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. 16OC00161B]

RESPONDENT'S ANSWER TO PETITION FOR REHEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes/Administrative Code

I.

INTRODUCTION

In its Petition for Rehearing ("Petition"), Appellant Public Employees Retirement System of Nevada ("PERS") conflates its dissatisfaction with the Court's En Banc Opinion ("Opinion") with actually having a legitimate legal basis to petition for rehearing. Despite this Court's clear and well-reasoned decision, PERS once again will not concede that the public has a legitimate interest in access to information regarding the pensions paid, at taxpayer expense, to government retirees. After not one but two decisions from this Court ordering PERS to produce specific retiree information, PERS attempts now for a third time to reargue its position in a meritless Petition.

PERS incorrectly asserts that the Opinion, which held that a state agency must "query and search its database to identify, retrieve and produce responsive records for inspection if the agency maintains public records in an electronic database" (*see* Petition at 1), will require public agencies to fundamentally change the way they respond to public records requests. PERS's general lament regarding what it calls a "judicial reinterpretation" (*see* Petition at 3) of the Nevada Public Records Act ("NPRA"), however, is unavailing.

PERS suggests two independent bases to seek rehearing: (1) that the Court misapprehended the existence of paper physical files for PERS members or retirees

and thus erred by incorrectly distinguishing the confidential and nonconfidential information contained therein (*see* Petition at 2); and (2) that the Opinion conflicts with NAC 239.869 insofar as it requires a public agency to create a new computer program to comply with a public records request (*see* Petition at 3). Neither basis, however, conforms to the rehearing standards.

First, PERS's Petition improperly seeks to reargue matters already presented to this Court. *See* NRAP 40(c)(1). Second, PERS has not demonstrated that this Court overlooked or misapprehended any material fact or material question of law. *See* NRAP 40(c)(2)(A). Finally, PERS has not shown that this Court overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in this case. *See* NRAP 40(c)(2)(B). As PERS's Petition fails to conform to the appropriate standards, this Court's denial of the Petition in its entirety is warranted.

II.

STANDARD FOR NRAP 40 REHEARING

NRAP 40(c) sets forth the content requirements for a petition for rehearing:

> (1) Matters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing.
> (2) The court may consider rehearings in the following circumstances:
> (A)When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
> (B)When the court has overlooked, misapplied or failed

> to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

As set forth in NRAP 40(c), the primary purpose of a petition for rehearing is to inform the court that it has overlooked an important argument or fact, or that it has misread or misunderstood a statute, case or fact in the record. *Stanfill v. State*, 99 Nev. 499, 501, 665 P.2d 1146, 1147 (1983). All such purposes are absent here.

III.

ARGUMENT

A. Respondent's Petition Improperly Reargues and Incorrectly Interprets the Court's Opinion Concerning the Confidentiality of PERS Records.

1. PERS Fails to Meet the Requirements of NRAP 40(c)(1) By Improperly Rearguing the Confidentiality of the Records.

Without regard for the mandates of NRAP 40(c)(1), in its Petition PERS improperly repeats broad swaths of its appellate arguments to this Court. The first example of this is the argument regarding confidentiality of the records in question. In its Opening Brief, PERS extensively argued the issue of confidentiality as set forth in NRS 286.110(3), stating in part:

> "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 "the individual files have been declared confidential by statute and are thereby exempt from requests pursuant to the Act")."

See Appellant's Opening Brief at 37; *see also* Appellant's Reply Brief at 13 – 15.

The same arguments again appear in the Petition, labeled as PERS's first purported basis for rehearing, as follows:

> "*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."

See Petition at 6 (emphasis in original). The above argument is not only repetitive, it also merely reflects PERS's disagreement with the Court's guidance. It in no way demonstrates that the Court overlooked or misapprehended a material fact or question of law in the case. Should the Court find PERS has not improperly reargued the matter of confidentiality in its Petition in violation of NRAP 40(c)(1), the argument nevertheless fails upon substantive review.

2. PERS Fails to Meet the Requirements of NRAP 40(c)(2)(A) By Incorrectly Interpreting the Factual Basis for the Court's Opinion Regarding Confidentiality of the Records.

PERS asserts that this Court committed factual error by concluding that an "individual retiree's physical file" was maintained by PERS as a paper record. *See* Petition at 2. This Court, however, drew no such conclusion. PERS attempts to manufacture the appearance of a factual error by excising four words – "individual retiree's physical file" – from a lengthier sentence regarding the electronic storage of PERS files, as follows:

> "While an individual retiree's physical file, which contains personal information such as social security numbers and beneficiary designations, may not be inspected in its entirety, that does not make all the information kept in that file confidential when the information is stored electronically and PERS can extract the nonconfidential information from the individual files."

See Opinion at 9. PERS asserts its computer database is organized by "individual member file," a statutorily undefined term made confidential in 1977 by NRS 286.110(3), and then uses the Court's language to argue the Court erred by not extending that blanket of confidentiality to the entirety of its computer database.

As the Court correctly assessed, "individual member file" is applicable to two distinct sets of records: (1) the physical file as it existed when NRS 286.110(3) made that file confidential in 1977; and (2) the Computer Automated Retirement System of Nevada ("CARSON") in use today, which PERS adopted in 2000 after moving all of its records from distinct, physical files into one electronic database. *See* Appellant's Opening Brief at 8. The Court then explicitly drew a distinction between the confidential pieces of information unique to the physical retiree file, as it existed previously, and the entirety of the CARSON database. In no way does the Court's Opinion signify a misunderstanding that PERS still uses physical files, which PERS argues represents the "factual error [which] is also the predicate for legal error" that justifies rehearing. *See* Petition at 2.

On the contrary, the Court's reference to the physical file was not a

suggestion that PERS still maintains its records in a paper format, but rather an indication of what NRS 286.110(3) actually applied to, i.e. the confidential pieces of information unique to the physical individual member files as they existed then. As the majority clearly recognized in the Opinion, an entire computer database must not be considered confidential because PERS uses the same label now to describe the information stored electronically as it used when PERS maintained numerous physical paper files, of which the individual member file was just one among many. This echoes the conclusion found by multiple California courts that have previously addresses this nearly identical issue. *See e.g. San Diego Cty. Employees Ret. Assn. v. Superior Court*, 196 Cal. App. 4th 1228, 127 Cal. Rptr. 3d 479 (2011); *see also SCERS v. Superior Court*, 195 Cal. App. 4th 440, 125 Cal.Rptr.3d 655 (2011).

In accordance with the NPRA mandate that courts construe "narrowly" any statute limiting or restricting access to public records in order to "promote government transparency and accountability," the Court correctly found that NRS 286.110(3) cannot be interpreted so broadly as to allow PERS to evade compliance with the NPRA simply as a result of technological changes in record-keeping. NRS 239.001; *see e.g. Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 882, 266 P.3d 623, 628 (2011).

Because this Court correctly ruled that there is a factual distinction between

information contained within the physical individual retiree file as it existed in 1977, and the entirety of the information within the CARSON database used today, and that both statute and case law precludes them from expanding a confidentiality statute designed for the former to encompass the latter, this Court should deny the petition for rehearing.

B. Respondent's Petition Improperly Reargues and Incorrectly Interprets the Court's Opinion Concerning the Requirement to Extract Records.

1. PERS Fails to Meet the Requirements of NRAP 40(c)(1) By Improperly Rearguing the Requirement to Extract Records.

The second example of impermissible re-argument by PERS is also the second basis upon which it seeks rehearing, specifically that a lack of obligation to create a new record precludes requiring a public agency to create a new computer program or apply new codes to search existing records. *See* Petition at 12-15. PERS makes this argument in the Petition, despite having fully argued the issue in its original appellate briefings. *See* Appellant's Opening Brief at 48-51; *see also* Appellant's Reply Brief at 24-26.

In its Opening Brief, PERS extensively argued that the holding in *PERS v. Reno Newspapers Inc.*, 313 P.3d 221, 225 (2013), makes clear that no public agency must create a new document to satisfy a public records request:

> "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(a) (permitting only "inspection" and copying of public records))."

See Appellant's Opening Brief at 43.

PERS reargues the same position in the Petition in pertinent part:

> "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."

Petition at 13. NRAP 40(c)(1) specifically precludes re-argument in the Petition of matters presented in the briefs. On this basis alone, PERS's Petition must fail. Should the Court find PERS has not improperly reargued the requirement to extract records in its Petition in violation of NRAP 40(c)(1), this argument also fails upon substantive review.

2. **PERS Fails to Meet the Requirements of NRAP 40(c)(2)(A) By Incorrectly Interpreting the Legal Basis for the Court's Opinion Regarding the Requirement to Extract Records.**

PERS asserts in its Petition that the Opinion is a "judicial reinterpretation" of the NPRA that conflicts with other statutes and regulations because the NPRA does not require public agencies to create a computer program in response to a public records request. *See* Petition at 3. PERS support for this sweeping proposition is a single sentence from the Nevada Public Records Act: A Manual for State Agencies, 2016 Edition ("Public Records Manual"), incorporated by reference in NAC 239.869, which states "software can generate public records

which are deemed to exist so long as a computer is already programmed to generate these records." *See* Petition at 3. This cherry-picked sentence, however, fails to demonstrate that the Opinion "misapprehends and overlooks" the NPRA or the NAC such that rehearing is warranted. *See* Petition at 15.

As the Court explained in *Comstock Residents Ass'n v. Lyon Cty. Bd. of Commissioners*, 134 Nev. Adv. Op. 19, 414 P.3d 318, 322 (2018), "[t]he administrative regulations do not limit the reach of the NPRA, but merely establish regulations for good records and management practices of those local programs." The administrative code is not intended to reinterpret or supersede the NPRA, but even if it was, PERS ignores the more applicable section of the Public Records Manual, which addresses the extraordinary use of technological resources pursuant to NRS 239.055. Consistent with the statute, the Public Records Manual lists among the examples of extraordinary use, circumstances when "[l]ocating records that the requester is entitled to requires computer programming." *See* Public Records Manual at 22, http://nsla.libguides.com/ld.php?content_id=34967931 (emphasis in original).

Indeed, the NPRA and its supporting administrative code make clear that lawmakers contemplated and expected governmental entities to query and extract data from computer databases, as required under NRS 239.055. In 1997, the Legislature enacted two separate fee provisions which authorized governmental

entities to charge a fee for providing a copy of a public record. First, NRS 239.052 mandates that the fee charged must not exceed the "actual cost" incurred to provide the copy. Second, NRS 239.055 authorizes an additional fee when the extraordinary use of personnel or technological resources is required. Contrary to the argument set forth by PERS and the dissent, i.e. that a public agency need only provide copies of existing documents or reports, NRS 239.055 plainly contemplates circumstances in which public records are not maintained in a readily available format and would require public agencies to "make extraordinary use....of personnel or technological resources." Rehearing this matter and adopting the position put forth by PERS and the dissent would effectively render NRS 239.055 nugatory, something this Court endeavors to avoid at all costs. *See Leven v. Frye*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007).

C. Respondents' Petition Fails to Show How This Court Overlooked, Misapplied or Failed to Consider Controlling Law Contrary to NRAP 40(c)(2)(B).

1. The *Cameranesi* Balancing Test Is Not Applicable to the Instant Case.

PERS attempts to use this Court's recent decision in *Clark Cty. Sch. Dist. v. Las Vegas Review Journal*, 134 Nev. Adv. Op. 84, 429 P.3d 313, 320 (2018) adopting the *Cameranesi* balancing test as a basis to "rebrief" the underlying appeal. *See Cameranesi v. U.S. Dep't of Defense,* 856 F.3d 626, 637 (9th Cir. 2017). The *Cameranesi* balancing test, however, is inapplicable to the instant case.

As this Court clearly articulated, the application of the two-part test is limited to "the context of a government investigation," it is not a wholesale replacement, as PERS suggests, of the balancing of interests articulated in *Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630, 635, 798 P.2d 144, 147 (1990). *See Clark Cty. Sch. Dist. v. Las Vegas Review Journal,* 134 Nev. Adv. Op. 84, 429 P.3d at 321.

In *Clark Cty. Sch. Dist.*, the Court considered whether the privacy interests of persons who participated in an internal investigation by a state agency, specifically public school teachers who reported misconduct by an elected public official within the Clark County School District, should be considered before publishing their identity or identifying information on public records. *Id.* at 320-321. To ensure the district court adequately weighed the competing interests of privacy and government accountability, this Court remanded the matter with instructions to apply the *Cameranesi* balancing test. *Id.* at 321. The two-part test first requires the government to establish a nontrivial personal privacy interest, and then, if the government makes that showing, shifts the burden to the requestor to demonstrate the public's interest in disclosure. *Id.* at 320. This Court explained that the *Cameranesi* test was appropriate "in cases in which the nontrivial privacy interest of a person named in an investigative report may warrant redaction." *Id.* at 320.

. . .

Here, the public records at issue in no way involve the personal privacy interests of an individual who participated in a government investigation, thus rendering the *Cameranesi* balancing test inapplicable. In the event, however, this Court intended broader application of the test, the factors weigh in favor of NPRI. As this Court concluded in its Opinion, "government retirees lack a reasonable expectation of privacy in the requested information."[1] *See* Opinion at 11; *see also San Diego Cty. Emps. Ret. Ass'n v. Superior Court*, 127 Cal. Rptr.3d 479, 489 (Ct. App. 2011) (quoting *Int'l Fed'n of Prof'l & Tech. Eng'rs, Local 21, AFL-CIO v. Superior Court*, 165 P.3d 488, 494 (Cal. 2007) (holding that "public employees lack a reasonable expectation of privacy in an expense the public largely bears after their retirement"). Because PERS cannot meet its initial burden to show that the limited information requested implicates a nontrivial personal privacy interest, PERS need not demonstrate the public's interest in disclosure. However, given the substantial public investment in PERS and its members and retirees, there can be no reasonable argument that the public's need for government transparency and accountability are outweighed by an individual privacy interest in the limited information requested.

Accordingly, even if this Court were to conclude that the *Cameranesi* balancing test were applicable to the instant matter, which it is not, the analysis

[1] PERS asserts, incorrectly, that this Court concluded "retirees lack any expectation of privacy." *See* Petition at 11.

would still demand disclosure of the records at issue. While PERS is correct that this Court decided *Clark Cty. Sch. Dist. v. Las Vegas Review Journal* after the instant matter, it is in no way controlling of a dispositive issue in this case such that rehearing is warranted.

2. The Court's Opinion Is Entirely Consistent With Prevailing Law.

Far from being legal error or a foundational departure from existing law, as PERS suggests, this Court's holding is a straightforward application of the NPRA and prevailing caselaw. The NPRA reflects that records of governmental entities, like PERS, belong to the public in Nevada. NRS 239.010(1) requires that, unless a record is confidential, "all public books and public records of a governmental entity must be open at all times during office hours to inspection by any person, and may be fully copied[.]" The NPRA also contains specific legislative findings and declarations that "[its] purpose . . . is to foster democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law" and that its provisions "must be construed liberally to carry out this important purpose[.]" NRS 239.001(1)-(2). And, "[a]ny exemption, exception or balancing of interests which limits access to public books and records....must be construed narrowly." NRS 239.001(3); *see also Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 878, 266 P.3d 623, 626 (2011).

Beyond the general provisions of NRS 239.001, the NPRA also contains the specific and controlling mandate that a governmental entity:

> "....shall not deny a request....to inspect or copy a public book or record on the basis that the public book or record contains information that is confidential if the governmental entity can redact, delete, conceal or separate the confidential information from the information included in the public book or record that is not otherwise confidential."

NRS 239.010(3).

In its Opinion, the Court clearly considered and correctly applied each of these dictates. And, PERS offers nothing more than disagreement with prevailing law in support of its Petition. As this Court correctly concluded, "PERS has failed to cite to any rule, statute, or caselaw declaring the requested information to be confidential, and it has previously disclosed the information." *See* Opinion at 9. Indeed, accepting the argument set forth by PERS and the dissent would radically undermine the purpose of the NPRA by allowing government entities to shield information from the public simply by storing it in a computer database and then claiming that it was unable to readily extract the requested information. Such a conclusion is wholly inconsistent with the NPRA and this Court's prior holdings. The public has a compelling interest in retirement payments to its government employees, paid for at taxpayer expense.

Finally, PERS argues that the Court misapprehends the state of the law with

respect to the imposition of fees for the satisfaction of NPRI's public records request. *See* Petition at 15 – 18. However, as the Court correctly concluded, PERS cannot evade production of public records based on the use of additional staff time or other costs associated with disclosure. *See* Opinion at 16. Indeed, the Opinion specifically recognizes the availability of fees pursuant to NRS 239.052 for the actual cost to provide a copy of a public record, and the additional fees available pursuant to NRS 239.055(1) for the extraordinary use of personnel or technological resources.

Contrary to PERS's assertions, the Opinion does not state that PERS is entitled to total reimbursement of all costs incurred for the production of the requested information. *See* Petition at 16. Instead, the Court remanded the matter to the district court to determine how the costs, if any, should be apportioned consistent with existing law. *See* Opinion at 16. Accordingly, the Court did not misapprehend the law regarding the costs of furnishing the requested records and this does not provide a basis for reconsideration.

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IV.

CONCLUSION

For all of the reasons, rehearing in this matter is neither appropriate nor necessary. Accordingly, Respondent respectfully requests that this Court deny Appellant's Petition for Rehearing in its entirety.

Dated this 3rd day of December, 2018.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify I have read this brief, that it 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, pursuant to NRAP 32(a)(5)(A), has been prepared in a proportionally spaced typeface using Word in Times New Roman style at a font size of 14.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), this brief contains 3,827 words.

3. I further certify to the best of my knowledge, information, and belief, this brief is not frivolous or interposed for any improper purpose. I further certify 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 transcript or appendix where the matter relied upon may be found.

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I understand I may be subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 3rd day of December 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Clark Hill, PLLC, and on this 3rd day of December 2018, I served a true and correct copy of the foregoing **RESPONDENT'S ANSWER TO PETITION FOR REHEARING** as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;

☒ via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;

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