

STATE OF NEW MEXICO  
SECOND JUDICIAL DISTRICT COURT  
BERNALILLO COUNTY

ENDORSED  
FILED IN MY OFFICE THIS  
FEB 02 2018  
J. C. GAY  
CLERK DISTRICT COURT

DANIEL LIBIT,

Plaintiff,

v.

No. D-202-CV-2017-01620

THE UNIVERSITY OF NEW MEXICO  
FOUNDATION, INC., and THE BOARD  
OF REGENTS OF THE UNIVERSITY  
OF NEW MEXICO,

Defendants.

### **PLAINTIFF DANIEL LIBIT'S MOTION FOR SUMMARY JUDGMENT**

Pursuant to NMRA Rule 1-056, Plaintiff Daniel Libit moves for summary judgment on his IPRA<sup>1</sup> claims against the University of New Mexico Foundation ("Foundation") and Board of Regents of the University of New Mexico ("University"). The undisputed facts demonstrate that the Foundation is a public body whose records are subject to IPRA, or, if not a public body, the Foundation creates public documents on behalf of the University, which is a public body, and those documents are subject to disclosure under IPRA. The undisputed facts further show that the University possesses documents which are responsive to Libit's IPRA requests, and that those documents are public records that should be disclosed. Moreover, the University should be compelled to disclose unredacted copies of the documents it has already disclosed to the Plaintiff.

#### **I.**

#### **STATEMENT OF UNDISPUTED FACTS**

Because the University and its Foundation have claimed that the Foundation is a separate entity and not subject to IPRA, Plaintiff has had to conduct extensive discovery to establish the

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<sup>1</sup> New Mexico Inspection of Public Records Act, NMSA 1978, §§ 14-2-1 *et seq.*

nature of the relationship between the University and its Foundation. As Plaintiff will argue at the conclusion of his recitation of undisputed facts, the following exhaustive recitation of undisputed facts demonstrates beyond any reasonable question that the UNM Foundation is not even nominally independent of the University, is itself a creature of the University, and that its activities, personnel and assets are indistinguishable from and commingled with those of the University itself. Furthermore, even if there were any lingering questions about the relationship of the two entities such that the Foundation could assert some colorable “independence,” it engages in its activities and manages its assets for the benefit of, and pursuant to an agreement with the University. Under either scenario, as explained in the Argument section of this motion, the Foundation’s documents should be produced pursuant to an IPRA request under IPRA and New Mexico decisional law.

**A. Jurisdiction and Venue**

**Undisputed Fact No. 1:** This action is brought according to this Court’s original jurisdiction enumerated under Article IV, Section 13 of the New Mexico Constitution, and NMSA 1978 § 14-2-12, which authorizes actions to enforce IPRA.

**Undisputed Fact No. 2:** Venue is proper in the County of Bernalillo because the defendants are corporate and governmental entities with their principal place of business in Albuquerque, New Mexico. NMSA 1978 § 38-3-1(A).

**Undisputed Fact No. 3:** Venue is further proper in the County of Bernalillo because the transaction at dispute in this complaint, namely the Foundation’s rejection of an IPRA request, occurred in Albuquerque, New Mexico.

**B. The parties to this litigation.**

**Undisputed Fact No. 4:** Plaintiff Daniel Libit is a journalist who, among other journalistic activities, operates NMFishbowl.com, a website “that primarily covers the University

of New Mexico, its Athletic department – and the key figures who maintain it, support it, and are enriched by it.” *See* <https://nmfishbowl.com/about/> (last accessed January 31, 2018).

**Undisputed Fact No. 5:** Plaintiff has written for numerous national publications, including Politico, National Journal, Washington Post magazine, Esquire, the New Republic, and The New York Times, among others. Ex. A at 134.

**Undisputed Fact No. 6:** Libit is a resident of Cook County, Illinois but was born and raised in New Mexico. *Id.* at 5.

**Undisputed Fact No. 7:** Libit commonly requests documents under IPRA in the course of his reporting, including for NMFishbowl.com. *Id.* at 63-65

**Undisputed Fact No. 8:** Defendant University of New Mexico Foundation, Inc. is a 501(c)(3), tax-exempt corporation. Ex. B.

**Undisputed Fact No. 9:** The University of New Mexico Foundation was established by the Board of Regents of the University of New Mexico. Ex. C at 2.

**Undisputed Fact No. 10:** It is incorporated in New Mexico and its principal place of business is in Albuquerque, New Mexico. *See* Ex. B.

**Undisputed Fact No. 11:** The “sole purpose” of the foundation is “soliciting, receiving, distributing and managing private gifts and donations given for the benefit of the University.” Ex. A to the Complaint, at 1.

**Undisputed Fact No. 12:** Moreover, the Foundation is “the primary organization for overseeing the development, coordination and implementation of the fund-raising activities for the University.” *Id.*

**Undisputed Fact No. 13:** As such, the University of New Mexico Foundation is a component unit of the University of New Mexico. *See* Ex. D at 11, Ex. E at 7-8.

**Undisputed Fact No. 14:** Defendant Board of Regents of the University of New Mexico is a corporate, governmental body and political subdivision of the State of New Mexico, established pursuant to the laws of the State of New Mexico.

**Undisputed Fact No. 15:** It is the governing body of the University of New Mexico and the body that established and controls the University of New Mexico Foundation.

**Undisputed Fact No. 16:** When originally created, the University of New Mexico Foundation was housed completely within the University and staffed with University employees. *See* Ex. C to the Complaint.

**Undisputed Fact No. 17:** In 2008, the University spun off the Foundation into its current organizational structure, with a separate Board of Trustees and its own employees. *Id.*

**Undisputed Fact No. 18:** One of the explicit reasons for spinning off the Foundation was to avoid disclosing documents through IPRA. For example, the Foundation has advertised that the benefit to contributing money to the University via the Foundation was that the Foundation was not subject to IPRA. *See* Ex. E to the Complaint at 5 (quoting the Foundation website, which at one time stated that “it offers donors ‘[g]reater assurance of . . . confidentiality, since [it] is a separate not-for-profit corporation and not subject to open records laws.’”).

**Undisputed Fact No. 19:** After a story noting this statement in the Columbia Journalism Review was published, this statement was taken off the website.

**Undisputed Fact No. 20:** Despite this action, the Foundation is still created by and under control of the Board of Regents of the University of New Mexico. Ex. C at 2; Ex. F at 21 (“The University could make its decision not to have the Foundation anymore.”).

**C. Memorandum of Agreement between the University and Foundation**

**Undisputed Fact No. 21:** A memorandum of agreement, the most current of which was signed in 2008, governs the relationship between the University of New Mexico Foundation and the Board of Regents of the University of New Mexico. *See* Ex. A to the Complaint.

**Undisputed Fact No. 22:** The University and the Foundation are signatories to the Memorandum of Agreement. *Id.*

**Undisputed Fact No. 23:** Under that agreement, The President of the University of New Mexico serves as a voting member of the Foundation’s Board of Trustees, its Executive Committee, and its Committee on Trustees. *Id.* at ¶ 1.3.

**Undisputed Fact No. 24:** The Board of Trustees of the Foundation also includes two Deans of colleges at the University and a member of the Board of Regents. *Id.* at ¶ 1.3.2. *See also* Ex. Q.

**Undisputed Fact No. 25:** The President of the University plays a leading role in the administration of the Foundation. For example, “[t]he Foundation recognizes a lead role of the President of the University in hiring, evaluating, compensating and terminating the President of the Foundation, and the President of the University must be included in all facts of the work of the President of the Foundation.” *See* Ex. A to the Complaint, at ¶ 1.4.

**Undisputed Fact No. 26:** The President of the Foundation reports “primarily to the President of the University.” *Id.*

**Undisputed Fact No. 27:** The Foundation has been designated by the Board of Regents as the investment advisory committee that manages the University’s endowment. *Id.* at ¶ 2.1.

**Undisputed Fact No. 28:** In this role, the Foundation is a fiduciary to the University, performs the public, governmental function of managing the University’s endowment, and makes recommendations to the Board of Regents regarding management of the endowment. *Id.* at ¶ 2.2.

**Undisputed Fact No. 29:** At the same time, the Board of Regents “retains the authority to remove some or all of the University’s funds” from management by the Foundation and to revoke the Foundation’s authority to manage the endowment. *Id.*

**Undisputed Fact No. 30:** The Foundation maintains records “of all gifts and donations to the University and affiliated organizations.” Ex. A to the Complaint at ¶ 1.8.

**Undisputed Fact No. 31:** Those records detail the fundraising for state-created and -controlled higher education at the University, as carried out by public officials.

**Undisputed Fact No. 32:** The Foundation is expressly limited by the University in how it may spend the funds that it maintains. For example, the University must work with the Foundation to establish the procedures for transferring money between the Foundation and the University. Ex. A to the Complaint at ¶ 3.1.

**Undisputed Fact No. 33:** The Foundation may distribute money as compensation for a University employee or for the purchase of goods or services for the University only after the approval of the President of the University. *Id.* at ¶ 3.2.

**Undisputed Fact No. 34:** When carrying out its enumerated duties, the Foundation possesses “a non-exclusive license to use the name ‘the University of New Mexico’ and any other trademarks of the University in connections with its fund-raising activities.” *Id.* at ¶ 7.1.

**Undisputed Fact No. 35:** Based on this authority, the Foundation and University shared the same logo until the University of New Mexico recently changed it.

**Undisputed Fact No. 36:** While carrying out its fundraising responsibilities under the Memorandum of Agreement, the Foundation is raising money used by the University of New Mexico to support its programs, research, and expenses. Ex. B at 1; Ex. C at 5.

**Undisputed Fact No. 37:** Without the money raised by the University of New Mexico Foundation, the University would either have to cut its budget, cut programmatic spending, or replace the money by raising funds itself. Ex. F at 20-21.

**D. University funding of Foundation.**

**Undisputed Fact No. 38:** The University provides the funding necessary for the Foundation to operate. *See* Ex. A to the Complaint, at ¶ 6.2.

**Undisputed Fact No. 39:** And “[t]he University, as it deems appropriate and as resources are available, may provide additional financial support to the Foundation for major fundraising campaigns.” *Id.* at ¶ 7.2.

**Undisputed Fact No. 40:** The Foundation has three sources of funding: 1) money given to it directly from the University; 2) fees received from managing the endowment; and 3) unrestricted donations it receives while fundraising on behalf of the University of New Mexico. Ex. E at 16.

**Undisputed Fact No. 41:** The direct funding the Foundation receives from the University accounts for approximately 40 percent of its annual operation budget. *Id.* at 78.

**Undisputed Fact No. 42:** This funding is derived from direct agreements between University departments and the Foundation as well as from a budget surcharge which is a percent contribution from each department operating similar to an excise tax. *See* Ex. D at 11-13; Ex. G.

**Undisputed Fact No. 43:** Currently the surcharge rate is one half of one percent of a Department’s budget. Ex. D at 11-13; Ex. G.

**Undisputed Fact No. 44:** For the 2015 fiscal year, the money received by the Foundation directly from the University equaled \$5,641,345. *See* Ex. H at 2.

**Undisputed Fact No. 45:** In the same fiscal year, the Foundation received a further \$7,131,715 from the University of New Mexico. *Id.*

**Undisputed Fact No. 46:** For the 2016 fiscal year, the Foundation received \$5,387,330 in cash support from the University. *Id.*

**Undisputed Fact No. 47:** The Foundation also receives operating expenses in the form of a fee it receives for managing the University's endowment funds. Ex. E at 76.

**Undisputed Fact No. 48:** In the 2016 fiscal year, the Foundation received \$2,663,363 in fees for managing the University's endowment funds. Ex. H at 2.

**Undisputed Fact No. 49:** The remainder of the Foundation's operating expenses are derived from interest on cash accounts and unrestricted donations to the Foundation, which are received on behalf of the University of New Mexico. Ex. E at 16.

**Undisputed Fact No. 50:** Interest on case accounts and unrestricted contributions equal roughly five percent of the Foundation's yearly operating budget. *Id.* at 78.

**E. Commingling of University and Foundation Funds.**

**Undisputed Fact No. 51:** The University of New Mexico and the University of New Mexico Foundation have money in the endowment fund which, for accounting purposes, they each assert title to. *Id.* at 17.

**Undisputed Fact No. 52:** For example, the University of New Mexico holds title to approximately half of the money contained in the University's endowment with the Foundation holding title to the other half. *Id.* at 14.



**Undisputed Fact No. 53:** The financial audit of the Foundation states that the funds of the University and the Foundation should be commingled. *See* Ex. C to the Complaint.

**Undisputed Fact No. 54:** Commingling also occurs in the daily operations of the University and the Foundation. For example, the University and the Foundation do not have a written policy for when University employees are to have the expenses of a fundraising activity reimbursed by the University or reimbursed by the Foundation. *See generally* Ex. J.

**Undisputed Fact No. 55:** Moreover, the New Mexico Office of the State Auditor determined, when auditing the University, that meals, alcohol, hotels, and fundraising trips such as a 2011 Athletic Department trip to Scotland were paid for by the University despite the fact that they should have been paid for by the Foundation. *Id.*

**Undisputed Fact No. 56:** The Foundation currently has an agreement with the University through which it can deposit checks that are made to the University of New Mexico instead of the University of New Mexico Foundation. Ex. E at 36.

**F. University oversight of the Foundation.**

**Undisputed Fact No. 57:** The University's oversight of the Foundation also establishes that it is subject to the exclusive control of the University.

**Undisputed Fact No. 58:** For example, the University occasionally audits the Foundation's operations at the direction of the Board of Regents's audit committee. *See* Ex. B to the Complaint.

**Undisputed Fact No. 59:** The 2015 financial statements of the Foundation, prepared by KPMG at the direction of the New Mexico State Auditor, state that the University of Mexico Foundation is "a component unit of the University of New Mexico." Ex. C to the Complaint.

**Undisputed Fact No. 60:** The Foundation is listed as a component unit of the University of New Mexico because the University recognizes the assets and revenue of the Foundation on its own financial audits. Ex. E at 7-8; Ex. D at 11.

**Undisputed Fact No. 61:** The Foundation provides a report on its activities to the Board of Regents of the University of New Mexico. *See* Ex. D to the Complaint.

**Undisputed Fact No. 62:** Foundation employees also play central roles on University committees that advise the Board of Regents of the University of New Mexico. For example, Foundation Vice President for University Development Larry Ryan serves on the Board of Regents Committee on Naming Facilities, Spaces, Endowments, and Programs. Ex. K at 69-70.

**G. Sharing employees among the University and the Foundation.**

**Undisputed Fact No. 63:** The Foundation receives the benefit of University employees working directly for the Foundation, but in such a scenario, those employees remain subject to the policies and procedures of the University. Ex. A to the Complaint at ¶ 6.1.

**Undisputed Fact No. 64:** Five current Foundation employees receive their salaries and benefits from the University of New Mexico. *See* Ex. Q at 2.

**Undisputed Fact No. 65:** The salaries of those employees are reimbursed by the University of New Mexico Foundation. *Id.*

**Undisputed Fact No. 66:** The benefits for those employees, however, are not reimbursed by the Foundation and the cost of those benefits are incurred by the University. *See* Ex. H at 1.

**Undisputed Fact No. 67:** Additional University employees appear on the Foundation's staff directory. Ex. E at 64; Ex. K at 7.

**Undisputed Fact No. 68:** The University of New Mexico has also entered into cost-sharing agreements with the University of New Mexico Foundation, through which the University of New Mexico pays a certain share of University of New Mexico Foundation employee salaries. Ex. E at 16, 54; Ex. I at 12-15.

**Undisputed Fact No. 69:** For example, in the Athletic Department, twenty-five percent of the salaries for the Foundation's employees that raise money for the Athletic Department is reimbursed by the Athletic Department itself. *See* Ex M.

**Undisputed Fact No. 70:** Moreover, the Foundation employees that raise money for the Athletic Department do so through a separate 501(c)(3) non-profit corporation called the Lobo Club. *See* Ex. I at 37-38; Ex K at 29-30, 32-33, 50-51.

**Undisputed Fact No. 71:** The Lobo Club's employees are the development officers employed by the University of New Mexico Foundation and support staff provided by the University of New Mexico Athletic Department. Ex. I at 39-40; Ex K at 50-51, 61.

**Undisputed Fact No. 72:** There are cost-sharing agreements for other University departments. For example, the Health Sciences Center and the Engineering Department have cost-sharing agreements through which those departments pay for a portion of Foundation employees' salaries. Ex. N; Ex. O.

**Undisputed Fact No. 73:** These cost sharing agreements are entered into because the University of New Mexico Foundation does not have the resources to pay the salaries for all the development officer positions requested by the University. *Id.* at 54. *See also* Ex. I at 12-15.

**Undisputed Fact No. 74:** Senior University officials receive benefits from the University of New Mexico Foundation. For example, the Foundation manages the President's

Fund, through which the President of the University of New Mexico receives benefits such as luxury boxes at sports games and tickets to community events. *See* Ex. E at 84-86.

**Undisputed Fact No. 75:** The former Athletic Director for the University of New Mexico, Paul Krebs, received benefits from the University of New Mexico Foundation, such as reimbursement for travel on fundraising events, free meals, and use of a courtesy car, among other things. Ex. I at 27, 36-37, 41.

**Undisputed Fact No. 76:** Approximately thirty individuals within the Athletic Department receive similar benefits, as do individuals employed by the University in other departments. Ex. K at 54-55.

**Undisputed Fact No. 77:** The University and the Foundation also intertwine supervision of Foundation employees. For example, development officers for a University department are supervised by Larry Ryan and by the Department head. *Id.* at 57-59.

**Undisputed Fact No. 78:** Mr. Ryan involves the University department heads in hiring and firing decisions of Foundation employees and includes University department head input as part of Foundation employee evaluations. *Id.*; *see also* Ex. I at 101-105.

**Undisputed Fact No. 79:** The same is true for Foundation Chief Financial Officer Rod Harder, who was interviewed by several University senior officers when he applied to be the Foundation's CFO. Ex. E at 26-27.

**Undisputed Fact No. 80:** University employees also provide unreimbursed services to the Foundation. For example, former University Athletic Director Paul Krebs would engage in fundraising services, which is normally the domain of the Foundation, without compensation or the Foundation reimbursing the University for his time. Ex. I at 27.

**H. The Foundation operates on University property.**

**Undisputed Fact No. 81:** The University of New Mexico Foundation's headquarters are currently located in a building owned by the University of New Mexico. Ex. C at 2-3.

**Undisputed Fact No. 82:** The Foundation rents the office space according to a lease entered into by the Foundation and the University. Ex. P.

**Undisputed Fact No. 83:** Because its office is located on University of New Mexico property, the Foundation receives services from the University of New Mexico such as security services from the University of New Mexico Police Department. Ex. L at 7; Ex. C at 4.

**Undisputed Fact No. 84:** Approximately twenty-two Foundation development officers and staffers are given courtesy office space within the University's campuses and buildings. Ex. Q at 2-3; Ex. F at 15.

**Undisputed Fact No. 85:** Those employees are given use of those offices free of charge. Ex. H at 1-2.

**Undisputed Fact No. 86:** Foundation employees are given ID badges for use at both the Foundation's headquarters and within the University of New Mexico's campuses, which are issued by the University of New Mexico's security office. Ex. L at 2-3; Ex. C at 5-6.

**I. The WisePies Naming Rights Agreement.**

**Undisputed Fact No. 87:** On December 1, 2014, the University of New Mexico announced that it had sold the naming rights to its basketball arena to WisePies Pizza & Salad.

**Undisputed Fact No. 88:** That arena, which is more commonly known as The Pit, is owned by the University of New Mexico. Ex. C at 11.

**Undisputed Fact No. 89:** The proceeds of the naming agreement were to be received by the Foundation. *See* Ex. H to the Complaint.

**Undisputed Fact No. 90:** According to the agreement, WisePies would pay the University \$5 million over ten years, with an escalating pay scale over the ten years, and in return the University's Basketball Arena, commonly known as The Pit, would be renamed WisePies Arena AKA The Pit. *Id.*

**Undisputed Fact No. 91:** The naming agreement originated with a conversation between University Athletic Director Paul Krebs and Steve Chavez, a representative of WisePies. Ex. I at 88.

**Undisputed Fact No. 92:** The naming agreement was negotiated by both University and Foundation employees. Ex. I at 88-90; Ex. L at 5; Ex. K at 68-69. 71-73; Ex. G to the Complaint.

**Undisputed Fact No. 93:** University employees and staff reviewed the Agreement before it was entered into by the Foundation and WisePies. Ex. L at 5.

**Undisputed Fact No. 94:** University employees and staff approved the agreement before it was entered into between the Foundation and WisePies. *Id.*

**Undisputed Fact No. 95:** Foundation President Henry Nemcik approved the agreement once it had been negotiated by the University and Wisepies. Ex. Q at 3.

**Undisputed Fact No. 96:** Both the University and Foundation oversaw the implementation of the agreement. *See* Ex. H to the Complaint; Ex. I at 92-93.

**Undisputed Fact No. 97:** Paul Krebs, a former senior University official, often physically received the payments made under the naming agreement and then transferred them to the Foundation. Ex. I at 92-93.

## **J. Plaintiff's IPRA Requests**

**Undisputed Fact No. 98:** On November 7, 2016, Plaintiff sent an IPRA request to the University requesting “All written communications, either sent or received by UNM Foundation’s Larry Ryan, transmitted between May 1, 2016 and the present date of this request, in which the following phrases, terms or words appear: ‘WisePies,’ ‘Wise,’ ‘Pies,’ ‘Steve Chavez,’ ‘gift,’ ‘naming.’ This includes emails in which Mr. Krebs is a third-party on an exchange. This request includes messages transmitted on UNM property, and/or through private electronic devices where the subject is discussing matters related to official UNM business.” Ex. N to the Complaint.

**Undisputed Fact No. 99:** The University denied this request on November 11, 2016, asserting that it “does not have the records” sought by the Plaintiff. *Id.*

**Undisputed Fact No. 100:** In the same letter denying the request, the University also suggested that the Plaintiff contact the “Foundation directly, which is a separate legal entity, for their consideration of your request.” *Id.*

**Undisputed Fact No. 101:** On November 14, 2016, Plaintiff sent an IPRA request to the Foundation requesting, among other things, “Any/all electronic correspondence, dated between Jan. 1, 2016 and the present moment of this request, to/from UNM Foundation’s Larry Ryan, in which the following words or terms appear: ‘WisePies’, ‘Wise’, ‘Pies,’ ‘Steve Chavez,’ ‘arena’, and/or ‘gift agreement’.” Ex. O to the Complaint.

**Undisputed Fact No. 102:** The Foundation does not have a custodian of records as required by IPRA. Therefore, the request was sent to Jennifer Kemp, Director of Communications for the Foundation. *Id.*

**Undisputed Fact No. 103:** The Foundation denied Plaintiff’s November 14th request on November 19, 2016. In doing so, the Foundation stated that it was a “501(c)(3) non-profit, non-

public entity and is therefore not subject to the Inspection of Public Records Act (IPRA).” Ex. P to the Complaint.

**Undisputed Fact No. 104:** On January 12, 2017, Plaintiff sent an IPRA request to the University requesting “a copy of the check(s), as well as any banking documentation – that relate to WisePies’ Pizza and Salad’s final naming rights payments of 2016. Pursuant to this request, I should note that Paul Krebs, UNM’s Athletic Director, told the Albuquerque Journal on Dec. 29, 2016, that he was planning to pick up the check from WisePies that day. This acknowledgement only served to further ratify the fact that the check payment was received in the course of public business being conducted by a public official at UNM. Therefore, *all documentation of payment* should be subject to a public records request.” Ex. Q to the complaint (emphasis added).

**Undisputed Fact No. 105:** On January 27, 2017, the University denied the request, stating that “[t]he University does not have the records” sought by the request. The University then directed Plaintiff to “contact the . . . Foundation directly.” *Id.*

**Undisputed Fact No. 106:** That same day, Plaintiff sent an IPRA request to the Foundation, requesting “any/all bank documentation related to the monies that WisePies gave to the UNM Foundation as part of its naming rights agreement for The Pit. This includes a copy of the checks themselves, and any deposit slips or bank documentation that indicates when such monies were deposited.” Ex. S to the Complaint.

**Undisputed Fact No. 107:** Because the Foundation does not have a custodian of records, the request was again sent to Jennifer Kemp. *See id.*

**Undisputed Fact No. 108:** On January 30, 2017, the Foundation denied this IPRA request, stating that “is a non-profit, non-public entity and is therefore not subject to [the] Inspection of Public Records Act (IPRA).” *Id.*



**Undisputed Fact No. 109:** On January 19, 2017, Plaintiff submitted an IPRA request to the University seeking the “[d]etailed operating expense report[s]” for the Dugout Club, Sixth Man Club, First Team Club, and the Lobo Club Unrestricted Fund. *See* Ex. T to the Complaint.

**Undisputed Fact No. 110:** On February 3, 2017, the University produced a set of documents responsive to this request. *See id.*

**Undisputed Fact No. 111:** Those expense reports included sections for each account detailing the gifts received into that account during the time period covering the report. The reports also had a field identifying donors, but redacted the identities of the donors. *See* Ex. U to the Complaint.

**Undisputed Fact No. 112:** The University then stated that the identities of the donors were redacted because the information was “collected and maintained by the University of New Mexico Foundation, a separate tax-exempt organization, and as a result, the redacted information is exempt from disclosure under the Inspection of Public Records Act § 14-2-1(A)(8) (“as otherwise provided by law”), specifically §6-5A-1(D) NMSA.” *See* Ex. V to the Complaint.

**K. Responsive documents not disclosed.**

**Undisputed Fact No. 113:** The University of New Mexico and the University of New Mexico Foundation engage in extensive document and information sharing. Ex. I at 95-98; *see generally* Ex. K.

**Undisputed Fact No. 114:** This information sharing includes the amount of money raised for University departments. Ex. I at 96-97

**Undisputed Fact No. 115:** The information also includes the identity of donors. Ex. I at 96-98; Ex. K at 14-15, 22.

**Undisputed Fact No. 116:** The Foundation grants certain University employees access to its donor database, which includes a comprehensive gift and donor history. Ex. K at 14-15, 22.

**Undisputed Fact No. 117:** Documents from unrelated requests show that the University produces Development Reports for individual donors, detailing the amount that donor gifted to UNM, the dates the gifts were received, and the programs supported by the gift. *See, e.g.*, Ex. R to the Complaint.

**Undisputed Fact No. 118:** The Athletic Department creates expense and budget reports, which include gifts received from donors for the time period covered by the report. Ex. U to the Complaint.

**Undisputed Fact No. 119:** These reports would include proof of payment made according to the WisePies gift agreement. *Id.*

**Undisputed Fact No. 120:** The Foundation also distributes to University Department chairs reports that include the donor information and gifts received for that department during a set time period. Ex. K at 27.

**Undisputed Fact No. 121:** Because the Foundation deposited the check, the Foundation possesses the documents requested by the Plaintiff. Ex. I at 94; Ex. K at 76-77.

**Undisputed Fact No. 122:** Employees of the Foundation and the University also engage in extensive communications. Ex. I at 95-98

**Undisputed Fact No. 123:** Those communications include discussion of gift agreements, donor identities, potential donors or gifts, and other fundraising activities engaged in by the Foundation and the University. *Id.*; *see also* Ex. K at 14-15

**Undisputed Fact No. 124:** Those communications also include communications between Larry Ryan and Paul Krebs related to the WisePies naming rights agreement. *See* Ex. I to the Complaint; Ex. K at 70-71

**Undisputed Fact No. 125:** Those communications also include communications between Foundation employees and University employees related to the WisePies gift agreement. Ex. K at 72-73, 74-75

## **II. LEGAL STANDARD FOR SUMMARY JUDGMENT**

Summary judgment is appropriate where “there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” Rule 1-056(C) NMRA. If the movant establishes that there are no material fact issues and that it is entitled to judgment as a matter of law, “the burden shifts to the non-movant to demonstrate the existence of specific evidentiary facts which would require trial on the merits.” *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 10, 148 N.M. 713, 242 P.3d 280. The non-movant cannot meet this burden with allegations or speculation but must present admissible evidence demonstrating the existence of a genuine issue of fact requiring trial. Rule 1-056(C), (E); *Romero*, 2010-NMSC-035, ¶ 10, 148 N.M. 713, 242 P.3d 280. If the non-movant fails to do so, “summary judgment . . . shall be entered against him.” Rule 1-056(E).

To defeat summary judgment, allegedly disputed facts must be material, meaning that they are necessary to ground the claim under the governing law and will affect the outcome of the case. *Romero*, 2010-NMSC-035, ¶ 11, 148 N.M. 713, 242 P.3d 280. “A dispute as to facts that are not material does not preclude summary judgment[.]” and summary judgment is proper although disputed factual issues remain. *Hansler v. Bass*, 1987-NMCA-106, ¶ 11, 106 N.M. 382, 743 P.2d 1031.

### III. LEGAL ARGUMENT

The New Mexico Inspection of Public Records Act (IPRA) seeks to ensure that the public receives “the greatest possible information regarding the affairs of government and the official acts of public officers and employees.” NMSA 1978 § 14-2-5. In that vein, IPRA mandates that “every person has a right to inspect public records,” *id.* at § 14-2-1(A), maintained by a “public body” in the State of New Mexico, *id.* at § 14-2-6(F). In this case, the University of New Mexico and the University of New Mexico Foundation have wrongfully denied the plaintiff’s requests to inspect documents under IPRA. Through this motion, the plaintiff asks this Court to declare that the Foundation is a public body that is subject to IPRA and that the Foundation maintains public records that are subject to disclosure by IPRA, order the Foundation and the University to turn over documents for inspection, without redactions, which are currently being withheld, and award him equitable relief and attorneys’ fees as a result of the Foundation’s and the University’s noncompliance with IPRA.

#### **A. The University of New Mexico Foundation is a public body that is subject to IPRA.**

Under IPRA, a public body is defined as “the executive, legislative and judicial branches of state and local governments and all advisory boards, commissions, committees, agencies or entities created by the constitution or any branch of government that receives any public funding, including political subdivisions, special taxing districts, school districts and institutions of higher learning.” NMSA 1978, § 14-2-6(F).<sup>2</sup> On the face of the statute, the University New Mexico Foundation, as an entity created by an institution of higher learning and acting for the exclusive benefit of the University, at the University’s direction, seems to inarguably be a public body

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<sup>2</sup> There is no dispute in this lawsuit that the University of New Mexico is a public body that is subject to IPRA’s requirements to disclose public records.

subject to IPRA. Nevertheless, New Mexico law applies a totality of the circumstances test when determining whether a private entity meets the definition of “public body” under IPRA. *State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, ¶ 22, 287 P.3d 364. This totality of the circumstances test is derived from two New Mexico Supreme Court Cases—*Raton Pub. Serv. Co. v. Hobbes*, 1966-NMSC-150, 76 N.M. 535, 417 P.2d 32, and *Mem’l Med. Ctr., Inc. v. Tatsch Const., Inc.*, 2000-NMSC-030, 129 N.M. 677, 12 P.3d 431. In those cases, the courts “considered when a private entity performs a public function such that it must comply with statutes generally governing only governmental agencies.” *Toomey*, 2012-NMCA-104, at ¶ 20. Thus, even if the Court were to determine that the Foundation is itself a private entity and not a public one, *Raton Public Service Company* and *Memorial Medical Center* provide guidance to courts in determining whether documents held by “private” entities are nevertheless subject to IPRA because of the relationship between a public entity and the private entity.

In *Raton Public Service Company*, the Supreme sought to determine whether a private corporation which operated the electric utility system in Raton, New Mexico was required to hold public meetings according to a statute requiring that “governing bodies of the state which are supported by public funds” “shall make all final decisions at meetings open to the public.” 1966-NMSC-150, at ¶¶ 1-3. In that case, the Raton Public Service Company contended that it was not a public board subject to the statute, and that it was not supported by public funds. *Id.* at ¶¶ 6-7, 12. The Supreme Court rejected that view, holding instead that the court’s “duty [was] to ascertain and declare the intention of the legislature, and to give effect to the legislative will as expressed in the laws.” *Id.* at ¶ 16. Thus, because the purpose of the statute “was to provide that governing bodies dealing with public funds be required to make decisions in the open where the interested

public could observe the action,” then “there is no reason to attempt to excuse [the Raton Public Service Company] from the operation of the act.” *Id.* at ¶ 16.

This rule was explained further in *Memorial Medical Center*. 200-NMSC-030. There, the issue was whether a non-profit corporation which leased a hospital from a government entity was a “political subdivision” for the purposes of the New Mexico Public Works Minimum Wage Act and the Procurement Code. *Id.* at ¶ 1. The court concluded that a non-profit corporation is a political subdivision if “under the totality of the circumstances the government entity is so intertwined with the private entity that the private entity has become an alter ego of the public entity.” *Id.* at ¶ 35. *See also Raton Pub. Serv. Co.*, 1966-NMSC-150 at ¶ 11 (“We would direct attention to other cases wherein the technical form has not been considered controlling, and where corporate instrumentalities for accomplishing public ends, whether governmental or proprietary, have been considered to be governmental agencies.”) (citation omitted). According to that test, courts look to nine factors to determine whether the private entity is an alter ego of the public body: 1) “government involvement in the promotion of the concept of a contract or project,” 2) “government participation in the funding of the project,” 3) “financial benefits inuring to a government entity,” 4) “the public purpose of the project,” 5) “continuing control over corporate governance, even if potential control,” 6) “continuing control over the current or final disposition of the assets that are or will be the product of the contract or project,” 7) “commingled public and private financing,” 8) “whether the activity of the private entity is conducted on publicly owned property,” and 9) “whether the private entity was created by a public entity.” *Mem’l Med. Ctr.*, 2000-NMSC-030 at ¶ 35, n. 2.

When applying this test, “no one factor is determinative, and all relevant factors need to be analyzed on a case-by-case basis.” *Toomey*, 2012-NMCA-104, at ¶ 22 (applying the totality of the

circumstances test under IPRA). Moreover, the test should be applied in a manner that “effectuates [IPRA’s] purpose, and courts should avoid narrow definitions that would defeat the intent of the legislature.” *Id.*; see also *Mem’l Medical Center*, 2000-NMSC-030, ¶ 35 (“When conducting this inquiry, courts must keep in mind that Legislature’s purpose in enacting the statutes.”). That intent is a “policy of open government,” favoring disclosure of records. *Rio Grande Sun v. Jemez Mountains Pub. Sch. Dist.*, 2012-NMCA-091, ¶ 9, 287 P.3d 318. See also *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 602 N.E.2d 1159, 1161 (“doubts as to the ‘public’ status of any entity should be resolved in favor of finding it subject to the disclosure statute”).

In this case, the relationship between the Foundation and the University is such that not *some*, but *all* factors are satisfied, establishing the Foundation as an alter ego of the University, and therefore as a public body. For example, the Foundation was created by the Board of Regents of the University of New Mexico. The University also provides the entirety of the Foundation’s operating expenses, either through direct support, fees from the University’s endowment funds, or from contributions that the Foundation raises on behalf of the University. Additionally, the operations of the Foundation inure to the University of New Mexico because the money raised or managed by the Foundation supports or funds University programs, research, or activities.

Moreover, an institution that fundraises on behalf of a public university is engaged in a public purpose. “The receipt and solicitation of gifts . . . is an indispensable function of any institution of higher learning.” *Toledo Blade Co.*, 602 N.E.2d at 1162. In fact, “[n]o one would dispute the significant legitimate public purpose served by government in establishing and supporting institutions of higher education. The University [of New Mexico] is a public institution and the solicitation and receipt of donations for the university, and keeping records of that activity, are government functions.” *Id.* at 1163.

The University also maintains control over the University of New Mexico Foundation. The Foundation's fundraising priorities are set by the University, the President of the University plays a leading role in the management of the Foundation, University employees are involved in the hiring, firing, and evaluation processes for employees of the Foundation, and the Board of Regents of the University of New Mexico is the ultimate arbiter of whether the Foundation exists. In other words, the Foundation was created by the Board of Regents of the University of New Mexico, it was spun off into its current corporate form by the Board of Regents, and the Foundation can be shuttered by the Board of Regents of the University of New Mexico.

The Foundation also lacks the ability to direct the disposition of its assets and the money it raises because the agreements between the University and the Foundation require that money raised by the Foundation be used to benefit the University of New Mexico. The University and the Foundation also commingle their funds, all of which are for the benefit of the public entity, either directly or indirectly. The Foundation operates from a hybrid of public funding received by the University and private financing received by the Foundation for the benefit of the University. Moreover, fundraising activities are occasionally paid for by the Foundation and occasionally paid for by the University with no policy for which organization pays the fundraising expenses. This financial arrangement even led to the New Mexico Office of the State Auditor determining that the University of New Mexico Athletic Department and the Foundation commingled funds in a manner that may violate state law.

Finally, the University of New Mexico Foundation operates on publicly owned property. The Foundation's main office space is housed in a building owned by the University of New Mexico. Additionally, many of the Foundation's development officers and fundraisers work in University office space provided by the University of New Mexico. The Foundation does not pay



for that office space. Thus, the totality of the circumstances based on the eight factors identified in *Memorial Medical Center* establish the Foundation as an alter ego of the University of New Mexico.

The fact that the University of New Mexico Foundation is separately incorporated and has its own Board of Trustees is not enough to overcome this conclusion. New Mexico law makes clear that “substance should prevail over form in order to effectuate the legislature’s intent.” *Mem’l Med. Ctr.*, 2000-NMSC-030, ¶ 34 (citing *Raton Pub. Serv. Co.*, 1966-NMSC-150, ¶ 11). Thus, because at its core the University of New Mexico Foundation is an alter ego of the University of New Mexico, it is subject to IPRA. NMSA 1978, §§ 14-2-1, *et seq.* The Foundation should be declared subject to IPRA and compelled to respond to Plaintiff’s IPRA requests.

**B. Other courts that have reviewed whether public university foundations are subject to public records laws confirm that the University of New Mexico Foundation is a public body subject to IPRA.**

That the University of New Mexico Foundation is a public body subject to IPRA is confirmed by decisions in other states that have reviewed whether public university foundations were subject to their respective public records laws. For example, in *Gannon v. Board of Regents of the State of Iowa*, 692 N.W.2d 31 (Iowa 2005), the Iowa Supreme Court addressed this issue and found, as is the case here, that the object of the Foundation was to “promote the welfare of ISU faculty, students, and alumni and to identify, cultivate, and solicit donors for the exclusive benefit of ISU.” *Id.* at 35. The Iowa State University Foundation, like the University of New Mexico Foundation, also included the President of the University and two members otherwise affiliated with the University or its Board of Regents on its Board of Directors. *Id.* The Iowa State University Foundation was also initially “staffed with ISU employees and located on the ISU campus” before beginning to operate with its own staff in off-campus facilities and performing services for the University according to an “elaborate ‘service agreement.’” *Id.* The University of

New Mexico Foundation has the same history, initially operating within the University before being spun off into a separate entity in 2008. Finally, like the University of New Mexico Foundation, the Iowa State University Foundation managed its own endowment funds as well as the University's endowment funds, engaged in regular reporting to the University, and was "permitted to use the ISU name [and] logo . . . ." *Id.* at 36. Based on these facts, the Iowa Supreme Court determined that the Iowa State University "Foundation [was] performing a government function," and therefore held that the "Foundation's records [were] subject to public disclosure." *Id.* at 39.

Similarly, in *State ex rel. Toledo Blade Co. v. University of Toledo Foundation*, 602 N.E.2d 1159 (Ohio 1992), the Supreme Court of Ohio concluded that the University of Toledo Foundation was a public entity subject to Ohio's public records law. Like the University of New Mexico Foundation and the Iowa State University Foundation, the University of Toledo Foundation was a successor to two other entities housed within and operated by the University of Toledo. *Id.* at 1162. Moreover, the University of Toledo Foundation's sole purpose was to "receive, hold, invest and administer property and to spend funds for the benefit of the university." *Id.* And like the University of New Mexico Foundation, employees of the University of Toledo Foundation that were previously employees of the University of Toledo continued to receive benefits which were paid for by the University of Toledo. *Id.* Therefore, because "[t]he University of Toledo is a public institution and the solicitation and receipt of donations for the university, and keeping records of that activity, are government functions," the Ohio Supreme Court determined that the University of Toledo Foundation was a public office within the meaning of Ohio's public records law. *Id.* at 1163.

In Kentucky and Pennsylvania, the results were the same. In *Frankfort Publishing Co., Inc. v. Kentucky State University Foundation*, 834 S.W.2d 681 (Ky. 1992), the Kentucky Supreme Court held that the Kentucky State University Foundation was subject to Kentucky’s open records statute because “it is the clear intent of the law to make public the records of all units of government by whatever title for public inspection.” And in *East Stroudsburg University Foundation v. Office of Open Records*, 995 A.2d 496 (Penn. 2010), the Commonwealth Court of Pennsylvania concluded that the Stroudsburg University Foundation was subject to Pennsylvania’s Right-to-Know Law because “all contracts that governmental entities entered into with private contractors necessarily carry out a ‘governmental function’—because the government always acts as the government.” Therefore, other states’ courts that have reviewed this issue regarding Foundations, with facts that are materially similar to this case, have determined that those public university foundations had an obligation to disclose public records for inspection, and the University of New Mexico Foundation should be declared a public body subject to IPRA.<sup>3</sup>

**C. Controlling law mandates that, regardless of its legal status, the University of New Mexico Foundation’s records be disclosed for inspection under IPRA.**

Regardless of its legal status as a private, non-profit corporation, New Mexico law mandates that records created and maintained by the University of New Mexico Foundation on behalf of the University of New Mexico must be disclosed if the Foundation is a “functional

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<sup>3</sup> While several states have also determined that certain public university foundations did not have to disclose records, those cases are easily distinguished from this one. For example, in *State Bd. of Accounts v. Indiana University Foundation*, 647 N.E.2d 342 (Ind. Ct. App. 1995), the Indiana University Foundation was not required to disclose its records to the State Board of Accounts, which audits public funds. But that lawsuit was brought under Indiana’s Board of Accounts statute rather than its Public Records Act. Additionally, in *State ex rel. Guste v. Nicholls College Foundation*, 592 So.2d 419, 420-21 (La. Ct. App. 1991), a public university foundation in Louisiana was determined to not be a public body because the plaintiff rested its case at trial without presenting evidence of “connections between the Foundation and Nicholls State University . . . .”

equivalent of a public agency.” *Toomey*, 2012-NMCA-104, at ¶ 23. Such an inquiry is nearly identical to the totality of the circumstances test used to determine whether the University of New Mexico Foundation is an alter ego of the University of New Mexico. This functional equivalent test looks to the following eight factors when considering whether a private contractor is acting on behalf of a public body when it creates and maintains records: 1) “the level of public funding,” 2) “commingling of funds,” 3) “whether the activity was conducted on publicly owned property,” 4) “whether the services contracted for are an integral part of the public agency’s chosen decision-making process,” 5) “whether the private entity is performing a governmental function or a function which the public agency otherwise would perform,” 6) “the extent of the public agency’s involvement with, regulation of, or control over the private entity,” 7) “whether the private entity was created by the public agency,” 8) “whether the public agency has a substantial financial interest in the private entity,” and 9) “for who[se] benefit the private entity is functioning.” *Id.* at ¶ 13 (citing *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So.2d 1029, 1031 (Fla. 1992)) (alteration in original).

As with the alter ego analysis, the University of New Mexico Foundation acts as the functional equivalent of the University of New Mexico. The University of New Mexico Foundation operates almost exclusively from funding received from public sources, with the remaining funding received from private donors contributing money for the benefit of the University. The Foundation and the University also commingle their funds, including the funds contained in the endowment that is managed by the Foundation. The Foundation’s activities are conducted on publicly owned property, including free office space for Foundation development staff that is provided within the University departments that those employees support. The activities of fundraising and providing financial support for a public institution of higher learning

are public functions, and the University maintains control over the Foundation because the Foundation is a creature of the Board of Regents of the University of New Mexico and the President of the University plays a leading role in the Foundation's activities. The University has a significant financial interest in the Foundation because the Foundation manages roughly \$400 million in endowment funds that benefit the University. And the University has admitted that if the Foundation did not exist, then the University would either need to find new funding sources or some programs would not be funded. Finally, there is no dispute that the Foundation exists to benefit the University as the sole purpose of the Foundation is to raise money in support of the University's activities.

Therefore, under this test, the University of New Mexico Foundation is acting "on behalf of" the University of New Mexico when carrying out its fundraising and endowment management responsibilities. "To allow [the University of New Mexico] to circumvent a citizen's right of access to records by contracting . . . would thwart the very purpose of IPRA and mark a significant departure from New Mexico's presumption of openness at the heart of our access law." *Toomey*, 2012-NMCA-104, ¶ 26. *See also Gannon*, 692 N.W.2d at 39 ("A government may not outsource one or more of its functions to a private corporation and thereby secret its doings from the public."). The University of New Mexico Foundation creates and maintains records on behalf of the University of New Mexico, and its records are subject to inspection according to IPRA.

**D. NMSA 1978 § 6-5A-1(D) is not a valid exception to IPRA.**

Defendants have asserted throughout this litigation that the University of New Mexico Foundation and any records it creates are exempted from IPRA according to NMSA 1978, § 6-5A-1(D). Whether Section 6-5A-1(D) serves as an exception to IPRA is an issue of first impression. The existence of an exception to IPRA that relieves a public entity from producing documents in response to an IPRA request must "be analyzed on a case-by-case basis." *Toomey*,

2012-NMCA-104, ¶ 22. “IPRA should be construed broadly to effectuate its purposes, and courts should avoid narrow definitions that would defeat the intent of the Legislature.” *Id.* (citing *Cox v. N.M. Dep’t of Pub. Safety*, 2010-NMCA-096, ¶ 5, 148 N.M. 934, 242 P.3d 501 (2010)). Because “access to information concerning the affairs of the government is a fundamental and necessary right of every person,” alleged exceptions to IPRA should be interpreted narrowly to effectuate the Act’s policy in favor of disclosure. *Id.* See also *Gannon*, 692 N.W.2d 31 at 38 (stating, when reviewing a similar open records law, that “[e]xceptions to the general rules of disclosure are to be narrowly construed”).

Defendants have invoked § 6-5A-1 as a basis for disposing of this case without further ado. But that section describes the requirements which public agencies must meet before they may accept funds from an organization created to provide support for the public agency. Defendants focus on Subsection D of that section of the statute which provides that “nothing in this section subjects an organization to the provisions of the Open Meetings Act” or that organization’s records to IPRA. NMSA 1978, § 6-5A-1(D). In other words, the statute states that a private entity that enters into a contract with a public agency doesn’t, by the fact of having done so, automatically subject its records to disclosure under IPRA. It does not provide that all documents created by the organization on behalf of the public agency, much less those in the possession of the public agency itself, are made exempt from disclosure.

This makes sense as a matter of policy. For example, the University of New Mexico’s Athletic Department may enter into an agreement with a non-profit alumni association through which the alumni association primarily provides funding to the Athletic Department. But the alumni association may also use money that it raises to hold community events or even raise money for a non-University program or charity. While the association may engage in behavior that would

deem its University-related fundraising subject to IPRA, § 6-5A-1(D) would protect records related to non-University activities from being disclosed under IPRA just because the association primarily provides financial support to the University. And that is different than this case, where despite entering into an agreement with the University under § 6-5A-1, the Foundation has engaged in behavior, which according to its governing documents may only be for the benefit of the University, that creates an independent obligation, separate from entering into the contract, to disclose public records.

Construing this statute through the lens of IPRA allows for the reasonable interpretation that the Foundation and the documents it produces on behalf of the University are not automatically exempt from IPRA merely because they enter into a contract governing the transfer of funds between the organizations. The mandate that IPRA be broadly construed and that any claimed exemption be narrowly tailored militates strongly in favor of an interpretation of § 6-5A-1(D) that does not find an unstated, sweeping exemption within it. *N.M. State Inv. Council v. Weinstein*, 2016-NMCA-069, ¶ 73, 382 P.3d 923 (2016); NMSA 1978, § 14-2-5 (“it is declared the public policy of this state, that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees”). Accordingly, the University of New Mexico Foundation and the University of New Mexico should be compelled to disclose records related to the University of New Mexico Foundation’s fundraising activities, and the University of New Mexico should be ordered to re-disclose the records which were improperly redacted free of such encumbrances.

**E. Libit possesses a common law right to inspect the documents in this case.**

IPRA provides a statutory *procedure* for vindicating the common law right of the public to access public records. “[T]he courts of this country recognize a general right to inspect and copy public records and documents.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978).

*See also Nowack v. Fuller*, 219 N.W. 749, 750 (Mich. 1928) (“There is no question as to the common-law right of people at large to inspect public documents and records.”). Generally, an individual seeking to enforce this common law right need only show that it is his “desire to keep a watchful eye on the working of public agencies” in order to inspect public records. *Id.* at 598. *See also Ferry v. Williams*, 41 N.J.L. 332, 336 (1879) (“It will justify his demand for inspection, if he may act in such suit as a representative of a common or public right.”). The rule is grounded in the English common law, which has long recognized the right to inspect public records. *See, e.g., Ferry*, 41 N.J.L. at 334-339 (discussing the English common law right to inspect public records).

This right is broad and includes general and financial information held by public entities. *See Palacios v. Corbett*, 172 S.W. 777, 781 (Tex. 1915) (“It has also been held in some cases that a writ will be awarded where . . . he shows that . . . it is important to the public interest for a general examination of the books and records to be had.”); *State ex rel. Welford v. Williams*, 75 S.W. 948, 958 (Tenn. 1903) (“The right rests, not only on the ground that the books are public books, but also on the same principle that authorizes a taxpayer . . . for the protection of the applicant and all other taxpayers from illegal burdens.”). For example, in *Casey v. McPhail*, 65 A.2d 657 (N.J. Sup. Ct. 1949), former Supreme Court Justice William Brennan, while serving as a Superior Court judge for the State of New Jersey, addressed the issue of whether a candidate for public office who sought a list of registered voters to determine whether any voter fraud had occurred had a common law right to inspect the City of Jersey City’s records. Justice Brennan concluded that the individual did have a common law right to inspect the city’s records to determine if any fraud had occurred because “[t]he general principle of the right of any citizen and taxpayer to inspect and have access to public records” was paramount. *Id.* at 660. And in *Nowack v. Fuller*, the Supreme Court of



Michigan held that the common law grants the “right to inspect the public records . . . to determine if the public money is being properly expended.” 219 N.W. at 751.

This action to obtain documents under IPRA should be read through the lens of these common law principles. It is well-established, as recognized by the Supreme Court of the United States, that individuals have a common law right to inspect documents for the public benefit. In this matter, the plaintiff, a journalist who reports on college Athletic, is seeking to inspect public records related to a matter of public interest, namely the receipt of money from a private company to pay debt service on a public building, in exchange for placing that private company’s name on a public building. Under the common law, there is no doubt that Libit would have access to such documents. *See Nowack*, 219 N.W. at 752 (“It is the plain duty of [a public entity] to exhibit . . . official records to any citizen . . . who desires to inspect them for any proper and lawful purpose.”). Therefore, since IPRA and other public records laws recognize and expand the right to inspect public documents, New Mexico law should be construed broadly in favor of disclosure, and the University of New Mexico and the University of New Mexico Foundation should be compelled to disclose the records sought in this lawsuit.

**F. The records sought through Libit’s IPRA requests are public records.**

IPRA defines a public record as

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

NMSA 1978, § 11-2-6(G). As discussed above, the University of New Mexico Foundation is a public body subject to IPRA, or, at minimum creates and maintains records on behalf of the University of New Mexico, a public body subject to IPRA. Those records include donor information, records related to fundraising on behalf of the University of New Mexico, records

related to the University of New Mexico's endowment funds, and records of communications between the University of New Mexico Foundation and the University of New Mexico related to fundraising activities and the management of the endowment. While the New Mexico courts have never determined whether such records relate to public business, out-of-state courts that have tackled this question have found that they are public records. *See, e.g., Toledo Blade Co.*, 602 N.E.2d at 1163 ("The University of Toledo is a public institution and the solicitation and receipt of donations for the university, *and keeping records of that activity*, are governmental functions.") (emphasis added); *Gannon*, 692 N.W.2d at 39 ("We agree . . . that the Foundation is performing a government function, and therefore . . . we hold the Foundation's records are subject to public disclosure."). Therefore, because the records sought through the plaintiff's IPRA requests fit into the category of documents, and are related to public business, they are public records and should be disclosed for inspection.

**G. The University and the Foundation possess the documents requested by Libit and should be compelled to disclose those documents for inspection.**

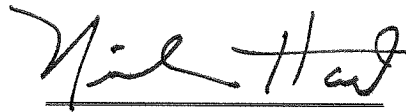
The University and the Foundation possess the documents that have been requested by the Plaintiff. There is no dispute that the University of New Mexico Foundation and the University of New Mexico engage in extensive document sharing. Nor is there a dispute that this document sharing includes the amount of money raised by the Foundation, the identity of donors, when gifts are received, and other information related to the Foundation's fundraising activities. And, there is no dispute that employees and officers of the Foundation and the University engage in extensive communications regarding these issues, including communications between Larry Ryan and Paul Krebs, as well as other Foundation and University employees, regarding the WisePies naming agreement. Therefore, because the University of New Mexico Foundation is subject to IPRA, because the records sought from both the Foundation and the University are public records, and

because those records exist, the Foundation and the University should be compelled to disclose for inspect the records requested by the plaintiff.

#### IV. CONCLUSION

The Court should grant Plaintiff Daniel Libit's motion for summary judgment and should order the University of New Mexico Foundation to comply with IPRA and order the University of New Mexico Foundation and the Board of Regents of the University of New Mexico to produce for inspection the records request by the Plaintiff.

Respectfully submitted,



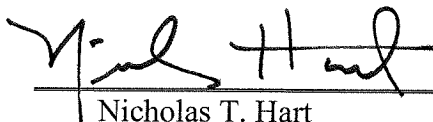
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I HEREBY certify that a copy of the foregoing was submitted to the NM Odyssey filing system on the 2nd day of February, 2018 and served via hand delivery on counsel for defendants:

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