



For the Public Good - Lessons Learned from Whistleblower and IPRA Complaints

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Relevant Laws

- Whistleblower Protection Act (WPA)
- Inspection of Public Records Act (IPRA)



The Whistleblower Protection Act

- ❑ Enacted in 2010 by the NM Legislature
- ❑ Forbids public employers –
 - From taking any retaliatory action against a public employee because the public employee
 - Communicates to the public employer or a third party information about an action or a failure to act
 - That the public employee believes in good faith constitutes an unlawful or improper act

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WPA

- ❑ It applies to you – a public employer
 - any department, agency, office, institution, board, commission, committee, branch or district of state government,
 - any political subdivision of the state,
 - any entity of the state specifically provided for by law, and
 - every office or officer of any entity listed above

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WPA's Prohibition

- ❑ Prohibits retaliation against a public employee
 - For sounding the alarm about unlawful or improper acts
 - Testifying about a public employer's unlawful or improper acts in a public investigation
 - Refusing to participate in the public employer's unlawful or improper act

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Improper Act

- ❑ Improper Act
 - "a practice, procedure, action or failure to act on the part of a public employer that... constitutes gross mismanagement [or] a waste of funds" or an abuse of authority.

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Remedies

- ❑ Actual damages
- ❑ Reinstatement with the same seniority status
- ❑ Two times the amount of back pay with interest on the back pay
- ❑ Compensation for any special damage sustained as a result of the violation
- ❑ Litigation costs and reasonable attorney fees

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Defenses

- Two-year statute of limitations – from the date on which the retaliatory action allegedly occurred
- Employer can show action taken was not retaliation but rather due to employee misconduct, poor job performance, reduction in force or other legitimate business purpose

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Herald v. Bd. Of Regents of UNM

- ❑ Plaintiff was a post-doctoral fellow and resident physician in anesthesiology (resident program) in June 2008 at the University of New Mexico
- ❑ She was both an employee and a student, but was under an employment contract with the university
- ❑ In June 2009, she visited the home of her supervising physician (senior resident) and she claims that while there, the senior resident raped her
- ❑ She reported the rape in September 2009 to several of the leaders/administrators of the residency program at the university

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Herald, cont.

- ❑ The rape was never reported to law enforcement and the senior resident was never charged with or convicted of any crime as a result of the allegation
- ❑ In June 2010, Plaintiff was terminated from the residency program
- ❑ She was provided a notice of final action that described several findings of administrative misconduct on the part of Plaintiff

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Herald, cont.

- ❑ The findings of misconduct:
 - Impaired and incompetent while on duty at the hospital
 - Investigation revealed that her hospital-issued narcotic pack was missing certain controlled substances and that she had altered a document pertaining to the contents of the narcotic pack so as to hide the discrepancy
 - She had also repeatedly filled prescriptions issued to her by other participants in the residency program, and many of those prescriptions may have been falsified
 - She also refused to attend meetings, refused to discuss the issues above, and deliberately lied to the School so as to obstruct the investigation

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Herald, cont.

- ❑ The lawsuit – claims under the WPA, the Tort Claims Act, negligent supervision and breach of contract
- ❑ Her allegations:
 - She alleged that she was discouraged from reporting the rape
 - That the Defendant failed to investigate the rape and failed to provide her appropriate assistance
 - That she was subjected to heightened security and increased criticisms
 - That she was denied medical leave to get help for the alleged rape
 - That her condition deteriorated after she reported the rape

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Herald, cont.

- ❑ Plaintiff's allegations:
 - She was granted a second request for leave
 - After she returned to work, she was told she would be subject to a 3-month formal remediation during which she would be assessed regularly
 - However, plaintiff alleged that she was not assessed and was eventually terminated
 - The hospital filed two motions to dismiss in district court

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Herald, cont.

- ❑ The District court dismissed the WPA and the TCA claims, but denied the Defendant's motion to dismiss on breach of contract claim
- ❑ However, after amendments to the complaint, and more attempts to dismiss the claims, Plaintiff alleged a claim for sex discrimination based on hostile work environment and retaliation and the district court allowed those claims to move forward to eventually a trial before a jury
- ❑ A jury found in favor of the hospital; Plaintiff appealed

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Herald, cont.

- ❑ The appeal
 - The appellate court reversed the district court's decision dismissing the WPA claim
- ❑ Analysis
 - The court reviewed the elements of the WPA
 - The court emphasized that the remedies available are not exclusive and shall be in addition to any other remedies available provided for in any other law
 - The court noted that the district court below ignored this provision in the WPA regarding non-exclusivity of remedies

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Herald, cont.

- ❑ Analysis, cont.
 - The court noted that the jury did not consider the definition of "retaliation" under the WPA – the jury rendered a verdict based on a definition of unlawful retaliation where an employee opposes a hostile work environment on the basis of sex
 - The court noted that issue was whether the hospital's alleged retaliatory behavior was triggered by Plaintiff's report of the alleged rape
- ❑ The court sent the case back to the district court for further proceedings related to the WPA and the question of retaliation due to the report of the rape

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Velasquez v. Regents of N. N.M. Coll.

□ Background

- The President of the College had concerns about one of the campuses and sought out a revitalization of that campus
- Plaintiff, serving as the Director of Adult Basic Education, was asked to draft a plan for revitalizing the campus by creating an Innovation Center
- Plaintiff, along with another administrator, created a plan and presented a 5-year plan for the Center to the Board of Regents
- The Board indicated its support of the plan, and in February 2012, Plaintiff was promoted to Director in charge of the campus to be revitalized



Velasquez, cont.

□ Background facts, cont.

- Grants and funding for the Center were secured
- The revitalization plan was implemented
- Plaintiff was recognized for certain accomplishments and received positive reviews from her supervisor – her appraisal was rated at the average score of 4.4 out of 5
- Plaintiff's contract was also renewed the following year with an increase in salary from \$60k to \$70k
- Sometime in July 2013, Plaintiff sought for more funding for certain kitchen staff at the facility and met with a college Vice President to discuss this



Velasquez, cont.

- ❑ Background facts, cont.
 - The meeting with the college VP did not go well
 - The VP shouted at the Plaintiff, ordered her to leave his office and denied the request for increased funding for kitchen staff
 - The VP also told Plaintiff that if she reported this to the College President, she would not be believed
 - Plaintiff eventually reported this to the President, in August 2013, and the President advised her against filing a grievance
 - Plaintiff sought approval for other activities, and to approve funds for those activities at the Center, and a number of her requests were denied

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Velasquez, cont.

- ❑ Background facts, cont.
 - In seeking approval for the activities and the funding, Plaintiff reported that these activities were tied to particular grants and that there would be consequences with respect to those grants if the activities were not approved
 - Within weeks, the Plaintiff's supervisor issued letters of reprimand and reassignment to the Plaintiff relieving her of her duties at the campus
 - She had no prior notice of any performance issues or opportunity to address those issues as the College's discipline policy provided

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Velasquez, cont.

- Background facts, cont.
 - Plaintiff was reassigned one more time
 - Her next evaluation found her average scores at 1.4 and 2.2 (out of 5)
 - On May 6, 2014, Plaintiff was notified in writing that due to a reduction in force that included her position, she would not be reemployed during the upcoming fiscal year

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Velasquez, cont.

- Velasquez eventually filed a complaint alleging violations of the WPA
- A jury found in favor of the Plaintiff and awarded damages to compensate Plaintiff for back pay and emotional distress, and the district court ordered Defendant to reinstate Plaintiff
- The College appealed and the appellate court focused on two types of “improper conduct” at issue in Plaintiff’s complaint
 - Waste of funds and gross mismanagement

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Velasquez, cont.

- Waste of funds
 - Plaintiff communicated in good faith about waste of funds
 - A waste of funds can either be an “action” or “failure to act”
 - Funds had been spent in pursuing the unfinished revitalization project
 - Further funding by third party grantors was contingent on certain activities being approved
 - Campus visits by student groups that were not funded or approved by administration resulted in lost revenue streams

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Velasquez, cont.

- Waste of funds
 - The Court distinguished or separated out discussions among employees and supervisors concerning various possible courses of action – which is healthy for an organization
 - Versus when such a discussion leads to an instruction to violate the law – that could lead to a violation of the WPA even if the improper act never occurs
 - What matters here were the communications and Plaintiff’s reasonable belief that waste was imminent
 - The loss of funds that would result from the College not approving the expenditures or certain activities was not speculative, this was real and immediate waste

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Velasquez, cont.

- Gross mismanagement
 - The Court also did not disturb the jury's conclusion that Plaintiff communicated believing in good faith that "gross mismanagement" occurred
 - The definition includes management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission
 - In this case, accomplishing the revitalization project of the campus

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Velasquez, cont.

- Gross mismanagement
 - The jury also had the benefit of the College's definition of actions that do not amount to "gross mismanagement"
 - Differences of opinion between employee and superiors on the proper approach to a particular problem
 - The allocation of funds among several competing priorities
 - Jury considered this and rejected the notion that this case was about a mere difference of opinion or a dispute regarding allocation of funds among competing priorities

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Velasquez, cont.

- Retaliation
 - Facts showed that Plaintiff had positive performance reviews before her communications regarding her concerns, and then two negative reviews after the concerns over the expenditures were expressed
 - She was removed from her position as the director of the campus and removed of certain duties just a few weeks after she communicated her concerns, and then she was terminated within a few months
- Key language – “Defendant bore the burden of proving... that, if Plaintiff had not engaged in protected conduct, Defendant would have reprimanded her, removed her from her director position, and terminated her nonetheless.”

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Wills v. Bd. of Regents of Univ. of New Mexico

- The case
 - Employee of state university health sciences center claimed there was a violation of the WPA and sought to recover “past due salaries” that were unpaid
 - He claimed he was terminated in retaliation for his initiation of this WPA lawsuit
 - His lawsuit was dismissed by the district court and the dismissal was upheld by the appellate court

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Wills, cont.

- Background
 - Plaintiff was hired to the position of Chair of the Department of Anesthesiology and Critical Care Medicine in September 2002
 - He had a 2-year employment contract in which it was agreed he would be paid a base salary plus a supplemental salary
 - After the 2-year term, Defendants continued to pay Plaintiff in an amount consistent with the payment terms of that original contract until 2009
 - In 2011, plaintiff filed his complaints regarding his salary and sought to recover “past due salaries”

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Wills, cont.

- Background
 - Plaintiff was terminated 4 days after filing his initial complaint
 - His WPA claim was that he was retaliated against by terminating him for filing this lawsuit
 - He alleged this act constituted abuse of authority as the term is used in the WPA
 - WPA defines an “unlawful or improper act as an action or failure to act on the part of a public employer that... constitutes... an abuse of authority”

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Wills, cont.

- The Court's analysis
 - Plaintiff failed to allege that Defendants retaliated against him because he communicated with them or a third party about their abuse of authority
 - His complaint is only that he was fired and this was an abuse of authority (the act of terminating him)
 - There is no "communication" of an improper act
 - Plaintiff tried to argue that the lawsuit itself was the communication
 - The Court didn't agree with the Plaintiff and dismissal was upheld

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Wills, cont.

- Key Language
 - "whistleblowing," which generally evokes the type of public disclosure that "serve[s] the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary government expenditures[.]" does not include an individual's communications regarding a supervisor's maltreatment of him personally

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Inspection of Public Records Act Cases

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IPRA

- ❑ IPRA is a state law that provides the public and media access to public information
- ❑ Requires open access to almost all public records in state and local government
- ❑ Has very few exceptions
 - Records of physical/mental examinations and treatment of individuals confined to an institution
 - Letters of reference concerning employment, licensing or permits
 - Letters of memoranda that are of opinion in personnel files or students' cumulative files
 - Portions of law enforcement records
 - As provided by the Confidential Materials Act
 - Trade secrets, attorney-client privileged information and other business plans of certain entities
 - Tactical response plans
 - As otherwise provided by law

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IPRA

- ❑ IPRA provides for –
 - Procedure for requesting records
 - Procedure for inspection of records
 - Procedure to address excessively burdensome or broad requests
 - Procedure for denied requests
- ❑ Requestor of records who is denied a request may attempt to enforce the law and seek damages

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IPRA

- ❑ IPRA provides for damages –
 - To be awarded if the failure to provide a timely explanation of denial is determined to be unreasonable
 - Not exceed one hundred (\$100) dollars per day
 - Accrue from the day the public body is in noncompliance until a written denial is issued
 - Payable from funds of the public body
- ❑ A court may also issue an order compelling the public body to produce information requested or provide an explanation as to a denial, or other appropriate remedies
- ❑ Reasonable attorneys' fees can also be awarded for enforcing IPRA if the enforcement is successful in a court action

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Dunn v. N.M. Dep't of Game and Fish

□ Background

- This case has to do with a request to produce the names and email addresses of individuals who applied for hunting licenses in 2015 and 2016 pursuant to Plaintiff's IPRA request
- Defendants argued that the information requested was not considered "public records" because they do not "relate to public business" as defined under IPRA
- They did not argue an exception applied, simply that the request for information did not touch on public records

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Dunn, cont.

□ Background

- The request was submitted by Plaintiff in January 2017
- Defendants determined that the information amounted to over 300,000 entries
- Defendants also determined that part of the information (email addresses) did not constitute a public record, so they agreed to only produce applicants' names
- Plaintiff filed the lawsuit seeking an order compelling the Department to produce the email addresses

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Dunn, cont.

- ❑ Court's holding
 - The district court agreed with the Plaintiff that the information request did not fall under any exception recognized by IPRA
 - The court also held that the Dept. had wrongfully withheld the email addresses pursuant to a policy decision to protect the applicants from potential harassment by anti-hunting groups
- ❑ On appeal
 - The appellate court noted that the only dispute at the time of appeal had to do with whether the email addresses are considered public records



Dunn, cont.

- ❑ On appeal
 - Key language – “IPRA must be construed in light of its purpose and statutory provisions under IPRA should be interpreted to mean what the Legislature intended it to mean, and to accomplish the ends sought to be accomplished.”
 - What is the purpose of IPRA?
 - To ensure... that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees.”



Dunn, cont.

- ❑ More aspirational language –
 - “each inquiry starts with the presumption that public policy favors the right of inspection.”
- ❑ Court then looks to the definition of public records
 - “all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained”
- ❑ The Dept. argued that email addresses do not relate to public business, they simply constitute contact information taken for administrative reasons

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Dunn, cont.

- ❑ Plaintiff argued –
 - The Dept. requires applicants to provide an email address, and that information is gathered, maintained, and used by the Dept. to carry out its official licensing acts
 - Hunting licenses are granted to permit members of the public to use public resources

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Dunn, cont.

- ❑ Court's analysis –
 - Prior cases have held that public records under IPRA is broadly defined
 - Absent an express exemption from disclosure, public agencies have been required to produce all records, even those held by or created by a private entity on behalf of the public agency
 - Court acknowledged that the phrase "relate to public business" is not exact, but is also not amenable to a narrow or limiting interpretation
 - The Legislature did not write IPRA to separate out records that relate to substantive decisions of the public body versus materials that are kept for purely administrative purposes
 - The Legislature also already made provisions for permitting redaction of protected personal identifier information and did not include email addresses in that description of personal identifier information

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Dunn, cont.

- ❑ The NM Court of Appeals agreed with the Plaintiff that the information requested (email addresses) had to do with the Dept.'s work regarding creating and collecting applications for game and fish licensing
- ❑ In fact, the collection of email addresses is an activity that furthers the Dept.'s business of carrying out its licensing program – there was no dispute as to this fact

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N.M. Found. for Open Gov't v. Corizon Health

- Background
 - NMFOG requested settlement documents related to services provided to the corrections department and related civil claims of misconduct
 - Corizon Health, a third-party medical service provider, was the custodian of the actual documents requested
 - Corizon and the New Mexico Corrections Department (NMCD) had a contractual arrangement in which Corizon provided healthcare services to correctional and detention centers
 - During the time the contract was in effect, there had been over fifty negotiated and settled claims regarding instances of improper care and/or sexual assault

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N.M. Found. for Open Gov't, cont.

- Background
 - In June 2016, Plaintiffs submitted written requests to inspect any and all settlement documents involving Corizon as medical contractor for NMCD
 - NMCD responded that they did not have any of the documents in its possession
 - NMCD instructed Plaintiffs to contact Corizon and also forwarded the IPRA requests to Corizon as well
 - Corizon produced a table with settlement amounts, and initially agreed to produce the settlement documents after an extension of time, but then refused and argued that the settlement documents were not include under IPRA

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N.M. Found. for Open Gov't, cont.

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N.M. Found. for Open Gov't, cont.

□ Enforcement action

- Plaintiffs then sought an order from a district court requiring that the documents be produced
 - They noted that Corizon was a private entity acting on behalf of a public body
 - Therefore, IPRA applied
 - And they noted that the settlement documents resulted from the business of medical treatment and care to state prison inmates
- The court agreed with the plaintiffs and issued an order requiring Corizon to comply by producing the settlement documents and to pay plaintiffs' reasonable attorney fees and costs for litigating this action

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N.M. Found. for Open Gov't, cont.

- ❑ Corizon's position
 - These are private contracts that include private persons which require confidentiality
 - These settlement agreements are also not a component of the public function that Corizon was contracted to perform for the state
- ❑ The District court disagreed with Corizon
 - The private entity was paid \$37 million a year from public funds for their services
 - Services are provided in publicly owned facilities
 - NMCD was involved in the medical decision making process
 - NMCD exerted control over Corizon's actions
 - NMCD and Corizon were under a contract that benefited NMCD and New Mexico inmates

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N.M. Found. for Open Gov't, cont.

- ❑ District court's findings
 - The settlement agreements related to Corizon's performance of public business and are public records subject to disclosure under IPRA
- ❑ Court of Appeals
 - Reviewed the purpose of IPRA (the entitlement to the greatest possible information regarding affairs of government)
 - Reviewed the definition of public records
 - Addressed the question of whether the settlement agreements were used, created, received, maintained, or held by or on behalf of NMCD and relate to public business

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N.M. Found. for Open Gov't, cont.

- Court of Appeals
 - Noted that the settlement agreements were plainly created and maintained in relation to a public business – medical care and personal safety of inmates held by NMCD
 - Corizon was acting on behalf of NMCD by providing medical services to inmates
 - The settlement agreements resulted from responding to allegations of mistreatment of inmates while in the custody of the state
 - The agreements are therefore public records under IPRA
 - They considered a prior case that held that agreements like this that were created, used and maintained by a public body (and not a private third-party) that involved settlements involving prison inmates were public records under IPRA

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N.M. Found. for Open Gov't, cont.

- Court of Appeals
 - The Court also expressed concern with the notion that a certain right of access to information regarding government affairs can be allowed to be hidden with the use of private entities
 - Key language –
 - Allowing private entities who contract with a public entity "to circumvent a citizen's right of access to records by contracting" with a public entity to provide a public function "would thwart the very purpose of IPRA and mark a significant departure from New Mexico's presumption of openness at the heart of our access law." *Toomey*, 2012-NMCA-104, ¶ 26, 287 P.3d 364 (holding recordings of city meetings to be disclosed under IPRA).

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Take-Aways

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Take-Aways

- ❑ Investigate, and look into, but do not ignore, communications regarding alleged unlawful or improper acts
- ❑ Respond and explain where possible the reasons for the actions or inactions, as well as document and justify the legitimate, business - related reasons for any adverse employment action
- ❑ Follow your policies and procedures regarding addressing and responding to employee complaints about employee working conditions, pay, etc.
- ❑ Don't assume a report of a concern regarding an improper act is unreasonable or outlandish

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Take-Aways

- ❑ Invest in IPRA training for your public records officers and personnel
- ❑ There are tight timelines related to responding to IPRA requests and providing for written explanations regarding production of documents or denials of requests for information
- ❑ Remember damages accrue per day from the date of noncompliance under IPRA
- ❑ Do not assume that a particular kind of information is not a “public record”
- ❑ WPA and IPRA complaints are on the rise and expensive!
- ❑ Consult with your school’s legal counsel regarding overall training and inservices, and on guidance related to a specific problem before the matter escalates



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