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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 REPLY BRIEF

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Plaintiffs/Petitioners *Albuquerque Journal* and KOB-TV, LLC ("Petitioners"), submit the following reply to the answer brief filed by Defendants/ Respondents Albuquerque Public Schools Board of Education and its records custodian, Rigo Chavez ("APS").

I. APS HAS NOT DEMONSTRATED THAT IT MET ITS BURDEN OF PROVING THAT THE ENTIRE PADILLA REPORT WAS A "MATTER OF OPINION IN A PERSONNEL FILE" AND THUS EXEMPT UNDER SECTION 14-2-1(C).

As noted previously, the Court has not interpreted NMSA 1978, Section 14-2-1(C) (2019), the "matters of opinion in a personnel file" exemption to the Inspection of Public Records Act ("IPRA"), in 38 years. **[BIC 24]** That gives this case particular significance, squarely presenting the Court with the opportunity to define the scope of the exemption. The Court's decision will determine the extent to which governmental entities in New Mexico can use the "matters of opinion" exemption to conceal factual information about the conduct of public employees doing public business and the activities of the entities that employ them.

Under these circumstances, it is disappointing that APS – one of the largest public employers in the state and the largest employer in Albuquerque[1] – is urging the Court to read the exemption broadly, in a way that defies its plain language and conflicts with the express public policy underlying IPRA. It is telling that APS, in

[1] https://www.aps.edu/about-us/aps-at-a-glance.

its answer brief, takes exception to Petitioners' dedication of "three pages of their brief writing about IPRA generally and how its purpose its [sic] transparency." **[AB 8]** In fact, that briefing merely sets forth what APS should acknowledge rather than resist, which are the undisputed guidelines for interpreting IPRA and its exemptions: 1) the Legislature's express statement that the purpose of IPRA is to provide the greatest possible information regarding the affairs of government and the official acts of public officers and employees; 2) the presumption, in interpreting IPRA, that public policy favors the right of inspection of public records; and 3) that IPRA exemptions must be interpreted narrowly to carry out this policy. **[BIC 12-14]**

APS asks the Court to ignore these guidelines, and to allow public bodies, at even the highest levels of government, to conceal critical factual information about how they perform their public duties and the factual basis for their actions. It is undisputed that APS's proposed reading of Section 14-2-1(C) would not, in fact, provide the "greatest possible information" regarding the facts surrounding the conduct of APS Superintendent Winston Brooks, the reasons APS agreed to pay him a large settlement to resign, or the reasons leading APS to contractually agree to keep silent about the reasons for its actions. To the contrary, APS asks the Court to endorse a reading of the "matters of opinion" exemption that would foreclose from public view almost any misconduct by government employees.

APS wants the Court to adopt for this case and all future cases involving alleged governmental misconduct a rule that allows a public body to conceal any information that can be described as "employer/employee information." This interpretation would result in any records touching on investigation of public employees, or even relating to the employment relationship, being concealed categorically from the public view. The scope of this proposal is breathtakingly broad and would undermine the core interests the Legislature sought to protect through IPRA. The Court should reject this radical proposition, which would broadly expand an IPRA exemption that the Legislature itself narrowly tailored.

A. APS Has Largely Chosen Not to Respond to Petitioners' Arguments Regarding Interpretation of Section 14-2-1(C).

Notably, APS has failed to respond to most of Petitioners' arguments regarding interpretation of Section 14-2-1(C). First, APS does not address at all Petitioners' showing that the plain language of the exemption protects only "matters of opinion," and not all records relating to the employer-employee relationship, or even those records that pertain to discipline. **[BIC 16-19]** Given that the Court has repeatedly emphasized that the starting point for statutory interpretation is the language of the statute itself, APS's failure on this point is an acknowledgement that it is asking the Court to define the exemption in a manner that conflicts with its actual language.

Similarly, APS does not address Petitioners' argument that the Legislature plainly opted not to create a broader exemption for personnel records. As previously noted, other states and the federal government have enacted provisions in open records statutes that expressly bar access to personnel files as a whole, records of discipline, or records for which public access would invade an employee's personal privacy. **[BIC 16-17]** Petitioners asserted that had the Legislature intended the exemption to cover material of this nature, or otherwise beyond the limits of "matters of opinion," it certainly could have done so. *Id.* APS offers no response to this argument.

APS also ignores the portion of Petitioners' brief in chief noting that the Attorney General of New Mexico's IPRA Compliance Guides have consistently acknowledged and advised public bodies 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." **[BIC 17-18]** APS does not address this point at all in its answer brief and certainly does not dispute that until the recent Court of Appeals decisions expanding Section 14-2-1(C), the exemption was interpreted by the Attorneys General to protect only opinions and not facts in employment documents.

B. The Court Should Reject APS's Argument That Legislative Silence Endorses Court Decisions Greatly Expanding Section 14-2-1(C)'s Scope.

APS, faced with the issues set forth above, resorts to arguing that the Legislature's failure to amend the exemption in the years following *State ex rel. Newsome v. Alarid*, 1977-NMSC-076, 90 N.M. 790 ("*Newsome*") and other decisions means that the Legislature must agree with those decisions. **[AB 13-17]** The Court should reject that argument.

First, as set forth previously, the plain language of a statute is the primary indicator of legislative intent, *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 11; *see also* **[BIC 16-19]**, and so the Court must not interpret subsequent "legislative silence" in a manner that controverts that plain language. Section 14-2-1(C) is short and direct, indicating the Legislature's specific intent to limit its reach, consistent with the policy underlying IPRA. Second, as set forth in the brief in chief, the discussion of the scope of Section 14-2-1(C) in both *Newsome* and *Cox v. New Mexico Department of Public Safety*, 2010-NMCA-096, 148 N.M. 934, was brief and was not necessary to resolve the issues in those cases. As retired Justice Richard Bosson noted in dissent below, the short discussion of the scope of Section 14-2-1(C) in both *Newsome* and *Cox* included "no additional rationale or citation to persuasive authority." Op. ¶ 94 (Bosson, J., dissenting). It is reasonable to conclude that, in light of decades of interpretation of the exemption by numerous

Attorneys General to include only information comprising matters of opinion, the plain language, and the policy underlying IPRA, the Legislature's decision not to amend the exemption to expressly extend it to records of disciplinary matters or other aspects of the employee-employer relationship indicates the Legislature's intent not to exempt such records.

Furthermore, contrary to Respondent's contention, the Legislature ***did*** amend IPRA after *Newsome* and *State ex rel. Barber v. McCotter*, 1987-NMSC-046, 106 N.M. 1, and those amendments contradict APS's proposed interpretation. First, the significant restructuring of IPRA in 1993 (*see* 1993 N.M. Laws, ch. 258) included a definition of public records, in direct response to the Court's statement in *Newsome* that "it would be helpful to the courts for the Legislature to delineate what records are subject to public inspection and those that should be kept confidential in the public interest." *Newsome*, 1977-NMSC-076, ¶ 33. The Legislature adopted a broad definition of public records that included all materials, regardless of form, "used, created, received, maintained or held by or on behalf of any public body and relate to public business." NMSA 1978, § 14-2-6 (1993). And, significantly, in clarifying the types of records exempt under IPRA, the Legislature did not add the type of "personnel record" exemption sought here by APS.

In fact, far from adopting the broad exemption for employment records urged by APS, the Legislature at the same time enacted two other provisions: 1) NMSA 1978, Section 14-2-5 (1993), declaring as the public policy of this state "that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees"; and 2) NMSA 1978, Section 14-2-9(A) (1993), requiring 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."

These provisions, read together, make apparent the Legislature's clear intent that the definition of public records is broad, that the exemptions are narrow, that all interpretation must effectuate the policy of transparency, and that records containing some exempt information are not wholly exempt from IPRA. The Court, relying on those amendments, then announced in *Republican Party of New Mexico v. New Mexico Taxation & Revenue Department*, 2012-NMSC-026, ¶¶ 16, 38, 50, that it was overruling *Newsome*'s "rule of reason" test, under which courts formerly allowed public bodies to withhold public records in cases where no specific exemption applied, and refusing to permit certain claimed privileges to serve as exemptions to IPRA. This history demonstrates that since *Newsome* and

Barber, the Legislature has clearly directed that IPRA should be interpreted in favor of transparency and limited exemptions.

C. Applying Section 14-2-9 to Records Containing "Matters of Opinion" Would Not Unduly Burden Records Custodians.

The Court need not accept APS's baseless argument that applying Section 14-2-9 to employment records would "completely disrupt the process of reviewing IPRA documents" as it would require custodians to "review[] a privileged document and determine[e] if and how a document can be parsed into exempt and non-exempt content."[2] **[AB 18-19]** In fact, undertaking this effort is what IPRA explicitly requires of records custodians, and is what they do every day. And this is what New Mexico's Attorneys General advised them, over the course of more than 40 years, they had to do. *See* **[BIC 17-18, 32]** IPRA's presumption is that all public records are available for inspection, and much of IPRA is devoted to designating the few exempt records, explaining the duties of custodians in asserting exemptions, and setting forth remedies when they fail to properly do so. Section 14-2-9 specifically imposes a duty on custodians to separate exempt and non-exempt portions of records, and to make the non-exempt portions available for

[2] Employment records containing factual information are not always or even commonly "privileged," and the Court should reject APS's blanket reference to such records as privileged.

inspection. APS's argument on this point is therefore directly contradicted by a statutory mandate and must be rejected.

D. APS's Asserted Policy Interests Do Not Support an Expansive Reading of Section 14-2-1(C).

The Court should reject APS's assertion of particular policy interests as a basis for expanding Section 14-2-1(C)'s scope. APS argues that the exemption "exists largely to protect the employee from any personal or damaging information being released to the public unnecessarily" and that "releasing highly personal or confidential materials can have devastating personal consequences for an employee." **[AB 21]** In the brief in chief, Petitioners noted alternative possible policy interests underlying Section 14-2-1(C), including the need for candor in the employment context. **[BIC 18-19]** APS has not shown that the need to protect public employees' reputations is the overriding policy interest underlying the exemption, and even if it could do so, that particular policy concern does not justify expansion of the exemption. Moreover, public employees, who are paid by citizens of New Mexico to carry out public functions, necessarily leave certain privacy rights in their employment at the door, as there is a public interest in transparency in their job performance (and in their supervision).

At any rate, because policy is primarily the province of the Legislature, this Court can only apply policy interests in the context of the language of the exemption itself. As noted in the brief in chief, the Legislature's choice of the

narrow language of "matters of opinion in a personnel file" reflects its weighing of the various possible policy interests. **[BIC 16-19]** The Legislature did not use more expansive language protecting all personnel records, and the Court should not accept APS's focus on the privacy interests of employees in a manner that substitutes the Court's own balancing of policy interests for the Legislature's choice.

E. APS Mischaracterizes the Complaints Leading to the Padilla Report as "Internal."

APS claims incorrectly that the purpose of retaining Agnes Padilla was "to investigate ***internal*** complaints." **[AB 1]** (emphasis added). To the extent that APS uses the term "internal" complaints to mean complaints by APS employees about another APS employee, the record does not support the claim. First, some of the complaints made were against, or referenced, Mr. Brooks's wife, Ann Brooks, who was not an APS employee. **[3 RP 742]** Also, to the extent that the complaints were about Mr. Brooks, Analee Maestas testified that some of the reports made to her about Mr. Brooks were second-hand, and APS presented no evidence that the original complainants were APS employees. **[3 RP 766-68]**

II. APS HAS NOT DEMONSTRATED THAT IT MET ITS BURDEN OF PROVING THAT ATTORNEY-CLIENT PRIVILEGE PROTECTS THE ENTIRE PADILLA REPORT.

APS bore the burden of proving, at the summary judgment stage, that there were no genuine issues of material fact, and that APS was entitled to judgment as a

matter of law, that the entire report was attorney-client privileged. APS has not shown that it was entitled to summary judgment on this issue.

A. APS Ignores That at the Summary Judgment Stage, All Facts Are to be Viewed in a Light Most Favorable to Petitioners, and Those Facts Favor a Finding that Ms. Padilla Acted Primarily as an Investigator.

In arguing that "all material undisputed facts point to the existence of attorney client privileged communication that is not subject to inspection," **[AB 25]** APS ignores that this matter was resolved via summary judgment. Because it was, the Court must view all facts in a light most favorable to Petitioners. *See, e.g.*, *Ridlington v. Contreras*, 2022-NMSC-002, ¶ 13 ("[W]e conduct a whole-record review of the facts in the light most favorable to the party opposing summary judgment and draws all reasonable inferences in support of a trial on the merits") (text only). In that context, the facts show that, contrary to APS's argument, the primary purpose in hiring Ms. Padilla was not clearly legal, and the non-legal communications between Ms. Padilla and Ms. Maestas were not privileged.

The only facts APS cites in favor of judgment as a matter of law are that Ms. Padilla and Ms. Maestas believed that their communications were privileged and that the engagement letter stated in part that Ms. Padilla would provide

"professional legal services" to APS.[3] **[AB 25]** APS ignores the facts showing that the primary purpose of her hiring was to conduct a factual investigation, including (1) Ms. Maestas's public statement, made contemporaneously with the initiation of the investigation 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" **[5 RP 1213-14]**; (2) her further statement that she retained Ms. Padilla, to obtain "factual information" **[5 RP 1213-14]**; (3) APS attorney Tony Ortiz's statement to 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]**; and (4) the actual contents of the report, which "contain[s] mostly factual findings," separate from any legal analysis. *See* Op. ¶ 76 (Bosson, J., dissenting); **[2 RP 266]**

APS fails to demonstrate that these facts, viewed most favorably to Petitioners, justify finding as a matter of law that the entire Padilla report is privileged. To the contrary, those facts show that Ms. Padilla was acting primarily

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[3] APS makes two errors in its description of the engagement letter. First, APS states that the letter said that Ms. Padilla would provide "attorney services" when in fact it said she would provide "professional legal services." *Compare* **[AB 2, 25]** *with* **[1 RP 91]**. More importantly, APS states that in the letter, Ms. Maestas "requested the creation of a report." **[AB 25]** But the letter does not mention a report, stating that her services "include, but are not limited to, research and inquiry into matters of concern to the Board and consultation with the Board President and members of the Board concerning the results of your work." **[1 RP 91]**

as a fact investigator, for the very purpose intended by APS, which was to gather facts.

B. APS Misstates Basic Premises of Attorney-Client Privilege.

APS, in discussing attorney-client privilege, misstates certain basic guidelines of the privilege, and misconstrues case law. For example, APS states that "if the communication is between a lawyer and a client, the entire communication garners that protection." **[AB 25]** APS relies on Rule 11-503 NMRA for that assertion, but Rule 11-503 limits the privilege to "confidential communication[s] made for the purpose of facilitating or providing professional legal services . . . ." Thus, communications which are not confidential, or which are not made for the purpose of facilitating or providing professional legal services, are not privileged.

APS also mischaracterizes *Upjohn Co. v. United States*, 449 U.S. 383 (1981), wrongly stating that "Petitioners' position was expressly rejected" by that decision. **[AB 27]** *Upjohn* did not involve a situation where an attorney acted in the capacity of a fact investigator, rather than providing legal advice or analysis. And nowhere in *Upjohn* did the U.S. Supreme Court address that particular issue, much less "expressly reject[]" Petitioners' arguments here.

Similarly, *Tawater v. Board of Commissioners for the County of Sandoval*, 2023-NMCA-052, is not relevant. *Tawater*'s principal holding is that emails

describing one employee's privileged communications with an attorney were themselves privileged; moreover, unlike here, the court's review "indicate[d] that it would be difficult to reveal this material without also revealing the substance of the privileged legal advice summarized in these emails." *Id.* ¶¶ 23-24. Here, as discussed above, the report is separated into factual and legal sections.

C. APS's Cited Case Law Regarding Attorney Investigators Should Not Sway This Court.

Petitioners provided the Court with extensive caselaw holding that when an attorney acts primarily as an investigator, the attorney's factual findings are not privileged. **[BIC 35-37]** In response, APS offers two cases, but the Court should reject APS's invitation to apply the holdings of those decisions here.[4]

Both *Harlandale Indep. School District v. Cornyn*, 25 S.W.3d 328 (Tex. App. 2000) and *In re Allen*, 106 F.3d 582 (4th Cir. 1997) depart from the "better view . . . that investigative work is not 'professional legal services' and that no privilege applies where the lawyer's primary function is as a detective"), 24 Wright

[4] In response to cases cited by Petitioners holding that when an attorney acts as an investigator in a human resources context, that attorney's factual findings are not privileged, APS asserts that any argument that the APS Board of Education "acts as 'human resources' for the district . . . is demonstrably false," as "the Board is demonstrably not in charge of HR for a district." **[AB 28]** Petitioners do not assert that the APS Board "is in charge of HR" for the school district, but the Legislature expressly makes it responsible for human resources issues regarding the ***superintendent***. NMSA 1978, § 22-5-4(B) (2005) ("A local school board shall . . . employ a local superintendent for the school district.")

& Graham, *Fed. Practice & Procedure: Evidence* § 5478 at 229 (1986). Moreover, *Allen* did not involve any issue of access to public records under an open records statute and thus does not address governmental transparency issues. 106 F.3d at 588-89.[5]

D. APS Overstates the Effect That Petitioners' Proposed Holding Will Have on Attorney-Client Relationships Beyond This Case.

The Court should reject APS's arguments that should the Court find that the district court erred in granting summary judgment to APS on this issue, the ability of attorneys to represent clients generally will be harmed. APS greatly exaggerates the potential effect of such a holding.

For example, APS argues that if Petitioners' position is accepted, "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." **[AB 31]** This speculation is unfounded. Petitioners have cited numerous cases in which an attorney-investigator's recitation of facts was found not to be privileged, and APS has not shown that in any of the jurisdictions where

[5] Notably, in both *Harlandale* and *Allen*, a factor in the courts' rulings that the reports could remain confidential was that the requestor had the opportunity to obtain the factual information in the reports from other sources; namely the persons that the attorneys interviewed or deposed. *See Harlandale*, 25 S.W.3d at 335; *Allen*, 106 F.3d at 604. That is impossible here, as neither APS nor Ms. Padilla has disclosed whom she interviewed or what documents she reviewed as part of her investigation.

those cases were decided that there was any subsequent extension of the privilege beyond those facts, or infringement of attorneys' ability to interview witnesses or to provide legal advice to their clients. Those cases generally stand for the proposition that when a client shares facts with its attorney, the attorney's legal advice arising out of those facts is privileged, thus encouraging clients to be candid with counsel. But when a client instructs an attorney to gather facts and report back, those facts are not privileged merely because it was an attorney who gathered them. The Court can easily limit its holding to avoid damaging the underlying principles of attorney-client privilege.

APS's "parade of horribles" also conflates attorney-client privilege with work-product protection, *see* **[AB 2, 31-33]**, which is improper for two reasons. First, "[t]he work-product doctrine is separate and distinct from attorney-client privilege." *S.F. Pac. Gold Corp. v. United Nuclear Corp.*, 2007-NMCA-133, ¶ 38, 143 N.M. 215. Second, APS's claim that Ms. Padilla was hired to "prepare a report assessing a legal matter in anticipation of litigation" **[AB 2]** is a misstatement of the record. The district court rejected APS's claim that the report was prepared in anticipation of litigation **[5 RP 1219-22]**, and APS did not appeal that finding.

Indeed, the existence of the work product doctrine undermines APS's argument that the attorney-client privilege covers all attorney investigations. If it

did, there would be no reason to recognize any work product protection for an attorney's witness interviews or factual investigations.

Similarly, the Court should disregard APS's warning of "unfettered, unchecked, reckless access that destroys basic protections for employees and for clients seeking attorney advice." **[AB 36]** The holding Petitioners propose is limited to situations where a public body hires an investigator to perform an investigation that, but for the investigator's law license, would never be privileged. Under the rule proposed, where the facts found can be separated from any advice provided, the facts are not privileged merely because an attorney gathered them.

E. The Court Should Reject APS's Argument That It Did Not Hire Ms. Padilla to Shield Facts.

Remarkably, APS argues that there is "no 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." **[AB 35]** APS calls such an assertion "rank speculation and 'conspiracy' gibberish." *Id.*

Here is what the record shows. First, APS insists that when Ms. Maestas hired Ms. Padilla, both of them intended the resulting investigative results would be kept confidential. **[AB 2]** That fact, if true, would necessarily mean that APS did intend to shield that information from the public, despite its clear public importance. Second, the settlement agreement with Mr. Brooks, released just days after the report was delivered, included a provision by which both APS and Mr.

Brooks agreed to keep the report secret, further demonstrating APS's intent. And, of course, APS has spent the last decade litigating to keep the report concealed.

III. APPROVAL OF APS'S SETTLEMENT WITH MR. BROOKS IS NOT RELEVANT.

In regard to both the "matters of opinion" and privilege issues, APS asks the Court to consider alleged facts regarding the approval of its settlement agreement by a district court and the New Mexico Public Education Department. **[AB 3, 34]** These approvals have nothing to do with whether the public is entitled to the factual sections of the report. After all, IPRA protects the right of citizens themselves to information about their government; it does not delegate that right to judges or government agencies.

APS appears to argue that the settlement approvals necessarily mean that public suffered no harm from APS's concealment of the report, the facts of Mr. and Mrs. Brooks' alleged misconduct, or APS's handling of those facts. But APS offers no details of those approval proceedings, including whether the court or NMPED was advised of the underlying facts or made any inquiry regarding those facts. There is no evidence that the proceedings were adversarial or contested. APS's argument that those proceedings satisfied the public interest is undermined by the fact that neither proceeding apparently resulted in any public disclosure of the facts underlying the settlement. APS asserts that the district court concluded that the agreement was "fair to the school district" and that NMPED's approval

"demonstrate[ed] fairness to the District." **[AB 3]** But nothing in the record demonstrates fairness ***to the public***.

CONCLUSION

WHEREFORE, Petitioners respectfully request that the Court hold as set forth in the brief in chief, including a determination that 1) the "matters of opinion" exemption applies only to actual matters of opinion contained in the Padilla report; and 2) the attorney-client privilege does not apply to any segregable factual material in the report. If the Court determines that any portion of the report is protected by attorney-client privilege, it should instruct the district court to address the issue of waiver, based on that court's prior determination that there are issues of fact whether APS waived any privilege in the report.

Respectfully submitted,

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RULE 12-318(G) NMRA STATEMENT OF COMPLIANCE

The body of this Reply Brief uses a proportionally-spaced typeface (Times New Roman), contains 4,387 words, as counted by Microsoft Word, Version 2504 (Build 18730.20142 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 15th day of May, 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:

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