

1 **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2 **Opinion Number:** _____

3 **Filing Date: March 12, 2015**

4 **NO. 34,204**

5 **DANIEL M. FABER,**

6 Plaintiff-Petitioner,

7 v.

8 **GARY K. KING, Attorney General of**
9 **the State of New Mexico,**

10 Defendant-Respondent.

11 **CONSOLIDATED WITH:**

12 **NO. 34,194**

13 **GARY K. KING, Attorney**
14 **General of the State of New Mexico,**

15 Defendant-Petitioner,

16 v.

17 **DANIEL M. FABER,**

18 Plaintiff-Respondent.

19 **ORIGINAL PROCEEDINGS ON CERTIORARI**

20 **Beatrice J. Brickhouse, District Judge**

1 Hector Balderas, Attorney General
2 Scott Fuqua, Assistant Attorney General
3 Santa Fe, NM
4 for Respondent and Petitioner Gary K. King

5 Tucker Law Firm, P.C.
6 Steven Lee Tucker
7 Santa Fe, NM

8 for Petitioner and Respondent Daniel M. Faber

1 **OPINION**

2 **MAES, Justice.**

3 {1} State agencies are supposed to make their documents available to the public
4 under the New Mexico Inspection of Public Records Act (IPRA), NMSA 1978,
5 Sections 14-2-1 to -12 (1947, as amended through 2009). *See* § 14-2-1(A) (“Every
6 person has a right to inspect public records of this state . . .”). Therefore, when an
7 agency wrongfully denies a request for documents, Section 14-2-12(D) of IPRA states
8 that “[t]he court shall award damages, costs and reasonable attorneys’ fees to any
9 person whose written request has been denied and is successful in a court action to
10 enforce the provisions of [IPRA].” The parties do not dispute that the Attorney
11 General wrongfully denied the IPRA request. Instead, the issue in these consolidated
12 cases is what type of damages were authorized by the Legislature in Section 14-2-
13 12(D). We hold that Section 14-2-12(D) permits compensatory or actual damages
14 because the plain language, purpose, and history of IPRA indicate that neither
15 punitive nor statutory damages were intended by the Legislature. We also hold that
16 Faber is not eligible for nominal damages.

17 **I. FACTS AND PROCEDURAL HISTORY**

18 {2} Attorney Daniel Faber (Faber) filed a federal lawsuit on behalf of three
19 assistant attorneys general alleging gender discrimination in connection with their

1 salaries. The Attorney General filed a motion to stay litigation pending resolution of
2 his motion to dismiss the complaint based on an immunity defense. On May 28, 2010,
3 the federal district court entered a memorandum opinion and order granting the
4 Attorney General's motion to stay all proceedings, including discovery; the federal
5 district court later lifted the stay on January 14, 2011.

6 {3} On August 23, 2010, Faber filed an IPRA request in his own name seeking
7 employment data for every attorney who had been employed by the Attorney
8 General's Office since January 1987. On August 26, 2010, the records custodian of
9 the Attorney General's Office denied the IPRA request, stating that "[o]n August 25,
10 2010[,] I received your request to inspect certain records. This request is being denied
11 as these records involve a current lawsuit and appear to circumvent the discovery
12 process and the current Order Staying Discovery (attached)."

13 {4} Faber filed a complaint for damages and a petition for writ of mandamus in the
14 state district court against the Attorney General on September 7, 2010, alleging that
15 his IPRA request had been wrongfully denied. The state district court found that the
16 stay of discovery entered by the federal court did not preempt the statutory rights
17 granted to New Mexico citizens by IPRA, and that the Attorney General violated
18 IPRA by denying Faber's August 23, 2010, request. The court also issued a writ of

1 mandamus ordering the Attorney General to comply and ruled that damages would
2 be considered at a later date.

3 {5} Faber subsequently moved for an award of “damages of \$100 per day from the
4 day the noncompliance began (August 26, 2010) until the day Defendant
5 complies” As support, Faber noted that courts may award damages of \$100 per
6 day for failure to timely respond to an IPRA request under Section 14-2-11(C). Faber
7 submitted that the same per diem damages should apply for wrongful denial of
8 requests under Section 14-2-12(D). The state district court awarded damages of \$10
9 per day from the date of the wrongful denial to the date the stay was lifted and
10 thereafter “damages of \$100 per day until the records are provided,” and \$257.19 in
11 costs to Faber. The Attorney General appealed the state district court’s award of
12 damages. The determination of the IPRA violation was not at issue on appeal. *See*
13 *generally Faber v. King*, 2013-NMCA-080, 306 P.3d 519.

14 {6} The New Mexico Court of Appeals did not directly address the type of
15 damages that are appropriate under Section 14-2-12(D). Nonetheless, the Court of
16 Appeals held that “damages for enforcement of a denied [IPRA] request are governed
17 by Section 14-2-12(D), not Section 14-2-11(C),” and that the “statutory maximum
18 per-day penalty of Section 14-2-11(C) does not create any ‘standard’ for an amount

1 of damages under Section 14-2-12(D) as asserted by Faber.” *Faber*, 2013-NMCA-
2 080, ¶ 15. Therefore, the Court determined that “[t]he only question we must answer
3 is whether the nature and amount of the award was supported.” *Id.* ¶ 9. The Court of
4 Appeals also noted that the “ term ‘damages’ under IPRA has not been construed or
5 limited by our courts.” *Id.* ¶ 11. The Court of Appeals held that Faber cannot receive
6 Section 14-2-11(C) per diem damages under Section 14-2-12(D) and that a district
7 court must specify and measure the nature of the damages. *Faber*, 2013-NMCA-080,
8 ¶ 15. Since the nature of the damages was unclear from the record, the Court of
9 Appeals remanded the case to the state district court to “enter findings supporting any
10 award of compensatory damages so that we may, on review, know the basis for such
11 damages and may then measure them against any award of punitive damages.” *Id.* ¶
12 17.

13 {7} Faber and the Attorney General appealed separately to this Court to clarify
14 what type of damages a court is permitted to award under Section 14-2-12(D). We
15 granted both petitions for certiorari and consolidated the cases. “*Faber v. King*,”
16 2013-NMCERT-007.

17 **II. STANDARD OF REVIEW**

18 {8} Our review requires us to interpret provisions of IPRA. Interpretation of the

1 language of a statute is a question of law that we review de novo. *Cooper v. Chevron*
2 *U.S.A., Inc.*, 2002-NMSC-020, ¶ 16, 132 N.M. 382, 49 P.3d 61. We construe IPRA
3 in light of its purpose and interpret it “to mean what the Legislature intended it to
4 mean, and to accomplish the ends sought to be accomplished by it.” *San Juan Agric.*
5 *Water Users Ass’n v. KNME-TV (San Juan)*, 2011-NMSC-011, ¶ 14, 150 N.M. 64,
6 257 P.3d 884 (internal quotation marks and citation omitted).

7 {9} “In discerning the Legislature’s intent, we are aided by classic canons of
8 statutory construction, and [w]e look first to the plain language of the statute, giving
9 the words their ordinary meaning, unless the Legislature indicates a different one was
10 intended.” *City of Albuquerque v. Montoya*, 2012-NMSC-007, ¶ 12, 274 P.3d 108
11 (alteration in original) (internal quotation marks and citation omitted). In addition to
12 looking at the statutory language, “consider the history and background of the
13 statute.” *State v. Rivera*, 2004-NMSC-001, ¶ 13, 134 N.M. 768, 82 P.3d 939. We
14 examine the overall structure of the statute and its function in the comprehensive
15 legislative scheme. *See id.*

16 {10} To the extent that the Attorney General argues the district court awarded an
17 erroneous amount of damages, we review an award of damages for substantial
18 evidence. *See Moody v. Stribling*, 1999-NMCA-094, ¶¶ 37, 40, 127 N.M. 630, 985

1 P.2d 1210 (“As long as there is a reasonable method used to achieve an amount of
2 damages, we will accept that amount.”).

3 **III. DISCUSSION**

4 **A. Section 14-2-12 does not authorize the award of statutory damages**

5 {11} We look first to the plain meaning of the statute to determine what damages are
6 allowed when a party wrongfully denies a request for documents. When a state
7 agency receives a written IPRA request, IPRA requires the agency’s custodian of
8 records to timely respond and IPRA also forbids the agency from wrongfully denying
9 the request. *See* §§ 14-2-8 to -12. IPRA then obligates state agencies in two primary
10 ways. First, it requires an agency’s custodian of records to either (1) “permit the
11 inspection immediately or as soon as practicable under the circumstances, but not
12 later than fifteen days after receiving [the] written request,” Section 14-2-8(D), or (2)
13 deny the written request, but “the custodian shall provide the requester with a written
14 explanation of the denial . . . within fifteen days after the request for inspection was
15 received,” Section 14-2-11(B)(3). Second, IPRA allows a claimant to file an action
16 to enforce the procedures of IPRA when a records request has been wrongfully denied
17 through separate mechanisms: Section 14-2-11, entitled “Procedure for denied
18 requests,” and Section 14-2-12, entitled “Enforcement.”

1 {12} Sections 14-2-11 and 14-2-12 create separate remedies depending on the stage
2 of the IPRA request. Section 14-2-11 only concerns the procedures a public entity
3 shall employ when the public entity denies an IPRA request. Section 14-2-11 requires
4 a public entity to respond to a records request within fifteen days unless the “request
5 has been determined to be excessively burdensome or broad.” Section 14-2-11(A).
6 If the request is denied, “the custodian shall provide the requester with a written
7 explanation of the denial.” Section 14-2-11(B). Section 14-2-11 also addresses the
8 damages available if the public entity does not adhere to the denial procedures.
9 Specifically, Section 14-2-11(C) provides that:

10 C. A custodian who does not deliver or mail a written explanation
11 of denial within fifteen days after receipt of a written request for
12 inspection is subject to an action to enforce the provisions of the
13 Inspection of Public Records Act . . . and the requester may be awarded
14 damages. Damages shall:

- 15 (1) be awarded if the failure to provide a timely
16 explanation of denial is determined to be unreasonable;
17 (2) not exceed one hundred dollars (\$100) per day;
18 (3) accrue from the day the public body is in
19 noncompliance until a written denial is issued; and
20 (4) be payable from the funds of the public body.

21 Section 14-2-12(A), (B), (D) provides that:

22 A. An action to enforce the Inspection of Public Records

1 Act . . . may be brought by:

2 (1) the attorney general or the district attorney in the
3 county of jurisdiction; or

4 (2) a person whose written request has been denied.

5 B. A district court may issue a writ of mandamus or order an
6 injunction or other appropriate remedy to enforce the provisions of the
7 Inspection of Public Records Act.

8

9 D. The court shall award damages, costs and reasonable
10 attorney's fees to any person whose written request has been denied
11 and is successful in a court action to enforce the provisions of the
12 Inspection of Public Records Act.

13 {13} Faber claims that statutory per diem damages are permissible under Section
14 14-2-12 as a penalty because otherwise the legislative purpose behind IPRA would
15 be frustrated. Faber asserts that the broad language in Section 14-2-12 includes the
16 authority for courts to award per diem damages comparable to those authorized under
17 Section 14-2-11. Under this analysis, Faber contends that neither one of the
18 comparable statutory damage provisions in Sections 14-2-11 or 14-2-12 requires
19 proof of actual damages. The Attorney General contends that the Legislature did not
20 clearly provide for an award of statutory damages under Section 14-2-12. The
21 Attorney General also maintains that had "the legislature intended to make the same
22 provision in wrongful withholding cases (*i.e.*, those cases enforced under Section 14-
23 2-12), it could and would have done so." The Attorney General asserts that Faber's

1 position that Section 14-2-12 is “broader” is unfounded, especially since the
2 legislature expressly provided for per diem damages in the immediately preceding
3 section.

4 {14} Statutory damages are those available to a litigant without proof of actual
5 injury because both the existence and the amount of the damages are established by
6 statute. *See Marauder Corp. v. Beall*, 301 S.W.3d 817, 822 (Tex. App. 2009) (noting
7 that “proof of actual damages is not a prerequisite to recovery of the damages”
8 authorized by statute). Section 14-2-11 authorizes statutory damages of up to \$100
9 per day. Section 14-2-11(C)(2); *see Edenburn v. N.M. Dep’t of Health*,
10 2013-NMCA-045, ¶ 5, 299 P.3d 424. The Legislature also has provided statutory
11 damages in several contexts. In the Unfair Practices Act, for example, the Legislature
12 provided that a person who has suffered from conduct in violation of the Act “may
13 bring an action to recover actual damages or the sum of one hundred dollars (\$100),
14 whichever is greater.” NMSA 1978, § 57-12-10(B) (2005); *see also Jones v. Gen.*
15 *Motors Corp.*, 1998-NMCA-020, ¶ 23, 124 N.M. 606, 953 P.2d 1104 (recognizing
16 that Section 57-12-10(B) authorizes the recovery of “statutory damages one hundred
17 dollars” if such a recovery would be greater than the actual damages). Statutory
18 damages are also common among environmental enforcement statutes. *See NMSA*

1 1978, § 72-5A-12(A) (1999) (providing damages for violating the Ground Water
2 Storage and Recovery Act, NMSA 1978, §§ 72-5A-1 to -17 (1999, as amended
3 through 2003), of up to “(1) one hundred dollars (\$100) per day [for] violation[s] not
4 directly related to the illegal recovery or use of stored water; or (2) ten thousand
5 dollars (\$10,000) per day [for] violation[s] directly related to the illegal recovery or
6 use of stored water”); NMSA 1978, § 74-6-10(C) (1993) (providing for damages for
7 violating the Water Quality Act, NMSA 1978, §§ 74-6-1 to -17 (1993, as amended
8 through 2009), of up to (1) “fifteen thousand dollars (\$15,000) per day of
9 noncompliance with the provisions in Section 74-6-5 . . .; or (2) ten thousand dollars
10 (\$10,000) per day of each violation of a provision of the Water Quality Act other than
11 the provisions in Section 74-6-5 . . . or of a regulation or water quality standard
12 adopted pursuant to the Water Quality Act).

13 {15} Faber does not explain why statutory damages are appropriate under Section
14 14-2-12, particularly in light of the fact that in the immediately preceding section,
15 Section 14-2-11, the Legislature expressly provided for statutory damages. Had the
16 Legislature intended to make the same damages available in wrongful denial cases
17 enforceable under Section 14-2-12, it could have easily done so. Faber’s reading
18 embeds language from Section 14-2-11 into Section 14-2-12, which violates our long-

1 established rule of construction prohibiting courts from reading language into a
2 statute which is not there, particularly when it makes sense as it is written. *See Reule*
3 *Sun Corp. v. Valles*, 2010-NMSC-004, ¶ 15, 147 N.M. 512, 226 P.3d 611 (“Under the
4 plain meaning rule, when a statute’s language is clear and unambiguous, we will give
5 effect to the language and refrain from further statutory interpretation. We will not
6 read into a statute language which is not there, especially when it makes sense as it
7 is written.” (internal quotation marks and citation omitted)).

8 {16} Section 14-2-11 and Section 14-2-12 create separate remedies depending on
9 the stage of the IPRA request. Section 14-2-11 requires a public entity to respond to
10 a records request within fifteen days unless the “request has been determined to be
11 excessively burdensome or broad.” Section 14-2-11(A). If the request is denied, “the
12 custodian shall provide the requester with a written explanation of the denial.”
13 Section 14-2-11(B). It is when the custodian fails to respond to a request or deliver
14 a written explanation of the denial that the public entity is subject to Section 14-2-11
15 damages. In that case, the court shall award the injured party damages not to exceed
16 \$100 per day that “accrue from the day the public body is in noncompliance until a
17 written denial is issued” and are “payable from the funds of the public body.” Section
18 14-2-11(C)(2)-(4).

1 {17} In this case, the Attorney General’s Office received the IPRA request on
2 August 25, 2010, and denied the request the next day, August 26, 2010. Section 14-2-
3 11 damages are not applicable in this case because the Attorney General’s Office
4 timely answered the request with a denial by following the denial procedures set out
5 in Section 14-2-11. However, because this action is for the post-denial enforcement
6 of Faber’s IPRA request, the enforcement and damages provisions under Section 14-
7 2-12 apply. Section 14-2-12(D) (“The court shall award damages, costs and reasonable
8 attorneys’ fees to any person whose written request has been denied and is successful
9 in a court action to enforce the provisions of [IPRA].”). We must now determine what
10 type of damages the Legislature authorized for a successful Section 14-2-12 claimant.

11 **B. Discussion of typical types of damages allowed**

12 {18} Unlike Section 14-2-11, Section 14-2-12 only provides that a “court shall
13 award damages” and does not specify the nature of damages to be awarded. Section
14 14-2-12(D). As a result, we cannot look to the plain language of the statute to
15 determine its meaning. Furthermore, the term “damages” has not been interpreted by
16 our courts. *See* Office of New Mexico Attorney General, Inspection of Public Records
17 Act Compliance Guide 45 (5th ed. 2008) (“Damages also could potentially include
18 amounts necessary to compensate the requester for any losses related to the improper

1 denial. However, in the absence of judicial interpretation of the Act's damages
2 provisions, we do not have a precise picture of what damages are allowed under the
3 Act at this time.”). Thus, we look to our precedent and the purpose, history, and
4 legislative scheme of IPRA for further guidance. *See Rivera*, 2004-NMSC-001, ¶ 13.

5 {19} Typically three kinds of damages are available to a prevailing party: (1)
6 damages designed to remedy an injury, *i.e.*, compensatory or actual damages; (2)
7 damages designed to punish a wrongdoer, *i.e.*, punitive damages; and (3) damages
8 available to a litigant without having to prove either the existence or the extent of an
9 injury. This last category includes both nominal and statutory damages.

10 {20} Compensatory, or actual, damages are “the measure of a loss” and are awarded
11 to place the plaintiff in a position that he or she would have been in had he or she not
12 suffered the wrong complained of. *Sanchez v. Clayton*, 1994-NMSC-064, ¶ 11, 117
13 N.M. 761, 877 P.2d 567 (internal quotation marks omitted); Restatement (Second) of
14 Torts § 903 cmt. a (1979). Punitive damages are awarded not to compensate a
15 plaintiff for injury or loss suffered but to penalize a defendant for particularly
16 egregious, wrongful conduct. *See* Restatement (Second) of Torts § 908. “Nominal
17 damages are a trivial sum of money awarded to a litigant who has established a cause
18 of action *but has not established that he is entitled to compensatory damages.*”

1 *Sanchez*, 1994-NMSC-064, ¶ 13 (emphasis in the original) (internal quotation marks
2 and citation omitted).

3 {21} We first determine whether punitive damages apply under IPRA. Then we
4 discuss actual or compensatory damages, and finally address Faber’s nominal
5 damages argument.

6 **1. Section 14-2-12 does not authorize the award of punitive damages**

7 {22} The Attorney General argues that the term “damages” in Section 14-2-12 can
8 only mean actual or nominal damages because punitive damages against the State are
9 unavailable absent an express declaration to the contrary, and Section 14-2-12 does
10 not make such a declaration. Faber argues that IPRA is not silent concerning punitive
11 damages; it expressly uses the word “penalty” in reference to the remedies in Section
12 14-2-8(A): “failure to respond to an oral request shall not subject the custodian to any
13 penalty.” The implication being “that the failure to respond to a *written* request *shall*
14 subject the custodian to a penalty as provided in Section [14-2-]11.” We disagree with
15 Faber’s conclusion.

16 {23} In *Torrance Cnty. Mental Health Program v. N.M. Health & Env’t Dep’t*,
17 1992-NMSC-026, ¶ 1, 113 N.M. 593, 830 P.2d 145, this Court considered whether
18 a litigant could recover punitive damages against the state in a breach of contract

1 action. We considered this issue in light of the fact that the Tort Claims Act expressly
2 prohibits punitive damages, whereas a comparable contract claims statute was silent
3 on the subject. *Torrance*, 1992-NMSC-026, ¶ 2. Because the Court was unable to
4 discern any legislative intent “one way or the other on the subject of punitive
5 damages in contract actions,” *id.* ¶ 19, the Court balanced the policy interests favoring
6 punitive damages against those favoring immunity. *Id.* ¶ 27. *Torrance* held that “the
7 state’s policy of not permitting assessment of punitive damages in tort cases, as
8 reflected in our Tort Claims Act, applies also, despite legislative silence on the issue,
9 to breach-of-contract cases.” *Id.* ¶ 2.

10 {24} In reaching that conclusion, *Torrance* cited to both *Brown v. Village of*
11 *Deming*, 1952-NMSC-042, 56 N.M. 302, 243 P.2d 609, and *Rascoe v. Town of*
12 *Farmington*, 1956-NMSC-115, 62 N.M. 51, 304 P.2d 575. The *Brown* court stated
13 that it is “the general rule, supported by the great weight of authority, that absent a
14 statute so providing, exemplary or punitive damages may not be awarded against a
15 municipality” because, among other things, punitive damages are intended to punish,
16 and taking them from the municipality “would be to penalize the taxpayers who had
17 no part in the commission of the tort.” 1952-NMSC-042, ¶ 32. *Rascoe* affirmed
18 *Brown* four years later, holding that “[e]xemplary damages ordinarily are not

1 allowable against a municipality in the absence of a statute so authorizing and we
2 have none.” 1956-NMSC-115, ¶ 14.

3 {25} With that in mind, *Torrance* recognized that government liability for punitive
4 damages would deter the abuse of governmental power and promote accountability
5 among government officials. 1992-NMSC-026, ¶ 25. It nevertheless found that “the
6 countervailing policies we believe must prevail are the necessity to protect public
7 revenues unless their diversion is specifically authorized by statute, coupled with the
8 function of punitive damages to visit *punishment* on one against whom they are
9 assessed.” *Id.* ¶ 27. The Court found those considerations “especially compelling”
10 because of the prohibition on punitive damages found in the Tort Claims Act. *Id.*

11 {26} Like NMSA 1978, Section 37-1-23 (1976), in *Torrance*, Section 14-2-12 is
12 silent concerning punitive damages. Accordingly, the countervailing policies that
13 must prevail are the necessity to protect public revenues unless their diversion is
14 specifically authorized by statute. Further, because awarding such damages against
15 a state entity would result in the expenditure of public, taxpayer dollars, it makes no
16 sense to bar punitive damages in the tort and contract contexts but not in the IPRA
17 enforcement context when the considerations supporting punitive
18 damages—malicious or egregious conduct—are very similar in all three instances.

1 Thus we hold that Section 14-2-12 does not authorize punitive damages.

2 **2. Section 14-2-12 authorizes the award of compensatory damages, costs, and**
3 **attorneys' fees**

4 {27} Faber argues that if a court does not have authority to award statutory or
5 punitive damages, IPRA is “rendered meaningless” because there are no
6 consequences for a public entity to wrongfully withhold documents. The Attorney
7 General counters that the fundamental purpose of IPRA is to provide access to the
8 public of documents that memorialize the operations of our State government; IPRA
9 “is not about recovering damages.”

10 {28} The purpose behind IPRA is clearly set forth in Section 14-2-5:

11 Recognizing that a representative government is dependent upon
12 an informed electorate, the intent of the legislature in enacting the
13 Inspection of Public Records Act . . . is to ensure, and it is declared to
14 be the public policy of this state, that all persons are entitled to the
15 greatest possible information regarding the affairs of government and
16 the official acts of public officers and employees.

17 Section 14-2-5. In recognition of this stated public policy, we have long held that the
18 public’s right to inspect documents is paramount. *See San Juan*, 2011-NMSC-011,
19 ¶¶ 15-16 (“IPRA’s stated policy reflects the fact that people in our democratic society
20 have ‘a fundamental right’ to inspect public records. . . . In order for government to
21 truly be of the people and by the people, and not just for the people, our citizens must

1 be able to know what their own public servants are doing in their name.”). The
2 damage provisions contained in IPRA are designed to promote compliance and
3 accountability from New Mexico’s public servants. *See San Juan*, 2011-NMSC-011,
4 ¶¶ 13, 16 (“IPRA’s damage provisions are intended to encourage public entities’
5 prompt compliance with records requests. . . . IPRA is intended to ensure that the
6 public servants of New Mexico remain accountable to the people they serve.”).
7 Additionally, “IPRA’s provisions create private attorneys general for more effective
8 and efficient enforcement of IPRA than would be possible if only the attorney general
9 or district attorney could enforce the statute.” *Id.* ¶ 12 (internal quotation marks and
10 citation omitted).

11 {29} In 1993, the Legislature enacted two separate damages provisions through
12 Sections 14-2-11 and 14-2-12. *See* 1993 N.M. Laws, ch. 258, § 8 (§ 14-2-11); 1993
13 N.M. Laws, ch. 258, § 9 (§ 14-2-12). By enacting these separate provisions in the
14 same year, the Legislature intended that the separate damages provisions in Sections
15 14-2-11 and 14-2-12 address separate issues concerning the overarching public policy
16 behind IPRA. *See State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M. 372, 98 P.3d 1022
17 (“Whenever possible, we must read different legislative enactments as harmonious
18 instead of contradicting one another.” (internal quotation marks and citation

1 omitted)). Considering the structure of IPRA, its history, and its purpose, we conclude
2 that the goal of prompt compliance is met by the damage provisions laid out in
3 Section 14-2-11 while Section 14-2-12 ensures that IPRA requests are not wrongfully
4 denied. Section 14-2-11 and Section 14-2-8(D) promote prompt compliance by
5 requiring the custodian of records to promptly respond to it in writing within fifteen
6 days so that the requester is apprised of his or her request. Therefore, we hold that the
7 Legislature intended for Section 14-2-12 to only authorize the recovery of
8 compensatory damages, costs, and attorneys' fees associated with the litigation to
9 enforce a wrongfully denied IPRA request.

10 {30} It is true that IPRA aims to open access to the public of government records,
11 however, there are certain restrictions and exceptions that may justify a public entity's
12 denial. Section 14-2-1(A)(1)-(8) limits a person's right to inspect public records for
13 a host of reasons, including, among other things, legal and medical confidentiality,
14 trade secrets, and work products. Right or wrong, the Attorney General's Office was
15 entitled to present its reasons for nonproduction to the district court for a decision
16 under Section 14-2-12; up to the time of decision, the Attorney General was in
17 compliance with IPRA. Otherwise, an agency would be subject to penalties simply
18 for asserting a good faith reason for nonproduction as IPRA entitles it to do. With the

1 district court's finding that the Attorney General wrongfully withheld the documents,
2 the goal of accountability was ultimately satisfied.

3 {31} A successful litigant suing under Section 14-2-12 is adequately compensated
4 by obtaining the documents he or she sought in the first place. If the litigant is not
5 made whole by the furnishment of the documents, he or she can seek actual damages,
6 costs, and attorneys' fees. These damages ensure that the entire process is virtually
7 costless to a successful litigant. Such a regime neither chills IPRA enforcement
8 litigation nor subverts the incentives IPRA provides to government agencies to
9 comply with its dictates, especially where under Section 14-2-12 a state agency has
10 a good-faith basis for denying the request, even if the denial is later deemed unlawful.
11 In contrast, Section 14-2-11 ensures prompt compliance by allowing for statutory
12 damages of up to \$100 per day if a public body fails to timely respond to a records
13 request. The built-in damages contained in Section 14-2-11 and 14-2-12 of IPRA
14 create a complete and sensible mechanism that properly satisfies the objective of a
15 transparent and accountable state government.

16 {32} Moreover, the damages expressly provided for in Section 14-2-12 promote
17 compliance and accountability in other ways. Section 14-2-12 allows for a writ of
18 mandamus, an injunction, actual damages, costs, and attorneys' fees. We find costs

1 and attorneys’ fees particularly important. In *State ex rel. N.M. State Hwy. and*
2 *Transp. Dep’t v. Baca*, 1995-NMSC-033, ¶¶ 21-22, 25, 120 N.M. 1, 896 P.2d 1148,
3 this Court concluded that awarding attorneys’ fees, which are punitive *and*
4 compensatory, did not conflict with *Torrance* because a court’s inherent authority to
5 “control the parties and the litigation before it” outweighed the possible depletion of
6 public revenues. In *Rio Grande Sun v. Jemez Mountains Pub. Sch. Dist.*, 2012-
7 NMCA-091, ¶ 19, 287 P.3d 318, the Court of Appeals held that, “[a]s with other
8 fee-shifting statutory schemes, IPRA’s fee requirement encourages individuals to
9 enforce IPRA on behalf of the public.” *See, e.g., Lucero v. Aladdin Beauty Colls.,*
10 *Inc.*, 1994-NMSC-022, ¶ 4, 117 N.M. 269, 871 P.2d 365 (noting that “one of the
11 policies embodied in the [Human Rights] Act is to encourage lawyers to take cases
12 involving alleged violations of the Act” by providing for the award of attorney fees).
13 We hold that attorneys’ fees, along with costs and actual damages, are sufficient
14 incentives for New Mexico public officials to “remain accountable to the people they
15 serve.” *San Juan*, 2011-NMSC-011, ¶ 16.

16 {33} This case is a prime example of how the express, built-in remedies of Section
17 14-2-12 achieve the overall purposes of IPRA without punishing the taxpayers. On
18 March 15, 2011, Faber was successful in his state court action to enforce the

1 provisions of IPRA, and the state district court issued a writ of mandamus ordering
2 the Attorney General to comply with the request. In response to a motion filed by
3 Faber, the district court subsequently awarded Faber “costs of \$257.19; damages of
4 \$10 per day from the date of the wrongful denial [August 26, 2010] to the date the
5 federal court stay was lifted [January 14, 2011]; thereafter, damages of \$100 per day
6 until the records are provided.” The state district court did not award Faber attorneys’
7 fees because Faber “waived an award of attorneys’ fees by representing himself in
8 this matter.”

9 {34} While the exact date of compliance cannot be known because the litigation is
10 ongoing, we can be certain that on the day of this writing over 1,000 days have
11 passed, thus tipping Faber’s damages over the \$100,000 mark. However, we
12 recognize that much more time has passed in this case than the typical IPRA
13 enforcement case. Still, we cannot conceive that the Legislature intended the
14 taxpayers to burden such a cost where a public office wrongfully denies public
15 records. *See State v. Herrera*, 1974-NMSC-037, ¶ 6, 86 N.M. 224, 522 P.2d 76 (“We
16 will not construe statutes to achieve an absurd result or to defeat the intended object
17 of the legislature.”). Further, with the resolution of this case, Faber will receive the
18 requested records and can recover his actual costs, thereby maintaining the goals of

1 providing access to public records and enforcing accountability. Faber is not entitled
2 to attorneys' fees because he is an attorney and he litigated this matter pro se. *See*
3 *Faber*, 2013-NMCA-080, ¶ 11 (“Here, Faber waived his claim to attorney fees and
4 argued for damages, thus removing from our consideration one possible remedy for
5 successful litigants.”); *see also Guttman v. Silverberg*, 374 F.Supp. 2d 991, 993
6 (D.N.M. 2005) (recognizing that “[t]here is authority in many types of cases for the
7 position that a pro se litigant who is also an attorney should not be awarded attorney’s
8 fees.” (providing string citation to supporting authority)).

9 {35} Thus, Faber’s damages under Section 14-2-12 are limited to compensatory
10 damages designed to compensate him for any loss or injury suffered as a proximate
11 result of the delayed production of the requested records. The Attorney General
12 points out to this Court that Faber never produced any evidence of actual,
13 compensatory damages, and the record contains none, an assertion that Faber has not
14 challenged anywhere in his briefing to this Court, preferring instead to argue for
15 statutory and punitive damages. Therefore, any claim to actual damages in this
16 particular case has been waived.

17 **C. Faber is not entitled to nominal damages**

18 {36} Faber makes the final argument that an award of per diem damages could be

1 upheld as nominal damages. Faber relies on *Ruiz v. Varan*, 1990-NMSC-081, ¶ 18,
2 110 N.M. 478, 797 P.2d 267, where this Court upheld the award of \$5,000 as nominal
3 damages because the party liable for the award did not complain of the amount and
4 the amount is a matter of discretion for the trial court. Faber contends that the same
5 is true here; that the Attorney General did not complain about the amount or argue
6 that the trial court abused its discretion.

7 {37} The Attorney General asserts that he did complain about the state district
8 court's discretion by advancing the argument that it lacked the authorization to award
9 per diem damages. The Attorney General also argues that Faber's requested amount
10 of damages of approximately \$20,000 cannot be described as a "trivial sum." *Id.*
11 Lastly, the Attorney General claims that Faber is reversing his "courses midstream"
12 because Faber never requested nominal damages. The Court of Appeals did not
13 address this issue.

14 {38} In *Ruiz*, this Court considered whether the district court abused its discretion
15 by awarding \$5,000 as nominal damages. *See* 1990-NMSC-081, ¶ 17. *Ruiz* defined
16 "nominal damages" as,

17 damages awarded for the infraction of a legal right, where the extent of
18 the loss is not shown, or the right is not dependent upon loss or damage,
19 as in the case of rights . . . to have one's material property undisturbed

1 by direct invasion. The award of nominal damages is made as a judicial
2 declaration that the plaintiff's right has been violated.

3 *Id.* (omission in original) (quoting C. McCormick, Handbook on the Law of Damages
4 § 20 (1935)). The *Ruiz* court stated that “nominal damages should be of a ‘trivial
5 sum.’” 1990-NMSC-081, ¶ 18 (citation omitted). *Ruiz* then noted that, “[a]ccording
6 to McCormick, [Handbook on the Law of Damages,] some courts would not consider
7 an award of \$5,000 ‘nominal,’ even as compared to the amount of the claim
8 involved.” *Id.* Yet *Ruiz* upheld that amount without expressly holding that \$5,000 was
9 not nominal because the party did not complain of the amount and the award and the
10 amount of nominal damages is “a matter of discretion for the trial court.” *Id.* *Ruiz*
11 affirmed the judgment because the plaintiff succeeded in proving harm to the trial
12 court and because the plaintiff “did not prove anything else in connection with its
13 damages.” *Id.* ¶ 19.

14 {39} *Ruiz* is inapposite to this case. In this case, we cannot review the district court's
15 award of nominal damages for an abuse of discretion because the district court never
16 specifically classified the damages as nominal. Instead, it awarded per diem damages
17 under Section 14-2-12, which were requested by Faber. Further, both parties'
18 argument that \$5,000 is or is not nominal is unfounded. The *Ruiz* court explicitly

1 refused to “hold that \$5,000 is a trivial sum as a matter of law” 1990-NMSC-
2 081, ¶ 18. Additionally, unlike the defendant in *Ruiz*, the Attorney General contested
3 the amount by disputing the court’s authority to award damages in the first place.

4 {40} More importantly, our jury instructions expressly provide that “[n]ominal
5 damages are a trivial sum of money, usually one cent or one dollar, awarded to a party
6 who has established a right to recover but has not established that [he] [she] [it] is
7 entitled to compensatory damages.” UJI 13-1832 NMRA. The Use Note to UJI 13-
8 1832 further states that “[t]his instruction should not be used when the cause of action
9 requires proof of actual damages.” Because Faber is entitled to the compensatory
10 damages clearly provided for in Section 14-2-12, we hold that Faber is not eligible
11 for nominal damages.

12 **IV. CONCLUSION**

13 {41} Section 14-2-12 does not permit punitive or statutory damages. Section 14-2-12
14 only allows for a writ of mandamus, an injunction, actual damages, costs, and
15 attorneys’ fees. For the foregoing reasons, we reverse both the Court of Appeals and
16 the district court and remand to the district court for further proceedings consistent
17 with this opinion.

1 {42} **IT IS SO ORDERED.**

2

3

PETRA JIMENEZ MAES, Justice

4 **WE CONCUR:**

5

6 **BARBARA J. VIGIL, Chief Justice**

7

8

9 **RICHARD C. BOSSON, Justice**

10

11 **EDWARD L. CHÁVEZ, Justice**

12

13 **CHARLES W. DANIELS, Justice**