STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

D-101-CV-2013-02328

Santa Fe Reporter Newspaper,
Plaintiff,

v.

Governor Susana Martinez,
Defendant.

Decision

This case involves claims by the Santa Fe Reporter ("Reporter) against the Governor concerning her Office's responses or failure to respond to requests for information from various members of the Reporter staff. The requests were in the form of emails or telephone calls or in the form of Inspection of Public Records Act ("IPRA")[1] requests.

I. Introduction

The Reporter is a weekly newspaper printed in Santa Fe. The Reporter also has an online presence that is updated daily. The Reporter describes itself as doing investigative reporting on issues often involving state government. It is the Reporter's position that because of its reporting critical of the Governor's administration that the Governor's Office has deliberately treated it adversely by

[1] NMSA 1978, § 14-2-1, *et seq.* (2011).

refusing to respond to inquiries either at all or in a timely fashion. On the other hand, the Governor takes the position that her Office has not treated the Reporter adversely or if they have it has been for legitimate reasons unrelated to the views espoused by the newspaper. The Court will analyze these claims in two separate sections. The first deals with the constitutional claim concerning allegations that freedom of the press has been abridged. The second deals with the IPRA requests.

In the Pretrial Order ("PTO") filed November 28, 2016, the parties stipulated to certain issues. Of help to understanding this decision are the stipulations regarding various people involved in this case. So as not to have to identify each person's role repeatedly throughout this Decision, the Court will adopted the following abbreviated descriptions from the Pretrial Order at pp. 25-27[2]"

1. **Plaintiff's Employees**. With respect to Plaintiff's editors and news staff:

    a. Alexa Schirtzinger was employed by Plaintiff until August 2013;

    b. Justin Horwath was employed by Plaintiff;

    c. Joey Peters was employed by Plaintiff:

    d. Julie Ann Grimm is currently employed as Plaintiff's editor and has occupied that position since Alexa Schirtzinger left it in August 2013. She has also served as Plaintiff's publisher since September 28, 2016.

[2] The Court has shortened the descriptions and does incorporate by reference the entire section of the PTO.

2. **Defendant's Employees**. With respect to the Office of the Governor's staff:

a. Enrique Knell was employed as the Office of the Governor's Communications Director from December 2012 until April 2015;

b. Chris Sanchez has been employed as the Office of the Governor's Communications Director since April 2015;

c. Pamela Cason was employed as a Legal Assistant with the Office of the Governor from March 14, 2011, until September 23, 2016. She served as the Office of the Governor's records custodian under IPRA during that period;

d. Scott Darnell was employed as the Office of the Governor's Communications Director from January 2011 to December 2012, and as the Office of the Governor's Deputy Chief of Staff from December 2012 until April 2016;

e. Keith Gardner has been employed as the Office of the Governor's Chief of Staff since January 2011.

II. First Amendment Right of Media Access to Information

The Count 2 constitutional issue in this case raises the right of a newspaper to have access to information from the government. The Reporter alleges that it has been denied access to information on account of its viewpoint. Before discussing

the facts as they relate to this issue, the Court will set out the law as it understands it to be.

A. **Discussion of First Amendment Law**

The Court begins with an illustrative quotation that discusses the importance of the issues raised by this case:

> Any question regarding infringement of First Amendment rights is of the utmost gravity and importance for it goes to the heart of the natural rights of citizens to impart and acquire information which is necessary for the well being of a free society. The predominant purpose of the grant of immunity to the press here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers of this country have shed more light on the affairs of this nation than any other instrumentality. Since an informed public is the most important of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The First and Fourteenth Amendments were intended to preclude congress and the States from adopting any form of restraint on printed publications, or their circulation, including those restraints which had theretofore been affected by means of censorship, license, and taxation, and from taking any governmental action which might prevent free and general discussion of public matters as seems essential to prepare the people for an intelligent exercise of their rights as citizens. *Grosjean v. American Free Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936).

New Times, Inc. v. Arizona Bd. of Regents, 110 Ariz. 367, 370–71, 519 P.2d 169, 172–73 (1974).

Both sides agree that federal cases interpreting the First Amendment apply, as there is no New Mexico controlling precedent that addresses the exact point raised by this case. Each side relies on cases it finds to be favorable to its respective position. The Court will endeavor to put the cases cited and others

found by the Court into a constitutional framework in order to explain the rationale for its ruling. This task is not easy as the cases seem to be conflicting.[3]

The Supreme Court has severely limited any right of access to information by the press. *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972), stated that there is no constitutional right of special access to information. The Court nevertheless recognized: "Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681-82. The Court, however, held that the right of the press to speak and publish does not imply an "unrestrained right to gather information[.]" *Id.* at 684.

Pell v. Procunier, 417 U.S. 817 (1974), held it violated the First Amendment to prohibit the press from interviewing specific inmates. *Id.* at 819. Nevertheless, the Court rejected any suggestion that "the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally." *Id.* at 834. *See also Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974).

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[3]One commentator described the law on the media's right to gather information as, "far from straightforward." Developments in the Law -- The Law of Media, IV. Viewpoint Discrimination and Media Access to Government Officials, 120 HARV. L. REV. 1019, 1020 (2007). As another commentator phrased it: "There are now multiple bodies of access law, none of which are internally settled or externally consistent with one another. As one circuit court remarked, judges confronted with a claim to access are now required to enter a "legal minefield" of conflicting and overlapping laws." Eugene Cerruti, "Dancing in the Courthouse": The First Amendment Right of Access Opens a New Round, 29 U. RICH. L. REV. 237, 263 (1995) (footnote omitted).

This same idea is found in Houchins v. KQED, Inc., 438 U.S. 1 (1978), which held that the media had no constitutional right of access to a county jail to interview inmates. *Id.* at 3. The Court found a difference between the right of the media to communicate information already obtained and any alleged constitutional obligation to supply the press with information or comply with demands for access. The Court stated that it had "never intimated a First Amendment guarantee of a right of access to all sources of information within government control." *Id.* at 9. The Court quoted Justice Stewart: "The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." *Id.* at 14 (quoting Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631, 636 (1975)). The outcome of these cases led some commentators to opine: "This claim of First Amendment-based access to government information had been so consistently and emphatically rejected by the Supreme Court that by the late 1970s, it was considered an all but dead letter." Cerruti, 29 U. RICH. L. REV. at 238.

Then the Court decided the seminal case which found some right of access in the realm of access to judicial proceedings. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the Court determined that the press and the public had the right to attend a criminal trial. *Id.* at 558. Justice Stewart developed a test

for access that has commonly been used by courts when deciding an access issue: 1) Whether there is an "enduring and vital tradition" of public access to the forum; and 2) "[W]hether access to a particular government process is important in terms of that very process." 448 U.S. at 589 (Brennan, J., concurring).[4]

There are no United States Supreme court cases that have extended a right of press access beyond judicial proceedings and documents. As one commentator noted:

> Several cases have held straightforwardly that the First Amendment right of access does not extend to government information outside the Judicial Branch. The seminal case that appears to find a First Amendment right of access to executive information involved the very narrow issue of a broadcaster's right to equal access to cover certain "limited coverage" events at the White House. . . .[I]t is a fair summary of the doctrine to state that the First Amendment right of access has been extended to almost every variety of legal proceeding or document, but it has not been so extended beyond the courthouse.

Cerruti, 29 U. RICH. L. REV. at 268–69 (footnotes omitted). As stated by one court faced with this issue:

> [I]t requires some straining of the text to construe the Amendment's explicit preclusion of government interference as conferring upon each citizen a presumptive right of access to any government-held information which may interest him or her. . . . It simply does not seem reasonable to suppose that the free speech clause would speak, as it does, solely to government interference if the drafters had thereby intended to create a right to know and a concomitant governmental duty to disclose.

[4] For other Supreme Court cases on access to judicial proceedings, see *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 598 (1982) (access to rape trials); *Press Enter. v. Superior Court*, 464 U.S. 501 (1984) (access to voir dire); *Press-Enterprise Co. v. Superior Court (II)*, 478 U.S. 1 (1986) (preliminary hearings).

Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1168 (3d Cir. 1986) (applying the two-part Stewart test and determining that there was no right of access in the situation before it).

While the Supreme Court has not further developed the law of media access to information, lower courts have advanced a number of rationales on which to analyze cases involving claims of press right to receive information. Generally, the state of the law has been described:

> The First Amendment does not "guarantee the public a right of access to information generated or controlled by government . . . . The Constitution does no more than assure the public and the press equal access once government has opened its doors." Therefore, although "news gathering is not without its First Amendment protections," the government is generally not obligated to provide access to the media.

120 HARV. L. REV. at 1020 (footnotes omitted).

One doctrine used to support claims of a media right of access is the equal protection clause.[5] As stated by the Ninth Circuit in a case involving alleged discriminatory enforcement of noise ordinances:

> To prevail on its claim under the equal protection clause of the Fourteenth Amendment, a plaintiff must demonstrate that enforcement had a discriminatory effect and the [government officials] were motivated by a discriminatory purpose. To establish a discriminatory effect ..., the claimant must show that similarly situated individuals ... were not prosecuted. To show discriminatory purpose, a plaintiff must establish that the decision-maker ... selected or reaffirmed a particular course of action at least in part

[5] It is cases from this line of analysis on which Defendant rely. *See, e.g., Rosenbaum v. City & County of San Francisco, 484 F.3d 1142, 1152–54 (9th Cir. 2007).* Defendant's cases, however, do not deal with press access to information, but rather they deal with time, place, and manner restrictions on speech and on selective enforcement of ordinances and criminal laws.

> 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.

Rosenbaum, 484 F.3d at 1152–53. The analysis to be applied under an equal protection claim would also require that Plaintiff identify a similar situated group to which Plaintiff could be compared. *Id.* at 1153. This Court does not believe that this analysis is the appropriate analysis to be used in deciding this case. First the Plaintiff did not bring an equal protection claim. Second the enforcement of a noise ordinance is factually distinguishable from the access to information cases.

Another analysis has its genesis in the Public Forum Doctrine cases that contrast time-place-manner restrictions with content-based restrictions. The former are upheld but the latter are prohibited because "the government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). In this analysis it is interesting to note that the Government has already determined that access is appropriate but has denied it in a particular instance because of the viewpoint of the person or entity to whom access is denied. *Id.* *See also Rosenberg v. Rectors & Visitors of University of Virginia*, 515 U.S. 819, 828, (1995), in which Justice Kennedy, writing for four of the Justices, opined that the University could not discriminate in its provision of funds to a student newspaper

based on its Christian viewpoint.[6]

Examples of cases applying this analysis include *McBride v. Vill. of Michiana*, 100 F.3d 457, 461-62 (6th Cir. 1996). In *McBride*, a reporter alleged that in retaliation for negative reporting, local government officials mistreated her in a number of ways, including ordering city employees not to speak with her and refusing to conduct meetings while she sat at the press table. The district court held that prohibiting her from sitting at a press table was actionable on First Amendment grounds, but the government efforts to prevent officials from communicating with her were not unconstitutional. The court found that "[p]ublic officials are under no constitutional obligation to speak to the press at all."

Similarly, in *Snyder v. Ringgold*, No. 97-1358, 1998 WL 13528 (4th Cir. Jan. 15, 1998), a reporter alleged discriminatory treatment by denying her access to information after she published an article that was not favored by the defendant police officer who was in charge of disseminating information to reporters. The Fourth Circuit held there was no constitutional right of nondiscriminatory access to

[6] In the Court's opinion, these cases and other cases cited by Plaintiff are not on point as they do not deal specifically with the provision of information to the press. While the cases cited by Plaintiff do have broad language about viewpoint discrimination, the fact that they arise in another context makes them unpersuasive. *See, e.g., OSU Student Alliance v. Ray*, 699 F.3d 1053, 1063 (9th Cir. 2012) (holding that the university could not remove an independent conservative student newspaper's distribution bins from campus unless the university regulated the placement of newsbins in a public forum according to established, content-neutral standards); *Child Evangelism Fellowship of Minnesota v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996, 1001 (8th Cir. 2012) (holding that excluding a Christian after school program from use of school facilities made available to secular after-school programs on the basis that the Christian program prayed is prohibited viewpoint discrimination).

information that the government has no obligation to make public. The court noted that "[n]o Supreme Court or Fourth Circuit case has held that reporters have" such a right. *Id.* at *3. The court recognized the right of reporters to get information generally available to the public but rejected any broad right of access because such a rule "would presumably preclude the common and widely accepted practice . . . of granting an exclusive interview to a particular reporter. And, it would preclude the equally widespread practice of public officials declining to speak to reporters whom they view as untrustworthy . . . ." *Id.* at *4 (footnote omitted). On remand, the district court held that the plaintiff's rights were not violated when she was denied interviews with government personnel. *Snyder v. Ringgold*, 40 F. Supp. 2d 714, 718 (D. Md. 1999). The court refused to extend any right of access to encompass preferential treatment because that "would completely change the longstanding relationship and understandings between journalists and public officials." *Id.*

In *Raycom Nat'l, Inc. v. Campbell*, 361 F. Supp. 2d 679, 681 (N.D. Ohio 2004), the mayor of Cleveland issued an order that no city employees were to talk with a certain TV station's personnel. The edict was issued after the station aired a story concerning police officers earning overtime for chauffeuring the mayor's family members. *Id*. The court ruled against the plaintiff. The court noted that the television station, instead of asserting denial of access to press conferences or press

releases, merely complained that it "no longer receiv[ed] interviews or statements off-the-record that it had been receiving." *Id.* at 683.

A similar result was reached in *Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410 (4th Cir. 2006). The Maryland Governor's press office directed staff not to speak with two Baltimore Sun reporters and not to comply with any of their requests for information. *Id.* at 413. The directive was issued based on a belief that the reporters were "failing to objectively report" on the administration. *Id.*[7] In holding these actions constitutional, the court observed that the reporters were still allowed to attend public press conferences and still received official press releases. *Id.* at 414. The Court characterized the reporters' request as seeking preferential information. *Id.* at 418 (finding the long-accepted scenario of preferential communications to a favored reporter to be "materially indistinguishable" from the practice challenged in the case). A similar sentiment had been voiced by the district court. *Baltimore Sun Co. v. Ehrlich*, 356 F. Supp. 2d 577, 582 (D. Md. 2005) (characterizing the plaintiff's position as seeking treatment "far beyond any citizen's reasonable expectations of access to his or her government"). The Fourth Circuit went so far as to state that reporters could be "denied access to discretionarily afforded information on account of their reporting." 437 F.3d at 418.

[7] The press office did, however, state its intention to comply with requests made pursuant to Maryland's Public Information Act "as legally required." *Id.* at 414 (internal quotation mark omitted).

In the same vain is *Youngstown Publishing Co. v. McKelvey*, No. 4:05 CV 00625, 2005 WL 1153996 (N.D. Ohio May 16, 2005), *vacated as moot*, 189 F. App'x 402 (6th Cir. 2006). The Mayor of Youngstown, Ohio, barred city officials from speaking with reporters from a newspaper that had published stories critical of the city government. *Id.* at *1. The district court stated the law to be as follows:

> The right of access sought by *The Business Journal* and impeded by the No-Comment Policy is the ability to conduct one-on-one interviews with and receive comments from City employees. Three courts, including a decision arising from this District, faced with similar facts have classified such interviews and comments as "information not otherwise available to the public." *See Raycom National, Inc. v. Campbell*, 361 F.Supp.2d 679 (N.D.Ohio 2004); *The Baltimore Sun Co. v. Ehrlich*, 356 F .Supp.2d 577 (D.Md.2005); *Snyder v. Ringgold*, 40 F.Supp.2d 714 (D.Md.1999) (*Snyder II*); *see also Snyder v. Ringgold*, No. 97-1358, 1998 WL 13528 (4th Cir. Jan. 15, 1998) (*Snyder I*). This set of cases concerns government officials who, in response to unflattering stories published and aired by the news media, instituted policies forbidding government employees from speaking to specific television and print journalists.

2005 WL 1153996, at *4. The court rejected the argument that such a right of access existed. The Court cited *Raycom*, *Baltimore Sun* and *Snyder I/Snyder II* decisions as drawing a "distinction between access to events and facilities opened to the press and access to one-on-one interviews and off-the-record comments." There is no constitutional right to the latter. 2005 WL 1153996, at *5.

There are a number of cases that have found a limited right of access. An examination of some of those cases, however, reveals their limitations. *See*, *e.g.*,

See United Teachers of Dade v. Stierheim, 213 F.Supp.2d 1368 (S.D.Fla.2002) (access to a press room); *ABC, Inc. v. Cuomo,* 570 F.2d 1080, 1083 (2nd Cir.1977) (access to post election activities at candidates' headquarters); *Westinghouse Broadcasting Co. v. Dukakis,* 409 F.Supp. 895 (D.Mass.1976) (access to city council meetings); *Borreca v. Fasi,* 369 F.Supp. 906, 907 (D.Haw.1974) (access to news conferences in mayor's office); *Telemundo of Los Angeles v. City of Los Angeles,* 283 F.Supp.2d 1095, 1102 (C.D.Cal.2003) (access to ceremony commemorating Mexican War). *See also Quad-City Community News Service, Inc. v. Jebens,* 334 F.Supp. 8, 13 (1971) (recognizing that while "[t]here is no constitutional right of a newspaper to unrestrained gathering of news[,]" plaintiff, an underground newspaper, had a right to review the information which is routinely available to other media); *Times-Picayune Pub. Corp. v. Lee*, 1988 WL 36491, at *9 (E.D. La. Apr. 15, 1988) (concluding that the First Amendment guarantees a limited right of access to news regarding activities and operations of government. This right includes, at a minimum, a right of access to information made available to the public or made available generally to the press.)

A similar case is *Sw. Newspapers Corp. v. Curtis*, 584 S.W.2d 362, 364–65 (Tex. Civ. App. 1979), in which the District Attorney required one media publisher to make appointments to discuss information with news sources in his office when other media outlets were routinely allowed to interview sources without

appointments. The by-appointment rule was instituted after the publisher ran articles about the DA's budget that the DA did not like.

The Court stated: "While public officials need not furnish information, other than public records, to any news agency, a public official may not constitutionally deny to one media access that is enjoyed by other media, because one media is entitled to the same right of access as any other." These cases recognize a limited right of media access to information made generally available, at least to other media. *See also Stevens v. New York Racing Ass'n, Inc.*, 665 F. Supp. 164, 175 (E.D.N.Y. 1987) (recognizing that restricting one journalist from taking photos in an area where other journalists were allowed to take photos was prohibited because the First Amendment prohibits government from restricting a journalist's access to areas otherwise open to the press based upon the content of the journalist's publications).

Some cases also find that the media's right of access is also limited by whether or not the information is available to the public. A case which illustrates the limited right is *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986). *Anderson* had two holdings of relevance to our inquiry. First, "A court may not selectively exclude news media from access to information otherwise made available for public dissemination." Thus it was impermissible to bar the dissemination of discovery materials to all media except one television station. On

the other hand, if the standards of Fed. R. Civ. P. 26(C) were met, then a court could prohibit the dissemination of discovery materials to all members of the public, including the media. *Id.* at 14. This case supports the proposition that the Press' right of access to information is no greater than the general public's.

A further question remains whether the government can discriminate in its dissemination of information based on the viewpoint of the particular media which is the subject of adverse treatment. Some of the cases discussed above recognize the ability of the Government to so discriminate. This is implicit in the holdings that an official may deny a media outlet certain types of information even when the reason is that the official is doing so because he does not like the outlet's coverage of his administration. *See, e.g., Raycom, Baltimore Sun, and Snyder I/Snyder II*.

To summarize: there is a limited right of access by the media to government information. Such right of access includes a right to receive information that is generally made available to the public or to other media outlets. The government cannot deny a particular media publisher access to routine information, such as press releases, made available to the media because of the particular publisher's viewpoint or non-establishment characteristics. Nor can the government deprive a particular media outlet access to facilities or localities where other press representatives routinely gather news. However, it is also clear that a particular media outlet has no right to interviews or comments, not generally available to the

public. Nor is it unconstitutional to deny a particular publisher preferential, non-routine information even if the reason for the denial is dissatisfaction with the publisher's coverage.

Having arrived at a conclusion as to what is constitutionally permitted, it is now necessary to discuss the burden of proof before turning to the evidence in the present case. It is unclear what the burden of proof is in a case like this. New Mexico law is replete with authority that applies a presumption of regularity to administrative action.[8] *See, e.g., State v. Myers*, 1958-NMSC-059, ¶ 14, 64 N.M. 186, 193, 326 P.2d 1075, 1080, which stated:

> We . . . must presume that the action of the state engineer is correct. We find ourselves in agreement with the authority cited by the State and appearing in 73 C.J.S. Public Administrative Bodies and Procedure § 205, p. 556:
>
> > 'On review of the acts or orders of administrative bodies, the courts will presume, among other things, that the administrative action is correct and that the orders and decisions of the administrative body are valid and reasonable; presumptions will not be indulged against the regularity of the administrative agency's action.'

See also Pickett Ranch, LLC v. Curry, 2006-NMCA-082, ¶ 53, 140 N.M. 49, 64, 139 P.3d 209, 224 (applying the presumption that administrative action is correct). This presumption has caused one court to state that a plaintiff challenging administrative action "must overcome the presumption of regularity that attaches

[8] New Mexico also has a plethora of cases saying that a challenger of a statute must prove beyond reasonable doubt that the statute is unconstitutional. *See, e.g., Titus v. City of Albuquerque*, 2011-NMCA-038, ¶ 38, 149 N.M. 556, 568, 252 P.3d 780, 792. Because this case does not involve a statute and because those cases did not deal with fundamental rights, these cases are not applicable and will not be discussed or used in the Court's analysis.

to discretionary agency decision-making[.]" *United States v. Payan*, 905 F.2d 1376, 1378 (10th Cir. 1990).

This presumption of regularity even has some applicability in cases involving constitutional questions. *See, e.g., Pinnell v. Bd. of County Com'rs of Santa Fe County*, 1999-NMCA-074, ¶ 29, 127 N.M. 452, 459, 982 P.2d 503, 510, holding:

> Finally, rational-basis scrutiny represents the least stringent level of scrutiny. It requires that a statute's classification be rationally related to a legitimate governmental interest. . . . Unlike the other levels of scrutiny, the rational-basis standard requires that a plaintiff bear the burden of proof and that the state action bears a strong presumption of validity.

(Citations omitted). This case, however, deals with an equal protection challenge that did not involve a fundamental right.

The Court believes that the burden of proof associated with claims that a fundamental right has been impinged is more applicable than the above discussed cases. While the Court has found no New Mexico cases that deal with the burden of proof issue in a case involving the First Amendment and administrative action, rather than a statute or ordinance, the Court is taking its guidance from the language in *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 5-6 (1st Cir. 1986), which recognized that when the First amendment is involved, there should be a heighted, but not strict, scrutiny. This suggests that an intermediate level of scrutiny should be employed as it is in the "time-place-manner" restriction cases. (For a time-

place-manner case see, *e.g., Stuckey's Stores, Inc. v. O'Cheskey,* 1979-NMSC-060, ¶18, 93 N.M. 312, 319, 600 P.2d 258, 265 (1979) (setting out three requirements for valid time-place-manner zoning).) As one commentator has observed:

> [N]ewsgathering generally is not as protected as publishing. Restraints on newsgathering are treated as incidental burdens on freedom of speech. Justice Brennan explained the dichotomy in terms of two models of the First Amendment. The free speech model posits that "the primary purpose of the First Amendment is more or less absolutely to prohibit any interference with freedom of expression." Government burdens on speech and publication are subject to close judicial scrutiny. Under the structural model, the press engages in activities designed to promote effective public discussion; it performs "communicative functions required by our democratic beliefs." This model, applicable to newsgathering, requires that courts balance the effects of a regulation on the informing and checking role of the media against the social values the regulation serves. A less speech-protective standard of judicial review is used to evaluate restraints on newsgathering.
>
> Whatever the merits of Justice Brennan's theoretical construct, the courts generally have not accorded newsgathering as much constitutional protection as publication.

C. Thomas Dienes, Trial Participants in the Newsgathering Process, 34 U. RICH. L. REV. 1107, 1125–26 (2001).

It has been recognized that in a Free Speech case the initial burden is on the Plaintiff:

> [T]he threshold questions are (1) whether the case involves a communicative interest protected by the first amendment and, if so, (2) whether the challenged government action infringed that interest. Claimant has the burden of proof on both these threshold requirements.

Russell W. Galloway, Basic Free Speech Analysis, 31 SANTA CLARA L. REV. 883,

891 (1991). If the Plaintiff meets these two hurdles, then the burden shifts to the government. As stated by one commentator:

> Under traditional first amendment standards, the government must show an important interest for it to be permitted to deny a first amendment right. The government holds the burden of proof to establish the existence of a legitimate interest that justifies the particular abridgment. Moreover, there is a firmly established doctrine that a government regulation of first amendment interests is unconstitutional if its sweep is overbroad, or if the legitimate purposes of the regulation can be achieved through means that impose a lesser burden on first amendment rights.

Robert N. Brailas, Press Access to Government-Controlled Information and the Alternative Means Test, 59 TEX. L. REV. 1279, 1294–95 (1981) (footnotes omitted). All of which suggest "the party having the burden of persuasion ... must suffer the consequences of such uncertainty." *See BBI Enters., Inc. v. City of Chicago*, 874 F.Supp. 890, 895 (N.D.Ill.1995).

Based on this analysis the Court rejects any argument that the Plaintiff must prove the government's actions were unconstitutional beyond a reasonable doubt. The Court also rejects the argument that the Government must meet a strict scrutiny test in justifying its actions. Plaintiff must prove that the Governor's staff's actions involved Plaintiff's First Amendment rights and that such actions impinged on the Plaintiff's rights. As to any conduct, on which Plaintiff succeeds in meeting this burden, then the Governor must prove that her administration had a legitimate interest that justified such abridgement and that there were no less restrictive means which could have achieved the Government's interests.

B. Factual Discussion of Constitutional Issue

With this legal background in mind, the Court will now turn to the evidence presented. The first area the Court will address is whether the inquiry involved a right protected by the First Amendment and whether the government action infringed that right. As an initial matter, it should be noted that the Reporter raises two different types of complaints: one deals with failure to respond to IPRA requests; the second deals with failure to respond to press inquiries and to provide information to the Reporter. The former complaint is a statutory violation that should be distinguished from a constitutional violation. IPRA violations may be redressed via statute. *See generally Ehrlich*, 437 F.3d at 414. The Reporter's remaining IPRA complaints will be discussed in a separate section of this decision. The second claim potentially implicates the constitution.

One issue discussed by a former editor of the Reporter, Alexa Schirtzinger, was the failure of the press office to send the Reporter presses releases. If proven, this is potentially the sort of discriminatory treatment prohibited by the cases discussed above. Ms. Schirtzinger's testimony on this issue, however, does not establish a constitutional violation because she admitted that the problem was an unintentional technical one, which when called the attention of the Information

Office was remedied. See Tr. 3.29.17, p. 62.[9] Further, it appears other news outlets suffered the same or similar problems with email communications from the Governor's office. *See generally* Def. Ex. A4. Tr. 3.31.17, pp. 190-91. The Court finds that the reason why the Reporter personnel were dropped from the press release email list was a technical temporary problem which was remedied. This evidence fails to establish viewpoint discrimination.

The Reporter provided evidence of a general nature that their inquiries to the press office would go unanswered. In the Court's opinion such general evidence is insufficient to prove a constitutional violation because the case law demands a look into the specific inquiry in order to determine whether it was seeking routine information generally available or particular non-routine information. Such an inquiry cannot be resolved based on general statements. While the Reporter's belief that the failure to respond deprived their readers of a complete story may explain why the Reporter wanted such information, such belief does not suffice to show a constitutional violation.

Specific issues discussed at the trial include Defendant's Exhibit A-3. This is a collection of emails between Reporter personnel and Scott Darnell. For the most part, these emails show responses that either answer the inquiry posed or refer the Reporter writer to another administration official who could answer the

[9] A subsequent editor testified that she did not know if it had been proven that the reason behind the Reporter personnel being dropped from the list was technical. Tr. 3.30.17, p. 31. The Court believes this is speculation on Ms. Grimm's part.

inquiry.

There is one email train in which the former editor complains that the Governor will not provide a twenty minute interview even though she has provided such an interview to "all of Santa Fe's (indeed, most of New Mexico's) other news outlets[.]" This complaint is one that has been rejected as a basis for claiming a constitutional violation. *See* cases cited on pp. 9-13, *supra.* The Reporter also asked for an interview with someone from the Governor's office regarding the pardon process. The failure to respond to this request is also not a basis on which a constitutional violation can be demonstrated. *Id.*

The Reporter also made an issue of the failure to respond to an email from Justin Horwath to Enrique Knell regarding a comment on a story the Reporter intended to publish about Susana2010.com email and transparency in government. See Pl. Ex. 4. This exhibit represents a specific example of a general complaint voiced by the Reporter that with regard to certain stories that the Reporter either had or intended to publish, the Press Information Office ("PIO") failed to respond to requests that they comment on the Reporter stories. (For other specific requests, see Pl. Ex. 5 to 12) The Reporter was of the opinion that its writers were refused comments on their articles after the Reporter published a story "The Year in

Closed Government."[10] This story was published on December 18, 2012, and is effectively a summary of stories from the preceding year that demonstrated how, in the Reporter's opinion, the Martinez administration had failed to live up to its promise of transparency in government. Pl. Ex. 1.

In the Court's opinion, under the cases cited above, these requests are not asking for routine information, generally available to the public or other media. Each of these emails contains unique questions and each concerns a story that is specific to the Reporter. This Court does not read the cases cited above as giving the news media any constitutional right to demand such information. Indeed, these inquiries appear to this Court to be the type of information which the press has no right to demand. *See, e.g., Raycom Nat'l, Inc.*, 361 F. Supp. 2d at 683 (noting that the television station, instead of asserting denial of access to press conferences or press releases, merely complained that it "no longer receiv[ed] interviews or statements off-the-record that it had been receiving," which did not constitute a constitutional denial). This is the case even if other media outlets receive comments on similar stories. *See, e.g.*, *Baltimore Sun Co. v. Ehrlich*, 437 F.3d at 413 (allowing the governor's press office to direct staff not to speak with reporters and not to comply with any of their requests for information). The court stated that the reporters were seeking preferential information, and found that "the long-

[10] This was the position taken by the former editor but other reporters, such as Joey Peters, thought the office was never very responsive and that the situation worsened throughout 2012.

accepted scenario of preferential communications to a favored reporter to be 'materially indistinguishable' from the practice challenged in the case. *Id.* at 418. This same rationale applies to the other instances in which Reporter writers or editors describe writing an article and requesting a comment about the article or its subject, even if a comment on the same general topic was given to another media outlet. Thus, the Court finds Ms. Grimm's comparison between Reporter inquiries and Albuquerque Journal comments (Tr. 1.30.17, pp. 5-7) to be examples of communicating with a favored reporter, which case law states is both traditional and not unconstitutional.

In this case the evidence also shows that the other media outlets which were alleged to receive more favorable treatment had larger circulations that the Reporter. One member of the Reporter staff admitted that it was unknown if this was the reason why these outlets received comments when the Reporter did not. Tr. 3.30.17, pp. 38, 41. Prioritizing responses based on circulation is not a violation of the constitution.

The Reporter tries to gloss over the requirement that their requests must be for information routinely made available by suggesting that because a purpose of the PIO is to respond to press inquiries, every request is therefore routine.[11] This attempt to water down the requirement, if recognized, would render the limitation

[11] *See, e.g.,* testimony of Joey Peters: "I think that all questions journalists ask are routine" "I believe that public officials should respond to journalists' questions." Tr. 3.29.17, p. 225.

meaningless. None of the cases discussed above that dealt with inquiries to a press office found it significant that the press office's duty was to respond to press inquiries. That fact alone was not sufficient to overcome the limitation that the right of access is limited to information made routinely available and not to information that is responsive to a unique request.

There is a category of inquiries that deserves special attention. This type of inquiry is illustrated by the exchanges between Enrique Knell and writers from various media outlets concerning the stolen emails, the revelation of which led to the indictment of the former campaign worker who disclosed the emails. On June 17, 2013, Joey Peters wrote asking the PIO for a telephone interview on the topic. Peters got no response. On May 30, 2013, Scott Darnell sent a staff member of KRQE a statement for attribution to the Governor about the indictment of the person who disclosed the emails. (Pl. Ex. 74) The same statement was also sent to KOAT on the same day (Pl. Ex. 75), to KOB (Pl. Ex. 76), to the Albuquerque Journal (Pl. Ex. 77), and to Steve Terrell of the Santa Fe New Mexican (Pl. Ex. 78). The release of the very same version Governor's statement to so many outlets makes the action look as if it was routine. That in itself does not make the failure to respond to Peters' request a violation of the Reporter's constitutional rights. Peters' email asked for a telephonic interview, not a prepared statement. Further, Peters' request came 18 days after the statement was released. As was often noted

by the Reporter witnesses, timeliness matters in the newspaper business. Sending Peters an 18-day old statement in response to a request for a telephone interview would not have been responsive. Accordingly, the Court finds no constitutional violation.

Another category of requests that deserve discussion are those that deal with immigration issues. By email dated March 18, 2013, Justin Horwath asked about Governor Martinez's positions taken while on a national panel and her position on immigration while in Santa Fe. On June 27, Horwath re-sent the same message. (Pl. Ex. 6 & &) Knell could not recollect if he ever responded. On August 12, 2013, a freelance writer from the Reporter sent an inquiry that concerned the Dreamers (DACA immigrants), including the issue of drivers licenses for Dreamers. Knell drafted a proposed response which he sent to Scott Darnell for his thoughts. (PL. Ex. 61) Knell did not recollect if a response was ever sent. By contrast, Plaintiff's Exhibits 42 to 60 and 62 showed comments or statements being sent to reporters from other media outlets on the driver's license legislation being proposed in the legislature. It is true that there is no showing that a similar statement was sent to the Reporter. However, the Reporter's inquiries would not have been satisfied by the statements that were distributed. The Reporter inquiries asked for more in depth analysis of immigration reform generally and for contrasts between the Governor's positions in national forums and in state. The type of

information sought by the Reporter was not routine. Therefore failure to respond did not constitute a constitutional violation. This same reasoning applies to Plaintiff's complaints concerning inquiries regarding the Plaintiff's lawsuit.

In other instances, Plaintiff showed that one or two media outlets received comments when the Reporter did not. Such conduct does not run afoul of the constitution under the cases cited above that permit favorable treatment to one reporter over another.

While, the Court believes that Plaintiff has failed to show the type of conduct that would amount to a violation of the First Amendment, the Court also wishes to address the issue of whether there was proof of viewpoint discrimination. The Report relies in large part on its belief that its relationship with the PIO changed after it wrote an article in December 2012 critical of the Governor's administration for lack of transparency. Plaintiff's own evidence on this issue was conflicting with some writers taking the position that they never got timely responses from the PIO. Further, even if Plaintiff's evidence of a change in attitude after an article was published were consistent, a temporal relationship alone would not prove the case. *See Trant v. Oklahoma*, 754 F.3d 1158, 1170 (10th Cir. 2014) (noting "temporal proximity between the protected speech and the alleged retaliatory conduct, without more, does not allow for an inference of retaliatory motive"). The evidence also shows that after the article in question was

published, the Reporter received numerous responses to inquiries it made.

Plaintiff also relies on the comments made by the Governor during a phone conversation with Joey Peters.[12] During this conversation, Peters asked the Governor about a story and she told him to reach out to Enrique. Peters told the Governor that Enrique never responded to them and the Governor stated: "I wonder why." The Reporter staff who testified about the comment said that it sounded sarcastic. The Reporter determined not to introduce the recording it had of the conversation so the Court cannot attribute any particular quality to the tone of the comment. The comment is ambiguous in that it could have been a legitimate question concerning Knell's failure to respond on the Governor's part; it could have been a comment on the amount of requests the Reporter made of the Governor's office, or it could have been a comment referring to the viewpoint of the Reporter. Since the evidence is insufficient to conclusively determine the nature of the comment, the party with the burden on this issue loses in its bid to attribute a particular meaning. In the Court's opinion this is part of the Reporter's burden and they have not convinced the Court that the comment showed a viewpoint animus.

This brings us to the last evidence that bears on this issue. This comes from the Governor's last two Communications Officers. First is Enrique Knell's

[12] Plaintiff's evidence on this issue was also inconsistent with different people having different recollections of who could actually hear the conversation. This difference seems somewhat immaterial as the conversation was recorded.

comment about this lawsuit filed by the Reporter which he made to any number of news outlets. In relevant part the comment described the Reporter as a "left-winged weekly tabloid." *See* Plaintiff Exhibits 86 – 90. This appears unquestionably to be a statement about the political viewpoint of the Reporter. Knell's explanation that he meant that because the lawsuit came out of left field the Reporter was left-winged begs credulity. The defense's after-the-fact explanation that Knell was merely parroting Peters' characterization of the email source as a "liberal" PAC does not fare any better. These flimsy rationales offered for use of the phrase "left-winged" are not important to the Court's conclusion. Rather, the Court is persuaded by the fact that this phrase appeared in September 2013 emails, almost nine months after the publication of the article alleged to have caused animus. Similar reasoning applies to the email from Chris Sanchez, another Communications Director, who commented on an article written in the Santa Fe New Mexican by a reporter who had formerly worked at the Reporter. Sanchez wrote: "Embarrassing. Reporter should do his homework. No surprise given his previous 'reporting' for liberal tabloid." Pl. Ex. 91. The Court does not believe these comments are sufficient to prove an unconstitutional motivation – an intentional discrimination based on viewpoint – for actions that occurred in many instances months before hand. Neither of these comments is comparable to the types of directions to discriminate given in the cases cited above which were found

not to be sufficient to demonstrate a constitutional violation. *See Raycom National, Inc. v. Campbell*, 361 F.Supp.2d 679 (N.D.Ohio 2004); *The Baltimore Sun Co. v. Ehrlich*, 356 F .Supp.2d 577 (D.Md.2005); *Snyder v. Ringgold*, 40 F.Supp.2d 714 (D.Md.1999) (*Snyder II*); *see also Snyder v. Ringgold*, No. 97-1358, 1998 WL 13528 (4th Cir. Jan. 15, 1998). In fact, the testimony in this case is that no directions were given to discriminate against the Reporter. *See* Tr. 3.31.17, p. 12; p. 79.

In sum, the Court rejects the Reporter's constitutional claim. Its requests for information or interviews which went unanswered were not comparable to the mundane requests made by other newspapers. The Reporter was requesting special treatment. Under the First Amendment, the Reporter had no right to this treatment. Further, to the extent that other outlets were sent comments when the Reporter was not, such a practice is consistent with the long recognized ability of a politician to favor certain reporters and disfavor other reporters, even if that favoritism is based on how the reporter covers the politician. Finally, the Reporter has not proven that the actions of the Governor's PIO were the product of viewpoint animus. For these reasons and those stated above, the Constitutional claim in Count 2 is dismissed.

III. IPRA Complaints

There are five IPRA requests remaining in this case. While each will be discussed in detail, the Court wishes to incorporate the stipulation of the parties in

the Pretrial Order, p. 27, as to the timing and description of these IPRA requests:

Request No.	**Request Date**	**Requested By**	**Response Date**	**Response From**	**Description of Request**
12-048	06-20-12	Peters	08-14-12	Cason	All emails sent from and received by keithgardner@susanapac.com, sdarnell@susanapac.com, rmkcang@yahoo.com, gardners90@yahoo.com and Gov. Susana Martinez' Susana PAC email address from the following dates: August 17, 2011; May 2, 2012; and June 13, 2012.
12-091	12-14-12	Horwath	01-25-13	Cason	All pardon requests made to Gov. Susana Martinez' Office made in 2012 and all documents relating to a denial or acceptance of pardons held by the governor's office in the year 2012
13-013	02-26-13	Peters	03-13-13	Cason	All emails concerning public business sent to or from Keith Gardner's Gmail account, kjgatc@gmail.com, on October 15, 2011

Request No.	Request Date	Requested By	Response Date	Response From	Description of Request
13-023	05-13-13	Horwath	06-21-13	Cason	All written communications between members of the Governor's office and state Sen. Mark Moores, R-Bernalillo, regarding the state Senate's Rules Committee confirmation hearings on Education Secretary-Designate Hanna Skandera during the 2013 legislative session
13-040	06-12-13	Schirtzinger	09-20-13	Cason	All records including appointment books; daily, weekly, and monthly calendars and back up materials which record the full schedule of appointments, including, but not limited to, all official meetings, public appearances, personal meetings and appointments, and travel for Governor Susana Martinez from January 1, 2012 through December 31, 2012

A. Challenges to Privilege

IPRA 12-091 – Pardon Requests

The parties entered into a stipulation regarding the timing associated with inspection of the pardon records requested by IPRA 12-091. PTO, pp. 29-30. This

stipulation is incorporated into this Decision:

Date	**Event**	**Record**
Dec. 14, 2012	Mr. Horwath, on behalf of the Santa Fe Reporter, submits IPRA Request No. 12-091 to Ms. Cason, the Office of the Governor's records custodian	IPRA Request No. 12-091 (Ex. 13, Q)
Jan. 25, 2013	Ms. Cason, on behalf of the Office of the Governor, responds to IPRA Request No. 12-091 by producing the 2012 final disposition letters rejecting or granting pardons and explaining grounds for claiming privilege as to records not produced	E-mail correspondence re: IPRA Request No. 12-091 (Ex. 13, Q)
Sept. 3, 2013	Plaintiff files its Complaint in First Judicial District Court	Complaint
Dec. 6, 2013	Defendant's counsel sends a letter attaching a privilege log for the 2012 pardon documents not produced and requesting clarification as to whether Plaintiff seeks production of additional 2012 pardon documents	Privilege log and transmittal letter (Ex. 39, S)
Sept. 19, 2014	Defendant produces redacted records from ten sample pardon files for 2012	Transmittal Letter (Ex. U)
Nov. 10, 2014	Defendant produces additional redacted records from ten sample files	Transmittal Letter (Ex. V)
Mar. 22, 2015	Court issues order granting in part and deferring a ruling in part on Defendant's motion for partial summary judgment on ten sample pardon files	Order on Defendant's Motion for Partial Summary Judgment on Ten Sample Pardon Files
Apr. 7, 2015	Court issues order granting Defendant's motion for partial summary judgment on ten sample files as to records subject to *in camera* review	Order Regarding *In Camera* Review for Defendant's Motion for Partial Summary Judgment on Ten Sample Pardon Files

Date	Event	Record
June 19, 2015- July 10, 2015	Defendant produces redacted records from remaining 2012 pardon files	Transmittal messages to counsel (Ex. 41, X)
Apr. 25, 2016	Court issues order granting in part Plaintiff's motion for partial summary judgment on remaining 2012 pardon files and granting in part Defendant's cross-motion for partial summary judgment on remaining 2012 pardon files	Order on Cross-Motions for Partial Summary Judgment on Pardon Records

On December 14, 2012, Justin Horwath sent IPRA 12-091 request for all pardon requests and all records regarding the grant or denial of those requests in 2011. On December 31, 2012, the request was described as broad and burdensome, and Horwath was told more time would be needed. On January 25, 2013, a letter response was sent which claimed privilege for most of the documents contained within the pardon files and stated:

> The items in the possession of the Office of the Governor, pertaining to the denial or acceptance of pardons for the year 2012, subject to the Inspection of Public Records Act are each specific letter of acceptance, denial or ineligibility that was issued to each applicant by the Governor.

Pl. Ex. 13. Plaintiff filed suit on September 3, 2013, seeking, among other things, the pardon records that had been withheld. See Complaint, Seventh IPRA Violation, p. 38. As a result of various pretrial motions, the Court reviewed a sample of the pardon files and ruled that certain of the documents that were withheld on grounds of privilege were not properly the subject of any privilege and

must be disclosed for inspection. While the Governor had previously offered to turn over most, if not all, of these documents, she had done so by waiving the privilege. The Reporter was not satisfied with this approach because it did not want future requests to be subjected to the same claim of privilege. *See generally* Tr. 3.30.17, p. 26. The Reporter's claim as to this IPRA request is that it is entitled to attorney's fees, costs, and compensatory damages, including the expense of litigation needed to secure the pretrial rulings. *See* PTO, p. 2.

The Court believes that the claim of privilege on some of the documents in the pardon file was unwarranted. Plaintiff was required to file suit to obtain these documents. The Court is further of the opinion that the Governor's offer to produce the documents under a waiver was inadequate to meet the request. In this regard this case is comparable to *Cook v. Craig*, 55 Cal. App. 3d 773, 780, 127 Cal. Rptr. 712, 716 (Ct. App, 1976), where the government argued that because it had voluntarily turned over its procedures for a given year, the case was moot. In rejecting the mootness claim, the court stated: "[I]t is apparent that defendant's unilateral decision to disclose its complaint investigation procedures is also unilaterally rescindable. Given the position of defendant that it has no legal obligation to disclose these procedures, and its voluntary disclosure only after litigation was commenced, we cannot say that the dispute will not recur." In the same vein, the Governor here could have reasserted the privilege claim in response

to a request for the pardon records for any succeeding year unless the validity of that claim was adjudicated. Because the Reporter had to file suit prior to the voluntary disclosure of the documents under a waiver of privilege and because the privilege claim was disallowed, the Reporter will be allowed to recover fees and costs related to securing the pardon files. All fee and cost requests will be taken up at post decision proceedings through motions.

The Reporter seeks damages under Section 14-2-12.[13] Plaintiff asks the Court to award monetary damages for injuries it claims to have suffered. It seems self-evident that if a newspaper wishes to publish a story about pardons granted or denied in 2012, the news will be rather stale by 2015. No injury, however, was specifically tied to this consequence. The injuries discussed during the trial were variously described as harm to the reader's ability to get information, loss of confidence that the Reporter should be taken seriously, possible loss of readership, and the inability to combat tyranny.[14] No evidence was submitted that showed a loss of readership or even a declination in reputation as a result of this IPRA violation. In fact, there was evidence that the online readership was growing, not declining.

Defendant argues that damages require proof of actual injury. Judge Hartz, in a concurring opinion, wrote: "[O]ne whose first amendment rights have been

[13] The Reporter expressly eschewed statutory damages under Section 14-2-11. See SFR Rebuttal Brief, p. 6.
[14] While the Court is of the opinion that the discussion of these injuries was primarily directed at the claimed constitutional violation, the same injuries could arise from delayed or denied responses to IPRA requests.

violated is not entitled to damages measured by the abstract value or importance of the first amendment, because such damages are not compensatory." *Jacobs v. Meister*, 1989-NMCA-033, 108 N.M. 488, 775 P.2d 254 (citing *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 309 n. 13 (1986)). The Court in this case finds that Plaintiff's damage evidence was too nebulous to support a compensatory damage award. In *Faber* the Supreme Court said: "Compensatory, or actual, damages . . . are awarded to place the plaintiff in a position that he or she would have been in had he or she not suffered the wrong complained of." 2015-NMSC-015, ¶ 20. *Faber* went on to note that "[a] successful litigant is compensated by obtaining the document he or she sought in the first place. If a litigant is not made whole by the furnishing of documents, he or she can seek actual damages. . . ." *Id.* at ¶ 31. None of the evidence presented showed that money was needed, over and above the production of documents to make the Reporter whole.

B. Claims of Delay

IPRA 13-040 – Calendar Records

IPRA 13-040 was received on June 12, 2013. It requested "all records including appointment books; daily, weekly, and monthly calendars and back up materials which record full schedule of appointments including, but not limited to, all official meetings, public appearances, personal meetings and appointments, and

travel" for the Governor for 2012. On Monday, June 17, 2013, Cason wrote to the requestor that there would be a response by June 27, 2013. On that date Cason wrote that more time was needed as allowed by NMSA 1978, Section 14-2-10. She said a response would be provided on July 27, 2013. On July 26, 2013, Cason wrote that additional time was needed as allowed by Section 14-2-10 and a response would be made by August 9, 2013. On August 8, 2013, Cason wrote again stating the need for more time as allowed by statute and said a response would be made on August 23, 2013. On August 23, 2013, Cason wrote: "Due to the broad and burdensome nature" of the request the Office would need more time and they would respond by September 6, 2013. On August 26, 2013, Schirtzinger wrote to inform Cason that she was no longer at the Reporter and asked Cason to send the response to her private email account. On September 20, 2013, (after suit had been filed) Cason wrote:

> As you may already know, the Office of the Governor has recently made available the Governor's Calendar at [the Governor's website]. I believe if you review the calendar it directly addressed your records request. . . .

Def. Ex. I (containing entire email train re IPRA 13-040). Thus it took 100 days to respond with a website entry that was created during the time the request was outstanding. No records that were used to create the website were ever produced. Tr. 3.31.17, p. 83. Ms. Cason stated that it was a very extensive process that was undertaken to respond as "There was [*sic*] a lot of things that had to be reviewed.

There was [*sic*] a lot of security issues and everything else." Tr. 3.31.17, p. 83. Ms. Cason did not, however, handle the Governor's calendar, and she did not participate in the work that led up to the production of the website reference. Tr. 3.31.17, p. 83.

As to this IPRA claim, Plaintiff claims that Defendant unreasonably and unlawfully delayed responding to Plaintiff's IPRA Request No. 13-040 for 2012 calendar records. See PTO, p. 2.

IPRA Section 14-2-10 provides:

> If a custodian determines that a written request is excessively burdensome or broad, an additional reasonable period of time shall be allowed to comply with the request.

As stated in the Attorney General's *Inspection of Public Records Act Compliance Guide* (7th ed. 2012) (introduced as Def. Ex. E), "The Act does not define 'excessively burdensome, or broad,' but leaves it to the determination of the custodian." Commentary, *Compliance Guide*, p. 38. As stated:

> A request may be excessively burdensome or broad because it will require the custodian to locate and review a large number of records, because the requested records are difficult to locate or obtain or because other circumstances exist that support the determination that the requested records cannot be made available within 15 days of the request.

Id.

In general, the Court is sympathetic to claims that other work may delay IPRA compliance; this delay is acceptable but only to a point. In the case of the

calendar request, the Court is of the opinion that what delayed the response was the decision to put calendar entries, including public appearances, onto the website. While this action is laudable and in keeping with the desire for transparency, it is not a substitute or an excuse for not complying with IPRA. Just as an agency need not create a document to respond to an IPRA request,[15] an agency may not use the time needed to create a website as a justification for not timely producing the requested documents.

Cason was not in charge of the calendar; she was not the person who handled the response to this request, and she could not testify from first hand-knowledge as to the reasons for the delay. While it is certainly understandable that security concerns might lead to the need to do a review before turning over the information, it does not justify a 100 day delay in responding.

The Arizona Court of Appeals confronted a similar issue in a case arising under the Arizona Public Records Act. The court there stated:

> Under Arizona's Public Records Law, when records are subject to disclosure the required response is the prompt and actual production of the documents. . . . Whether a response is prompt depends on the factual circumstances of the request. . . . The burden is on the agency to establish its responses to requests were prompt.

Lunney v. State of Arizona, 2017 WL 6049445, at *7 (Ariz. Ct. App. Dec. 7, 2017) (internal quotations & citations omitted). *See also State ex rel. Wadd v. City of*

[15] NMSA 1978, § 14-2-8(B) (2009)

Cleveland, 1998-Ohio-444, 81 Ohio St. 3d 50, 53, 689 N.E.2d 25, 28 (rejecting Respondents' assertion that their installation of a new computer system, as well as Cleveland's policy of processing "raw" accident reports into "final" form prior to providing access, supported their argument that they acted reasonably by delaying access to requested accident reports and recognizing there is nothing to suggest that Wadd would not be entitled to public access of the preliminary, unnumbered accident reports following prompt redaction of exempt information such as Social Security numbers); *Libertarian Party of Cent. New Jersey v. Murphy*, 384 N.J. Super. 136, 140, 894 A.2d 72, 74 (App. Div. 2006) (rejecting a claim that a party was not entitled to records because they were available on a website because of the actual time delay in the posting of the minutes on the municipal website). Similarly, in this case, there was no sufficient explanation given for a 100 day delay.

Plaintiff claims that it is entitled to statutory damages under Section 14-2-11 which provides in relevant part:

> C. A custodian who does not deliver or mail a written explanation of denial within fifteen days after receipt of a written request for inspection is subject to an action to enforce the provisions of the Inspection of Public Records Act and the requester may be awarded damages. 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[.]

NMSA 1978, § 14-2-11 (1993). These statutory damages are available only when a request has been denied. *Faber v. King*, 2015-NMSC-015, ¶ 12, 348 P.3d 173. The Court is of the opinion that the late production of the calendar is not a denial of a request under the records. This claim is more properly looked as a Section 14-2-12 claim. This means that Plaintiff must prove it is entitled to compensatory damages. The Court incorporates its discussion of compensatory damages with regard to the pardon records and rejects the claim as not being supported by substantial evidence.

Faber also recognized that a successful IPRA litigant can recover fees and costs. The Reporter is entitled to recover costs associated with bring this claim. These fees and costs will be considered in post-trial proceedings.

C. Claims of Inadequate Searches

1. IPRA 12-048 – Private Email Use

IPRA Request 12-048 was received on June 20, 2012. It requested:

> All emails sent from and received by keithgardner@susanapac.com,[16] sdarnell@susanapac.com, rmkcang@yahoo.com, gardners90atyahoo.com, and Gov. Susana Martinez' Susana PAC email address from the following dates: August 17, 2011; May 2, 2012; and June 13, 2012.

Pl. Ex. 17, Def. Ex. A. Thus, the request sought emails from five email addresses

[16] There was no such email address. Tr. 3.29.17, p. 201. Contrary to what was suggested by the Reporter's witness, the Court does not believe the Governor's Office had an obligation to substitute other email addresses which might have existed for the one specified. The Court need not decide this issue, however, because Gardner said he would have searched any susanapac email account to which he had access.

on three days. On June 25, 2012, the Records Custodian for the Governor's Office, Pamela Cason, responded that she was reviewing and would respond by July 5, 2012. On that date Cason wrote that due to the broad and burdensome nature of the request the office needed additional time. On August 7, 2012, the Reporter writer wrote asking about the status of the request. On August 14, 2012, Cason wrote back and provided one responsive document.

At the time this request was made or shortly thereafter the Reporter was aware of email that was responsive to this request which was not produced. There was an email from Larry Behrens to kgardner@susanapac.com and scottdarnell@susanapac.com sent on May 2, 2012, which provided a list of non-union teachers. (Pl. Ex. 19) This document, if extant at the time of the request, would have been responsive. This email had been published by the Santa Fe New Mexican. The Reporter made this inquiry to see if the Governor's office has a mechanism for locating emails dealing with public business that were sent on private email accounts by staff members. Tr. 3.29.17, p. 208-09.

When Cason received this request she distributed it to all the staff in the Governor's Office. Pl. Ex. 105. She asked Scott Darnell and Keith Gardner to search as she did not have access to the non-governmental emails that were the subject of the inquiry. Tr. 3.31.17, p. 146. Gardner, the Governor's Chief of Staff, had no recollection of searching in response to this particular email, but he testified

that he would have searched his yahoo account for any responsive emails. As to the keithgardner@susanapac.com email address, Gardner confirmed that it never existed. He said despite that, if he had access to the susanapac accounts, he would have searched for kgardner@susanapac.com, but he did not think he ever had access to those accounts. Tr. 3.31.17, pp. 41-42. Gardner explained that he had password issues with those accounts so he may not have been able to access them. Tr. 3.31.17, p. 45.

Darnell was also asked to search for records responsive to this request. He did this when Cason came to his office. Tr. 3.31.17, p. 166. Darnell said he searched the personal email and the state email for documents, but did not find the Behrens email. Tr. 3.31.17, p. 169. He seems to have searched his susanapac account. Tr. 3.31.17, p. 179, 181. Darnell said because this email was a duplicate and a convenience copy to him unrelated to his agency business, he had no obligation to retain it. Tr. 3.31.17, p. 170. Darnell was a direct recipient of this email as opposed to a "cc." Darnell said his deletion of the Behrens email was consistent with Plaintiff's Exhibit 123, Checklist for Retention of Email from the State Records Center. Tr. 3.31.17, p. 184.

Plaintiff's Exhibit 123 stated, in relevant part:

- Is this a message that my co-workers are receiving too? Am I responsible for retention or is someone else responsible?

Mr. Darnell also testified he complied with the definitions of "transitory" and "non-records" found in 1.13.4.Z and KK, NMAC (Def. Ex. F). Tr. 3.31.17, p. 186.

At no time while the request was pending did the Reporter narrow the request or explain that it was looking for the Behrens email. Tr. 3.31.17, p. 147. If the Reporter had specified the Behrens email at any time, the search could have been narrowed and done much faster. Moreover, Cason could have forwarded the request to the Public Education department which was the entity that should have retained the email for record keeping purposes. In fact, another person made an IPRA request to PED for the Behrens email and received it. Tr. 3.31.17, pp. 148, 182.

As to the Behrens email (Pl. Ex. 19), Gardner would have produced it if it was in his email account. His explanation for why it was not in his email account was that he was not the action recipient or the final holder of the email so he had no obligation to retain the email. Tr. 3.31.17, p. 46. Gardner was of the opinion that he was not the person with the obligation to retain the email so he could have deleted it. Tr. 3.31.17, p. 48.

Following the response which did not include the Behrens email, Peters contacted Cason and asked her why she did not produce the Behrens document in response to his IPRA request. Pl. Ex. 18. Cason was unable to remember if she did any follow up after she received this inquiry. Tr. 3.31.17, p. 86.

Before leaving this IPRA request, the Court wishes to briefly discuss the Attorney General Complaint that was filed regarding IPRA 12-048. On August 17, 2012, Joey Peters filed a complaint with the Attorney General alleging that in response to his request for emails from private email accounts, the Governor's Office had not produced the Behrens email. He complained that the Behrens email had been withheld without explanation as required by statute. Pl. Ex. 20. The Attorney General's Office informed the Governor's counsel that it believed the Governor's response was inadequate because it did not clearly cover any responsive public documents found in the private email accounts listed in the request. Pl. Ex. 22. The Governor's Office apparently responded that no documents held in the Governor's Office had been withheld. *See* Pl. Ex. 24. The response said the Governor's Office did not withhold or deny any responsive public documents "held by our Office." Pl. Ex. 24. The Attorney General found this response to be inadequate because it did not address whether public documents contained in the susanapac email accounts or other private email accounts had been withheld. Pl. Ex. 24.

In court, however, the defense did provide testimony concerning the searching of the private email accounts. It does appear from the testimony that the personal email accounts (but not all the susanapac accounts) listed were searched. There is no evidence, however, that all the susanapac accounts were searched.

Based on Gardner's testimony it is a fair inference that he did not search any susanapac account because he claimed he always had problem with access because of password difficulties. Darnell may have searched his own susanapac account but there is no evidence he searched the Governor's susanapac account or any other account at that address.

2. IPRA 13-013 – Gardner Email on October 15, 2011

Plaintiff's Exhibit 106 contains IPRA request 13-013 which sought:

> All emails concerning public business sent to or from Keith Gardner's Gmail account, kjgatc@gmail.com, on October 15, 2011.

This request was received on February 26, 2013. On March 13, 2013, the Governor's Office responded that The Governor's Office did not have any responsive emails. (Pl. Ex. 30)

This request concerned the Reporter's search for emails that appears as Plaintiff's Exhibit 31, an exchange between Pat Rogers, an attorney, and Gardner at two non-governmental emails and another email. The Rogers exchange dealt with the locale for a proposed breakfast with a representative of Rogers' client who was in the gaming industry. In addition to proposing a new locale because it would be more private, Rogers also commented on proposed action to cut funding for his client's contract. This exhibit also had an email that appeared to be from a phone number regarding a meeting with the Governor.

Cason testified that when she received this request, she asked Gardner to

search for any responsive documents. She followed up with Gardner who said he had no responsive documents. Tr. 3.31.17, p. 11. Gardner testified that he did not specifically recollect what he did in response to IPRA 13-013, but his usual practice would have been to search his email account for emails requested. His explanation for why nothing was found that was responsive to IPRA 13-013 is that he would not have kept the emails since they were transitory matters. Gardner testified that because the Rogers email would have resulted in a calendar entry after he forwarded the email to his secretary he would have discarded the email. Tr. 3.31.17, p. 74-76. Cason agreed that this was not the type of email that needed to be retained. Tr. 3.31.17, p. 152-53. As to the second email in Exhibit 30, Gardner had no recollection of seeing it. He testified that it was the kind of email he would not retain because he was not involved in the transaction identified in the message which was addressed to "Ryan." According to Gardner, the person who should have retained it was the person to whom it was written if that person thought it was a public record. Tr. 3.31.17, p 74-76. Regardless of whether or not the email was transitory, if it existed at the time an IPRA request was received, the document would be produced. Tr. 3.31.17, p. 74.

Both IPRA 12-048 and 13-013 have in common a use of non-governmental

emails to conduct public business.[17] This issue is relevant to the IPRA claims because it raises concerns about the Governor's Office procedures for reviewing non-governmental emails for public records in response to IPRA requests. Gardner testified that Pamela Cason, the person responsible for responding to IPRA requests directed to the Governor's office, would request that he search for any responsive documents if the IPRA request expressly concerned him or if it was a broad request to which he might have responsive documents. Tr. 3.31.17, p. 55.

Part of the background on why the Reporter was requesting emails from nongovernmental accounts is found in a request for response that Jason Horwath asked Scott Darnell: had Keith Gardner told Brian Powell that Gardner did not send emails on his government account to avoid court and jail time. Def. Ex. A-2, p. 156. In response, Darnell said: "Attached is the audio of the Gardner conversation that actually provides the context, along with a statement." Def. Ex. A-2, p. 156. Plaintiff wished to introduce a transcript of a portion of this audio. Over Defendant's objection, the transcript was allowed into evidence subject to the Defendant being given the opportunity to demonstrate that the portion was not an accurate transcription. Tr. 3.31.17, pp. 25-27. No such showing was attempted. Therefore, the Court will maintain its ruling on the admissibility of the transcript.

The section of the transcript on which the Plaintiff focuses is the following

[17] It is uncontested that private emails used for public purposes or to conduct public business are public records under IPRA. *See* Office of the Attorney General, Commentary, *Inspection of Public Records Act: Compliance Guide*, p. 25 (2015) (introduced as Def. Ex. E).

discussion which takes place in a conversation between Powell and Gardner about third parties who have sent emails and made Facebook postings:

> Gardner: I pull computers up – I forensically look at computers, you know, at least one or two a week for all the people up there.
> Powell: For people looking at nasty sites or --
> Gardner: That or just emails they shouldn't be sending –
> Powell: Really?
> Gardner: -- just doing shit they are not supposed to. So there's a way, yeah. And that's, see that's all discoverable.
> Powell: Hmmm.
> Gardner: That's why I never email on my state email. It could come back to bite my ass. It's all done offline.
> Powell: Right.
> Gardner: I never -- Shit, I never use my state email. Because it's all done on different stuff. I don't want to go to court and jail.

Pl. Ex. 125. Defendant's major objection to the exhibit was that the quotation was taken out of context. The context could have been provided by a transcript of the remainder of the recording or the entire recording, but use of the entire recording would have unduly embarrassed Gardner and members of his family without providing relevant information. The entire conversation concerned a very sensitive issue involving some of Gardner's family which he did not want to discuss in court. Gardner was allowed, however, to provide the context of his comments without going into embarrassing details.

Gardner explained that the entire conversation was within the context of Gardner explaining that, unlike other parties being discussed, Gardner would never use his state system for anything other than governmental business. As Gardner

testified, if he were to use his state system for personal reasons he would get into trouble. Tr. 3.31.17, pp. 50-51.

The Court credits Gardner's explanation of the context. It does not make sense to attribute a broader meaning to the discussion of using his state email because he was aware that emails discussing state business, even if on a personal account, were still public records subject to disclosure under IPRA and retention policies. In fact, Gardner said if he received an email on his personal account that dealt with state business he would forward it to his state email account or to his assistant so it could be retained. Tr. 3.31.17, p. 78. He would gain no advantage in terms of hiding matters from public scrutiny by using only his personal email accounts. Further, there is evidence which disproves the statement is an absolute because we have examples of use of Gardner's state email. *See, e.g.*, Pl. Ex. 105.[18]

3. IPRA Request 13-023 – Communications with Sen. Mark Moores

On May 23, 2013, Justin Horwath sent an IPRA request seeking "all written communications between members of the Governor's office and state Sen. Mark Moores, R-Bernalillo, regarding the state Senate Rules Committee confirmation hearings on Education Secretary-Designate Hanna Skandera during the 2013 legislative session." Pl. Ex. 14. A response was initially promised on May 28, 2013. After two extension letters were issued, on June 21, 2013, a response was

[18] Other examples of the use of Gardner's state email (Pl. Exs. 106-08) may not be significant as they were generated after Governor Martinez issued a statement directing all state employees under her authority to use official state email when conducting state business. Def. Ex. H.

made that the Office of the Governor had no responsive documents. Pl. Ex. 14.

As with the two previously discussed IPRA requests, Horwath became aware of a document that would be responsive if it existed in the Governor's files. There was an email from Janelle Anderson to Sen. Moores which contained a draft letter for Sen. Moores to send to the Chair of the Senate Rules Committee regarding complaints he had about the confirmation hearing for then Secretary-Designate Hannah Skandera. Pl. Ex. 16. A copy of this letter was obtained from the Legislative Council Service,[19] which obtained it from Sen. Moores.

Anderson was at the relevant time the Policy Director for the Governor's Office. Tr. 3.31.17, p. 134. By the time the request was made, Anderson was no longer with the office. Cason, therefore, conducted a search of Anderson's P.S.T. file. A P.S.T. file contains the email accounts of former personnel. (Tr. 3.31.17, p. 133; *see also* Def. Ex. A-38, pp. 82-83) Cason could not find any responsive documents in Anderson's P.S.T. file. Cason also asked Anderson to search, and she found nothing. Tr. 3.31.17, p. 135. Cason attributed this to the fact that the email contained a draft letter, and drafts are not required to be retained.

As to the three IPRA requests discussed in this section, Plaintiff contends that Defendant's search for responsive public records contained in text messages and emails was inadequate and unlawful. See PTO, p. 2.

[19] LCS itself responded to an IPRA request that it had no documents (Pl. Ex. 15), but it sought documents from Sen. Moores as an accommodation.

The law is clear that when a person conducts public business on a private email account, the record created is a public record subject to inspection under IPRA. Commentary, IPRA Compliance Guide, p. 25 (stating "if email is used to conduct public business, the email is a public record even though a personal account is used. The person using the personal account is effectively using, creating, receiving, maintaining or holding the public record on behalf of the public body.") Thus, if susanapac or a personal email was used to communicate about public business, the email was a public record that had to be disclosed if it existed at the time of an IPRA request.

We know because of revelation of certain emails through other sources that public records did exist on private email accounts at some point in time. This recognition does not alone mean there was an IPRA violation. As recognized by federal cases interpreting the Freedom of Information Act ("FOIA"), "'[T]he issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate.'" *Callaway v. U.S. Dep't of Treasury*, 893 F. Supp. 2d 269, 273 (D.D.C. 2012)(citation omitted), and *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991). Thus, "the fact that the . . . searches did not produce the specific documents the plaintiff sought does not render the searches inadequate." *Cleveland v. U.S. Dep't of State*, 128 F. Supp. 3d 284, 296 (D.D.C. 2015). As

noted by *Callaway*, FOIA "only obligates [the government] to provide access to those [records] which it in fact has created and retained." 893 F. Supp. 2d at 273 (citing *Kissinger v. Reporters Comm. For Freedom of the Press*, 445 U.S. 136, 153 (1980).

In this case, the Court finds the searches done in response to 13-013 and 13-023 were shown to be adequate. The personal email of Gardner was searched for any responsive emails and Anderson's email was searched. As to these two requests, the Court is of the opinion that the complaint is not, in fact, that the searches were inadequate, but rather the complaint is that records were not retained which Plaintiff believes should have been retained. That issue, however, is not properly before the Court. IPRA is not a records retention act. An IPRA lawsuit is not the proper vehicle for investigating why a record was deleted before an IPRA request for that record was submitted. *See Flowers v. IRS*, 307 F. Supp. 2d 60, 72 (D.D.C. 2004). *See also* Order filed April 29, 2016. This case was not brought as a Records Retention Act case. The Court declines to give an advisory opinion on whether the Governor's office is correctly interpreting its duty under the Records Retention Act. Courts decline to issue an advisory opinion when an issue is not properly before them. *See, e.g., Insure New Mexico, LLC v. McGonigle*, 2000-NMCA-018, ¶ 1, 128 N.M. 611, 995 P.2d 1053.

The Court does have an issue with regard to the search for documents

responsive to 12-048. It does not appear from the testimony that anyone searched any of the susanapac emails, other than Darnell's. Cason certainly did not and she did not reach out to anyone who might have access to these emails to do so. Gardner could not because he had no access. Darnell testified that he searched his own susanapac email, but he did not testify to searching other susanapac emails. It is the Court's opinion that if people create public documents on private email accounts, then when an IPRA request is made the governmental body for whom those people are employed has an obligation to search or at least attempt to search those private accounts. To hold otherwise would make it too easy to hide from inspection the very types of public records which are most in need of disclosure. As the D.C. Circuit recognized:

> The Supreme Court has described the function of FOIA as serving "the citizens' right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989) (internal quotation marks and citation omitted). If a department head can deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain, that purpose is hardly served.

Competitive Enter. Inst. v. Office of Sci. & Tech. Policy, 827 F.3d 145, 150 (D.C. Cir. 2016). As *CEI* held, when an agency head uses a private email account at an outside entity to store public documents, the records in that email account must be searched and produced in response to a FOIA request.

We already know of one email that went to a susanapac address which was

not disclosed by the Governor's Office but which the Reporter has in its possession,[20] and so it might be argued that requiring further searches is a pointless exercise, but the Court disagrees. The Reporter was looking not only for the Behrens memo, but also it was looking for any other public records created on private email accounts. Unless the searches are undertaken, we cannot know if such records exist. The Court will therefore order the Governor's Office to take all reasonable steps to forthwith attempt to have susanapac emails accounts for Keith Gardner and Gov. Susana Martinez from the following dates: August 17, 2011; May 2, 2012; and June 13, 2012, searched for any public records. Once such attempt is made, the results will be disclosed via a certified declaration filed with the Court. If for any reason this order cannot be carried out, the reasons for such impossibility will be explained in detail in a certified declaration filed with the Court.

As to all IPRA requests discussed above, the Governor challenges them as not being specific. The Court rejects this argument. As to 12-048. 13-013, and 13-023 the requests specified particular people and particular times either by date or

[20] It cannot be argued that the fact that the Reporter already had the Behrens email, the Moores' email, or the Rogers' email negates the Governor's Office's duty to respond adequately to an IPRA request which might reveal such documents. "Section 14–2–1(A), which provides public policy exceptions to IPRA's disclosure requirements, does not include prior possession as a legitimate ground for withholding public records. *See Republican Party of N.M.*, 2012–NMSC–026, ¶ 16, 283 P.3d 853 ("[C]ourts now should restrict their analysis to whether disclosure under IPRA may be withheld because of a specific exception contained within IPRA[.]"). Appellant cites no cases supporting the proposition that an IPRA litigant's possession of a public record negates an agency's duty to respond." *Am. Civil Liberties Union of New Mexico v. Duran*, 2016-NMCA-063, ¶ 37, 392 P.3d 181.

legislative session. The Governor's argument ignores that Reporter's purpose of seeking to find other public record emails in addition to the ones revealed by other means. As to the pardons request, the Reporter wanted all non-privileged records relating to the pardon decisions for a given year. Again, this is specific. *See generally Am. Civil Liberties Union of New Mexico v. Duran*, 2016-NMCA-063, ¶¶ 26, 31, 392 P.3d 181. "By 'reasonable particularity' the Act does not mean that a person must identify the exact record needed, but the description provided should be sufficient to enable the custodian to identify and find the requested record." Commentary, Compliance Guide, § C, p. 32.

D. General Challenges to IPRA Procedures Employed by the Governor's Office

General Procedures Applicable to all IPRA Requests

Gardner described the procedures that were employed in the Governor's office to search for records in response to an IPRA request. First all employees were trained on IPRA and had access to the Attorney General's Guide (Def. Ex. E). There were also lawyers with whom the IPRA requests could be discussed. Tr. 3.31.17, pp. 60-62. Pamela Cason, in addition to her other duties, was the records custodian for purposes of IPRA requests. Tr. 3.31.17, p. 99. Cason said that on her first day she was given the Attorney General's Guide to IPRA Compliance (Def. Ex. E) and told to learn it. According to her testimony, she followed the *Compliance Guide*. Tr. 3.31.17, p. 107-08. Cason also said that she

was familiar with the electronic records management guidelines (Def. Ex. F) and that she followed these regulations. Tr. 3.31.17, p. 108. With regard to training Cason said that she was trained by the attorneys in the office and that she went to the Attorney General's quarterly training session. If she could not go, an attorney from the office would go. They would then discuss any changes. Tr. 3.31.17, p. 122-23. Cason also went to training put on by New Mexico Foundation for Open Government. Tr. 3.31.17, p. 124. They also discussed IPRA at weekly office meetings. Tr. 3.31.17, p. 124. Cason also said that she informed the staff how to use the search function in Outlook. Tr. 3.31.17, p. 126.

When an IPRA request was received, Cason would review it and note deadlines, specifically the three and 15 day statutory deadlines. She would assign a number to the request. During the initial three days she would talk with the Governor's attorneys and determine to whom the request needed to be sent. She would then email the request to anyone who was to be involved in obtaining responsive documents. She would create folders for each request and would put responses she got into the folder. Tr. 3.31.17, p. 99-101. She would use the forms suggested in the AG's Guide for sending letters regarding the requests. Tr. 3.31.17, p. 111-13. Cason did not tell people what the due date was when she asked them to search, but if the time was running out, she would "hunt them down" and ask them about the response. Tr. 3.31.17, p. 133. Cason would determine, in

consultation with the attorneys, whether the request was burdensome. Tr. 3.31.17, p. 113. If a request concerned a private email account, and the account holder had left the Governor's Office, Cason would not contact them to ask them to search for public records on their private accounts. Tr. 3.31.17, p. 238-39.

If a request dealt with particular people, Cason would not do the search herself but would contact the people and have them do the search. Tr. 3.31.17, p. 120. If a person who might have responsive documents was no longer at the Governor's Office, Cason herself would search the archived files for any responsive documents in that persons computer accounts. Tr. 3.31.17, p. 133. The archived files did not contain any private email account records.

With regard to policies regarding the deletion of emails or the keeping of documents, Cason said that the Governor's Office followed the rules established by the Commission on Public Records and that the staff and she were trained by the State Records and Archives Office as to what needed to be kept and what could be discarded. Tr. 3.31.17, p. 143-44. Regardless of whether a document was subject to being retained or permitted to be discarded, if there was an IPRA request and the Governor's Office was in possession of the document at the time of the request, it will be produced and would not be discard even if a non-record or transitory. Tr. 3.31.17, pp. 134, 187.

Cason said that she did consider her need to perform her other duties when

responding to IPRA requests. She gave preference to Constitutional mandates, such as judicial appointments. Emergencies, such as fires, could also take people necessary to a response out of the office. In addition Cason had to work on extraditions, pardons, and appointments while the IRPA requests were pending. Tr. 3.31.17, pp. 92-98. In support of this consideration of her other duties when determining if more time was needed, Cason cited the *Compliance Guide* which states that the duty to provide reasonable opportunities to inspect public records does not mean "that a request to inspect must take precedence over all other business of the public body. Rather, the duty to provide reasonable opportunities to inspect permits a records custodian to take into account the public body's office hours, available space, available personnel, need to safeguard records and other legitimate concerns. . . . Generally, the obligation to provide reasonable access to public records should not require an office to disrupt its normal operations. . . ." Def. Ex. E, pp. 28-29.[21]

The following facts are included for informational purposes: during 2013 the Reporter made 23 IPRA requests to the Governor's Office. (Def. Ex. K) A summary of these requests is found in Def. Ex. L. Defendant's Exhibit A-13 shows that in comparison to the Reporter's 23 requests, the Albuquerque Journal

[21] This particular paragraph, however, seems more like a time, place, and manner restriction than an excuse for delaying in responding to the requests. This paragraph of the Guide states that this recognition is "[s]ubject to the Act's specific requirements[.]" Included in those specific requirements are the response time limits.

made three IPRA requests and the Santa Fe New Mexican four requests. The television stations made even fewer requests.

The evidence also showed that in June 2013, there were numerous fire emergencies which involved the Governor's Office. Tr. 3.31.17, p. 159. This and other business of the Governor's office often increased the time it took to respond to IPRA requests.

This discussion is included, in part, to give context for all of the other IPRA claims. It is also included because Plaintiff brings general challenges to Defendant's IPRA policies and procedures, claiming they are legally deficient because: 1) there is a standard-less delegation of records custodian duties that lacks timelines, guidelines and training, 2) there is a lack of clear search protocols and training for staff, 3) there is a failure recognize documents as public records and a failure to retain and produce electronic public records, and 4) there is a failure to produce public records within statutory deadlines. See PTO, p. 2-3. In response to the general claim of inadequate procedures, Defendant states that there cannot be injunctive relief in the abstract and that injunctive relief can be had only as to specific violations of IPRA shown to have been committed. See PTO, p. 18-19.

The Court is inclined to agree with Defendant that there is no IPRA cause of action for general inadequacy in practices and procedures. This, however, is not dispositive because the Court finds that in general the procedures are adequate.

The testimony demonstrated there was adequate training. The Records custodian was aware of the timelines and had procedures in place to comply with them. As to the timeliness of the disclosures, as was discussed above, the statute vests the records custodian with broad discretion in determining whether a request is broad or burdensome needing additional time. As to the one area in which the Court found an unreasonable delay – the calendar requests for 2012 – the website has now been built and is available. There is no indication that the delay that occurred in 2013 will occur again or that it evinces a systemic problem. While the Court found in one instance there was a failure to adequately search private email accounts for public records, the Court is of the opinion that this failure does not justify general injunctive relief. The Court believes that the Governor's staff will follow the directives in this order with regard to private email accounts and that an injunction will not be needed. Once again as to the adequacy of the Governor's record retention policies, that is not before this Court and will not be the basis for any finding or relief.

In summary then, the Court finds the following IPRA violations:

1. IPRA 13-040 – there was unreasonable delay;
2. IPRA 12-048 – there was an inadequate search of susanapac accounts for Gardner and for the Governor for public records on the dates specified in the request.

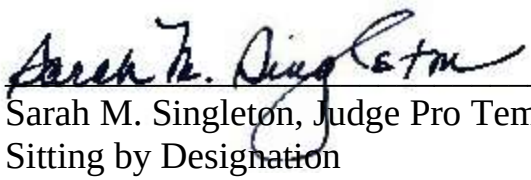
3. IPRA 12-091 – there was an improper claim of privilege which led to an unreasonable delay in disclosing the records.

As to all other IPRA requests, the claims are rejected and the claims are dismissed.

IV. Conclusion

For the reasons given above, the constitutional claims are rejected. The remaining claims related to IPRA Requests 12-048 are granted in part; the claims related to IPRA 12-091 are granted; and the claims related to IPRA 13-040 are granted. All other IPRA claims are denied.

The parties will be given 14 days from the date this decision is accepted for filing to informally notify the judge and the other party if it/she is thinking of appealing. This information may be conveyed informally by email. Email to the judge should be sent to sfedsms@nmcourts.gov. If either party indicates an intention to appeal, then both parties will have 14 days from the date that notification is sent to submit to the Court proposed findings of fact and conclusions of law. These proposals should be filed and submitted. Submission to the judge should be in Word format to the above email address. Thereafter the Court will enter its findings and conclusions and will provide further instructions regarding submission of a judgment. Following entry of judgment, post-judgment motions regarding attorney's fees and costs, consistent with this decision, will be entertained.



Sarah M. Singleton, Judge Pro Tem
Sitting by Designation

On the date of acceptance for efiling copies of the above decision were eserved on those registered for eservice in this matter.