IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS REVIEW-JOURNAL, Appellant, vs. CITY OF HENDERSON, Respondent.	Case No. 73287 DC Case No. A-16-747289-W

APPELLANT'S REPLY 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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I. INTRODUCTION

Pursuant to NRS 239.001 et seq. (the Nevada Public Records Act, the "NPRA"), the Las Vegas Review-Journal (the "LVRJ") sought records probing the nature of the relationship between Elizabeth Trosper—a political consultant that helped City of Henderson ("Henderson") officials get elected—and Henderson.[1] The public is entitled to know how its funds are being used and should not have to pay Henderson's legal bills to find out. The public is also entitled to the full picture, and Henderson is not entitled to withhold records. The district court (1) refused to address the illegal policy Henderson relied on to make the public pay for its attorneys' efforts to keep records secret, and (2) failed to order Henderson to produce records it listed on a privilege log.

Henderson's arguments ignore the singular, over-arching purpose of the NPRA: "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." NRS 239.001(1). This "important purpose" (NRS 239.001(2)) should govern every application of the NPRA.[2] While each and every government-created record is

[1] Specifically, the LVRJ's October 4, 2016 request (the "Request") asked Henderson to produce emails pertaining to Elizabeth Trosper and her agreements with Henderson. (1 JA013.)

[2] To further the NPRA's "important purpose," the Nevada Legislature has outlined a number of governing principles that governmental entities and the courts must bear in mind. First, "the provisions of [the NRA] must be construed liberally to carry out

presumed non-confidential and a requester need not explain the aim of an NPRA request, the underlying democratic purpose is of particular importance in this case.

Perhaps reflecting the extent to which Henderson's elected officials conferred taxpayer-funded financial benefits on their own political consultant, Henderson's answer to the Request was that too many responsive records existed to provide any in timely fashion. Henderson demanded that the LVRJ pay an exorbitant sum for it to finish searching for records—and to pay Henderson's attorneys to figure out how to keep the records under wraps. (1 JA016.) Such tactics are antithetical to the NPRA.

To justify its actions, Henderson contends that it can rely on its own policy and Municipal Code (the "Code") to force a requester to bear Henderson's costs in responding to NPRA requests—*i.e.* having attorneys review documents and determine how to withhold them. Forcing a member of the public to pay for a governmental entity to assert that the records are confidential is the opposite of "foster[ing] democratic principles."

[its] important purpose [of fostering democratic principles]." Second, and in contrast, "any exemption, exception or balancing of interests which limits or restricts access to public books and records by members of the public must be construed narrowly." Nev. Rev. Stat. § 239.001(3). Third, a government-generated record is presumed available to the public; a governmental entity asserting that a public record should be confidential bears the heavy burden of proving by a preponderance of evidence that a record falls outside the reach of the NPRA. Nev. Rev. Stat. § 239.0113(2).

Despite litigation, Henderson has never established by a preponderance of the evidence that each record at issue—in its entirety—merits protection. Instead, as part of its delay tactics, Henderson failed to comply with the express mandate of the NPRA to, **within five (5) business days**, provide specific notice—with "citation to the specific statute or other legal authority that makes the public book or record, or a part thereof, confidential"—regarding why the records at issue are confidential. NRS 239.0107(1)(d). Henderson argues that there is no express provision about waiver in the NPRA. This ignores that the NPRA explicitly mandates that the governmental entity provide specific and timely notice about the specific bases for withholding records, and its argument would render this provision meaningless. Henderson's interpretation would deter access to public records and conflicts with the liberal construction of the NPRA mandated by statute. *See* NRS 239.001(2). A requester should not have to hire a lawyer or go to court to figure out which records the government is withholding and why.

Henderson eventually provided a log of withheld records, but the log entries are insufficient. Specifically, Henderson failed to demonstrate by a preponderance of the evidence that the withheld records should be secret. Moreover, Henderson misapplies its confidentiality claims. For example, it fails to point to high-level decisions and ignores the procedural steps it must follow to establish the application of the deliberative process privilege in the first instance. Henderson also applies the

attorney-client privilege too broadly.

Henderson's other arguments also fail. For example, even though the parties have antithetical views, Henderson makes a red-herring argument that the LVRJ filed suit too early. The LVRJ endeavored to resolve issues with Henderson; however, it had no obligation to do so before filing suit. The NPRA explicitly allows a requester to file suit to obtain compliance from recalcitrant governmental entities, such as Henderson, without any pre-litigation obligations. NRS 239.011(1). Further, the time frame of this case reflects the struggles a requester faces to obtain speedy compliance. Paying heed to Henderson's irrelevant view of the pre-litigation conduct in this matter would not further access to public records.

While on the one hand arguing that the LVRJ should have waited longer to file suit, Henderson also argues on the other that the disputes between the parties have taken too long and are now moot. Despite agreeing that this Court should consider the question of whether Henderson can apply its own policies and Code even they conflict with the NPRA (2 JA234), Henderson argues the question has been mooted by recent revisions to its Code, and because Henderson agreed to provide the records at the hearing on the LVRJ's amended petition. (AB, pp. 16-22.)

Henderson has not meet its burden of establishing mootness. First, it is well-established that voluntary cessation of a challenged practice does not deprive a court of its ability to determine the legality of the practice. *City of Mesquite v. Aladdin's*

Castle, Inc., 455 U.S. 283, 289 (1982). Second, and more critically, because the Code still permits Henderson to charge requesters a fee for searching for, reviewing, and redacting public records, the issue is still ripe for this Court's consideration. Further, this matter is capable of repetition yet evading review. If this Court does not provide relief, Henderson is free to change its Code and policy back. Judicial economy also warrants reviewing the question and providing clarity as to whether a government entity can enact policies, code, or regulations that conflict with and limit the NPRA.

In another attempt to evade clarity regarding the applicability of the NPRA, Henderson also argues that the NPRA does not permit the LVRJ to request declaratory and injunctive relief regarding the inapplicability of its Municipal Code to NPRA matters. (AB, pp. 22-25.) However, Nevada law and this Court's case law contemplate that a litigant may seek declaratory and injunctive relief. *Nuleaf CLV Dispensary, LLC v. State Dep't of Health & Human Servs., Div. of Pub. & Behavioral Health*, 134 Nev. Adv. Op. 17, 414 P.3d 305, 308 (2018) (citing NRS 30.040). Finally, while Henderson pretends otherwise, both mootness and the district court's legal evaluation of Henderson's confidentiality claims are subject to de novo review.

For all these reasons and for the reasons set forth below and in the LVRJ's Opening Brief, this Court should rule that:

- The NPRA does not permit Henderson to charge requesters a fee for conducting a privilege review;
- The LVRJ's Request did not involve "extraordinary use;"
- Henderson waived its ability to assert any privileges rendering the requested records confidential because it failed to comply with NRS 239.0107; and
- Henderson's privilege log does not prove by a preponderance of the evidence that any of the records are confidential, let alone that any claim outweighs the presumption in favor of access.

II. REPLY TO HENDERSON'S STATEMENT OF FACTS

A. The LVRJ's NPRA Petition Was Not Premature.

Henderson contends the LVRJ "prematurely" petitioned the district court for mandamus relief. (AB, pp. 7-8.) While not required to do so, prior to filing the petition with the district court, counsel for the LVRJ tried to resolve the disputes with Henderson. (3 JA299.) It was clear that the parties disagreed, and the LVRJ submitted its petition to the district court pursuant to NRS 239.011.

There is nothing in the NPRA that requires requesters to endlessly meet and confer with a governmental entity prior to requesting judicial intervention—a fact that Henderson acknowledges. (AB, p. 39.) On the contrary, the NPRA is premised on the concept that prompt access to public records fosters democracy. *See, e.g.* NRS 239.0107 (mandating that, by not later than the end of the fifth business day after receiving a records request, a governmental entity respond); NRS 239.011(2) (mandating that a court give an application for public records "priority over other

civil matters").) The NPRA is designed to provide quick access to public records. Thus, Henderson's complaints about the allegedly "premature" nature of the LVRJ are of no moment.

B. The LVRJ Requested Copies of the Records.

Henderson asserts that, after it agreed to allow a LVRJ reporter to inspect records[3] it had refused to produce absent payment of its extortionate privilege review fees, the LVRJ never again requested copies of the records. (AB, pp. 9, 11.) This is false. The LVRJ's Request was for copies. (1 JA014.) The parties' agreement to an in-person inspection while the parties resolved disputes in court did not modify the Request, nor did it moot the LVRJ's live request for copies. (2 JA237-240 (email correspondence discussing agreement to in-person inspection during pendency of the LVRJ's petition).)

Second, counsel for the LVRJ specifically asked for electronic copies of the records reviewed. (3 JA364.) Henderson declined this request. (*Id.*) Henderson finally provided electronic copies only when the district court directed it to do so.[4]

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[3] The NPRA separately provides for inspection and copying rights. *See* NRS 239.0107; NRS 239.011.

[4] Henderson's final agreement to provide electronic copies was a litigation tactic that should not be countenanced by this Court. Henderson only provided the records in court after litigation; but then, to avoid paying fees, Henderson argued that it voluntarily produced the records. (*See* 3 JA427 (THE COURT: Are you -- are you willing to give them a USB drive with all the documents? MR. KENNEDY: Sure.).)

To support its false claim that the LVRJ did not request copies, Henderson includes a misleading portion of the transcript. (AB, p. 11 (citing 3 JA424-25).) Henderson omits the portions in which counsel affirmed that the LVRJ asked for copies. (3 JA423; *see also* 3 JA426.) LVRJ counsel also noted the in-person inspection was "an interim solution." (3 JA425.)

III. ARGUMENT

A. This Matter Is Subject to *De Novo* Review.

Henderson did not present any evidence in district court to support Henderson's claims that the records at issue are confidential. The district court did not review the records *in camera*; it just reviewed the log Henderson provided (prepared by counsel and containing argument) and found that confidentiality applied as a matter of law. (3 JA449.) This determination is subject to *de novo* review. *LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608, 612 (2015) ("[W]e review the district court's interpretation of caselaw and statutory language de novo") (citation omitted).

The determination that this matter is moot—which was largely centered on the district court's lack of desire to address complicated questions regarding the NPRA[5]—is also subject to *de novo* review. Henderson contends otherwise, but cites

[5]This exchange reflects the district court's "rationale" for its refusal to consider exceptions to mootness:

no law. This Court has made plain that "[w]hether an issue is moot is a question of law that we review de novo." *Martinez-Hernandez v. State*, 132 Nev. Adv. Op. 61, 380 P.3d 861, 863 (2016) (citing *Stevenson v. State*, 131 Nev. Adv. Op. 61, 354 P.3d 1277, 1280 (2015)); *Stephens Media, LLC v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 125 Nev. 849, 858, 860 (2009) (in writ proceeding challenging district court order denying access to criminal proceeding, finding exception to mootness because matter was capable of repetition yet evading review and applying *de novo* review).

B. Charging to Perform a Privilege Review Violates the NPRA.

The key question to resolve in the instant appeal is whether a governmental entity has an existing obligation to search for responsive records and respond to NPRA requests, or if a governmental entity can demand exorbitant sums to search for records, review records, and have attorneys attempt to keep records secret. In response to the Request, Henderson demanded $5,787.09 for attorneys to search for

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> MS. SHELL: …again our concern is that this [fees provisions] will be an impediment in future cases not just for the RJ.
>
> THE COURT: Well, let's worry about the future cases when we get there. That's for maybe a younger Judge.

(*See* 3 JA428.) Even if the district court's determination regarding mootness were subject to abuse of discretion review, its refusal to consider the applicability of exceptions to the mootness doctrine and its decision to leave it "for maybe a younger judge" is an abuse of discretion.

records and to begin reviewing to determine whether any records would be released. (1 JA016 ("Under the City's Public Records Policy, a fifty percent deposit of fees is required *before we can start our review*.") (emphasis added).) Henderson relied on its Public Records Policy and Henderson Municipal Code 2.47.085 to claim that the LVRJ should pay $77.99 per hour—"the actual hourly rate of the two Assistant City Attorneys who will be undertaking the review"—for its attorneys to conduct a privilege review. (*Id.*)

The LVRJ disagrees with Henderson's supposition that the permissible fees an entity may charge a requester for fulfilling a records request include fees for its attorneys' work. (AB, p. 40.) Henderson ignores public agencies' general mandates to maintain public records and to cooperatively respond to public records requests. It is also not a requester's responsibility to bear the costs of a governmental entity's search for responsive records in the first place. Henderson is responsible for maintaining records pertaining to any public service it provides.[6] Thus, if Henderson maintains public records in a way that does not facilitate easy access or

[6] In making an irrelevant point regarding the need to protect personal information—something that was never an issue in this case—Henderson notes the NPRA does not define "public records." (AB, p. 34.) This Court has held that a "public record" is any record concerning the provision of a public service. *See Comstock*, 414 P.3d at 320-321; *see also Blackjack Bonding*, 131 Nev. at 86, 343 P.3d at 613; *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011) ("…we begin with the presumption that all government-generated records are open to disclosure").

review, it is not the responsibility of a requester to pay Henderson to search for responsive records. If governmental entities could charge requesters for searching for records that were not maintained in an easily accessible manner, governmental entities would be incentivized to store records in a disorganized manner and pass the costs of search and retrieval on to requesters. This would in turn discourage public records requests in defiance of the NPRA's mandates.

In addition, a requester should not have to pay for a privilege review for several reasons. First, the NPRA mandates that a governmental entity must assert specific claims of privilege within five (5) business days (NRS 239.0107(1)(d)), which negates any argument that Henderson can simply demand money for its attorneys go through records and conjure up reasons to withhold them.

Second, requiring a requester to pay for a privilege review is at odds with the NPRA. NRS 239.0113(2) plainly states that if "[t]he governmental entity that has legal custody or control of the public book or record asserts that the public book or record, or a part thereof, is confidential, the governmental entity has the burden of proving by a preponderance of the evidence that the public book or record, or a part thereof, is confidential." Likewise, this Court's case law ***squarely places the burden on the governmental entity to establish that a record is confidential. "[W]e begin with the presumption that all government-generated records are open to disclosure***." *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623,

628 (2011) (citing *Reno Newspapers v. Sheriff*, 126 Nev. 211, 213, 234 P.3d 922, 924 (2010) and *DR Partners*, 116 Nev. at 621, 6 P.3d at 468 (2000); *see also* NRS 239.010(1). "[I]n unity with the underlying policy of ensuring an open and accountable government, the burden is on the government to prove confidentiality by a preponderance of the evidence." *Reno Newspapers v. Sheriff*, 126 Nev. at 215, 234 P.3d at 924; *see also Comstock Residents Ass'n v. Lyon Cty. Bd. of Commissioners*, 134 Nev. Adv. Op. 19, 414 P.3d 318, 320 (2018) (citing *PERS v. Reno Newspapers, Inc.*, 129 Nev. 833, 837, 313 P.2d 221, 224 (2013)). Accordingly, it cannot be the case that the requester must pay for a privilege review. In light of this authority, the NPRA, broadly construed, dictates that the governmental entity must bear the costs of making that showing.

Third, on a common-sense level, it would be both unfair and run afoul of the letter and spirit of the NPRA to make a requester pay for the government to keep records secret. Here, the LVRJ contests that Henderson properly applied privileges. A requester should not be in the position of paying for attorney time misspent on keeping public records from public view and delaying rightful access to information about the conduct of government and the expenditure of taxpayer funds. The NPRA and this Court's precedent explicitly mandate that the provisions of the NPRA be interpreted liberally to further the purpose of the NPRA and facilitate access to public records. NRS 239.001(2); *see also Gibbons*, 127 Nev. at 878, 266 P.3d at

626 (holding that the provisions of the NPRA "must be liberally construed to maximize the public's right of access"). "Conversely, any limitations or restrictions the public's right of access must be narrowly construed." *Gibbons*, 127 Nev. at 878, 266 P.3d at 626 (citing NRS 239.001(3)). To interpret the NPRA otherwise would subvert its explicit purpose of facilitating access to public records.

For all these reasons, the Code, and Henderson's reliance upon it to charge Petitioners excessive fees, fail to comply with the NPRA.

C. Conducting a Privilege Review Is Not "Extraordinary Use."

Henderson is incorrect that a records request which requires its personnel to conduct a privilege review is "extraordinary" (AB, pp. 29-30). It is a fundamental precept of statutory construction that, unless otherwise defined, "words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United State*s, 444 U.S. 37, 42 (1979). Because, as Henderson acknowledges (AB, p. 29), the NPRA does not define "extraordinary use," this Court must interpret the term based on its common meaning. Black's Law Dictionary defines "extraordinary" as "[b]eyond what is usual, customary, regular, or common." Black's Law Dictionary (10th ed. 2014).

As a preliminary matter, the LVRJ does not believe it has the authority under the NPRA to "dictate" which personnel Henderson should allocate to review documents that are the subject of a public records request. (*See* AB, pp. 31-32.) The

question is not whom Henderson should assign to public records requests; the question is whether a requester should have to pay for a privilege review. It is worth noting, however, that an attorney is not uniquely qualified to respond to public records requests. Generally, that sort of work can be assigned to other employees, including Henderson's Public Information Officers or any employee within Henderson's Department of Public Affairs. Indeed, public entities should not be incentivized to assign public request responses to attorneys by allowing for collection of their fees. Further, nothing in the text of the NPRA allows for governmental entities to charge requesters for attorney's fees while it specifically addresses the award of attorney's fees for prevailing requesters. Applying one of the basic maxims of statutory construction, *expression unius est exclusion alterius*, the expression of one thing is the exclusion of the other[7], this Court can infer that the absence of any provision for attorney's fees for governmental entities in the NPRA indicates that the Legislature did not intend to permit Henderson to request fees for work performed by its attorneys in responding to records requests.

Further, the request did not require work that was "extraordinary."[8] As

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[7] *See Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967).

[8] Indeed, this type of work is routine for Henderson's attorneys. As indicated on Henderson's webpage (http://www.cityofhenderson.com/city-attorney/civil-division (last accessed July 20, 2018)), its city attorneys are responsible for "provid[ing] legal guidance and support for elected officials, City departments, and boards and commissions" and are tasked with, *inter alia*, "furnish[ing] legal advice

discussed above, the LVRJ requested Henderson produce emails communications pertaining to Elizabeth Trosper and any contracts it entered into with Trosper Communications. (1 JA013.) Rather than being an indication that the Request was overbroad as Henderson argues (AB, p. 33)[9], the fact that this Request yielded a high number of responsive emails raises serious questions about the amount of work Henderson contracted to Trosper Communications and the financial benefits Ms. Trosper reaped from the politicians she helped get elected.

More fundamentally, responding to NPRA requests cannot be deemed to be "extraordinary" because, as discussed above, the burden of establishing confidentiality does not fall on the requester—it falls on the governmental entity. For that reason, it is not and cannot be deemed "extraordinary use." Accordingly, Henderson cannot force the LVRJ or any other requester to pay for the time its attorneys expend in doing their jobs, or to otherwise pay for the government to meet its burdens under the NPRA.[10]

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and opinions; draft[ing] and review[ing] contracts and other legal documents; initiat[ing] legal action; [and] interpret[ing] law." Because privilege review falls squarely within these responsibilities, there is nothing "extraordinary" about a records request that requires Henderson city attorneys to review records for confidential information.

[9] Moreover, the LVRJ offered to work with Henderson to narrow the scope of requests.

[10] Henderson cites to a single sentence from this Court's opinion in *Blackjack Bonding* to support its assertion that it can charge requesters for costs associated with producing the requested records. (AB, p. 37.) In *Blackjack Bonding*, the petitioners

D. Henderson Cannot Assert Privileges It Did Not Timely Assert.

NRS 239.0107 outlines strict requirements a governmental entity must meet when responding to a public records request. Pursuant to that statute, if a governmental entity intends to deny a records request on the grounds that the record or some part thereof is confidential, it must provide written notice of that fact within five business days, with citation to the specific statutory or legal authority that makes it confidential. NRS 239.0107(1); NRS 239.0107(1)(d).

Rather than comply, Henderson indicated that it would take three weeks to complete a privilege review and produce the documents, then refused to fulfill the records request unless the LVRJ committed to paying an exorbitant fee for privilege review. (1 JA16.) Because it did not provide timely and specific notice—instead trying to deter the request by holding the public records hostage until it got an extortionate fee—Henderson waived the ability to assert that any privilege rendered

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requested from the Las Vegas Metropolitan Police Department all call record details from telephones used by inmates at the Clark County Detention Center. *Blackjack Bonding*, 343 P.3d at 611. Those services were provided by CenturyLink, a private telecommunications provider. *Id.* at 610. In the order entered by the district court granting in part the public records petition, the district court held that "Petitioners shall be responsible for all costs associated with the production [of a report of the requested telephone calls] charged by Century Link [sic] to Respondents, if any." (**Addendum at p.3**.) Thus, the district court only ordered that the petitioners pay for any costs CenturyLink charged the LVMPD—not any costs associated with review and redaction by a governmental entity.

the requested records confidential. To hold otherwise would place requesters in the untenable position of having to fight to just get information that the government is required to provide by statute. In this case, it would have meant paying exorbitant fees to get the information that Henderson was supposed to provide within five days. Most fundamentally, it would render NRS 239.0107(1)(d)'s plain language meaningless and would give governmental entities carte blanche to ignore the law.

Henderson makes three arguments to the contrary. First, it asserts that because NRS 239.0107 does not contain the magic word "waiver," it cannot have waived its ability to assert that any privileges rendered the requested records confidential. (AB, p. 43.) Henderson conveniently ignores this Court's precedent stating that when a statute prescribes a specific time and manner for performance, that statute "is mandatory and requires strict compliance." *Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 664, 310 P.3d 569, 572 (2013) (quoting *Leven v. Frey*, 123 Nev. 399, 408, 168 P.3d 712, 718 (2007)).

Henderson also ignores the NPRA's mandate to interpret its statutory provisions liberally to further "democratic principles" and in favor of access. NRS 239.0107(1) and 239.0107(1)(d) mandate that a governmental entity that withholds records based on confidentiality provide a specific basis for doing so within a precise time period—five (5) business days. Thus, pursuant to the guidance regarding statutory compliance in *Markowitz* and the mandates regarding statutory

interpretation of the NPRA, NRS 239.0107 must be interpreted to mean what it says: that a governmental entity ***actually provide notice of claims of confidentiality within five (5) business days***. A contrary interpretation—allowing a governmental entity to delay asserting claims of confidentiality—would render the requirements of NRS 239.0107 meaningless, something this Court must avoid. *Pellegrini v. State*, 117 Nev. 860, 874, 34 P.3d 519, 528–29 (2001) (". . . we must construe statutory language to avoid absurd or unreasonable results, and, if possible, we will avoid any interpretation that renders nugatory part of a statute") (citation omitted)

Second, Henderson argues that the legislative history of the NPRA militates against a waiver of confidentiality. (AB, p. 44.) However, given that the language of NRS 239.0107 is plain—a fact Henderson concedes (AB, p. 44)—the legislative history is irrelevant. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) Moreover, Henderson's attempt to have this court narrowly construe the NPRA and read it in a manner that renders it toothless violates the NPRA's mandate to interpret its provisions in furtherance of access and democracy.

Third, Henderson argues that "[i]nserting a waiver penalty into the NPRA … defies common sense." (AB, p. 46.) It is Henderson's position that defies common sense and ultimately would subvert the purpose of the NPRA. Because the NPRA specifically delineates the time and manner in which a governmental entity must respond to a records request, and because the overall purpose of the NPRA is to

facilitate access to public records, it cannot be the case that a governmental entity can violate NRS 239.0107 only to claim privileges later.

1. The Provisions of the NPRA Are Subject to Strict Compliance.

In interpreting a statute, "this court considers the statute's multiple legislative provisions as a whole." *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007) (quotation omitted). The Court must "construe statutes to give meaning to all of their parts and language, and … will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation." *Harris Assocs. v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003) (quotation omitted).

In general, this Court has held that "a rule is mandatory and requires strict compliance when its language states a specific 'time and manner' for performance." *Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 664, 310 P.3d 569, 572 (2013) (quoting *Leven v. Frey*, 123 Nev. 399, 407 n. 27, 408, 168 P.3d 712, 717 n. 27, 718 (2007)); *see also Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. 689, 696, 290 P.3d 249, 254 (2012) ("In general, 'time and manner' requirements are strictly construed") (quotation omitted). In determining whether a statute and rule require strict compliance or substantial compliance, this Court "looks at the language used and policy and equity considerations." *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 255 P.3d 1275, 1278 (2011) (citing *Leven*, 123 Nev. at 406-07, 168 P.3d

at 717). "In so doing, [the Court] examine(s) whether the purpose of the statute or rule can be adequately served in a manner other than by technical compliance with the statutory or rule language." *Id.* (citations omitted).

"As with most issues pertaining to statutory construction, our goal is to determine and implement the Legislature's intent." *Vill. League to Save Incline Assets, Inc. v. State ex rel. Bd. of Equalization*, 124 Nev. 1079, 1087, 194 P.3d 1254, 1260 (2008). As discussed above, the Legislature's intent in implementing the NPRA is explicitly stated: it is intended to further democratic principles by ensuring swift access to public records. NRS 239.001(1). Given that the Legislature's intent is to facilitate quick access to public records, the provisions of NRS 239.0107 require strict compliance.

Moreover, "time and manner requirements are strictly construed," *Einhorn*, 128 Nev. at 696, 290 P.3d at 254. "[W]hen a statutory time limit is material, it should be construed as mandatory unless the Legislature intended otherwise." *Vill. League to Save Incline Assets, Inc.*, 124 Nev. at 1086, 194 P.3d at 1259. As discussed above, the plain language of NRS 239.0107 sets forth strict time and manner requirements a governmental entity must follow in responding to a records request. These strict time and manner requirements are intended to facilitate the NPRA's purpose of "further[ing] the democratic ideal of an accountable government by ensuring that public records are broadly accessible." *Gibbons*, 127 Nev. 877–78, 266 P.3d at 626.

Thus, this Court should strictly construe the time and manner requirements for governmental responses to records request in NRS 239.0107 to further this purpose.

2. Because the Language of NRS 239.0107 is Plain, the Legislative History Is Irrelevant.

As discussed above, Henderson concedes that the language of NRS 239.0107 is plain. (AB, p. 44.) As this Court has explained,

> When interpreting a statute, legislative intent "is the controlling factor." *Robert E. v. Justice Court*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983). The starting point for determining legislative intent is the statute's plain meaning; when a statute "is clear on its face, a court cannot go beyond the statute in determining legislative intent." *Id.*; see also [*State v.*] *Catanio*, 120 Nev. [1030] at 1033, 102 P.3d [588] at 590 ("We must attribute the plain meaning to a statute that is not ambiguous.").

State v. Lucero, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011); *see also McKay v. Bd. of Sup'rs of Carson City*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986) ("Where a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent.") Given this guidance and Henderson's concession that the language of NRS 239.0107 is plain, this Court should not look beyond the statute itself in interpreting the Legislature's intent.

Moreover, even if the language of NRS 239.0107 were ambiguous, it should be construed "in line with what reason and public policy would indicate the legislature intended." *McKay*, 102 Nev. at 649, 730 P.2d at 442 (citation omitted). The legislature detailed the procedure a governmental entity must follow in

responding to records request, and the intent animating this guidance was facilitating the public's access to the records of governmental entities. Thus, when a governmental entity fails to comply with the procedural requirements of the NPRA, there must be some effect.

3. NRS 239.0107 Cannot Be Rendered Nugatory.

"[S]tatutory language should be construed to avoid absurd or unreasonable results." *Anthony Lee R., A Minor v. State*, 113 Nev. 1406, 1414, 952 P.2d 1, 6 (1997). Furthermore, "'no part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can properly be avoided.'" *Paramount Ins. v. Rayson & Smitley*, 86 Nev. 644, 649, 472 P.2d 530, 533 (1970) (citation omitted). Because the NPRA was designed to facilitate access to public records, and because it provided specific requirements for a governmental entity's response to records requests, there must be some penalty for a governmental entity's failure to comply with those requirements. If the Court were to accept Henderson's argument that there are no consequences for noncompliance, NRS 239.0107 would be rendered meaningless.

E. Henderson Failed to Meet its Burden and Its Log Is Insufficient.

An issue presented in this case is "whether the district court erred in not requiring that documents listed on the log be produced." To argue otherwise, Henderson essentially contends that its log meets formulaic requirements. (AB, p.

48.) However, as discussed in the LVRJ's Opening Brief (p. 15), "a governmental entity … must prove by a preponderance of the evidence that the records are confidential or privileged *and* that the interest in nondisclosure outweighs the strong presumption in favor of public access" (citing NRS 239.0113(2) and *Gibbons*, 127 Nev. at 880, 260 P.3d at 628). The log provided by Henderson is insufficient[11] and is not evidence that supports Henderson's claims. Rather, the Log over-applies confidentiality claims, in contravention of this Court's directive "that privileges, whether creatures of statute or the common law, should be interpreted and applied narrowly." *DR Partners*, 116 Nev. at 621, 6 P.3d at 468 (citation omitted). Moreover,

[11] As detailed in the Opening Brief (pp. 30-31), this Court has 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").

even assuming that the attorney-client privilege[12] and the deliberative process[13] apply, neither in the district court nor on appeal does Henderson ever explain how those claims "clearly outweigh" the presumption in favor of access. *See Gibbons*, 127 Nev. at 880, 266 P.3d at 628 ("[I]n order for requested records to be withheld under this balancing test, the state entity bears the burden to prove that its interest in nondisclosure 'clearly outweighs the public's right to access'") (quoting *Reno Newspapers v. Sheriff*, 126 Nev. at 219, 234 P.3d at 927).

1. Henderson Over-Applied the Attorney-Client Privilege.

Henderson asserts that the Log properly designated documents under the attorney-client privilege. (AB, pp. 49-52). Henderson ignores that the attorney-client privilege must be construed narrowly. *See, e.g.*, *Whitehead v. Nevada Comm'n on Judicial Discipline*, 110 Nev. 380, 414-15, 873 P.2d 946, 968 (1994) ("Because both

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[12] Henderson designated Document Nos. 181, 184, 191, 193, 195, 199, 226, 227, 233, 234, 237, 238, 244, 245, 246, 249, 251, 252, 267, 1807, 1806, 1808, 1809, 2485, 2487, 2491, 3352, 4016, 4056, 4057, 4058, 4078, 4083, 4084, 4090, 4091, 4092, 4093, 4094, 4095, 4944, 4954, 4955, 5249, 5253, 5695, 6759, 6882, 6958, 6959, 6978, 7009, 7019, 7059, 7127, 7199, 7406, 7496, 7507, 7509, 7631, 7636, 7693, 7698, 7703, 12153, 12154, 12156, 12184, 12185, 12189, 12328, 13422, 13423, 13425, and 13428 as confidential either in part or in their entirety pursuant to the attorney-client privilege. (1 JA068-073.)

[13] Henderson designated Document Nos. 1362, 1363, 1364, 1365, 1366, 1367, 3862, 3864, 3866, 7717, and 7718 as confidential in their entirety pursuant to the deliberative process privilege. (1 JA070-073.)

the work product and the attorney-client privileges obstruct[ ] the search for truth and because [their] benefits are, at best, 'indirect and speculative,' [they] must be 'strictly confined within the narrowest possible limits consistent with the logic of [their] principles.'") (quotation and internal punctuation omitted); *see also 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.") (citation omitted).

Rather than following this guidance that the privilege must be narrowly construed, Henderson designated a broad swath of documents—or portions thereof—as confidential simply because they pertained to communications regarding the terms of Ms. Trosper's contract or because they were "made for the purposes of facilitating the rendition of professional legal services." (1 JA068-073.) This sort of conclusory and broad description does not provide the LVRJ (or this Court) with sufficient information to discern that the attorney-client privilege does indeed apply to any of these records.

In addition, this Court's proviso that the attorney-client privilege must be "'strictly confined within the narrowest possible limits consistent with the logic of [their] principles,'" when combined with NRS 239.010(3)'s admonition that any "exemption, exception or balancing of interests which limits or restricts access to public books and records by members of the public must be construed narrowly"

indicates that a governmental entity asserting the attorney-client privilege must do so as narrowly as possible to facilitate the purpose of the NPRA.

2. Henderson Did Not Properly Invoke the Deliberative Process Privilege.

As this Court explained in *DR Partners*, the deliberative process privilege "provide[s] protection to the deliberative and decision-making processes of the executive branch of government" and "shields from mandatory disclosure inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." *DR Partners*, 116 Nev. at 622, 6 P.3d at 469 (internal quotation marks omitted). Henderson asserts that for the privilege to apply, "a governmental agency must 'pinpoint an agency decision or policy' to which the documents contributed." (AB, p. 54 (quoting *DR Partners*, 116 Nev. at 623, 6 P.3d at 36).) However, this is a misstatement of the rigorous showing a governmental entity must make to assert the deliberative process privilege.

As several courts have explained, to assert the deliberative process privilege, the party resisting disclosure must meet several procedural requirements. First, the head of the agency that has control over the requested document must assert the privilege after personal consideration. *Pac. Gas & Elec. Co. v. United States*, 70 Fed. Cl. 128, 134, *modified on reconsideration*, 71 Fed. Cl. 205 (2006) (quotation

omitted). Second, the party seeking protection "must state with particularity what information is subject to the privilege." *Id.* (quotation omitted).

Third, "the agency must supply the court with 'precise and certain reasons' for maintaining the confidentiality of the requested document." *Id.* (quotation omitted); *see also U.S. E.E.O.C. v. Hotspur Resorts Nevada, Ltd.*, 2012 WL 2415541, at *2 (D. Nev. June 26, 2012) ("The claim of privilege is formally made by the head of agency after he or she has personally considered the material in question and has submitted a declaration stating the precise reasons for reserving the confidentiality of the information and identifying and describing the documents to which the privilege is asserted."); *In re McKesson Governmental Entities Average Wholesale Price Litig.*, 264 F.R.D. 595 (N.D. Cal. 2009); *U.S. E.E.O.C. v. Cont'l Airlines, Inc.*, 395 F. Supp. 2d 738, 741 (N.D. Ill. 2005) (finding that EEOC had properly invoked the privilege by having its department head by "1) make a knowing and formal claim of privilege; 2) submit a Declaration stating the precise reasons for preserving the confidentiality of the investigative report; and 3) identify and describe the documents").

Henderson did not meet these procedural requirements. Instead, the Log generally describes the withheld documents and indicates "Deliberative Process Privilege" as the basis for withholding. (*See generally* 1 JA061873.)

3. Henderson Did Not Establish the Deliberative Process Privilege.

Even if Henderson had properly complied with the requirements of the deliberative process privilege, it could not establish that any of the withheld records are subject to that privilege. The deliberative process privilege allows governmental entities to conceal public records only if the entity can prove that the relevant public records were part of a predecisional and deliberative process that led to a *specific decision or policy*. 116 Nev. 616, 623 (Nev. 2000). "To establish that [the requested 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").

As discussed in the Opening Brief (OB, p. 39), the Log and its generic descriptions failed to establish that any of the documents Henderson withheld on the basis of the deliberative process privilege involved significant policy judgments. In

addition, Henderson failed to establish "the role played by the documents" in the course of any deliberative process. *See DR Partners*, 116 Nev. at 623. 6 P.3d at 470 ("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.") (quotation omitted). Thus, given the fact that it met neither the procedural nor substantive requirements of the deliberative process privilege, Henderson failed to establish that any of the withheld documents are confidential or privileged.

During the hearing on the Petition, counsel for the LVRJ noted that Henderson's privilege log failed to establish that the documents it had designated as confidential pursuant to the deliberative process privilege were related to significant policy judgments. (3 JA433.) Rather than presenting the district court with evidence or information regarding the withheld documents, Henderson only argued that its log entries complied with this Court's guidance in *Gibbons*. (3 JA436-437.) However, simply stating that a document is confidential pursuant to the deliberative process privilege without "establishing the character of the decision, the deliberative process involved, and the role played by the documents in the course of that process" does not satisfy Henderson's heavy burden. Moreover, as noted above, Henderson entirely failed to explain how any deliberative process privilege outweighed the presumption in favor of access.

F. Henderson Did Not Establish Mootness.

Approximately four months after the LVRJ filed a notice of appeal in this case, Henderson amended Municipal Code 2.47.085. (Addendum to AB, p. 26.) Henderson asserts that this moots the LVRJ's claims for declaratory and injunctive relief because it "ensure[s] that the circumstances at issue in this appeal are not capable of repetition" by providing that (1) Henderson will only demand fees for extraordinary use if a records request requires more than ten hours for Henderson personnel to complete, and (2) the per-page fee for extraordinary use will be no more than 50 cents per page. (AB, p. 18.)

The standard for determining whether a defendant's voluntary conduct moots a case is "stringent: A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 189 (2000). As several courts have explained, a party's voluntary cessation of challenged conduct "does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012); *see also Friends of the Earth*, 528 U.S. at 189 ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." (internal

quotation marks omitted)); *accord Bell v. City of Boise*, 709 F.3d 890, 898 (9th Cir. 2013).

A party asserting mootness bears a "heavy burden" of demonstrating that, after a voluntary cessation, "the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth*, 528 U.S. at 189 (quotation omitted). "Such a burden will typically be met only by changes that are permanent in nature and that foreclose a reasonable chance of recurrence of the challenged conduct." *Tandy v. City of Wichita*, 380 F.3d 1277, 1291 (10th Cir. 2004); *see also Rosebrock v. Mathis*, 745 F.3d 963, 972 (9th Cir. 2014) (noting in the governmental policy context that mootness is more likely if evidenced by language that is unequivocal in tone, the case in question was the catalyst for the change in policy, and the policy has been in place for a long time); *Bell v. City of Boise*, 709 F.3d at 901 (deeming that courts will be less inclined to find mootness where a new policy "could be easily abandoned or altered in the future" because that type of policy is not "the kind of permanent change that proves voluntary cessation"). Henderson has not met this heavy burden because, despite its arguments to the contrary, the 2017 version of Municipal Code 2.47.085 still does not comply with the NPRA. Thus, the problems complained of in the instant matter are likely to recur.

Further, 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")).

Henderson complains that the LVRJ has not established that this issue is capable of repetition but evading review because "there is nothing in the records indicating the City has, is currently, or plans in the future to assess illegal fees to force requesters to file suit, and then reverse course in front of the District Court to avoid resolution of the propriety of its fees." (AB, pp. 20-21.) This argument ignores a critical flaw in both the 2016 and 2017 versions of Municipal Code 2.47.085: the NPRA does not permit a governmental entity to charge a requester for a privilege review. Pursuant to NRS 239.052(1), a governmental entity "may charge a fee for providing a copy of a public record." Such a fee must not exceed 50 cents per page. NRS 239.052(4). NRS 239.055(1) in turn provides that a 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…."

The 2017 version of Municipal Code 2.47.085 contemplates that Henderson can charge requesters for any time in excess of ten hours spent by Henderson employees to "search for, compile, *segregate, redact, remove*, scan, and/or reproduce records responsive to the records request." (Appendix to AB, p. 26) (emphasis added). Thus, the 2017 version of Municipal Code 2.47.085 still permits Henderson to charge requesters a fee to review and redact putatively privileged information from requested public records. Nothing in NRS 239.052 or 239.055, however, permits a governmental entity to charge a requester for privilege review.

Henderson also attempts—and fails—to meet its burden of establishing mootness by pointing to its prior responses to other public records requests. (AB, p. 21.) While Henderson's past regarding open government isn't quite as rosy as it alleges[14], that Henderson has responded to other public records requests is irrelevant to determining whether any of the questions presented in this appeal are moot. What is relevant is whether this case involves "a matter of widespread importance that is capable of repetition, yet evading review." *Cashman Equip. Co. v. W. Edna Assocs., Ltd.*, 132 Nev. Adv. Op. 69, 380 P.3d 844, 853 (2016) (quotation omitted). This case fits squarely within the exception to the mootness doctrine: Henderson Municipal

[14] (*See, e.g.*, 3 JA333-36 (February 17, 2015 Review-Journal article regarding Henderson's directive to employees to not communicate with a Review-Journal reporter).)

Code 2.47.085—in both its 2016 and 2017 iterations—impermissibly allows Henderson to pass the costs of meeting its burden under the NPRA to the requester by allowing it to charge for having its employees review public records to determine whether any information is confidential.

Moreover, as the Ninth Circuit warned in *Bell v. City of Boise*, the mootness doctrine is less likely to apply where a new policy "could be easily abandoned or altered in the future" because that type of policy is not "the kind of permanent change that proves voluntary cessation." 709 F.3d at 901. Henderson has the ability to change Municipal Code 2.47.085 at any time, as evidenced by the fact that Henderson amended it while this appeal was pending. Thus, in addition to the fact that the 2017 amendment to Municipal Code 2.47.085 does not fix its most fundamental issue, there is no guarantee that Henderson will not alter the Code again.

Finally, Henderson is estopped from arguing mootness given that, after the LVRJ filed suit, then-Henderson City Attorney Josh Reid stated in a December 5, 2016 letter that Henderson was interested in having the courts resolve the parties' dispute over Henderson's fee demand. (See 2 JA234 ("The City is interested in having the courts provide clarity over the meaning and application of NRS 239.055.").) Given Henderson's stated interest in judicial review of this question, it should not now be permitted to argue that the issue is moot. *See In re Harrison Living Trust*, 121 Nev. 217, 223, 112 P.3d 1058, 1061-62 (2005).

G. The LVRJ Is Not Prohibited From Requesting Declaratory and Injunctive Relief.

In addition to requesting the district court issue a writ of mandamus requiring Henderson to provide the requested public records, the LVRJ requested in its Amended Petition that the district court grant it (1) injunctive relief prohibiting Henderson from applying Municipal Code 2.47.085 and its Public Records Policy "to demand or charge fees in excess of those permitted by the NPRA," (2) declaratory relief stating that the Municipal Code and Public Records Policy are "invalid to the extent they provide for fees in excess of those permitted by the NPRA," and (3) declaratory relief limiting the fees Henderson can charge for "extraordinary use" to 50 cents per page and limiting Henderson from demanding fees for attorney review. (1 JA40-41.) Henderson asserts that these requests for declaratory and injunctive relief exceed the scope of permissible relief, arguing that the only relief available to requesters is that provided in NRS 239.011. (AB, pp. 22-25.) However, the LVRJ properly requested and is entitled to the declaratory and injunctive relief it seeks.

1. The LVRJ Is Entitled to Declaratory Relief.

Henderson cites heavily to this Court's opinions in *Stockmeier v. Nevada Dept. of Corrections Psychological Review Panel*, 124 Nev. 313, 183 P.3d 133 (2008) and *Builders Ass'n of Nev. v. Reno*, 105 Nev. 368, 776 P.2d 1234 (1989) for

the proposition that the only remedies available to a petitioner are those set forth in NRS 239.011. (*See* AB, pp. 23-25.) However, as this Court recently explained in *Nuleaf CLV Dispensary, LLC v. State Dep't of Health & Human Servs., Div. of Pub. & Behavioral Health*, NRS 30.040 specifically provides that a person "whose rights, status or other legal relations are affected by a statute, ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status or other legal relations thereunder." 134 Nev. Adv. Op. 17, 414 P.3d 305, 308 (2018) (quoting NRS 30.040(1)); *see also* NRS 30.030 ("Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for.")

The LVRJ is entitled to declaratory relief from this Court regarding the validity of Henderson Municipal Code 2.47.085. As discussed above, it contains a provision authorizing Henderson to charge fees not just for providing copies of documents responsive to a records request, but also for any time spent in excess of ten hours for, *inter alia*, compiling, segregating, and redacting those responsive documents. (Appendix to AB, p. 26.) As detailed above, charging a requestor for the time expended by Henderson in conducting a privilege review and segregating records conflicts with the NPRA's mandate that the governmental entity has the

burden of establishing whether requested records are privileged. *See* NRS 239.0113(2) (mandating that "the governmental entity has the burden of proving by a preponderance of the evidence that the public book or record, or a part thereof, is confidential"). Essentially, Municipal Code 2.47.085 requires a requester to pay Henderson to meet its burden. This is fundamentally at odds with the purpose of the NPRA—fostering democratic principles by ensuring swift access to public records. NRS 239.001(1).

Thus, although NRS 239.011 outlines remedies a requester may seek for a governmental entity's refusal to produce public records, it does not limit a court's discretion to grant supplemental declaratory relief.

2. The LVRJ Is Entitled to Injunctive Relief.

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, again, to facilitate the public's access to public records—as well as the statutory cap set by NRS 239.055 on the maximum fee an entity can charge for providing the records. The NPRA is a clear expression of the Nevada legislature's intent to develop a comprehensive statutory scheme to facilitate access to public records and has set clear limits on what and how much a governmental entity can charge a requestor for records. The clear intent of the legislature was to limit such charges as to those only related to the production of records, not the

governmental entity's review of the requested records for privilege or confidentiality. Accordingly, the LVRJ may properly request injunctive relief preventing Henderson from charging requesters for any privilege review of public records.

V. CONCLUSION

For all these reasons, and for the reasons set forth in the LVRJ's Opening Brief, this Court should declare that Henderson is not permitted under the NPRA to charge requesters a fee for searching for, reviewing, and redacting records. 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, as it has not met its burden of proving by a preponderance of the evidence that any portion of the records are confidential.

DATED this the 23rd day of July, 2018.

/s/ Margaret A. McLetchie

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CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 28.2:

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

I further 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 it has been prepared in a proportionally spaced typeface (14 point Times New Roman font).

This brief exceeds the type-volume limitation of NRAP 32(a)(7)(ii) because it contains 9,264 words. A Motion for Leave to File Reply in Excess of the Page/Type Volume Limitation is submitted along with this brief.

DATED this the 23rd day of July, 2018.

/s/ Margaret A. McLetchie

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CERTIFICATE OF SERVICE

I certify that I am an employee of McLetchie Shell LLC and that on this 23rd day of May, 2018 the APPELLANT'S REPLY 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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ADDENDUM

ADDENDUM

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

BLACK JACK BONDING, INC., Petitioner, vs. LAS VEGAS METROPOLITAN POLICE DEPARTMENT, and DOUGLAS C. GILLESPIE, Respondents.	CASE NO. A-12-670077-W DEPT. NO. XXX

ORDER GRANTING IN PART

MOTION FOR ISSUANCE OF A WRIT OF MANDAMUS

Petitioner Blackjack Bonding Inc.'s Motion for Issuance of Writ of Mandate having come on its appointed scheduled time for hearing on November 26, 2012 and again on the 29th day of January, 2013, the Honorable Judge Jerry A. Wiese presiding, Petitioner BLACKJACK BONDING, INC. appearing by and through their attorneys, TRACY A. DIFILLIPPO, ESQ. and CONOR FLYNN, ESQ., and Respondents LAS VEGAS METROPOLITAN POLICE DEPARTMENT ("LVMPD"), and DOUGLAS C. GILLESPIE, appearing by and through their attorney, THOMAS D. DILLARD, JR., ESQ. and the Court having read and considered all of the papers and pleadings on file and being fully advised in the premises, and good cause appearing therefor, the Court hereby grants the motion in part and makes the following findings of fact and conclusions of law:

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I.

PROCEDURAL HISTORY AND FINDINGS OF FACT

1. On November 26, 2012, the Court heard oral arguments on Petitioner's motion to issue a writ of mandamus and compel Respondents to produce logs of collect phone calls made by all inmates in the Clark County Detention Center ("CCDC") in 2011 and 2012 to all bail agents through use of the phone system installed in CCDC and operated by a Century Link, a private corporation who has contracted with Respondents.

2. The contract between Century Link and Respondents allows Respondents to receive a portion of the collect charges.

3. Upon inquiry of the Court at the hearing, counsel for Petitioner represented to the Court that the information was not needed for any marketing reasons but rather to verify phone calls made through the system intended to be received by Respondents were working properly.

4. Upon further inquiry of the Court at the hearing, counsel for Respondents represented that the subject logs are not kept by Respondents in the ordinary course of business and Respondents were unaware of the ability to generate such logs until after filing of Petitioner's motion. Respondents counsel further represented that they were informed by Century Link that the logs could be generated by them but they were not certain whether Century Link would assess any charges for running and producing the 2 year phone call log.

5. The Court, upon recommendation from Respondents, declined to order the production of the documents at that time but rather order that access be given to Respondents to enter CCDC under supervision and test to see that all phones available to inmates are working properly by placing a call to Petitioner's phone number and checking to see that it properly connects to that number.

6. The Court further ordered that the manner be continued until January 29, 2013 to report on the CCDC site inspection and the phone check.

7. On January 29, 2013, the Court heard from the parties as to the results of the site inspection and further heard oral arguments on the motion to produce two years of CCDC inmate phone records.

8. Petitioner's counsel reported that they had access to all phones in operation at the time and all phone calls to Respondents' office worked appropriately; however, counsel reiterated it still wanted to receive the phone logs for the two year period to check to see if the phones were working on that particular day.

9. Upon inquiry from the Court of exactly what information was still requested, Petitioner's counsel limited the request to phone calls just made by inmates to a list of all bail agents in Clark County for the calendar years of 2011 and 2012 (but not limited to Petitioner's bail agents alone).

10. Petitioner's counsel further represented that it would accept redaction of identification numbers and the names of the CCDC inmates and Petitioner would be responsible for any costs associated with producing this report.

11. Respondents argued the concern raised by Petitioners has been extinguished through the site inspection and the request seeks records that are not public for purposes of NRS Chapter 239.

II.

ORDER

1. The Court, finds upon balance, that the requested records request, as limited by Petitioner, falls under the public records definition of NRS Chapter 239 – although the question is a close one and the public interest in these documents is not weighty.

2. Petitioners shall be responsible for all costs associated with the production of this report charged by Century Link to Respondents, if any.

3. The report produced shall be in the form capable to be produced by Century Link without Petitioners having to convert the information to any particular format.

4. The Court will afford Respondents two weeks from the entry of this order to produce to Petitioners the requested report containing information of all phone calls placed by CCDC inmates in 2011 and 2012 to the list of bail agents currently posted in CCDC.

///

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5. The names and identification numbers of the inmates shall be redacted from this report.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that

DATED this 5th day of ~~February~~ March, 2013.

IT IS SO ORDERED.

DISTRICT COURT JUDGE

Submitted by:

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