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

Court of Appeals of New Mexico

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

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4 **No. A-1-CA-41149**

5 **AARON BORREGO and VIRGIL VIGIL,**

6 Petitioners-Appellants,

7 v.

8 **FIRST JUDICIAL DISTRICT ATTORNEY'S**

9 **OFFICE and FELICIA LUJAN,**

10 Respondents-Appellees.

11 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

12 **Bryan Biedscheid, District Court Judge**

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1 **OPINION**

2 **MEDINA, Judge.**

3 {1} Petitioners Aaron Borrego and Virgil Vigil appeal the district court’s order  
4 granting Respondents’ motion for summary judgment, under the Inspection of  
5 Public Records Act (IPRA), NMSA 1978, §§ 14-2-1 to -12 (1947, as amended  
6 through 2023).<sup>1</sup> Petitioners contend that the district court erred in concluding that  
7 the following were not subject to disclosure under IPRA: (1) the content of plea  
8 negotiations between the First Judicial District Attorney’s Office (FJDA) and  
9 attorneys representing defendants and (2) the mandatory statements of admission the  
10 defendants submitted with their applications to participate in the FJDA’s  
11 preprosecution diversion program (PPD). We are satisfied, in light of district  
12 attorneys’ constitutional role in New Mexico’s criminal justice system, defendants’  
13 constitutional rights to effective assistance of counsel and to a public trial by an  
14 impartial jury, and our Supreme Court’s recognition of the evidentiary privilege  
15 expressed in Rule 11-410 NMRA, *see Republican Party of N.M. v. N.M. Tax’n &*  
16 *Revenue Dep’t*, 2012-NMSC-026, 283 P.3d 853; *State v. Trujillo*, 1980-NMSC-004,

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<sup>1</sup>The requests at issue in this appeal were submitted in August 2021. The language of IPRA was amended in 2023, but the specific section relied on by the parties has not substantially changed. The 2023 amendment renumbered the “as otherwise provided by law” exception to IPRA from Section 14-2-1(H) (2019) amendment to Section 14-2-1(L). We, therefore, cite the 2023 version of IPRA throughout this opinion for ease of reference and to prevent confusion about the current law.

1 93 N.M. 724, 605 P.2d 232, that the “as otherwise provided by law” exception, § 14-  
2 2-1(L), shields records of plea negotiations from disclosure under IPRA. For the  
3 same reasons we hold that mandatory statements of admission submitted under the  
4 PPD are excepted from disclosure.

## 5 **BACKGROUND**

6 {2} The FJDA charged nine individuals for their roles in destroying the Soldier’s  
7 Monument in the Santa Fe Plaza, Santa Fe, New Mexico, commonly referred to as  
8 the Obelisk. The FJDA’s prosecutors and the defendants, through counsel, engaged  
9 in plea negotiations. Many, if not all, plea negotiations were conducted through  
10 email. Ultimately, the FJDA permitted the defendants to submit applications to the  
11 FJDA’s PPD. *See* NMSA 1978, § 31-16A-7 (2019) (permitting a district attorney to  
12 suspend criminal proceedings and divert defendants to PPD as provided for under  
13 the Preprosecution Diversion Act, NMSA 1978, §§ 31-16A-1 to -8 (1981, as  
14 amended through 2019) (the Act)). The express purpose of the Act is to “remove  
15 those persons from the criminal justice system who are most amenable to  
16 rehabilitation and least likely to commit future offenses, to provide those persons  
17 with services designed to assist them in avoiding future criminal activity, to conserve  
18 community and criminal justice resources, to provide standard guidelines and to  
19 evaluate preprosecution programs.” Section 31-16A-2.

1 {3} Among the requirements of the FJDA PPD application and assessment  
2 process, the defendants were required to submit statements of admission setting forth  
3 the elements of each crime committed.<sup>2</sup> The defendants submitted their statements  
4 and eight of the defendants (the Obelisk defendants) were accepted to participate in  
5 the program.<sup>3</sup>

6 {4} Three months later, Petitioners submitted written IPRA requests to the FJDA  
7 and Felicia Lujan, Records Custodian, (collectively Respondents) seeking, among  
8 other items, emails relating to the plea negotiations between the FJDA’s prosecutors  
9 and attorneys representing the Obelisk defendants, as well as their statements of  
10 admission. Respondents provided Petitioners with copies of the emails with the  
11 content of the plea negotiation discussions redacted. Respondents did not provide  
12 Petitioners with the statements of admission. As grounds for redacting the emails  
13 and withholding the statements of admission, Respondents asserted that the records  
14 were: (1) attorney work product, (2) “attorney-client privileged communications,”

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<sup>2</sup>The FJDA PPD included a waiver in which participants waived their rights to privacy under the arrest record information act, and, with the exception of statements of admission, authorized the FJDA to release to the public all information submitted by the applicant in their application to PPD.

<sup>3</sup>Defendants who are not accepted into PPD may request the return of their statements of admission and those statements will not be used against them. Presumably, plea negotiations would then resume. When a defendant is admitted in the PPD but is subsequently discharged, the admission statement may be used as evidence against the defendant.

1 (3) “include[d] privileged plea discussions or relate to the possible  
2 settlement/resolution of pending litigation,” and (4) confidential under the Act.

3 {5} Petitioners filed petitions for alternative writs of mandamus, which were later  
4 consolidated. Petitioners alleged in part that the redacting of the documents and  
5 failure to produce documents violated IPRA because no lawful exception to  
6 disclosure applied. Petitioners also filed a motion for summary judgment (MSJ),  
7 reiterating their claim that IPRA did not except records of plea negotiations.<sup>4</sup>  
8 Petitioners argued that, while Rule 11-410, Rule 11-408 NMRA, and Rule 5-304  
9 NMRA govern the admissibility of plea negotiations as to the negotiating  
10 defendants, the rules do not create a privilege in other contexts. Respondents replied  
11 in part that the redacted material and withheld statements of admission were  
12 privileged under Rule 11-410 and therefore excepted from disclosure under Section  
13 14-2-1(L).

14 {6} The district court deferred ruling on the MSJ and directed counsel for the  
15 parties to consult with the Obelisk defendants and ascertain their position as to: “(1)  
16 whether [their] plea negotiations [were] privileged; and (2) if so, whether [they]  
17 waive[d] any privilege as to the email communications and [their] statements of  
18 admission.” The Obelisk defendants filed a joint report, with an attached letter in  
19 which they asserted that their plea negotiations and statements of admission were

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<sup>4</sup>Petitioners filed two other MSJs that are not pertinent to this appeal.

1 privileged and protected by the New Mexico Rules of Criminal Procedure and the  
2 New Mexico Rules of Evidence. The Obelisk defendants additionally maintained  
3 that the release of the requested information would violate and infringe on their Fifth  
4 Amendment rights and their contractual agreements with the FJDA. Counsel for the  
5 Obelisk defendants asserted in general that several of their clients received threats  
6 and that release of the documents posed safety concerns.

7 {7} The district court denied the MSJ, concluding that the requested information  
8 was appropriately redacted and/or withheld under Section 14-2-1(L). Specifically,  
9 the district court concluded that “[c]onstitutional rights, evidentiary privilege,  
10 judicial procedure, and the good faith contractual rights of third parties can be  
11 sources of such law or legal right referenced in [Section 14-2-1(L)].” Respondents  
12 then moved for summary judgment on the grounds that they did not violate IPRA as  
13 a matter of law, which the district court granted reiterating its prior ruling. Petitioners  
14 appeal the district court’s order granting Respondents’ MSJ.

15 **DISCUSSION**

16 {8} Petitioners continue to assert that there is no IPRA exception permitting the  
17 redaction or withholding of documents containing plea negotiations. Petitioners  
18 contend that the evidentiary rules governing plea negotiations govern admissibility,  
19 not disclosure under IPRA; the disclosure of plea negotiations under IPRA does not  
20 implicate the Fifth Amendment privilege against self-incrimination; only statutes

1 and regulations may provide an exception to disclosure under IPRA and neither the  
2 Respondents nor the Obelisk defendants invoked any statutory or regulatory  
3 exceptions to disclosure; government agencies may not use contracts to “thwart”  
4 disclosure under IPRA; and there is no IPRA exception based on allegations that  
5 disclosure will endanger a person. Respondents answer that evidentiary privileges,  
6 Fifth Amendment protections, and contractual rights provide a basis for withholding  
7 the information.

8 (9) We first outline the standard of review and the analytical framework for IPRA  
9 and the “as otherwise provided by law” exception. We then reflect on the public’s  
10 right to access information under IPRA as weighed against governmental privilege  
11 to withhold information as outlined in *Republican Party*. Next, we consider Rule 11-  
12 410, the principle of candor underlying plea negotiations, and the constitutional and  
13 legislative foundations of district attorney authority, as well as defendants’  
14 constitutional rights to effective assistance of counsel and a public trial with an  
15 impartial jury. Because we resolve the issue before us based upon the evidentiary  
16 privilege for plea negotiations and the implicated constitutional considerations, we  
17 do not address the remaining arguments of the parties.<sup>5</sup>

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<sup>5</sup>Petitioners did not assert that a distinction between the plea negotiation emails and the statements of admission at issue exists such that it would implicate a distinction in our analyses for the two types of information. We therefore assume without deciding that the statements of admission are effectively a component of the plea negotiation process under the PPD.



1 **I. The Limits of the Public’s Right to Access Information Under IPRA**

2 {10} The parties contest whether Rule 11-410 is a “privilege” recognized by our  
3 Supreme Court such that it excepts documents containing plea negotiations and  
4 discussions in criminal cases from disclosure under IPRA. Petitioners and Amicus  
5 Curiae New Mexico Foundation for Open Government (NMFOG) assert in part that  
6 Rule 11-410 is an evidentiary rule governing admissibility of evidence and not a rule  
7 of “privilege” or confidentiality that prohibits disclosure in other contexts.  
8 Respondents answer that our Supreme Court has already identified Rule 11-410 as  
9 a “privilege.” *See Trujillo*, 1980-NMSC-004, ¶ 21 (“[A] weighing of conflicting  
10 policies demonstrates that the balance is tipped in favor of interpreting Rule [11-]410  
11 as the cloak of privilege around plea negotiation discussions.”). Similarly, Amicus  
12 Curiae the New Mexico Department of Justice (NMDOJ) and Amicus Curiae Law  
13 Offices of the Public Defender (LOPD) argue that the privilege expressed in Rule  
14 11-410 shields the disclosure of plea negotiation documents. Respondents, as well  
15 as NMDOJ and LOPD, additionally discuss the ramifications to the criminal justice  
16 system that will result from opening the door to IPRA requests for documents  
17 containing plea negotiation discussions, including, in part, significantly hindering  
18 plea negotiations and prosecutors’ ability to obtain testimony from cooperative  
19 codefendants.

1 **A. Standard of Review, IPRA, and the “as Otherwise Provided by Law”**  
2 **Exception to Disclosure**

3 {11} The issues in this appeal raise questions of statutory interpretation arising  
4 from the district court’s grant of summary judgment. With no facts in dispute, our  
5 review of the district court’s summary judgment order involves purely legal  
6 questions, which we review de novo. *See Self v. United Parcel Serv., Inc.*, 1998-  
7 NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582; *Dunn v. N.M. Dep’t of Game & Fish*,  
8 2020-NMCA-026, ¶ 3, 464 P.3d 129 (noting that this Court reviews de novo disputes  
9 that require us to “construe the statute and apply the relevant case law to undisputed  
10 facts”).

11 {12} Our Legislature enacted IPRA to promote the goal of transparency in our state  
12 government:

13 Recognizing that a representative government is dependent upon an  
14 informed electorate, the intent of the [L]egislature in enacting [IPRA]  
15 is to ensure, and it is declared to be the public policy of this state, that  
16 all persons are entitled to the greatest possible information regarding  
17 the affairs of government and the official acts of public officers and  
18 employees.

19 Section 14-2-5. “IPRA is intended to ensure that the public servants of New Mexico  
20 remain accountable to the people they serve.” *San Juan Agric. Water Users Ass’n v.*  
21 *KNME-TV*, 2011-NMSC-011, ¶ 16, 150 N.M. 64, 257 P.3d 884. “The citizen’s right  
22 to know is the rule and secrecy is the exception.” *State ex rel. Newsome v. Alarid*,

1 1977-NMSC-076, ¶ 34, 90 N.M. 790, 568 P.2d 1236, *superseded by statute as stated*  
2 *in Republican Party of N.M.*, 2012-NMSC-026.

3 {13} Under IPRA, “[e]very person has a right to inspect public records,” § 14-2-1,  
4 by making a request pursuant to the procedures set forth in Section 14-2-8. IPRA  
5 expressly enumerates categories of records that are excepted from inspection. *See*  
6 § 14-2-1(A)-(K) (enumerating among other things: attorney-client privileged  
7 information, trade secrets, and governmental emergency response plans). In addition  
8 to these specifically enumerated disclosure exceptions, IPRA excepts records from  
9 inspection “as otherwise provided by law.” Section 14-2-1(L). This exception  
10 includes statutory and regulatory bars to disclosure, constitutionally mandated  
11 privileges, and privileges established by our rules of evidence. *Republican Party*,  
12 2012-NMSC-026, ¶ 13.

13 **B. *Republican Party and the Public’s Right to Information Weighed Against***  
14 ***Privilege Under IPRA***

15 {14} In *Republican Party*, our Supreme Court considered “executive privilege in  
16 the context of a public records request,” and whether such privilege would qualify  
17 under the “as otherwise provided by law” exception to disclosure, the same  
18 exception that we address in this opinion. *Id.* ¶¶ 3, 13-16 (internal quotation marks  
19 and citations omitted). The case weighed “a conflict between . . . two important  
20 principles.” *Id.* ¶ 3. On the one side, our Supreme Court recognized the principle  
21 underlying IPRA’s mandate that ““a representative government is dependent upon

1 an informed electorate.” *Id.* ¶ 1 (quoting § 14-2-5). On the other hand, our Supreme  
2 Court observed that “[o]ur constitution and laws recognize that under certain  
3 circumstances the [g]overnor is entitled to a limited degree of privilege . . . in the  
4 course of performing [their] duties” in part because “[u]nder the New Mexico  
5 Constitution, the people delegate . . . ‘supreme executive power of the state’” in the  
6 governor. *Id.* ¶ 2 (quoting N.M. Const. art. V, § 4). Our Supreme Court recognized  
7 that, while “the public’s right to access information concerning the inner workings  
8 of its government is considerable, it is not without limit.” *Id.* As such, the Court was  
9 called upon “to delineate under what circumstances the executive may properly  
10 invoke that privilege pursuant to IPRA.” *Id.* ¶ 3.

11 {15} To do so, the Court assessed the history of the “rule of reason,” which had  
12 been applied by the courts since *Newsome*, 1977-NMSC-076, to determine “whether  
13 records not specifically exempted by IPRA nonetheless should be withheld from the  
14 requester on the grounds that disclosure would not be in the public interest.”  
15 *Republican Party*, 2012-NMSC-026, ¶ 15 (internal quotation marks and citation  
16 omitted). The Court in *Newsome* suggested that the Legislature “delineate what  
17 records are subject to public inspection and those that should be kept confidential in  
18 the public interest” and the Legislature has since accommodated this request. 1977-  
19 NMSC-076, ¶ 33. At the time of the decision in *Newsome*, in addition to the “as  
20 otherwise provided by law” exception, three specific exceptions were delineated. *Id.*

1 ¶ 8; *see* NMSA 1953, § 71-5-1 (1973) (recompiled as §§ 14-2-1). At the time of  
2 *Republican Party*, thirty-five years later, an additional four specific exceptions were  
3 delineated. *See* § 14-2-1 (2012). As such, our Supreme Court in *Republican Party*  
4 determined that “any need that existed for application of the ‘rule of reason’” was  
5 obviated. 2012-NMSC-026, ¶ 16.

6 {16} Further, in considering the history of the executive privilege in New Mexico,  
7 *Republican Party* observed the explanation stated in *State ex rel. Attorney General*  
8 *v. First Judicial District Court of New Mexico*, that ““for a privilege to exist in New  
9 Mexico, it must be recognized or required by the [N.M.] Constitution, the Rules of  
10 Evidence, or other rules of [our Supreme Court].”” *Id.* ¶ 35 (quoting *State ex rel.*  
11 *Att’y Gen. v. First Jud. Dist. Ct.*, 1981-NMSC-053, 96 N.M. 254, 629 P.2d 330,  
12 *abrogated on other grounds by Republican Party of N.M.*, 2012-NMSC-026).

13 {17} Our Supreme Court in *First Judicial*, cited *United States v. Nixon*, 418 U.S.  
14 683 (1974), agreeing that “[t]he purposes of the executive privilege are to safeguard  
15 the decision-making process of the government by fostering candid expression of  
16 recommendations and advice and to protect this process from disclosure.” *First Jud.*  
17 *Dist. Ct.*, 1981-NMSC-053, ¶ 17. The *Republican Party* Court reasoned, “*First*  
18 *Judicial District Court* identified the competing interests as ‘the public’s interest in  
19 preserving confidentiality to promote intra[ ]governmental candor,’ and ‘the  
20 individual’s need for disclosure of the particular information sought.” *Id.* ¶ 36

1 (quoting *First Judicial*, 1981-NMSC-053, ¶ 22). *Republican Party* identified that  
2 these rationales “could support the executive communications privilege, the  
3 deliberative process privilege, or both,” but disavowed this logic “to the extent that  
4 it could be read to support the adoption of the deliberative process privilege.” *Id.*  
5 ¶¶ 41, 42. *Republican Party* then followed “the principles established by *First*  
6 *Judicial*” in holding “that our jurisprudence supports a limited form of executive  
7 privilege derived from the constitution” and proceeded to clarify its scope. *Id.* ¶ 43  
8 {18} Fundamentally, in moving forward to determine “under what circumstances  
9 the executive may properly invoke that privilege pursuant to IPRA,” our Supreme  
10 Court explained how courts should analyze the question of whether it is appropriate  
11 to withhold information from disclosure under IPRA. *Id.* ¶ 3. Specifically,  
12 information “may be withheld because of a specific exception contained within  
13 IPRA, or statutory or regulatory exceptions, or privileges adopted by this Court or  
14 grounded in the constitution.” *Id.* ¶ 16.

15 **C. Rule 11-410, *Trujillo*, and the Protection of Candor During Plea**  
16 **Negotiations**

17 {19} Relying on the plain language of Rule 11-410, Petitioners contend that this  
18 rule only governs “when plea statements are ‘admissible’” and “[n]othing in the rule  
19 prohibits using those statements against other persons or in other contexts.” NMFOG  
20 additionally asserts that Rule 11-410 is not applicable to the Defendants because the  
21 rule “explicitly prohibits admission of evidence of a guilty plea when the defendant

1 withdraws their plea or does not plead guilty” and “affords no such protection for a  
2 guilty plea that is successful.”

3 {20} The interpretation of a provision of the New Mexico Rules of Evidence is a  
4 question of law which we review de novo. *See Allen v. LeMaster*, 2012-NMSC-001,  
5 ¶ 11, 267 P.3d 806. “When construing our procedural rules [promulgated by our  
6 Supreme Court], we use the same rules of construction applicable to the  
7 interpretation of statutes.” *Id.* “Under the plain meaning rule, when a [rule]’s  
8 language is clear and unambiguous, we will give effect to the language and refrain  
9 from further [rule] interpretation.” *State v. Hubble*, 2009-NMSC-014, ¶ 10, 146  
10 N.M. 70, 206 P.3d 579 (internal quotation marks and citation omitted). “In applying  
11 the plain meaning rule, we additionally consider the context surrounding a particular  
12 [rule], such as its history” and “its apparent objective.” *State v. Archuleta*,  
13 2023-NMCA-077, ¶ 9, 536 P.3d 528 (internal quotation marks and citation omitted).  
14 “[I]n giving effect to the plain meaning of the rule, we take care to avoid an absurd  
15 or unreasonable result.” *Id.*

16 {21} We begin with the language of Rule 11-410. Rule 11-410 states:

17           A. Prohibited uses. In a civil, criminal, or children’s court  
18 case, evidence of the following is not admissible against the defendant  
19 who made the plea or participated in the plea discussions:

- 20                   (1) a guilty plea that was later withdrawn;
- 21                   (2) a nolo contendere plea;

1 (3) an admission in a delinquency case;

2 (4) a statement made during a proceeding on any of  
3 those pleas or admissions in any court;

4 (5) a statement made during plea discussions with an  
5 attorney for the prosecuting authority if the discussions did not  
6 result in a guilty plea or resulted in a later-withdrawn guilty plea.

7 B. Exceptions. The court may admit a statement described in  
8 Rule 11-410(A)(4) or (5) . . .

9 (1) in any proceeding in which another statement made  
10 during the same plea or plea discussions has been introduced, if  
11 in fairness both statements ought to be considered together, or

12 (2) in a criminal proceeding for perjury or false  
13 statement, if the defendant made the statement under oath, on the  
14 record, and with counsel present.

15 {22} Our Supreme Court first interpreted Rule 11-410 in *Trujillo* and held that Rule  
16 11-410 precluded the admissibility of an incriminating statement made in connection  
17 with a plea negotiation to impeach the defendant in a subsequent criminal  
18 proceeding. *Trujillo*, 1980-NMSC-004, ¶¶ 3, 6. In so holding, the Court reasoned,

19 Rule [11-]410 embodies the public interest in encouraging negotiations  
20 concerning pleas between the criminal defendant and the [s]tate. Guilty  
21 pleas are an essential part of our criminal justice system, and candor in  
22 plea discussions aids greatly in the reaching of agreements between the  
23 defendant and the [s]tate. This ultimately results in the speedy  
24 disposition of cases.

25 *Id.* ¶ 18; *see also Santobello v. New York*, 404 U.S. 257, 260-61 (1971) (recognizing  
26 that plea bargaining “is an essential component of the administration of justice” in  
27 supporting “prompt and largely final disposition of most criminal cases,” avoiding



1 “the corrosive impact of enforced idleness during pre[ ]trial confinement,” protecting  
2 “the public from those accused persons who are prone to continue criminal conduct  
3 even while on pretrial release,” and enhancing “the rehabilitative prospects of the  
4 guilty when they are ultimately imprisoned” by “shortening the time between the  
5 charge and [the] disposition”); *Missouri v. Frye*, 566 U.S. 134, 143 (2012)  
6 (recognizing that “[n]inety-seven percent of federal convictions and ninety-four  
7 percent of state convictions are the result of guilty pleas”). As our Supreme Court in  
8 *Trujillo* recognized, these policy considerations are similar to those the President’s  
9 Commission on Law Enforcement and Administration of Justice (the Commission)  
10 found influential in approving plea bargaining:

11         The negotiated guilty plea serves important functions. The quality of  
12         justice in all cases would suffer if overloaded courts were faced with a  
13         great increase in the number of trials. Tremendous investments of time,  
14         talent, and money, all of which are in short supply and can be better  
15         used elsewhere, would be necessary if all cases were tried.

16 1980-NMSC-004, ¶ 18 (omission, internal quotation marks, and citation omitted).  
17 The *Trujillo* Court further supported its interpretation of Rule 11-410 as “closing the  
18 door on the admissibility of all of these matters as evidence at trial for either  
19 substantive or impeachment purposes” by observing “[t]he attorney for the [s]tate  
20 and the attorney for the defendant or the defendant acting pro se need to feel free to  
21 discuss the merits of the case, the alternatives for disposition, and the possible  
22 concessions each is willing to make.” *Trujillo*, 1980-NMSC-004, ¶ 19. The Court

1 concluded “a weighing of conflicting policies demonstrates that the balance is tipped  
2 in favor of interpreting Rule [11-]410 as the cloak of privilege around plea  
3 negotiation discussions.” *Trujillo*, 1980-NSMC-004, ¶ 21.

4 {23} The Commission’s recognition that negotiated plea agreements conserve  
5 resources is similar to one of our Legislature’s expressed purposes of the Act: to  
6 conserve criminal justice resources. *See* § 31-16A-2 (outlining the purpose of the  
7 Act as “remov[ing] those persons from the criminal justice system who are most  
8 amendable to rehabilitation and least likely to commit future offenses, to provide  
9 those persons with services designed to assist them in avoiding future criminal  
10 activity, *to conserve community and criminal justice resources*, to provide standard  
11 guidelines and to evaluate preprosecution programs.” (emphasis added)).<sup>6</sup>

12 **D. District Attorney Constitutional Authority, Confidentiality in Plea**  
13 **Discussions, Effective Assistance of Counsel, and the Right to a Public**  
14 **Trial by Impartial Jury**

15 {24} The New Mexico Constitution identifies the district attorney as “the law  
16 officer of the state and of the counties within [their] district.” N.M. Const. art. VI,

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<sup>6</sup>With regard to achieving the expressed purposes of the Act, we do not overlook that our Legislature requires each district attorney to establish a PPD. *See* § 31-16A-3. And our Legislature conferred upon each district attorney significant discretion in deciding who should be admitted into the program. *See* § 31-16A-4(B). Jeopardizing candor in communications made in relation to a PPD would make it more difficult for district attorneys to perform their duties and exercise their discretion. This may also have a chilling effect on defendants seeking PPD consideration during the plea negotiation process.

1 § 24. We recognize that inherent in this constitutional authority to enforce the law is  
2 discretion. *See State v. Session*, 1978-NMCA-005, ¶ 2, 91 N.M. 381, 574 P.2d 600  
3 (“The prosecutor makes the determination whether to file criminal charges and  
4 which charges to file” (internal quotation marks and citation omitted)).<sup>7</sup> This  
5 discretion is manifest in the plea discussion process. *See State v. Romero*, 2023-  
6 NMSC-008, ¶ 43, 528 P.3d 640 (“A plea agreement is negotiated between the  
7 defendant and the prosecution, and the parties may negotiate the terms of a plea  
8 agreement to the full extent allowed by law.” (internal quotation marks and citation  
9 omitted)); *see also State v. Surratt*, 2016-NMSC-004, ¶ 14, 363 P.3d 1204  
10 (reasoning, while determining “clear evidence of an intent by the Legislature [is  
11 required] to limit prosecutorial discretion,” that “courts must be wary not to infringe  
12 unnecessarily on the broad charging authority of district attorneys” (internal  
13 quotation marks and citation removed)). Further, a presumption of confidentiality  
14 persists throughout the discretionary plea negotiation process. *See United States v.*  
15 *El-Sayegh*, 131 F.3d 158, 163 (D.C. Cir. 1997) (“Public access to unconsummated  
16 plea agreements cannot be squared with the confidentiality required for candid

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<sup>7</sup> The position of attorney general is established in the New Mexico Constitution, and has been vested, as head of the NMDOJ, with concurrent authority to prosecute criminal offenses with district attorneys by our Legislature. N.M. Const. art. V, § 1; *see* NMSA 1978, § 8-5-1 (1933); NMSA 1978, § 8-5-2 (1975); NMSA 1978, § 8-5-3 (1933). Accordingly, similar reasoning as applied in this section and opinion to district attorneys applies to the attorneys general.

1 negotiations.”).<sup>8</sup> As the LOPD and NMDOJ agree here, the parties rely on this  
2 confidentiality. *See El-Sayegh*, 131 F.3d at 163. Without it, the entire process would  
3 be encumbered, if not rendered practically impossible. *See id.* at 162.

4 {25} Public disclosure of this information does not just risk the chilling  
5 consequences implied in the analysis of *Trujillo*. *See* 1980-NMSC-004, ¶¶ 18-19;  
6 *see also El-Sayegh*, 131 F.3d at 162 (“This chilling of plea negotiations is precisely  
7 the evil sought to be avoided by [Fed. R. of Crim. P.] 11(e).”). Among other things,  
8 plea negotiations may include sensitive information about victims and witnesses,

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<sup>8</sup>In *El-Sayegh*, the D.C. Circuit Court of Appeals considered “refin[ing] the concept of ‘judicial records’ to which there are public rights of access.” 131 F.3d at 159. The court “conclud[ed] that a plea agreement submitted to the court before the plea is offered, solely for the purpose of allowing the court to rule on the government’s motion to seal the agreement, is not subject at that stage to a public right of access under either the First Amendment or the common law.” *Id.* We recognize *El-Sayegh* considers public rights of access to judicial documents as they relate to the First Amendment of the U.S. Constitution and the common law, and it is therefore distinguishable in several respects to the issue before this Court. Despite the differences in the pertinent legal frameworks, we consider *El-Sayegh* useful in identifying the purposes of rules of admissibility relating to the plea process and providing insight on the policy underlying the admissibility rule at issue here. Further, we observe *El-Sayegh* articulates that a Freedom of Information Act request may be the “appropriate device” to access the details of plea agreements for the sake of “evaluating the performance of the Department of Justice or other law enforcement agencies in their dealings with [a defendant].” *Id.* at 163. The public’s access to government records to enable public oversight of government operations is a key principle underlying IPRA. *See Republican Party*, 2012-NMSC-026, ¶ 1 (determining the applicability of exceptions to disclosure under IPRA by reasoning, “[w]ithout some protection for the acquisition of information about the operation of public institutions . . . the process of self-governance contemplated by the Framers would be stripped of its substance” (internal quotations marks and citation omitted)). This countervailing policy consideration is spoken to in part below.

1 and expressions of a defendant’s willingness to cooperate against people who have  
2 been charged with crimes, some of whom might pose a threat of physical harm to a  
3 potential cooperating witness or a threat of intimidating such a witness. For these  
4 reasons, we observe that in order for a district attorney to satisfy their constitutional  
5 mandate as the “law officer of the state and of the counties within [their] district,”  
6 confidentiality in their plea negotiations and discussions with criminal defendants or  
7 their counsel is implied. N.M. Const. art. VI, § 24.

8 {26} Further, we recognize there are relevant additional constitutional  
9 considerations from the perspective of defendants during the plea negotiation  
10 process. Notably, there is a constitutional right to effective assistance of counsel that  
11 “extends to the plea[ ]bargaining process.” *Lafler v. Cooper*, 566 U.S. 156, 162  
12 (2012); *see also Frye*, 566 U.S. at 144 (“The potential to conserve valuable  
13 prosecutorial resources and for defendants to admit their crimes and receive more  
14 favorable terms at sentencing means that a plea agreement can benefit both parties.  
15 In order that these benefits can be realized, however, criminal defendants require  
16 effective counsel during plea negotiations.”). “The reality is that plea bargains have  
17 become so central to the administration of the criminal justice system that defense  
18 counsel [too] have responsibilities in the plea bargain process, responsibilities that  
19 must be met to render the adequate assistance of counsel that the Sixth Amendment  
20 requires in the criminal process at critical stages.” *Frye*, 566 U.S. at 143; *see State*

1 *v. Paredes*, 2004-NMSC-036, ¶¶ 13-14, 136 N.M. 533, 101 P.3d 799 (recognizing  
2 the Sixth Amendment right to effective assistance of counsel during plea  
3 negotiations). In order to effectively represent the accused during plea negotiations,  
4 defense counsel must be able to communicate candidly with the prosecutor—without  
5 fear that those communications will be disclosed to the public.

6 {27} Disclosure of the content of plea negotiations additionally risks impeding on  
7 a defendant’s right to a public trial by impartial jury. “The Sixth Amendment to the  
8 United States Constitution requires in all criminal prosecutions, the accused shall  
9 enjoy the right to a speedy and public trial, by an impartial jury.’ An impartial jury  
10 is one that ‘does not favor one side more than another, treats all alike, [and] is  
11 unbiased, equitable, fair and just.” *State v. Romero*, 2023-NMSC-014, ¶ 7, 533 P.3d  
12 735 (internal quotation marks and citation omitted). Our State constitution requires  
13 the same. *See* NM Const. art. II, § 14 (providing the right to “a speedy public trial  
14 by an impartial jury”). Questioning prospective jurors during voir dire with respect  
15 to their ability to apply the law impartially is the primary method in our criminal  
16 justice system to uncover bias. *Romero*, 2023-NMSC-014, ¶ 8. Public disclosure of  
17 the contents of plea negotiations risks informing potential jurors of facts regarding a  
18 criminal case in those instances where plea negotiations do not resolve a case against  
19 a defendant or all codefendants. The result of which could lead to the tainting of an  
20 entire jury pool during voir dire and/or jeopardizing a jury verdict. *Cf. State v. Perea*,

1 1981-NMCA-033, ¶¶ 2, 14-15, 95 N.M. 777, 626 P.2d 851 (holding that juror  
2 exposure by another juror to a newspaper article suggesting that the defendant was  
3 guilty required a new trial).

4 **II. Rule 11-410 and the Federal and New Mexico Constitutions Provide a**  
5 **Basis for Withholding Disclosure of the Emails and Admissions Under**  
6 **the “as Otherwise Provided by Law” Exception**

7 {28} The reasoning underlying the requirement for candor in communications  
8 between district attorneys and criminal defendants in fostering effective plea  
9 agreements is analogous to the reasoning underlying the requirement for candor in  
10 intragovernmental executive communications as recognized in *First Judicial* and  
11 *Republican Party*. See *First Judicial*, 1981-NMSC-053, ¶ 17; *Republican Party*,  
12 2012-NMSC-026, ¶ 36. The office of the district attorney is a constitutional office  
13 with duties prescribed by the Legislature. See N.M. Const. art. VI, § 24 (establishing  
14 the district attorney as “the law officer of the state and of the counties within [their]  
15 district” and authorizing legislation to prescribe duties and qualifications for their  
16 office); NMSA 1978, § 36-1-18(A)(1) (2001) (requiring each district attorney to  
17 “prosecute . . . all cases, criminal and civil, in which the state or any county in [their]  
18 district may be a party or may be interested). In performing these duties, district  
19 attorneys often rely on confidentiality akin to a privilege to facilitate candor from  
20 criminal defendants. Cf. *Republican Party*, 2012-NMSC-026, ¶ 2 (“Our constitution  
21 and laws recognize that under certain circumstances the [g]overnor is entitled to a

1 limited degree of privilege . . . in the course of performing [their] duties” in part  
2 because “[u]nder the New Mexico Constitution, the people delegate . . . supreme  
3 executive power of the state” in the governor. (internal quotation marks and citation  
4 omitted)).

5 {29} Our Supreme Court in *Trujillo*, 1980-NMSC-004, ¶ 18, recognized the  
6 importance of candor in plea discussions. While *Trujillo* weighed policy  
7 considerations in a context removed from IPRA, those same policy considerations  
8 have application in the IPRA context. Notably, there is a public interest embodied  
9 in Rule 11-410 to “encourag[e] negotiations concerning pleas between the criminal  
10 defendant and the [s]tate. Guilty pleas are an essential part of our criminal justice  
11 system, and candor in plea discussions aids greatly in the reaching of agreements  
12 between the defendant and the [s]tate. This ultimately results in the speedy  
13 disposition of cases.” *Trujillo*, 1980-NMSC-004, ¶ 18. The effectuation of candor in  
14 plea discussions is as much undercut by a risk of public disclosure under IPRA as it  
15 is by a risk of admission into evidence in a court of law. *Cf. El-Sayegh*, 131 F.3d at  
16 162 (reasoning that, had a court ruled on a motion to seal a plea agreement submitted  
17 to the court before the plea was offered in order to rule on a motion to seal the  
18 agreement, “affording public scrutiny [of the plea agreement was] logically  
19 incompatible with the nature of the proceedings. . . . The idea’s logical incoherence



1 is, of course, reflected in its practical effects—to thwart the use of documents that  
2 parties would not submit at all without assurances of confidentiality”).

3 {30} We respect these considerations as at the core of the evidentiary protection for  
4 defendants recognized as a “cloak of privilege” by our Supreme Court. *See Trujillo*,  
5 1980-NMSC-004, ¶ 21 (“[A] weighing of conflicting policies demonstrates that the  
6 balance is tipped in favor of interpreting Rule [11-]410 as the cloak of *privilege*  
7 around plea negotiation discussions.” (emphasis added)); *see also State v. Gonzalez*,  
8 2020-NMCA-022, ¶ 10, 461 P.3d 920. Similarly, as reasoned above, we  
9 acknowledge district attorneys’ requirement for confidentiality to effectively reach  
10 plea agreements in accordance with their constitutional authority as “the law officer  
11 of the state and of the counties within [their] district.” N.M. Const. art. VI, § 24.

12 {31} The United States Supreme Court has recognized that “[a]lthough many  
13 governmental processes operate best under public scrutiny, it takes little imagination  
14 to recognize that there are some kinds of government operations that would be totally  
15 frustrated if conducted openly.” *Press-Enter. Co. v. Superior Ct. of Cal. for*  
16 *Riverside Cnty.*, 478 U.S. 1, 8-9 (1986) (recognizing that there is no First  
17 Amendment right of public access to grand jury proceedings). We conclude that plea  
18 negotiations are one of those operations, and that recognizing a privilege for plea  
19 negotiations is the only way to achieve the purposes of both Rule 11-410 and IPRA,  
20 while ensuring that district attorneys are able to fulfill their obligations consistent

1 with their legislative and constitutional roles in New Mexico’s criminal justice  
2 system and protecting defendants’ rights to effective assistance of counsel and to  
3 enjoy the right to a public trial, by an impartial jury.

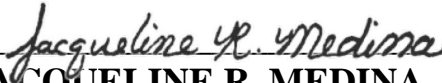
4 {32} Although the plain language of Rule 11-410 discusses admissibility in court,  
5 the purposes of the rule cannot be achieved and the constitutional interests at stake  
6 here cannot be protected without recognizing the cloak of privilege in the IPRA  
7 context. Thus, we exercise caution in relying only on the plain language of Rule 11-  
8 410 because the language’s “beguiling simplicity may mask a host of reasons why  
9 [the rule], apparently clear and unambiguous on its face, may for one reason or  
10 another give rise to legitimate (i.e., nonfrivolous) differences of opinion concerning  
11 the [rule]’s meaning.” *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 23, 117  
12 N.M. 346, 871 P.2d 1352. This recognition does not prevent the public from having  
13 information about how prosecutors are handling cases, or how the FJDA handles  
14 PPD cases. Indeed, public oversight is available here based on the considerable  
15 information provided by the FJDA regarding its implementation of the Act,  
16 including application information and various forms related to PPD, as well as the  
17 pleadings filed in connection with the cases against the defendants.

18 {33} Accordingly, the documents containing plea discussions and the statements of  
19 admission are privileged under Rule 11-410 and qualify as excepted from disclosure  
20 under Section 14-2-1(L) of IPRA.

1 **CONCLUSION**

2 {34} For the foregoing reasons, we affirm.

3 {35} **IT IS SO ORDERED.**

4   
5 **JACQUELINE R. MEDINA, Judge**

6 **WE CONCUR:**

7   
8 **J. MILES HANISEE, Judge**

9   
10 **ZACHARY A. IVES, Judge**