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8 *Residents Association & Joe McCarthy*

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

10 COMSTOCK RESIDENTS
11 ASSOCIATION, JOE MCCARTHY,
12

13 Appellants,

CASE NO. 70738

14
15 vs.

16 LYON COUNTY BOARD OF
17 COMMISSIONERS,
18

19 Defendant-Respondent,
20 _____/

21 ///

1 **APPELLANT’S OPENING BRIEF**

2 COMES NOW the Appellant(s), COMSTOCK RESIDENTS

3

4 ASSOCIATION, JOE MCCARTHY by and through the

5

6 undersigned counsel, and hereby file the following Appellant’s Opening

7 Brief pursuant to Nevada Rule of Appellate Procedure (“NRAP”) 28,

8

9 seeking that the Court reverse the Order (JA at 175) issued in Docket

10 No. 14-CV-01304 by the Third Judicial District Court June 14, 2016 in

11

12 favor of Respondent Lyon County Board of Commissioners, a political

13 subdivision of the State of Nevada.

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1 **NRAP 26.1 DISCLOSURE**

2 The undersigned counsel of record certifies that the following are
3 persons and entities as described in NRAP 26.1(a), and must be
4 disclosed. These representations are made in order that the judges of
5 this court may evaluate possible disqualification or recusal:
6
7

8 Comstock Residents Association, a Nevada nonprofit corporation
9

10 Joe McCarthy, an individual, Appellants.
11

12 Lyon County Board of Commissioners, a political subdivision of
13 the State of Nevada – Respondent.
14

15 Attorney of record for Comstock Residents Association and Joe
16 McCarthy
17

18 Respectfully submitted this Friday, November 4, 2016.

19 By: 
20

21 Luke Busby, Esq.
22 Nevada Bar No. 10319
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I. JURISDICTIONAL STATEMENT

Nevada Rule of Appellate Procedure 3A(b)(1) grants the Supreme Court jurisdiction over this appeal. On June 14, 2016, the District Court issued its Order Denying Petition (“Order”). Joint Appendix (“JA”) 175. The Order was entered on June 15, 2016. JA 182. The District Court’s Order constitutes a final order as it disposed entirely of the issues raised in this case. Appellants timely filed this appeal on July 1, 2016. JA 241.

II. STATEMENT OF ISSUE

The Nevada Public Records Act (“NRPA”), codified in Nevada Revised Statutes (“NRS”) Chapter 239, mandates disclosure of public records created by Governmental entities conducting the public’s business. The question presented to the Court is whether Respondent Lyon County Board of Commissioners may withhold disclosure of public records when they conduct official business using personal electronic devices or personal email accounts?

III. STATEMENT OF THE CASE

This is an appeal from an order denying Appellants Comstock Residents Association and Joe McCarthy's (collectively "CRA") Petition for Writ of Mandate challenging Lyon County's determination that records created by its employees and Commissioners in the course of conducting their official duties on personal electronic devices or personal email accounts are not subject to disclosure under the Nevada Public Records Act. The Petition was heard and a subsequent Order was issued by the Third Judicial District Court, Lyon County, Hon. Steven R. Kosach, Senior District Judge.

IV. ROUTING STATEMENT

Appellant CRA respectfully submits that this appeal is appropriate for resolution in the Supreme Court. As an appeal arising from litigation over a decision by a local government to withhold public records under the NPRA, this action does not fall within any of the presumptive categories for review by the Nevada Court of Appeals of NRAP 17(a)(1)-(12) or 17(b)(1)-(10). Lyon County is not an administrative agency (see e.g., NRS 233B.031 defining "agency" for purposes of the

1 Nevada Administrative Procedure Act, as a constituent part of the
2 “Executive Department of the State Government”). As such, the
3 “administrative agency appeals” provisions of NRAP 17(a)(9) and
4 17(b)(4) do not on their face apply to this appeal.
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7 This appeal raises a question of first impression in Nevada under the
8 NPRA. Namely: whether a public agency may shield otherwise public
9 records from disclosure where its officials and employees conduct
10 official business using personal electronic devices or personal email
11 accounts. This appeal raises statewide issues of public importance under
12 NRAP 17(a)(14) because, as the District Court recognized in its Order,
13 its holding “may cause public employees to skirt the disclosure
14 requirements of the NPRA by conducting business on their private
15 devices.” JA 180.
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21 The Supreme Court’s decision in this case will provide critical
22 guidance to local governments on issues directly affecting Nevada
23 citizens right to access public records. As a result, Appellant CRA
24 submits that this appeal should be directly assigned to the Supreme
25 Court under NRAP 17(a)(14).
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V. BACKGROUND

This NPRA case arises out of a contested land use decision regarding an application by Comstock Mining Incorporated (“CMI”) to change to longstanding land use and zoning designation for property within Silver City, Nevada. Silver City is one of two communities Lyon County dedicated as a living, historic community. As modern planning and zoning emerged for the area, Silver City has retained this historical backdrop as its foundation, and overlaid a modern transect of desired development. Using zoning law, Lyon County has consistently envisioned the “Silver City Town Site” as a commercial core with a small industrial zone, which includes some relic historic mills and mines, all surrounded by residential development. Zoning provisions assigned residential densities within the Town Site reflected existing conditions and promoted densities capable of facilitating infrastructure improvement.

Beyond the boundaries of the Town Site, land use has consistently been designated for less dense development and open space. Using different designations with different names, this basic concept has

1 carried through generations of Lyon County land use plans for Silver
2 City since 1971.

3
4 In August 2013 and in order to mine its property, CMI applied to
5 Lyon County to change the land use designations and zoning within
6 Silver City from more urban to more rural, which would allow industrial
7 uses, such as mining, which had been prohibited. See generally JA 041-
8 076.
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10
11 Lyon County professional planning staff exhaustively reviewed
12 CMI's application and issued in-depth reports on the requested changes
13 and recommended that CMI's application be denied based on multiple
14 factors, including but not limited to the following: industrial land uses
15 requested by CMI's application were in conflict with multiple 2010
16 Master Plan policies; no change in conditions has occurred to justify so
17 altering the longstanding land use designations within Silver City; and as
18 envisioned by the 2010 Master Plan, a land use change of such a
19 magnitude should be considered, if at all, during the development of the
20 Silver City Community Plan. *Id.* After hearing hours of public
21 testimony, the Lyon County Planning Commission adopted the
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1 recommendation of its professional staff and recommended – by a 4 to 1
2 vote – that the Lyon County Commission deny CMI’s requested
3 changes. JA 82-86.
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5 The Lyon County Commissioners thereafter reversed the
6 recommendation of both its planning staff and Planning Commission at
7 its January 2, 2014 meeting. At the beginning meeting, Commissioner
8 Keller announced she had a new action for consideration.
9

10 Commissioner Keller indicated she had contacted other Commissioners
11 and CMI to discuss her proposal outside of a public meeting. JA 082-
12 086.¹
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15 As it turned out, Commissioner Keller and other members of the
16 Lyon County Commissioners used their personal devices or email
17 accounts to conduct official business regarding CMI’s land use
18 application. Indeed, the Commissioners listed as official contact their
19 personal cell phone numbers and used their personal email addresses on
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25 ¹ Respondent CRA sought judicial review of Lyon County’s land use
26 decision. That case, Nevada Supreme Court Docket No. 68433, was
27 argued before the Supreme Court, on September 14, 2016 and is
28 awaiting a panel decision.

1 Lyon County's website. See e.g. JA 095; JA 093. Candid admissions of
2 this fact are also made in briefs and declarations submitted by Lyon
3 County during the course of the underlying litigation.
4

5 On February 11, 2014, the Petitioners submitted to the Lyon County
6 Board of County Commissioners and Lyon County staff a request for all
7 public records pursuant to the NPRA related to CMI's 2013 application
8 for the master plan amendment and zoning change, including but not
9 limited to all records of communication regarding CMI to or from the
10 Lyon County Commissioners regardless of whether they occurred on
11 devices owned by Lyon County or personally by the Lyon County
12 Commissioners. JA 037-038.
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18 Lyon County responded to Petitioners' NPRA request and provided,
19 *inter alia*, copies of phone records, emails and other records in
20 electronic form as long as those records were created and/or stored on
21 county administration owned and controlled equipment. See e.g. JA
22 093. However, Lyon County refused to provide any record received,
23 created or stored by an individual County Commissioner or employee on
24 a personal device, stating: "Lyon County does not provide cellular
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1 phones for the County Commissioners, and as such, Lyon County does
2 not maintain any of those records and they are not public records
3 pursuant to NRS Chapter 239.” JA 40. Petitioners then brought this
4 action to enforce Lyon County’s obligation under the NPRA to produce
5 all relevant public records.
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8 **G. District Court Proceedings**

9
10 CRA filed its Petition for Writ of Mandate (“Petition”) on October
11 24, 2014 (JA 001) after the District Court denied CRA’s request to add
12 the NPRA to its existing lawsuit challenging Lyon County’s land use
13 decision (JA 127-129). CRA’s Petition states a single cause of action
14 for violation of the NPRA, alleging that public officials may not shield
15 from disclosure by using personal electronic devices or email accounts
16 to create, store or receive otherwise public records. JA 009. Lyon
17 County answered the CRA’s Petition on December 5, 2014. JA 015-
18 021. The parties thereafter briefed the merits of CRA’s Petition. JA
19 022, JA 099, JA 162.
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25 On June 14, 2016, the District Court denied CRA’s Petition. JA -
26 175. The District Court determined that the NPRA did not reach
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1 records, which would otherwise be public if located on County systems,
2 because the Commissioners paid for their personal devices and email
3 accounts, “which tends to show that these records are not public.” The
4 District Court also held that records on personal devices and accounts
5 are not “open to public inspection” as required by the NPRA and outside
6 of the control of the public agency. The District Court also found that
7 the requested records were not, in and of themselves, “official actions”
8 of Lyon County and therefore beyond the reach of the NPRA. The
9 District Court concluded that it lacked the authority to order production
10 under the NPRA over personal devices and accounts. Finally, the
11 District Court recognized that its “holding may cause public employees
12 to skirt the provisions of the NPRA by conducting business on their
13 private devices.” JA 175-180.

21 VI. SUMMARY OF ARGUMENT

22 The NPRA requires public agencies, their elected officials and staff,
23 to produce public records. A record is public if it concerns a public
24 matter. An otherwise public record does not lose public status simply
25 because it was created, received or stored on a personal device or
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1 personal account. As long as the public entity or individual has
2 sufficient control over the device or account, the NPRA compels
3 disclosure. Thus, Lyon County legally erred when it withheld from
4 disclosure public records solely because the records were stored on
5 officials' and staff members' personal electronic devices or personal
6 accounts.
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10 **VII. STANDARD OF REVIEW**

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12 This Court reviews the District Court's Order for an abuse of
13 discretion. However, the District Court's legal conclusions and statutory
14 interpretation are reviewed *de novo*. *Las Vegas Police Department v.*
15 *Blackjack Bonding*, 131 Nev. ___, 343 P.3d 608, 612 (2015)
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18 **VIII. ARGUMENT**

19 **A. CRA Seeks Public Records**

20
21 No party disputes that the NPRA applies to individual County
22 Commissioners and employees and staff. NRS 239.005(a) and (b); JA
23 103. Further, no party disputes that Lyon County officials and staff used
24 their personal electronic devices and private email accounts to conduct
25 governmental business. JA 102 ("The County Commissioners use their
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1 cellular telephones and email accounts for private matters in addition to
2 County Business.”). Lyon County concedes the NPRA requires
3 disclosure of public records created or received by Commissioners and
4 staff on their personal devices and accounts if those records
5 subsequently were stored on County-owned systems. JA 154, at ¶ 2
6 (County provided “phone records, emails and other records in electronic
7 form, **as long as those records were created and or stored on county-**
8 **owned and controlled equipment.**” (Emphasis added)).
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13 Lyon County withheld public records on the basis that the NPRA
14 does not apply to records created or received by government officials
15 and employees in the course of their public duties if those records
16 remain on their personal devices or private accounts. In other words,
17 Lyon County (and the District Court) assert that whether a record falls
18 within the NPRA is controlled by the electronic record’s place of storage
19 rather than its content. As demonstrated below, Lyon County and the
20 District Court’s legal position is supported neither by law nor policy.
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1 **B. The NPRA Is Broadly Construed to Protect Citizen Access**
2 **to Public Records**

3 This Court broadly applies the NPRA to maximize public
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5 disclosure:

6 The NPRA provides that all public books and public
7 records of governmental entities must remain open to
8 the public, unless “otherwise declared by law to be
9 confidential.” NRS 239.010(1). The Legislature has
10 declared that the purpose of the NPRA is to further the
11 democratic ideal of an accountable government by
12 ensuring that public records are broadly accessible. NRS
13 239.001(1). Thus, the provisions of the NPRA are
14 designed to promote government transparency and
15 accountability.

16 In 2007, in order to better effectuate these purposes, the
17 Legislature amended the NPRA to provide that its
18 provisions must be liberally construed to maximize the
19 public’s right of access. NRS 239.001(1)-(2); 2007 Nev.
20 Stat., ch. 435, § 2, at 2061. Conversely, any limitations
21 or restrictions on the public’s right of access must be
22 narrowly construed. NRS 239.001(3); 2007 Nev. Stat.,
23 ch. 435, § 2, at 2061. In addition, the Legislature
24 amended the NPRA to provide that if a state entity
25 withholds records, it bears the burden of proving, by a
26 preponderance of the evidence, that the records are
27 confidential. NRS 239.0113; 2007 Nev. Stat., ch. 435, §
28 5, at 2062.

29 *Reno Newspapers v. Gibbons*, 127 Nev. 873, 877-878; 266 P.3d 623,
30 626 (2011).

1 In light of the foregoing authority, Lyon County bore the burden to
2 establish its limitations on granting access to the requested government
3 records are lawful or that the records are confidential.
4

5
6 **C. Public Records Are Defined By Content Not Location**

7 Under the plain language of the Nevada Public Records Act
8 (“NRPA”), the nature of the communication, rather than delivered
9 address, is the determinative factor of whether the record is public.² In
10 *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 343 P.3d 608,
11 131 Nev. Adv. Rep. 10 (Nev. 2015), the Court analyzed independently
12 whether a record was public from whether the government entity had the
13 ability to access those public records. *Id.* at 612-613. The Supreme
14 Court’s determination that the records at issue were public rested on the
15 nature of the record; i.e., did it pertain to a matter of public interest? *Id.*
16 Here, no dispute exists that the records CRA requested pertain to a
17 matter of public interest (CMI’s land use application) and during the
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26 ² This is particularly relevant here because the officials advertised to the
27 public that the proper address to receive communications were their
28 personal addresses (both physical and electronic).

1 performance of public officials’ public duties (consideration of CMI’s
2 application by the County Commission).
3

4 Although the Nevada Supreme Court has not addressed the question
5 presented, other jurisdictions have and confirm that the nature of the
6 record rather than its location controls. For example, in *Competitive*
7 *Enterprise Institute v. Office of Science and Technology Policy*, ---F.3d--
8
9 - (D.C. Cir. 2016), 2016 WL 3606551 (July 5, 2016), the federal Court
10 of Appeals for the District of Columbia held the Freedom of Information
11 Act (“FOIA”) required federal officials to search non-federal email
12 accounts used for official work-related correspondence. “Because we
13 agree with plaintiff-appellant that an agency cannot shield its records
14 from search or disclosure under FOIA by the expedient of storing them
15 in a private email account controlled by the agency head, we reverse the
16 dismissal and remand the case for further proceedings.” *Id.* at *1.
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22 Similarly, in *O’Neill v. City of Shoreline*, 170 Wn.2d 138, 150, 240
23 P.3d 1149 (2010), the Washington Supreme Court held that state’s
24 Public Records Act (“PRA”) applied to records stored on government
25 employees’ personal computers used for government business. More
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1 recently, the same court, in *Nissen v. Pierce County*, 183 Wn.2d 863,
2 357 P.3d 45 (Wash. 2015), extended in prior holding such that “text
3 messages sent and received by a public employee in the employee’s
4 official capacity are public records of the employer, even if the
5 employee uses a private cell phone.” *Id.* See also *City of Champaign v.*
6 *Lisa Madigan*, 992 N.E.2d 629, 2013 Ill. App. LEXIS 481, 372 Ill. Dec.
7 787, 2013 WL 3704619 (Ill. App. Ct. 4th Dist. 2013) (Records of city
8 aldermen communication on private electronic devices about public
9 business constituted public records). These cases, like *Blackjack*
10 *Bonding*, find records produced by government official and staff, in the
11 course of their public duties, are public records regardless of whether
12 they were produced, received or stored on personal devices or email
13 accounts.
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21 Further, the 2014 version of the State Administrative Manual
22 (“SAM”) Nevada Department of Administration provides that although
23 state employees may use personal devices to conduct state business,
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1 “Employees must be aware that it is possible the record of use for any
2 device used for State business, could be considered a public record.”³
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4 **D. Government Officials And Staff Have Sufficient Control**
5 **Over Their Devices and Accounts**

6 The public records sought by CRA appear to reside on the personal
7 electronic devices (cellular phones and computers) and/or on personal
8 accounts supporting such devices (e.g., internet mail or cellular service
9 providers’ servers). Lyon County argues that the public records CRA
10 seeks are stored on servers of third parties and therefore “may” not be
11 within the “legal custody or control” of a Commissioner or employee
12 and therefore are not public. JA105-106.
13

14 As an initial matter, this argument does not reach to records stored
15 on or that could be accessed by the Commissioners or employees’
16 personal devices as they would clearly have control that equipment.
17 Likewise, the holder of an email account has sufficient control to access
18 records stored on it. *Competitive Enterprise Institute*, supra; see also
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26 ³ (SAM at 1616, available at
27 <http://budget.nv.gov/uploadedFiles/budgetnv.gov/content/Documents/State%20Administrative%20Manual.pdf>)
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1 *Kiser v. Pride Communs., Inc.*, 2011 U.S. Dist. LEXIS 124124 *, 2011
2 WL 5080162 (D. Nev. Oct. 26, 2011) (“Pursuant to Fed. R. Civ. P. 34,
3 documents sought in discovery motions must be within the "possession,
4 custody, or control" of the party upon whom the request is served.
5
6 However, the ‘phrase 'possession, custody, or control' is disjunctive and
7 only one of the numerated requirements need be met.’ *Soto v. City of*
8 *Concord*, 162 F.R.D. 603, 619 (N.D.Cal. 1995)(quoting *Cumis Ins.*
9 *Society, Inc. v. South-Coast Bank*, 610 F.Supp. 193, 196 (N.D. Ind.
10 1985). Therefore, "actual possession" is not required. *Soto*, 162 F.R.D.
11 at 619. Rather, a ‘party may be ordered to produce a document in the
12 possession of a non-party entity if that party has a legal right to obtain
13 the document or has control over the entity who is in possession of the
14 document.’ *Id.* (internal citation omitted).”).

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21 More importantly, Lyon County seeks to inappropriately shift the
22 burden of compliance with the NPRA to Appellant CRA. Lyon County
23 refused to produce public records without proof that the records are not
24 within the legal custody or control of the Commissioners or employees.
25

26
27 Indeed, Lyon County admits that the terms of those contracts are

1 “unknown” to its central administration and therefore “it is not clear” if
2 the records are under the Commissioners’ control. JA 106. In order to
3 avoid producing these otherwise clearly public records, it is Lyon
4 County’s burden to prove that its Commissioners or employees lack
5 adequate control over them. *PERS v. Reno Newspapers, Inc.*, 313 P.3d
6 221, 223-224 (2013); NRS 239.0107. Since Lyon County admits that it
7 does not know whether the individuals lack control to access these
8 records, it cannot categorically deny disclosing all of the requested
9 records.
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15 When faced with these same arguments, other courts’ impose a
16 simple good faith effort test. In *Nissen v. Pierce County*, supra, the
17 Washington Supreme Court held that records on personal devices
18 regarding public matters where indeed public:
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21 Of course, the public's statutory right to public records
22 does not extinguish an individual's constitutional rights
23 in private information. But we do not read the [Public
24 Records Act] as a zero-sum choice between personal
25 liberty and government accountability. Instead, we turn
26 to well-settled principles of public disclosure law and
27 hold that an employee's good-faith search for public
28 records on his or her personal device can satisfy an
agency's obligations under the PRA.

1
2 *Id.*

3 Lyon County and its public officials seek to avoid all responsibility
4
5 to make reasonable efforts to produce public records as required under
6
7 the NRPA as a result of their voluntary decision to use their personal
8
9 devices. Because they have not meet their burden to establish that these
10
11 public records are outside of their control, Lyon County Commissioners
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13 and staff should conduct the reasonable search of their personal devices
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15 and accounts for public records and disclose them.

14 **E. Lyon County Failed To Establish Confidentiality**

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16 Given that the records at issue concern a matter of public interest
17
18 and concern, Lyon County may only withhold such records if it meets its
19
20 burden to demonstrate an overwhelming competing privacy interest.

21 The balancing-of-competing-interests test is employed
22 “when the requested record is not explicitly made
23 confidential by a statute” and the governmental entity
24 nonetheless resists disclosure of the information. *Reno*
25 *Newspapers, Inc. v. Gibbons*, 127 Nev. —, —, 266
26 P.3d 623, 627 (2011). This test weighs “the fundamental
27 right of a citizen to have access to the public records”
28 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).

Blackjack Bonding, 343 P.3d at 614.

During the litigation below, Lyon County argued that the records sought were categorically private and confidential. However, Lyon County made no claim of confidentiality when it originally denied CRA’s record request as to the disputed class of documents. JA 150. Nor did Lyon County include the withheld documents to its privilege log as required under *PERS v. Reno Newspapers, supra*. See JA 152 (“Redaction Log” only withholding documents as “attorney-client privileged”).

Under *PERS*, any claims of confidentiality must be based on a particular nature of the individual record. *Id.*, at 628 (“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.”) Since Lyon County failed to

1 assert any basis for confidentiality below nor provide a log of the
2 individual documents, it cannot now rely on an a delinquent, categorical
3 claim of “privacy” or generic deliberative process privilege.
4

5 Even if the Court were to consider the merits of Lyon County’s
6 categorical confidentiality arguments it should reject them. The
7 Supreme Court’s NPRA cases demonstrate the high bar governments
8 resisting disclosure face because of the strong public interest in favor of
9 disclosure. In *Donrey of Nevada v. Bradshaw*, 106 Nev., 630, 798 P.2d
10 144 (1990), the Court held a police investigative report of public bribery
11 should have been disclosed. In *DR Partners v. Board of County*
12 *Commissioners*, 116 Nev. 616, 6 P.3d 465 (2000), the Court held that a
13 local county could not redact phone numbers from cellular telephone
14 logs based on a general assertion of deliberative process privilege. In
15 *Reno Newspapers v. Sheriff*, 126 Nev. 211, 234 P.3d 922 (2010), the
16 Court ordered the disclosure of the identity of concealed carry firearms
17 permits holders and any subsequent records of investigations,
18 suspensions or revocations.
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1 In each of these cited cases public records considerably more private
2 than the discussions of public matters at issue here, were held to be
3 subject to disclosure under the NPRA. Lyon County fails to provide
4 evidence as to why withholding these particular records would outweigh
5 the overwhelming policy of public disclosure, particularly where it has
6 already disclosed emails among Commissioners with staff and
7 constituents, that happened to have been in the possession of the central
8 county administration.

13 **F. The District Court Erred In Accepting Lyon County's**
14 **Various Legal Theories To Avoid Disclosure**

15 The District Court erred as a matter of law when it accepted a
16 variety of Lyon County's arguments to deny CRA's Petition. First, the
17 District Court determined that "the records in question where [sic] not
18 paid for with public money which tends to show that these records are
19 not public." JA 179. While not citing any authority for this blanket
20 proposition, the District Court apparently accepted Lyon County's
21 reliance on an out-of-date regulation promulgated by the State Library
22 and Archives Administrator for an entirely different purpose.

1 The Legislature addresses multiple distinct topics in the NPRA: the
2 requirements to disclose public records (NRS 239.001 to 239.030), the
3 reproduction of records (NRS 239.051 to 239.070), the disposal of
4 obsolete records (NRS 239.073 to 239.125), and the restoration of lost or
5 destroyed records (NRS 239.130 to 239.290). Under the provisions for
6 the disposal of obsolete records, the Legislature provided, “[t]he State
7 Library and Archives Administrator shall adopt regulations to carry out
8 a program to establish and approve minimum periods of retention for
9 records of local governments.” Under this limited grant, and for the
10 specific purpose of records retention, the State Library and Archives
11 Administrator (“Administrator”) promulgated a set of regulations, NAC
12 sections 239.011-239.165, to help guide local governments in their
13 record retention programs. In a prior version of these regulations, the
14 Administrator defined, for purposes of local government retention,
15 “public record” (since deleted). JA Lyon County Exhibit 9. Lyon
16 County seizes upon this deleted definition to limit its obligation to
17 disclose public records under an entirely distinct section of the NPRA.
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27 JA 104.

1 However, the Administrator lacks the authority to otherwise limit
2 the application of NRS 239.010. NRS 239.125 provides the
3 Administrator only with authority to implement the local government
4 retention obligations, not limit their obligation to disclose records. *Id.*
5 The regulation therefore has no force or effect to limit NRS 239.010
6 disclosure obligations. As noted above, the Supreme Court analyzes
7 independently whether a record was public under NRS Section 239.010
8 and NAC 239.091. In *LVPD v. Blackjack Bonding*, the Supreme Court
9 specifically noted that because it found the records in question to be
10 public under NRS 239.010, the Court did not need to consider whether it
11 was public under NAC 239.010. *LVPD v. Blackjack Bonding*, 303 P.3d
12 at 613, n. 3. Thus, the deleted NAC 239.091 did not limit NRS
13 239.010's application but provided a separate basis for finding a record
14 public.

15 Furthermore, even if one were to use the disjunctive definition
16 provided in the deleted NAC 239.091, the records sought here were
17 either created or received by a government entity in the performance of
18 their public duties paid for with public funds; the public pays the Lyon

1 County Commissioners to perform their official duties. Thus, the
2 records are public even under NAC 239.091 (which must be construed
3 liberally to promote disclosure per NRS 239.001).
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6 Second, the District Court also erred by apparently relying on
7 another administrative regulation defining “records” and “non-record
8 materials” for record retention purposes. See JA 179 (Order citing NAC
9 239.051, 239.061, 239.101). Below, Lyon County argued that any
10 record that does not represent “the record of official action” is not
11 public. JA 107. Not only does such a construction not comport with the
12 County’s own response to CRA’s NPRA request (which included
13 communications exactly of the type sought by CRA), but it also
14 contradicts numerous Nevada Supreme Court decisions and illustrates
15 the inapplicability of the NAC retention definitions for disclosure
16 purposes.
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19 For example, Lyon County admits public records responsive to
20 CRA’s request include “cellular records,” “emails” and other documents
21 kept by Lyon County even those these records are not allegedly “records
22 of official action.” JA 101. Indeed, the Nevada Supreme Court has
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1 ruled that such records fall within the NPRA. See e.g. *Blackjack*
2 *Bonding*, supra (phone records), *Reno Newspapers, Inc. v. Gibbons*, 127
3 Nev. 873, 266 P.3d 623 (2011) (emails); *DR Partners v. Board of*
4 *County Commissioners*, 116 Nev. 616, 6 P.3d 465 (2000) (phone
5 records); *Reno Newspapers, Inc. v. Sheriff*, 126 Nev. 211 (concealed
6 carry gun permit documents).

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10 And, contrary to Lyon County’s representation, NAC 239.101 does
11 not limit the definition of public records to just “records of official
12 action.” The State Archivist broadly defines records as “including,
13 without limitation, all documents, papers, letters, bound ledger volumes,
14 maps, charts, blueprints, drawings, photographs, films. . . , recorded
15 media, financial statements, statistical tabulations and other
16 documentary materials or information, regardless of physical form or
17 characteristic.” NAC 239.101. CRA seeks records produced or received
18 by Commissioners or other employees in the course of their official
19 duties. No NAC definition limits the NPRA’s reach to just a limited
20 class of documents reflecting official action.
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1 Third, the District Court erred when it determined that the records
2 should not be disclosed because they “are not open for public
3 inspection” when on personal devices or private accounts. JA 179.
4 However, Lyon County officials voluntarily chose to conduct their
5 public business using personal rather than official equipment, e.g.,
6 personal email addresses rather than the ones Lyon County provided.
7 Lyon County argues as a result of this choice, these email records lose
8 their public record status because they are not “open at all times during
9 office hours to inspection by any person” as allegedly required by NRS
10 239.010(1). JA 100. Lyon County asserts that because their officials’
11 homes or business are private and do not have regular business hours,
12 the records – otherwise public – become private. *Id.* Lyon County’s
13 reading proves too much, would exclude all records not open to
14 immediate inspection, and is contrary to the Legislative and Supreme
15 Court mandates to expansively interpret the NPRA to favor disclosure.
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24 The NPRA requirement to have records open to inspection does not
25 function to limit what records are public put rather as a right of the
26 public to access records. Under Lyon County’s theory, any record not
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1 readily accessible, even if the County’s possession, could be withheld
2 simply because of the time it took to produce a copy.
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4 Furthermore, immediate inspection has not been required under
5 NRS 239.010(1). Public agencies are able to schedule times and places
6 for inspection for a variety of reasons including aggregation of records,
7 privilege review, etc. In fact, NRS 239.0107 provides the time periods
8 under which inspection must occur for records under the legal custody or
9 control of a government entity, which as Lyon County admits, is defined
10 to include individual Commissioners and staff. The records may be
11 brought to Lyon County offices for inspection within 5 business days; no
12 “invasion” of Commissioner homes or business need occur. Since the
13 NRPA’s obligation to produce public records may be reconciled with an
14 official or employee’s choice to use their personal devices or accounts,
15 there is no need to interpret NRS 239.010(1) as a shield against
16 disclosure – thereby encouraging agency personnel to conduct official
17 business on personal equipment as a means to avoid public disclosure.
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26 Fourth, the District Court erred when it expressed doubts regarding
27 its ability to “order personal information” to be disclosed to CRA. JA
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1 108. CRA, however, does not seek “personal” information; only public
2 records that Lyon County would otherwise disclose but for their location
3 on personal devices or private accounts.
4

5 As conceded by Lyon County, the NPRA applies to its public
6 officials and employees. JA 101; see also NRS 239.010(4) (requiring
7 “[a]n **officer, employee or agent of a governmental entity** who has
8 legal custody or control of a public record” to produce it.) (Emphasis
9 added).). Under the NPRA, a court may then order these individuals to
10 produce public records in their control:
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15 If a request for inspection, copying or copies of a public
16 book or record open to inspection and copying is denied,
17 the requester may apply to the district court in the
18 county in which the book or record is located for an
19 order:

20 [¶]

21 (b) Requiring the person who has legal custody or
22 control of the public book or record to provide a copy to
23 the requester . . .
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25 NRS 239.011(1). Thus, the NPRA provided the District Court with
26 adequate authority to insure compliance with the NPRA.
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IX. CONCLUSION

Public officials and employees may choose to use personal electronic devices and personal accounts when conducting the public's business. That choice, however, does not control the application of the NPRA and the cleansing sunshine of public scrutiny under this Court's prior precedents. The Court should therefore reverse the District Court's denial of CRA's Petition for Writ of Mandate and order Lyon County, its official and employees, to make a good faith inspection of personal electronic devices and personal accounts for records responsive to CRA's NRPA request.

Dated: Friday, November 4, 2016

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CERTIFICATE OF COMPLIANCE

1
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3 1. I hereby certify that this brief complies with the formatting
4 requirements of NRAP 32(a)(4), the typeface requirements of NRAP
5 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this
6 brief has been prepared in a proportionally spaced typeface using
7 Microsoft Word in Times, font 16.
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10 2. I further certify that this brief complies with the page- or type-
11 volume limitations of NRAP 32(a)(7) because, excluding the parts of
12 the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced,
13 has a typeface of 14 points or more, and contains 5,261 words.
14
15

16 3. Finally, I hereby certify that I have read this appellate brief, and
17 to the best of my knowledge, information, and belief, it is not frivolous
18 or interposed for any improper purpose. I further certify that this brief
19 complies with all applicable Nevada Rules of Appellate Procedure, in
20 particular NRAP 28(e)(1), which requires every assertion in the brief
21 regarding matters in the record to be supported by a reference to the
22 page and volume number, if any, of the transcript or appendix where the
23 matter relied on is to be found. I understand that I may be subject to
24
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1 sanctions in the event that the accompanying brief is not in conformity
2 with the requirements of the Nevada Rules of Appellate Procedure.
3

4 Dated: Friday, November 4, 2016

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