IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

ALBUQUERQUE JOURNAL and KOB-TV, LLC, Plaintiffs-Petitioners, vs. 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/Respondents.	No. S-1-SC-40671

PLAINTIFFS-PETITIONERS ALBUQUERQUE JOURNAL AND KOB-TV, LLC'S BRIEF IN CHIEF

PEIFER, HANSON, MULLINS & BAKER, P.A.

Charles R. Peifer
Gregory P. Williams
Matthew E. Jackson

20 First Plaza, N.W. Suite 725
Albuquerque, New Mexico 87102
(505) 247-4800

Attorneys for Plaintiffs-Petitioners Albuquerque Journal and KOB-TV, LLC

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Plaintiffs/Petitioners *Albuquerque Journal* and KOB-TV, LLC ("Petitioners"), submit the following brief in chief in accordance with the Court's order granting their petition for writ of certiorari.

SUMMARY OF PROCEEDINGS

I. NATURE OF CASE

This case will decide whether, under the Inspection of Public Records Act ("IPRA"), a public body may conceal from the public the facts set forth in the body's written investigative report of alleged wrongdoing by a high-ranking public official. It arises in the context of an attempt by the state's largest school district to conceal from the public the entire contents of a report leading to the termination of its school superintendent and the payment of $350,000 in public funds as part of a "settlement agreement," under which both the school district and superintendent agreed contractually to maintain silence regarding the termination. This case asks the Court to decide: 1) whether a public body can withhold from the public the entire contents of an investigative report, including facts surrounding misconduct, as "letters or memoranda that are matters of opinion in personnel files" under a statutory exemption to IPRA; 2) whether a public body can commission a report of a factual investigation regarding alleged governmental misconduct and conceal it under the attorney-client privilege by hiring an attorney to conduct the investigation; and 3) whether the public body established here that the primary

purpose of the investigation was to obtain legal advice, not to conduct a factual investigation, and if so, whether the factual portions of the report could not be separated from legal advice.

After Defendants/Respondents Albuquerque Public Schools Board of Education and its records custodian, Rigo Chavez ("APS"), refused to produce its investigative report regarding APS Superintendent Winston Brooks in response to Petitioners' IPRA requests, the district court ruled that APS could conceal the entire report, and a divided Court of Appeals affirmed. This Court granted certiorari.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

The district court granted partial summary judgment to APS (and denied Petitioners' cross-motion) regarding an investigative report prepared for APS by attorney Agnes Padilla regarding complaints made against Mr. Brooks. **[5 RP 1209-24]** The district court concluded that even though the report contained factual, non-opinion material **[5 RP 1215]**, it was exempt from IPRA in its entirety pursuant to NMSA 1978, Section 14-2-1(C) (2019), which exempts "letters or memoranda that are matters of opinion in personnel files."[1] The district court also

[1] When this action began, this exemption was codified as NMSA 1978, Section 14-2-1(A)(3) (2011). It was recodified as Section 14-2-1(C) in 2019, without substantive modification. The exemption is referred to as Section 14-2-1(C) throughout.

concluded that the entire report fell within the scope of the attorney-client privilege and thus was exempt from IPRA pursuant to NMSA 1978, Section 14-2-1(A)(8) (2011), which exempts records "as otherwise provided by law."[2]

Petitioners appealed to the Court of Appeals, arguing that APS had not met its burdens of proving either that the entire report was exempt from IPRA under the "matters of opinion" exemption or the attorney-client privilege. Petitioners also appealed the denial of their request for fees and costs related to their request for the report, contingent on successfully appealing the district court's decision.[3]

In a divided decision, the Court of Appeals affirmed. Two members of the panel felt constrained to do so by that court's own recent IPRA decisions. The majority held that the entire report was exempt from IPRA under the "matters of opinion" exemption and the attorney-client privilege, including the separate factual sections of the report. Op. ¶¶ 9-31. The dissenting retired Justice would have

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[2] Section 14-2-1(A)(8) has been recodified as NMSA 1978, Section 14-2-1(L) (2023); *see also* NMSA 1978, Section 14-2-1(G) (2023) (now expressly including attorney-client privilege as exemption).

[3] Petitioners also appealed the district court's failure to conduct an *in camera* inspection of the report before entering partial summary judgment. The Court of Appeals issued a limited remand to the district court for the purpose of conducting that inspection and supplementing its prior order, if necessary. The district court conducted the inspection and issued a Supplemental Order on Remand on May 22, 2024. *See* Op. ¶ 4 n.1.

found the factual portions of the report to be non-exempt, and particularly noted the negative ramifications of the majority opinion for government transparency:

> The majority opinion is, in my opinion, the first step on a path that ultimately provides public entities with the means to shield any information from public disclosure. The facts of this case provide a clear example of a public agency attempting to covertly disguise what could be described as a hush money payment using extensive public funds. This is an egregious example of the manipulation of IPRA's exceptions, but given the majority's resolution of these issues and the new principles it endorses, it will not be the last.

Op. ¶ 100 (Bosson, J., dissenting).

This Court granted certiorari.

III. SUMMARY OF RELEVANT FACTS

A. The Padilla Report

Defendant Board of Education of Albuquerque Public Schools is a seven-member, elected school board that governs the largest public school district in New Mexico, setting policy and approving the annual budget. The board also hires and supervises a superintendent, who oversees the operations of the district. APS hired Winston Brooks as superintendent of APS in July 2008. He received a salary of $250,000 and, pursuant to his contract, he was to remain superintendent until June 2016. **[6 RP 1492]**

Before July 16, 2014, several persons complained to APS Board President Analee Maestas about Mr. Brooks. **[3 RP 742]** Some of the complaints made

were against, or referenced, Mr. Brooks's wife, Ann Brooks, who was not an APS employee. **[3 RP 742]**

Around this time, the APS Board held a closed meeting to discuss Mr. Brooks. **[3 RP 743]** Two days later, Ms. Maestas, on behalf of APS, entered into an agreement with attorney Agnes Padilla to investigate issues related to Mr. Brooks. **[3 RP 743]** The agreement stated in part that Ms. Padilla would provide professional legal services to the Board. **[1 RP 91]** On the same day, Ms. Maestas told each APS Board member that her intention in obtaining the investigation was to "provide [the Board] with ***factual*** information" and because "we need to have ***hard facts***." **[3 RP 743]** (emphasis added). Ms. Maestas further stated that her purpose was to "clear Supt. Winston of these accusations once and for all." **[3 RP 743]**

Ms. Padilla subsequently delivered a written report to Ms. Maestas. Ms. Padilla testified that the report contained separate sections, including a factual report separate from her legal analysis. Ms. Padilla's report included names of persons who had made complaints regarding Mr. Brooks. **[3 RP 744]** APS has never disputed that the report contains factual, non-opinion material.[4]

[4] As the dissent below noted, "the report at issue contained mostly factual findings, not opinions." *See* Op. ¶ 76 (Bosson, J., dissenting).

After receiving the report, the Board again met in closed session to discuss Mr. Brooks. As reflected in notes taken by Mr. Brooks's attorney, Maureen Sanders, APS attorney Tony Ortiz told Ms. Sanders and Mr. Brooks that the report was 12 pages long and the purpose of the report was to see whether the Board had received any corroborating evidence regarding Mr. Brooks or his wife. **[3 RP 745]** Mr. Ortiz advised Ms. Sanders and Mr. Brooks that APS would like to work out an amicable resolution and exit plan for Mr. Brooks's employment. **[3 RP 745]**

On August 15, 2014, four days after the closed meeting, APS announced to the public that Mr. Brooks was resigning, and that APS was paying him $350,000. The same day, APS released a detailed, fully executed settlement agreement, which included a provision stating that the Padilla report would not be released to anyone, and another provision binding all parties to remain silent about the facts surrounding the agreement, specifically that a particular mutually drafted and brief public statement would be "the only public comment made by the Board, APS administration, Brooks, or Ann Brooks" regarding Mr. Brooks's termination. **[3 RP 745-46]** The settlement agreement resulted from negotiations between Mr. Brooks, Ms. Sanders, and Mr. Ortiz. **[3 RP 746]**

Petitioner *Albuquerque Journal* is a newspaper in circulation in New Mexico. Petitioner KOB-TV, LLC, is a television station broadcasting throughout the state. Both Petitioners are newsgathering organizations that report on the

conduct of public officials and employees, including activities of APS' administration, employees, and students. **[6 RP 1491-92]** Each Petitioner requested the Padilla report from APS pursuant to IPRA. APS denied both requests. **[3 RP 746].** Petitioners subsequently filed this lawsuit. **[1 RP 1-41]**

The parties filed cross-motions for partial summary judgment regarding the Padilla report. **[3 RP 73-111, 720-22, 739-811]** APS asserted that the report was wholly exempt from IPRA because it 1) constituted "letters or memoranda that are matters of opinion in a personnel file" under Section 14-2-1(C); 2) was subject in its entirety to the attorney-client privilege; and 3) constituted protected attorney work product. **[3 RP 73-111]** Petitioners argued that none of these exemptions applied, and that the entire report, and certainly the factual sections, were public. As to the "matters of opinion" exemption, Petitioners argued that the plain language of the exemption, and the policy of transparency underlying IPRA, required that only those portions of the report constituting "matters of opinion" were exempt. They noted a separate section of IPRA, NMSA 1978, Section 14-2-9(A) (1993), which requires that "[r]equested public records containing information that is exempt and nonexempt from disclosure shall be separated by the custodian prior to inspection, and the nonexempt information shall be made available for inspection." **[3 RP 739-811]** Regarding the attorney-client privilege, Petitioners argued that Ms. Padilla had acted primarily as an investigator rather

than an attorney, and so the privilege should apply only to her legal impressions and advice, not to the factual section of her report, especially in light of Section 14-2-9(A) and the public interest in access to the facts surrounding Mr. Brooks's conduct. Petitioners also argued that even if some or all of the report was attorney-client privileged or constituted work product, APS had waived these protections. **[3 RP 739-811]**

The district court granted APS partial summary judgment on the Padilla report (and denied Petitioners' cross-motion), finding that it was exempt in its entirety under the "matters of opinion" exemption, and was also exempt as attorney-client privileged material. **[6 RP 1209-24]** The district court did find that there existed genuine issues of material fact whether APS had waived the privilege in sharing its contents with Mr. Brooks and his attorney. **[5 RP 1217-19]** The district court rejected APS's claim that the report constituted attorney work product. **[5 RP 1219-22]**

Petitioners appealed the grant of partial summary judgment and denial of the cross-motion. The Court of Appeals affirmed, with the majority concluding that the report, in its entirety, was sufficiently related to Ms. Padilla's professional legal services to be exempt from IPRA on the basis of the attorney-client privilege. Op. ¶¶ 11-23. The court rejected the application of Section 14-2-9(A) to the report, holding that although "there may be circumstances in which portions

of a requested record are so divorced from professional legal services that a district court may properly deem such portions of the record unprotected," and that, in such cases, "redaction of any information that *is* protected by privilege may be appropriate," such circumstances were not present here. Op. ¶¶ 16-18.

As to the "matters of opinion" exemption, the Court of Appeals affirmed the district court's finding that the report was fully exempt from IPRA. *Id.* ¶¶ 25-31. In doing so, the majority indicated it was constrained by prior appellate decisions, primarily *Cox v. New Mexico Dept. of Pub. Safety*, 2010-NMCA-096, 148 N.M. 934, and *Henry v. Gauman*, 2023-NMCA-078 ("*Gauman*"). *Id.* ¶¶ 26-27. The court particularly noted a portion of *Gauman* which held that the "matters of opinion" exemption excepts entire documents that contain opinion information, not merely the opinion information in those documents. *Id.* ¶ 27.

Retired Justice Richard Bosson, sitting by designation, dissented, explaining that the covert actions at issue represented "the quintessential circumstance that IPRA is designed to reveal," *Id.* ¶ 76 (Bosson, J., dissenting), and expressing concern that the majority opinion "paves the way for public entities to shield *any* undesirable information from the public eye. This is directly contrary to the core tenets of IPRA—transparency and accountability—and threatens to effectively nullify an act that is vital to protecting the rights and interests of New Mexicans." *Id.* ¶ 73 (emphasis in original).

Justice Bosson also noted that Ms. Padilla was "hired first in an investigative capacity to apprise APS of the factual basis underlying a series of reputationally harmful allegations" and that "I am convinced that the primary purpose of the Padilla Report was not to provide legal advice, and therefore, is not protected by the attorney-client privilege." *Id.* ¶¶ 76, 79. The dissent further stated that "[t]he majority of the Padilla Report—the fact section—resembles a human resources investigation," and Ms. Padilla's involvement in the investigation "does not transform what would otherwise be human resources and business communications into legal communications." *Id.* ¶¶ 83, citing *Koumoulis v. Indep. Fin. Mktg. Group, Inc.*, 295 F.R.D. 28, 45 (E.D.N.Y. 2013). The dissent expressed the concern that the majority's position

> creates a dangerous new principle: a public entity seeking to insulate any information from public disclosure need only (1) hire an attorney to perform an action and/or communicate the resulting information; and (2) express their subjective beliefs that the attorney was acting in a legal capacity while doing so. Whether intentional or not, such is the natural result of the majority's opinion. As Plaintiffs' counsel warned, this provides a clear roadmap for keeping misconduct, and any other form of undesirable information, secret from the people of New Mexico.

Op. ¶¶ 85-86.

B. The Attorney Fee Award

After the partial summary judgment rulings by the district court, the case proceeded to trial on the remaining IPRA issues. Following trial, the court entered

findings of fact and conclusions of law, and, because it found that APS had violated IPRA in several ways, granted in part Petitioners' fee application. **[6 RP 1491-1520, 7 RP 1562-1728, 1788-98]** However, the court denied fees and costs arising solely out of legal services related to the Padilla report, including a mid-case appeal taken by Ms. Sanders, in the total amount of $157,152.97. **[8 RP 1839-41]**. Petitioners appealed that partial denial of fees and costs on the basis that the district court had erred in regard to the Padilla report. On appeal, the Court of Appeals, having affirmed the district court on that issue, declined to address the related fees and costs issue. Op. ¶ 31.

ARGUMENT

The Court of Appeals erred in affirming the district court's entry of partial summary judgment for APS as to the investigative report. APS did not meet its burden of demonstrating that the entire report, including the separate factual sections of the report, were "matters of opinion" under Section 14-2-1(C) and thus were exempt. Furthermore, APS did not meet its burden of showing that the full report was subject to the attorney-client privilege and that there were no non-privileged facts in the report that should have been segregated from other portions subject to the privilege. This Court should reverse the Court of Appeals, as well as the district court's entry of partial summary judgment for APS. Furthermore, because those rulings were in error, this Court should also reverse the district

court's subsequent ruling that Petitioners were not entitled to the portion of their attorney fees and costs that related solely to the report.

I. FACTUAL INFORMATION IN THE PADILLA REPORT IS NOT EXEMPTED EITHER BY THE "MATTERS OF OPINION" EXEMPTION OR BY THE ATTORNEY-CLIENT PRIVILEGE.

A. Standard of Review

The Court reviews de novo both the grant of partial summary judgment and the application of IPRA. *See Freeman v. Fairchild*, 2018-NMSC-023, ¶ 14 (summary judgment is reviewed de novo); *see also Romero v. Lovelace Health Sys., Inc.*, 2020-NMSC-001, ¶ 11 (review of applicable statutes is de novo).[5] As part of its review of the order, the Court should review the report *in camera*, as did the lower courts.

B. IPRA Must Be Interpreted to Carry Out the Legislature's Policy of Transparency in Government, and its Exemptions Must Be Construed Narrowly.

"Legislative intent is this Court's touchstone when interpreting a statute." *State v. Vest*, 2021-NMSC-020, ¶ 21. "We construe IPRA in light of its purpose and interpret it to mean what the Legislature intended it to mean and to accomplish the ends sought to be accomplished by it." *Jones v. City of Albuquerque Police*

[5] The order to be reviewed is the district court's original order, **[RP 1209-24]**, as modified by its Supplemental Order on Remand dated May 22, 2024, entered after the district court conducted an *in camera* review of the report. *See* A-1-CA-40172, Notice of District Court's Filing of Supplemental Order on Remand (June 4, 2024), Exhibit 1.

Dep't, 2020-NMSC-013, ¶ 17, citing *Faber v. King*, 2015-NMSC-015, ¶ 8. "Unlike many statutes, for which the Legislature has provided no express statement of intent, IPRA contains a clear declaration of the public policy the Legislature intended to further by enacting IPRA." *Britton v. Office of Attorney Gen.*, 2019-NMCA-002, ¶ 29. "As declared by our Legislature, the purpose of IPRA "is to ensure . . . that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees." *Jones*, 2020-NMSC-013, ¶ 18, citing NMSA 1978, Section 14-2-5 (1993). Moreover:

> It is the further intent of the legislature, and it is declared to be the public policy of this state, that to provide persons with such information is an essential function of a representative government and an integral part of the routine duties of public officers and employees.

Section 14-2-5. IPRA is intended to ensure that New Mexico public servants remain accountable to the people they serve. *San Juan Agric. Water Users*, 2011-NMSC-011, ¶ 16, 150 N.M. 64.

Each IPRA inquiry starts with the presumption that public policy favors the right of inspection, *Edenburn v. N.M. Dep't of Health*, 2013-NMCA-045, ¶ 17. If a public body claims that a public record is exempt from IPRA, "the burden [falls on the public body] to demonstrate that one of the IPRA exceptions from inspection covered the withheld records." *Jones*, 2020-NMSC-013, ¶ 49.

The Court has relied on the Legislature's statement of policy in interpreting IPRA's exemptions narrowly. Notably, in *Republican Party of New Mexico v. New Mexico Taxation & Revenue Dept.*, 2012-NMSC-026, ¶ 16, this Court 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. In doing so, the Court overruled prior cases, including *Newsome v. Alarid*, 1977-NMSC-076, 90 N.M. 790, that applied a "rule of reason" to each of the enumerated IPRA exemptions. *See Republican Party*, 2012-NMSC-026, ¶ 16 ("[C]ases applying the 'rule of reason' to all of the exceptions enumerated by the Legislature are overruled to the extent they conflict with this Opinion."). More recently, in *Jones*, the Court rejected a district court's interpretation of another IPRA exemption, NMSA 1978, Section 14-2-1(A)(4) (2011), that expanded the exemption beyond its plain language. *Jones*, 2020-NMSC-013, ¶ 38 ("the district court certainly did not apply the plain language of Section 14-2-1(A)(4)."); *id.* ¶ 1 ("Section 14-2-1(A)(4) does not create a blanket exception from inspection for law enforcement records relating to an ongoing criminal investigation").[6]

[6] That exemption has been recodified as NMSA 1978, Section 14-2-1(D) (2019).

C. The Lower Courts Erred in Determining that the Full Contents of the Report Are Exempt as "Matters of Opinion."

The courts below erred in concluding that the full contents of the Padilla report were exempt from IPRA under Section 14-2-1(C). The report undisputedly contained factual material that did not constitute matters of opinion. To the contrary, the undisputed facts were that the report contained factual information capable of being segregated from any protected opinions. The district court should either have granted partial summary judgment to Petitioners or found that there were genuine issues of material fact regarding the applicability of the exemption, and denied partial summary judgment to APS.

Both courts improperly interpreted Section 14-2-1(C) to exempt far more than matters of opinion. The district court relied primarily on *Cox*, 2010-NMCA-096, in concluding that the report "constitute[s] personnel information of the type generally found in a personnel file, i.e., information regarding the employer/employee relationship." **[5 RP 1223]** The court further ruled that, notwithstanding Section 14-2-9(A), "the caselaw indicates that an entire record falling within the confines of Section 14-2-1(C), is exempt from disclosure." **[5 RP 1224]**, citing *Newsome*, 1977-NMSC-076. The Court of Appeals, constrained by recent rulings interpreting this exemption, affirmed. These rulings were in error.

1. *The plain language of the exemption limits its scope to "matters of opinion."*

In interpreting the "matters of opinion" exemption, this Court must first look to its plain language. *Jones*, 2020-NMSC-013, ¶¶ 37-39 ("[t]he primary indicator of the Legislature's intent is the plain language of the statute" and the plain language rule applies to the interpretation of IPRA exemptions). A plain reading of the phrase "matters of opinion in personnel files" in Section 14-2-1(C), taken in the context of the express legislative policy of providing the greatest possible information to the public, shows the Legislature's intent to exempt only matters of opinion, not facts.[7] Any reading of the term "matters of opinion" to encompass non-opinion material contradicts IPRA's plain language.

The Legislature's enactment of Section 14-2-1(C) demonstrates that it specifically considered the issue of public access to employment records, and the restrictive language it chose reveals its intent to keep only a very limited subsection of these records from the public. Had the Legislature intended to exempt more than "matters of opinion," it could have enacted the exemption to include additional, non-opinion records, or it could have adopted the kind of

[7] Matters of opinion in a personnel file might include a hiring committee's subjective views of a job applicant's potential, a previous employer's appraisal of an applicant's strengths and weaknesses, a supervisor's assessment of a current employee's job performance, an employee's evaluation of his or her own work, etc.

general "personnel records" exemption of the type found in the federal Freedom of Information Act and in other states' public records laws.[8] It did not. Specifically, it did not enact an exemption covering all records related to employee discipline. *See State v. Trujillo*, 2009-NMSC-012, ¶ 11, 146 N.M. 14 ("[w]e will not read into a statute any words that are not there, particularly when the statute is complete and makes sense as written." (internal citation omitted). Notably, in the present case, to the extent that the report addresses complaints about Ann Brooks, the exemption does not apply at all, as Ms. Brooks was not an APS employee. **[3 RP 757]**

The interpretation of 14-2-1(C) to mean that only opinions are exempt, and that non-opinion material should be made public, had been the government's own interpretation of the language for more than 30 years. The Attorney General of New Mexico, designated by the Legislature to enforce IPRA (NMSA 1978, § 14-2-12(A)(1) (1993)), has issued IPRA Compliance Guides since the current version of IPRA was enacted in 1993, to provide guidance to records custodians and the

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[8] Had the Legislature intended the exemption to cover all personnel or disciplinary records, it could have so stated, other states have done. *See, e.g.*, Mo. Ann. Stat. § 610.021 (Missouri statute barring access to individually identifiable personnel records, performance ratings or records); Vt. Stat. Ann. tit. 1, § 317 (Vermont statute barring access to information in any files maintained to hire, evaluate, promote, or discipline any employee of a public agency). *See also* 5 U.S.C. § 552(b)(6) (section of Freedom of Information Act exempting "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy").

public regarding IPRA. In each guide issued before 2024, the Attorneys General, in every administration, had acknowledged and advised public agencies that in regard to the "matters of opinion" exemption, "[r]equested employment documents that contain significant factual information in addition to opinion should be provided with the opinion information blocked out or otherwise redacted."[9]

The narrow language of Section 14-2-1(C) provides guidance as to the Legislature's policy considerations. One straightforward, plain-language interpretation arising is that the Legislature recognized the need for candor in the employer/employee context. The public employment sector is best served if a public entity can forthrightly evaluate employees (and potential employees), and, similarly, if employees may be open with their own self-evaluations, without fear of those opinions becoming public. Interpreting Section 14-2-1(C) to cover such opinions reasonably balances the government's interest in encouraging candor in employee evaluations against transparency considerations. The dissent below

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[9] N.M. Dep't of Just., *N.M. Inspection of Public Records Act Compliance Guide* (8th ed. 2015), at 10; 7th ed. (2012) at 9; 6th ed. (2009), at 9; 5th ed. (2008), at 10; 4th ed. (2004), at 10; 3d ed. (2002), at 18; 2nd ed. (1993) at 6. Even before the 1993 IPRA amendments, the first edition of the Guide (issued in 1980, three years after *Newsome*), instructed, in regard to this exemption, that "factual information is not protected by virtue of being in files kept on employees," and because files may contain protected and non-protected information, custodians should purge files of confidential documents before granting inspection. That guide further noted that "the fact that a file may contain <u>some</u> information which may not be disclosed does not protect <u>all</u> the information from public disclosure." 1st ed. (1980), at 8 (emphasis in original).

identified another possible policy basis for the exception. Justice Bosson, discussing *Newsome*, noted that this Court, in interpreting the exemption, appeared to have "grounded its rationale in the principle that such documents could contain baseless and potentially harmful statements of opinion" regarding public employees. Op. ¶ 94 (Bosson, J., dissenting). In other words, the exemption could reasonably be based on a policy of protecting employees against unproven or false allegations.[10]

Each of these rationales are noted in the Attorney General Compliance Guides and both share one overriding characteristic: they both arise out of the plain language of the exemption. Any expansion of the "matters of opinion" exemption beyond its language would depart from the guidance provided by this Court in *Republican Party* and *Jones*, which require that a court must apply specific exceptions to IPRA, interpret them narrowly, and not construe them beyond their plain language.

2. Public policy also requires interpreting the exemption narrowly.

Should the Court choose to look beyond the plain language of Section 14-2-1(C), the Court should interpret the exemption narrowly for public policy reasons.

[10] Though not cited in the dissent, this interpretation is in accord with an analogous provision in New Mexico's public records law; namely, the "accused but not charged" protection for individuals under the Arrest Record Information Act. *See* NMSA 1978, § 29-10-4 (1993).

The policy of transparency underlying IPRA favors providing the public with access to facts determined in connection with the review of public employee conduct. There are few matters of governance that require public scrutiny more than charges of wrongful conduct against public officials, and the outcome of those charges. When a public employee is found to have engaged in misconduct, the public has the right to access records of such actions. The public interest is magnified when an employee is high-ranking and highly paid, such as a school superintendent.

Furthermore, records relating to facts of misconduct and discipline shine light on the ***employer's*** actions. The public has an interest in knowing how supervisors of public employees investigate and resolve accusations of wrongdoing against those employees. Indeed, supervisors may have a personal incentive to conceal wrongful conduct, as when those supervisors were complicit in the conduct or permitted it to happen. Records containing facts concerning an employee's misconduct are just as relevant to the employer's conduct as they are to the employee's, and the public interest is just as great.

This case illustrates what results if the "matters of opinion" exemption is not applied narrowly. The board overseeing the State's largest school district was permitted to investigate allegations of wrongdoing against the school district's highest-ranking employee, authorize and receive written documentation of that

wrongdoing, enter into a costly settlement agreement at the public's expense, and keep the entire process secret. APS deprived the public of any ability to oversee the board's conduct, know whether the settlement was appropriate, or even know what conduct of the superintendent or his wife justified terminating the superintendent's contract. Going forward, any school board, law enforcement agency, municipal government or state entity may label records of wrongdoing, and the investigation of such wrongdoing, as "disciplinary records" and keep them out of public view.

3. The lower courts relied upon wrongly-decided cases.

Because of recent Court of Appeals decisions straying from the plain language of the "matters of opinion" exemption, and this Court's guidelines for interpretation of IPRA exemptions in *Republican Party* and *Jones*, this Court should examine the exemption anew. This Court has considered it only twice (the last time in 1987), and in neither of those cases did it analyze the exemption in depth in regard to legislative intent. Furthermore, IPRA has changed since the Court last addressed the exemption, with the 1993 addition of Sections 14-2-5 (expressly stating IPRA's purpose and declaring public policy) and 14-2-9(A) (requiring separation of exempt and non-exempt information and production of non-exempt information), reflecting that the Legislature requires, even where a record contains some exempt material, that non-exempt material be made public.

Meanwhile, as set forth in Justice Bosson's dissent, opinions from the Court of Appeals have deviated from the plain language of the exemption and the legislative intent. This Court should take the opportunity to correct that history and construe the exemption in accordance with the legislative intent of transparency underlying IPRA.

The history of interpretation of Section 14-2-1(C) begins with *Newsome*. *Newsome* addressed a broad request for all non-exempt records from the personnel files of staff employees of the University of New Mexico. *Newsome*, 1977-NMSC-076, ¶ 1. This Court, in reviewing the lower courts' handling of this request, stated as follows:

> The 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***. We hold that letters of reference, documents concerning infractions and disciplinary action, personnel evaluations, opinions as to whether a person would be re-hired or as to why an applicant was not hired, and other ***matters of opinion*** are also exempt from disclosure under the statute.

Id. ¶ 12 (emphasis added).

Newsome's continued relevance, 48 years later, is dubious. First, the holding above was made "with limited analysis and without any citation to precedential or persuasive authority." Op. ¶ 92 (Bosson, J., dissenting). The Court's consideration of the scope of the exemption is limited to the single

paragraph cited above. Significantly, *Newsome* does not explain ***why*** it chose to interpret the exemption so far beyond its plain language. In particular, nothing in the term "matters of opinion in a personnel file" suggests that it encompasses the much broader category of all "documents concerning infractions and disciplinary action." The Court gives no indication that it considered whether including that category would significantly enlarge the universe of exempt public records, and whether doing so was consistent with legislative intent.

Furthermore, *Newsome* applied a "rule of reason" test to interpreting IPRA exemptions that this Court overruled in *Republican Party*, 2012-NMSC-026, ¶¶ 15-16.[11] In *Republican Party*, this Court made clear that policy decisions regarding access to public records rest with the Legislature, not the courts. *Id.* Thus, to the extent that *Newsome*'s policy-based interpretation of the "matters of opinion" exemption expanded its reach beyond the plain language, it is no longer reliable precedent.

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[11] *Newsome* based the "rule of reason" on the lack of specific delineation in the then-operative version of IPRA. *See Newsome*, 1977-NMSC-076, ¶ 33 ("Until the Legislature gives us direction in this regard, the courts will have to apply the 'rule of reason' to each claim for public inspection as they arise."). *Republican Party* abrogated the "rule of reason" in part because the Legislature had since provided that delineation. *See Republican Party*, 2012-NMSC-026, ¶¶ 15-16 (quoting *Newsome* and recognizing that "[t]he Legislature has since responded to the Court's request, obviating any need that existed for application of the 'rule of reason,' by enumerating specific exceptions to disclosure . . . .").

This Court addressed Section 14-2-1(C) only once more, in a brief discussion in *State ex rel. Barber v. McCotter*, 1987-NMSC-046, 106 N.M. 1, also decided before the 1993 amendments and the overruling of *Newsome's* "rule of reason." In *Barber*, after it was publicly revealed that five public employees had been terminated, a records requestor sought to review personnel records "for the express purpose of ascertaining the identity of the five." *Id.*, ¶ 5. The Court, acknowledging that the case presented unusual circumstances, *id.* ¶¶ 2, 11-12, barred access to the records. The Court relied on the language from *Newsome* quoted above, as well as what the Court referred to as a "privilege of personnel proceedings" arising in part out of a regulation promulgated by the State Personnel Board, apparently in response to *Newsome*. *Barber*, 1987-NMSC-046, ¶ 8. This decision is of questionable guidance to the present case.

First, the short discussion of Section 14-2-1(C) rests wholly upon *Newsome*, and, as set forth above, *Newsome*'s analysis of the exemption was incomplete, inconsistent with IPRA's plain language, and decided in the context of a "rule of reason" test that this Court has long since abandoned. Second, *Barber's* reliance on a "privilege of personnel proceedings," apparently also based on *Newsome*, was improper, because no such privilege exists in New Mexico. *Newsome*, in fact, did not expressly or even implicitly recognize such a privilege, and, since *Barber*, the Court has never again addressed such a privilege. Instead, as this Court held in

Republican Party, "[w]ithout proof of the Legislature's intent to the contrary, we do not construe IPRA to contemplate privileges not applicable elsewhere in our state government." 2012-NMSC-026, ¶ 13. The reliance on such a privilege by the Court in *Barber* renders suspect its precedential value.

Additionally, in 1993, after *Newsome* and *Barber*, the Legislature amended IPRA to include what is now Section 14-2-9(A), requiring separation of exempt and non-exempt information and production of non-exempt information. This amendment underscores the Legislature's post-*Newsome* command that only those records expressly exempted by IPRA should be shielded from public view.

Decades after *Newsome*, the Court of Appeals began veering even further from the plain statutory language. *Cox v. New Mexico Dept. of Pub. Safety*, 2010-NMCA-096, ¶¶ 2, 12, 20-29, considered whether citizen complaints against police officers were exempt under Section 14-2-1(C). The primary holding in *Cox* strongly reinforced the public policy of transparency underlying IPRA, and, in fact, that holding should have required production of the factual sections of the Padilla report in the present case. The court disagreed with the district court's findings that the citizen complaints were "matters of opinion" under Section 14-2-1(C). The court held that citizen complaints "are not the type of 'opinion' material the Legislature intended to exclude from disclosure," and that "it would be against IPRA's stated public policy to shield from public scrutiny as 'matters of opinion in

personnel files' the complaints of citizens who interact with police officers." *Id.* ¶¶ 27, 29. The court thus reversed the district court's ruling in favor of the law enforcement agency. *Id.* ¶ 32.

The factual sections of the Padilla report are analogous to the citizen complaints addressed in *Cox*. Ms. Maestas testified that the employee and third-party complaints against Mr. Brooks are a part of what is contained in the report. **[3 RP 744]** It is not relevant whether the report contains other, non-factual sections; what is relevant is that the factual sections are not matters of opinion and thus are not covered by the exemption. *Cox* specifically addressed this point:

> While citizen complaints may lead DPS to investigate the officer's job performance and could eventually result in disciplinary action, this fact by itself does not transmute such records into "matters of opinion in personnel files."

Cox, 2010-NMCA-096, ¶ 24.

However, *Cox* also contained dicta that has led subsequent courts to misapply Section 14-2-1(C), specifically the following:

> 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. ¶ 21. Records other than the citizen complaints were not at issue in the case; to the contrary, the court was very clear that other records were not at issue, noting

that the requests did not seek "information regarding DPS's investigatory processes, disciplinary actions, or internal memoranda that might contain DPS opinions (in its capacity as the officer's employer)." *Id.* ¶ 24. Nonetheless, this dicta in *Cox* went far beyond not only the plain language of the exemption, but also this Court's analysis in *Newsome*. The court extended the exemption beyond "matters of opinion" to include "information of the type generally found in a personnel file," including "disciplinary reports or documentation" and "promotion, demotion, or termination information." *Id.* ¶ 21. By incorporating the exemption to include "information of the type generally found in a personnel file," the dicta in *Cox*, if followed, would essentially create an exemption covering ***all*** employment records, notwithstanding the Legislature's plain limiting language. As Justice Bosson noted below, "[l]ike the *Newsome* Court, this Court in *Cox* reached this conclusion with no additional rationale or citation to persuasive authority." Op. ¶ 94 (Bosson, J., dissenting).

From there, the Court of Appeals, case by case, expanded the exemption beyond recognition. In 2022, the court applied the exemption categorically to bar inspection of police officers' disciplinary records, making no distinction between matters of opinion and factual information. *See generally Santa Fe Reporter Newspaper v. City of Santa Fe*, A-1-CA-39337, mem. op. (N.M. Ct. App. July 27,

2022) (nonprecedential).[12] In 2023, the court went further still, barring public access to even the ***names*** of police officers who had been disciplined (and the objective fact of such discipline), as well as a wide variety of other fact-based records, including ***all*** documents prepared in furtherance of internal affairs investigations. *See generally Hall v. City of Carlsbad*, 2023-NMCA-042.

The Court of Appeals further expanded the exemption in two cases against the state Livestock Board. First, in *Henry v. N.M. Livestock Board*, 2023-NMCA-082 ("*Henry*"), the court, citing *Hall*, held that an investigative report regarding misconduct by state employees was wholly exempt from IPRA, ruling that the exemption "applies to documents prepared as part of an employer's investigation of allegations of misconduct by an employee undertaken for the purpose of determining whether to take disciplinary action." *Id.* ¶ 40.

Shortly thereafter, in *Gauman*, the Court of Appeals went even further. In again considering a request for an investigative report, the Court first rejected the plaintiff's argument that the Board must produce factual information in a report containing both facts and opinion. The Court did so via a rationale not previously seen in any prior case interpreting Section 14-2-1(C), holding that "singling out" the phrase "matters of opinion" to require segregation of non-opinion material

[12] This Court denied certiorari in *Santa Fe Reporter*, *see* Order, S-1-SC-39529 (N.M. Sept. 23, 2022), not foreseeing that the Court of Appeals, as discussed below, would continue expanding the exemption.

would somehow vitiate the "letters or memoranda" portion of the exemption. *See Gauman*, 2023-NMCA-078, ¶¶ 12-14. This strained reading of the exemption is neither logical nor carries out the intent of the Legislature (notably, *Gauman* contains no reference to Section 14-2-5). *Gauman's* unnecessary attention to the ordering of the words in the exemption turns the focus of the interpretation from "matters of opinion" to "letters or memoranda," in a manner that belies the Legislature's clear intent on exempting only opinions. By the court's reasoning, the investigative report at issue, because it apparently contained *some* "letter or memoranda that are matters of opinion" was thus excluded from public inspection entirely. *See id.* ¶¶ 12-17.

The court then also expressly held that Section 14-2-9(A) did not independently require separating factual and opinion matter within a public record, despite the statute's plain language. The court held that Section 14-2-9(A) does not apply *at all* to Section 14-2-1(C):

> When an exemption applies to a document as a whole, as Section 14-2-1(C) does, Section 14-2-9(A) requires the custodian of records to separate exempt documents from nonexempt documents. When an exemption applies only to certain portions of a document or certain types of information within a document, then separating the exempt from nonexempt material demands redaction of the exempt material.

Gauman, 2023-NMCA-078, ¶ 20. This holding undermines the intent and application of Section 14-2-9(A). The Legislature did not limit Section 14-2-9(A)'s application only to certain types of public records or provide that it was

inapplicable to certain identified exemptions, such as Section 14-2-1(C). It did not decree, as *Gauman* held, that Section 14-2-9(A) applies only to separate ***documents***, and not to records that contain some exempt information and some non-exempt information. To the contrary, Section 14-2-9(A) states that "[r]equested public records containing ***information*** that is exempt and nonexempt from disclosure shall be separated by the custodian prior to inspection, and the nonexempt ***information*** shall be made available for inspection." Section 14-2-9(A) (emphasis added).[13] The *Gauman* court's apparent reliance on *Jones* was misplaced. *Jones*, in fact, stands for the proposition that exempt and non-exempt material within a single public record should be separated with the non-exempt material made available, consistent with Section 14-2-9(A). *Jones*, 2020-NMSC-013, ¶ 39. *Gauman* instead appeared to focus on the fact that the particular exemption interpreted in *Jones* (Section 14-2-1(D)) uses the term "portions of" in regard to separation of records. *Gauman*, 2023-NMCA-078, ¶ 20. This interpretation of *Jones* implies that Section 14-2-9(A) should apply ***only*** to Section 14-2-1(D) – the only exemption that includes the term "portions of" – which would

[13] Although the Court denied certiorari in both of the *Henry* cases, the petitions did not address the conflict between the decisions at issue and *Republican Party*. *See* Pet. in S-1-SC-39937 (May 30, 2023); Pet. in S-1-SC-40039 (July 31, 2023). The Court also did not have the benefit of the dissent's analysis that exists in this case.

be an implausible interpretation of the Legislature's intent in enacting Section 14-2-9(A) as a separate section, rather than including it only in Section 14-2-1(D).

It is understandable that the district court in the present case felt constrained to follow *Newsome* and *Cox*, and just as understandable that the Court of Appeals felt similarly constrained to follow these more recent cases.[14] But these decisions are obviously far afield from the Legislature's intent in enacting the exemption, as well as Section 14-2-9(A), and the results of these decisions are fundamentally inconsistent with the plain language of and policies underlying IPRA. The dissent below notes that the Court of Appeals' decisions have "done a significant disservice to the letter and purpose of IPRA." Op. ¶ 95 (Bosson, J., dissenting).

This Court should correct these decisions and declare what the law is. It should hold that Sections 14-2-1(C) and 14-2-9(A), read in conjunction and consistent with Section 14-2-5, require 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. It should further hold that IPRA requires this regardless of the nature of the non-opinion material; i.e., whether the record is one relating to

[14] The district court's order of partial summary judgment, entered on January 6, 2021, predated the *Santa Fe Reporter, Hall, Henry* and *Gauman* decisions from the Court of Appeals.

discipline, or hiring, or any other facet of public employment. The Court should expressly overrule those portions of *Newsome* and any other subsequent case that are inconsistent with this decision, thereby returning the proper scope of Section 14-2-1(C) to that which prevailed for 30 years under every one of the Attorneys General's Compliance Guides. And in the present case, the Court should apply this interpretation, after its own *in camera* review of the Padilla report, by ruling that APS violated IPRA by withholding the entire report, and order that the non-opinion sections be made available for public inspection.[15]

D. The Courts Below Erred in Determining that the Full Contents of the Report Are Privileged.

The courts below also erred in ruling that the entire Padilla report was attorney-client privileged. The undisputed record is that the report contains primarily factual information, and that the factual information is separated in the report from any legal advice. The record moreover supports Petitioners' contention that Ms. Padilla acted primarily as a factual investigator, not as a provider of legal advice, carrying out a task that would not be privileged if conducted by a non-attorney. Ms. Padilla's status as an attorney should not serve

[15] Even if this Court affirms as to the attorney-client privilege issue, it should still address the "matters of opinion" issue. Because the district court found that there is a fact issue on whether the attorney-client privilege was waived, the privilege issue is not dispositive. The district court would need to conduct a trial on the issue of waiver if this Court reverses the Court of Appeals on the "matters of opinion" issue, even if this Court holds that the investigative report is privileged.

to exempt otherwise public factual information. Requiring production of that factual information regarding allegations of misconduct by a public official protects the public interests underlying IPRA without restricting the right of the public entity to receive legal advice.[16]

1. Attorney-client privilege does not protect all communications from an attorney to a client.

The attorney-client privilege has strict limitations; it does not automatically protect every communication made by an attorney to his or her client. Rule 11-503 NMRA states that a "client has a privilege to refuse to disclose, and to prevent any other person from disclosing, a ***confidential communication made for the purpose of facilitating or providing professional legal services*** to that client between the client and the client's attorney." (emphasis added). By the express terms of Rule 11-503, communications which are not confidential, or which are not made for the purpose of facilitating or providing professional legal services to the client, are not privileged.

Furthermore, "the attorney-client privilege protects communications, not facts." *S.F. Pac. Gold Corp. v. United Nuclear Corp.*, 2007-NMCA-133, ¶ 13, 143 N.M. 215, citing *State ex rel. State Highway Comm'n v. Steinkraus*, 1966-NMSC-134, ¶ 4, 76 N.M. 617. Facts included in a communication by an attorney to a

[16] The standard of review regarding application of the attorney-client privilege is de novo. *See* Op. ¶ 10.

client are not privileged. *See, e.g.*, *Neuder v. Battelle Pac. Nw. Nat. Lab.*, 194 F.R.D. 289, 292 (D.D.C. 2000) ("when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged"); *United States v. Naegele*, 468 F. Supp. 2d 165, 169 (D.D.C. 2007) ("it also follows that when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged."); *Metzler Contracting Co. LLC v. Stephens*, 642 F. Supp. 2d 1192, 1204 (D. Haw. 2009) ("[t]here is no expectation of confidentiality with respect to facts and the attorney's subsequent use of the information does not automatically make it privileged information.").

And the privilege does not protect all communications. "The privilege protects communications generated or received by an attorney giving legal advice ***but does not protect communications derived from an attorney giving business advice or acting in some other capacity***." *S.F. Pac. Gold Corp.*, 2007-NMCA-133, ¶ 23 (emphasis added). This limitation recognizes that "[a]ttorneys for businesses also provide non-legal services, such as 'negotiating contracts, analyzing potential corporate transactions, ***and investigating potential claims.***'" *Bhandari v. Artesia Gen. Hosp.*, 2014-NMCA-018, ¶ 12 (emphasis added), citing Gregory C. Sisk & Pamela J. Abbate, *The Dynamic Attorney-Client Privilege*, 23 Geo. J. Legal Ethics 201, 210 (2010). "[A] court faced with a situation where the primary purpose of a communication is not clearly legal, or business advice should

conclude the communication is for a business purpose, unless evidence clearly shows that the legal purpose outweighs the business purpose." *Bhandari*, 2014-NMCA-018, ¶ 18. Indeed, the Court of Appeals' reliance on the *Restatement (Third) of the Law Governing Lawyers* § 69 (2000), *see* Op. ¶ 17, is misplaced in light of the Restatement's command that "[a] client must consult the lawyer for the purpose of obtaining legal assistance and not predominantly for another purpose" to render a communication privileged. *See id.* § 72 cmt. c.

2. When an attorney acts primarily as an investigator, the attorney's communication of the factual results of the investigation is not protected by the attorney-client privilege.

APS's purpose for hiring Ms. Padilla was "not clearly legal." *Id.* To the contrary, its purpose was non-legal. APS's Board hires and supervises a superintendent, who oversees the operations of the district. **[6 RP 1492]** As such, it has a responsibility to evaluate his job performance, including, when necessary, investigating allegations of wrongdoing against him. These human resources duties are part of the Board's routine operations. Furthermore, APS, as a public body, has a responsibility to its constituents – the students, teachers, and citizens of Albuquerque – to inform them of the facts uncovered by investigation. Under these circumstances, had the Board itself investigated the allegations regarding Mr. Brooks, or hired a non-attorney for that purpose, the facts discovered would

indisputably have been public record, especially considering that those facts were the basis for terminating the superintendent's contract and paying him $350,000.

Against this backdrop, the Court must consider whether APS may shield the results from the public via the attorney-client privilege by hiring an attorney to handle this routine aspect of its operations. In this context, courts have found that an attorney-investigator's report is generally not considered privileged and certainly not in its entirety. *See, e.g.*, *Nat'l Farmers Union Prop. and Cas. Co. v. Dist. Ct.*, 718 P.2d 1044, 1049-50 (Colo. 1986) (requiring production of factual information in memorandum prepared by outside counsel to investigate and inform client of result, even though memorandum also contained legal analysis); *see also* 24 Wright & Graham, *Federal Practice and Procedure: Evidence* § 5478 at 229 (1986) ("The better view would seem to be that investigative work is not 'professional legal services' and that no privilege applies where the lawyer's primary function is as a detective"). This is particularly true for human resources issues, which are part of the ordinary course of a business's activities and thus "not a privileged legal activity." *Koumoulis v. Indep. Fin. Mktg. Group, Inc.*, 295 F.R.D. 28, 45 (E.D.N.Y. 2013), *aff'd*, 29 F. Supp. 3d 142 (E.D.N.Y. 2014). As a result, when an attorney does human resources work, his or her "status as an attorney does not transform what would otherwise be human resources and business communications into legal communications." *Id.*

In a case factually similar to the present case, a court held that information obtained by an attorney as part of a sexual harassment investigation was not protected by the attorney-client privilege (or work product doctrine), distinguishing between the portion of the materials constituting "factual recitations of witness interviews" and "attorneys' thoughts and comments." The court ordered production of that information while permitting the attorney's conclusions and recommendations to be withheld. *Duran v. Andrew*, 2010 WL 1418344, *2 (D.D.C. Apr. 5, 2010).[17]

[17] *See also, e.g.*, *Lightbourne v. McCollum*, 969 So. 2d 326, 333 (Fla. 2007) (in public records case, memoranda prepared by attorney that conveyed specific factual information rather than mental impressions or litigation strategies was not attorney-client privileged); *Payton v. N.J. Tpk. Auth.*, 691 A.2d 321, 334 (N.J. 1997) ("when an attorney conducts an investigation not for the purpose of preparing for litigation or providing legal advice, but rather for some other purpose, the privilege is inapplicable"); *First Aviation Services, Inc. v. Gulf Ins. Co.*, 205 F.R.D. 65, 69 (D. Conn. 2001) (where attorney is retained to gather facts and is "acting in a capacity other than merely a legal one," communication of those facts to client is not privileged); *Brandon Steven Motors, LLC v. Landmark Am. Ins. Co.*, 2020 WL 5889434, at *4 (D. Kan. Oct. 5, 2020) (in insurance context, where counsel's activities consist of conducting interviews of various officers and employees for the purpose of determining the factual circumstances the attorneys are acting more in the role of claims investigators than legal counsel) (citation omitted); *Ex parte Birmingham News Co., Inc.*, 624 So. 2d 1117, 1130 (Ala. Crim. App. 1993) ("No attorney-client privilege attaches to investigative reports that are merely compilations or synopses of facts found by members or associates of law firm from reviewing documents and interviewing witnesses and that are merely factual findings that were not acquired from the client."

3. The facts gathered by Ms. Padilla and communicated to Ms. Maestas are not privileged.

The record reflects that APS's primary purpose in hiring Ms. Padilla was to gather factual information. The district court erred in determining that APS's principal basis for hiring Ms. Padilla was only to provide professional legal services, as APS offered insufficient evidence to support such a ruling. In fact, Ms. Maestas's public statement that she initiated Ms. Padilla's investigation because of a "need to have hard facts" to "clear Supt. Winston of these accusations once and for all" and to conduct a "factual investigation" **[5 RP 1213-14]** leave no doubt that the actual purpose of the assignment was to conduct a factual investigation.

The district court determined that any inference taken from Ms. Maestas' statements that she was not retaining Ms. Padilla for the provision of legal services would not be reasonable. *See id.* In doing so, the district court improperly weighed evidence. *See Ocana v. Am. Furniture Co.*, 2004-NMSC-018, ¶ 22, 135 N.M. 539 ("A court reviewing a summary judgment motion may not weigh the evidence or pass on the credibility of the witnesses."). Moreover, "[t]he only evidence seemingly relied upon by the district court, and subsequently the majority, in determining that the services provided by Padilla to APS were 'professional legal services' are the affidavits of Padilla and Maestas." Op. ¶ 85

(Bosson, J., dissenting). Those bare and conclusory assertions did not serve to demonstrate that the entire report was privileged.

Even if Ms. Maestas and Ms. Padilla intended confidentiality, their subjective intent was insufficient to confer confidentiality upon communications of facts from Ms. Padilla to Ms. Maestas. As noted in the dissent below, there is "no authority to support the proposition that an individual's belief that they are retaining an attorney to provide legal services is sufficient to establish that the attorney was, in fact, providing legal services" *Id.*, citing *Bujac v. Wilson*, 1921-NMSC-024, ¶ 7, 27 N.M. 112; *see also Metzler Contracting*, 642 F. Supp. 2d 1192 (D. Haw. 2009). And, as set forth above, because facts are not privileged, there can be no expectation of confidentiality with respect to facts communicated by attorney to client. *Id.* Moreover, Justice Bosson warned of the consequences of permitting a statement of the subjective views of an attorney and client to resolve the issue of whether the resulting communications are privileged.

> This assertion, paired with a substantial reliance on the client's and attorney's affidavits, creates a dangerous new principle: a public entity seeking to insulate any information from public disclosure need only (1) hire an attorney to perform an action and/or communicate the resulting information; and (2) express their subjective beliefs that the attorney was acting in a legal capacity while doing so.

Op. ¶ 86 (Bosson, J., dissenting).

Notwithstanding the conclusory assertions of Ms. Maestas and Ms. Padilla as to the purpose of Ms. Padilla's retention, the record – including the report itself

– viewed in the light most favorable to Petitioners, demonstrates that Ms. Padilla acted primarily as an investigator, not an attorney, and her work was principally a routine investigation of workplace complaints. APS cannot dispute that Ms. Maestas hired Ms. Padilla to gather factual information. Indeed, APS attorney Tony Ortiz told Mr. Brooks's attorney, Maureen Sanders, that the purpose of Ms. Padilla's investigation was to see whether any evidence corroborated any complaints regarding Mr. Brooks or his wife. **[3 RP 745]** APS has never asserted that the report contains only legal analysis or advice (and the district court made no such finding). Thus, the report almost certainly is not limited to "confidential communications," as opposed to facts, and facts are not protected by the privilege.

In concluding otherwise, **[5 RP 1215]**, the district court improperly interpreted *State of N.M. ex rel State Highway Commission v. Steinkraus*, 1966-NMSC-134, ¶ 5 ("*Steinkraus*"), which addressed whether an expert witness land appraiser, hired by one party, could later be called by the adverse party, or whether his appraisal was attorney-client privileged. *Id.* ¶ 2. The Supreme Court said it was not. *Id.* ¶ 7. The district court relied on dicta from *Steinkraus* stating that "[t]his is not a situation where counsel was required to divulge from his files memoranda, statements or other written reports detailing the substance of conversations between counsel and a potential witness." **[RP 1215];** *Steinkraus*, ¶ 5. The district court apparently interpreted these dicta to mean that when an

attorney gains factual information from a witness, that factual information is subject to the attorney-client privilege. **[RP 1215]**. This misreads *Steinkraus*, as the Court did not address whether facts gathered by an attorney as a part of an investigation on behalf of a client are privileged. And *Hickman v. Taylor*, 329 U.S. 495, 508 (1947), cited in the dicta in *Steinkraus*, relates to attorney work product protection, not the attorney-client privilege, and in fact states that this protection "does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation."[18]

The Court of Appeals did not explicitly address or adopt the district court's reliance on *Steinkraus*, choosing to instead cite *Henry*, 2023-NMCA-082, ¶ 18, for the principle that "communications concerning facts are privileged so long as they were made in confidence for the purpose of obtaining legal advice or legal services." Op. ¶ 13. *Henry*, however, is distinguishable. The communications in *Henry* were between two attorneys representing the same client. 2023-NMCA-082, ¶¶ 6, 16. They were not, as in the present case, communications in which an attorney, acting primarily as an investigator, relayed facts from that investigation to the client. The Court of Appeals gave undue importance to the use of the term "the

[18] The district court similarly misapplied *Upjohn Co. v. United States*, 449 U.S. 383 (1981). That case is relevant in that it holds that the attorney-client privilege does not protect facts. *Id.* at 395. Moreover, unlike the present case, *Upjohn* did not involve a situation where an attorney acted at least in part as a fact investigator, rather than provide legal advice or analysis.

document" in *Henry*, apparently to create or recognize a guideline that if any purpose of a document communicated between an attorney and client is providing legal services, the entire document is privileged. Op. ¶ 14. If that was the Court of Appeals' intention – either in *Henry* or in the present case – it misstates the law of privilege in New Mexico. The proper inquiry, as set forth above is whether the *primary* purpose of a communication is to provide legal services. *Bhandari*, 2014-NMCA-018, ¶ 18. As discussed above and as set forth by Justice Bosson, the primary purpose of the communication here was fact-gathering.

Additionally, interpreting the privilege as the Court of Appeals did ignores Section 14-2-9(A), which requires that records containing information that is exempt and nonexempt from disclosure shall be separated with the nonexempt information being produced. Where a communication from attorney to a government client can easily be divided between factual information and legal advice, in the context of an attorney acting primarily as a factual investigator, Section 14-2-9(A) requires that the factual information be separated and made available for inspection. Any other interpretation of the attorney-client privilege renders Section 14-2-9(A) a nullity.

Notably, the Court of Appeals itself stops short of adopting a firm rule that any document setting forth a communication from attorney to client is always privileged if it relates in some manner to professional services. In fact, the

majority conceded that "there may be circumstances in which portions of a requested record are so divorced from professional legal services that a district court may properly deem such portions of the record unprotected." Op. ¶ 14. Justice Bosson found such circumstances here, as his review of the Padilla report demonstrated that a majority of the report consisted of facts, and should properly be considered non-privileged. Op. ¶¶ 82-83 (Bosson, J., dissenting). This Court should conduct its own review of the report, and reach the same conclusion.

4. Public policy supports a narrow interpretation of the attorney-client privilege in the context of IPRA.

The rulings below are contrary not only to established law regarding the limited scope of the attorney-client privilege; they create a dismaying roadmap for public entities to hide important information from the public. Any public entity faced with allegations of serious misconduct against a public official, may, under the district court's reasoning, hire an attorney to conduct a factual investigation and thus cloak any facts about official misconduct inside attorney-client privilege. The concealment is complete notwithstanding the gravity of misconduct or seniority of the employee. And the concealment covers all details of investigations into wrongful conduct, allowing persons in positions of authority to conduct shoddy or incomplete investigations, either out of carelessness or to intentionally conceal those persons' complicity in or disregard for the wrongful conduct. This Court

should clarify that neither IPRA nor the attorney-client privilege permit such a result.

The Court need not worry that finding that the factual portions of the Padilla report are non-privileged will cause any damage to the scope of the attorney-client privilege in other contexts. Such a finding would be entirely consistent with the findings of our appellate courts, and of courts in other jurisdictions, that the privilege is limited to confidential communications between clients and attorneys "made for the purpose of facilitating or providing professional legal services," *see* Rule 11-503, and that does not extend to communications of facts from attorneys to clients in limited circumstances such as these, where a client retains an attorney for primarily investigative and non-legal purposes.

Petitioners ask the Court to hold that the primary purpose of APS's hiring of Ms. Padilla was to conduct a factual investigation, and not to provide legal services. Thus, she was performing an investigative function that was part of the APS Board's normal activities in supervising its superintendent. The Court should hold that under New Mexico law, when an attorney acts primarily as a factual investigator, the facts gathered during that investigation and communicated to the attorney's client are not privileged. Under those circumstances, and considering the public interest in the facts gathered and the requirement that the Court apply IPRA exemptions narrowly, APS should have provided the factual portions of the

Padilla report for inspection, and violated IPRA by not doing so. The Court should reverse that portion of the district court's grant of partial summary judgment to APS based on privilege, and grant partial summary judgment on that issue in favor of Petitioners.

II. ANY REVERSAL OF THE DECISIONS BELOW SHOULD BE ACCOMPANIED BY REMAND OF THE ISSUE OF FEES AND COSTS.

Any remanding reversing the decision of the Court of Appeals should also include a remand to the courts below to consider Petitioners' request for fees and costs in both lower courts and in this Court for work related to the Padilla report.

SUMMARY OF RELIEF SOUGHT

Petitioners respectfully ask the Court to hold that the courts below erred in not requiring disclosure of the factual portions of the Padilla report. The Court should further rule that the district court necessarily erred in denying Petitioners' request for attorney fees and costs incurred in relation to that report.

In the alternative, the Court should rule that the genuine issues of material fact precluded summary judgment in APS's favor on the issue of the application of the "matters of opinion" exemption and the attorney-client privilege.

Under either alternative, the Court should find that the "matters of opinion" exemption applies only to actual matters of opinion contained in the Padilla report, and either itself identify such material or direct the district court to do so and to

require APS to produce such material in the report to Petitioners. The Court should additionally find that the attorney-client privilege applies only to that portion of the report constituting confidential communications made for the purpose of facilitating or providing professional legal services, and not to any segregable factual material in the report, and either itself identify the segregable factual material or direct the district court to do so and to require APS to produce all such material in the report Petitioners.

If the Court determines that any portion of the report is protected by the attorney-client privilege, it should instruct the district court to address the issue of waiver, based on the district court's prior determination that there are genuine issues of material fact whether APS waived any privilege in the Padilla report by revealing contents of the report.

Respectfully submitted,

PEIFER, HANSON, MULLINS & BAKER, P.A.

By: */s/ Gregory P. Williams*
Charles R. Peifer
Gregory P. Williams
Matthew E. Jackson
P.O. Box 25245
Albuquerque, NM 87125-5245
Tel: (505) 247-4800
Email: cpeifer@peiferlaw.com
gwilliams@peiferlaw.com
mjackson@peiferlaw.com

Attorneys for Plaintiffs-Petitioners Albuquerque Journal and KOB-TV, LLC

RULE 12-318(G) NMRA STATEMENT OF COMPLIANCE

The body of the Petition uses a proportionally-spaced typeface (Times New Roman), contains 10,992 words, as counted by Microsoft Word, Version 2503 (Build 18623.20156 Click-to-Run), and thus complies with the limitations of Rule 12-318(F)(3) NMRA.

CERTIFICATE OF SERVICE

We hereby certify that on the 7th day of April, 2025, the foregoing was electronically filed through the Odyssey File & Serve system and that a copy of the foregoing was served electronically on the following counsel of record:

Tony F. Ortiz
Jessica R. Terrazas
Ortiz & Zamora, Attorneys at Law, LLC
530 Harkle Road, Suite B
Santa Fe, New Mexico 87505
Tel: (505) 986-2900
Email: tony@ortiz-zamora.com
jessica@ortiz-zamora.com

Attorneys for Board of Education of Albuquerque Public Schools and Rigo Chavez

PEIFER, HANSON, MULLINS & BAKER, P.A.

By: */s/ Gregory P. Williams*
Gregory P. Williams