IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

GALE COOPER, *pro se*

Plaintiff-Appellant Petitioner

vs. No. S-1-SC-35844

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 Respondents.

ON APPEAL
FROM THIRTEENTH JUDICIAL DISTRICT COURT,
SANDOVAL COUNTY, NEW MEXICO
NO. D-1329-CV-2007-01364
HON. GEORGE P. EICHWALD, PRESIDING
AND
FROM COURT OF APPEALS NO. 33,876

PLAINTIFF-APPELLANT GALE COOPER'S PETITION FOR WRIT OF CERTIORARI

Gale Cooper
P.O. Box 328
Sandia Park, NM 87047
(505) 286-8483
Pro se Plaintiff-Appellant

SUPREME COURT OF NEW MEXICO
FILED

MAY 31 2016

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Complying with NMRA Rule 12-502(D)(1)(3), the body of this "Petition for Writ of Certiorari" contains 3,102 words (including footnotes), counted by Microsoft Word in Times New Roman in 14 point font, exclusive of parts excepted by NMRA Rule 12-502(D)(1)

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STANDARD OF REVIEW: The meaning of the language used in a statute is a question of law that the appellate court reviews de novo. *Cooper v. Chevron U.S.A., Inc,* 2002-NMSC-020, ¶ 16, 132 N.M. 382, 49 P.3d 61.

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Whistle-blower Gale Cooper (**"Cooper"**), *pro se* prevailing IPRA[1] Plaintiff, petitions her case of maximally violating Defendants spared penalties, as the ideal test for reconsidering *Faber v. King's*[2] rewritten IPRA damages as transforming statutory meaning to **I**gnoring of **P**ublic **R**ackets **A**ct.

I. DATES

Attached are Court of Appeals' March 23, 2016 "Memorandum Opinion" (**"Opinion"**); and District Court's May 15, 2014 "Findings of Fact and Conclusions of Law" and June 4, 2014 "Judgment."

II. QUESTIONS RAISED

Since 1993 - like in Billy the Kid's day - New Mexicans packed a big gun - The IPRA-12-Section - to get Bad-Guys' public records. Section 14-2-11 cocked for hiding records and faking excuse letters; giving Enforcer-Judges daily penalty-fines to cattle-prod hold-outs, then pay-out in Section 14-2-12 of penalty-fines, costs, and attorneys fees. But in 2015, the King gang rode in, rigging big guns to fire only if records-hiding hurt folks personally; and confiscated Enforcer-Judges' cattle-prod fines. So Bad-Guys won, leading to questions:

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[1] New Mexico Inspection of Public Records Act, NMSA 1978, Sections 14–2–1 to –12 (1947, as amended through 2013).

[2] *Faber v. King*, 2013-NMCA-080, 306 P.3d 519, *overruled by Faber v. King*, 2015-NMSC-015, 348 P.3d 172.

1. Whether this Court will affirm Cooper's justified penalty-damages by overruling *Faber v. King's* fatally flawed rewrite of legislative intent by misconstruing Section 14-2-11(A)(B)(C)'s penalty-damages and inserting Section 14-2-12(D) "actual damages;" thereby negating compliance goads for records turn-overs, subjecting courts to violators' stonewalling, and burdening taxpayers.

2. Whether this Court will grant Cooper's full Section 14-2-12(D) costs.

3. Whether this Court will affirm District Court's non-IPRA forgery penalty.

III. RELEVANT MATERIAL FACTS

PRESERVATION: In Court of Appeals briefing, Record Proper, and transcripts.

A. IPRA CASE

1. REQUEST PHASE: DNA records (**"the records"**) of Lincoln County Sheriff's Department Case 2003-274, "Billy the Kid Case," were requested by Cooper to save New Mexico's Old West history by exposing its forensic fraud alleging Pat Garrett murdered an innocent man, not the Kid. Four (4) categories were: (1) Dr. Henry Lee's (**"Lee"**) carpenter's bench samples of alleged Kid's blood (**"bench DNA"**); (2) Orchid Cellmark Labs' (**"Cellmark"**) DNA extractions of bench DNA; (3) Cellmark's DNA extractions from two (2) exhumed men; and (4) Cellmark's matched bench DNA to exhumed men's DNA. **(FOF 10)**

Requests were to Sheriff Rick Virden (**"Virden"**) and Deputy-agents, Tom Sullivan and Steve Sederwall (**"Deputies"**). Violation was total: improper

denial letters, lacking IPRA exceptions or mandatory information, falsely called records private hobby property; no requests were made to Lee or Cellmark; and no records were given (though available, as co-Plaintiff's 2012 subpoena proved).

2. ENFORCEMENT PHASE: Seven (7) year litigation had zero records turn-overs, wasted a half-million tax-dollars for defense fees (**BIC 37**), and stonewalled by: shell games about records possession; Virden lying that Case 2003-274's file had no records (until subpoenaed thick file proved "Contact List" for records); ignored court-ordered turn-overs; and no valid requests to Lee or Cellmark. Also, Lee reports were forged as hobbies to dupe the court (**FOF 29**); necessitating Cooper's hearings from 2011 to 2014 for non-IPRA sanctions.

In December 18, 2013 hearing, Cooper requested Section 14-2-11(A)(B)(C) penalty-damages of $966,000.00 ($100 per 2,415 days for improper denial letter and withheld four (4) record categories), Section 12-2-12(D) costs of $19,594.56 (attorneys settled on March 26, 2013), and non-IPRA forgery sanction.

3. DECISION: Cooper prevailed for "improper denial letter under "Section 14-2-11(B)(1-3)" (**COL 8**) and "not [getting] requested records" (**FOF 18**), and non-IPRA "punitive damages" for forgery (**COL 25, 27**); receiving:

a. Zero IPRA award for improper denial letters;

b. $1,000.00 "nominal damages" award for zero records turn-over (for not claiming resulting personal injury under *Faber v. King*) (**COL 24**);

c. $8,629.56 costs award and $10,994.28 "past attorney's fees ... not .. previously paid" award (**COL 30, 31; Judgment 5, 6**); and

d. $100,000.00 non-IPRA forgery "punitive damages." (**Judgment 4**).

4. APPEALS: Cooper's for IPRA awards; Defendants' for forgery sanction.

B. COURT OF APPEALS DECISION ("OPINION")

OVERVIEW: Agreeing "Defendants acted egregiously" (**¶ 10**), Opinion voided more penalties:

> "We affirm the district court's determination that statutory damages are not available. We vacate the punitive damage and fee awards." (**¶ 16**)

1. IMPROPER DENIAL LETTERS CALLED PROPER: Citing *Faber v. King*, letters were called proper solely as "timely" (**¶ 5**); concluding:

> "Otherwise, *every wrongful denial* would be subject to Section 14-2-11's statutory damage provision and *every public entity would face a penalty*." (**¶ 8**) (emphasis added)

OUTCOME: Improper denial letters were declared proper!

2. AFFIRMING "NOMINAL DAMAGES" FOR NO RECORDS: By applying *Faber v. King*, Cooper's lack of personal injury governed damages. (**¶ 9**)

OUTCOME: Defendants got $1,000.00 penalty instead of $966,000.00!

3. VOIDING NON-IPRA FORGERY SANCTION: Calling non-IPRA sanction an IPRA "punitive damage," it was voided as prohibited punitive damages (**¶ 11**); and the court record for non-IPRA sanction was ignored. (**¶ 12**)

OUTCOME: Defendants' got no penalty for forgery!

4. <u>DENYING FULL COSTS AWARD</u>: "Attorneys' fees" award was voided as "redundant" under past settlement. (**¶¶ 13-15**)

OUTCOME: Prevailing Cooper is left $10,994.28 out-of-pocket!

IV. ARGUMENT FOR RECONSIDERATIONS

<u>OVERVIEW</u>: At issue are Cooper's IPRA and non-IPRA awards, emphasizing *Faber v. King's* destructive and unsupportable impact on IPRA enforcement.

ASSERTION 1: *FABER V. KING* DISASTROUSLY IMPACTS PUBLIC RECORDS ACCESS, JUDICIAL RESOURCES, AND PUBLIC COFFERS

<u>OVERVIEW</u>: *Faber v. King's* imposed personal injury damages for full IPRA enforcement awarding negates intended, universal, records access empowerment.

A. <u>ENDING UNIVERSAL APPLICABILITY</u>: Twelve-sectioned since 1993,[3] IPRA's "*intent of the legislature*" is giving "*all persons*" public "information" (Section 14-2-5) as "*fundamental right*"[4] by enforcement remedies for "*any person*" wrongfully denied. (Sections 14-2-11 and 14-2-12) Contradictory *Faber v. King* made a "harm-suffered" class as sole qualifiers for all remedies.

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[3] 1993 N.M. Laws, ch. 258, *Public Records - Inspection of Public Records Act*

[4] *State of New Mexico ex rel. Newsome v. Alarid,* 1977-NMSC-076, ¶ 34, 90 N.M. 790, 568 P.2d 1236.

B. ADDING REQUESTING REASON: Requesters cannot be burdened[5] to "state the reason for inspecting public records" (Section 14-2-8(C); and everyone gets "action to enforce" as a "person whose written request has been denied." (Section 14-2-12(A)(2)) Contradictory *Faber v. King* requires *personal injury proof* for full enforcement remedies against wrongful records withholders.

C. THWARTING WHISTLE-BLOWING: IPRA intends whistle-blower "private attorneys general[s]"[6] to check "public servants [for] honestly ... performing."[7] Contradictory *Faber v. King* blocks getting exposé records by blocking penalty-damages empowerment to non-harm-suffered requesters.

D. ENFORCEMENT'S FISCAL DRAIN: Removed compliance goad penalty-damages yield stonewalling fiscal drain on courts and taxpayers.

RECONSIDERATION: Altered enforcement scheme is deleterious to all.

ASSERTION II.
SECTION 14-2-11'S EXISTING PENALTY-DAMAGES FOR IMPROPER DENIAL LETTER *AND* WRONGFUL RECORDS WITHHOLDING CANNOT BE IGNORED

OVERVIEW: *Faber v. King* ignores Section 14-2-11's true enforcement scheme.

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[5] *City of Farmington v. The Daily Times,* 2009-NMCA-057, ¶ 13, 146 N.M. 349, 210 P.3D 246.

[6] *San Juan Agric. Water Users Ass'n, v. KNME-TV,* 2011–NMSC–011, ¶ 12, 150 N.M. 64, 257 P.3d 884

[7] *Newsome,* 1977-NMSC-076, ¶ 16, 90 N.M. 790, 568 P.2d 1236.

A. <u>IGNORED SINGLE ENFORCEMENT SCHEME</u>:

1. IPRA's stated sole purpose - sans personal injury - empowers Section 14-2-5's access of "all persons" to public records by Sections deterring non-compliance: 14-2-7(E)(5) orders custodians "to make available public records;" 14-2-8(A) notes "penalty" [for] "failure to respond;" 14-2-10 heralds "remedies … if the custodian does not permit the records to be inspected;" 14-2-11(A)(B)(1-3)(C)(1-4) mandates per day, graded, penalty-damages for "a written request ... that has not been permitted;" and 14-2-12(A)(2) guarantees enforcement "to any person ... denied and ... successful in a court action."

B. <u>IGNORED MEANING OF REQUEST "DEEMED DENIED</u>":

1. Section 14-2-11 triggers enforcement remedies. *Faber v. King* - as argued below - ignores its inclusion of withheld records to limit enforcement to denial letters. But Section 14-2-11(A) defines a request "deemed denied" as "a written request for inspection of public records that has not been permitted." Obviously, requester "has not been permitted" inspection by getting *no records to inspect* and/or *by a letter refusing inspection*. Refusal must be wrongful:

a. WRONGFUL TIMING: Compliance is in fifteen (15) days.

b. WRONGFUL LETTER: Refusing records needs Section 14-2-11(B)(1-3)'s "written explanation" - sole excuse being Section 14-2-1(A)(1-8)'s "Exceptions" - and mandated: "describe records sought" and name deniers.

Improper "explanation" is epitomized by Cooper's Defendants' lying letters.

c. WRONGFUL RECORDS WITHHOLDING: IPRA's core violation - refused records inspection - must be "determined to be unreasonable." (Section 14-2-11(C)(1))

C. IGNORED LANGUAGE, INTENT, AND PRECEDENT OF GRADED PENALTY-DAMAGES:

1. Requesters' sole power over records deniers is Section 14-2-11(C)(1-4)'s penalty-damage per day goad up to $100 for violators from lazy to malicious:

> "The legislature's punitive intent in imposing a cost for non-disclosure is evident." *Board of Comm'rs of Doña Ana County v. Las Cruces Sun-News*, 2003- NMCA-102, ¶ 29, 134, N.M. 238, 76 P.3d 36.

D. RECONSIDERATIONS:

1. AFFIRM MAXIMUM IMPROPER DENIAL LETTER AWARD:

a. District Court, confused by *Faber v. King*, called letters "improper" under Section 14-2-11(B)(1-3) and deserving "Section 14-2-11(C) ... monetary damages" (**COL 8**); but confined award to "Section 14-2-12(D)" as lacking "standard for an amount" - as if no award existed. (**COL 20**) In fact, *Faber v. King* upholds Section 14-2-11's statutory damages for letters (***Faber v. King* ¶¶ 4-10**), alleging only new standard for records denial. (***Faber v. King* ¶ 6**)

b. Opinion, likewise confused by *Faber v. King*, held letters as *proper* solely as "timely," opining sanctimoniously that otherwise "every wrongful denial" would elicit "a penalty" (**¶ 8**) - exactly IPRA's stated intent! In fact,

Faber v. King states correctly: "Section 14-2-11 ensures prompt compliance by allowing for statutory damages." (**Faber v. King ¶ 31**)

RECONSIDERATION: Cooper's Section 14-2-11 $966,000 penalty-damages award for improper denial letters should be affirmed as groundlessly denied.

2. <u>AFFIRM MAXIMUM PENALTY-DAMAGE AWARD FOR WRONGFULLY DENIED RECORDS</u>:

a. Undisputedly, Cooper's records were all wrongfully denied (**COL 9-16**) by "egregious" (**Opinion ¶ 10**), "willful, wanton, and in bad faith" withholding. (**COL 26**)

b. Applying only *Faber v. King's* Section 14-2-12(D) "actual damages," lower courts ignored Cooper's Section 14-2-11 statutory penalties.

RECONSIDERATION: Statutory penalty-damages of $966,000.00 should be affirmed; or full awarding should be remanded to District Court

ASSERTION III.
FABER V. KING IS IRRELEVANT TO COOPER, SO CANNOT IMPOSE SECTION 14-2-12(D) ACTUAL DAMAGES TO BLOCK HER SECTION 14-2-11 PENALTY-DAMAGE AWARD

<u>OVERVIEW</u>: IPRA's empowerment is universal; "harm-suffered" is irrelevant.

A. <u>STANDING</u>: Cooper's standing was solely "injury in fact" of denied public records triggering Section 14-2-11's enforcement remedy litigation.

B. <u>UNNECESSARY</u>: IPRA encompasses all requesters - including harm-suffered – for enforcement remedies for improper denials.

C. IRRELEVANT: *Faber v. King* is silent on the non-harm-suffered.

RECONSIDERATION: *Faber v. King's* irrelevancy to Cooper precludes applying its harm-suffered damages scheme to her.

ASSERTION IV.
DIVIDED AND CONFLICTED LOWER COURTS' AWARDS REFLECT *FABER V. KING'S* UNWORKABLE DAMAGES SCHEME

OVERVIEW: Applying "actual damages" blocked Cooper's correct awards.

A. CONTRADICTIONS:

1. Lower courts cited IPRA purpose of records access for all (**COL 1;** (**Opinion ¶ 4**), but put Cooper in harm-suffered class for awarding. (**COL 24**)

2. Lower courts' encountered *mandated* Section 14-2-12(D) damages award for all prevailing plaintiffs,[8] but *Faber v. King* restricted to harm-suffered.

B. JUDICIAL DIVISIVENESS:

1. Facing *Faber v. King's* indecipherable illogic, lower courts could neither award nor agree about Cooper's fraudulent denial letters.

C. ABSURDITY:

1. For awarding, lower courts felt compelled to rely on Cooper's lacking harm-suffered, rather than on penalizing egregious stonewalling violators.

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[8] *Derringer v. State,* 2003-NMCA-073, ¶ 10, 133 N.M. 721, 68 P.3d961.

2. Requesters, now burdened by unchecked stonewalling violators, would need life-extension to add personal injury litigation to prevail in IPRA.

RECONSIDERATION: *Faber v. King* makes IPRA "absurd or unreasonable [causing] injustice or contradiction;"[9] rendering it useless.

ASSERTION V.
FABER V. KING IS INAPPLICABLE TO ALL AS FATALLY FLAWED AND REQUIRING OVERRULING

OVERVIEW: *Faber v. King* Decision's **("Decision")** judicial rewrite of IPRA's penalty-damages as "actual damages" is fatally flawed by improper statutory interpretation, destruction of statutory intent, fallacious argument, fiscal burdening of courts and taxpayers, and usurpation of legislative power to write statutes.

A. OVERRULING IS PROPER:

1. A *Faber v. King* meets this Court's overruling factor as: "precedent ... so unworkable as to be intolerable ... [And if that] past decision is wrong, [this] Court has not hesitated to overrule even recent precedent."[10]

B. INTERPRETATION CONSTRAINT WAS VIOLATED:

1. IPRA's language *and intent* to empower public records access for all is violated by inserting a harm-suffered class as sole qualifiers for full damages:

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[9] *N.M. State Bd. of Educ. v. Bd. of Educ.,* 95 N.M. 588, 591, 624 P.2d 530, 533 (1981)).

[10] *State v. Pieri,* 2009–NMSC–019, ¶ 21, 146 N.M. 155, 207 P.3d 1132.

"In ascertaining legislative intent, we look not only to the language used in the statute, but also to the object sought to be accomplished and the wrong to be remedied." *Patterson v. Globe Am. Cas. Co.*, 1984-NMCA-076, ¶ 7, 101 N.M. 541, 685 P.2d 396.

2. Reading IPRA's sections as a whole to construe intent is violated by switching Section 14-2-12(D)'s penalty-damages to alien "actual damages."

"We should read the entire statute as a whole so that all the provisions will be considered in relation to one another." *New Mexico Pharm. Ass'n v. State,* 1987-NMSC-054, ¶ 8, 106 N.M. 73, 738 P.2d 1318.

3. Interpreting is not whimsical opining, as was "actual damages."

"A statute must be read and given effect as it is written by the Legislature, not as the court may think it should be or would have been written." *Burch v. Foy,* 62 N.M. 219, 223, 308 P.2d 199, 202 (1957).

C. <u>STATUTORY LANGUAGE WAS MISREPRESENTED</u>:

1. Plain-meaning of penalty-damages as statutory remedies[11] is misrepresented as improper "punitive damages" against a "municipality" (¶¶ 21, 24); which also ignores its waived sovereign rights by Section 14-2-11(C)(4)'s awarding from public funds.

2. Wording in Section 14-2-11 is misrepresented as only for improper denial letters (¶¶ 14, 16) by omitting records withholding (as argued above).

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[11] *White Chevy*, 2002-NMSC-014, ¶ 11 , 132 N.M. 187, 46 P.3d 94

D. "ACTUAL DAMAGES" ARGUMENT IS FALLACIOUS:

1. Violating reading IPRA's Sections as whole, Decision fabricates *different* "damages" meanings:

> "[D]amages for enforcement of denied requests are governed by Section 14-2-12(D), not Section 14-2-11(C). (**¶ 1**)

2. Violating clear intent of penalty-damages as goad, "ambiguity" is fabricated as "damages' " meaning not being "construed ... by our courts" (**¶ 6**):

> "[W]hen a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *United Rentals Nw., Inc. v. Yearout Mech. Inc.*, 2010–NMSC–030, ¶ 9, 148 N.M. 426, 237 P.3d 728.

3. Fabricating legislative intent for two (2) kinds of "damages," IPRA's 1993 amendment is cited as "history" for separate "damages" in Sections 14-2-11 and 14-2-14. (**¶ 29**) In truth, that amendment is just 12-Section IPRA verbatim (before *Faber v. King* tampering) with identical penalty-damages first stipulated in Section 14-2-11, then awarded in Section 14-2-12.

4. Violating formal logic, Decision argues from its own false premise of two (2) "damages" to fabricate *separate* enforcement mechanisms for Sections 14-2-11 and 14-2-12. (**¶¶ 6, 11, 19, 29**)

5. From false premise of separate "mechanisms" is fabricated need for "separate remedies" (**¶ 12**) - as if legislators idiotically forgot to put remedy for IPRA's core violation of records withholding *anywhere*! (**¶¶ 15, 17**)

6. Circular reasoning localizes "damages" to Section 14-2-12(D) - severing them from Section 14-2-11's potent time-based graded penalty goads.

7. Whimsical opining then names Section 14-2-12(D)'s "damages" "actual damages;" thus reversing an intended pro-requester compliance goad to anti-requester burden of personal injury proof - with implicit pro-violator shielding from Section 14-2-11's penalty clout for all requesters (as Cooper's case proves).

E. RATIONALIZATIONS ARE INVALID:

1. Penalty-damage destruction is covered-up by: calling attorneys' fees award "punitive" goad (**¶ 32**) instead of civil rights enabling of litigation;[12] touting taxpayer benefit (**¶¶ 33, 34**) though stonewalling is tax-funded; misnaming getting records "compensation" (**¶ 31**) not "fundamental right;" and vilifying penalty-damages as "underserved profit" (**¶ 32**) by ignoring they are IPRA's intent.

F. UNSUBSTANTIATED CONCLUSION:

1. Naming "damages" "actual," and contending they do not "chill" litigation or "subvert compliance"(**Opinion ¶¶ 31, 41**) are fabrications.

G. ABUSE OF JUDICIAL POWER:

1. U.S. Constitution Framers' separated official powers into executive, legislative, and judicial prevent encroaching of one branch on another.[13]

---

[12] *Riddell v. Nat'l Democratic Party*, 624 F.2d 539, 543 (5th Cir. 1980).

[13] *Buckley v. Valeo,* 424 U.S. 1, 122, 96 S.Ct. 612, 684, 46 L.Ed.2d 659 (1976).

2. Legislative power to write statutes was usurped by IPRA's judicial rewrite, which constitutes *ultra vires* abuse of power, invalidating *Faber v. King*.

RECONSIDERATION: Overruling *Faber v. King* is justified.

ASSERTION VI.
ALL PREVAILING PLAINTIFFS SHOULD BE AWARDED SECTION 14-2-12(D) COSTS

A. Cooper's $19,594.56 out-of-pocket costs were divided into District Court's costs and unpaid attorney's fees awards. (**COL 30, 31**)

B. Opinion voided $10,994.28 as redundant settled attorneys' fees, implying past attorneys' unethical double-billing from Cooper and then from settlement.

C. Section 14-2-12(D) mandates costs award; and 42 U.S.C. § 1988 states, "[P]rivate enforcement ... of civil rights [is encouraged] by providing recovery of all costs." (*Witherspoon v. Sielaff*, 507 F. Supp. 667, 669 (N.D. Ill. 1981). **RECONSIDERATION: Cooper requests affirming full costs award as $19,594.56, or as its District Court two-part payment.**

ASSERTION VII.
NON-IPRA AWARD FOR FORGERY SHOULD BE UPHELD

A. Holding Defendants' forgeries "wanton, willful, and in bad faith," District Court awarded Cooper $100,000 non-IPRA "punitive damages" under UJI 13-1827, NMRA. (**COL 18, 25, 27, 28; Judgment 4**)

B. Opinion voided award by misnaming it as IPRA award, while ignoring offence was non-IPRA forgery proved by the record. **(FOF 17, 19-23, 25-26, 29)**

C. Forgery is not under IPRA, being NMSA Section 30-16-10(A)(2)'s felony of "knowingly issuing ... a forged writing with intent to ... defraud." Even *Faber v. King* supports such "punitive" awards under "a court's inherent authority to 'control the parties and the litigation before it.' " (***Faber v. King* ¶ 32**)

RECONSIDERATION: Cooper requests affirming District Court's $100,000 award, or remanding to District Court for clarified awarding.

ASSERTION VIII.
BROADER BASIS FOR GRANTING WRIT

A. UNDER U.S. CONSTITUTION:

1. DUE PROCESS: U.S. Constitutional Amendments V and XIV, Section 1, protect "due process." *Faber V. King's* repression of IPRA enforcement power will impede due process in all litigation needing public records.

2. ABUSE OF JUDICIAL POWER: (argued above)

B. CONFLICTING PAST N.M. SUPREME COURT DECISION:

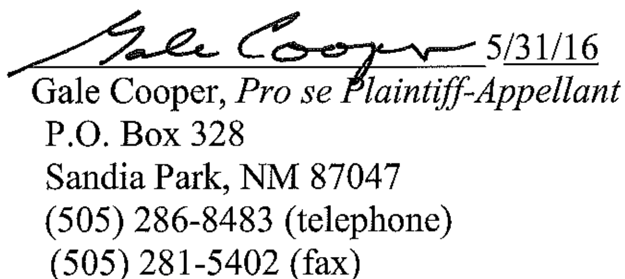
1. Contrary to *Faber v.* King, this Court prevented requester burden. *City of Farmington,* 2009-NMCA-057, ¶ 13, 146 N.M. 349, 210 P.3D 246.

C. PUBLIC INTEREST:

1. On this appeal rests New Mexicans' IPRA empowerment to access public records and to protect tax-money and judicial resources from its violators.

V. CONCLUSION

WHEREFORE, this Petition for Writ of Certiorari should be granted consideration as New Mexico's paramount civil and democratic rights case.



5/31/16

Gale Cooper, *Pro se Plaintiff-Appellant*
P.O. Box 328
Sandia Park, NM 87047
(505) 286-8483 (telephone)
(505) 281-5402 (fax)

CERTIFICATE OF SERVICE

I, Gale Cooper, hereby certify that the original foregoing document with six (6) copies was hand-delivered by me on May 31, 2016 to the New Mexico Supreme Court; and copies will be mailed to the following:

Attorney Henry Narvaez, *for Defendant-Appellee Rick Virden*
P.O. Box 25967
Albuquerque, NM 87125-5967

Attorney Desiree Gurulé, *for Defendant-Appellee Steven M. Sederwall*
Brown Law Firm
3777 The American Road NW
Suite 100
Albuquerque, NM 87114

Clerk of Sandoval District Court
P.O. Box 600
Bernalillo, NM 87004
USPS Certified Mail No.
7015-0640-0006-5160-1970

Judge George P. Eichwald
Sandoval District Court
P.O. Box 600
Bernalillo, NM 87004

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

1 **MEMORANDUM OPINION**

2 **VANZI, Judge.**

3 {1} After seven years of litigation, Plaintiff Gale Cooper prevailed in her suit
4 against officials affiliated with the Lincoln County Sheriff's Department (collectively,
5 Defendants), alleging the unlawful withholding of public records related to the
6 County's 2003-2005 investigation into whether Pat Garrett really killed William
7 Bonney (commonly known as "Billy the Kid") on July 14, 1881. The district court
8 applied the enforcement provisions of the New Mexico Inspection of Public Records
9 Act (IPRA), NMSA 1978, §§ 14-2-1 to -12 (1947, as amended through 2013), and
10 awarded nominal and punitive damages, costs, and "past attorney fees."

11 {2} Plaintiff argues, in essence, that the district court erred in failing to consider
12 and award statutory per diem damages available under IPRA. Defendants dispute that
13 contention, and they also cross-appeal, arguing that the existing punitive damage
14 award is foreclosed by *Faber v. King*, 2015-NMSC-015, 348 P.3d 173, and that
15 attorney fees are barred by the doctrine of accord and satisfaction. We agree with
16 Defendants. All issues involving statutory and punitive damages have been resolved
17 by *Faber*, which was decided after the district court issued its order. Attorney fees
18 have already been settled. We vacate Plaintiff's award of punitive damages and
19 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.

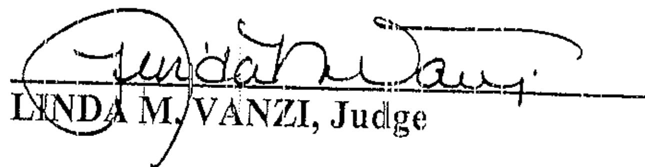
{14} "[A] release given by one party pursuant to a settlement with a second party constitutes an accord and satisfaction of all claims between the two parties arising out of the incident giving rise to the liability, absent an express reservation of rights by the settling party." *Vidal v. Am. Gen. Cos.*, 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.

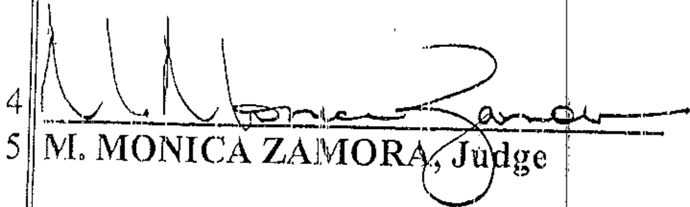
{17} **IT IS SO ORDERED.**



LINDA M. VANZI, Judge

1 WE CONCUR:

2
3 JAMES J. WECHSLER, Judge



4
5 M. MONICA ZAMORA, Judge

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THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF SANDOAL
STATE OF NEW MEXICO

GALE COOPER and DE BACA COUNTY NEWS,
a New Mexico Corporation,

Plaintiffs,

v. No. D-1329-CV-2007-1364

RICK VIRDEN, LINCOLN COUNTY SHERIFF and CUSTODIAN
OF THE RECORDS FOT THE LINCOLN COUNT SHERIFF'S OFFICE;
and STEVEN M. SETERWALL, FORMER LINCOLN COUNTY DEPUTY
SHERIFF; and THOMAS T. SULLIVAN, FORMER COUNT SHERIFF AND
AND FORMER LINCOLN COUNTY DEPUTY SHERIFF,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER OF THE COURT

All requested Findings of Fact and Conclusions of Law are denied except such as are herein incorporated by the Court.

FINDINGS OF FACT

1. This Court has jurisdiction over the parties and subject matter of this litigation.

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

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

4. The matter in controversy is for enforcement of the New Mexico Inspection of Public Act, Section 14-2-1 *et seq.* NMSA 1978(IRPA) 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").

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 the suspect Pat Garrett of murdering an innocent victim instead of Billy the Kid; with a sub-investigation of Billy the Kid's double homicide of Deputies James Bell and Robert Olinger.

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.

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 (herein after Orchid Cellmark) in Texas.

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 to match with Lee's bench DNA to solve the Garrett murder.

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.

10. From April 24, 2007 to June 26, 2007 Plaintiff Cooper made IRPA 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.

11. In the request phase, no records were given and their denials were improper: without

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valid IRPA 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 Case2004-274 records; and with Virden not attempting to recover records from Sullivan, Sederwall, Lee, or Orchid Cellmark.

12. The case at hand for enforcement of IRPA was filed on October 15, 2007.

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.

14. On September 3, 2007, 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.

15. In his September 8, 2008 deposition Virden denied knowledge of requested records.

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

17. On February 18, 2010 Sederwall turned over to the Plaintiffs an unrequested nine (9) page Lee report on courthouse floorboards. Its 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.

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

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.

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.

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").

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

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 fees which were granted.

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.

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.

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.

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

27. In his June27, 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.

28. Cooper challenged De Baca County News standing which the Court denied.

29. At an Evidentiary hearing conducted on December 21, 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, 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.

30. Court ordered mediation between Cooper and Defendants was unsuccessful.

CONCLUSIONS OF LAW

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."

2. Section 14-2-8(C) NMSA 1978 states, "No person requesting records shall be required to state the reason for inspecting records."

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3. Cooper's status as an author is irrelevant in requesting records under IRPA and is entitled to receive document which were requested.

4. Without statutory justification, no requested records were produced by the Defendants.

5. The requested records exist, and have been recoverable from the time of the request phase.

6. After De Baca County News' subpoena outside IRPA requirement, the requested Lee report and Orchid Cellmark DNA matchings remain unrecovered.

7. Section 14-2-5 NMSA 1978 states, " To provide persons 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.

8. Virden did not comply with Section 14-2-11(B)(1-3) NMSA 1978, "Procedure for Denied Requests" 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) NMSA 1978 subjects the custodian to monetary damages.

9. In both the request and enforcement phases, Virden's records recovery refusal 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 of Consequences*, N.M. CT. Ap. No. 30,795, P.4. (2012), clearly stated "public agencies must produce all record, 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.

10. Virden was obligated to recover records from it 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."

11. Ignorance of records existence was argued by Virden to refuse recovery. Ignorance is not an IRPA exception under Section 14-2-1(A) (1-8) NMSA 1978. Virden's lack or 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. 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.

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 961 9 (Ct. App. 2003).

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."

14. As commissioned deputies, under Section 13-2-11(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

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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 of 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."

15. Sullivan and Sederwall said they were hobbyists and the records were private property and the records were private property. Sullivan's and Sederwall's argument of being unsalaried "reserve deputies" is irrelevant to their 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.

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.

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

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 public body and related to public business, whether or not the records are required ty law to be created or maintained." The plain language implication is that the records are to be "originals" of true "duplicates" of an original. Under Rule 11-1001(D) NMRA 1978, "an original of a writing is the writing

itself. Rule 11-1001(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.

19. The Defendants' actions and/or inactions in responding to Plaintiff's IPRA requests are in violation of IPRA law and subject to sanctions.

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 Section14-2-12(D) NMSA 1978. *Faber v. King*, 2013-NMCA-080,306 P.3d 519, cert. granted, 2013-NMCERT-007.

21. Section 14-2-12(D) provides for damages "which we hold must be somehow specified as to their nature by the district court." *Faber v. King*, 2013-NMCA-080 (15).

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.

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

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.

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.

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

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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.

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.

29. Section 14-2-12(D) allows for the award of attorney's fees and costs.

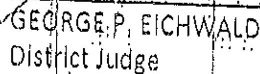
30. Plaintiff Cooper is awarded attorney's fees which have not been previously paid.

31. Plaintiff Cooper is awarded her costs.

ORDER

IT THEREFORE ORDERED Judgment be entered in favor of Plaintiff Cooper against Defendants as follows:

1. Nominal Damages in the amount of one thousand dollars ($1,000.00);
2. Punitive Damage in the amount of one hundred thousand dollars ($100,000.00);
3. Attorney's fees which have not been previously paid;
4. Plaintiff is awarded costs and shall provide the Court with an affidavit supporting her costs within ten(10) days of the filing of these Findings of Fact, Conclusions of Law and Order of the Court;
5. Interest shall accrue at the rate of 8.75 percent per annum commencing from the date of the filing of the Judgment in this matter.
6. Plaintiff shall prepare the Judgment reflecting the Court's decision , approved as to form by counsel for Defendants, within fifteen(15) of the filing of these Findings of Fact, Conclusion of Law and Order of the Court.



GEORGE P. EICHWALD
District Judge

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CHRISTAL BRADFORD
Ann Maxwell

STATE OF NEW MEXICO
COUNTY OF SANDOVAL
THIRTEENTH JUDICIAL DISTRICT COURT

GALE COOPER, et al.,
Plaintiffs,

v. D-1329-CV-2007-1364

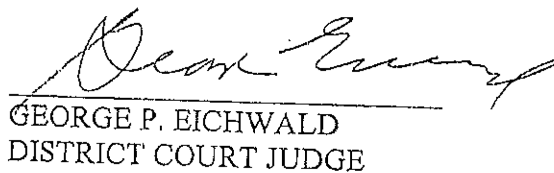
RICK VIRDEN, et al.,
Defendants.

JUDGMENT

THIS MATTER having been under consideration by the Court since October 15, 2007, and based on the Court's Findings of Fact and Conclusions of Law and Order of the Court filed May 15, 2014, the Court hereby orders Judgment be entered as follows:

1. All proposed findings of fact and conclusions of law are denied except those incorporated by the Court in its May 15, 2014 Findings of Fact and Conclusions of Law and Order of the Court.
2. Final Judgment is entered in favor of Plaintiff Gale Cooper as set forth herein.
3. Defendants are ordered to pay Plaintiff Cooper nominal damages under the Inspection of Public Records Act in the amount of one thousand dollars ($1,000.00).
4. Defendants are ordered to pay Plaintiff Cooper punitive damages in the amount of one hundred thousand dollars ($100,000.00).
5. Defendants are ordered to pay Plaintiff Cooper's past attorney fees of ten thousand, nine hundred ninety four dollars and twenty eight cents ($10,994.28).
6. Defendants are ordered to pay Plaintiff Cooper her costs of litigation totaling eight thousand, six hundred twenty nine dollars and fifty six cents ($8,629.56).

7. Interest shall accrue at the rate of eight and three-quarters per cent (8.75%) per annum on all the above sums from the date of filing of this Judgment.



GEORGE P. EICHWALD
DISTRICT COURT JUDGE

I certify that a copy of this Judgment was sent to all parties on 5-4-14 by electronic filing or U.S. Mail.