Nevada Public Record Law Update

Blake A. Doerr, Esq.
Lewis Brisbois Bisgaard & Smith LLP

Where State Public Records Laws Come From

- * The Federal Freedom of Information Act (FOIA) enacted in 1966 grants disclosure of federal government documents.
- * However, federal FOIA <u>does not</u> apply to a state agency.

FOIA

- * FOIA did encourage each of the fifty states to enact some form of public record disclosure laws.
- * Nevada's Public Records Law is codified in NRS Chapter 239.

N.R.S. 239.001 et seq.

* The purpose of the Public Records Act is to ensure the accountability of the government to the public by facilitating public access to vital information about governmental activities. DR Partners v. Board of County Commissioners, 116 Nev. 616, 6 P.3d 465 (2000).

Pre 2015 - NRS § 239.010

- * 1. Except as otherwise provided in subsection 3, all public books and public records of a governmental entity, the contents of which are not otherwise declared by law to be confidential, must be open at all times during office hours to inspection by any person, and may be fully copied or an abstract or memorandum may be prepared from those public books or public records.
 - * Limited exceptions for local government entities. See NRS 239.0105(names of people who have applied for use of recreational facility; names of children participating in activities conducted by the local government).

Current NRS § 239.010 What they get.

* Except as otherwise provided... all public books and public records of a governmental entity must be open at all times during office hours to inspection by any person, and may be fully copied or an abstract or memorandum may be prepared from those public books or public records.

Exceptions

NRS 1.4683, 1.4687, 1A.110, 3.2203, 41.071, 49.095, 49.293, 62D.420, 62D.440, 62E.516, 62E.620, 62H.025, 62H.030, 62H.170, 62H.220, 62H.320, 75A.100, 75A.150, 76.160, 78.152, 80.113, 81.850, 82.183, 86.246, 86.54615, 87.515, 87.5413, 87.4200, 87.4.580, 87.4.640, 88.3355, 88.5927, 88.6067, 88.4.345, 88.4.7345, 89.045, 89.251, 90.730, 91.160, 116.757, 116A.270, 116B.880, 118B.026, 119.260, 119.265, 119.267, 119.280, 119A.280, 119A.653, 119B.370, 119B.382, 120A.690, 125.130, 125B.140, 126.141, 126.161, 126.163, 126.730, 127.007, 127.057, 127.130, 127.140, 127.2817, 128.090, 130.312, 130.712, 136.050, 159.044, 159A.044, 172.075, 172.245, 176.01249, 176.015, 176.0625, 176.09129, 176.156, 176A.630, 178.39801, 178.4715, 178.5691, 179.495, 179A.070, 179A.165, 179D.160, 200.3771, 200.3771, 200.5095, 200.604, 202.3662, 205.4651, 209.392, 209.3925, 209.419, 209.521, 211A.140, 213.010, 213.040, 213.095, 213.131, 217.105, 217.110, 217.464, 217.475, 218A.350, 218E.625, 218F.150, 218G.130, 218G.240, 218G.350, 228.270, 228.450, 228.495, 228.570, 231.069, 231.1473, 233.190, 237.300, 239.0105, 239.0113, 239B.030, 239B.040, 239B.050, 239C.140, 239C.210, 239C.230, 239C.250, 239C.270, 240.007, 241.020, 241.030, 241.039, 242.105, 244.264, 244.335, 247.540, 247.550, 247.560, 250.087, 250.130, 250.140, 250.150, 268.095, 268.490, 268.910, 2714.105, 281.195, 281.805, 2814.350, 2814.680, 2814.685, 2814.750, 2814.755, 2814.780, 284.4068, 286.110, 287.0438, 289.025, 289.080, 289.387, 338.1379, 338.1593, 338.1725, 338.1727, 348.420, 349.597, 349.775, 353.205, 353A.049, 353A.085, 353A.100, 353C.240, 360.240, 360.247, 360.255, 360.755, 361.044, 361.610, 365.138, 366.160, 368A.180, 370.257, 370.327, 372A.080, 378.290, 378.300, 379.008, 379.1495, 385A.830, 385B.100, 387.626, 387.631, 388.1455, 388.259, 388.501, 388.503, 388.513, 388.750, 388A.247, 388A.249, 391.035, 391.120, 391.925, 392.029, 392.147, 392.264, 392.271, 392.315, 392.317, 392.325, 392.327, 392.325, 392.850, 394.167, 394.1698, 394.447, 394.460, 394.465, 396.3295, 396.405, 396.525, 396.525, 396.9685, 398.8115, 408.3885, 408.3886, 408.3888, 408.5484, 412.153, 416.070, 422.2749, 422.305, 422A.342, 422A.350, 425.400, 427A.872, 432.028, 432.205, 432B.175, 432B.280, 432B.290, 432B.407, 432B.430, 432B.560, 432B.5902, 433.534, 433A.360, 437.145, 439.840, 439B.420, 440.170, 441A.195, 441A.220, 441A.230, 442.330, 442.335, 442.735, 445A.665, 445B.570, 449.209, 449.245, 449A.112, 450.140, 453.164, 453.720, 453A.610, 453A.700, 458.055, 458.280, 459.050, 459.3866, 459.555, 459.7056, 459.846, 463.120, 463.15993, 463.240, 463.3403, 463.3407, 463.790, 467.1005, 480.365, 480.940, 481.063, 481.091, 481.093, 482.170, 482.5536, 483.340, 483.363, 483.575, 483.659, 483.800, 484E.070, 485.316, 501.344, 503.452, 522.040, 534A.031, 561.285, 571.160, 584.655, 587.877, 598.0964, 598.0968, 598A.110, 599B.090, 603.070, 603A.210, 604A.710, 612.265, 616B.012, 616B.015, 616B.315, 616B.350, 618.341, 618.425, 622.310, 623.131, 623A.137, 624.110, 624.265, 624.327, 625.425, 625A.185, 628.418, 628B.230, 628B.760, 629.047, 629.069, 630.133, 630.30665, 630.336, 630.4.855, 631.368, 632.121, 632.125, 632.405, 633.283, 633.301, 633.524, 634.055, 634.214, 634A.185, 635.158, 636.107, 637.085, 637B.288, 638.087, 638.089, 639.2485, 639.570, 640.075, 640A.220, 640B.730, 640C.400, 640C.600, 640C.620, 640C.745, 640C.760, 640D.190, 640E.340. 641.090, 641.325, 641A.191, 641A.289, 641B.170, 641B.460, 641C.760, 641C.800, 642.524, 643.189, 644.446, 645.180, 645.625, 645A.050, 645A.082, 645B.060, 645B.092, 645C.220, 645C.225, 645D.130, 645D.135, 645E.300, 645E.375, 645C.510, 645H.320, 645H.320, 647.0945, 647.0947, 648.033, 648.197, 649.065, 649.067, 652.228, 654.110, 656.105, 661.115, 665.130, 665.130, 669.275, 669.285, 669.285, 669.230, 671.170, 673.450, 673.480, 675.380, 676A.340, 676A.370, 677.243, 679B.122, 679B.152, 679B.159, 679B.190, 679B.285, 679B.690, 680A.270, 681A.440, 681B.260, 681B.410, 681B.540, 683A.6873, 685A.677, 686A.289, 686B.170, 686C.306, 687A.110, 687A.115, 687C.010, 688C.230, 688C.480, 688C.490, 689A.696, 692A.117, 692C.190, 692C.3536, 692C.3536, 692C.3538, 692C.3534, 692C.3536 693A.480, 693A.615, 696B.550, 696C.120, 703.196, 704B.320, 704B.325, 706A.230, 710.159, 711.600, sections 35, 38 and 41 of chapter 478, Statutes of Nevada 2011 and section 2 of chapter 391, Statutes of Nevada 2013 and unless otherwise declared by law to be confidential,

NRS § 239.010 Must disclose non-confidential information.

* 3. A governmental entity that has legal custody or control of a public book or record shall not deny a request made pursuant to subsection 1 to inspect or copy a public book or record on the basis that the requested public book or record contains information that is confidential if the governmental entity can redact, delete, conceal or separate the confidential information from the information included in the public book or record that is not otherwise confidential.

NRS § 239.010 They can request a copy

* 4. A person may request a copy of a public record in any medium in which the public record is readily available. An officer, employee or agent of a governmental entity who has legal custody or control of a public record shall not refuse to provide a copy of that public record in a readily available medium because the officer, employee or agent has already prepared or would prefer to provide the copy in a different medium.

NRS 239.0107 When must the agency respond by if they have the record?

- 1. Not later than the end of the <u>fifth business day</u> after the date on which the person who has legal custody or control of a public book or record of a governmental entity receives a <u>written or oral request</u> from a person to inspect, copy or receive a copy of the public book or record, a governmental entity <u>shall</u> do one of the following, as applicable:
 - a. Except as otherwise provided in subsection 2, allow the person to inspect or copy the public book or record or, if the request is for the person to receive a copy of the public book or record, provide such a copy to the person.

NRS 239.0107 When must the agency respond if they don't have the record?

- a. If the governmental entity does not have legal custody or control of the public book or record, provide to the person, in writing:
 - 1. Notice of that fact; and
 - 2. The name and address of the governmental entity that has legal custody or control of the public book or record, if known.
- b. <u>Except</u> as otherwise provided in paragraph (d), <u>if</u> the governmental entity is <u>unable to make the public book</u> <u>or record available by the end of the fifth business day</u> after the date on which the person who has legal custody or control of the public book or record received the request, <u>provide to the person</u>, <u>in writing</u>:
 - 1. Notice of that fact; and
 - 2. A <u>date and time after which the public book or record will be available</u> for the person to inspect or copy. If the public book or record is not available to the person to inspect or copy by that date and time, the person may inquire regarding the status of the request.
- c. <u>If</u> the governmental entity <u>must deny</u> the person's request to inspect or copy the public book or record because the public book or record, or a part thereof, <u>is confidential</u>, provide to the person, <u>in writing</u>:
 - 1. **Notice** of that fact; and
 - 2. A <u>citation to the specific statute or other legal authority</u> that makes the public book or record, or a part thereof, confidential.
- 1. If a public book or record of a governmental entity is readily available for inspection or copying, the person who has legal custody or control of the public book or record shall allow a person who has submitted a request to inspect, copy or receive a copy of a public book or record.

What you have to tell them. NRS § 239.0107

By end of 5th business day or:

provide to the person, in writing:

- 1. Notice of that fact; and
- 2. A date and time after which the public book or record will be available for the person to inspect or copy or after which a copy of the public book or record will be available to the person. If the public book or record or the copy of the public book or record is not available to the person by that date and time, the person may inquire regarding the status of the request.

NRS § 239.011

(For records in custody/control less than 30 years)

- * (1) If a request for inspection or copying of a public book or record open to inspection and copying is denied, the requester may apply to the district court in the county in which the book or record is located for an order: (a) permitting the requester to inspect or copy it; or (b) Requiring the person who has legal custody or control of the public book or record to provide a copy to the requester as applicable.
- * (2) The court shall give this matter **priority over other civil matters** to which priority is not given by other statutes. If the **requester prevails**, the requester is entitled to **recover his or her costs and reasonable attorney's fees** in the proceeding from the governmental entity whose officer has custody of the book or record.
 - * Note the government entity cannot recover its fees and costs.

NRS § 239.0113

- * 1. The confidentiality of a public book or record, or a part thereof, is at **issue in a judicial** or administrative proceeding; and
- * 2. The **governmental entity** that has legal custody or control of the public book or record **asserts** that the public book or record, or a part thereof, is **confidential**,
- the governmental entity has the burden of proving by a preponderance of the evidence that the public book or record, or a part thereof, is confidential.

NRS § 239.0107

What to do if you're not providing it?

- * (d) If the governmental entity must deny the person's request because the public book or record, or a part thereof, is confidential, provide to the person, in writing:
- * (1) Notice of that fact; and
- * (2) A citation to the specific statute or other legal authority that makes the public book or record, or a part thereof, confidential.

NRS § 239.0115(2)

(For records in custody/control more than 30 years)

* 2. There is a **rebuttable presumption** that a person who applies for an order as described in subsection 1 is **entitled to inspect or copy** the public book or record, or a part thereof, that the person seeks to inspect or copy.

NRS § 239.0115.3

(For records in custody/control more than 30 years)

- * 3. The provisions of subsection 1 do not apply to any book or record:
 - (a) Declared confidential pursuant to NRS 463.120.
 - (b) Containing personal information pertaining to a **victim of crime** that has been declared by law to be confidential.

Procedure NRS § 239.0113

* the requester may apply to the district court in the county in which the book or record is located for an order: (a) permitting the requester to inspect or copy it; or (b) Requiring the person who has legal custody or control of the public book or record to provide a copy to the requester as applicable.

Writ of mandamus, generally

* A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station, see NRS 34.160, or to control an arbitrary or capricious exercise of discretion. See Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981). A district court's decision to grant or deny a writ petition is reviewed by this court under an abuse of discretion standard. See County of Clark v. Doumani, 114 Nev. 46, 53, 952 P.2d 13, 17 (1998).

Writ of mandamus, as it applies to public request

* Mandamus is the appropriate procedural remedy to compel production of the public records sought in this case. See, e.g., <u>Donrey of Nevada v. Bradshaw</u>, 106 Nev. 630, 798 P.2d 144 (1990).

Immunity of public officer for good faith disclosure/withhold. NRS § 239.012

* A public officer or employee who acts in good faith in disclosing or refusing to disclose information and the employer of the public officer or employee are immune from liability for damages, either to the requester or to the person whom the information concerns.

Public Records Rules to Remember

- * The public records statute presumes all records to be open to the public unless the contents are otherwise "declared by law to be confidential." NRS 239.010(1).
- * The public records statute makes a government agency responsible for the costs and reasonable attorney's fees of the requester if the government agency is found by a court to have failed to allow inspection and copy without a lawful excuse that the contents are confidential as a matter of law. NRS 239.011.
 - * But see NRS 239.0115 (no statutory cost and fee provision for documents in custody/control more than 30 years)

Public Records in Plain English

* The public records statute does not grant any express right to exercise government discretion, and the record (or its contents) is either confidential as a matter of law or it is required to be disclosed.

Public Records Rules to Remember

- * The Government has a duty to redact and release where possible.
- * Federal FOIA is not applicable to a state entity.
- * You should expect a District Court judge will exercise considerable independent judgment in deciding a public records dispute.

N.R.S. 239.001 et seq.

* The purpose of the Public Records Act is to ensure the accountability of the government to the public by facilitating public access to vital information about governmental activities.

Exceptions

- * Where there is no statutory expression that a specific record is confidential:
 - * Two common law exceptions exist to the public records law in Nevada.
 - * The two exception are narrowly construed and applied by the courts.

First Common Law Exception

- * Balancing of Interests:
 - * In 1990, the Nevada Supreme Court construed the public records statute to include a government's duty to disclose by considering a "balancing of interests." See Donrey of Nevada v. Bradshaw, 106 Nev. 630, 798 P.2d 199 (1990).
 - * "In balancing interests..., the scales must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference."

First Common Law Exception

- 1. The Court did not find in favor of government non-disclosure in *Donrey*.
- 2. The Court's analysis suggests a government duty to engage in balancing of interests to ensure sound public policy is exercised in any decision to not disclose a public record regardless of a claim of record confidentiality.

The Four Elements of Public Policy Interest

- 1. Protection of the elements of the investigation from premature disclosure
- 2. The avoidance of prejudice to the later trial of the defendant from harmful pretrial publicity
- 3. The protection of the privacy of persons who are not arrested from the stigma of being singled out as a criminal suspect
- 4. The protection of the identity of informants

Balancing of Interests

* "In balancing interests..., the scales must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference."

Second Common Law Exception

Deliberative Process Privilege:

It also permits "agency decision-makers to engage in that frank exchange of opinions and recommendations necessary to the formulation of policy without being inhibited by fear of later public disclosure," *id.* at 698, and, thus, **protects materials or records that reflect a government official's deliberative or decision-making process**. See EPA v. Mink, 410 U.S. 73, 89, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973). The privilege is not, at least in general, designed to protect purely factual matters. *Id.* More particularly, purely factual matters are not protected unless "inextricably intertwined" with the policy-making process. DR Partners v. Board of County Com'rs of Clark County, 116 Nev. 616, 622-623, 6 P.3d 465, 469 (Nev.,2000).

Deliberative Process Privilege

DR Partners v. Board of County Commissioners, 116 Nev. 616, 6 P.3d 465-471 (Nev. 2000)

- * "The agency bears the burden of establishing the character of the decision, the deliberative process involved, and the role played by the documents in the course of that process."
- * "The citizen's predominant interest may be expressed in terms of the burden of proof which is applicable in this class of cases; the burden is cast upon the agency to explain why the records should not be furnished."

Second Common Law Exception

DR Partners v. Board of County Commissioners, 116 Nev. 616, 6 P.3d 465-471 (Nev. 2000)

- * "Once the court determines that a document is privileged, it must still determine whether the document should be withheld. Unlike some other branches of the executive privilege, the deliberative process privilege is a qualified privilege."
- * "Once the agency demonstrates that document fits within [the deliberative process privilege], the burden shifts to the party seeking disclosure. It must demonstrate that its need for the information outweighs the regulatory interest in preventing disclosure."

Can you charge a fee?

- * NRS 239.052
 - 1. Except as otherwise provided in this subsection, a governmental entity may charge a fee for providing a copy of a public record. Such a fee must not exceed the actual cost to the governmental entity to provide the copy of the public record unless a specific statute or regulation sets a fee that the governmental entity must charge for the copy. A governmental entity shall not charge a fee for providing a copy of a public record if a specific statute or regulation requires the governmental entity to provide the copy without charge.
 - 2. A governmental entity may waive all or a portion of a charge or fee for a copy of a public record if the governmental entity:
 - (a) Adopts a written policy to waive all or a portion of a charge or fee for a copy of a public record; and
 - (b) Posts, in a conspicuous place at each office in which the governmental entity provides copies of public records, a legible sign or notice that states the terms of the policy.
 - 3. A governmental entity shall prepare and maintain a list of the fees that it charges at each office in which the governmental entity provides copies of public records. A governmental entity shall post, in a conspicuous place at each office in which the governmental entity provides copies of public records, a legible sign or notice which states:
 - (a) The fee that the governmental entity charges to provide a copy of a public record; or
 - (b) The location at which a list of each fee that the governmental entity charges to provide a copy of a public record may be obtained.

Fee

* Such a fee must not exceed the actual cost to the governmental entity to provide the copy of the public record unless a specific statute or regulation sets a fee that the governmental entity must charge for the copy.

To fee or not to fee?

- * 2. A governmental entity may waive all or a portion of a charge or fee for a copy of a public record if the governmental entity:
- (a) Adopts a written policy to waive all or a portion of a charge or fee for a copy of a public record; and
- * (b) Posts, in a conspicuous place at each office in which the governmental entity provides copies of public records, a legible sign or notice that states the terms of the policy.

Cases

Donrey v. Bradshaw Sept. 1990

- * 106 Nev. 630, 798 P.2d 144
- * Where the court starts recognizing exception to bright line statutory confidentiality rules

Donrey of Nevada v. Bradshaw

- * Donrey requested written police investigative report of city attorney and police department.
- * Court employed a balancing of interests test
- * Public's interest for information vs. agency, victims
- * The court held that investigative reports were subject to disclosure if policy considerations so warranted. The court weighed the absence of any privacy or law enforcement policy justifications for nondisclosure against the general policy in favor of open government, and ordered the city attorney and the police department to release to the media the entire police investigative report.

Reno Newspapers, Inc. v. Haley July 2010

- * 234 P.3d 922
- * Newspaper filed petition for writ of mandamus to compel county sheriff to allow newspaper to inspect and copy postapplication records detailing action taken by sheriff's office on private citizen's concealed firearms permit.
- * Court applied a balancing of interests between private or law enforcement interests vs. public's right to access
- * Supreme Court held that identity of the permittee of concealed firearms permit, and any post-permit records of investigation, suspension, or revocation were public records open to inspection, unless the records contained information that was expressly declared confidential by statute making applications for concealed firearms permits confidential.

Reno Newspapers, Inc. v. Gibbons Dec. 2011

- * 266 P.3d 623
- * Newspaper filed petition under Nevada Public Records Act (NPRA) against state for writ of mandamus for access to 104 of former governor's e-mail communications while he was in office, or, alternatively, to receive a detailed log or index identifying sender, recipient(s), date, subject matter, and the basis upon which state was denying access to each e-mail.
- * Court employed a balancing of interests test as well as a deliberative process analysis
- * Supreme Court held that:
- (1) after the commencement of a lawsuit under NPRA, the requesting party generally is entitled to a log containing a factual description of each withheld record and a specific explanation for nondisclosure;
- * (2) state was required, in response to mandamus petition, to provide such a log to newspaper; and
- * (3) state failed to satisfy prelitigation requirements for claiming confidentiality of withheld e-mails.

Reno Newspapers, Inc. v. Gibbons Vaughn log?

Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir.1973).

- * A Vaughn index is a submission commonly utilized in cases involving the Freedom of Information Act (FOIA), the federal analog of the NPRA. This submission typically contains "detailed public affidavits identifying the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption." Lion Raisins v. U.S. Dept. of Agriculture, 354 F.3d 1072, 1082 (9th Cir.2004).
- * A Vaughn index is designed to preserve a fair adversarial proceeding when a lawsuit is brought after the denial of a FOIA request. See Wiener v. F.B.I., 943 F.2d 972, 977 (9th Cir.1991) ("The purpose of the index is to 'afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." (quoting King v. U.S. Dept. of Justice, 830 F.2d 210, 218 (D.C.Cir.1987))).

Reno Newspapers, Inc. v. Gibbons Vaughn log – no – but maybe.

We decline to adopt the Vaughn index as a prelitigation requirement under the NPRA. First, a Vaughn index is not required outside of the litigation context. See Natural Resources Defense Council, Inc. v. N.R.C., 216 F.3d 1180, 1190 (D.C.Cir.2000). But, more importantly, the NPRA already defines precisely what is required in prelitigation situations. NRS 239.0107(1)(d) provides:

If the governmental entity must deny the person's request to inspect or copy the public book or record because the public book or record, or a part thereof, is confidential, [the governmental entity shall] provide to the person, in writing:

- (1) Notice of that fact; and
- (2) A citation to the specific statute or other legal authority that makes the public book or record, or a part thereof, confidential.

Thus, if a state entity declines a public records request prior to litigation, it must provide the requesting party with notice and citation to legal authority that justifies nondisclosure. No log, in the form of a Vaughn index or otherwise, is required under NRS 239.0107(1)(d).

Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc. March 2015

- * 343 P.3d 608
- * A private entity contracted with Clark county to provide telephone services to inmates a CCDC.
- * Blackjack Bonding, Inc. made a public records request to Metro for inmate phone logs
- * Issues: is information public record; and do provisions regarding attorney's fees apply given that private entity held the records?

Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.

- * Court held:
- * The information is public record because it concerns the provision of a public service and is within the agency's legal control
- * The requester was a prevailing party and was entitled to recover fees and costs pursuant to NRS 239.011

Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.

- * Important points
 - * More digital information is public record -not book, paper, cell phone record
 - Held by private entity
 - Held on private property
 - * Decision focuses on the substance of the record and that it regards a public service and the format of the record is unimportant i.e. <u>substance over form</u>

Comstock Residents Ass'n v. Lyon Cty. Bd. Of Comm'rs March 2018

- * 414 P.3d 318
- * HOA board wanted private cellphone and email records of county commissioners for information which related to government business
- * Issues: since they were used in the furtherance of county business, does the private nature of the holder of the phone and email account except this from public records law?

Comstock Residents Ass'n v. Lyon Cty. Bd. Of Comm'rs

* Court held: where a private entity holds records of a governmental entity performing a service rendered for public interest, those records are public records.

Comstock Residents Ass'n v. Lyon Cty. Bd. Of Comm'rs

- * Important points
 - * More digital information-not book, paper, cell phone record
 - Held by private entity
 - Held on private property
 - * Decision focuses on the substance of the record and that it regards a public service i.e. substance over form

PERS of Nevada v. Nevada PRI Oct. 2018

- * 429 P.3d 280
- * NPRI sought information on retirees for 2014 to include on their TransparentNevada.com website
- * PERS had provided it in prior years but refused
- PERS had provided a raw data feed to its actuary to perform an actuarial soundness study so NPRI wanted that
- * PERS argued that the request required it to create a completely new document since it had changed databases

PERS of Nevada v. Nevada PRI

* Court:

- * No statute declared the information confidential
- * Balancing of interests weighed in favor of disclosure
- * Disclosure did not require creation of a new record
 - * Since PERS had changed databases, case remanded since PERS did not have the information as it existed in 2014 so the district court should figure out how PERS should get the information from the new database to NPRI

Pending Legislation on Public Records 2019 Regular Session

- * AB 371
- * SB 224
- * SB 287
- * SB 388

AB 371 Bright line rule on confidential records

* Under this balancing test, the governmental entity is required to demonstrate the private or governmental interest served by withholding the book or record clearly outweighs the right of the public to inspect or copy the book or record. Donrey v. Bradshaw, 106 Nev. 630 (1990); DR Partners v. Board of County Comm'rs, 116 Nev. 616 (2000); Reno Newspapers, Inc. v. Haley, 126 Nev. Adv. Op. 23, 234 P.3d 922 (2010); Reno Newspapers, Inc. v. Gibbons, 127 Nev. Adv. Op. 79, 266 P.3d 623 (2011).

AB 371

* Section 1 of this bill provides that the only exemptions or exceptions to providing access to inspect, copy or receive of a copy of public books and records are those provided by statute or regulation. Section 1 also abrogates any common-law exemption or exception to providing such access, including, without limitation, any balancing of interests.

AB 371

- * Does this mean goodbye to evolving jurisprudence on the topic of a balancing of interest analysis and a reversion to a bright line test?
- * Was the decision in Donrey a way to recognize that not everything that should be confidential must be specifically codified? If so, then isn't this a step backward?

SB 224 Legislative fix for PERS v. NPRI

* makes information about a member of a public retirement system, retired public employee, retired justice or judge, retired Legislator or beneficiary of a public retirement system confidential. Section 1 further provides, however, that the following information relating to a member, retired employee, retired justice or judge or retired Legislator which is contained in a record or file in the possession, control or custody of a public retirement system is a public record:

(1) the identification number of such a person; (2) the last public employer of the person; (3) the number of years of service credit such a person has with a public retirement system; (4) the retirement date of the person; (5) the amount of annual pension benefit paid to the person; and (6) whether the person is receiving a disability or service retirement allowance.

SB 224

- * Retired public employee, retired justice or judge, retired Legislator
- * Excludes:
 - * (1) the identification number of such a person;
 - * (2) the last public employer of the person;
 - * (3) the number of years of service credit such a person has with a public retirement system;
 - * (4) the retirement date of the person;
 - * (5) the amount of annual pension benefit paid to the person; and
 - * (6) whether the person is receiving a disability or service retirement allowance.

What are they seeking to keep private?

SB 287 – Highlights General streamlining of the statute

- * Expands the definition of public records to be any record in connection with the transaction of official business of provision of public service
- * Clarifies what the entity can charge as part of its "actual cost"
- * Removes provision that entity can charge for extraordinary use of personnel or resources
- * Requires entity to provide record in electronic format unless specifically requested to not be in electronic format

SB 287 - Highlights

- * Expands entity's obligation if it cannot provide the records within 5 days-written notice, assist the requester in narrowing the topic, written explanation of why they cannot provide it within the time frame
- * Allows a requester to apply to district court for unreasonable delay or if entity charges excessive fee and allows recover of \$100/day for delay
- * States that the immunity provision for good faith withhold is not applicable to the fees and costs awarded to a requester

What's next?

- * Continuing issues regarding digital storage
- * Continuing expansion of exceptions to confidential documents

The End

Blake A. Doerr, Esq. Lewis Brisbois Bisgaard & Smith LLP 6385 South Rainbow Blvd., Suite 600 Las Vegas, NV 89118 702-693-4302

SENATE BILL NO. 224–SENATORS RATTI, PARKS AND WOODHOUSE

FEBRUARY 18, 2019

Referred to Committee on Government Affairs

SUMMARY—Provides for the confidentiality certain information in the records and files of public employee retirement systems. (BDR 19-598)

FISCAL NOTE: Effect on Local Government: No.

Effect on the State: No.

EXPLANATION - Matter in bolded italics is new; matter between brackets formitted material is material to be omitted.

AN ACT relating to public records; providing for the confidentiality of certain information in the records and files of public employee retirement systems; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Under existing law, a record of a governmental entity is public and open to inspection unless the confidentiality of the record or the information in the record is specifically provided for by law. (NRS 239.010) Existing law also makes the official correspondence and records of certain public retirement systems, other than the files of individual members, public records. (NRS 1A.100, 286.110)

Section 1 of this bill generally makes information about a member of a public retirement system, retired public employee, retired justice or judge, retired Legislator or beneficiary of a public retirement system confidential. Section 1 further provides, however, that the following information relating to a member, retired employee, retired justice or judge or retired Legislator which is contained in a record or file in the possession, control or custody of a public retirement system is a public record: (1) the identification number of such a person; (2) the last public employer of the person; (3) the number of years of service credit such a person has with a public retirement system; (4) the retirement date of the person; (5) the amount of annual pension benefit paid to the person; and (6) whether the person is receiving a disability or service retirement allowance.

Section 1 also prohibits, with limited exceptions, a person or governmental entity that possesses or has legal custody or control of a record or file with any information that is confidential pursuant to this bill from disclosing the information or producing the record or file for inspection. Section 1 further provides that such a person or governmental entity must not be required to disclose the information or produce the record or file for inspection by a person or for use in a judicial proceeding.





16

17

18

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 239 of NRS is hereby amended by adding thereto a new section to read as follows:

- 1. Except as otherwise provided in this section, all information about a member, retired employee, retired justice or judge, retired Legislator or beneficiary of a public retirement system which is contained in a record or file in the possession, control or custody of a public retirement system is confidential, regardless of the form, location and manner of creation or storage of a record or file containing the information.
- 2. The following information about a member, retired employee, retired justice or judge or retired Legislator which is contained in a record or file in the possession, control or custody of a public retirement system is a public record:

(a) The identification number of the member, retired employee, retired justice or judge or retired Legislator;

(b) The last public employer of the member, retired employee, retired justice or judge or retired Legislator;

(c) The number of years of service credit a member, retired employee, retired justice or judge or retired Legislator has with a public retirement system;

(d) The retirement date of the member, retired employee, retired justice or judge or retired Legislator;

(e) The amount of annual pension benefit paid to the member, retired employee, retired justice or judge or retired Legislator from a public retirement system; and

(f) Whether the member, retired employee, retired justice or judge or retired Legislator receives a disability retirement allowance or a service retirement allowance from a public retirement system.

- 3. Except as specifically authorized or required by chapters 1A, 218C and 286 of NRS, a person or governmental entity that possesses or has legal custody or control of a record or file with any information that is confidential pursuant to this section shall not disclose the information or produce the record or file for inspection, and must not be required to disclose the information or produce the record or file for inspection, to or by any other person or governmental entity or for use in any judicial action or proceeding.
 - 4. As used in this section:
- (a) "Disability retirement allowance" has the meaning ascribed to it in NRS 286.031.





- (b) "Employee" has the meaning ascribed to it in NRS 286.040.
 - (c) "Identification number" means the unique number assigned by a public retirement system to the record or file of each member, retired employee, retired justice or judge or retired Legislator.
 - (d) "Member" has the meaning ascribed to it in NRS 286.050.
 - (e) "Public employer" has the meaning ascribed to it in NRS 286.070.
 - (f) "Public retirement system" means the Public Employees' Retirement System established by NRS 286.110, the Judicial Retirement System established by NRS 1A.100 and the Legislators' Retirement System established by NRS 218C.100.
 - (g) "Service retirement allowance" has the meaning ascribed to it in NRS 286.080.

Sec. 2. NRS 239.010 is hereby amended to read as follows:

16 17 1. Except as otherwise provided in this section and NRS 1.4683, 1.4687, 1A.110, 3.2203, 41.071, 49.095, 49.293, 18 62D.420, 62D.440, 62E.516, 62E.620, 62H.025, 62H.030, 62H.170, 19 62H.220, 62H.320, 75A.100, 75A.150, 76.160, 78.152, 80.113, 20 81.850, 82.183, 86.246, 86.54615, 87.515, 87.5413, 87A.200, 21 22 87A.580, 87A.640, 88.3355, 88.5927, 88.6067, 88A.345, 88A.7345, 89.045, 89.251, 90.730, 91.160, 116.757, 116A.270, 116B.880, 23 24 119.260. 119.265, 119.267, 119.280, 118B.026. 119A.280. 119A.653, 119B.370, 119B.382, 120A.690, 125.130, 125B.140, 25 26 126.141, 126.161, 126.163, 126.730, 127.007, 127.057, 127.130, 127.140, 127.2817, 128.090, 130.312, 130.712, 136.050, 159.044, 27 159A.044, 172.075, 172.245, 176.01249, 176.015, 176.0625, 28 176.09129, 176.156, 176A.630, 178.39801, 178.4715, 178.5691, 29 179.495, 179A.070, 179A.165, 179D.160, 200.3771, 200.3772, 30 200.604, 202.3662, 205.4651, 209.392, 31 200.5095, 209.3925, 209.419, 209.521, 211A.140, 213.010, 213.040, 213.095, 213.131, 32 33 217.105. 217.110. 217.464. 217.475. 218A.350. 218E.625, 218F.150, 218G.130, 218G.240, 218G.350, 228.270, 228.450, 34 228.495, 228.570, 231.069, 231.1473, 233.190, 237.300, 239.0105, 35 239.0113, 239B.030, 239B.040, 239B.050, 239C.140, 239C.210, 36 239C.230, 239C.250, 239C.270, 240.007, 241.020, 37 241.039, 242.105, 244.264, 244.335, 247.540, 247.550, 247.560, 38 250.087, 250.130, 250.140, 250.150, 268.095, 268.490, 268.910, 39 271A.105, 281.195, 281.805, 281A.350, 281A.680, 281A.685, 40 281A.750, 281A.755, 281A.780, 284.4068, 286.110, 287.0438, 41 42 289.025, 289.080, 289.387, 289.830, 293.4855, 293.5002, 293.503, 293.504, 293.558, 293.906, 293.908, 293.910, 293B.135, 293D.510, 43 331.110, 332.061, 332.351, 333.333, 333.335, 338.070, 338.1379, 44 338.1593, 338.1725, 338.1727, 348.420, 349.597, 349.775, 353.205, 45



1 2

3

4 5

6

7

8

9

10

11 12

13



353A.049, 353A.085, 353A.100, 353C.240, 360.240, 360.247, 1 2 360.255, 360.755, 361.044, 361.610, 365.138, 366.160, 368A.180, 370.257, 370.327, 372A.080, 378.290, 378.300, 379.008, 379.1495, 3 385B.100, 387.626, 387.631, 388.1455, 4 385A.830. 5 388.501, 388.503, 388.513, 388.750, 388A.247, 388A.249, 391.035, 391.120, 391.925, 392.029, 392.147, 392.264, 392.271, 392.315, 6 7 392.317, 392.325, 392.327, 392.335, 392.850, 394.167, 394.1698, 394.447, 394.460, 394.465, 396.3295, 396.405, 396.525, 396.535, 8 396.9685, 398A.115, 408.3885, 408.3886, 408.3888, 408.5484, 9 412.153, 416.070, 422.2749, 422.305, 422A.342, 422A.350, 10 425.400, 427A.1236, 427A.872, 432.028, 432.205, 432B.175, 11 432B.280, 432B.290, 432B.407, 432B.430, 432B.560, 432B.5902, 12 13 433.534, 433A.360, 437.145, 439.840, 439B.420, 440.170. 441A.195, 441A.220, 441A.230, 442.330, 442.395, 14 442.735. 445A.665, 445B.570, 449.209, 449.245, 449A.112, 450.140. 15 453.164, 453.720, 453A.610, 453A.700, 458.055, 458.280, 459.050, 16 17 459.3866, 459.555, 459.7056, 459.846, 463.120, 463.15993, 463.240, 463.3403, 463.3407, 463.790, 467.1005, 480.365, 480.940, 18 481.063, 481.091, 481.093, 482.170, 482.5536, 483.340, 483.363, 19 483.575, 483.659, 483.800, 484E.070, 485.316, 501.344, 503.452, 20 522.040, 534A.031, 561.285, 571.160, 584.655, 587.877, 598.0964, 21 22 598.098, 598A.110, 599B.090, 603.070, 603A.210, 604A.710, 612.265, 616B.012, 616B.015, 616B.315, 616B.350, 618.341, 23 618.425, 622.310, 623.131, 623A.137, 624.110, 624.265, 624.327, 24 25 625.425, 625A.185, 628.418, 628B.230, 628B.760, 26 629.069. 630.133, 630.30665, 630.336, 630A.555, 631.368. 27 632.121, 632.125, 632.405, 633.283, 633.301, 633.524, 634.055, 28 634.214, 634A.185, 635.158, 636.107, 637.085, 637B.288, 638.087, 29 638.089, 639.2485, 639.570, 640.075, 640A.220, 640B.730, 640C.400, 640C.600, 640C.620, 640C.745, 640C.760, 640D.190, 30 640E.340, 641.090, 641.325, 641A.191, 641A.289, 641B.170, 31 641B.460, 641C.760, 641C.800, 642.524, 643.189, 644A.870, 32 645.180, 645.625, 645A.050, 645A.082, 645B.060, 645B.092, 33 645C.220, 645C.225, 645D.130, 645D.135, 645E.300, 645E.375, 34 645G.510, 645H.320, 645H.330, 647.0945, 647.0947, 648.033, 35 648.197, 649.065, 649.067, 652.228, 654.110, 656.105, 661.115, 36 665.130, 665.133, 669.275, 669.285, 669A.310, 671.170, 673.450, 37 673.480, 675.380, 676A.340, 676A.370, 677.243, 679B.122, 38 679B.152, 679B.159, 679B.190, 679B.285, 679B.690, 680A.270, 39 40 681A.440, 681B.260, 681B.410, 681B.540, 683A.0873, 685A.077, 686A.289, 686B.170, 686C.306, 687A.110, 687A.115, 687C.010, 41 42 688C.230, 688C.480, 688C.490, 689A.696, 692A.117, 692C.190, 43 692C.3507, 692C.3536, 692C.3538, 692C.354, 692C.420. 693A.480, 693A.615, 696B.550, 696C.120, 703.196, 704B.320, 44 704B.325, 706.1725, 706A.230, 710.159, 711.600, section 1 of this 45





act, sections 35, 38 and 41 of chapter 478, Statutes of Nevada 2011 and section 2 of chapter 391, Statutes of Nevada 2013 and unless otherwise declared by law to be confidential, all public books and public records of a governmental entity must be open at all times during office hours to inspection by any person, and may be fully copied or an abstract or memorandum may be prepared from those public books and public records. Any such copies, abstracts or memoranda may be used to supply the general public with copies, abstracts or memoranda of the records or may be used in any other way to the advantage of the governmental entity or of the general public. This section does not supersede or in any manner affect the federal laws governing copyrights or enlarge, diminish or affect in any other manner the rights of a person in any written book or record which is copyrighted pursuant to federal law.

2. A governmental entity may not reject a book or record which is copyrighted solely because it is copyrighted.

- 3. A governmental entity that has legal custody or control of a public book or record shall not deny a request made pursuant to subsection 1 to inspect or copy or receive a copy of a public book or record on the basis that the requested public book or record contains information that is confidential if the governmental entity can redact, delete, conceal or separate the confidential information from the information included in the public book or record that is not otherwise confidential.
- 4. A person may request a copy of a public record in any medium in which the public record is readily available. An officer, employee or agent of a governmental entity who has legal custody or control of a public record:
- (a) Shall not refuse to provide a copy of that public record in a readily available medium because the officer, employee or agent has already prepared or would prefer to provide the copy in a different medium.
- (b) Except as otherwise provided in NRS 239.030, shall, upon request, prepare the copy of the public record and shall not require the person who has requested the copy to prepare the copy himself or herself.
 - **Sec. 3.** NRS 1A.100 is hereby amended to read as follows:
- 1A.100 1. A system of retirement providing benefits for the retirement, disability or death of all justices of the Supreme Court, judges of the Court of Appeals and district judges, and certain justices of the peace and municipal judges, and funded on an actuarial reserve basis is hereby established and must be known as the Judicial Retirement System.
- 2. The System consists of the Judicial Retirement Plan and the provisions set forth in NRS 2.060 to 2.083, inclusive, 2A.100 to





2A.150, inclusive, and 3.090 to 3.099, inclusive, for providing benefits to justices of the Supreme Court, judges of the Court of Appeals or district judges who served either as a justice of the Supreme Court or district judge before November 5, 2002. Each justice of the Supreme Court, judge of the Court of Appeals or district judge who is not a member of the Public Employees' Retirement System is a member of the Judicial Retirement System.

- 3. [The] Except as otherwise provided in section 1 of this act, the official correspondence and records [, other than the files of individual members of the System or retired justices or judges,] and, except as otherwise provided in NRS 241.035, the minutes, audio recordings, transcripts and books of the System are public records and are available for public inspection. A copy of the minutes or audio recordings must be made available to a member of the public upon request at no charge pursuant to NRS 241.035.
- 4. The System must be administered exclusively by the Board, which shall make all necessary rules and regulations for the administration of the System. The rules must include, without limitation, rules relating to the administration of the retirement plans in accordance with federal law. The Legislature shall regularly review the System.

Sec. 4. NRS 1A.110 is hereby amended to read as follows:

1A.110 [All] Except as otherwise provided in section 1 of this act, all records and files maintained for a member of the System, retired justice or judge, justice of the Supreme Court, judge of the Court of Appeals or district judge who retired pursuant to NRS 2.060 to 2.083, inclusive, 2A.100 to 2A.150, inclusive, or 3.090 to 3.099, inclusive, or the beneficiary of any of them may be reviewed and copied only by the System, the member, the Court Administrator, the board of county commissioners if the records concern a justice of the peace or retired justice of the peace whom the board of county commissioners allowed to participate in the Judicial Retirement Plan pursuant to NRS 1A.285, the city council if the records concern a municipal judge or retired municipal judge whom the city council allowed to participate in the Judicial Retirement Plan pursuant to NRS 1A.285, the spouse of the member, or the retired justice or judge or his or her spouse, or pursuant to a court order, or by a beneficiary after the death of the justice or judge on whose account benefits are received pursuant to the System. Any member, retired justice or judge, justice of the Supreme Court, judge of the Court of Appeals or district judge who retired pursuant to NRS 2.060 to 2.083, inclusive, 2A.100 to 2A.150, inclusive, or 3.090 to 3.099, inclusive, or beneficiary may submit a written waiver to the System authorizing his or her representative to review or copy all such records.





- **Sec. 5.** NRS 286.110 is hereby amended to read as follows:
- 286.110 1. A system of retirement providing benefits for the retirement, disability or death of employees of public employers and funded on an actuarial reserve basis is hereby established and must be known as the Public Employees' Retirement System. The System is a public agency supported by administrative fees transferred from the retirement funds. The Executive and Legislative Departments of the State Government shall regularly review the System.
- 2. The System is entitled to use any services provided to state agencies and shall use the services of the Purchasing Division of the Department of Administration, but is not required to use any other service. The purpose of this subsection is to provide to the Board the necessary autonomy for an efficient and economic administration of the System and its program.
- 3. [The] Except as otherwise provided in section 1 of this act, the official correspondence and records [, other than the files of individual members or retired employees,] and, except as otherwise provided in NRS 241.035, the minutes, audio recordings, transcripts and books of the System are public records and are available for public inspection. A copy of the minutes or audio recordings must be made available to a member of the public upon request at no charge pursuant to NRS 241.035.
- 4. The respective participating public employers are not liable for any obligation of the System.
 - **Sec. 6.** NRS 286.117 is hereby amended to read as follows:
- 286.117 [All] Except as otherwise provided in section 1 of this act, all records and files maintained for a member, retired employee or beneficiary may be reviewed and copied only by the System, the member, the member's public employer or spouse, or the retired employee or the retired employee's spouse, or pursuant to a court order, or by a beneficiary after the death of the employee on whose account benefits are received. Any member, retired employee or beneficiary may submit a written waiver to the System authorizing the representative of the member, retired employee or beneficiary to review or copy all such records.
 - **Sec. 7.** This act becomes effective on July 1, 2019.







SENATE BILL NO. 287–SENATORS PARKS, HANSEN, SPEARMAN; DENIS AND WOODHOUSE

MARCH 15, 2019

Referred to Committee on Government Affairs

SUMMARY—Revises provisions governing public records. (BDR 19-648)

FISCAL NOTE: Effect on Local Government: May have Fiscal Impact. Effect on the State: Yes.

EXPLANATION - Matter in bolded italics is new; matter between brackets fomitted material is material to be omitted.

AN ACT relating to public records; clarifying the records of a governmental entity that must be made available to the public to inspect, copy or receive a copy thereof; revising provisions relating to the manner of providing copies of public records; revising provisions governing the actions taken by governmental entities in response to requests for public records; revising provisions relating to the relief provided for a requester of a public record who prevails in a legal proceeding; revising provisions governing immunity from liability for public officers and employees who disclose or refuse to disclose certain information; revising provisions governing the fees that governmental entities are authorized to charge for a copy of a public record; providing civil penalties; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law provides that all public books and public records of a state or local governmental entity, unless otherwise declared by law to be confidential, are required to be open at all times during office hours for the public to inspect, copy or receive a copy thereof. Existing law also authorizes a person to request a copy of a public record in any medium in which the public record is readily available. (NRS 239.010) The purpose of the existing law governing public records, as stated in the legislative declaration for that law, is, in part, to foster democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law. (NRS 239.001) Section 2 of this bill provides that the legislative intent is for such access to be provided promptly. Section 3 of this bill defines "public record" to mean any of several types of





records and information prepared, created, used, owned, retained or received in connection with the transaction of official business or the provision of a public service. Section 12 of this bill provides for making conforming changes relating to this definition. Sections 2 and 4 of this bill make changes to conform with existing law which provides that, in addition to the right to inspect and copy a public record, members of the public have the right to receive a copy of a public record upon request.

With certain exceptions, existing law prohibits a governmental entity from charging a fee for providing a copy of a public record that exceeds the actual cost to the governmental entity to provide the copy. (NRS 239.052) **Section 3** clarifies that the actual cost to a governmental entity: (1) includes such direct costs as the cost of ink, toner, paper, media and postage; and (2) does not include overhead and labor costs that a governmental entity incurs regardless of the request. **Section 13** of this bill eliminates the authority of a governmental entity to charge an additional fee for providing a copy of a public record when extraordinary use of personnel or resources is required. (NRS 239.055)

Existing law generally places certain requirements on a governmental entity that has legal custody or control of a public record. (NRS 239.010, 239.0107, 239.0113, 239.0115) **Sections 5-9** of this bill change the applicable type of custody or control of a public record from "legal custody or control" to "possession, custody or control." **Section 5** of this bill specifically authorizes the electronic redaction of public records. **Section 5** also requires a governmental entity to provide a copy of a public record in an electronic format by means of an electronic medium unless the public record was requested in a different medium. **Section 5** further requires that a public record be provided in the electronic format in which it was created or prepared, if requested.

Under existing law, if a person requests to inspect or copy a public record or receive a copy of a public record which the governmental entity is unable to make available by the end of the fifth business day after the request was received, the governmental entity is required to provide written notice of that fact to the person who made the request and the date and time after which the public record or the copy of the public record will be available. (NRS 239.0107) Section 6 of this bill clarifies that the date and time provided to the requester must reflect the earliest date and time after which the governmental entity reasonably believes the public record will be available. If the public record is not made available by this date and time, section 6 requires the governmental entity to provide to the requester, in writing, an explanation of the reason the public record is not available and a date and time after which the governmental entity reasonably believes the public record will be available. Section 6 also requires a governmental entity that is unable to provide access to a public record within the prescribed time period to make a reasonable effort to assist the requester to focus the request in such a manner as to maximize the likelihood the requester will be able to inspect, copy or receive a copy of the public record as expeditiously as possible. Section 6 additionally requires a person who has possession, custody or control of a public record of a governmental entity to provide to a requester certain contact information regarding the person who is responsible for making the decision on behalf of the governmental entity concerning the action the governmental entity will take with respect to the request for the public record or any other decision in connection with

If a request for inspection, copying or copies of a public record is denied, existing law authorizes a requester to apply to a district court for an order permitting the requester to inspect or copy the record or requiring the person who has legal custody or control of the public record to provide a copy to the requester. Existing law provides that if the requester prevails in such a proceeding, the requester is entitled to recover his or her costs and reasonable attorney's fees in the



 $\overline{24}$

<u>2</u>9

 $\overline{30}$



proceeding from the governmental entity whose officer has custody of the record. (NRS 239.011) Section 7 of this bill authorizes a requester of a public record to apply to a district court for a similar order if a request for inspection, copying or copies of a public record is unreasonably delayed or if a person who requests a copy of a public record believes that the fee charged by the governmental entity for providing the copy of the public record is excessive or improper. Section 7 additionally provides that if the requester prevails in a proceeding involving an unreasonable delay in the provision of a public record or the imposition of an excessive or improper fee for the public record, the requester is entitled to recover from the governmental entity his or her costs and reasonable attorney's fees and \$100 per day for each day that the requester was denied the right to inspect, copy or receive a copy of the public record. **Section 7** also authorizes the recovery of this daily monetary penalty for the denial of a request for a public record. Section 7 further provides that if the governmental entity appeals the decision of the district court and the decision is affirmed in whole or in part, the requester is also entitled to recover from the governmental entity his or her costs and reasonable attorney's fees for the appeal and \$100 per day for each day that the requester was denied the right to inspect, copy or receive a copy of the public record. Section 1 of this bill provides that, in addition to any such costs, attorney's fees or other monetary awards, the requester of a public record is entitled to recover a civil penalty and to any additional relief deemed proper by the court if a governmental entity or the person who is responsible for making decisions on behalf of the governmental entity relating to the public record request fails to comply with the existing law governing public records.

Existing law confers immunity from liability for damages upon public officers and employees who act in good faith in disclosing or refusing to disclose information. (NRS 239.012) **Section 10** of this bill provides that the burden of proof that a public officer or employee acted in good faith in refusing to disclose information is on the public officer or employee or his or her employer. **Section 10** also clarifies that the immunity from liability for damages for public officers and employees does not include immunity from liability for paying the costs and reasonable attorney's fees and other monetary relief awarded to a prevailing requester. **Section 11** of this bill provides that the provisions of the bill apply to actions that are currently pending on October 1, 2019, which is the effective date of this bill, as well as to actions filed on and after October 1, 2019.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 239 of NRS is hereby amended by adding thereto a new section to read as follows:

1. In addition to any relief awarded pursuant to NRS 239.011, if a court determines that a governmental entity or the person identified pursuant to subsection 3 of NRS 239.0107 as responsible for making the decision on behalf of the governmental entity concerning the request to inspect, copy or receive a copy of a public record failed to comply with the provisions of this chapter, the requester of the public record is entitled to:

(a) Recover from the governmental entity or the person identified pursuant to subsection 3 of NRS 239.0107, or both, a



67

68

69

70

71

72 73

74

75

76

77

78

79

80

81

82

83

84

85

86

87

88

89

90

91

92

 $9\overline{3}$

94

95

96

97

98 99

100

101

3

4

5

6

8

9

10



civil penalty of not less than \$1,000 or more than \$250,000 per offense.

(b) Any such additional relief as the court deems proper to punish and deter violations of the provisions of this chapter.

2. The rights and remedies recognized by this section are in addition to any other rights or remedies that may exist in law or in equity.

Sec. 2. NRS 239.001 is hereby amended to read as follows: 239.001 The Legislature hereby finds and declares that:

- 1. The purpose of this chapter is to foster democratic principles by providing members of the public with *prompt* access to inspect, [and] copy *or receive a copy of, including, without limitation, in an electronic format by means of an electronic medium*, public [books and] records to the extent permitted by law;
- 2. The provisions of this chapter must be construed liberally to carry out this important purpose;
- 3. Any exemption, exception or balancing of interests which limits or restricts access to public [books and] records by members of the public must be construed narrowly;
- 4. The use of private entities in the provision of public services must not deprive members of the public access to inspect, [and] copy [books and] or receive a copy of records relating to the provision of those services; and
- 5. If a public [book or] record is declared by law to be open to the public, such a declaration does not imply, and must not be construed to mean, that a public [book or] record is confidential if it is not declared by law to be open to the public and is not otherwise declared by law to be confidential.
- **Sec. 3.** NRS 239.005 is hereby amended to read as follows: 239.005 As used in this chapter, unless the context otherwise requires:
- 1. "Actual cost" means the direct cost [related to the reproduction] incurred by a governmental entity in the provision of a public record [.], including, without limitation, the cost of ink, toner, paper, media and postage. The term does not include a cost that a governmental entity incurs regardless of whether or not a person requests a copy of a particular public record [.], including, without limitation, any overhead costs of the governmental entity and any labor costs incurred by a governmental entity in the provision of a public record.
- 2. "Agency of the Executive Department" means an agency, board, commission, bureau, council, department, division, authority or other unit of the Executive Department of the State Government. The term does not include the Nevada System of Higher Education.





- 3. "Committee" means the Committee to Approve Schedules for the Retention and Disposition of Official State Records.
- 4. "Division" means the Division of State Library, Archives and Public Records of the Department of Administration.
 - 5. "Governmental entity" means:

- (a) An elected or appointed officer of this State or of a political subdivision of this State;
- (b) An institution, board, commission, bureau, council, department, division, authority or other unit of government of this State, including, without limitation, an agency of the Executive Department, or of a political subdivision of this State;
 - (c) A university foundation, as defined in NRS 396.405;
- (d) An educational foundation, as defined in NRS 388.750, to the extent that the foundation is dedicated to the assistance of public schools; or
- (e) A library foundation, as defined in NRS 379.0056, to the extent that the foundation is dedicated to the assistance of a public library.
 - 6. "Official state record" includes, without limitation:
 - (a) Papers, unpublished books, maps and photographs;
- (b) Information stored on magnetic tape or computer, laser or optical disc;
- (c) Materials that are capable of being read by a machine, including, without limitation, microforms and audio and visual materials: and
- (d) Materials that are made or received by a state agency and preserved by that agency or its successor as evidence of the organization, operation, policy or any other activity of that agency or because of the information contained in the material.
- 7. "Privatization contract" means a contract executed by or on behalf of a governmental entity which authorizes a private entity to provide public services that are:
- (a) Substantially similar to the services provided by the public employees of the governmental entity; and
- (b) In lieu of the services otherwise authorized or required to be provided by the governmental entity.
- 8. "Public record" means any record, document, paper, letter, map, notes, calendar, spreadsheet, database, book, tape, photograph, film, sound recording, video recording, data processing software, computer and other electronic data, metadata, electronic mail or any other material or means of recording information, regardless of the physical form, characteristics or means of transmission, which is prepared, created, used, owned, retained or received in connection with the transaction of official business or the provision of a public service.





- Sec. 4. NRS 239.008 is hereby amended to read as follows:
- The head of each agency of the Executive 239.008 Department shall designate one or more employees of the agency to act as records official for the agency.
- A records official designated pursuant to subsection 1 shall carry out the duties imposed pursuant to this chapter on the agency of the Executive Department that designated him or her with respect to a request to inspect, for copy or receive a copy of a public book or record of the agency.
- **Public** The State Library, Archives and Records Administrator, pursuant to NRS 378.255 and in cooperation with the Attorney General, shall prescribe:
- (a) The form for a request by a person to inspect, [or] copy or receive a copy of a public [book or] record of an agency of the Executive Department pursuant to NRS 239.0107;
- (b) The form for the written notice required to be provided by an agency of the Executive Department pursuant to paragraph (b), (c) or (d) of subsection 1 of NRS 239.0107; and
- (c) By regulation the procedures with which a records official must comply in carrying out his or her duties.
- Each agency of the Executive Department shall make available on any website maintained by the agency on the Internet or its successor the forms and procedures prescribed by the State Library, Archives and Public Records Administrator and the Attorney General pursuant to subsection 3.

Sec. 5. NRS 239.010 is hereby amended to read as follows:

26 27 239.010 1. Except as otherwise provided in this section and 28 NRS 1.4683, 1.4687, 1A.110, 3.2203, 41.071, 49.095, 49.293, 29 62D.420, 62D.440, 62E.516, 62E.620, 62H.025, 62H.030, 62H.170, 30 62H.220, 62H.320, 75A.100, 75A.150, 76.160, 78.152, 80.113, 81.850, 82.183, 86.246, 86.54615, 87.515, 87.5413, 87A.200, 31 87A.580, 87A.640, 88.3355, 88.5927, 88.6067, 88A.345, 88A.7345, 32 33 89.045, 89.251, 90.730, 91.160, 116.757, 116A.270, 116B.880, 118B.026, 119.260, 119.265, 119.267, 119.280, 119A.280, 34 119A.653, 119B.370, 119B.382, 120A.690, 125.130, 125B.140, 35 126.141, 126.161, 126.163, 126.730, 127.007, 127.057, 127.130, 36 127.140, 127.2817, 128.090, 130.312, 130.712, 136.050, 159.044, 37 172.075, 172.245, 176.01249, 176.015, 176.0625, 38 159A.044, 176.09129, 176.156, 176A.630, 178.39801, 178.4715, 178.5691, 39 179.495, 179A.070, 179A.165, 179D.160, 200.3771, 200.3772, 40 200.5095, 200.604, 202.3662, 205.4651, 209.392, 41 209.3925, 42 209.419, 209.521, 211A.140, 213.010, 213.040, 213.095, 213.131, 43 217.105, 217.110, 217.464, 217.475, 218A.350, 218E.625, 218F.150, 218G.130, 218G.240, 218G.350, 228.270, 228.450, 44 45 228.495, 228.570, 231.069, 231.1473, 233.190, 237.300, 239.0105,



1

2

3

4

5

6

7

8

9

10

11 12

13

14

15 16

17

18 19

20 21

22

23

24



239.0113, 239B.030, 239B.040, 239B.050, 239C.140, 239C.210, 1 2 239C.230. 239C.250. 239C.270. 240.007. 241.020. 241.039, 242.105, 244.264, 244.335, 247.540, 247.550, 247.560, 3 250.087, 250.130, 250.140, 250.150, 268.095, 268.490, 268.910, 4 271A.105, 281.195, 281.805, 281A.350, 281A.680, 281A.685, 5 281A.750, 281A.755, 281A.780, 284.4068, 286.110, 287.0438, 6 7 289.025, 289.080, 289.387, 289.830, 293.4855, 293.5002, 293.503, 293.504, 293.558, 293.906, 293.908, 293.910, 293B.135, 293D.510, 8 331.110, 332.061, 332.351, 333.333, 333.335, 338.070, 338.1379, 9 338.1593, 338.1725, 338.1727, 348.420, 349.597, 349.775, 353.205, 10 353A.049, 353A.085, 353A.100, 353C.240, 360.240, 360.247, 11 360.255, 360.755, 361.044, 361.610, 365.138, 366.160, 368A.180, 12 13 370.257, 370.327, 372A.080, 378.290, 378.300, 379.008, 379.1495, 385B.100, 387.626, 387.631, 388.1455, 14 385A.830. 388.501, 388.503, 388.513, 388.750, 388A.247, 388A.249, 391.035, 15 391.120, 391.925, 392.029, 392.147, 392.264, 392.271, 392.315, 16 392.317, 392.325, 392.327, 392.335, 392.850, 394.167, 394.1698, 17 394.447, 394.460, 394.465, 396.3295, 396.405, 396.525, 396.535, 18 396.9685, 398A.115, 408.3885, 408.3886, 408.3888, 408.5484, 19 20 412.153, 416.070, 422.2749, 422.305, 422A.342, 422A.350, 425.400, 427A.1236, 427A.872, 432.028, 432.205, 432B.175, 21 22 432B.280, 432B.290, 432B.407, 432B.430, 432B.560, 432B.5902, 433.534, 433A.360, 437.145, 439.840, 439B.420, 23 440.170. 441A.195, 441A.220, 441A.230, 442.330, 442.395, 24 442.735. 450.140, 25 445A.665, 445B.570, 449.209, 449.245, 449A.112, 26 453.164, 453.720, 453A.610, 453A.700, 458.055, 458.280, 459.050, 27 459.3866, 459.555, 459.7056, 459.846, 463.120, 463.15993, 28 463.240, 463.3403, 463.3407, 463.790, 467.1005, 480.365, 480.940, 29 481.063, 481.091, 481.093, 482.170, 482.5536, 483.340, 483.363, 483.575, 483.659, 483.800, 484E.070, 485.316, 501.344, 503.452, 30 522.040, 534A.031, 561.285, 571.160, 584.655, 587.877, 598.0964, 31 32 598.098, 598A.110, 599B.090, 603.070, 603A.210, 604A.710, 612.265, 616B.012, 616B.015, 616B.315, 616B.350, 618.341, 33 618.425, 622.310, 623.131, 623A.137, 624.110, 624.265, 624.327, 34 625.425, 625A.185, 628.418, 628B.230, 628B.760, 629.047, 35 36 629.069. 630.133, 630.30665, 630.336, 630A.555, 631.368. 632.121, 632.125, 632.405, 633.283, 633.301, 633.524, 634.055, 37 634.214, 634A.185, 635.158, 636.107, 637.085, 637B.288, 638.087, 38 639.2485, 639.570, 640.075, 640A.220, 39 638.089. 640B.730. 640C.400, 640C.600, 640C.620, 640C.745, 640C.760, 640D.190, 40 640E.340, 641.090, 641.325, 641A.191, 641A.289, 641B.170, 41 42 641B.460, 641C.760, 641C.800, 642.524, 643.189, 644A.870, 43 645.180, 645.625, 645A.050, 645A.082, 645B.060, 645B.092, 645C.220, 645C.225, 645D.130, 645D.135, 645E.300, 645E.375, 44 645G.510, 645H.320, 645H.330, 647.0945, 647.0947, 648.033. 45





648.197, 649.065, 649.067, 652.228, 654.110, 656.105, 661.115, 1 2 665.130, 665.133, 669.275, 669.285, 669A.310, 671.170, 673.450, 673.480, 675.380, 676A.340, 676A.370, 677.243, 679B.122, 3 679B.152, 679B.159, 679B.190, 679B.285, 679B.690, 680A.270, 4 5 681A.440, 681B.260, 681B.410, 681B.540, 683A.0873, 685A.077, 686A.289, 686B.170, 686C.306, 687A.110, 687A.115, 687C.010, 6 7 688C.230, 688C.480, 688C.490, 689A.696, 692A.117, 692C.190, 8 692C.3507. 692C.3536. 692C.3538, 692C.354. 692C.420. 9 693A.480, 693A.615, 696B.550, 696C.120, 703.196, 704B.320, 704B.325, 706.1725, 706A.230, 710.159, 711.600, sections 35, 38 10 and 41 of chapter 478, Statutes of Nevada 2011 and section 2 of 11 12 chapter 391. Statutes of Nevada 2013 and unless otherwise declared 13 by law to be confidential, all public [books and public] records of a 14 governmental entity must be open at all times during office hours to 15 inspection by any person, and may be fully copied or an abstract or 16 memorandum may be prepared from those public [books and public] 17 records. Any such copies, abstracts or memoranda may be used to 18 supply the general public with copies, abstracts or memoranda of the 19 records or may be used in any other way to the advantage of the 20 governmental entity or of the general public. This section does not supersede or in any manner affect the federal laws governing 21 22 copyrights or enlarge, diminish or affect in any other manner the 23 rights of a person in any written [book or] record which is 24 copyrighted pursuant to federal law. 25

- 2. A governmental entity may not reject a **[book or]** record which is copyrighted solely because it is copyrighted.
- 3. A governmental entity that has [legal] possession, custody or control of a public [book or] record shall not deny a request made pursuant to subsection 1 to inspect or copy or receive a copy of a public [book or] record on the basis that the requested public [book or] record contains information that is confidential if the governmental entity can redact, delete, conceal or separate, including, without limitation, electronically, the confidential information from the information included in the public [book or] record that is not otherwise confidential.
- 4. A [person may request] governmental entity shall provide a copy of a public record in [any] an electronic format by means of an electronic medium [in which the public record is readily available.] unless the public record was requested in a different medium. If requested, a copy of a public record must be provided in the electronic format in which the public record was created or prepared.



26

27

28

29

30

31

32

33 34

35

36 37

38

39

40



- 5. An officer, employee or agent of a governmental entity who has **[legal]** *possession*, custody or control of a public record:
- (a) Shall not refuse to provide a copy of that public record in **[a readily available]** *the* medium *that is requested* because the officer, employee or agent has already prepared or would prefer to provide the copy in a different medium.
- (b) Except as otherwise provided in NRS 239.030, shall, upon request, prepare the copy of the public record and shall not require the person who has requested the copy to prepare the copy himself or herself.
 - **Sec. 6.** NRS 239.0107 is hereby amended to read as follows:
- 239.0107 1. Not later than the end of the fifth business day after the date on which the person who has [legal] possession, custody or control of a public [book or] record of a governmental entity receives a written or oral request from a person to inspect, copy or receive a copy of the public [book or] record, a governmental entity shall do one of the following, as applicable:
- (a) Except as otherwise provided in subsection 2, allow the person to inspect or copy the public [book or] record or, if the request is for the person to receive a copy of the public [book or] record, provide such a copy to the person.
- (b) If the governmental entity does not have [legal] possession, custody or control of the public [book or] record, provide to the person, in writing:
- (1) Notice of [that] the fact [;] that it does not have possession, custody or control of the public record; and
- (2) The name and address of the governmental entity that has **[legal]** *possession*, custody or control of the public **[book or]** record, if known.
- (c) Except as otherwise provided in paragraph (d), if the governmental entity is unable to make the public [book or] record available by the end of the fifth business day after the date on which the person who has [legal] possession, custody or control of the public [book or] record received the request [, provide]:
 - (1) **Provide** to the person, in writing
- (1) Notice] notice of [that] the fact [;] that it is unable to make the public record available by that date and
- [(2) A] the earliest date and time after which the governmental entity reasonably believes the public [book or] record will be available for the person to inspect or copy or after which a copy of the public [book or] record will be available to the person. If the public [book or] record or the copy of the public [book or] record is not available to the person by that date and time, the [person may inquire regarding the status of the request.] governmental entity shall provide to the person, in writing, an





explanation of the reason the public record is not available and a date and time after which the governmental entity reasonably believes the public record will be available for the person to inspect or copy or after which a copy of the public record will be available to the person.

- (2) Make a reasonable effort to assist the requester to focus the request in such a manner as to maximize the likelihood the requester will be able to inspect, copy or receive a copy of the public record as expeditiously as possible, including, without limitation, by:
- (I) Advising the requester regarding terms to be used or the applicable database in which to perform a search for the public record;
- (II) Eliciting additional clarifying information from the requester that will assist the person who has possession, custody or control of a public record in identifying the public record;
- (III) Providing suggestions for overcoming any practical basis that would deny or otherwise limit access to the public record; and
- (IV) Describing the manner in which the public record is stored, including, without limitation, whether the public record is stored electronically.
- (d) If the governmental entity must deny the person's request because the public [book or] record, or a part thereof, is confidential, provide to the person, in writing:
 - (1) Notice of that fact; and
- (2) A citation to the specific statute or other legal authority that makes the public [book or] record, or a part thereof, confidential.
- 2. If a public [book or] record of a governmental entity is readily available for inspection or copying, the person who has [legal] possession, custody or control of the public [book or] record shall allow a person who has submitted a request to inspect, copy or receive a copy of a public [book or] record [.] as expeditiously as practicable.
- 3. In addition to performing the actions required by subsections 1 and 2, the person who has possession, custody or control of a public record of a governmental entity shall provide in writing to a person who makes a request for the public record:
- (a) The name and title or position of the person responsible for making the decision on behalf of the governmental entity concerning the action the governmental entity will take pursuant to this section concerning the request or any other decision in connection with the request; and





- (b) Contact information for the person described in paragraph (a), including, without limitation, his or her business address, telephone number and electronic mail address.
 - **Sec. 7.** NRS 239.011 is hereby amended to read as follows:
- 239.011 1. If a request for inspection, copying or copies of a public [book or] record open to inspection and copying is denied [,] or unreasonably delayed or if a person who requests a copy of a public record believes that the fee charged by the governmental entity for providing the copy of the public record is excessive or improper, the requester may apply to the district court in the county in which the [book or] record is located for an order:
- (a) Permitting the requester to inspect or copy the [book or] record; [or]
- (b) Requiring the person who has [legal] possession, custody or control of the public [book or] record to provide a copy to the requester [,]; or
 - (c) Providing relief relating to the amount of the fee,
- ⇒ as applicable.

- 2. The court shall give this matter priority over other civil matters to which priority is not given by other statutes. If the requester prevails, the requester is entitled to recover [his] from the governmental entity that has possession, custody or control of the record:
- (a) His or her costs and reasonable attorney's fees in the proceeding [from the governmental entity whose officer has custody of the book or record.]; and
- (b) One hundred dollars per day for each day he or she was denied the right to inspect, copy or receive a copy of the public record.
- 3. If the governmental entity appeals the decision of the district court and the decision is affirmed in whole or in part, the requester is entitled to recover from the governmental entity that has possession, custody or control of the record:
- (a) His or her costs and reasonable attorney's fees for the appeal; and
- (b) One hundred dollars per day for each day he or she was denied the right to inspect, copy or receive a copy of the public record.
- 4. The rights and remedies recognized by this section are in addition to any other rights or remedies that may exist in law or in equity.
 - **Sec. 8.** NRS 239.0113 is hereby amended to read as follows: 239.0113 Except as otherwise provided in NRS 239.0115, if:
- 1. The confidentiality of a public [book or] record, or a part thereof, is at issue in a judicial or administrative proceeding; and





- 2. The governmental entity that has **[legal]** *possession*, custody or control of the public **[book or]** record asserts that the public **[book or]** record, or a part thereof, is confidential,
- → the governmental entity has the burden of proving by a preponderance of the evidence that the public [book or] record, or a part thereof, is confidential.
 - **Sec. 9.** NRS 239.0115 is hereby amended to read as follows:
- 239.0115 1. Except as otherwise provided in this subsection and subsection 3, notwithstanding any provision of law that has declared a public [book or] record, or a part thereof, to be confidential, if a public [book or] record has been in the [legal] **possession**, custody or control of one or more governmental entities for at least 30 years, a person may apply to the district court of the county in which the governmental entity that currently has flegal **possession**, custody or control of the public [book or] record is located for an order directing that governmental entity to allow the person to inspect or copy the public [book or] record, or a part thereof. If the public [book or] record pertains to a natural person, a person may not apply for an order pursuant to this subsection until the public [book or] record has been in the [legal] possession, custody or control of one or more governmental entities for at least 30 years or until the death of the person to whom the public [book] or record pertains, whichever is later.
- 2. There is a rebuttable presumption that a person who applies for an order as described in subsection 1 is entitled to inspect or copy the public [book or] record, or a part thereof, that the person seeks to inspect or copy.
- 3. The provisions of subsection 1 do not apply to any **[book or]** record:
 - (a) Declared confidential pursuant to NRS 463.120.
- (b) Containing personal information pertaining to a victim of crime that has been declared by law to be confidential.
 - **Sec. 10.** NRS 239.012 is hereby amended to read as follows:
- 239.012 1. A public officer or employee who acts in good faith in disclosing or refusing to disclose information and the employer of the public officer or employee are immune from liability for damages, either to the requester or to the person whom the information concerns. Such damages do not include any costs and reasonable attorney's fees or other monetary amount awarded to the requester pursuant to NRS 239.011 or section 1 of this act.
- 2. For the purposes of subsection 1, the public officer or employee or his or her employer, as applicable, has the burden of proving by a preponderance of the evidence that the public officer or employee acted in good faith in refusing to disclose information.





- **Sec. 11.** The amendatory provisions of this act apply to all actions pending or filed on or after October 1, 2019.
 - **Sec. 12.** 1. When the next reprint of Nevada Revised Statutes is prepared by the Legislative Counsel, the Legislative Counsel shall replace the term "public book or record" as it appears in the Nevada Revised Statutes with the term "public record" in the manner provided in this act.
 - 2. The Legislative Counsel shall, in preparing supplements to the Nevada Administrative Code, make such changes as necessary so that the term "public book or record" is replaced with the term "public record" as provided for in this act.
 - 3. To the extent that revisions are made to Nevada Revised Statutes pursuant to subsection 1, the revisions shall be construed as nonsubstantive and it is not the intent of the Nevada Legislature to modify any existing interpretations of any statute which is so revised.
 - **Sec. 13.** NRS 239.055 is hereby repealed.

TEXT OF REPEALED SECTION

239.055 Additional fee when extraordinary use of personnel or resources is required; limitation.

Except as otherwise provided in NRS 239.054 regarding information provided from a geographic information system, if a request for a copy of a public record would require a governmental entity to make extraordinary use of its personnel or technological resources, the governmental entity may, in addition to any other fee authorized pursuant to this chapter, charge a fee not to exceed 50 cents per page for such extraordinary use. Such a request must be made in writing, and upon receiving such a request, governmental entity shall inform the requester, in writing, of the amount of the fee before preparing the requested information. The fee charged by the governmental entity must be reasonable and must be based on the cost that the governmental entity actually incurs for the extraordinary use of its personnel or technological resources. The governmental entity shall not charge such a fee if the governmental entity is not required to make extraordinary use of its personnel or technological resources to fulfill additional requests for the same information.



1

2

3

4

5

6 7

8

9

10

11

12

13

14 15



2. As used in this section, "technological resources" means any information, information system or information service acquired, developed, operated, maintained or otherwise used by a governmental entity.







SENATE BILL NO. 388-SENATOR DENIS

MARCH 20, 2019

Referred to Committee on Government Affairs

SUMMARY—Revises provisions relating to public records. (BDR 19-827)

FISCAL NOTE: Effect on Local Government: May have Fiscal Impact. Effect on the State: Yes.

EXPLANATION - Matter in bolded italics is new; matter between brackets fomitted material] is material to be omitted.

AN ACT relating to public records; providing for the designation of certain public records and portions of public records as confidential; requiring a governmental entity to grant a request to copy such records under certain circumstances; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law generally authorizes members of the public to inspect or copy public records not declared by law to be confidential. (NRS 239.010) **Section 1** of this bill provides that a record or portion of a record that contains personally identifiable information collected by a governmental entity as part of the electronic collection of information from the general public is confidential if the governmental entity determines that the disclosure of the personally identifiable information could create negative consequences for the person to whom the record pertains. **Section 1** additionally requires a governmental entity to maintain a list of records and portions of records declared confidential under such circumstances. **Section 1** requires the governmental entity to grant a request to inspect or copy such a record or portion of a record declared confidential under such circumstances if the requester demonstrates a compelling justification that outweighs the risk of potential negative consequences. **Section 1** requires a governmental entity to submit to the Legislature an annual report that includes a description of each record determined to be confidential under such circumstances and the reasons for that determination.



10

11

12

13 14



THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 239 of NRS is hereby amended by adding thereto a new section to read as follows:

- 1. Except as otherwise provided in subsection 3, a record or portion of a record that contains personally identifiable information collected by a governmental entity as part of the electronic collection of information from the general public is confidential if the governmental entity determines that the disclosure of the personally identifiable information could potentially create negative consequences, including, without limitation, financial loss, stigmatization, harm to reputation, anxiety, embarrassment, fear or other physical or emotional harm, for the person to whom the information pertains.
- 2. Each governmental entity shall maintain a list of records and portions of records determined to be confidential pursuant to subsection 1. The list must describe each record or portion of a record without revealing any personally identifiable information contained in the record.
- 3. A governmental entity shall grant a request pursuant to NRS 239.010 to inspect or copy a record or portion of a record determined to be confidential pursuant to subsection 1 if the requester demonstrates a compelling operational, administrative, legal or educational justification for inspecting or copying the record or portion of a record, as applicable, that, in the determination of the governmental entity, outweighs the risk of potential negative consequences to the person to whom the record pertains.
- 4. On or before February 15 of each year, a governmental entity shall:
- (a) Prepare a report that provides a detailed description of each record or portion of a record determined to be confidential pursuant to subsection 1 and an explanation of the reasons for that determination. The report must not include any personally identifiable information.
- (b) Submit the report to the Director of the Legislative Counsel Bureau for transmittal to:
- (1) If the Legislature is in session, the standing committees of the Legislature which have jurisdiction of the subject matter; or
- (2) If the Legislature is not in session, the Legislative Commission.
- 5. As used in this section, "personally identifiable information" means information that, alone or in combination with other information, may be used to identify a person or an





electronic device used by the person. The term includes, without limitation, the name, address, telephone number, date of birth, and directory information of a person.

4 **Sec. 2.** NRS 239.010 is hereby amended to read as follows: Except as otherwise provided in this section and 5 239.010 NRS 1.4683, 1.4687, 1A.110, 3.2203, 41.071, 49.095, 49.293, 6 7 62D.420, 62D.440, 62E.516, 62E.620, 62H.025, 62H.030, 62H.170, 8 62H.220, 62H.320, 75A.100, 75A.150, 76.160, 78.152, 80.113, 81.850, 82.183, 86.246, 86.54615, 87.515, 87.5413, 87A.200, 9 87A.580, 87A.640, 88.3355, 88.5927, 88.6067, 88A.345, 88A.7345, 10 89.045, 89.251, 90.730, 91.160, 116.757, 116A.270, 116B.880, 11 12 118B.026. 119.260. 119.265, 119.267, 119.280, 119A.280. 13 119A.653, 119B.370, 119B.382, 120A.690, 125.130, 125B.140, 126.141, 126.161, 126.163, 126.730, 127.007, 127.057, 127.130, 14 127.140, 127.2817, 128.090, 130.312, 130.712, 136.050, 159.044, 15 159A.044, 172.075, 172.245, 176.01249, 176.015, 176.0625, 16 176.09129, 176.156, 176A.630, 178.39801, 178.4715, 178.5691, 17 179.495, 179A.070, 179A.165, 179D.160, 200.3771, 200.3772, 18 200.604, 202.3662, 205.4651, 209.392, 19 200.5095, 209.3925, 209.419, 209.521, 211A.140, 213.010, 213.040, 213.095, 213.131, 20 218A.350. 21 217.105. 217.110. 217.464. 217.475. 218E.625. 22 218F.150, 218G.130, 218G.240, 218G.350, 228.270, 228.450, 23 228.495, 228.570, 231.069, 231.1473, 233.190, 237.300, 239.0105, 239.0113, 239B.030, 239B.040, 239B.050, 239C.140, 239C.210, 24 239C.250, 239C.270, 240.007, 241.020, 25 239C.230, 26 241.039, 242.105, 244.264, 244.335, 247.540, 247.550, 247.560, 250.087, 250.130, 250.140, 250.150, 268.095, 268.490, 268.910, 27 271A.105, 281.195, 281.805, 281A.350, 281A.680, 281A.685, 28 281A.750, 281A.755, 281A.780, 284.4068, 286.110, 287.0438, 29 289.025, 289.080, 289.387, 289.830, 293.4855, 293.5002, 293.503, 30 293.504, 293.558, 293.906, 293.908, 293.910, 293B.135, 293D.510, 31 331.110, 332.061, 332.351, 333.333, 333.335, 338.070, 338.1379, 32 338.1593, 338.1725, 338.1727, 348.420, 349.597, 349.775, 353.205, 33 353A.049, 353A.085, 353A.100, 353C.240, 360.240, 360.247, 34 360.255, 360.755, 361.044, 361.610, 365.138, 366.160, 368A.180, 35 370.257, 370.327, 372A.080, 378.290, 378.300, 379.008, 379.1495, 36 37 385A.830, 385B.100, 387.626, 387.631, 388.1455, 388.259, 388.501, 388.503, 388.513, 388.750, 388A.247, 388A.249, 391.035, 38 391.120, 391.925, 392.029, 392.147, 392.264, 392.271, 392.315, 39 40 392.317, 392.325, 392.327, 392.335, 392.850, 394.167, 394.1698, 394.447, 394.460, 394.465, 396.3295, 396.405, 396.525, 396.535, 41 42 396.9685, 398A.115, 408.3885, 408.3886, 408.3888, 408.5484, 43 412.153, 416.070, 422.2749, 422.305, 422A.342, 422A.350, 425.400, 427A.1236, 427A.872, 432.028, 432.205, 432B.175, 44 45 432B.280, 432B.290, 432B.407, 432B.430, 432B.560, 432B.5902,



1



439.840, 439B.420, 1 433.534, 433A.360, 437.145, 440.170, 2 441A.220, 441A.230, 442.330, 442.395, 441A.195. 442.735. 3 445A.665. 445B.570, 449.209, 449.245, 449A.112, 450.140. 453.164, 453.720, 453A.610, 453A.700, 458.055, 458.280, 459.050, 4 5 459.3866, 459.555, 459.7056, 459.846, 463.120, 463.15993, 463.240, 463.3403, 463.3407, 463.790, 467.1005, 480.365, 480.940, 6 7 481.063, 481.091, 481.093, 482.170, 482.5536, 483.340, 483.363, 8 483.575, 483.659, 483.800, 484E.070, 485.316, 501.344, 503.452, 522.040, 534A.031, 561.285, 571.160, 584.655, 587.877, 598.0964, 9 598.098, 598A.110, 599B.090, 603.070, 603A.210, 604A.710, 10 612.265, 616B.012, 616B.015, 616B.315, 616B.350, 618.341, 11 12 618.425, 622.310, 623.131, 623A.137, 624.110, 624.265, 624.327, 13 625.425, 625A.185, 628.418, 628B.230, 628B.760, 629.047, 14 629.069. 630.133. 630.30665, 630.336, 630A.555. 631.368. 632.121, 632.125, 632.405, 633.283, 633.301, 633.524, 634.055, 15 16 634.214, 634A.185, 635.158, 636.107, 637.085, 637B.288, 638.087, 17 638.089, 639.2485, 639.570, 640.075, 640A.220, 640B.730, 640C.400, 640C.600, 640C.620, 640C.745, 640C.760, 640D.190, 18 19 640E.340, 641.090, 641.325, 641A.191, 641A.289, 641B.170, 20 641B.460, 641C.760, 641C.800, 642.524, 643.189, 644A.870, 21 645.180, 645.625, 645A.050, 645A.082, 645B.060, 645B.092, 22 645C.220, 645C.225, 645D.130, 645D.135, 645E.300, 645E.375, 23 645G.510, 645H.320, 645H.330, 647.0945, 647.0947, 648.033, 24 648.197, 649.065, 649.067, 652.228, 654.110, 656.105, 661.115, 25 665.130, 665.133, 669.275, 669.285, 669A.310, 671.170, 673.450, 26 673.480, 675.380, 676A.340, 676A.370, 677.243, 679B.122, 27 679B.152, 679B.159, 679B.190, 679B.285, 679B.690, 680A.270, 28 681A.440, 681B.260, 681B.410, 681B.540, 683A.0873, 685A.077, 29 686A.289, 686B.170, 686C.306, 687A.110, 687A.115, 687C.010, 30 688C.230, 688C.480, 688C.490, 689A.696, 692A.117, 692C.190, 692C.3507, 31 692C.3536, 692C.3538, 692C.354, 32 693A.480, 693A.615, 696B.550, 696C.120, 703.196, 704B.320, 704B.325, 706.1725, 706A.230, 710.159, 711.600 [] and section 1 33 of this act, sections 35, 38 and 41 of chapter 478, Statutes of 34 Nevada 2011 and section 2 of chapter 391, Statutes of Nevada 2013 35 and unless otherwise declared by law to be confidential, all public 36 37 books and public records of a governmental entity must be open at 38 all times during office hours to inspection by any person, and may be fully copied or an abstract or memorandum may be prepared 39 40 from those public books and public records. Any such copies, abstracts or memoranda may be used to supply the general public 41 42 with copies, abstracts or memoranda of the records or may be used 43 in any other way to the advantage of the governmental entity or of 44 the general public. This section does not supersede or in any manner 45 affect the federal laws governing copyrights or enlarge, diminish or





affect in any other manner the rights of a person in any written book or record which is copyrighted pursuant to federal law.

2. A governmental entity may not reject a book or record

which is copyrighted solely because it is copyrighted.

- 3. A governmental entity that has legal custody or control of a public book or record shall not deny a request made pursuant to subsection 1 to inspect or copy or receive a copy of a public book or record on the basis that the requested public book or record contains information that is confidential if the governmental entity can redact, delete, conceal or separate the confidential information from the information included in the public book or record that is not otherwise confidential.
- 4. A person may request a copy of a public record in any medium in which the public record is readily available. An officer, employee or agent of a governmental entity who has legal custody or control of a public record:
- (a) Shall not refuse to provide a copy of that public record in a readily available medium because the officer, employee or agent has already prepared or would prefer to provide the copy in a different medium.
- (b) Except as otherwise provided in NRS 239.030, shall, upon request, prepare the copy of the public record and shall not require the person who has requested the copy to prepare the copy himself or herself.
- **Sec. 3.** The provisions of subsection 1 of NRS 218D.380 do not apply to any provision of this act which adds or revises a requirement to submit a report to the Legislature.
 - **Sec. 4.** This act becomes effective on July 1, 2019.







ASSEMBLY BILL NO. 371—ASSEMBLYMAN DALY

MARCH 20, 2019

Referred to Committee on Government Affairs

SUMMARY—Revises provisions governing public records. (BDR 19-16)

FISCAL NOTE: Effect on Local Government: May have Fiscal Impact. Effect on the State: Yes.

EXPLANATION - Matter in bolded italics is new; matter between brackets fomitted material; is material to be omitted.

AN ACT relating to public records; revising provisions governing the inspection, copying or receipt of a copy of public records; abrogating any common-law exemption or exception to providing such access to public records; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Under existing law, all public books and records of a governmental entity are required to be open at all times during office hours for inspection and copying or receipt of a copy unless the records are otherwise declared by law to be confidential. (NRS 239.010) **Section 2** of this bill specifies that "by law" means only by specific statute or regulation.

The Nevada Supreme Court has established a balancing test for a governmental entity to apply to determine whether to disclose a book or record when the law is silent with respect to the confidentiality of the book or record. Under this balancing test, the governmental entity is required to determine whether the private or governmental interest served by withholding the book or record clearly outweighs the right of the public to inspect or copy the book or record. (Donrey v. Bradshaw, 106 Nev. 630 (1990); DR Partners v. Board of County Comm'rs, 116 Nev. 616 (2000); Reno Newspapers, Inc. v. Haley, 126 Nev. Adv. Op. 23, 234 P.3d 922 (2010); Reno Newspapers, Inc. v. Gibbons, 127 Nev. Adv. Op. 79, 266 P.3d 623 (2011)) The legislative declaration for the provisions in existing law governing public records requires that those provisions be construed liberally to foster democratic principles by providing the public with access to inspect and copy public books and records and that any exemption or exception or balancing of interests which limits or restricts such access be construed narrowly. (NRS 239.001) Section 1 of this bill provides that the only exemptions or exceptions to providing access to inspect, copy or receive of a copy of public books and records are those provided by statute or regulation. Section 1 also abrogates any common-law exemption or exception to providing such access, including, without limitation, any balancing of interests.





13

14

15 16

17

18

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 239.001 is hereby amended to read as follows: 239.001 **1.** The Legislature hereby finds and declares that:

[1.] (a) The purpose of this chapter is to foster democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law;

[2.] (b) The provisions of this chapter must be construed

liberally to carry out this important purpose;

[3.] (c) Any exemption [,] or exception [or balancing of interests] provided by statute or regulation which limits or restricts access to public books and records by members of the public must be construed narrowly;

[4.] (d) The use of private entities in the provision of public services must not deprive members of the public access to inspect and copy books and records relating to the provision of those services; and

[5.] (e) If a public book or record is declared by law to be open to the public, such a declaration does not imply, and must not be construed to mean, that a public book or record is confidential if it is not declared by law to be open to the public and is not otherwise declared by law to be confidential.

2. In interpreting and applying the provisions of this chapter, the only exemptions or exceptions limiting or restricting access to inspect, copy or receive a copy of public books and records are those provided by statute or regulation. Any common-law exemption or exception to providing such access, including, without limitation, any balancing of interests, is hereby abrogated.

3. As used in this section, "regulation" means a regulation adopted by a governmental entity pursuant to express statutory authority allowing the governmental entity to create an exemption or exception to this chapter or otherwise provide confidentiality for a record.

Sec. 2. NRS 239.010 is hereby amended to read as follows:

239.010 1. Except as otherwise provided in this section and NRS 1.4683, 1.4687, 1A.110, 3.2203, 41.071, 49.095, 49.293, 62D.420, 62D.440, 62E.516, 62E.620, 62H.025, 62H.030, 62H.170, 62H.220, 62H.320, 75A.100, 75A.150, 76.160, 78.152, 80.113, 81.850, 82.183, 86.246, 86.54615, 87.515, 87.5413, 87A.200, 87A.580, 87A.640, 88.3355, 88.5927, 88.6067, 88A.345, 88A.7345, 89.045, 89.251, 90.730, 91.160, 116.757, 116A.270, 116B.880, 118B.026, 119.260, 119.265, 119.267, 119.280, 119A.280, 119A.653, 119B.370, 119B.382, 120A.690, 125.130, 125B.140, 126.141, 126.161, 126.163, 126.730, 127.007, 127.057, 127.130,





127.140, 127.2817, 128.090, 130.312, 130.712, 136.050, 159.044, 1 2 172.075, 172.245, 176.01249, 176.015, 176.0625, 159A.044. 176.09129, 176.156, 176A.630, 178.39801, 178.4715, 178.5691, 3 179.495, 179A.070, 179A.165, 179D.160, 200.3771, 200.3772, 4 5 200.5095, 200.604, 202.3662, 205.4651, 209.392, 209.3925, 209.419, 209.521, 211A.140, 213.010, 213.040, 213.095, 213.131, 6 7 217.105, 217.110, 217.464, 217.475, 218A.350, 218E.625, 8 218F.150, 218G.130, 218G.240, 218G.350, 228.270, 228.450, 228.495, 228.570, 231.069, 231.1473, 233.190, 237.300, 239.0105, 9 239.0113, 239B.030, 239B.040, 239B.050, 239C.140, 239C.210, 10 239C.230. 239C.250. 239C.270. 240.007. 241.020. 11 241.039, 242.105, 244.264, 244.335, 247.540, 247.550, 247.560, 12 13 250.087, 250.130, 250.140, 250.150, 268.095, 268.490, 268.910, 271A.105, 281.195, 281.805, 281A.350, 281A.680, 281A.685, 14 281A.750, 281A.755, 281A.780, 284.4068, 286.110, 287.0438, 15 289.025, 289.080, 289.387, 289.830, 293.4855, 293.5002, 293.503, 16 293.504, 293.558, 293.906, 293.908, 293.910, 293B.135, 293D.510, 17 331.110, 332.061, 332.351, 333.333, 333.335, 338.070, 338.1379, 18 338.1593, 338.1725, 338.1727, 348.420, 349.597, 349.775, 353.205, 19 353A.049, 353A.085, 353A.100, 353C.240, 360.240, 360.247, 20 360.255, 360.755, 361.044, 361.610, 365.138, 366.160, 368A.180, 21 22 370.257, 370.327, 372A.080, 378.290, 378.300, 379.008, 379.1495, 23 385A.830. 385B.100, 387.626, 387.631, 388.1455, 388.501, 388.503, 388.513, 388.750, 388A.247, 388A.249, 391.035, 24 391.120, 391.925, 392.029, 392.147, 392.264, 392.271, 392.315, 25 392.317, 392.325, 392.327, 392.335, 392.850, 394.167, 394.1698, 26 394.447, 394.460, 394.465, 396.3295, 396.405, 396.525, 396.535, 27 28 396.9685, 398A.115, 408.3885, 408.3886, 408.3888, 408.5484, 29 412.153, 416.070, 422.2749, 422.305, 422A.342, 422A.350, 425.400, 427A.1236, 427A.872, 432.028, 432.205, 432B.175, 30 432B.280, 432B.290, 432B.407, 432B.430, 432B.560, 432B.5902, 31 433.534, 433A.360, 437.145, 439.840, 439B.420, 32 440.170. 441A.195, 441A.220, 441A.230, 442.330, 442.395, 33 442.735. 445A.665, 445B.570, 449.209, 449.245, 449A.112, 450.140, 34 453.164, 453.720, 453A.610, 453A.700, 458.055, 458.280, 459.050, 35 459.3866, 459.555, 459.7056, 459.846, 463.120, 463.15993, 36 463.240, 463.3403, 463.3407, 463.790, 467.1005, 480.365, 480.940, 37 481.063, 481.091, 481.093, 482.170, 482.5536, 483.340, 483.363, 38 483.575, 483.659, 483.800, 484E.070, 485.316, 501.344, 503.452, 39 522.040, 534A.031, 561.285, 571.160, 584.655, 587.877, 598.0964, 40 598.098, 598A.110, 599B.090, 603.070, 603A.210, 604A.710, 41 42 612.265, 616B.012, 616B.015, 616B.315, 616B.350, 618.341, 43 618.425, 622.310, 623.131, 623A.137, 624.110, 624.265, 624.327, 44 625.425, 625A.185, 628.418, 628B.230, 628B.760, 629.047, 45 629.069. 630.133, 630.30665, 630.336, 630A.555,





632.121, 632.125, 632.405, 633.283, 633.301, 633.524, 634.055, 1 2 634.214, 634A.185, 635.158, 636.107, 637.085, 637B.288, 638.087, 3 638.089, 639.2485, 639.570, 640.075, 640A.220, 640B.730. 640C.400, 640C.600, 640C.620, 640C.745, 640C.760, 640D.190, 4 5 640E.340, 641.090, 641.325, 641A.191, 641A.289, 641B.170, 641B.460, 641C.760, 641C.800, 642.524, 643.189, 644A.870, 6 7 645.180, 645.625, 645A.050, 645A.082, 645B.060, 645B.092, 8 645C.220, 645C.225, 645D.130, 645D.135, 645E.300, 645E.375, 645G.510, 645H.320, 645H.330, 647.0945, 647.0947, 648.033, 9 648.197, 649.065, 649.067, 652.228, 654.110, 656.105, 661.115, 10 665.130, 665.133, 669.275, 669.285, 669A.310, 671.170, 673.450, 11 673.480, 675.380, 676A.340, 676A.370, 677.243, 12 679B.122. 13 679B.152, 679B.159, 679B.190, 679B.285, 679B.690, 680A.270, 681A.440, 681B.260, 681B.410, 681B.540, 683A.0873, 685A.077, 14 686A.289, 686B.170, 686C.306, 687A.110, 687A.115, 687C.010, 15 16 688C.230, 688C.480, 688C.490, 689A.696, 692A.117, 692C.190, 17 692C.3507, 692C.3536, 692C.3538, 692C.354, 692C.420, 693A.480, 693A.615, 696B.550, 696C.120, 703.196, 704B.320, 18 704B.325, 706.1725, 706A.230, 710.159, 711.600, sections 35, 38 19 20 and 41 of chapter 478, Statutes of Nevada 2011 and section 2 of 21 chapter 391, Statutes of Nevada 2013 and unless otherwise declared 22 by flaw statute or regulation to be confidential, all public books 23 and public records of a governmental entity must be open at all 24 times during office hours to inspection by any person, and may be 25 fully copied or an abstract or memorandum may be prepared from 26 those public books and public records. Any such copies, abstracts or 27 memoranda may be used to supply the general public with copies, 28 abstracts or memoranda of the records or may be used in any other 29 way to the advantage of the governmental entity or of the general 30 public. This section does not supersede or in any manner affect the 31 federal laws governing copyrights or enlarge, diminish or affect in 32 any other manner the rights of a person in any written book or 33 record which is copyrighted pursuant to federal law. 34

- 2. A governmental entity may not reject a book or record which is copyrighted solely because it is copyrighted.
- 3. A governmental entity that has legal custody or control of a public book or record shall not deny a request made pursuant to subsection 1 to inspect or copy or receive a copy of a public book or record on the basis that the requested public book or record contains information that is confidential if the governmental entity can redact, delete, conceal or separate the confidential information from the information included in the public book or record that is not otherwise confidential.
- 4. A person may request a copy of a public record in any medium in which the public record is readily available. An officer,



35

36

37 38

39

40

41

42

43

44



employee or agent of a governmental entity who has legal custody or control of a public record:

- (a) Shall not refuse to provide a copy of that public record in a readily available medium because the officer, employee or agent has already prepared or would prefer to provide the copy in a different medium.
- (b) Except as otherwise provided in NRS 239.030, shall, upon request, prepare the copy of the public record and shall not require the person who has requested the copy to prepare the copy himself or herself.
- 5. As used in this section, "regulation" means a regulation adopted by a governmental entity pursuant to express statutory authority allowing the governmental entity to create an exemption or exception to this chapter or otherwise provide confidentiality for a record.
 - **Sec. 3.** This act becomes effective on July 1, 2019.





1 2



Comstock Residents Ass'n v. Lyon Cty. Bd. of Comm'rs

Supreme Court of Nevada March 29, 2018, Filed

No. 70738

Reporter

414 P.3d 318 *; 2018 Nev. LEXIS 20 **; 134 Nev. Adv. Rep. 19; 2018 WL 1559818

COMSTOCK RESIDENTS ASSOCIATION; AND JOE MCCARTHY, Appellants, vs. LYON COUNTY BOARD OF COMMISSIONERS, Respondent.

Prior History: [**1] Appeal from a district court order denying a petition for a writ of mandamus concerning disclosures under a public records request. Third Judicial District Court, Lyon County; Steven R. Kosach, Senior Judge.

Comstock Residents Ass'n v. Lyon Cnty. Bd. of Comm'rs, 2016 Nev. Unpub. LEXIS 990, 385 P.3d 607 (Dec. 2, 2016)

Disposition: Reversed and remanded.

Core Terms

public record, records, government entity, email, district court, public service, inspection, devices, subject to disclosure, disclosure, servers, requested records, communications, phones, public records request, government office, private entity, legal custody, exempt, zoning change

Case Summary

Overview

HOLDINGS: [1]-Petitioners were entitled to a writ of mandamus to compel disclosure of records where county commissioners conducted county business on private cellphones and email accounts because where a private entity possessed records of a governmental entity performing "a service rendered in the public interest," those records constituted public records under Nev. Stat. \\$ 239.010(1) and were subject to disclosure pursuant to the Nevada Public Records Act (NPRA), Nev. Rev. Stat. ch. 239; [2]-Remand was

required because the district court needed to determine whether the requested records were made in "the provision of a public service," and so that the county or the commissioners themselves could raise any challenge to the presumption that the public records are to be disclosed.

Outcome

Judgment reversed and action remanded.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Governments > Legislation > Interpretation

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Remedies > Writs

HN1 ≥ Standards of Review, Abuse of Discretion

The Supreme Court of Nevada reviews the denial of a writ petition for abuse of discretion, but reviews questions of statutory interpretation de novo.

Administrative Law > Governmental Information > Public Information

<u>HN2</u>[♣] Governmental Information, Public Information

Under the Nevada Public Records Act (NPRA), Nev. Rev. Stat. ch. 239, all public books and public records of

a governmental entity must be open to public inspection unless declared by law to be confidential. Nev. Rev. Stat. § 239.010(1). A governmental entity includes elected or appointed officers of Nevada's political subdivisions. Nev. Rev. Stat. § 239.005(5)(a). The NPRA is intended to foster democratic principles by providing members of the public with access to inspect and copy public records to the extent permitted by law, and the court will construe the Act's provisions liberally to achieve this purpose. Nev. Rev. Stat. § 239.001(1), (2). It is in the interest of transparency that the NPRA facilitates public access to information regarding government activities.

Administrative Law > Governmental Information > Public Information

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Preponderance of Evidence

<u>HN3</u>[♣] Governmental Information, Public Information

To achieve the important democratic principles served by the Nevada Public Records Act (NPRA), Nev. Rev. Stat. ch. 239, the court begins from a presumption that public records must be disclosed to the public. The burden is then on the governmental entity to show by a preponderance of the evidence that the records sought are either confidential by statutory provision, or the balance of interests weighs clearly in favor of the government not disclosing the requested records. Even in the instance that an exemption on disclosure is applicable or the balance of interests weighs against disclosure, the restriction must be construed narrowly. Nev. Rev. Stat. § 239.001(3). Amongst the things considered public records, subject to disclosure under the NPRA, are records of private entities used in the provision of a public service. Nev. Rev. Stat. § 239.001(4).

Governments > Legislation > Interpretation

<u>HN4</u>[基] Legislation, Interpretation

Whenever possible, a court will interpret a rule or statute in harmony with other rules or statutes.

Administrative Law > Governmental Information > Public Information

<u>HN5</u> **L** Governmental Information, Public Information

The use of private entities in the provision of public services must not deprive members of the public access to inspect and copy books and records relating to the provision of those services. Nev. Rev. Stat. § 239.001(4). The Nevada Public Records Act (NPRA), Nev. Rev. Stat. ch. 239, further allows five business days for a governmental entity to resolve a public records request. Nev. Rev. Stat. § 239.0107(1). In light of these requirements, Nev. Rev. Stat. § 239.010(1) cannot be read as limiting public records to those that are physically maintained at a government location or on a government server and are immediately accessible to the public during the business hours of that governmental entity.

Administrative Law > Governmental Information > Public Information

Civil Procedure > Discovery &
Disclosure > Disclosure > Motions to Compel

<u>HN6</u>[♣] Governmental Information, Public Information

Courts have compelled the production of public records when they have been in the possession of private parties.

Administrative Law > Governmental Information > Public Information

Governments > Legislation > Interpretation

<u>HN7</u>[♣] Governmental Information, Public Information

The logical interpretation of Nev. Rev. Stat. \$ 239.010(1), and the one that best satisfies the Legislature's requirement to construe the Nevada Public Records Act (NPRA), Nev. Rev. Stat. ch. 239, liberally to maximize public access, Nev. Rev. Stat. \$ 239.001(2), is that public records maintained by government agencies must be readily available for inspection by the public, but this statute does not limit

what qualifies as a public record.

Administrative Law > Governmental Information > Public Information

<u>HN8</u>[Governmental Information, Public Information

Where a private entity possesses records of a governmental entity performing "a service rendered in the public interest," those records constitute public records and must be disclosed pursuant to the Nevada Public Records Act (NPRA), Nev. Rev. Stat. ch. 239.

Administrative Law > Governmental Information > Public Information

<u>HN9</u>[♣] Governmental Information, Public Information

The requirement of transparency in the Nevada Public Records Act (NPRA), Nev. Rev. Stat. ch. 239, in the performance of government activities necessarily includes within the definition of the provision of a public service actions performed by governmental entities for the public's benefit. A number of jurisdictions have come to similar conclusions that records concerning the performance of the public's business are public, and their storage on private devices does not alter that determination.

Administrative Law > Governmental Information > Recordkeeping & Reporting

<u>HN10</u>[♣] Governmental Information, Recordkeeping & Reporting

While Nev. Admin. Code § 239.041 provides a definition of legal custody, this regulation applies to local government records management programs created under Nev. Admin. Code § 239.125(1) and serves to determine whether requests for public records of a certain type are properly directed to that program. The administrative regulations do not limit the reach of the Nevada Public Records Act (NPRA), Nev. Rev. Stat. ch. 239, but merely establish regulations for good records management practices of those local programs.

Administrative Law > Governmental Information > Public Information

<u>HN11</u>[♣] Governmental Information, Public Information

A record within the possession of a private entity may still constitute a public record subject to disclosure upon request. See <u>Nev. Rev. Stat. § 239.001(4)</u>. It does not follow, then, that a public record is inherently beyond the control of a governmental entity by virtue of the fact that it exists on a device or server not designated as governmental.

Administrative Law > Governmental Information > Public Information

<u>HN12</u>[♣] Governmental Information, Public Information

Public records stored on private devices or servers may still be subject to disclosure under the Nevada Public Records Act (NPRA), Nev. Rev. Stat. ch. 239.

Administrative Law > Governmental Information > Public Information

Evidence > Burdens of Proof > Allocation

<u>HN13</u> **Sovernmental Information, Public** Information

In the context of public records stored on private devices or servers, although only those records that concern the public's business are subject to disclosure, there are privacy protections available that allow the district court to determine the public records are protected as confidential, find the interest nondisclosure clearly outweighs the interest disclosure, id., or redact portions of the record not required to be disclosed as a public record. However, the governmental entity bears the burden to make a particularized showing that the public record is exempt from disclosure, and a mere assertion of possible endangerment is not sufficient.

Administrative Law > Governmental Information > Public Information

Evidence > Burdens of Proof > Allocation

<u>HN14</u> **Solution** Governmental Information, Public Information

The Nevada Public Records Act (NPRA), Nev. Rev. Stat. ch. 239, does not categorically exempt public records maintained on private devices or servers from disclosure. To withhold a public record from disclosure, the government entity must present, with particularity, the grounds on which a given public record is exempt.

Counsel: John L. Marshall, Reno; Luke A. Busby, Reno, for Appellants.

Stephen B. Rye, District Attorney, Lyon County, for Respondent.

Judges: CHERRY, J. We concur: Douglas, C.J., Pickering, J., Parraguirre, J., Gibbons, J., Hardesty, J., Stiglich, J.

Opinion by: CHERRY

Opinion

[*319] BEFORE THE COURT EN BANC.

By the Court, CHERRY, J.:

In this appeal, we consider a district court's denial of a petition for a writ of mandamus to compel disclosure of records where members of the Lyon County Board of Commissioners conducted county business on private cellphones and email accounts. We conclude that the grounds on which the district court denied the records requests were erroneous and remand this case to the district court to determine whether the requested records concern "the provision of a public service," as defined in Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc., 131 Nev. 80, 86, 343 P.3d 608, 613 (2015), and this opinion, and are within the control of the county or its commissioners.

FACTS AND PROCEDURAL HISTORY

In 2013, the Lyon County Board of Commissioners received an application to alter the [**2] zoning within Lyon County to allow for industrial development. The Board received [*320] reports from the county's planning staff and held public hearings, after which they voted to recommend denying the proposed zoning

change. At a subsequent meeting of the county commissioners, the issue was reintroduced and the zoning change approved. Appellant, the Comstock Residents Association (CRA), brought suit against the Board, challenging the approval of the zoning change.

As part of that suit, CRA made a public records request of Lyon County and its commissioners, seeking communications concerning the approval of the zoning change, regardless of whether they occurred on public or private devices. Lyon County provided phone records, emails, and other records that were created or maintained on county equipment and some public records created on private devices as well. However, Lyon County also notified CRA that it did not provide or pay for phones or email accounts to any commissioners. The county's website listed the commissioners' personal phone numbers and email addresses as their contact information. The county concedes that these private telephones and email addresses were used to conduct county [**3] business.

CRA subsequently filed a petition for a writ of mandamus to compel the county to disclose all public records of the commissioners' communications regarding the change to the county's zoning plan, including those communications contained on the commissioners' private cell phones and email accounts. The district court denied CRA's petition, reasoning that the records were not (1) open to public inspection, (2) within the control of the county, and (3) records of official actions of the county or paid for with public money. CRA subsequently appealed to this court.

DISCUSSION

Standard of review

HN1 This court reviews the denial of a writ petition for abuse of discretion, but reviews questions of statutory interpretation de novo. <u>Blackjack, 131 Nev. at</u> 85, 343 P.3d at 612.

Communications on private devices or servers are not categorically exempt from the Nevada Public Records Act

HN2[1] Under the Nevada Public Records Act (NPRA), codified in NRS Chapter 239, all public books and public records of a governmental entity must be open to public

inspection unless declared by law to be confidential. NRS 239.010(1). A governmental entity includes elected or appointed officers of this state's political subdivisions. NRS 239.005(5)(a). The NPRA is intended to "foster democratic principles [**4] by providing members of the public with access to inspect and copy public . . . records to the extent permitted by law," and this court will construe the Act's provisions liberally to achieve this purpose. NRS 239.001(1), (2). It is in the interest of transparency that the NPRA facilitates "public access to information regarding government activities." Public Employees' Ret. Sys. v. Reno Newspapers, Inc., 129 Nev. 833, 836-37, 313 P.3d 221, 223 (2013). HN3 To achieve the important democratic principles served by the NPRA, we begin from a presumption that public records must be disclosed to the public. Id. at 837, 313 P.3d at 223-24. The burden is then on the governmental entity to show by a preponderance of the evidence that the records sought are either confidential by statutory provision, or the balance of interests weighs clearly in favor of the government not disclosing the requested records. Id. at 837, 313 P.3d at 224. Even in the instance that an exemption on disclosure is applicable or the balance of interests weighs against disclosure, the restriction "must be construed narrowly." NRS 239.001(3). Amongst the things considered public records, subject to disclosure under the NPRA, are records of private entities used in "the provision of a public service." Blackjack, 131 Nev. at 86, 343 P.3d at 613; see also NRS 239.001(4).

A. Public records are not limited to records maintained in government offices, but include all records [**5] concerning the provision of a public service

The Board first argues that the district court properly denied the records request on the ground that the records were **[*321]** not open to public inspection. The Board asserts that *NRS 239.010(1)*'s requirement that all public records "be open at all times during office hours to inspection by any person" indicates that only records maintained in government offices constitute public records.

On its face, <u>NRS 239.010(1)</u> does not state that only records maintained in government offices constitute public records, and the requirement that public records "be open at all times during office hours to inspection by any person" is not clear as to whether those records must be immediately available on demand at a government office. Therefore, we look at other provisions in the NPRA for guidance, and the Board's

interpretation contradicts other provisions of the NPRA and our precedent on this topic. See <u>Watson Rounds</u>, <u>P.C. v. Eighth Judicial Dist. Court</u>, <u>131 Nev. Adv. Rep. 79, 358 P.3d 228, 232 (2015) HN4[↑]</u> ("[W]henever possible, a court will interpret a rule or statute in harmony with other rules or statutes." (quoting <u>Nev. Power Co. v. Haggerty</u>, <u>115 Nev. 353, 364, 989 P.2d 870, 877 (1999)))</u>.

HN5 The use of private entities in the provision of public services must not deprive members of the public [**6] access to inspect and copy books and records relating to the provision of those services." NRS 239.001(4). The NPRA further allows five business days for a governmental entity to resolve a public records NRS 239.0107(1). In light of these request. requirements, NRS 239.010(1) cannot be read as limiting public records to those that are physically maintained at a government location or on a government server and are immediately accessible to the public during the business hours of that governmental entity. Such an interpretation would render both NRS 239.001(4) and NRS 239.0107 meaningless, as the records of private entities rendering public services would not necessarily be stored at the government office, and providing a time frame for resolving a records request would be unnecessary if records were required to be immediately produced for inspection at that location. Because of this, we reject the Board's interpretation.

Furthermore, the Board's argument contradicts this court's previous decisions where HN6 \(\frac{1}{4} \) we have compelled the production of public records when they have been in the possession of private parties, see Blackjack, 131 Nev. at 82, 86-87, 343 P.3d at 610, 613 (concluding that Clark County Detention Center call records were subject to disclosure under a public records request even though the records [**7] were in the possession of a private telephone service provider), and addressed whether individual emails sent by a government official were subject to disclosure under a public records request, despite the fact that emails are not open for immediate inspection at a government office, see Reno Newspapers, Inc. v. Gibbons, 127 Nev. 873, 876, 885-86, 266 P.3d 623, 625, 631 (2011) (requiring specific reasons for withholding the governor's emails sent on a state-issued email account from disclosure under the NPRA). HN7 1 The logical interpretation of NRS 239.010(1), and the one that best satisfies the Legislature's requirement to construe the Act liberally to maximize public access, NRS 239.001(2), is that public records maintained by

government agencies must be readily available for inspection by the public, but this statute does not limit what qualifies as a public record.

The proper question for determining whether the maintained requested records on the county commissioners' private cellphones and email accounts constitute public records subject to disclosure under a public records request, see NRS 239.001(4), is whether they concern "the provision of a public service" as defined in Blackjack, 131 Nev. at 86, 343 P.3d at 613. In Blackjack, we held that HN8 \(\bar{1} \) where a private entity possesses records of a governmental entity performing "a service rendered in the public [**8] interest," those records constitute public records and must be disclosed pursuant to the NPRA. Id. at 85-86, 343 P.3d at 612-13 (quoting Merriam-Webster's Collegiate Dictionary 944 (10th ed. 1994)). While the public service in Blackjack was the provision of telephones at Clark County Detention Center, id. at 83, 343 P.3d at 611, we find its definition of a public record to be applicable here.

Here, Lyon County concedes that its commissioners conducted county business, performing their duties as public servants, [*322] through their private phones and email addresses. It is further clear that the commissioners themselves are governmental entities, subject to the NPRA. NRS 239.005(5)(a). Because this court must liberally construe NRS Chapter 239 in order to facilitate "public access to information regarding government activities," PERS, 129 Nev. at 836-37, 313 P.3d at 223, and records of communications regarding the zoning change in Lyon County exist on the commissioners' private phones and servers. communications made in the performance of the commissioners' duties on behalf of the public fall within this definition of a public service. HN9 1 The NPRA's requirement of transparency in the performance of government activities necessarily includes within the definition of the provision of a public service actions performed by [**9] governmental entities for the public's benefit. A number of jurisdictions have come to similar conclusions that records concerning the performance of the public's business are public, see, e.g., City of San Jose v. Superior Court, 2 Cal. 5th 608, 214 Cal. Rptr. 3d 274, 389 P.3d 848, 854 (Cal. 2017); Doyle v. Town of Falmouth, 2014 ME 151, 106 A.3d 1145, 1149 (Me. 2014); Cowles Publ'g Co. v. Kootenai Cty. Bd. of Cty. Comm'rs, 144 Idaho 259, 159 P.3d 896, 900 (Idaho 2007), City of Champaign v. Madigan, 2013 IL App (4th) 120662, 992 N.E.2d 629, 636-37, 372 III. Dec. 787 (III. Ct. App. 2013), and their storage on private devices does not alter that determination, see, e.g., City of San

Jose, 389 P.3d at 858; Nissen v. Pierce Cty., 183 Wn.2d 863, 357 P.3d 45, 53-54 (Wash. 2015); City of Champaign, 922 N.E.2d at 639. However, the district court did not make any findings as to which specific communications were made in furtherance of the public's interests or would be exempt from the NPRA, and we remand this matter to the district court with instructions to determine whether the requested records regard the provision of a public service and are subject to disclosure.

B. Records that can be generated or obtained by the county or its commissioners are within the county's control

In denying the petition, the district court also concluded that the records were not public records because they were not in the control of the county. The Board contends that public records are only subject to requests if they are within the legal custody or control of "[a]n officer, employee or agent of a governmental entity." NRS 239.010(4). They argue that under NAC 239.041, the governmental entity must have all rights of access to the record [**10] and be charged with its care for the record to be within the entity's legal custody. Because the Board is not charged with maintaining records of the private emails and communications of its commissioners, the Board concludes the county does not have legal custody or control of the records in question.

HN10 While NAC 239.041 provides a definition of legal custody, this regulation applies to local government records management programs created under NRS 239.125(1) and serves to determine whether requests for public records of a certain type are properly directed to that program. The administrative regulations do not limit the reach of the NPRA, but merely establish regulations for good records management practices of those local programs. See NRS 239.125(1); see also NRS 378.255(1) (indicating that the State Library, Archives and Public Records Administrator may set standards for the effective management of records of local and state government entities). The best practices for local government record management and what constitutes a public record for purposes of the NPRA are distinct, and we are careful not to conflate them here.1

¹ This same analysis applies to the district court's findings that the designation of "nonrecord materials" as those that are not

[*323] As discussed above, <code>HN11[1]</code> a record within [**11] the possession of a private entity may still constitute a public record subject to disclosure upon request. See <code>NRS 239.001(4)</code>; <code>Blackjack, 131 Nev. at 82, 86-87, 343 P.3d at 610, 613</code>. It does not follow, then, that a public record is inherently beyond the control of a governmental entity by virtue of the fact that it exists on a device or server not designated as governmental. While Lyon County does not provide the subject phones or email accounts, the commissioners themselves are governmental entities, <code>NRS 239.005(5)(a)</code>, and their custody of the requested records would satisfy the requirement of legal custody under <code>NRS 239.010(4)</code>.

In *Blackjack*, we concluded that the Las Vegas Metropolitan Police Department had sufficient control of the requested public records based on "substantial evidence . . . that the requested information could be generated [by the private entity] . . . and could be obtained [by the governmental entity]." 131 Nev. at 86-87, 343 P.3d at 613. Whether the governmental entity had effective control over the requested record is a question of fact, and therefore, the district court erred by strictly applying the administrative definition of legal custody and it is incumbent on the district court, on remand, to determine whether the commissioners are able to produce the requested public records.²

records of an official government action, <u>NAC 239.051</u>, and definition of public record as one paid for with public money, NAC 239.091 (repealed 2014), are dispositive in determining whether the records sought fall under the NPRA. Both are administrative regulations pertaining to local records management programs, and do not determine the overall scope of the NPRA for the reasons discussed.

Additionally, the Board's citation to Nev. Policy Research Inst., Inc. v. Clark Cnty. Sch. Dist., Docket No. 64040 (Order of Reversal and Remand, 2015 Nev. Unpub. LEXIS 654, May 29, 2015), in support of applying the definitions of public records given in NAC 239.051 and NAC 239.091 (repealed 2014) is unpersuasive. We consider, for their persuasive value, unpublished dispositions filed after January 1, 2016. NRAP 36(c)(3). As the cited unpublished disposition was issued prior to January 1, 2016, it is not considered for its persuasive value here.

² The Board also raises two other arguments regarding the practicality of disclosing public records maintained on private devices or servers and the potential for these public records requests to violate the privacy rights of the county commissioners. The Board has only speculated that some of the records requested may be difficult to obtain or would require the county to adopt costly practices for maintaining such records. We see no certain connection between

CONCLUSION

We conclude that HN14 1 the NPRA does not categorically exempt public records maintained on private devices or servers from disclosure. To withhold a public record from disclosure, the government entity must present, with particularity, the grounds on which a given public record is exempt. We reverse and remand to the district court for further proceedings to determine whether the requested records were made in "the provision of a public service," as defined in Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc., 131 Nev. 80, 86, 343 P.3d 608, 613 (2015), and this opinion, and are in the control of the county or its commissioners. If it is determined that the requested records indeed public records. the county commissioners themselves may raise any challenge to the presumption that the public records are to be disclosed.

concluding that public records stored on private devices or servers may be subject to disclosure and a requirement that the county take costly measures to maintain and manage private servers and devices. Our decision here is limited to our holding that https://www.hw.limited.co.ni/ public records stored on private devices or servers may still be subject to disclosure under the NPRA. Moreover, if any commissioner wishes to challenge the disclosure of any particular record, they are free to do so in the district court.

The Board's argument that the privacy rights of the commissioners could be violated by disclosing public records from the commissioners' private devices and emails cannot be evaluated without further development of the district court record. Having concluded that public records are not beyond the NPRA's reach merely because they are privately maintained, we decline any bright line rule that privacy concerns always outweigh the presumption that public records are to be disclosed. PERS, 129 Nev. at 837, 313 P.3d at 223-24. HN13 Although only those records that concern the public's business are subject to disclosure, there are privacy protections available that allow the district court to determine the public records are protected as confidential, id. at 837, 313 P.3d at 224, find the interest in nondisclosure clearly outweighs the interest in disclosure, id. [**12], or redact portions of the record not required to be disclosed as a public record, Reno Newspapers, Inc. v. Haley, 126 Nev. 211, 219-20, 234 P.3d 922, 927-28 (2010). However, the governmental entity bears the burden to make a particularized showing that the public record is exempt from disclosure, Gibbons, 127 Nev. at 880, 266 P.3d at 628, and "[a] mere assertion of possible endangerment" is not sufficient, Haley, 126 Nev. at 218, 234 P.3d at 927 (quoting CBS, Inc. v. Block, 42 Cal. 3d 646, 230 Cal. Rptr. 362, 725 P.2d 470, 474 (Cal. 1986)).

/s/ Cherry, J.
Cherry
We concur:
/s/ Douglas, C.J.
Douglas
[*324] /s/ Pickering, J.
Pickering
/s/ Parraguirre, J.
Parraguirre
/s/ Gibbons, J.
Gibbons
/s/ Hardesty [**13] , J.
Hardesty
/s/ Stiglich, J.
Stiglich

End of Document

Donrey of Nevada v. Bradshaw

Supreme Court of Nevada September 19, 1990

No. 20057

Reporter

106 Nev. 630 *; 798 P.2d 144 **; 1990 Nev. LEXIS 111 ***; 18 Media L. Rep. 1305

DONREY OF NEVADA, INC., AND RENO NEWSPAPERS, Appellants, v. ROBERT BRADSHAW, RENO POLICE DEPARTMENT, ROBERT L. VAN WAGONER AND THE CITY OF RENO, Respondents

Prior History: [***1] Appeal from a district court order denying appellants' petition for a writ of mandamus. Second Judicial District Court, Washoe County; William N. Forman, Judge.

Disposition: Reversed.

Core Terms

records, Exemption, investigative, public record, confidential, disclosure, criminal history, investigative report, balancing, intelligence, federal regulation, subject to disclosure, dissemination, categorical, investigatory, compiled, balancing test, law enforcement, files, policy considerations, privacy, intelligence information, law enforcement purpose, declaration, individuals, deviated, media, appellant's contention, criminal investigation, public official

Case Summary

Procedural Posture

Petitioner media appealed from an order of the Second Judicial District Court, Washoe County (Nevada), which denied the media's petition for a writ of mandamus in the media's effort to obtain a written report from respondents, city attorney and police department. The trial court concluded that the report was a police investigative report intended by the legislature to be confidential under Nev. Rev. Stat. 179A.

Overview

The trial court concluded that Chapter 179A did not involve a balancing test to determine whether

investigative reports could be released if public policy considerations outweighed privacy and/or security interests. The media contended that the investigative report prepared by the police department was a public record subject to disclosure under Nev. Rev. Stat. 239.010 because no statutory provision declared the contents of this type of report confidential. The media maintained that the trial court erred in concluding that Chapter 179A declared investigative and intelligence information confidential and not subject to disclosure. The court reversed the decision of the trial court, finding that the media had accurately observed that other excluded records were clearly not considered confidential. The court held that investigative reports were subject to disclosure if policy considerations so warranted. The court weighed the absence of any privacy or law enforcement policy justifications for nondisclosure against the general policy in favor of open government, and ordered the city attorney and the police department to release to the media the entire police investigative report.

Outcome

The court reversed the trial court's denial of the media's petition and remanded with instructions to issue a writ of mandamus ordering the court to release to the media the entire police investigative report. The court concluded that the entire report was subject to disclosure after weighing the absence of any privacy or law enforcement policy justifications for nondisclosure against the general policy in favor of open government.

LexisNexis® Headnotes

Administrative Law > Governmental Information > Personal Information > General Overview Governments > Courts > Court Records

<u>HN1</u>[♣] Governmental Information, Personal Information

See Nev. Rev. Stat. § 179A.100(5).

Governments > Courts > Court Records

HN2 Courts, Court Records

A "record of criminal history" is defined at <u>Nev. Rev. Stat. § 179A.070</u> and specifically excludes investigative or intelligence information. The court has never interpreted the criminal history records statute, but in 1983 the Nevada Attorney General rendered an opinion that criminal investigative reports were confidential and were not public records subject to <u>Nev. Rev. Stat. § 239.010</u>.

Governments > Courts > Court Records

HN3 Courts, Court Records

See Nev. Rev. Stat. § 179A.070.

Administrative Law > Governmental Information > Personal Information > General Overview

<u>HN4</u>[♣] Governmental Information, Personal Information

While <u>Nev. Rev. Stat. § 239.010</u> mandates unlimited disclosure of all public records, there are common law limitations on disclosure of such records.

Governments > Courts > Court Records

HN5 L Courts, Court Records

The legislature may have balanced interests in deciding to require the release of criminal history records to the media, but this is not dispositive of whether a court must balance public policy considerations when release of records other than those specifically defined as criminal sought. The public history records is policy considerations that justify the withholding

investigative information are: there is no pending or anticipated criminal proceeding; there are no confidential sources or investigative techniques to protect; there is no possibility of denying someone a fair trial; and there is no potential jeopardy to law enforcement personnel.

Counsel: Woodburn, Wedge & Jeppson, and James W. Hardesty, Reno, for Appellants.

Georgeson, McQuaid, Thompson & Angaran, Reno; Patricia Lynch, Reno City Attorney, and Stephen F. Volek, Deputy City Attorney, Reno, for Respondents.

Judges: Young, C. J. Springer, Mowbray and Rose, JJ., concur. Steffen, J., dissenting.

Opinion by: YOUNG

Opinion

[*631] [**145] In March 1986, pursuant to a plea bargain, the Reno City Attorney's office dismissed charges against Joe Conforte for contributing to the delinquency of a minor. Because the Reno Police Department opposed the dismissal, it undertook an investigation of the circumstances of the dismissal and prepared a written report. The report, which concluded that there was no evidence of criminal wrongdoing (e.g. no bribery of a public official), was sent to the City Attorney's office, the District Attorney, and a municipal judge. Thereafter, both the City Attorney's office and the Police Department refused to release a copy of the report to petitioners Donrey of Nevada, dba [***2] KOLO-TV (Donrey), and Reno Newspapers, Inc., dba Reno Gazette-Journal (Reno Newspapers).

[*632] In April 1986, Donrey and Reno Newspapers filed a petition for a writ of mandamus based on NRS 239.010 which provides for disclosure of public records. In March 1989, the district court denied the petition, concluding that the report was a police investigative report intended by the legislature to be confidential under NRS Chapter 179A. The court further concluded that Chapter 179A did not involve a balancing test to determine whether such reports could be released if public policy considerations outweighed privacy and/or security interests. The court also found, following an in camera review, that the report was approximately 85 percent criminal investigation and 15 percent

recommendations on future administrative procedures.

Appellants contend that the district court erred in concluding that the entire report was a police investigative report and in failing to release at least the 15 percent of the report that the court found administrative. As discussed below, because we conclude that the entire report was subject to disclosure based on a balancing of the interests involved, we [***3] need not address this argument.

Appellants principally contend that the investigative report prepared by the Reno Police Department is a public record subject to disclosure under <u>NRS 239.010</u> because no statutory provision declares the contents of this type of report confidential. Pursuant to <u>NRS 239.010</u>, "all public books and public records of . . . government[] . . . officers and offices . . . the contents of which are not otherwise declared by law to be confidential, shall be open at all times during office hours to inspection by any person" (Emphasis added.) Specifically, appellants maintain that the district court erred in concluding that NRS Chapter 179A declares investigative and intelligence information confidential and not subject to disclosure.

NRS Chapter 179A was enacted in 1979 in response to the federal government's requirement that states "provide an acceptable plan concerning the dissemination of criminal history records, or be subject to certain budgetary sanctions." See 83 Op. Att'y Gen. No. 3 (May 2, 1983).

HN1 NRS 179A.100(5) provides that

[r]ecords of criminal history must be disseminated by an agency of criminal [**146] [***4] justice upon request, to the following persons or governmental entities:

. . .

(i) Any reporter for the electronic or printed media in his professional capacity for communication to the public.

. . .

HN2 A "record of criminal history" is defined at NRS 179A.070 and [*633] specifically excludes investigative or intelligence information. Although this court has

never interpreted the criminal history records statute, in 1983 the Attorney General rendered an opinion that criminal investigative reports were confidential and were not public records subject to *NRS 239.010*. See 83 Op. Att'y Gen. No. 3, *supra*.

[***5] Appellants maintain that the exclusion of the records listed in <u>NRS 179A.070(2)</u> from the definition of "record of criminal history" does not constitute a declaration of their confidentiality. Accurately observing that other excluded records are clearly not considered confidential, (e.g., posters of wanted persons, court

justice, the subject of which is a natural person, consisting of descriptions which identify the subject and notations of arrests, detention, and indictments, informations or other formal criminal charges and dispositions of charges, including dismissals, acquittals, convictions, sentences, correctional supervision and release, occurring in Nevada. The term includes only information contained in memoranda of formal transactions between a person and an agency of criminal justice in this state. The term is intended to be equivalent to the phrase "criminal history record information" as used in federal regulations.

- 2. "Record of criminal history" does not include:
- (a) *Investigative or intelligence information*, reports of crime or other information concerning specific persons collected in the course of the enforcement of criminal laws.
- (b) Information concerning juveniles.
- (c) Posters, announcements or lists intended to identify fugitives or wanted persons and aid in their apprehension.
- (d) Original records of entry maintained by agencies of criminal justice if the records are chronological and not cross-indexed in any other way.
- (e) Records of application for and issuance, suspension, revocation or renewal of occupational licenses, including permits to work in the gaming industry.
- (f) Court indices and records of public judicial proceedings, court decisions and opinions, and information disclosed during public judicial proceedings.
- (g) Records of traffic violations constituting misdemeanors.
- (h) Records of traffic offenses maintained by the department to regulate the issuance, suspension, revocation or renewal of drivers' or other operators' licenses.
- (i) Announcements of actions by the state board of pardons commissioners and the state board of parole commissioners.
- (j) Records which originated in an agency other than an agency of criminal justice in this state.

(Emphasis added.)

¹ HN3 | NRS 179A.070 provides:

[&]quot;Record of criminal history" defined.

^{1. &}quot;Record of criminal history" means information contained in records collected and maintained by agencies of criminal

records of public judicial proceedings), appellants assert that the **[*634]** Attorney General's opinion that investigative reports are confidential is inconsistent with the public status of the other records listed in <u>NRS</u> 179A.070(2).

Furthermore, appellants note that while Chapter 179A was patterned after the federal regulations concerning criminal history records, the Nevada legislature specifically deviated from the federal regulations when it excluded, along with other records, investigative and intelligence information from the definition of "criminal history records." See NRS 179A.070(2). Under the federal regulations, while the definition of "criminal history record information" is qualified not to extend to investigative information, a separate subpart specifically excludes various other records from the regulations governing disclosure of criminal [***6] history records. See 28 C.F.R. §§ 20.3(b), 20.20(b) and (c), and Appendix -- Commentary on § 20.3(b) (1989). Unlike the federal regulations, the Nevada statute lists investigative and intelligence information together with other excluded records in the same subsection, NRS 179A.070(2), as not included in the definition of "record of criminal history" contained in NRS 179A.070(1). Appellants assert that the inescapable conclusion is that the Nevada legislature intended investigative reports to be subject to disclosure as are the other records.

[**147] Respondents maintain that this "overlap" does not appear to be intentional and they note that NRS 179A.070(1) states that "[t]he term [record of criminal history] is intended to be equivalent to the phrase 'criminal history record information' as used in the federal regulations." However, we reject respondents' argument that the legislature mistakenly lumped investigative reports together with other exclusions which are public records disclosable under NRS 239.010. Rather, we hold that the legislature deviated from the federal regulations with an intent to clarify that investigative reports are subject to disclosure if policy [***7] considerations so warrant.

Because NRS 179A.070 does not expressly declare criminal investigative reports to be confidential, we must determine to what extent they are disclosable under NRS 239.010. HN4 While NRS 239.010 mandates unlimited disclosure of all public records, other courts considering this question have recognized the common law limitations on disclosure of such records. See, e.g., Carlson v. Pima County, 687 P.2d 1242, 1245 (Ariz. 1984); see also Records and Recording Laws, 66

Am.Jur.2d § 12 (1973). ² **[*635]** Appellants argue that, under common law, criminal investigative reports were not confidential unless confidentiality was made necessary by considerations of public policy and on a case-by-case basis. Appellants note that the Attorney General's 1983 opinion lists a number of public policy considerations in support of the conclusion that criminal investigative reports are confidential. ³ In the present case, appellants argue that those same policy considerations favor disclosure of the report in question. Thus, appellants contend that the court erred in refusing to apply a balancing test to determine whether the investigative **[***8]** report should have been released.

[***9] Respondents assert that in enacting Chapter 179A, the legislature performed the necessary balancing between the public's right to know and individuals' rights to privacy and that consequently no additional judicial balancing is required. However, while <code>HN5[]</code> the legislature may have balanced interests in deciding to require the release of criminal history records to the media, this is not dispositive of whether a court must balance public policy considerations when release of records other than those specifically defined as criminal history records is sought.

In support of their contention that the court should have used a balancing test to determine disclosure, appellants rely on a number of cases from other jurisdictions. See, e.g., Carlson, 687 P.2d at 1245; Irvin

The legitimate public policy interests in maintaining confidentiality of criminal investigation records and crime reports include the protection of the elements of an investigation of a crime from premature disclosures, the avoidance of prejudice to the later trial of the defendant from harmful pretrial publicity, the protection of the privacy of persons who are not arrested from the stigma of being singled out as a criminal suspect, and the protection of the identity of informants.

83 Op. Att'y Gen. No. 3 (May 2, 1983).

² The dissent argues that if the reports are non-confidential and subject to disclosure under <u>NRS 239.010</u>, then "the reports are to be made available to any person, at all times during office hours, for any advantage and for copying in full." Stating that this is an untenable conclusion, the dissent asserts that we have rewritten <u>NRS 239.010</u> with a balancing limitation regarding investigative and intelligence files. Rather than rewriting the Public Records Act, however, we simply recognize a common law limitation on the otherwise unlimited provisions of <u>NRS 239.010</u>.

³ The opinion states:

v. Macon Telegraph Publishing Co., 316 S.E.2d 449, 452 (Ga. 1984). Although respondents contend that these cases are inapposite, we hold that a balancing of the interests involved is necessary regardless of the case law from other jurisdictions. 4 Moreover, in applying a balancing [**148] test to this [*636] case, none of the considerations public policy identified [***10] in the case law and the Attorney General's opinion as justifying the withholding of investigative information is present. There is no pending or anticipated criminal proceeding; there are no confidential sources or investigative techniques to protect; there is no possibility of denying someone a fair trial; and there is no potential jeopardy to law Even the district court enforcement personnel. acknowledged in its order that "if a [balancing] test were applied under the circumstances of this case, petitioners would undoubtedly prevail."

[***11] Accordingly, weighing the absence of any privacy or law enforcement policy justifications for nondisclosure against the general policy in favor of open government, we reverse the district court's denial of appellants' petition and remand with instructions to issue a writ of mandamus ordering respondents to release to appellants the entire police investigative report.

Dissent by: STEFFEN

Dissent

Steffen, J., dissenting:

Respectfully, I dissent.

Police investigative and intelligence reports are not subject to disclosure under NRS Chapter 179A, Nevada's Records Of Criminal History Act (the Act). They are specifically exempted from disclosure under

⁴ The dissent suggests that we should adopt a "categorical" balancing test similar to that involved in the federal Freedom of Information Act. *5 U.S.C. § 552(b)(7) (1988)*. Contrary to the dissent's characterization of our balancing test as "ad hoc," however, we do not believe that there is a meaningful difference between the two tests, especially where a number of the considerations listed in federal Exemption 7 are virtually identical to policy considerations mentioned here. Furthermore, we do not perceive that it would be any less burdensome to judicially screen these records under the dissent's proposed categorical test, if indeed judicial screening is unduly burdensome at all.

the terms of the Act. Appellants contend that because other records are also specifically exempted that are not confidential, the Act intended to treat criminal investigative and intelligence reports as public records subject to disclosure to the media. The most that can be said for appellants' position is that the Act does not classify such reports as confidential or non-confidential. Appellants' contention that the Attorney General's opinion declaring investigative reports confidential is inconsistent with the public status of other records listed in NRS [***12] 179A.070(2) appears to me to be unsound. All the referenced exemptive provision does is exclude various items from the mandatory disclosure requirements of the Act.

Appellants also contend that police investigative and intelligence reports are "public records" subject to disclosure under NRS 239.010 because they have not been accorded a confidential [*637] status by statute. By so contending, appellants are seeking the realignment of two strongly favored and juxtaposed public policies involving open government and effective law enforcement. Heretofore, law enforcement agencies have released to the media selective information on criminal investigations and procedures consistent with the ongoing interests of effective and efficient police operations and the right of the public to be reasonably informed. Obviously, if appellants had succeeded in achieving their optimum position, serious problems would have resulted in the law enforcement community. Considerations of safety for officers and informants, investigative methodology and efficacy, and cooperative efforts between agencies, to name but a few, would be seriously impacted.

majority appears to have assumed position [***13] of "neither fish nor fowl" concerning the status of criminal investigative and intelligence reports. As a result of the majority's rule of equivocation, law enforcement agencies will be unable to predict with assurance the status of their investigative and intelligence reports in any given case until they have been subjected to the uncertainties of a judicial balancing test. I expect that the end result of such a rule will be an altered method of maintaining or memorializing ongoing police investigations. In any event, I suggest that the majority rule is unnecessarily vexatious and disruptive to law enforcement. There is, I submit, a preferable alternative that I will address in due course.

As noted previously, appellants maintain that because some of the records excluded from the definition of

criminal history records are not confidential in nature, all excluded records are public records and subject to dissemination under <u>NRS 239.010</u>. Aside from the fact that the premise is a non sequitur, it would be highly unlikely that the Legislature would exclude investigative and intelligence records from [**149] mandatory dissemination in one statute and require their disclosure in [***14] another. Appellants also assert, and the majority agrees, that because the Act deviated from the parent federal regulations by excluding investigative and intelligence records along with other records, the "inescapable conclusion" is that the Nevada Legislature intended such records to be subject to disclosure. I have reached a contrary conclusion.

The fact that certain records are excluded from the definition of "criminal history records" does not make them public records. For example, 28 C.F.R. § 20.20(b) of the parent federal regulations (hereinafter, in general, Federal Regulations) does not exclude information concerning juveniles. However, that category of records is among the records excluded from NRS 179A.070. NRS Chapter 62 prescribes a procedure for handling [*638] juvenile records, including the sealing thereof. Although juvenile records are not explicitly declared confidential by statute, their general inaccessibility to the public and the procedures provided for their sealing compel the inference that they are confidential.

Similarly, criminal investigative and intelligence records are not among the enumerated documents excluded from the definition of "criminal [***15] history records" in the Federal Regulations. For this reason, the majority concludes that the Nevada Legislature deviated from the Federal Regulations with the intention that such records be subject to disclosure. It is clear, however, that NRS 179A.070(2) is not a "deviation" from the Federal Regulations. Subsection 20.21(g)(6) of the Code of Federal Regulations provides that:

The individual's right to access and review of criminal history record information *shall not* extend to data contained in intelligence, investigatory, or other related files and shall not [**152] be construed to include any other information than that defined by § 20.3(b).

(Emphasis added.)

The quoted section limits an individual's right of access to his criminal history records. An individual who is the subject of a criminal history record is among those who *must* be given access to such records under *NRS* 179A.100(5). It is unreasonable to assume that the

Federal Regulations, after which Chapter 179A was patterned, would preclude an individual from obtaining investigatory information on himself while mandating the release of the same information to the media. It is equally incredible that [***16] the Nevada Legislature, also precluding an individual from accessing investigative data concerning himself (NRS 179A.150(1)), would mandate the disclosure of such information to the media. I suggest, therefore, that Nevada's Act does not constitute a deviation from its federal counterpart and that the majority improperly concludes that the non-existent deviation purposefully enacted in order to "clarify that investigative reports are subject to disclosure if policy considerations so warrant."

In <u>Branzburg v. Hayes, 408 U.S. 665 (1972)</u>, the Supreme Court noted that "[i]t has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." <u>Id. at 684</u>. The court also observed that the press is regularly excluded from grand jury proceedings and crime scenes to which the public has no access, despite the fact that news gathering may be impeded. <u>Id.</u> Grand jury proceedings and crime [*639] scenes are generally loci of investigations and intelligence which law enforcement agencies seek to protect from public access. [***17] Thus, even the public's right to know must at times be subordinate to criminal detection and investigation.

As previously noted, *NRS 179A.070(2)* does not make a declaration of confidentiality, but rather of exemption. NRS 179.100(5) (Supp. 1989) mandates that records of criminal history *must* be disseminated to certain enumerated individuals and entities, including the media. By excluding investigative and intelligence information from criminal history records, the statute is exempting such information from mandatory access. This position is supported by the **[**150]** Opinion of the Attorney General 83-3 (5-2-1983) in regards to *NRS* 239.010 as follows:

Criminal investigation and intelligence reports are confidential as internal intelligence and investigative records collected in the course of the enforcement of criminal laws and are not public records subject to inspection under this section.

Because appellants' contentions are founded on the Public Records Act (PRA) embodied in <u>NRS 239.010</u>, it is illuminating to review cases in other jurisdictions interpreting similar statutes and their federal

counterpart, the Federal Freedom of Information Act (FOIA). ¹

[***18] Appellants cite the PRA in support of the proposition that "absent an express declaration that a record is confidential, its disclosure is mandatory." They contend that because investigative and intelligence records have not been expressly declared confidential, they are public records subject to mandatory disclosure under the PRA. Importantly, however, that statute provides that "[a]II public books and public records . . . the contents of which are not otherwise declared by law to be confidential" shall be available to the public. (Emphasis added.) Equally important, before a document comes within the purview of the statute, it must be a "public record." And, if the public record is declared to be confidential, it is exempt from disclosure under the PRA. Unfortunately, "public record" is not defined in the statute.

I am convinced that an investigative report is not, and was never intended to be, a public record subject to the disclosure mandates of the PRA. It has been stated that:

"A public record, strictly speaking, is one made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as [***19] a memorial of official transactions for public reference."

[*640] Also a record is a "public record" which is required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a memorial and evidence of something written, said or done. . . . It has also been held that a written record of transactions of a public officer in his office, which is a convenient and appropriate method of discharging his duties, and is kept by him as such, whether required by express provisions of law or not, is admissible as a public record.

<u>Matthews v. Pyle, 251 P.2d 893, 895 (Ariz. 1952)</u> (emphasis supplied).

Moreover, the mere fact that a record is prepared by a public official or employee does not make it a public record. <u>Cowles Pub. Co. v. Murphy</u>, 637 P.2d 966, 968 (<u>Wash. 1981</u>) (en banc). Similarly, a document does not become a public record merely because public

officials collectively act upon it. *Id.* Nor does the fact that a document is kept by a public officer make it a public record. *Looby v. Lomenzo, 301 N.Y.S.2d 163 (1969)*. In *Looby* [***20] , the court ruled that a card index file was not a public record because it was created to promote office efficiency rather than to satisfy statutory mandate. *Id. at 165*.

In the case of *In re Toth, 418 A.2d 272 (N.J.Super.A.D.* 1980), the Right to Know Law defined a public record as one "required by law to be made, maintained or kept on file" by government officials. *Toth* was, in essence, an inverse disclosure action. An officer was appealing a disciplinary action for disclosing an investigatory report on the chairman of the Casino Control Board. His defense was that the record was public under the State's Right to Know Law. The court held that because the statute did not require a written record or report to be made, it was not a public record within the purview of the statute.

By its very nature, a criminal investigative report does not fit the category of a public record. It is not prepared for dissemination to the public or to memorialize official transactions for public reference. Neither is it required by Nevada law to be prepared, maintained, or filed, unlike the situation in <u>Carlson v. Pima County, 687 P.2d 1242 (Ariz. 1984)</u>, [***21] relied on by appellants. In *Carlson*, the report at issue dealt with an altercation between inmates and was required by law to be made.

The court in Westchester Rockland Newspapers, Inc. v. Mosczydlowski, 396 N.Y.S.2d 857 (1977), noted that "records of law enforcement agencies have traditionally been held exempted from public disclosure." Id. at 860. That case involved an Internal Affairs Division investigation into the untimely death of an inmate. As here, the inquiry focused on whether any crimes had [*641] been committed and the extent to which any police department personnel were guilty of breach of The IAD prepared its report, and the district attorney concluded that no evidence of criminal wrongdoing existed. The press, dissatisfied with a summary of the report, unsuccessfully sought access to the original. One of the grounds for denial was that the report was outside the purview of the Freedom of Information Law because it was part of a police investigatory file. The lower court ordered disclosure under the rationale that because the investigation had been closed without determining a basis for any [***22] criminal action, the report was no longer protected by the statute.

¹ 5 U.S.C. § 552.

In reversing, the appellate court recognized that the New York Public Officers Law (akin to the Nevada's Public Records Law) subjected some police records to disclosure (e.g., police blotter and booking entries). The court nevertheless stated that:

The subject report is not such a record. . . . [I]t is akin to an intra- or inter-agency memorandum within the contemplation of the Federal Freedom of Information Act (*U.S. Code, tit. 5, § 552[b][5]*), upon which our law is patterned, or is, perhaps, a final agency opinion on the facts and circumstances surrounding the death of an individual while in police custody. . . . So viewed, the competing interests at bar are best satisfied by directing disclosure of only so much of the subject report as represents purely factual matter, with the names of police officers and jail personnel deleted.

<u>Id. at 860</u>. The competing interests in the instant case appear to have been satisfied by the City Attorney's disclosure of the facts surrounding the dismissal of charges against Joe Conforte, portions of the report, and [***23] corresponding data.

I suggest, therefore, that only if a record can be properly construed to be both "public" and non-confidential in nature is it subject to mandatory dissemination. Although the majority has rewritten the PRA with a balancing limitation regarding investigative and intelligence files, if, as appellants contend, such files are non-confidential and subject to the terms of the PRA, then, under its express terms, the reports are to be made available to any person, at all times during office hours, for any advantage and for copying in full. In my opinion, such a conclusion is untenable and inimical to society's interests.

Appellants also assert that publication of the investigation report is necessary so that the public is not "left in the dark" about the policies and procedures of the City Attorney's office. However, as emphasized by cases interpreting FOIA and its state counterparts, there are some documents to which the public should not be privy.

[*642] Appellants cited <u>Houston Chronicle Pub. Co. v.</u> <u>City of Houston, 531 S.W.2d 177 (Tex. 1975)</u>, for the proposition that the press and the public have a constitutional right of access to **[***24]** information concerning crime in the community and activities of law enforcement agencies. However, as stated by that court:

This constitutional right of access to information should not extend to such matters as a synopsis of a purported confession, officers' speculation of a suspect's guilt, officers' views as to the credibility of witnesses, statements by informants, ballistics reports, fingerprint comparisons, or blood and other laboratory tests.

Id. at 187.

Prior to 1976, FOIA's Exemption 7 pertained to "investigatory records compiled for law enforcement purposes except to the extent available by law to a private party." 5 U.S.C. § 552(b)(7). That phrase was broadly interpreted to include any records containing information garnered in the investigation of possible criminal activity. For example, in Koch v. Dept. of Justice, 376 F.Supp. 313 (D.C. 1974), three Congressmen sought disclosure of files pertaining to themselves. The files contained background information on the Congressmen, correspondence, internal memoranda, and citizen complaints and comments. The court ruled that files maintained [***25] by the FBI in aid of investigations into the possibility that a subject had engaged in criminal activity or other conduct that would disqualify the person from government service were "investigatory files" and thus exempt under Exemption 7. The Koch court reasoned that "[i]n order to insure such confidentiality, F.B.I. files may be withheld if law enforcement was a significant aspect of the investigation for which they were compiled. . . . " Id. at 315. Because all documents (investigatory and non-investigatory) had been mingled together, the court ordered an in camera inspection. It stated that the inspection "could have been avoided had the Bureau clearly segregated investigatory material from other documents. ... " Id.

Because Exemption 7 was subject to broad interpretation, it was amended by Congress in 1986 to narrow its scope. As amended, records and information compiled for law enforcement purposes are exempt from disclosure. However, the exemption applies only where disclosure would result in one of six specified harms. ²

(b) This section does not apply to matters that are --

. . .

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably

² 5 U.S.C. § 552(b)(7) (1988 ed.) provides:

[***26] [*643] In *Abramson v. FBI*, 456 U.S. 615 (1981), the Supreme Court interpreted the meaning and scope of the 1976 version of Exemption 7. 3 Abramson involved a professional journalist who invoked the FOIA in an attempt to obtain information compiled by the FBI regarding certain politicians. The desired reports had been incorporated into a document transmitted to the White House. The bureau denied the request on grounds that the information was exempt from disclosure under Exemptions 6 and 7 of the FOIA. However, the Bureau did provide the journalist with 84 documents, some of which had been partially redacted. The issue was whether the FBI reports lost their exempt status when joined with records compiled for other than law enforcement purposes.

The *Abramson* court approached the issue with [***27] the following analysis:

The language of the Exemption indicates that judicial review of an asserted Exemption 7 privilege requires a two-part inquiry. First, a requested document must be shown to have been an investigatory record "compiled for law enforcement purposes." If so, the agency must demonstrate that release of the material would have one of six results specified in the Act.

<u>Id. at 622</u>. The court of appeals had ordered disclosure on the basis that the record did not qualify for the exemption. It reasoned that the record transmitted to the

be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence information, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

³ The 1976 version of Exemption 7 is substantially the same as the current Exemption 7. The amendment substituted the words "records and information" for the words "investigatory records." White House had not been compiled for law enforcement purposes, even though it contained information that was. The Supreme Court reversed, holding that:

[*644] If a requested document . . . contains or essentially reproduces all or part of a record that was previously compiled for law enforcement reasons, it is reasonably arguable that the law enforcement record does not lose its exemption by its subsequent inclusion in a document created for a non-exempt purpose.

. . . .

[T]he statutory language is reasonably construable to protect that part of an otherwise non-exempt compilation which essentially [***28] reproduces and is substantially the equivalent of all or part of an earlier record made for law enforcement uses.

Id. at 624-25.

In the instant matter, the subject report unquestionably satisfies the threshold inquiry. The investigation commenced to determine whether bribery or other misconduct was a factor in the dismissal of charges against Conforte. Appellants contend, however, that because the report did not result in a prosecution and was subsequently labeled "administrative" in nature, the report is subject to disclosure. I do not agree.

Under the *Abramson* ruling, if a report is initially prepared for law enforcement purposes, the threshold requirement is met, and the subsequent use to which the report is committed or name it is given is of no significance. As declared by the court in <u>Arenberg v. DEA</u>, 849 F.2d 579 (11th Cir. 1988):

The information gathered by the agency need not lead to a criminal prosecution in order to meet the threshold requirement. Courts should be hesitant to reexamine a law enforcement agency's decision to investigate if there is a plausible basis for the agency's decision.

Id. at 581. [***29]

Under the foregoing federal authorities interpreting the FOIA, it is apparent that the investigative report compiled by the Reno Police Department would qualify as exempt under subsection 7. However, the inquiry does not end there. Next, an agency claiming the Exemption 7 privilege must demonstrate that one of six

"harms" within Exemption 7 would result.

Appellants contend that because the investigative report has not been declared by law to be confidential, at the very least a balancing test should be used to determine whether the report should be disseminated to the public. According to the Supreme Court, the FOIA does not require such a test. The *Abramson* court interpreted the federal act to mean that "[c]ongress . . . created a scheme of categorical exclusion; it did not invite a [*645] judicial weighing of the benefits and evils of disclosure on a case-by-case basis. *Abramson*, 456 U.S. at 631.

In <u>U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989)</u>, the court discussed the categorical balancing approach to the FOIA exemptions. Reporters there sought to obtain the "rap sheets" [***30] of individuals believed to have improper dealings with a corrupt Congressman. The FBI invoked Exemption 7(C) in refusing the request. The court rejected an ad hoc balancing approach in favor of categorical balancing. Under the latter test, once a report falls into an exempted category, it is exempt from disclosure without the need for case-by-case balancing. The court reasoned that:

establishing a discrete category of exempt information implements the congressional intent to provide "workable" rules. . . . Only by construing the Exemption to provide a categorical rule can the Act's purpose of expediting disclosure by means of workable rules be furthered.

(Emphasis in original.) <u>Id. 489 U.S. at 779</u> (quoting <u>FTC v. Grolier Inc., 462 U.S. 19 at 27-28)</u>. The court declared that this approach may be undertaken for an "appropriate class of law-enforcement records or information." <u>Reporters Comm., 489 U.S. at 777</u>. Thus, the court held:

as a categorical matter that a third party's request for law-enforcement records or information about a private citizen can reasonably be expected to invade [***31] that citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely records that a Government happens to be storing, the invasion of privacy is "unwarranted."

Id. 489 U.S. at 780.

However, protection from disclosure is not limited to persons in their individual capacity. In <u>Buhovecky v. Dept. of Justice, 700 F.Supp. 566 (D.C. 1988)</u>, an inmate convicted of bank robbery sought access to FBI records. The investigative file consisted of grand jury material, "rap sheets," information obtained through interviews with law enforcement officials and individuals, and other materials. The FBI released some of the requested material, but withheld information which included the names of individuals and FBI personnel and the rap sheets. After undergoing a two-part inquiry to determine whether Exemption 7 was applicable, the court ruled that:

The type of information defendants seek to protect is information which would lead to discovery of the identity of [*646] participants in a criminal investigation. The interest in non-disclosure is obvious here; there is a need to protect [***32] from harassment those who participate, in either an official capacity or as investigative sources, in FBI investigations.

Id. at 570.

Here, among the reasons respondents refused disclosure is the invasion of privacy of those who were investigated and against whom no charges were brought. Appellants claim the invasion is "minimal" and thus the public's need to know should be balanced favorably against the minimal intrusion. Such reasoning is inconsistent with the Supreme Court's interpretation of Exemption 7.

Categorical balancing is consistent with the second prong of the *Abramson* court's two-part analysis of Exemption 7. That is, once *one* of the six "harms" is demonstrated, the exemption is applicable. Moreover, it would appear that a "categorical balancing" would be both administratively and judicially efficient. In handling a records request, a government agency should be able to rely on bright-line procedures for disseminating information rather than awaiting a case-by-case judicial determination.

I have belabored federal case law concerning the FOIA by way of analogy only. In those limited instances where "public records" are of [***33] an uncertain confidential status, I suggest that the categorical balancing approach would be preferable to the ad hoc balancing fashioned by the majority. Despite the absence of Exemption 7 in Nevada's PRA, it would

appear that the categories contained therein could be accorded judicial deference by Nevada courts as guidelines for implementing a categorical balancing approach. In so doing, we would assume no greater liberties with the language of the PRA than the majority rule limiting access to investigative and intelligence reports under the PRA to material sifted by an ad hoc judicial balancing.

Unfortunately, my preoccupation with the categorical balancing test amounts to little more than vented frustration over the burdensome judicial screening imposed by the majority under circumstances that, I respectfully submit, justify no balancing requirements at all. To me, it is beyond cavil that the PRA operates only on "public records," and that criminal investigative and intelligence reports are not, and were never intended to be, classified as public records. NRS Chapter 179A mandates the dissemination of specific criminal history information, expressly excluding investigatory [***34] and intelligence reports. The PRA mandates a complete dissemination of "public records." It is illogical to assume that what the Legislature specifically excluded from dissemination under the former, it intended to mandatorily [*647] release in full under the latter. Such contortive reasoning renders meaningless the exclusion under Chapter 179A.

For the reasons hereinbefore expressed, I am convinced that the district court judge was both perceptive and correct and should be affirmed. I therefore dissent.

End of Document

DR Partners v. Board of County Comm'rs

Supreme Court of Nevada August 18, 2000, Decided

No. 31999

Reporter

116 Nev. 616 *; 6 P.3d 465 **; 2000 Nev. LEXIS 84 ***; 29 Media L. Rep. 1330; 116 Nev. Adv. Rep. 72

DR PARTNERS, A NEVADA GENERAL
PARTNERSHIP, D/B/A LAS VEGAS REVIEW
JOURNAL, Appellant, vs. THE BOARD OF COUNTY
COMMISSIONERS OF CLARK COUNTY, NEVADA;
YVONNE ATKINSON GATES, CHAIRPERSON;
LORRAINE HUNT, ERIN KENNY, MARY J. KINCAID,
MYRNA WILLIAMS, BRUCE WOODBURY AND
LANCE MALONE, IN THEIR REPRESENTATIVE
CAPACITIES; DALE ASKEW, CLARK COUNTY
MANAGER, IN HIS REPRESENTATIVE CAPACITY,
AND RANDY WALKER, DIRECTOR OF AVIATION, IN
HIS REPRESENTATIVE CAPACITY, Respondents.

Prior History: [***1] Appeal from a district court order denying appellant's petition for a writ of mandamus compelling respondents to disclose Clark County officials' cellular telephone records. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

Disposition: Reversed and remanded.

Core Terms

records, disclosure, deliberative process, district court, documents, cellular telephone, Newspaper, public record, non-disclosure, numbers, privacy, confidentiality, billing, telephone number, unredacted, redacted, unlisted, public official, balancing test, materials, cellular, mandamus, public interest, Communications, deliberative, implicated, balancing, consulted, provides, advice

Case Summary

Procedural Posture

Appellant newspaper claimed the Eighth Judicial District Court, Clark County (Nevada), erred in denying its petition for a writ of mandamus compelling respondents, board of commissioners and individual board members.

to disclose cellular telephone records of publicly owned cellular telephones.

Overview

Appellant newspaper sought the phone records of respondents, county board of commissioners, as part of an investigation into government waste. The lower court denied the petition under respondents' claim of confidentiality based upon a deliberative process privilege. Respondents did not provide particularized evidence showing that any interest in non-disclosure outweighed the general presumption in favor of public access. Respondents did not identify an agency decision or policy to which the documents contributed. Names of persons with whom respondents consulted were not protected from disclosure under a deliberative process privilege. No showing was made that the factual material was inextricably intertwined with any policy-Weighing process. process compelled making disclosure. There was no expectation of privacy in these billings. Judgment reversed.

Outcome

Lower court erred in denying appellant's petition, and case was remanded to compel respondents to provide unredacted copies of requested records. Phone records were not protected under the deliberative process privilege. Respondents failed to identify deliberative processes implicated by calls.

LexisNexis® Headnotes

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Civil Procedure > Remedies > Writs > General Overview

HN1[**★**] Common Law Writs, Mandamus

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station, Nev. Rev. Code § 34.160, or to control an arbitrary or capricious exercise of discretion.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Remedies > Writs > General Overview

HN2 Standards of Review, Abuse of Discretion

A district court's decision to grant or deny a writ petition is reviewed under an abuse of discretion standard.

Administrative Law > Governmental Information > Freedom of Information > General Overview

<u>HN3</u>[♣] Governmental Information, Freedom of Information

See Nev. Rev. Code § 239.010.

Administrative Law > Governmental Information > Freedom of Information > General Overview

<u>HN4</u>[♣] Governmental Information, Freedom of Information

The public official or agency bears the burden of establishing the existence of privilege based upon confidentiality. It is well settled that privileges, whether creatures of statute or the common law, should be interpreted and applied narrowly.

Administrative Law > Governmental Information > Freedom of Information > General Overview

<u>HN5</u>[♣] Governmental Information, Freedom of Information

Unless a statute provides an absolute privilege against disclosure, the burden of establishing the application of a privilege based upon confidentiality can only be satisfied pursuant to a balancing of interests: the scales must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference. The citizen's predominant interest may be expressed in terms of the burden of proof which is applicable in this class of cases; the burden is cast upon the agency to explain why the records should not be furnished.

Administrative Law > Governmental Information > Freedom of Information > General Overview

<u>HN6</u>[♣] Governmental Information, Freedom of Information

Any limitation on the general disclosure requirements of Nev. Rev. Code § 239.010 must be based upon a balancing or weighing of the interests of non-disclosure against the general policy in favor of open government.

Administrative Law > ... > Defenses & Exemptions
From Public Disclosure > Interagency
Memoranda > Deliberative Process Privilege

Evidence > ... > Government Privileges > Official Information Privilege > Deliberative Process Privilege

Administrative Law > Governmental Information > Freedom of Information > General Overview

Administrative Law > ... > Defenses & Exemptions From Public Disclosure > Interagency Memoranda > General Overview

Evidence > Privileges > Government Privileges > Executive Privilege

Evidence > Privileges > Government Privileges > Freedom of Information Act

Evidence > ... > Government Privileges > Official Information Privilege > General Overview

<u>HN7</u>[♣] Interagency Memoranda, Deliberative Process Privilege

The deliberative process or executive privilege is one of the traditional mechanisms that provide protection to the deliberative and decision-making processes of the executive branch of government and is preserved in Exemption 5 of the Freedom of Information Act, 5 U.S.C.S. § 552 (1994).

Administrative Law > ... > Defenses & Exemptions From Public Disclosure > Interagency Memoranda > Deliberative Process Privilege

Evidence > ... > Government Privileges > Official Information Privilege > Deliberative Process Privilege

Administrative Law > Governmental Information > Freedom of Information > General Overview

Administrative Law > ... > Defenses & Exemptions
From Public Disclosure > Interagency
Memoranda > General Overview

Evidence > Privileges > Government Privileges > Executive Privilege

Evidence > Privileges > Government Privileges > Freedom of Information Act

Evidence > ... > Government Privileges > Official Information Privilege > General Overview

<u>HN8</u>[Interagency Memoranda, Deliberative Process Privilege

The deliberative process or executive privilege shields from mandatory disclosure inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. 5 U.S.C.S. § 552(b)(5). It also permits agency decision-makers to engage in that frank exchange of opinions and recommendations necessary to the formulation of policy without being inhibited by fear of later public disclosure, and thus protects materials or records that reflect a government official's deliberative or decision-making process.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Evidence > ... > Government Privileges > Official Information Privilege > Deliberative Process Privilege

Evidence > Privileges > Government Privileges > Executive Privilege

Evidence > ... > Government Privileges > Official Information Privilege > General Overview

<u>HN9</u>[♣] Governmental Information, Freedom of Information

The deliberative process or executive privilege under 5 U.S.C.S. § 552 (1994) is not, at least in general, designed to protect purely factual matters. More particularly, purely factual matters are not protected unless inextricably intertwined with the policy-making process.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Evidence > ... > Government Privileges > Official Information Privilege > Deliberative Process Privilege

Evidence > Privileges > Government Privileges > Executive Privilege

Evidence > ... > Government Privileges > Official Information Privilege > General Overview

<u>HN10</u>[♣] Governmental Information, Freedom of Information

To qualify for non-disclosure under the deliberative process or executive privilege, the requested documents must be both predecisional and deliberative.

Administrative Law > Governmental Information > Freedom of Information > General Overview

<u>HN11</u>[♣] Governmental Information, Freedom of Information

To qualify as part of deliberative process, the materials must consist of opinions, recommendations, or advice about agency policies.

Administrative Law > Governmental Information > Freedom of Information > General Overview

<u>HN12</u>[♣] Governmental Information, Freedom of Information

To ascertain whether the documents at issue are predecisional, the court must first be able to pinpoint an agency decision or policy to which these documents contributed. The agency bears the burden of establishing the character of the decision, the deliberative process involved, and the role played by the documents in the course of that process.

Administrative Law > ... > Defenses & Exemptions From Public Disclosure > Interagency Memoranda > Deliberative Process Privilege

Administrative Law > Governmental Information > Freedom of Information > General Overview

Administrative Law > ... > Defenses & Exemptions From Public Disclosure > Interagency Memoranda > General Overview

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

<u>HN13</u>[♣] Interagency Memoranda, Deliberative Process Privilege

Purely factual material which is severable from the opinion or policy advice in a document is generally not protected and must be disclosed in a Freedom of Information Act suit.

Evidence > ... > Government Privileges > Official Information Privilege > Deliberative Process Privilege

Administrative Law > Governmental Information > Freedom of Information > General

Overview

Administrative Law > ... > Defenses & Exemptions
From Public Disclosure > Interagency
Memoranda > General Overview

Administrative Law > ... > Defenses & Exemptions From Public Disclosure > Interagency Memoranda > Deliberative Process Privilege

Evidence > Privileges > General Overview

Evidence > Privileges > Government Privileges > General Overview

Evidence > Privileges > Government Privileges > Freedom of Information Act

Evidence > ... > Government Privileges > Official Information Privilege > General Overview

Evidence > Privileges > Government Privileges > Procedural Matters

<u>HN14</u> **Solution** Information Privilege, Deliberative Process Privilege

The names of persons with whom government officials have consulted are not protected from disclosure under a deliberative process privilege.

Administrative Law > ... > Defenses & Exemptions From Public Disclosure > Interagency Memoranda > General Overview

Evidence > Privileges > Government Privileges > Freedom of Information Act

Administrative Law > Governmental Information > Freedom of Information > General Overview

<u>HN15</u> Defenses & Exemptions From Public Disclosure, Interagency Memoranda

Identification of persons, retained or otherwise, who participate in policy formation and are somehow identified in the public written record, does not implicate the disclosure of factual information inextricably intertwined with the decision or policy-making processes of government.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Evidence > ... > Government Privileges > Official Information Privilege > Deliberative Process Privilege

Evidence > Privileges > Government Privileges > General Overview

Evidence > Privileges > Government Privileges > Executive Privilege

Evidence > ... > Government Privileges > Official Information Privilege > General Overview

<u>HN16</u>[♣] Governmental Information, Freedom of Information

A deliberative process privilege, even when applicable, is conditional: once the court determines that a document is privileged, it must still determine whether the document should be withheld. Unlike some other branches of the executive privilege, the deliberative process privilege is a qualified privilege. Once the agency demonstrates that documents fit within it, the burden shifts to the party seeking disclosure. It must demonstrate that its need for the information outweighs the regulatory interest in preventing disclosure.

Counsel: Campbell & Williams, Las Vegas, for Appellant.

Stewart L. Bell, District Attorney, and Mary-Anne Miller, Deputy District Attorney, Clark County, for Respondents.

JoNell Thomas, Las Vegas, for Amicus Curiae the Nevada Press Association.

Judges: MAUPIN, J. ROSE, C.J., YOUNG, SHEARING, AGOSTI, LEAVITT AND BECKER, JJ., concur.

Opinion by: MAUPIN

Opinion

[*619] [**467] BEFORE THE COURT EN BANC. BY THE COURT, MAUPIN, J. The appellant, DR Partners, a Nevada General Partnership, dba Las Vegas Review Journal (the "Newspaper"), operates a newspaper of general circulation in Clark County, Nevada. The respondents are the Clark County Board of Commissioners, individual members of that board, and two managerial employees of county government (the "County").

The district court denied the Newspaper's petition for writ of mandamus seeking disclosure of unredacted records documenting use of publicly owned cellular telephones. It did so under [***2] the County's claim of confidentiality based upon a "deliberative process" privilege. The Newspaper seeks reversal of this ruling.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On February 9, 1998, the Newspaper requested that the county manager of Clark County produce copies of records documenting the use, over a two-year period, of publicly owned cellular telephones issued to the individual respondents. This request was made in connection with the Newspaper's investigation into possible government waste, and the extent of influence over public officials by private lobbying interests. The County partially complied with the request by providing billing statements for the time period in question in edited form, i.e., with the last four digits of the listed incoming and outgoing telephone numbers redacted. The documents produced reflected all calls made on a monthly basis, whether the calls were local or long distance, the length of each call, whether the calls were incoming or outgoing, whether the calls were made to or from government land lines, the charges for each call and the total monthly expenses. The redactions prevented any person reviewing the documents from determining [***3] the identity of the individuals with whom cellular telephone conversations occurred, or whether numbers with non-government prefixes reflected personal or government business use.

The County claimed that the redacted information was subject **[*620]** to claims of confidentiality on three grounds: first, the records were subject to a "deliberative process" privilege; second the disclosures were protected under an "official information" privilege, see <u>NRS 49.285</u>; and third, the disclosures sought would violate individual privacy rights of persons whose telephone numbers were listed on the billing statements.

On February 17, 1998, the Newspaper filed a petition in

the district court for issuance of a writ of mandamus compelling the County to produce unedited records. <u>See NRS 239.011</u>. The district court denied the petition, and the Newspaper timely appealed. For the reasons stated below, we reverse the district court's order and direct that the district court compel the disclosure of complete unredacted records documenting use of publicly owned cellular telephones.

DISCUSSION

The County argues that the ruling below should be affirmed based upon statutory and common-law claims of [***4] confidentiality. In substance, the only issue determined by the district court was whether a deliberative process privilege protects the County from disclosing the redacted portions of the cellular telephone records. In its written decision, the district court impliedly rejected the official information privilege asserted under NRS 49.285, and did not reach the issue of [**468] whether individual privacy rights were violated. Because the district court refused to find the presence of a statutory privilege, the primary issue to be determined in this matter is whether a deliberative process privilege applies as found by the district court. 1 Because we conclude that such a privilege is not implicated in this instance, we will also discuss the related issue of whether privacy considerations protect the County from disclosure of the unredacted records.

[***5] *HN1*[**?**]

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station, see NRS 34.160, or to control an arbitrary or capricious exercise of discretion. See Round Hill Gen. Imp. Dist. [*621] v. Newman, 97 Nev. 601, 637 P.2d 534 (1981). HN2[*] A district court's decision to grant or deny a writ petition is reviewed by this court under an abuse of discretion

standard. See County of Clark v. Doumani, 114 Nev. 46, 53, 952 P.2d 13, 17 (1998). Mandamus is the appropriate procedural remedy to compel production of the public records sought in this case. See, e.g., Donrey of Nevada v. Bradshaw, 106 Nev. 630, 798 P.2d 144 (1990).

HN3 [The Nevada Public Records Act provides that "all public books and public records of a governmental entity, the contents of which are not otherwise declared by law to be confidential, must be open at all times during office hours to inspection by any person." NRS 239.010. The purpose of the Act is to ensure the accountability of the government to the public by facilitating public access to vital information about governmental activities. Neither party [***6] to this appeal disputes that the records at issue are public records under the Act. This view is consistent with the prevailing weight of legal authority. See, e.g., City of Elkhart v. Agenda: Open Government, Inc., 683 N.E.2d 622 (Ind. Ct. App. 1997), PG Publishing Company v. County of Washington, 162 Pa. Commw. 196, 638 A.2d 422 (Pa. Commw. 1994); Dortch v. Atlanta Journal, 261 Ga. 350, 405 S.E.2d 43 (Ga. 1991).

HN4 The public official or agency bears the burden of establishing the existence of privilege based upon confidentiality. It is well settled that privileges, whether creatures of statute or the common law, should be interpreted and applied narrowly. See Ashokan v. State, Dept. of Ins., 109 Nev. 662, 668, 856 P.2d 244, 247 (1993) (citing United States v. Nixon, 418 U.S. 683, 710, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974)). HN5 T Unless a statute provides an absolute privilege against disclosure, the burden of establishing the application of a privilege based upon confidentiality can only be satisfied pursuant to a balancing of interests:

In balancing the interests . . .,the scales must reflect the fundamental [***7] right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference. . . . The citizen's predominant interest may be expressed in terms of the burden of proof which is applicable in this class of cases; the burden is cast upon the agency to explain why the records should not be furnished.

MacEwan v. Holm, 226 Ore. 27, 359 P.2d 413, 421-22 (Or. 1961); see Bradshaw, 106 Nev. at 635-36, 798 P.2d at 147-48.

[*622] In <u>Bradshaw</u>, this court, at least by implication,

¹ We note in the margin our agreement with the district court that the claim of "official information" privilege under <u>NRS</u> <u>49.285</u> was "tortured" and conclude that the claim was completely without merit. <u>NRS 49.285</u> provides that "[a] public officer shall not be examined as a witness as to communications made to him in official confidence, when the public interests would suffer by disclosure." First, no testimony was sought. Second, no showing was made by the County below that any particular public interest would suffer as a result of full compliance with the public records request in this case.

recognized that <code>HN6[↑]</code> any limitation on the general disclosure requirements of <code>NRS 239.010</code> must be based upon a balancing or "weighing" of the interests of non-disclosure against the general policy in favor of open government. <code>Bradshaw</code> specifically held that, in the absence of an express statutory privilege against non-disclosure, certain criminal investigative reports prepared by a public law enforcement agency were subject to disclosure pursuant to the balancing test. The <code>Bradshaw</code> court did not elaborate on the existence or scope of common law privileges protecting disclosure of public records.

[**469] The claim of [***8] deliberative process privilege

As noted, the district court concluded that the records at issue were subject to partial non-disclosure under a common-law "deliberative process privilege." It then applied the Bradshaw balancing test and ruled that the production of redacted documents did not violate the Public Records Act. The County did not, in aid of the balancing process, provide the district court with particularized evidence showing that any interest in nondisclosure outweighed the general presumption in favor of public access. Noting apparent inconsistencies in the case law from around the country, and faced with a case of first impression in this state, the district court applied decisional law from California. See Times Mirror Co. v. Superior Ct., 53 Cal. 3d 1325, 813 P.2d 240, 242, 283 Cal. Rptr. 893 (Cal. 1991) (discussing the rationale behind the deliberative process privilege); Rogers v. Superior Court, 19 Cal. App. 4th 469, 23 Cal. Rptr. 2d 412 (Ct. App. 1993) (holding that cellular telephone bills of the Burbank City Council and other City employees were subject to the deliberative process privilege). Having considered the various approaches [***9] taken by other courts, and having weighed the public policy considerations inherent in our Public Records Act, we respectfully disagree with the district court and conclude that these records are not protected under a deliberative process privilege.

PINT The deliberative process or "executive" privilege is one of the traditional mechanisms that provide protection to the deliberative and decision-making processes of the executive branch of government and is preserved in "Exemption 5" of the Freedom of Information Act, 5 U.S.C. § 552 (1994).

HN8 This privilege "shields from mandatory disclosure 'inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency[.]"

Paisley v. C.I.A., 229 U.S. App. D.C. 372, 712 F.2d 686, 697 (D.C. Cir. 1983) (quoting 5 U.S.C. § 552(b)(5)). [*623] It also permits "agency decision-makers to engage in that frank exchange of opinions and recommendations necessary to the formulation of policy without being inhibited by fear of later public disclosure," 712 F.2d at 698, and, thus, protects materials or records that reflect a government [***10] official's deliberative or decision-making process. See EPA v. Mink, 410 U.S. 73, 89, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973). HN9 The privilege is not, at least in general, designed to protect purely factual matters. Id. More particularly, purely factual matters are not protected unless "inextricably intertwined" with the policy-making process. See Soucie v. David, 145 U.S. App. D.C. 144, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971). But see National Wildlife Federation v. U.S. Forest Service, 861 F.2d 1114, 1118-19 (9th Cir. 1988); Wolfe v. Department of Health and Human Services, 268 U.S. App. D.C. 89, 839 F.2d 768, 774 (D.C. Cir. 1988); Dudman Communications v. Dept. of the Air Force, 259 U.S. App. D.C. 364, 815 F.2d 1565, 1568 (D.C. Cir. 1987); Russell v. Department of the Air Force, 221 U.S. App. D.C. 96, 682 F.2d 1045, 1048 (D.C. Cir. 1982); Ryan v. Department of Justice, 199 U.S. App. D.C. 199, 617 F.2d 781, 790 (D.C. Cir. 1980); Lead Industries Ass'n v. OSHA, 610 F.2d 70, 85-86 (2d Cir. 1979); Montrose Chemical Corporation of California v. Train, 160 U.S. App. D.C. 270, 491 F.2d 63, 67-71 (D.C. Cir. 1974). [***11] ²

HN10[**↑**]

To qualify for non-disclosure under this privilege, the requested documents must be both predecisional and deliberative. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151-54, 44 L. Ed. 2d 29, 95 S. Ct. 1504 (1975); Vaughn v. Rosen, 173 U.S. App. D.C. 187, 523 F.2d 1136, 1143-44 (9th Cir. 1975). To establish that the phone records in this case are "predecisional," the County must identify an agency decision or policy to which the documents contributed. See Senate of Puerto Rico v. U.S. Dept. of Justice, 262 U.S. App. D.C. 166, 823 F.2d 574, 585 (D.C. Cir. 1987). HN11 To qualify as part of "deliberative" process, the materials requested [***12] must consist opinions,

² National Wildlife, Wolfe, Dudman, Russell, Ryan, Lead Industries and Montrose Chemical all found inextricable interconnection between documents sought and the deliberative process, i.e., none of the materials sought in those cases would have been discoverable in the context of ordinary litigation discovery.

recommendations, or advice about agency policies. In *Paisley v. C.I.A.*, 229 *U.S. App. D.C.* 372, 712 *F.2d* 686, 698 (*D.C. Cir.* 1983), vacated in part on other grounds, 233 *U.S. App. D.C.* 69, 724 *F.2d* 201 (*D.C. Cir.* 1984), the United States Court [**470] of Appeals for the District of Columbia explained the analysis as follows:

HN12 To ascertain whether the documents at issue are pre-decisional, the court must first be able to pinpoint an agency decision or policy to which these documents contributed. The agency bears the burden of establishing the character of the decision, the deliberative process involved, and the role played by the documents in the course of that process.

[*624]

If, on remand, the District Court finds that the documents did play a role in some agency decision making process, the documents must yet be shown to be "deliberative" to be protected under Exemption 5. It is well established that https://example.com/hn13 purely factual material which is severable from the opinion or policy advice in a document is generally not protected and must be disclosed in a FOIA suit.

712 F.2d at 698-99; see also Senate of Puerto Rico, 823 F.2d at 585.

The County asserts [***13] that the factual nature of the documents requested should not be the primary focus of inquiry under the Public Records Act. Rather, the County contends that this court must center any analysis on "whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." Times Mirror, 813 P.2d at 250 (quoting Dudman Communications, 815 F.2d at 1568). The court in Times Mirror observed that "disclosing the identity of persons with whom the Governor has met and consulted . . . would indicate which interests or individuals he deemed to be of significance with respect to critical issues of the moment. The intrusion into the deliberative process is patent." 813 P.2d at 251. Thus, the County argues under Times Mirror and Rogers (applying Times Mirror to public cellular telephone records) that a particularized evidentiary showing was unnecessary to establish application of the deliberative process privilege. Id. We disagree with the premise of the California decisions and conclude that HN14 1 the names [***14] of persons with whom government officials have consulted are not protected from disclosure under a deliberative process privilege. See

Van Bourg, Allen, Weinberg & Roger v. N.L.R.B., 751 F.2d 982, 985 (9th Cir. 1985) (inferentially stating that Exemption 5 to the Freedom of Information Act does not protect documents prepared for the government by outside consultants who do not have a formal relationship with the government); County of Madison, N.Y. v. U.S. Dept. of Justice, 641 F.2d 1036 (1st Cir. 1981) (approving principle that interested outside parties are not covered by Exemption 5 to FOIA). We agree with the proposition that HN15 1 identification of persons, retained or otherwise, who participate in policy formation and are somehow identified in the public written record, does not implicate the disclosure of factual information inextricably intertwined with the decision or policy-making processes of government. We also agree that "few outside consultants would be discouraged from providing recommendations by the mere prospect that their names [*625] would be disclosed, without the content of their advice" and that "there is . . . a public interest in knowing who [***15] is being consulted by the Government and contributing to its decisions." Note, The Freedom of Information Act and the Exemption for Intra-agency Memoranda, Harv. L. Rev. 1047, 1065-66 (1973).

Records kept with regard to use of cellular telephones issued to county officials, telephones that are issued as a matter of convenience, reveal nothing that would interfere with any deliberative process of government. The public officials in this case were not compelled to conduct business over a phone system where the billings, as a matter of course, include the local and long distance numbers of the parties to the telephonic conversations.

We also conclude that Times Mirror and Rogers are distinguishable from the present matter. Times Mirror enforced executive privilege in the context of a request for copies of Governor George Deukmejian's appointment calendars and schedules for the preceding five-year period. We agree that such materials are protected under notions of executive privilege and note that, within the [**471] special facts of that case, the California Supreme Court performed a balancing test and concluded that the public interest in nondisclosure [***16] outweighed the public interest in disclosure under the California public records law. In Rogers, the California Court of Appeals simply extended the holding in Times Mirror to the public records kept in connection with public cellular telephone use. Further, Rogers did not reach the issue of whether disclosure of cellular telephone records could be justified in connection with an investigation of possible government

waste. Finally, neither <u>Rogers</u> nor <u>Times Mirror</u> hold that disclosure of records of this nature is subject to blanket protection.

Other courts have held publicly owned cellular telephone records subject to disclosure. See City of Elkhart v. Agenda: Open Government, Inc., 683 N.E.2d 622 (Ind. Ct. App. 1997); PG Publishing Company v. County of Washington, 162 Pa. Commw. 196, 638 A.2d 422 (Pa. Commw. 1994); Dortch v. Atlanta Journal, 261 Ga. 350, 405 S.E.2d 43 (Ga. 1991). While Elkhart, PG Publishing and Dortch do not resolve public disclosure of these records under a deliberative process privilege, they acknowledge the public nature of these records and the general presumption in favor of public [***17] disclosure, subject only to a particularized showing of risks compelling non-disclosure. Further, as is true with regard to the materials sought in this case, the records in Elkhart, PG Publishing and Dortch fell within no statutory protection against disclosure.

In the proceedings below, the County never identified the particular policies or decisions that could result from any of the cellular telephone calls documented in the redacted records. The [*626] County also failed to demonstrate that the records revealed any opinion, recommendation, or advice held by or given to any of the individual respondents. Thus, the information requested is purely factual in nature and does not reveal the content of any deliberative processes of the County. Further, as noted, no showing was made that the factual material is "inextricably intertwined" with any policy-making process.

We also conclude that any weighing process on this record would compel disclosure of the unredacted documents. In the proceedings below, payment for private use of governmental cellular phone service by government officials was not properly accounted for in the records produced by the County. This lack of accounting [***18] prevented the Newspaper from determining the extent to which any governmental waste may have occurred. The County also failed to demonstrate that the records, as they were disclosed, exact accounting provided an of government expenditures for what may have been personal calls. Rather, the County concedes that "ball park figures" were utilized to determine the proper amounts for which the individual respondents reimbursed the County for personal calls. Further, the records as released failed to establish which conversations were entitled confidentiality.

We therefore hold that the County did not make a showing that the requested records implicate a deliberative process privilege. These records contain only numbers and billing information. They contain no information as to topics discussed or advice or opinions exchanged between the parties to the telephone calls.

HN16 We also note that a deliberative process privilege, even when applicable, is conditional:

Once the court determines that a document is privileged, it must still determine whether the document should be withheld. Unlike some other branches of the executive privilege, the deliberative process privilege is a qualified privilege. [***19] Once the agency demonstrates that documents fit within it, the burden shifts to the party seeking disclosure. It must demonstrate that its need for the information outweighs the regulatory interest in preventing disclosure.

Capital Info. Group v. Office of the Governor, 923 P.2d 29, 36 (Alaska 1996) (quoting Weaver & Jones, The Deliberative Process Privilege, 54 Mo. L. Rev. 279, 315 (1989)). Here, because the County never demonstrated by evidentiary proofs that a deliberative process privilege was implicated by the disclosure of the unredacted records, the burden never shifted to the Newspaper. [*627] Further, the absence [**472] of such proof prevented the district court from engaging in the weighing process mandated by Bradshaw.

Privacy considerations

In a related argument, not based on privilege, the County contends that disclosure of unredacted records would violate the privacy of persons with unlisted telephone numbers reflected on the billing statements. We conclude that, in general, there is no expectation of privacy in these billings. First, public officials who make calls to unlisted numbers or who provide their cellular numbers to members of the [***20] public know that the billings are a public record. Thus, the act of placing a cellular call to a private citizen places the number called within the public domain. Second, members of the public who knowingly place calls to government-issued cellular phones know that the public billings will reflect their unlisted telephone numbers. Third, to the extent that exigent circumstances are shown to justify nondisclosure, a district court reviewing such a claim is required to apply the Bradshaw balancing test. This issue is addressed immediately below.

The County registers its public policy concern that

private numbers of public officials, police and other persons whose privacy, and possibly safety, might be compromised will be forced into the public record. The County asks us to consider the reasoning of the dissent in Dortch:

The real result of today's opinion is that any member of the general public, including convicted felons, may access the personal unlisted telephone numbers of our citizens, including police officers and their families. All that is required is that a person's home receive a call from a city-subscribed cellular phone. This is especially troubling in light of [***21] the fact that many police officers order and pay for unpublished telephone numbers in order to protect their families from harassment. Today's opinion effectively denies these officers, and others, their right to privacy and frustrates their attempts to shield their families and homes from intrusion.

Additionally, giving the public, through the release of the city's cellular telephone numbers, the means to call city officials at will and at the city's expense serves no conceivable purpose. The city has already complied with the Open Records Act by releasing the names of the official users of each cellular telephone and an accounting of the telephone expenses of each of those individuals. This adequately provides the public with the means to "evaluate the expenditure of public funds."

Revealing the city's cellular telephone numbers will do [*628] nothing to improve the public's ability to communicate with the government or to monitor government expenses but will leave city officials open to harassment and the city treasury open to unchecked costs. . . . The police have even more pressing reasons to keep their cellular telephone numbers confidential. . . . Allowing the general public, including [***22] pranksters, to clog these confidential lines may seriously impair [police] ability to communicate, respond to calls, and insure the public's safety.

Dortch, 405 S.E.2d at 46-47 (citation omitted).

Expanding on the concerns expressed in the dissent in <u>Dortch</u>, the County raises the point that "inside" or "back lines" of government offices, the cellular telephone numbers themselves, and the unlisted home telephone numbers of county employees who are contacted after hours will be subject to disclosure if the Newspaper prevails on this appeal. We conclude that the County has not laid an adequate predicate on this record for non-disclosure on this basis. First, these concerns are easily addressed by the balancing test adopted by this

court in <u>Bradshaw</u>. Second, as noted, no offer of proof of any kind was submitted to the district court for the purpose of balancing important or critical privacy interests against the presumption in favor of public disclosure of these redacted records. ³ Rather, the County seeks to meet [**473] its burden by voicing non-particularized hypothetical concerns. <u>See Star Pub. Co. v. Parks, 178 Ariz. 604, 875 P.2d 837, 838 (Ariz. Ct. App. 1993)</u> [***23] (observing that "it is insufficient [for the public entity] to hypothesize cases where secrecy might prevail and then contend that the hypothetical controls all cases").

CONCLUSION

We conclude that the district court erred in its denial of the Newspaper's petition for mandamus relief. While a deliberative process or "executive" privilege against certain disclosures exists in certain contexts, such a privilege is not implicated here. Thus, we defer any discussion of the scope of the deliberative process for an appropriate case. Further, even if a deliberative process privilege were found to apply, we conclude that public policy justifications for nondisclosure urged by the County below do not outweigh the presumption in favor of full disclosure in this [***24] instance.

We therefore reverse the district court's order denying the **[*629]** Newspaper's writ petition and remand this matter to the district court for issuance of a writ of mandamus compelling the County to provide the Newspaper with unredacted copies of the requested records and for an award to the Newspaper of attorney's fees and costs pursuant to <u>NRS 239.011</u>. ⁴

If a request for inspection or copying of a public book or record open to inspection and copying is denied, the requester may apply to the district court in the county in which the book or record is located for an order permitting him to inspect or copy it. The court shall give this matter priority over other civil matters to which priority is not given by other statutes. If the requester prevails, he is entitled to recover his costs and reasonable attorney's fees in the proceeding from the governmental entity whose officer has custody of the book or record.

³ To the extent that disclosure of an unlisted number might raise serious privacy concerns, the district court, applying the balancing test, could require the County to divulge the identity of the caller but not his or her unlisted telephone number.

⁴ NRS 239.011 provides, as follows:

ROSE, C.J., YOUNG, SHEARING, AGOSTI, LEAVITT AND BECKER, [***25] JJ., concur.

End of Document

Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.

Supreme Court of Nevada March 5, 2015, Filed No. 62864, No, 63541

Reporter

343 P.3d 608 *; 2015 Nev. LEXIS 16 **; 131 Nev. Adv. Rep. 10

LAS VEGAS METROPOLITAN POLICE
DEPARTMENT; AND DOUGLAS C. GILLESPIE,
Appellants, vs. BLACKJACK BONDING, INC.,
Respondent.BLACKJACK BONDING, INC., Appellant,
vs. LAS VEGAS METROPOLITAN POLICE
DEPARTMENT; AND DOUGLAS C. GILLESPIE,
Respondents.

Subsequent History: Rehearing denied by <u>LV Metro</u> <u>Police Dep't v. Bonding, 2015 Nev. LEXIS 44 (Nev., May 29, 2015)</u>

Reconsideration denied by <u>LV Metro Police Dep't v.</u> <u>Blackjack Bonding, 2015 Nev. LEXIS 68 (Nev., July 6, 2015)</u>

Prior History: [**1] Consolidated appeals from a district court order granting in part a writ of mandamus to compel compliance with a public records request and a post-judgment order denying a motion for attorney fees and costs. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Disposition: Affirmed in part, reversed in part, and remanded.

Core Terms

public record, inmate, costs, attorney's fees, records, request information, government entity, requester, telephone, district court, legal custody, disclosure, confidential, provides, redacted, prevails, abuse of discretion, requested records, prevailing party, detainee's, numbers, telephone service, public service, entity's, public records request, telephone call, legal control, balancing-of-competing-interests, compile, argues

Case Summary

Overview

HOLDINGS: [1]-Because inmate telephone services provided by an outside provider assisted a city police department's facilitation of detainees' statutory rights to use a telephone, *Nev. Rev. Stat.* § 171.153(2), the inmate calls related to the provision of a public service, *Nev. Rev. Stat.* § 239.001(4), and a bonding company's request for call details from the county detention center was a request for a public record; [2]-Because the requested information could be generated by the inmate telephone system and could be obtained by the police department, the information was in the department's legal control; [3]-The bonding company was the prevailing party and was entitled to attorney's fees under *Nev. Rev. Stat.* § 239.011 (2011).

Outcome

Affirmed in part, reversed in part, and remanded.

LexisNexis® Headnotes

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > ... > Sanctions Against Agencies > Costs & Attorney Fees > Grounds for Recovery

Administrative Law > Governmental Information > Public Information > General Overview

<u>HN1</u>[♣] Freedom of Information, Compliance With Disclosure Requests

The Nevada Public Records Act (NPRA) requires governmental agencies to make nonconfidential public records within their legal custody or control available to the public. *Nev. Rev. Stat.* § 239.010. It also entitles a requester who prevails in a lawsuit to compel the production of public records to recover reasonable attorney fees and costs. *Nev. Rev. Stat.* § 239.011.

Administrative Law > Governmental Information > Public Information > General Overview

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

<u>HN2</u>[♣] Governmental Information, Public Information

See Nev. Rev. Stat. § 239.010(1) (2011).

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > Deletion of Material

HN3 Compliance With Disclosure Requests, Deletion of Material

See Nev. Rev. Stat. § 239.010(3) (2011).

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN4 ≥ Standards of Review, Abuse of Discretion

An appellate court reviews a district court's grant or denial of a writ petition for an abuse of discretion.

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN5 L Standards of Review, De Novo Review

An appellate court reviews the district court's interpretation of caselaw and statutory language de novo.

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

HN6[♣] Freedom of Information, Compliance With Disclosure Requests

Nev. Rev. Stat. § 239.001(4) mandates public access to records relating to the provision of those public services that are provided by private entities on behalf of a governmental entity. "Public service" has been broadly defined as a service rendered in the public interest.

Civil Rights Law > Protection of Rights > Prisoner Rights > General Overview

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > General Overview

HN7 Protection of Rights, Prisoner Rights

Often, the use of a telephone is essential for a pretrial detainee to contact a lawyer, bail bondsman, or other person in order to prepare his case or exercise his constitutional rights. Nevada law protects a detainee's right to use a telephone while detained by providing that any person arrested has the right to make a reasonable number of completed telephone calls from the police station or other place at which the person is booked. Nev. Rev. Stat. § 171.153(1). A reasonable number of calls must include one completed call to a friend or bail agent. Nev. Rev. Stat. § 171.153(2). Nev. Rev. Stat. § 171.153 does not limit a detainee's right to make telephone calls when a private entity provides the telephone services that are to be used by the detainee.

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

HN8 L Freedom of Information, Compliance With Disclosure Requests

See Nev. Rev. Stat. § 228.308.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > General Overview

<u>HN9</u>[♣] Freedom of Information, Defenses & Exemptions From Public Disclosure

A governmental entity's duty to disclose a public record applies only to records within the entity's custody or control. *Nev. Rev. Stat.* § 239.010(4) (2011).

Governments > Courts > Judicial Precedent

HN10 [♣] Courts, Judicial Precedent

The meaning of an opinion is ascertained by reading it as a whole and by considering the authorities on which it relies and the facts and procedure involved.

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Reguests > General Overview

<u>HN11</u>[♣] Freedom of Information, Compliance With Disclosure Requests

When a government agency has a computer program that can readily compile requested public information, the agency is not excused from its duty to produce and disclose that information.

Administrative Law > ... > Freedom of Information > Enforcement > Burdens of Proof

Evidence > Burdens of Proof > Allocation

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > General Overview

<u>HN12</u>[基] Enforcement, Burdens of Proof

The balancing-of-competing-interests test is employed when a requested public record is not explicitly made confidential by a statute and the governmental entity nonetheless resists disclosure of the information. This test weighs the fundamental right of a citizen to have access to the public records against the incidental right of the agency to be free from unreasonable interference. The government bears the burden of showing that its interest in nondisclosure clearly outweighs the public's interest in access.

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > Deletion of Material

HN13 Compliance With Disclosure Requests, Deletion of Material

A government agency cannot deny a public records request on the basis of confidentiality if it can redact, delete, conceal or separate the confidential information from the information included in the public book or record. *Nev. Rev. Stat.* § 239.010(3) (2011).

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > Processing Fees

<u>HN14</u> Compliance With Disclosure Requests, Processing Fees

Nev. Rev. Stat. § 239.052(1) (2011) provides that a governmental entity may charge a fee for providing a copy of a public record that shall not exceed the actual cost to the governmental entity of producing the record.

Administrative Law > ... > Sanctions Against Agencies > Costs & Attorney Fees > General Overview

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN15 Sanctions Against Agencies, Costs & Attorney Fees

An appellate court reviews a district court's decision regarding an award of attorney fees or costs for an abuse of discretion. An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or disregards controlling law.

Administrative Law > ... > Sanctions Against Agencies > Costs & Attorney Fees > Grounds for Recovery

Civil Procedure > ... > Attorney Fees &

Expenses > Basis of Recovery > Statutory Awards

<u>HN16</u>[♣] Costs & Attorney Fees, Grounds for Recovery

Nev. Rev. Stat. § 239.011 (2011) provides that if the requester seeking disclosure of public records prevails, the requester is entitled to recover his or her costs and reasonable attorney's fees in the proceeding from the governmental entity whose officer has custody of the book or record. It does not preclude a prevailing requester from recovering costs when the requester is to pay the agency for the expenses associated with the production. Thus, by its plain meaning, this statute grants a requester who prevails in Nevada Public Records Act (NPRA) litigation the right to recover attorney fees and costs, without regard to whether the requester is to bear the costs of production.

Administrative Law > ... > Sanctions Against Agencies > Costs & Attorney Fees > Grounds for Recovery

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

<u>HN17</u> **L** Costs & Attorney Fees, Grounds for Recovery

A party prevails if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit. To be a prevailing party, a party need not succeed on every issue.

Counsel: Olson, Cannon, Gormley, Angulo & Stoberski and Thomas D. Dillard, Jr., Las Vegas, for Las Vegas Metropolitan Police Department and Douglas C. Gillespie.

Armstrong Teasdale, LLP, and Tracy A. DiFillippo and Conor P. Flynn, Las Vegas, for Blackjack Bonding, Inc.

Josh M. Reid, City Attorney, and Michael J. Oh, Assistant City Attorney, Henderson, for Amicus Curiae City of Henderson.

Staci J. Pratt and Allen Lichtenstein, Las Vegas, for Amicus Curiae American Civil Liberties Union of Nevada Foundation.

Judges: BEFORE PARRAGUIRRE, SAITTA and PICKERING, JJ.

Opinion by: SAITTA

Opinion

[*610] By the Court, SAITTA, J.:

HN1[1] The Nevada Public Records Act (NPRA) requires governmental agencies to make nonconfidential public records within their legal custody or control available to the public. NRS 239.010. It also entitles a requester who prevails in a lawsuit to compel the production of public records to recover reasonable attorney [**2] fees and costs. NRS 239.011.

In the present case, a private telecommunications provider contracted with Clark County to provide telephone services to inmates at a county jail and to make records of the inmates' calls available to the governmental agency operating the jail. At issue here is whether (1) this information was a public record within the agency's legal custody or control and thus subject to disclosure and (2) the requester of this information was entitled to recover attorney fees and costs. We hold that this information is a public record because it concerns the provision of a public service and is within the agency's legal control. We also hold that the requester was a prevailing party and thus entitled to recover attorney fees and costs pursuant to <u>NRS 239.011</u>.

FACTUAL AND PROCEDURAL HISTORY

In 2011, Clark County and CenturyLink, a private telecommunications provider, entered into a contract for the provision of inmate telephone services for the Clark County Detention Center (CCDC). Under the contract, CenturyLink provides a telephone system that could generate records of inmate telephone calls "for use in administrative and investigative purposes." The records include, among other details, the [**3] number dialed, the call duration, the station originating the call, the call's cost, and the method of call termination. The system provides CCDC personnel with access to historical detail records containing multiple types of data, including calls to specified destination numbers, calls from specific inmates, completed and incomplete calls, and calls from specific inmate telephones. It allows the CCDC system administrators to print reports based on recorded data.

In 2012, Blackjack Bonding, Inc., made a public records request to the Las Vegas Metropolitan Police

Department (LVMPD), the governmental entity that runs the CCDC. In [*611] the request, Blackjack sought "all call detail records from telephones used by [CCDC] inmates . . . for 2011 and 2012"—specifically, "a call log that details the description of the phone used. . . , the call start time, dialed number, complete code, call type, talk seconds, billed time, cost, inmate id, and last name." Additionally, Blackjack asked for "a list of all phones used by inmates and the phone description, including whether the phone is used to place . . . free calls, collect calls, or both." Blackjack subsequently narrowed the scope of the requested [**4] information to calls to "all telephone numbers listed on the various bail bond agent jail lists posted in CCDC in 2011 and 2012" and conveyed that it understood "that the inmate names and identification numbers may need to be redacted." LVMPD denied Blackjack's request, claiming that it did not possess the records.

Blackjack then petitioned the district court for a writ of mandamus to compel LVMPD to provide the requested records. In support of its petition, Blackjack submitted an affidavit from its president stating that before making the public records request at issue, Blackjack asked CenturyLink to provide call detail records regarding CCDC inmate calls to Blackjack's number and received this data on the day that it made the request. The district court granted in part Blackjack's request for mandamus relief, stating that (1) the requested records were public records that LVMPD had a duty to produce, (2) the inmates' names and identification numbers must be redacted before production, and (3) Blackjack would pay the costs associated with the production.

Blackjack also made a motion for attorney fees and costs. The district court denied Blackjack's motion because it found that (1) [**5] the order granting writ relief in part required Blackjack to pay the costs associated with the production of the records and precluded LVMPD from paying any expenses, including Blackjack's attorney fees and costs, and (2) Blackjack was not a prevailing party.

LVMPD appealed the district court's order granting partial writ relief to Blackjack. Blackjack appealed the district court's denial of its motion for attorney fees and costs.

DISCUSSION

The district court did not err or abuse its discretion in

granting in part Blackjack's petition for a writ of mandamus

Pursuant to the NPRA, the public records and public books of a governmental entity are subject to inspection by the public:

governmental entity, the contents of which are not otherwise declared by law to be confidential, must be open at all times during office hours to inspection by any person, and may be fully copied or an abstract or memorandum may be prepared from those public books and public records.¹

NRS 239.010(1) (2011). If the public record contains confidential information that can be redacted, the governmental entity with legal custody or control of the record cannot rely on the confidentiality of that [**6] information to prevent disclosure of the public record:

custody or control of a public book or record shall not deny a request made pursuant to [NRS 239.010(1)1] ... on the basis that the requested public book or record contains information that is confidential if the governmental entity can redact, delete, conceal or separate the confidential information from the information included in the public book or record that is not otherwise confidential.

NRS 239.010(3) (2011).

LVMPD argues that the requested records are not public records subject to disclosure because they (1) do not concern an issue of public interest, (2) involve communications between private entities, and (3) are not in LVMPD's legal custody or control.² Moreover, [*612] LVMPD contends that it need not produce the requested records because <u>Public Employees'</u> <u>Retirement System v. Reno Newspapers, Inc. (PERS).</u>

¹ We apply the version of the NPRA that was in effect in 2012 when Blackjack made its public records request. Thus, we do not address the subsequent amendments to the NPRA.

²LVMPD also argues that it had no duty to fulfill Blackjack's records request because Blackjack purportedly acted to serve a business interest. This argument is without merit because (1) LVMPD did not provide evidence to support its assertion about Blackjack's motive and (2) the NPRA does not provide that a requester's motive is relevant to a government entity's duty to disclose public records. See NRS 239.010 (2011).

<u>129 Nev.</u>, <u>313 P.3d 221 (2013)</u>, prevents it from having to create a new document to satisfy a public records request. Alternatively, LVMPD argues that if the requested records are public records, then a balancing-of-competing-interests test weighs [**7] in favor of nondisclosure because of the inmates' privacy interests and the burdens associated with production.

Blackjack argues that because LVMPD can acquire the requested information from CenturyLink at no cost, the information is within LVMPD's control. Blackjack also contends that the balancing-of-competing-interests test does not preclude production of the documents because LVMPD failed to offer a legitimate interest for denying the request for disclosure and because Blackjack resolved any privacy concerns by agreeing to redact the inmates' names and identification numbers.

Standard of review

LVMPD has a duty to provide nonconfidential public records over which it has legal custody or control

Here, neither party disputes that LVMPD is a governmental entity subject to the NPRA. Therefore, we consider whether the requested information is a public record subject to LVMPD's legal custody or control.

The requested information is a public record

HN6 NRS 239.001(4) mandates public access to "records relating to the provision of those [public] services" that are provided by "private entities" on behalf of a governmental entity. "[P]ublic service" has been broadly defined as "a service rendered in the public interest." Merriam-Webster's Collegiate Dictionary 942 (10th ed. 2000); see also V & S Ry., LLC v. White Pine Cnty., 125 Nev. 233, 239-40, 211 P.3d 879, 883 (2009)

(referring to a dictionary to ascertain the plain meaning of statutory language); Black's Law Dictionary 1352 (9th ed. 2009) (defining "public service" as "[a] service provided or facilitated by the government for the general public's convenience and benefit").

HN7 To Often, the "use of a telephone is essential for a pretrial detainee to contact a lawyer, bail bondsman or other person in order to prepare his case or . [**9] . . exercise his [constitutional] rights." Johnson v. Galli, 596 F. Supp. 135, 138 (D. Nev. 1984) (finding that a detainee's reasonable access to a telephone is protected by the First Amendment). Nevada law protects a detainee's right to use a telephone while detained by providing that "[a]ny person arrested has the right to make a reasonable number of completed telephone calls from the police station or other place at which the person is booked." NRS 171.153(1) (emphasis added). "A reasonable number of calls must include one completed call to a friend or bail agent. . . . " NRS 171.153(2). NRS 171.153 does not limit a detainee's right to make telephone calls when a private entity provides the telephone services that are to be used by the detainee.

Here, the inmate telephone services provided by CenturyLink assist LVMPD's facilitation of detainees' statutory rights to use a telephone. The fact that telephone calls between private individuals are detailed in the call histories does not alter the public service at issue because NRS 171.153(2) contemplates detainees making telephone calls to private parties. Therefore, these calls relate to the provision of a public service and the public has an interest in having governmental [*613] entities honor inmates' statutory rights. HN8 1 See NRS 228.308 (defining "[p]ublic interest," albeit in the context [**10] of consumer protection, as "rights" that "arise" from "constitutions, court decisions and statutes"). Thus, the information that Blackjack requested is a public record because it relates to the provision of a public service.³

The requested information was within LVMPD's legal control

Since the information that Blackjack requested was a public record, we now address whether it was in

³ Because the information that Blackjack requested is a public record pursuant to <u>NRS 239.001(4)</u>, we decline to address whether it would also be a public record under NAC 239.091.

LVMPD's legal custody or control. This issue is relevant because <u>HN9[17]</u> a governmental entity's duty to disclose a public record applies only to records within the entity's custody or control. See <u>NRS 239.010(4)</u> (2011).

Here, substantial evidence indicates that LVMPD has legal control over the requested information. Under the contract for inmate telephone services, CenturyLink provides a telephone system that could generate "call detail records for use in administrative and investigative purposes." Thus, this contract indicates that the requested information could be generated by the inmate telephone system that CenturyLink provides and could be obtained by LVMPD.⁴ Therefore, the [**11] information is in LVMPD's legal control.

The recent PERS opinion does not preclude the duty to produce the requested information

LVMPD argues that PERS precludes it from having to ask CenturyLink to generate a new document that does not yet exist and thus excuses it from fulfilling Blackjack's request.

In *PERS*, this court considered "the applicability of [the NPRA] to information stored in the individual files of retired employees that are maintained by [an agency]." 129 Nev. at , 313 P.3d at 222. After concluding that such information must be disclosed, this court held that to the extent that a records request required "PERS to create new documents or customized reports by searching for and compiling information from individuals' files or other records," the NPRA did not [**12] require their production and disclosure. Id. at , 313 P.3d at 225.

The scope of the holding in PERS is gleaned from the facts of that case. See <u>Liu</u>, 130 Nev. at , 321 P.3d at 878-80 (providing that <u>HN10[1]</u> the meaning of an opinion is ascertained by reading it as a whole and by considering the authorities on which it relies and the

facts and procedure involved). In *PERS*, this court did not approve of the agency having to "search[] for and compil[e] information from individuals' files or other records." 129 Nev. at , 313 P.3d at 225. PERS did not address the situation where an agency had technology to readily compile the requested information. See id. Instead, HN11[1] when an agency has a computer program that can readily compile the requested information, the agency is not excused from its duty to produce and disclose that information. See State, ex rel. Scanlon v. Deters, 45 Ohio St. 3d 376, 544 N.E.2d 680, 683 (Ohio 1989), overruled on other grounds by State ex rel. Steckman v. Jackson, 70 Ohio St. 3d 420, 639 N.E.2d 83, 89 (Ohio 1994).

Unlike *PERS*, the record in this case reveals that Blackjack's request does not involve searching through individual files and compiling information from those files. Here, the inmate telephone services contract and the evidence showing that CenturyLink had previously fulfilled a similar records request demonstrate that CenturyLink had the capacity to readily produce the requested information. Moreover, during a hearing on the [**13] writ petition, LVMPD admitted through its attorney that CenturyLink could produce [*614] the requested information. Therefore, the requested public records are readily accessible and *PERS* does not prevent their disclosure.

The balancing-of-competing-interests test does not preclude disclosure

HN12 The balancing-of-competing-interests test is employed "when the requested record is not explicitly made confidential by a statute" and the governmental entity nonetheless resists disclosure of the information. Reno Newspapers, Inc. v. Gibbons, 127 Nev. , , 266 P.3d 623, 627 (2011). This test weighs "the fundamental right of a citizen to have access to the public records" against "the incidental right of the agency to be free from unreasonable interference." DR Partners v. Bd. of Cnty. Comm'rs, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) (internal quotations omitted). "The government bears the burden of showing that its interest in nondisclosure clearly outweighs the public's interest in access." PERS, 129 Nev. at , 313 P.3d at 225 (internal quotations omitted).

Here, LVMPD fails to satisfy its burden under the test. Without explanation, LVMPD contends that the request compromises the private interests of inmates and is burdensome. However, https://example.com/html/. LVMPD cannot deny

⁴ <u>NAC 239.620</u> does not affect our holding that substantial evidence shows that LVMPD had legal custody of the requested records for two reasons. First, <u>NAC 239.620</u> defines "legal custody" and does not address "legal control"; thus, it is inapposite to our holding. Second, <u>NAC 239.620</u> applies to state agencies, a type of governmental entity that LVMPD has not demonstrated itself to be. See <u>NAC 239.690</u> (defining a state agency as a part of the executive branch of the Nevada state government).

a public records request on the basis of confidentiality if it "can redact, delete, conceal or separate the confidential information [**14] from the information included in the public book or record." NRS 239.010(3) (2011). Furthermore, Blackjack agreed to the redaction of inmate names and numbers from the requested information, and the district court's amended order required the redaction of the inmate names and identification numbers. Thus. LVMPD fails demonstrate that the requested disclosure would compromise any privacy interests. Moreover, the district court mitigated any burdens associated with the request by requiring Blackjack to pay the costs associated with the production of the requested documents.⁵ Thus, LVMPD fails to demonstrate that the requested disclosure is financially burdensome. Therefore, the balancing-of-competing-interests test does not preclude its duty to produce the requested information.

The district court abused its discretion by refusing to award reasonable attorney fees and costs to Blackjack

[**15] In its challenge to the denial of its motion for attorney fees and costs, Blackjack disputes the district court's findings that Blackjack was not a prevailing party and that the prior order granting writ relief in part precluded LVMPD from having to pay Blackjack's attorney fees and costs.

Standard of review

HN15 We review a district court's decision regarding an award of attorney fees or costs for an abuse of discretion. Albios v. Horizon Communities, Inc., 122 Nev. 409, 417, 132 P.3d 1022, 1027-28 (2006) (reviewing an award of attorney fees for an abuse of discretion); Vill. Builders 96, L.P. v. U.S. Labs., Inc., 121 Nev. 261, 276, 112 P.3d 1082, 1092 (2005) (reviewing an award of costs for an abuse of discretion).

An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or disregards controlling law. NOLM, LLC

⁵ The district court's requirement that Blackjack pay LVMPD's costs of production is consistent with <u>HN14[1] NRS 239.052(1)</u> (2011), which provides that "a governmental entity may charge a fee for providing a copy of a public record. [that shall] not exceed the actual cost to the governmental entity" of producing the record.

v. Cnty. of Clark, 120 Nev. 736, 739, 100 P.3d 658, 660-61 (2004) (holding that relying on factual findings that "are clearly erroneous or not supported by substantial evidence" can be an abuse of discretion (internal quotations omitted)); Bergmann v. Boyce, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993) (holding that a decision made "in clear disregard of the guiding legal principles" can be an abuse of discretion).

NRS 239.011 entitles a prevailing requester to recover attorney fees and costs

HN16 NRS 239.011 (2011) provides that "[i]f the requester prevails, the requester is entitled to recover his or her costs and reasonable [*615] attorney's fees in the proceeding [**16] from the governmental entity whose officer has custody of the book or record." It does not preclude a prevailing requester from recovering costs when the requester is to pay the agency for the expenses associated with the production. See id. Thus, by its plain meaning, this statute grants a requester who prevails in NPRA litigation the right to recover attorney fees and costs, without regard to whether the requester is to bear the costs of production.

The district court abused its discretion in failing to find that Blackjack was a prevailing party

HN17 A party prevails "if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit." Valley Elec. Ass'n v. Overfield, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005) (emphasis added) (internal quotations omitted). To be a prevailing party, a party need not succeed on every issue. See Hensley v. Eckerhart, 461 U.S. 424, 434, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (observing that "a plaintiff [can be] deemed 'prevailing' even though he succeeded on [**17] only some of his claims for relief").

Here, the district court ordered LVMPD to produce nearly all of the information that Blackjack sought in its petition for a writ of mandamus. Since the record demonstrates that Blackjack obtained a writ compelling

⁶ To the extent that the parties raise policy arguments that conflict with <u>NRS 239.011</u>'s plain meaning, they are without merit and do not alter our analysis. See <u>Williams v. United Parcel Servs., 129 Nev.</u>, <u>302 P.3d 1144, 1147 (2013)</u> (refusing to deviate from the plain meaning of a statute and rejecting arguments that would require the court to read additional language into the statute).

the production of the telephone records with CCDC's inmates' identifying information redacted, it succeeded on a significant issue and achieved at least some of the benefit that it sought. Thus the district court abused its discretion by relying on the clearly erroneous finding that Blackjack was not a prevailing party. See <u>NOLM</u>, <u>LLC</u>, 120 Nev. at 739, 100 P.3d at 660-61.

Blackjack was a prevailing party and is entitled to recover attorney fees and costs associated with its efforts to secure access to the telephone records, despite the fact that it was to pay the costs of production. See <u>NRS 239.011</u> (2011). Accordingly, we reverse the district court's order denying Blackjack's motion for attorney fees and costs and remand the matter for the district court to enter an award for reasonable attorney fees and costs consistent with this opinion. See <u>DR Partners, 116 Nev. at 629, 6 P.3d at 473</u> (remanding a case where a public records requester prevailed "for an award to the [requester] of attorney's fees and costs pursuant to <u>NRS 239.011"</u>).

/s/ Saitta, J.

Saitta

We concur:

/s/ Parraguirre, J.

Parraguirre

/s/ Pickering, J.

Pickering

End of Document

⁷We have considered [**18] the parties' remaining arguments, including those based on other jurisdictions' public records caselaw and the NPRA's legislative history, and conclude that they are without merit.

Public Emples. Ret. Sys. of Nev. v. Nev. Policy Research Inst., Inc.

Supreme Court of Nevada October 18, 2018, Filed

No. 72274

Reporter

429 P.3d 280 *; 2018 Nev. LEXIS 86 **; 2018 Media L. Rep. 351; 134 Nev. Adv. Rep. 81; 2018 WL 5077907

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF NEVADA, A PUBLIC AGENCY, Appellant, vs. NEVADA POLICY RESEARCH INSTITUTE, INC., Respondent.

Prior History: [**1] Appeal from a district court order granting a petition for a writ of mandamus concerning a public records request. First Judicial District Court, Carson City; James E. Wilson, Judge.

Disposition: Affirmed in part, reversed in part, and remanded.

Core Terms

database, confidential, files, request information, public record, retirees', records, disclosure, individuals', district court, compile, pension, electronic, feed, outweigh, inspection, retirement, searching, agency's, public interest, customized, requires, government entity, argues, new document, new record, raw data, disclose, technology, quotation

Case Summary

Overview

HOLDING: [1]-The district court erred by entering an order to produce the 2014 information under the Nevada Public Records Act, because the computer database could no longer be able to produce the information as it existed when the public records request was made, when searching the electronic database for existing and nonconfidential information was not the creation of a new record; the search of a database or the creation of a program to search for existing information was not the creation of new documents or customized reports.

Outcome

Judgment affirmed in part, reversed in part, and case remanded.

LexisNexis® Headnotes

Administrative Law > Governmental Information > Freedom of Information > Enforcement

<u>HN1</u>[基] Enforcement

Where the requested information merely requires searching a database for existing information, is readily accessible and not confidential, and the alleged risks posed by disclosure do not outweigh the benefits of the public's interest in access to the records, the Nevada Public Records Act mandates that Public Employees' Retirement System of Nevada disclose the information.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN2[♣] Abuse of Discretion

The Nevada Supreme Court generally reviews a district court's decision to grant a writ petition for an abuse of discretion, but when the writ petition raises questions of statutory interpretation, the Court reviews the district court's decision de novo.

Administrative Law > Governmental Information > Freedom of Information

HN3

Ereedom of Information

The Nevada Legislature enacted the Nevada Public Records Act to foster democratic principles, *Nev. Rev. Stat.* § 239.001, and promotes government transparency and accountability by facilitating public access to information regarding government activities. To accomplish these goals of transparency and accountability, the Act provides that unless otherwise provided by statute or declared by law to be confidential, all public books and public records of a governmental entity must be open at all times during office hours to inspection by any person, and may be fully copied. *Nev. Rev. Stat.* § 239.010(1).

Administrative Law > ... > Freedom of Information > Enforcement > Burdens of Proof

HN4[基] Burdens of Proof

The Nevada Public Records Act's provisions must be liberally construed to maximize the public's right of access, and any limitations or restrictions on that access must be narrowly construed. There is a presumption in favor of disclosure, and the governmental entity in control of the requested information bears the burden of overcoming this presumption by demonstrating by a preponderance of the evidence that the requested information is confidential. *Nev. Rev. Stat.* § 239.0113. This burden may be met by either showing that a statutory provision declares the record confidential or, in the absence of such a provision, that its interest in nondisclosure clearly outweighs the public's interest in access.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Medical & Personnel Files

<u>HN5</u>[Medical & Personnel Files

Under the Nevada Public Records Act, public books and records of government entities are open to the public for inspection, except as otherwise provided by statute or otherwise declared by law to be confidential. Nev. Rev. Stat. § 239.010(1). In addition, official state records include information stored on magnetic tape or computer. Nev. Rev. Stat. § 239.005(6)(b). Among the statutes listed as providing a potential exception is Nev. Rev. Stat. § 286.110(3), which specifies that the official correspondence and records, other than the files of individual members or retired employees, and the

minutes, audio recordings, transcripts and books of the Public Employees' Retirement System of Nevada are public records and are available for public inspection. *Nev. Rev. Stat.* § 286.117 additionally requires the individual member or government retiree to submit a waiver in order to review or copy their records. As these latter statutes limit and restrict the public's right of access, a court construes them narrowly. *Nev. Rev. Stat.* § 239.001(2)-(3).

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Medical & Personnel Files

HN6[Medical & Personnel Files

Nev. Rev. Stat. § 286.110(3)'s scope of confidentiality does not extend to all information by virtue of it being contained in individuals' files and that Public Employees' Retirement System of Nevada had not identified any statute, rule, or caselaw that would foreclose production of the requested information.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Medical & Personnel Files

HN7[♣] Medical & Personnel Files

A mere assertion of possible endangerment does not clearly outweigh the public interest in access to records. To the extent some public employees may expect their salaries to remain a private matter, that expectation is not a reasonable one. Indeed, public employees lack a reasonable expectation of privacy in an expense the public largely bears after their retirement.

Administrative Law > Governmental Information > Freedom of Information > Compliance With Disclosure Requests

HN8 L Compliance With Disclosure Requests

Sorting a pre-existing database of information to make information intelligible does not involve the creation of a new record because computer records found in a database rather than a file cabinet may require the application of codes or some form of programming to retrieve the information. Sorting a database by a

particular data field (e.g., date, category, title) is essentially the application of codes or some form of programming, and thus does not involve creating new records or conducting research.

Administrative Law > Governmental Information > Freedom of Information > Compliance With Disclosure Requests

HN9 Compliance With Disclosure Requests

The Nevada Public Records Act requires a state agency to query and search its database to identify, retrieve, and produce responsive records for inspection if the agency maintains public records in an electronic database. The search of a database or the creation of a program to search for existing information is not the creation of new documents or customized reports. When an agency has a computer program that can readily compile the requested information, the agency is not excused from its duty to produce and disclose that information. Similarly, if there is confidential information within the requested information, disclosure with the appropriate redactions would not constitute the creation of a new document or customized report. Nev. Rev. Stat. § 239.010(3).

Counsel: McDonald Carano LLP and Adam D. Hosmer-Henner and Joshua J. Hicks, Reno, for Appellant.

Joseph F. Becker, Reno, for Respondent.

Judges: Douglas, C.J. We concur: Cherry, J., Gibbons, J., Pickering, J. STIGLICH, J., with whom HARDESTY and PARRAGUIRRE, JJ., agree, dissenting.

Opinion by: DOUGLAS

Opinion

[*282] BEFORE THE COURT EN BANC.

By the Court, DOUGLAS, C.J.:

In this appeal, we consider whether the <u>Nevada Public Records Act</u> (the Act) requires the Public Employees' Retirement System of Nevada (PERS) to disclose certain employment and pension payment information about its government retirees held in its computer database when sought through a public records request. We hold that <u>HN1</u> where the requested information

merely requires searching a database for existing information, is readily accessible and not confidential, and the alleged risks posed by disclosure do not outweigh the benefits of the public's interest in access to the records, the Act mandates that PERS disclose the information. Because PERS [**2] represents that the computer database may no longer be able to produce the information as it existed when the public records request was made, we remand for the district court to determine an appropriate way for PERS to comply with the request.

FACTS AND PROCEDURAL HISTORY

Respondent Nevada Policy Research Institute, Inc. (NPRI) submitted a public records request to appellant PERS seeking payment records of its government retirees, including retiree names, for the year 2014. NPRI sought to post this information on their TransparentNevada.com website for the public to view. Despite having previously disclosed the requested information to NPRI for the year 2013, PERS refused to disclose the requested information for the following year. PERS argued that the raw data feed that an independent actuary uses to analyze and value the retirement system did not contain the names of its government retirees, only redacted social security numbers, and it had no duty to create a new document in order to satisfy NPRI's request. NPRI alternatively requested any other records that would contain the following information for the year 2014: retiree name, years of service credit, gross pension benefit amount, [**3] year of retirement, and last employer. PERS still refused to disclose the requested information by denying the availability of any such record.

NPRI filed a petition for a writ of mandamus in district court seeking retiree name, payroll amount, date of retirement, years of service, last employer, retirement type, original retirement amount, and COLA increases. NPRI asserted that the requested information is not confidential because it is a public record and is easily accessible through an electronic search of the PERS database. Following an evidentiary hearing, the district court concluded that the requested information was not confidential, that the risks posed by disclosure did not outweigh the benefits of the public's interest in access to these records, and that PERS had a duty to create a document with the requested information. Thus, the district court granted NPRI's petition and ordered disclosure. However, the district court ordered PERS to produce only retiree name, years of service credit, gross

pension benefit amount, year of retirement, and last employer.

DISCUSSION

PERS argues that the district court erred by requiring disclosure because the information confidential, [**4] and the risks posed by disclosure outweigh the benefits of the public's interest in access to the records. It also argues that the district court's decision goes against this court's holding in Public Employees' Retirement System of Nevada v. Reno Newspapers, Inc. (Reno Newspapers), 129 Nev. 833, 313 P.3d 221 (2013), where we [*283] held that there is no duty "to create new documents or customized reports by searching for and compiling information from individuals' files or other records," id. at 840, 313 P.3d at 225, and that the narrow exception we subsequently created in Las Vegas Metropolitan Police Department v. Blackjack Bonding, Inc. (Blackjack Bonding), 131 Nev. 80, 343 P.3d 608 (2015), only applies where the records are under the control of a third party, that third party can readily generate a report, and a report has been routinely generated in the past.

Conversely, NPRI argues that the information requested constitutes a public record under the Act because it is information that is stored on a governmental computer and that under *Blackjack Bonding*, PERS is required to disclose the information because the records are readily accessible and PERS has previously disclosed the information sought.

Standard of review

HN2[This court generally reviews a district court's decision to grant a writ petition for an abuse of discretion, but when the writ petition raises questions of statutory interpretation, this court reviews the district court's decision de novo. [**5] <u>City of Reno v. Reno Gazette-Journal, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003)</u>.

The Nevada Public Records Act

HN3 The Nevada Legislature enacted the Nevada Public Records Act to "foster democratic principles," NRS 239.001, and "promote government transparency and accountability by facilitating public access to information regarding government activities." Reno

Newspapers, 129 Nev. at 836-37, 313 P.3d at 223; Reno Gazette-Journal, 119 Nev. at 59, 63 P.3d at 1149. To accomplish these goals of transparency and accountability, the Act provides that unless otherwise provided by statute or "declared by law to be confidential, all public books and public records of a governmental entity must be open at all times during office hours to inspection by any person, and may be fully copied " NRS 239.010(1).

We are cognizant of these important goals and, thus, have held that HN4[1] the Act's "provisions must be liberally construed to maximize the public's right of access," and "any limitations or restrictions on [that] narrowly construed." access must be Newspapers, Inc. v. Gibbons (Gibbons), 127 Nev. 873, 878, 266 P.3d 623, 626 (2011) (citing NRS 239.001(1)-(3)). In addition, there is a presumption in favor of disclosure, and the governmental entity in control of the requested information bears the burden of overcoming this presumption by demonstrating by a preponderance of the evidence that the requested information is confidential.¹ NRS 239.0113; Reno Newspapers, 129 Nev. at 837, 313 P.3d at 223-24. This burden may be met by either showing "that a statutory provision [**6] declares the record confidential or, in the absence of such a provision, that its interest in nondisclosure clearly outweighs the public's interest in access." Reno Newspapers, 129 Nev. at 837, 313 P.3d at 224 (internal quotation omitted). With this framework in mind, we turn to the parties' contentions.

The requested information was not declared confidential by statute

PERS argues that the district court's order would erroneously require PERS to extract information from government retirees' individual files that are protected by NRS 286.110(3) and NRS 286.117. According to PERS, these statutes would be rendered meaningless if the information contained in government retirees' files could be subject to disclosure. Because individual files of government retirees are confidential, PERS argues, so too should custom reports that are generated exclusively from these files.

As noted above, **HN5** and under the Act, public books

¹ Neither party disputes that PERS is a governmental entity subject to the Act nor disputes that the requested information is subject to PERS' legal custody or control.

and records of government entities are open to the public for inspection, "[e]xcept as otherwise provided" by statute or "otherwise declared by law to be confidential." NRS 239.010(1). In addition, official state records include "[i]nformation stored on magnetic [*284] tape or computer." NRS 239.005(6)(b). Among the statutes listed as providing a potential exception is NRS 286.110(3), which specifies that [**7] "[t]he official correspondence and records, other than the files of individual members or retired employees, and . . . the minutes, audio recordings, transcripts and books of [PERS] are public records and are available for public added.)² inspection." (Emphasis NRS 286.117 additionally requires the individual member government retiree to submit a waiver in order to review or copy their records. As these latter statutes limit and restrict the public's right of access, we construe them narrowly.3 NRS 239.001(2)-(3); Gibbons, 127 Nev. at

² PERS draws inapposite analogies to our recent decision in City of Sparks v. Reno Newspapers, Inc., 133 Nev. Adv. Rep. 56, 399 P.3d 352 (2017), to contend that because NRS 286.110(3) protects the government retirees' individual files from inspection, any report that extracts information from these files is confidential and not subject to disclosure. However, in City of Sparks, the applicable statute, NRS 453A.370(5), had conferred upon the agency the authority to protect certain information, and pursuant to this authority, the agency implemented regulations explicitly declaring the requested information to be confidential. 133 Nev. Adv. Rep. 56, 399 P.3d at 358. Unlike the statute in City of Sparks, NRS 286.110(3) does not mandate that PERS affirmatively protect the type of information requested by NPRI. Compare NRS 286.110(3) (stating only that "official correspondence and records, other than the files of individual members or retired employees, . . . are public records and are available for public inspection"), with NRS 453A.370(5) (stating that the Division of Public and Behavioral Health of the Department of Health and Human Services "must . . . [a]s far as possible while maintaining accountability, protect the identity and personal identifying information of each person" (emphasis added)). Thus, NRS 286.110(3) does not clearly indicate that the Legislature has conferred upon the agency the authority to grant confidentiality to the requested information. See Banegas v. State Indus. Ins. Sys., 117 Nev. 222, 227, 19 P.3d 245, 248 (2001) ("[T]he Legislature may authorize administrative agencies to make rules and regulations supplementing legislation if the power given is prescribed in terms sufficiently definite to serve as a guide in exercising that power." (emphasis added)).

³ Contrary to this principle, PERS argues that we should defer to its broad interpretation of these statutes. While we will generally defer to an agency's interpretation of its governing statutes and regulations, we need only do so if its

878, 266 P.3d at 626.

This court has previously addressed the scope of NRS 286.110(3). See Reno Newspapers, 129 Nev. at 838, 313 P.3d at 224. In Reno Newspapers, PERS denied Reno Newspapers' request "for the names of all individuals who are collecting pensions, the names of their government employers, their salaries, their hire and retirement dates, and the amounts of their pension payments" and "assert[ed] that the information was confidential pursuant to NRS 286.110(3) . . . and NRS 286.117." 129 Nev. at 835, 313 P.3d at 222, In opposing Reno Newspapers' writ petition [**8] seeking the requested information, "PERS submitted a declaration from its executive officer explaining that all information related to the individual files is maintained as confidential but that PERS provides an annual valuation of its system in aggregate form as a public record," Id, at 835-36, 313 P.3d at 223, We held that HN6 1 "NRS 286.110(3)'s scope of confidentiality does not extend to all information by virtue of it being contained in individuals' files" and that "PERS ha[d] not identified any statute, rule, or caselaw that would foreclose production of the requested information." Id. at 838, 313 P.3d at 224-25.

In Reno Newspapers, PERS released the requested information to a third party for an actuarial evaluation, which made the information clearly available outside of an individual's file. See id. at 838, 313 P.3d at 224 ("Where information is contained in a medium separate from individuals' files, including administrative reports generated from data contained in individuals' files, information in such reports or other media is not confidential merely because the same information is also contained in individuals' files."). Following our opinion in Reno Newspapers, PERS removed names from the spreadsheet it transmitted to the actuary. Then when NPRI made its public records request, [**9] PERS only turned over the spreadsheet consisting of the anonymous profiles. With only the information contained in the spreadsheet, NPRI could no longer match the payroll amounts [*285] and other information to the respective recipient of that retirement benefit. And, consequently, NPRI could no longer post the information in profile form, identified by the recipient's name, on its website.

interpretation is reasonable. See <u>Collins Disc. Liquors & Vending v. State, 106 Nev. 766, 768, 802 P.2d 4, 5 (1990)</u>. We reject PERS' contention because, as more fully discussed herein, its interpretation would contravene the very purpose of the Act. See id.

Pointing to our discussion in Reno Newspapers of the "confidentiality" of the individual retiree files, and the fact PERS no longer generates the report ordered produced in that case, PERS maintains the information NPRI seeks does not exist outside the individual files and so is exempt from public disclosure. This reads our prior opinion and NRS 286.110(3) too broadly. While an individual retiree's physical file, which contains personal information such as social security numbers and beneficiary designations, may not be inspected in its entirety, that does not make all the information kept in that file confidential when the information is stored electronically and PERS can extract the nonconfidential information from the individual files. Indeed, PERS has failed to cite to any rule, statute, or caselaw declaring the [**10] information requested to be confidential, and it has previously disclosed the information.

There are, in addition, compelling reasons that PERS cannot evade disclosure on this premise. PERS maintains over 55,000 individual files for its government retirees in its proprietary database, the Computer Automated Retirement System of Nevada (CARSON). To allow PERS to preclude the public by law from inspecting otherwise validly requested government information, particularly information that can only be obtained by requesting it from PERS, by virtue of PERS including the information in the individual retiree files that are in an electronic database, would contravene the plain language and purpose of the Act by "functionally plac[ingl [the CARSON] records . . . outside of the public records law."4 See Am. Civil Liberties Union, 377 P.3d at 345; see also NRS 239.010(3); Blackjack Bonding, 131 Nev. at 84, 343 P.3d at 611 ("If the public record contains confidential information that can be redacted. the governmental entity with legal custody or control of the record cannot rely on the confidentiality of that information to prevent disclosure of the public record.").

⁴The dissent conflates the CARSON with the "individuals' files" to argue that the entire CARSON database is confidential. However, while the CARSON may be proprietary in nature, merely storing information in the CARSON does not render that information confidential. See 89-1 Op. Att'y Gen. 1, 3 (1989) ("Computer programs are intellectual property owned or licensed by the State and are not public records. Although most information stored by computer will, as with other forms of agency records, consist of public records, public inspection of particular information will still be subject to the case-by-case analysis . . .") Additionally, for the reasons outlined herein, adopting the dissent's position would run contrary to our established caselaw interpreting the Act and would undermine the very purpose for which the Act was established.

Thus, PERS has failed to demonstrate that the requested information is confidential by statute.

We next assess PERS' alternative argument [**11] that, in the absence of a provision declaring the requested information confidential, its interest in nondisclosure clearly outweighs the public's interest in access.

The district court did not err in concluding that the risks posed by disclosure of the requested information do not clearly outweigh the benefits of the public's interest in access

PERS argues that the risks posed by disclosure of the requested information outweigh the benefits. In particular, PERS contends that disclosure of the government retirees' names creates a heightened risk of identity theft and cybercrime against the retirees and that these risks outweigh the marginal benefit to the public. PERS also argues that the district court did not take into consideration the government retirees' privacy interests. Conversely, NPRI contends that PERS' assertion that disclosure would subject its government retirees to a higher risk of fraud or cybercrime is hypothetical and speculative, and thus, the district court did not err in balancing the interests involved in favor of disclosure. We agree with NPRI's contention.

In Reno Newspapers, "PERS argue [d] that disclosure of the requested information would subject retired employees [**12] to a higher risk of identity theft and elder abuse." [*286] 129 Nev. at 839, 313 P.3d at 225. However, "[t]he record indicate [d] that the only evidence presented [below] to support PERS's argument was a PowerPoint presentation with statistics showing that Nevada is the third leading state in the number of fraud complaints . . . and the sixth leading state in the number of identity theft complaints." Id. There, we concluded PERS failed to show that disclosure "would actually cause harm to retired employees or even increase the risk of harm," but rather, "the record indicate[d] that their concerns were merely hypothetical and speculative and did not clearly outweigh the public interest in disclosure." Id,; see also Reno Newspapers, Inc. v. Haley, 126 Nev. 211, 218, 234 P.3d 922, 927 (2010) (HN7 1 "A mere assertion of possible endangerment does not 'clearly outweigh' the public interest in access to these records." (internal quotation marks omitted)). Furthermore, "[t]o the extent some public employees may expect their salaries to remain a private matter, that expectation is not a reasonable one." San Diego Cty. Emps. Ret, Ass'n v.

Superior Court, 196 Cal. App. 4th 1228, 127 Cal. Rptr. 3d 479, 489 (Ct. App, 2011) (quoting Int'l Fed'n of Prof'l & Tech. Eng'rs, Local 21, AFL-CIO v. Superior Court, 165 P.3d 488, 494, 42 Cal. 4th 319, 64 Cal. Rptr. 3d 693 (Cal. 2007)). Indeed, "public employees lack a reasonable expectation of privacy in an expense the public largely bears after their retirement." Id.

Here, an expert report PERS provided from a technology and security [**13] advisor concluded that the inclusion of the government retirees' names in the raw data feed would create a greater risk for identity theft, fraud, or other cybercrime if the information was publicly released. However, given the limited nature of NPRI's requests, "their concerns [are] merely hypothetical and speculative . . . [and] [d]o not clearly outweigh the public's presumed right to access [the requested information]." Reno Newspapers, 129 Nev. at 839, 313 P.3d at 225. In addition, the government retirees lack a reasonable expectation of privacy in the requested information.

This does not mean that the risk of identity theft, fraud, or other cybercrime can never outweigh the benefits of the public's interest in access. If disclosure of a government retiree's information includes more sensitive personal information, such as birth date, sex, marital status, beneficiary information, and beneficiary birth dates, the balancing test may weigh in favor of nondisclosure. The requested information here, however, is limited in scope and helps promote government transparency and accountability by allowing the public access to information that could reveal, for example, if an individual is abusing retirement benefits. Given the strong presumption [**14] in favor of disclosure, PERS fails to demonstrate that the risks posed by disclosure outweigh the important benefit of public access, Thus, the district court did not err in concluding that the alleged risks posed by disclosure do not outweigh the benefits of the public's interest in access.

Having decided that the information is not confidential, we next determine whether requiring PERS to extract the information from the CARSON database is the creation of a new record.

The requested information did not require the creation of a new record

PERS further argues that *Reno Newspapers*, which recognized there is no duty "to create new documents or

customized reports by searching for and compiling information from individuals' files or other records," *id. at* 838, 840, 313 P.3d at 224-25, precludes disclosure of the information sought because NPRI's request requires the creation of a new document.

Although PERS correctly notes that a public agency has no duty to create a new record in response to a public records request, it improperly concludes that disclosure in the present case requires the creation of a new record simply because it would involve searching its database for information. Several courts have distinguished between [**15] public records requests that simply require an agency to search its electronic database in order to obtain the information requested from those that require the agency to compile a document or report about the information contained in the database. For example, in the context of Freedom of Information Act (FOIA) requests, a federal district court held that "[i]n responding to a FOIA request for [*287] 'aggregate data,' . . . an agency need not create a new database or [] reorganize its method of archiving data, but if the agency already stores records in an electronic database, searching that database does not involve the creation of a new record." Nat'l Sec. Counselors v. CIA (NSC I), 898 F. Supp. 2d 233, 270 (D.D.C. 2012); see also People for Am. Way Found. v. U.S. Dep't of Justice, 451 F. Supp. 2d 6, 14 (D.D.C. 2006) ("Electronic database searches are thus not regarded as involving the creation of new records." (quoting Schladetsch v. HUD, No. 99-0175, 2000 U.S. Dist. LEXIS 22895, 2000 WL 33372125, at *3 (D.D.C. Apr. 4, 2000))). As the NSC I court reasoned,

HN8 sorting a pre-existing database of information to make information intelligible does not involve the creation of a new record because . . . computer records found in a database rather than a file cabinet may require the application of codes or some form of programming to retrieve the information. Sorting a database by a particular data field (e.g., date, category, title) is essentially the application [**16] of codes or some form of programming, and thus does not involve creating new records or conducting research—it is just another form of searching that is within the scope of an agency's duties in responding to FOIA requests.

<u>898 F. Supp. 2d at 270</u> (internal quotation marks and citations omitted).

Other jurisdictions have employed similar logic when analyzing an agency's duty of disclosure under their

respective public records laws. For example, in American Civil Liberties Union v. Arizona Department of Child Safety, the Arizona Court of Appeals held that "[s]earching an electronic database to produce existing records and data is not the same as searching an electronic database to compile information about the information it contains." 240 Ariz. 142, 377 P.3d 339, 346 (Ariz. Ct. App. 2016). That court reasoned that "[w]hen a public employee fills out a form to obtain public records from, for example, a storage or file room, the employee has created a record to retrieve records that already exist. Creating a query to search an electronic database is functionally the same." *Id. at 345*. Thus, "Arizona's Public Records Law requires a state agency to query and search its database to identify, retrieve, and produce responsive records for inspection if the agency maintains public [**17] records in an electronic database." Lunney v. State, 244 Ariz. 170, 418 P.3d 943, 950 (Ariz. Ct. App. 2017) (internal quotation marks omitted). "To hold otherwise would . . . functionally place most records maintained in public agency databases outside of the public records law." Am. Civil Liberties Union, 377 P.3d at 345 (internal quotation marks omitted); see also Commonwealth, Dep't of Envtl. Prot. v. Cole, 52 A.3d 541, 547 (Pa. Commw. Ct. 2012) ("[D]rawing information from a database does not constitute creating a record under the Right-to-Know Law.").

We agree with these courts and similarly hold that <u>HN9</u>[] the Act requires a state agency to query and search its database to identify, retrieve, and produce responsive records for inspection if the agency maintains public records in an electronic database. In doing so, we clarify that the search of a database or the creation of a program to search for existing information is not the "creat[ion] [of] new documents or customized reports," as contemplated by *Reno Newspapers*. This comports with our holding in *Reno Newspapers*, 6 as

⁵The dissent argues that the creation of a computer program is not merely drawing information from a database, but rather, improperly requires the agency to conduct research. However, its reasoning ignores the realities of information storage in the digital age. As specifically recognized by the *NCI I* court, "computer records found in a database rather than a file cabinet may require the application of codes or some form of programming to retrieve the information." See <u>NCI I</u>, 898 F. <u>Supp. 2d at 270</u> (internal quotation marks omitted).

well as our later holding **[*288]** in *Blackjack Bonding*, where we held that "when an agency has a computer program that can readily compile the requested information, the agency is not excused from its duty to produce and disclose that information." <u>131 Nev. 80, 87, 343 P.3d 608, 613 (2015)</u>. Similarly, if there is confidential information within the requested **[**18]** information, disclosure with the appropriate redactions would not constitute the creation of a new document or customized report. See <u>NRS 239.010(3)</u>; see also <u>Stephan v. Harder, 230 Kan. 573, 641 P.2d 366, 374 (Kan. 1982)</u>.

Finally, PERS cannot evade disclosure on the basis that satisfying NPRI's public record request would require additional staff time and cost because PERS could charge NPRI for such an incurred fee. See NRS 239.052 (stating that "a governmental entity may charge a fee for providing a copy of a public record," and "[s]uch a fee must not exceed the actual cost to the governmental entity to provide the copy of the public record"); see also NRS 239.055(1) (stating that "if a request for a copy of a public record would require a governmental entity to make extraordinary use of its personnel or technological resources, the governmental entity may . . . charge a fee not to exceed 50 cents per page for such extraordinary use," and such a fee "must be reasonable and must be based on the cost that the governmental entity actually incurs for the extraordinary use of its personnel or technological resources").

The record indicates, however, that the CARSON database is not static, and PERS may not be able to obtain the [**19] information as it existed when NPRI requested it in 2014. We, therefore, reverse the district court's order to produce a document with the requested information and remand this case to the district court to determine how PERS should satisfy NPRI's request and

requests and clarify our earlier holding to reflect the realities of the advancements in technology and to further the purpose underlying the Act. *Reno Newspapers* did not need to address whether the requested information was confidential by virtue of it being contained within the CARSON database, because the information was released to a third party in a report. See *Reno Newspapers*, 129 Nev. at 838, 313 P.3d at 224 ("Where information is contained in a medium separate from individuals' files, including administrative reports generated from data contained in individuals' files, information in such reports or other media is not confidential merely because the same information is also contained in individuals' files."). Thus, this case requires us to answer a different question than *Reno Newspapers*: whether nonconfidential information in the CARSON database must be produced as public record.

⁶ The dissent incorrectly suggests that we are overruling our previous holding in *Reno Newspapers*. We merely recognize the case-by-case application required in public records

how the costs, if any, of producing the information at this time should be split.

CONCLUSION

We conclude that searching PERS' electronic database for existing and nonconfidential information is not the creation of a new record and therefore affirm the district court's order in this regard. But because the record demonstrates that PERS may no longer be able to obtain the requested information as it existed in 2014 by searching the CARSON database, we reverse the district court's order to produce the 2014 information and remand this matter for proceedings consistent with this opinion as to production of information.

/s/ Douglas, C.J.

Douglas

We concur:

/s/ Cherry, J.

Cherry

/s/ Gibbons, J.

Gibbons

/s/ Pickering, J.

Pickering

Dissent by: STIGLICH

Dissent

STIGLICH, J., with whom HARDESTY and PARRAGUIRRE, JJ., agree, dissenting:

Five years ago, this court held that PERS had no duty "to create new documents or customized reports by searching for and compiling information [**20] from individuals' files or other records." Pub. Emps.' Ret. Sys. of Nev. v. Reno Newspapers, Inc., 129 Nev. 833, 840, 313 P.3d 221, 225 (2013). The majority's decision today cannot be reconciled with that opinion or the Public Records Act as it is written. Before today, an agency's duty under the Public Records Act was limited to disclosing existing public records. After today, they will have a duty to create records so long as a court determines that the agency has the technology to

readily compile the requested information. While I understand the temptation to expand agencies' duties under the Public Records Act, I believe that such an expansion is for the Legislature—not this court—to make. Accordingly, I dissent.

Background

My disagreement with the majority is largely a factual one. To highlight it, I clarify **[*289]** the three categories of documents at issue in this case. First are retirees' individual files contained in the CARSON database. Those files are confidential pursuant to <u>NRS 286.110(3)</u>. But the information contained within those files is not confidential to the extent that it appears within some other non-confidential public record. See <u>Reno Newspapers</u>, 129 Nev. at 835, 313 P.3d at 222 ("Although . . . individual files have been declared confidential by statute and are thereby exempt from requests pursuant to the Act, other reports that **[**21]** PERS generates based on information contained in the files are not similarly protected by <u>NRS 286.110(3)</u>.").

The second category of documents is PERS' monthly payment register reports. Those reports contain both retirees' names and social security numbers. PERS provided at least one such report to NPRI after redacting the social security numbers.

The third and last category of documents are the raw data feeds that PERS produces annually for actuarial purposes. The 2013 data feed contained retirees' names and the pension amount each retiree received. We held in *Reno Newspapers* that PERS had to disclose that report, including the names of retirees. 129 Nev. at 840, 313 P.3d at 225. Possibly, in response to our holding in that case, PERS created its 2014 data feed using numerical identifiers for retirees rather than their names. PERS provided that 2014 report to NPRI.

¹ The majority relies upon American Civil Liberties Union v. Arizona Department of Child Safety for the proposition that declaring the CARSON records confidential places those records "outside of the public records law." 240 Ariz. 142, 377 P.3d 339, 345 (Ariz. Ct. App. 2016) (internal quotation marks omitted). The majority fails to recognize that it is the Nevada Legislature—not I—that exempted CARSON files from the Public Records Act. NRS 286.110(3) (exempting "files of individual members or retired employees"). Curiously, the majority cites and correctly analyzes NRS 286.110(3) but then fails to apply it to the CARSON database.

The upshot is that NPRI now possesses a list of every retiree's name and a separate list of payments to anonymized retirees, but NPRI has no way of linking names to payments. Thus, NPRI cannot update its website with a list of retirees and the amount of pension each received in 2014. The district court [**22] solved NPRI's problem by ordering PERS to add retirees' names to the 2014 data feed.

I.

My first objection with the majority's decision is that it overrules Reno Newspapers. The facts of that case are nearly identical to the present one: A plaintiff requested several categories of information from PERS, including the names of all Nevada state pensioners and the amount of their pensions. 129 Nev. at 834-35, 313 P.3d at 222. Some or all of that information was contained within two documents: retirees' individual files in the CARSON database and the 2013 raw data feed. This court rejected PERS' contention that the information was confidential solely because it was contained within individuals' confidential files. Id. at 838, 313 P.3d at 224. We therefore required PERS "to provide the requested information to the extent that it is maintained in a medium separate from individuals' files." Id. at 839, 313 P.3d at 225 (emphasis added). But we clarified: "However, to the extent that the district court ordered PERS to create new documents or customized reports by searching for and compiling information from individuals' files or other records, we vacate the district court's order." Id. at 840, 313 P.3d at 225. That holding was subsequently codified in NAC 239.867: "If a person requests to inspect, copy or receive a copy [**23] of a public record that does not exist, a records official or agency of the Executive Department is not required to create a public record to satisfy the request."

Applying *Reno Newspapers* to the present case is straightforward. NPRI requested a record containing pensioners' names and the amount of their pensions for the 2014 fiscal year. *No such record exists*. That is because, unlike the 2013 report at issue in *Reno Newspapers*, the 2014 raw data feed does not contain names. The only way PERS can create such a record—assuming it *can* create such a record²—is to extract

information **[*290]** from retirees' files contained in the CARSON database. That is precisely what *Reno Newspapers* prohibited. <u>129 Nev. at 840, 313 P.3d at 225</u> (holding that PERS cannot be ordered "to create new documents or customized reports by searching for and compiling information from individuals' files"). Yet it is precisely what the majority orders today: PERS is required "to query and search its database to identify, retrieve, and produce responsive records for inspection if the agency maintains public records in an electronic database."

Rather than distinguishing *Reno Newspapers*, the majority cites cases from mostly foreign jurisdictions for the proposition [**24] that the district court's order merely requires PERS to "to search its electronic database" but does not "require the agency to compile a document or report *about* the information contained in the database." This distinction fails for two reasons.

First, the district court's order goes far beyond requiring PERS "to search its electronic database." Contrary to the majority's conclusory assertion, calling this a "search" does not comport with Las Vegas Metropolitan Police Department v. Blackjack Bonding, Inc., wherein we held that "when an agency has a computer program that can readily compile the requested information, the agency is not excused from its duty to produce and disclose that information." 131 Nev. 80, 87, 343 P.3d 608, 613 (2015). Unlike the agency's contractor in Blackjack, PERS does not have a "computer program" that can readily compile the requested information." Id. Rather, to comply with the district court's order, PERS must create a computer program to link information from the 2014 data feed to the current CARSON database. Moreover, ordering PERS to add information to the 2014 raw data feed is tantamount to ordering PERS to create a customized record. The Blackjack court did not order the agency to create anything [**25] of this sort it merely required the agency to produce the requested information, which was readily accessible and did not require compiling information from the individual files. Id. at 87, 343 P.3d at 613, 614. "An agency is not required to organize data to create a record that doesn't exist at the time of the request, but may do so at the discretion of the agency if doing so is reasonable." Nev. State Library, Archives & Pub. Records, Nevada Public Records Act: A Manual for State Agencies 5 (2014); NAC 239.869 ("adopt[ing] by reference the Nevada Public Records Act: A Manual for State Agencies, 2014 edition").

The cases cited by the majority do not impose such an

² The 2013 raw data feed contained retirees' names, so PERS was able to provide the requested information simply by providing an unredacted version of that data feed. By contrast, to add names to the 2014 feed, PERS will have to extract names from the current CARSON database, which has changed since 2014. The majority concedes as much.

expansive duty upon agencies. Creating a computer program is not merely "drawing information from a database." Commonwealth, Dep't of Envtl. Prot. v. Cole, 52 A.3d 541, 547 (Pa. Commw. Ct. 2012). Rather, such action requires the agency to "conduct research," Nat'l Sec. Counselors v. CIA, 898 F. Supp. 2d 233, 270 (D.D.C. 2012), and go beyond its duty under the Public Records Act, see, e.g., People for Am. Way Found. v. U.S. Dep't of Justice, 451 F. Supp. 2d 6, 14 (D.D.C. 2006) ("It is well-settled that . . . FOIA applies only to records which have in fact [been] obtained . . . not to records which merely could have been obtained." (second and third alterations in original) (internal quotation marks omitted)); see also Frank v. U.S. Dep't of Justice, 941 F. Supp. 4, 5 (D.D.C. 1996) (holding that agencies are "not required, by FOIA or by any other statute, to dig [**26] out all the information that might exist, in whatever form or place it might be found, and to create a document that answers plaintiffs question" (emphasis in original)).

Second, even if this were a mere "search" of the CARSON database, that database is confidential, and a court cannot order PERS to "search[] for and compile] information from individuals' files." Reno Newspapers, 129 Nev. at 840, 313 P.3d at 225. Again, the majority's error sterns from a factual confusion. The majority is correct that neither 2014 retiree names nor 2014 pension amounts are confidential, because both sets of information are contained within public documentsnamely, the monthly payment register report (names) and the 2014 raw data [*291] feed (pension amounts). See Reno Newspapers, 129 Nev. at 839, 313 P.3d at 225 (holding that retiree information is not confidential "to the extent that it is maintained in a medium separate from individuals' files"). But no public report links retiree names to the amount of pension that each retiree receives. That information is contained exclusively within retirees' individual files in the CARSON database. Those files are confidential pursuant to NRS 286.110(3), and PERS cannot be ordered to extract information contained exclusively within them. Reno Newspapers, 129 Nev. at 840, 313 P.3d at 225.

Further, to the extent that the majority [**27] suggests that an agency can now search the CARSON database pursuant to NRS 239.005(6)(b), this suggestion is misplaced as a matter of law. NRS 239.005(6)(b) merely defines "official state record" to include, in pertinent part, "information stored on magnetic tape or computer." NRS 239.005(6)(b) is not in conflict with NRS 286.110(3), because nothing in the statutory scheme suggests that a state record deemed confidential under NRS

<u>286.110(3)</u> would lose its confidential character merely because of the medium in which it is stored.

II.

My second objection to the majority's decision is that it amounts to a judicial transformation of the Public Records Act. The majority of this court agrees with NPRI and the district court that disclosure of that information is in the public interest, and that PERS has the technology to readily compile the requested information, so it imposes a duty upon PERS to create a report customized containing the requested information.3 But that is not how the Public Records Act is written. See NRS 239.010(1) (providing that "all public books and public records of a governmental agency must be open at all times during office hours to inspection"). The Legislature, no doubt, had the option of creating an act along the lines of what the majority holds today—that [**28] is, one requiring agencies to create customized reports whenever a court determines that the agency has the technology to readily compile the requested information. The Legislature declined to write such an act, perhaps because it would give an inordinate amount of discretion to courts, who, as this case demonstrates, are not adept at making such technological determinations.

In sum, the majority's opinion today contravenes the plain language of the Public Records Act, it directly violates <u>NRS 286.110(3)</u>, it exposes official state records otherwise declared confidential to agency search simply because they are stored on a computer, it inexplicably departs from *stare decisis* by overruling *Reno Newspapers*, and it sets Nevada apart from other jurisdictions that have considered this issue. I see no reason to depart so drastically from these binding and persuasive authorities.

Therefore, I dissent.

/s/ Stiglich, J.

Stiglich

We concur,

³ The majority, like the district court below, appears to fault PERS for removing pensioners' names from its 2014 raw data feed following our decision in *Reno Newspapers*. I am perplexed as to why PERS should be faulted for adhering to this court's decision while simultaneously protecting pensioners' information to the greatest extent possible.

/s/ Hardesty, J.		
Hardesty		
/s/ Parraguirre, J.		
Parraguirre		

End of Document

Reno Newspapers, Inc. v. Haley

Supreme Court of Nevada

July 1, 2010, Filed

No. 51697

Reporter

234 P.3d 922 *; 2010 Nev. LEXIS 25 **; 126 Nev. Adv. Rep. 23

RENO NEWSPAPERS, INC., A NEVADA CORPORATION, Appellant, vs. MIKE HALEY, WASHOE COUNTY SHERIFF; WASHOE COUNTY SHERIFF'S OFFICE; AND COUNTY OF WASHOE, STATE OF NEVADA, Respondents.

Prior History: [**1] Appeal from a district court order denying a petition for a writ of mandamus in an action seeking access to public records. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Disposition: Reversed and remanded with instructions.

Core Terms

confidential, records, concealed firearm, permittee, revocation, suspension, permits, post-permit, public record, applications, district court, balancing, sheriff, inspection, permit holder, privacy, confidential information, law enforcement, documents, redaction, nondisclosure, outweigh, revoke

Case Summary

Procedural Posture

The Second Judicial District Court, Washoe County, Nevada, denied appellant newspaper's petition for a writ of mandamus to compel respondent sheriff to allow the newspaper to inspect and copy concealed firearms permit records. The district court found that all postapplication records were confidential under Nev. Rev. Stat. § 202.3662. The newspaper appealed.

Overview

The sheriff maintained that the district court properly applied <u>Nev. Rev. Stat. § 202.3662</u> when it determined that the permit and the name of the permit holder were confidential. The supreme court found that if the

Legislature had intended post-application information about a permit's status to be confidential, it could and would have stated that, but it did not. According to the Nevada Public Records Act's, Nev. Rev. Stat. §§ 239.001 et seg., rules of construction requiring a narrow interpretation of any exception to openness and the Legislature's failure to explicitly grant confidentiality to a permittee, the name of a permittee and post-permit records of investigation, suspension, or revocation of a concealed firearms permit were not explicitly contained within the scope of the confidentiality exception of § 202.3662(1). The sheriff did not meet his burden of proof to show that the government interest clearly outweighed the public's right to access. A narrow reading of § 202.3662 mandated that the supreme court favor public access over confidentiality. Not all postpermit records were public documents but may contain confidential information subject to redaction.

Outcome

The judgment was reversed and remanded to the district court with instructions to evaluate the contents of the post-permit investigation, suspension, or revocation records sought by the newspaper to determine whether information within the requested records contained confidential information; if so, they should be redacted and the remaining records made available to the newspaper.

LexisNexis® Headnotes

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

HN1 ! Methods of Disclosure, Public Inspection

The Nevada Public Records Act, Nev. Rev. Stat. §§

<u>239.001 et seq.</u>, considers all records to be public documents available for inspection unless otherwise explicitly made confidential by statute or by a balancing of public interests against privacy or law enforcement justification for nondisclosure.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

Criminal Law & Procedure > ... > Firearms Licenses > Holders > Carrying & Concealed Permits

Governments > Police Powers

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

<u>HN2</u>[基] Methods of Disclosure, Public Inspection

Although *Nev. Rev. Stat.* § 202.3662 is plain and unambiguous in its declaration that an application for a concealed firearms permit is confidential, the identity of the permittee of a concealed firearms permit, and any post-permit records of investigation, suspension, or revocation, are not declared explicitly to be confidential under § 202.3662 and are, therefore, public records under *Nev. Rev. Stat.* § 239.010. However, since post-permit records of investigation, suspension, or revocation may contain information from the application for a concealed firearms permit that is considered confidential under *Nev. Rev. Stat.* § 202.3662, post-permit records of investigation of a permit holder, or suspension or revocation of a permit holder's permit, may be subject to redaction under § 239.010(3).

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Civil Procedure > Appeals > Standards of Review > De Novo Review

<u>HN3</u>[基] Standards of Review, Abuse of Discretion

Ordinarily, a district court denial of a writ petition is reviewed for an abuse of discretion. However, when the writ petition includes questions of statutory construction, the Nevada Supreme Court will review the district court's decision de novo.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

HN4[♣] Methods of Disclosure, Public Inspection

Under the Nevada Public Records Act (Act), Nev. Rev. Stat. §§ 239.001 et seq., all public records generated by government entities are public information and are subject to public inspection unless otherwise declared to be confidential, Nev. Rev. Stat. § 239.010. The purpose of the Act is to foster principles of democracy by allowing the public access to information about government activities, Nev. Rev. Stat. § 239.001(1). In 2007, the Legislature amended the Act to ensure the presumption of openness, and provided that all statutory provisions related to the Act must be construed liberally in favor of the Act's purpose, § 239.001(2). In contrast, any exemption, exception, or a balancing of interests that restricts the public's right to access a governmental entity's records must be construed narrowly, § 239.001(3). Thus, the Nevada Supreme Court will presume that all public records are open to disclosure unless either (1) the Legislature has expressly and unequivocally created an exemption or exception by statute, or (2) balancing the private or law enforcement interests for nondisclosure against the general policy in favor of an open and accessible government requires restricting public access to government records. And, the burden is on the government to prove confidentiality by a preponderance of the evidence, Nev. Rev. Stat. § 239.0113(2).

Criminal Law & Procedure > ... > Firearms Licenses > Holders > Carrying & Concealed Permits

Governments > Police Powers

HN5 | Holders, Carrying & Concealed Permits

See Nev. Rev. Stat. § 202.3662.

Criminal Law & Procedure > ... > Firearms Licenses > Holders > Applications

Governments > Police Powers

Criminal Law & Procedure > ... > Firearms Licenses > Holders > Carrying & Concealed Permits

HN6[♣] Holders, Applications

The only affirmative grant of confidentiality appears in subsection 1 of *Nev. Rev. Stat.* § 202.3662. This subsection, by its terms, extends the protection of confidentiality only to applications, information within the applications, and information related to the investigation of the applicant. The statute is notably silent, however, as to whether the name of a permittee, or records generated as part of an investigation, suspension, or revocation of the permit, are confidential. Additionally, Nevada's concealed firearms statutes repeatedly recognize a difference between an applicant and a permittee.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

HN7 ▶ Methods of Disclosure, Public Inspection

Nev. Rev. Stat. § 239.001 says that open records are the rule, and that exceptions to the rule are narrowly construed: 1. The purpose of this chapter is to foster democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law; 2. The provisions of this chapter must be construed liberally to carry out this important purpose; and 3. Any exemption, exception or balancing of interests which limits or restricts access to public books and records by members of the public must be construed narrowly.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

Criminal Law & Procedure > ... > Firearms

Licenses > Holders > Carrying & Concealed Permits

Governments > Police Powers

HN8 Methods of Disclosure, Public Inspection

The narrow construction of confidentiality required by the Nevada Public Records Act (Act), Nev. Rev. Stat. §§ 239.001 et seg., and the Legislature's distinction between an applicant and a permittee, does not extend a statutory grant of confidentiality for an applicant to a permittee. The status of an applicant changes to that of a permittee when the permit issues as demonstrated by the concealed firearms statutory scheme and the plain omission of post-permit records from confidentiality in Nev. Rev. Stat. § 202.3662. According to the Act's rules of construction requiring a narrow interpretation of any exception to openness and the Legislature's failure to explicitly grant confidentiality to a permittee, the name of a permittee and post-permit records of investigation, suspension, or revocation of a concealed firearms permit are not explicitly contained within the scope of the confidentiality exception of § 202.3662(1).

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

HN9 Methods of Disclosure, Public Inspection

In addition to statutory exceptions, the Nevada Public Records Act (Act), Nev. Rev. Stat. §§ 239.001 et seg., acknowledges that confidentiality may be granted through a balancing of interests. Prior to the amendment of the Act, the Nevada Supreme Court routinely employed a balancing test when a statute failed to unambiguously declare certain documents to be confidential. This balancing test equally weighed the general policy in favor of open government against privacy or law enforcement policy justifications for nondisclosure. However, in light of the Legislature's declaration of the rules of construction of the Act-requiring the purpose of the Act to be construed liberally and any restriction to government documents to be construed narrowly--the balancing test now requires a narrower interpretation of private or government interests promoting confidentiality or nondisclosure to be weighed against the liberal policy for an open and accessible government, Nev. Rev. Stat. § 239.001. The balancing test must be employed in accordance with the underlying policies and rules of construction required by the Nevada Public Records Act.

Administrative Law > Governmental Information > Personal Information > General Overview

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

<u>HN10</u>[Governmental Information, Personal Information

By enacting the Nevada Public Records Act (Act), <u>Nev. Rev. Stat.</u> §§ 239.001 et seq., the Legislature has clearly evidenced its intent to promote principles of democracy by ensuring an open government, <u>Nev. Rev. Stat.</u> §§ 239.001; 239.010. Therefore, the Act ensures that the government is held accountable for its actions by preventing secrecy. Nonetheless, an individual's privacy is also an important interest, especially because private and personal information may be recorded in government files.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

<u>HN11</u>[基] Methods of Disclosure, Public Inspection

Because Nev. Rev. Stat. § 202.3662 is silent concerning confidentiality of post-permit investigation, suspension, or revocation records, such records are open to public inspection unless they contain information that is expressly declared confidential by statute. The Nevada Public Records Act, Nev. Rev. Stat. §§ 239.001 et seq., addresses this situation and recognizes that public documents may contain confidential information. In the event that public records contain confidential information, the Legislature has provided that the records should be redacted and the remaining document open to inspection: A government entity that has legal custody or control of a public book or record shall not deny a request made pursuant to subsection 1 to inspect or copy a public book or record on the basis that the requested public book or record contains information that is confidential if the governmental entity can redact, delete, conceal or

separate the confidential information from the information included in the public book or record that is not otherwise confidential, *Nev. Rev. Stat.* § 239.010(3).

Counsel: Burton Bartlett & Glogovac, Ltd., and Scott A. Glogovac, Reno, for Appellant.

Richard A. Gammick, District Attorney, and Nathan J. Edwards, Deputy District Attorney, Washoe County, for Respondents.

Judges: Hardesty, J. We concur: Parraguirre, C.J., Douglas, J., Cherry, J., Saitta, J., Gibbons, J., Pickering, J.

Opinion by: Hardesty

Opinion

[*923] BEFORE THE COURT EN BANC.

By the Court, HARDESTY, J.:

In this appeal, we consider whether <u>NRS 202.3662</u>, which provides that an application for a concealed firearms permit and the sheriff's related investigation of the applicant are confidential, includes within its scope the identity of the permittee of a concealed firearms permit and any records of suspension or revocation generated after a permit is issued.

HN1 The Nevada Public Records Act considers all records to be public documents available for inspection unless otherwise explicitly made confidential by statute or by a balancing of public interests against privacy or law enforcement justification for [**2] nondisclosure.

unambiguous in its declaration that an application for a concealed firearms permit is confidential, we conclude that the identity of the permittee of a concealed firearms permit, and any post-permit records of investigation, suspension, or revocation, are not declared explicitly to be confidential under NRS 202.3662 and are, therefore, public records under NRS 239.010. However, since post-permit records of investigation, suspension, or revocation may contain information from the application for a concealed firearms permit that is considered confidential under NRS 202.3662, we conclude that post-permit records of investigation of a permit holder, or suspension or revocation of a permit holder's permit, may be subject to redaction under NRS 239.010(3).

FACTS

Appellant Reno Newspapers, Inc., owns and operates the Reno Gazette-Journal (RGJ), a daily newspaper published in Reno, Washoe County, Nevada. Respondent Washoe County Sheriff's Office is an agency of respondent County of Washoe, State of Nevada, and respondent Mike Haley is the Washoe County Sheriff.

Residents of Washoe County may apply for a concealed firearms permit from Haley. Haley [**3] oversees the administration and regulation of concealed firearms permits, including the application process, the investigation of applicants before issuance or denial of a permit, the issuance of the permit, and, if appropriate, the suspension or revocation of a permit.

In March 2008, the RGJ received information that Haley had suspended or revoked a concealed firearms permit issued to Nevada Governor Jim Gibbons. Allegedly, the suspension or revocation was based on inaccuracies in the application that Governor Gibbons submitted. Consequently, the RGJ began publishing news articles discussing the possible suspension or revocation of Governor Gibbons's concealed firearms permit.

[*924] As part of its news coverage, a reporter with the RGJ requested all records "detailing the status of any and all [concealed firearms] permits issued by the Washoe County Sheriff's Office to Gov. Jim Gibbons," and all "documents detailing action taken by the Washoe County Sheriff's Office on that permit, including a decision to suspend, revoke, or hold the permit." The reporter acknowledged that an application for a concealed firearms permit and any investigations related to the application are confidential. However, [**4] the reporter stressed that the RGJ sought information regarding the post-application permit process and not the application.

Haley denied the RGJ's request and refused to provide any information regarding Governor Gibbons's permit. Haley claimed that the permit records are confidential under <u>NRS 202.3662</u> and that public policy and the need for privacy outweighs the need for public disclosure.

The RGJ filed a petition for writ of mandamus with the district court to compel Haley to allow the RGJ to inspect and copy the requested records. Following a hearing, the district court denied the petition for a writ of mandamus. The district court determined that because

NRS 202.3662 makes confidential "all information contained within [an] application [for a permit]," any records related to a suspended or revoked permit would necessarily contain information from the application. Therefore, the district court deemed the entirety of the post-application records to be confidential and denied the petition for a writ of mandamus. The RGJ appeals.

DISCUSSION

In resolving this appeal, we consider whether <u>NRS 202.3662</u>, which makes applications for concealed firearms permits confidential, includes within [**5] its scope the identity of the permittee of a concealed firearms permit and any records of investigations, suspensions, or revocations that are generated after the permit has issued. To determine <u>NRS 202.3662</u>'s scope, this court must first construe that statute in light of Nevada's Public Records Act.

Based on that analysis, this court will address whether <u>NRS 202.3662</u>'s confidentiality scope includes (1) the permit holder's name; and (2) records of investigation of a permit holder, or suspension or revocation action taken against a permit holder's permit. Then, we will address whether the private and law enforcement interests in restricting access to concealed weapons permits outweigh the general policy of an open and accessible government.

Standard of review

HN3 ordinarily, a district court denial of a writ petition is reviewed for an abuse of discretion. Las Vegas Taxpayer Comm. v. City Council, 125 Nev., , 208 P.3d 429, 433-34 (2009). However, when the writ petition includes questions of statutory construction, this court will review the district court's decision de novo. Id.

Nevada Public Records Act

HN4[1] Under the Nevada Public Records Act (the Act), all public records generated by government [**6] entities are public information and are subject to public inspection unless otherwise declared to be confidential. NRS 239.010. The purpose of the Act is to foster principles of democracy by allowing the public access to information about government activities. NRS 239.001(1); see DR Partners v. Bd. of County Comm'rs, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000). In 2007, the

Legislature amended the Act to ensure the presumption of openness, and provided that all statutory provisions related to the Act must be construed liberally in favor of the Act's purpose. NRS 239.001(2); 2007 Nev. Stat., ch. 435, § 2, at 2061. In contrast, any exemption, exception, or a balancing of interests that restricts the public's right to access a governmental entity's records must be construed narrowly. NRS 239.001(3); 2007 Nev. Stat., ch. 435, § 2, at 2061. Thus, this court will presume that all public records are open to disclosure unless either (1) the Legislature has expressly and unequivocally created an exemption or exception by statute, see Cowles Pub. Co. v. Kootenai County Bd., 144 Idaho 259, 159 P.3d 896, 899 (Idaho 2007) (holding that unless public records are "expressly exempted [*925] by statute," they are presumed [**7] to be open to inspection by the public); Kroeplin v. DNR, 2006 WI App 227, 297 Wis. 2d 254, 725 N.W.2d 286, 292 (Wis. Ct. App. 2006) (holding that "exceptions to the open records law are to be narrowly construed; unless the exception is explicit and unequivocal, we will not hold it to be an exception"); or (2) balancing the private or law enforcement interests for nondisclosure against the general policy in favor of an open and accessible government requires restricting public access to government records. See Donrey of Nevada Bradshaw, 106 Nev. 630, 635-36, 798 P.2d 144, 147-48 (1990). And, in unity with the underlying policy of ensuring an open and accountable government, the burden is on the government to prove confidentiality by a preponderance of the evidence. NRS 239.0113(2).

Scope of the statutory exception creating confidentiality within NRS 202.3662

The parties dispute the scope of NRS 202.3662, which governs the "[c]onfidentiality of information about [an] applicant for [a concealed firearms] permit and [a] permittee." Haley argues that because an application for a concealed firearms permit and information related to the applicant are confidential under NRS 202.3662, any information generated in a permit [**8] that is derived from the application would remain confidential, including the name of both the applicant and the ultimate permittee. Therefore, Haley maintains that the district court properly applied NRS 202.3662 when it determined that the permit and the name of the permit holder were confidential. We disagree.

We recognize that <u>NRS 202.3662</u> clearly and unambiguously creates an exception to the general rule that concealed firearms permit records are public.

However, we have not addressed whether the confidentiality provisions of <u>NRS 202.3662</u> extend to the name of the permittee or records of investigation, suspension, or revocation of issued permits; therefore, resolution of this appeal requires this court to interpret the statute.

NRS 202.3662 provides, in pertinent part, as follows:

<u>HN5</u>[♣] 1. Except as otherwise provided . . .

- (a) An application for a permit, and all information contained within that application; and
- (b) All information provided to a sheriff or obtained by a sheriff in the course of his investigation of an applicant, are confidential.
- 2. Any records regarding an applicant or permittee may be released to a law enforcement agency for the purpose of conducting an investigation [**9] or prosecution.
- 3. Statistical abstracts of data compiled by a sheriff regarding permits applied for or issued pursuant to NRS 202.3653 to 202.369, inclusive, including, but not limited to, the number of applications received and permits issued, may be released to any person.

HN6 The only affirmative grant of confidentiality appears in <u>subsection 1 of NRS 202.3662</u>. This subsection, by its terms, extends the protection of confidentiality only to applications, information within the applications, and information related to the investigation of the applicant.

The statute is notably silent, however, as to whether the name of a permittee, or records generated as part of an investigation, suspension, or revocation of the permit, are confidential. Additionally, Nevada's concealed firearms statutes repeatedly recognize a difference between an applicant and a permittee. NRS 202.3662(2) ("Any records, regarding an applicant or permittee may be released "); NRS 202.3657(3) ("The sheriff shall deny an application or revoke a permit if he determines that the applicant or permittee:"); NRS 202.3657(4) ("The sheriff may deny an application or revoke a permit if he receives a sworn affidavit [**10] . . . that the applicant or permittee has or may have committed an offense"); compare NRS 202.3665(1) ("If a sheriff who is processing an application for a permit receives notification . . . that the applicant has been: "), with NRS 202.3665(2) ("If a sheriff who has issued a permit to a permittee receives notification . . . that the permittee has been: ").

Haley makes two arguments to extend to permittees the limited grant of confidentiality [*926] for applicants in NRS 202.3662(1). First, he suggests that the Legislature must have intended <u>subsection 1</u> to apply to both applications and permits because, in providing for the release of statistical abstracts of data "to any person," <u>subsection 3 of NRS 202.3662</u> expressly refers to "permits applied for or issued" and "the number of applications received and permits issued." Second, he argues that because permits grow out of applications and applications are confidential, permits must be confidential too. We disagree.

Whatever merit Haley's arguments might have if we were to read <u>NRS 202.3662</u> in isolation from the Act, they fail in light of the explicit rules of construction stated in <u>HN7</u> NRS 239.001, which says that open records [**11] are the rule, and that exceptions to the rule are narrowly construed:

- 1. The purpose of this chapter is to foster democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law;
- 2. The provisions of this chapter must be construed liberally to carry out this important purpose; and
- 3. Any exemption, exception or balancing of interests which limits or restricts access to public books and records by members of the public must be construed narrowly.

Given this unmistakable declaration of purpose, we cannot credit Haley's argument that the reference to "permits issued or applied for" in <u>subsection 3</u> broadens the grant of confidentiality in <u>subsection 1</u> from "applications" to permits. If the Legislature had intended post-application information about a permit's status to be confidential, it could and would have stated that, but it did not.

Despite Haley's argument that the identity of a permittee is confidential because it is the same name as an applicant, which is confidential, <code>HN8[]</code> the narrow construction of confidentiality required by the Act and the Legislature's distinction between an applicant and a permittee, does <code>[**12]</code> not extend a statutory grant of confidentiality for an applicant to a permittee. The status of an applicant changes to that of a permittee when the permit issues as demonstrated by the concealed firearms statutory scheme and the plain omission of post-permit records from confidentiality in <code>NRS 202.3662</code>.

According to the Act's rules of construction requiring a

narrow interpretation of any exception to openness and the Legislature's failure to explicitly grant confidentiality to a permittee, we must conclude that the name of a permittee and post-permit records of investigation, suspension, or revocation of a concealed firearms permit are not explicitly contained within the scope of the confidentiality exception of NRS 202.3662(1).

Balancing of interests--general policy in favor of open government against privacy or law enforcement policy justifications for nondisclosure

HN9[1] In addition to statutory exceptions, the Nevada Public Records Act acknowledges that confidentiality may be granted through a balancing of interests. Prior to the amendment of the Act, this court routinely employed a balancing test when a statute failed to unambiguously declare certain documents to be confidential. Donrey of Nevada v. Bradshaw, 106 Nev. 630, 635-36, 798 P.2d <u>144, 147-48 (1990)</u>. [**13] This balancing test equally weighed the general policy in favor of open government against privacy or law enforcement policy justifications for nondisclosure. See id. However, in light of the Legislature's declaration of the rules of construction of the Act--requiring the purpose of the Act to be construed liberally and any restriction to government documents to be construed narrowly--the balancing test under Bradshaw now requires a narrower interpretation of private or government interests promoting confidentiality or nondisclosure to be weighed against the liberal policy for an open and accessible government. See NRS 239.001. We emphasize that the balancing test must be employed in accordance with the underlying policies and rules of construction required by the Nevada Public Records Act. See id.

We have previously concluded that, <code>HN10[]</code> by enacting the Act, the Legislature has clearly evidenced its intent to promote principles [*927] of democracy by ensuring an open government. <code>NRS 239.001</code>; <code>NRS 239.001</code>; <code>NRS 239.010</code>; <code>DR Partners, 116 Nev. at 621, 6 P.3d at 468</code>. Therefore, the Act ensures that the government is held accountable for its actions by preventing secrecy. <code>DR Partners, 116 Nev. at 621, 6 P.3d at 468</code>.

Nonetheless, [**14] we recognize that an individual's privacy is also an important interest, especially because private and personal information may be recorded in government files. See, e.g., CBS, Inc. v. Block, 42 Cal. 3d 646, 230 Cal. Rptr. 362, 725 P.2d 470 (Cal. 1986). In considering the privacy arguments made by Haley on behalf of permit holders, we consider the argument

advanced by the government in this case. See NRS 239.0113(2); DR Partners, 116 Nev. at 621, 6 P.3d at 468 (stressing that the burden of proof is on the government agency to show why information contained in a record should not be disclosed to the public). Haley argues that if permit records were available to the public, permit holders and the public would be at risk because potential attackers would know that they were armed, or may burglarize their homes to steal their weapons. ¹

Although we have not previously addressed the concerns raised by Haley, we find the California Supreme Court's [**15] analysis in Block to be persuasive. In Block, the California Supreme Court considered whether applications and licenses for concealed firearms were confidential under California law. 725 P.2d at 471. To resolve the case, the court balanced the public's interests in access to information with individual privacy interests. Id. at 473-74. One argument advanced by the defendant was that releasing the concealed firearms records would allow potential attackers to more carefully plan a crime. Id. at 474. However, the court concluded that the "[d]efendants' concern . . . is conjectural at best. . . . A mere assertion of possible endangerment does not 'clearly outweigh' the public interest in access to these records." Id. The court also determined that public access may actually deter crimes and does not make a celebrity or other public figure any more public merely because their records are public. Id. at 474 n.9.

In this case, like in *Block*, Haley has provided no evidence to support his argument that access to records relating to concealed firearms permits would increase crime or subject a permit holder or the public to an unreasonable risk of harm. Therefore, because Haley bases his argument [**16] on the supposition that access would increase the vulnerability of permit holders, we conclude that Haley has not met his burden of proof to show that the government interest clearly outweighs the public's right to access. And because Haley has not met his burden of proof, a narrow reading of *NRS* 202.3662 mandates that we favor public access over confidentiality.

Therefore, we conclude that Haley has not met his

burden to show that the law enforcement or individual privacy concerns outweigh the public's right to access the identity of the permit holder, and in compliance with the policies of the Nevada Public Records Act, the identity of the permittee and any post-permit records identifying the permittee are not confidential.

Not all post-permit records are public documents but may contain confidential information subject to redaction

Next, we consider whether all post-permit records of investigation, suspension, or revocation are confidential. Haley also asserts that all post-permit records are confidential because they, too, may contain information derived from an application for a concealed firearms permit, which is considered confidential under <u>NRS</u> <u>202.3662</u>. Therefore, he argues, [**17] the entire record is confidential. We disagree.

HN11[1] Because NRS 202.3662 is silent concerning the confidentiality of post-permit investigation, suspension, or revocation records, we must conclude that such records are open to public inspection unless they contain information that is expressly declared confidential by statute. The Nevada Public Records Act [*928] addresses this situation and recognizes that public documents may contain confidential information. In the event that public records contain confidential information, the Legislature has provided that the records should be redacted and the remaining document open to inspection:

A government entity that has legal custody or control of a public book or record shall not deny a request made pursuant to subsection 1 to inspect or copy a public book or record on the basis that the requested public book or record contains information that is confidential if the governmental entity can redact, delete, conceal or separate the confidential information from the information included in the public book or record that is not otherwise confidential.

NRS 239.010(3)

In this case, an investigative report was generated regarding Governor Gibbons's issued concealed [**18] firearms permit. Although we determine that the district court erred by making the entirety of the post-permit investigation, suspension, or revocation record sought by the RGJ confidential, we recognize that there may be information included within the record that may be confidential. For example, if the investigative record

¹ Haley's law enforcement and public policy argument for confidentiality is limited to the identity of the permittee and does not address any other law enforcement or public policy concerns supporting confidentiality for records of investigation, suspension, or revocation of a permit.

contains "information provided to a sheriff or obtained by a sheriff in the course of his investigation [as] an applicant," the information generated prior to the issuance of the permit and as part of the application process would remain confidential. *NRS* 202.3662(1)(b). Therefore, the district court must review the post-permit investigation, suspension, or revocation record to determine whether it contains information within either the application or the post-application investigation that is explicitly made confidential under *NRS* 202.3662. In such event, the district court must order the redaction of confidential information from the post-permit record under *NRS* 202.3662(1)(b).

Accordingly, we reverse the district court's order denying the petition for a writ of mandamus and remand the case to the district court with instructions to evaluate the contents of the [**19] post-permit investigation, suspension, or revocation records sought by the RGJ to determine whether information within the requested records contains confidential information under NRS 202.3662. If the district court determines that the requested records contain such confidential information, the records should be redacted and the remaining records made available to the RGJ for inspection and copying.

/s/ Hardesty, J.

Hardesty

We concur:

/s/ Parraguirre, C.J.

Parraguirre

/s/ Douglas, J.

Douglas

/s/ Cherry, J.

Cherry

/s/ Saitta, J.

Saitta

/s/ Gibbons, J.

Gibbons

/s/ Pickering, J.

Pickering

End of Document

Reno Newspapers, Inc. v. Gibbons

Supreme Court of Nevada December 15, 2011, Filed No. 53360

Reporter

127 Nev. 873 *; 266 P.3d 623 **; 2011 Nev. LEXIS 110 ***; 127 Nev. Adv. Rep. 79

RENO NEWSPAPERS, INC., A NEVADA CORPORATION, Appellant, vs. JIM GIBBONS, GOVERNOR OF THE STATE OF NEVADA, AND THE STATE OF NEVADA, EX REL. OFFICE OF THE GOVERNOR OF THE STATE OF NEVADA, Respondents.

Prior History: [***1] Appeal from a district court order granting in part and denying in part a petition for a writ of mandamus challenging the former Nevada Governor's refusal to provide access to or information regarding certain e-mail communications. First Judicial District Court, Carson City; James Todd Russell, Judge.

Disposition: Reversed and remanded with instructions.

Core Terms

log, confidential, e-mails, district court, records, state entity, requesting party, public record, disclosure, withheld, nondisclosure, requested records, in camera, withholding, prelitigation, adversarial, provisions, balancing, mandamus, cases, entity, confidential information, deliberative process, required to provide, burden of proof, records request, commencement, asserts, contest, lawsuit

Case Summary

Procedural Posture

Appellant newspaper sought review of an order from the First Judicial District Court, Carson City (Nevada), which denied in part its petition for a writ of mandamus against respondents, a former governor and the State of Nevada, seeking access to e-mails, pursuant to the Nevada Public Records Act (NPRA), between the governor and 10 individuals.

The newspaper made a records request for e-mail communications sent over a six-month time period between the governor and 10 individuals. The State denied the newspaper's request for the e-mails or a log identifying, for each e-mail, the sender, all recipients, the message date, and the legal basis upon which the State was denying access. The newspaper filed a petition for a writ of mandamus, seeking access to the e-mails or, in the alternative, to receive a detailed log or index. The trial court denied the newspaper's request for a log or index. It granted the petition as to six e-mails and denied it as to 98 e-mails. On appeal, the court held that the trial court erred in denying the newspaper's request for a log containing a general factual description of each of the records withheld and a specific explanation for nondisclosure. The State failed to meet its prelitigation responsibilities under Nev. Rev. Stat. § 239.0107(1)(d). Merely pinning a string of citations to a boilerplate declaration of confidentiality did not satisfy obligation the State's prelitigation under 239.0107(1)(d)(2) to cite to specific authority that made the e-mail, or a part thereof, confidential.

Outcome

The court reversed the order denying in part the newspaper's petition for a writ of mandamus and remanded the case to the trial court with instructions to direct the State to provide the newspaper with a log containing a general factual description of each of the 98 e-mails withheld and a specific explanation for nondisclosure. The trial court was then to determine whether the e-mails were subject to disclosure.

LexisNexis® Headnotes

Overview

Administrative Law > ... > Freedom of

Information > Defenses & Exemptions From Public Disclosure > General Overview

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Vaughn Indexes

<u>HN1</u>[♣] Freedom of Information, Defenses & Exemptions From Public Disclosure

Based upon the provisions of the Nevada Public Records Act (NPRA), NPRA jurisprudence, and elementary notions of fairness inherent in the adversarial system, a state entity withholding requested records is required to provide the requesting party with a log containing a factual description of each withheld record and a legal basis for nondisclosure. In most cases, the log should contain, at a minimum, a general factual description of each withheld record and a specific explanation for nondisclosure.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > General Overview

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

<u>HN2</u>[♣] Freedom of Information, Defenses & Exemptions From Public Disclosure

As mandated by <u>Nev. Rev. Stat. § 239.0107(1)(d)</u>, if a state entity denies a public records request prior to the commencement of litigation, it must provide the requesting party with notice of its claim of confidentiality and citation to legal authority that justifies nondisclosure.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Civil Procedure > Appeals > Standards of

Review > De Novo Review

HN3[♣] Standards of Review, Abuse of Discretion

Although a trial court's denial of a writ of mandamus petition is ordinarily reviewed for an abuse of discretion, when a petition entails questions of law, an appellate court reviews a trial court's decision de novo.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

HN4 ≥ Methods of Disclosure, Public Inspection

The Nevada Public Records Act (NPRA) provides that all public books and public records of governmental entities must remain open to the public, unless otherwise declared by law to be confidential. <u>Nev. Rev. Stat. § 239.010(1)</u>. The Nevada Legislature has declared that the purpose of the NPRA is to further the democratic ideal of an accountable government by ensuring that public records are broadly accessible. <u>Nev. Rev. Stat. § 239.001(1)</u>. Thus, the provisions of the NPRA are designed to promote government transparency and accountability.

Administrative Law > ... > Freedom of Information > Enforcement > Burdens of Proof

Evidence > Burdens of Proof > Preponderance of Evidence

Governments > Legislation > Interpretation

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

HN5 ★] Enforcement, Burdens of Proof

The provisions of the Nevada Public Records Act (NPRA) must be liberally construed to maximize the public's right of access. *Nev. Rev. Stat.* § 239.001(1)-(2) (2007). Conversely, any limitations or restrictions on the public's right of access must be narrowly construed. *Nev. Rev. Stat.* § 239.001(3). If a state entity withholds records, it bears the burden of proving, by a preponderance of the evidence, that the records are confidential. *Nev. Rev. Stat.* § 239.0113.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

Governments > Courts > Common Law

<u>HN6</u>[♣] Freedom of Information, Methods of Disclosure

A balancing of the interests involved is necessary before any common law limitations on the disclosure of public records can be applied.

Administrative Law > ... > Defenses & Exemptions
From Public Disclosure > Interagency
Memoranda > Deliberative Process Privilege

<u>HN7</u>[♣] Interagency Memoranda, Deliberative Process Privilege

The requirement for showing that the deliberative process privilege applies to public records is that the withheld records must be both "predecisional" and "deliberative."

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

<u>HN8</u>[♣] Freedom of Information, Methods of Disclosure

When a requested record is not explicitly made confidential by a statute, the balancing test set forth in Bradshaw must be employed. Any limitation on the general disclosure requirements of *Nev. Rev. Stat.* § 239.010 must be based upon a balancing or "weighing" of the interests of nondisclosure against the general policy in favor of open government.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

<u>HN9</u>[♣] Methods of Disclosure, Public Inspection

Under the Nevada Public Records Act (NPRA), all

public records generated by government entities are public information and are subject to public inspection unless otherwise declared to be confidential. Under the NPRA, open records are the rule, and any nondisclosure of records is the exception.

Administrative Law > ... > Freedom of Information > Enforcement > Burdens of Proof

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > General Overview

HN10 L Enforcement, Burdens of Proof

The balancing test under Bradshaw requires a narrow interpretation of private or government interests promoting confidentiality or nondisclosure to be weighed against the liberal policy for an open and accessible government. In order for requested records to be withheld under this balancing test, a state entity bears the burden to prove that its interest in nondisclosure clearly outweighs the public's right to access.

Administrative Law > ... > Freedom of Information > Enforcement > Burdens of Proof

Evidence > Burdens of Proof > Preponderance of Evidence

Governments > Legislation > Interpretation

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > General Overview

HN11[♣] Enforcement, Burdens of Proof

A framework has been established for testing claims of confidentiality under the backdrop of the Nevada Public Records Act's (NPRA's) declaration that its provisions must be construed liberally to facilitate access to public records, *Nev. Rev. Stat.* § 239.001(2), and that any restrictions on access must be construed narrowly. *Nev. Rev. Stat.* § 239.001(3). First, a court begins with the presumption that all government-generated records are open to disclosure. A state entity therefore bears the burden of overcoming this presumption by proving, by a preponderance of the evidence, that the requested records are confidential. *Nev. Rev. Stat.* § 239.0113.

Next, in the absence of a statutory provision that explicitly declares a record to be confidential, any limitations on disclosure must be based upon a broad balancing of the interests involved, and the state entity bears the burden to prove that its interest in nondisclosure clearly outweighs the public's interest in access. Finally, caselaw stresses that the state entity cannot meet this burden with a non-particularized showing or by expressing hypothetical concerns.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Vaughn Indexes

HN12 Methods of Disclosure, Vaughn Indexes

A Vaughn index is a submission commonly utilized in cases involving the Freedom of Information Act (FOIA), the federal analog of the Nevada Public Records Act (NPRA). This submission typically contains detailed public affidavits identifying the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption. A Vaughn index is designed to preserve a fair adversarial proceeding when a lawsuit is brought after the denial of a FOIA request.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Vaughn Indexes

HN13 L Methods of Disclosure, Vaughn Indexes

Although a Vaughn index is often a vital method for resolving the tension between the government's interest in keeping certain records confidential and the requesting party's need for enough information to meaningfully contest a claim of confidentiality, a Vaughn index is not necessarily required in all cases. For instance, when a requesting party has sufficient information to present a full legal argument, there is no need for a Vaughn index.

Administrative Law > ... > Freedom of Information > Enforcement > Burdens of Proof

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

HN14 Enforcement, Burdens of Proof

The Nevada Public Records Act (NPRA) expressly provides that its provisions must be construed liberally to ensure the presumption of openness and explicitly declares that any restriction on disclosure must be construed narrowly. *Nev. Rev. Stat.* § 239.001(2)-(3). In harmony with the overarching purposes of the NPRA, the burden of proof is imposed on a state entity to prove that a withheld record is confidential. *Nev. Rev. Stat.* § 239.0113.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > General Overview

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Vaughn Indexes

<u>HN15</u> **L** Freedom of Information, Methods of Disclosure

It is anomalous and inequitable to deny a requesting party basic information about withheld public records, thereby relegating it to advocating from a nebulous position where it is powerless to contest a claim of confidentiality. Requiring a requesting party to blindly argue for disclosure not only runs contrary to the spirit of the Nevada Public Records Act (NPRA) and NPRA jurisprudence but it seriously distorts the traditional adversary nature of the legal system's form of dispute resolution. A claim that records are confidential can only be tested in a fair and adversarial manner, and in order to truly proceed in such a fashion, a log typically must be provided to the requesting party.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > General Overview

Administrative Law > ... > Freedom of Information > Enforcement > In Camera Inspections

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Vaughn

Indexes

<u>HN16</u>[♣] Freedom of Information, Defenses & Exemptions From Public Disclosure

After the commencement of a Nevada Public Records Act (NPRA) lawsuit, the requesting party generally is entitled to a log unless, for example, the state entity withholding the records demonstrates that the requesting party has sufficient information meaningfully contest the claim of confidentiality without a log. In most cases, in order to preserve a fair adversarial environment, the log should contain, at a minimum, a general factual description of each record withheld and a specific explanation for nondisclosure. In the log, the state entity withholding records need not specify its objections in such detail as to compromise the secrecy of the information. A court nonetheless must require the state entity to provide the requesting party an explanation for nondisclosure in as much detail as possible on the public record before resorting to in camera review.

Administrative Law > ... > Freedom of Information > Enforcement > In Camera Inspections

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Vaughn Indexes

<u>HN17</u>[♣] Enforcement, In Camera Inspections

In and of itself, an in camera review is not improper. In camera review reinforces the notion that the courts, rather than government officials, are the final arbiter of what qualifies as a public record. An in camera review, however, is not a replacement for a log when a log is necessary to preserve a fair adversarial proceeding. In other words, an in camera review may be used to supplement a log but it may not be used as a substitute when a log is necessary to preserve a fair adversarial proceeding.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Vaughn Indexes

<u>HN18</u>[♣] Freedom of Information, Methods of Disclosure

The Nevada Supreme Court declines to adopt the Vaughn index as a prelitigation requirement under the Nevada Public Records Act (NPRA). A Vaughn index is not required outside of the litigation context. The NPRA already defines precisely what is required in prelitigation situations.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > General Overview

<u>HN19</u> Freedom of Information, Defenses & Exemptions From Public Disclosure

See Nev. Rev. Stat. § 239.0107(1)(d).

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > General Overview

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Vaughn Indexes

<u>HN20</u>[♣] Freedom of Information, Defenses & Exemptions From Public Disclosure

If a state entity declines a public records request prior to litigation, it must provide the requesting party with notice and citation to legal authority that justifies nondisclosure. No log, in the form of a Vaughn index or otherwise, is required under <u>Nev. Rev. Stat.</u> § 239.0107(1)(d).

Counsel: Burton, Bartlett & Glogovac and Scott A. Glogovac, Reno, for Appellant.

Catherine Cortez Masto, Attorney General, and James T. Spencer, Chief of Staff, Carson City, for Respondents.

Judges: Saitta, Chief Judge. We concur: Douglas, J. Cherry, J. Gibbons, J. Pickering, J. Hardesty, J. Parraguirre, J.

Opinion by: Saitta

Opinion

[**625] [*875] BEFORE THE COURT EN BANC.

By the Court, SAITTA, C.J.:

This appeal involves the denial of a records request made pursuant to the Nevada Public Records Act (NPRA). The primary issue we are asked to resolve is whether, after the commencement of a public records lawsuit, the state entity withholding the requested records is required to provide the requesting party with a [*876] log containing a factual description of each withheld record and a legal basis for nondisclosure. We conclude that HN1[1] based upon the provisions of the NPRA, our NPRA jurisprudence, and elementary notions [***2] of fairness inherent in our adversarial system, the requesting party generally is entitled to a log. In most cases, this log should contain, at a minimum, a general factual description of each withheld record and a specific explanation for nondisclosure. Here, we conclude that such a log was required and that the district court erred to the extent it denied the request for a log.

We also address what the state entity withholding the requested records is required to provide to the requesting party in prelitigation situations. We conclude that, <code>HN2[]</code> as mandated by <code>NRS 239.0107(1)(d)</code>, if a state entity denies a public records request prior to the commencement of litigation, it must provide the requesting party with notice of its claim of confidentiality and citation to legal authority that justifies nondisclosure. Here, we conclude that the state entity withholding the requested records failed to satisfy these responsibilities.

FACTS AND PROCEDURAL HISTORY

Appellant Reno Newspapers, Inc., is a Nevada corporation doing business as the Reno Gazette-Journal (RGJ). Respondents are Jim Gibbons, former Governor of the State of Nevada, and the State of Nevada (collectively, the State). In 2008, the RGJ [***3] made a records request, pursuant to the NPRA, for e-mail communications sent over a six-month time period between Governor Gibbons and ten individuals. The request specified that the e-mails being sought were transmitted to or from Governor Gibbons' state-issued e-mail account. In the event that the State rejected the request, the RGJ asked that it be provided a log identifying, for each e-mail, the sender, all

recipients, the message date, and the legal basis upon which the State was denying access. The State denied the RGJ's request for the e-mails or a log. Citing to our decision in DR Partners v. Board of County Commissioners, 116 Nev. 616, 6 P.3d 465 (2000), California caselaw, a Nevada Attorney General Opinion, and the State of Nevada Policy on Defining Information Transmitted via E-mail as a Public Record, 1 the State informed the RGJ that all of the requested e-mails were confidential because they were either privileged or not considered public records. The RGJ repeated its request for a log containing a description of each individual e-mail so that it could assess whether to challenge the State's classification of the e-mails as confidential. The State again denied the RGJ's [***4] request.

[*877] Thereafter, the RGJ filed a petition for a writ of mandamus in the district court seeking access to the emails or, in the alternative, to receive a detailed log or index identifying the sender, recipient(s), date, subject matter, and the basis upon which the State [**626] was denying access to each of the total 104 requested emails. Ultimately, after conducting a hearing to consider the RGJ's petition and an in camera review of the emails, the district court denied the RGJ's request for a detailed log or index, reasoning that given the brevity of some of the e-mails, such a log or index would disclose otherwise confidential information. The district court then determined that, of the 104 requested e-mails, 24 were personal in nature, 32 were of a transitory nature, 42 were of a transitory nature and/or covered by the deliberative process privilege, and 6 were not confidential. The district court therefore granted the [***5] petition as to the 6 e-mails that it determined were not confidential and denied the petition as to the remaining 98 e-mails. The RGJ filed this appeal. 2

DISCUSSION

HN3[1] Although the district court's denial of a writ

¹ This policy provides state employees with informal guidelines on how to determine if a given e-mail is a public record and describes procedures for dealing with e-mails classified as public records. For example, it indicates that public records should not be deleted.

² The State did not file a cross-appeal challenging the district court's issuance of the writ of mandamus with respect to 6 of the requested e-mails. As such, our consideration of this appeal is limited to whether the district court erred in denying the RGJ's writ petition as to the 98 remaining e-mails.

petition is ordinarily reviewed for an abuse of discretion, when, as here, the petition entails questions of law, we review the district court's decision de novo. <u>Reno Newspapers v. Sheriff, 126 Nev.</u>, , 234 P.3d 922, 924 (2010).

The district court erred in denying the RGJ's request for a log

The RGJ's primary contention on appeal is that the district court erred in refusing to order the State to provide it with a detailed log describing the factual nature of each withheld e-mail and the legal basis for nondisclosure so that it could make an informed decision regarding whether to challenge the State's claim of confidentiality. We begin our analysis of this contention by providing [***6] an overview of the NPRA and our jurisprudence regarding claims of confidentiality made in response to public records requests.

Overview of the NPRA

HN4 The NPRA provides that all public books and public records of governmental entities must remain open to the public, unless "otherwise declared by law to be confidential." NRS 239.010(1). The Legislature has declared that the purpose of the NPRA is to further the democratic ideal of an accountable government by ensuring that [*878] public records are broadly accessible. NRS 239.001(1). Thus, the provisions of the NPRA are designed to promote government transparency and accountability.

In 2007, in order to better effectuate these purposes, the Legislature amended the NPRA to provide that <code>HN5</code> its provisions must be liberally construed to maximize the public's right of access. <code>NRS 239.001(1)-(2)</code>; 2007 Nev. Stat., ch. 435, § 2, at 2061. Conversely, any limitations or restrictions on the public's right of access must be narrowly construed. <code>NRS 239.001(3)</code>; 2007 Nev. Stat., ch. 435, § 2, at 2061. In addition, the Legislature amended the NPRA to provide that if a state entity withholds records, it bears the burden of proving, by a preponderance of the evidence, <code>[***7]</code> that the records are confidential. <code>NRS 239.0113</code>; 2007 Nev. Stat., ch. 435, § 5, at 2062.

Overview of our NPRA jurisprudence

In Donrey of Nevada v. Bradshaw, 106 Nev. 630, 798

P.2d 144 (1990), we built the foundation for analyzing claims of confidentiality made in response to NPRA requests. Bradshaw involved a request from KOLO-TV and Reno Newspapers for a police investigative report into bribery of a public official. Id. at 631, 798 P.2d at 145. The Reno City Attorney's Office and the Reno Police Department refused the request. Id. KOLO-TV and Reno Newspapers subsequently filed a petition for a writ of mandamus in the district court, asserting that the NPRA required the disclosure of the investigative report. Id. at 632, 798 P.2d at 145. The district court denied the petition, determining that the report was confidential based upon NRS Chapter 179A, which contains provisions concerning the dissemination of criminal history records. Id. It also determined [**627] that no balancing of the interests involved was needed. ld.

On appeal, we determined that the confidentiality provisions contained in NRS Chapter 179A did not cover the record at issue. Id. at 634, 798 P.2d at 147. As a consequence, we [***8] explained that HN6[1] "a balancing of the interests involved is necessary" before any common law limitations on disclosure could be applied. Id. at 635, 798 P.2d at 147. Under this balancing test, we concluded that the investigative report should be released to KOLO-TV and Reno Newspapers. Id. at 636, 798 P.2d at 148. Our conclusion was based on the facts that no criminal proceeding was pending or anticipated, no confidential sources or investigative techniques were contained in the report, there was no possibility of denying anyone a fair trial, and disclosure did not jeopardize law enforcement personnel. Id. We therefore directed the district court to issue a [*879] writ of mandamus ordering the City Attorney's Office and the Reno Police Department to release the report. Id.

We expanded upon <u>Bradshaw</u>'s consideration of claims of confidentiality in <u>DR Partners v. Board of County Commissioners</u>, 116 Nev. 616, 6 P.3d 465 (2000). <u>DR Partners</u> concerned the Las Vegas Review Journal's attempt to compel the disclosure of billing statements documenting county officials' use of publicly owned cellular telephones. <u>Id. at 619, 6 P.3d at 467</u>. Clark County released the records but redacted portions of the incoming [***9] and outgoing telephone numbers, thereby preventing any person reviewing the statements from determining the identity of the individuals with whom conversations occurred. <u>Id.</u> The Review Journal filed a petition for a writ of mandamus in the district court seeking to compel Clark County to disclose the records. <u>Id. at 620, 6 P.3d at 467</u>. The district court

denied the petition, <u>id.</u>, determining that the records were confidential based upon the common law deliberative process privilege. <u>Id. at 619</u>, 6 <u>P.3d at 467</u>.

On appeal, we first set forth HN7 1 the requirements for showing that the deliberative process privilege applies-namely, that the withheld records be both "predecisional" and "deliberative." Id. at 623, 6 P.3d at 469. We also reiterated that HN8 1 when the requested record is not explicitly made confidential by a statute, the balancing test set forth in Bradshaw must be employed, explaining that "[i]n Bradshaw, this court, at least by implication, recognized that any limitation on the general disclosure requirements of NRS 239.010 must be based upon a balancing or 'weighing' of the interests of non-disclosure against the general policy in favor of open government." Id. at 622, 6 P.3d at 468. [***10] We then concluded that even if the deliberative process privilege applied to the records at issue, the absence of a particularized evidentiary showing by Clark County "prevented the district court from engaging in the weighing process mandated by Bradshaw." Id. at 627, 6 P.3d at 472. We therefore reversed the district court's order denying the writ and remanded the case to the district court to issue the writ compelling Clark County to provide the Review Journal with unredacted copies of the requested records. Id. at 628-29, 6 P.3d at 473.

We recently considered a claim of confidentiality made in response to an NPRA request in Reno Newspapers v. Sheriff, 126 Nev. , , 234 P.3d 922, 923 (2010), where we concluded that the identity of a holder of a concealed firearms permit and records of any postpermit investigation, suspension, or revocation of such a permit are public records subject to disclosure unless the requested records contain confidential information. In reaching this conclusion, we explained that **HN9** under the NPRA, "all public [*880] records generated by government entities are public information and are subject to public inspection unless otherwise declared to be confidential." [***11] Id. at , 234 P.3d at 924. We also emphasized that under the NPRA, "open records are the rule," and any nondisclosure of records is the exception. Id. at , 234 P.3d at 926. Furthermore, we explained that by virtue of the 2007 amendments to the NPRA, HN10 [1] "the balancing test under Bradshaw now requires a narrower interpretation of private or government interests promoting confidentiality or nondisclosure to be weighed against the liberal policy for an open and accessible government." Id. More specifically, [**628] in order for requested records to be withheld under this balancing test, the state entity bears the burden to prove that its interest in nondisclosure

"clearly outweighs the public's right to access." Id. at, 234 P.3d at 927. We concluded that the withholding entity failed to meet this burden because it presented no evidence to support its claim that releasing the records would increase crime or expose permit holders or the public to harm. Id. Finally, while we acknowledged that portions of the records made available for public inspection might contain confidential information, we concluded that such portions should simply be redacted. Id. at 7.234 P.3d at 928.

Our jurisprudence [***12] has therefore HN11[1] established a framework for testing claims of confidentiality under the backdrop of the NPRA's declaration that its provisions "must be construed liberally" to facilitate access to public records, NRS 239.001(2), and that any restrictions on access "must be construed narrowly." NRS 239.001(3). First, we begin with the presumption that all government-generated records are open to disclosure. See Reno Newspapers v. Sheriff, 126 Nev. at , 234 P.3d at 924, DR Partners, 116 Nev. at 621, 6 P.3d at 468. The state entity therefore bears the burden of overcoming this presumption by proving, by a preponderance of the evidence, that the requested records are confidential. NRS 239.0113, DR Partners, 116 Nev. at 621, 6 P.3d at 468. Next, in the absence of a statutory provision that explicitly declares a record to be confidential, any limitations on disclosure must be based upon a broad balancing of the interests involved, DR Partners, 116 Nev. at 622, 6 P.3d at 468; Bradshaw, 106 Nev. at 635, 798 P.2d at 147, and the state entity bears the burden to prove that its interest in nondisclosure clearly outweighs the public's interest in access. Reno Newspapers v. Sheriff, 126 Nev. at , 234 P.3d at 927. [***13] Finally, our caselaw stresses that the state entity cannot meet this burden with a non-particularized showing, DR Partners, 116 Nev. at 627-28, 6 P.3d at 472-73, or by expressing hypothetical concerns. Reno Newspapers v. Sheriff, 126 Nev. at , 234 P.3d at 927.

[*881] After the commencement of an NPRA lawsuit, the state entity withholding requested records is generally required to provide the requesting party with a log

With the foregoing principles in mind, we turn to the RGJ's assertion that because the district court did not order the State to provide it with a log describing each e-mail withheld, it could not meaningfully assess and challenge the State's claim that the requested e-mails were confidential. It urges us to adopt a rule whereby

each time that a state entity asserts that requested records are confidential, the state entity must provide the requesting party with a log in the form of a "Vaughn index" as described in Vaughn v. Rosen, 484 F.2d 820, 157 U.S. App. D.C. 340 (D.C. Cir. 1973). The RGJ contends that without a Vaughn index, the requesting party is at a severe disadvantage in NPRA cases because it otherwise lacks the necessary information to meaningfully advocate for disclosure.

HN12 A Vaughn index [***14] is a submission commonly utilized in cases involving the Freedom of Information Act (FOIA), the federal analog of the NPRA. This submission typically contains "detailed public affidavits identifying the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption." Lion Raisins v. U.S. Dept. of Agriculture, 354 F.3d 1072, 1082 (9th Cir. 2004). Broadly stated, a Vaughn index is designed to preserve a fair adversarial proceeding when a lawsuit is brought after the denial of a FOIA request. See Wiener v. F.B.I., 943 F.2d 972, 977 (9th Cir. 1991) ("The purpose of the index is to 'afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." (quoting King v. U.S. Dept. of Justice, 830 F.2d 210, 218, 265 U.S. App. D.C. 62 (D.C. Cir. 1987))).

While we agree that the RGJ should have been provided with a log under the circumstances of this case, we disagree that this log was required to be in the specific form of a Vaughn index or that a log is required each time records are withheld. As federal courts have explained when considering the FOIA, HN13 1 although [***15] a Vaughn index is [**629] often a vital method for resolving the tension between the government's interest in keeping certain records confidential and the requesting party's need for enough information to meaningfully contest a claim of confidentiality, "a Vaughn index . . . is [not] necessarily required in all cases." Fiduccia v. U.S. Dept. of Justice, 185 F.3d 1035, 1042-43 (9th Cir. 1999). Indeed, even the authority that the RGJ relies upon recognizes that a Vaughn index is not required in all FOIA cases. See, e.g., Wiener, 943 F.2d at 978 n.5 (discussing circumstances in which a Vaughn index was not required). For instance, when the requesting party "has sufficient information [*882] to present a full legal argument, there is no need for a Vaughn index." Minier v. Central Intelligence Agency, 88 F.3d 796, 804 (9th Cir. 1996); see Wiener, 943 F.2d at 978 n.5 ("Consistent with its purpose, a Vaughn index is not required where it is not needed to restore the traditional adversary process."); Brown v. Federal Bureau of Investigation, 658 F.2d 71, 74 (2d Cir. 1981) ("[W]hen the facts in plaintiffs possession are sufficient to allow an effective presentation of its case, an itemized and indexed justification [***16] of the specificity contemplated by Vaughn may be unnecessary."). Moreover, if we were to require a log—in the form of a Vaughn index or otherwise—each time a lawsuit is brought after the denial of an NPRA request, we would essentially be rewriting the NPRA because it imposes no such unqualified requirement.

Nonetheless, the provisions of the NPRA place an unmistakable emphasis on disclosure. HN14 The NPRA expressly provides that its provisions "must be construed liberally" to ensure the presumption of openness and explicitly declares that any restriction on disclosure "must be construed narrowly." 239.001(2)-(3). In harmony with the overarching purposes of the NPRA, the burden of proof is imposed on the state entity to prove that a withheld record is confidential. NRS 239.0113. Equally unmistakable is the emphasis that our NPRA jurisprudence places on adequate adversarial testing. Indeed, the framework established in Bradshaw, DR Partners, and Reno Newspapers v. Sheriff exemplifies an intensely adversarial method for determining whether requested records are confidential.

In view of the emphasis placed on disclosure and the importance of testing claims of confidentiality in an adversarial [***17] setting, we agree with the Vaughn court that HN15 | "it is anomalous" and inequitable to deny the requesting party basic information about the withheld records, thereby relegating it to advocating from a nebulous position where it is powerless to contest a claim of confidentiality. 484 F.2d at 823. Furthermore, requiring the requesting party to blindly argue for disclosure not only runs contrary to the spirit of the NPRA and our NPRA jurisprudence but it "seriously distorts the traditional adversary nature of our legal system's form of dispute resolution." Id. at 824. In sum, a claim that records are confidential can only be tested in a fair and adversarial manner, and in order to truly proceed in such a fashion, a log typically must be provided to the requesting party.

We therefore conclude that <u>HN16</u> after the commencement of an NPRA lawsuit, the requesting party generally is entitled to a log unless, for example, the state entity withholding the records demonstrates that the requesting party has sufficient information to

[*883] meaningfully contest the claim of confidentiality without a log. We decline to spell out an exhaustive list of what such a log must contain or the precise form that this log **[***18]** must take because, depending on the circumstances of each case, what constitutes an adequate log will vary. See Keys v. U.S. Dept. of Justice, 830 F.2d 337, 349, 265 U.S. App. D.C. 189 (D.C. Cir. 1987) (stressing that "it is the function, not the form, of the index that is important"). For purposes of this opinion, it is sufficient to simply explain that in most cases, in order to preserve a fair adversarial environment, this log should contain, at a minimum, a general factual description of each record withheld and a specific explanation for nondisclosure. ³

[**630] The State asserts that it was not required to provide the RGJ with a log because the district court conducted an in camera review of the requested emails. It further asserts that an in camera review is the optimal method for the district court to [***20] review claims of confidentiality while protecting confidential information from being disclosed.

³We caution that in this log, the state entity withholding records "need not specify its objections in such detail as to compromise the secrecy of the information." Church of Scientology, Etc. v. U. S. Dept., 611 F.2d 738, 742 (9th Cir. 1979). The district court nonetheless must require the state entity to provide the requesting party an explanation for nondisclosure "in as much detail as possible on the public record before resorting to in camera review." Lion Raisins v. U.S. Dept. of Agriculture, 354 F.3d 1072, 1084 (9th Cir. 2004). Thus, in the instant matter, the district court may very well be correct that given the brevity of some of the requested [***19] e-mails, an extensive log might disclose otherwise confidential information. The district court nonetheless should have required the State to provide the RGJ with a log containing as much information as possible before resorting to an in camera review.

Furthermore, we are cognizant that requiring an individual description of each requested record may become overly burdensome when the requesting party seeks access to several hundred records. In such a circumstance, a log providing a representative sampling of the larger group of records may be appropriate. See Bonner v. U.S. Dept. of State, 928 F.2d 1148, 1151, 289 U.S. App. D.C. 56 (D.C. Cir. 1991) ("Representative sampling is an appropriate procedure to test an agency's FOIA exemption claims when a large number of documents are involved."). A log containing only representative samples of the requested e-mails, however, would likely not be appropriate here given the relatively limited number of e-mails involved.

HN17 In and of itself, an in camera review is not improper. See Griffis v. Pinal County, 215 Ariz. 1, 156 P.3d 418, 422 (Ariz. 2007) ("In camera review . . . reinforces [the notion] that the courts, rather than government officials, are the final arbiter of what qualifies as a public record."). An in camera review, however, is not a replacement for a log when a log is necessary to preserve a fair adversarial proceeding. See Wiener, 943 F.2d at 979 (explaining that an in camera review of withheld records "is not an acceptable substitute" for an adequate log because "[i]n camera review does not permit [*884] effective advocacy"); Church of Scientology, Etc. v. U. S. Dept., 611 F.2d 738, 743 (9th Cir. 1979) (in camera review is "not a substitute for the government's burden of proof, and should not be resorted to lightly"). In other words, an in camera review may be used to supplement a log but it may not be used as a substitute when a log is necessary to preserve a fair adversarial proceeding.

Here, the State responded to the RGJ's petition for a writ of mandamus ⁴ by providing the district court with the e-mails claimed [***21] to be confidential, as well as a log. The State, however, did not provide the RGJ with a log of any type containing a general factual description of these e-mails and a specific explanation of why each e-mail was confidential, nor did the State demonstrate that the RGJ possessed sufficient information to argue for disclosure without a log. Thus, the State's response was, in a word, deficient. Accordingly, we conclude that the district court erred in denying the RGJ's request for a log containing a general factual description of each of the records withheld and a specific explanation for nondisclosure. ⁵

⁴We note that mandamus was the appropriate procedural vehicle for the RGJ to seek access to the withheld e-mails or a log. See generally *DR Partners v. Bd. of County Comm'rs*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000).

⁵ In light of this conclusion, we need not consider whether the district court correctly determined that of the 98 e-mails at issue here, 24 were personal in nature, 32 were of a transitory nature, and 42 were of a transitory nature and/or covered by the deliberative process privilege. See Davin v. United States DOJ, 60 F.3d 1043, 1049 (3d Cir. 1995) (explaining that [***22] under the FOIA, before considering whether requested records were correctly determined to be exempt from disclosure, a reviewing court must first examine "whether the [withholding entity's] explanation was full and specific enough to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." (quoting McDonnell

The State failed to satisfy its prelitigation duties under the NPRA

The RGJ contends that the State also failed to satisfy its prelitigation duties under the NPRA. In particular, it asserts that the state entity denying an NPRA request prior to the commencement of litigation is required to provide the requesting party with a <u>Vaughn</u> index.

[**631] HN18 We decline to adopt the Vaughn index as a prelitigation requirement under the NPRA. First, a Vaughn index is not required outside of the litigation context. See Natural Resources Defense Council, Inc. v. N.R.C., 216 F.3d 1180, 1190, 342 U.S. App. D.C. 337 (D.C. Cir. 2000). But, [*885] more importantly, the NPRA already defines precisely what is required in prelitigation situations. NRS 239.0107(1)(d) provides:

HN19 If the governmental entity [***23] must deny the person's request to inspect or copy the public book or record because the public book or record, or a part thereof, is confidential, [the governmental entity shall] provide to the person, in writing:

- (1) Notice of that fact; and
- (2) A citation to the specific statute or other legal authority that makes the public book or record, or a part thereof, confidential.

Thus, <code>HN20</code> if a state entity declines a public records request prior to litigation, it must provide the requesting party with notice and citation to legal authority that justifies nondisclosure. No log, in the form of a <code>Vaughn</code> index or otherwise, is required under <code>NRS</code> <code>239.0107(1)(d)</code>. Nevertheless, in the instant case, we conclude that the State failed to meet its prelitigation responsibilities under <code>NRS</code> <code>239.0107(1)(d)</code>.

In response to the RGJ's prelitigation request for Governor Gibbons' e-mails, the State informed the RGJ that "all [the requested] emails are either privileged or are not considered public records." Following this blanket denial, the State summarily listed <u>DR Partners</u>, California caselaw, a Nevada Attorney General Opinion, and the State of Nevada Policy on Defining Information Transmitted via E-mail as a [***24] Public Record. The State provided no explanation whatsoever as to why the cases it cited actually supported its claim of confidentiality or were anything other than superfluous.

We cannot conclude that merely pinning a string of citations to a boilerplate declaration of confidentiality satisfies the State's prelitigation obligation under NRS 239.0107(1)(d)(2) to cite to "specific" authority "that makes the public book or record, or a part thereof, confidential." And, suffice it to say, the State's informal employee e-mail policy does not have the force of law, and therefore, we reject the notion that the State satisfied its prelitigation duties by citing this policy. See generally State v. City of Clearwater, 863 So. 2d 149, 154 (Fla. 2003) (explaining that a "Computer Resources Use Policy" could not alter the statutory definition of what constitutes a public record under Florida law). We therefore conclude that the State's prelitigation response, in the first instance, was inadequate under NRS 239.0107(1)(d).

CONCLUSION

We reverse the district court's order denying in part the RGJ's petition for a writ of mandamus and remand this case to the district court with instructions to direct [***25] the State to provide the RGJ with [*886] a log containing a general factual description of each of the 98 e-mails withheld and a specific explanation for nondisclosure. The district court must then determine, under the framework delineated in this opinion, whether these e-mails are subject to disclosure.

/s/ Saitta, C.J.

Saitta

We Concur:

/s/ Douglas, J.

Douglas

/s/ Cherry, J.

Cherry

/s/ Gibbons, J.

Gibbons

/s/ Pickering, J.

Pickering

/s/ Hardesty, J.

Hardesty

/s/ Parraguirre, J.

Parraguirre

End of Document