Thirteenth Judicial District Court
County of Sandoval
State of New Mexico

Gale Cooper,
Plaintiff-Appellant,
vs. D-1329-CV-2007-01364

Rick Virden, Lincoln County Sheriff and Custodian of the Records of the Lincoln County Sheriff's Office; and Steven M. Sederwall, Former Lincoln County Deputy Sheriff,

Defendants-Appellees.

PLAINTIFF GALE COOPER'S PROPOSED FINAL JUDGMENT WITH UPDATED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN ACCORDANCE WITH APPEALS COURTS' DECISIONS

COMES NOW prevailing Plaintiff Gale Cooper (**"Cooper"**), as *pro se* for her Inspection of Public Records Act (NMSA 1978, Sections 14-2-1 to - 12) **("IPRA")** enforcement litigation, D-1329-CV-2007-01364, to present a "Proposed Final Judgment" and "Updated "Findings of Fact and Conclusions of Law" (**"Findings and Conclusions"**) after appeals to the New Mexico Court of Appeals and Supreme Court, and on the Court of Appeals's March 23, 2016 "Memorandum Opinion." (Exhibit 1)

BACKGROUND

Following this Court's "Findings and Conclusions" of May 15, 2014, and "Judgment" of June 4, 2014, Cooper appealed her denied IPRA penalty-damages' reliance on *Faber v. King*, 2013-NMCA-080, 306 P.3d 519, *overruled by Faber v. King*, 2015-NMSC-015, 348 P.3d 172 (***"Faber v. King"***) as irrelevant to her as a non-harm suffered whistleblower, and as being fatally flawed and meriting overruling.

Cooper's Court of Appeals Case No. 33,876 had its "Docketing Statement" on July 13, 2014, "Brief in Chief" on August 12, 2015, and "Notice of Submission" on February 1, 2016. Defendants' "Joint Cross Appeal" was on July 3, 2014 against monetary sanction for records forgeries. Cooper's "Reply Brief" to Defendants' "Answer Brief" of September 28, 2015 was on October 19, 2015; and Cooper's "Answer Brief" to Defendants' "Joint Cross Appeal" was on November 13, 2015. On March 23, 2016, the Court of Appeals issued its "Memorandum Opinion" denying IPRA penalty-damages, condoning improper and fraudulent IPRA records denials if having "timely" delivery, removing sanction for records forgeries, and cutting Cooper's IPRA costs by more than half. Cooper's "Writ of Certiorari" for Supreme Court Case No. S-1-SC-35844 was on May 31, 2016. Defendants' "Response" in opposition was on June 15, 2016. Cooper's "Writ" was denied on June 22, 2016. On June 5, 2016, she filed a "Motion for Reconsideration," and was denied on July 20, 2016. On September 16, 2016, the Court of Appeals remanded Cooper's case to District Court.

On November 2, 2016, Cooper filed a "Motion to Enforce Judgment" with this Court. On November 17, 2016, Defendants paid to Cooper eleven thousand seven hundred and two dollars and fifty-five cents ($11,702.55) to satisfy Cooper's award, as Cooper notified this Court on December 7, 2016 by an "Addendum" to her "Motion to Enforce Judgment."

On February 2, 2017, this Court held Cooper's requested hearing to "Enforce Judgment" without her presence, since she was not informed of it. This hearing now is for "Final Judgment," and Cooper presents "Updated Proposed Findings of Fact," "Updated Proposed Conclusions of Law," and "Updated Proposed Final Judgment."

UPDATED PROPOSED FINDINGS OF FACT FROM MAY 15, 2014

Added in boldface to the original "Findings and Conclusions" is the Court of Appeals's upheld "Memorandum Opinion" (**"Opinion"**) with Cooper's commentary:

1. "This Court has jurisdiction over the parties and subject matter of this litigation" **was upheld.**

2. "Plaintiff De Baca County News is no longer a party to this litigation as it has settled all matters in controversy with Defendants" **was upheld.**

3. "On January 14, 2014 Plaintiff Gale Cooper (hereinafter Cooper) filed a Voluntary dismissal against Defendant Thomas Sullivan as Defendant Sullivan is now deceased" **was upheld.**

4. "The matter in controversy is for enforcement of the New Mexico Inspection of Public Records Act, Section 14-2-1 *et seq.* NMSA 1978 (IPRA) and concerning Defendants' refusal to turn over requested DNA records of Lincoln County Sheriff's Department Case No. 2003-274, "Billy the Kid Case," ("Case 2003-274")" **was upheld.**

5. "Case 2003-274 is a murder case, filed in 2003 in the Lincoln County Sheriff's Department by Sheriff Tom Sullivan (hereinafter Sullivan) and his commissioned Deputy Steve Sederwall (hereinafter Sederwall) to be solved by forensic DNA acquisitions and matching, and accusing suspect Pat Garrett of murdering an innocent victim instead of Billy the kid; with sub-investigation of Billy the Kid's double homicide of Deputies James Bell and Robert Olinger" **was upheld.**

6. "From 2003 to 2004, Case 2003-274's New Mexico exhumation attempts on Billy the Kid and his mother for matching DNA were legally blocked so no DNA was obtained" **was upheld.**

7. "In 2004 Billy the Kid's DNA was allegedly obtained for Case 2003-274 by Dr. Henry Lee (hereinafter Lee) from an old carpenter's bench on which Billy the Kid laid after being shot. Lee's specimens were sent for DNA processing to Orchid Cellmark Lab (hereinafter Orchid Cellmark) in Texas" **was upheld.**

8. "In 2005 newly elected Lincoln County Sheriff Rick Virden (hereinafter Virden) deputized Sullivan and Sederwall to continue Case 2003-274 by exhuming Billy the Kid's identity claimants John Miller and "Brushy Bill" Roberts for DNA match with Lee's bench DNA to solve the Garrett murder" **was upheld.**

9. "On May 19, 2005, for Case 2003-274, John Miller and William Hudspeth were exhumed in Arizona and their bones were taken to Orchid Cellmark for DNA extractions and for DNA matching to the carpenter's bench DNA" **was upheld.**

10. "From April 24, 2007 to June 26, 2007 Plaintiff Cooper made IPRA record requests from Sheriff Virden for Case 2003-274 through her then attorney Mickey Barnett ("request phase"). Requested records were for: A. Lee's DNA recoveries from the carpenter's bench; B. Orchid Cellmark's DNA extractions from Lee's specimens; C. Orchid Cellmark's DNA extractions for the two Arizona bodies; and D. Orchid Cellmark's DNA matchings for the carpenter's bench to the bodies" **was upheld.**

11. "In the request phase, no records were given and their denials were improper; without valid IPRA exceptions; with Sullivan and Sederwall after having resigned their deputyship on June 21, 2007 admitting to records possession, but calling them private hobby "trade secrets;" with Virden denying having any Case 2003-274 records; and with Virden not attempting to recover records from Sullivan, Sederwall, Lee, or Orchid Cellmark" **was not fully upheld. Upheld was "no records were given." Reversed were statutory violations for: "denials were improper" by lacking "valid IPRA exceptions" by Defendant Sederwall fraudulently "calling them private hobby 'trade secrets' " and by Defendant "Virden irrelevantly denying possession of and Case 2003-274 records." Claimed was that "timely" response alone (within IPRA's 15 day stipulation) met IPRA's requirement. (Opinion ¶¶ 2, 5, 7, 8, 16) (see "Conclusion" 8)**

12. "The case at hand for enforcement of IPRA was filed on October 15, 2007" **was upheld.**

13. "In their August 18, 2008 depositions Sullivan and Sederwall admitted knowing that the requested records existed, and admitted that Sederwall possessed Lee's carpenter's bench report" **was upheld.**

14. "On September 3, 2007 [sic – 2008], by subpoena duces tecum, Virden turned over his Case 2003-274 file of one hundred ninety-three (193) pages; lacking requested records, but with documents confirming the DNA investigation and having contact information for records recovery" **was upheld.**

15. "In his September 8, 2008 deposition Virden denied knowledge of requested records" **was upheld.**

16. "On November 20, 2009 Partial Summary Judgment was issued in favor of the Plaintiffs and against Defendants declaring that the records requested were public, were created in official capacities, and should be turned over" **was upheld.**

17. "On February 18, 2010 Sederwall turned over to the Plaintiffs an unrequested nine (9) page Lee report on courthouse floorboards. It's header had no link to Case 2003-274. It was signed by Lee and Calvin Ostler. In the March 9, 2010

Presentment Hearing, the Court was told that this floorboard report was the only Lee report in Sederwall's possession" **was upheld.**

18. "On October 26, 2010 Virden first made records requests to Lee and Orchid Cellmark but never followed up to recover the records after Lee responded that he had one report, and Orchid Cellmark responded that it would send the records if released by their client" **was upheld.**

19. "On November 10, 2010 Sederwall turned over to the Plaintiffs a sixteen (16) page Lee report on the carpenter's bench but was lacking a link to Case 2003-274" **was upheld.**

20. "An Evidentiary Hearing was held on January 21, 2011 and Virden argued that he could not turn over records that were not in his direct possession and which he did not know existed. Sederwall's Lee courthouse floorboard report was entered as Exhibit "F," and the carpenter's bench report was entered as Exhibit "E." At this hearing the Court reminded the parties that the Partial Summary Judgment previously entered on November 20, 2009 found that the Defendants and the investigation were official and connected to the Lincoln County Sheriff and that all evidence was public record and that all information should be turned over to Plaintiffs" **was upheld.**

20. "[sic – numbering repeats 20] In July, 2011 Cooper recognized that the Lee courthouse floorboard report (entered as Exhibit "F") was a rewrite of the alleged same floorboard report given on November 10, 2010, and that this rewriting also put in doubt the authenticity of the carpenter's bench report (Exhibit "E")" **was upheld.**

21. "At a September 23, 2011 Presentment Hearing Cooper alerted the Court of the discrepancies in the Lee reports" **was upheld.**

22. "On January 17, 2012 a Hearing on Sanctions was conducted and Plaintiffs stated that there were no records productions and allegations of altered Lee reports. Production of the original Lee report was ordered. Plaintiff De Baca County News requested attorney's [sic – attorneys'] fees which were granted" **was upheld.**

23. "On January 31, 2012 Sederwall turned over a twenty-five (25) page "original" Lee report combining the courthouse floorboard and the carpenter's bench. Its header identified Lee's work as for Case 2003-274" **was upheld.**

24. "On March 20, 2012 Plaintiff De Baca County News subpoenaed the Orchid Cellmark records for Case 2003-274, receiving one hundred thirty-three (133) pages on April 20, 2012. The records included DNA results from Lee's specimens and from the two exhumed Arizona bodies" **was upheld.**

25. "On May 31, 2012 a Hearing for Sanctions was conducted. The newest Lee report was presented as evidence of altering of the past Lee reports to conceal the

law enforcement header, but was also called not original as lacking signatures. The subpoenaed Orchid Cellmark records were entered as evidence to prove records' existence. Sanctions included the ordering of new depositions of the Defendants" **was not upheld as to this Court's sanctioning for records forgeries under its inherent authority, and Cooper's requested non-IPRA sanctions were renamed as unacceptable punitive penalties under IPRA.**

26. "In his June 26, 2012 deposition Sederwall admitted to: removing law enforcement information from later Lee reports; called the twenty-five (25) page Lee report he first received from Lee as original; and admitted to knowing that the Orchid Cellmark client was Calvin Ostler" **was upheld.**

27. "In his June 27, 2012 deposition Virden admitted to: waiting three (3) years into litigation to write record requests to Lee and Orchid Cellmark; not requesting from Lee the report when Lee wrote back that he had one; and not trying to find out the client's name after Orchid Cellmark wrote back that it was required to send Virden the requested records" **was upheld.**

29. "At an Evidentiary Hearing conducted on December 21 [sic – 18], 2012 and February 4, 2013 Virden admitted: that the subpoenaed Orchid Cellmark DNA records were from Case 2003-274 but gave no valid explanation for waiting three (3) years to begin records recovery or for not following up on the resulting responses to get the records. Witness Seterwall [sic], still calling Case 2003-274 his private hobby, admitted to altering the first Lee report's header to remove Case 2003-274 information; and admitted to creating the other report versions given to the Court and lacking law enforcement information" **was upheld.**

UPDATED PROPOSED CONCLUSIONS OF LAW FROM MAY 15, 2014

1. "Section 14-2-5 NMSA 1978 states, 'The intent of the legislature in enacting the Inspection of Public Records Act is to ensure as the policy of the State of New Mexico, that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees' " **was upheld.**

2. "Section 14-2-8(C) NMSA 1978 states, 'No person requesting records shall be required to state the reason for inspecting records' **was not upheld, with Cooper being forced to have the reason of "personal injury" under *Faber v. King* to get enforcement of her damages award; and was, thus, awarded only "nominal damages" for being a non-harm suffered whistleblower.**

3. "Cooper's status as an author is irrelevant in requesting records under IPRA and [she] is entitled to receive document[s] which were requested" **was not upheld, since Cooper was penalized by being barred from IPRA damages for being an investigative author-whistleblower exposing the Defendants' law enforcement fraud in Lincoln County Sheriff's Department Case No. 2003-274.**

4. "Without statutory justification, no requested records were produced by the Defendants" **was upheld.**
5. "The requested records exist, and have been recoverable from the time of the request phase" **was upheld.**

6. "After De Baca County News' subpoena outside IPRA requirement, the requested Lee report and the Orchid Cellmark DNA matchings remain unrecovered" **was upheld, as well as that the Defendants had total and "egregious" wrongful records withholding. (Opinion ¶ 10)**

7. "Section 14-2-5 NMSA 1978 states, 'To provide persons with such information is … an integral part of the routine duties of public officers and employees.' Virden produced no requested records and gave no statutory justification for non-recovery, in violation of IPRA" **was upheld.**

8. "Virden did not comply with Section 14-2-11(B)(1-3) NMSA 1978, "Procedure for Denied Requests: [sic -"] by providing "the requester with a written explanation of the denial" listing: "the records sought", "each person responsible for the denial," and "mailed to the person requesting the records within fifteen days after the request." Improper denial under Section 14-2-11(C) subjects the custodian to monetary damages" **was reversed and called proper by claiming IPRA's only requirement was a "timely" response within the fifteen (15) days stipulated. Thereby, IPRA's mandated compliance requirements and statutory damages under Section 14-2-11(C) were ablated - exceeding *Faber v. King* itself. (Opinion ¶¶ 2, 5, 7, 8, 16) And non-compliant records refusals were deemed subject only to proof of causing personal injury damage to whistleblower Cooper under Section 14-2-12(D). (Opinion ¶ 9). Cooper declared these contentions to be an outrageous misstatement of the IPRA statute, enabling fraudulent denial letters by mere "timely" response, removing of stated and justified statutory penalties against her Defendants wrongful and fraudulent records denial letters, and intentionally chilling whistleblowing.**

9. "In both the request and enforcement phases, Virden's records recovery refusal[s] have been misplaced and ignored IPRA by arguing that recovery pertains only to records in direct physical possession. Section 14-2-6(A) NMSA 1978 states enforcement custodial responsibility "regardless of whether the records are in that person's actual physical custody and control." Section 14-2-6(F) NMSA 1978 repeats that "public records" can be held "on behalf of any public body." *Toomey v. Truth or Consequences,* N.M. Ct. Ap. No. 30,795, P.4. (2012) clearly stated "public agencies must produce all record[s], even those held by or created by a private entity 'on behalf of' the public agency.["] The DNA records of Lee and Orchid Cellmark were held on behalf of Lincoln Sheriff's Office by Lee and Orchid Cellmark, and are intrinsic to solving its Pat Garrett murder Case 2003-274" **was upheld.**

10. "Virden was obligated to recover records from it [sic- his] deputy agents. *Ronald A. Coco, Inc. v. St Paul's Methodist Church of Las Cruces, N.M., Inc.*, 78, N.M. 97, 99, 428 P.2d 636, 638 (1967), states, in part, 'Unquestionably, insofar as an agent's acts are with the agent's authority they are in legal contemplation of the acts of the principal' " **was upheld.**

11. "Ignorance of records existence was argued by Virden to refuse recovery. Ignorance is not an IPRA exception under Section 14-2-1(A)(1-8) NMSA 1978. Virden's lack or [sic - of] knowledge of records is disingenuous, since his deputies admitted to records possession, his Case 2003-274 file showed DNA investigations and recovery options, Lee responded to Virden and Lee had the record, and Orchid Cellmark responded to Virden that it had the records. Virden's questioning the existence of records burdens the requester with proof, contrary to the decision in *State of New Mexico ex Re.* [sic – *rel.*] *Newsome v. Alarid*, 90 N.M. 790, 568 P.2d 1236 (1977), which held that the burden is placed upon the custodian to justify why the records sought to be examined should not be furnished. See also, *City of Farmington v. The Daily Times*, 2009-NMCA-057, 146, N.M. 349, 210 P.3d 246" **was upheld.**

12. "Virden ignored Section 14-2-7(E)(5) NMSA 1978, "the responsibility of a public body to make available public records for inspection." Virden waited three (3) years into litigation to seek records, then did not actually try to recover them from Lee and Orchid Cellmark. To prevent stonewalling, IPRA has time based damages in NMSA Section 14-2-11. IPRA damage provisions are intended to encourage public entities' prompt compliance with records requests. *Derringer v. State*, 133 N.M. 721, 68 P.3rd 691 9(Ct. App. 2003)" **was upheld only as to Virden's IPRA violation being "egregious." (Opinion ¶ 10) Reversed was any "time based [penalty] damages in NMSA Section 14-2-11;" and reversed was that "IPRA damage provisions are intended to encourage public entities' prompt compliance with records requests. *Derringer v. State*, 133 N.M. 721, 68 P.3rd 691 9(Ct. App. 2003)." The only remedy allowed was for personal injury. (Opinion ¶ 9, 10) Cooper called this judicial sparing of her egregious violators by removal of IPRA's penalty-damages an outrage.**

13. "As public officials, under Section 14-2-5 NMSA 1978, Sullivan and Sederwall had to provide records as, 'an integral part of the routine duties of public officers and employees' **was upheld.**

14. "As commissioned deputies, under Section 13[sic - 14]-2-11(B)(2) NMSA 1978, along with Virden, they were 'responsible for the denial of records.' As Virden's deputies, they were his agents. 'A person may appoint an agent to do the same acts and achieve the same legal consequences by performing of an act as if he or she had acted personally.' 3 Am. Jur. 2d Agency Section 18, at 422 (2002). Section 4-41-9 NMSA 1978 states, 'The said deputies are hereby authorized to discharge all the duties which belong to the office of sheriff, that may be placed

under their charge by their principals, with the same effect as though they were executed by the respective sheriffs' " **was upheld.**

15. "Sullivan and Sederwall said they were hobbyists and the records were private property. Sullivan's and Sederwall's argument of being 'unsalaried reserve deputies' is irrelevant to the records responsibility, since 'an agent is a person who, by agreement with another called the principal, represents the principal in dealings with third persons or transacts some other business … for the principal, with or without compensation.' UJI 13-401, NMRA" **was upheld.**

16. "In their June 21, 2007 "Memorandum" to Virden, Sullivan and Sederwall admitted to having Case 2003-274 records, but called them private property, while at the same time resigning their public official positions as deputies. Furthermore, from 2010 to 2012, Sederwall offered Case 2003-274 records for sale on his own billythekidcase.com website" **was upheld.**

17. "After being court-ordered, Sederwall made a non-specific records request for Orchid Cellmark on February 3 [sic – 5], 2011; later admitting in his June 26, 2012 deposition, that he knew Calvin Ostler was the Orchid Cellmark client contact for getting records released" **was upheld.**

18. "In his June 26, 2012 deposition, Sederwall admitted to willful involvement in altering Lee reports by rewritings to remove the original law enforcement information in Lee's 'first' report sent to him as Lincoln County Deputy Sheriff. Section 14-2-6(F) NMSA 1978 defines "public records" as "all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, used, created, received, maintained or held by or on behalf of any pubic body and related to public business, whether or not the records are required by law to be created or maintained." The plain language implication is that the records are to be 'originals' of [sic – or] true "duplicates" of the original. Under Rule 11-1001(D) NMRA 1978, "an original of a writing is the writing itself. Rule 11-101(E) NMRA 1978 states 'a duplicate is a counterpart produced by the same impression as the original … which accurately reproduces the original.' Neither an 'original' nor a 'duplicate' report was presented, only altered records which do not comply with IPRA law" **was not contested as to forgeries' occurrence; but non-IPRA sanction by this Court was denied by calling it a not permissible punitive IPRA award. (Opinion ¶¶ 2, 11, 12, 16)**

19. "The Defendants' actions and/or inactions in responding to Plaintiff's IPRA requests are in violation of IPRA law and subject to sanctions" **was reversed, using *Faber v. King's* rewriting of IPRA "damages" as only for a personal injury claim, which Cooper lacked as a whistleblower. And non-IPRA sanctions for records forgery were renamed IPRA punitive damages to deny them also. (Opinion ¶¶ 2, 11, 12, 16) The resulting outcome of no penalty to the Defendants was called outrageous by Cooper.**

20. "Damages for enforcement of a denied request to inspect records are governed by Section 14-2-12(D) NMSA 1978, not Section 14-2-11(C) NMSA 1978. The statutory maximum per-day penalty of Section 14-2-11(C) NMSA 1978 does not create any standard for an amount of damages under Section 14-2-12 (D) NMSA 1978. *Faber v. King*, 2013-NMCA-080, 306 P.3d 519, cert. granted, 2013-NMCERT-007." **Though Cooper appealed based on errors of these contentions, since statutory penalty-damages are intended by IPRA and defined as per diem in Section 14-2-11(C) for award in Section 14-2-12(D); but her appeals were denied by use of *Faber v. King*, making these contentions upheld. (Opinion ¶ 2, 4)**

21. "Section 14-2-12(D) provides for damages, "which we hold must be somehow specified as to their true nature by the district court." *Faber v. King*, 2013-NMCA-080 {15}" **was upheld, by denial of Cooper's appeal that *Faber v. King* was irrelevant to her whistleblower case and was fatally flawed meriting overruling.**

22. "Punitive damages cannot be recovered in absence of compensatory or nominal damages. *Madrid v. Marquez*, 2001-NMCA-087 pp. 3, 131, N.M. 132, 33 P.3d 683" **was upheld under the "harm suffered" personal injury rewriting of IPRA "damages" by *Faber v. King.***

23. "UJI 13-1832, NMRA reads in part, 'Nominal damages are a trivial sum of money ... awarded to a party who has established right to recover, but has not established that she is entitled to compensatory damages' " **was upheld.**

24. "Plaintiff Cooper has established that she has a right to recover but has not established that she is entitled to compensatory damages and is awarded one thousand dollars ($1,000.00) as nominal damages against Defendants" **was upheld, with penalizing of Cooper for not having personal injury to claim "compensatory damages." (Opinion ¶ 11) Cooper called this an outrage, since she was barred from damages though a proper IPRA whistleblower, and since that improper hurdle functioned to spare her "egregious" violators their deserved penalty-damages.**

25. "UJI 13-1827, NMRA allows the award of punitive damages if the conduct of the Defendants is malicious, willful, reckless, wanton, or in bad faith" **was reversed by calling the non-IPRA sanction for records forgery an unacceptable "punitive damage" under IPRA. (Opinion ¶ ¶ 2, 11, 12, 16)**

26. "Defendants' conduct in not providing the requested records enumerated in Findings of Fact 10, is willful, wanton, and in bad faith" **was upheld.**

27. "Defendants' conduct in providing altered records as discussed in Findings of Facts 25, 26, and 29 and Conclusions of Law 18 is wanton, willful, and in bad

faith" **was not reversed as to occurrence of forgeries, but was deemed immune to District Court's monetary sanction.**

28. "Based on Defendants' conduct, Plaintiff Cooper is entitled to punitive damages in the amount of one hundred thousand dollars ($100,000.00) against Defendants" **was reversed to zero (0) by calling that non-IPRA sanction for non-IPRA crime of forgeries an IPRA punitive award which was not permissible.**

29. "Section 14-2-12(D) allows for an award of attorney's fees and costs" **was partially reversed by denying Cooper over half of her out-of-pocket costs by naming them "attorney fees" already paid to attorneys. (Opinion** ¶¶ 2, 13, 14, 15, 16**)**

30. "Plaintiff Cooper is awarded attorney's [sic – attorneys'] fees which have not been previously paid" **was reversed by claiming the attorneys were paid in settlement. (Opinion** ¶¶ 2, 15, 16**) Ignored was that Cooper was left out-of-pocket after paying her attorneys' their demanded costs, not fees.**

31. "Plaintiff Cooper is awarded her costs" **was partially reversed, in that Cooper was left with over half her out-of-pocket IPRA costs unpaid by being renamed "attorneys' fees." (Opinion** ¶¶ 2, 13, 14, 15, 16**)**

UPDATED JUDGMENT OF JUNE 4, 2014

In the Judgment of June 4, 2014, Cooper was declared the prevailing Plaintiff, and Defendants were ordered "to pay Plaintiff Cooper nominal damages under the Inspection of Public Records Act in the amount of one thousand ($1,000.00) ... punitive damages in the amount of one hundred thousand dollars ($100,000.00) ... attorney fees of ten thousand, nine hundred ninety four dollars and twenty eight cents ($10,994.28) ... costs of litigation totaling eight thousand, six hundred twenty nine dollars and fifty six cents ($8,629.56) ... [and] [i]nterest shall accrue at the rate of eight and three-quarters per cent (8.75%) per annum on the above sums from the date of filing of this judgment."

Reflecting appellate courts' decisions, Cooper's "Proposed Final Judgment" is as follows:

"PLAINTIFF COOPER'S PROPOSED FINAL JUDGMENT"

1. Final Judgment is ordered in favor of Plaintiff Cooper as set forth herein and following decisions by the New Mexico Court of Appeals and Supreme Courts.

2. Though the Defendants provided no proper letters for denying Cooper's requested records - giving no IPRA exception(s) not complying with IPRA's mandated content, and giving fraudulent reasons for records withholding – the Defendants are not to be considered in violation of IPRA, or to receive penalty, because their letters were delivered in "timely" fashion, and, as a whistleblower, Cooper had no personal injury from the improper letters.

3. Though the Defendants wrongfully withheld all requested and available public records, they are to receive no penalty under IPRA because the only "damages" available are for harm-suffered requesters, which whistleblower Cooper was not.

4. Though the Defendants forged records to dupe the Court, they get no penalty.

5. Defendants are ordered to pay Plaintiff Cooper "nominal damages" under the Inspection of Public Records Act in the amount of one thousand ($1,000.00), since whistleblower Cooper had no personal injury claim to qualify for "actual damages" from withheld records.

6. Defendants are ordered to pay Plaintiff Cooper's IPRA costs of eight thousand, six hundred twenty nine dollars and fifty six cents ($8,629.56), but not her costs billed to her by attorneys, as bring now named attorney fees and declared already paid to her attorneys.

7. Interest on Cooper's awards shall accrue at the rate of eight and three-quarters per cent (8.75%) per annum on the above sums from the date of filing of the Judgment of June 4, 2014.

8. Defendants have paid to Cooper eleven thousand seven hundred and two dollars and fifty-five cents ($11, 702.55).

9. The Final Judgment is now satisfied.

10. This satisfied judgment was contended by Cooper as unjustly penalizing her as a whistleblower by its reliance on *Faber v. King*, which she held was contrary to IPRA's statutory intent for whistleblowing, and for penalty-damages as a compliance goad; and resulted in unjust shielding of her egregiously violating Defendants from all penalty. Cooper further contended that removing all penalty from the Defendants for non-IPRA records forgeries was unjust.

_____

Judge George P. Eichwald

CONCLUSION

WHEREFORE, Plaintiff Cooper presents her proposed concluding documents for Case No. D-1329-CV-2007-01364 to District Court for disposition.

Respectfully submitted by hand delivery in Sandoval County District Court by

Gale Cooper 3/08/17

GALE COOPER
P.O. Box 328
Sandia Park, NM 87047
505-286-8483

CERTIFICATION

I, Gale Cooper, certify that the foregoing was hand-delivered by me to Sandoval County District Court on March 8, 2017, and will be hand-delivered to the following:

Judge George P. Eichwald
13th Judicial District Court,
County of Sandoval
P.O. Box 600
Bernalillo, NM 87004

Attorney Henry Narvaez
for Defendant-Appellee Rick Virden
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Attorney Desiree Gurulé *for Defendant-Appellee Steven M. Sederwall*
The Brown Law Firm
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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
MAR 23 2016

GALE COOPER,

Plaintiff-Appellant/Cross-Appellee,

v.

NO. 33,876

RICK VIRDEN, LINCOLN COUNTY SHERIFF and CUSTODIAN OF RECORDS; and STEVEN M. SEDERWALL, FORMER LINCOLN COUNTY DEPUTY SHERIFF,

Defendants-Appellees/Cross-Appellants.

APPEAL FROM THE DISTRICT COURT OF SANDOVAL COUNTY
George P. Eichwald, District Judge

Gale Cooper
Sandia Park, NM

Pro Se Appellant

Narvaez Law Firm, P.A.
Henry Narvaez
Carlos Sedillo
Albuquerque, NM

Brown Law Firm
Brown & Gurulé
Desiree D. Gurulé
Kevin Brown
Albuquerque, NM

for Appellees

EXHIBIT
Plaintiff-Appellant Gale Cooper
1

MEMORANDUM OPINION

VANZI, Judge.

{1} After seven years of litigation, Plaintiff Gale Cooper prevailed in her suit against officials affiliated with the Lincoln County Sheriff's Department (collectively, Defendants), alleging the unlawful withholding of public records related to the County's 2003-2005 investigation into whether Pat Garrett really killed William Bonney (commonly known as "Billy the Kid") on July 14, 1881. The district court applied the enforcement provisions of the New Mexico Inspection of Public Records Act (IPRA), NMSA 1978, §§ 14-2-1 to -12 (1947, as amended through 2013), and awarded nominal and punitive damages, costs, and "past attorney fees."

{2} Plaintiff argues, in essence, that the district court erred in failing to consider and award statutory per diem damages available under IPRA. Defendants dispute that contention, and they also cross-appeal, arguing that the existing punitive damage award is foreclosed by *Faber v. King*, 2015-NMSC-015, 348 P.3d 173, and that attorney fees are barred by the doctrine of accord and satisfaction. We agree with Defendants. All issues involving statutory and punitive damages have been resolved by *Faber*, which was decided after the district court issued its order. Attorney fees have already been settled. We vacate Plaintiff's award of punitive damages and attorney fees and affirm the district court's determination that statutory damages are

not available. Because this is a memorandum opinion and because the parties are familiar with the case, we reserve discussion of the facts for our analysis of the issues on appeal.

DISCUSSION

Standard of Review

{3} Interpretation of IPRA is a question of law that we review de novo. *Id.* ¶ 8. "We construe IPRA in light of its purpose and interpret it to mean what the Legislature intended it to mean, and to accomplish the ends sought to be accomplished by it." *Id.* (internal quotation marks and citation omitted). "[W]hen a party is challenging a legal conclusion, the standard of review is whether the law was correctly applied to the facts." *Sunwest Bank of Albuquerque, N.A. v. Colucci*, 1994-NMSC-027, ¶ 8, 117 N.M. 373, 872 P.2d 346.

Statutory Damages Are Not Available

{4} "State agencies are supposed to make their documents available to the public under [IPRA]." *Faber*, 2015-NMSC-015, ¶ 1. When an agency wrongfully denies a request for documents, Section 14-2-12(D) provides actual damages, costs, and reasonable attorney fees to any person who successfully enforces the provisions of IPRA in court. *Id.* Separate statutory damages are available under Section 14-2-11(C) when the agency does not adhere to denial procedures. *Faber*, 2015-NMSC-015, ¶ 12.

Damages under the two sections serve distinct purposes. Section 14-2-11(B)(3) ensures "prompt compliance" in apprising the requester of his or her request, and "Section 14-2-12 ensures that IPRA requests are not wrongfully denied." *Faber*, 2015-NMSC-015, ¶ 29.

{5} To meet the procedural requirements of Section 14-2-11, the custodian of records must provide the requester with a written explanation of the denial. Section 14-2-11(B) provides that:

> The written denial shall:
>
> (1) describe the records sought;
>
> (2) set forth the names and titles or positions of each person responsible for the denial; and
>
> (3) be delivered or mailed to the person requesting the records within fifteen days after the request for inspection was received.

In the event of noncompliance, the custodian is subject to statutory damages. Section 14-2-11(C) provides that:

> Damages shall:
>
> (1) be awarded if the failure to provide a timely explanation of denial is determined to be unreasonable;
>
> (2) not exceed one hundred dollars ($100) per day;
>
> (3) accrue from the day the public body is in noncompliance until a written denial is issued; and

(4) be payable from the funds of the public body.

"It is when the custodian fails to respond to a request or deliver a written explanation of the denial that the public entity is subject to Section 14-2-11 damages." *Faber*, 2015-NMSC-015, ¶ 16. When a timely denial letter is issued, but the request is wrongfully denied, recovery is limited to the remedies available under Section 14-2-12. *Faber*, 2015-NMSC-015, ¶¶ 29, 32. This construction of IPRA ensures that public entities are allowed to present their reasons—right or wrong—for nonproduction of documents without facing statutory per diem penalties that might otherwise accrue over several years of litigation. *Id.* ¶¶ 30, 34.

{6} The district court found that Plaintiff made requests for four categories of public records related to the Billy the Kid investigation undertaken by Defendant Rick Virden, who was the Lincoln County Sheriff after 2005, and Defendant Steve Sederwall, who was involved in the investigation as a sheriff's deputy since 2003. The County responded with letters denying those requests, but the district court found the denial letters to be "improper" and "without valid IPRA exceptions." The court then entered a conclusion of law that the letters did not comply with IPRA's procedural requirements for written denials set forth in Section 14-2-11(B), subjecting Virden, as the custodian of records, to monetary damages.

{7} But no damages were awarded under Section 14-2-11 for procedural violations. And in fact, there were no procedural violations. *See Bass Enters. Prod. Co. v. Mosaic Potash Carlsbad Inc.*, 2010-NMCA-065, ¶ 49, 148 N.M. 516, 238 P.3d 885 ("Upon review, we will not defer to the district court's conclusions of law."). The initial IPRA request for the first two categories of records was made to Sheriff Virden in a letter dated April 24, 2007. On behalf of Sheriff Virden, counsel for Lincoln County responded in writing three days later, denying the existence of both categories of records. The second request was made on May 9, 2007. Counsel for Lincoln County again promptly responded (in two days this time) on behalf of Sheriff Virden, denying the existence of all of the remaining requested records. Section 14-2-11 requires nothing more.

{8} That the denials were "improper" and "without valid IPRA exceptions[,]" as the district court found, does not mean that they were out of compliance with IPRA's procedural requirements. *See Faber*, 2015-NMSC-015, ¶ 16 ("It is when the custodian fails to respond to a request or deliver a written explanation of the denial that the public entity is subject to Section 14-2-11 damages."); *id.* ¶ 31 ("Section 14-2-11 ensures prompt compliance by allowing for statutory damages of up to $100 per day if a public body fails to timely respond to a records request."). Otherwise, every wrongful denial would be subject to Section 14-2-11's statutory damage provision,

and every public entity would face a penalty of up to one hundred dollars per day for asserting its reasons—right or wrong—for not producing records. That is precisely the construction of IPRA that is now foreclosed by *Faber*, 2015-NMSC-015, ¶¶ 29, 30, 34.

{9} Plaintiff's remedy for the wrongful denials of her records requests is entirely contained within Section 14-2-12. Plaintiff's related contention that the district court evinced bias in failing to award statutory damages is not well taken. *State v. Fernandez*, 1994-NMCA-056, ¶ 15, 117 N.M. 673, 875 P.2d 1104 ("Judicial bias must be personal and cannot be based on adverse rulings."). Plaintiff's argument that *Faber* is "fatally flawed" is better addressed to the Supreme Court in a petition for certiorari. *See State v. Manzanares*, 1983-NMSC-102, ¶ 3, 100 N.M. 621, 674 P.2d 511 (stating that the Court of Appeals is governed by the precedents of the New Mexico Supreme Court).

Punitive Damages Are Not Available

{10} Defendants acted egregiously in this case. The district court found that Sheriff Virden feigned ignorance about the existence of the requested records, and Deputy Sederwall resigned from his post, declaring that the records were "private property," which he offered for sale on his website. Defendants made minimal effort to comply with IPRA, even after being ordered by the court to do so. Deputy Sederwall was

"wilful[ly]" involved in altering requested reports to remove law enforcement information.

{11} Since Plaintiff did not prove compensatory damages, which are recoverable under Section 14-2-12(D), the district court awarded nominal damages of $1000 and punitive damages of $100,000 for conduct that was willful, wanton, and in bad faith. Our Supreme Court subsequently decided *Faber*, holding that "Section 14-2-12 does not authorize punitive damages." *Faber*, 2015-NMSC-015, ¶ 26.

{12} On appeal, Plaintiff characterizes the $100,000 damage award as involving contempt damages, discovery sanctions, or "non-IPRA" penalties associated with the litigation itself. The record does not support that characterization. The court's order awarding damages states that the "case at hand" is for "enforcement of IPRA." Defendants' "actions and/or inactions in responding to Plaintiff's IPRA requests," the order states "are in violation of IPRA law and subject to sanctions." The order expressly awards nominal and punitive damages pursuant to IPRA's enforcement provision, Section 14-2-12(D), relying on the apparent availability of those damages after our opinion in *Faber v. King*, 2013-NMCA-080, ¶ 17, 306 P.3d 519, which was later reversed. *See Faber*, 2015-NMSC-015, ¶ 41. Punitive damages that were unquestionably awarded for enforcement of IPRA must be vacated. *See id.* ¶ 26.

Attorney Fees Were Already Settled

{13} Plaintiff, who is now *pro se*, was represented by several attorneys before the district court. She does not dispute that claims for attorney fees payable to Martin Threet, John Tiwald, and William Riordan were resolved in court-ordered mediation on March 26, 2013. She was a party to that settlement agreement. Plaintiff's cost affidavit, filed on May 23, 2014, characterized retainer and other payments to those same attorneys as "costs," totaling $10,994.28. The district court ultimately awarded that amount as "past attorney fees" over Defendants' objection.

{14} "[A] release given by one party pursuant to a settlement with a second party constitutes an accord and satisfaction of all claims between the two parties arising out of the incident giving rise to the liability, absent an express reservation of rights by the settling party." *Vidal v. Am. Gen. Cos.*, 1990-NMSC-003, ¶ 13, 109 N.M. 320, 785 P.2d 231. Plaintiff has no quarrel with the doctrine of accord and satisfaction, but she argues that the district court erroneously labeled the award as attorney fees, which are barred by the settlement agreement, instead of costs, which were not settled—and are still available under Section 14-2-12(D). She asserts that costs, under IPRA, includes all out-of-pocket payments and all expenses of litigation, presumably including the "[c]osts for [a]ttorney[s]" that she submitted in her affidavit.

{15} We conclude that the district court correctly designated the $10,994.28 as attorney fees. The only error was in awarding them. Section 14-2-12(D) provides for both costs and reasonable attorney fees. We assume that the Legislature did not consider "[c]osts for attorney[s]" to be anything other than attorney fees, or else the fee provision of the statute would be meaningless, and the two damage provisions would be redundant. *State v. Javier M.*, 2001-NMSC-030, ¶ 32, 131 N.M. 1, 33 P.3d 1 ("[A] statute must be construed so that no part of the statute is rendered surplusage or superfluous." (internal quotation marks and citation omitted)). Pursuant to the settlement agreement, the award for "past attorney fees" is hereby set aside. Plaintiff's request for sanctions against Defendants' attorneys on the ground that the cross-appeal is frivolous is denied.

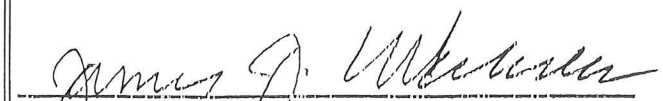
CONCLUSION

{16} We affirm the district court's determination that statutory damages are not available. We vacate the punitive damage and fee awards.

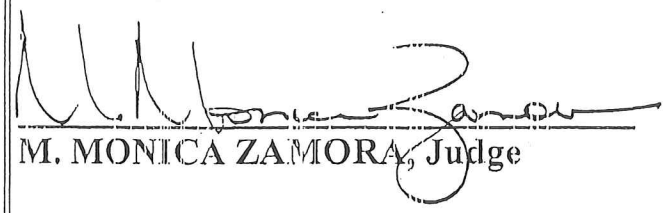
{17} **IT IS SO ORDERED.**

LINDA M. VANZI, Judge

WE CONCUR:



JAMES J. WECHSLER, Judge



M. MONICA ZAMORA, Judge