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 PETITION FOR REHEARING

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I. INTRODUCTION

Regardless of whether the Court's Opinion is entirely overruling or only clarifying *Public Employees' Retirement System of Nevada v. Reno Newspapers, Inc.,* 129 Nev. 833, 313 P.3d 221 (2013) *(Reno Newspapers)*, it significantly changes the landscape of the Nevada Public Records Act (NPRA). *Public Employees' Retirement System of Nevada v. Nevada Policy Research Institute, Inc.,* 134 Nev. Adv. Op. 81 (2018), 2018 WL 5077907 at *6 n.6 *(NPRI* Opinion*).* Before Appellant (PERS) and other public agencies in Nevada rewrite their public records policies in an attempt to comply with the *NPRI* Opinion, additional clarification is needed from the Court on two critical issues, each providing an independent basis for rehearing. Without these clarifications, future uncertainty and litigation will be unavoidable as the *NPRI* Opinion does not provide adequate guidance to PERS and other public agencies when responding to public records requests.

First, the *NPRI* Opinion holds that "retiree name, years of service credit, gross pension benefit amount, year of retirement, and last employer" are nonconfidential and could be extracted from the CARSON database. 2018 WL 5077907 at *3. However, the *NPRI*

Opinion also holds that an "individual retiree's physical file" does contain some confidential information such as "social security numbers and beneficiary designations." *Id.* The *NPRI* Opinion unequivocally misapprehends this point of fact as there are no such physical files maintained by PERS. Appellant's Op. Br. 9 ("PERS does not maintain physical files for its members or Retirees.") (citing JA000121).

This factual error is also the predicate for legal error as the *NPRI* Opinion arbitrarily distinguishes between confidential and nonconfidential information located within the files of individual members or retired employees. 2018 WL 5077907 at *3. In NRS Chapter 286, the only applicable confidentiality provisions are those that apply to the entire file of the member or retiree. *See* NRS 286.110(3); NRS 286.117. The *NPRI* Opinion does not provide a legal basis for treating some of the information within a retiree's file as confidential and some of the information as nonconfidential. *Compare Reno Newspapers* 313 P.3d at 224-25 (holding "data contained in individuals' files" was confidential but the data must be produced if it was "contained in a medium separate from individuals' files, including administrative reports generated from data contained in individuals'

files"). Post-*Reno Newspapers* and in the absence of an articulated standard for applying NRS 286.110(3) and NRS 286.117, PERS cannot determine whether discrete categories of information within an individual's file are confidential.

Second, the *NPRI* Opinion holds that a public agency is obligated to create "a [software] program to search for existing information." 2018 WL 5077907 at *14-15. While this holding is purportedly in recognition of technological advancements, the reality is that this judicial reinterpretation of the NPRA is in significant conflict with other statutes and regulations. Crucially, the *NPRI* Opinion overlooks NAC 239.869, which provides, through the incorporation of the Nevada Public Records Act Manual, that "software can generate public records which are deemed to exist *so long as a computer is already programmed to generate these records*." NAC 239.869 (adopting by reference the Nevada Public Records Act: A Manual for State Agencies, 2016 edition, 7) (available at http://nsla.libguides.com/ld.php?content_id=34967931) (emphasis added). Accordingly, the *NPRI* Opinion is directly in conflict with NAC 239.869 insofar as it requires a public agency to create a new computer program or apply new codes or new programming.

Additionally, the Court misapprehends the ability of a public agency to recoup the cost of creating a new computer program. 2018 WL 5077907 at *16. While NRS 239.052 permits a public agency to charge a fee based on actual cost, NAC 239.869 prevents an agency from charging for "[s]earching for or retrieving documents" or for "[s]taff time for complying with a public records request." NAC 239.869 (incorporating the Nevada Public Records Act: A Manual for State Agencies, 2016 edition, 20) (available at http://nsla.libguides.com/ld.php?content_id=34967931). Moreover, while a public agency may charge a fee for extraordinary use of technological resources, this fee is capped at 50 cents per page. NRS 239.055(1). This statutory fee calculation does not take into consideration the "technological advancements" noted in the *NPRI* Opinion and results in a situation where it may take thousands of dollars to program new software to generate a record constituting a single page.

II. ARGUMENT

A. Legal Standard for Rehearing.

A petition for rehearing may be granted when the Court has overlooked or misapprehended a material fact in the record or a

material question of law in the case or misapplied or failed to consider controlling authority. NRAP 40(a)(2); *Lavi v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 38, 325 P.3d 1265, 1266 (2014), superseded on other grounds by statute as stated in *Bank of Nev. v. Petersen*, 132 Nev. Adv. Op. 64, 380 P.3d 854 (2016).

B. The *NPRI* Opinion Does Not Articulate A Standard To Determine Whether Retirees' Information Is Confidential.

The NPRA requires that all public books and public records of government entities must remain open to the public unless "otherwise declared by law to be confidential." NRS 239.010(1). The only applicable statutory declarations of confidentiality at issue here, as recognized in both *Reno Newspapers* and the *NPRI* Opinion, are found in NRS 286.110 and NRS 286.117. Both statutes are broad and do not contain any internal divisions. *See* NRS 286.110(3) (excluding from the definition of a public record "the files of individual members or retired employees"); NRS 286.117 (covering "[a]ll records maintained for a member, retired employee or beneficiary"). The *NPRI* Opinion appears to limit the scope of NRS 286.110(3) to only the confidential information within the individual files. 2018 WL 5077907 at *8-9. However, the

information in the individual files is statutorily confidential *because of* NRS 286.110(3) and NRS 286.117 and not some other provision. The *NPRI* Opinion somehow parses the categories within the individual files but does not articulate a basis for why some information within the individual files is statutorily confidential and other information is not.

The parties in this action briefed whether the creation of a new record from information contained within the individual files would preserve or destroy confidentiality. Appellant's Op. Br. 37-38. The Court's interpretation goes further than either party anticipated and completely renders NRS 286.110(3) and NRS 286.117 meaningless and irrelevant. *Reno Newspapers* held that the "individual files have been declared confidential by statute and are thereby exempt from requests pursuant to the Act." 313 P.3d at 222. The *NPRI* Opinion overlooks NRS 286.110(3) and NRS 286.117 entirely and leaves it up to a case-by-case application of a common law balancing test as to whether *any* of the information contained within the individual files is confidential.

The CARSON database, for example, contains at least 28 different categories of information within the individual files of members and retirees. Appellant's Opp. Br. 13 (citing JA000122-123). The *NPRI*

Opinion deems five of these fields to be nonconfidential (retiree name, years of service credit, gross pension benefit amount, year of retirement, and last employer) but deems other fields to be confidential (social security number and beneficiary designation). 2018 WL 5077907 at *8-9. There simply is no statutory basis for this distinction as NRS 286.110(3) and NRS 286.117 apply to the entirety of the member file. The *NPRI* Opinion provides no guidance on how PERS should respond to a new public records request for information contained, and only contained, within an individual member's or retiree's file such as marital status or birth date. Under *Reno Newspapers*, PERS had a duty to maintain the confidentiality of this information, pursuant to NRS 286.110(3) and NRS 286.117, unless it was produced in a separate medium. After the *NPRI* Opinion, PERS appears to have no statutory duty to maintain the confidentiality of any of the information within the individual files. This cannot be what the Legislature intended when enacting NRS 286.110(3) and NRS 286.117.

The *NPRI* Opinion is specifically incorrect with respect to PERS's recordkeeping. The *NPRI* Opinion holds that an "individual retiree's physical file" does contain confidential information such as "social

security numbers and beneficiary designations." 2018 WL 5077907 at *8-9. The *NPRI* Opinion unequivocally misapprehends this point of fact as there are no such physical files. Appellant's Op. Br. 9 ("PERS does not maintain physical files for its members or Retirees.") (citing JA000121). PERS has never argued that records become confidential solely by virtue of being stored in an electronic format rather than paper format. To the contrary, PERS's consistent position has been that confidential records remain confidential regardless of how they are stored. Appellant's Op. Br. 36-37. Accordingly, the *NPRI* Opinion is incorrect to the extent that it drew a distinction between physical and electronic files that were purportedly maintained by PERS.

Under the analysis of the *NPRI* Opinion, it seems that each category of information in the CARSON database may be deemed confidential under a balancing test. 2018 WL 5077907 at *12 (stating that "birth date, sex, marital status, beneficiary information, and beneficiary birth dates" constitute "more sensitive personal information"). The *Donrey* balancing test is employed "when the requested record is not explicitly made confidential by a statute." *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 877, 266 P.3d 623, 636

(2011). Thus, the balancing test discussed in the *NPRI* Opinion exists regardless of the interpretation of NRS 286.110(3) and NRS 286.117. The question therefore remains as to what effect the Court ascribes to these two statutes. If they only render information confidential to the extent that a balancing test renders them confidential, then the *NPRI* Opinion has erroneously interpreted NRS 286.110(3) and NRS 286.117 such that they are superfluous statutory pronouncements with no legal significance.

1. The NPRI Opinion Erroneously Holds That Retirees Have No Reasonable Expectation Of Privacy.

The Court's statement that the "government retirees lack a reasonable expectation of privacy in the requested information" misapprehends the factual record and the law. 2018 WL 5077907 at *12. PERS is a fiduciary for the personal information of its members and is statutorily obligated to protect their confidential information. Moreover, NPRI's public records request was not limited to former public employees but also sought information about children, spouses, and widows of public employees, who never held public employment themselves. Appellant's Op. Br. 55. Additionally, the CARSON database

contains information for retired law enforcement and other public servants with specific privacy considerations. The blanket proclamation in the *NPRI* Opinion negating any reasonable expectation of privacy is incorrect.

The California case relied upon by the Court for the above proposition is factually and legally distinguishable. First, the public records request in California was limited to the "names of retirees who in any month in 2010 received $8,333 or more in pension benefits, the pension amounts, and how they were calculated." *San Diego Cty. Employees Ret. Assn. v. Superior Court*, 196 Cal. App. 4th 1228, 1232, 127 Cal. Rptr. 3d 479, 482 (2011). Second, the California statute provides: "Sworn statements and individual records of members shall be confidential and shall not be disclosed to anyone except insofar as may be necessary for the administration of this chapter or upon order of a court of competent jurisdiction, or upon written authorization by the member." *Id.* at 1237. This statute was specifically interpreted by the court not to include separate reports that were created and used to "facilitate the periodic payment of pension benefits." *Id.* at 1241. Accordingly, *San Diego County Employees Retirement Ass'n.* is in

agreement with *Reno Newspapers* and not the *NPRI* Opinion. In fact, *San Diego County Employees Retirement Ass'n* was *cited* by *Reno Newspapers*, which still applied the *Donrey* balancing test without holding that retirees lacked a reasonable expectation of privacy.

At a minimum, the *NPRI* Opinion should be clarified to remove the blanket proclamation that retirees lack any expectation of privacy as this could apply to undercover law enforcement officers or other similarly situated individuals.

2. The Parties Should Have The Opportunity To Rebrief Based On The New Cameranesi Balancing Test.

Only one week after the *NPRI* Opinion was issued, the Court adopted the new *Cameranesi* balancing test. *Clark County School Dist. v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 84, 2018 WL 5307729, at *6 (citing *Cameranesi v. U.S. Dep't of Defense*, 856 F.3d 626, 637 (9th Cir. 2017)). The *Cameranesi* test appears to replace or supplement the *Donrey* test that was briefed by the parties. *See* Appellant's Op. Br. 61. Accordingly, neither party had the opportunity to apply the "two-part balancing test" that first requires the government to establish a "personal privacy interest stake to ensure that disclosure implicates a

personal privacy interest that is nontrivial or ... more than [ ] de minimis" and then "[s]econd, if the agency succeeds in showing that the privacy interest at stake is nontrivial, the requester must show that the public interest sought to be advanced is a significant one and that the information [sought] is likely to advance that interest." *Las Vegas Review-Journal*, 2018 WL 5307729, at *6 (internal quotations omitted).

The *NPRI* Opinion concludes that PERS failed "to demonstrate that the risks posed by disclosure outweigh the important benefit of public access." 2018 WL 5077907 at *12. This conclusion may be different under the *Cameranesi* balancing test, which places the burden on NPRI to show that the public interest sought to be advanced is a significant one.

C. The NPRA Does Not Require Public Agencies To Program New Software In Response To Public Records Requests.

The *NPRI* Opinion purports to "clarify [the] earlier holding [in *Reno Newspapers*] to reflect the realities of the advancements in technology." 2018 WL 5077907 at *15. Yet the *NPRI* Opinion does not identify any specific technological advancements that would necessitate a different result than in *Reno Newspapers.* The *NPRI* Opinion also does not recognize that the CARSON database was in place in 2013

when *Reno Newspapers* was decided and that it has been operating for almost two decades. Technological advancement has not yet made its way to the CARSON database. The factual record does not match the Court's uncited belief concerning technological advancements.

Additionally, the *NPRI* Opinion creates an unreasonable burden on public agencies by requiring the "creation of a program to search for existing information." 2018 WL 5077907 at *14. Prior to the *NPRI* Opinion, Nevada public agencies were not "required to create a public record to satisfy the [public records] request." NAC 239.867. This provision and others within the NPRA are unmistakable indicators that the Legislature wanted to avoid placing an undue burden on public agencies. In 2013, this Court 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. There are no technological advancements and certainly no legal developments that would require a public agency to not only search for and compile information in response to a public records request, but to *reprogram* its computer system in order to comply with such a request. Rehearing is warranted to clarify that a

public agency need not incur the burdensome expense of creating new software to create a new record.

1. The Result In The NPRI Opinion Is Directly Contrary To NAC 239.869.

The *NPRI* Opinion does not cite to NAC Chapter 239 nor to the Nevada Public Records Act: A Manual for State Agencies, which NAC 239.869 incorporates. The *NPRI* Opinion does hold that a public agency is obligated to create "a [software] program to search for existing information." 2018 WL 5077907 at *14-15. However, this is directly contrary to the Nevada Public Records Act: A Manual for State Agencies, which provides that "software can generate public records which are deemed to exist *so long as a computer is already programmed to generate these records*." (emphasis added).

Even the authorities cited in the *NPRI* Opinion do not fully support the conclusion that a public agency needs to create a new software program or apply additional coding in response to a public records request. *See Am. Civil Liberties Union v. Arizona Dep't of Child Safety*, 240 Ariz. 142, 150, 377 P.3d 339, 347 (Ct. App. 2016) (rejecting the situation where "DCS would have had to write a computer program to extract the raw data from CHILDS responsive to the request, and

then would have had to determine or calculate the number of children who fell within the various categories identified in the request"); *Nat'l Sec. Counselors v. C.I.A.*, 898 F. Supp. 2d 233, 270 (D.D.C. 2012) (basing the analysis on legislative history to the E-FOIA Amendments, not found in the similar history of NRS Chapter 239, which stated that "[c]omputer records found in a database rather than a file cabinet may require the application of codes or some form of programming to retrieve the information").

The record is undisputed that the search in response to NPRI's public records request would "involve the specific coding of a program to query the individual members files in the CARSON data base.") Appellant's Op. Br. 15 (citing JA000360 (Hr'g Tr. 30:3-6)). Accordingly, the *NPRI* Opinion misapprehends and overlooks NAC 239.769 by requiring PERS to specifically code a new program in order to obtain specific output from the CARSON database.

2. The NPRI Opinion Creates An Unreasonable Financial Burden On Public Agencies.

While NRS Chapter 239 permits public agencies to mitigate some of the cost of responding to public records requests, the *NPRI* Opinion expands the duty of public agencies past the contemplation of the

statutes. Searching or querying an existing database may not be cost prohibitive when the database is designed to output the requested information. But by requiring a public agency to "creat[e] a program to search for existing information," the *NPRI* Opinion goes farther than the NPRA and this Court's precedent require. 2018 WL 5077907 at *14-15. The Court's dismissal of PERS's concern over cost misapprehends the state of the law. The *NPRI* Opinion inaccurately states that "PERS could charge NPRI for such an incurred fee" in response to the "additional staff time and cost" occasioned by NPRI's public record request. 2018 WL 5077907 at *16. Yet, NRS Chapter 239 has not been updated or revised based on the Court's presumed technological advancements.

First, NRS 239.052(1) does permit a public agency to charge a fee up to the actual cost to provide the copy of the public record. Yet any such fees must be posted in advance at the agency's office, which cannot be done for a unique request for the creation of new software. NRS 239.052(3). Additionally, the public agency still cannot charge for their staff time, rendering these fees essentially inapplicable to the present circumstances. NAC 239.869 (adopting the Nevada Public Records Act:

A Manual for State Agencies, 2016 edition, 20) ("An agency may not charge staff time for complying with a public records request").

Second, while a public agency can charge a fee for extraordinary use of technological resources, this fee is capped at 50 cents per page. NRS 239.055(1). In response to NPRI's request, PERS could have been obligated to expend $1,300 in staff time to reprogram the CARSON database. Appellant's Op. Br. 14. Of this amount, only a limited amount could be recovered under NRS 239.055(1) because a request could end up being fulfilled with a single page of information, leaving PERS with a hypothetical $1299.50 shortfall.

Notably, the Nevada Public Records Act: A Manual for State Agencies specifically states that a public agency may not charge a fee for "[s]earching for or retrieving documents." Manual, 2016 edition, 20. This is in keeping with the purpose of the NPRA to provide access to existing documents and records. But documents that require customized software to access, retrieve, or compile cannot fairly be described as existing. The extraordinary expenses incurred by public agencies will rarely match the 50 cents per page that a public agency can recoup. This is especially true as the *NPRI* Opinion requires public

agencies to conduct a case-by-case assessment prior to creating a new record, which may require significant attorney review or other legal expenses. Accordingly, the *NPRI* Opinion should be amended to prevent this unreasonable financial burden from being placed on public agencies.

CONCLUSION

For all of the above reasons, this Court should grant rehearing and restore this case to the calendar for further briefing or reargument.

AFFIRMATION

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

Dated this 5th day of November 2018.

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CERTIFICATION OF ATTORNEY

I hereby certify that this brief complies with NRAP 40, 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 40(b)(3) because it contains 3,490 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.

Dated this 5th day of November 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDONALD CARANO LLP and that on November 5, 2018, a true and correct copy of the foregoing **APPELLANT'S PETITION FOR REHEARING** was electronically filed with the Clerk of the Court for the Nevada Supreme Court through the Nevada Supreme Court's e-filing system (Eflex) and e-served on all registered parties to the Supreme Court's electronic filing system as listed below:

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