IN THE SUPREME COURT OF THE STATE OF NEVADA

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF NEVADA, Appellant, vs. NEVADA POLICY RESEARCH INSTITUTE, INC. Respondent.	Supreme Court Case No.: 72274 District Court Case No.: 16OC001611B

On Appeal from the First Judicial District Court
Carson City, Nevada
Honorable James E. Wilson, Jr.

RESPONDENT'S ANSWERING BRIEF

NPRI CENTER FOR JUSTICE
JOSEPH F. BECKER, ESQ.
Nevada State Bar No. 12178
75 Caliente Street
Reno, Nevada 89509
Tel: (775) 636-7703
Fax: (775) 201-0225

Attorney for Respondent
Nevada Policy Research Institute, Inc.

17-26822

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 justices of this Court may evaluate possible disqualification or recusal:

Nevada Policy Research Institute, Inc., ("NPRI") is the Respondent in this matter. Since the inception of this case, NPRI has been represented only by Joseph Becker of NPRI Center for Justice and Constitutional Litigation. No other attorneys are expected to appear on Respondent's behalf.

Dated this 10th day of August, 2017.

NPRI CENTER FOR JUSTICE AND CONSTITUTIONAL LITIGATION

BY: _____

JOSEPH F. BECKER, ESQ.
Nevada State Bar No. 12178
75 Caliente Street
Reno, Nevada 89509
Tel: (775) 636-7703
Fax: (775) 201-0225
cjcl@npri.org
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

Respondent, Nevada Policy Research Institute, Inc. (hereinafter "NPRI"), by and through its undersigned counsel, JOSEPH F. BECKER, of NPRI Center for Justice and Constitutional Litigation (hereinafter "CJCL") hereby submits its Answering Brief.

Respondent takes no issue with Appellant's Jurisdictional Statement or Statement of Standard of Review and, thus, neither is repeated herein.

I. ROUTING STATEMENT

Respondent takes issue with Appellant's designation of this as raising a "substantial issue of first impression" (rather, *see PERS v. Reno Newspapers Inc.*, 129 Nev. Adv. Op. 88, 313 P.3d 221 (2013) (on the issue of whether requested PERS records are confidential and/or must be disclosed) and *LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608 (2015) (on the issue of whether PERS has a duty to compile two easily-compiled non-confidential records to satisfy a records request.))

Respondent does, however, agree with Appellant that this case presents an issue of "statewide public importance" insofar as an incorrect ruling in this case could potentially eviscerate the Nevada Public Records Act, NRS 239.001 *et seq*. Eviscerating the Nevada Public Records Act would pose a significant danger to all Nevadans and the transparency the Nevada legislature endeavored so diligently to engender.

II. STATEMENT OF THE ISSUES

1) Whether, as a general rule, information stored on a government computer is a "public record" under the Nevada Public Records Act?

2) Whether NRS 286.110 makes everything contained in the "CARSON database" statutorily confidential?

3) Even if, *arguendo*, the CARSON database were deemed confidential in its entirety, whether *Blackjack Bonding* nonetheless imposes a duty on PERS to compile two records PERS itself believes are "public?"

4) Whether the District court correctly found, as a factual matter, that Appellant's supposition of mere speculative harm did not "clearly outweigh" the public's interest favoring disclosure?

5) Whether NPRI's good-faith efforts to tailor its public records request to facilitate PERS' proffered limitations may now be used to defeat the Act's express purpose of governmental transparency?

III. STATEMENT OF THE CASE

This action arises out of a request made by NPRI pursuant to Nevada's Public Records Act, NRS Chapter 239, for 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.

PERS, having altered the way it kept records in 2014 to circumvent this Court's 2013 order – replacing names with Social Security numbers (and then redacting those numbers) – failed to satisfy Respondent's records request.

IV. STATEMENT OF THE FACTS

On or about January 5, 2015, Robert Fellner, an employee of NPRI, sent a request to PERS for PERS' 2014 "actuary report," (sometimes referred to as a "raw data feed"). The report is known both by PERS and NPRI to customarily contain payment records of its retirees including retiree name, payroll amount, date of retirement, years of service, last employer, retirement type, original retirement amount, and COLA increases (all information which, for example, was contained in the 2013 "actuary report" as provided to NPRI). JA Vol. 1 at 000059.

On January 9, 2015, Fellner received an email from PERS with the 2014 "actuary report" attached. However, no retiree names were part of the report thus making the list of payment amounts largely meaningless. *Id.*

Fellner learned, however, through additional communications with PERS officials, that sometime subsequent to a 2013 Nevada Supreme Court opinion mandating that PERS release its "actuary report" to those then requesting it under the NPRA, PERS altered its recordkeeping methodology to attach only social security numbers to retiree payment amounts as the sole payee identifier,

such that, when social security numbers are duly redacted (pursuant to the NPRA), the remaining records contain only payment amounts with no indication as to which payee receives any of those amounts. *Id.*

Fellner also learned through communications with PERS officials, that PERS maintains a separate record ("the monthly payment register") associating each name with its respective social security number. JA Vol. 1 at 000060.

On January 16, 2015, Fellner received an email from PERS stating that a report containing the information (including names) requested by NPRI no longer exists and that PERS is not required to create one. *Id.*

To ensure that PERS had not reverted from its post-2013-recordkeeping-methodology (excluding names from actuary reports) to its pre-2014 methodology, in March 2016, Fellner submitted a new request for the information detailed above, which was once again met with the same denial of anything other than nameless payment amounts. *Id.*

To the date of the initial filing of this case, neither Fellner nor anyone else working at NPRI have received the requested information from PERS. *Id.* This remains the case today.

V. SUMMARY OF THE ARGUMENT

PERS returns to this Court to re-litigate the records confidentiality issue decided against it by this Court as recently as late 2013.

By compiling all of its historic records (both those containing non-sensitive and sensitive information) into files categorized by individual in its CARSON database, PERS again hopes to hoodwink this Court into believing all PERS records are now statutorily confidential under the statutorily-undefined term, "individual member files." However, neither logic nor legislative history warrants such an over-inclusive definition of statutorily-exempt records.

Even if, *arguendo*, the confidentiality statute could be so contorted, this Court's *Blackjack Bonding* decision in 2015 nonetheless requires disclosure.

Because PERS attempted to circumvent this Court's 2013 order by altering, the very next year, the way in which its actuary report is kept – replacing names with social security numbers (which PERS duly redacts) – this case raises another issue upon which this Court has already ruled, namely its 2015 decision that requires government entities like PERS to compile two non-confidential, easily-compiled records to satisfy public records requests.

Lastly, in an attempt to avoid disclosure, PERS takes another run at the balancing test but again introduces only a supposition of speculative harm, which according to numerous decisions by this Court is insufficient to warrant withholding of records.

//

VI. ARGUMENT

> [P]ublic employees lack a reasonable expectation of privacy in an expense the public largely bears after their retirement. In *SCERS, supra*, 195 Cal.App.4th at p. 469, 125 Cal.Rptr.3d 655, the court reached the same decision because, among other things, "a public pension is deferred public compensation." ... The "names of pension recipients combined with their pension amounts is not information of a personal nature. The information does not solely relate to private assets or personal decisions. Rather, the pension amounts reflect specific governmental decisions regarding retirees' continuing compensation for public service. Therefore, the pension amounts are more comparable to public salaries than to private assets." "[R]etirees' publicly funded pensions—like their previous salaries—are of interest to the public, and only through the disclosure can the public expect to prevent abuse."

San Diego Cty. Employees Ret. Assn. v. Superior Court, 196 Cal. App. 4th 1228, 1242, 127 Cal. Rptr. 3d 479, 489–90 (2011) (internal citations omitted).

A. Information Stored on a Government Computer is a "Public Record."

In its opening brief, PERS concludes that the *Nevada Public Records Act: A Manual for State Agencies, 2014 Edition* has "the force of law." Appellant's Opening Brief at p. 18. That manual reads, "[a]s used in the Act, the term 'all public books and public records' includes everything within in [sic] the definition of official records in NRS 239.080(4), with the exception of those official records which are explicitly declared confidential by law."[1]

[1] http://nsla.nv.gov/uploadedFiles/nslanvgov/content/Records/Public_Records/Bulletin3_PR_Manual.pdf at p.4.

According to the Nevada Public Records Act, "...'official state record' includes, without limitation, any: (a) Papers, unpublished books, maps and photographs; (b) *Information stored on magnetic tape or computer*, laser or optical disc. . . ." NRS 239.080(4) (emphasis added).

Thus, by PERS own admission, public records include "information stored on ... [a] computer." Interestingly, "PERS does not maintain physical files for its members or retirees." Appellant's Opening Brief at p. 9. Logically, then, the only avenue left for the public to access PERS records, is for that information to be extracted from PERS' computer database. Such extraction of a public record (information stored on a computer) is not "the creation of a new record or document" as Appellant would lead this Court to believe. Rather, it is the public record, itself.

Although this Court, citing an Ohio decision, held in 2013 that PERS is not required "to create new documents or customized reports," this Court thought it unnecessary to include the clarifying language from the Ohio Supreme Court as related by Ohio's Attorney General in its 2017 Ohio Sunshine Laws Manual which reads:

> A database is an organized collection of related data. The Public Records Act does not require a public office to search a database for information and compile or summarize it to create new records. However, if the public office already uses a computer program that can perform the search and produce the compilation or summary

> described by the requester, the Ohio Supreme Court has determined that the output already "exists" as a record for the purposes of the Public Records Act.

http://www.ohioattorneygeneral.gov/yellowbook at p. 8 (internal footnotes omitted).

NPRI specifically tailored its request to the exact pieces of information stored and maintained by PERS in their CARSON database in which they are held. JA Vol. 1 at 000059-60. Therefore, such records and the extracts thereof are both decidedly public and constitute neither the creation of a new record nor new document; they are merely the means by which an existing record is disseminated pursuant to the NPRA.

Any other interpretation is inherently illogical. For the legislature to declare by statute "information stored on a computer" to be a public record yet to deny any extraction thereof as "creating a new document or record" would, rather, create an exception which swallows the statute. Said differently, declaring information stored on a computer to be public necessitates that a government agency must make that information available in a format that can be accessed by the public.

//

//

B. PERS Renewed Supposition That 286.110(3) Precludes Disclosure is, Yet Again, Unavailing.

PERS again cites 286.110(3) in an attempt to convince this Court that everything stored in the CARSON database is "confidential." Appellant's Opening Brief at p. 16.

In 1977, when NRS 286.110(3) was enacted, the "individual member file" consisted only of one paper document within a collection of other paper documents which otherwise were deemed public. However, PERS now claims that the digital intermingling of information categorized and stored under the PERS member's identifier in the CARSON database is off-limits to the public.

Yet, in an attempt to re-litigate *PERS v Reno Newspapers*, Appellant is arguing that all information in its possession is confidential because it is categorized in the CARSON database by individual file folder, misconstruing the exception in NRS 286.110(3) which states, in relevant part, that all of PERS records are public with the exception of "individual member files." Importantly, however, the term "files of individual members" is **not** defined by statute.

Moreover, it is undeniable that the PERS files in 1977 — when NRS 286.110 was passed — were stored in an entirely different manner than today; namely, PERS has testified that prior to the creation of the CARSON computer database in 2000, it maintained "paper files" that were "organized in physical file folders and stored in the file room." JA Vol. 4 at 000340. PERS concedes

that it "does not maintain physical files for its members or Retirees." Appellant's Opening Brief at p.9. Given the fact that PERS maintains no physical files with retiree disbursement information, the only logical conclusion following from PERS' contention is that all of PERS records, books, and payout information are closed to the public as a result of a mere technological shift, despite no change of statute.

PERS' attempts to conflate the narrow definition of a members' physical file in 1977 – which the legislature intended to include only a select few categories of sensitive personal information, well beyond the scope of NPRI's record request – to now encompass all information in PERS possession, is an unduly broad construction.

To a large extent, this Court so recognized in 2013 when it held that:

> PERS's position exceeds the plain meaning of NRS 286.110(3)'s restrictions, which must be narrowly construed to protect only individuals' files. NRS 239.001(3). In concluding that only individuals' files have been declared confidential as a matter of law, we specify that NRS 286.110(3)'s scope of confidentiality does not extend to all information by virtue of it being contained in individuals' files.

PERS v. Reno Newspapers Inc., 313 P.3d 221, 224 (2013).

NPRI does not dispute that the CARSON database may be organized in electronic file folders, categorized by individual member. However, as discussed above, treating everything contained in these recently-digitized

electronic files to be as confidential as those few, highly-sensitive personal paper documents found in the 1977-era paper files, is overbroad and untenable under the public records statute and legislative history. What's more, the Legislative minutes strongly support this contention.

In the record relating to NRS 286.110(3), Senator Wilson asked then-PERS CEO Vernon Bennett to respond to concerns that this statute would reduce transparency.[2] The minutes therein show that Bennett reiterated that NRS 286.110 would not affect the fact that PERS minutes and books are public records. *See* fn. 2. Instead, it would merely maintain the confidentiality of members' physical, individual files which contain sensitive personal information, that is, "the key to whether people are entitled to certain services or whether they are denied it." *Id.* This, of course, almost certainly refers to disability claims and accompanying medical records rather than all information regarding taxpayer-funded retirement disbursements.

To further demonstrate that the legislature never contemplated the level of secrecy that PERS now claims under NRS 286, the legislative minutes reveal a subsequent hearing where PERS officials raise concerns that NRS 286, as written, did not provide enough secrecy. In response, the minutes quote Senator Wilson as having stated that, "if they were going to provide for confidentiality

[2] https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1977/SB173,1977pt1.pdf at PDF p.46.

they should do it with more specificity than presently in the bill." *Id.* at PDF page 66. No such amendment or augmentation ever occurred. This text, again, is a clear recognition that NRS 286 was not intended to provide the complete secrecy as PERS now claims and constitutes unmistakable evidence that NRS 286.110 did not exempt all of PERS books, as PERS now asserts by unilaterally redefining the term 'individual member files' to encompass **all** information in their CARSON database.

PERS thus attempts to employ a novel definition of "individual member files" that is entirely divorced from the definition in use when the law was passed. PERS admits that there are no physical member files, as all information is stored in the CARSON database. And since that information is now arranged and compartmentalized by individual member, PERS asserts that all the information contained therein — which, again is all of PERS records — is now part of the "individual members file" and thus exempt for disclosure. This, again, due entirely to technological changes; not to legislative action.

Simply put, if PERS "new-technology" definition of confidentiality is correct, then the law stating that PERS books are open with the exception of individual members files has, in practice, been reworded to "PERS books are now closed." In fact, PERS would restrict even state officials from accessing PERS records. When asked by the trial court as to whether either the governor

or members of the legislature would have access to PERS records under PERS' interpretation of NRS 286, PERS replied that "by statute," they would not. JA Vol. 4 at 000429-430.

A parallel issue was heard by multiple California Courts, which found that the term 'individual records of members' cannot be reasonably interpreted to include records of the type sought by NPRI; this from the state seemingly most likely to overprotect public employee records.

Like Nevada's NRS 286, California's "Section 31532 does not define the term 'individual records of members.'" *San Diego Cty. Employees Ret. Assn.* ["SDCERA"] *v. Superior Court*, 196 Cal. App. 4th 1228, 1237, 127 Cal. Rptr. 3d 479, 486 (2011):

> Contrary to SDCERA's [public pension fund for San Diego County] position, the term does not plainly include records a retirement system creates for purposes of conducting the governmental function of calculating and paying out monthly pension benefits. An ambiguity exists when statutory language is "susceptible of more than one reasonable interpretation." "If the statutory terms are ambiguous, we may examine extrinsic sources, including ... the legislative history."

Id. (internal citations omitted).

Moreover, "[t]he legislative history of section 31532 [did] not indicate the Legislature intended to exempt records a county retirement system creates to allow it to pay monthly benefits." *Id.* at 1238, 486.

California courts have concluded that "the term 'individual records of members' in section 31532 cannot reasonably be interpreted to include the records CFFR [the records requestor] seeks, which SDCERA creates and uses to facilitate the periodic payment of pension benefits. The court in SCERS [Sacramento County Employees Retirement System] came to the same conclusion for many of the same reasons." *Id.* at 1241, 489 (internal footnotes and citations omitted).

Further damaging to PERS' argument, in the California cases the legislative history was silent. In the present case, however, the Nevada legislative history is unambiguous: the provision was intended only to keep a limited set of uniquely personal documents – such as medical records and disability claim information – confidential; it was not intended to conceal PERS' records in their entirety, as PERS now contends.

C. Even if, *Arguendo*, the Entire CARSON Database were Deemed Confidential, PERS Must Still Satisfy NPRI's Records Request Under *Blackjack Bonding*.

Even if, *arguendo*, this Court should entertain and adopt PERS' notion that because it converted all records to electronic records and all such records are now somehow confidential, NPRI still prevails under this set of facts.

Because: (1) PERS created two separate records to which PERS itself admitted below were public; JA Vol.4 at 000378-380 and (2) these records can

be "readily compiled" to satisfy NPRI's public records request, "the agency is not excused from its duty to produce and disclose that information." *LVMPD v. Blackjack Bonding*, 343 P.3d 608, 613 (2015).

In *Blackjack Bonding*, 343 P.3d 608 (2015), this Court held that a government entity "cannot deny a public records request on the basis of confidentiality if it 'can redact, delete, conceal or separate the confidential information from the information included in the public book or record,'" *Id.* at 610. And, "[w]hen an agency has a computer program that can readily compile the requested information, the agency is not excused from its duty to produce and disclose that information." *Id.* at 613.

Here, the requested public records are readily accessible, believed by PERS to be public, and thus *Blackjack Bonding* requires their disclosure. *See Id., generally*. While it is true that "[a] governmental entity's duty to disclose a public record applies only to records within the entity's custody or control," NRS 239.010(4), here, PERS does have the requested record within its control, and in an accessible format, having stated in its Opening Brief that the FY 2014 Retiree Raw Data was formatted as a Microsoft Excel Spreadsheet and included Social Security numbers as one of the fields of information contained within. Appellant's Opening Brief at p.12.

PERS also testified below that they produce a monthly payment register every month that contains, among other things, members' Social Security numbers and their names. JA Vol. 4 at 000378-379. Thus, PERS could satisfy NPRI's request simply by compiling these two readily identifiable, existing reports to attach names onto the FY 2014 Raw Data Feed (sometimes referred to as the "Actuary Report"). *Id.* Further, this makes it clear that PERS' personnel are capable of "extracting" records and breaking them down into separate spreadsheets.

Yet, PERS refuses even to perform even basic Microsoft Excel functions in appending the names of the Retirees as an information field in the Raw Data Feed.

NPRI's request of PERS to provide the 2014 retiree payroll records does not force PERS to search for and compile new information from retirees files or other records. In fact, the requested information has previously been disclosed by PERS when the 2013 report was ordered by this Court to be released to Reno Newspapers.

PERS evades questions regarding the manpower required to comply with NPRI's request. Likely this is because the data could be provided by the simple use of a built-in feature of Microsoft Excel called "V-Look Up," an automated process that would take less than 10 minutes of actual staff time to perform.

JA Vol. 4 at 000403-404. Instead, they deflect, claiming PERS, "cannot accurately recreate the FY2014 data as it existed then." Appellant's Opening Brief at p. 25. This, however, even if true, is irrelevant.

The data sought by NPRI is of a historical nature and would not change over time. Unless PERS destroyed their copies of the records that are at the heart of this case, they can simply reattach names to the Social Security numbers in the automated manner outlined above.

If the duty to compile electronic data, as applied in *Blackjack Bonding*, is not applied here, it will be an invitation to other government entities to invent recordkeeping mechanisms using non-disclosable data fields to evade the legislative intent of openness of government records. Failure to enforce this duty to compile will effectively gut the entire Nevada Public Records Act.

D. The Balancing Test Favors Public Disclosure and the Trial Court Did NOT Abuse its Discretion nor Commit Clear Error in so Finding.

The balancing-of-competing-interests test is employed "when the requested record is not explicitly made confidential by a statute" and the governmental entity nonetheless resists disclosure of the information. *Reno Newspapers, Inc. v. Gibbons,* 127 Nev. 873, 879, 266 P.3d 623, 627 (2011). This test weighs "the fundamental right of a citizen to have access to the public records" against "the incidental right of the agency to be free from unreasonable

interference." *DR Partners v. Bd. of Cnty. Comm'rs,* 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) *(internal quotations omitted).* "The government bears the burden of showing that its interest in nondisclosure clearly outweighs the public's interest in access." *PERS,* 129 Nev. at ——, 313 P.3d at 225 *(internal quotations omitted).*

PERS argues that disclosure of the requested information would subject its retirees to a higher risk of identity theft or fraud. Appellant's Opening Brief at p. 20. However, such concerns are hypothetical and speculative and thus cannot outweigh the presumption in favor of disclosure. JA Vol. 4 at 000410.

This Court recently held that the public's interest in access to these records is not clearly outweighed by the government's interest in non-disclosure. In *PERS v. Reno Newspapers Inc.,* 313 P.3d 221 (2013), this Court affirmed that "in Nevada, '[a] mere assertion of possible endangerment does not clearly outweigh the public interest in access to ... records.'" (citing *Reno Newspapers, Inc. v. Haley,* 234 P.3d 922, 927 (2010)). *See also San Diego Cnty. Emps. Ret. Ass'n v. Superior Court,* 196 Cal.App.4th 1228, 127 Cal.Rptr.3d 479, 492–93 (2011) (holding the potential for elder abuse and financial crime did not outweigh the public's interest in disclosure of pension information).

Whereas PERS provided expert reports below containing only speculation about harms that could hypothetically be visited upon PERS retirees and members, JA Vol. 2 at 000256-273, Robert Fellner, Director of Transparency at NPRI offered testimony specifically identifying actual harms visited upon the public by PERS' refusal to provide the information requested. JA Vol. 4 at 000394-399. The system is extraordinarily complex and operates, in certain instances, in ways that directly contradict the legislatively stated purpose as outlined in NRS 286. For example, though 286 states that the purpose of PERS is to, "provide a reasonable base income to those whose earning capacity has been removed or substantially reduced," previously released records indicate that there are retirees in their 40's collecting six figure disbursements from PERS while still earning income from other sources. JA Vol. 4 at 000395. Only through the publication of name, pension payout and related data can the public better understand how the system works and the legislative purpose be effectuated. JA Vol. 4 at 000390-391. Additionally, because lawmakers can directly profit from decisions they make pertaining to PERS, there is an overwhelming need for the public to have comprehensive access to this information.

In order to convince this Court otherwise, PERS submitted expert reports indicating that the disclosure of records containing birthdate, residence, gender

and zip codes would increase retirees' risk of becoming victims to cybercrime. JA Vol. 2 at 000256-273. PERS objection here is disingenuous. NPRI (and Reno Newspapers before them) never specifically requested birthdates, residence, gender and zip code.

First, the only reason birthdate and gender were released on certain prior occasions is because PERS, itself, refused to extract those much narrower fields of pension payment related data sought by NPRI (and again, Reno Newspapers before them). Because PERS refused these narrower data fields as requested, this Court, instead, ordered PERS to provide a copy of an existing report (the "raw data feed" sent to their actuary) which contained the requested pension payout related data as well as other data fields including gender and birthdate. Neither zip codes nor other residential data were ever requested or disclosed.

Thus, any assertion by PERS as to hypothetical or speculative cyberthreats resulting from the release of such data was irrelevant to the balancing test and the instant case.

When analyzed properly within the historic framework detailed in Section VI.A above – that is, the presumption that all data stored on a government computer is a public record – the analysis here becomes quite simple. PERS had a legal duty to simply extract the requested data fields (none of which are "confidential") and provide those excerpts to NPRI.

Moreover, prior iterations of this information were previously released to NPRI and have been published on their TransparentNevada.com website for the past two years. Yet, PERS has not produced a single example of an actual case of the hypothetical harms alleged; thus, the harms PERS posits are not only speculative, they are most improbable. Likewise, comparable information has been made public in California since 1985 with similarly "no untoward consequences." *See San Diego Cty. Employees Ret. Assn. v. Superior Court*, 196 Cal. App. 4th 1228, 1244, 127 Cal. Rptr. 3d 479, 493 (2011).

Lastly, the type of information requested by NPRI (and Reno Newspapers before it) is made public in at least 34 states, again with no "untoward consequences." The State of New Jersey **itself** makes even more comprehensive public retirement data available on *its own* website. *See*: https://data.nj.gov/Government-Finance/YourMoney-Retired-Pension-Members-for-2016/6n22-63a4.

Given the actual and previous disclosures that PERS formerly claimed were confidential, all with no previous devastating effect on PERS (or its members), it is clear that the court below neither abused its discretion nor committed clear error with regard to the balancing test.

//

E. NPRI's attempts to facilitate government transparency by tailoring their request to accommodate PERS stated-but-*ultra-vires* limitations must not be allowed to defeat the Public Record Acts' express purpose.

PERS objects to the District Court's order requiring PERS to extract the readily available and existing fields of information stored in a computer database specifically designed for their storage and extraction, arguing that *this* Court-ordered "Custom Report" does not match the exact data points sought in NPRI's original request. Appellant's Opening Brief at 16.

Even if PERS were correct on this point, the alternative would be for the Court to apply *Blackjack Bonding* and order PERS to reattach names to the 2014 Raw Data Feed – resulting in the same production of all the data points cited in the Court's Custom Report, as well as the unnecessary, non-requested data points. If PERS' true priority is the minimizing disclosure of its members' information, this second alternative must appear clearly inferior to them, as it does to NPRI.

When PERS first denied NPRI's request to provide a 2014 version of the "Raw Data Feed" with names, NPRI responded by clarifying the nature of their request was for just those fields of information necessary to understand the governmental function of how pension payments are calculated when NPRI communicated:

> Alternatively, are there any other reports or information that could be provided that would contain the following pieces of information: * Retiree Name * Years of Service Credit * Gross Pension Benefit Amount * Year of Retirement * Last Employer?

JA Vol. 1 at 000081.

As a matter of public policy, certainly flexibility in tailoring their request in a manner most accommodating to PERS stated limitations, while still serving the goals of government transparency, should not now be used by PERS to defeat the NPRA's expressly-stated legislative purpose. NRS 239.001.

VII. CONCLUSION

PERS returns to this Court to re-litigate the records confidentiality issue decided against it by this Court as recently as late 2013.

By compiling all of its historic records (both those containing non-sensitive and sensitive information) into files categorized by individual in its CARSON database, PERS again hopes to hoodwink this Court into believing all PERS records are now statutorily confidential under the statutorily-undefined term, "individual member files." However, neither logic nor legislative history warrants such an over-inclusive definition of statutorily-exempt records.

Even if, *arguendo*, the confidentiality statute could be so contorted, this Court's *Blackjack Bonding* decision in 2015 nonetheless requires disclosure.

Because PERS attempted to circumvent this Court's 2013 order by altering, the very next year, the way in which its actuary report is kept – replacing names with social security numbers (which PERS duly redacts) – this case raises another issue upon which this Court has already ruled, namely its 2015 decision that requires government entities like PERS to compile two non-confidential, easily-compiled records to satisfy public records requests.

Lastly, in an attempt to avoid disclosure, PERS takes another run at the balancing test but again introduces only a supposition of speculative harm, which according to numerous decisions by this Court is insufficient to warrant withholding of records.

For these, all foregoing reasons, and all those itemized in the record below, this Court should once again order the records disclosed according to the bases and rationale specified herein.

Dated this 10th day of August, 2017

NPRI CENTER FOR JUSTICE AND CONSTITUTIONAL LITIGATION

By: _____

JOSEPH F. BECKER
Nevada State Bar No. 12178
75 Caliente Street
Reno, NV 89509
Tel: (775) 636-7703
cjcl@npri.org
Attorney for Respondent

AFFIRMATION PURSUANT TO NRS 239B.030

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

Dated this 10th day of August, 2017.

NPRI CENTER FOR JUSTICE AND CONSTITUTIONAL LITIGATION

BY: _____

JOSEPH F. BECKER, ESQ.
Nevada State Bar No. 12178
75 Caliente Street
Reno, Nevada 89509
Tel: (775) 636-7703
Fax: (775) 201-0225
cjcl@npri.org
Attorney for Respondent

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 5,021words.

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

//

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

Dated this 10th day of August, 2017.

NPRI CENTER FOR JUSTICE AND CONSTITUTIONAL LITIGATION

BY: _____

JOSEPH F. BECKER, ESQ.
Nevada State Bar No. 12178
75 Caliente Street
Reno, Nevada 89509
Tel: (775) 636-7703
Fax: (775) 201-0225
cjcl@npri.org
Attorney for Respondent

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I certify that I am an employee of NPRI Center for Justice, and that on this date, I caused a true and correct copy of the foregoing Respondent's Answering Brief, Supreme Court Case No. 72274, to be filed and served upon the following individual(s) through the U.S. Mail, first class mail, postage prepaid as follows:

Joshua J. Hicks
Adam Hosmer-Henner
McDonald Carano
100 West Liberty Street, 10th Floor
Reno, NV 89501

Dated this 10th day of August, 2017.

NPRI CENTER FOR JUSTICE AND CONSTITUTIONAL LITIGAITON

By: _____

JOSEPH F. BECKER
75 Caliente Street
Reno, NV 89509
Tel: (775) 636-7703
Fax: (775) 201-0225
cjcl@npri.org