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2017 JAN 31 PM 2:11

SUSAN HERRIWETHER

BY

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Feb 02 2017 02:42 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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Nevada Bar No. 6679
2 Adam Hosmer-Henner, Esq.
Nevada Bar No. 12779
3 MCDONALD CARANO WILSON LLP
100 West Liberty Street, 10th Floor
4 Reno, NV 89501
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6 *Attorneys for Respondents Public Employees'*
Retirement System of Nevada and Tina Leiss

7
8 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
9 **IN AND FOR CARSON CITY**

10
11 NEVADA POLICY RESEARCH
INSTITUTE, INC.,

Case No.: 16 OC 00161 1B

Dept. No.: II

12
13 Petitioner,

14 vs.

15 PUBLIC EMPLOYEES' RETIREMENT
SYSTEM OF NEVADA, a Public Agency;
16 TINA LEISS, in her official capacity as
Executive Officer of the Public Employee
17 Retirement System of Nevada; STATE OF
NEVADA,

18 _____
Respondents.

19 **NOTICE OF APPEAL**

20 Notice is hereby given that the Public Employees' Retirement System of Nevada, above-
21 named party of record, hereby appeals to the Supreme Court of Nevada from the Order Granting
22 Petition for Writ of Mandamus entered on January 24, 2017. A true and correct copy of the
23 Order is attached hereto.

24 **AFFIRMATION**

25 The undersigned does hereby affirm that the preceding document does not contain the
26 social security number of any person.
27
28

MCDONALD-CARANO-WILSON

100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
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DATED: January 31, 2017.

McDONALD CARANO WILSON LLP

By 

Joshua J. Hicks
Adam Hosmer-Henner
100 West Liberty Street, 10th Floor
P.O. Box 2670
Reno, Nevada 89505-2670

*Attorneys for Respondents Public Employees'
Retirement System of Nevada and Tina Leiss*

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDONALD CARANO WILSON LLP and that on January 31, 2017, I served the foregoing on the parties in said case by placing a true copy thereof enclosed in sealed envelopes with postage prepaid thereon in the United States Post Office mail at 100 West Liberty Street, 10th Floor, Reno, Nevada 89501 addressed as follows:


JOSEPH BECKER, ESQ.
NPRI CENTER FOR JUSTICE
AND CONSTITUTIONAL LITIGATION
75 CALIENTE STREET
RENO, NV 89509-2807

I am familiar with the firm's practice for collection and processing of correspondence for mailing with the United States Postal Service.

The envelopes addressed to the above parties were sealed and placed for collection by the firm's messengers and will be deposited today with the United States Postal Service in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 31, 2017, at Reno, Nevada.

By 
Jill Nelson

REC'D & FILED

2017 JAN 24 PM 2:55

SUSAN MERRIWETHER
CLERK

BY SW DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

-o0o-

NEVADA POLICY RESEARCH
INSTITUTE, INC.,

Petitioner,

vs.

PUBLIC EMPLOYEES' RETIREMENT
SYSTEM OF NEVADA, a Public
Agency; TINA LEISS, in her official
capacity as Executive Officer of the
Public Employee Retirement System
of Nevada; STATE OF NEVADA,

Respondents.

CASE NO. 16 OC 00169 1B

DEPT. 2

ORDER GRANTING PETITION
FOR WRIT OF MANDAMUS

PROCEDURAL BACKGROUND

Nevada Policy Research Institute, Inc. (NPRI) filed a Petition for Writ of Mandamus seeking to compel Public Employees' Retirement System of Nevada (PERS) to produce information under the Nevada Public Records Act (NPRA).

ISSUES

Are the records NPRI requested confidential?

Does PERS have a duty to create a document that contains the requested information?

1 Do the alleged cybercrime risks posed by the disclosure of the requested
2 information outweigh the benefits?

3 If PERS is required to disclose the information is NPRI entitled to
4 attorney's fees and costs?
5

6 7 **FACTS**

8 In 2013 the Nevada Supreme Court decided *Public Employees'*
9 *Retirement System v. Reno Newspapers*, 129 A.O. 88, 313 P.3d 221
10 (2013)(*Reno Newspapers*). In that case Nevada Newspapers requested PERS
11 produce "the names of all individuals who are collecting pensions, the names of
12 their government employers, their salaries, their hire dates, and the amount of
13 their pension payments." *Id.* 222. PERS opposed the petition on grounds very
14 similar to those asserted in the present case. The district court concluded that
15 neither NRS 286.110(3) nor NRS 286.117 declared the requested information
16 confidential and the privacy concerns did not clearly outweigh the public's right
17 to disclosure, and ordered PERS to produce a report containing the requested
18 information. The Nevada Supreme Court concluded PERS had not identified any
19 statute, rule, or caselaw that would foreclose production of the requested
20 information and upheld the District court writ except for the portion of the order
21 which required PERS to create new documents or customized reports.
22

23 In the present case PERS' Operation Director Cheryl Price testified that as
24 a result of the *Reno Newspapers* decision PERS "possibly" eliminated retiree
25 names from the report it sends its actuary. This Court understood this testimony
26 to mean PERS eliminated retiree names from the report it sends its actuary in
27

1 part because of the *Reno Newspapers* decision. By eliminating retiree names
2 from the report for the actuary, PERS can respond to requests for information
3 that include a request for retiree names by stating no such document exists.

4 After PERS eliminated retiree names from the report it sends to its
5 actuary, NPRI requested PERS' FY 2014 Retiree Raw Data. PERS complied with
6 the request, but the FY 2014 Retiree Raw Data does not contain retiree names
7 because of the change PERS' made in its procedure after the *Reno Newspapers*
8 decision. Through email exchanges NPRI sought different ways of obtaining
9 information. On January 13, 2015 NPRI requested "reports or information that
10 could be provided that would contain the following pieces of information":
11 retiree name, years of service credit, gross pension benefit amount, year of
12 retirement, and last employer. Pet. for Writ of Mandamus, Ex. 2. Operations
13 Director Price responded that PERS did not have, and did not have a duty to
14 create, a report that contained the requested information. NPRI then filed its
15 Petition for Writ of Mandamus (Petition) to compel PERS to provide a record of
16 the information requested in the January 13, 2015 email referenced above, and
17 additional information, i.e., payroll amount, retirement type, and COLA
18 increases. Pet. for Writ of Mandamus, p. 6. NPRI did not request the additional
19 information in the January 13, 2015 email and therefore the request in the
20 Petition for that information is not proper because there was no specific denial
21 to produce that information.

24 PERS did not provide any evidence on the time or cost that would be
25 required to produce the requested information. Instead it focused on the time
26 and cost to match retiree names to the FY 2014 Retiree Raw Data.

1 **GENERAL LEGAL PRINCIPLES**

2 A writ of mandamus is available to compel the performance of an act the
3 law requires as a duty resulting from an office or to control an arbitrary or
4 capricious exercise of discretion. *Int'l Game Tech., Inc. v. Second Judicial Dist.*
5 *Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008).

6 Chapter 239 – Public Records

7 NRS 239.001 Legislative findings and declaration.

8 The Legislature hereby finds and declares that:

9 1. The purpose of this chapter is to foster
10 democratic principles by providing members of the
11 public with access to inspect and copy public books
12 and records to the extent permitted by law;

13 2. The provisions of this chapter must be
14 construed liberally to carry out this important
15 purpose;

16 3. Any exemption, exception or balancing of
17 interests which limits or restricts access to public
18 books and records by members of the public must be
19 construed narrowly; ...

20 NRS 239.010(1) Public books and public records open to
21 inspection

22 ... unless otherwise declared by law to be
23 confidential, all public books and public records of a
24 governmental entity must be open at all times during
25 office hours to inspection by any person, and may be
26 fully copied or an abstract or memorandum may be
27 prepared from those public books and public records.

28 NRS 239.0113 Burden of proof where confidentiality of public
book or record is at issue.

1 Except as otherwise provided in NRS 239.0115, if:

2 1. The confidentiality of a public book or
3 record, or a part thereof, is at issue in a judicial or
4 administrative proceeding; and

5 2. The governmental entity that has legal
6 custody or control of the public book or record
7 asserts that the public book or record, or a part
8 thereof, is confidential,

9 the governmental entity has the burden of proving by
10 a preponderance of the evidence that the public book
11 or record, or a part thereof, is confidential.

12 NRS 286.110(3) Public Employees' Retirement System : ... public
13 inspection of records; ...

14 ... records, other than the files of ... retired employees
15 are public records

16 NAC 239.867 No requirement to create public record that does
17 not exist.

18 If a person requests to inspect, copy or receive a copy
19 of a public record that does not exist, a records
20 official or an agency of the Executive Department is
21 not required to create a public record to satisfy the
22 request.

23 ANALYSIS

24 **Are the records NPRI requested confidential?**

25 As it did in *Reno Newspapers*, PERS argued NRS 286.110(3) and NRS
26 286.117 bar production of the requested information because it is confidential.
27 The information requested in this case is substantially similar to the information
28 requested in *Reno Newspapers*. This Court concludes, as the Supreme Court did
in *Reno Newspapers*, that PERS failed to cite any statute, rule, or case that bars

1 production of the information NPRI requested on grounds the information is
2 confidential.

3
4 **Does PERS have a duty to create a document that contains the**
5 **requested information?**

6 PERS cited NAC 239.867 to support its position that there is no duty to
7 create a document. NAC 239.867 provides:

8 No requirement to create public record that does not
9 exist.

10 (NRS 239.008, 378.255) If a person requests to
11 inspect, copy or receive a copy of a public record that
12 does not exist, a records official or an agency of the
Executive Department is not required to create a
public record to satisfy the request.

13 NAC 239.867 does not require an agency to create a public record, but
14 neither does it does bar an agency from creating a record. PERS quoted in part
15 Nevada Public Records Act: A Manual for State Agencies 2014 which states in
16 part: "An agency is not required to organize data to create a record that doesn't
17 exist at the time of the request." The part PERS left out from that sentence in the
18 Manual is: "but may do so at the discretion of the agency if doing so is
19 reasonable." PERS failure to indicate it was quoting only part of the sentence
20 seems a bit deceptive.

21
22 The *Reno Newspapers* Court did not cite NAC 239.867 but vacated the
23 district court's order to the extent is required PERS to create new documents or
24 customized reports by searching for and compiling information from
25 individuals' files or other records. But two years later in *Las Vegas Metro. Police*
26 *Dept. v. Blackjack Bonding, Inc.*, 131 Nev A.O. 10, 343 P.3d 608 (2015)
27 (*Blackjack*) the Court referenced *Reno Newspapers* and stated that case "did not
28

1 address the situation where an agency had technology to readily compile the
2 requested information. Instead, when an agency has a computer program that
3 can readily compile the requested information, the agency is not excused from
4 its duty to produce and disclose that information." Id. 613. (Internal citations
5 omitted.) The *Blackjack* Court did not discuss NAC 239.867.

6 NPRI tried to avoid the issue by arguing its request does not require
7 PERS to create new records because PERS produced a record with the requested
8 information in the past, and PERS would only need to collate data it already has.
9 The Court finds these arguments lack merit. The old report does not provide the
10 current information requested and collating documents would result in
11 something new and different than existed before – a new document.
12

13 Considering the purpose of the NPRA, to foster democratic principles by
14 providing members of the public with access to public books and records; the
15 legislative mandate that courts construe the NPRA liberally to carry out this
16 important purpose; the legislative mandate that any exemption, exception or
17 balancing of interests which limits or restricts access to public books and records
18 by members of the public must be construed narrowly; the lack of evidence that
19 producing the requested information, retiree name, years of service credit, gross
20 pension benefit amount, year of retirement, and last employer would require
21 unreasonable demands or costs on PERS; and the fact that PERS altered its
22 procedure in providing information to its actuary to eliminate the names of
23 retirees in part because of the *Reno Newspapers* decision, the court concludes
24 that PERS does have a duty to create a document that contains the requested
25 information.
26
27
28

1 **Do the alleged cybercrime risks posed by the disclosure of the**
2 **requested information outweigh the benefits?**

3 PERS' argument that the risk of cybercrime against retirees posed by
4 disclosure of the requested information outweigh the benefits, suffers from the
5 same fatal defect its argument had in *Reno Newspapers* – there is no convincing
6 evidence that the concerns are anything other than hypothetical and speculative.
7 The testimony provided by PERS did not limit the opinions to the information
8 requested in this case. Instead the opinions are based upon the inclusion of
9 information not requested by NPRI like sex, birth date, and address.

10 Like in *Reno Newspapers* PERS failed to provide sufficient evidentiary
11 support for its position that disclosure of the requested information would
12 actually cause harm or even increase the risk of harm to retired employees.
13

14
15 **If PERS is required to disclose the information is NPRI entitled to**
16 **attorney's fees and costs?**

17 Under NRS 230.011(2) if the requester prevails, the requester is entitled
18 to recover its costs and reasonable attorney's fees from the governmental entity
19 whose officer has custody of the records. NPRI has prevailed and is therefore
20 entitled to recover its costs and reasonable attorney's fees from PERS.
21

22 **CONCLUSIONS OF LAW**

23 The information NPRI requested is not confidential.

24 PERS does have a duty to create a document that contains for FY 2014,
25 retiree name, years of service credit, gross pension benefit amount, year of
26 retirement, and last employer.
27
28

1 The alleged cybercrime risks posed by the disclosure of the requested
2 information do not outweigh the benefits.

3 NPRI is entitled to attorney's fees and costs from PERS.

4 Any arguments of the parties not addressed in this order lack merit.
5

6 **ORDER**

7 IT IS ORDERED:
8

9 The Petition for Writ of Mandamus is granted.

10 PERS is ordered to produce the following information to NPRI within five
11 business days:

- 12 a) Retiree name;
13 b) Years of service credit;
14 c) Gross pension benefit amount;
15 d) Year of retirement; and
16 e) Last employer
17

18 NPRI will file a memorandum of costs and an affidavit for attorney's fees
19 that complies with FJDCR 15(13) within five business days.

20 Under NRS 239.052 PERS may charge a fee for providing a copy of the
21 ordered public record. The fee must not exceed the actual cost to PERS to
22 provide the copy of the public record.

23 January 23, 2016.

24 
25 District Judge
26
27
28

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of the First
3 Judicial District Court of Nevada, that on this 24 day of January, 2017, I:

4 ☒ deposited for mailing at Carson City, Nevada

5 Joshua Hicks, Esq.
6 Andrew Hosmer-Henner, Esq.
7 100 W. Liberty Street, 10th floor
8 Reno, NV 89505

9 Joseph Becker, Esq.
10 75 Caliente Street
11 Reno, NV 89509

12 ☐ caused to be delivered by messenger service

13 ☐ faxed to: Joseph F. Becker, Esq. 775-201-0225; and Joshua J.
14 Hicks, Esq. 775-788-2020

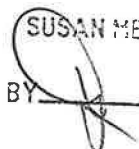
15 a true and correct copy of the above order.

16 
17 _____
18 Judicial Assistant

ORIGINAL

REC'D & FILED

2017 JAN 31 PM 2:11

SUSAN MERRIWETHER
CLERK
BY  DEPUTY

1 Joshua J. Hicks, Esq.
Nevada Bar No. 6679
2 Adam Hosmer-Henner, Esq.
Nevada Bar No. 12779
3 MCDONALD CARANO WILSON LLP
100 West Liberty Street, 10th Floor
4 Reno, NV 89501
775-788-2000 – phone
5 775-788-2020 – facsimile

6 *Attorneys for Respondents Public Employees'*
7 *Retirement System of Nevada and Tina Leiss*

8
9 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
10 **IN AND FOR CARSON CITY**

11 NEVADA POLICY RESEARCH
12 INSTITUTE, INC.,

Case No.: 16 OC 00161 1B

Dept. No.: II

13 Petitioner,

14 vs.

15 PUBLIC EMPLOYEES' RETIREMENT
SYSTEM OF NEVADA, a Public Agency;
16 TINA LEISS, in her official capacity as
Executive Officer of the Public Employee
17 Retirement System of Nevada; STATE OF
NEVADA,

18 Respondents. /

19 **RESPONDENTS' CASE APPEAL STATEMENT**

20 Respondent Public Employees' Retirement System of Nevada ("PERS") submits the
21 following Case Appeal Statement pursuant to Nevada Rule of Appellate Procedure 3(f):

22 **1. Name of appellant filing this case appeal statement:**

23 Public Employees' Retirement System of Nevada

24 **2. Identify the judge issuing the decision, judgment, or order appealed from:**

25 The Honorable James E. Wilson, Jr., Department 2, First Judicial District Court, Carson
26 City, Nevada.

27 //

28 //

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3. Identify each appellant and the name and address of counsel for each appellant:

Public Employees' Retirement System of Nevada
 Joshua J. Hicks, Esq.
 Adam Hosmer-Henner, Esq.
 MCDONALD CARANO WILSON LLP
 100 West Liberty Street, 10th Floor
 Reno, NV 89501

4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as much and provide the name and address of that respondent's trial counsel):

Nevada Policy Research Institute, Inc.
 Joseph Becker, Esq.
 NPRI Center for Justice and Constitutional Litigation
 75 Caliente Street
 Reno, NV 89509-2807

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission):

Not applicable.

6. Indicate whether appellant was represented by appointed or retained counsel in the district court:

Appellant was represented by retained counsel in the district court.

7. Indicate whether appellant is represented by appointed or retained counsel on appeal:

Appellant is represented by retained counsel on appeal.

8. Indicate whether appellant was granted leave to proceed in forma pauperis and the date of entry of the district court order granting such leave:

Not applicable.

//
 //

1 **9. Indicate the date the proceedings commenced in the district court:**

2 Petitioner Nevada Policy Research Institute, Inc. filed a Petition for Writ of Mandamus
3 on July 6, 2016.

4 **10. Provide a brief description of the nature of the action and result in the district court,**
5 **including the type of judgment or order being appealed and the relief granted by the**
6 **district court:**

7 This is a public records action brought by the Nevada Policy Research Institute ("NPRI")
8 who sought to compel the Public Employees' Retirement System of Nevada ("PERS") to
9 produce information under the Nevada Public Records Act. The district court granted
10 NPRI's Petition for Writ of Mandamus, determining that the requested records were not
11 confidential and that PERS had a duty to create a document containing the requested
12 information. The district court further determined that NPRI was entitled to attorney's
13 fees and costs from PERS.

14 **11. Indicate whether the case has previously been the subject of an appeal to or original**
15 **writ proceedings in the Supreme Court and, if so, the caption and Supreme Court**
16 **docket number of the prior proceeding:**

17 Not applicable.

18 **12. Indicate whether this appeal involves child custody or visitation:**

19 Not applicable.

20 **13. If this is a civil case, indicate whether this appeal involves the possibility of**
21 **settlement:**

22 It is unknown whether settlement is a possibility in this judicial review action.

23 //

24 //

25 //

26 //

27 //


28 //

AFFIRMATION

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: January 31, 2017.

McDONALD CARANO WILSON LLP

By 
Joshua J. Hicks
Adam Hosmer-Henner
100 West Liberty Street, 10th Floor
P.O. Box 2670
Reno, Nevada 89505-2670

*Attorneys for Respondents Public Employees'
Retirement System of Nevada and Tina Leiss*

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDONALD CARANO WILSON LLP and that on January 31, 2017, I served the foregoing on the parties in said case by placing a true copy thereof enclosed in sealed envelopes with postage prepaid thereon in the United States Post Office mail at 100 West Liberty Street, 10th Floor, Reno, Nevada 89501 addressed as follows:

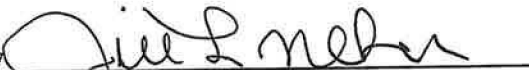
JOSEPH BECKER, ESQ.
NPRI CENTER FOR JUSTICE
AND CONSTITUTIONAL LITIGATION
75 CALIENTE STREET
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Executed on January 31, 2017, at Reno, Nevada.

By 
Jill Nelson

Judge: WILSON JR, JAMES E

Case No. 16 OC 00161 1B
Ticket No.
CTN:

NEVADA POLICY RESEARCH
INSTITUTE, INC

By:

LEISS, TINA

DRSPND

-vs-

By: HICKS, JOSHUA
100 WEST LIBRARY STREET
10TH FLOOR
PO BOX 2670
RENO, NV 89505

Dob:
Lic:
PUBLIC EMPLOYEES'
RETIREMENT SYSTEM OF
NEVADA

Sex:
Sid:
DRSPND

By: HICKS, JOSHUA

100 WEST LIBRARY STREET
10TH FLOOR
PO BOX 2670
RENO, NV 89505

Dob:
Lic:
STATE OF NEVADA

Sex:
Sid:
DRSPND

By:

Dob:
Lic:

Sex:
Sid:

Plate#:
Make:
Year: Accident:
Type:
Venue:
Location:

NEVADA POLICY RESEARCH
INSTITUTE, INC

PLNTPET

Bond: Set:
Type: Posted:

Charges:

Ct. Offense Dt: Cvr:
Arrest Dt:
Comments:

Ct. Offense Dt: Cvr:
Arrest Dt:
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Ct. Offense Dt: Cvr:
Arrest Dt:
Comments:

Sentencing:

No.	Filed	Action	Operator	Fine/Cost	Due
1	01/31/17	RECEIPT	1BCCOOPER	0.00	0.00
2	01/31/17	SECURITY BOND DEPOSIT Receipt: 48060 Date: 01/31/2017	1BCCOOPER	500.00	0.00
3	01/31/17	MOTION TO STAY PENDING APPEAL	1BCCOOPER	0.00	0.00
4	01/31/17	RESPONDENTS CASE APPEAL STATEMENT	1BCCOOPER	0.00	0.00
5	01/31/17	NOTICE OF APPEAL Receipt: 48060 Date: 01/31/2017	1BCCOOPER	24.00	0.00
6	01/30/17	PETITIONERS MEMORANDUM OF COSTS AND AFFIDAVIT FOR ATTORNEYS FEES PURSUANT TO FJDCR 15(13)	1BCCOOPER	0.00	0.00
7	01/24/17	FILE RETURNED AFTER SUBMISSION - ORDER ENTERED	1BCCOOPER	0.00	0.00
8	01/24/17	ORDER GRANTING PETITION FOR WRIT OF MANDAMUS	1BCCOOPER	0.00	0.00

No.	Filed	Action	Operator	Fine/Cost	Due
29	09/16/16	ORDER DENYING MOTION TO DISMISS PETITION OR, IN THE ALTERNATIVE, TO STRIKE THE PETITION AND EXHIBITS, OR IN THE ALTERNATIVE, FOR MORE DEFINITE STATEMENT	1BJULIEH	0.00	0.00
30	09/06/16	NOTICE OF INTENT TO ANSWER PETITION FOR WRIT OF MANDAMUS	1BCCOOPER	0.00	0.00
31	09/02/16	REQUEST FOR SUBMISSION	1BCCOOPER	0.00	0.00
32	09/02/16	REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PETITION OR, IN THE ALTERNATIVE TO STRIKE THE PETITION AND EXHIBITS OR IN THE ALTERNATIVE FOR MORE DEFINITE STATEMENT	1BCCOOPER	0.00	0.00
33	08/26/16	REQUEST FOR SUBMISSION	1BVANESSA	0.00	0.00
34	08/26/16	REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR EXTENSION OF TIME	1BVANESSA	0.00	0.00
35	08/25/16	FILE RETURNED AFTER SUBMISSION - ORDER ENTERED	1BCCOOPER	0.00	0.00
36	08/25/16	ORDER GRANTING IN PART EX PARTE MOTION FOR ORDER SHORTENING TIME	1BCCOOPER	0.00	0.00
37	08/23/16	PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS PETITION OR, IN THE ALTERNATIVE, TO STRIKE THE PETITION AND EXHIBITS, OR IN THE ALTERNATIVE, FOR MORE DEFINITE STATEMENT	1BVANESSA	0.00	0.00
38	08/17/16	MOTION FOR EXTENSION OF TIME (ON ORDER SHORTENING TIME)	1BCCOOPER	0.00	0.00
39	08/17/16	EX-PARTE MOTION FOR ORDER SHORTENING TIME	1BCCOOPER	0.00	0.00
40	08/05/16	MOTION TO DISMISS PETITION OR, IN THE ALTERNATIVE, TO STRIKE THE PETITION AND EXHIBITS, OR IN THE ALTERNATIVE, FOR MORE DEFINITE STATEMENT	1BCCOOPER	0.00	0.00
41	08/05/16	FILE RETURNED AFTER SUBMISSION - ORDER ENTERED	1BJHIGGINS	0.00	0.00
42	08/05/16	ORDER DIRECTING ANSWER	1BJHIGGINS	0.00	0.00
43	08/02/16	ADDITIONAL DEFENDANT (TINA LEISS) Receipt: 45543 Date: 08/02/2016	1BVANESSA	30.00	0.00
44	08/02/16	NOTICE OF APPEARANCE Receipt: 45543 Date: 08/02/2016	1BVANESSA	218.00	0.00
45	07/28/16	PROOF OF SERVICE (3)	1BCGRIBBLE	0.00	0.00
46	07/06/16	PETITION FOR WRIT OF MANDAMUS	1BCGRIBBLE	0.00	0.00
47	07/06/16	CREDIT CARD PROCESSING FEE Receipt: 45178 Date: 07/06/2016 Receipt 45178 reversed by 45184 on 07/06/2016. Receipt: 45185 Date: 07/06/2016	1BCGRIBBLE	2.50	0.00
48	07/06/16	ISSUING SUMMONS	1BCGRIBBLE	0.00	0.00

No.	Filed	Action	Operator	Fine/Cost	Due
49	07/06/16	AFFIRMATION PURSUANT TO NRS 239.030	1BCGRIBBLE	0.00	0.00
50	07/06/16	PETITION FOR WRIT OF MANDAMUS Receipt: 45178 Date: 07/06/2016 Receipt 45178 reversed by 45184 on 07/06/2016. Receipt: 45185 Date: 07/06/2016	1BCGRIBBLE	265.00	0.00
Total:				1,039.50	0.00
Totals By: COST				539.50	0.00
HOLDING				500.00	0.00
INFORMATION				0.00	0.00
*** End of Report ***					

REC'D & FILED

2017 JAN 24 PM 2:55

SUSAN MERRIWETHER
CLERK

BY SW DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

-o0o-

**NEVADA POLICY RESEARCH
INSTITUTE, INC.,**

Petitioner,

vs.

**PUBLIC EMPLOYEES' RETIREMENT
SYSTEM OF NEVADA, a Public
Agency; TINA LEISS, in her official
capacity as Executive Officer of the
Public Employee Retirement System
of Nevada; STATE OF NEVADA,**

Respondents.

CASE NO. 16 OC 00169 1B

DEPT. 2

**ORDER GRANTING PETITION
FOR WRIT OF MANDAMUS**

PROCEDURAL BACKGROUND

Nevada Policy Research Institute, Inc. (NPRI) filed a Petition for Writ of Mandamus seeking to compel Public Employees' Retirement System of Nevada (PERS) to produce information under the Nevada Public Records Act (NPRA).

ISSUES

Are the records NPRI requested confidential?

Does PERS have a duty to create a document that contains the requested information?

1 Do the alleged cybercrime risks posed by the disclosure of the requested
2 information outweigh the benefits?

3 If PERS is required to disclose the information is NPRI entitled to
4 attorney's fees and costs?

6 **FACTS**

7
8 In 2013 the Nevada Supreme Court decided *Public Employees'*
9 *Retirement System v. Reno Newspapers*, 129 A.O. 88, 313 P.3d 221
10 (2013)(*Reno Newspapers*). In that case Nevada Newspapers requested PERS
11 produce "the names of all individuals who are collecting pensions, the names of
12 their government employers, their salaries, their hire dates, and the amount of
13 their pension payments." *Id.* 222. PERS opposed the petition on grounds very
14 similar to those asserted in the present case. The district court concluded that
15 neither NRS 286.110(3) nor NRS 286.117 declared the requested information
16 confidential and the privacy concerns did not clearly outweigh the public's right
17 to disclosure, and ordered PERS to produce a report containing the requested
18 information. The Nevada Supreme Court concluded PERS had not identified any
19 statute, rule, or caselaw that would foreclose production of the requested
20 information and upheld the District court writ except for the portion of the order
21 which required PERS to create new documents or customized reports.
22

23 In the present case PERS' Operation Director Cheryl Price testified that as
24 a result of the *Reno Newspapers* decision PERS "possibly" eliminated retiree
25 names from the report it sends its actuary. This Court understood this testimony
26 to mean PERS eliminated retiree names from the report it sends its actuary in
27

1 part because of the *Reno Newspapers* decision. By eliminating retiree names
2 from the report for the actuary, PERS can respond to requests for information
3 that include a request for retiree names by stating no such document exists.

4 After PERS eliminated retiree names from the report it sends to its
5 actuary, NPRI requested PERS' FY 2014 Retiree Raw Data. PERS complied with
6 the request, but the FY 2014 Retiree Raw Data does not contain retiree names
7 because of the change PERS' made in its procedure after the *Reno Newspapers*
8 decision. Through email exchanges NPRI sought different ways of obtaining
9 information. On January 13, 2015 NPRI requested "reports or information that
10 could be provided that would contain the following pieces of information":
11 retiree name, years of service credit, gross pension benefit amount, year of
12 retirement, and last employer. Pet. for Writ of Mandamus, Ex. 2. Operations
13 Director Price responded that PERS did not have, and did not have a duty to
14 create, a report that contained the requested information. NPRI then filed its
15 Petition for Writ of Mandamus (Petition) to compel PERS to provide a record of
16 the information requested in the January 13, 2015 email referenced above, and
17 additional information, i.e., payroll amount, retirement type, and COLA
18 increases. Pet. for Writ of Mandamus, p. 6. NPRI did not request the additional
19 information in the January 13, 2015 email and therefore the request in the
20 Petition for that information is not proper because there was no specific denial
21 to produce that information.

24 PERS did not provide any evidence on the time or cost that would be
25 required to produce the requested information. Instead it focused on the time
26 and cost to match retiree names to the FY 2014 Retiree Raw Data.

GENERAL LEGAL PRINCIPLES

A writ of mandamus is available to compel the performance of an act the law requires as a duty resulting from an office or to control an arbitrary or capricious exercise of discretion. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008).

Chapter 239 – Public Records

NRS 239.001 Legislative findings and declaration.

The Legislature hereby finds and declares that:

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

NRS 239.010(1) Public books and public records open to inspection

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

NRS 239.0113 Burden of proof where confidentiality of public book or record is at issue.

1 Except as otherwise provided in NRS 239.0115, if:

2 1. The confidentiality of a public book or
3 record, or a part thereof, is at issue in a judicial or
4 administrative proceeding; and

5 2. The governmental entity that has legal
6 custody or control of the public book or record
7 asserts that the public book or record, or a part
8 thereof, is confidential,

9 the governmental entity has the burden of proving by
10 a preponderance of the evidence that the public book
11 or record, or a part thereof, is confidential.

12 NRS 286.110(3) Public Employees' Retirement System : ... public
13 inspection of records; ...

14 ... records, other than the files of ... retired employees
15 are public records

16 NAC 239.867 No requirement to create public record that does
17 not exist.

18 If a person requests to inspect, copy or receive a copy
19 of a public record that does not exist, a records
20 official or an agency of the Executive Department is
21 not required to create a public record to satisfy the
22 request.

23 ANALYSIS

24 **Are the records NPRI requested confidential?**

25 As it did in *Reno Newspapers*, PERS argued NRS 286.110(3) and NRS
26 286.117 bar production of the requested information because it is confidential.
27 The information requested in this case is substantially similar to the information
28 requested in *Reno Newspapers*. This Court concludes, as the Supreme Court did
in *Reno Newspapers*, that PERS failed to cite any statute, rule, or case that bars

1 production of the information NPRI requested on grounds the information is
2 confidential.

3
4 **Does PERS have a duty to create a document that contains the**
5 **requested information?**

6 PERS cited NAC 239.867 to support its position that there is no duty to
7 create a document. NAC 239.867 provides:

8 No requirement to create public record that does not
9 exist.

10 (NRS 239.008, 378.255) If a person requests to
11 inspect, copy or receive a copy of a public record that
12 does not exist, a records official or an agency of the
Executive Department is not required to create a
public record to satisfy the request.

13 NAC 239.867 does not require an agency to create a public record, but
14 neither does it does bar an agency from creating a record. PERS quoted in part
15 Nevada Public Records Act: A Manual for State Agencies 2014 which states in
16 part: "An agency is not required to organize data to create a record that doesn't
17 exist at the time of the request." The part PERS left out from that sentence in the
18 Manual is: "but may do so at the discretion of the agency if doing so is
19 reasonable." PERS failure to indicate it was quoting only part of the sentence
20 seems a bit deceptive.

21
22 The *Reno Newspapers* Court did not cite NAC 239.867 but vacated the
23 district court's order to the extent is required PERS to create new documents or
24 customized reports by searching for and compiling information from
25 individuals' files or other records. But two years later in *Las Vegas Metro. Police*
26 *Dept. v. Blackjack Bonding, Inc.*, 131 Nev A.O. 10, 343 P.3d 608 (2015)
27 (*Blackjack*) the Court referenced *Reno Newspapers* and stated that case "did not
28

1 address the situation where an agency had technology to readily compile the
2 requested information. Instead, when an agency has a computer program that
3 can readily compile the requested information, the agency is not excused from
4 its duty to produce and disclose that information.” Id. 613. (Internal citations
5 omitted.) The *Blackjack* Court did not discuss NAC 239.867.

6 NPRI tried to avoid the issue by arguing its request does not require
7 PERS to create new records because PERS produced a record with the requested
8 information in the past, and PERS would only need to collate data it already has.
9 The Court finds these arguments lack merit. The old report does not provide the
10 current information requested and collating documents would result in
11 something new and different than existed before – a new document.
12

13 Considering the purpose of the NPRA, to foster democratic principles by
14 providing members of the public with access to public books and records; the
15 legislative mandate that courts construe the NPRA liberally to carry out this
16 important purpose; the legislative mandate that any exemption, exception or
17 balancing of interests which limits or restricts access to public books and records
18 by members of the public must be construed narrowly; the lack of evidence that
19 producing the requested information, retiree name, years of service credit, gross
20 pension benefit amount, year of retirement, and last employer would require
21 unreasonable demands or costs on PERS; and the fact that PERS altered its
22 procedure in providing information to its actuary to eliminate the names of
23 retirees in part because of the *Reno Newspapers* decision, the court concludes
24 that PERS does have a duty to create a document that contains the requested
25 information.
26
27
28

1 **Do the alleged cybercrime risks posed by the disclosure of the**
2 **requested information outweigh the benefits?**

3 PERS' argument that the risk of cybercrime against retirees posed by
4 disclosure of the requested information outweigh the benefits, suffers from the
5 same fatal defect its argument had in *Reno Newspapers* – there is no convincing
6 evidence that the concerns are anything other than hypothetical and speculative.
7 The testimony provided by PERS did not limit the opinions to the information
8 requested in this case. Instead the opinions are based upon the inclusion of
9 information not requested by NPRI like sex, birth date, and address.

10 Like in *Reno Newspapers* PERS failed to provide sufficient evidentiary
11 support for its position that disclosure of the requested information would
12 actually cause harm or even increase the risk of harm to retired employees.
13

14
15 **If PERS is required to disclose the information is NPRI entitled to**
16 **attorney's fees and costs?**

17 Under NRS 230.011(2) if the requester prevails, the requester is entitled
18 to recover its costs and reasonable attorney's fees from the governmental entity
19 whose officer has custody of the records. NPRI has prevailed and is therefore
20 entitled to recover its costs and reasonable attorney's fees from PERS.
21

22 **CONCLUSIONS OF LAW**

23 The information NPRI requested is not confidential.
24

25 PERS does have a duty to create a document that contains for FY 2014,
26 retiree name, years of service credit, gross pension benefit amount, year of
27 retirement, and last employer.
28

1 The alleged cybercrime risks posed by the disclosure of the requested
2 information do not outweigh the benefits.

3 NPRI is entitled to attorney's fees and costs from PERS.

4 Any arguments of the parties not addressed in this order lack merit.
5

6 **ORDER**

7
8 IT IS ORDERED:

9 The Petition for Writ of Mandamus is granted.

10 PERS is ordered to produce the following information to NPRI within five
11 business days:

- 12 a) Retiree name;
13 b) Years of service credit;
14 c) Gross pension benefit amount;
15 d) Year of retirement; and
16 e) Last employer
17

18 NPRI will file a memorandum of costs and an affidavit for attorney's fees
19 that complies with FJDCR 15(13) within five business days.

20 Under NRS 239.052 PERS may charge a fee for providing a copy of the
21 ordered public record. The fee must not exceed the actual cost to PERS to
22 provide the copy of the public record.

23 January 23, 2016.

24
25 
26 District Judge
27
28

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of the First
3 Judicial District Court of Nevada, that on this 24 day of January, 2017, I:

4 ☒ deposited for mailing at Carson City, Nevada

5 Joshua Hicks, Esq.
6 Andrew Hosmer-Henner, Esq.
7 100 W. Liberty Street, 10th floor
8 Reno, NV 89505

9 Joseph Becker, Esq.
75 Caliente Street
Reno, NV 89509

10 ☐ caused to be delivered by messenger service

11 ☐ faxed to: Joseph F. Becker, Esq. 775-201-0225; and Joshua J.
12 Hicks, Esq. 775-788-2020

13 a true and correct copy of the above order.

14 
15 _____
Judicial Assistant

FIRST JUDICIAL DISTRICT COURT MINUTES

CASE NO. 16 OC 00161 1B

TITLE: NEVADA POLICY RESEARCH
INSTITUTE, INC. VS PUBLIC
EMPLOYEES' RETIREMENT SYSTEM
OF NEVADA, A PUBLIC AGENCY; TINA
LEISS, IN HER OFFICIAL CAPACITY AS
EXECUTIVE OFFICER OF THE PUBLIC
EMPLOYEE RETIREMENT SYSTEM OF
NEVADA; STATE OF NEVADA

1/17/17 – DEPT. II – HONORABLE JAMES E. WILSON, JR.
J. Harkleroad, Clerk – Not Reported

EVIDENTIARY HEARING

Present: Joseph Becker counsel for Pltf; Robert Felner representative Robert Felner; Adam Hosmer-Henner and Joshua Hicks counsel for Public Employees' Retirement System of Nevada and Tina Leiss; Chris Nelson, General Counsel and client representative.

Statements were made by Court and counsel.

Evidence was marked and admitted in accordance with the Exhibit Sheet.

The following witnesses were sworn and testified:

1. Cheryl Price
2. Robert Felner

Closing arguments were made by counsel.

COURT ORDERED: Matter is submitted.

The Court minutes as stated above are a summary of the proceeding and are not a verbatim record. The hearing held on the above date was recorded on the Court's recording system.

FIRST JUDICIAL DISTRICT COURT MINUTES

CASE NO. 16 OC 00161 1B

TITLE: NEVADA POLICY RESEARCH
INSTITUTE, INC. VS PUBLIC
EMPLOYEES' RETIREMENT SYSTEM
OF NEVADA, A PUBLIC AGENCY; TINA
LEISS, IN HER OFFICIAL CAPACITY AS
EXECUTIVE OFFICER OF THE PUBLIC
EMPLOYEE RETIREMENT SYSTEM OF
NEVADA; STATE OF NEVADA

12/22/16 – DEPT. II – HONORABLE JAMES E. WILSON, JR.
J. Harkleroad, Clerk – Not Reported

TELEPHONE CONFERENCE

Present: Joseph Becker counsel for Pltff; Adam Hosmer-Henner counsel for Public Employees' Retirement System of Nevada and Tina Leiss

Statements were made by Court and counsel.

COURT ORDERED: It will set the matter for January 17, 2017 at 1:30 p.m. for 3 ½ hours.

Further statements were made by Court and counsel.

COURT ORDERED: It will give counsel January 25, 2017 at 9:00 a.m. for the cyber security experts. Becker to prepare a brief order indicating that the Court held this conference and include the dates and times that are set. January 17th is going to be primarily devoted to Mrs. Price, if another expert is going to be called Mr. Hosmer-Henner or Mr. Hicks will advise Mr. Becker will in writing so that he can be prepared. Otherwise, the January 25th from 9:00 a.m. to 12:00 p.m. will be for those experts if they want to continue to present them.

Statements were made by counsel and Court.

The Court minutes as stated above are a summary of the proceeding and are not a verbatim record. The hearing held on the above date was recorded on the Court's recording system.

DISTRICT COURT CIVIL COVER SHEET

Carson City County, Nevada
Case No. 16DC00161-13
(Assigned by Clerk's Office) 16 pt. II

REC'D & FILED

2016 JUL -6 AM 11:47

I. Party Information (provide both home and mailing addresses if different)

Petitioner(s) (name/address/phone): NEVADA POLICY RESEARCH INSTITUTE, INC. Attorney (name/address/phone): JOSEPH F. BECKER, ESQ. NPRI CENTER FOR JUSTICE AND CONSTITUTIONAL LITIGATION 75 Caliente Street, Reno, Nevada 89509-2807 Tel: (775) 636-7703	Respondent(s) (name/address/phone): PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF NEVADA, a Public Agency; TINA M. LEISS, in her official capacity as Executive Officer of the Public Employees' Retirement System of Nevada; STATE OF NEVADA; Attorney (name/address/phone): SUSAN MERRILL WETTER
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II. Nature of Controversy (please select the one most applicable filing type below)

Civil Case Filing Types

Real Property Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Negligence <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	Torts Other Torts <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
Probate Probate (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Judicial Review/Appeal Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Civil Writ Civil Writ <input type="checkbox"/> Writ of Habeas Corpus <input checked="" type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ		Other Civil Filing Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters

Business Court filings should be filed using the Business Court coversheet.

July 6, 2016
Date

Signature of initiating party or representative

See other side for family-related case filings.