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# PRIVATE ACTORS, PUBLIC RECORDS, AND NEW MEXICO'S INSPECTION OF PUBLIC RECORDS ACT

By: John Kreienkamp\*

## INTRODUCTION

The term “public records” is understood by the public to mean records of governmental institutions. This is straightforward enough: those records held by government entities and related to their work are public records and, in New Mexico, all individuals, companies, and entities are guaranteed access to them through the Inspection of Public Records Act (“IPRA”).<sup>1</sup> But the relative simplicity of this proposition is belied slightly by the fact that government entities have employees and private contractors who sometimes possess records related to public business in their own private e-mails, cell phones, or offices. In those cases, where records are held by a private individual or corporation but effectively on behalf of a government entity, this leads to real questions as to the application of IPRA and open government principles more generally.

In a series of three recent court decisions, New Mexico’s appellate courts have grappled with IPRA’s implications for private entities. In *State ex rel. Toomey v. City of Truth or Consequences*<sup>2</sup> and *New Mexico Foundation for Open Government v. Corizon Health*,<sup>3</sup> the Court of Appeals held that the records of a private contractor performing services on behalf of a public body were subject to inspection under IPRA to the extent they related to government business. In both of these cases, the private contractor was one of the defendants in the lawsuit. By contrast, in *Pacheco v. Hudson*,<sup>4</sup> the Supreme Court determined that records associated with a social media page operated by the reelection campaign of a sitting District Court judge were not public records because they were not effectively held on behalf of a public body. In that case, the Supreme Court determined that the sitting District Court judge was not a proper defendant in the lawsuit.<sup>5</sup> However, these three cases sent mixed signals as to the finer point of whether IPRA applied to private

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1. N.M. STAT. ANN. §§ 14-2-1 to -12 (2019).

2. 2012-NMCA-104, ¶ 25, 287 P.3d 364, 371.

3. 2019-NMCA-014, ¶ 21, 460 P.3d 43, 51.

4. 2018-NMSC-022, ¶ 36, 415 P.3d 505, 512–13.

5. See *Pacheco*, 2018-NMSC-022, ¶ 57, 415 P.3d at 516 (holding that the public body’s designated records custodian “is the only official who statutorily ‘is subject to an action to enforce’ IPRA”) (citing N.M. STAT. ANN. § 14-2-11(C)).

entities themselves or merely their records. In other words, to whom should an IPRA request be directed: the public body or the private entity? And who is the proper defendant in an action to enforce IPRA: the public body or the private entity?

This article maintains that IPRA requests must be directed to the public body, not a private contractor, and that a private entity is not a proper defendant in an action to enforce IPRA. Based on IPRA's plain language and overall statutory purpose, the decisions in *Toomey*, *Pacheco*, and *Corizon* should be read narrowly as holding only that the records of a private entity are public records when held on behalf of a public body. The nine-factor test from *Toomey*,<sup>6</sup> weighing the circumstances to determine whether records are effectively held on behalf of a public body, should not be misconstrued to subject a private entity itself to IPRA. Instead, only a private entity's records may be subject to IPRA through the public body on whose behalf the private entity is operating. An IPRA request should be directed to the public body, not the private contractor or employee. And, in the event of alleged noncompliance with IPRA, the public body is the proper defendant, not its private contractor.

The first section of this article describes the history of IPRA, particularly as it relates to private entities. First, it traces the evolution of IPRA over time, with an emphasis on its shifting scope and provisions, until the statute reached approximately its current form roughly thirty years ago. The article then discusses *Toomey*, *Pacheco*, and *Corizon* in detail, explaining each case's procedural history and the respective court's decision. The second section analyzes the holdings in all three cases and outlines various possible interpretations. Finally, this article argues that these three cases cannot, consistent with IPRA, be interpreted as holding that private entities may constitute public bodies for the purposes of specific public records requests.

## I. IPRA AND ITS RELATION TO PRIVATE ACTORS

### A. The Inspection of Public Records Act

The Inspection of Public Records Act was signed into law in 1947.<sup>7</sup> Originally referred to inconsistently as either "New Mexico's 'right to know' act"<sup>8</sup> or the "Inspection of Public Records Act,"<sup>9</sup> the statute in its first form was relatively simple and undeveloped in comparison to today's much more detailed statute.<sup>10</sup> For example, IPRA at first contained no stated civil remedies of any kind for

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6. See *Toomey*, 2012-NMCA-104, ¶ 13, 287 P.3d at 368.

7. See 1947 N.M. Laws, ch. 130, § 1.

8. State ex rel. Newsome v. Alarid, 1977-NMSC-076, ¶ 30, 568 P.2d 1236, 1243 (referring to "New Mexico's 'right to know' act, § 71-5-1, et seq."), *superseded by statute as stated in* Republican Party of N.M. v. N.M. Taxation and Revenue Dep't, 2012-NMSC-026, 283 P.3d 853.

9. See N.M. Atty. Gen. Op. 63-55 (1963) (referring to "the Inspection of Public Records Act").

10. In its modern form, IPRA consists of eleven separate sections that, cumulatively speaking, set forth a comprehensive statutory scheme governing the public's right to inspect public records, the procedures for both requesting and providing public records, and the civil penalties for noncompliance by public bodies. At the time of its initial enactment, however, IPRA consisted of only three short sections that were far less comprehensive. See 1947 N.M. Laws, ch. 130, § 1.

noncompliance by public bodies,<sup>11</sup> no provisions requiring public bodies to provide copies of public records by way of postal mail, and not even a single definition of any term. However, while the statute was at that time undeniably less expansive than it is today, it did stand for an important public policy: that “[e]very citizen of this State has a *right* to inspect any public records of this State” except as otherwise provided by law.<sup>12</sup>

As first enacted, IPRA provided the public with the right to inspect “any state, county, school, city or town records in this state.”<sup>13</sup> Notably, this earlier version of the statute did not contain the phrase “public body,” whether to describe its scope or otherwise. Instead, the statute provided that it applied to any “state, county, school, city or town.”<sup>14</sup> By contrast, IPRA in its first form did use the term “public records” in several of its provisions.<sup>15</sup> However, as the New Mexico Supreme Court noted in at least one opinion, IPRA did not define the term and this led to some ambiguity as to which particular records fell within the ambit of the statute.<sup>16</sup>

Although several smaller-scale amendments were made to IPRA between 1973 and 1983,<sup>17</sup> the statute was overhauled and modernized into approximately its current form in 1993.<sup>18</sup> The 1993 amendment added an array of provisions to the statute, including those that set forth specific deadlines,<sup>19</sup> required each public body to designate its own “records custodian” who would be responsible for public records

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11. One of the most notable differences between IPRA as it exists today and its initial 1947 version is that the latter contained only a criminal penalty for noncompliance by “any officer having the custody of any state, county, school, city or town records in this state.” 1947 N.M. Laws, ch. 130, § 2. By contrast, today IPRA does not include any criminal penalties for noncompliance and instead only provides for *civil* enforcement by the District Courts. *See* N.M. STAT. ANN. § 14-2-12(B) (1993) (“A district court may issue a writ of mandamus or order an injunction or other appropriate remedy to enforce the provisions of the Inspection of Public Records Act.”).

12. N.M. STAT. ANN. § 13-501 (1947) (emphasis added). Following the 1953 recompilation of the New Mexico Statutory Code, this statute became Section 71-5-1.

13. *See* N.M. STAT. ANN. § 13-502 (1947) (“All officers having the custody of any state, county, school, city or town records in this state shall furnish proper and reasonable opportunities for the inspection and examination of all the records requested of their respective offices.”); *see also* N.M. STAT. ANN. § 13-503 (1947) (providing a criminal penalty for a violation of the statute by “any officer having the custody of any state, county, school, city or town records in this state”).

14. N.M. STAT. ANN. §§ 13-502 to -503 (1947).

15. *See* N.M. STAT. ANN. §§ 13-501 to -503 (1947).

16. *See* State ex rel. Newsome v. Alarid, 1977-NMSC-076, ¶ 30, 568 P.2d 1236, 1243 (“New Mexico’s ‘right to know’ act, § 71-5-1, *et seq.* does not define ‘public record.’”). *See also* N.M. Att’y Gen. Op. 51-5342 (1951) (opining that many of the records created and held by the New Mexico State Penitentiary and the Prison Board were public records for the purposes of IPRA); N.M. Att’y Gen. Op. 47-5074 (1947) (concluding that criminal complaints filed with justices of the peace by law enforcement agencies “before the accused has been arrested” were not public records).

17. *See* 1973 N.M. Laws, ch. 271, § 1 (adding exceptions to disclosure for letters of reference and matters of opinion in personnel files and students cumulative files); 1981 N.M. Laws, ch. 47, § 3 (amending the statute to incorporate exceptions to disclosure contained in the Confidential Materials Act); 1983 N.M. Laws, ch. 141, § 1 (amending IPRA’s enforcement mechanism to permit an “aggrieved citizen” to file a petition for a writ of mandamus in District Court to compel the production of records).

18. 1993 N.M. Laws, ch. 258, §§ 1–10.

19. 1993 N.M. Laws, ch. 258, § 5 (requiring public bodies to allow the requestor to inspect the requested records “immediately or as soon as is practicable under the circumstances, but not later than fifteen days after receiving a written request” and additionally requiring public bodies to send a written communication to the requestor within three business days).

requests,<sup>20</sup> and bestowed on the statute the formal title of the “Inspection of Public Records Act.”<sup>21</sup> Although the Legislature has continually updated and amended IPRA in the past twenty years,<sup>22</sup> the 1993 amendment effectively transformed the statute into the version in place today.

Today, IPRA sets forth a comprehensive statutory scheme governing public records requests in New Mexico. Individuals are guaranteed the right to both inspect<sup>23</sup> and obtain copies<sup>24</sup> of public records held by or on behalf of any “public body.”<sup>25</sup> A public body in receipt of an IPRA request must respond to all written requests within three business days<sup>26</sup> and provide all requested records within fifteen calendar days,<sup>27</sup> unless the public body designates the request to be excessively burdensome or broad, in which case an additional “reasonable” amount of time to respond is permitted.<sup>28</sup> Public bodies may charge fees only for copies of records and must otherwise allow inspection free of charge.<sup>29</sup>

IPRA effectively operates through a singular point of contact and reference within each public body: the records custodian. All public bodies are affirmatively required by IPRA to designate at least one individual within their agency to be the records custodian,<sup>30</sup> who is responsible for carrying out virtually all of the public body’s IPRA requirements. Most importantly, the records custodian is the individual

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20. 1993 N.M. Laws, ch. 258, § 4 (requiring each public body designate a records custodian who would be required to “receive and respond to requests to inspect public records,” among other duties).

21. 1993 N.M. Laws, ch. 258, § 1.

22. *See, e.g.*, 1998 N.M. Laws (1st S.S.), ch. 3, § 1; 2011 N.M. Laws, ch. 134, §§ 2–6; 2019 N.M. Laws, ch. 27, § 1.

23. *See* N.M. STAT. ANN. § 14-2-7(C) (2011) (requiring records custodians to provide “proper and reasonable opportunities to inspect public records”).

24. *See* N.M. STAT. ANN. § 14-2-7(D) (2011) (requiring records custodians to “provide reasonable facilities to make or furnish copies of the public records”). A public body cannot charge the requestor for their inspection of the public records, but the public body may charge “reasonable” copying fees. *See* N.M. STAT. ANN. 14-2-9(C) (2013). *See also* NEW MEXICO ATTORNEY GENERAL’S INSPECTION OF PUBLIC RECORDS ACT COMPLIANCE GUIDE 37 (8<sup>th</sup> ed. 2015) (explaining that IPRA “does not permit the custodian to require payment in advance of allowing *inspection*”) (emphasis added).

25. *See* N.M. STAT. ANN. § 14-2-1 (2019) (“Every person” the right to “inspect public records of this state.”). *See also* N.M. STAT. ANN. § 14-2-6(G) (2018) (defining “public record” as a record held by or on behalf of a “public body”).

26. IPRA provides that a public records custodian must issue a written communication to the requestor within three business days if the requested records are not immediately available. *See* N.M. STAT. ANN. § 14-2-8(D) (2009) (“If the inspection is not permitted within three business days, the custodian shall explain in writing when the records will be available for inspection or when the public body will respond to the request.”).

27. With the exception of excessively broad and burdensome requests, *see infra* note 29, IPRA requires a records custodian in receipt of a public records request to “permit the inspection immediately or as soon as is practicable under the circumstances, but not later than fifteen days after receiving a written request.” § 14-2-8(D).

28. The exception to IPRA’s general fifteen-day rule is for requests designated in writing by the public body to be “excessively burdensome or broad,” for which “an additional reasonable period of time shall be allowed to comply with the request.” N.M. STAT. ANN. § 14-2-10 (2018).

29. *See* N.M. STAT. ANN. § 14-2-9(C)(1) (2019) (providing that a records custodian “may charge reasonable fees for *copying* the public records”) (emphasis added).

30. *See* N.M. STAT. ANN. § 14-2-7 (2011) (“Each public body shall designate at least one custodian of public records . . .”).

who must receive and respond to IPRA requests.<sup>31</sup> The deadlines for IPRA—for example, providing records within fifteen calendar days and acknowledging a request within three business days—are all calculated from the date on which the public body's records custodian receives the request.<sup>32</sup> The records custodian shoulders the burden of providing requestors both “proper and reasonable opportunities to inspect public records” and “reasonable facilities to make or furnish copies of the public records during usual business hours.”<sup>33</sup> Whenever a public body denies a records request, the records custodian must provide the requestor “a written explanation of denial.”<sup>34</sup> The records custodian must also post a notice “in a conspicuous location” at the public body's administrative office and on its website describing the public's right to inspect public records and the procedures through which a request may be made.<sup>35</sup> Finally, IPRA itself specifies that a public body's records custodian “is subject to an action to enforce the provisions of the Inspection of Public Records Act” in District Court.<sup>36</sup> As a whole, virtually all of IPRA's statutory apparatus depends on the designated records custodian.

IPRA now also contains definitions that both clarify its scope and shed light on its potential applicability to private entities. In particular, IPRA now defines both of the terms “public body” and “public record.” Section 14-2-6(F) defines the term “public body”<sup>37</sup> as limited only to branches of government, including:

[T]he executive, legislative and judicial branches of state and local governments and all advisory boards, commissions, committees,

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31. See § 14-2-7 (providing that the records custodian is responsible for both receiving and responding to IPRA requests).

32. See N.M. STAT. ANN. § 14-2-8(D) (2009) (providing that the three-day time frame for the public body's acknowledgement of a request “shall not begin until the written request is delivered to the office of the custodian”). However, in the event that a request is sent to the wrong records custodian, or an employee at a public body who is not the records custodian, the request must be forwarded to the correct custodian “promptly.” § 14-2-8(E).

33. § 14-2-7.

34. IPRA specifically requires that “the custodian” provide the requestor a “written explanation of denial” whenever the public body denies the request either in whole or in part. N.M. STAT. ANN. § 14-2-11(B) (1993). This written explanation must include a description of the records sought, “the names and titles or positions of each person responsible for the denial,” and the legal exception to disclosure authorizing the public body to deny the request. § 14-2-11(B)(2); see also NEW MEXICO ATTORNEY GENERAL'S INSPECTION OF PUBLIC RECORDS ACT COMPLIANCE GUIDE 41 (8<sup>th</sup> ed. 2015) (explaining that “[t]he denial notice must . . . explain the reason for the denial” and that “[t]he reason provided in the denial notice must be authorized by the Act, another law, court rule, or the U.S. or state constitution”). See also *infra* note 42.

35. § 14-2-7(E). Specifically, a public body's inspection notice must include a description of “the right of a person to inspect a public body's records,” the contact information for the records custodian and a more general description of how a requestor might go about submitting a records request to the public body, and “the responsibility of a public body to make available public records for inspection.” *Id.*

36. N.M. STAT. ANN. § 14-2-12(C) (1993). As the New Mexico Supreme Court held in *Pacheco*, “The designated records custodian is the only official who is assigned IPRA compliance duties, see § 14-2-7, and is the only official who statutorily ‘is subject to an action to enforce’ IPRA, see § 14-2-11(C).” 2018-NMSC-022, ¶ 57, 415 P.3d 505, 516.

37. See § 14-2-7 (requiring all public bodies to designate a records custodian to receive and respond to requests for public records); § 14-2-12(C) (providing for damages “payable from the funds of the public body” found to be in noncompliance with IPRA).

agencies or entities created by the constitution or any branch of government that receives any public funding, including political subdivisions, special taxing districts, school districts and institutions of higher education.<sup>38</sup>

Further clarifying its scope, IPRA's Section 14-2-6(G) defines "public records" as:

[A]ll 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.<sup>39</sup>

In the context of private entities, this definition is striking because it uses the phrase "on behalf of any public body," which is not itself defined in the statute.<sup>40</sup> The clear import of this definition is that IPRA, by its plain language, extends to at least some records held by private entities: those that are held "on behalf of" a public body. In any case, through these two definitions of "public body" and "public record," IPRA essentially provides individuals with the right to inspect any public record held by or on behalf of any public body in New Mexico, except as otherwise provided in the statute itself.<sup>41</sup>

Although IPRA's plain language is of enormous consequence when interpreting the statute's various provisions,<sup>42</sup> the legislative intent behind the statute is also of paramount importance. IPRA's expressed purpose is to provide the public with access to "the greatest possible information" regarding governmental affairs.<sup>43</sup> The statute leaves no ambiguity as to that purpose, stating in Section 14-2-5 that it represents "the public policy of this state" and also adding that providing the public with information and records "is an essential function of a representative government and an integral part of the routine duties of public officers and employees."<sup>44</sup> In light of the oft-stated canon of statutory interpretation that requires courts to effectuate the

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38. N.M. STAT. ANN. § 14-2-6(F) (2018).

39. N.M. STAT. ANN. § 14-2-6(G) (2018).

40. See *Toomey v. Truth or Consequences*, 2012-NMCA-104, ¶ 10, 287 P.3d 364, 367 ("The 'on behalf of' language . . . is not defined").

41. IPRA contains eight exceptions to disclosure, the last of which operates as a catch-all to incorporate other provisions in law. See N.M. STAT. ANN. § 14-2-1(H). In analyzing the "as otherwise provided by law" exception, the New Mexico Supreme Court has noted that the exception extends to "statutory or regulatory exceptions, or privileges adopted by this Court or grounded in the constitution." *Republican Party N.M. v. N.M. Tax. Rev. Dept.*, 2012-NMSC-026, ¶ 16, 283 P.3d 853, 860.

42. It is well-established that "where the meaning of statutory language is plain, and words used by the legislature are free of ambiguity, there is no basis for interpreting the statute." *Johnson v. Francke*, 1987-NMCA-029, ¶ 11, 734 P.2d 804, 806. See also *State v. Ogden*, 1994-NMSC-029, ¶ 24, 880 P.2d 845, 853 (noting that the goal of statutory interpretation is to give effect to the intent of the legislature "using the plain language of the statute as the primary indicator of legislative intent").

43. N.M. STAT. ANN. § 14-2-5 (1993).

44. *Id.*

intent of the legislature,<sup>45</sup> this public purpose has repeatedly been emphasized by courts construing IPRA's various provisions.<sup>46</sup>

## B. Private Entities and IPRA

Although IPRA's modern applicability to state and local governmental agencies is clear and relatively unambiguous as a legal matter, the statute contains only an implied reference to records held by private actors. Specifically, the definition of a public record includes those records that are held "on behalf of" public bodies.<sup>47</sup> This has proven to create no small amount of uncertainty with respect to records held by private actors in an era in which government agencies are increasingly contracting with private companies to provide governmental services.<sup>48</sup>

The first appellate case in New Mexico to discuss in detail the issue of IPRA's applicability to private entities and records held by private entities was *State ex rel. Toomey v. City of Truth or Consequences*.<sup>49</sup> In that case, the Court of Appeals held that a series of video recordings possessed by a private company operating pursuant to a contract with a municipality were public records for the purposes of IPRA.<sup>50</sup> The decision, along with its reasoning and analysis, has proven to be particularly consequential, having been repeatedly cited in subsequent cases addressing similar issues.

*Toomey* involved records held by a private contractor, the Sierra Community Council, Inc. ("SCC"), who was operating on behalf of the City of Truth or Consequences (the "City").<sup>51</sup> The City had entered into a contract with SCC to operate a public access cable channel (that was itself authorized by a City ordinance).<sup>52</sup> Although the City provided the funding necessary for SCC to run the cable channel and required an annual accounting from SCC as to how that funding was spent,<sup>53</sup> the Court of Appeals noted in its decision that the contract between the

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45. See, e.g., *State v. Torres*, 2006-NMCA-106, ¶ 8, 141 P.3d 1284, 1286 (observing that when interpreting a statute the "primary goal" of appellate courts is to "give effect to the intent of the legislature"); *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 23, 871 P.2d 1352, 1359 (observing that "it is part of the essence of judicial responsibility to search for and effectuate the legislative intent").

46. See, e.g., *San Juan Agr. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶ 14, 257 P.3d 884, 888 (noting that courts "construe IPRA in light of its purpose"); *Cox v. N.M. Dep't of Pub. Safety*, 2010-NMCA-096, ¶ 16, 242 P.3d 501, 506 (explaining that, in interpreting IPRA and its exceptions, courts must "begin . . . with the strong presumption that the public has a right to inspect").

47. See *supra* note 39 and accompanying text.

48. See Anna Ya Ni & Stuart Bretschneider, *The Decision to Contract Out: A Study of Contracting for E-Government Services in State Governments*, 67 PUBLIC ADM. REV. 3, 532 (2007) (noting that "government contracts with the private and nonprofit sectors have rapidly increased in volume and extended to various service areas" and that surveys have shown "a significant movement toward privatization, particularly [in] contracting").

49. 2012-NMCA-104, 287 P.3d 364.

50. See *Toomey v. Truth or Consequences*, 2012-NMCA-104, ¶ 25, 287 P.3d 364, 371 (holding that "the DVD recordings were public records subject to inspection").

51. *Id.* ¶ 5, 287 P.3d at 366.

52. *Id.* ¶ 4, 287 P.3d at 366.

53. See *id.* ¶ 24, 287 P.3d at 370 (noting that the City "funded SCC with an annual grant of \$3 per subscriber from the cable company as well as with ninety percent of the franchise fees paid to the City by [the cable company]" and that "SCC was required to provide an accounting of how the City's funds were spent").



parties specifically “identified SCC as an independent contractor and stated that no principal/agent or employer/employee relationship existed between SCC and the City.”<sup>54</sup> As part of its operation of the cable channel, SCC staff recorded various City Commission meetings for replay on television.<sup>55</sup>

The dispute in *Toomey* arose out of a public records request that the plaintiff submitted to the City.<sup>56</sup> That request specifically sought “recordings of three City Commission meetings and one city workshop on truck traffic that had been played on the [cable] channel.”<sup>57</sup> Upon receipt of the request, the City Clerk forwarded it to SCC, who refused to fulfill the request, and then informed the plaintiff that SCC was not required to maintain such records pursuant to the contract with the City.<sup>58</sup> Although one of the requested records did exist at that time and was being held by SCC,<sup>59</sup> the City nevertheless denied the request.<sup>60</sup> The plaintiff promptly filed suit against the City and the City Clerk, seeking injunctive relief and access to the requested records. However, the plaintiff also included as defendants both the SCC and the SCC employee who had refused to fulfill the request.<sup>61</sup> After the District Court ruled in favor of the defendants,<sup>62</sup> the plaintiff appealed to the Court of Appeals.

The central issue posed to the Court of Appeals in *Toomey*, as posed by the parties to the case,<sup>63</sup> was whether the SCC recordings constituted public records.<sup>64</sup> The Court phrased this issue variously, first as whether the relevant *records* “were made on behalf of the City so as to constitute public records within the meaning of IPRA,”<sup>65</sup> and later as “whether a private actor that contracts with a governmental

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54. *Id.* ¶ 3, 287 P.3d at 366.

55. *Id.* ¶ 4, 287 P.3d at 366.

56. *Id.*

57. *Id.* ¶ 5, 287 P.3d at 366.

58. *Id.*

59. *See id.* ¶ 6, 287 P.3d at 366 (noting the District Court’s finding that “at the time of the request, one meeting was still on SCC’s computer”).

60. *Id.* ¶ 5, 287 P.3d at 366.

61. *Id.* ¶ 6, 287 P.3d at 366.

62. After holding a bench trial, the District Court ruled in favor of the defendants. *Id.* Although the District Court’s ruling was not addressed at great length by the Court of Appeals, the latter did note that the District Court ultimately concluded that the recording held by SCC was not a public record. *Id.* As explained by the Court of Appeals, the District Court had emphasized that “SCC was an independent contractor, not an agent of the City,” and that “nothing in the operating agreement required SCC to create, maintain, or hold recordings of City meetings on behalf of the City.” *Id.*

63. Some of the ambiguity left in the wake of *Toomey* may stem from the fact that the parties to the case, according to the decision itself, failed to provide the Court much in the way of coherent briefing. The decision was less than complementary in its description of the briefing it received by the parties, noting at one point that “the parties’ arguments are not helpful.” *Id.* ¶ 11, 287 P.3d at 367. In particular, the Court noted that the City’s brief was “bereft of any argument on the relevant issues, leaving us without a coherent understanding of its position on appeal,” that it failed contain either legal analysis or supporting authority, and (perhaps most glaringly) that the City’s brief had neglected “to discuss IPRA.” *Id.* ¶ 7, 287 P.3d at 366.

64. As the Court of Appeals phrased it, “the dispositive question is whether SCC’s recordings of the City’s meetings were made on behalf of the City so as to constitute public records within the meaning of IPRA.” *Id.* ¶ 8, 287 P.3d at 366.

65. *See id.*

entity to perform a public function is subject to the provisions of IPRA.”<sup>66</sup> Regardless, the opinion began by focusing heavily on IPRA’s definition of a public record and in particular the definition’s inclusion of records that are held “on behalf of” the public body.<sup>67</sup> The Court of Appeals noted that, “[t]he ‘on behalf of’ language . . . is not defined, and the statute does not indicate whether every purportedly public document created or held by a private entity comes within the ambit of IPRA or whether there are any limitations to production of requested records.”<sup>68</sup>

Observing that the issue was a matter of first impression, the Court of Appeals looked to case law from other states for guidance.<sup>69</sup> Many of these cases involved the issue of whether a private entity could become the functional equivalent of a public body for the purposes of that state’s public records law.<sup>70</sup> In particular, the Court of Appeals looked to a number of decisions from Florida, where courts generally utilized a “totality of factors test” to apply that State’s public records law to private entities acting on behalf of public agencies.<sup>71</sup> In *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Gr., Inc.*, the Florida Supreme Court outlined nine non-exhaustive factors to consider in such cases:

- (1) The level of public funding;
- (2) commingling of funds;
- (3) whether the activity was conducted on publicly owned property;
- (4) whether services contracted for are an integral part of the public agency’s chosen decision-making process;
- (5) whether the private

66. *Id.* ¶ 10, 287 P.3d at 367.

67. *See id.* The Toomey opinion did not discuss or cite IPRA’s definition of a public body. *See infra* note 160 for a discussion of the codification of IPRA’s definition of public body and public record.

68. *Toomey*, 2012-NMCA-104, ¶ 10, 287 P.3d at 367

69. *See id.* ¶ 11, 287 P.3d at 367 (“Because the parties’ arguments are not helpful and because this is a matter of first impression, we look to other jurisdictions that have squarely faced this issue for guidance.”).

70. *See id.* ¶ 15–19, 287 P.3d at 368–69. *See also* *Mem’l Hosp.-West Volusia, Inc. v. News-Journal Corp.*, 729 So.2d 373, 379–82 (Fla. 1999) (holding that a private nonprofit corporation operating a hospital pursuant to a lease with a public agency was acting on behalf of a public agency and therefore constituted an agency for the purposes of public records); *Connecticut Humane Soc’y v. Freedom of Info. Comm’n*, 591 A.2d 395, 396–97 (Conn. 1991) (holding that a humane society was not a public agency for the purposes of public records and concluding that “the determination of whether a hybrid public/private entity is a public agency subject to the FOIA requires a balance case-by-case consideration of various factors”); *A.S. Abell Publishing Co. v. Mezzanote*, 464 A.2d 1068, 1074 (Md. 1983) (holding that an insurance guaranty association was “an agency or instrumentality of the State within the scope of the Public Information Act”); *News & Observer Publ’g Co. v. Wake Cnty. Hosp. Sys.*, 284 S.E.2d 542, 548–49 (N.C. Ct. App. 1981) (holding that a nonprofit corporation was an “agency” of North Carolina government for the purposes of public records).

71. *Toomey*, 2012-NMCA-104, ¶ 14, 287 P.3d at 368. *See also* *B & S Utilities, Inc. v. Baskerville-Donovan, Inc.*, 988 So. 2d 17, 22 (Fla. Dist. Ct. App. 2008) (holding that a private company’s records “generated in performing engineering services for the City over the more than fifteen years it has served as the *de facto* city engineer are public records”) (emphasis in original); *Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So. 2d 302, 307 (Fla. Dist. Ct. App. 2001) (holding that a private company’s records were subject to disclosure); *Volusia*, 729 So. 2d at 380 (Fla. 1999) (holding that a nonprofit hospital corporation was subject to Florida’s public records laws because it was operating on behalf of the local hospital taxing authority); *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Grp., Inc.*, 596 So. 2d 1029, 1033 (Fla. 1992) (holding that “an architectural firm . . . that contracts to provide professional services for the construction of a school is not acting on behalf of a public agency”).

entity is performing a governmental function or a function which the public agency otherwise would perform; (6) the extent of the public agency's involvement with, regulation of, or control over the private entity; (7) whether the private entity was created by the public agency; (8) whether the public agency has a substantial financial interest in the private entity; and (9) for who's benefit the private entity is functioning.<sup>72</sup>

Concluding that other states "have adopted approaches analogous to the totality of factors approach of Florida,"<sup>73</sup> the Court of Appeals held that New Mexico too would use the nine-factor test from *Schwab* to gauge the totality of the circumstances and determine whether a private entity was acting "on behalf of" a public body.<sup>74</sup>

In reaching its conclusion that the nine-factor test from *Schwab* was consistent with IPRA and New Mexico case law, the Court of Appeals also cited to two New Mexico Supreme Court cases addressing related issues.<sup>75</sup> The first of these was *Raton Public Service Company v. Hobbes*,<sup>76</sup> which involved an earlier version of the Open Meetings Act.<sup>77</sup> In that case, the Supreme Court determined that the board of directors of a private company was effectively "a governing body of a municipality, or a governmental board or commission of a subdivision of the state, supported by public funds" so as to be subject to New Mexico's laws governing open meetings.<sup>78</sup> In making this determination, the Supreme Court noted that the private company received significant government funding and operated exclusively for the benefit of a municipality. The Court of Appeals also cited to *Memorial Medical Center, Inc. v. Tatsch Construction, Inc.*,<sup>79</sup> a case in which the Supreme Court had held that the proper standard to determine whether a private hospital corporation was subject to the provisions of both New Mexico's Public Works Minimum Wage Act and the Procurement Code was "whether under the totality of the circumstances, the private entity is so intertwined with a public entity that the private entity becomes an alter ego of the public entity."<sup>80</sup>

The Court of Appeals concluded its decision in *Toomey* by applying the nine factors from *Schwab* and analyzing the totality of the circumstances. It emphasized that SCC had contracted with the City to operate the cable channel for public access; that the City had provided the necessary funding for SCC to operate the cable channel; and that the City required an annual accounting from SCC as to how this funding was spent.<sup>81</sup> In addition, the record contained additional evidence

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72. *Schwab*, 596 So. 2d at 1031 (Fla. 1992).

73. *Toomey*, 2012-NMCA-104, ¶ 16, 287 P.3d at 368. The Court of Appeals cited to cases from Connecticut, Maryland, North Carolina, and Oregon as support for this conclusion. *Id.* ¶¶ 16–19, 287 P.3d at 368–69.

74. *Id.* ¶ 22, 287 P.3d at 370.

75. *Id.* ¶¶ 20–21, 287 P.3d at 369–370.

76. 1966-NMSC-150, 417 P.2d 32.

77. N.M. STAT. ANN. §§ 10-15-1 to -4 (2013).

78. *Raton*, 1966-NMSC-150, ¶¶ 4, 13, 417 P.2d at 33, 35.

79. 2000-NMSC-030, 12 P.3d 431.

80. *Mem'l Med. Ctr.*, 2000-NMSC-030, ¶ 1, 12 P.3d at 434.

81. *Toomey v. Truth or Consequences*, 2012-NMCA-104, ¶ 24, 287 P.3d 364, 370.

of the City's oversight of SCC's activities: the agreement specifically provided that "the City would only release these funds to SCC after SCC provided it with an annual activity plan and budget and that SCC could only spend the funds for the scope of services listed in that plan" and that SCC would make all of its records related to the cable channel available to the City upon request.<sup>82</sup> Based on these facts, the Court of Appeals concluded that "SCC was acting 'on behalf of' the City" and that the records in question "were public records subject to inspection."<sup>83</sup> In describing its own conclusion, the Court also stated that it had determined "that under the totality of the circumstances, the SCC was the functional equivalent of a public agency in this case."<sup>84</sup>

Six years after the *Toomey* decision was issued, the New Mexico Supreme Court had occasion to address the issue of private entities and IPRA in *Pacheco v. Hudson*.<sup>85</sup> Although that case primarily addressed other issues, in particular whether New Mexico would recognize a constitutional judicial deliberations privilege as an exception to disclosure under IPRA<sup>86</sup> and which District Court could enforce IPRA,<sup>87</sup> it also addressed *Toomey* in some detail. In doing so, the Supreme Court effectively confirmed that the nine-factor test from *Schwab* and *Toomey* was the proper standard to determine whether the records of a private entity constituted public records for the purposes of IPRA.<sup>88</sup>

The IPRA lawsuit in *Pacheco* itself arose from another (non-IPRA) civil lawsuit in New Mexico's First Judicial District Court.<sup>89</sup> One of the attorneys in the first lawsuit submitted two IPRA requests, one directed to the First Judicial District Court<sup>90</sup> and another to District Court Judge Wilson, who presided over the civil lawsuit.<sup>91</sup> The request to the First Judicial District Court sought a variety of communications involving Judge Wilson,<sup>92</sup> including email communications between him and his wife, who was employed at that time as a Supreme Court law librarian.<sup>93</sup> These same records were also sought in the IPRA request directed to Judge Wilson, but this latter request also specifically asked for records associated with his "personal election campaign Facebook page" including private messages, a

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82. *Id.*

83. *Id.* ¶ 25, 287 P.3d at 370.

84. *Id.* ¶ 23, 287 P.3d at 370.

85. 2018-NMSC-022, 415 P.3d 505.

86. *See id.* ¶ 54, 415 P.3d at 515 (holding that certain communications were shielded from disclosure under IPRA pursuant to the judicial deliberations privilege).

87. *See id.* ¶ 66, 415 P.3d at 517 (holding that "the Fifth Judicial District Court had no constitutional jurisdiction to litigate any aspect of an IPRA enforcement action against the First Judicial District Court").

88. *See infra* note 108 and accompanying text.

89. *See Pacheco*, 2018-NMSC-022, ¶ 4, 415 P.3d at 507 (explaining that "the controversy arose from a civil case in the First Judicial District Court, *State ex rel. King v. Valley Meat Co., LLC*") (italics in original).

90. *Pacheco*, 2018-NMSC-022, ¶ 5, 415 P.3d at 507-08.

91. *Id.* ¶ 6, 415 P.3d at 508.

92. *Id.* ¶ 5, 415 P.3d at 507-08.

93. *See id.* ¶ 14, 415 P.3d at 509 (noting that the District Court judge's wife "was an employee of the Supreme Court Law Library").

list of Facebook members who had “liked” the page, and copies of posts on the page itself.<sup>94</sup>

The designated records custodian for the First Judicial District Court responded to both of the IPRA requests at issue in *Pacheco*,<sup>95</sup> despite the fact that one of the requests had been submitted not to the Court itself but instead to Judge Wilson. In relevant part, the records custodian responded to the requests by providing some records but withholding others as subject to legal privileges. As to the request for records associated with Judge Wilson’s social media page, the records custodian explained to the requestor that “the court was not in a position to produce items related to Judge Wilson’s personal election campaign Facebook page, none of which were ‘used, created, received, maintained, or held by or on behalf of the First Judicial District Court.’”<sup>96</sup> The requestor in *Pacheco* then filed an IPRA enforcement action in New Mexico’s Fifth Judicial District Court,<sup>97</sup> which concluded that “Judge Wilson had not been acting in any official judicial capacity in establishing or maintaining his election campaign Facebook page,”<sup>98</sup> but granted partial summary judgment in the requestor’s favor as to other records.<sup>99</sup>

*Pacheco* went directly to the New Mexico Supreme Court after the First Judicial District Court, one of the defendants, filed a petition for a writ of superintending control.<sup>100</sup> After initially remanding the case back to the Fifth Judicial District Court so that the lower court could “complete the adjudication of all issues outstanding in the case,”<sup>101</sup> the Supreme Court issued the writ of superintending control requested by the First Judicial District Court and ruled in favor of the defendants on all issues involved.<sup>102</sup> Importantly, this included the issue of Judge Wilson’s social media page.

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94. *Id.* ¶ 6, 415 P.3d at 508. The request directed to the District Court judge sought an extensive array of records “relating to the ‘Keep Judge Matthew Wilson Facebook page’ on an Internet social media website maintained by Judge Wilson’s personal election campaign.” *Id.* This included “copies of all private Facebook message to or from Judge Wilson” as well as “copies of the ‘permissions settings’ for the Facebook page.” *Id.*

95. The Court of Appeals decision noted that the records custodian for the First Judicial District Court “responded to both IPRA requests, advising [the requestor] that as an executive officer of the First Judicial District Court he, and not Judge Wilson, was the district court’s custodian of records designated to receive and respond to IPRA requests.” *Id.* ¶ 7, 415 P.3d at 508.

96. *Id.* ¶ 8, 415 P.3d at 508.

97. *Id.* ¶ 9, 415 P.3d at 508. The Supreme Court decision specifically noted that the plaintiffs in the IPRA enforcement lawsuit had named Judge Wilson and the First Judicial District Court as defendants but not the records custodian for the First Judicial District Court. *Id.*

98. *Id.* ¶ 15, 415 P.3d at 509.

99. *Id.* ¶ 17, 415 P.3d at 509 (noting that the District Court judge had “granted partial summary judgment in favor of the judicial defendants on all issues except the undisclosed e-mail exchange between Judge Wilson and Supreme Court Law Librarian Stephanie Wilson regarding the request to proofread a preliminary draft of an order in the underlying lawsuit and the thirteen pages of e-mails disclosed after commencement of the IPRA enforcement action”).

100. *Id.* ¶ 18, 415 P.3d at 509.

101. *Id.* ¶ 19, 415 P.3d at 509.

102. The writ directed the Fifth Judicial District Court to vacate its grant of partial summary judgment and to dismiss the entire IPRA enforcement action due to a lack of jurisdiction. *See id.* ¶ 70, 415 P.3d at 518.

The Supreme Court decisively held in *Pacheco* that “the contents of Judge Wilson’s personal election campaign Facebook page were not public records of a public body subject to IPRA disclosure requirements.”<sup>103</sup> In reviewing this issue, the Court began by quoting IPRA’s definitions of both a public body<sup>104</sup> and a public record,<sup>105</sup> as well as emphasizing the purpose behind the statute.<sup>106</sup> Stating, “We recognize that it is possible for a public body to involve a private entity in conducting governmental business and subject the otherwise private entity’s records relating to that governmental activity to IPRA requirements,”<sup>107</sup> the Supreme Court cited to *Toomey* and affirmed that the Court of Appeals’ “nine nonexclusive factors in a totality-of-factors test”<sup>108</sup> governed the disposition of the issue. To that end, the Court noted that no evidence suggested that Judge Wilson had conducted any official judicial business on the social media page,<sup>109</sup> or that the page itself had operated on behalf of the First Judicial District Court.<sup>110</sup> Furthermore, no government funding—judicial or otherwise—had been used to create or maintain the social media page.<sup>111</sup> As a result, the records associated with Judge Wilson’s social media page were “not public records of a public body subject to IPRA disclosure requirements.”<sup>112</sup>

In addition, outside of its application of the *Toomey* factors to Judge Wilson’s social media page, *Pacheco* also directly addressed the question of the proper defendant in an IPRA enforcement action. Although Judge Wilson had initially been named as a party to the lawsuit, in its original remand order to the Fifth Judicial District Court the Supreme Court had directed the dismissal of Judge Wilson as a party and the substitution of the records custodian for the First Judicial District Court.<sup>113</sup> The published decision in *Pacheco* later explained this order by stating that “[t]he designated records custodian is the *only* official who is assigned IPRA compliance duties” and “the *only* official who statutorily ‘is subject to an action to enforce’ IPRA.”<sup>114</sup>

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103. *Id.* ¶ 36, 415 P.3d at 512–13.

104. *See supra* note 38 and accompanying text. That *Pacheco* cited to IPRA’s definition of a public body is marginally noteworthy if only because *Toomey* did not do so. *See supra* note 67.

105. *See supra* note 39 and accompanying text.

106. “IPRA textually makes clear that it is aimed at ‘the affairs of government’ and the ‘official’ acts of public officers and employees.” *Pacheco*, 2018-NMSC-022, ¶ 27, 415 P.3d at 511.

107. *Id.* ¶ 29, 415 P.3d at 511.

108. *Id.*

109. *Id.* ¶ 32, 415 P.3d at 512.

110. *Id.*

111. *Id.* ¶ 32, 415 P.3d at 512.

112. *Id.* ¶ 36, 415 P.3d at 512–13. The Supreme Court also rejected the requestor’s assertion that certain “unsolicited extrajudicial comments” made on Judge Wilson’s social media page by members of the public (comments that related to the original lawsuit and praised Judge Wilson’s rulings) transformed records associated with the social media page into public records. *See id.* ¶ 33, 415 P.3d at 512 (noting that such a conclusion “would blur any standards imposed by IPRA”).

113. *See id.* ¶ 19, 415 P.3d at 509 (“We also directed Judge Hudson to dismiss Judge Wilson as a named defendant in the IPRA action and to substitute Stephen Pacheco, the lawfully designated IPRA custodian of public records for the First Judicial District Court.”).

114. *Id.* ¶ 57, 415 P.3d at 516 (emphasis added). The Supreme Court apparently viewed this as a simple issue, noting that it was “clearly answered in the text of IPRA itself.” *Id.*

The next and most recent appellate case to substantively<sup>115</sup> address the issue of IPRA's applicability to the records of private actors was the Court of Appeals' decision in *New Mexico Foundation for Open Government v. Corizon Health*.<sup>116</sup> That case arose out of several contracts between the New Mexico Corrections Department and Corizon Health, a private company, to provide healthcare services in certain New Mexico prisons and detention centers from approximately June 2012 to May 2016.<sup>117</sup> Although the private company ceased providing healthcare services after the expiration of its contracts with the Corrections Department,<sup>118</sup> it faced a number of lawsuits from inmates who claimed that the company had violated their civil rights.<sup>119</sup> The private company entered into settlement agreements to resolve "at least fifty-nine such civil claims."<sup>120</sup> These settlement agreements were then requested by the petitioners (the Foundation for Open Government, the Albuquerque Journal, and the Santa Fe New Mexican).<sup>121</sup>

The three petitioners individually sent IPRA requests asking to inspect and copy all of the settlement agreements involving the private company.<sup>122</sup> The petitioners directed these requests initially to the Corrections Department, which then responded by referring the requests directly to Corizon Health and stating that the contract with the company specified that the company would defend and indemnify the Corrections Department in the event of a lawsuit.<sup>123</sup> The Corrections Department took no further action on the records requests. Pursuant to this referral from the Corrections Department, however, the petitioners individually sent their

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115. This issue was mentioned only briefly in *Dunn v. Brandt*, where the petitioner argued, relying on *Toomey*, that the records of a guardian ad litem were public records subject to IPRA because "a guardian ad litem acts as 'as an arm of the court.'" 2019-NMCA-061, ¶ 7, 450 P.3d 398, 401. However, the Court of Appeals did not reach that issue in its opinion, instead assuming without deciding that the petitioner's assertion was correct but still ruling in favor of the respondents on the grounds that the records at issue were shielded from disclosure by a protective order and the judicial deliberations privilege. *See id.* ¶ 17, 450 P.3d at 405.

116. 2020-NMCA-014, 460 P.3d 43.

117. *Id.* ¶ 2, 460 P.3d at 46.

118. *See id.* ("Respondent stopped providing medical care services for NMCD after the Contract ended.").

119. *See id.* (noting that "certain inmates filed civil claims against Respondent alleging instances of improper care and/or sexual assault").

120. *Id.* ¶ 2, 460 P.3d at 46.

121. The Court of Appeals noted that the Petitioners sent their requests to the Corrections Department as Corizon Health's contract was terminating in May 2016. *See id.* (noting that the requests were sent to the Corrections Department in "May and June 2016").

122. *See id.* ¶ 3, 460 P.3d at 46 ("Petitioners separately submitted written IPRA requests to NMCD requesting to inspect and copy all settlement documents involving Respondent in its role as medical services contractor for NMCD.").

123. *See id.* ("NMCD explained that under the Contract, Respondent defends and indemnifies NMCD . . ."). Given that the Department provided this written explanation to the Petitioners, and went further by providing the Petitioners with Corizon Health's contract information and forwarding the Petitioners' request directly to the company, the Department appears to have been acting as if Corizon Health was a public body for the purposes of IPRA's Section 14-2-8(E). *See id.* That section generally requires a records request sent to the wrong public body to be forwarded to the correct one, along with an explanation and the contact information for the correct records custodian. *See* N.M. STAT. ANN. § 14-2-8(E) (2009) (setting forth procedures governing "the event that a written request is not made to the custodian having possession of or responsibility for the public records requested").

requests directly to the private company, which initially indicated that it would provide the requested settlement agreements but then later denied the petitioners' requests outright.<sup>124</sup>

The petitioners in *Corizon* filed a petition for a writ of mandamus<sup>125</sup> in District Court to compel the private company to disclose the settlement agreements. Importantly, the petition named the private company—and not the Corrections Department—as the respondent.<sup>126</sup> For its part, the private company did not appear to challenge its status as the proper respondent in the case and even conceded at the District Court merits hearing that it “stood ‘in the shoes of the State by providing medical services to inmates.’”<sup>127</sup> As a result, whether the private company was the proper respondent in the case was not a question before either the District Court or the Court of Appeals. Instead, the central and dispositive issue was whether the settlement agreements were public records for the purposes of IPRA. The respondent argued in the negative, maintaining that the mere fact that it had provided medical services on behalf of the state did not transform its private records into public ones, and the petitioners contended precisely the opposite.<sup>128</sup> Applying the *Toomey* test, the District Court held in favor of the petitioners, and granted the requested writ of mandamus compelling the respondent to produce the settlement agreements.<sup>129</sup>

On appeal, the Court of Appeals described the issue before it as “whether the Legislature intended for settlement agreements, entered into by third-party entities and arising from the third-party’s performance of the public function, to be public documents available under IPRA.”<sup>130</sup> Citing to *Toomey* and IPRA’s definition of a “public record” in Section 14-2-6(G),<sup>131</sup> the Court concluded that the settlement agreements were “public records subject to production under IPRA.”<sup>132</sup> Central to this conclusion was the Court’s observation that “the settlement agreements were plainly created and maintained in relation to a public business, here, the medical care

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124. The Court of Appeals decision noted that the company had initially agreed to release the settlement agreements to the Petitioners in exchange for a two-week extension of time within which it could redact the names of the inmates (the plaintiffs) involved in the lawsuits. *See Corizon*, 2020-NMCA-014, ¶ 4, 460 P.3d at 46. Shortly thereafter, however, the company denied all three requests, arguing that IPRA did not require it to disclose the records and the confidentiality provisions in the agreements themselves prohibited the records’ disclosure. *Id.*

125. *See id.* ¶ 5, 460 P.3d at 46. *See also* N.M. STAT. ANN. § 14-2-12(B) (1993) (providing that a District Court may issue “a writ of mandamus . . . to enforce the provisions of the Inspection of Public Records Act”). This enforcement mechanism became a small issue at the Court of Appeals, where the respondent for the first time argued that mandamus was an improper remedy because the case posed “a fact intensive inquiry ill-suited for resolution by writ of mandamus.” *Corizon*, 2020-NMCA-014, ¶ 24, 460 P.3d at 52. The Court of Appeals rejected this argument by emphasizing both that IPRA itself permitted the petitioners to seek mandamus relief, *id.* ¶ 25, 460 P.3d at 52, and that, “Petitioners have a clear legal right of enforcement against Respondent, and Respondent has a clear legal duty to provide public records to Petitioners under Section 14-2-12.” *Id.* ¶ 26, 460 P.3d at 52.

126. *See generally Corizon*, 2020-NMCA-014, ¶ 5, 460 P.3d at 46.

127. *Id.* ¶ 7, 460 P.3d at 47.

128. *See id.* ¶ 8, 460 P.3d at 47–48.

129. *See id.* ¶ 8, 460 P.3d at 47 (“[T]he district court granted the petition, and . . . issued its final order granting writ of mandamus.”).

130. *Id.* ¶ 17, 460 P.3d at 49.

131. *See id.*

132. *Id.* ¶ 18.



and personal safety of the inmates held by the [Corrections Department].”<sup>133</sup> As the Respondent had entered into a contract with the Corrections Department to perform a clear government function,<sup>134</sup> the Court of Appeals had little difficulty in concluding that the settlement agreements arising out of that contractual duty were public records. The Court also stated, in describing its own holding, that it had “concluded . . . there is no distinction between Respondent and a public entity concerning the issues here.”<sup>135</sup>

## II. INTERPRETING *TOOMEY*, *PACHECO*, AND *CORIZON*

The decisions in *Toomey*, *Pacheco*, and *Corizon* must be interpreted and considered in the light of the precise issue before the court: whether the private entity’s records were held “on behalf of” a public body so as to become subject to disclosure under IPRA.<sup>136</sup> Viewed narrowly, these three holdings are hardly disputable given IPRA’s definition of a public record, which includes those records held “on behalf of” a public body,<sup>137</sup> as well as IPRA’s overall purpose of providing the public access to “the greatest possible information” about governmental affairs.<sup>138</sup> The records requested in *Toomey* were “recordings of three City Commission meetings and one city workshop” held by a private entity who had contracted with the City to operate a public access television channel.<sup>139</sup> Similarly, in *Corizon*, the requested records were settlement agreements entered into by a private company that arose directly from its performance of a contract it held with the Corrections Department.<sup>140</sup> In both of these cases, the relevant records existed solely because the private entity had contracted with a public body to perform a governmental service on the public body’s behalf. By contrast, in *Pacheco*, no evidence suggested that Judge Wilson’s social media page had any relationship to public business or governmental service: it was an election campaign account on which no official judicial activity was ever conducted.<sup>141</sup> The records associated with that account were clearly not held on behalf of a public body. In that sense, then, looking to the narrow holdings in each of these cases, the three decisions are hardly even debatable. The cases were not wrongly decided.

However, beyond their narrow holdings, these three decisions have left real uncertainty in their wake as to whether the private entity is *itself* subject to IPRA or

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133. *Id.* ¶ 18, 460 P.3d at 50.

134. “Allowing private entities who contract with a public entity ‘to circumvent a citizen’s right of access to records by contracting’ with a public entity to perform a public function ‘would thwart the very purpose of IPRA and mark a significant departure from New Mexico’s presumption of openness at the heart of our access law.’” *Id.* ¶ 19, 460 P.3d at 50 (quoting *Toomey*, 2012-NMCA-104, ¶ 26, 287 P.3d at 371).

135. *Corizon*, 2020-NMCA-014, ¶ 21, 460 P.3d at 51.

136. *See supra* notes 64, 102, and 129, and accompanying texts. Of course, each of these cases involved a number of issues related to IPRA, but these other issues are not generally pertinent to this analysis.

137. *See supra* note 39 and accompanying text.

138. *See supra* note 43 and accompanying text.

139. *See supra* note 57 and accompanying text.

140. *See supra* note 121.

141. *See supra* note 111 and accompanying text.

merely its records. This distinction—whether IPRA applies to the private actor or the private actor’s records—was thrown into sharp relief by the fact that the only named defendant in *Corizon* was a private company.<sup>142</sup> Notwithstanding the fact that the private company was providing governmental services on behalf of the Corrections Department,<sup>143</sup> the actual public body was completely uninvolved in the litigation. To be sure, the private company in *Corizon* did not argue that they were an improper defendant (and in fact conceded that they were the proper defendant),<sup>144</sup> but this still leads to the question of whether, moving forward, *Toomey* and *Corizon* stand for the proposition that a private contractor may be considered a public body for the purposes of IPRA.

Moreover, the series of events leading up to litigation in *Corizon* further illustrates the confusion in New Mexico as to whether IPRA applies to private entities themselves or merely their records. In *Corizon*, the requestors originally submitted their requests to the Corrections Department,<sup>145</sup> who then promptly referred the requests to the private company rather than working itself to obtain the records or deny the request.<sup>146</sup> That the Corrections Department, a public body, referred the request to its contractor rather than handle the request itself demonstrates that at least some public bodies in New Mexico are operating under the assumption that they need take no responsibility for the records held by their contractors, and that they may simply refer the requests to their contractors to be fulfilled or denied.<sup>147</sup> Similarly, the fact that the requestors in *Corizon* directed their requests to the Corrections Department and then had to redirect their requests to the company<sup>148</sup> also demonstrates that they themselves were unsure of who the “public body” was for the purposes of their request.

This confusion and ambiguity originated in the *Toomey* decision. Notwithstanding the clarity of the Court’s limited holding in that case, the language and the reasoning of the opinion itself left real uncertainty as to whether it stood for the proposition that IPRA may apply to *records* held by a private entity or the private entity itself. In describing the central issue before it, for example, the Court of Appeals in *Toomey* first referred to the issue as whether the relevant *records* “were made on behalf of the City so as to constitute public records within the meaning of

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142. See *supra* note 125 and accompanying text.

143. See *supra* note 116 and accompanying text. The private company provided healthcare services in certain New Mexico prisons and detention centers for approximately four years. N.M. Found. Open Gov. v. Corizon Health, 2020-NMCA-014, ¶ 2, 460 P.3d at 46.

144. See *Corizon*, 2020-NMCA-014, ¶ 7, 460 P.3d 43, 47 (noting that the respondent “agreed that it stood ‘in the shoes of the State by providing medical services to inmates’”).

145. See *supra* note 121.

146. See *supra* note 122.

147. Although the contract between the private company and the Corrections Department did contain an indemnification clause, see *supra* note 122, this does not explain why neither the Corrections Department nor its records custodian was a defendant in *Corizon*, nor does it explain why the private company was a defendant in light of the Supreme Court’s holding in *Pacheco* that the public body’s custodian is the proper defendant in an IPRA lawsuit. See *supra* note 113 and accompanying text.

148. See *Corizon*, 2020-NMCA-014, ¶ 3, 460 P.3d at 46 (explaining that after the Corrections Department referred the requestors to the private company, “Each Petitioner then sent written IPRA requests to Respondent requesting the same information previously requested of NMCD.”).

IPRA,<sup>149</sup> but then later rephrased it as “whether a private actor that contracts with a governmental entity to perform a public function is subject to the provisions of IPRA.”<sup>150</sup> In describing its ultimate legal conclusion, the Court first stated that it had found “that under the totality of the circumstances, the SCC was the functional equivalent of a public agency in this case,”<sup>151</sup> but then later stated that it had held “that the recordings of the City meetings were public records subject to inspection under IPRA.”<sup>152</sup> These are different formulations.

The cases cited in *Toomey* also add to this uncertainty. The overwhelming majority of the out-of-state cases cited in *Toomey*, for example, involved courts from other states grappling with the issue of whether a private entity could be considered a *public agency* for the purposes of their respective state’s public records law.<sup>153</sup> Indeed, the Court of Appeals’ reliance on and adoption of the *Schwab* test is striking because, in that case, Florida’s Supreme Court specifically noted that the word “agency” (Florida’s functional equivalent to New Mexico’s “public body”) was defined broadly in its state’s public records law “to include private entities ‘acting on behalf of any public agency.’”<sup>154</sup> Thus, the issue in *Schwab*—the principal case on which *Toomey* relied—was whether a private entity itself was essentially a public body under Florida’s public records law.<sup>155</sup> Along the same lines, the Court of Appeals’ reference to *Hobbes*<sup>156</sup> is also telling, because there the New Mexico Supreme Court had held that the board of directors of a private company was in effect “a governing body of a municipality, or a governmental board or commission of a subdivision of the state” so as to be subject to a predecessor of New Mexico’s Open Meetings Act.<sup>157</sup>

*Corizon* also contains ambiguous language. At one point, when describing its own holding, the Court of Appeals stated that it had “concluded above there is no distinction between Respondent and a public entity concerning the issues here.”<sup>158</sup> Similarly, it also summarized a portion of the Petitioners’ argument at the District Court level as “even if Respondent had settlement autonomy in the context of civil lawsuits, such alone *did not recharacterize Respondent’s central function from that*

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149. State ex rel. *Toomey v. Truth or Consequences*, 2012-NMCA-104, ¶ 8, 287 P.3d 364, 366.

150. *Id.* ¶ 10, 287 P.3d at 367.

151. *Id.* ¶ 23, 287 P.3d at 370.

152. *Id.* ¶ 29, 287 P.3d at 371.

153. See *supra* note 70.

154. *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Grp., Inc.*, 596 So. 2d 1029, 1031 (Fla. 1992) (“This broad definition serves to ensure that a public agency cannot avoid disclosure under the Act by contractually delegating to a private entity that which otherwise would be an agency responsibility.”)

155. See *id.* at 1031 (noting that the issue was “whether a private entity is subject to the Public Records Act”). In this respect, Florida’s public records law is fundamentally different than New Mexico’s. Whereas Florida defines the term “agency” as inclusive of “any . . . private agency, person, partnership, corporation, or business entity acting on behalf of any public agency,” FLA. STAT. § 119.011(2) (2018), New Mexico’s definition of a public body does not include private entities.

156. See *supra* note 78 and accompanying text.

157. *Raton Pub. Serv. Co. v. Hobbes*, 1966-NMSC-150, ¶ 4, 417 P.2d 32, 33. See also Open Meetings Act, NMSA 1978, §§ 10-15-1 to -4 (2013).

158. *N.M. Found. Open Gov. v. Corizon Health*, 2020-NMCA-014, ¶ 21, 460 P.3d 43, 51.

of a public entity subject to IPRA.”<sup>159</sup> Although these references are far less extensive than those in *Toomey*, they remain conspicuous given that the only defendant in the case was a private company.

One critical fact suggests that neither *Toomey* nor *Corizon* were intended to hold that private entities become public bodies for the purposes of IPRA by functioning on behalf of governmental entities: neither decision actually cited or even mentioned IPRA’s definition of “public body” in Section 14-2-6(F).<sup>160</sup> Instead, the holdings of both cases explicitly rested on the “on behalf of” language in IPRA’s definition of a public record.<sup>161</sup> Having not reviewed the definition of a public body to determine whether it was broad enough to include private entities, a reasonable interpretation of both cases would be that they were not intended to suggest that the private contractors were public bodies.

Although the New Mexico Supreme Court’s decision in *Pacheco* did cite to IPRA’s definition of a “public body,”<sup>162</sup> its overall language and rationale was far less ambiguous (or perhaps merely more fastidious) than that in *Toomey* and *Corizon*. The Supreme Court used relatively consistent language when describing its holding, providing that “in the circumstances presented in this record, the contents of Judge Wilson’s personal election campaign Facebook page were not public records of a public body subject to IPRA disclosure requirements.”<sup>163</sup> Similarly, in describing the function of the *Toomey* test, the Supreme Court said that it was used to determine whether a public body had “involve[d] a private entity in conducting governmental business and subject[ed] the otherwise private entity’s records relating to that governmental activity to IPRA requirements.”<sup>164</sup> As a result, *Pacheco* does not appear to stand for the proposition that private entities may be considered public bodies for the purposes of IPRA.<sup>165</sup>

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159. *Id.* ¶ 6, 460 P.3d at 47 (emphasis added).

160. At the time of the *Toomey* decision, IPRA’s definition of “public body” was in Section 14-2-6(E) and its definition of “public record” was in Section 14-2-6(F). *See* N.M. STAT. ANN. § 14-2-6 (2011). The statute was amended in 2013 to add a new definition of “protected personal identifier information,” which is when the two definitions of “public body” and “public record” were recodified to their current locations in the statutory code. *See* N.M. LAWS 2013, ch. 117, § 1. In any case, *Toomey* cited to IPRA’s definition of a “public record” but not its definition of the term “public body.” *State ex rel. Toomey v. Truth or Consequences*, 2012-NMCA-104, ¶ 10, 287 P.3d 364, 367.

161. *See Toomey*, 2012-NMCA-104, ¶ 10, 287 P.3d at 367 (citing to IPRA’s definition of a public record and observing that “[t]he ‘on behalf of’ language, however, is not defined”); *see also Corizon*, 2020-NMCA-014, ¶ 18, 460 P.3d at 50 (emphasizing that “we rely on the language of Section 14-2-6(G),” which contains IPRA’s definition of a public record).

162. *Pacheco v. Hudson*, 2018-NMSC-022, ¶ 27, 415 P.3d 505, 511. The Court’s analysis, however, did not appear to suggest a connection between this definition and the *Toomey* test.

163. *Id.* ¶ 36, 415 P.3d at 512–13.

164. *Id.* ¶ 29, 415 P.3d at 511.

165. There is at least one line in *Pacheco* that may be interpreted differently. In refuting the requestor’s argument that comments made by third parties on a social media page could render it a public record, the Supreme Court stated, “It would blur any standards imposed by IPRA if we were to hold that third-party comments about an officeholder’s performance of the officeholder’s official duties that are communicated through social media, news outlets, online discussion sites, or other nongovernmental entities *would transform those entities into public bodies* and subject their records to IPRA disclosure and inspection obligations.” *Pacheco*, 2018-NMSC-022, ¶ 33, 415 P.3d at 512 (emphasis added).

However, even if *Pacheco* does not indicate that *Toomey* stands for the proposition that private entities may be considered public bodies for the purposes of IPRA, this by no means appears to be an issue of settled law. As mentioned previously, the facts and circumstances surrounding *Corizon* (the most recent case to analyze *Toomey* in depth) suggests that some public bodies and records requestors in New Mexico view private contractors as the equivalent of public bodies, at least where the contractor is acting on behalf of a public body. It also suggests that some public bodies and records requestors are operating under the belief that records requests can be submitted directly to a private contractor and that private entities may be proper defendants in legal actions to enforce IPRA. Although no private entity has yet challenged these premises in any appellate case as of yet, it would seem to be an argument that stands a high likelihood of being raised in the near future.

### III. PRIVATE ENTITIES ARE NOT PUBLIC BODIES

Notwithstanding the current ambiguity on this issue, *Toomey* should not be interpreted as holding that records requests may be directed specifically to private entities or that private entities are proper defendants in IPRA enforcement actions. This is so because private entities—be they companies, nonprofits, or individuals—are not public bodies under IPRA. The statute’s plain language unambiguously establishes that a public body is responsible for those records held on its behalf by a private entity. Equally important, an interpretation of *Toomey* to the effect that private entities may in some contexts be considered public bodies for the purposes of IPRA would frustrate the purpose of the statute, serving only to delay access to public records and create confusion on the part of records requestors. *Toomey* and its progeny should be interpreted based on the actual holdings of the cases, as clarifying IPRA’s definition of a public record and confirming that those records held on behalf of a public body by a private entity are, in fact, public records subject to inspection.

The single most important reason why *Toomey* should not be interpreted as holding that a private contractor may be considered a public body for the purposes of IPRA is that the statute itself contains a definition of a public body that clearly excludes private entities.<sup>166</sup> As defined by Section 14-2-6(G), public bodies consist of:

[T]he executive, legislative and judicial branches of state and local governments and all advisory boards, commissions, committees, agencies or entities created by the constitution or any branch of government that receives any public funding, including political subdivisions, special taxing districts, school districts and institutions of higher education.<sup>167</sup>

This definition clearly shows, by its plain language, that an entity must be an actual subdivision of state or local government in order to qualify as a public

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166. That *Toomey*, and for that matter also *Corizon*, did not cite or mention IPRA’s definition of a public body, also strongly suggests that the Court of Appeals did not intend to suggest that private contractors were public bodies for the purposes of public records requests. See *supra* note 160 and accompanying text.

167. N.M. STAT. ANN. § 14-2-6(G) (2018).

body. Even its reference to entities in receipt of public funding includes only, in context, a “*branch of government* that receives any public funding.”<sup>168</sup> Thus, the definition of a public body itself leaves no ambiguity as to whether it depends on the particular records involved or whether it includes private entities: it plainly does not.<sup>169</sup>

The role of the public body’s records custodian is equally dispositive on these issues. A records request clearly cannot be submitted to a private entity because it must be submitted to and handled specifically by the public body’s records custodian.<sup>170</sup> This in particular is not ambiguous and this requirement is not generalized, as IPRA states that the records custodian specifically “shall . . . respond to requests” and “provide proper and reasonable opportunities to inspect public records.”<sup>171</sup> Where a request is denied by the public body, IPRA is not vague or nondescript as it pertains to who must provide an explanation of the denial: it places this burden again on the shoulders of the public body’s records custodian.<sup>172</sup> Similarly, a private entity cannot be a defendant in an action to enforce IPRA because the statute specifically provides, and the Supreme Court confirmed in *Pacheco*,<sup>173</sup> that an action to enforce the statute must be brought against the records custodian,<sup>174</sup> not another employee.

The larger statutory context of IPRA shows yet another inherent inconsistency in concluding that private entities may be public bodies able to receive requests and be subject to enforcement actions. Were *Toomey* to be interpreted as holding that private contractors may be public bodies, this would necessarily only be the case in limited contexts, depending on the particular records involved and the

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168. *Id.* (emphasis added).

169. This conclusion may be qualified slightly by the New Mexico Supreme Court’s decision in *Hobbes*, upon which *Toomey* partially relied. *See Toomey v. Truth or Consequences*, 2012-NMCA-104, ¶ 20, 287 P.3d 364, 369 (citing *Raton Pub. Serv. Co. v. Hobbs*, 1966-NMSC-150, 417 P.2d 32). In *Hobbes*, the Supreme Court determined that a private entity could effectively be “a governing body of a municipality, or a governmental board or commission of a subdivision of the state, supported by public funds” so as to be subject to New Mexico’s laws governing open meetings where it received significant government funding and operated *exclusively* for the benefit of a municipality. *Hobbes*, 1966-NMSC-150, ¶ 4, 417 P.2d at 33. Notwithstanding the Court’s citation to *Hobbes* in *Toomey*, the cases are quite distinguishable because in *Hobbes*, the private entity operated exclusively for the benefit of a local government body and therefore in general would constitute a political subdivision, whereas in *Toomey* and *Corizon*, the private contractor could only constitute a public body for the purposes of specific records and records requests. *See id.* As a result, it may be theoretically possible for a private entity who receives significant government funding and operates exclusively for the benefit of a state or local governmental subdivision to be a public body under IPRA, not for the purposes of particular records but in total, but this would require very unique and limited circumstances.

170. *See supra* notes 30 and 32 and accompanying texts. To that end, when a requestor sends a request to an employee or individual who is not the designated custodian, IPRA mandates that the request be forwarded to the custodian specifically. *See N.M. STAT. ANN. § 14-2-8(E)* (2009) (providing that, where a request is not sent to the custodian directly by the requestor, “the person receiving the request shall promptly forward the request to the custodian of the requested records”).

171. N.M. STAT. ANN. § 14-2-7 (2011).

172. *See id.*

173. *See Pacheco v. Hudson*, 2018-NMSC-022, ¶ 57, 415 P.3d 505, (holding that the records custodian is “the only official who statutorily ‘is subject to an action to enforce’ IPRA”).

174. *See N.M. STAT. ANN. § 14-2-11(C)* (1993) (“A custodian . . . is subject to an action to enforce the provisions of the Inspection of Public Records Act.”).

functions performed by the private entity.<sup>175</sup> Under the plain language of IPRA, however, whether an entity is a public body for the purposes of the statute does not depend on the particular records involved. The statute's definition of a "public body" makes no reference to records. Moreover, the statute imposes general obligations on public bodies entirely outside of specific records and specific records requests. All public bodies must, irrespective of any particular request it receives, designate at least one employee as a "records custodian" responsible for receiving and responding to records requests.<sup>176</sup> All public bodies—again, outside of any particular request—must post a notice describing the public's right to inspect public records and the procedures through which a request may be made.<sup>177</sup> These provisions leave no ambiguity that, under IPRA, whether an entity is a public body does *not* depend on the particular records involved.

Although *Toomey* and *Corizon* addressed records held by private contractors, this issue should also be examined in light of the records held by public employees on their own private devices or at their own homes. Like records maintained by a private contractor, records maintained by a public employee on his or her own cell phone or private email address would still be subject to IPRA so long as they related to public business.<sup>178</sup> And yet, despite these two circumstances being legally indistinguishable from one another, no court, public body, or records requestor could possibly maintain that the public employee would constitute a public body unto himself or herself, or for that matter that a records request could be directed to the employee rather than the custodian or that the employee could be named as a defendant to a lawsuit. The public body would *clearly* be responsible for responding to a request for such records under IPRA.

Lastly, holding that a private entity may constitute a public body able to receive IPRA requests and be sued in an enforcement action would carry real practical consequences. For one, if a private entity may be a public body able to receive IPRA requests, then huge numbers of private companies in New Mexico will need to immediately designate their own records custodian.<sup>179</sup> Far more importantly, such an interpretation of IPRA would frustrate the purpose of the statute by delaying

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175. Such an interpretation would only transform a private entity into a public body when the private entity is acting on behalf of a public body. *See supra* note 85 and accompanying text. A private contractor would not, at least as a general rule, function as a public body for the purposes of all of its records unless it operated exclusively on behalf of a public body.

176. *See* N.M. STAT. ANN. § 14-2-7 (2011); *see also supra* note 30 and accompanying text.

177. § 14-2-7(E).

178. *See* N.M. STAT. ANN. § 14-2-6(G) (2018). To the extent that an employee holds records—for example, in an employee's private email account—that "relate to public business," they almost certainly would be subject to inspection. *See id.*

179. *See* N.M. STAT. ANN. § 14-2-7 (2011) ("Each public body shall designate at least one custodian of public records . . ."). A public body's designation of a records custodian is not discretionary: it is an obligatory duty under IPRA. For this reason, if private contractors are themselves subject to IPRA and required to themselves receive and respond to requests, they must also designate their own records custodians.

access to public records.<sup>180</sup> As occurred prior to the *Corizon* litigation,<sup>181</sup> if a private entity may be itself subject to IPRA outside of the applicable public body, this will likely only confuse records requestors, who would logically direct their requests first to the public body and then be forced later to redirect their attention to the private contractor. Given that many private contractors are unknown to the general public, most records requestors would not know to whom they should submit a request other than the public body. Inevitably, this would delay access to public records because the deadlines for inspection would start when the private company's records custodian receives the request, as opposed to when the earlier request was received by the public body's custodian.<sup>182</sup> Given that IPRA must be interpreted in light of its purpose,<sup>183</sup> these practical consequences show yet another flaw in interpreting *Toomey* as holding that private entities may be public bodies themselves subject to the statute.

Instead, the proper interpretation of IPRA and *Toomey* is that public bodies themselves are responsible for providing records held on their behalf by private entities. The *Toomey* test determines whether the records of the private entity are being held on behalf of the public body, but the public body itself is still responsible for providing the record or otherwise handling the request. Pursuant to IPRA, the records request must be directed to the public body's records custodian,<sup>184</sup> and the public body cannot avoid responsibility by redirecting the requestor to a private entity.<sup>185</sup> The proper defendant in an IPRA lawsuit is, as stated in *Pacheco*,<sup>186</sup> the records custodian for the public body. This interpretation is consistent with the express language of IPRA, as well as its legislative intent of providing the public with access to the greatest possible information as to governmental affairs.

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180. The purpose of IPRA is explicitly to "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." N.M. STAT. ANN. § 14-2-5 (1993). *See also supra* note 44 and accompanying text.

181. *See supra* notes 121–22 and accompanying texts.

182. The deadlines under IPRA begin to run upon the records custodian's receipt of the request. *See supra* note 33 and accompanying text. Were the private entity treated as a public body unto itself, IPRA's deadlines would only start upon the private entity's receipt of the request. The actual public body—that is, the public body on whose behalf the private entity is operating—would not be the custodian of the records and therefore its receipt of the request would not trigger IPRA's deadline.

183. *See, e.g.,* San Juan Agr. Water Users Ass'n v. KNME-TV, 2011-NMSC-011, ¶ 14, 257 P.3d 884, 888 (noting that courts "construe IPRA in light of its purpose"); Cox v. N.M. Dep't of Pub. Safety, 2010-NMCA-096, ¶ 16, 242 P.3d 501, 506 (explaining that, in interpreting IPRA and its exceptions, courts must "begin . . . with the strong presumption that the public has a right to inspect").

184. *See* N.M. STAT. ANN. § 14-2-8(A) (2009) ("Any person wishing to inspect public records may submit an oral or written request to the custodian.").

185. To the extent that public bodies might raise concerns as to their ability to obtain public records from a private entity, it is incumbent on the public body to establish adequate safeguards (such as contractual provisions with private contractors or employees) to ensure that its records custodian has access to all those records related to public business.

186. *See* 2018-NMSC-022, ¶ 19, 415 P.3d 505, 509.



## CONCLUSION

Because of the increasing proliferation of government contracts,<sup>187</sup> as well as the modern reality that public officers and employees maintain private electronic accounts and home offices that intersect with their professional obligations, the issues surrounding IPRA and private entities are certain to arise again in the coming years. The boundaries of *Toomey* and *Corizon*, particularly as they relate to private companies contracting with state and local governmental entities to perform public services, are likely to be tested as records requestors seek access to more information. And, although the private contractors involved in *Toomey* and *Corizon* did not raise the issue, a similarly-situated private entity sued by a requestor under IPRA may very well raise the defense that it is not a proper defendant in an IPRA action. As a result, New Mexico courts will almost certainly be called upon to clarify the holding of *Toomey* as to the issues identified in this article.

Interpreted in accordance with both its plain language and its statutory intent, IPRA applies only to the records held by private entities and not the private entities themselves. When a requestor submits a request to inspect records held by a private entity on behalf of a public body, the request must be submitted to the public body's records custodian, and then the public body itself must work to provide those records to the requestor. It is emphatically *not* sufficient for a public body to simply refer a requestor to its private contractor, because IPRA clarifies that the public body's records custodian must respond to the request either by providing the requested records<sup>188</sup> or a proper explanation of why the public body will not permit inspection.<sup>189</sup> And, where a requestor must resort to legal means of enforcing the provisions of the statute, the action must be maintained against the public body and its records custodian,<sup>190</sup> not a private contractor.

To be clear, *Toomey*, *Pacheco*, and *Corizon* were not wrongly-decided cases. As the Court of Appeals stated most eloquently in *Toomey*, if a court were to hold that records related to the provision of governmental services by private contractors were not public records, it would "thwart the very purpose of IPRA and mark a significant departure from New Mexico's presumption of openness at the heart of our access law."<sup>191</sup> The Court of Appeals was correct in *Toomey* and *Corizon* that records, at least in the context of those cases, must be public records because they relate to public business and are effectively maintained on behalf of a public body. In that sense, interpreted narrowly and looking to the precise holdings of the cases, *Toomey*, *Pacheco*, and *Corizon* properly interpreted IPRA by facilitating access to public records.

But it is pivotal that these cases not be misinterpreted so as to transform private entities into public bodies in the context of some records and some records requests. Although these decisions did include language which might suggest that private entities are themselves subject to IPRA and are themselves the proper defendants in an IPRA action, such an interpretation is at odds with both the statute's

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187. See Ni & Bretschneider, *supra* note 48.

188. See *supra* note 27.

189. See *supra* note 34.

190. See *supra* note 113 and accompanying text.

191. *Toomey v. Truth or Consequences*, 2012-NMCA-104, ¶ 26, 287 P.3d 364, 371.

definition of a public body and the statute's overall structure. For the purposes of IPRA, a public body is *always* a public body, not varying from request to request. And a public body cannot avoid its responsibilities under IPRA by simply referring a requestor to its private contractor. IPRA is clear that "to provide persons with such information is an *essential function of a representative government* and an integral part of the routine duties of public officers and employees."<sup>192</sup> This requires any public body to be responsible for the records related to its public business, even those created and maintained by its private contractors.

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192. N.M. STAT. ANN. § 14-2-5 (1993).