

## Closing arguments filed in lawsuit against Gov. Martinez

Written by By Andy Lyman NM Political Report  
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Lawyers for the *Santa Fe Reporter* and Gov. Susana Martinez have submitted written closing arguments in a long-running court battle over public information and records.

The Reporter sued Martinez in 2013, alleging she and her staff discriminated against the paper by refusing to communicate with its journalists and violated the state Inspection of Public Records Act (IPRA) by refusing to turn over records related to pardons, her schedule and other public business.

The paper's attorneys argued that the stonewalling began, ironically enough, after publication of a cover story critical of the administration's lack of transparency.

The unusual case has received wide attention, including from numerous state and local news organizations and from the Columbia Journalism Review. A victory for the newspaper could set new transparency standards for New Mexico state government; a win for the governor would mean some vindication for an elected official who has touted hers as "the most transparent administration in state history."

A three-day bench trial in the courtroom of state District Judge Sarah Singleton of Santa Fe concluded in April, setting the stage for both sides' lawyers to sum up their cases in writing.

In his closing arguments, Martinez's contract lawyer, Paul Kennedy, argued that the lack of communication from the governor's staff was a workload problem, not a form of discrimination.

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Further, Kennedy said, the governor's office did not violate IPRA and said any delays in turning over records were the result of an understaffed and overloaded workforce in her office.

The Reporter's lawyer, Daniel Yohalem, argued that the governor's office lacks comprehensive policies for responding to records requests and that the governor's office did not show enough proof that its staffers did not timely respond to both requests for comment and records. Yohalem also argued that public comments from key government staffers show discriminatory views held by Martinez's administration.

Kennedy said the Reporter didn't adequately prove the 2012 Martinez cover story resulted in her office shutting off communication with the paper. The two events, he argued, were "not close enough to support an inference of causation."

Yohalem argued that by publicly referring to the Reporter as a "left-wing tabloid," former administration spokesman Enrique Knell was indeed showing a bias against the paper.

Kennedy dismissed Knell's comment, but conflated the political agenda of a local political action committee, which provided documents to the paper, with political views of the paper itself.

The now defunct Independent Source PAC gave emails to the paper, which Kennedy claimed led to the lawsuit.

Knell's comment, Kennedy argued, "connotes the admitted bias of the source Plaintiff used for the subject matter of its lawsuit, not any bias on the part of Mr. Knell himself."

During Knell's testimony earlier this year, he attributed his "left-wing" comment to the lawsuit coming out of "left field."

Kennedy also said the lack of communication between Knell and the Reporter stemmed from a scantily staffed governor's office, noting that Knell's "personal circumstances" prevented him

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from responding to press inquiries in a timely fashion. Kennedy said Knell's lack of responsiveness to the Reporter staff was due to a death in Knell's family, a commute from Albuquerque to Santa Fe and childcare obligations.

"So it would have been impossible for Mr. Knell to respond right away to detailed questions on every single bill that passed, much less all the potential legislation which did not pass," Kennedy wrote about Knell's workload in early 2013.

Kennedy also said the governor's office didn't respond to Reporter staff because Knell's communication style with the news media differed from that of his predecessor, Scott Darnell.

Darnell, Kennedy said, "devoted more time to staying in the office responding to e-mail and did not travel by the press rooms during the legislative session."

Part of Yohalem's argument, both in the courtroom and in the written closing, was that there were numerous, documented instances in which Knell sent seemingly unsolicited emails to journalists at other organizations while ignoring emails from Reporter staffers.

During his testimony, Knell said he often walked the halls of the state Capitol building, where reporters would ask for comment on certain issues.

Kennedy pointed back to that testimony and said the Reporter staff could have communicated with Knell had they frequented the press gallery.

During testimony earlier this year, Pam Cason, the governor's former records custodian, said when she received IPRA requests she contacted pertinent staffers and asked them to retrieve responsive records.

During the trial, Yohalem questioned Cason and others on the office's policy for searching and retaining records. Key staffers such as Chief of Staff Keith Gardner and Darnell, who became a

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deputy chief of staff, said in their testimony that they would delete emails they deemed “transitory,” or not related to official business.

The administration’s “legally deficient IPRA procedures,” Yohalem wrote in his closing argument, “resulted in a systematic failure to retain, maintain and produce public records contained in emails.”

Kennedy argued the governor’s staff should not be expected to keep email records, saying “an e-mail message from 49, 73, or 500 days earlier may no longer exist in a person’s e-mail account if the copy of the message residing in that particular account was deleted during that 49, 73, or 500-day period.”

Kennedy also chalked up the delays to a “busy fire and flood season in 2013.”

He argued that Cason herself was not out of the office during major events like wildfires or floods, but that “scheduling and communications staff” she relied on to retrieve documents were.

Kennedy also cited the IPRA compliance guide that states “a records custodian may need assistance from other staff members to complete a search, and the office is not expected to disrupt its normal operations in order to respond to IPRA requests.”

The case is far from over. Both sides are expected to submit written rebuttals this week. It’s unclear exactly when a final ruling is expected, but Judge Singleton and the lawyers made clear during the trial that whichever side loses plans to appeal.

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