IN THE SUPREME COURT OF THE STATE OF NEVADA

THE LAS VEGAS REVIEW JOURNAL, Appellant, vs. CITY OF HENDERSON, Respondent.	CASE NO.: 73287

APPELLANT'S OPENING BRIEF

Appeal from Eighth Judicial District Court, Clark County
The Honorable Mark Bailus, District Judge
District Court Case No. A-16-747289-W

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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) that must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

Appellant the Las Vegas Review-Journal is a Delaware corporation registered in the State of Nevada as a foreign corporation. The Las Vegas Review-Journal does not have any parent company, and no publicly held corporation owns ten percent or more of the Las Vegas Review-Journal's stock.

The law firm whose partners or associates have or are expected to appear for the Las Vegas Review-Journal is MCLETCHIE SHELL, LLC.

DATED this 16th day of February, 2018.

/s/ Margaret A. McLetchie
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JURISDICTIONAL STATEMENT

This is an appeal from the denial of a Petition for Writ of Mandamus filed by the Las Vegas Review-Journal ("LVRJ") pursuant to the Nevada Public Records Act ("NPRA"), Nev. Rev. Stat. § 239.001 *et seq.* seeking access to certain documents created and possessed by the City of Henderson ("Henderson") pertaining to the public relations/communications firm Trosper Communications and its principal, Elizabeth Trosper and seeking declaratory relief regarding Henderson's policy of charging a fee for privilege review of public records. The district court's order denying the LVRJ's Petition for Writ of Mandamus, entered on May 15, 2017, was a final judgment under NRAP 3A(b)(1) because it disposed of all claims in the case. (III JA445-50.)[1] The LVRJ filed a timely notice of appeal on June 9, 2017. (III JA451-52); *see also* Nevada Rule of Appellate Procedure ("NRAP") (a)(1) (mandating that a notice of appeal must be filed no later than 30 days after service of the notice of entry of the judgment or order being appealed).

ROUTING STATEMENT

This case is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(14) because it raises as a principal issue a question of statewide public

[1] For the Court's ease of reference, citations to the Joint Appendix ("JA") cite to both volume and page number(s). Hence, "III JA445-50" refers to volume 3 of the Joint Appendix at pages 445 through 450.

importance regarding the district court's interpretation of the Nevada Public Records Act, Nev. Rev. Stat. § 239.001 *et seq*. This case is also presumptively retained by the Supreme Court pursuant to NRAP 17(a)(13) because it raises a question of first impression regarding the interpretation of Nev. Rev. Stat. § 239.055. Additionally, this matter is not one that would be presumptively assigned to the Court of Appeals under NRAP 17(b).

ISSUES PRESENTED FOR REVIEW

1. Whether the Nevada Public Records Act ("NPRA") prohibits a governmental entity from charging a fee for conducting a search for public records and performing a privilege review of records that are responsive to a public records request.

2. Whether Henderson Municipal Code 2.47.085 and Henderson's Public Records Policy violate the Nevada Public Records Act by permitting Henderson to charge a fee for the extraordinary use of personnel or technological resources in responding to public records requests that exceeds the 50 cents per page limit set by Nev. Rev. Stat. § 239.055.

3. Whether a request for copies under the NPRA can be deemed moot where the parties agree to inspection of the records as a temporary solution while litigation regarding access to the copies is ongoing.

4. Whether the district court erred in denying the LVRJ's petition requesting copies of records pursuant to Nev. Rev. Stat. § 239.011 where Henderson only agreed to provide copies upon request from the district court at hearing on the matter.

5. Whether Henderson's privilege log of withheld documents failed to provide sufficient legal or factual bases for withholding or redacting other records, and whether the district court erred in not requiring that documents listed on the log be produced.

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I. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a decision by the Eighth Judicial District Court, Mark Bailus presiding (the "district court"),[2] denying a petition for writ of mandamus filed by the LVRJ pursuant to the NPRA (specifically, Nev. Rev. Stat. § 239.011(1)) to obtain certain public records from Henderson pertaining to Trosper Communications, and denying the LVRJ's request for declaratory relief regarding Henderson's policy of charging requesters a per-hour fee for its attorneys to conduct a privilege review of public records.

B. Course of the Proceedings

As more fully described in the Statement of Facts below, this action arose pursuant to the NPRA. No discovery was undertaken; rather, this matter was decided on the Petition and briefs (and exhibits thereto) and oral argument. Upon the filing of the Notice of Entry of Order on May 15, 2017 (III JA445-450), the LVRJ filed a timely notice of appeal on June 9, 2017. (III JA451-452.)

C. Disposition Below

On October 4, 2016, the LVRJ submitted a public records request to the City of Henderson pursuant to the NPRA seeking certain documents pertaining to the

[2] Although Judge Bailus is now the presiding judge in this matter, the order at issue was entered by the prior presiding judge, the Honorable J. Charles Thompson. (*See, e.g.*, III JA420; *see also* JAIII JA450.)

public relations/communications firm Trosper Communications and its principal, Elizabeth Trosper. (I JA011-014.) Trosper Communications had a contract with Henderson and assisted with the campaigns of elected officials. (*Id.*)

In response to the LVRJ's request, on October 11, 2016, Henderson indicated it required additional time to search for responsive documents but that, due to the time required to review the documents for privilege and confidentiality, it intended to charge the LVRJ $5,787.89 for "extraordinary use" of Henderson personnel, citing Nev. Rev. Stat. § 239.055, Henderson Municipal Code 2.47.085 ("Code"), and Henderson's public records policy ("Policy"). (I JA016; *see also* I JA018-022 (the Policy).) Henderson demanded a deposit of $2,893.94 just to continue its search for documents. (I JA016.) Henderson charges for any time in excess of thirty (30) minutes spent by City staff or any City contractor "to locate the requested public records, to review the records in order to determine whether any requested records are exempt from disclosure, to segregate exempt records, to supervise the requester's inspection of original documents, to copy records, to certify records as true copies, and to send records by special or overnight methods such as express mail or overnight delivery." (I JA020.)

In short, Henderson charges requesters for its attorneys to conduct a privilege review and for its attorneys to determine how and whether to withhold records. However, the NPRA only permits fees of actual reproduction costs for copies (*see*

Nev. Rev. Stat. § 239.052; *see also* Nev. Rev. Stat. § 239.005(1)). If a request for a copy of a public record would require a governmental entity to "make extraordinary use of its personnel or technological resources," it may charge reasonable costs of up to fifty cents a page for "extraordinary use" (Nev. Rev. Stat. § 239.055(1)). No assessed cost may compensate an agency for costs it would expend regardless of the requests. *See* Nev. Rev. Stat. § 239.005(1) ("Actual cost" means the direct cost related to the reproduction of a public record. The term does not include a cost that a governmental entity incurs regardless of whether or not a person requests a copy of a particular public record); *see also* Nev. Rev. Stat. § 239.055(1) (only allowing for an additional "extraordinary use" fee if "a request for a copy of a public record would require a governmental entity to make extraordinary use of its personnel or technological resources.") Henderson not only improperly charges just for searching for records and its attorneys' time, it also exceeds the per page cap that is allowed if (and only if) a request requires "extraordinary use." Nev. Rev. Stat. § 239.055(1). Here, the request did not involve "extraordinary use."

On November 29, 2016, the LVRJ filed a petition for writ of mandamus pursuant to Nev. Rev. Stat. § 239.011. (I JA001-022.) The LVRJ also sought declaratory and injunctive relief to address the rights of the parties and the applicability of Henderson's Code and Policy. As an interim solution to allow access while the matter was being litigated, the parties agreed that Henderson would allow

a reporter to inspect the records pursuant to Nev. Rev. Stat. § 239.011 at no fee and that the matter would continue to be litigated. (*See* III JA348-351 at JA350-JA351 (letter from Josh Reid offering to provide access to the records while "the courts provide clarity to the meaning and application of NRS 239.055") and III JA346 (LVRJ counsel response noting "I am … happy to develop a process for getting the RJ records as quickly as possible while we litigate the issues pertaining to the permissible NPRA fees, and appreciate that offer…").) However, Henderson continued to refuse to provide copies pursuant to Nev. Rev. Stat. § 239.055. Subsequently, Henderson produced a log of withheld records; the LVRJ then amended its petition to address the privilege log, contending Henderson failed to provide sufficient bases for withholding and redacting. (I JA026-167.) At the hearing on the LVRJ's amended petition, Henderson finally agreed to provide copies of some records in electronic form. (III JA434.) On May 15, 2017, the district court entered an order denying the petition. (III JA445-450.) This appeal follows.

II. STATEMENT OF FACTS

A. The LVRJ's Public Records Request

On October 4, 2016, the LVRJ sent Henderson a request pursuant to the NPRA seeking certain documents dated from January 1, 2016 through the date of the request pertaining to Trosper Communications and its principal, Elizabeth Trosper. (I JA011-014.) Trosper Communications is a communications firm that had

a contract with the City of Henderson and has assisted with the campaigns of elected officials in Henderson. The request was directed to Henderson's Chief Information Officer and the Director of Intergovernmental Relations. (I JA013 (listing requested records).)

B. Henderson's Response and Demand for Excessive Fees for "Extraordinary Use"

On October 11, 2016, Henderson provided a letter in response to the LVRJ's records request. (I JA016.) Henderson indicated that it was "in [the] process of searching for and gathering responsive e-mails and other documents" but that "[d]ue to the high number of potentially responsive documents that meet your search criteria (we have approximately 5,566 emails alone) and the time required to review them for privilege and confidentiality, we estimate that your request will be completed in three weeks from the date we commence our review." *Id.*

In addition to its nebulous statement that it required additional time, and failure to provide a date certain,[3] Henderson demanded payment of almost $6,000.00

[3] Nev. Rev. Stat. § 239.0107, which requires a governmental entity to provide records or otherwise provide meaningful response to a NPRA request within 5 days of a request, dictates that a governmental entity intending to delay production past the 5 day response deadline provide a date certain by which it will provide records. *See* Nev. Rev. Stat. § 239.0107(1)(c)("Except as otherwise provided in paragraph (d), if the governmental entity is unable to make the public book or record available by the end of the fifth business day after the date on which the person who has legal custody or control of the public book or record received the request, provide to the person, in writing: (1) Notice of that fact; and (2) A date and time after which the public book or record will be available for the person to inspect or copy or after

to continue its review. It explained the basis of its demand as follows:

> The documents you have requested will require extraordinary research and use of City personnel. Accordingly, pursuant to NRS 239.052, NRS 239.055, and Henderson Municipal Code 2.47.085, *we estimate that the total fee to complete your request will be $5,787.89*. This is calculated by averaging the actual *hourly rate of the two Assistant City Attorneys* who will be undertaking the review of potentially responsive documents ($77.99) and multiplying that rate by the total number of hours it is estimated it will take to *review the emails and other documents* (approximately 5,566 emails divided by 75 emails per hour equals 74.21 hours).

(I JA016) (emphases added). In other words, Henderson was demanding the LVRJ pay Henderson's city attorneys to review public records and determine whether any records would even be released. Henderson's response also stated that pursuant to its Public Records Policy, it would not continue searching for responsive documents and reviewing them for privilege unless the LVRJ paid a "deposit" of $2,893.94:

> Under the City's Public Records Policy, a fifty percent deposit of fees is required before we can start our review. Therefore, please submit a check payable to the City of Henderson in the amount of $2,893.94. Once the City receives the deposit, we will begin processing your request.

Id. A copy of the Policy can be found at I JA018-022. The pertinent fees provision is located at I JA020. Henderson also informed the LVRJ that it would not release any records until the total final fee was paid, stating: "[w]hen your request is

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which a copy of the public book or record will be available to the person. If the public book or record or the copy of the public book or record is not available to the person by that date and time, the person may inquire regarding the status of the request.").

completed, we will notify you and, once the remained [sic] of the fee is received, the records and any privilege log will be released to you." *Id.*

C. The LVRJ Files Suit

On November 26, 2016, after informal efforts to resolve this dispute failed, the LVRJ filed a petition for writ of mandamus pursuant to the NPRA, Nev. Rev. Stat. § 239.011(1). (I JA001-022.) On December 20, 2016, Henderson provided the LVRJ with an initial list of documents it was redacting or withholding, with cursory (but insufficient) notes regarding the bases for withdrawal such as unexplained citations to *Donrey*. (I JA057-059.) Henderson also agreed to make the requested documents available for inspection free of charge. (*See*, *e.g.*, II JA237-JA240 (correspondence between counsel discussing agreement to allow the LVRJ to conduct an in-person inspection to facilitate access while the litigation resolved the rights of the parties with regard to access to copies and the fees demanded).) That inspection took place on over the course of several days. (*See* III JA364; JA370 (emails discussing inspection).)

On January 9, 2017, in response to requests from the LVRJ, Henderson provided a privilege log describing the documents being withheld or redacted and the putative bases for such withholding or redacting. (I JA061-066; I JA187, ¶ 11.) The log indicated who sent and received the emails responsive to the NPRA request, but in instances where the sender or recipient was a city attorney or legal staff, the

log did not identify the attorney or staff person. *Id.*

On January 10, 2017, in response to concerns expressed by LVRJ counsel regarding the adequacy of the log (I JA187, ¶ 13), Henderson provided the LVRJ with a revised privilege log (I JA068-073), as well as a number of redacted documents corresponding to the log. (I JA075-167.) In the revised log, Henderson included a description of the senders and recipients of withheld or redacted documents.

D. The LVRJ Files an Amended Petition

On February 8, 2017, pursuant to stipulation between the parties (I JA025-028), the LVRJ filed an amended petition to address inadequacies with Henderson's final privilege log (I JA026-167), as well as a memorandum in support of the Amended Petition. (I JA168-189.) In the Amended Petition and Memorandum, the LVRJ asserted that Henderson's attempt to charge it for a privilege review of the requested documents violated the NPRA because the Act does not permit a governmental entity to charge a requestor for a privilege review. (I JA035-036; I JA172-174.) The LVRJ additionally asserted that Henderson Code and Policy conflicted with the NPRA's limitations in Nev. Rev. Stat. § 239.055(1) on the fees a governmental entity can charge for extraordinary use of personnel. (I JA036; I JA173-174.)

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The LVRJ requested (1) that the Court issue a writ of mandamus requiring Henderson to immediately make available all records the LVRJ had previously requested but had been withheld and/or redacted; (2) injunctive relief prohibiting Henderson from applying the provisions of its Code and its Policy to demand fees in excess of those permitted by the NPRA; (3) declaratory relief stating that Henderson Municipal Code § 2.47.085 and the City of Henderson's Public Records Policy ("Henderson Code and Policy") are invalid to the extent they provide for fees in excess of those permitted by the NPRA; and (4) declaratory relief limiting Henderson to charging fees for extraordinary use of personnel to fifty cents per page, as well as limiting Henderson from demanding fees for attorney review. (I JA040-041.) Henderson filed a response to the Amended Petition and Memorandum on March 8, 2017. (II JA190-295.) The LVRJ filed a reply on March 23, 2017. (III JA296-418.)

The district court conducted a hearing on the LVRJ's Amended Petition on March 30, 2017. (III JA420-444.) At that hearing, at the request from counsel for the LVRJ and the court, counsel for Henderson finally agreed to provide the LVRJ a USB drive with copies of the requested documents. (III JA427:8-11.) At the conclusion of the hearing, the district court directed Henderson to provide the LVRJ with a "USB drive with [the requested documents] on it." (III JA443, ll. 15-20.)

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During the hearing, the LVRJ requested that the district court rule on the propriety Henderson's Public Records Policy, noting that the policy conflicted with the NPRA and could present an impediment to future public records requests. (III JA427-428.) The Court declined to do so, stating simply "let's worry about the future cases when we get there. That's maybe for a younger Judge." (III JA428, ll. 20-21.)

On May 15, 2017, the Court entered an order denying the LVRJ's request for a writ of mandamus, injunctive relief, and declaratory relief. (III JA445-450.) In that order, the Court noted that at the hearing, Henderson finally agreed to provide electronic copies of the documents that were responsive to the LVRJ's public records request. (III JA449, ¶ 2.) With respect to the LVRJ's claims regarding the propriety of Henderson Code and Policy, the district court found those claims were mooted by Henderson's agreement to provide electronic copies at no charge. (*Id.* at ¶ 3.) Further, the district court denied the LVRJ's claims regarding the adequacy of Henderson's final privilege log, finding that it was both timely and sufficient. (*Id.* at ¶ 4.)

E. Henderson's Public Records Policy and Municipal Code 2.47.085

One of the central issues in this appeal is the propriety of Henderson's Code and Policy, both of which allow Henderson to charge public records requesters a fee for conducting a privilege review. Henderson Municipal Code 2.47.085(C) currently provides that:

> [I]f the public records request will require more than ten hours of city personnel time to search for, compile, segregate, redact, remove, scan and/or reproduce records responsive to the records request, which hourly rate charged for the extraordinary use of personnel time shall not exceed thirty-five dollars per hour. The total fee under this provision shall not exceed fifty cents per page contained in the records request.

Likewise, under Henderson's Public Records Policy, Henderson charges requesters for time spent in excess of thirty minutes for:

> review[ing] the records in order to determine whether any requested records are exempt from disclosure, to segregate exempt records, to supervise the requester's inspection of original documents, to copy records, to certify records as true copies, and to send records by special or overnight methods such as express mail or overnight delivery.

(I JA020, § V(A).) As detailed below, the application of the Code and Policy lead to the absurd result that members of the public requesting public records pay Henderson to keep their own records from them.

IV. ARGUMENT

A. Standard of Review

Typically, a district court's decision to grant or deny a writ petition is reviewed by this Court under an abuse of discretion standard. *DR Partners v. Bd. of Cty. Comm'rs of Clark Cty*., 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) (citing *County of Clark v. Doumani*, 114 Nev. 46, 53, 952 P.2d 13, 17 (1998)). However, when, as here, the petition entails questions of law such as application of the NPRA, this Court reviews the district court's decision de novo. *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 877, 266 P.3d 623, 626 (2011) (citing *Reno Newspapers v.*

Haley, 126 Nev. 211, 213, 234 P.3d 922, 924 (2010)). "[Q]uestions of statutory construction, including the meaning and scope of a statute, are questions of law, which this court reviews de novo." *City of Reno v. Reno Gazette–Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003) (citation omitted).

B. The NPRA Is Designed to Promote Democracy, and Must Be Interpreted Accordingly.

The purpose of the NPRA is to foster democratic principles by ensuring easy and expeditious access to public records. Nev. Rev. Stat. § 239.001(1) ("The purpose of this chapter is to foster democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law"); *see also Gibbons*, 127 Nev. at 878 (holding that "the provisions of the NPRA are designed to promote government transparency and accountability").

To fulfill that goal, the NPRA must be construed and interpreted liberally to further access; government records are presumed public records subject to the Act, and any limitation on the public's access to public records must be construed narrowly. Nev. Rev. Stat. §§ 239.001(2) and 239.001(3); *see also Gibbons*, 127 Nev. at 878, 266 P.3d at 626 (noting that the Nevada legislature intended the provisions of the NPRA to be "liberally construed to maximize the public's right of access").

C. The NPRA Starts From the Presumption of Access to Public Records.

In 2007, after *Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990) was decided, the Nevada Legislature amended the NPRA to

strengthen its provisions. *Gibbons*, 127 Nev. at 882, 266 P.3d at 628. Among other things, the legislature added Nev. Rev. Stat. § 239.001, the provision declaring the purpose of the NPRA 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[.]" Nev. Rev. Stat. § 239.001(1). The Nevada Legislature has made it clear that—unless they are explicitly confidential—public records must be made available to the public for inspection or copying. Nev. Rev. Stat. § 239.010(1); *see also Gibbons*, 127 Nev. at 879-80, 266 P.3d at 627.

Consistent with that presumption of access, the NPRA places a heavy burden on governmental entities to demonstrate that a public record should be kept confidential. If a statute explicitly makes a record confidential or privileged, the public entity need not produce it. Nev. Rev. Stat. § 239.010(1). A governmental entity seeking to withhold or redact records on some other basis, however, has a heavy burden: it must prove by a preponderance of evidence that the records are confidential or privileged *and* that the interest in nondisclosure outweighs the strong presumption in favor of public access. Nev. Rev. Stat. § 239.0113(2); *see also Gibbons*, 127 Nev. at 880, 266 P.3d at 628.

Moreover, the NPRA provides that a governmental entity must provide timely and specific notice if it is denying a request because the entity determines the documents sought are confidential. Specifically, Nev. Rev. Stat. § 239.0107(1)(d)

provides that if a government entity intends to withhold a public record (or part thereof) as confidential, it must, within five business days, provide the requester notice of that fact in writing, with citation to the specific statute or other legal authority that makes the public record or any part of it confidential. Notably, this makes clear that the governmental entity has the obligation to search for responsive records—and to establish confidentiality—within five business days of an NPRA request. In violation of this mandate, here Henderson just responded with a demand for money before it searched for records and performed a privilege review. (I JA016.)

Further, as noted above, if the governmental entity is not able to make the requested records available within five business days, it must provide the requester (1) notice of that fact, and (2) "[a] date and time after which the public book or record will be available for the person to inspect or copy or after which a copy of the public book or record will be available." Nev. Rev. Stat. § 239.0107(1)(c)(1) and (2).

In *Gibbons*, this Court analyzed the NPRA, surveyed its prior cases, and set forth the applicable steps and burdens a withholding entity must satisfy to withhold records:

> First, we begin with the presumption that all government-generated records are open to disclosure. [] The state entity therefore bears the burden of overcoming this presumption by proving, by a preponderance of the evidence, that the requested records are confidential. [] Next, in the absence of a statutory provision that explicitly declares a record to be confidential, any limitations on disclosure must be based upon a

> broad balancing of the interests involved, [], and the state entity bears the burden to prove that its interest in nondisclosure clearly outweighs the public's interest in access. [] Finally, our caselaw stresses that the state entity cannot meet this burden with a non-particularized showing, [] or by expressing hypothetical concerns. []

Gibbons, 127 Nev. at 880, 266 P.3d at 628 (citations omitted). Thus, in addition to first establishing by a preponderance of the evidence that the records are confidential, a governmental entity also bears the burden in this case of establishing that the interest in withholding documents outweighs the presumption in favor of access.

Even before the NPRA was explicitly amended to strengthen its terms, tis Court made clear that the burden remains squarely on the governmental entity to establish that a record is confidential:

> In balancing the interests . . . , the scales must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference . . . The citizen's predominant interest may be expressed in terms of the burden of proof which is applicable in this class of cases; the burden is cast upon the agency to explain why the records should not be furnished.

DR Partners v. Bd. of Cty. Comm'rs of Clark Cty., 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) *Id.* (quoting *MacEwan v. Holm*, 226 Or. 27, 46, 359 P.2d 413, 421-22 (1961) and citing *Donrey*, 106 Nev. at 635–36, 798 P.2d at 147–48). Moreover, at every step of this analysis, privileges and limitations on disclosure must be construed narrowly. *DR Partners*, 116 Nev. at 621, 6 P.3d at 468 ("It is well settled that

privileges, whether creatures of statute or the common law, should be interpreted and applied narrowly"); *see also* Nev. Rev. Stat. § 239.001(3) (requiring that any limitation on the public's access to public records "must be construed narrowly"). Further, if a public record contains confidential or privileged information only in part, in response to a request for access to the record, a governmental entity has the duty to redact the confidential information and produce the record in redacted form. Nev. Rev. Stat. § 239.010(3). Notably, the redaction statute does not contemplate that the governmental entity can charge to redact records.

D. The NPRA Limits the Fees a Governmental Entity May Charge a Requester.

Consistent with these principles of liberal access to public records and narrow construction of any limitation on that access, the NPRA does not permit a governmental entity to charge fees for conducting a privilege review. Although the NPRA does not define the term "extraordinary use" as used in Nev. Rev. Stat. § 239.055, principles of statutory construction, this Court's precedent regarding local deference to legislative schemes for regulation of specific subjects, the Court's limited precedent regarding Nev. Rev. Stat. § 239.055, and a decision from another court in the Eighth Judicial District Court interpreting the same provision all demonstrate that Henderson's policy of charging requesters a fee for privilege review is impermissible.

1. Henderson's Interpretation of Nev. Rev. Stat. § 239.055 Is at Odds With the Plain Language of the Statute.

One of the first places this Court should look in interpreting Nev. Rev. Stat. § 239.055 is the title of the section of the NPRA in which it appears. As the United States Supreme Court has explained, "the title of a statute and the heading of a section" are "tools available for the resolution of a doubt" about the meaning of a statute. *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (quotation omitted). In the NPRA, the only fees a government entity is permitted to charge a requester are set forth in Nev. Rev. Stat. § 239.052 and Nev. Rev. Stat. § 239.055(1) in a section of the NPRA entitled "Reproduction of Records." The heading of that section thus indicates that the only fees contemplated under the NPRA are fees for reproduction of records—not a privilege review.

Drilling down into the substance of the provisions contained in the "Reproduction of Records" section of the NPRA, the plain language of those provisions indicates that the legislature only intended to permit governmental entities to charge requesters a fee for copies of records or certain enumerated costs associated with producing certain public records. *Great Basic Water Network v. State Eng'r*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010) (The Court "will not go beyond a statute's plain language if the statute is facially clear") (internal citations omitted). Section 239.052 provides that "a governmental entity may charge a fee for providing a copy of a public record," Nev. Rev. Stat. § 239.052(1), permits a

governmental entity to waive "all or a portion of a charge or fee for a copy of a public record," Nev. Rev. Stat. § 239.052(2), and requires that a governmental entity must conspicuously post its fee schedules for copies of public records. Nev. Rev. Stat. § 239.052(3). Finally, Nev. Rev. Stat. § 239.052(4) caps the per-page fee a governmental entity may charge for copies of a public record at the actual cost to the agency, and it may not exceed 50 cents per page. Nothing within § 239.052 contemplates that a governmental entity can charge for review of public records for confidential or privileged material.

The other provisions of the "Reproduction of Records" section likewise do not contemplate permitting a governmental entity to charge for privilege review. Nev. Rev. Stat. § 239.053(1) allows a governmental entity to pass on to requesters any costs associated with reproducing a transcript of an administrative proceeding that was transcribed by a certified court reporter to compensate the court reporter for his or her services. And Nev. Rev. Stat. § 239.054 permits governmental entities to charge requesters for the costs associated with reproducing information for a geographical information system, including the costs of gathering and entering data, maintaining databases, and costs associated with hardware and software.

Nev. Rev. Stat. § 239.055(1), the provision Henderson relied on for its demand for fees, allows for fees for "extraordinary use." It provides that "… if a request for a *copy* of a public record would require a governmental entity to make

extraordinary use of its personnel or technological resources, the governmental entity may, in addition to any other fee authorized pursuant to this chapter, charge a fee *not to exceed 50 cents per page for such extraordinary use*….” (emphases added.) Based on the plain language of this statute, the only fees Henderson and other governmental entities may charge a requester is for producing *copies* of public records—not reviewing those records for a determination of whether the records should be kept confidential, and not for in-person inspection of records

Moreover, the term “extraordinary use” should be given its plain meaning. Words and terms within a statute should be given their plain meaning, and this Court has and can rely on dictionary and commonplace meanings of words and terms. *See, e.g., MGM Mirage v. Nevada Ins. Guar. Ass’n*, 125 Nev. 223, 231, 209 P.3d 766, 771 (2009). The term “extraordinary use of personnel or technological resources” is not defined in Chapter 239 of the Nevada Revised Statutes, or within Nev. Rev. Stat. § 239.055. However, Merriam-Webster includes the following in its definition: “a: going beyond what is usual, regular, or customary” and “b: exceptional to a very marked extent.”[4] The NPRA request at issue sought access to records about a political consultant, Elizabeth Trosper, and the contracts the politicians she got elected may have helped her obtain. This is not a request that is “exceptional to a

[4]*See* https://www.merriam-webster.com/dictionary/extraordinary (last checked 2/15/18).

very marked extent," and taxpayers should not be required to pay thousands and thousands of dollars just to assess whether a political consultant is getting sweetheart deals from the politicians she helps get elected once they take office and control the purse strings.

As detailed above, the NPRA was designed to promote transparency and other democratic principles. The request at issue squarely falls within exactly the type of public access that the NPRA was designed to effectuate. If the media, or any other member of the public, has to pay thousands and thousands of dollars just to evaluate what contracts a political consultant may have obtained from the politicians she got elected, that would necessarily defeat the purpose of the NPRA. Moreover, that Henderson had such an extensive relationship with Elizabeth Trosper that the request yielded so many responsive records should not result in charging the LVRJ an exorbitant fee to be able to assess the relationship. It is also notable that, the LVRJ has consistently endeavored to work with Henderson to narrow the responsive "hits" yielded by searches for responsive records—but Henderson had told the LVRJ it would charge for all review. (*See* IIIA JA 348-51 at 348 (letter from Josh Reid to counsel for the LVRJ noting that "the City has always worked with the LVRJ to modify the scope of an electronic document search" and that counsel for the City of Henderson and the LVRJ had spoken about removing duplicates.).) It is notable that the documents produced by Henderson also yielded a number of nonresponsive

documents) and I JA049 (demanding payment for City Attorney time to review all the "hits" yielded by an electronic search and a "deposit of fees" of $2,893.44, half the estimated cost of $5,787.89 before the City "will begin processing your request.").

Interpreting Nev. Rev. Stat. § 239.055 to limit public access by requiring requesters to pay public entities for searching for records and undertaking a confidentiality review for (i.e., to keep records away from requesters) as Henderson did would be inconsistent with the plain terms of the statute and with the mandate to interpret the NPRA broadly to facilitate access. Further, allowing a public entity to charge a requester for legal fees associated with reviewing responsive documents for confidentiality is impermissible because "[t]he public official or agency bears the burden of establishing the existence of privilege based upon confidentiality." *DR Partners,* 116 Nev. at 621, 6 P.3d at 468. Finally, even if Henderson could charge for its review by characterizing it as "extraordinary use," such fees would be capped at 50 cents a page for copies. Nev. Rev. Stat. § 239.055(1).

2. Henderson's Policy of Charging a Fee for Privilege Review Conflicts With the Intent of the Legislature in Adopting the NPRA.

Charging a requester for searching for responsive records and conducting a privilege review is also at odds with the overall scheme of the NPRA. As this Court has explained, "[w]henever a legislature sees fit to adopt a general scheme for the

regulation of particular subject, local control over the same subject, through legislation, ceases." *Lamb v. Mirin*, 90 Nev. 329, 332, 526 P.2d 80, 82 (1974); *accord Crowley v. Duffrin*, 109 Nev. 597, 605, 855 P.2d 536, 541 (1993). This "plenary authority of a legislature operates to restrict and limit the exercise of all municipal powers." *Lamb*, 90 Nev. 329, 333, 526 P.2d 80, 82 (citation omitted). Thus, once the legislature has adopted a scheme to regulate a particular subject—in this case, a general scheme for accessing public records—"[i]n no event may a [municipal entity] enforce regulations which are in conflict with the clear mandate of the legislature." *Lamb*, 90 Nev. 329, 333, 526 P.2d 80, 82 (citing *Mabank Corporation v. Board of Zoning Appeals*, 143 Conn. 132, 120 A.2d 149 (1956)); *see also Falcke v. Douglas Cty.*, 116 Nev. 583, 588, 3 P.3d 661, 664 (2000) (recognizing that "[b]ecause counties obtain their authority from the legislature, county ordinances are subordinate to statutes if the two conflict"); *Boulware v. State, Dep't Human Resources*, 103 Nev. 218, 219, 737 P.2d 502, 502 (1987) (noting that an entity "may not act outside the meaning and intent of [its] enabling statute").

In this case, Henderson's policy of charging a requestor for conducting a privilege review and segregating putatively privileged documents conflicts with the general purpose of the NPRA—which is, as discussed above, to facilitate public access to public records. The NPRA explicitly spells out the Nevada legislature's intent to develop a comprehensive statutory scheme to facilitate access to public

records. Consistent with that, it sets forth clear limits on the fees a governmental entity can assess a fee for and how much a governmental entity can charge a requestor for records. Consistent with the NPRA's aim of facilitating access, the expressed intent of the legislature is to limit such charges only to those related to the production of records, not the governmental entity's review of the requested records for responsiveness, privilege, or confidentiality. Accordingly, the LVRJ's declaratory relief should be granted.

3. Guidance from a District Court Regarding Whether a Governmental Entity Can Charge for Privilege Review

The issues presented in this case regarding a governmental entity's inability to charge fees for a privilege review was previously decided by another court in the Eighth Judicial District Court for Clark County, Nevada. (III JA397-418.) In *Gray v. Clark County School District, et al.*, Eighth Judicial Dist. Ct. Case No. A543861, the court granted petitioner Karen Gray relief pursuant to Nev. Rev. Stat. § 239.011 after the Clark County School District ("CCSD") refused to produce certain public records—including school district trustees' emails—unless Ms. Gray paid the CCSD approximately $4,280.00 for retrieval and review of the responsive emails. (III JA400, ¶ 5.) While district court orders are not binding precedent,[5] the *Gray* court's

[5] *See, e.g.*, *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.") (quotation omitted).

consideration of the identical issue is more consistent with this Court's precedent holding that the NPRA must be construed liberally to allow the greatest access possible to public records. Of relevance here, the court rejected CCSD's assertions that a requestor should bear the costs of a governmental entity's privilege review:

> Given the balance between the citizen's fundamental and predominant interest to have public records access, and the governmental entity's interest to be free from unreasonable interference, it is evident that CCSD must be the party to first explain what records, if any, are confidential or privileged, and then why they should not be furnished. To wit, it is not [Ms. Gray's] burden to bear the expense to determine what public records she seeks may be confidential. Once she makes a request for public records, it is the governmental entity's burden to produce the record or explain why it is not furnished. In short, if CCSD believes certain e-mails generated by its school trustees contain confidential information, it is the one who should bear the expense of review and redaction, if any, as well as provide [Ms. Gray] an explanation as to why the public record will not be produced.

(III JA415.) This approach makes sense, as the NPRA mandates disclosure of public records and places the onus on governmental entities to demonstrate that public records should be kept confidential. Logic and the principles animating the NPRA dictate that the governmental entity, not those who request records therefrom, should bear the cost of such review. Moreover, holding otherwise incentives governmental entities to make searching for and segregating confidential material from public records prohibitively expensive. Henderson's Code and Policy conflict with this statutory mandate and pass what should be Henderson's costs for complying with its burden under the NPRA on to requesters. Thus, this Court should declare Municipal

Code 2.47.085 and Henderson's Public Records Policy invalid.

E. The District Court Erred in Declining to Rule on the Propriety of Henderson's Municipal Code and Public Records Policy.

As noted above, Henderson did make records available for inspection during the course of the litigation. Then, during the hearing on the LVRJ's petition, Henderson also finally agreed to make electronic copies of the requested records available to the LVRJ free of charge. (III JA427: ll. 8-10.) in its order denying the LVRJ's petition, the District Court found that the LVRJ's claims regarding Henderson's policy of charging requesters for privilege review were mooted by Henderson's in-court agreement to provide the electronic copies of the requested records. (III JA449, ¶ 3.) This finding was in error.

This Court has recognized that even when an issue becomes moot, a court may consider it when the matter is "capable of repetition, yet evading review." *Univ. & Cmty. Coll. Sys. of Nevada v. Nevadans for Sound Gov't*, 120 Nev. 712, 720, 100 P.3d 179, 186 (2004) (citing *Traffic Control Servs. v. United Rentals*, 120 Nev. 168, 171–72, 87 P.3d 1054, 1057 (2004) (recognizing that the "capable of repetition, yet evading review" exception to the mootness doctrine applies when the duration of the challenged action is "relatively short," and there is a "likelihood that a similar issue will arise in the future")).

Baltimore Sun Co. v. Goetz, 886 F.2d 60 (4th Cir. 1989), a case involving a media request to unseal a warrant affidavit is instructive. In that case, the media was

initially denied access to an affidavit in district court but then, while the appeal was pending, "on the government's motion, the magistrate unsealed the affidavit." *Id*, at 62. The Fourth Circuit court of appeals rejected "the government's contention that, because the affidavit has been released to the public, this appeal should be dismissed as moot," explaining "[t]his case falls within the exception to the mootness rule which permits judicial review when the dispute is capable of repetition, yet evading review." *Id.* at 63 (internal quotation marks and citation omitted).

Just like there was a "reasonable expectation" in the *Baltimore Sun* case that would "be subject to another sealing order denying it access to an affidavit" (*id.*), there is a reasonable expectation that the LVRJ will continue to make requests from Henderson. As with sealing orders (*id.*), the time period applicable to requests is also short in duration. Thus, the mootness exception applies. *See also Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 711 F.3d 180, 184 (D.C. Cir. 2013) (FOIA case not moot because the complaint not only asserted that the [entity] failed to respond to [the requester's] request in a timely fashion, but also raised a substantive challenge to the agency's withholding of responsive, non-exempt records."); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 120 S. Ct. 693, 698 (2000) ("A defendant's voluntary cessation of a challenged practice ordinarily does not deprive a federal court of its power to determine the legality of the practice.") (citation omitted).

So long as Henderson charges fees at odds with the NPRA, Henderson will continue to charge requesters for searching for records and conducting a privilege review. This is particularly troublesome given the chilling effect that such fees will have on requesters. By charging a fee that can run into the thousands of dollars just to determine whether it will even disclose the records, Henderson will discourage individuals—including media entities like the LVRJ—from making public records requests at all. This is plainly at odds with the NPRA's stated purpose: "foster[ing] 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 must not be allowed. Nev. Rev. Stat. § 239.001(1).

Moreover, as noted above, Henderson proposed making the records available for inspection to allow for access *while issues regarding the legality of the fees it charges were being litigated.* (*See* III JA348-351 at JA350-351 and III JA346.) Further, access via inspection and requests for copies are two different means of access to records under the NPRA. *See, e.g.,* Nev. Rev. Stat. § 239.010(1) (allowing for inspection or copying) Despite all this, Henderson (after obtaining outside counsel) then argued that the LVRJ's matter was not justiciable. (II JA190-295 (Henderson's Response to Petition at II JA200-203).) Finally, it refused to provide copies, the LVRJ filed suit, and the parties litigated the case intensely—only to have Henderson finally provide copies to the LVRJ on a drive in the middle of the hearing

in the case, at the district court's request. (III JA 427:8-11). This gamesmanship by Henderson should not be rewarded. If this Court does not address the legality of the Code and Policy, Henderson can continue to assess illegal fees, require requesters to file suit, and then provide records at the hearings on the matter to avoid resolution of the important questions at the heart of this appeal.

F. Henderson's Privilege Log Did Not Provide Sufficient Information for The LVRJ to Challenge its Assertions of Privilege.

The district court also found Henderson's privilege log sufficient and "in compliance with the requirements of the NPRA." (III JA449, ¶ 4.) As discussed above, the NPRA and this Court's interpretive precedent start from the presumption that government records are public, and that absent a specific statute declaring a record to be confidential, a governmental entity bears the burden of demonstrating by a preponderance of the evidence that some interest in confidentiality outweighs the public's interest in access. Nev. Rev. Stat. §§ 239.010(1) and 239.0113(2); *see also Gibbons*, 127 Nev. at 880, 266 P.3d at 628. These principles must guide any evaluation of the privilege log and accompanying arguments.

In *Gibbons*, this Court held that after the commencement of a lawsuit pursuant to the NPRA, a state entity withholding requested records is generally required to provide the requesting party with a log which details the records it is withholding and sufficient information about the basis for withholding each public record or a part thereof. *Gibbons*, 127 Nev. at 882-83, 266 P.3d at 629; *see also id.* at 882 ("[A]

claim that records are confidential can only be tested in a fair and adversarial manner, and in order to truly proceed in such a fashion, a log typically must be provided to the requesting party"). Although the Court declined to "spell out an exhaustive list of what such a log must contain or the precise form" a log must take, it held that a log "should contain, at a minimum, a general factual description of each record withheld and a specific explanation for nondisclosure." *Id.* at 883. Because a governmental entity bears the burden in resisting disclosure, the log it produces must necessarily establish that the records it is withholding are confidential such that the presumption in favor of access is overcome.

At issue here is the third and final privilege log Henderson produced. (I JA068-073.) Henderson's log generally cites three different bases for withholding or redacting the records requested by the LVRJ: attorney-client privilege/attorney work product, the deliberative process privilege, and confidential personal information. (*See generally id.*) The LVRJ maintains that Henderson failed to provide sufficient factual and legal basis for withholding or redacting the remaining records listed in the final privilege log.

1. Henderson Waived Its Ability to Assert Any Privileges by Failing to Respond to the LVRJ's Records Request in the Manner Required by Nev. Rev. Stat. § 239.0107(1)(d).

As a preliminary matter, the LVRJ argued below and argues again here that Henderson waived its ability to assert any privileges which justified withholding the

requested records because Henderson failed to assert any claims of confidentiality within five business days as mandated by Nev. Rev. Stat. § 239.0107(1)(d). (I JA180; III JA306-309.) As discussed above, on October 11, 2016, Henderson responded to the LVRJ's public records request and stated that it was "in [the] process of searching for and gathering responsive e-mails and other documents", estimating that it would take approximately three weeks to provide the documents once it commenced its review. (I JA016.)

Henderson did not, however, provide a date certain for production of the requested records as required by Nev. Rev. Stat. § 239.0107(1)(c)(1) and (2). Instead, it estimated it would take three weeks to complete a privilege review of the documents. (I JA016.) More importantly, Henderson refused to respond to the LVRJ's records request unless the LVRJ committed to paying an exorbitant fee for privilege review, stating it *would not even begin a review* of the records to determine whether they would be produced unless the LVRJ paid the city $2,893.94—half of the exorbitant $5,787.89 Henderson asserted was necessary just to complete a document review. *Id.*

In short, Henderson failed to comply with Nev. Rev. Stat. § 239.0107(1). It did not provide the requested records as contemplated by Section (1)(a) of the statute. It did not notify the LVRJ that it did not have custody or control of the document as contemplated by Section (1)(b). It did not inform the LVRJ that it would

have the records ready at a specified later date as contemplated by Section (1)(c). And it did not deny the LVRJ's records request in the manner specified by Section (1)(d). Instead, Henderson demanded payments of almost $3,000.00 just to determine whether it would even produce the documents the LVRJ requested. This failure to comply with Nev. Rev. Stat. § 239.0107 should be construed as a waiver to assert any privileges attach to the requested records.

2. Henderson's Final Privilege Log is Not Sufficient.

Even if Henderson's noncompliance with Nev. Rev. Stat. § 239.0107 did not result in a waiver of its ability to assert any privileges with respect to the withheld records, the District Court erred in finding that Henderson's final privilege log was "sufficient and in compliance with the requirements of the NPRA." (III JA449.)

a. Henderson Failed to Establish that the "Attorney Client Privilege/Work Product" Overcame the Public's Presumptive Right of Access to the Requested Documents.

As noted above, Henderson cited attorney-client privilege/attorney work production as the basis for withholding several records responsive to the LVRJ records request. (*See, e.g.*, I JA068-73.) However, the bulk of the documents withheld on that basis do not fit within the narrow definitions of either attorney-client privilege or the attorney work product doctrine.

Nevada has a statutory attorney-client privilege. *See* Nev. Rev. Stat. § 49.095. That statute provides that:

> A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications:
> 1. Between the client or the client's representative and the client's lawyer or the representative of the client's lawyer.
> 2. Between the client's lawyer and the lawyer's representative.
> 3. Made for the purpose of facilitating the rendition of professional legal services to the client, by the client or the client's lawyer to a lawyer representing another in a matter of common interest.

Nevada statutory attorney/client privilege is similar to the federal common law attorney/client privilege, which exists where: 1) legal advice of any kind is sought, 2) from a professional legal adviser in his capacity as such, 3) the communications relating to that purpose, 4) made in confidence, 5) by the client, 6) are at his instance permanently protected, 7) from disclosure by himself or by the legal adviser, 8) unless the protection is waived. *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010).

Additionally, Nevada Rule of Civil Procedure ("NRCP") 26(b)(3) protects work created in anticipation of trial. This Court relies on federal law in interpreting the scope of the work product privilege. *See Means v. State*, 120 Nev. 1001, 1009, 103 P.3d 25, 30 (2004) (citing Fed. R. Civ. P. 26(b)(3) and interpreting federal case law). The Ninth Circuit has held that work-product doctrine is only protected if made in anticipation of litigation. *U.S. v. Richey*, 632 F.3d 559, 567-568 (9th Cir. 2011). A court will determine if a document is work-product by analyzing whether 1) the document is prepared in anticipation of litigation, and 2) the document was prepared "by or for another party or by or for that other party's representative." *Id.* at 567. If

there is a dual purpose (i.e., if the document was not prepared exclusively for litigation) then the court will use a "because of" test, which looks to the totality of circumstances. *Id*., at 568. A court will also look to whether the document would have been created in the same or substantially similar form, but for the anticipation of litigation. *Id.* Thus, a document is "work-product" only if it is prepared in anticipation of litigation and was prepared for another party or that party's representative.

The documents redacted or withheld by Henderson do not fit within these narrow definitions of attorney-client or work product privilege, and in several instances are so generically described that it is impossible to determine whether they are protected by any privilege at all. For example, several documents identified in Henderson's log—including Documents 181, 184, 191, 193, 195, 199, 226, 227, 233, 234, 237, 238, 244, 245, 246, 249, 251, 252, 267, 6978, 7009, 7019, 7059, 7127, 7199, 7507, 12153, 12154, and 12156—are described by Henderson as "[e]lectronic correspondence containing communication between attorney and staff made for the purposes of facilitating the rendition of professional legal services re Trosper contract terms." (I JA068-69, JA071, JA072, JA073.) This description is too conclusory for the LVRJ to discern whether the either the attorney-client or work product privilege applies and fails to comport with this Court's requirement that a privilege log must contain a general factual description of each record withheld and

a specific explanation for nondisclosure. *Gibbons*, 127 Nev. at 883, 266 P.3d at 629; *cf.* at 885 ("We cannot conclude that merely pinning a string of citations to a boilerplate declaration of confidentiality satisfies [a government entity's] prelitigation obligation under NRS 239.0107(1)(d)(2) to cite to 'specific' authority 'that makes the public book or record, or a part thereof, confidential.'") Further, based on the descriptions provided by Henderson's log, there is no indication that the documents that have been withheld or redacted were created in anticipation of litigation. *Richey*, 632 F.3d at 567-68.

Other documents produced by Henderson in redacted form also appear to fall outside the scope of either the attorney-client or work product privilege. For example, in its log, Henderson asserts that Document 5249 is a redacted "internal report containing communication between attorney and staff made for the purposes of facilitating the rendition of professional legal services." (I JA071.) However, Document 5249 is a document entitled "Public Information & Market Weekly Report" containing information pertaining to marketing campaigns, marketing reports, and public information requests. (I JA129-134.) This sort of document is not subject to confidentiality under either the attorney-client or work product privilege doctrine. Instead, it appears to be a weekly briefing prepared for Henderson employees. In other words, it is a quintessential example of a public record.

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Even more problematic are the documents listed on the privilege log at 1807, 1808, 1809, 2485, 2487, 4016, 4056, 4057, 4058, 4078, 4083, 4084, 4090, 4091, 4092, 4093, 4094, 4095, 4944, 4954, 4955, 6882, 6958, 7496, 7509, 7631, 7636, 7698, 7703, and 12328. Henderson's final privilege log merely indicates those documents are "Electronic correspondence containing communication between attorney and staff for the purposes of facilitating the rendition of professional legal services." (I JA070, JA071, JA073, JA074.) This description—which is simply a recitation of the language of Nev. Rev. Stat. § 49.095(3)—is so generic that it is essentially meaningless.[6]

There are also several documents in Henderson's final privilege log—specifically, Documents 3, 3352, 5246, 5253, and 5695 that are described as "Internal report containing communication between attorney and staff made for the purposes of facilitating the rendition of professional legal services." (I JA068, JA070, JA071.) Also, document 6759 is identified as an "internal status report prepared by attorney containing legal thoughts, impressions, and advice concerning legal matters." (I JA071) In addition to being so generic that the LVRJ was unable to assess whether Henderson is properly asserting attorney-client privilege as to

[6] Henderson also asserted that attorney-client privilege applies to document 2491, which it describes as "Electronic correspondence containing communication between attorney and staff made for the purposes of facilitating the rendition of professional legal services re HAD," but did not provide any explanation regarding what "HAD" is an acronym for.

these documents, Henderson's privilege log also fails to indicate who authored those reports, or to whom the reports were distributed. Thus, Henderson failed to prove by a preponderance of the evidence that the records are confidential. Moreover, Henderson failed to demonstrate that its interest in nondisclosure outweighs the presumption of public access that underpins the NPRA.

Thus, Henderson's privilege log failed to establish that the documents Henderson withheld or redacted pursuant to an attorney-client or attorney work product privilege actually fell within either of those claims of confidentiality. Accordingly, the district court erred in finding Henderson's log was sufficient.

b. Henderson Failed to Establish That the Deliberative Privilege Process Applied to the Documents in its Final Privilege Log.

Henderson also asserted that the deliberative process privilege justified withholding several responsive public records as confidential. However, even a cursory review of Henderson's final privilege log demonstrates that it improperly relied on this privilege to withhold presumptively public records.

As this Court explained in *DR Partners*, "to qualify for non-disclosure under this privilege, the requested documents must be both predecisional and deliberative." *DR Partners*, 116 Nev. at 623, 6 P.3d at 470 (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151–54 (1975) and *Vaughn v. Rosen*, 523 F.2d 1136, 1143–44 (C.A.D.C. 1975)). To establish that public records are predecisional, "the

[governmental entity] must identify an agency *decision or policy* to which the documents contributed." *Id.* (citation omitted; emphasis added). To determine whether a document is predecisional, a court "must be able to pinpoint an agency decision or policy to which these documents contributed. The agency bears the burden of establishing the character of the decision, the deliberative process involved, and the role played by the documents in the course of that process." *Id.* (quoting *Paisley v. C.I.A.*, 712 F.2d 686, 698 (D.C.Cir. 1983)); *see also Nevada v. U.S. DOE*, 517 F. Supp. 2d. 1245, 1265 (D. Nev. Sept. 27, 2007) (indicating the deliberative process privilege applies only to draft documents that "involve significant policy judgments").

The records withheld by Henderson do not fit within this specific definition of "predecisional." For example, Henderson's privilege log designates Documents 1362, 1363, 1364, 1365, 1366, 1367, 3862, 3864, and 3866 as subject to the deliberative process privilege. (I JA069, JA070.) Henderson's privilege log indicates those documents are all "Electronic correspondence containing mental impressions and strategy of City management regarding preparation of public statement and comments on draft statement." *Id.* However, Henderson's privilege log does not indicate that the draft public statements discussed in documents 1362, 1363, 1364, 1365, 1366, 1367, 3862, 3864, and 3866 involve "significant policy judgments." Thus, Henderson has not met its burden of making a particularized showing that

these documents are in fact subject to the deliberative process privilege. *See, e.g.*, *Gibbons*, 127 Nev. at 880, 266 P.3d at 628.

Henderson's privilege log also improperly asserts that the deliberative process privilege applies to Document 7717 (I JA072) and Document 7718 (I JA073). Document 7717 is described as "[e]lectronic correspondence containing mental impressions and strategy of City management regarding changes to organizational structure within the City Manager's Office." (*Id.* at I JA072). Document 7718 is described as "[d]raft document reflecting deliberations, thoughts, and impressions concerning changes to organizational structure within the City Manager's Office". (*Id*. at I JA073.) Again, however, Henderson failed to establish that these communications involved "significant policy judgments." Thus, Henderson did not satisfy its burden of proving these documents are privileged. And as with the documents it is withholding on the basis of attorney-client privilege, Henderson did not demonstrate that its interest in withholding the documents outweighs the strong presumption of access that attaches to public records. Thus, the District Court's order finding otherwise must be vacated.

V. CONCLUSION

For all these reasons, this Court should declare that Henderson is not permitted to charge in excess of the fees permitted in the NPRA—the actual costs of copies (Nev. Rev. Stat. § 239.052) and up to 50 cents a page (but no more than the actual

cost involved) for extraordinary use (Nev. Rev. Stat. § 239.055(1)). regardless of what its own Code and Policy state. This Court should also find that the NPRA request at issue in this case did not involve "extraordinary use." Finally, this Court should require Henderson to produce the records it withheld.

DATED this the 16th day of February, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 28.2:

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 the APPELLANT'S OPENING BRIEF has been prepared in a proportionally spaced typeface (14-point Times New Roman font).

I further certify that this APPELLANT'S OPENING BRIEF complies with the type-volume limitation of NRAP 32(a)(7)(ii) because it contains 10,209 words.

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.

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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 16th day of February, 2018.

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CERTIFICATE OF SERVICE

I certify that I am an employee of McLetchie Shell LLC and that on this 16th day of February, 2018 the APPELLANT'S OPENING BRIEF was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the Master Service List as follows:

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