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Nicholas T. Davis

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Nicholas T. Davis*

> Publicity is justly commended as a remedy for social and industrial diseases.
> Sunlight is said to be the best of disinfectants;
> electric light the most efficient policeman.[1]

Following an officer-involved shooting that results in a death, family members will often want to consult a lawyer about what happened. To answer questions from a prospective client and carry out his or her professional obligation, a lawyer needs information, and often it requires more information than the potential client has been given by the law enforcement agency involved. In order to meet those ethical obligations and comply with the rules of civil procedure, i.e., to not bring frivolous claims, the lawyer will rely on New Mexico's sunshine statute, the Inspection of Public Records Act, to request those public records that the lawyer believes contain the valuable and necessary information. The lawyer's requests will often include records from the shooting itself, as well as events leading up to it, and seek audio and video recordings, witness statements, and all reports by law enforcement related to the incident. The goal of these requests is to obtain enough information to help the lawyer better understand what happened and determine whether there may, or may not, be actionable claims under the law resulting from the shooting. However, for several years law enforcement agencies have refused to allow inspection of public records in officer-involved shootings, instead issuing blanket denials in response to IPRA requests. Such blanket denials are not supported by the plain meaning of the law or any case law interpreting it. Further, a fix should be instituted that requires that public bodies not only review and produce documents, properly redacted, but also provide a more detailed denial communication specifying the reasons why any redacted information is being withheld to allow a requestor to decide whether to challenge that withholding of information.

New Mexico's Inspection of Public Records Act ("IPRA") has been in place for many decades and allows "any person" to request public records from any public body. "Public records" is broadly defined, and the Legislature has identified only a narrow list of records that are exempt from inspection for public policy reasons. Many agencies have an online portal through which someone may make a request,

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* Nicholas T. Davis is an attorney practicing at Davis Law New Mexico in Albuquerque, New Mexico and graduated from the University of New Mexico School of Law. Many thanks to Kara Shair-Rosenfeld and Lucy River for the extensive help, Phil Davis for the edits, and Adam Flores for sharing and talking me through the cases.

1. Buckley v. Valeo, 424 U.S. 1, 67 n.80 (1976) (quoting Louis L. Brandeis, OTHER PEOPLE'S MONEY 62 (Nat'l Home Library Found. ed. 1933)).

or a written request may be submitted to the records custodian of the public body. While the statute allows for verbal requests, the issues in this article should make apparent why having documentation is preferable when making IPRA requests in officer-involved shootings.

A public body must respond to every IPRA request within prescribed time limits, though it does have the ability to request more time to comply with the request if the request is deemed excessively broad or burdensome. To help with the enforcement of the statute and incentivize compliance by public bodies, IPRA allows for damages whenever an agency fails to respond or makes a denial that, when challenged in the courts, is found to be an improper one.

This article will lay out why law enforcement agencies' blanket denials in response to IPRA requests for their investigation-related records are unfounded in logic, contrary to the plain language and intent of the law, and lead to the perverse result of breeding the very distrust in government that IPRA is intended to avoid and remedy. The article then explores pragmatic ways to resolve law enforcement's actions. Specifically, it argues that New Mexico should take a page from federal case law and establish, by amendment to the IPRA or through interpretive case law, that public bodies, and specifically law enforcement agencies, be required to produce an index of those documents that fall under IPRA but which the public body claims are subject to withholding based on an exception.

The first section of this article briefly reviews the purpose and evolution of laws that recognize or create the right to access government records, then focuses on explaining New Mexico's IPRA. The second section is dedicated to exploring IPRA's exceptions in general and the law enforcement records exception in particular. The third section addresses the arguments made by law enforcement agencies—including the attempts by those public bodies to claim, once they untimely produce records, that none of the penalties available under the Act apply to their conduct—and explains why those arguments are unavailing. The final section argues that New Mexico should adopt an index requirement, similar to that which developed under federal law, both as a sunlight measure in response to law enforcement agencies evading their duties under the IPRA and to conserve judicial resources.

I. TRANSPARENCY IN GOVERNMENT: A FUNDAMENTAL PILLAR OF DEMOCRACY

> [P]opular Government, without popular information, or the means of acquiring it,
> is but a Prologue to a Farce or a Tragedy; or, perhaps both.[2]

A. Sunshine Laws: A Brief Primer

There is a long history, pre-dating specific legislation on the issue in the United States, of the recognition that government operates better when its citizens have access to its records.[3] It has long been understood that a well-informed public

2. Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt, ed. 1910).

3. *See generally* Joe Regalia, *The Common Law Right to Information*, 18 RICH. J. L. & PUB. INT. 89, 90 (2015).

and a government that recognizes its public's right to information is a fundamental pillar of democracy.[4] A common law right of the public to access government information derives from English common law[5] and has existed since the United States Constitution was created.[6] In the twentieth century, the federal and state governments specifically codified this right, enacting so-called "sunshine laws" that require government agencies to disclose documents in its possession—i.e., public records—upon request.[7]

B. New Mexico's Sunshine Law: The Inspection of Public Records Act

While many states adopted language wholesale from the federal Freedom of Information Act (FOIA) enacted in 1966 as statutorily providing a right of access to public records under state law, New Mexico's sunshine law, enacted in 1947, predates FOIA by nearly two decades and has always stood, and been interpreted, independent of FOIA.[8] The New Mexico courts have clearly held that the IPRA "ensures greater access to government records than does FOIA."[9] The courts have further held that despite their common purpose, FOIA case law is of "limited persuasion when interpreting IPRA."[10] Thus, because IPRA and the cases construing it represent the law of New Mexico, it is those sources of law that frame and support the remainder of this article's discussion.

1. IPRA's Purpose

In its 1993 comprehensive amendment of IPRA, the New Mexico Legislature included an express statement explaining the purpose to be served by, and the public policy underlying, IPRA:

> Recognizing that a representative government is dependent upon an informed electorate, the intent of the legislature in enacting the [IPRA] is to ensure, and it is declared to be 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. 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

4. *See* Jimmy Carter, *Foreword* to ACCESS TO INFORMATION: A KEY TO DEMOCRACY 3 (Laura Neuman ed., 2002).

5. Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1069 (3d Cir. 1984) ("The Supreme Court [has] recognized that [the] English common law right of access was transferred to the American colonies.").

6. Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 161 (3d Cir. 1993).

7. Regalia, *supra* note 3, at 91–92.

8. 1947 N.M. Laws, ch. 130, § 1 (codified as amended at N.M. STAT. ANN. § 14-2-1 (2019)).

9. *See* Republican Party v. N.M. Taxation & Revenue Dep't, 2012-NMSC-026, ¶ 28, 283 P.3d 853, 864. And as such, greater access undermines any reliance agencies try to draw from broad discretion given under FOIA to agency withholdings. *See* Jones v. City of Albuquerque Police Dep't, No. A-1-CA-35120, 2018 WL 3000216, at *1 (N.M. Ct. App. May 10, 2018) (stating how defendant New Mexico Department of Public Safety argued against release of records under a confidential law enforcement records exception), *cert. granted*, S-1-SC-37094 (N.M. Sup. Ct. 2018).

10. *Republican Party*, 2012-NMSC-026, ¶ 28, 283 P.3d at 864.

> function of a representative government and an integral part of the routine duties of public officers and employees.[11]

In construing the IPRA, New Mexico courts have explained that "[e]ach inquiry starts with the presumption that public policy favors the right of inspection."[12] IPRA's text "underscore[s] a legislative intent to ensure that New Mexicans have the greatest possible access to their public records."[13] The New Mexico Supreme Court has interpreted IPRA's creation of a statutory right to access public records as "intend[ing] to ensure that the public servants of New Mexico remain accountable to the people they serve."[14] Indeed, "New Mexico's policy of open government is intended to protect the public from having to rely solely on the representations of public officials that they have acted appropriately."[15]

2. IPRA Deconstructed: The Nuts and Bolts of Fulfilling IPRA's Goal

IPRA begins with the simple mandate that "[e]very person has a right to inspect public records of this state."[16] First, what are public records? They are "all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained."[17] Second, what are public bodies? They are "the executive, legislative and judicial branches of state and local government and all advisory boards, commissions, committees, agencies or entities created by the constitution or any branch of government that receives public funding."[18] Lastly, what does it meant to inspect? "'[I]nspect' means to review *all* public records that are not excluded" by IPRA.[19] Thus, all records created by public bodies that relate to public business, unless they are subject to an exception, may be inspected by the public.

It does not matter who is making the request for the records. "Any person" may submit an oral or written request to inspect public records, though public bodies are only subject to IPRA's penalties for failing to respond to a written request.[20] In

11. 1993 N.M. Laws, ch. 258, § 2 (codified at N.M. STAT. ANN. § 14-2-5 (1993)).

12. Cox v. N.M. Dep't of Pub. Safety, 2010-NMCA-096, ¶ 17, 148 N.M. 934, 242 P.3d 501 (citation omitted).

13. San Juan Agric. Water Users Ass'n v. KNME-TV, 2011-NMSC-011, ¶ 38, 150 N.M. 64, 257 P.3d 884.

14. *Republican Party*, 2012-NMSC-026, ¶ 12, 283 P.3d at 859 (quoting other sources).

15. ACLU of N.M. v. Duran, 2016-NMCA-063, ¶ 44, 392 P.3d 181, 191 (citation omitted).

16. N.M. STAT. ANN. § 14-2-1 (2019).

17. § 14-2-6(G) (2018).

18. § 14-2-6(E). Note that a private entity may also be included if they meet a nine factor, totality of the circumstances analysis regarding entanglement. *See* New Mexico Foundation for Open Government v. Corizon Health, No. A-1-CA-35951, 2019 WL 4551658, at *4 (N.M. Ct. App. Sept. 13, 2019) (though a private contractor, DOC subcontractor health care provider still subject to IPRA); Pacheco v. Hudson, 2018-NMSC-022, ¶ 29, 415 P.3d 505, 511; *see generally* State *ex rel.* Toomey v. City of Truth or Consequences, 2012-NMCA-104, 287 P.3d 364.

19. § 14-2-6(C) (2018) (emphasis added); *see also* N.M. STAT. ANN. § 12-2A-19 (1997) ("The text of a statute or rule is the primary, essential source of its meaning.").

20. § 14-2-8(A) (2009).

making a request, the requester need not state a reason for wishing to inspect the records, and the public body may not require the requester to provide a reason.[21] Indeed, a requester may request documents for no more reason than to verify that an agency both has the documents and is complying with IPRA in fully disclosing them.[22]

a. Public Bodies' Duties Under IPRA

IPRA requires every public body to designate at least one custodian of records who is responsible for receiving and responding to requests and providing "reasonable opportunities" to inspect public records.[23] The designated custodian bears the ultimate responsibility for complying with IPRA requests.[24] IPRA demands not only the production of public records, but their timely production as well. A records custodian must "permit the inspection immediately or as soon as is practicable under the circumstances, but not later than fifteen days after receiving a written request[.]"[25] If the custodian does not permit inspection within fifteen days, "[t]he person requesting the public records may pursue the remedies provided in [IPRA]."[26] While the IPRA does not require an agency to create a document to have a document responsive to a request, it does require an agency create a writing to respond to a requester if the agency requires more time to respond to a request[27] and when an agency denies a request.[28]

Custodians must ensure not only procedural but also substantive compliance with IPRA.[29] On a substantive level, custodians are responsible for determining whether records in the public body's possession are subject to disclosure.[30] Specifically, "[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."[31] While separating exempt from not exempt matter may be burdensome in some cases, IPRA recognizes that it is "an essential function of a representative government and an integral part of the routine duties of public officers and employees" to provide access to public records.[32] Thus, the burden is a requisite of the public body under the IPRA. This is analogous to a prejudicial evidence analysis in which all evidence is recognized to be prejudicial but it is only that evidence which is *unfairly*

21. § 14-2-8(C).
22. *See* ACLU of N.M. v. Duran, 2016-NMCA-063, ¶ 52, 392 P.3d 181, 193.
23. § 14-2-7(C) (2011).
24. *See* Pacheco v. Hudson, 2018-NMSC-022, ¶ 57, 415 P.3d 505, 516.
25. § 14-2-8(D) (2009).
26. § 14-2-11(A) (1993).
27. *See* § 14-2-10 (1993).
28. § 14-2-11(B) (1993).
29. *See* §§ 14-2-7 (2011), 14-2-9 (2013).
30. § 14-2-9(A).
31. *Id.*
32. § 14-2-5 (1993).

prejudicial that, when weighed against its probative value, may be excluded.[33] The Legislature has thus mandated that a records custodian undertake the process—however burdensome—of reviewing and sorting records as a duty of public office,[34] and expressly provided a statutory procedure for responding to excessively burdensome requests.[35]

b. Documents That Fall Under IPRA

Draft documents must generally be released under IPRA.[36] A document that is merely "thought processes," such as a an offer of a contract, does not rise to the level of a public record.[37] However, a draft letter or email string—maintained or held by or on behalf of a public entity—constitutes a public record that is subject to inspection.[38] "[N]either the deliberative process privilege nor the rule of reason . . . is recognized in New Mexico."[39] Therefore, withholding a draft letter or email on the ground of a deliberative process privilege violates IPRA.[40] IPRA does except matters of opinion found in personnel files, but it does not except citizen complaints about government officials.[41] Citizen complaints are also not "letters of reference," for which there is an exception.[42] A jury list is a public record and the media is entitled to inspect and publish it.[43] The State's public records consisting of doctor's opinions and other medical information in personnel files are excepted under the meaning of the IPRA statute.[44] A public employee's privacy interests in his or her personal position regarding union representation requires protecting union

33. *Cf.* N.M. R. EVID. 11-403 (relevant and probative evidence excluded when "unfairly" prejudicial); State v. Hogervorst, 1977-NMCA-057, 90 N.M. 580, 566 P.2d 828, *cert. denied*, 90 N.M. 636, 567 P.2d 485 (Sup. Ct. N.M. June 24, 1977).

34. § 14-2-9(A).

35. § 14-2-10 (1993).

36. Edenburn v. N.M. Dep't of Health, 2013-NMCA-045, ¶ 23, 299 P.3d 424, 431.

37. Sanchez v. Bd. of Regents of E. N.M. Univ., 1971-NMSC-065, ¶ 17, 82 N.M. 672, 486 P.2d 608.

38. *See Edenburn*, 2013-NMCA-045, ¶¶ 13, 26, 299 P.3d at 429, 432.

39. *Id.* ¶ 42, 299 P.3d at 436.

40. *Id.* ¶¶ 30–31, 299 P.3d at 433.

41. Cox v. N.M. Dep't of Pub. Safety, 2010-NMCA-096, ¶ 19, 148 N.M. 934, 242 P.3d 501 ("[T]he citizen complaints at issue are not letters of reference as that term is contemplated by the statute and, therefore, they do not qualify for exclusion under this exception.").

42. *Id.* ("The complaints were not solicited by DPS or the officer and were not intended to recommend the officer for employment or licensing. We determine that based on the plain language of the statute, the citizen complaints at issue are not letters of reference as that term is contemplated by the statute and, therefore, they do not qualify for exclusion under this exception.").

43. State *ex rel.* N.M. Press Ass'n v. Kaufman, 1982-NMSC-060, ¶ 30, 98 N.M. 261, 648 P.2d 300 (citation omitted) ("Furthermore, since the names of the jurors were announced in open court and filed as a public record, the procedures failed the third prong of the test. Every citizen has a right to inspect public records, with certain well-defined exceptions. There is no question that the jury list is a public record and that the Media was entitled to inspect and publish it.").

44. State *ex rel.* Newsome v. Alarid, 1977-NMSC-076, ¶ 10, 90 N.M. 790, 568 P.2d 1236 ("The intent of the Legislature to exempt doctors' opinions and other medical information in personnel files from disclosure is evident from an analysis of this statute, and the intent comports with common sense and reasoning as well as with good public policy.").

representation petitions from public disclosure.[45] Other laws may provide an exception a public body may use to withhold documents that would otherwise be responsive to an IPRA request, if the express language or intent of that law so indicates.[46]

II. HOW IPRA IS ENFORCED: CIVIL ACTIONS AND DAMAGES

IPRA grants authority to the attorney general and district attorneys to bring an action to enforce IPRA.[47] IPRA also expressly allows a requester whose written request "has been denied" to bring an action to enforce IPRA.[48] A request "has been denied" when a public entity does not respond to a written IPRA request within the deadlines contained within the statute, or fails to provide a timely writing explaining the denial of the request or any part thereof,[49] or fails to produce all responsive records, whether through intentional or inadvertent withholding of responsive records.[50] There is no requirement to exhaust administrative remedies before filing suit.[51] IPRA empowers district courts to "issue a writ of mandamus or order an injunction or other appropriate remedy to enforce the provisions of [IPRA]."[52]

If the requester's suit is successful, "[t]he court shall award damages, costs, and reasonable attorneys' fees."[53] "Shall" is mandatory.[54] This provision of IPRA has been described as a fee-shifting provision intended to place "the imposition of the cost of litigation on the party who unsuccessfully resists a statutorily-compelled, socially beneficial action."[55] The provision is consonant with the understanding that IPRA is "intended to ensure that the public servants of New Mexico remain accountable to the people they serve."[56] Moreover, it encourages compliance with IPRA and discourages abuse by shifting the obligation to pay the requester's fees to the public body that wrongfully withheld the requested records.[57] An action to enforce IPRA cannot be rendered moot simply because the requester accepts belatedly produced records after a complaint and dispositive motions have been filed, as that approach would neutralize the Legislature's aim to create "private attorneys

45. City of Las Cruces v. Pub. Emp. Labor Relations Bd., 1996-NMSC-024, ¶ 11, 121 N.M. 688, 917 P.2d 451.

46. *Id.* ¶ 12, 917 P.2d at 455 ("We hold that Section 14-2-1(F), 'as otherwise provided by law,' incorporates Regulation 1.17, an administrative regulation that effectuates the Legislature's intent in enacting the Public Employee Bargaining Act: to protect the right of public employees to organize for collective bargaining purposes. Additionally, we hold that any benefit to the public from inspecting the representation petition would be significantly outweighed by the police officers' privacy interest.").

47. N.M. STAT. ANN. § 14-2-12(A)(1) (1993).

48. § 14-2-12(A)(2).

49. § 14-2-11 (1993).

50. Britton v. Office of the Att'y Gen., 2019-NMCA-002, ¶ 35, 433 P.3d 320, 333.

51. § 14-2-12(C).

52. § 14-2-12(B).

53. § 14-2-12(D).

54. *See* N.M. STAT. ANN. § 12-2A-4 (1997) (providing that, under the Uniform Statute and Rule Construction Act, "shall" expresses an obligation or requirement).

55. Rio Grande Sun v. Jemez Mountains Pub. Sch. Dist., 2012-NMCA-091, ¶ 9, 287 P.3d 318, 320.

56. Faber v. King, 2015-NMSC-015, ¶ 28, 348 P.3d 173, 180 (quoting San Juan Agric. Water Users Ass'n v. KNME-TV, 2011-NMSC-011, ¶ 16, 150 N.M. 64, 257 P.3d 884).

57. *See* ACLU of N.M. v. Duran, 2016-NMCA-063, ¶ 35, 392 P.3d 181, 190 (citations omitted).

general" incentivized to enforce all provisions of the Act.[58] The disclosure issue under IPRA is one of public importance that is capable of repetition yet evading review.[59] And, because an individual making a request under IPRA is inherently at a disadvantage when it comes to knowing what records an agency has, our courts have held that a citizen has the right to challenge whether an agency has truthfully identified the records it does have when that agency has claimed an exception under the Act.[60] If the public body makes a denial based on exemptions, in good faith or not, that are later adjudicated to not have existed, damages, costs and reasonable attorney's fees are available.[61]

IPRA additionally provides for the possibility of recovering statutory damages of up to one hundred dollars per day against a public body that fails to timely, and completely, respond to a request when the failure is determined by the district court to be "unreasonable."[62] Considered a "penalty" against the public body for failing to comply with its obligations under IPRA, the main purpose served by IPRA's statutory damage provision is to deter inappropriate non-disclosure of requested records.[63] The provision "create[s] a financial disincentive to failing to respond in a way that fulfills the public body's substantive obligation under IPRA,"[64] i.e., its obligation to provide "the greatest possible information" to the public "regarding the affairs of government and the official acts of public officers and employees."[65] The penalty evinces the Legislature's intent that public bodies follow both the language and intent of the law.[66]

A. IPRA's Exceptions

The 1947 enactment provided a right to inspect *all* public records of the state and contained only two exceptions: one for records "pertaining to physical or mental examinations and medical treatment of persons confined to any institutions," and one for records exempt from disclosure "as otherwise provided by law."[67] In 1973, the New Mexico Legislature added two additional exceptions to the general rule of access: (1) "letters of reference concerning employment, licensing or permit;"

58. *See San Juan Water Users*, 2011-NMSC-011, ¶ 12, 150 N.M. 64, 257 P.3d 884 (citing OFFICE OF THE N.M. ATT'Y GEN., NEW MEXICO INSPECTION OF PUBLIC RECORDS ACT COMPLIANCE GUIDE 42 (2015).

59. Republican Party v. N.M. Taxation & Revenue Dep't, 2012-NMSC-026, ¶ 10, 283 P.3d 853, 858.

60. *See Duran*, 2016-NMCA-063, ¶ 44, 392 P.3d at 191.

61. *See* San Juan Agric. Water Users Ass'n v. KNME-TV, No. A-1-CA-35839, 2019 WL 2089540, at *9–11 (N.M. Ct. App. Apr. 16, 2019).

62. N.M. STAT. ANN. § 14-2-11(C) (1993); *see* Britton v. Office of the Att'y Gen., 2019-NMCA-002, ¶ 35, 433 P.3d 320, 333.

63. *See Britton*, 2019-NMCA-002, ¶ 34, 433 P.3d at 333.

64. *Id.*

65. § 14-2-5 (1993).

66. *See Britton*, 2019-NMCA-002, ¶ 33, 433 P.3d at 332.

67. 1947 N.M. Laws ch. 130, § 1 (as codified in N.M. STAT. ANN. § 71-5-1 (1953)).

and (2) "letters or memorandums which are matters of opinion in personnel files or students' cumulative files[.]"[68]

In 1977, the New Mexico Supreme Court was presented with a challenge under IPRA from a student reporter against his university seeking personnel records to which an exception to IPRA applied to some documents, but not others.[69] The *Newsome* court concluded that existing exemptions to disclosure were insufficient and adopted an "implied rule of reason" to balance the public's interest in disclosure against privacy interests.[70] In the same opinion, the court called on the Legislature to abrogate the newly formulated, judge-made rule by amending the statute to delineate "what records are subject to public inspection and those that should be kept confidential in the public interest."[71]

The Legislature took up *Newsome's* call and amended the exemptions to IPRA.[72] Consequently, courts may no longer apply the "rule of reason" and are instead to "restrict their analysis to whether disclosure under IPRA may be withheld because of a specific exception contained within IPRA, or statutory or regulatory exceptions, or privileges adopted by this Court or grounded in the constitution,"[73] and the absence in the law of an enumerated exemption to public access may not be read as an oversight to be corrected by the courts.[74] The Legislature in so amending IPRA over the years has adjusted the balance between privacy and public access as it saw fit, taking back that responsibility from the courts. The IPRA currently lists eight narrowly[75] codified exceptions to the mandate that "[e]very person has a right to inspect public records of this state"[76]: 1) records of treatment of confined persons, 2) letters of reference, 3) opinion documents in personnel or student files, 4) law enforcement records, 5) records covered by the Confidential Materials Act, 6) specifically protected records, 7) records comprising tactical response plans or procedures that could be used to facilitate the planning or execution of a terrorist attack, and 8) other records provided for by the New Mexico Constitution, statutes, or rules.[77] The Legislature clearly carved out areas that either touched on personal opinion or sensitive information, and information where that body felt that the detrimental effects of its disclosure outweighed the public policy of transparency and accountability. Exceptions should always be construed narrowly to give the broadest

68. 1973 N.M. Laws, ch. 271, § 1; *see* State *ex rel.* Newsome v. Alarid, 1977-NMSC-076, ¶ 8, 90 N.M. 790, 568 P.2d 1236, *superseded by statute*, 1981 N.M. Laws, ch. 47, § 3, *as recognized in* Republican Party v. N.M. Taxation & Revenue Dep't, 2012-NMSC-026, ¶ 16, 283 P.3d 853, 860.

69. *Newsome*, 1977-NMSC-076, ¶ 1, 568 P.2d at 1239–40.

70. *Id.* ¶¶ 28, 33, 37, 568 P.2d at 1243, 1244.

71. *See id.* ¶ 33, 568 P.2d at 1243.

72. *See* 1981 N.M. Laws, ch. 47, § 3; 1993 N.M. Laws, ch. 260, § 1; 1998 N.M. Laws, ch. 3, § 1; 1999 N.M. Laws, ch. 158, § 1; 2003 N.M. Laws, ch. 288, § 1; 2005 N.M. Laws, ch. 126, § 1; 2011 N.M. Laws, ch. 134, § 2.

73. *Republican Party*, 2012-NMSC-026, ¶ 16, 283 P.3d at 860.

74. *See id.* ¶¶ 51–52, 283 P.3d at 870–71.

75. *See* Cox v. N.M. Dep't of Pub. Safety, 2010-NMCA-096, ¶ 7, 148 N.M. 934, 242 P.3d 501 ("IPRA itself contains twelve narrow statutory exceptions enumerated in Section 14-2-1(A).").

76. *See* N.M. STAT. ANN. § 14-2-1 (2019).

77. *See* § 14-2-1(A)-(H).

possible meaning to the general statute.[78] These exceptions are few, narrow, and, unless provided for elsewhere in New Mexico law, leave little room for any public body to withhold records that fall under IPRA.

1. IPRA's Law Enforcement Exception, Specifically

Despite the *Newsome* court's call to the Legislature to undo its "implied rule of reason" test, it was not until the 1993 enactment that the Legislature included an exception for law enforcement records.[79] Since 1993, IPRA has excepted from inspection

> law enforcement records that reveal confidential sources, methods, information or individuals accused but not charged with a crime. Law enforcement records include evidence in any form received or compiled in connection with a criminal investigation or prosecution by a law enforcement or prosecuting agency, including inactive matters or closed investigations to the extent that they contain the information listed [in this paragraph].[80]

Though the plain language "broadly defines" what is considered a law enforcement record, the exception expressly limits what law enforcement records may be claimed as exempt from inspection under IPRA to only those "that reveal confidential sources, methods, or information or individuals accused but not charged with a crime."[81] Law enforcement records that do not fall into one of the four enumerated categories of exempt information plainly are not exempt from inspection.[82]

The law enforcement records exception was amended and clarified in 2019. Effective July 1, 2019, the IPRA exempts from inspection:

> portions of law enforcement records that reveal: (1) confidential sources, methods or information; or (2) before charges are filed, names, address, contact information, or protected personal identifier information . . . of individuals who are: (a) accused but not charged with a crime; or (b) victims of or non-law-enforcement witness to [specified] alleged crime[s].[83]

The legislature also made changes in the definition of law enforcement records, deleting the word "paragraph" and replacing it with: "subsection; provided that the

78. Regents of Univ. of N.M. v. N.M. Fed'n of Teachers, 1998-NMSC-020, ¶ 27, 125 N.M. 401, 962 P.2d 1236 ("[S]trict or narrow construction is usually applied to exceptions to the general operation of a law.").

79. 1993 N.M. Laws, ch. 260, § 1.

80. *See id.*

81. *See* Noll v. N.M. Dep't of Pub. Safety, No. A-1-CA-35981, 2019 WL 1615040, at *4 (N.M. Ct. App. Mar. 19, 2019).

82. *See* Republican Party v. Dep't of Taxation & Revenue, 2012-NMSC-026, ¶ 16, 283 P.3d 853, 860.

83. 2019 N.M. Laws, Ch. 27, §1 (codified at N.M. STAT. ANN. § 14-2-1 (2019)).

presence of such information on a law enforcement record does not exempt the record from inspection."[84]

There are two notable changes to the exception. First, the Legislature's addition of the words "portions of"[85] to begin the exception is significant in that it reveals that the Legislature intends for the law enforcement records exception to be construed narrowly, not broadly. [86] This construction of the Legislature's intent is further reinforced by the second notable addition: the Legislature's pronouncement that "that the presence of [exempt] information on a law enforcement record does not exempt the record from inspection."[87] In other words, public bodies may not withhold an entire record—much less entire investigation files—simply because the record contains information that may be exempt from inspection. Only those "portions of" the record that fall within an exception may be withheld, and then only through the procedures specifically prescribed by IPRA.[88]

2. Procedures for Denying Requests and Withholding Documents Under An Exception

IPRA prescribes specific procedures with which a custodian must comply in order to withhold public records from inspection based on a claimed exemption and still be considered "in compliance" with IPRA.[89] A custodian must separate "information that is exempt and nonexempt from disclosure" and must timely make all nonexempt information available for inspection.[90] Implicit in this requirement is a threshold obligation to first identify in good faith all records that are responsive to the request. If a request or any portion thereof is denied by the custodian, the custodian must "provide the requester with a written explanation of the denial" within the applicable time period established by IPRA.[91] At a minimum, the written explanation must include a description of the records sought and must identify by name and title or position the person or persons "responsible for the denial[.]"[92] As noted by the New Mexico Court of Appeals, "[d]enials are valuable information-gathering tools."[93] As such, and because IPRA's goal is to provide "the greatest possible information" to the public,[94] written denials are an integral and substantive

84. S.B. 118, 54th Leg., Reg. Sess. (N.M. 2019).

85. *Id.*

86. 2019 N.M. Laws, ch. 27, § 1 (adding "portions" to the beginning of the exception); N.M. LEGIS. FIN. COMM., FISCAL IMPACT REPORT OF S.B. 118, 54th Leg., Reg. Sess., at 2 (2019) [hereinafter S.B. 118 FISCAL IMPACT REPORT] ("[T]he law enforcement records exception applies to portions of . . . records . . . [and] the presence of information covered by the exception does not exempt the record from inspection."); *see* N.M. STAT. ANN. § 12-2A-18 (1997) ("A statute or rule is construed, if possible, to: . . . give effect to its entire text; and avoid an unconstitutional, absurd or unachievable result.").

87. S.B. 118 FISCAL IMPACT REPORT, *supra* note 86, at 2.

88. *See* N.M. STAT. ANN. §§ 14-2-9(A) (2013), 14-2-11(B) (1993); Noll v. N.M. Dep't of Pub. Safety, No. A-1-CA-35981, 2019 WL 1615040, at *3 (N.M. Ct. App. Mar. 19, 2019).

89. Faber v. King, 2015-NMSC-015, ¶ 30, 348 P.3d 173, 181.

90. § 14-2-9(A).

91. § 14-2-11(B).

92. § 14-2-11(B)(1), (2).

93. ACLU of N.M. v. Duran, 2016-NMCA-063, ¶ 38, 392 P.3d 181, 190.

94. § 14-2-5 (1993).

part of responding to any IPRA request.[95] Much as providing a "perfunctory 'response'" to an IPRA request is "not a response at all,"[96] providing a perfunctory written denial that fails to provide "the greatest possible information" about the basis for the denial is equally noncompliant with the intent of IPRA. "The expectation established by IPRA is that records custodians will *diligently* undertake their responsibility to process and fully respond to requests, including determining what public records are responsive to the request and what records or portions thereof may be exempt from disclosure . . . ."[97]

Consonant with the purpose and structure of IPRA, the burden is on the custodian to demonstrate both that he or she has followed the procedures for separating exempt and nonexempt information,[98] and that there exists a valid reason for nondisclosure.[99] Initially, the custodian must demonstrate that he or she has undertaken his or her statutory duty to conduct a document-by-document review of the records that are responsive to a request.[100] Failure to demonstrate compliance with that threshold obligation may, on its own, subject the custodian to liability under IPRA.[101] Upon diligently undertaking a document-by-document review, the custodian must then be able to articulate the basis upon which records are being withheld from inspection, i.e., what basis exists for claiming records to be exempt.[102]

Notably, there is no provision in IPRA authorizing an agency to make a temporary denial of a public records request. In fact, such a response makes the request "deemed denied."[103] IPRA also does not allow for incomplete or less than full response to requests.[104] And there is no provision in IPRA that allows an agency to make a preliminary and blanket denial for records in its possession. Instead, the statute requires that an agency undertake an analysis of the documents requested and determine what information, not documents or files, shall and must be produced.[105] "Requested public records containing information that is exempt and nonexempt from disclosure shall be separated by the custodian prior to inspection, and the

95. *See ACLU*, 2016-NMCA-063, ¶ 38, 392 P.3d at 190; Britton v. Office of the Att'y Gen., 2019-NMCA-002, ¶ 30, 433 P.3d 320, 331–32.

96. *Britton*, 2019-NMCA-002, ¶ 41, 433 P.3d at 335.

97. *Id.* ¶ 31, 433 P.3d at 332 (emphasis added).

98. *See id.*; Noll v. N.M. Dep't of Pub. Safety, No. A-1-CA-35981, 2019 WL 1615040, at *5 (N.M. Ct. App. Mar. 19, 2019).

99. *See* City of Farmington v. Daily Times, 2009-NMCA-057, ¶ 14, 146 N.M. 349, 210 P.3d 246 ("The burden is upon the custodian to justify why the records sought to be examined should not be furnished."), *overruled by* Republican Party v. N.M. Taxation & Revenue Dep't, 2012-NMSC-026, 283 P.3d 853.

100. *See Noll*, 2019 WL 1615040, at *5.

101. *See id.* at *5–6.

102. *See* State *ex rel.* Newsome v. Alarid, 1977-NMSC-076, ¶ 35, 90 N.M. 790, 568 P.2d 1236 ("The burden is upon the custodian to justify why the records sought to be examined should not be furnished."), *superseded by statute*, 1981 N.M. Laws, ch. 47, § 3, *as recognized in* Republican Party v. N.M. Taxation & Revenue Dep't, 2012-NMSC-026, ¶ 16, 283 P.3d 853, 860).

103. N.M. STAT. ANN. § 14-2-11(A) (1993).

104. Britton v. Office of the Att'y Gen., 2019-NMCA-002, ¶ 31, 433 P.3d 320, 332.

105. *See* § 14-2-9(A) (2013); *see also* Jones v. Albuquerque Police Dep't, No. A-1-CA-35120, 2018 WL 3000216, at *5 (N.M. Ct. App. May 10, 2018) (Vargas, J., dissenting), *cert. granted* S-1-SC-37094 (N.M. Sup. Ct. July 23, 2018).

nonexempt information shall be made available for inspection."[106] The legislative intent is that even the presence of information that may fall under an exception does not itself make the sought-after record exempt from disclosure.[107]

The exceptions are not merely formulaic, and how an agency labels or designates a record is also immaterial to whether it is exempt from inspection under IPRA.[108] What matters is not *where* the public record is located—e.g., in a particular type of file, such as a personnel file or an investigation file—but rather the nature of the record that determines whether the record is exempt from inspection.[109] In considering a case where the New Mexico Department of Public Safety ("DPS") denied a request to inspect citizen complaints by claiming that they fell under the "matters of opinion in personnel files" exception,[110] the New Mexico Court of Appeals explained that "[t]o hold that any matter of opinion could be placed in a personnel file, and thereby avoid disclosure under IPRA, would violate the broad mandate of disclosure embodied in the statute."[111]

III. BLANKET DENIALS BY LAW ENFORCEMENT AGENCIES VIOLATE IPRA

In direct contravention of IPRA's plain language and case law interpreting it, New Mexico law enforcement agencies, and DPS in particular, have taken the position that the "law enforcement records" exception can be broadly read to support blanket denials of IPRA requests due to an "on-going investigation."[112] In particular, requests for records in officer-involved shootings are routinely met with blanket denials by these public bodies in clear violation of the procedural and substantive mandates of IPRA.[113] Cases regarding officer-involved shootings are not going away anytime soon, as New Mexico led the nation in 2018 in the rate of fatal shootings by

106. § 14-2-9(A).

107. S.B. 118 FISCAL IMPACT REPORT, *supra* note 86, at 2.

108. Edenburn v. N.M. Dep't of Health, 2013-NMCA-045, ¶ 23, 299 P.3d 424, 431 ("[A] document's designation as a 'non-record' for the purposes of the Public Records Act has no impact on its status as a public record under IPRA.").

109. Cox v. N.M. Dep't of Pub. Safety, 2010-NMCA-096, ¶ 21, 148 N.M. 934, 242 P.3d 501.

110. N.M. STAT. ANN. §14-2-1(C) (2019).

111. *Cox*, 2010-NMCA-096, ¶ 21, 242 P.3d at 506.

112. *See, e.g.*, Noll v. N.M. Dep't of Pub. Safety, No. A-1-CA-35981, 2019 WL 1615040, at *5 (N.M. Ct. App. Mar. 19, 2019); Jones v. City of Albuquerque Police Dep't, No. A-1-CA-35120, 2018 WL 3000216, at *1 (N.M. Ct. App. May 10, 2018) *cert. granted* S-1-SC-37094 (N.M. Sup. Ct. July 23, 2018); Findings of Fact, Conclusions of Law, and Final Decree at 7, Anchondo v. N.M. Dep't of Public Safety, D-101-CV-2018-00661 (N.M. 1st Jud. Dist. Ct. Sept. 12, 2019) (finding "willful failure" by DPS to produce records despite invocation of exception for ongoing criminal investigation); Order on Motion to Compel Defendant New Mexico Department of Public Safety's Responses at 3, Rio Grande Sun v N.M. Dep't of Public Safety, D-117-CV-2017-00245 (N.M. 1st Jud. Dist. Ct. May 7, 2019); Stipulated Order Permitting *In Camera* Review, Adams *ex rel*. Bailon v. N.M Dep't of Pub. Safety, D-101-CV-2018-01508 (N.M. 1st Jud. Dist. Ct. Feb. 5, 2019) (DPS's claim of IPRA exception denied); Response to Plaintiff's Motion for an Index and for Summary Judgment at 2, Sanchez *ex rel.* Sanchez v. N.M Dep't of Pub. Safety, D-101-CV-2018-01510 (N.M. 1st Jud. Dist. Ct. Jan. 22, 2019) (asserting IPRA exemption for "ongoing criminal investigation"); Duran v. Dep't of Pub. Safety, D-101-CV-2018-00450 (N.M. 1st Jud. Dist. Ct.).

113. *See, e.g.*, *Jones*, 2018 WL 3000216, at *1.

law enforcement officers, and has been either number one or two since 2015.[114] DPS investigates the "vast majority" of these shootings.[115] DPS routinely provides blanket denials for requests of any information regarding the shootings or its investigations into them.

The notion that a law enforcement agency, or any public body, may withhold an entire investigation file without establishing the application of the law enforcement exception to every record contained within that file raises obvious and serious issues. For example, an agency may hold an investigation open to preclude a plaintiff from ever being able to obtain the information necessary to bring a lawsuit against a public official or governmental agency within the statute of limitations.[116] Such a tactic to justify withholding an entire investigation file forces potential litigants and their lawyers to bring lawsuits based on an underlying incident that has not been fully investigated prior to filing lawsuits that, were they armed with knowledge of the facts of an incident, lawyers and their clients might well not have filed. For the lawyers involved, it challenges their ability to meet their obligations to do due diligence before filing suit.[117]

New Mexico's law enforcement agencies, and specifically DPS, have engaged in a pattern of completely withholding the documents unless and until those actions are challenged through IPRA litigation.[118] DPS has taken many tacks in its IPRA arguments, but three key arguments are consistently made. The first is that even the *possibility* that any request for documents in an ongoing investigation could lead to one of the four enumerated types of exempt information being disseminated is a sufficient basis for a denial. DPS's broad reading runs counter to a common-sense statutory interpretation and *de facto* creates a blanket "ongoing investigation" exception that IPRA does not provide for.[119] The second is that *dicta* in the *Jones* case created a broad "ongoing criminal investigation" exception, but that too runs contrary to the narrow exception language in the statute.[120] The third is that because the Attorney General or the local district attorney decides whether or not to prosecute a case, it is not the law enforcement agency's place to produce any documents

114. Elise Kaplan, *NM Once Again No. 1 in Fatal Police Shootings*, ALBUQUERQUE J. (Jan. 10, 2019, 11:58 PM), https://www.abqjournal.com/1266910/nm-ranks-no-1-for-fatal-police-shootings.html [https://perma.cc/9ZX7-4KEV] ("In 2018, New Mexico ranked first in the nation, finishing the year with 20 fatal shootings by police officers around the state, a rate of 9.59 per 1 million people. . . . Connecticut had the smallest number of fatal police shootings—0.").

115. *Id.*

116. *See* Amended Complaint, Chavez v. City of Albuquerque, D-202-CV-2016-00086 (N.M. 2nd Jud. Dist. Ct. Jan. 26, 2016) at 9–12 (lawsuit by former records custodian alleging having received orders to engage in IPRA misconduct by city officials); *Cf.* ACLU of N.M. v. Duran, 2016-NMCA-063, 392 P.3d 181.

117. *See*, *e.g.*, N.M. R. EVID. 1-011. Litigants and their lawyers must have a good faith basis for the allegations made in any pleading, including a complaint that initiates a claim of police misconduct.

118. *See*, *e.g.*, Stipulated Order Permitting *In Camera* Review, Adams *ex rel.* Bailon v. N.M Dep't of Pub. Safety, D-101-CV-2018-01508 (N.M. 1st Jud. Dist. Ct. Feb. 5, 2019); Jones v. City of Albuquerque Police Dep't, No. A-1-CA-35120, 2018 WL 3000216, at *1 (N.M. Ct. App. May 10, 2018), *cert. granted* S-1-SC-37094 (N.M. Sup. Ct. July 23, 2018); Sanchez *ex rel.* Sanchez v. N.M. Dep't of Pub. Safety, D-101-CV-2018-01510; Anchondo v. New Mexico Dep't of Pub. Safety, D-101-CV-2018-00661; Rio Grande Sun v. New Mexico Dep't of Pub. Safety, D-117-CV-2017-00245.

119. *Sanchez*, D-101-CV-2018-01510.

120. *Jones*, 2018 WL 3000216, at *1.

responsive to an IPRA request because the information *might* affect that prosecution. None of these arguments is supported under well-established standards of statutory interpretation or by the case law on which DPS relies.

A. IPRA's Language Does Not Support Withholding Any Information, Let Alone Entire Investigation Files, Based On an "Ongoing Investigation"

IPRA and its exceptions are clear and should be construed narrowly, and not broadly as law enforcement agencies responding to IPRA requests have made it a practice of doing.[121] The purpose of the Act 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."[122] As such, "[t]he burden is upon the custodian to justify why the records sought to be examined should not be furnished."[123] Like the other exceptions set out in the Act, the law enforcement exception must be construed according to its plain terms.[124] Yet, there are a growing number of cases in New Mexico in which law enforcement agencies have taken it upon themselves to construe this section of IPRA as a justification for making a blanket denial to provide records in violation of IPRA.[125] Law enforcement's construction of the law enforcement exception requires the reading in of language that does not exist in the exception or defining words in the statute more broadly than those words in their context can be read.

Any argument that an "ongoing investigation" warrants special consideration under IPRA is not anchored in the language of the statute.[126] Informing all analysis of the law enforcement exception is the overarching tenet and expressly stated public policy of the Legislature that IPRA favors informing the public.[127] Thus, an analysis starts from an understanding that an agency has a duty to provide all information, unless that information is specifically excepted. The argument to withhold entire files unreasonably seeks to broaden what is clear and narrow language. The language in the exception applies only to records "that reveal

121. Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers, 1998-NMSC-020, ¶ 27, 125 N.M. 401, 962 P.2d 1236; State *ex rel.* Toomey v. City of Truth or Consequences, 2012-NMCA-104, ¶ 22, 287 P.3d 364, 370 ("We emphasize, however, that [the] IPRA should be construed broadly to effectuate its purposes, and courts should avoid narrow definitions that would defeat the intent of the Legislature.").

122. N.M. STAT. ANN. § 14-2-5 (1993).

123. City of Farmington v. Daily Times, 2009-NMCA-057, ¶ 14, 146 N.M. 349, 210 P.3d 246, *overruled by* Republican Party v. N.M. Taxation & Revenue Dep't, 2012-NMSC-026, ¶ 16, 283 P.3d 853, 860.

124. Bank of N.Y. v. Romero, 2014-NMSC-007, ¶ 40, 320 P.3d 1, 11 (citation omitted) ("[W]hen a statute contains language which is clear and unambiguous, [the Supreme Court] must give effect to that language and refrain from further statutory interpretation.").

125. *See, e.g.*, Adams v. N.M. Dep't of Pub. Safety, No. D-101-CV-2018-01508; Jones v. City of Albuquerque Police Dep't, No. A-1-CA-35120, 2018 WL 3000216, at *1 (N.M. Ct. App. May 10, 2018), *cert. granted* S-1-SC-37094 (N.M. Sup. Ct. July 23, 2018); Sanchez *ex rel.* Sanchez v. N.M. Dep't of Pub. Safety, No. D-101-CV-2018-01510; Anchondo v. New Mexico Dep't of Pub. Safety, D-101-CV-2018-00661; Rio Grande Sun v. New Mexico Dep't of Pub. Safety, No. D-117-CV-2017-00245.

126. Noll v. N.M. Dep't of Pub. Safety, No. A-1-CA-35981, 2019 WL 1615040, at *6 (N.M. Ct. App. Mar. 19, 2019) ("Nothing in the plain language of IPRA authorizes a blanket denial of public access to records, express or implied, solely because those records are the subject of an ongoing investigation.").

127. § 14-2-5.

confidential sources, methods, or information," or contact information regarding either a) individuals accused but not charged with a crime, or b) victims of, or non-law-enforcement witnesses to, alleged sex crimes or alleged stalking.[128] The definition of "reveal" is to "to make something secret or hidden publicly or generally known."[129] The statute does not contain any qualifying language with regard to its use of the word "reveal." And the language is in the present tense. This is significant because it indicates that at the time of reviewing a document, as an agency must do when presented with an IPRA request,[130] an agency must know that the document in fact reveals one of the four sources of information. If it does not, the agency must allow that document to be inspected. This is the simple, plain reading of the first sentence of the law enforcement exception.

Plainly, the exception is not concerned with the phase of the investigation, but with the actual content of the material withheld. The second sentence is nothing more than a definition of which records are contemplated. The Legislature defined information within an investigation that could be exempt to include "inactive matters or closed investigations," but only "*to the extent that*" they "reveal confidential sources, methods, or information; or individuals accused but no charged with a crime."[131] By stating that the exception includes "inactive matters and closed investigations," it implies that it also includes active investigations.[132] The statute does not support any argument that the phase of the investigation matters or that what the document must reveal depends upon the phase of the investigation. In fact, the statute does *not* distinguish between open, closed, active, inactive or otherwise ongoing investigations. The statute is not concerned with what phase the investigation is in, but instead extends to *all* phases. Any argument that the analysis changes when an investigation is in the early phase finds no support in the statute.

The law enforcement exception is plainly not a broad exception; rather it is a limited exception allowing law enforcement to withhold *only* "records that reveal confidential sources, methods, information or individuals accused but not charged with a crime."[133] The new statutory language further limits the applicability of the exception to only those "portions" of documents or records containing any of the specifically identified information.[134] A reading of the "law enforcement exception" as allowing anything other than a withholding of the specific information falling within the exception, not full documents or files, ignores both the plain language and context of the law enforcement exception as well as case law interpreting IPRA since its enactment.[135] In analyzing IPRA, courts must "restrict their analysis to whether disclosure under IPRA may be withheld because of a specific exception contained within IPRA, or statutory or regulatory exceptions, or privileges adopted by this

128. § 14-2-1(D).

129. *Reveal*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2016).

130. *See* § 14-2-9(A) (2013).

131. § 14-2-1(D) (emphasis added).

132. *Id.*

133. *Id.*

134. 2019 N.M. Laws, ch. 27, §1 (codified at N.M. STAT. ANN. § 14-2-1).

135. Bishop v. Evangelical Good Samaritan Soc'y, 2009-NMSC-036, ¶ 11, 146 N.M. 473, 212 P.3d 361 (providing that a statute should be considered "in reference to the statute as a whole," and read together with related sections "so that all the parts are given effect").

Court or grounded in the constitution."[136] If the Legislature had wanted to create a broad investigation exception, it would have used broad language. And in fact, it did so in the second sentence of the exception when it defined the records to which the exception may apply. Although "law enforcement records" are broadly defined, law enforcement records that reveal individuals accused but not charged with a crime are exempt, and *only* "to the extent that" they do so.[137] And since these terms must be given their ordinary meaning,[138] it cannot be ignored that the broad definition of records does not relate back to the previous sentence that defines what those records must reveal in order to be exempt. However, law enforcement agencies are making the argument that an ongoing investigation exemption can be derived from the portion of Section 14-2-1(D) that exempts "law enforcement records that reveal . . . individuals accused but not charged with a crime." Law enforcement makes its argument by ignoring the plain language of the statute and expanding the statutory phrase that insulates records from public access to include all materials "surrounding," "pertaining to," "related to," or "connected with," "individuals accused but not charged with a crime." This is contrary to the established cannons of construction in which interpretation of a statute should neither read out existing language nor, as the argument to withhold entire files relies on, read in language that is not there.[139]

B. The *Romero* Decision Does Not Support Blanket Denials Under IPRA

Until *Noll*, a 2019 New Mexico Court of Appeals decision on point, the closest case to take on the issue of the law enforcement exception since the 1993 amendment was *Estate of Romero ex rel. Romero v. City of Santa Fe*.[140] Notably, *Romero* did not involve an IPRA enforcement action. Rather, *Romero* involved a discovery dispute over police investigative materials regarding a still-active criminal investigation into the disappearance of a seven-year-old boy. In that particular discovery context, the New Mexico Supreme Court considered whether either the New Mexico Constitution or the Rules of Evidence provided an express or implied "law enforcement privilege" that would allow the defendant police department to withhold in its entirety its on-going investigation file.[141] The Court found no such privilege in the New Mexico Constitution, and while it noted that the Rules of Evidence provide protection for individual pieces of investigatory materials and information, it concluded that the Rules of Evidence "do not afford complete protection from disclosure for all on-going criminal investigatory materials obtained by law enforcement."[142] Despite concluding that no privilege existed to protect on-

136. Republican Party v. N.M. Taxation & Revenue Dep't, 2012-NMSC-026, ¶ 16, 283 P.3d 853, 860.

137. § 14-2-1(D).

138. State v. Johnson, 2009-NMSC-049, ¶ 11, 147 N.M. 177, 218 P.3d 863.

139. Regents of Univ. of N.M. v. N.M. Fed'n of Teachers, 1998-NMSC-020, ¶ 28, 125 N.M. 401, 962 P.2d 1236 (internal citation and punctuation omitted) ("Statutes must be construed so that no part of the statute is rendered surplusage or superfluous . . . [and] we will not read into a statute or ordinance language which is not there, particularly if it makes sense as written.").

140. 2006-NMSC-028, 139 N.M. 671, 137 P.3d 611.

141. *Id.* ¶¶ 1, 14, 137 P.3d at 613, 616.

142. *Id.* ¶ 13, 137 P.3d at 616 ("[W]e can find no implied privilege in the Constitution for the protection of local law enforcement investigatory materials.").

going criminal investigative material from disclosure in discovery, the Court went on to exercise its power of superintending control "to protect the confidentiality of . . . information against unwarranted disclosure."[143] In doing so, it turned to IPRA's law enforcement exception to "guide the court in appraising public policy concerns" related to disclosing potentially sensitive information obtained by law enforcement.[144] The Court concluded that "the IPRA exception for law enforcement records in a criminal investigation *is illustrative* of a vitally important policy concern, leading to immunity from discovery *of some police investigative materials* in civil litigation."[145] It then expressly stated that such immunity "is not absolute."[146] Despite *Romero*'s clear distinguishability and the Court's limited discussion—in dictum—of IPRA, it is the *Romero* case that agencies such as DPS have relied upon as somehow justifying their attempts to expand the narrowly worded IPRA law enforcement exception.

C. Law Enforcement Cannot Pawn Its IPRA Duties Off on Other Agencies

Another argument made by law enforcement agencies to support their blanket denials has been that because the Attorney General or the local district attorney decide whether or not to prosecute a criminal case, it is not the law enforcement agency's place to produce any documents responsive to an IPRA request because the information *might* affect that prosecution.[147] This argument is twofold. It shoehorns entire investigation files into the law enforcement exception because *some* information in an investigation *might* turn out to reveal "sources, methods, information and individuals," and based on that possibility, *all* the information "must remain 'confidential'" during an "ongoing investigation to avoid jeopardizing it."[148] It also attempts to shirk the clear duty of the agency in receipt of the IPRA request by directing the decision making process to another agency. These arguments demand overreaching discretion be given to any law enforcement agency to label documents as part of an ongoing investigation to avoid compliance with IPRA. These arguments also seek to render the monetary enforcement provisions moot. Such a reading of the statute is contrary to its plain meaning as well as its intent and creates an enormous hole in the citizenry's ability to obtain records under the IPRA from any law enforcement agency when all an agency must do is keep an investigation open, or claim that it is, to hide every single document in that file.

And such concerns are not unfounded. There are cases in which entire files have been withheld by an agency, and the denial letter simply provides the language of Section 14-2-1(A)(4) (now Section 14-2-1(D)) as its justification, when the

143. *Id*. ¶ 15, 137 P.3d at 617 (quoting *In re* Motion for a Subpoena Duces Tecum, 1980-NMSC-010, ¶ 11, 94 N.M. 1, 606 P.2d 539).

144. *Id*. ¶ 18, 137 P.3d at 618.

145. *Id*. (emphasis added).

146. *Id*. ¶ 19, 137 P.3d at 618.

147. Response to Plaintiff's Motion For An Index And For Summary Judgment, Sanchez *ex rel.* Sanchez v. N.M. Dep't of Pub. Safety, D-101-CV-2018-01510 (N.M. 1st Jud. Dist. Ct. Oct. 23, 2018), at 8 ("[I]t is not feasible to predict, in advance, whether certain items of evidence may ultimately turn out to be key pieces of evidence, crucial to a criminal investigation for a prosecution.").

148. *Id*.

requester was asking for information regarding an officer-involved shooting.[149] In *Adams*, the IPRA requester filed a motion for partial summary judgment on liability against the agency based on its blanket denial of the records requested, and within two weeks, the requester received an invoice for the entire investigation file, evidencing the agency's willingness to produce the records requested.[150] This type of gaming—withholding documents until challenged, clearly showing that no exception applied—is also used by agencies in their arguments that there is no support for damages against the agencies for their conduct.[151] The most outlandish conduct has been brought to light by a former records custodian who brought an employment-related retaliation lawsuit against the agency he worked for, alleging his superiors often falsely answered IPRA requests under his name and ordered him to withhold or delay production of certain materials to requesters without lawful justification.[152]

In essence, the law enforcement agencies' arguments described above distill down to their claims that they are unable, but in reality simply unwilling, to undertake any kind of analysis of what information falls within the four specific categories of information detailed in the law enforcement exception. To do so, they say, is too burdensome, and they cannot know what words a witness stated, or which evidence gathered, *might* affect an investigation.[153] Yet, agencies have been on notice since 2011 that they must "diligently" respond to requests including undertaking an analysis of which records are responsive and which fall under an exception.[154] And a public body that provides an incomplete or inadequate response is not in compliance as well.[155] Further, the broadening argument seeks to allow an agency to shirk its responsibility under the statute to undertake some analysis of the information to determine what does or does not fall within the exception before producing whole or redacted documents and files, contrary to clear language in the statute that such an analysis must be undertaken.[156] In fact, the courts have repeatedly held that the analysis is required by the Act, and that the critical factor is the nature of each document itself—thus imposing the duty on agencies to review documents

149. *Id*.

150. *Id*.; *see also* Adams v. New Mexico Dep't of Pub. Safety, No. D-101-CV-2018-01508 (DPS produced the entire investigation file within weeks of Plaintiff's filed motion for summary judgment).

151. *See, e.g.*, *id*.; Jones v. City of Albuquerque Police Dep't, No. A-1-CA-35120, 2018 WL 3000216 (N.M. Ct. App. May 10, 2018), *cert. granted*, S-1-SC-37094 (N.M. Sup. Ct. July 23, 2018); Noll v. New Mexico Dep't of Pub. Safety, No. D-101-CV-2015-02403 (N.M. 1st Jud. Dist. Ct. Sept. 12, 2016); Noll v. New Mexico Dep't of Pub. Safety, No. A-1-CA-35981, 2019 WL 1615040 (N.M. Ct. App. Mar. 19, 2019).

152. Amended Complaint, Chavez v. City of Albuquerque, D-202-CV-2016-00086 (N.M. 2nd Jud. Dist. Ct. Jan. 26, 2016).

153. Response to Plaintiff's Motion For An Index And For Summary Judgment, Sanchez *ex rel*. Sanchez v. N.M. Dep't of Pub. Safety, D-101-CV-2018-01510 (N.M. 1st Jud. Dist. Ct. Oct. 23, 2018), at 8.

154. Britton v. Office of the Att'y Gen., 2019-NMCA-002, ¶ 31, 433 P.3d 320, 322 (citing San Juan Agric. Water Users Ass'n, 2011-NMSC-011, ¶ 36, 150 N.M. 64, 257 P.3d 884).

155. *Id*. ¶ 33, 433 P.3d at 332.

156. *See* N.M. STAT. ANN. § 14-2-9 (2013).

prior to any denial.[157] Not only must an agency follow the language of the exception, the exception cannot be read to ignore the rest of the statute.[158] Nor can an agency ignore that the statute has been amended to clarify that only portions of a record or document may be withheld, codifying redaction and mandating review of the records.[159] These actions, and arguments, have been recently disagreed with by district courts and the court of appeals.[160]

Thus, although some materials in an ongoing investigation might reveal a confidential informant, a confidential tactical plan, or some other "confidential information" within the meaning of the statute's law enforcement exception, IPRA simply does not permit the denial of a public records request in its entirety based solely on the investigation's existence and that phantom possibility.[161] If, for example, an agency's videos or witness interviews contain information that may cross-contaminate witnesses if revealed, the agency cannot make a blanket refusal to produce records or a file, but is required to redact that information and produce the nonexempt portions of the public record.[162] There is no allowance in the statute, or in the case law that has interpreted it, for an agency to refuse to review the documents in the first instance, make a blanket denial based on the possibility that some material *might* fall under the exception, and withhold those documents or portions thereof that are responsive to the request and not even claimed to be subject to an exception. Moreover, there is simply nothing in IPRA that permits an agency to deny a request by pawning its statutory responsibility onto another agency.

D. Recent and Ongoing IPRA Litigation Regarding the Law Enforcement Records Exception

The courts are now grappling with what to do with these cases as they make their way through the New Mexico Court of Appeals.[163]

In *Jones v. City of Albuquerque Police Dep't*, the defendants alleged the existence of an ongoing law enforcement investigation into an APD shooting to

157. *E.g.*, Cox v. N.M. Dep't of Pub. Safety, 2010-NMCA-096, ¶ 7, 148 N.M. 934, 242 P.3d 501; *Britton*, 2019-NMCA-002, ¶ 31, 433 P.3d at 322.

158. *See* Dewitt v. Rent-A-Center, Inc., 2009-NMSC-032, ¶ 14, 146 N.M. 453, 212 P.3d 341 (internal quotation marks and citation omitted) ("We look first to the plain meaning of the statute's words, and we construe the provisions of the Act together to produce a harmonious whole.").

159. *Cf.* 2019 N.M. Laws ch. 27, § 1.

160. *See* Noll v. N.M. Dep't of Pub. Safety, No. A-1-CA-35981, 2019 WL 1615040 (N.M. Ct. App. Mar. 19, 2019); Findings of Fact, Conclusions of Law, and Final Decree at 6, Anchondo v. N.M. Dep't of Pub. Safety, No. D-101-CV-2018-00661 (N.M. 1st Jud. Dist. Ct. Sept. 12, 2019) (concluding DPS violated IPRA in releasing some information to media outlets and denying all records to Plaintiff).

161. *Cf.* Jones v. City of Albuquerque Police Dep't, No. A-1-CA-35120, 2018 WL 3000216, at *3 (N.M. Ct. App. May 10, 2018), *cert. granted* S-1-SC-37094 (N.M. Sup. Ct. July 23, 2018). Jones, however, is a unique case in which the FBI was involved and timing of production of a privilege log was based on the FBI's investigation or a date certain set by the court, not by DPS's conduct. *Id.* ("[T]he trial court also ordered that if the FBI failed to complete its investigation by January 15, 2015, then DPS would be required to produce a privilege log to Plaintiff 'providing a description of the documents withheld and the basis therefore.'").

162. *See* N.M. STAT. ANN. § 14-2-9(A) (2013).

163. *See Jones*, 2018 WL 3000216; *Noll*, 2019 WL 1615040.

evade disclosing discovery materials.[164] The trial court held that investigative documents would have to be turned over to the plaintiffs by a certain date, the time the court had been told that the ongoing law enforcement investigation would be concluded.[165] If the investigation was still ongoing, however, then:

> DPS would be required to produce a privilege log to Plaintiff "*providing a description of the documents withheld and the basis therefore*[,]" which Plaintiff would then be given an opportunity to challenge. And concurrently with the production of the privilege log, [production of] the records for an *in camera* review, to enable the trial court to address any challenge to the privilege log made by the Plaintiff.[166]

While the court of appeals disposed of the case on other grounds, it is informative that the trial court in the case required the preparation of a privilege log.[167] In fact, in so holding, the trial court was recognizing that all of the information being withheld by the defendants was not necessarily subject to an exception.[168]

In *Sanchez v. New Mexico Dep't of Public Safety*, an officer-involved-shooting out of Ruidoso, the Plaintiff made a pre-filing request for records from the agency who investigated the shooting, DPS.[169] DPS responded with a blanket denial based on the law enforcement exception to IRPA, to which the Plaintiff wrote a detailed letter challenging the withholding, and to which DPS did not reply. The Plaintiff was then forced to file suit and it was not until Plaintiff filed her Motion for Summary Judgment that DPS produced the entire file.[170] DPS argued that because it could not determine which information may be important to a prosecution that DPS could not release the information until the district attorney cleared the file, and that because DPS did eventually produce the information, no damages could flow from their actions.[171] DPS provided no documents or evidence to the court to prove that any documents in the investigation file fell within the law enforcement exception, only generalized argument.[172] The district court disagreed with DPS that it could

164. The plaintiffs sued both the Albuquerque Police Department and the New Mexico Department of Public Safety. DPS had averred that disclosure of records in its possession would interfere with an investigation of the shooting by the Federal Bureau of Investigation. *Jones*, 2018 WL 3000216, at *1.

165. *Id.* at *3.

166. *Id.* (first alteration in original) (emphasis added).

167. *Id.*; *see also* Hartman v. Texaco, Inc., 1997-NMCA-032, ¶ 20, 123 N.M. 220, 937 P.2d 979, *cert. denied*, 123 N.M. 83, 934 P.2d 277 (N.M. Sup. Ct. Mar. 7, 1997) (party can meet burden to establish immunity from disclosure of documents under work product doctrine by submitted "detailed affidavits sufficient to show that precise facts exist to support the immunity claim").

168. *Jones*, 2018 WL 3000216, at *5 (Vargas, J., dissenting) ("While the district court appears to have concluded that the exemption set out in Section 14-2-1(A)(4)[, now 14-2-1(D),] was applicable to this case, it simultaneously recognized that all of the information withheld by Defendant may not be subject to the exemption" because it ordered a log produced if the files were not.).

169. Response to Plaintiff's Motion for an Index and for Summary Judgment at 2, Sanchez *ex rel.* Sanchez v. N.M., D-101-CV-2018-01510.

170. *Id*.

171. *Id.*

172. *Id.*

make a blanket denial under IPRA, and during argument cited its own case that was up on appeal at that time, *Noll*.[173]

In March of 2019, the Court of Appeals decided *Noll*.[174] *Noll* involved an IPRA enforcement action based on requests to inspect public records made by Erin Noll, the widow of a man who was killed in an officer-involved shooting. One defendant, the Town of Edgewood, refused to permit inspection of any records because the Town claimed that the records were "part of an ongoing investigation." The other defendant, DPS, initially deemed Noll's request to be "over[ly] burdensome" then later informed Noll that it could not comply with her request "at the present time" because it had not received approval from the district attorney to release the information from its investigation. Noll filed an IPRA enforcement action and was ultimately successful, receiving both the records she requested and costs and attorney fees. DPS and the Town appealed, challenging both the district court's award of costs and fees and what DPS and the Town perceived to be the district court's effective imposition of a "requirement that they file suit and seek *in camera* review before invoking the law enforcement exception." In affirming the district court's decision, the court held that a public body fails "to satisfy t[its] statutory responsibilities to process and fully respond" to an IPRA when it does not conduct a meaningful review of the requested documents.[175] Further, the court expressly held that "[n]othing in the plain language of IPRA authorizes a blanket denial of public access to records, express or implied, solely because those records are the subject of an ongoing investigation."[176] As to the district court's "requirement" of an in camera review, the court found that though the specific testimony of the involved parties resulted in the court's conclusion that defendants should have sought in camera review, "to the extent that the facts of a case may leave the public body questioning the applicability of an exception, in camera review is an appropriate method to ensure compliance."[177]

Noll offers two key takeaways. First, there exists no "ongoing investigation" exemption in IPRA that justifies blanket denials of requests related to officer-involved shootings. Second, *Noll* makes clear that it is the "initial responsibility of the custodian—not the court—to determine what records are responsive to the request and what public records are exempt from disclosure[.]"[178] *Noll* thus reinforces IPRA's requirement that a public body must, in the first instance, undertake a meaningful evaluation of the requested records; there is simply no other way to determine what records are (1) responsive, and (2) exempt. Denying a request without first engaging in the requisite evaluation violates both the spirit and the letter of IPRA.

Jones made clear, through a different avenue, that a law enforcement agency is not allowed to make a blanket withholding of documents, and that a

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173. Order Granting in Part Plaintiff's Motion for Summary Judgment, Sanchez *ex rel.* Sanchez v. N.M. Dep't of Pub. Safety, D-101-CV-2018-01510 (N.M. 1st Jud. Dist. Ct. Jan. 22, 2019).

174. Noll v. N.M. Dep't of Pub. Safety, No. A-1-CA-35981, 2019 WL 1615040 (N.M. Ct. App. Mar. 19, 2019).

175. *Id*. at *5.

176. *Id.* at *6.

177. *Id.* at *6.

178. *Id.*

privilege log provides the plaintiff sufficient information to assess the reasoning of the withholding and challenge any documents believed to be withheld improperly. *Noll* tackled the IPRA issue head on and held, at the district court and court of appeals levels, that the law enforcement exception does not support blanket denials—IPRA requires all agencies to conduct a meaningful review of the requested documents. However, this still allows agencies to withhold documents with little information provided to the requester which in turn requires the requester to sue an agency and records custodian to obtain an in camera review—all of which consumes the time of the parties and the courts. A better solution, one that is consistent with IPRA's intent, is required that will disabuse law enforcement agencies in the first instance of their notion that they may hide the ball from IPRA requesters.

IV. THE CONDUCT OF NEW MEXICO LAW ENFORCEMENT AGENCIES SUGGESTS THE NEED TO REQUIRE MORE DETAILED DENIALS FROM AGENCIES.

There exists a clear issue of transparency in New Mexico regarding its law enforcement agencies that challenges the foundation of IPRA, the trust of the public, and the capacity of the courts. An effective and reasonable mechanism aimed at improving and promoting transparency while simultaneously respecting the public policy concerns that underlie IPRA's law enforcement exception already exists under federal law.

At the federal level, FOIA allows any person to request any record from any federal agency or entity without having to provide a reason for the request.[179] There are, as with all comprehensive statutory schemes, exceptions to the general rule of access established by FOIA.[180] Federal courts interpreting FOIA have held that the government defendant is required to produce an index containing a description of the documents in its possession claimed to be exempt from inspection, along with an explanation of the reasons for withholding production of those documents. Such a requirement should be adopted in New Mexico—either by the Legislature through the adoption of an explicit statutory provision, or by New Mexico's appellate courts through their ability to construe IPRA, specifically Section 14-2-11(B), in a way consistent with and to effectuate the purpose of IPRA—as a way to battle law enforcement agencies', and any other public body's, ongoing and repeated efforts to hide the ball and to seek their compliance with the spirit, and letter, of IPRA.[181] Every public body must already undertake document-by-document review of records and make individualized determinations regarding whether information is exempt or

179. 5 U.S.C § 552(3) (2012).

180. FOIA contains nine specific exceptions to public access. 5 U.S.C. § 552(b)(1-9). Only the exception for information specifically exempted under other laws is mandatory; the others are discretionary. *See* 5 U.S.C. § 552(b)(3); *see also* Nat'l Sec. Archive v. Archivist of the U.S., 909 F.2d 541, 545 (D.C. Cir. 1990) and 5 U.S.C. § 551(1)(A) (2012)(FOIA does not apply to the President, the President's advisors or the legislature.), *see* 5 U.S.C. §552(3)(C); Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 28 (D.C. Cir 1998)(only a "reasonable" search for requested documents need be undertaken by an agency and if done and no documents are found, that ends the agency's responsibilities).

181. *Cf.* Noll v. N.M. Dep't of Pub. Safety, No. A-1-CA-35981, 2019 WL 1615040, at *1–2, *5 (N.M. Ct. App. Mar. 19, 2019) (testimony of the district attorney for Santa Fe in-line with that of the records custodian for DPS' arguments for withholding production).

nonexempt.[182] Any public body who claims any information or documents may be withheld under any exception under IPRA, and particularly under the law enforcement records exception, should be required to provide, as part of the denial process, an index, suitably detailed, informing the requester generally of the information or material being withheld, and with a level of detail beyond mere conclusory generalizations as to how the material meets the specific exception. The requirement to document that undertaking—and then to provide that documentation to the requester in lieu of the records themselves—is neither unreasonable nor burdensome because an agency's custodian is already implicitly required to undertake that review under IPRA. The proposal to require agencies to provide an index when denying inspection of records simply makes the requirement explicit and formalizes its parameters.

A. *Vaughn* and the Idea of an Index – A Modest Proposal

Under FOIA, the federal courts utilize *in camera* review of contested documents, but, because of the burden this puts on the court, the *Vaughn* court long ago established an intermediate step—the creation of an index by the defendant—that places the burden back on the government to encourage disclosure and increases efficiency in the courts.[183]

The *Vaughn* index came about when the government denied a FOIA request and responded to the requester by stating that certain documents fell under three exemptions which permitted it to refuse disclosure.[184] In contravention of congressional intent and the statute, the government "claim[ed] all it need[ed] do [was] to aver that the factual nature of the information is such that it falls under one of the exemptions."[185] The court rejected the government's contention, reasoning that "as a tactical matter, it is conceivable that an agency could gain an advantage by claiming overbroad exemptions"[186] and once the request was denied in such a manner,

> the opposing party is comparatively helpless to controvert this characterization. If justice is to be done and the Government's characterization adequately tested, the burden now falls on the court system to make its own investigation. This is clearly not what Congress had in mind.[187]

In *Vaughn*, the information withheld was voluminous and based on multiple claimed exemptions under FOIA; the court declined to commit resources and costs to reviewing the withheld information, which, in terms of judicial manpower required

182. *See, e.g.*, San Juan Agric. Water User Ass'n v. KNME-TV, 2011-NMSC-011, 150 N.M. 64, 257 P.3d 884; Britton v. Office of the Att'y Gen., 2019-NMCA-002, 433 P.3d 320; Noll v. N.M. Dep't of Pub. Safety, No. A-1-CA-35981, 2019 WL 1615040 (N.M. Ct. App. Mar. 19, 2019).

183. Vaughn v. Rosen, 484 F.2d 820, 822–23 (D.C. Ct. App. 1973).

184. *Id.*

185. *Id.* at 825–26.

186. *Id.* at 826; *cf.* ACLU v. Duran, 2016-NMCA-063, 392 P.3d 181.

187. 484 F.2d at 826.

would have been immense.[188] In addition, in such situations where an entire document was unlawfully withheld simply because a portion of it was arguably exempt, a practice that the court expressly disapproved of, the court noted that it would have to expend even more resources because "[i]solating what exemptions apply to what parts of a document makes the burden of evaluating allegations of exemption even more difficult."[189] Such a burden, the court stated, was not justified or permissible. Rather, "[t]he burden ha[d] been placed specifically by statute on the Government."[190]

The *Vaughn* court also disapproved of the tactical advantage a government agency might gain from placing the burden upon the court. "If the morass of material is so great that court review becomes impossible, there is a possibility that an agency could simply point to selected, clearly exempt portions, ignore disclosable sections, and persuade the court that the entire mass is exempt."[191] To avoid such ploys and the resulting evasion of justice, the court implemented an indexing requirement that governmental agencies must use in FOIA requests. Thereafter, when the government withholds a document alleging exceptions under FOIA, it must provide to the requesting party:

> (1) A detailed justification that contains "a relatively detailed analysis in manageable segments" explaining the exemptions.[192] The justification must not be merely "conclusory and generalized allegations of exemptions."[193]
> (2) A description of the documents withheld that satisfies the need for "specificity, separation, and indexing," by "specify[ing] in detail which portions of the document are disclosable[,] and which are allegedly exempt . . . achieved by formulating a system of itemizing and indexing that would correlate statements made in the Government's refusal justification with the actual portions of the document."[194]
> (3) enough detail to permit "adequate adversary testing," because given a "more adequate, or rather less conclusory, justification in the Government's legal claims, and more specificity by separating and indexing the assertedly exempt documents themselves, a more adequate adversary testing will be produced."[195]

Such an index makes it more likely that "a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and . . . permit[s] the court system effectively and efficiently to evaluate the factual nature of disputed information."[196] Such an index is also necessary because

188. *Id.*
189. *Id.* at 825.
190. *Id.*
191. *Id.* at 826.
192. *Id.*
193. *Id.*
194. *Id.* at 827.
195. *Id.* at 828.
196. *Id.* at 826.

> the agency has full knowledge of the contents of the withheld records and the requester has only the agency's affidavits and descriptions of the documents, its affidavits must be specific enough to give the requester 'a meaningful opportunity to contest' the withholding of the documents and the court to determine whether the exemption applies. [T]he agency must describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of disclosing the sought-after information.[197]

The *Vaughn* court also reasoned that the preparation of an index would avoid the court having to expend its precious judicial resources engaging in an in camera review of the documents withheld by the agency, or at the very least, narrow its expenditure of effort in reviewing withheld documents.[198]

The *Vaughn* index has since been codified in the Code of Federal Regulations and is identified therein as an

> [i]temized index, correlating each withheld document (or portion) with a specific FOIA exemption(s) and the relevant part of the agency's nondisclosure justification. The index may contain such information as: date of document; originator; subject/title of document; total number of pages reviewed; number of pages of reasonably segregable information released; number of pages denied; exemption(s) claimed; justification for withholding; etc."[199]

While some state jurisdictions have adopted the requirement of the FOIA index,[200] others have no such requirement.[201]

Indices similar to the *Vaughn* index, as well as the requirement for *in camera* review, have been utilized by New Mexico courts in some cases.[202] Moreover, the production of an explanation by the withholding party to the requesting party is not a novel concept under New Mexico law. While admittedly in a different context, New Mexico courts have established the requirement a party who refuses to produce documents in discovery in a civil action based on a claim of

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197. ACLU of N. Cal. v. Superior Court, Cal. Rptr. 3d 472, 493–94 (Cal. Ct. App. 2011) (second alternation in original) (internal quotation marks and citations omitted).

198. *Id.* at 824-25.

199. Vaughn Index, 32 C.F.R. § 701.39 (2019).

200. Cranford v. Montgomery Cty., 481 A.2d 221, 229, 231 (Md. 1984) (burden on records custodian to fully review all records requests "to determine whether the document or any severable portion of the document meets all of the elements of an exemption" and for anything withheld, "the agency involved ordinarily should be able, without disclosing privileged information, to present a sufficiently detailed description and explanation to enable the trial court to rule whether a given document, or portion thereof, is exempt without the necessity of an *in camera* inspection.").

201. Reno Newspapers, Inc. v. Gibbons, 266 P.3d 623, 631 (Nev. 2011) (declining to adopt a pre-litigation *Vaughn* index under its records act because the act already lays out a requirement that any denial in whole or part requires "(1) Notice of that fact; and (2) A citation to the specific statute or other legal authority that makes the public book or record, or a part thereof, confidential.").

202. *See* Jones v. City of Albuquerque Police Dep't, No. A-1-CA-35120, 2018 WL 3000216, at *3 (N.M. Ct. App. May 10, 2018), *cert. granted* S-1-SC-37094 (N.M. Sup. Ct. July 23, 2018).

attorney-client privilege or the attorney work product doctrine to produce a privilege log *at the time of the refusal*.[203]

The likely response to and argument against this proposal by public bodies is that there is no obligation for public bodies "to create a public record" under IPRA.[204] It is true that IPRA does not require that an agency create a record in order to have a document responsive to a records request.[205] However, IPRA *does* require that a governmental agency presented with a properly formatted IPRA request respond *in writing* to the requester in several circumstances.[206] This evinces the Legislature's acknowledgment and intent that agencies will, indeed, have to create records in some instances in order to fully and ably fulfill their obligations under IPRA. Such a record is a necessary product of the IPRA procedure, as would be an index. An index should be a part of the agency's statutory obligation to communicate, in writing, with a requester regarding the requester's right to inspect records and an agency's alleged assertion that it may limit that right under one of IPRA's narrow, enumerated exceptions. And like FOIA, which does not require an index but under which it became the norm as a result of judge-made law, and was codified in the CFRs, IPRA does not require an index. However, to carry out the Legislature's intent and purpose in enacting IPRA, and to combat the disconcerting rise of unabashed blanket denials by law enforcement agencies, New Mexico courts should follow the common sense approach long ago implemented in federal courts interpreting FOIA and establish a *Vaughn*-like index requirement, at the least holding that the law requires agencies to provide a denial letter detailed enough for any requestor to understand why any information is being withheld and whether to challenge it.

V. CONCLUSION

Law enforcement records clearly fall under the IPRA definition of a public record. Any request for them under IPRA must result in production of those records, unless a public body undertakes its statutory duty to perform a meaningful review and determines in good faith that records or portions thereof that it seeks to withhold from inspection *specifically* meets the narrow law enforcement exception under IPRA. Under a plain reading of the statute, there is no support for the myriad arguments advanced by law enforcement agencies to justify their blanket denials of

203. *See* N.M. R. CIV. P. 1-026 committee cmt. to 2009 amends. ("It is desirable that a party comply with the provisions of Rule 1-026(B)(7)(a) by producing a privilege log of any information being withheld from discovery on the ground of privilege."); Pina v. Espinoza, 2001-NMCA-055, ¶¶ 24–25, 130 N.M. 661, 29 P.3d 1062 (party withholding information bears responsibility of identifying each document withheld, describing nature of information withheld, and explaining the basis for withholding it—a general statement is not sufficient); Hartman v. Texaco Inc., 1997-NMCA-032, ¶ 20, 123 N.M. 220, 937 P.2d 979 (rejecting argument that documents withheld under statute not subject to privilege log requirements at time of withholding, not after challenged).

204. N.M. STAT. ANN. § 14-2-8(B) (2009).

205. *Id.*

206. *See, e.g.*, § 14-2-8(D) ("If the inspection is not permitted within three business days, the custodian shall explain in writing when the records will be available for inspection."); § 14-2-11(B) (1993) ("If a written request has been denied, the custodian shall provide the requester with a written explanation of the denial."); § 14-2-10 (1993) (requires written notice to requester after receipt of excessively broad request); § 14-2-11(C) (custodian subject to action for damages for failure to deliver written explanation of request denial).

the citizenry's right to access those documents. First, IPRA has no conditional language supporting an argument of withholding because a record *might* reveal exempt information. Second, IPRA's language makes it clear that records are to be reviewed and sorted to differentiate between records that are responsive and non-responsive and excepted or not excepted and that are to be disclosed or may be withheld accordingly. Third, IPRA does not allow a public body to shift the duty to comply with its requirements onto another public body that is not the target or custodian of the records requested. And finally, *Romero*, a case about civil discovery and not IPRA, does not allow blanket denials under IPRA. In other words, none of DPS's arguments comport with law enforcement's obligations under IPRA.

The repeated, blanket denials of IPRA requests by New Mexico's law enforcement agencies are burdening requesters by requiring them to engage the courts for relief. These IPRA suits are in turn burdening the courts, which have been faced with conducting *in camera* reviews to resolve the issues. In the *Noll* and *Sanchez* cases, no documents were properly withheld pursuant to the law enforcement exception.[207]

In the interest of justice, disclosure, and efficiency, it is time that DPS and all New Mexico law enforcement agencies be required to uphold their statutory obligations under IPRA to disclose requested information to which requesters are entitled under the Act. As to any records an agency chooses to withhold, it should be required to inform the requester, in writing as required by IPRA, of the reason or reasons why it is withholding. Mere conclusory statements in this regard do not suffice, and an index requirement should be established, either as a matter of interpretation by the courts, or by the Legislature through an amendment to the IPRA. Indeed, such an index would also aid law enforcement agencies, which have an actual, founded belief that information must be withheld to maintain the integrity of an investigation, as long as the records in question fall within one of the four categories of information exempted from disclosure under IPRA. The agency's preparation of an index would surely bolster its argument to courts, and narrow both the dispute between the parties and the expenditure of judicial resources required to resolve the parties' remaining disputes.

207. Noll, *supra*.