

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

CITY OF SPARKS, a Municipal  
Corporation,

Appellant,

vs.

RENO NEWSPAPERS, INC., a Nevada  
Corporation,

Respondent.

Supreme Court Case No. 69749  
Electronically Filed  
Aug 08 2016 10:56 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

On Appeal from the Second Judicial District Court  
Washoe County, Nevada  
Honorable Scott N. Freeman, District Court Judge

---

**RESPONDENT'S ANSWERING BRIEF**

---

GLOGOVAC & PINTAR  
SCOTT A. GLOGOVAC, ESQ.  
Nevada Bar No. 000226  
ROBERT R. HOWEY, ESQ.  
Nevada Bar No. 11608  
427 W. Plumb Lane  
Reno, Nevada 89509  
Telephone: (775) 333-0400  
Facsimile: (775) 333-0412

Attorneys for Respondent  
Reno Newspapers, Inc.

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
I. STATEMENT OF THE CASE.....	1
II. STATEMENT OF THE FACTS.....	1
III. SUMMARY OF ARGUMENT .....	6
IV. STANDARD OF REVIEW .....	7
V. ARGUMENT .....	10
A. A Mandamus Proceeding Is The Appropriate Remedial Mechanism For Addressing A Dispute Concerning Access To Public Records .....	10
1. NRS 239.011(1), not Nevada’s Administrative Procedure Act, controls the public records dispute in this matter. ....	10
2. Joinder of the Division is not necessary in this dispute over access to public records maintained by the City. ....	16
B. The Names Of The City’s MME Business License Holders Are Not Declared By Law To Be Confidential. ....	18
1. NRS 453A.370(5) is not a confidentiality statute. ....	19
2. NAC 453A.714(1) does not establish confidentiality for the names of the City’s MME business license holders.....	24
a) The City’s interpretation of NAC 453A.714(1) must be rejected in light of the limited legislative grant of authority underlying that regulation. ....	24
b) The City’s interpretation of NAC 453A.714(1) is in direct contravention of the Nevada Public Records Act. ....	26
VI. CONCLUSION.....	28
VII. ATTORNEY’S CERTIFICATE .....	30

## **TABLE OF AUTHORITIES**

### **Cases**

<u>Cowles Pub. Co. v. Kootenai County Bd,</u> 144 Idaho 259, 159 P.3d 896 (2007).....	8
<u>Donrey of Nevada v. Bradshaw,</u> 106 Nev. 630, 798 P.2d 144 (1990). ....	9
<u>DR Partners v. Bd of County Comm’rs of Clark County,</u> 116 Nev. 616, 6 P.3d 465 (2000). ....	8, 9, 12, 17
<u>Kroeplin v. Wisconsin DNR,</u> 297 Wis.2d 254, 725 N.W.2d 286 (Wis. Ct. App. 2006). ....	9
<u>Reno Newspapers, Inc. v. Gibbons,</u> 127 Nev. 873, 266 P.3d 623 (2011). ....	9, 10
<u>Reno Newspapers, Inc. v. Sheriff,</u> 126 Nev. 211, 234 P.3d 922 (2010). ....	7, 8, 9, 14, 15, 24
<u>S. Nevada Homebuilders Ass’n v. Clark Cnty.,</u> 121 Nev. 446, 117 P.3d 171 (2005). ....	20, 21
<u>State Div. of Ins. v. State Farm Mut. Auto. Ins. Co.,</u> 116 Nev. 290, 995 P.2d 482 (2000). ....	17

### **Statutes**

NRS 202.3662.....	14
NRS 233B.040.....	25
NRS 233B.110.....	11
NRS 239.001.....	4, 8, 10
NRS 239.010.....	7, 22
NRS 239.011.....	11, 13, 17
NRS 239.0113.....	9
NRS 453.700.....	26
NRS 453A.030.....	23
NRS 453A.140.....	23
NRS 453A.320.....	2, 21
NRS 453A.326.....	3
NRS 453A.344.....	2
NRS 453A.370.....	18, 19, 20, 22, 23, 24, 25, 26
NRS 453A.610.....	4, 22, 23
NRS 453A.700.....	4, 22, 23

### **Regulations**

NAC 453A.714.....	4, 5, 7, 12, 13, 15, 17, 18, 24, 26, 27, 28
-------------------	---

### **Legislative History**

2013 Statutes of Nevada, Ch. 414, AB 31 .....	22
---	----

Respondent Reno Newspapers, Inc., doing business as the Reno Gazette-Journal (“RGJ”), by and through its undersigned counsel, Glogovac & Pintar, hereby submits its Answering Brief.

## **I. STATEMENT OF THE CASE**

This action arises out of a request made by the RGJ pursuant to Nevada’s Public Records Act, NRS Chapter 239, for public documents in the custody of Appellant City of Sparks (“the City”). Specifically, the RGJ requested the City to provide copies of all business licenses, including the names of the license holders, it has issued to medical marijuana establishments (“MMEs”). The City did not deny that the requested licenses are public, and, in fact, produced copies of that documentation. But the City redacted and withheld the names of the license holders, contending that those names are confidential.

The City rejected the RGJ’s subsequent request for unredacted copies of the business licenses, and thus the RGJ filed a Petition for Writ of Mandamus in Washoe County District Court, seeking a directive from the court that the City provide unredacted documentation. The district court granted the RGJ’s petition, and this appeal ensued.

## **II. STATEMENT OF THE FACTS**

The RGJ is a newspaper published daily in Reno, Nevada, with circulation

throughout northern Nevada. Among other things, the RGJ provides coverage of state and local government affairs, including the affairs of the City. This coverage is important to the public as it provides a main source of information regarding the activities of the City, including the City's performance of its regulatory powers under state and local law. (JA 002).

The City is a municipal corporation duly organized and existing under Nevada law, and, as such, is a "governmental entity" subject to the requirements of the Nevada Public Records Act as set forth in NRS Chapter 239. (JA 002).

Chapter 453A of the Nevada Revised Statutes provides the legislative framework by which medical use of marijuana is permitted in the State of Nevada. Included in that framework are statutory provisions governing the registration of MMEs. See NRS 453A.320 through NRS 453A.344. As expressly stated by the Nevada Legislature, the purpose of such statutory provisions "is to protect the public health and safety and the general welfare of the people of this State." See NRS 453A.320. (JA 002).

The foregoing statutory provisions not only mandate the registration of MMEs with the requisite division of the Nevada state government, they also recognize that an MME seeking to do business in a local government jurisdiction that issues business licenses will be subject to the local business licensing

requirements of that jurisdiction. See NRS 453A.326(3). Consistent with this recognition, the City requires any MME seeking to do business within the City to obtain a City-issued business license. (JA 003).

The identity of any person or entity who obtains a business license from the City to operate an MME within the City is a matter of clear public interest in northern Nevada and throughout the State. Indeed, as stated above, the Nevada Legislature has expressly pronounced that its statutory framework for the regulation of MMEs exists to protect the public health and safety and the general welfare of the people of Nevada. (JA 0003).

In furtherance of the foregoing public interest, and in the course of the RGJ's newsreporting activities, RGJ reporter Channele Bessette sent an August 20, 2015 email to the City requesting, pursuant to the Nevada Public Records Act, "copies of the business licenses of medical marijuana establishments in Sparks, including the names of the applicants/licensees." (JA 003 and JA 013).

The City responded to this request by letter dated August 24, 2015. In that letter, the City asserted that the names of the MME business license holders are confidential under Nevada law, and are therefore not subject to disclosure under the Nevada Public Records Act. The City thus produced copies of the requested business licenses, but redacted the names of the license holders. (JA 003 and JA

015 – 026).

The City's basis for redacting the names of the business license holders was limited to a single contention - - that NAC 453A.714(1), which is a regulation promulgated by the State of Nevada Division of Public and Behavioral Health ("the Division"), read in conjunction with certain provisions of NRS Chapter 453A, confers confidentiality on those names. (JA 004).

The City's interpretation of that regulation, however, was overbroad and in contravention of the longstanding requirement of Nevada law that limitations on the public's right of access to public records be narrowly construed. See NRS 239.001(3). NAC 453A.714(1) does not make any reference to MMEs, let alone to the names of the owners and licensees of those establishments. Thus, it does not expressly or unambiguously declare the names of the City's MME business license holders confidential and not subject to public inspection.

Furthermore, the Nevada Legislature has chosen to provide confidentiality for the names of only a few limited classes of persons involved in the medical marijuana industry, and those classes do not include the owners or business licensees of MMEs. See NRS 453A.610; NRS 453A.700. (JA 005 – 006).

Under the circumstances, because the basis for the City's claim of confidentiality was meritless, and because the City had improperly denied the



RGJ's request for unredacted copies of its MME business licenses, the RGJ filed a petition in the Second Judicial District Court of the State of Nevada seeking issuance of a writ of mandamus compelling the City to produce unredacted copies of those records. (JA 002 – 028).

The City filed a response to the RGJ's petition, advancing substantive arguments as to the purported confidentiality of the names of its MME business license holders. Additionally, the City made the procedural argument that because the RGJ's Petition for Writ of Mandamus allegedly addresses the validity of an administrative regulation (i.e., NAC 453A.714(1)), the processes of Nevada's Administrative Procedure Act, and not this mandamus proceeding, are the appropriate remedial mechanism for addressing the parties' public records dispute. (JA 032 – 124). The RGJ thereafter filed a reply, fully demonstrating the lack of merit to the City's substantive and procedural arguments. (JA 125 – 145).

Following a subsequent hearing in open court, the district court entered an order granting the RGJ's petition and requiring the City to produce unredacted copies of its MME business licenses. In that order, the district court first addressed the procedural argument made by the City, concluding that the mandamus proceeding filed by the RGJ is the appropriate remedial vehicle for addressing the parties' public records dispute. The district court then addressed the substantive question of whether the names of the City's MME business license holders are



confidential, and, consistent with the RGJ's position, held that "the Nevada Legislature did not expressly or unequivocally create an exemption or exception by statute protecting MME license holders under [the Nevada Public Records Act]." (JA 203 – 209).

The City thereafter filed a timely notice of appeal from the district court's order. (JA 222 – 223).

### **III. SUMMARY OF ARGUMENT**

The district court correctly concluded that, irrespective of the fact that this matter raises issues as to the proper interpretation of an administrative regulation, the proper remedial mechanism for addressing the parties' public records dispute is a mandamus proceeding under the Nevada Public Records Act. The bottom line is that this matter concerns public access to records maintained by a government agency, and this Court has long held that such issues are properly addressed through a mandamus proceeding.

The district court also correctly ruled that no express, unequivocal grant of confidentiality exists under Nevada law for the names of the City's MME business license holders. Under the Nevada Public Records Act, all public records of government agencies in this state are open to public inspection unless expressly and unequivocally declared by law to be confidential. Moreover, any claimed exception

to this rule must be construed narrowly and in favor of public disclosure. In disregard of these legal principles, and in an attempt to shield the names of its MME business license holders from public disclosure, the City has advanced the most expansive and overbroad interpretation possible of NAC 453A.714(1), and of certain related statutes in NRS Chapter 453A. However, when that regulation and the related statutes are narrowly construed as required by the Nevada Public Records Act, it is clear that no express, unequivocal grant of confidentiality exists for those names under Nevada law.

The order of the district court should therefore be affirmed in all respects.

#### **IV. STANDARD OF REVIEW**

The RGJ agrees with the City that the standard of review for any issues of statutory interpretation in this matter is de novo. See Reno Newspapers, Inc. v. Sheriff, 126 Nev. 211, 214, 234 P.3d 922, 924 (2010).

The City's Opening Brief, however, notably fails address the further, more specific standard of statutory construction that is mandated in public records litigation by the Nevada Public Records Act and the decisions of this Court.

NRS 239.010(1) states, in pertinent part, that "[a]ll public books and public records of a government 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 . . . .” As confirmed by this Court:

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 nondisclosure.

Sheriff, 126 Nev. at 212, 234 P.3d at 923.

The purpose of the Nevada Public Records Act is to ensure the accountability of the government to members of the public by facilitating public access to vital information about government activities. DR Partners v. Bd of County Comm’rs of Clark County, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000); see also Sheriff, 126 Nev. at 214, 234 P.3d at 924 (“[t]he purpose of the Act is to foster principles of democracy by allowing the public access to information about government activities.”)

The Nevada Legislature has thus specifically mandated that the Nevada Public Records Act “be construed liberally”, and that any limitations on public disclosure be “construed narrowly”. NRS 239.001; DR Partners, 116 Nev. at 621, 6 P.3d at 468; Sheriff, 126 Nev. at 214, 234 P.3d at 924. Moreover, this Court has stated that in cases under the Nevada Public Records Act, it 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 (2007) (holding that unless public records are “expressly exempted by statute,” they are presumed to be open to inspection by the public); *Kroeplin v. Wisconsin DNR*, 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 v. Bradshaw*, 106 Nev. 630, 635-36, 798 P.2d 144, 147-48 (1990).

Sheriff, 126 Nev. at 214-15, 234 P.3d at 924-25 (emphasis supplied).

Furthermore, the public official or agency bears the burden of establishing that the requested records are “declared by law to be confidential.” DR Partners, 116 Nev. at 621, 6 P.3d at 468; NRS 239.0113. “[I]n 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.” Sheriff, 126 Nev. at 215, 234 P.3d at 925.

Recently, in Reno Newspapers, Inc. v. Gibbons, 127 Nev. 873, 266 P.3d 623 (2011), this Court provided a comprehensive overview of Nevada’s public records jurisprudence, along with a detailed framework for review of cases under the Nevada Public Records Act. As noted by the Court, the starting point for the analysis in such matters is the mandate of the Public Records Act that its provisions “be construed liberally” to facilitate access to public records, and that any

restrictions on access “ be construed narrowly.” *Id.*, 127 Nev. at 880, 266 P.3d at 628; NRS 239.001(2) and (3). There is a *presumption* that all government-generated records are open to disclosure, and the governmental entity bears the burden of overcoming this presumption in favor of public access. *Id.* Only a statutory provision that “explicitly” declares a record to be confidential can meet this burden, and absent such the government entity must prove that, in a balancing of interests, its interest in nondisclosure clearly outweighs the public’s interest in access. *Id.*

In this matter, the City has not advanced any form of “balancing of interests” argument, thereby acknowledging that any interest it may have in keeping the names of its MME business license holders confidential does not outweigh the public’s interest in disclosure. The City instead asserts that the names are confidential pursuant to an express statutory-based declaration of confidentiality. As will be demonstrated below, however, the City cannot meet the rigorous burden imposed upon it under Nevada’s public records jurisprudence for establishing such a declaration.

## V. ARGUMENT

### A. A Mandamus Proceeding Is The Appropriate Remedial Mechanism For Addressing A Dispute Concerning Access To Public Records

1. **NRS 239.011(1), not Nevada’s Administrative Procedure Act, controls the public records dispute in this matter.**

The City’s initial argument in this matter is procedural, not substantive. The

argument is that this mandamus proceeding is not the appropriate means of addressing the parties' public records dispute. According to the City, because its claim of confidentiality raises issues as to the proper interpretation of an administrative regulation (as opposed to a statute, court rule, or balancing test), Nevada's Administrative Procedure Act and, specifically, NRS 233B.110, provides the exclusive means of addressing whether the public records at issue are subject to public disclosure. This argument, however, is a clear instance of the proverbial "tail wagging the dog." Simply put, the remedial process the RGJ is entitled to pursue to enforce its rights under the Nevada Public Records Act is not dictated by the nature of the government agency's chosen theory of confidentiality.

Instead, the Nevada Legislature has expressly declared that a party who has been denied access to public records may proceed with an action before the district court. In this regard, NRS 239.011(1) states:

If a request for inspection, copying or copies of a public book or record open to inspection is denied, the requestor 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 custody or control of the public book or record to provide a copy to the requester, as applicable.

Nowhere does this statute impose any obligation of exhausting administrative remedies, and nowhere does it exempt public records disputes involving issues of interpretation related to administrative regulations.

Moreover, the Nevada Supreme Court has long held that a petition for writ of mandamus is the proper procedural mechanism for an action involving a dispute over access to public records. “[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, or to control an arbitrary or capricious exercise of discretion. *Mandamus is the appropriate procedural remedy to compel production of public records.*” DR Partners, 116 Nev. at 620-21, 6 P.3d at 468 (emphasis added).

At the heart of the City’s attempt to circumvent this clear direction from the Nevada Supreme Court is its misguided belief that this action seeks to challenge or invalidate an administrative regulation -- i.e., NAC 453A.714(1). That, however, is not an accurate characterization of this action.

Instead, this action was filed by the RGJ for the simple purpose of obtaining access to public records that have been wrongfully withheld from disclosure. Nowhere in its Petition for Writ of Mandamus does the RGJ challenge the validity of NAC 453A.714(1). Rather, the Petition makes clear that it is the City’s overly broad interpretation of that regulation, and the resulting denial of a valid public



records request, which led to the filing of this action. Indeed, the RGJ's Petition plainly states:

Under the circumstances, the City, through its overly expansive interpretation of NAC 453A.714(1), has done exactly what the Nevada Legislature and the Nevada Supreme Court have instructed government agencies in this state not to do in public records matters - - it has wrongfully given the broadest possible interpretation to an unclear, ambiguous regulation for the purpose of defeating public access to public information.

See (JA 009).

As a result, any requirements of the Administrative Procedure Act, including exhaustion of administrative remedies, are not applicable in this action. To the contrary, because this action merely implicates the proper interpretation of a purported confidentiality provision and involves a denial of access to public records, mandamus is the proper legal mechanism. See NRS 239.011(1).

A public records dispute may very well, and often does, present a disagreement between the parties as to the proper scope or interpretation of a purported confidentiality provision, as is the case here with NAC 453A.714(1). This, necessarily, means that the party advocating public disclosure, consistent with Nevada's public records jurisprudence, will advance a narrow construction of the confidentiality provision. But such advocacy does not equate with a contention that the provision is invalid or must be stricken from the books as unlawful. Rather, it is

simply a means of supporting that party's position that the provision should not and cannot be given the overly broad interpretation typically advanced by the party advocating non-disclosure.

A good example of this can be found in Sheriff, 126 Nev. 211, 234 P.3d 922 (2010), a mandamus action in which the RGJ sought disclosure of certain concealed weapon permit information maintained by the Washoe County Sheriff. In framing the issue, the Nevada Supreme Court noted that "the parties dispute the scope of NRS 202.3662, which governs the confidentiality of information about an applicant for a concealed firearms permit and a permittee." Id., 126 Nev. at 215, 234 P.3d at 925. The Sheriff broadly construed the statute, arguing that because an application for a concealed firearms permit and information related to the applicant are declared confidential under the statute, any information contained in a subsequently issued permit, including the name of the permittee, was likewise confidential. The Supreme Court disagreed, holding that under the narrow construction mandate of the Nevada Public Records Act, the statutory grant of confidentiality under NRS 202.3662 did not extend to a permittee. The names of permittees were therefore found to be a matter of public record, and the Court ordered the Sheriff to disclose the same. Id., 126 Nev. at 216-17, 234 P.3d at 926.

At no point in Sheriff did the RGJ argue that NRS 202.3662 was invalid or somehow unenforceable under the law. Rather, it simply advocated the narrow

statutory construction approach embraced by the Nevada Supreme Court.

Very similarly, in this case, and as a preview of the substantive arguments set forth later in this brief, the parties dispute the proper interpretation and scope of a purported confidentiality provision, namely, NAC 453A.714(1). Just as in Sheriff, the RGJ advocates a narrow construction of the provision and contends that it does not extend to the names of the City's MME business license holders. Conversely, the City broadly construes the provision, arguing that the Nevada Legislature evidenced an intent that the provision apply to such names. In advocating its contravening position, one of the RGJ's arguments is that the overly broad interpretation advanced by the City is inconsistent with and not supported by the statutory structure that underlies that provision, and therefore that the provision must be construed narrowly and consistent with that structure. This action, therefore, does not seek a determination of the validity of NAC 453A.714(1). Instead, it merely advances the argument that the City's interpretation of that regulation is overly broad and impermissible under Nevada's public records jurisprudence.

Under the circumstances, the City's argument that Nevada's Administrative Procedure Act controls the resolution of the parties' public records dispute is simply

wrong.<sup>1</sup>

**2. Joinder of the Division is not necessary in this dispute over access to public records maintained by the City.**

As a further product of its erroneous conclusion that Nevada's Administrative Procedure Act governs the parties' public records dispute, the City argues that the RGJ's Petition for Writ of Mandamus should not have been heard by the district court because, contrary to the provisions of the Administrative Procedure Act, the Division was not joined as a party. According to the City, joinder of the Division is necessary because the RGJ seeks to invalidate a regulation adopted by the Division. This assertion, however, is incorrect for all the reasons

---

<sup>1</sup>Equally misplaced is the City's citation to Southern California Edison v. Dist. Ct., 127 Nev. 276, 255 P.3d 231 (2011), as authority for the proposition that the Administrative Procedure Act is the proper remedial mechanism for addressing the parties' public records dispute. The obvious distinction in that case is that it involved a claim for a tax refund which proceeded through an administrative process involving a hearing in front of the Nevada Department of Taxation, followed by an appeal to the Nevada Tax Commission and a decision by an administrative law judge. The only issue in that case was whether the district court, once the administrative process was complete, was to review the administrative law judge's decision under a de novo standard of review or under a petition for judicial review applying a more deferential standard. Id., 127 Nev. at 278, 255 P.3d at 232. This is factually and procedurally distinct from this case which, as noted, involves a denial of access to public records. Unlike the tax refund issues in Southern California Edison, the public records dispute in this case does not invoke administrative oversight, and does not seek to invalidate any administrative regulation. The provisions of the Administrative Procedure Act are therefore not triggered.

discussed above. The RGJ has not challenged the validity of NAC 453A.714(1). Rather, it challenges the City's overbroad, incorrect interpretation of that regulation.

In addition, citing State Div. of Ins. v. State Farm Mut. Auto. Ins. Co., 116 Nev. 290, 995 P.2d 482, 485 (2000), the City contends that joinder of the Division is required so that the Division can weigh in on the interpretation of its own regulation. The City further argues that with the Division as a party, the district court would be obligated to give "great deference" to the Division's proffered interpretation of the regulation.

Such an argument, however, is completely contrary to the standards of Nevada's public records jurisprudence. "Great deference", as advocated by the City, is the exact opposite of the narrow construction that, under the Nevada Public Records Act, must be given to any claimed exception to the public's right of access to public records.

Again, then, the proper procedural mechanism for addressing the public records dispute in this matter is the process identified in the Nevada Public Records Act - - i.e., an action filed in the district court of the county where the disputed records are maintained. NRS 239.011(1). And, pursuant to the decisions of this Court, the form of that action is a petition for writ of mandamus. See DR Partners,

116 Nev. at 621, 6 P.3d at 468.

**B. The Names Of The City's MME Business License Holders Are Not Declared By Law To Be Confidential.**

Similar to its misplaced procedural arguments, the City's substantive arguments regarding the purported confidentiality of the names of its MME business license holders are without merit.

According to the City, NAC 453A.714(1), as allegedly authorized by NRS 453A.370(5), establishes confidentiality for the name of "any person" who participates or "delivers" services in the medical marijuana industry in Nevada, including the City's MME business license holders. In essence, the City would have this Court declare that pursuant to NAC 453A.714(1) and NRS 453A.370(5), all participants in the medical marijuana industry in this state can conduct business under a veil of secrecy free from any public disclosure of their personal identities at any time. For the reasons discussed below, however, that is simply not a conclusion that can be reached when NAC 453A.714(1) and NRS 453A.370(5) are, as mandated by the Nevada Public Records Act, construed narrowly and in favor of disclosure.

In the final analysis, there is no provision of Nevada law that expressly and unequivocally declares the names of the City's MME business license holders confidential. The district court's order mandating disclosure of those names should

therefore be affirmed.

**1. NRS 453A.370(5) is not a confidentiality statute.**

As an initial matter, it must be noted that for several reasons, NRS 453A.370(5) is not a confidentiality statute, and therefore does not grant confidentiality to any public records or items of public information, including the names of the City's MME business license holders.

First, NRS 453A.370(5) is nothing more than part of the Nevada Legislature's larger mandate under NRS 453A.370 that the Division promulgate certain regulations to carry out the requirements of NRS Chapter 453A. In that regard, NRS 453A.370(5) requires the Division's regulations to include provisions that:

5. **As far as possible while maintaining accountability**, protect the identity and personal information of each person who receives, facilitates or delivers services in accordance with this chapter.

NRS 453A.370(5) (emphasis added).

Nothing in this statute, however, actually grants specific confidentiality for anything. There is thus no way that NRS 453A.370(5), or any other aspect of NRS 453A.370, can be construed as providing confidentiality for the names of the City's MME business license holders. This is particularly true when it is considered that an exception to disclosure of public records in this state can only exist when it is



expressly and unequivocally stated in the law.

Second, any notion that NRS 453A.370(5) contains an express and unequivocal grant of confidentiality is fully undercut by the standardless initial phrase of that statute: “[a]s far as possible while maintaining accountability.” What does that mean, and how can any statute that incorporates such language be considered as imposing any form of express and unequivocal rule?

While this language is standardless, it nonetheless cannot be ignored. In fact, when interpreting a statute, a court should not render “words or phrases superfluous or make a provision nugatory.” S. Nevada Homebuilders Ass’n v. Clark Cnty., 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). As a result, the phrase “maintaining accountability” must be considered an integral part of the Division’s express obligation under NRS 453A.370(5). The task thus becomes one of attempting to identify the standards of accountability that must be maintained. No such standards, however, are enumerated in the statutory structure of Chapter 453A. Again, then, it simply cannot be concluded that NRS 453A.370(5) contains an express, unequivocal grant of confidentiality for any public records or items of public information, including the names of the City’s MME business license holders.

Moreover, to the extent any standard of accountability can be gleaned from Chapter 453A, that standard would not favor blanket confidentiality for those

names. In this regard, the following statement of legislative intent concerning the regulation of MMEs in Nevada is set forth in NRS 453A.320:

The purpose for registering medical marijuana establishments and medical marijuana establishment agents is to protect the public health and safety and the general welfare of the people of this State.

With such an expression of legislative intent and public policy, it makes little sense to require MMEs and their agents to be registered with the Division and to obtain business licenses from the City, but at the same time to prevent the general public, for whose safety Chapter 453A was enacted, from knowing who the establishment license holders are.

Again, a court must interpret provisions within a common statutory scheme harmoniously with one another in accordance with the general purpose of those statutes and to avoid unreasonable or absurd results. S. Nevada Homebuilders Ass'n., 121 Nev. at 449, 117 P.3d at 173. To do as the City requests, thereby ignoring the Division's obligation to maintain accountability relative to licensed MMEs, would leave a large hole in the public's ability to investigate and ascertain whether its health and safety are being protected by the licensing agencies. This absurd result certainly cannot be what the Legislature intended in light of the stated purpose of the MME regulatory statutes. The mandate to "maintain accountability" is the opposite of granting confidentiality.

As stated, then, NRS 453A.370(5) cannot be construed as an express and unequivocal grant of confidentiality for the names of the City's MME business license holders.

Also supporting this conclusion is that NRS 453A.370(5) is not included in the comprehensive list of confidentiality statutes contained in Nevada's Public Records Act. In this regard, NRS 239.010(1) specifically identifies every confidentiality statute in the Nevada Revised Statutes that exempts public documents from public disclosure. See 2013 Statutes of Nevada, Ch. 414, AB 31 (directing that this bill "compile all the statutory provisions that prohibit the disclosure of or specifically declare public books and records confidential"). Absent from that list of statutes is NRS 453A.370(5).

Importantly, however, two other provisions from NRS Chapter 453A do appear in that list. The first is NRS 453A.610, which contains a declaration of confidentiality limited to certain documentation and information generated or received by the University of Nevada School of Medicine as part of the program it has established for research related to the medical use of marijuana. This confidentiality provision clearly does not extend to the names of the City's MME business license holders.

The second provision is NRS 453A.700, which contains a declaration of

confidentiality limited to the name and any other identifying information of an “attending physician” or a person who has applied for or obtained a “registry identification card.” The phrase “attending physician” is defined in NRS 453A.030 as a duly licensed medical doctor or osteopath who has responsibility for the care and treatment of a person with a chronic or debilitating medical condition. The phrase “registry identification card” is defined in NRS 453A.140 as a document issued by the Division, or its designee, that identifies a person who is exempt from state prosecution for engaging in the medical use of marijuana, or that person’s designated primary caregiver. Given these definitions, the confidentiality conferred by NRS 453A.700 just as clearly does not extend to the names of the City’s MME business license holders.

Nevertheless, the City would have this Court compare the “linguistic variation” between NRS 453A.370(5) and the actual confidentiality statutes of NRS 453A.610 and NRS 453A.700 as evidence of “an intentional and meaningful expansion of the class of individuals whose names and personal information are protected.” See City’s Opening Brief at p. 17. However, the City’s comparison of “linguistic variation” does not support or help its argument for confidentiality. In fact, pointing out the distinction and vast difference between express, unambiguous confidentiality statutes and the language contained in NRS 453A.370(5) further demonstrates that NRS 453A.370(5) is not a clear or explicit declaration of

confidentiality.

What is clear is that the Legislature knew how to impose confidentiality for the identities of specific classes of persons who would be involved in the medical marijuana industry in this state. Indeed, that is precisely what the Legislature did with “attending physicians” and applicants for and holders of “registry identification cards.” But the Legislature specifically chose not to impose any such confidentiality for the owners or business license holders of MMEs. The Legislature thus obviously did not intend to create any such confidentiality through NRS 453A.370(5).

Simply put, NRS 453A.370(5) is not a confidentiality statute. As stated above, the Legislature must “expressly and unequivocally create an exemption or exception [to public disclosure] by statute.” Sheriff, 126 Nev. at 214, 234 P.3d at 924. That was not done in NRS 453A.370(5).

**2. NAC 453A.714(1) does not establish confidentiality for the names of the City’s MME business license holders.**

- a) The City’s interpretation of NAC 453A.714(1) must be rejected in light of the limited legislative grant of authority underlying that regulation.

The City’s argument that NAC 453A.714(1) provides confidentiality for the names of its MME business license holders fails for the initial reason that its proffered interpretation of NAC 453A.714(1) forces meaning on that regulation that

far exceeds the regulation-making authority given to the Division under NRS 453A.370.

Pursuant to NRS 233B.040, state agencies such as the Division are vested with regulation-making authority. However, in any specific regulation-making circumstance, that authority is limited to the grant of authority provided by the Nevada Legislature in the statutory provisions which underlie the regulations in question. NRS 233B.040 (1).

In this instance, the Division's regulation-making authority under NRS Chapter 453A is granted by NRS 453A.370. However, as explained above, that statute is not a confidentiality statute and does not grant authority to the Division to bestow confidentiality upon the names of any individuals or class of individuals beyond those specifically enumerated in NRS Chapter 453A. While subsection 5 of NRS 453A.370 confers authority on the Division to promulgate regulations that "[a]s far as possible while maintaining accountability, protect the identity and personal identifying information of each person who receives, facilitates or delivers services in accordance with this chapter," nowhere in NRS Chapter 453A is the phrase "person who receives, facilitates or delivers services in accordance with this chapter" defined. This absence has clear significance because, as discussed above, the only persons whose identities are expressly declared by NRS Chapter 453A to be confidential are "attending physicians" and persons who apply for or hold

“registry identification cards.” See NRS 453.700(1). As a consequence, because NRS 453A.370(5) is not itself a confidentiality statute, but rather, merely contains a grant of regulation-making authority under the substantive provisions of NRS Chapter 453A, it must be concluded that as it pertains to the confidentiality of persons’ names and other identifying characteristics, the Division’s regulation-making authority was and is limited to “attending physicians” and applicants for and holders of “registry identification cards.”

Any suggestion that the scope of confidentiality imposed by NAC 453A.714(1) extends beyond the two specific instances of confidentiality contained within NRS Chapter 453A is an expansive and unsupportable position.

- b) The City’s interpretation of NAC 453A.714(1) is in direct contravention of the Nevada Public Records Act.

The City’s argument that NAC 453A.714(1) provides confidentiality for the names of its MME business license holders fails for the additional reason that its interpretation of the regulation contravenes the requirement of Nevada’s Public Records Act that any exemption to disclosure of public records be narrowly construed.

Under a narrow construction of NAC 453A.714(1), the conclusion is inescapable that the regulation does not contain an express grant of confidentiality



for the names of MME business license holders. This, in turn, defeats the City's proffered basis for confidentiality in this matter.<sup>2</sup>

The City instead takes a more global view of NAC 453A.714(1), and, through its generalized focus on the non-specific, undefined words "any person" and "delivers" within the regulation, ultimately reaches an interpretation of NAC 453A.714(1) that expands confidentiality to the broadest reach possible. In fact, the City's interpretation effectively extends confidentiality to the identities of all persons involved in any respect in the medical marijuana industry in this state. Obviously, however, where the Nevada Legislature has chosen to confer confidentiality on the identities of only two specific classes of persons involved in the industry (i.e., attending physicians and registry card holders), such an interpretation does not comport with the standards of the Nevada Public Records Act. Indeed, the City, through its overly-expansive interpretation of NAC 453A.714(1), has done exactly what the Nevada Legislature and this Court have instructed government agencies in this state not to do in public records matters - - it has wrongly given the broadest possible interpretation to a statute (or regulation

---

<sup>2</sup> The City characterizes this position by the RGJ as "pedantic." (Opening Brief, p. 25, ln. 1.) If it is "pedantic," then the Public Records Act -- by requiring a narrow construction of any purported exception to the public's right of access to public records -- is, itself, "pedantic." But "pedantic" or not, that is the law. NRS 239.001(3).

in this instance) for the purpose of defeating public access to public information.

The City simply cannot escape the Nevada Legislature's choice to limit confidentiality to the identities of "attending physicians" and applicants for or holders of "registry identification cards". A similar declaration of confidentiality was not made in NRS Chapter 453A for MMEs or the names of the owners or business license holders of such establishments. And NAC 453A.714(1) merely refers to "any person who facilitates or delivers services" pursuant to NRS Chapter 453A, without defining or clarifying who are intended to be included in that category of "persons."

This absence of an express grant of confidentiality for the names of MME business license holders cannot be ignored. Given that the Legislature must "expressly and unequivocally create an exemption or exception" to the Nevada Public Records Act, the only proper conclusion is that the names of the City's MME business license holders are not confidential.

## **VI. CONCLUSION**

For all the reasons stated above, the arguments advanced by the City in support of its contention that the names of its MME business license holders are confidential are without merit and completely ignore the standards of Nevada's public records jurisprudence.

Moreover, as fully demonstrated above, this mandamus proceeding is the proper remedial vehicle for addressing the parties' public records dispute.

Under the circumstances, the order of the District Court compelling the City to produce unredacted copies of its MME business licenses should be affirmed.

DATED this 4 day of August, 2016.

GLOGOVAC & PINTAR

By:

A handwritten signature in black ink, appearing to be 'SAG', written over a horizontal line.

SCOTT A. GLOGOVAC, ESQ.

Nevada Bar No. 226

ROBERT R. HOWEY, ESQ

Nevada Bar No. 11608

Attorneys for Respondent  
*Reno Newspapers, Inc.*

## **VII. ATTORNEY'S CERTIFICATE**

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14 point Times New Roman type style. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), the brief does not exceed 30 pages and contains approximately 7,174 words.


I further certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, and it complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

///

///

DATED this 8 day of August, 2016.

GLOGOVAC & PINTAR

By:   
SCOTT A. GLOGOVAC, ESQ.  
Nevada Bar No. 226  
ROBERT R. HOWEY, ESQ  
Nevada Bar No. 11608

Attorneys for Respondent  
*Reno Newspapers, Inc.*

### CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(b), I certify that I am an employee of the law offices of Glogovac & Pintar, 427 West Plumb Lane, Reno, NV 89509, and that on the 8<sup>th</sup> day of August 2016, I served the foregoing document(s) described as follows:

#### **RESPONDENT'S ANSWERING BRIEF**

On the party(s) set forth below by:

\_\_\_\_\_ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage prepaid, following ordinary business practices, addressed as follows:

  X   I electronically filed with the Clerk of the Court, using the Supreme Court Electronic Filing System, which sends an immediate notice of the electronic filing to the following registered e-filers for their review of the document in the Supreme Court Electronic Filing System:

SCOTT A. GLOGOVAC, ESQ. for RENO NEWSPAPERS, INC.

DOUGLAS R. THORNLEY, ESQ. for CITY OF SPARKS

\_\_\_\_\_ Personal delivery via messenger.

\_\_\_\_\_ Facsimile (FAX).

\_\_\_\_\_ Federal Express or other overnight delivery.

Dated this 8<sup>th</sup> day of August, 2016.

Brenda Riviera

An Employee of Glogovac & Pintar