504, *cert. denied,* 2023-NMCERT-010, ¶ 18, 547 P.3d 102, specifically rejected use of that statutory section to require redacting privileged and unprivileged material from a document. In the decision, the court of appeals rejected plaintiff's argument and this Court denied Certiorari, declining the invitation to overturn the court of appeals' holding. In holding that the board in *Gauman* was not required by either subsection to separate facts from opinion, the court of appeals reasoned that Legislature intended to exempt the entire "letter or memorandum" if being withheld pursuant to Section 14-2-1(C). *Id.* ¶ 20 (alterations omitted). The court went on to explain that there are limits to 14-2-1(C)'s reach, noting that

> An agency may not shield documents that are not exempt from disclosure by attaching them to an exempt disciplinary report or by placing them in a disciplinary file. Just as this Court has held that a document cannot be shielded from disclosure by placing it in a personnel file, attaching a nonexempt document to a disciplinary report or placing it in a disciplinary file does not shield the document from disclosure under IPRA. *In camera* inspection may be required if an agency attempts to shield documents without adequately identifying their content or without identifying nonexempt attachments.

Id. ¶ 23.

In doing so, the court of appeals provided a reasonable, balanced approach to determining whether the document as a whole is exempt pursuant to 14-2-1(C). It noted that *in camera* reviews may be necessary to determine whether an agency was attempting to shield documents inappropriately. *Id.* Here, over objections by Respondents that an *in camera* review was unnecessary, the court of appeals ordered the district court to undertake an *in camera* review and then conducted its own *in camera* review. *Op.* ¶ 15. Such a holding would seem to alleviate Justice Bosson's concerns that withholding the Padilla Report would "pave[] the way for public entities to shield any undesirable information from the public eye." *Id.* ¶ 73. Again, in this matter, the trial court and court of appeals reviewed the Padilla Report, and the trial court, as well as a majority of the court of appeals panel determined that the entirety of the Report was exempted from disclosure by Section 14-2-1(C) (and (G)).

Not only would a decision in favor of disclosure completely disrupt the process of reviewing IPRA documents, but it would also nullify almost fifty (50) of

court guidance on Section 14-2-1 with clear indications from the Legislature that it did not desire to disrupt the appellate courts' interpretations thus far. Such a request is a drastic measure and one that disrupts the uniformity, certainty and stability in the law. Instead, *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fostering reliance on judicial decisions, and contributing to the actual and perceived integrity of the judicial process." *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011, ¶ 7, 133 N.M. 661, 68 P.3d 901 (internal quotation marks and citation omitted) This Court must consider the implication if significant changes are made to IPRA "matters of opinion" case law with no express of implied action by the Legislature that it had any intention of amending it.

c. Neither Section 14-2-9(A) nor New Mexico Case Law Requires a Records Custodian to Parse Through Records that Qualify for an Exemption in Their Entirety.

Petitioners further urge this Court to hold that a records custodian, pursuant to NMSA 1978, Section 14-2-9, has the authority and a statutory duty to differentiate between "factual" and "opinion" information within a document marked attorney-client privileged, or otherwise exempted as a "personnel matter" under IPRA. (BIC at pg. 31) Petitioners essentially argue that a public entity's records custodian is responsible for reviewing a privileged document and determining if and how a document can be parsed into exempt and non-exempt content. Petitioners offer no

authority to support their position; rather, they only argue that the Legislature did not "decree" that Section 14-2-9(A) only applies to separate documents.

First, Petitioners misrepresent the Court of Appeals' holding in *Gauman*. *Gauman* noted that if an exemption applies to a document as a whole, such as a matter of opinion in a disciplinary record , or report as was the case in *Gauman* and as is the case here, withheld pursuant to 14-2-1(C), then the **entire report** is exempted. The Court of Appeals then compared that to Section 14-2-1(D) (and now 14-2-1.2) which explicitly provides that only portions of law enforcement records are exempt. *Gauman*, ¶ 20.[2] Second, as just discussed, the legislature's plain language does not support Petitioners'' position. *See* NMSA 1978, §§ 14-2-1(C)-(D), 14-2-1.2. Third , although many records custodians are very experienced in responding to IPRA requests, Plaintiffs' proposal would put a tremendous amount

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[2] Contrary to Petitioners' argument, in *Gauman*, the Court of Appeals cited *Jones* to differentiate 14-2-1(C) from 14-2-1(D). Petitioners misconstrue the use of *Jones* as an example by stating that *Gauman* stands for the proposition that 14-2-9(A) only applies to 14-2-1(D). There are other examples of when Section 14-2-9(A) is applicable. *See* Section 14-2-1.1 "Protected personal identifier information contained in public records may be redacted by a public body before inspection or copying of a record. The presence of protected personal identifier information on a record does not exempt the record from inspection."); *see also Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2010-NMCA-080, 148 N.M. 877, 242 P.3d 444, cert. granted, 2010-NMCERT-008, 148 N.M. 942, 242 P.3d 1288 (holding that the district court did not err in redacting individual tax identification numbers, names, drivers' license numbers, and addresses or driver's license recipients where state and federal law prohibited the disclosure). Petitioners' argument summarized above is not a holding or result of *Gauman,* and Petitioners' extreme argument that Gauman held that 14-2-9(A) only applies to 14-2-1(D)must be rejected by this Court.

of strain on records custodians, most of whom are not lawyers. Additionally, it would open up a Pandora's box of potential lawsuits against the public entity for improperly disclosing privileged information and/or waiving privileges not held by the public entity. Such an absurd and unreasonable result was not contemplated by the legislature when it simply instructs records custodians not to produce "letters or memoranda" – not "portions" – falling under the "personal matters" IPRA exception. *New Mexico Found. for Open Gov't v. Corizon Health, 2020-NMCA-014, ¶ 15, 460 P.3d 43* (noting that a statute must be read in a way that would not lead to absurdity, unreasonableness, or contradiction). Thus, Respondents ask this Court to reject Petitioners' unreasonable request and hold that records custodians will not be required to review a document to determine exempt and non-exempt for purposes of withholding a document pursuant to Section 14-2-1(C).

Moreover, 14-2-1(C) exists largely to protect the employee from any personal or damaging information being released to the public unnecessarily. Such a public discussion can do real harm, damaging an individual's reputation or career. In a state where school employees often work at more than one school district over the course of their careers, releasing highly personal or confidential materials can have devastating personal consequences for an employee. For that reason, New Mexico law is replete with protections that indicate an intention to keep the details of such negotiations and attempts at resolution confidential.

Furthermore, this Court need not be concerned that the public will have no access to the final outcomes. IPRA makes all final settlement documents public record. NMSA 1978, §§ 14-2-1, 14-2-6(G). The settlement agreement itself and the expenditures in this case were available as soon as the Board voted on the Brooks resignation agreement. The Petitioners' position ignores the multitude of policy reasons that permit, and indeed, encourage employer/employee exchanges, and it also overlooks the employer's due process obligations to protect employee confidential information in such a scenario. In this regard as well, the Petitioners' position is unworkable and unfair to public employers who are trying to deal equitably with their employees.

d. The Intent of APS and Attorney Padilla, as well as the Surrounding Evidence, Demonstrate that the Attorney Client Privilege Applies to the Entirety of the Padilla Report.

"A client may claim attorney-client privilege to refuse to disclose confidential communications between certain persons if the communications were made for the purpose of acquiring legal advice for the client." *S.F. Pac. Gold Corp. v. United Nuclear Corp.*, 2007-NMCA-133, ¶ 13, 143 N.M. 215; *see also* Rule 11-503 NMRA. "[T]he [attorney-client] privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. *The first step in the resolution of any legal problem is ascertaining the factual background and sifting*

through the facts with an eye to the legally relevant." *Upjohn Co. v. United States,* 449 U.S. 383, 390–91 (emphasis added). *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328, 335 (Tex. App. 2000) (holding that the Texas equivalent of IPRA excepted disclosure of an entire investigative report, including facts, given that the outside attorney was hired to distill her factual investigation into a legal analysis); *United States v. Davis*, 131 F.R.D. 391, 398 (S.D.N.Y.1990) ("[T]he attorney-client privilege encompasses factual investigations by counsel.").

In *Harlandale,* a school board hired an outside attorney to conduct an investigation into a grievance filed by an employee accused of sexual harassment. *Harlandale*, 25 S.W.3d 328, 330. The retention letter provided that the school board wanted the attorney to investigate all allegations made by the complainant and, after the fact-finding investigation, to prepare a legal analysis of the matters investigated. *Id.* After the report was completed, a local newspaper submitted to the school board a request for the report prepared by the outside attorney. *Id.* Maintaining that the report was privileged, the school board nonetheless sought the opinion of the attorney general. *Id.* The attorney general opined that the factual portions of the report should be handed over. *Id.* The school board then filed a suit for declaratory judgment. *Id.* The trial court agreed with the attorney general, noting that there were two distinct parts of the report; one factual, the other legal opinion. *Id.* at 330-31. The school board appealed. *Id.* at 331. In reversing the trial court, the Texas Court

of Appeals noted that the attorney was primarily hired to give legal advice; that the board hired an attorney precisely to analyze the facts gathered during the investigation; and both parties intended for the report to remain confidential. *Id.* at 333. Thus, the court granted the plaintiff's request for declaratory relief. *Id.* at 335. *See also In re Allen*, 106 F.3d 582, 602-05 (4th Cir. 1997) ("The relevant question is not whether Allen was retained to conduct an investigation, but rather, whether this investigation was "related to the rendition of legal services.").

"The elements of attorney-client privilege, as reflected in Rule 11–503(B), are (1) a communication (2) made in confidence (3) between privileged persons (4) for the purpose of facilitating the attorney's rendition of professional legal services to the client." *S.F. Pac. Gold Corp. v. United Nuclear Corp.*, 2007-NMCA-133, ¶ 14, 143 N.M. 215, 221, 175 P.3d 309, 315. Rule 11-503 NMRA does not provide a process for parsing out facts from legal analysis. To the contrary, the rationale for confidentiality of attorney client communications, both verbal and written, is articulated clearly in Committee Commentary 4 of Rule 16-106 NMRA 2015.

> A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation…This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.

This privilege protects "communication" between a lawyer and her client. Rule 11-503 NMRA. Said another way, if the communication is between a lawyer and client, the entire communication garners that protection. Petitioners ask this Court to put the responsibility of separating the communication squarely on the shoulders of records custodians – many if not most of whom are not attorneys – to decide what words, phrases, characterizations, excluded facts and included data does not constitute "a communication" between the lawyer and client. Thus, while they try mightily not to portray it as such, Petitioners are attempting to puncture holes in privileged attorney-client communication, or to parse what portion of communication is or is not privileged. Ultimately, their position risks eviscerating the protections that make effective legal representation possible.

Petitioners argue that APS's purpose for hiring Ms. Padilla was "not clearly legal." (BIC 34) However, Petitioners fail to provide a citation for their phrase in quotations. Instead, in this matter, all material undisputed facts point to the existence of attorney client privileged communication that is not subject to inspection. Both Attorney Padilla and President Maestas assert that they believed and expected that all of their communications were attorney-client privileged. **[RP 90, 94]** The letter establishing the relationship sought "attorney services" and requested the creation of a report. **[RP 91]** Hence, before the Report was generated, there was a "meeting of the minds and expectations" as to the privileged nature of the relationship, the

communications regarding the matter, and the report that Padilla was asked to produce. *Id.*

Furthermore, the expectation of both parties was that the requested report, once created, also would be privileged attorney-client communication. **[RP 863-70, 871-882]** Attorney Padilla testified during her deposition that she believed her report was privileged, and she treated it as such. ***Id.*; *see also* [RP 90-94]** President Maestas similarly expected the document was privileged. ***Id***. Thus, there is no reasonable dispute that the indicia demonstrating the creation of an attorney-client privilege are present in the creation of the Padilla Report.

In their Brief, Petitioners are focused on the wrong question for determining whether the attorney-client privilege applies. The question is not whether the Padilla Report only contains legal analysis, but rather whether Attorney Padilla was hired to give legal advice to the client. *Rule 11-503(4) NMRA*; *see also In re Allen*, 106 F.3d 582, 603 (4th Cir. 1997).

Naturally, any investigation of a matter, whether it be an investigation into allegations that very likely will result in litigation or into a matter that already has resulted in a suit, will have facts that have to be analyzed in the context of applicable law. *Gingrich v. Sandia Corp.*, 2007-NMCA-101, ¶ 10, 142 N.M. 359. Petitioners seem to be advancing the proposition that the fact sections of any attorney's legal analysis – presumably, also including theirs – is discoverable. Such a proposition

ignores the basic tenet that *the communication* as a whole is protected by the privilege. Rule 11-503(4). In this regard, the Court simply should reject the argument that a document clearly conceived and created pursuant to an attorney-client relationship is obtainable through IPRA.

Furthermore, Petitioners' position was expressly rejected by the preeminent case on the matter, *Upjohn Co. v. United States*, 449 U.S. 383 (1981). In *Upjohn*, the Supreme Court of the United States recognized that "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." *Upjohn Co.*, 449 U.S. 383, 390–91 (emphasis added). Petitioners ask this Court to separate the facts from the analysis. While it may appear tempting to follow such a siren song, case law makes it clear that even fact sections of reports contain attorney mental impressions in that the attorney has decided which facts are relevant enough to put in the report, which ones are not, and how the facts, as presented, are going to impact her ultimate recommendation to her client. To that end, even the vocabulary choices, verbs, and phrases may convey meaning and thus are part of the "communication" between attorney and client.

Similarly, both *Nat'l Farmers Union Prop. and Cas. Co. v. Dist Ct.*, 718 P.2d 1044 (Colo. 1986), and *Koumoulis v. Indep. Fin. Mktg. Group, Inc.*, 295 F.R.D. 28 (E.D.N.Y. 2013) are easily distinguishable from the facts of this case. In *Nat'l Farmers*, the court recognized that in insurance claim cases, investigations are a substantial part of an insurance company's business and "must be presumed to be . . . part of the normal business activity of the company." *Nat'l Farmers Union Prop. & Cas. Co.*, 718 P.2d 1044, 1047. Thus, the reports and witness statements in that case were not protected by the attorney client privilege because they were categorized as ordinary business records. *Id.* This case, of course, is not an insurance matter. Petitioners try to assert that the Padilla Report can be characterized as an ordinary business record and that the board can be said to have "human resources" duties. However, investigations such as the one Attorney Padilla undertook are not routinely done, and Petitioners cite to no evidence in the record to support their speculative arguments that the board acts as "human resources" for the district. In fact, this is demonstrably false. NMSA 1978, § 22-5-4 and NMSA 1978 § 22-5-14 outline the statutory powers of a board and superintendent. A superintendent has sole authority to hire/fire employees. The Board is demonstrably not in charge of HR for a district. Further, there is no evidence that attorney-led investigations for APS are commonplace. The only operative fact here is that Attorney Padilla was

asked to come into the case for a specific reason and give her legal advice on the matter. Thus, this case cannot fairly be analogized to *Nat'l Farmers*.

The same can be said for *Koumoulis*, where the court determined that the outside counsel hired to investigate a discrimination claim was essentially an arm of the human resources department of the company when she had an ongoing supervisory role in directing investigations, instructing HR team members, and drafting scripts for interviews with the plaintiff in that case. *Koumoulis*, 295 F.R.D. at 44-45. Again, the court determined that such advice could properly be characterized as business-related advice. *Id.*

Here, there was no on-going role, no supervisory role, no engagement with APS's Human Resources group, no script drafting. *Id.* On the contrary, from the undisputed material facts, this was an outside attorney hired to review information, analyze risk, and convey that assessment of risk to her client. By offering these anomalous cases from other jurisdictions, Petitioners ask that the peculiar and very fact-driven exceptions to privilege in those situations swallow up a cornerstone principle: That attorneys and clients should be able to rely on privilege in their communication. It is an extremely high bar for the Petitioners to clear, and they have failed to do so in this matter.

The D.C. Circuit case cited by Petitioners also is inapposite. *Duran v. Andrew*, No. 09-730 (HHK/AK), 2010 WL 1418344, at *3 (D.D.C. Apr. 5, 2010). In *Duran*,

an attorney third party, whose firm prepared an investigative report for one of its clients was subpoenaed to testify at a deposition and was asked to conduct an investigation "concerning allegations of sexual harassment and other wrongdoing by employees." *Id.* The facts of this case are easily distinguishable. First, the investigation in *Duran* was commissioned by a non-party to the litigation. Second, portions of the contents of the report had previously been released by the plaintiff in that case. Third, the defendant in that case convinced the judge that the contents of the report were essential to defending the case. Here, the Padilla Report was commissioned by party APS. Second, although the Petitioners have claimed that the privileged was waived, the substantive contents of the report have never been revealed and waiver is specifically rejected. Third, despite the contents of the report being confidential, the settlement agreement between the parties is public so Petitioners know what ultimately came from the Padilla Report.[3]

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[3] The other cases cited by Petitioners are equally distinguishable. *Lightbourne v. McCollum*, 969 So. 2d 326, 333 (Fla. 2007) (noting that the memorandums at issue were not prepared in the rendition of legal services with "he first memorandum, dated . . . relat[ing] generally to the lethal injection procedures and describes the process by which the chemicals were administered at that time. The second memorandum . . . relate[d] . . . to an inmate's level of consciousness during an execution."); *Payton v. New Jersey Tpk. Auth.*, 148 N.J. 524, 537, 691 A.2d 321, 327 (1997) (noting that the report at issue in that case had been put directly into issue by the party for which the report it was created when that party affirmatively argued that its remedial measures in the case were effective); *First Aviation Servs., Inc. v. Gulf Ins. Co.*, 205 F.R.D. 65, 69 (D. Conn. 2001) (noting that there was evidence in the record establishing that the attorney hired in that case was functioning as an insurance claims handler, and the decisions he made were primarily business

Petitioners argue that Ms. Padilla was hired for a factual investigation. (BIC 38) However, the fact of the matter is she was hired to give her legal opinion on what the accusations against Superintendent Brooks meant for APS. **[RP 91]** While Ms. Padilla interviewed people identified by Board President Maestas, she did not relay those interviews verbatim to Ms. Maestas or to the Board. She instead used the information in her own analysis, making independent judgments about what was relevant to her assessment for her client. She also did not supply the Board with recorded statements of those individuals' statements. Instead, she was hired specifically to review the matter and to provide her analysis of the information she found and its legal implications to her client. **[*Id.*]** Taken to its logical extreme, Petitioners' position would mean that attorneys could never interview witnesses in reviewing a matter for a client for fear that any new facts uncovered, analyzed and shared as part of their analysis to a client might not be privileged.

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decisions). The other two cases cited by Petitioners, a federal trial court insurance case and an Alabama criminal appeals court case, similarly do not offer any persuasive guidance on the issue. See Brnadon Steven Motors, LLC v. Landmark Am. Ins. Co., 2020 WL 5889434, at *4 (D. Kan. Oct. 5, 2020) (insurance matter); *see also Ex parte Birmingham News Co., Inc.*, 624 So. 2d 1117, 1130 (Ala. Crim. App. 1993) (criminal case in which there was no objection to the use of an allegedly attorney-client privileged communication that had initially been protected).

Petitioners further argue that the only evidence to support Respondents' position are subjective beliefs of Ms. Maestas and Ms. Padilla. (BIC 38) Petitioners seem to imply that the sworn testimony of President Maestas and Attorney Padilla, who both went on to give deposition testimony under oath, are inadequate as evidence of intent. **[RP at 90-94, 863-882]** Petitioners fail to acknowledge that the district court and court of appeals saw and gave persuasive weight to the letter establishing legal services stating that APS sought "attorney services." **[RP 91]**

Petitioners argue that not all of the Padilla Report is privileged because the entire report is not entirely confidential communications. However, the entirety of the Padilla Report is protected because it is a confidential communication between APS and the attorney it retained for legal advice. Rule 11–503(B) NMRA. It should go without saying that prior to analyzing any legal issue, it is necessary to apply the facts to the applicable law. It is impossible to separate the summary of facts created by Ms. Padilla from an analysis portion of the Report. There is no evidence in the record that establishes that the factual portion of the Record is a verbatim recitation of the interviews Ms. Padilla conducted. Ms. Padilla had to choose what communications were important to her analysis and presumably included only those facts in her overall analysis of exposure to APS. Objectively, two different courts have reviewed the Padilla Report and determined that the entirety of the Report is protected. Taken to its logical extreme, Petitioners' position would mean that

attorneys could never interview witnesses in reviewing a matter for a client for fear that any new facts uncovered, analyzed and shared as part of their analysis to a client might not be privileged.

Contrary to Plaintiffs' argument that Attorney Padilla was acting primarily as an investigator, not an attorney, the undisputed material facts establish this was an outside attorney hired to review information, analyze risk, and convey that assessment of risk to her client. **[RP 90-94, 863-882]** Petitioners ask that the peculiar and very fact-driven exceptions to privilege in those situations swallow up a cornerstone principle under New Mexico law: That attorneys and clients should be able to rely on privilege in their communication. It is an extremely high bar for the Petitioners to pierce that privilege, and they have failed to do so in this matter. At the very least, the implications for privilege urged here by the Petitioners are concerning, not just for this case, but for the protection of attorney-client communications in every case.[4]

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[4] Petitioners spend time writing about *State of N.M. ex rel State Highway Commission v. Steinkraus*, 1966-NMSC-134, ¶ 5. Although the district court considered the case, the case had to do with an expert report, which is not the issue in this case. If this Court were to determine that the district court improperly relied on *Steinkraus*, the district court still reached the correct conclusion. *Westland Dev. Co. v. Romero*, 1994 -NMCA- 021, ¶ 2, 117 N.M. 292 ("An appellate court will affirm a lower court's ruling if right for any reason."); *Shultz v. Ramey*, 1958 -NMSC- 099, ¶5, 64 N.M. 366 ("Review is for correction of an erroneous result, rather than merely to approve or disapprove the grounds on which it is based."). The court of appeals citation to *Henry*, 2023-NMCA-082, ¶18 is appropriate since it simply states a principle found elsewhere in New Mexico rules and case law. Rule 11-503(B)(3)

Additionally, Petitioners' argument that attorney-client privilege should not apply or should be applied differently to public institutions must be rejected. (BIC at 38). Such a rule is unworkable and unconstitutional. Everyone deserves a defense, including public entities. Petitioners' allegation that APS is hiding important information from the public is false. Most everything requested by Petitioners was produced. Moreover, the settlement reached by APS and Winston Brooks was made public after several layers of statutory and state-level administrative approvals that were all public. Further, Petitioners argument the APS Board of Education could be hiding things within the Padilla Report or that the Board intentionally hired an attorney to shield information must be rejected. There is absolutely no evidence from which one can infer any truth to this allegation.

e. There is No Evidence in the Record to Support the Idea or Theory that Ms. Padilla was Hired to Prepare a Report to Improperly Shield Information from Disclosure.

Petitioners rely on Justice Bosson's dissent to make the argument that the attorney-client privilege should be pierced because public entities may use the attorney-client privilege to insulate information from public disclosure. (BIC 39); *see also Op.* ¶ 86. To the extent Petitioners argue that the APS Board is not fairly sharing information with the public regarding the settlement, or that the public has

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NMRA; *S.F. Pac. Gold Corp. v. United Nuclear Corp.*, 2007-NMCA-133, ¶ 14, 143 N.M. 215, 221, 175 P.3d 309, 315.

no recourse, the Court should reject such spurious suggestions out of hand. There is absolutely no evidence in the record to support that APS had an improper purpose in hiring Ms. Padilla or that it intended to improperly shield information. They have not argued it; it is not an issue in this case; and there certainly is no testimony or documentary evidence of any improper purpose. Such arguments are rank speculation and "conspiracy" gibberish and should be treated by this Court as such.

As an initial matter, public employees such as former Superintendent Brooks have the right to confidentiality in their evaluative assessments with their employers. NMSA 1978, § 14-2-1(C). Therefore, the Court must start with the basic rejection of the notion that Petitioners are entitled to every piece of data that informed the Board's assessment. Second, Petitioners ask this Court for a brightline rule, which would mean that communications to attorneys hired "primarily" as factual investigators would never be protected. That is a significant break with existing precedent. It also could fairly apply to a majority of attorney-client relationships, which often start out as fact gathering missions. Are Petitioners suggesting that anything learned by an attorney during the "fact finding" phase of any representation that they include in a report is not protected?[5] Completely upending the attorney

[5] Of course, any information discovered by a lawyer is not deemed unobtainable. Such facts found in first instance by an attorney could of course be discovered by other outside investigators, or otherwise could be independently discovered through subsequent discovery. In this instance, Petitioners spent over ten years investigating, litigating, conducting discovery, seeking to pierce privileges and force depositions.

client privilege in this State, or, even worse, creating a different attorney client privilege that only applies to schools, State subdivisions or agencies in the context of IPRA – is a rash and extreme position that would place New Mexico alone in the universe of attorney client communication decisions and far afield from the stated intent of the legislature.

The Court does not need to pierce a valid attorney-client privilege communication to vindicate the public interest. The public interest does not mean that Petitioners should have unfettered, unchecked, reckless access that destroys basic protections for employees and for clients seeking attorney advice. Here, the public interest was vindicated or could be vindicated in several ways. First, there was public accountability because the vote to accept the Brooks settlement was placed on the APS board's public agenda, advertised, and the public had the opportunity to speak to the board prior to the vote at a public meeting. Second, each board member publicly voted on the record as to whether to accept the settlement. Third, Petitioners then could view Superintendent Brooks' contract and the settlement signed by the District. That allowed for a clear view of what was owed and whether the settlement amount bore a rational relationship to the contract.

In doing so, they spent hundreds of thousands of dollars in attorney time (as investigators and analysts) on the public dime to ferret out any independently existing facts. It cannot be said in any way that whatever facts that were not subject to a privilege were not laid bare to all forms of inquiry.

Fourth, both the New Mexico Public Education Secretary and the Second Judicial District Court independently reviewed and held hearings to ensure that the settlement was aligned with the public interest, before BOTH ruled to accept it. Anyone, including the Petitioners, could have voiced a request at those hearings for the settlement to be rejected. Finally, to the degree that there was any outcry that the settlement was unfair to the public, any APS board member voting for it could have been ousted from office. In short, those board members are selected precisely to assess risks, review confidential data, and work with attorneys precisely to make such decisions *for the public*. Petitioners' position that the public is entitled to the granular --- the confidential, the sensitive, to the privileged --- is beyond the pale. This Court should not be hoodwinked into thinking that this matter was not fully assessed, reviewed and accountable at multiple levels. Impermissibly expanding the range of IPRA past any semblance of its legislative intent is not in the public interest. Gutting the attorney client privilege is not in the public interest. Common sense and the vast weight of New Mexico authority resoundingly rejects Petitioners' requests here, and this Court should do so as well.

IV. REQUEST FOR RELIEF

For all of the aforementioned reasons, Respondents request that this Court uphold the trial court's and Court of Appeals' determinations that both the attorney client privilege and that the "personnel matters" exception to IPRA barred

Petitioners' access to the Padilla Report and that Section 14-2-9(A) does not require records custodians to separate privileged and non-privileged communications and/or exempt material from non-exempt material when then entirety of the document qualifies for the exemption. Respondents also request that they be permitted costs and fees pursuant to Rule 12-403 NMRA for any costs/fees associated with this appeal, and for such other and further relief as the Court deems just.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 7th day of May 2025, a copy of the foregoing pleading was electronically filed through the Odyssey File & Serve System which caused the following parties or counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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RULE 12-502 NMRA STATEMENT OF COMPLIANCE

I HEREBY CERTIFY that this Cross-Petitioner's Answer was prepared in compliance with Rule 12-305 NMRA using proportionally-spaced, 14-point, Time New Roman typeface, contains 9,403 words, in the Microsoft Word 2013 word-processing program and that the body of the Brief in Chief - in compliance with the limitations of Rule 12-318(F)(2) NMRA - consists of 38 pages.

By: /s/ *Jessica R. Terrazas*
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