IN THE SUPREME COURT OF THE STATE OF NEVADA

COMSTOCK RESIDENTS ASSOCIATION, JEOE MCCARTHY,

Appellants,

vs.

LYON COUNTY BOARD OF COMMISSIONERS,

Respondent.

Case No. 70738

RESPONDENT'S ANSWERING BRIEF

Appeal from Judgment of Conviction, Third Judicial District Court, The Honorable Steven R. Kosach, Senior Judge, Case No.

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SUMMARY OF ARGUMENT

Communications by Lyon County employees and public officials to and from private email accounts or private electronic devices, such as cellular telephones, are not public records under the Nevada Public records Act (NPRA). This is the only reasonable conclusion because such communications are not "open to public inspection," they are not under the legal custody or control of the County and are not accessible to the County, employees or public officials, and privacy rights preclude release of the records.

JURISDICTIONAL STATEMENT

Respondent Lyon County Board of Commissioners ("Lyon County") agrees with the jurisdictional statement as set forth by Appellants.

ROUTING STATEMENT

This action under the Nevada Public Records Act (NPRA) does not fall within any if the presumptive categories for cases assigned to either the Supreme Court or the Court of Appeals. NRAP 17. This appeal involves an issue of first impression under the NPRA, and this determination will provide guidance to Nevada governmental entities and agencies on issues directly affecting public records requests in Nevada. Either the Court of Appeals or the Supreme Court can decide this case.

STATEMENT OF ISSUE

This case presents a very important and undecided question in Nevada: are emails and cellular telephone communications to and from private electronic devices and private email accounts public records under the Nevada Public Records Act? Lyon County submits that the answer to this question is no.

STATEMENT OF THE CASE

On October 24, 2014, CRA filed a Petition for Writ of Mandate requesting that the District Court order Lyon County to comply with the NPRA. Lyon County filed an answer on December 5, 2014. On November 30, 2015, CRA filed brief in support of the Petition. On January 4, 2016, Lyon County filed its brief in support of the answer. The District Court held a hearing on the matter on April 14, 2016.

On June 14, 2016, the District Court, Senior Judge Kosach, entered the Order denying CRA's Petition. CRA appeals the decision of the District Court and contests the decision of the District Court denying the Petition.

STATEMENT OF FACTS

The relevant facts for this case are set forth herein. In 2013, Comstock Mining, Inc. filed an application with the Lyon County Community Development Department to change the master plan and zoning designations for certain property in the Silver City area of Lyon County ("CMI Application"). The application

proceeded through the process and was considered by the Lyon County Planning Commission on November 12, 2013 and December 10, 2013, and the CMI Application was ultimately approved by the Lyon County Board of Commissioners at a hearing held January 2, 2014. The Board of County Commissioners approved the Application by a vote of 4-1. Joint Appendix (JA) 85.

CRA spends considerable time describing a background which is not part of the record in this case and is opinion not based on fact. The issues surrounding the land use decision could have been made part of the record had CRA decided to do so. All parts of the Background presented by CRA and not referenced in the record in this Case must be disregarded by the Court.

After approval of the Comstock Mining, Incorporated land use applications, the Comstock Residents Association ("CRA") filed an action on January 31, 2014, in District Court challenging the decision of Lyon County on the Planning Application. That case proceeded to court, a decision by the District Court upholding the decision of Lyon County, and an appeal to this Court in Case No. 68433.

On February 11, 2014, John L. Marshall, Attorney at Law, representing CRA at the time, made a public records request to Lyon County, Lyon County Commissioners and Lyon County Staff. ("Public Records Request") JA 131-132. The Request was addressed to the Lyon County Board of Commissioners and Lyon

County Staff, c/o Jeff Page, Lyon County Manager. *Id.* Over the course of the next several months, numerous records and documents were provided by Lyon County. It is critical to understand the parameters and scope of the request in this case. The initial public records request was as follows:

> Specifically, I request access to any and all records related to Comstock Mining, Inc. Application for Master Plan Amendment and Zoning Change (PLZ-13-0050, 0051) This request includes, but is not limited to, any and all records of communication between Comstock Mining, Inc., ("CMI") and members of the Lyon County Board of Commissioners and Lyon County Staff, including but not limited to phone recordings, emails, internal documents and communications, notes, and any and all other related documents in the possession of you subject to disclosure under Nevada's public records law. **These records also include records of all communications between CMI and you regardless of whether the communications occurred on private or public devices**. (emphasis added).

The County sought further clarification of the request. On March 20, 2014, Mr. Marshall provided by email the following "since we know Ms. Keller's response was inadequate, we urge Lyon County to carefully search its files, physical and electronic as well as those of its Commissioners and provide a full response as soon as possible. " JA 134. The initial request dealt with matters related to the application filed by CMI that the County decided on January 2, 2014.

The County sought further clarification as to the parameters of the request, and on March 21, 2014, Mr. Marshall expanded the request significantly as follows:

> I do agree that CRA February 11 Request is limited to records concerning CMI's application for the master plan and zone change. Please treat my

> email of yesterday as expanding that request to all records of communication with Comstock Mining Incorporated from January 1, 2010 to the present.

JA 135. The Public Records Request further included phone logs/records, texts, emails or any other form of communication. JA 135.

The County responded to the request by providing thousands of pages of documents, cellular phone bills kept or maintained at the County, long distance phone records kept or maintained by the County, an email from the County explaining the new phone system and ability to retrieve records. JA 136-152. Numerous emails received by the County Commissioners on private email accounts were included in the public records response provided by the County. JA 150-151.

Lyon County does not provide or reimburse the County Commissioners for cellular telephones and the County does maintain any of those records. JA 149; 154. Lyon County does not pay for or reimburse County Commissioners for cellular telephones, computers or email accounts. *Id*. At the time of this public records request (2014), Lyon County Commissioners paid for their own cellular telephones and home computers and private email accounts. Lyon County does not maintain email records or telephone records for County Commissioners' private telephones and email accounts. JA 154. The County Commissioners use their cellular telephones and email accounts for private matters in addition to County Business. JA 155.

Commissioner Hastings used a cellular telephone provided and paid for by his employer, a third party not affiliated with Lyon County. JA 155. Commissioner Hastings does not receive the bills, is unware of records retention of those bills and is not familiar with whether multiple phones are billed on the same invoice. *Id*.

The County provides certain staff with cellular telephones and bills for those devices are sent directly to the County, paid by the County and the telephone bills are maintained by the County. JA 155. Copies of these bills and records were provided to Petitioners pursuant to the Public Records Request. *Id.*

The County did not have a policy for gathering or retaining text messages sent or received from either County owned or privately paid for cellular telephones. The County does not maintain in its offices or on its computer servers any emails sent or received from commissioners, employees or officials private cellular or private email accounts. *Id*.

The County had approximately 341 employees at the time the Petition was filed, which includes employees, appointed and elected officials who are paid employees. In addition, the County had approximately 125 appointed officials (including the County Health Officer and Public Administrator) who are unpaid that serve on advisory boards and in similar capacities for Lyon County. JA 155.

At the time of this request, Lyon County did not have a written policy regarding the use of private cellular telephones, computers and email account. *Id*.

Although Petitioners focus on the County Commissioners' records in this case, this Public Records Request is not limited to the County Commissioners and must be reviewed with respect to the specific request directed to all elected officials, employees and staff. The decision may well be different if the actual parameters of the request in this case are evaluated.

STANDARD OF REVIEW

Lyon County agrees with the standard of review set forth by CRA. This Court reviews a district court's grant or denial of a writ petition for an abuse of discretion. However, this Court reviews the district court's interpretation of case law and statutory language de novo. *LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608, 612 (2015), *reh'g denied* (May 29, 2015), *reconsideration en banc denied* (July 6, 2015) (internal citations omitted).

ARGUMENT

I. The Records Sought by CMI are not Public Records

The Nevada Legislature has declared that the purpose of the Nevada Public Records Act (NPRA) is to further the democratic ideal of an accountably government by ensuring that public records are broadly accessible. NRS

239.001(1). "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 and public records." NRS 239.010. The provisions of the NPRA are designed to promote government transparency and accountability. *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. Adv. Op. 79, 266 P.3d 623 (2011). Open records are the rule and any nondisclosure is the exception. Id. at 627 (citing *Reno Newspapers, Inc. v. Sheriff*, 126 Nev. 211, 234 P.3d 922 (2010)).

"Governmental entity" for purposes of the NPRA includes county departments and elected and appointed officers of the County. NRS 239.005(5). The parties agree that Lyon County, elected officials, appointed officials and County Commissioners are subject to the provisions of the NPRA. However, that does not answer the question in this case. The issue is whether the information requested are public records and whether the County and the County Commissioners are required to disclose the same.

A. Private Cellular Phone Records and Private Email Records are not Public Records under the Nevada Public Records Act (NPRA)

1. The Records Sought are not Open To Public Inspection

"All public books and records of a governmental entity must be open at all times during office hours to inspection by any person." NRS 239.010(1). This section explicitly provides that public books and records are those that are open to inspection during office hours. The private emails and private electronic devices of an individual commissioner or a county employee are never open to inspection by any person. Employees and public officials do not have regular office hours or a system to maintain such records such that they can be "open to inspection." To allow such would open up a Commissioner's or employee's home or business to inspection at all times during office hours. That is not the purpose or intent of the NPRA. The NPRA clearly contemplates records that are maintained at the government location or on equipment provided or maintained by the government. The Court must interpret the statute in a way that gives meaning to the words of the statute. *Southern Nevada Homebuilders Ass'n v. Clark Cty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). The Court must also construe the statute in a manner that avoids absurd results. *California Commercial v. Amedeo Vegas I, Inc.*, 119 Nev. 143, 145, 67 P.3d 328, 330 (2003).

If Lyon County were required to control and maintain the public officials' and employees' private correspondence as CRA suggests, this Court would have decided cases allowing access to public officials' home file cabinets, for example, to look for correspondence, phone records, notes or other public books or records.

In order for the Court to declare the records on these private devices "public records" it would have to completely disregard the "open to inspection" language in the statute. Or it would lead to the absurd result of having private records and residences and businesses open to inspection by the public. That is not the intent or plain meaning of the statute and such a reading is not consistent with tenets of statutory construction.

2. **The Records are not in the Legal Custody or Control of the Commissioners, Employees or County**

NRS 239.010(4) states, in part, that "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 . . ." In many cases, the county commissioner or employee does not have legal custody or control of the record requested if it is on a private email account or device. A governmental entity's duty to disclose a public record applies only to records within the entity's custody or control. *Blackjack Bonding*, 343 P.3d at 612. LVMPD v. Blackjack Bonding involved a request by Blackjack for certain inmate telephone records. Las Vegas Metro had a contract with Century Link to provide the inmate telephone services. The contract specifically provided that the requested information could be generated by the inmate telephone system that Century Link provides and could be obtained by LVMPD. *Id*. at 613.

With respect to this request for records by CRA, the facts are quite different than those in *Blackjack Bonding*. None of the County Commissioners, and it is unlikely any of the employees, elected officials or appointed officials maintain private email servers to keep their emails. Each of the accounts at issue in this case is on a separate internet email service provider or server.

The NAC defines "legal custody" as follows:

> NAC 239.051. "Legal custody" defined. (NRS 239.125, 378.255) "Legal custody" means all rights and responsibilities of access to and maintenance of a record which are vested in an office or department of a local government entity and with the official or head of the department charged with the care, custody and control of that record.

The County Clerk is charged with the care, custody and control of the records of the board of county commissioners, and the County Clerk is charged with the rights and responsibilities of access to and maintenance of the records of the County Commission. NRS 244.075. Because the County and County Commissioners do not have legal custody or control of the information, it is not a "public record" for purposes of the NPRA.

Blackjack Bonding is further distinguishable because the Legislature has declared that "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." NRS 239.001(4). There is no similar provision relating to private email accounts and private devices of staff or public

officials. There was a specific contract between CenturyLink and LVMPD in the *Blackjack Bonding* case which indicated the requested information could be generated by the inmate telephone system. *Blackjack Bonding*, 343 P.3d at 613.

Petitioners want the Court to adopt the standard that public records are defined by content not location. This Court has never adopted such a rule because that is not what the Nevada Public Records Act states. Whether a certain record is "public" under the Act certainly depends on content. However, the plain language of the statute also requires that it depend on location. To read otherwise is to ignore the express provisions of the Act regarding "legal custody or control" and "open to inspection." This Court cannot ignore these integral provisions of the statutes.

Cases interpreting the Freedom of Information Act are not binding on this Court in determining the meaning of the NPRA. In fact, it appears there are some significant differences between the two, particularly the requirement that the records be open to public inspection during business hours. Petitioners in this case ask the Court to compare to a FOIA request where the director of an agency used a private email account and "maintained the putative records on a private email account in his name at a site other than the government email site. *Competitive Enterprise Institute v. Office of Science and Technology Policy*, 827 F.3d 145, 146 (DC Cir. 2016). This comparison fails for two primary reasons. First, this case

does not address the "open to inspection" language of the NPRA. In order to reach this same result, the Court would have to ignore that language. Second, the DC Circuit states "while this specific fact is not addressed in the record, it is not apparent to us that the domain where an email account is maintained controls the emails therein to the exclusion of the user, in this case Director Holdren, who maintains the account." Competitive Enter. Inst. v. Office of Sci. & Tech. Policy, 827 F.3d at 149. It appears that this assumption is critical to the analysis and result reached. This Court is not permitted to make the same assumption. The record before this Court does not have any information as to who controls the private emails of the employees or public officials as it relates to this request.

The Washington Supreme Court's decision in *Nissen* is not controlling in this case either because it involves the Washington Public Records Act. In *Nissen,* a sheriff's detective brought action under the Washington Public Records Act against county and county prosecutor's office, seeking disclosure of call logs from prosecutor's personal cellular telephone and text messages. The Washington Court held that content of work-related text messages sent and received by county prosecutor on the personal device were "public records" subject to disclosure. *Nissen v. Pierce County*, 183 Wash.2d 863, 357 P.3d 45 (2015). Lyon County contends that the case is distinguishable because of the specific definition of "public record" adopted by the Washington Legislature. Nevada has no similar

definition. *Nissen*, however, is important in that it does say the call and text message logs on private devices are not public records. *Id.* at 882. It is unclear why text messages or voice mail or other information on the private device would be treated differently. The *Nissen* court stated that the call and text message logs were prepared and retained by Verizon. Yet, any text messages are retained by Verizon as well. Text messaging is transitory in nature and the contents of the messages are typically maintained by the service provider unless specific steps are taken to preserve the information. The same is true of voicemail. The CRA's request in this case included requests for records of phone calls and call logs. JA 131-135. Under *Nissen* the phone records and call logs would not be subject to a public records request.

Petitioners claim that public officials and staff have sufficient control over their devices and accounts. That may be true in some instances. However, there is nothing in the record before the Court to either confirm or deny this claim. Petitioners claim that this Court should adopt a discovery rule standard is novel, however, it has never been done, in Nevada or elsewhere. Lyon County has never claimed that this information is precluded in discovery. That is not the issue before the Court. Lyon County is also not attempting to shift the burden of compliance with the NPRA to CRA. The California Court of Appeals rejected a similar claim in City of San Jose:

> Any control the City has over its employees' behavior is not equivalent to control over, or even access to, the text messages and e-mail sent to and from its employees' private devices and accounts. Furthermore, it is noteworthy that the Flagg court regarded materials as under an agency's control if the agency had the legal right to obtain them. To apply that point here would make Smith's argument circular: we should deem the requested records to be within the City's control as a matter of law because it had the legal right to obtain them. Unquestionably, Flagg has no application here.

City of San Jose v. Superior Court, 225 Cal.App.4th 75, 92, 169 Cal.Rptr.3d 840, 852 (2014), review granted June 25, 2014, S218066.

The availability of records in this modern world often turns on the policies of third parties, federal law, or other requirements outside the control of local governments, officials and employees. "How long does your cell phone carrier retain information about your calls, text messages, and data use? According to data gathered by the Department of Justice, it can be as little as a few days or up to seven years, depending on your provider."[1] Certainly, the definition of public record cannot turn on the practices of a private enterprise in retaining the records. The bottom line is that the County does not control these records. At the time of this request, county employees and public officials were not instructed by this Court or the Legislature that text messages and emails on private accounts were public records.

[1] http://www.pcmag.com/article2/0,2817,2393887,00.asp, Albanesius, Chloe, PC Magazine, September 30, 2011

3. **The Communications are Not Official Actions and Are not Required by Law or Ordinance or Made in Connection with the Official business or any agency or department**

"Record of a local governmental entity" or "record" means information that is created or received pursuant to a law or ordinance, or in connection with the transaction of the official business of any office or department of a local governmental entity. NAC 239.101. "Office or department of a local governmental entity" is defined as an office, department, board, commission, committee, agency or any other subdivision of a local governmental entity where records and made, received or kept." NAC 239.061. "Nonrecord materials" means any other documentation that does not serve as the record of an official action of a local governmental entity. NAC 239.051.

Emails to individual commissioners or from individual commissioners or telephone records, or notes, or other writings do not serve as the record of an official action of the Commissioners. As such, the requested records are not public records. The rationale for this seems obvious. Under Petitioners argument, any records created by County Commissioners (or County staff for that matter) that in any way relate to Lyon County would be public records. County Commissioners (and other elected officials) could make no notes, could not communicate with constituents or citizens without those communications being subject to a public

records request. County Commissioners need to be able to communicate with constituents regarding the business of the County. If all communications are deemed public records it would have a chilling effect on persons wanting to approach County Commissioners.

4. **Nevada Law does not Support That the Requested Documents are Public Records**

Contrary to Petitioners assertion, Lyon County has never asserted that the County, County Commissioners, or county staff are not subject to the NPRA. Nor has the County claimed that the NPRA should be construed narrowly. However, no law supports Petitioners broad based assertion that all county commissioner or elected official communications related to the county are public records. The fact that the requester specified a certain subject matter does not somehow make the records "public records."

In *Reno Newspapers, Inc. v. Gibbons*, the Nevada Supreme Court addressed a Petition where Newspaper requested access to 104 of former Governor Gibbons e-mail communications while he was in office which were issued from the state-issued email account (not his private email). The State denied the request for the emails, stating in part that the emails were not public records. The district court determined that of the 104 emails, 24 were personal, 32 were transitory, 42 were transitory or covered by the deliberative process privileged and 6 were not

confidential. *Id*. The Supreme Court never changed this determination. This case is important for a number of reasons – foremost it deals with state issued email accounts, not private accounts. It is also important because it emphasizes that not all emails or communications are public records.

In fact, no case in Nevada supports Petitioners' claim that the records sought in this matter – communications from employees and elected officials on private email accounts or devices - are public records. The line of Nevada cases interpreting the NPRA deal with a variety of issues, but they all involve records that are kept as official records of the County or elected or appointed officials at a location and in a manner under the custody and control of the County or elected official.[2]

The Petitioners ask this Court to go where no Nevada court has gone, declaring all communications by a County Commissioner or County employee related to County business to be public records. The decision of this magnitude should be left to the legislature. This Court should review the cases and language

[2] See *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990)(request for a police investigative report); *DR Partners v. Board of County Commissioners*, 116 Nev. 616, 6 P.3d 465 (2000)(Las Vegas Review Journal request to compel disclosure of billing statements documenting county officials' use of publicly owned cellular telephones); *Reno Newspapers v. Sheriff*, 126 Nev. at 212. (Newspaper sought records related to concealed weapons permits maintained by the Sheriff of Washoe County); *Blackjack Bonding*, (Blackjack sought records from jail inmate telephone service).

of the NAC and NPRA, and determine that the reasonable interpretation of the NPRA does not include communications on private devices that are not open to inspection or within the custody or control of the County Commissioners.

The risk that a County Commissioner or other county official or employee may conceal their public record communications on public issues by sending them on private devices is a serious concern, however that is a matter for the legislature to address. This Court should not abridge its judicial role. See *City of San Jose v. Superior Court*. This Court has not expanded the definition of "public records" in a manner inconsistent with the plain language of the statute, administrative code and case law. This Court should not either.

5. **To be "Public Record" It must be Paid for with Public Money**

At the time CRA made its public records request the Nevada Administrative Code defined "public record" for purposes of records of local governments as follows:

> "NAC 239.091. "Public record" defined. (NRS 239.125, 378.255) "Public record" means a record of a local government entity that is created, received or kept in the performance of a duty and paid for with public money. [3]

Therefore, at the time of this request the law applicable to the request clearly and unequivocally established that, in order for something to be a public record, it

[3] JA 161. This provision existed in this form until it was repealed in October 2014 by Regulation LCB File R 118-12, effective October 24, 2014.

had to be paid for with public money. It is uncontroverted that the cellular phones and private email accounts for the County Commissioners and other county elected officials and employees were not paid for by public money. JA 154. That is the end of the analysis, and the records sought are not public records subject to the NPRA.

This Court has previously used NAC 239.091 to define "public records". The Nevada Policy Research Institute sent a written request to Clark County School District for its directory of teachers' email addresses. The School District denied the request. This Court ultimately determined that the directory was a public record, stating "the NPRA does not specifically define a public record, so we look to the Nevada Administrative Code (NAC). NAC 239.091 defines a public record as "a record of a local governmental entity that is created, received or kept in the performance of a duty and paid for with public money." *Nevada Policy Research Inst., Inc. v. Clark Cty. Sch. Dist.*, No. 64040, 2015 WL 3489473, at *2 (Nev. May 29, 2015)(unpublished disposition).

The County Commissioners and Lyon County are entitled to rely on the law as it existed at the time CRA made its request. It is reasonable for the County and its elected and appointed officials to believe that communications on private devices would not be deemed public records based on the Nevada Administrative Code. This is particularly true in the case of private information where the county

employees, elected and appointed officials were under no legal duty to preserve the items as public records. In addition to not paying for the records, the government has not provided, identified or paid for any way to maintain or handle these records. This Court cannot impose a burden on appointed and elected officials when the law does not require it.

II. Practical Limitations Require This Court to Defer to the Legislature

The California Supreme Court is deciding a records case where the City of San Jose claims that communications on private email accounts or private devices are not public records. *City of San Jose v. S.C.*, 326 P.3d 976 (Cal. 2014). In the case, the Court of Appeals discussed practical limitations in making such information subject to public records requests.

> Petitioners suggest that if local agencies were required to search the personal electronic accounts of their employees, "the burden and cost would be overwhelming." Indeed, petitioners suggest, "without the requisite custody or control of such records, it is difficult to imagine how the City would be able to implement such searches if employees declined to cooperate." The League likewise emphasizes that without access to and control over private messaging accounts and electronic devices, a public agency has no "viable, legal means of searching for and producing private documents of its employees and officials." The superior court's interpretation is unworkable, the League argues, because a records request would require the City to conduct an active search not only of devices and accounts stored in its system or under its control, but also of all private computers, phones, tablets, and other electronic devices of its employees and officials. And those searches, the League points out, would intrude into private conversations with family members or friends that happen to include some discussion of a public issue. As the League sees it, "[n]either the Legislature nor the electorate has demonstrated an intent that the Act reach those purely private communications."

City of San Jose v. Superior Court, 225 Cal. App. 4th at 85. Although this case is under review, the same practical considerations must be applied in evaluating this case.

It is true that local governments can take steps to resolve these issues, but each involves significant costs and choices that should ultimately be made by our legislative and executive branches of government, not the Courts. For example, emails can be routed through county servers, documents can be cached to cloud services, and instant message apps can store conversations. See *Nissen*, 357 P.3d at 886. One or more of these, or other options, may be wise decisions for Nevada local governments. However, none of these were in place at the time CRA made the request that is before this Court. There is just not a practical way to meaningfully respond to the request that has been presented to Lyon County and its employees and public officials.

Contrary to Petitioners claim, the *Nissen* case does not resolve these practical considerations. A "simple good faith effort test" sounds good, but is unworkable. "An employee's good-faith search for public records on his or her personal device can satisfy an agency's obligation under the PRA." *Id*. at 56-57. What if the records have been deleted? What if the records are stored in the cloud or are not readily searchable or accessible? Do we now tell county employees and

public officials that they have to contact service providers and request records or is it sufficient to say no records exist, even though they may well exist?

Without specific legislative authority, this Court should not direct Counties in Nevada to undertake such burden and costs of searches of employee private email accounts and private devices unless the Legislature has an opportunity to weigh in. This is an unfunded mandate the Court should not impose on rural counties and cities with staffing levels that cannot meet the obligations already imposed on government employees and agencies.

III. This Requests Violates the Employees Right to Privacy

Individuals do not sacrifice all constitutional protection by accepting public employment. *City of Ontario v. Quon*, 560 U.S. 746, 756, 130 S.Ct. 2619, 177 L.Ed.2d 216 (2010). Advancements in technology have made the storage of information easier. Modern cell phones have immense storage capacity. See *Riley v. California*, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014). The storage on a cell phone can include millions of pages of text, thousands of pictures or hundreds of videos. Id. This storage capacity has many interrelated consequences for privacy, including, collection of distinct types of information in one location making searching for specific items difficult; information can be stored for extended periods of time; and the cell phone can contain a digital record of nearly every aspect of their life. *Id.*

For a court to declare the personal devices of government employees open to inspection pursuant to a public records request violates the employees' right to privacy. Then the Court must decide whether data on the phone is also subject to inspection and disclosure pursuant to a public records request. Information such as where the County Commissioner went, when and whether the phone shows who may have accompanied the County Commissioner. To further complicate the scope of the privacy interests, the data a user views on many modern cell phones may not in fact be stored on the device itself. *Id.*

Riley involved a criminal investigation and a search of the cell phones in that case. The issue is different, but the same protections are involved. An overreaching rule that private email accounts and private devices are subject to public records requests when county employees and public officials were not aware of such is a violation of their right to privacy.

Further complications arise in the modern usage of personal computers and electronic devices. It is common that devices are shared by family members. Personal email accounts may be shared by family members. In this particular case, Commissioner Hastings was employed by a third party who provided his cellular phone. Commissioner Hastings did not receive copies of the bills or any other documentation related to the phone. Does his employer have any privacy interest

in that information? Or, is it waived because the employee has decided to enter public office.

This Court has determined that a balancing test is appropriate to determine whether a record is subject to disclosure. Lyon County asserts that in this instance, given the broad request of CRA, this Court should determine that the communications on private emails and private devices are not public records based on the balancing of the privacy interests of county employees and public officials.[4]

IV. Remedy is Affirmance or Remand with Instructions

In reliance upon existing law at the time of the request and in good faith, Lyon County timely provided documents meeting the request and denied the request only as it related to information on private accounts and private devices. This is the same action of denial taken by Pierce County and the City of San Jose in the case discussed. If this Court determines that communications sent or received on private email accounts or private devices may be deemed public records under the NPRA, the proper remedy is to remand the case to the District Court for further proceedings. The County would then be allowed to determine whether employees or public officials have any public records, and would be able to claim privilege or other reason if disclosure is not required under the NPRA.[5]

[4] See *Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. at 632.
[5] In *Nissen*, the Washington Supreme Court remanded with specific instructions. Nissen, 357 P.3d at 57.

CONCLUSION

Lyon County contends in this matter that the records sought from the private emails, telephones, and other private records of County Staff and elected and appointed officials are not public records subject to inspection for the following reasons: (1) they are not "public records" under the NRPA; (2) privacy interests weigh against disclosure; and, (3) practical limitations preclude this Court from declaring all records public records. The legislature should expand the definition of public records if it is to include communications contained on private devices or private email accounts. It is the Court's task to construe, not to amend the statute.

The District Court properly analyzed the law and facts of this case. The decision of the District Court must be affirmed. If this Court disagrees, the proper remedy is to remand for an evidentiary hearing on what records, if any, would be deemed public records subject to disclosure.

Dated this 21st day of December, 2016.

Respectfully submitted,

STEPHEN B. RYE
Lyon County District Attorney

By: /e/Stephen B. Rye
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CERTIFICATE OF COMPLIANCE

1) 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) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman style.

2) I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionally spaced, has a typeface of 14 points, and contains 6,229 words.

3) Finally, I hereby 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. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28€(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 subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 21st day of December, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on December 21st, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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/s/ Stephen B. Rye
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