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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: \_\_\_\_\_

Court of Appeals of New Mexico  
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Ramon J. Maestas  
Chief Clerk

4 **No. A-1-CA-40172**

5 **ALBUQUERQUE JOURNAL and**  
6 **KOB-TV, LLC,**

7 Plaintiffs-Appellants/Cross-Appellees,

8 v.

9 **BOARD OF EDUCATION OF ALBUQUERQUE**  
10 **PUBLIC SCHOOLS and RIGO CHAVEZ, in his**  
11 **capacity as Custodian of Records for Board of**  
12 **Education for Albuquerque Public Schools,**

13 Defendants-Appellees/Cross-Appellants.

14 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**  
15 **Nancy J. Franchini, District Court Judge**

16 Peifer, Hanson, Mullins & Baker, P.A.  
17 Charles R. Peifer  
18 Gregory P. Williams  
19 Albuquerque, NM

20 for Appellants

21 Ortiz & Zamora, Attorneys at Law, LLC  
22 Tony F. Ortiz  
23 Daniel R. Rubin  
24 Jessica R. Terrazas  
25 Santa Fe, NM

26 for Appellees

1 **OPINION**

2 **HANISEE, Judge.**

3 {1} This appeal is the second arising from a long-running dispute between  
4 Plaintiffs Albuquerque Journal (the Journal) and KOB-TV, LLC and Defendants the  
5 Board of Education (the Board) of Albuquerque Public Schools (APS) and its prior  
6 records custodian, Rigo Chavez. Plaintiffs, advancing their case under the Inspection  
7 of Public Records Act (IPRA or the Act), NMSA 1978, §§ 14-2-1 to -12 (1947, as  
8 amended through 2023), seek public disclosure of certain documents related to the  
9 abrupt and premature resignation of Winston Brooks in 2014, then-Superintendent  
10 of APS, and the associated \$350,000 buyout of his contract with public funds. In  
11 their direct appeal, Plaintiffs contend that the district court erred in concluding that  
12 a particular investigatory report, prepared by attorney Agnes Fuentes Padilla at  
13 the behest of the Board (the Padilla Report or the Report), fits within either of two  
14 enumerated exceptions to IPRA: public records that are matters of opinion contained  
15 within a personnel file, or public records protected by attorney-client privilege. *See*  
16 § 14-2-1(C), (G). On cross-appeal, Defendants challenge the district court’s  
17 determination regarding IPRA’s applicability to certain other documents, the district  
18 court’s award of damages to Plaintiffs, and its denial of Defendants’ requests for  
19 court costs. For the reasons set forth below, we affirm the district court on all  
20 grounds.

1 **BACKGROUND**

2 {2} The general factual background underlying this case was explained by this  
3 Court in our prior opinion resolving a separate appeal in this matter. *See*  
4 *Albuquerque J. v. Bd. of Educ. of Albuquerque Pub. Schs.*, 2019-NMCA-012, ¶¶ 3-  
5 5, 436 P.3d 1. We incorporate the facts set forth in that opinion and supplement them  
6 here as pertinent to the specific issues now before us.

7 {3} On August 7, 2014, the Journal sent its first records request to APS seeking  
8 production of “any report Agnes Padilla . . . has provided through her legal services  
9 to the district.” On August 8, 2014, Chavez denied the request on behalf of APS,  
10 stating that the only responsive document, the Padilla Report, was both a matter of  
11 opinion within a personnel file and a confidential legal communication. Plaintiffs  
12 thereafter filed the instant enforcement action seeking production of the Padilla  
13 Report in addition to other records discussed below. In April 2015, Defendants  
14 moved for summary judgment regarding the Padilla Report’s status as excepted from  
15 disclosure under IPRA, but the case was then delayed by an appeal taken by Brooks’  
16 attorney, Maureen Sanders, who contested an order compelling disclosure of  
17 pertinent information she possessed regarding the Padilla Report to Plaintiffs. *See*  
18 *Albuquerque J.*, 2019-NMCA-012. Notably, while Defendants were not originally a  
19 party to Sanders’ appeal, they opted to participate in the proceeding by opposing  
20 Plaintiffs’ right to the information Sanders possessed, even informing this Court by

1 motion that “the central issues of [Sanders’] appeal bear on the core interests of  
2 APS.”

3 {4} The resolution of Sanders’ appeal took almost three-and-a-half years during  
4 which litigation regarding Defendants’ motion for summary judgment stopped.  
5 After the case was remanded back to the district court, Plaintiffs filed their own  
6 cross-motion for summary judgment, seeking production of the Padilla Report and  
7 requesting that the district court conduct an in camera review of the document. The  
8 district court denied Plaintiffs’ motion and granted Defendants’ previously filed  
9 motion without reviewing the Padilla Report itself, agreeing with Defendants that  
10 the public record is excepted from inspection in its entirety as both a matter of  
11 opinion within a personnel file and because it is protected by attorney-client  
12 privilege under Sections 14-2-1(C) and 14-2-1(G) of IPRA.<sup>1</sup> The district court thus  
13 determined as a matter of law that the Padilla Report is not subject to inspection  
14 under IPRA.

15 {5} The case thereafter proceeded to trial on Plaintiffs’ remaining records  
16 requests. The district court found that Defendants committed nine separate violations  
17 of IPRA’s fifteen-day production requirement by failing to identify several records

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<sup>1</sup>The district court did subsequently review the Padilla Report in camera pursuant to a limited order of remand issued by this Court. Upon doing so, the district court adhered to its prior conclusion that the document was entirely excepted from production under IPRA on the same bases previously identified in its order.

1 responsive to Plaintiffs' requests and provide for their inspection, or otherwise give  
2 a reasonable explanation as to why certain records were being withheld. *See* § 14-2-  
3 8(D). The district court collectively awarded Plaintiffs \$411,625 in statutory  
4 damages and \$214,911.76 in attorney fees and court costs. Defendants appeal  
5 various determinations supporting such awards.

6 {6} While Defendants' IPRA violations relate to numerous records requests, the  
7 documents principally at issue in Defendants' cross-appeal are (1) Padilla's billing  
8 records for services rendered in relation to the Padilla Report; (2) two anonymous  
9 "hotline complaints" in which the complainants alleged misconduct by Brooks or  
10 his wife, Ann Brooks, and (3) an APS-created investigative report about one such  
11 complaint. As to the billing records, Defendants received the Journal's relevant  
12 IPRA request on September 3, 2014, but Chavez did not respond substantively until  
13 September 26. Chavez's response stated that APS "ha[d] no records to provide," but,  
14 purportedly unbeknownst to him, the billing records had been hand-delivered to  
15 Analee Maestas, then-President of the Board, on September 25, one day prior.

16 {7} The two "hotline complaints" at issue are anonymous reports originating  
17 either through a "1-800" telephone number or a publicly accessible online webpage,  
18 both of which are maintained by a third-party vendor called Ethical Advocate. The  
19 report about one of the hotline complaints was made by APS's Internal Audit  
20 Department as an investigatory follow-up. Regarding all three records, the Journal

1 made its relevant request on September 2, 2014, but Defendants again did not  
2 respond until September 26. Although Defendants possessed all three responsive  
3 records at the time of the request, their letter in response disclosed the existence of  
4 only one hotline complaint, stated that Defendants were not disclosing the complaint  
5 because it constituted a matter of opinion contained within a personnel file, and made  
6 no mention of the other complaint or the related report. Defendants did, in fact, later  
7 produce both complaints for inspection—but not the report—albeit more than two  
8 years after Plaintiffs’ request.

9 {8} Following trial, the district court concluded that Defendants possessed the  
10 billing records at the time of the denial of Plaintiffs’ request and violated IPRA in  
11 declaring otherwise. The court concluded as well that the hotline complaints were  
12 not “matters of opinion” excepted from IPRA, *see* § 14-2-1(C), and Defendants’  
13 failure to produce the complaints for two years, or even identify the report about one  
14 of them, were wrongful denials of those records under IPRA. After trial, both  
15 Plaintiffs and Defendants filed the instant competing appeals.

## 16 **DISCUSSION**

### 17 **I. Plaintiffs’ Appeal**

18 {9} On direct appeal, Plaintiffs challenge the district court’s summary judgment  
19 determination that the Padilla Report is entirely excepted from production under  
20 IRPA on both grounds determined by the district court to be applicable, namely

1 Sections 14-2-1(C) and 14-2-1(G) (matters of opinion within a personnel file and  
2 attorney-client privilege, respectively). We address each exception in turn,  
3 beginning with attorney-client privilege.

4 **A. Standard of Review**

5 {10} We review an order granting or denying summary judgment de novo. *Jones*  
6 *v. City of Albuquerque Police Dep't*, 2020-NMSC-013, ¶ 16, 470 P.3d 252.

7 “Summary judgment is appropriate in the absence of any genuine issues of material  
8 fact and where the movant is entitled to judgment as a matter of law.” *Id.* (internal  
9 quotation marks and citation omitted). When considering an order on summary

10 judgment, we view facts “in a light most favorable to the nonmoving party and  
11 drawing all reasonable inferences in support of a trial on the merits.” *Id.* (internal

12 quotation marks and citation omitted). “A party may not simply argue that such  
13 evidentiary facts might exist, nor may it rest upon the allegations of the complaint.”

14 *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 10, 148 N.M. 713, 242 P.3d 280  
15 (text only) (citation omitted). The district court’s entry of summary judgment in this

16 case requires us to determine the applicability of various IPRA exceptions to the  
17 Padilla Report, which is a question of law we also review de novo. *See Cox v. N.M.*

18 *Dep’t of Pub. Safety*, 2010-NMCA-096, ¶ 4, 148 N.M. 934, 242 P.3d 501 (“The  
19 meaning of language used in a statute is a question of law that we review de novo.”

20 (internal quotation marks and citation omitted)). In particular, we review the

1 applicability of a privilege de novo. *Breen v. N.M. Tax'n & Revenue Dep't*, 2012-  
2 NMCA-101, ¶ 21, 287 P.3d 379.

3 **B. Attorney-Client Privilege**

4 {11} In granting Defendants' motion for summary judgment, the district court  
5 found that the entire Padilla Report was protected by attorney-client privilege under  
6 the exception to IPRA established by Section 14-2-1(G). The district court did so on  
7 the principal basis that both Padilla and Maestas, who personally hired Padilla on  
8 behalf of the Board, submitted affidavits stating that they believed Padilla was  
9 providing professional legal services and her related communications would,  
10 therefore, be privileged. The district court also relied on a retention letter sent from  
11 Maestas to Padilla, which stated the attorney was being hired to "provid[e]  
12 professional legal services to the Board" and that "[t]hose services include . . .  
13 research and inquiry into matters of concern to the Board and consultation with the  
14 Board [p]resident and members of the Board concerning the results of [Padilla's]  
15 work."

16 {12} Plaintiffs, however, assert that Padilla was acting primarily as an investigator  
17 rather than legal counsel, and, therefore, facts she unearthed during her investigation  
18 are not protected by the attorney-client privilege. Plaintiffs point to Padilla's  
19 deposition testimony indicating that her Report contains a factual section distinct  
20 from her legal analysis as well as Maestas's verbal statement at a board meeting



1 indicating that she sought counsel “to provide the Board with factual information”  
2 and “clear [Brooks] of these accusations once and for all.” Plaintiffs contend that the  
3 attorney-client privilege, as outlined in Rule 11-503 NMRA, applies to  
4 “communications” and not whole documents, and APS was thus required to “assert  
5 the privilege with sufficient detail so that Plaintiffs and the [c]ourt may assess the  
6 claim of privilege as to each withheld communication.” Plaintiffs point to the public  
7 policy underpinning IPRA—the need for transparent and accountable government,  
8 *see* § 14-2-5—to support a narrow application of attorney-client privilege to prevent  
9 public bodies from hiding important factual information from the public under the  
10 guise of hiring legal counsel to conduct investigations.

11 {13} We disagree with Plaintiffs and conclude that the Padilla Report in its entirety,  
12 including factual information set forth therein, is sufficiently related to Padilla’s  
13 professional legal services that it is excepted from inspection under IPRA on the  
14 basis of attorney-client privilege. *See Henry v. N.M. Livestock Bd.*, 2023-NMCA-  
15 082, ¶¶ 17, 21, 538 P.3d 102, *cert. denied* (S-1-SC-39937, Aug. 11, 2023) (holding  
16 that documents containing facts relevant to legal services were not discoverable  
17 under IPRA). “The elements of attorney-client privilege are a communication made  
18 in confidence between privileged persons for the purpose of facilitating the  
19 attorney’s rendition of professional legal services to the client.” *Id.* ¶ 17 (internal  
20 quotation marks and citation omitted). Although “the attorney-client privilege

1 should only be applied to protect communications—not facts,” *State ex rel. Highway*  
2 *Comm’n v. Steinkraus*, 1966-NMSC-134, ¶ 4, 76 N.M. 617, 417 P.2d 431,  
3 “communications themselves . . . even communications concerning facts, are  
4 privileged so long as they were made in confidence for the purpose of obtaining legal  
5 advice or legal services.” *Henry*, 2023-NMCA-082, ¶ 18. It is well established that  
6 an attorney, in providing sound and informed legal advice, must inquire into the facts  
7 pertinent to the issues on which their advice is sought. *See Upjohn Co. v. United*  
8 *States*, 449 U.S. 383, 391-92 (1981) (“The first step in the resolution of any legal  
9 problem is ascertaining the factual background and sifting through the facts with an  
10 eye to the legally relevant.”).

11 {14} The Padilla Report’s inclusion of separate factual and legal sections is alone  
12 insufficient to strip the former of its privileged status or otherwise divorce it from  
13 the whole, which was a report produced as a part of professional legal services  
14 provided by Padilla to the Board. *See Henry*, 2023-NMCA-082, ¶ 17 (“The attorney-  
15 client privilege protects ‘communications’ between a lawyer and a client . . . so long  
16 as the communication—the *document*, conversation, e-mail, or memorandum—is  
17 made for the purpose of facilitating the rendition of professional legal services to the  
18 client.” (emphasis added)). “So long as an e-mail or other communication is made  
19 privately and not intended for further disclosure except to other persons in  
20 furtherance of the purpose of the communication, that communication is a

1 confidential communication protected by the attorney-client privilege.” *Id.* ¶ 20  
2 (internal quotation marks and citation omitted).

3 {15} Here, the evidence before the district court supports its conclusion that Padilla  
4 was acting as an attorney hired to provide professional legal services regarding the  
5 Board’s employment of Brooks. Maestas and Padilla attested that communications  
6 or feedback Padilla provided as a part of her work for the Board were confidential  
7 and privileged. Maestas’s letter to Padilla confirmed that Padilla was hired to  
8 provide “professional legal services” including “research and inquiry into matters of  
9 concern to the Board.” Although Maestas told the Board that she was seeking an  
10 attorney to obtain factual information and “clear [Brooks] of these accusations once  
11 and for all,” spoken statements at a board meeting do not overcome the scope of  
12 Padilla’s employment as defined by the retention letter she received and as described  
13 in the affidavits both women made. This evidence was further supported by the  
14 district court’s subsequent in camera review of the Report in which it affirmed its  
15 previous decision regarding the Report’s status as privileged. Based on the above  
16 evidence, as well as our own review of the Padilla Report, we conclude that  
17 Defendants have met their burden in establishing the entire document is sufficiently  
18 related to the provision of professional legal services such that it is protected in its  
19 entirety by attorney-client privilege.

1 {16} Having so concluded, we briefly address the application of Section 14-2-9(A),  
2 which requires separation of exempt and nonexempt information and disclosure of  
3 the latter, to documents that are entirely protected by privilege. On this point, we  
4 understand Plaintiffs to argue that Section 14-2-9(A) requires a records custodian to  
5 deconstruct individual, privileged documents and identify, sentence by sentence,  
6 which parts of the requested records are exempt from production and which are not.  
7 We reject this proposition. Section 14-2-9(A) states, in part, the following:

8 Requested public records containing information that is exempt and  
9 nonexempt from disclosure shall be separated by the custodian prior to  
10 inspection, and the nonexempt information shall be made available for  
11 inspection.

12 We do not read this statute to impose on public bodies a general obligation to sift  
13 through a document that has been successfully established as privileged in its  
14 entirety, and parse what may be properly withheld. The definition of “public  
15 records” as provided by the Act and the nature of the attorney-client privilege itself  
16 contradict such an interpretation. “Public records” are defined by IPRA as “all  
17 *documents*, papers, letters, books, maps, tapes, photographs, recordings and other  
18 materials.” Section 14-2-6(H) (emphasis added). Construed in light of this  
19 definition, Section 14-2-9(A)’s requirement that “records . . . shall be separated,” as  
20 it applies to the attorney-client privilege exception, requires only that exempt and  
21 nonexempt documents be separated from one another, not that each statement or  
22 section therein be analyzed individually to determine whether it was properly

1 excepted and withheld. *See Key v. Chrysler Motors Corp.*, 1996-NMSC-038, ¶ 14,  
2 121 N.M. 764, 918 P.2d 350 (“We are to read the statute in its entirety and construe  
3 each part in connection with every other part to produce a harmonious whole.”).

4 {17} This conclusion is bolstered by other, more general discussions of the  
5 attorney-client privilege. The Restatement (Third) of the Law Governing Lawyers §  
6 69 (2000) defines a “communication” as, “any expression through which a  
7 privileged person . . . undertakes to convey information to another privileged person  
8 and any *document or other record* revealing such expression.” (Emphasis added.)

9 Section 69, Illustration 7 of the Restatement (Third) of the Law Governing Lawyers  
10 further identifies an example of a confidential letter, written from attorney to client,  
11 that contains information supplied by the client, “gathered by [the l]awyer from third  
12 persons,” and garnered by the lawyer’s own research, and states that “[e]ven if each  
13 such portion[s] of the letter could by be separated from the others, the letter is a  
14 communication under this [s]ection.” Thus, under both the language of the  
15 Restatement (Third) of the Law Governing Lawyers and IPRA, the Padilla Report,  
16 although containing facts and information gathered by an attorney, is a confidential  
17 communication wholly excepted from production under Section 14-2-1(G).

18 {18} We note, however, that there may be circumstances in which portions of a  
19 requested record are so divorced from professional legal services that a district court  
20 may properly deem such portions of the record unprotected. In such cases, redaction

1 of any information that *is* protected by privilege may be appropriate. Any such claim,  
2 however, would present an inquiry that must be resolved on the specific facts and  
3 documents before the district court. *See Albuquerque J.*, 2019-NMCA-012, ¶ 21  
4 (“Failure to adequately support a claim of privilege thwarts both the adversarial  
5 process and meaningful independent judicial review and justifies denial of the claim  
6 of privilege.” (internal quotation marks and citation omitted)). Thus, we emphasize  
7 our strong preference that district courts, when practicable, conduct an in camera  
8 review of documents where, as here, reasonable argument suggests that a public  
9 body *may* be attempting to hide otherwise discoverable facts under the guise of  
10 attorney-client privilege. In addition, we reiterate that witnesses with knowledge of  
11 facts included in a privileged document cannot use the privilege to refuse to disclose  
12 what they know. *Steinkraus*, 1966-NMSC-134, ¶ 4.

13 {19} The dissent suggests that our conclusion today “paves the way for public  
14 entities to shield *any* undesirable information from the public eye” and “nullif[ies]  
15 an act that is vital to protecting the rights and interests of New Mexicans.” *Dissent*  
16 ¶ 72. It asserts that, based on our holding, “a public entity seeking to insulate any  
17 information from public disclosure need only (1) hire an attorney to perform an  
18 action and/or communicate the resulting information, and (2) express their  
19 subjective beliefs that the attorney was acting in a legal capacity while doing so.”  
20 *Dissent* ¶ 85. This mischaracterization, however, omits a third requirement, which

1 has long served as a bedrock principle of attorney-client privilege and is the core of  
2 our conclusion today: a party asserting a privilege may not simply declare such to  
3 exist but bears the burden of proving the existence and scope of the privilege to a  
4 court of law. *See* Rule 11-104(A) NMRA (“The court must decide any preliminary  
5 question about whether . . . a privilege exists.”); *Allen v. LeMaster*, 2012-NMSC-  
6 001, ¶ 38, 267 P.3d 806 (“A petitioner asserting the attorney-client privilege bears  
7 the burden of demonstrating that the privilege applies.”); *Albuquerque J.*, 2019-  
8 NMCA-012, ¶ 21 (“Failure to adequately support a claim of privilege thwarts both  
9 the adversarial process and meaningful independent judicial review and justifies  
10 denial of the claim of privilege.” (internal quotation marks and citation omitted));  
11 *See Santa Fe Pac. Gold Corp. v. United Nuclear Corp.*, 2007-NMCA-133, ¶ 13, 143  
12 N.M. 215, 175 P.3d 309 (“The party claiming privilege has the burden of  
13 establishing that a communication is protected as an exception to the ordinary  
14 rule.”). Such is exactly what happened here.

15 {20} We reiterate that it is courts, and not litigants, that determine whether a  
16 document, or information within it, is protected by a privilege. Our holding today  
17 does not tarnish this principle and acknowledges that the Padilla Report itself was  
18 reviewed by both the district court and this Court and has been deemed protected by  
19 attorney-client privilege.

1 {21} The dissent further suggests the attorney-client privilege is intended to protect  
2 or otherwise encourage a client’s free and honest communications to their attorney  
3 but not an attorney’s communications to the client. *See dissent* ¶ 79 (“The purpose  
4 of the attorney-client privilege in New Mexico is to encourage ‘clients to disclose  
5 more information to their attorneys.’” (quoting *Bhandari v. Artesia Gen. Hosp.*,  
6 2014-NMCA-018, ¶ 10, 317 P.3d 856)). Yet, in the same breath, the dissent  
7 acknowledges that the purpose of the privilege “is to encourage full and frank  
8 communication *between attorneys and their clients.*” *Dissent* ¶ 79 (emphasis added)  
9 (quoting *Pub. Serv. Co. of N.M. v. Lyons*, 2000-NMCA-077, ¶ 25, 129 N.M. 487, 10  
10 P.3d 166). Lastly, the dissent states that “Padilla was hired first in an investigative  
11 capacity to apprise APS of the factual basis underlying a series of reputationally  
12 harmful allegations.” *Dissent* ¶ 75. In our view, this is a mischaracterization of the  
13 record before us, which, as we have explained, shows that Padilla was hired as an  
14 attorney to (1) apprise herself of the facts surrounding a potential legal problem  
15 facing her client, and (2) provide advice regarding such circumstance.

16 {22} Our conclusion that the Padilla Report is entirely protected by privilege  
17 recognizes that it is (1) a communication (2) made in confidence (3) between the  
18 Board and its hired legal counsel (4) for the purpose of facilitating the attorney’s  
19 professional legal services to the Board. *See Henry*, 2023-NMCA-082, ¶ 23 (stating



1 these are the four elements of attorney-client privilege). As such, it is entirely  
2 protected by privilege. *See dissent* ¶ 77 (quoting *Henry*, 2023-NMCA-082, ¶ 23).

3 {23} In short, it seems that the dissent objects less to our application of Section 14-  
4 2-1(G) in this case and more to the very existence of Section 14-2-1(G) within IPRA  
5 itself. The dissent urges the adoption of a version of attorney-client privilege under  
6 Section 14-2-1(G) that is narrower than the substantive law governing the privilege  
7 in other contexts. However, as we have recently stated, the law governing attorney-  
8 client privilege is the “substantive law governing [its] application . . . as [an]  
9 exception[] to IPRA.” *See Energy Pol’y Advocs. v. Hector Balderas*, \_\_\_-NMCA-  
10 \_\_\_, ¶ 23, \_\_\_ P.3d \_\_\_ (A-1-CA-39915, Oct. 15, 2024). Moreover, we cannot erase  
11 some provisions of a statutory enactment any more than we can add others. That is  
12 why it is the province of the Legislature, and not a group of judges, to make changes  
13 in the provisions of statutory law. *Varos v. Union Oil Co. of Cal.*, 1984-NMCA-091,  
14 ¶ 6, 101 N.M. 713, 688 P.2d 31.

15 {24} Given then the existence of Section 14-2-1(G), our conclusion rests on  
16 established law governing attorney-client privilege itself, as discussed above, *and*  
17 our own review of the Padilla report, which reveals that Defendants did not seek to  
18 cloak information within the scope of attorney-client privilege that would otherwise  
19 be rightly subject to public inspection. Rather, our review confirms that it is a twelve-  
20 page report, the contents of which are confined to the specific tasks Padilla was hired

1 to perform. Its length and scope are limited to facts and legal advice related the  
2 matters discussed above, and there is no indication that Defendants or the authoring  
3 attorney attempted to conceal otherwise inspectable information from Plaintiffs or  
4 the public. In short, our review of the Padilla Report confirms that it is what  
5 Defendants purported it to be: a report generated by an attorney that, while  
6 containing facts, was made in furtherance of the legal services for which the attorney  
7 was retained.

8 **C. Matter of Opinion**

9 {25} We now turn to Plaintiffs’ argument relating to the “matter of opinion”  
10 exception to IPRA established by Section 14-2-1(C). Similar to Plaintiffs’ argument  
11 regarding attorney-client privilege, they assert that the plain language of Section 14-  
12 2-1(C) limits the excepted material to “only matters of opinion” and that factual  
13 information within responsive records remains subject to public inspection.  
14 Plaintiffs further urge us to “clarify [our] own decision” in *Cox*, which, according to  
15 Plaintiffs, impermissibly expands the scope of Section 14-2-1(C) beyond its plain  
16 meaning. *See Cox*, 2010-NMCA-096. Plaintiffs suggest that Section 14-2-1(C)  
17 exempts from inspection only specific opinions contained in documents relating to  
18 personnel matters, not whole records themselves, as *Cox* seems to suggest. *See Cox*,  
19 2010-NMCA-096, ¶ 21.

1 {26} We read Plaintiffs’ argument to be substantially the same as that which they  
2 advanced regarding attorney-client privilege: that public bodies have a duty to  
3 separate exempt and nonexempt information contained within a single document,  
4 sentence by sentence, and disclose the latter. Yet both before and since Plaintiffs’  
5 briefing in this case, New Mexico appellate courts have rejected Plaintiffs’ argument  
6 as to Section 14-2-1(C). *See Henry v. Gauman*, 2023-NMCA-078, ¶ 20, 536 P.3d  
7 498 (“Because Section 14-2-1(C) of IPRA describes [an] entire ‘letter or  
8 memorandum’ as exempt, the custodian is required only to separate exempt from  
9 nonexempt documents, and make the latter available for inspection.” (alterations  
10 omitted)); *Cox*, 2010-NMCA-096, ¶¶ 21, 22 (concluding that entire documents or  
11 records containing matters of opinion, such as “internal evaluations” and  
12 “disciplinary reports,” are excepted by Section 14-2-1(C)); *see also State ex rel.*  
13 *Newsome v. Alarid*, 1977-NMSC-076, ¶ 12, 90 N.M. 790, 568 P.2d 1236 (holding  
14 that “documents concerning infractions and disciplinary action, personnel  
15 evaluations, opinions as to whether a person would be re[h]ired or as to why an  
16 applicant was not hired, and other matters of opinion are also exempt from disclosure  
17 under [IPRA’s precursor “right to know”] statute.” (emphasis added)),<sup>2</sup> *superseded*

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<sup>2</sup>*Newsome* construes the meaning of an IPRA predecessor, the “Right-to-Know” Act. *See* 1977-NMSC-076, ¶¶ 30-32 (discussing NMSA 1953, § 71-5-1 (1975 Supp.)). Given that the materials excepted from inspection in that case are, as here, “letters or memorand[a] which are matters of opinion[,]” *Newsome*, 1977-NMSC-076, ¶ 12, we continue to rely on its reasoning in this instance.

1 *by statute as stated in Republican Party of N.M. v. N.M. Tax'n & Revenue Dep't,*  
2 2012-NMSC-026, 283 P.3d 853.

3 {27} Plaintiffs argue that the district court improperly relied on *Cox* and *Newsome*  
4 to conclude that entire documents containing employer opinion information are  
5 excepted from inspection under Section 14-2-1(C). While we disagree that the  
6 district court misread either case, our own recent interpretation of the plain language  
7 of Section 14-2-1(C) forecloses Plaintiffs' argument. *See Gauman, 2023-NMCA-*  
8 *078, ¶ 20. Gauman*, although published after the parties filed briefing in this case,  
9 specifically rejects Plaintiffs' contention that the plain meaning of Section 14-2-1(C)  
10 should be limited to except only specific statements of opinion within documents  
11 addressing employee discipline, as opposed to entire records. This Court held that  
12 "[t]he exemption does not state, as it easily could, that 'matters of opinion contained  
13 in a letter or memorandum' are exempt, nor does it say 'portions of letters or  
14 memoranda that are matters of opinion' are exempt." *Gauman, 2023-NMCA-078,*  
15 *¶ 13.* Contrary to Plaintiffs' arguments, *Gauman* solidifies that Section 14-2-1(C)  
16 requires only that "the custodian . . . separate exempt from nonexempt documents,  
17 and make the latter available for inspection." *Gauman, 2023-NMCA-078, ¶ 20.*  
18 Thus, Plaintiffs' argument that the district court improperly relied on *Cox*, or that  
19 *Cox* impermissibly expanded the scope of Section 14-2-1(C) to include entire  
20 documents, contradicts established appellate precedent. Based thereon, we decline

1 to depart from the reasoning in *Cox* and *Gauman*. See *Padilla v. State Farm Mut.*  
2 *Ins. Co.*, 2003-NMSC-011, ¶ 7, 133 N.M. 661, 68 P.3d 901 (setting out four factors  
3 that an appellate court must consider before overturning precedent).

4 {28} Lastly, Plaintiffs stated in oral argument before this Court that the records  
5 request to which the Padilla Report is a responsive document also included a request  
6 for information related to allegations against Ann Brooks, who was not an employee  
7 of APS at any time relevant to this case. Plaintiffs argued that a lack of employee  
8 status as to Mrs. Brooks renders Section 14-2-1(C) wholly inapplicable to records  
9 related to her. While we make no comment on the contents of the Padilla Report,  
10 including whether Mrs. Brooks is mentioned therein, we reject Plaintiffs' argument.

11 A record that is produced in contemplation of an employee's future employment  
12 with a public body, even if such report includes references to others or incidentally  
13 contains allegations of misconduct by persons other than the employee, may still be  
14 excepted from inspection under Section 14-2-1(C). Indeed, it is the very nature of  
15 most allegations of misconduct that persons other than the employee being  
16 investigated will very likely be mentioned in an ensuing investigative report. Such  
17 alone, however, does not transmute the nature of the document itself, the purpose of  
18 which is to investigate an employee's potential misconduct and assess their future  
19 viability as an employee.

1 {29} To conclude that a record’s potential reference to misconduct committed by  
2 others removes the document from the exception in Section 14-2-1(C) would  
3 publicly disclose information related to an employee’s personnel file simply because  
4 nonemployees are mentioned therein. *Newsome* long ago admonished courts that the  
5 public policy underpinning Section 14-2-1(C) is to protect public employees from  
6 disclosure of “adverse opinions . . . in documents concerning disciplinary action . . .  
7 that might have no foundation in fact but, if released for public view, could be  
8 seriously damaging to an employee.” *Newsome*, 1977-NMSC-076, ¶ 12. It would be  
9 difficult indeed, if not practically impossible, to permit inspection of the portions of  
10 such documents that reference nonemployees without exposing the employee to the  
11 embarrassment and damage Section 14-2-1(C) is designed to protect against.

12 {30} As a final matter, we note that the dissent suggests Section 14-2-1(C) may not  
13 be applicable to the Padilla Report at all because Brooks and APS agreed not to keep  
14 the Padilla Report in Brooks’ personnel file. *Dissent* ¶ 88. However, “the location of  
15 a record in a personnel file is not dispositive of whether the exception applies; rather,  
16 the critical factor is the nature of the document itself.” *Cox*, 2010-NMCA-096, ¶ 21.  
17 Thus, precisely where the Report was stored, or how it was otherwise handled, does  
18 not control our decision. The dissent further asserts that Section 14-2-1(C) is  
19 intended to protect public officials from “disclosure of information that is *untrue* or  
20 mere gossip and rumor.” *Dissent* ¶ 95. This seems to be squarely applicable to

1 documents, such as the Padilla Report, in which allegations of misconduct are  
2 investigated and very often contain unsubstantiated accusations that amount to little  
3 more than gossip. Disclosure of such inflammatory and uncorroborated allegations  
4 are, by the dissent’s own admission, precisely what Section 14-2-1(C) was designed  
5 to protect against, and the dissent does not explain how such is not the case here.

6 {31} We, therefore, affirm the district court’s determination that the Padilla Report  
7 is excepted from inspection under Sections 14-2-1(C) and 14-2-1(G) of IPRA.  
8 Having so concluded, Plaintiffs’ remaining argument on direct appeal—related to  
9 attorney fees and court costs if successful as to the Padilla Report—fails, and we  
10 decline to address it.

## 11 **II. Defendants’ Cross-Appeal**

12 {32} On cross-appeal, Defendants advance four arguments challenging (1) the  
13 district court’s factual findings regarding two complaints made by unknown  
14 individuals via an anonymous reporting system (the “hotline complaints”); (2) the  
15 district court’s conclusion that Defendants wrongfully withheld Padilla’s billing  
16 records that Defendants did not possess at the time they received Plaintiffs’ related  
17 request; (3) the denial of their motion for court costs under Rule 1-054(D) NMRA;  
18 and (4) the district court’s calculation of the time during which statutory damages  
19 accrued under Section 14-2-11(C). We address each argument in turn.

1 **A. The Hotline Complaints and the Related Investigatory Report**

2 {33} As stated above, the two complaints at issue were made through an  
3 anonymous, publicly accessible reporting system maintained on behalf of APS by a  
4 third-party vendor called Ethical Advocate. After receiving the “hotline complaints,”  
5 APS apparently investigated one of them and produced the internal report about it.  
6 The district court deemed these three documents responsive to at least one of  
7 Plaintiffs’ IPRA requests, and, after trial, Defendants were found liable for failing  
8 to timely produce them. Specifically, the district court found that the complaints  
9 were created by a process separate from APS’s Human Resources Department, that  
10 they were distinct from regular personnel records relating to employee evaluations,  
11 and based on the evidence presented, “it was impossible to know” if either  
12 complainant was, in fact, an APS employee. Critically, the district court found that  
13 the hotline (either the telephone number or the webpage) is open to the public and  
14 is, therefore, more comparable to the citizen complaints discussed in *Cox* than  
15 internal personnel records subject to protection under Section 14-2-1(C). *See Cox*,  
16 2010-NMCA-096, ¶ 11 (holding that complaints about state employees generated by  
17 members of the public are “available to the public for inspection”). The district court,  
18 therefore, concluded the hotline complaints were not matters of opinion within a  
19 personnel file and were wrongfully withheld under IRPA.



1 {34} As to the report, the district court found that APS possessed it at the time  
2 Chavez received Plaintiffs’ relevant request, failed to identify it in its response, and  
3 never produced the report or offered a denial or explanation as to why it was not  
4 produced. The district court concluded such to violate IPRA.

5 {35} On appeal, Defendants argue that the complaints and report were exempt from  
6 production under IPRA as matters of opinion within personnel files. *See* § 14-2-1(C).  
7 Specifically, Defendants challenge the district court’s factual finding that the hotline  
8 complainants were not APS employees. They assert that the sole witness to testify  
9 on the matter, APS’s then director of its Internal Audit Department, Margaret  
10 Koshmider, provided unrebutted testimony that the complaints were “most likely, or  
11 more likely than not, [APS] employees.” Defendants argue that, as such, the  
12 preponderance of evidence indicates that the hotline complainants were APS  
13 employees, and the complaints are, therefore, internally created documents excepted  
14 from inspection under Section 14-2-1(C). Defendants continue that the report,  
15 although neither identified to Plaintiffs nor produced, is excepted from IPRA on the  
16 same basis.

17 {36} We review a district court’s findings of fact for substantial evidence. *Sims v.*  
18 *Sims*, 1996-NMSC-078, ¶ 65, 122 N.M. 618, 930 P.2d 153. “Substantial evidence  
19 means relevant evidence that a reasonable mind could accept as adequate to support  
20 a conclusion.” *Id.* (internal quotation marks omitted). “This Court will resolve all

1 disputed facts and indulge all reasonable inferences in favor of the trial court’s  
2 findings.” *Id.* In reviewing a factual finding, “the question is not whether substantial  
3 evidence exists to support the opposite result, but rather whether such evidence  
4 supports the result reached.” *Sonntag v. Shaw*, 2001-NMSC-015, ¶ 22, 130 N.M.  
5 238, 22 P.3d 1188 (text only) (citation omitted). “When there is a conflict in the  
6 testimony, we defer to the trier of fact.” *Sunnyland Farms, Inc. v. Cent. N.M. Elec.*  
7 *Coop., Inc.*, 2013-NMSC-017, ¶ 37, 301 P.3d 387 (text only) (citation omitted). “We  
8 will not reweigh the evidence nor substitute our judgment for that of the fact[-  
9 ]finder.” *N.M. Tax’n & Revenue Dep’t v. Casias Trucking*, 2014-NMCA-099, ¶ 20,  
10 336 P.3d 436 (internal quotation marks and citation omitted).

11 {37} Here, only one witness, Koshmider, testified regarding the potential identity  
12 of the persons who generated the two hotline complaints at issue. While her  
13 testimony is, therefore, not contradicted by any other evidence, Koshmider herself  
14 equivocated repeatedly about the employment status of each complainant.  
15 Koshmider stated, based on her experience and the content of each complaint, that  
16 the complainants responsible for each hotline tip were “more likely than not” APS  
17 employees. However, she continued that she never affirmatively determined the  
18 identity of either complainant and that it was “impossible to know” for certain if  
19 each complainant was an APS employee. She also conceded that it is possible that

1 an APS employee with knowledge of the subject matter contained in either  
2 complaint communicated that information to a nonemployee who then complained.

3 {38} Koshmider’s testimony permits a reasonable fact-finder to conclude that the  
4 complaints were not internally created documents possibly protected by Section 14-  
5 2-1(C). *See Shaw*, 2001-NMSC-015, ¶ 22 (in reviewing for substantial evidence, we  
6 look only to the evidence which supports the district court’s finding). While  
7 Koshmider certainly testified that the complainants were likely APS employees, she  
8 could not be definitive in her assessment of probability. Koshmider’s hunch in this  
9 regard, however confident, is also by her own words possibly mistaken. Koshmider  
10 repeatedly stated that she could not know for certain if the complainants were APS  
11 employees and we will neither reweigh her testimony nor substitute our judgment  
12 for that of the district court. *See Casias Trucking*, 2014-NMCA-099, ¶ 20.

13 {39} Defendants also seem to argue that the hotline complaints are excepted from  
14 IPRA under Section 14-2-1(C) regardless of who made them. This presents a  
15 question of law we review de novo. *See Cox*, 2010-NMCA-096, ¶ 4 (“The meaning  
16 of language used in a statute is a question of law that we review de novo.” (internal  
17 quotation marks and citation omitted)). We find our reasoning in *Cox* controlling  
18 and decline to accept Defendants’ argument. *Cox* states that the exception embodied  
19 by Section 14-2-1(C) applies to matters of opinion that constitute “personnel  
20 information of the type generally found in a personnel file, i.e., information

1 regarding the employer/employee relationship such as internal evaluations;  
2 disciplinary reports or documentation; promotion, demotion, or termination  
3 information; or performance assessments.” *Cox*, 2010-NMCA-096, ¶ 21. Thus, we  
4 held in *Cox* that records exempt from production under this exception are those  
5 “generated by an employer or employee in support of the working relationship  
6 between them.” *Id.* ¶ 22.

7 {40} Here, the hotline complaints are similar to the citizen complaints in *Cox* in  
8 that they were made through a reporting mechanism that is open to the public. *See*  
9 *id.* ¶¶ 24-25. We reasoned in *Cox* that, although the complaints in that case may have  
10 led to disciplinary action against the public employee, “this fact by itself does not  
11 transmute such records into matters of opinion in personnel files.” *Id.* ¶ 24 (internal  
12 quotation marks omitted). We further stated that the information within the  
13 complaint belongs to the citizen who made it and not to the public body that received  
14 the complaint. *Id.* ¶ 25. Such is true of the hotline complaints in this case. As stated  
15 by the district court, the hotline complaints here were created through a system open  
16 to the public; they were kept separate from APS’s Human Resources Department—  
17 which generally maintains personnel records related to employee evaluations—and,  
18 as discussed above, there is inconclusive evidence to establish that the complainants  
19 were APS employees. In light of such facts, we conclude that the hotline complaints  
20 were not “generated by [the] employer or employee in support of the working

1 relationship between them,” and are, therefore, not exempt from production under  
2 Section 14-2-1(C). *See Cox*, 2010-NMCA-096, ¶ 22.

3 {41} Lastly, we decline to resolve whether the related report about one hotline  
4 complaint, which was produced by APS’s Internal Audit Department as an  
5 investigatory follow-up, qualifies as a matter of opinion within a personnel file. The  
6 district court determined APS to have violated IPRA by failing to disclose the  
7 report’s existence or provide an explanation for withholding it, and its related  
8 imposition of fines and fees rests solely on that basis. Because such failures are a  
9 violation of IPRA on their own, we need not engage in further analysis. *See Britton*  
10 *v. Office of the Att’y Gen.*, 2019-NMCA-002, ¶ 36, 433 P.3d 320 (holding that failure  
11 to identify a public record or issue a written denial of the related request is a violation  
12 of IPRA); *see also Crutchfield v. N.M. Dep’t of Tax’n & Revenue*, 2005-NMCA-  
13 022, ¶ 36, 137 N.M. 26, 106 P.3d 1273 (“A reviewing court generally does not  
14 decide academic or moot questions.”). We, therefore, affirm the district court’s  
15 factual findings and conclusions of law regarding the two hotline complaints and the  
16 related investigative report.

17 **B. Padilla’s Billing Records**

18 {42} After trial, the district court awarded the Journal statutory penalties in the  
19 amount of \$117,450 for Defendants’ failure to provide billing records related to  
20 Padilla’s services. Defendants argue that, although APS did have the billing records

1 at the time it responded to the Journal’s relevant request on September 26, 2014, it  
2 did not receive the bills from Padilla until after Chavez had both received the request  
3 and conducted his search. Defendants assert that practical considerations as well as  
4 persuasive authority from both within New Mexico and around the country urge us  
5 to adopt the rule that public bodies incur no obligation to produce records they do  
6 not have at the time an IPRA request is received, regardless of subsequent  
7 obtainment. Plaintiffs, on the other hand, argue that nothing within IPRA indicates  
8 that there is a “cutoff date” regarding IPRA requests and this Court’s ad hoc creation  
9 of such a limitation, should we declare such to exist, would contravene the public  
10 policy underpinning the Act. *See* § 14-2-5. Neither Plaintiffs nor Defendants point  
11 us to any authority, nor have we found any, that establishes a cutoff date by which,  
12 upon receiving an IPRA request, records custodians in New Mexico may  
13 appropriately conclude their search. Nor have we found any authority establishing a  
14 date in relation to a request upon which a public entity is deemed to possess or not  
15 possess a given record such that it must be disclosed under IPRA. Stated differently,  
16 there is no cutoff date or event established by IPRA or binding jurisprudence beyond  
17 which a public entity need not disclose the existence and possession of a responsive  
18 record. As such, the issue presented is one of first impression.

19 {43} The facts relevant to the billing records at issue are not in dispute. On  
20 September 3, 2014, Defendants received a public records request from the Journal

1 for “all invoices or other billing records from Butt, Thornton & Baehr, P.C. [(BTB)]  
2 since January 1, 2014.” BTB is the law firm that employed Padilla while she  
3 prepared the Padilla Report. Chavez thereafter began his search for any such billing  
4 records possessed by APS. Chavez first inquired with Maestas as to the existence of  
5 invoices received from Padilla or her firm, and Maestas directed Chavez to APS’s  
6 Risk Management Division, stating any such records would have been sent there.  
7 Chavez thereafter asked the Risk Management Division if it had received any such  
8 bills, and was told that it had not. Chavez completed his search sometime on or  
9 before September 25, 2014, after also inquiring about Padilla’s billing records with  
10 APS’s accounts payable office and APS Board Services and finding no responsive  
11 documents.

12 {44} The next day, on September 26, Chavez sent his letter to the Journal  
13 summarizing his search and denying its request on the grounds that APS had “no  
14 records to provide.” Notably, Chavez’s letter did not include any qualification as to  
15 the effective date of his response or any other information indicating a temporal  
16 limitation on his search. Critically, BTB produced a bill for Padilla’s services on  
17 September 16, 2014, but kept it in their possession until hand-delivering it to  
18 Maestas on September 25, one day *before* Chavez issued his denial. Indeed, soon  
19 after sending his response denying the Journal’s request, Chavez was notified by  
20 APS’s Risk Management Division that they had received a bill from the law firm.

1 Nonetheless, Chavez did not send a new response to the Journal updating them as to  
2 the existence of the record because, relying on the New Mexico Department of  
3 Justice’s IPRA Compliance Guide, it was Chavez’s belief that a public body is only  
4 responsible for addressing documents it possesses at the time a public records  
5 request is received. *See* N.M. Dep’t of Just., *N.M. Inspection of Public Records Act*  
6 *Compliance Guide* 33 (2015) (hereinafter *Compliance Guide*),  
7 [https://www.nmag.gov/wp-content/uploads/2021/11/Inspection-of-Public-Records-](https://www.nmag.gov/wp-content/uploads/2021/11/Inspection-of-Public-Records-Compliance-Guide-2015-Edit.pdf)  
8 [Compliance-Guide-2015-Edit.pdf](https://www.nmag.gov/wp-content/uploads/2021/11/Inspection-of-Public-Records-Compliance-Guide-2015-Edit.pdf) (“The right to inspect applies to any nonexempt  
9 public record that exists at the time of the request.”).<sup>3</sup>

10 {45} At the conclusion of trial and based on the above facts, the district court found  
11 that Defendants did, in fact, possess billing records responsive to the Journal’s  
12 request when Chavez sent his denial letter. It further found that Defendants had  
13 access to the records as of September 16 because its hired attorneys, as agents,  
14 prepared the bills and had them in their possession as of that date. The district court  
15 pointedly found that Chavez could have contacted BTB or Padilla during the  
16 pendency of his search, and thereby obtained the billing records, but did not do so.

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<sup>3</sup>We note that the *Compliance Guide* has since been updated from the 2015 version but provides substantially the same provision as it did during the events at issue. *See Compliance Guide* 11 (2024), <https://nmdoj.gov/wp-content/uploads/NMDOJ-IPRA-Guide-Ninth-Edition.pdf> (“[T]he public body will only provide documents that exist at the time the request is received.”).



1 It therefore concluded that Defendants’ failure to produce the requested records  
2 violated IPRA.

3 {46} Defendants’ central contention—that a public body is only responsible for  
4 producing documents it possesses at the time it receives a public records request—  
5 requires us to interpret several provisions of IPRA, which is an issue of statutory  
6 construction we review de novo. *See N.M. Found. for Open Gov’t v. Corizon Health*,  
7 2020-NMCA-014, ¶ 15, 460 P.3d 43.

8 {47} In the instant case, the district court provided alternate bases for its conclusion  
9 that Defendants violated IPRA regarding their failure to produce the requested  
10 billing records. First, it concluded the bills were “used, created, received, maintained  
11 or held by or on behalf of APS” as of September 16 when they were completed and  
12 held by the law firm but before they were delivered to APS. Second, it stated that  
13 Defendants had actual possession of the bills on September 25 when they were hand-  
14 delivered to Maestas, and Defendants’ response on September 26 to the contrary  
15 was, therefore, false. While we are unable to affirm on the former rationale used by  
16 the district court, the record supports affirmance on the latter.<sup>4</sup>

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<sup>4</sup>We decline to resolve whether Defendants “possessed” the bills at issue before they were delivered to APS, and note that the district court’s conclusion in this regard lacks specific analysis based upon facts in the record. *Cf. State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, ¶ 13, 287 P.3d 364 (providing a nine-factor analysis to determine whether a private contractor is “acting on behalf of any public agency” for purposes of IPRA); *Corizon Health*, 2020-NMCA-014, ¶ 21 (concluding that *only* where “there is no distinction” between a

1 {48} IPRA defines “public records” as

2 all documents, papers, letters, books, maps, tapes, photographs,  
3 recordings and other materials, regardless of physical form or  
4 characteristics, that are used, created, received, maintained or held by  
5 or on behalf of any public body and relate to public business, whether  
6 or not the records are required by law to be created or maintained.

7 Section 14-2-6(H). IPRA imposes an affirmative duty on public agencies to respond  
8 to requests it receives by either providing for inspection of responsive public records  
9 or issuing a denial explaining its “reasonable, good-faith belief that the record falls  
10 within one of IPRA’s enumerated exemptions.” *Britton*, 2019-NMCA-002, ¶ 31; *see*  
11 §§ 14-2-1, -12. The Act, therefore, does not permit public agencies who possess a  
12 document or item that conforms to the definition of “public record” to deny its  
13 inspection without asserting the applicability of some statutory exception. *See* §§  
14 14-2-1 to -12. Nonetheless, IPRA is silent as to when a document becomes  
15 “possessed” by a given public entity. Stated differently, neither the Act nor New  
16 Mexico case law establishes what date, if any, public agencies are to use to conclude  
17 their records search or beyond which date newly obtained records are beyond the  
18 purview of a received request.

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private contractor and a public entity may records held by the contractor be considered public records under IPRA). Because we affirm the district court on alternate grounds on which it also relied, we decline to further address this basis for the court’s conclusion.

1 {49} Defendants urge that we limit the scope of responsive documents to only those  
2 maintained or held by or on behalf of any public body when it receives the relevant  
3 request. Defendants argue that a contrary holding could result in an “endless loop”  
4 of searches in which records custodians receive a records request, inquire for  
5 responsive records with the appropriate offices, wait for such offices’ replies, and  
6 before issuing a denial stating that no relevant records exist, reconduct their search  
7 due to the possibility that an expected record had been created or received while the  
8 search was ongoing. Defendants assert that public agencies—particularly large  
9 organizations with many internal departments and offices, such as APS—“should be  
10 entitled to the certainty” that if a timely search is conducted and responsive records  
11 are not then discovered, the agencies’ subsequent denial will not be deemed a  
12 violation of IPRA should responsive documents arrive during or after the search.

13 {50} Defendants’ arguments are not without merit. Indeed, taken to their logical  
14 extreme, and considering the stark absence of statutory guidance as to a cutoff date  
15 applicable to IPRA requests or the searches they generate, Defendants’ rightly worry  
16 that requests will effectively create a standing obligation on public bodies to  
17 supplement denials previously issued in order to inform requestors that documents  
18 previously sought have since come into possession of the public body. To this very  
19 concern, the district court, in concluding Defendants violated IPRA, found, “After  
20 denying the request for the billing records . . . Chavez became aware that APS in

1 fact possessed the bills. Despite this, he did not produce them to the Journal or to  
2 KOB-TV.”

3 {51} Nonetheless, the strict statutory requirement IPRA places on public agencies  
4 to disclose the existence of public records “maintained or held” by them, § 14-2-  
5 6(H), coupled with the absence of clarity from precedent or IPRA itself and the  
6 overarching public policy underlying IPRA, combine to defeat Defendants’  
7 arguments. IPRA “declare[s it] to be the public policy of this state[] that all persons  
8 are entitled to the greatest possible information regarding the affairs of government  
9 and the official acts of public officers.” Section 14-2-5. Our appellate courts have  
10 repeatedly admonished that we “must construe IPRA in light of its purpose and  
11 interpret it to mean what the Legislature intended it to mean, and to accomplish the  
12 ends sought to be accomplished by it.” *Britton*, 2019-NMCA-002, ¶ 27 (internal  
13 quotation marks and citation omitted). In considering on appeal a given evidentiary  
14 record related to an IPRA request—each of which in this Court’s experience is  
15 unique from the last—we must bear in mind “the presumption that public policy  
16 favors the right of inspection.” *Cox*, 2010-NMCA-096, ¶ 17 (internal quotation  
17 marks and citation omitted).

18 {52} Here, Defendants denied the Journal’s request for the bills on September 26,  
19 stating that APS “had no records to provide,” when, in fact, the bills had been hand-  
20 delivered to Maestas the previous day. The district court observed, “Nothing in IPRA

1 states or implies that a records custodian need only make available for inspection  
2 those records that were in the public body’s possession at the time of the request, as  
3 opposed to the time of the custodian’s response.” We agree with the district court  
4 but express concern as to its suggestion, stated above, that a records custodian is  
5 responsible for updating requestors after a response has been issued. We explain.

6 {53} Defendants ask us to graft onto IPRA a provision that limits the scope of  
7 responsive documents to only those possessed by a public entity at the time it  
8 receives a request. We decline to do so because such a gloss on the Act would be at  
9 odds with IPRA’s expressly stated underlying policy. *See* § 14-2-5; *see also Faber*  
10 *v. King*, 2015-NMSC-015, ¶ 15, 348 P.3d 173 (“We will not read into a statute  
11 language which is not there, especially when it makes sense as it is written.” (internal  
12 quotation marks and citation omitted)); *Varos*, 1984-NMCA-091, ¶ 6 (“It is the  
13 province of the [L]egislature to make changes in the provisions of statute law.”).

14 {54} Simply put, Defendants denied an IPRA request on the basis that they did not  
15 have the records requested when, in fact, they did. It is noteworthy that the records  
16 were possessed by the chairperson of the APS Board and that she was aware of  
17 Plaintiffs’ IPRA request. The district court found that Chavez consulted with  
18 Maestas about the request before sending the denial letter. The identity of the person  
19 possessing the billing record, the chairperson of the Board, further contextualizes  
20 the district court’s decision to hold APS accountable for not supplementing the

1 response. Under such facts, we cannot exculpate Defendants from that civil liability  
2 expressly provided for by IPRA. *See* § 14-2-1, -12. While statutory silence may often  
3 permit us to infer legislative intent, we cannot, and will not, interpret IPRA in a  
4 manner that undermines its expressly stated and strongly reiterated public policy.  
5 *See Britton*, 2019-NMCA-002, ¶ 29 (“The starting point for any court tasked with  
6 resolving an IPRA challenge is to place into statutory context the particular  
7 arguments made vis-à-vis the Legislature’s declared purpose in enacting IPRA.”).

8 {55} Defendants, therefore, improperly denied the Journal’s request at the time of  
9 their response stating that they did not have any responsive documents to provide  
10 when, in fact, they did.<sup>5</sup> Moreover, the nature of Defendants’ response asserted an  
11 absence of records with no qualification as to the conclusion of its search being some  
12 day or days prior to the date of the response itself. Given these facts, we cannot  
13 disagree with the district court’s determination that Defendants violated IPRA as to  
14 the BTB billing records sought by Plaintiffs.

15 {56} Defendants’ stated concerns regarding what they perceive could become an  
16 endless, standing obligation to update responses previously issued for each and every  
17 IPRA request are adequately addressed by IPRA’s current text. As stated, IPRA

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<sup>5</sup> We suggest that the Legislature consider and address the ambiguity surrounding the time when a public record is deemed to be possessed in relation to a given IPRA request or ensuing search by a public entity. The Act’s silence regarding such a date leaves courts, public bodies, and the general public alike without guidance as to which documents fall within the scope of a request.

1 imposes a duty on public entities to disclose the existence of records responsive to a  
2 request and either permit inspection thereof or assert the applicability of a statutory  
3 exception. *See* §§ 14-2-1, -11. If, as here, such a response is factually inaccurate  
4 regarding the public entity’s possession of such records, the public entity is in  
5 violation of IPRA and a subsequent corrective letter may limit the entity’s liability  
6 for having violated IPRA in its response. However, if a public entity, in fact, does  
7 *not* possess responsive records at the time its denial letter is issued but subsequently  
8 gains possession, the entity’s response was accurate, it remains in compliance with  
9 IPRA, and nothing in the statute or interpretive case law suggests that any future  
10 update to a past, closed IPRA request—which could always be renewed by the  
11 requestor—is required by IPRA or otherwise warranted.

12 {57} We, therefore, affirm the district court’s determination that Defendants  
13 violated IPRA by denying the Journal’s request on the basis that they did not have  
14 any records to provide when, as of the date of Defendants’ response, they did possess  
15 such records. Our holding does not imply, and IPRA does not create, a general duty  
16 that public agencies must update valid and accurate responses to requests that have  
17 already been properly denied under IPRA.

18 **C. Rule 1-054(D) Costs for a “Prevailing” Public Body Defendant**

19 {58} Defendants next argue that the district court erred as a matter of law when it  
20 ruled that Section 14-2-12(D) precludes an award of costs to which they might

1 otherwise “be entitled pursuant to Rule 1-054(D).” Defendants assert that, having  
2 been successful in their claim that the Padilla Report was exempt from inspection,  
3 they are the “prevailing party” regarding “more than half of the parties’ litigation  
4 efforts,” and that nothing within IPRA precludes an award of costs under Rule 1-  
5 054(D) to public body defendants who are successful in defending an IPRA  
6 enforcement action.

7 {59} After trial, the district court determined that Plaintiffs were entitled to “costs  
8 and reasonable attorney fees pursuant to [Section] 14-2-12(D).” Defendants  
9 thereafter filed their own motion for an award of partial costs, pursuant to Rule 1-  
10 054(D), in their favor requesting \$3,630.23 for costs related to the Padilla Report,  
11 or, alternatively, \$542.18 for costs incurred in obtaining Sanders’ testimony. The  
12 district court denied Defendants’ motion, and collectively awarded Plaintiffs  
13 \$18,398.25 in costs. The district court’s order stated, “As a matter of law, Section  
14 14-2-12(D) . . . precludes the [c]ourt from awarding any costs to . . . Defendants to  
15 which they might otherwise be entitled pursuant to Rule 1-054(D).” The district  
16 court continued, noting that it, therefore, “does not have discretion to grant any costs  
17 to . . . Defendant[s].” Importantly, the district court reduced Plaintiffs’ requested  
18 award for costs by the amount it deemed arose “solely out of legal services related  
19 to the Padilla [R]eport.” Despite this reduction, Defendants still seek a distinct award  
20 of costs in their favor.



1 {60} Defendants’ argument requires us to determine whether Section 14-2-12(D)  
2 displaces the general costs provision in Rule 1-054(D), which is an issue of statutory  
3 construction we review de novo. *See Cox*, 2010-NMCA-096, ¶ 4. Section 14-2-  
4 12(D) provides the following:

5 D. The court shall award damages, costs and reasonable  
6 attorney[] fees to any person whose written request has been denied and  
7 is successful in a court action to enforce the provisions of [IPRA].

8 The Act does not, however, provide for, or even contemplate, an award of costs for  
9 prevailing defendants. *See* §§ 14-2-1 to -12. Rule 1-054(D), in part, further provides  
10 for an award of costs in general civil matters as follows:

11 Unless expressly stated either in a statute or in these rules, costs, other  
12 than attorney fees, shall be allowed to the prevailing party unless the  
13 court otherwise directs; but costs against the state, its officers, and  
14 agencies shall be imposed only to the extent permitted by law.

15 Defendants argue that IPRA’s statutory silence does not operate as a preclusion of  
16 such costs under Rule 1-054(D) and rely on the traditional rule of statutory  
17 construction that “laws should be read harmoniously so as to give effect to both the  
18 statute and the rule.” *See, e.g., Miller v. Bank of Am., N.A.*, 2015-NMSC-022, ¶ 18,  
19 352 P.3d 1162 (“Whenever possible, we will read statutes in harmony, to give effect  
20 to all provisions.”). While this principle of statutory interpretation is generally true,  
21 IPRA’s text outside of Section 14-2-12(D), its underlying policy considerations, and  
22 our own case law contradict Defendants’ argument and lead us to conclude that  
23 IPRA’s damages provisions preclude an award of costs to public agency defendants,

1 even if such defendants are entirely successful in an IPRA enforcement action  
2 against them.

3 {61} Put simply, the language of Section 14-2-12(D) does not permit an award of  
4 costs to public bodies. Section 14-2-12(D) expressly allows for costs to be awarded  
5 to “any person whose written request has been denied” but does not mention such  
6 an award for public body defendants. This Court has consistently interpreted such  
7 statutory omissions as deliberate and we will not now construe the Legislature’s  
8 failure to provide for an award of costs to successful public bodies as implicit  
9 permission to do so under Rule 1-054(D). *See Schultz ex rel. Schultz v. Pojoaque*  
10 *Tribal Police Dep’t*, 2013-NMSC-013, ¶ 36, 484 P.3d 954 (“[W]hen the Legislature  
11 includes a particular word in one portion of a statute and omits it from another  
12 portion of that statute, such omission is presumed to be intentional.” (internal  
13 quotation marks and citation omitted)); *Cordova v. Cline*, 2021-NMCA-022, ¶ 9,  
14 489 P.3d 957 (“The Legislature knows how to include language in a statute if it so  
15 desires.” (alteration, internal quotation marks, and citation omitted)).

16 {62} IPRA’s underlying public policy, which places strong emphasis on access to  
17 public records by “all persons,” further supports our conclusion. *See* § 14-2-5. As  
18 we have indicated, IPRA is intended to promote transparency in government and is  
19 specifically designed to enable requestors to obtain the “greatest possible  
20 information regarding [its] affairs.” *Id.* IPRA’s cost-shifting provisions, embodied

1 by Section 14-2-12(D), are crafted to further these public policies by “encourag[ing]  
2 individuals to enforce IPRA on behalf of the public and ensur[ing] that the entire  
3 process is virtually costless to a successful litigant.” *Am. Civ. Liberties Union of*  
4 *N.M. v. Duran*, 2016-NMCA-063, ¶ 42, 392 P.3d 181 (alteration, internal quotation  
5 marks, and citation omitted). Allowing a public body to be awarded costs as a matter  
6 of law under Section 14-2-12(D) for successfully defending an IPRA enforcement  
7 action would threaten potential plaintiffs with possible future penalties for advancing  
8 colorable, albeit ultimately unsuccessful, IPRA claims. Such a holding would  
9 constitute an impermissible chilling effect on potential future claims that  
10 contravenes IPRA’s strongly supported and oft reiterated public policy  
11 underpinnings. We therefore conclude, based on IPRA’s text itself and its underlying  
12 policy, that Section 14-2-12(D) does not permit an award of costs to public body  
13 defendants, even if entirely successful.

14 **D. Accrual of Statutory Damages**

15 {63} Defendants lastly challenge the district court’s calculation of statutory  
16 damages entered against them pursuant to Section 14-2-11(C). In support of their  
17 claim on appeal, Defendants advance two primary arguments. First, Defendants  
18 argue, somewhat obliquely, that the only mandatory accrual of statutory damages in  
19 this case was “from August or September 2014 until September 26, 2014, when  
20 Defendants issued their denial.” As we explain below, we read Defendants’

1 argument on this point to be that their denials of Plaintiffs’ requests were reasonably  
2 in compliance with IPRA, and accrual of statutory penalties under Section 14-2-  
3 11(C) after issuance of such denials was, therefore, not mandatory. Second,  
4 Defendants argue that, as a matter of law, the district court erred in ruling that it did  
5 not have discretion under Section 14-2-11(C) to disregard the amount of time taken  
6 by Sanders’ appeal, which Defendants argue was a third-party appeal not of their  
7 own making.

8 {64} The relevant facts are undisputed. Defendants received various IPRA requests  
9 from Plaintiffs regarding Brooks’ resignation in late August and early September  
10 2014. Defendants’ substantive responses to these requests were all issued in mid- or  
11 late September 2014 and were generally beyond IPRA’s fifteen-day response  
12 deadline. As described above, during litigation in the matter, Sanders, Brooks’  
13 attorney and a nonparty in this case, took an appeal against Plaintiffs regarding a  
14 discovery order Sanders believed violated attorney-client privilege. *See*  
15 *Albuquerque J.*, 2019-NMCA-012. Resolution of that interlocutory appeal took over  
16 1,200 days during which statutory damages accrued under Section 14-2-11(C). After  
17 trial, the district court concluded that the majority of Defendants’ responses to  
18 Plaintiffs’ requests were unreasonable for various reasons articulated in its order. At  
19 a post-trial hearing in which the district court heard argument regarding accrual of  
20 statutory damages, the court stated it did not “see where IPRA allows [the court] to

1 reduce the number of days to which statutory damages apply. However, IPRA does  
2 give the court discretion to set the rate of per diem damages under 14-2-11(C)(2),  
3 which is what [the court has] done.” Defendants appeal, presenting substantially the  
4 same arguments as those they made before the district court.

5 {65} Defendants’ arguments require us to interpret the meaning of Section 14-2-  
6 11(C) to determine what discretion, if any, it provides a district court in determining  
7 the number of days on which statutory damages accrue pursuant to a violation of  
8 IPRA. This presents an issue of statutory construction we review de novo. *See Cox*,  
9 2010-NMCA-096, ¶ 4. Plaintiffs argue that this Court should review the district  
10 court’s assessment of statutory damages merely for support by substantial evidence  
11 because, in their view, Defendants’ simply challenge the amount of damages entered  
12 against them. However, Defendants do not make any argument regarding the actual  
13 amount of damages for which they were found liable. At no point in briefing to this  
14 Court do Defendants assert that the district court’s selection of either \$25 per day or  
15 \$50 per day—the two amounts used for all IPRA violations in this case—was  
16 erroneous. Rather, we read Defendants’ arguments to challenge the district courts’  
17 legal conclusions regarding the meaning of, and the amount of discretion permitted  
18 by, Section 14-2-11(C). Thus, our review is de novo.

19 {66} Section 14-2-11(C) provides, in pertinent part, the following:

20 C. A custodian who does not deliver or mail a written  
21 explanation of denial within fifteen days after receipt of a written

1 request for inspection is subject to an action to enforce the provisions  
2 of the Inspection of Public Records Act and the requester may be  
3 awarded damages. Damages shall:

4 . . . .

5 (2) not exceed one hundred dollars (\$100) per day;

6 (3) accrue from the day the public body is in  
7 noncompliance until a written denial is issued.

8 Defendants first rely on Section 14-2-11(C)(3) to argue that statutory damages were  
9 only mandatory until the dates it issued its relevant responses in September 2014.

10 However, this Court has previously explained, and the district court stated in its  
11 order, that a court may still award statutory damages after a written denial is issued  
12 if the denial is deemed unreasonable. *See Britton*, 2019-NMCA-002, ¶ 38 (“If . . .  
13 the facts of a case support the conclusion that the public body’s failure was  
14 ‘unreasonable,’ the district court must award statutory damages.”). As we explained  
15 in *Britton*, this is to prevent public bodies from avoiding substantive compliance  
16 with IPRA by issuing “perfunctory” responses that fail to meaningfully address the  
17 request. *See id.* ¶¶ 38, 41.

18 {67} Here, the district court found all of Defendants’ responses that served as a  
19 basis for statutory damages to be unreasonable, and Defendant does not challenge  
20 the district court’s determinations in that regard. Rather, Defendants merely assert  
21 that the only mandatory calculation of damages under Section 14-2-11(C) was from  
22 the date of its noncompliance to the date of its responses. We disagree. Defendants

1 concede that Section 14-2-11(C) contains mandatory language with which a district  
2 court must comply, and without argument that the district court’s findings of  
3 unreasonableness were made in error, we find no basis to reverse the district court’s  
4 calculation of statutory damages in this case.

5 {68} As to Defendants’ second argument—that the district court erred in  
6 concluding it did not have the discretion when calculating statutory damages to  
7 disregard the time taken by a third-party appeal—we disagree for several reasons.  
8 First, as we stated above, *Britton* admonishes that Section 14-2-11(C) is mandatory,  
9 and without a finding that the public agency’s written denial was reasonable,  
10 statutory damages must be awarded. *Britton*, 2019-NMCA-002, ¶ 38. Second, the  
11 Legislature *did* grant district courts discretion in considering the facts and  
12 circumstances of each case, and in determining the amount of per diem statutory  
13 damages necessitated thereby, by permitting the district court to award statutory  
14 damages in any amount up to \$100 per day. *See* § 14-2-11(C)(2). Indeed, the district  
15 court’s statement that it considered such discretion when assessing such damages  
16 against Defendant alleviates any concern we may have here that Defendants were  
17 unfairly subjected to damages resulting from a three-and-a-half year delay they did  
18 not cause.

19 {69} Finally, we do not consider Sanders’ appeal in this case to truly be a “third-  
20 party appeal” during which Defendants were merely forced to wait before continuing

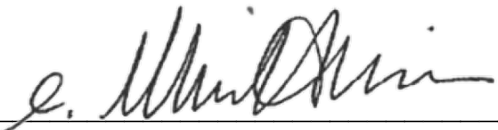
1 their defense against Plaintiffs’ claims. Defendants joined Sanders in her appeal and,  
2 as stated, told this Court “the central issues of [Sanders’] appeal bear on the core  
3 interests of APS.” To this end, Defendants filed briefs and presented argument  
4 adverse to Plaintiffs. In such circumstance, the facts of this case do not require that  
5 we decide whether a substantial delay caused by a truly unrelated third-party appeal  
6 justifies accrual of statutory damages.

7 {70} We, therefore, conclude, based on the foregoing analysis, that Section 14-2-  
8 11(C) contains mandatory language requiring district courts to assess statutory  
9 damages for the relevant period of noncompliance. Defendants were deemed out of  
10 compliance with IPRA regarding several of the requests they received up to the date  
11 of trial because their written denials were unreasonable. As such, the district court’s  
12 assessment of statutory damages for that period was not error.

13 **CONCLUSION**

14 {71} For the reasons set forth, we affirm.

15 {72} **IT IS SO ORDERED.**

16   
17 **J. MILES HANISEE, Judge**



1 **I CONCUR:**

2 

3 **MICHAEL D. BUSTAMANTE, Judge,**  
4 **Retired, sitting by designation**

5 **BOSSON, Justice, retired, sitting by designation,**  
6 **Specially concurring in part and dissenting in part**

1 **BOSSON, Justice, retired, sitting by designation (specially concurring in part**  
2 **and dissenting in part).**

3 {73} Although I concur in the majority’s resolution of Defendants’ cross-appeal, I  
4 am unable to concur in the majority’s conclusion that the Padilla Report is exempt  
5 from disclosure under IPRA under either exception. The circumstances surrounding  
6 the nature of the Padilla Report and the secret settlement agreement between APS  
7 and former Superintendent Brooks demonstrate the critical need for public  
8 accountability in such situations, and the impropriety of keeping such actions secret.  
9 In oral argument before this Court, Plaintiffs’ counsel warned that affirming the  
10 district court’s decision regarding the applicability of IPRA exemptions would  
11 “provide[] a roadmap of how to keep misconduct by public officials secret from the  
12 people of New Mexico.” This is not hyperbole. The majority opinion paves the way  
13 for public entities to shield *any* undesirable information from the public eye. This is  
14 directly contrary to the core tenets of IPRA—transparency and accountability—and  
15 threatens to effectively nullify an act that is vital to protecting the rights and interests  
16 of New Mexicans. I respectfully dissent.

17 {74} The following is drawn from information in the public record. After becoming  
18 aware of allegations of wrongdoing on the part of then-Superintendent Brooks, APS  
19 hired an attorney, Ms. Padilla, to investigate the allegations and prepare a report  
20 detailing her findings and providing legal advice to the School Board. Padilla sent  
21 the report containing her findings to Board President Ms. Maestas on August 6,

1 2014. That concluded Ms. Padilla’s contract, which she fulfilled competently and  
2 professionally.

3 {75} Five days later, on August 11, 2014, a private Board meeting was held to  
4 discuss the Padilla Report. Brooks and APS entered into a settlement agreement on  
5 August 15, 2014, negotiating his resignation as Superintendent of APS in exchange  
6 for a lump sum payout of \$350,000 in public funds, mutual confidentiality, and  
7 indemnity from civil suit for both him and his wife. Only nine days transpired  
8 between Padilla’s submission of the Report and Brooks’ resignation pursuant to the  
9 settlement agreement. The sheer haste with which Brooks and APS reached this  
10 settlement only days after learning of the report’s factual content—and of course the  
11 size of the payoff—strongly suggest that the contents of the Padilla Report cannot  
12 have been favorable to either Brooks or APS.

13 {76} Based on this chain of events, and this Court’s review of the Padilla Report, I  
14 am convinced of the following. Padilla was hired first in an investigative capacity to  
15 apprise APS of the factual basis underlying a series of reputationally harmful  
16 allegations. Padilla prepared a report containing mostly factual findings, which was  
17 then used as the underlying basis for what amounted to little more than a hush money  
18 payment to secure Brooks’ resignation and avoid further embarrassment. The price  
19 for his departure: \$350,000 in public funds. At its core, the covert nature of these  
20 events constitutes a kind of constructive fraud on the people of New Mexico. This is

1 the quintessential circumstance that IPRA is designed to reveal. The people have a  
2 right to know what is happening in their government.

3 {77} Unfortunately, in holding the Padilla Report exempt from disclosure, the  
4 majority opinion fails to protect that right, and in so doing opens the door for the  
5 further invalidation of the fundamental provisions of IPRA.

### 6 **III. The Factual Section of the Padilla Report is Not Privileged**

7 {78} Under Section 14-2-1(G), “attorney-client privileged information” is exempt  
8 from disclosure under IPRA. The attorney-client privilege in New Mexico is  
9 codified in Rule 11-503(B) NMRA, which specifies that “[a] client has a privilege  
10 to refuse to disclose . . . a confidential communication made for the purpose of  
11 facilitating or providing professional legal services to that client.” Thus, under  
12 Section 14-2-1(G)’s attorney-client privilege exception, information is exempt from  
13 IPRA disclosure if it is “(1) a communication (2) made in confidence (3) between  
14 privileged persons (4) for the purpose of facilitating the attorney’s rendition of  
15 professional legal services to the client.” *Henry*, 2023-NMCA-082, ¶ 23 (internal  
16 quotation marks and citation omitted). “The burden of proving an assertion of  
17 privilege rests upon the party asserting such claim.” *Albuquerque J.*, 2019-NMCA-  
18 012, ¶ 16 (internal quotation marks and citation omitted).

19 {79} I am convinced that the primary purpose of the Padilla Report was not to  
20 provide legal advice, and therefore, is not protected by the attorney-client privilege.

1 As the ultimate authority on the scope of the attorney-client privilege, it is now up  
2 to our Supreme Court to review the report and determine whether it is privileged.  
3 *See State v. Serna*, 2013-NMSC-033, ¶ 14, 305 P.3d 936 (explaining that “the  
4 ultimate rule making authority over procedure resides in [our New Mexico Supreme  
5 Court]”).

6 {80} The purpose of the attorney-client privilege in New Mexico is to encourage  
7 “clients to disclose more information to their attorneys.” *See Bhandari*, 2014-  
8 NMCA-018, ¶ 10; *see also Lyons*, 2000-NMCA-077, ¶ 25 (providing that the  
9 purpose of the attorney-client privilege “is to encourage full and frank  
10 communication between attorneys and their clients and thereby promote broader  
11 public interests in the observance of law and administration of justice” (internal  
12 quotation marks and citation omitted)). The United States Supreme Court has  
13 observed that because “the privilege has the effect of withholding relevant  
14 information from the fact-finder, it applies only where necessary to achieve its  
15 purpose,” and therefore “protects *only those disclosures necessary to obtain*  
16 *informed legal advice* which might not have been made absent the privilege.” *Fisher*  
17 *v. United States*, 425 U.S. 391, 403 (1976) (emphasis added). New Mexico has not  
18 yet expressly addressed whether the attorney-client privilege is limited to situations  
19 where it achieves its stated purpose, but such an approach to the privilege would be

1 appropriate in the context of IPRA, where “[t]he citizen’s right to know is the rule  
2 and secrecy is the exception.” *Newsome*, 1977-NMSC-076, ¶ 34.

3 {81} Our courts have, however, recognized that not all actions undertaken by an  
4 attorney on behalf of their client will fall within the attorney-client privilege. *See*  
5 *Bhandari*, 2014-NMCA-018, ¶ 12 (recognizing that attorneys “also provide  
6 non[]legal services, such as negotiating contracts, analyzing potential corporate  
7 transactions, and investigating potential claims” (internal quotation marks and  
8 citation omitted)); *Santa Fe Pac. Gold Corp.*, 2007-NMCA-133, ¶ 23 (providing that  
9 the attorney-client privilege “protects communications generated or received by an  
10 attorney giving legal advice but does not protect communications derived from an  
11 attorney giving business advice *or acting in some other capacity*” (emphasis added)).  
12 This recognition that there *is* a distinction between professional legal services and  
13 other services performed by an attorney has not yet yielded a clear understanding in  
14 New Mexico of where exactly the demarcating line falls. What is clear to me,  
15 however, is that the Report falls outside the proper scope of the attorney-client  
16 privilege.

17 {82} The report is divided into two separate sections: a recitation of facts, as found  
18 by Ms. Padilla during her investigation, and a discussion of the implications of those  
19 facts. First, the purpose of the attorney-client privilege is not met here because the  
20 facts in the Padilla Report seemingly did not originate from Ms. Padilla’s client, but

1 rather, her own investigation, including interviews with third parties. Thus,  
2 application of the attorney-client privilege to Ms. Padilla’s independent fact-finding  
3 does not further the goal of Rule 11-503 to encourage “clients to disclose more  
4 information to their attorneys.” *See Bhandari*, 2014-NMCA-018, ¶ 10. There is no  
5 evidence that the factual information gleaned from interviews with nonclients in this  
6 case was disclosed contingent upon the information being privileged. *See Fisher*,  
7 425 U.S. at 403 (providing that the attorney-client privilege “protects only those  
8 disclosures necessary to obtain informed legal advice which might not have been  
9 made absent the privilege”).

10 {83} Second, under New Mexico precedent, the Padilla Report’s “primary or  
11 predominate purpose” was not to provide legal advice, and therefore is not protected  
12 by the attorney-client privilege. *See Bhandari*, 2014-NMCA-018, ¶¶ 16-21  
13 (emphasis omitted) (adopting the primary purpose test to determine whether a dual-  
14 purpose communication is privileged under the attorney-client privilege and  
15 concluding that a memorandum prepared by an attorney which included both legal  
16 and business advice was predominantly business advice, and therefore not  
17 privileged). Here, it appears that the primary purpose of the Report was to convey to  
18 the Board Ms. Padilla’s factual findings regarding allegations against Brooks. Even  
19 the majority acknowledges that Ms. Maestas told the Board that she would be  
20 retaining independent counsel to provide the Board with “hard facts” regarding

1 allegations against Brooks, and to “clear [Superintendent Brooks] of these  
2 accusations once and for all.” The majority of the Padilla Report—the fact section—  
3 resembles a human resources investigation, which is a business, not legal,  
4 consideration. *See Koumoulis v. Indep. Fin. Mktg. Group, Inc.*, 295 F.R.D. 28, 45  
5 (E.D.N.Y. 2013) (providing that where the content of a communication—detailing  
6 the results of a human resources investigation—demonstrates that the  
7 communication’s “predominant purpose was to provide human resources and thus  
8 business advice, not legal advice” the communication is not privileged, and that an  
9 attorney’s involvement in the investigation or the drafting of the communication  
10 “does not transform what would otherwise be human resources and business  
11 communications into legal communications”), *aff’d*, 29 F. Supp. 3d 142 (E.D.N.Y.  
12 2014).

13 {84} Of course, as the majority points out, *see Maj. op.* ¶ 13, “The first step in the  
14 resolution of any legal problem is ascertaining the factual background and sifting  
15 through the facts with an eye to the legally relevant.” *Upjohn Co.*, 449 U.S. at 391-  
16 92. But it does not necessarily follow that we should extend the attorney-client  
17 privilege to fact-finding investigations that can be as competently performed by a  
18 nonattorney as an attorney. *See* 24 Charles Alan Wright & Arthur R. Miller, *Federal*  
19 *Practice and Procedure* § 5478 (1st ed. June 2024 Update) (“The better view would  
20 seem to be that investigative work is not ‘professional legal services’ and that no



1 privilege applies where the lawyer’s primary function is as a detective.”); *see also*  
2 Wright, *supra*, at § 5478 (“[T]he privilege should only apply where the investigation  
3 is one that cannot be carried on by non[ ]lawyer investigators; e.g., where the matters  
4 to be investigated are legal documents whose meaning would not be apparent  
5 without legal training.”); *cf. Nat’l Farmers Union Prop. & Cas. Co. v. Dist. Ct. for*  
6 *City & Cnty. of Denver*, 718 P.2d 1044, 1049 (en banc) (Colo. 1986) (holding that  
7 the lengthy facts section of a memorandum prepared by an attorney investigating the  
8 issuance of a lease guaranty insurance policy did not fall within the attorney-client  
9 privilege, because the attorney’s actions in “conducting interviews with various  
10 officers and employees for the purpose of determining the factual circumstances  
11 underlying the issuance of the policy” meant that “the attorneys were acting more in  
12 the role of claims investigators than legal counsel”).

13 {85} The only evidence seemingly relied upon by the district court, and  
14 subsequently the majority, in determining that the services provided by Padilla to  
15 APS were “professional legal services” are the affidavits of Padilla and Maestas.  
16 Those affidavits state that they “believed Padilla was providing professional legal  
17 services” to APS. *Maj. op.* ¶ 11. Maestas also sent a retention letter to Padilla stating  
18 that Padilla was being hired to render legal services. The majority does not cite any  
19 authority to support the proposition that an individual’s belief that they are retaining  
20 an attorney to provide legal services is sufficient to establish that the attorney was,

1 in fact, providing legal services. This approach was rejected by our Supreme Court  
2 nearly a century ago when it explained that “an attorney might not decide for himself  
3 whether a given communication with his client was privileged,” because the question  
4 of “whether a given communication is privileged, [is] to be determined by the court  
5 after an examination into the attending and characterizing circumstances under  
6 which the communication was made.” *Bujac v. Wilson*, 1921-NMSC-024, ¶ 7, 27  
7 N.M. 112, 196 P. 513. “The fact that during the time [a lawyer] was acting as  
8 attorney for his client he wrote the letters does not, standing alone, establish their  
9 privileged character.” *Id.* ¶ 8. This Court has recently endorsed a similar principle—  
10 regarding what a public agency must demonstrate to establish a prima facie case for  
11 summary judgment on IPRA’s attorney-client privilege exception—explaining that  
12 “[a] public agency’s burden to justify the withholding of information in an  
13 enforcement proceeding in district court cannot be satisfied by a good-faith assertion  
14 that all of the documents withheld or redacted were privileged or confidential.”  
15 *Energy Pol’y Advocs.*, \_\_\_-NMCA-\_\_\_, ¶ 23.

16 {86} The only other inferable basis for the majority’s conclusion that the Padilla  
17 Report constitutes “professional legal services” is that the individual who prepared  
18 it is an attorney. Again, such a conclusion is untenable. *See Bujac*, 1921-NMSC-  
19 024, ¶ 8; *United States v. Bartone*, 400 F.2d 459, 461 (6th Cir. 1968) (“The mere  
20 fact that a person is an attorney does not render as privileged everything [they do]

1 for or with the client.”); *Anaya v. CBS Broad., Inc.*, 251 F.R.D. 645, 650 (D.N.M.  
2 2007) (“Channeling work through a lawyer rather than having non[]legal personnel  
3 perform it does not provide a basis for claiming attorney-client privilege.”). This  
4 assertion, paired with a substantial reliance on the client’s and attorney’s affidavits,  
5 creates a dangerous new principle: a public entity seeking to insulate any information  
6 from public disclosure need only (1) hire an attorney to perform an action and/or  
7 communicate the resulting information; and (2) express their subjective beliefs that  
8 the attorney was acting in a legal capacity while doing so. Whether intentional or  
9 not, such is the natural result of the majority’s opinion. As Plaintiffs’ counsel  
10 warned, this provides a clear roadmap for keeping misconduct, and any other form  
11 of undesirable information, secret from the people of New Mexico.

12 {87} As the primary purpose of the Padilla Report was to conduct and provide the  
13 results of an extensive factual investigation, with the stated purpose of acquiring said  
14 information and clearing Brooks’ name, the report—or at least the fact section  
15 within—should not be subject to the attorney-client privilege. *See United States v.*  
16 *Defazio*, 899 F.2d 626, 635 (7th Cir. 1990) (“Communications from attorney to  
17 client are privileged only if they constitute legal advice, or tend directly or indirectly  
18 to reveal the substance of a client confidence.”); *Ex parte Birmingham News Co.,*  
19 *Inc.*, 624 So. 2d 1117, 1130 (“No attorney-client privilege attaches to investigative  
20 reports that are merely compilations or synopses of facts found by members or

1 associates of law firm from reviewing documents and interviewing witnesses and  
2 *that are merely factual findings that were not acquired from the client.*” (emphasis  
3 added)); *Bhandari*, 2014-NMCA-018, ¶ 18 (“[T]he entire communication is  
4 privileged only if the legal purpose outweighs the business purpose.” (internal  
5 quotation marks and citation omitted)). IPRA’s stated purpose in protecting the  
6 public’s entitlement “to the greatest possible information regarding the affairs of  
7 government and the official acts of public officers and employees,” *see* § 14-2-5,  
8 compels such a result.

9 {88} I acknowledge that there is a lack of New Mexico precedent on this issue to  
10 rigorously support either the majority’s or this dissent’s positions. However, it is  
11 clear from the circumstances, which outcome best supports the public policies  
12 underlying both IPRA and the attorney-client privilege, and best reflects what kinds  
13 of actions on the part of attorneys should and should not be privileged. “In order for  
14 government to truly be of the people and by the people, and not just for the people,  
15 our citizens must be able to know what their own public servants are doing in their  
16 name.” *San Juan Agr. Water Users Ass’n v. KNME-TV*, 2011-NMSC-011, ¶ 16, 150  
17 N.M. 64, 257 P.3d 884. The purposes of IPRA, the implications for the First  
18 Amendment of the U.S. Constitution, and the public’s right to know demonstrate  
19 that disclosure of the factual investigation is the proper outcome in this case. *See*,  
20 *e.g.*, 24 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*

1 § 5475 (1st ed. June 2024 Update) (describing “a number of considerations that  
2 militate against the expansion of the [attorney-client] privilege to all governmental  
3 entities,” including a concern that “granting the government the power to suppress  
4 evidence of communications between government employees and government  
5 lawyers is inconsistent with the openness to scrutiny that is thought by some to be  
6 the hallmark of a truly democratic republic”). The majority’s opinion will redefine  
7 how IPRA and the attorney-client privilege interact in our state, and may have far-  
8 reaching consequences for attorneys as well as the public. Intervention on the part  
9 of our Supreme Court as the sole court with superintending control over attorneys  
10 and the attorney-client privilege will be helpful in this instance.

11 **IV. The Case Law Underlying the “Matters of Opinion” Exception is**  
12 **Antithetical to the Purpose and Nature of IPRA and Should be**  
13 **Reevaluated.**

14 {89} Additionally, the majority concludes that the entirety of the Padilla Report is  
15 exempt from IPRA disclosure pursuant to the Section 14-2-1(C) exception for  
16 “letters or memoranda that are matters of opinion in personnel files.” First, I note at  
17 the outset that this exception may be wholly inapplicable to the Padilla Report, as  
18 the exception specifies that it applies to those documents that are “matters of opinion  
19 *in personnel files.*” *Id.* (emphasis added). The Settlement Agreement, however,  
20 explicitly states that the report is to be kept in a file separate and apart from Brooks’  
21 personnel file. Thus, APS would have our courts insulate its report as if it were part

1 of a personnel file while contractually agreeing *not* to put it in that same personnel  
2 file. These two options are mutually exclusive. APS cannot reap the benefits of both.  
3 As the Padilla Report is contractually excluded from Brooks’ personnel file, the  
4 Section 14-2-1(C) exception does not apply.

5 {90} That aside, I acknowledge the recent case law from this Court that appears to  
6 support Section 14-2-1(C) exception in this case. I write separately on this issue to  
7 address what I perceive to be a profound deviation from the established purpose of  
8 IPRA in this line of precedent.

9 {91} The stated purpose of IPRA is to “ensure . . . that all persons are entitled to  
10 the greatest possible information regarding the affairs of government and the official  
11 acts of public officers and employees,” and it is “an essential function of a  
12 representative government” to provide the public with such information. Section 14-  
13 2-5. This principle has long been recognized by our Courts. In *Newsome*, our New  
14 Mexico Supreme Court provided that “[t]he citizen’s right to know is the rule and  
15 secrecy is the exception.” 1977-NMSC-076, ¶ 34.

16 {92} The Court in *Newsome* also sought, for the first time, to outline the scope of  
17 Section 14-2-1(C) and the documents contemplated therein. The Court held that  
18 “letters of reference, documents concerning infractions and disciplinary action,  
19 personnel evaluations, opinions as to whether a person would be re[]hired or as to  
20 why an applicant was not hired, and other matters of opinion are . . . exempt from

1 disclosure under [Section 14-2-1(C)].” *Newsome*, 1977-NMSC-076, ¶ 12. The Court  
2 did so with limited analysis and without any citation to precedential or persuasive  
3 authority. *See id.* The rationale behind exempting this list of documents from  
4 disclosure stemmed from the Court’s perception that “there would be critical  
5 material and adverse opinions” in these types of documents “that might have no  
6 foundation in fact but, if released for public view, could be seriously damaging to an  
7 employee.” *Id.*

8 {93} This list of exempt documents has been consistently relied upon in setting the  
9 boundaries of the Section 14-2-1(C) exception since it was first espoused in  
10 *Newsome* almost fifty years ago. As recently as 2023, this Court held that “the  
11 Legislature intended the ‘letters or memorandums which are matters of opinion’ in  
12 personnel files exemption to apply to documents concerning disciplinary action and  
13 promotions, characterizing these documents as a whole as ‘opinion information.’”  
14 *See Gauman*, 2023-NMCA-078, ¶ 14 (internal quotation marks and citation  
15 omitted). However, the rationale for this characterization has shifted.

16 {94} Whereas *Newsome* grounded its rationale in the principle that such documents  
17 could contain baseless and potentially harmful statements of opinion, more recent  
18 opinions place significantly more emphasis on preserving the sanctity of the  
19 employer/employee relationship. For instance, this Court has previously determined  
20 that “[t]he documents listed by the *Newsome* Court are all documents generated by

1 an employer or employee in support of the working relationship between them” and  
2 that, based on this point of similarity, “[i]t is clear . . . that the Court intended ‘other  
3 matters of opinion’ to apply to documents of the same general category as those in  
4 the specific listing.” *See Cox*, 2010-NMCA-096, ¶ 22. Like the *Newsome* Court, this  
5 Court in *Cox* reached this conclusion with no additional rationale or citation to  
6 persuasive authority. Unfortunately, our current Court has further endorsed this  
7 viewpoint, recently holding that “[t]he purpose of the exemption . . . is to protect the  
8 employer/employee relationship from disclosure of any ‘letters or memoranda’ that  
9 are generated by an employer or employee in support of the working relationship  
10 between them.” *Gauman*, 2023-NMCA-078, ¶ 15 (internal quotation marks and  
11 citation omitted).

12 {95} This transition from focusing on the potential harm of disclosing documents  
13 containing unsubstantiated rumors, as was seemingly contemplated in *Newsome*, to  
14 focusing on the proposed list of exempt documents and the nature of the  
15 employer/employee relationship, has—in my opinion—done a significant disservice  
16 to the letter and purpose of IPRA. The list of documents provided in *Newsome* is  
17 secondary to the underlying purpose of rendering such documents exempt: to protect  
18 employees from the disclosure of harmful opinions and information that is lacking  
19 in factual support. *See Newsome*, 1977-NMSC-076, ¶ 12. Under this reading of  
20 *Newsome*, documents that are contained in a personnel file, but do not threaten to



1 baselessly harm an employee, could still be subject to disclosure. In other words,  
2 documents that fall within the enumerated list espoused in *Newsome* could still be  
3 subject to disclosure, provided that the contents “have a foundation in fact” and are  
4 not comprised of unsubstantiated rumor. *See id.*

5 {96} The purpose of Section 14-2-1(C) is not to insulate public officials from  
6 disclosure of information that may prove reputationally harmful, but rather to protect  
7 them from disclosure of information that is *untrue* or mere gossip and rumor. This  
8 is in line with the tenets of transparency and accountability that form the core of  
9 IPRA. As *Newsome* itself states, “The citizen’s right to know is the rule and secrecy  
10 is the exception.” *Newsome*, 1977-NMSC-076, ¶ 34. Under the modern approach  
11 which emphasizes the nature of the employer/employee working relationship,  
12 however, such documents are exempt seemingly without regard for their contents.  
13 This was not what was contemplated by the *Newsome* Court, and it is untenable now.

14 {97} The facts and circumstances of this case perfectly demonstrate how this  
15 modern approach undermines IPRA’s purpose. Here, the Padilla Report ultimately  
16 led APS, a public entity, to utilize hundreds of thousands of taxpayer dollars to  
17 sweep the issues raised by the report, and the results of the investigation therein,  
18 under the proverbial rug. The reasons why APS entered the settlement agreement,  
19 and the contents of the Report, have never been released to the public. And under  
20 the modern approach to Section 14-2-1(C), the people will *never* be privy to this

1 information—a drastic curtailment of their “right to know that the people they  
2 entrust with the affairs of government are honestly, faithfully and competently  
3 performing their function as public servants.” *See Bd. of Comm’rs of Doña Ana Cnty.*  
4 *v. Las Cruces Sun-News*, 2003-NMCA-102, ¶ 29, 134 N.M. 283, 76 P.3d 36 (internal  
5 quotation marks and citation omitted), *overruled on other grounds by Republican*  
6 *Party of N.M.*, 2012-NMSC-026, ¶ 16.

7 {98} This is not a circumstance involving an innocent employee assailed by gossip  
8 and meritless rumor. *Newsome* intended to protect such *unsubstantiated* claims from  
9 disclosure. The Padilla Report is more than that. The use of the Padilla Report—  
10 predominantly a recitation of facts resulting from a professional investigation—as  
11 the basis for a private settlement agreement, which included the transfer of hundreds  
12 of thousands of dollars of public funds, functionally takes the report out of the realm  
13 of mere conjecture into the realm of operative fact.

14 {99} This is exactly the kind of circumstance that necessitates transparency,  
15 accountability, and public disclosure. IPRA requires no less. *See* § 14-2-5 (“[I]t is  
16 declared to be the public policy of this state[] that all persons are entitled to the  
17 greatest possible information regarding the affairs of government and the official  
18 acts of public officers and employees. It is the further intent of the [L]egislature, and  
19 it is declared to be the public policy of this state, that to provide persons with such  
20 information is an essential function of a representative government and an integral

1 part of the routine duties of public officers and employees.”). The people have a right  
2 to know.

3 {100} IPRA is of vital importance in protecting the interests and rights of New  
4 Mexico citizens. The recent case law interpreting the IPRA exception for “letters or  
5 memoranda that are matters of opinion in personnel files,” *see* § 14-2-1(C),  
6 represents a substantial deviation from what was contemplated by the *Newsome*  
7 Court. The majority opinion is, in my opinion, the first step on a path that ultimately  
8 provides public entities with the means to shield any information from public  
9 disclosure. The facts of this case provide a clear example of a public agency  
10 attempting to covertly disguise what could be described as a hush money payment  
11 using extensive public funds. This is an egregious example of the manipulation of  
12 IPRA’s exceptions, but given the majority’s resolution of these issues and the new  
13 principles it endorses, it will not be the last.

14 {101} As of this writing, there is a lack of both New Mexico Supreme Court and  
15 Court of Appeals authority on both of these exceptions. Resultingly, this case will  
16 be the first and leading authority on the interpretation of IPRA and its exceptions  
17 going forward. Unfortunately, it is the first step down a path that places in jeopardy  
18 IPRA’s most critical functions. Disclosure must be the default, the exceptions must  
19 be specific and narrow, and the public’s right to knowledge and transparency

1 regarding the actions of their public officials must be preserved. The people of our  
2 state would greatly benefit from intervention on the part of our Supreme Court.

3 

4 **RICHARD C. BOSSON, Justice,**  
5 **Retired, sitting by designation**