IN THE SUPREME COURT OF THE STATE OF NEVADA

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF NEVADA,

Appellant,

v.

NEVADA POLICY RESEARCH INSTITUTE, INC.,

Respondent.

Supreme Court Case No. 72274

District Court Case No. 16OC00161 1B

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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

Appellant Public Employees' Retirement System of Nevada ("PERS") is a public agency and governmental party. *See* NRAP 26.1(a).

PERS has been represented throughout this matter by attorneys at McDonald Carano LLP.

DATED: July 11, 2017.

McDONALD CARANO LLP

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ROUTING STATEMENT

This matter is presumptively retained by the Supreme Court pursuant to NRAP 10 ("Matters raising as a principal issue a question of first impression involving the United States or Nevada Constitutions or common law") and NRAP 11 ("Matters raising as a principal issue a question of statewide public importance, or an issue upon which there is an inconsistency in the published decisions of the Court of Appeals or of the Supreme Court . . ."). The Nevada Supreme Court has never before burdened a public agency with the obligation to itself create a new record in response to a public records request as the District Court's Order would require the Public Employees' Retirement System of Nevada ("PERS") to do. Furthermore, the District Court's interpretation rendered the holdings of *PERS v. Reno Newspapers, Inc.*, 313 P.3d 221 (2013) and *LVMPD v. Blackjack Bonding*, 343 P.3d 608 (2015) in direct conflict. The former decision held that PERS did not need to "create new documents or customized reports by searching for and compiling information from individuals' files or other records." *Reno Newspapers,* 313 P.3d at 228. Yet the District Court's Order relied upon *Blackjack Bonding* to require PERS to do exactly that.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over PERS's appeal pursuant to NRS 34.310 ("The provisions of the Nevada Rules of Civil Procedure and Nevada Rules of Appellate Procedure relative to new trials in, and appeals from, the district court, except so far as they are inconsistent with the provisions of NRS 34.150 to 34.290, inclusive, apply to the proceedings mentioned in NRS 34.150 to 34.290, inclusive.") and NRAP 3A(b)(1) ("A final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered.") PERS filed a timely Notice of Appeal on January 31, 2017. JA000461-463.

STATEMENT OF THE ISSUES

1.) Whether the District Court erred by requiring PERS to extract and disclose information from the statutorily confidential files of PERS's individual members?

2.) Whether PERS had a duty to create a new document or customized report in response to a public records request?

3.) Whether, under the *Bradshaw* balancing test, the unrefuted expert evidence presented by PERS concerning privacy and

cybercrime risks from disclosure outweighed a nonspecific public interest in open government?

STATEMENT OF THE CASE

NPRI filed a Petition for Writ of Mandamus ("Petition") on July 6, 2016. JA000001-14. The Petition requested that the District Court order PERS to provide NPRI with "a record of retiree name, payroll amount, date of retirement, years of service, last employer, retirement type, original retirement amount, and COLA increases." JA000006. PERS filed a Motion to Dismiss on August 5, 2016 arguing that the Petition was not supported by a sworn affidavit in accordance with NRS 34.170 and that NPRI should be required to provide a more definite statement as the Petition did not clearly identify the public records request, the public records in question, or the relief sought. JA000026-35.

On the same day, August 5, 2016, the District Court issued an Order Directing Answer, requesting that PERS answer within thirty days. JA000023-25. Given the pending Motion to Dismiss, PERS then filed a Motion for Extension of Time and an Ex-Parte Motion for Order Shortening Time on August 17, 2016. JA000036-49. These motions were

never responded to by NPRI. NPRI responded to PER's Motion to Dismiss on August 23, 2016. JA000050-60. The District Court issued an order denying PER's Motion to Dismiss on September 16, 2016 (which was not received by PERS until September 20, 2016) requiring PERS to respond to the Petition for Writ of Mandamus by September 29, 2016. JA000077-82.

The District Court found that the eight categories of information requested in the petition ("a record of retiree name, payroll amount, date of retirement, years of service, last employer, retirement type, original retirement amount, and COLA increases") was somehow consistent with the five categories of information referenced in an email from NPRI to PERS ("(a) Retiree name; (b) Years of service credit; (c) Gross pension benefit amount; (d) Year of retirement; and (e) Last employer.") JA000081. At the evidentiary hearing in this matter, the district court recognized that NPRI's request "has been a bit of a moving target though, if you made request for a record that no longer existed at the time the request was made, why shouldn't you be required to do a new request . . ." JA000433 (Hr'g Tr. 103:15-24).

PERS filed its Answer to Petition for Writ of Mandamus ("Answer") on September 29, 2017. JA000086-278. On October 17, 2016, NPRI filed a Reply to PERS's Answer. JA000279-291. On January 17, 2017, the District Court held an evidentiary hearing at which the parties presented the testimony of Cheryl Price and Robert Fellner. JA000331-440. One week later on January 24, 2017, the District Court granted NPRI's Petition ("Order"). PERS timely appealed on January 31, 2017. JA000461-463. NPRI filed a Petition for Writ of Mandamus ("Petition") on July 6, 2016. JA000001-14. The Petition requested that the District Court order PERS to provide NPRI with "a record of retiree name, payroll amount, date of retirement, years of service, last employer, retirement type, original retirement amount, and COLA increases." JA000006. PERS filed a Motion to Dismiss on August 5, 2016 arguing that the Petition was not supported by a sworn affidavit in accordance with NRS 34.170 and that NPRI should be required to provide a more definite statement as the Petition did not clearly identify the public records request, the public records in question, or the relief sought. JA000026-35.

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STATEMENT OF THE FACTS

A. PERS Maintains Confidential Records For Public Employees and Retirees.

PERS is a public agency that is responsible for administrating the entire public employee retirement system in Nevada, including collecting contributions, investing contributions, paying benefits, and conducting audits. JA000119. This includes the retirement systems for the Executive, Legislative, and Judicial branches of Nevada's

government. JA000124.

Public employers in Nevada transmit employees' confidential information and records to PERS in order to facilitate the provision of retirement benefits to these employees. JA000121. At the time of retirement, Retirees also fill out a Retirement Application Packet to provide PERS with supplemental information and updates to their information already on file. *Id.* PERS then maintains and supplements these individual files for its active members who are public employees in Nevada. *Id.* PERS also maintains individual files for retired members and beneficiaries (hereinafter "Retirees"). *Id.* These Retirees are individuals who "worked in the public sector . . . [became] vested and [are] no longer working" who collect a retirement benefit. JA000339 (Hr'g Tr. 9:1-6).

Information and records pertaining to individuals are organized into and accessed within an individual's file. JA000119. All information in the individual files is maintained as discrete, confidential record in the CARSON (computer automated retirement system of Nevada) database. *Id.* CARSON is a proprietary database, which is over 17 years old, programmed specifically for PERS and is treated as wholly

confidential. *Id.* Prior to the CARSON database, PERS maintained "paper files" that were "organized in physical file folders and stored in the file room." JA000340 (Hr'g Tr. 10:7-13).

The CARSON database is located behind comprehensive security safeguards in order to maintain member privacy. JA000119; *see also* JA000341 (Hr'g Tr. 11:16-12:9) (discussing PERS's "policies and procedures of the confidentiality of our files that each and every member of our staff signs and is trained on"). PERS strictly limits authorized access to the individual files and confidential information in the CARSON database and requires a personal waiver from the member, retiree, or beneficiary to release information contained within the records maintained in the individual file. *Id.*

PERS does not maintain physical files for its members or Retirees. JA000121. The information in the individual files is only kept in the CARSON database and located within the electronic folder belonging that the individual in that database. JA000341 (Hr'g Tr. 11:3-15).

B. Transmittal of PERS Data to an Independent Actuary.

Article 9 of the Nevada Constitution requires PERS to employ an independent actuary and requires the PERS board to adopt actuarial

assumptions based upon the recommendations made by the independent actuary it employs. JA000121. The law and policy of the PERS Board require an actuary to analyze the financial status of member and Retiree obligations on a yearly basis. *Id.* PERS operates on a fiscal year calendar, beginning on July 1st and ending on June 30th of each year. *Id.*

The independent actuary employed by PERS requires access to the confidential information contained with the individual files in order to analyze and value the retirement system. *Id.* The actuary and PERS discuss the necessary categories of information and these categories have changed over time based on the needs of the actuary and the operations of PERS. JA000122. Based on these discussions, the names of members and Retirees were not included in the data sent to the actuary from fiscal year 2014 forward because the names were unnecessary for the actuary to perform a valuation. *Id.*[1]

[1] The District Court took some liberties with the evidence concerning why PERS altered its actuarial procedures. Ms. Price was asked whether the "deletion of names occurred as a result of Supreme Court order in 2013 ordering disclosure." JA000368 (Hr'g Tr. 38:19-22). Ms. Price's answer was that it was a possible explanation, but that she had not been involved in the specific conversations. JA000368-369 ("Possibly.") Furthermore, there is nothing unusual or untoward about a public agency altering its procedures in response to a Supreme Court

Prior to providing information to the independent actuary, PERS requires that the actuary agree to and execute a confidentiality agreement. JA000122. Once PERS receives the requests from the actuary, and the actuary has signed a confidentiality agreement, PERS extracts only the information that the actuary needs to value the retirement system from the individual files in the CARSON database. *Id.* This raw data is then password-protected and securely transmitted to the independent actuary ("Raw Data Feed"). *Id.*

The transmittal of the Raw Data Feed to the independent actuary is a significant undertaking. Approximately 30 PERS employees are involved for "a couple of months" in gathering and validating the Raw Data Feed. JA000343 (Hr'g Tr. 13:2-16); JA000344 (Hr'g Tr. 14:7-17) ("We want to make sure that that information is updated because that's very important information for our actuary to have to value our system.") The Raw Data Feed is presented to the actuary as a spreadsheet that only contains data extracted from the individual files of the members and Retirees and does not contain information separate and apart from these individual files. JA000122. The Raw Data Feeds

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decision, especially when that decision affects the agency's confidentiality obligations.

are generated on a fiscal year basis (July 1 through June 30) and are not generated on a calendar year basis. *Id.*

C. Transmittal of the 2014 Data to NPRI.

Pursuant to its normal practices, PERS responded to its independent actuary's information request concerning Retirees by generating a Raw Data Feed for fiscal year 2014 ("FY 2014 Retiree Raw Data"). JA000122. The FY 2014 Retiree Raw Data was formatted as a Microsoft Excel spreadsheet and contained information extracted from the individual files of 57,157 Retirees. *Id.* Of this total, there were 50,605 service retirees and 3,328 disability retirees. *Id.* Furthermore, there were 3,224 adult and child survivor beneficiaries. *Id.* The adult and child survivor beneficiaries receive benefits based on their relationship to an active member or Retiree and may never have been public employees themselves, or even aware that their personal information is maintained by PERS. *Id.*

The FY 2014 Retiree Raw Data includes the following information fields:

- ITEM NAME
- SYSTEM
- YEAR
- SB427 FLAG (2010_RULE_FLAG)
- MASTER ACCOUNT TYPE

- MASTER FUND
- MASTER STATUS
- MASTER LAST EMPLOYER
- MASTER EES CONTRIBUTIONS
- MASTER TOTAL SERVICE CREDIT
- MASTER SSN
- RECIPIENT SSN
- RECIPIENT RELATIONSHIP
- RECIPIENT OPTION
- RECIPIENT BIRTH DATE
- RECIPIENT SEX
- RECIPIENT MARITAL STATUS
- RECIPIENT EFFECTIVE DATE
- RECIPIENT GROSS AMOUNT
- RECIPIENT BASE AMOUNT
- RECIPIENT ADJUSTMENTS TO BASE (LEGISLATIVE ADJUSTMENTS)
- RECIPIENT TOTAL PRI AMOUNT
- RECIPIENT STOP DATE
- RECIPIENT STOP REASON
- PENDING BENEFICIARY FLAG
- BENEFICIARY BIRTH DATE
- CONTINUENCE AMOUNT FOR OPTION 6 AND 7
- ERPAID FLAG

JA000122-123.

NPRI requested that PERS create a new version of the FY 2014 Retiree Raw Data that included entries for the Retiree names. JA000010. PERS responded to NPRI's request to create a different version of the FY 2014 Retiree Raw Data by stating that the different version did not exist "and the Supreme Court order does not require us to create it." *Id.*

PERS cannot create a custom report for FY 2014 due to account updates and changes to the individual files, which are dynamic files

that are not preserved at specific points in time. JA000123-124. The information in the "CARSON system is not static . . . There's updates and there's a lot of information that changes over time. So it wouldn't be possible to have the exact same information of 2014 with the names." JA000359 (Hr'g Tr. 29:10-18.) There would be "no way to create an accurate custom report with the fiscal year 2014 data" as the District Court ordered. *Id.* (Hr'g Tr. 29:19-22).

In order for the FY 2014 Retiree Raw Data to be modified to include Retiree names linked to each data field as NPRI requested during the evidentiary hearing, PERS would have to dedicate at least two full-time staff members in its information technology department for at least two full days of staff time each. JA000124. This work would include extracting the Retiree names from the CARSON database and matching them up to the FY 2014 Retiree Raw Data and validating that the Retiree names were accurately included in the FY 2014 Retiree Raw Data spreadsheet. *Id.* Based upon the estimated staff time, the estimated cost for this project is $1,300 although it could increase depending on data errors and issues. *Id.*

Alternately, if PERS were to create a custom report for future fiscal years, this would "involve the specific coding of a program to query the individual members files in the CARSON data base." JA000360 (Hr'g Tr. 30:3-6). But this process could not be undertaken for a prior fiscal year due such as 2014 to the dynamic nature of the data. JA000359 (Hr'g Tr. 29:14-18).

SUMMARY OF THE ARGUMENT

In 2013, the en banc Nevada Supreme Court unanimously held that PERS was not required to create a new document from the files of its retired public employees in response to a public records request. *PERS v. Reno Newspapers, Inc.*, 129 Nev. Adv. Op. 88, 313 P.3d 221, 225 (2013) (citing NRS 239.010(1) (permitting only "inspection" and copying of public records)). In *Reno Newspapers*, Judge Russell of the First Judicial District Court had ordered PERS to create and furnish a report containing: "(a) The name of the retired employee; (b) The name of the retired employee's employer; (c) The retired employee's salary; (d) The retired employee's hire and retirement dates; and (e) The amount of the retired employee's benefit payment." JA000519-524. On appeal, this Court reversed Judge Russell holding, "to the extent that the district

court ordered PERS to create new documents or customized reports by searching for and compiling information from individuals' files or other records, we vacate the district court's order." *Reno Newspapers,* 313 P.3d at 228. In 2017, Judge Wilson of the First Judicial District Court issued a nearly-identical order to Judge Russell's, requiring PERS to create a new document in response to a public records request by NPRI containing: "(a) Retiree name; (b) Years of service credit; (c) Gross pension benefit amount; (d) Year of retirement; and (e) Last employer" for the 2014 fiscal year. JA000472 (hereinafter referred to as the "Custom Report"). This Court cannot affirm the Order without directly overruling its unanimous, en banc decision in *Reno Newspapers* and it should not affirm for the reasons articulated below.

First, the District Court erred by concluding that the requested information was not confidential by statute. NRS 286.110(3) specifically exempts the "files of individual members or retired employees" from the definition of public records that are available for public inspection. The District Court noted that the "information requested in this case is substantially similar to the information requested in *Reno Newspapers*." JA000468-469. But then it concluded "as the Supreme

Court did in *Reno Newspapers*, that PERS failed to cite any statute, rule, or case that bars production of the information NPRI requested on grounds the information is confidential." *Id.*

This is a clear misreading of *Reno Newspapers*, which held that the "individuals' files have been declared confidential as a matter of law." 313 P.3d at 224. *Reno Newspapers* held that where "information is contained in a medium separate from individuals' files, including administrative reports generated from data contained in individuals' files, information in such reports or other media is not confidential merely because the same information is also contained in individuals' files." *Id.* Thus, it considered the situation of whether *existing* administrative reports must be disclosed pursuant to a public records request. The Court held that PERS had essentially waived the confidentiality of the information by using and including it within an administrative report, thus taking outside of the narrow confines of the statutory confidentiality. Here, NPRI is not seeking an existing administrative report and the District Court would require PERS to create a brand-new report from information that only exists in the confidential files, effectively using the compelled creation of that report

to self-justify its disclosure. This is the same logic as if a court ordered a party to turn over privileged documents to a third-party, on the basis that that the compelled transfer rendered the documents non-privileged. NRS 286.110 and NRS 286.117 would be meaningless if the individual files remained confidential, but a requester could obtain all of the information within those files.

Second, the District Court held that PERS has "a duty to create a document that contains the requested information." JA000470. Neither the Nevada Public Records Act, NRS 239.001 *et seq.*, nor any decision from this Court requires PERS to create a new record to satisfy a public records request. "If a person requests to inspect, copy or receive a copy of a public record that 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." NAC 239.867. Furthermore, NAC 239.869 provides that "the Nevada Public Records Act: A Manual for State Agencies, 2014 edition, and any subsequent edition issued by the Division which has been approved by the Administrator" is "hereby adopt[ed] by reference," thus giving it the force of law. The Nevada Public Records Manual explicitly states that an "agency is not required to organize

data to create a record that doesn't exist at the time of the request, but may do so at the discretion of the agency if doing so is reasonable" Nevada Public Records Act – A Manual For State Agencies 2014, 4.

Despite these clear pronouncements, the District Court employed its own novel balancing test to require PERS to create the Custom Report. The only decision of this Court that required the creation of a new document in any circumstances was *Blackjack Bonding*, 343 P.3d at 608. *Blackjack Bonding did not*, however, require a public agency to create a new record – doing so would run afoul of NAC 239.867 – but instead required a third-party vendor of the public agency to produce a readily available report. Here, the creation of a new custom report cannot be done in the first place as PERS does not maintain static data for prior fiscal years. But even if it could be completed, a custom report containing data for over 57,000 Retirees would be labor-intensive and costly.

Third, if this Court opts to not reverse the District Court based on the specific statutes in NRS Chapter 286, it should still reverse based on the *Bradshaw* balancing of interests test as the risks of disclosure far outweigh the benefits. The District Court arbitrarily rejected the

evidence presented by PERS – unrefuted expert testimony from two extremely well-qualified experts – because it was speculative. JA000471 ("there is no convincing evidence that the concerns are anything other than hypothetical and speculative"). When the balancing test relates to the future disclosure of information, privacy risks can only be speculative because the information has not yet been released to the public domain. This evidentiary burden placed upon public agencies is impossible to overcome; indeed, this Court has never used the *Bradshaw* analysis to preclude disclosure of public records. The expert evidence presented by PERS demonstrated that the public disclosure of the personally identifiable information in the Custom Report about 57,000 Retirees significantly heightened their risk of identity theft and cybercrime.

PERS is merely an administrator of public retirement benefits and the Legislature has expressly declared that these individuals' files are confidential. Rather than override these statutes, NPRI could seek to obtain the requested information from the other public agencies that actually made the salary and pension decisions for their employees. Judicial reweighing of these Legislative decisions is unwarranted here.

The privacy interests of 57,000 retirees trumps any non-particularized policy in favor of open government, especially when the public records in question do not exist and therefore cannot be a part of governmental process or operations.

ARGUMENT

I. STANDARD OF REVIEW.

This Court reviews a district court's decision to grant or deny a petition for a writ of mandamus under an abuse of discretion standard. *Reno Newspapers*, 313 P.3d at 223. "Questions of statutory construction, however, including the meaning and scope of a statute, are questions of law, which this court reviews de novo." *Id.*

II. THE DISTRICT COURT'S ORDER IS FACTUALLY IMPOSSIBLE TO COMPLY WITH.

The District Court ordered PERS to create the new Custom Report, which is not what NPRI sought in its public records request or in its Petition. This disconnect should require, at an absolute minimum, reversal or remand so that NPRI can either file a new public records request or the District Court can evaluate NPRI's actual records request rather than fashion its own compromise remedy like the Custom Report. Although this appeal raises weighty legal issues about

Nevada's public records laws, it also involves significant factual confusion that is case-dispositive. At an early stage, PERS sought a more definite statement as the Petition did not clearly identify the public records request, the public records in question, or the relief sought. JA000026-35. The District Court denied this request, JA000077-82, only to later backtrack at the evidentiary hearing, noting that NPRI's records request "has been a bit of a moving target." JA000433 (Hr'g Tr. 103:15-24). In response, NPRI stated that "the lawsuit really is about them not supplying the raw data feed [and] . . . compiling with the other existing report which has names, that's what the lawsuit is really about." JA000434 (Hr'g Tr. 104:10-18).

NPRI's actual public records request asked PERS to create a new version of the FY 2014 Retiree Raw Data that included entries for the Retiree names. JA000013 ("I wanted to ask if it were possible to get names attached to the 2014 actuary report previously provided"); JA000010 ("Would NVPERS create a version of this report, with names instead of SS numbers, in response to our request?"). The Petition itself requested "a record of retiree name, payroll amount, date of retirement, years of service, last employer, retirement type, original retirement

amount, and COLA increases." JA000006. The parties both briefed the case as being about the request to add names to an existing report. Specifically, NPRI argued the following:

- "NPRI seeks PERS 'actuary report' as it has customarily done and been delivered from PERS to NPRI in past years." JA000053 (Opposition to the Motion to Dismiss Petition Or, In the Alternative, to Strike the Petition and Exhibits, or in the Alternative, for More Definite Statement).
- "[NPRI] does not request that any 'new record be created;' simply that already-admitted-to-exist records be compiled." JA000288 (Reply to Answer to Petition for Writ of Mandamus).
- NPRI requested that PERS "append[] the names of the Retirees as an information field in the Raw Data Feed." JA000289 (Reply to Answer to Petition for Writ of Mandamus).
- "NPRI would simply ask this Court to . . . order Respondent PERS to compile two previously compiled records – two existing records." JA000309 (Reply to Respondents' Opposition to Motion for Judgment on the Pleadings).

- "PERS is required to make available to NPRI the requested actuary report (which has customarily included the retiree name, payroll amount, date of retirement, years of service, last employer, retirement type, original retirement amount, and COLA increases), even if disclosing this report requires PERS to compile another existing record admittedly held by PERS associating names with social security numbers of retirees." JA000312 (Reply to Respondents' Opposition to Motion for Judgment on the Pleadings).

But eliding the issues raised by both parties, as well as NPRI's actual requests, the District Court ordered the creation of an entirely separate document, the Custom Report. JA000464-473. This compromise cannot stand. NPRI asked for the FY 2014 Retiree Raw Data Feed with the inclusion of names and expressly disclaimed that it requested something like the Custom Report.

Apart from all of the other legal arguments advanced by PERS, reversal is warranted because the District Court ignored the unrefuted evidence that it would be impossible to create the Custom Report for fiscal year 2014. Ms. Price, PERS's Operations Officer, testified:

> "Q: So there would be no way to create an accurate custom report with the fiscal year 2014 data if you started now?
> A: No.

JA000359 (Hr'g Tr. 29:19-22). A FY 2014 Custom Report could not be created as ordered by the District Court because PERS's information is not stored on a temporal basis or locked in at a certain point in time. JA JA000359 (Hr'g Tr. 29:10-18) ("our information in our CARSON system is not static so it's changing. There's updates and there's a lot of information that changes over time. So it wouldn't be possible to have the exact same information of 2014 with the names.") The District Court's compromise position is unfeasible. NPRI seemed to recognize this by only requesting that PERS compile separate reports or attach names to an existing report, not to generate a new document.

PERS cannot comply with the District Court's Order as written because it cannot accurately recreate the FY 2014 data as it existed then. This problem illustrates the problem with requiring a public agency to create new documents in response to a public records request rather than the traditional limitation of only providing existing records. It also may have serious and widespread ramifications on the document retention policies across all state agencies. Requiring state agencies not

only to retain actual records for a certain period of time, but also to store all data in a manner that could be used to create new records in response to future requests could have a devastating fiscal impact.

PERS provided NPRI with the FY 2014 Retiree Raw Data, a comprehensive spreadsheet that was exhaustively checked for accuracy before it was transmitted to an independent actuary. PERS cannot provide NPRI with the Custom Report and should not be required to retroactively create a new document covering a prior time period.

III. THE HISTORICAL DEVELOPMENT OF NEVADA'S PUBLIC RECORDS ACT JURISPRUDENCE.

The current appeal lies at the end of a relatively short line of public records cases in Nevada. Because the development of this case law is important for the analysis and resolution of PERS's appeal, the major cases on NRS Chapter 239 are presented below.

Nevada's public records act was originally enacted in 1911 and "for many years, the law simply stated that 'all books and records of the state and county officers . . . shall be open at all times during office hours to inspection by any person, and the same may be fully copied.'" *Public Records*, Policy and Program Report, Research Division, Nevada Legislative Counsel Bureau April 2016, available at:

https://www.leg.state.nv.us/Division/Research/Publications/PandPReport/16-PR.pdf; *see also City of Reno v. Reno-Gazette-Journal*, 119 Nev. 55, 59 (2003). The initial law did not contain a definition of "precisely what constituted a public record [and] . . . since 1913, over two dozen Attorney General's opinions have attempted to clarify the intent of the public records law, determine whether a particular document constitutes a public record, and define when a public record should be stored and preserved." *Id.* NRS 239.010(1) currently creates a functional definition of a public record as "all public books and public records of a governmental entity" unless they are "otherwise declared by law to be confidential." The public record must be supplied to the requestor in "any medium in which the public record is *readily available.*" NRS 239.010(4) (emphasis added).

Judicial analysis of the Nevada Public Records Act ("NPRA") begins with *Donrey of Nevada, Inc. v. Bradshaw* in 1990. 106 Nev. 630 (1990).[2] In *Bradshaw,* the appellants filed a petition for writ of mandamus based on NRS 239.010 seeking to obtain a police investigative report. *Id.* at 631. The Court found that NRS 179A.070(1)

[2] NRS Chapter 239 was mentioned but not substantively analyzed in *State Farm Fire and Cas. Co. v. All Elec., Inc.*, 99 Nev. 222 (1983) and *Adair v. City of North Las Vegas*, 85 Nev. 66 (1969).

rendered certain criminal records confidential and exempt from disclosure, but did not "expressly declare criminal investigative reports to be confidential." *Id.* at 634. The Court held that the initial legislative balancing expressed in the statutes did not preclude judicial balancing of "public policy considerations when release of records other than those specifically defined as criminal history records is sought." *Id.* at 635. Therefore, the Court weighed "the absence of any privacy or law enforcement policy justifications for nondisclosure against the general policy in favor of open government." *Id.* at 636. Based on the specific circumstances, the Court ordered the release of the entire police investigative report.

Justice Steffen authored a dissenting opinion in *Bradshaw* that presciently discussed the potential issues with ad hoc balancing:

> "[a]s a result of the majority's rule of equivocation, law enforcement agencies will be unable to predict with assurance the status of their investigative and intelligence reports in any given case until they have been subjected to the uncertainties of a judicial balancing test. I expect that the end result of such a rule will be an altered method of maintaining or memorializing ongoing police investigations."

Id. at 637. The dissent cited *FBI v. Abramson*, 456 U.S. 615, 631 (1981), which held that "[c]ongress . . . created a scheme of categorical

exclusion; it did not invite a judicial weighing of the benefits and evils of disclosure on a case-by-case basis." *Id.* Justice Steffen would not have held that the report was a public record in first place, but in place of that holding, he would have adopted a categorical balancing standard that would be "both administratively and judicially efficient." *Bradshaw*, 106 Nev. at 646. Public agencies "should be able to rely on bright-line procedures for disseminating information rather than awaiting a case-by-base judicial determination." *Id.*

A decade later, this Court again considered the NPRA in *DR Partners v. Bd. of Cnty. Comm'rs,* 116 Nev. 616, 621, 6 P.3d 465, 468 (2000). The appellant filed a petition for writ of mandamus seeking disclosure of "unredacted records documenting use of publicly owned cellular telephones." *Id.* at 619. Clark County was asked to produce records "documenting the use, over a two-year period, of publicly owned cellular telephones issued to the individual respondents." *Id.* Clark County responded by providing the records but redacting the last four digits of each incoming and outgoing telephone number on the grounds that this information was confidential because it was subject to a

deliberative process privilege, an official information privilege, or would violate the individual callers' privacy.

The Court analyzed *Bradshaw* as recognizing that "any limitation on the general disclosure requirements of NRS 239.010 must be based upon a balancing or 'weighing' of the interests of non-disclosure against the general policy in favor of open government." *Id.* at 622. The en banc Court ordered complete disclosure of the phone records, writing: "having weighed the public policy considerations inherent in our Public Records Act, we respectfully disagree with the district court and conclude that these records are not protected under a deliberative process privilege." *Id.* at 622. The Court stated that the County did not make an "offer of proof of any kind . . . for the purpose of balancing important or critical privacy interests against the presumption in favor of public disclosure of these redacted records." *Id.* at 628. Thus, the County could not satisfy its burden by voicing "non-particularized hypothetical concerns" about privacy. Importantly, the Court stated that the "public officials in this case were not compelled to conduct business over a phone system where the billings, as a matter of course, include the local and long distance numbers of the parties to the

telephonic conversations." *Id.* at 625. This statement unintentionally echoes the warnings of Justice Steffen in *Bradshaw* that a case-by-case balancing test would cause public officials to alter their manner of conducting business.

The next case, *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55 (2003), represents the sole occasion on which this Court has ever sided in favor of a public agency opposing a public records request. The respondent filed a petition for mandamus seeking documents related to a major public works project, which was partially financed with federal funds. *Id.* at 59. The Court, sitting en banc, held that applicable federal regulations declared the subject records confidential and thus exempt from disclosure. *Id.* at 61. Justice Gibbons dissented and wrote that NRS 239.010 provided the applicable law and was not displaced by the federal regulation.

In 2010, the en banc Court analyzed whether "NRS 202.3662, which makes applications for concealed firearms permits confidential, includes within its scope the identity of the permittee of a concealed firearms permit and any records of investigations, suspensions, or revocations that are generated after the permit has issued." *Reno*

Newspapers v. Haley, 126 Nev. 211, 214 (2010). The Court unanimously construed NRS 202.3662 narrowly, finding that it did not explicitly declare post-permit records confidential, and required the disclosure of the requested documents. *Id.* at 212. Based on legislative amendments to the NPRA, the Court recognized a presumption that "all public records are open to disclosure unless either (1) the Leiglsature has expressly and unequivocally created an exemption or exception by statute . . . [or] (2) balancing the private or law enforcement interests for nondisclosure against the general policy in favor of an open and accessible government requires restricting public access to government records." *Id.* at 215.

The public agency argued that "because an application for a concealed firearms permit and information related to the applicant are confidential under NRS 202.3662, any information generated in a permit that is derived from the application would remain confidential." *Id.* While NRS 202.3662 "clearly and unambiguously" created an exception to disclosure for "applications, information within the applications, and information related to the investigation of the applicant," it was silent with respect to the information generated after

the application is approved or rejected. *Id.* at 216. The Court found post-permit records were not explicitly confidential even though they contained the same information as in the application. *Id.* at 217. The Court then recognized "that an individual's privacy is also an important interest, especially because private and personal information may be recorded in government files." *Id.* Using the *Bradshaw* balancing test, the Court found that the public agency had not met its "burden to show that the law enforcement or individual privacy concerns outweigh the public's right to access the identity of the permit holder." *Id.* at 219.

Next in 2011, the Court considered a request for access to a former governor's e-mail communications. *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873 (2011). The primary holding was that the "requesting party generally is entitled to a log unless, for example, the state entity withholding the records demonstrates that the requesting party has sufficient information to meaningfully contest the claim of confidentiality without a log." *Id.* at 883. Additionally, a public agency must cite to specific authority that makes the public book or record confidential. *Id.*

The Court relied upon its own "inherent authority to manage its own affairs" to determine that information held by the AOC was explicitly declared confidential by law and that the "AOC acted within its power by maintaining the requested documents as confidential in order to protect the privacy of [foreclosure mediation program] participants." *Civil Rights for Seniors v. AOC*, 313 P.3d 216, 220 (2013). The Court held that even if it "were to conclude that the requested documents were public court records . . . the AOC's interest in maintaining the confidentiality of participant information is justified, given the personal and sensitive nature of the information involved." *Id.* Moreover, holding otherwise "would expose highly sensitive personal and financial information to the public and thus have a chilling effect on open and candid FMP participation, undermining the Legislature's interest in promoting mediation." *Id.*

In 2013, the Court decided *Reno Newspapers,* 313 P.3d 221, 225-26. The Court held, in accordance with the reasoning of *Haley*, that "NRS 286.110(3) only protects as confidential the individuals' files held by PERS, not all information contained in separate media that also happens to be contained in individuals' files." *Id.* So where "information

is contained in a medium separate from individuals' files, including administrative reports generated from data contained in individuals' files, information in such reports or other media is not confidential merely because the same information is also contained in individuals' files." 313 P.3d at 224. But, PERS did not need to "create new documents or customized reports by searching for and compiling information from individuals' files or other records." *Reno Newspapers,* 313 P.3d at 228. Upon remand, the district court did not require PERS to create a report with five information items as in the original order, but only required the production of existing records.

Finally, in *Blackjack Bonding* in 2015, the Court found that the record revealed that "Blackjack's request does not involve searching through individual files and compiling information from those files" like it would have in *Reno Newspapers.* 343 P.3d at 613–14. Instead, LVMPD could acquire the requested information from its third-party vendor, CenturyLink, at no cost. *Id.* at 612 ("the inmate telephone services contract and the evidence showing that CenturyLink had previously fulfilled a similar records request demonstrate that CenturyLink had the capacity to readily produce the requested

information"). Because CenturyLink had previously produced the requested information for free and could so again in the future, the Court held that the records should be disclosed. *Id.*

IV. THE DISTRICT COURT INCORRECTLY ORDERED THE PRODUCTION OF CONFIDENTIAL INFORMATION.

The Custom Report, if created, would exclusively comprise information drawn from the confidential individual files of the Retirees and would be wholly protected by the statutes shielding these files from disclosure. NRS 286.110(3) specifically exempts the "files of individual members or retired employees" from the definition of public records that are available for public inspection. *See also* NRS 239.010 (1) (recognizing the exception to the public records law created by NRS 286.110). Additionally, NRS 286.117 provides that all "records maintained for a member, retired employee or beneficiary may be reviewed and copied only by the System, the member, the member's public employer or spouse, or the retired employee or the retired employee's spouse, or pursuant to a court order, or by a beneficiary after the death of the employee on whose account benefits are received." These statutes clearly recognize the sensitivity of the information contained within the individual files and protects their confidentiality.

PERS has the burden of "proving by a preponderance of the evidence that the public book or record, or a part thereof, is confidential." NRS 239.0113 (2). The District Court misread *Reno Newspapers* and concluded that the "information requested in this case is substantially similar to the information requested in *Reno Newspapers*" and therefore held that "PERS failed to cite any statute, rule, or case that bars production of the information NPRI requested on grounds the information is confidential." JA000468-469. *Reno Newspapers* cannot be so interpreted. It is indisputable that the individual files of retirees are confidential pursuant to NRS 286.110 and NRS 286.117 and cannot be obtained through a public records request. *Reno Newspapers*, 313 P.3d at 222 (concluding that "the individual files have been declared confidential by statute and are thereby exempt from requests pursuant to the Act"). *Reno Newspapers* held only that information therein could be subject to disclosure if it was contained in separate media, not that the PERS member files were not confidential.

Critically, the distinction between this case and *Reno Newspapers* is that there were already existing documents at the time of the public

records request in *Reno Newspapers*, whereas here the District Court ordered the creation of a new document out of the confidential files. NRS 286.110 and NRS 286.117 would be rendered meaningless if the information within the Retirees' files could be subject to information requests. The protections of NRS 286.110 and 286.117 are toothless if they stop NPRI from requesting an individual's file, but allow NPRI to force PERS to generate a custom report containing selected information within the file.

A. *Reno Newspapers* Does Not Support Disclosure of a Newly Created Document.

Reno Newspapers specifically held that to the extent that the district court ordered PERS to "create new documents or customized reports by searching for and compiling information from individuals' files or other records, we vacate the district court's order." *Reno Newspapers,* 313 P.3d at 228. This is the exact issue before the Court again.

The District Court, reaching a contrary conclusion to *Reno Newspapers*, misread that decision. In *Reno Newspapers,* the Court recognized the sacrosanct nature of the individual files themselves but held that "not all information contained in separate media that also

happens to contained in individuals' files" was confidential. 313 P.3d at 225. This reasoning was essentially that the confidentiality of the specific information in question had been waived by inclusion in a separate report outside of the files. *Id.* at 224 ("Where information is contained in a medium separate from individuals' files, including administrative reports generated from data contained in individuals' files, information in such reports or other media is not confidential merely because the same information is also contained in individuals' files."). Based on this logic, *Reno Newspapers* cannot be extended to support the disclosure of "separate media" that has not yet been created as no waiver could have occurred. This is especially true in light of the explicit holding that PERS was not required to create a new customized report.

A New Jersey court noted the illogic of treating an aggregate report as confidential if the underlying files were not confidential: "For the Legislature to restrict access to the compilation of records . . . but permit access to the records themselves . . . would be meaningless because the public could prepare such a compilation of the records on file in the Clerk's Office. Accordingly, this court determines that it was

the Legislature's intent to classify as confidential, the records maintained in the files of the Superior Court Clerk." *Pepe v. Pepe*, 258 N.J. Super. 157, 162–63, 609 A.2d 127, 129 (Ch. Div. 1992). Conversely, it would be just as meaningless to hold that the individual files of Retirees were confidential but that the Custom Report, generated exclusively from these files, is not.

B. The Custom Report Does Not Contain Independently Sourced Information.

The Custom Report cannot be created as ordered by the District Court. JA000359 (Hr'g Tr. 29:10-18) ("our information in our CARSON system is not static so it's changing. There's updates and there's a lot of information that changes over time. So it wouldn't be possible to have the exact same information of 2014 with the names.") Even if the Custom Report actually could be created, it would have to be drawn exclusively from the confidential information within the individual files of the Retirees. JA000121-122. It would not include information from other sources that could also be located within these individual files, because the requested information is *only* found within these confidential files.

This distinction separates NPRI's public records request from those previously considered by the Nevada Supreme Court in *Haley* and *Reno Newspapers* where the information was independently available. In *Haley*, the Court considered the scope of confidentiality for applicants for concealed firearms permits. 126 Nev. at 216-17. The statute in question granted confidentiality to "applications, information within the applications information related to the investigation of the applicant" but was silent about whether the "name of a permittee, or records generated as part of an investigation, suspension, or revocation of the permit" were confidential. *Id.* The public agency argued that the "permits grow out of applications and applications are confidential, permits must be confidential too" but the Court disagreed, holding that if the "Legislature had intended post-application information about a permit's status to be confidential, it could and would have stated that, but it did not." *Id.* It was critical to the Court's holding that there were separate sources for the purportedly confidential information. The application itself was confidential and so the individual's name could not be drawn from that confidential source. But once a permit had been issued for an individual, then his or her name could be drawn from that

non-confidential source. The application and the permit were two separate government functions and processes.

The Nevada Supreme Court built upon the *Haley* decision in *Reno Newspapers.* 313 P.3d at 225-26. The Court construed *Haley* as holding that "although NRS 202.3662 unambiguously protects the applications for concealed firearms permits as confidential, the statute's scope of confidentiality must be narrowly construed and does not extend to protecting the identities of permittees or any post-permit records of investigation, suspension, or revocation." *Id.* Thus, the Court held similarly that "NRS 286.110(3) only protects as confidential the individuals' files held by PERS, not all information contained in separate media that also happens to be contained in individuals' files." *Id.* Here, PERS is not arguing that it is entitled to protect information contained in an independent source solely because that information is duplicated in the Retiree files. Rather, if the confidential individual files are the source of the information then confidentiality should be preserved even if those files are aggregated into the Custom Report.

V. PERS HAS NO DUTY TO CREATE A NEW REPORT IN RESPONSE TO A PUBLIC RECORDS REQUEST.

No public agency in Nevada has ever been required by this Court to create a new document to satisfy a public records request.[3] This precise issue was adjudicated only a few years ago in 2013 when this Court specifically held that PERS was not required to "create new documents or customized reports by searching for and compiling information from individuals' files or other records." *Reno Newspapers*, 313 P.3d at 225 (citing NRS 239.010(1) (permitting only "inspection" and copying of public records)). An en banc decision from this Court, within the past four years, involving the same public agency, a similar records request, and explicitly concluding that PERS did not need to create a new document, should have made for an open and shut case in the lower court. Nevertheless, the District Court still held that "PERS does have a duty to create a document that contains the requested information." JA000470. This holding is directly contrary to *Reno Newspapers* and cannot be reconciled.

The *Reno Newspapers* decision is factually identical to the present appeal. There, the district court ordered PERS to create a new report

[3] *Blackjack Bonding* required a third-party vendor to generate the records, not the public agency. 343 P.3d at 613–14.

containing: "(a) The name of the retired employee; (b) The name of the retired employee's employer; (c) The retired employee's salary; (d) The retired employee's hire and retirement dates; and (e) The amount of the retired employee's benefit payment." JA000519-524. This Court reversed, holding: "to the extent that the district court ordered PERS to create new documents or customized reports by searching for and compiling information from individuals' files or other records, we vacate the district court's order." *Reno Newspapers,* 313 P.3d at 228. Here, the District Court ordered PERS to create a new document in response to NPRI's public records request containing: "(a) Retiree name; (b) Years of service credit; (c) Gross pension benefit amount; (d) Year of retirement; and (e) Last employer." JA000472. Once again, this new document could only be created by searching for and compiling information from the Retirees' files and again this Court should reverse the District Court.

Both district court decisions, in *Reno Newspapers* and below, were contrary to clear and unambiguous regulations that do not require a public agency to create new records. "If a person requests to inspect, copy or receive a copy of a public record that 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." NAC 239.867. Furthermore, NAC 239.869 provides that "the Nevada Public Records Act: A Manual for State Agencies, 2014 edition, and any subsequent edition issued by the Division which has been approved by the Administrator" is "hereby adopt[ed] by reference," thus giving it the force of law. The Nevada Public Records Manual explicitly states that an "agency is not required to organize data to create a record that doesn't exist at the time of the request, but may do so at the discretion of the agency if doing so is reasonable." Nevada Public Records Act – A Manual For State Agencies 2014, 4.[4]

Additionally, the Nevada Attorney General stated in an Opinion that the "public records law does not require a governmental entity to create a record that does not already exist." Op. Nev. Att'y Gen. No. 2000-12 (April 6, 2000). PERS followed this direction exactly. The boundary between producing copies of public records and creating new

[4] The District Court stated that PERS left out part of the provision in the Manual: "but may do so at the discretion of the agency if doing so is reasonable" and that "PERS failure to indicate it was quoting only part of the sentence seems a bit deceptive." JA000469. This characterization was unwarranted and unfair. The Petition filed by NPRI asked the Court to decide whether PERS was legally obligated to provide a public record, not whether PERS had the discretion to voluntarily create a new record and provide it to NPRI. That PERS did not quote this part of the Manual is not remotely deceptive or relevant.

records is critical to prevent state agencies from becoming overworked research divisions for the private sector. PERS responded to NPRI's request to create a different version of the FY 2014 Retiree Raw Data by stating that the different version did not exist "and the Supreme Court order does not require us to create it." JA000010. This is a correct statement of the law.

A. The *Reno Newspapers* Decision Controls Rather Than *Blackjack Bonding*.

This Court created a narrow exception to *Reno Newspapers* for records under the control of a third-party. In *Blackjack Bonding*, the Court described *Reno Newspapers* as concluding that a public agency did not have to search for and compile "information from individuals' files or other records." 343 P.3d at 613–14 (quoting *Reno Newspapers*, 313 P.3d at 225). But the Court in *Blackjack Bonding* also described *Reno Newspapers* as limited to its facts as the request at issue required PERS itself to do the work necessary to create the new document. *Id.*

In *Blackjack Bonding,* the Court found that the record revealed that "Blackjack's request does not involve searching through individual files and compiling information from those files" like it would have in *Reno Newspapers*. 343 P.3d at 613–14. Instead, LVMPD could acquire

the requested information from its third-party vendor, CenturyLink, at no cost. *Id.* at 612 ("the inmate telephone services contract and the evidence showing that CenturyLink had previously fulfilled a similar records request demonstrate that CenturyLink had the capacity to readily produce the requested information").[5] Because CenturyLink had previously produced the requested information for free and could so again in the future, the Court held that the records should be disclosed. *Id. Blackjack Bonding* should be limited to its specific factual record as well. The Court's holding did not require the public agency to create a new document. Instead, the public agency only had to ask its third-party vendor to generate a report that could be done quickly and costlessly by that vendor and that had been routinely done in the past.

Here, the Custom Report cannot be generated at all due to account updates and changes to the individual files, which are dynamic files that are not preserved at specific points in time. JA000359. The District

[5] *State, ex rel. Scanlon v. Deters* was the sole authority cited by the Court in *Blackjack Bonding* concerning the custody and control of records. 45 Ohio St.3d 376, 544 N.E.2d 680, 683 (1989), overruled on other grounds by *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83, 89 (1994). *Scanlon*, however, held that there is no obligation to create a new form of a public record, but if the clerk's computer is already programmed to produce a desired record or document, then the record should be considered to already exist. *Id.* PERS's CARSON database is not "already programmed" to create the document requested by NPRI. JA000123-124.

Court ignored this and held that "PERS did not provide any evidence on the time or cost that would be required to produce the requested information. Instead it focused on the time and cost to match retiree names to the FY 2014 Retiree Raw Data." JA000469-470. PERS focused on this because 1) *that is what NPRI requested from PERS* and 2) it cannot produce the requested information for 2014 as that information is not preserved on an annual basis.

B. The District Court Erroneously Employed a Novel Balancing Test.

The District Court erred in derogating from NRS Chapter 239, NAC Chapter 239, and this Court's opinions to establish a new balancing test that requires the creation of new records on a case-by-case basis. The only balancing test that has been recognized by this Court is the *Bradshaw* analysis, which is employed when a statute does not unambiguously declare certain documents to be confidential but there are still "privacy or law enforcement policy justifications for nondisclosure." *Haley*, 126 Nev. at 217. No decision has employed a balancing test to determine whether a document is a public record or whether a new public record must be created. This type of balancing

would extensively reinterpret the NPRA and substitute judicial analysis for the Legislature's determinations.

The Order noted that NAC 239.867 "does not require an agency to create a public record, but neither does it bar an agency from creating a record." JA000469. Based on this supposed discretion, the Court employed a novel balancing test to determine whether PERS should be required to create a new record. The Court weighed the "purpose of the NPRA . . . the legislative mandate that courts construe the NPRA liberally to carry out this important purpose . . . [and] the legislative mandate that any exemption, exception or balancing of interests which limits or restricts [disclosure] . . . must be construed narrowly" against "the lack of evidence that producing the requested information . . . would require unreasonable demands or costs on PERS; and the fact that PERS altered its procedure in providing information to its actuary to eliminate the names of retirees in part because of the *Reno Newspapers* decision." JA000469-470. Based on these considerations, the District Court concluded that "PERS does have a duty to create a document that contains the requested information." *Id.*

This decision by the District Court reflects a substitution of its judgment for that of the Legislature. 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." NAC 239.867 further provides that if "a person requests to inspect, copy or receive a copy of a public record that 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." This language is clear and unambiguous, yet the District Court created a new exception based on an unsupported balancing of interests. The harm of this case-by-case approach to public agencies is readily apparent. In response to a public records request, Nevada agencies would have to undertake their own analysis of the specific interests involved before determining whether to create a new public record. Based on the District Court's references to the "legislative mandate" to narrowly construe any "balancing of interests" that limits or restricts disclosure, it would seem that the creation of a new document would be required in almost every single case. The District Court erred by expanding the

NPRA in such a fashion and overriding the Legislature's clear directions.

C. The Weight of Authority is Against Requiring the Creation of a New Record.

The Court in *Blackjack Bonding* relied only on a single authority, an overruled 1989 decision from Ohio, that would require the creation of a new document in response to a public records request. On the other side, there are multiple similar cases that strongly reject the imposition on a public agency of the burden to create new documents.

In New York, a court considered requests for payroll tables that used Social Security numbers of state employees as their primary key and identifier. *Hearst Corp. v. State, Office of State Comptroller*, 24 Misc. 3d 611, 882 N.Y.S.2d 862 (Sup. 2009). The court found that requiring the public agency to create a substitute key that would replace the Social Security number for the payroll tables would improperly require the public agency to create a new record that it did not maintain. *Id.* The public agency did not need to create a new computer program to create a new database table as this process would go well beyond mere extraction of data stored in the payroll database and would require "85 to 90 hours of actual staff time." *Id.*

In a second case, a Missouri court reached the same conclusion. *Jones v. Jackson Cty. Circuit Court*, 162 S.W.3d 53, 58–60 (Mo. Ct. App. 2005). The requestor sought "records on CD-ROM of landlord petitions and complaints for rent and possession, unlawful detainer, and damages for breach of lease or rental agreements." *Id.* He further requested that the record include "the date the case was filed; the case style; the names and addresses of the plaintiff and defendant; the court to which the case was assigned; the number of the case; the party against whom judgment was entered; the judgment date; the judgment amount; the date of judgment satisfaction; other disposition of the petition; and the case type." *Id.* Public records were defined in Missouri as "any record, whether written or electronically stored, retained by or of any public governmental body." *Id.* The court applied the plain meaning of the definition and held that it "includes only those records—either written or electronic—that are already in existence that the public governmental body is 'holding' or 'maintaining' in its possession." *Id.* Furthermore, the court held that public records do not include "*written or electronic records that can be created by the public governmental body, even if the new record could be created from*

information culled from existing records." *Id.* (emphasis added). Accordingly, the public agency did not need to create a "new, customized record containing only the specific information he requested." *Id.*

These two cases, along with the overwhelming majority of precedent, establish that a public agency need not generate a new record from a database, even if it is theoretically feasible, to satisfy a public records request. *See also Schulten, Ward & Turner, LLP v. Fulton–DeKalb Hosp. Auth.,* 272 Ga. 725, 535 S.E.2d 243, 245 (2000) (open records law "does not require a public agency or officer to create or compile new records by any method, including the development of a computer program or otherwise having a computer technician search the agency's or officer's database according to criteria conceived by the citizen making the request"); *State ex rel. Kerner v. State Teachers Ret. Bd.,* 82 Ohio St.3d 273, 695 N.E.2d 256, 258 (1998) (under open records statute, "a compilation of information must already exist in public records before access to it will be ordered"); *Brent v. Paquette,* 132 N.H. 415, 567 A.2d 976, 983 (1989) (open records "statute does not require public officials to retrieve and compile into a list random information

gathered from numerous documents, if a list of this information does not already exist").

The public records laws were enacted to promote transparency in government and this goal is not furthered by requiring public agencies to create new documents for the private purposes of the requestor. If the public agency is not maintaining and using a document, then it should not be required to create one for the private benefit of a private party. Otherwise, the inspection of public records ceases to be a government monitoring tool and instead becomes a free research resource for the private sector.

VI. THE APPLICATION OF THE *BRADSHAW* BALANCING OF INTERESTS TEST FAVORS NONDISCLOSURE.

The public records cases that reach this Court typically involve a public agency attempting to shield its own activities from disclosure. This case is an exception. PERS is not attempting to withhold documents about its own employees or operations; instead, PERS is defending the Retirees' interests in their confidential information since they are not parties in this action. PERS is the fiduciary for the Retirees' personal information as it has been entrusted with confidential information belonging to tens of thousands of private

citizens in Nevada. PERS's beneficiaries include the children, spouses, and widows of public employees, who have never held public employment themselves. The risk of disclosure falls upon these nonparties and it is great enough to warrant nondisclosure under the *Bradshaw* balancing analysis.

The *Bradshaw* analysis is employed "when the requested record is not explicitly made confidential by a statute." *Gibbons*, 266 P.3d at 627. It need not be addressed here as the Court can and should find that the Custom Report is unambiguously confidential pursuant to NRS Chapter 286. If considered though, the *Bradshaw* test provides an alternative basis for reversal of the District Court.

Under *Bradshaw,* the district court weighs the interests of non-disclosure against the general policy of open government. *DR Partners,* 116 Nev. at 621. (internal quotations omitted). PERS has the burden to show that these interests "clearly outweigh[] the public's interest in access." *Reno Newspapers Inc.*, 313 P.3d at 225. The District Court found that PERS had not satisfied this burden. It held that there "is no convincing evidence that [PERS's] concerns are anything other than hypothetical and speculative" and that there was not "sufficient

evidentiary support for its position that disclosure of the requested information would actually cause harm or even increase the risk of harm to retired employees." JA000471. These conclusions were made after an inadequate balancing of the interests involved.

First, the District Court did not adequately conduct the required balancing exercise because it assumed that there was an automatic benefit to open government from the disclosure of the Custom Report. Under these circumstances, where the substantive information is already in the public domain, the public benefit from additional disclosure of names is negligible. Second, the District Court overlooked the intrinsic privacy interests of the Retirees, which should have been taken into consideration in addition to other risks. Third, the District Court improperly abbreviated its analysis of the cybercrime and identity theft risks. By essentially requiring actual evidence of harm, from a disclosure that had not yet occurred, the District Court imposed an insurmountable burden on PERS.

A. The Disclosure of the Custom Report Provides Minimal Marginal Benefit to the Public.

A balancing test only makes sense if the public interest in disclosure is somehow measurable or quantifiable. Otherwise, the

assertion of any public interest automatically forecloses the inquiry in favor of the requester. The District Court did not make any findings about the public importance or value of the disclosure of the Custom Report. The District Court recited the general purpose of the NPRA to "foster democratic principles by providing members of the public with access to public books and records," but there is not a single factual finding or legal conclusion about the public's interest in the Custom Report. JA000469. Thus, while the District Court held that the "alleged cybercrime risks posed by the disclosure of the requested information do not outweigh the benefits," the Order can be scoured without finding a description of these alleged benefits.

Additionally, NPRI already received the FY 2014 Retiree Raw Data from PERS. This transmission provided NPRI with everything in the Custom Report except for the Retiree names. Thus, the analysis of *Bradshaw* must be focused on weighing only the marginal benefit of including Retiree names in the Custom Report against the privacy and security interests of the Retirees. Because the District Court did not discuss this marginal benefit at all, nondisclosure is warranted under *Bradshaw*. *See NARFE v. Horner,* 879 F.2d 873, 879 (D.C. Cir. 1989)

("We have been shown no public interest in, and a modest personal privacy interest against, disclosure of the names and addresses of individuals receiving federal employee retirement benefits. We need not linger over the balance; *something, even a modest privacy interest, outweighs nothing every time*.") (emphasis added).

Even if on remand the District Court were to reach the question, there is little marginal benefit to be found from the disclosure of Retiree names. NPRI argues that the purpose of requesting the Custom Report is to put the information on a website, which is intended to increase transparency and "to be a resource for public sector administrators, allowing easy comparisons across jurisdictions within the state for labor and other costs." JA000003. This purpose, and any others, can be accomplished with the aggregate FY 2014 Retiree Raw Data without needing to include the names of the Retirees. If NPRI wants to argue that public employees are paid too much, they can do so based on this general data and there is no additional benefit to specifically identifying and embarrassing or attacking the individual Retiree. *See Horner*, 879 F.2d at 879 ("While we can see how the percentage of the federal budget devoted to annuities, the amount of the benefit an average annuitant

receives, or other aggregate data might be of public interest, disclosure of those facts would not be entailed in (and could be accomplished without) releasing the records NARFE seeks here.") Moreover, there is no showing that NPRI needs this aggregate information from PERS rather than from another source such as the public employers themselves.

In *Horner,* the D.C. Circuit opined that "unless the public would learn something directly about the workings of the Government by knowing the names and addresses of its annuitants, their disclosure is not affected with the public interest." 879 F.2d at 879. Here, the disclosure of the names of the Retirees provides no information about the operations of PERS. In fact, NPRI admitted as much when asked about PERS's compilation of Retiree data for the purpose of generating an actuary report: "The [actuary report's function] is to calculate the funds' liability. So names are irrelevant to do that." JA00398 (Hr'g Tr. 68 11-14.) PERS does not generate compilation reports with Retiree names, like the Custom Report, because it has no use or need for the individual names. PERS is concerned with the aggregate valuation of the system and the disclosure of the Retiree names does not reveal

anything to NPRI about the workings of PERS. This is especially true when the District Court ordered the creation of the Custom Report, which does not exist and so could not have been used by PERS.

B. The District Court Did Not Take into Consideration the Retirees' Intrinsic Privacy Interests.

This Court recognized in *Haley* that an "individual's privacy is also an important interest, especially because private and personal information may be recorded in government files." 126 Nev. at 218. The Custom Report contains the name and pension information for approximately 57,000 Retirees, who all have an interest in maintaining the privacy of their financial information.

The United States Supreme Court upheld privacy rights in the FOIA context and differentiated between discrete data about an individual and aggregate data. *U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 763–64 (1989). The Supreme Court recognized a distinction between "scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole." *Id.* This distinction led to the conclusion that "a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy." *Id.*

Moreover, when "the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted.'" *Id.*

Reporters Committee sets forth exactly the brightline that PERS urges this Court to adopt. If a public records request seeks personally identifiable information that the state agency "happens to be storing" rather than information about the workings of the agency, then disclosure is precluded under *Bradshaw.*

C. Disclosure Creates a Significant, Demonstrable Risk to the Retirees.

This Court has never before applied the *Bradshaw* test to restrict disclosure, each time favoring transparency. While this certainly demonstrates the importance of that half of the balancing test, it also signals an imbalance in the way that the test is applied. *Haley* held that "[a] mere assertion of possible endangerment does not clearly outweigh the public interest in access to . . . records." 234 P.3d at 927 (internal quotations omitted). Despite introducing unrefuted expert evidence, the District Court still arbitrarily ignored the risks to the Retirees.

To support its position, PERS introduced the testimony of two extremely qualified expert witnesses who both opined that the

contemplated disclosure heightened the risks of identity theft and cybercrime against the Retirees. JA00258-273. It appears that this is more evidence for the purposes of the *Bradshaw* analysis than was in any previous case before this Court. *Cf. Haley*, 126 Nev. at 219 ("Haley has provided no evidence to support his argument that access to records relating to concealed firearms permits would increase crime or subject a permit holder or the public to an unreasonable risk of harm."); *Reno Newspapers*, 313 P.3d at 225 ("Because PERS failed to present evidence to support its position that disclosure of the requested information would actually cause harm to retired employees or even increase the risk of harm, the record indicates that their concerns were merely hypothetical and speculative.")

NPRI did not call rebuttal experts or introduce any countervailing evidence. Nevertheless, the District Court overlooked the risks to the Retirees as merely speculative. In *Horner*, the D.C. Circuit wrote that "[w]here there is a substantial probability that disclosure will cause an interference with personal privacy, it matters not that there may be two or three links in the causal chain." 879 F.2d at 878. The proper balancing test must weigh the probability that disclosure will cause

harm. This is always going to be a speculative, forward-looking exercise because if proof of actual harm is required, then the pre-disclosure balancing test is meaningless.

1. The Custom Report Contains Dangerous Amounts of Personally Identifiable Information.

Each additional data point about an individual that falls into the hands of cybercriminals increases the likelihood that the cybercriminal can cause financial harm. JA000262. While some types of information can be used to infer passwords, other types of information can be used to build a profile the cybercriminal can use for impersonation to provide access to accounts or the ability to create new accounts. *Id.* There is sufficient information in the Custom Report, for cybercriminals to successfully engage in identity theft or fraud. *Id.* Moreover, the concentration of individual information permits cybercriminals to acquire even more information about the victim. *Id. See also Reporters Committee*, 489 U.S. at 765 (recognizing the "power of compilations to affect personal privacy that outstrips the combined power of the bits of information contained within").

The Retirees would also be vulnerable to spear-phishing[6] attacks as the disclosure of the Custom Report would provide a ready source of ammunition for criminals. JA000262-263. The Retirees, already a more vulnerable segment of society, may be subject to sophisticated and personalized messages from cybercriminals. *Id.* It would be very easy for a cybercriminal to create a message that seemed legitimate because it contained accurate information about the retiree and their pension amounts. *Id.* Moreover, the spear-phishing attack could prey upon the fears of the retirees by listing their benefit amount and notifying them that there was a problem that required their urgent attention. *Id.*

2. The District Court Erred By Distancing the Expert Testimony from the Order to Disclose the Custom Report.

The District Court held that the "testimony provided by PERS did not limit the opinions to the information requested in this case. Instead the opinions are based upon the inclusion of information not requested by NPRI like sex, birth date, and address." JA000471. This statement is

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[6] This is a sophisticated type of attack that does not rely on volume or spam, but on targeted attacks to a known group of individuals. JA000262-263. Spear-phishing is not a technological attack, but one that is based on the susceptibility of the group of individuals and the ability of the attacker to imitate a legitimate sender. *Id.* The spear-phishing attacks are highly personalized and mimic legitimate email messages. The attack then tricks recipients into providing confidential information or installing malware on their computer. *Id.*

erroneous standing alone. Earlier in the same Order, the District Court dismissed NPRI's argument that its request "does not require PERS to create new records because PERS produced a record with the requested information in the past, and PERS would only need to collate data it already has." JA000470. Moreover, NPRI's actual public records request, as detailed above, *was for* information like sex, birth date and address. JA000013-14 (containing NPRI's public records request on March 8, 2016: "I wanted to ask if it were possible to get names attached to the 2014 actuary report previously provided."). It is a complete bait-and-switch for the District Court to ignore the unrefuted expert testimony that responded to NPRI's actual public request, because the testimony did not directly address the District Court's unilateral interpretation of what NPRI requested.

In any event, the removal of certain information from the Retirees' disclosures does not alter the calculus but only creates a meaningless illusion of security. Based on the information NPRI would have (he Custom Report and the FY 2014 Retiree Raw Data) together with other publicly available databases, it would be possible to recreate supposedly "hidden" information about the Retirees. The tactic of de-identifying a

dataset by removing sensitive fields has been repeatedly demonstrated to be inadequate to protect the privacy of the individuals in the dataset. JA000269-273. Surprisingly little data is required to construct a unique fingerprint. *Id.* For instance, former Chief Technologist of the Federal Trade Commission Latanya Sweeney analyzed the 1990 US Census and discovered that "87% (216 million of 248 million) of the population in the United States had reported characteristics that likely made them unique based only on [three fields: their] 5-digit ZIP [code], gender, [and] date of birth." *Id.* Additionally, in 2009 two researchers demonstrated that a Social Security Number can be accurately estimated based on one's birthdate and residence information; for instance, "1 out of 20 SSNs of individuals born in DE in 1996 in our dataset could be identified with just 10 or fewer attempts." *Id.* Thus, the Custom Report, which provides the Retiree names, together with the FY 2014 Retiree Raw Data, which contains birthdates and genders, could easily be used to generate the Social Security numbers of any retiree who was born in Nevada.

Re-identification poses concrete threats to the privacy and integrity to both the Retirees and PERS. *Id.* As stated by the US

Department of Commerce's National Institute of Standards and Technology in a draft document on *De-Identifying Government Datasets*, "adverse impacts resulting from re-identification… include [for individuals] increased availability of personal information leading to an increased risks of fraud or identity theft. … [Additionally,] potential adverse impacts to an agency resulting from a successful re-identification include: reputational damage if it can be publicly demonstrated that de-identified data can be re-identified, direct harm to the agency's operations as a result of having de-identified data re-identified, financial impact resulting from the harm to the individuals (e.g. settlement of lawsuits), [and] civil or criminal sanctions against employees or contractors resulting from a data release contrary to US law." *Id.*

It was an unmistakable error for the District Court to assume that the Custom Report did not pose the same risks detailed by PERS's experts because the Custom Report can be melded with the already produced FY 2014 Retiree Raw Data. Accordingly, the District Court erred by failing to accurately consider the privacy and cybercrime risks posed by the disclosure of the Custom Report.

CONCLUSION

For all of the above reasons, the District Court's Order should be reversed.

AFFIRMATION

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

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CERTIFICATION OF ATTORNEY

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of 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 in 14-point Century font.

I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 13,108 words.

Pursuant to NRAP 28.2, 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(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in

conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted on July 11, 2017.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDONALD CARANO LLP and that on July 11, 2017, a true and correct copy of the foregoing APPELLANT'S OPENING BRIEF was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system and by United States First-Class mail to all unregistered parties as listed below:

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