IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY SCHOOL DISTRICT, Appellant. vs. LAS VEGAS REVIEW-JOURNAL, Respondent.	Supreme Court No. 73525 District Court No. A750151 District Court Dept. No. XVI

APELLANT'S OPENING BRIEF

Appeal from Eighth Judicial District Court, Clark County, Order Granting Writ of Mandamus as to Withheld Records and Requiring Depositions

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JURISDICTIONAL STATEMENT

This is an appeal from the July 11, 2017, Eighth Judicial District Court's final Order Granting Writ of Mandamus as to Withheld Records and Requiring Depositions. Appellant's App. pp. 286-302. The Notice of Entry of Order was filed on July 12, 2017. Appellant's App. pp. 283-285. Clark County School District's, (hereinafter "CCSD") Notice of Appeal was filed in the district court on July 12, 2017. Appellant's App. pp. 303-304. The July 11, 2017, Order constitutes a final order or judgment in the district court case providing this Court appellate jurisdiction pursuant to Nev. R. App. P. 3A(b)(1).

ROUTING STATEMENT

This case involves the interpretation of the Nevada Public Records Law, and therefore may be considered a case appropriate to be retained by the Nevada Supreme Court under NRAP 17(a)(13) and (a)(14) (2015 version effective at time of filing appeal through September 30, 2017) or NRAP 17(a)10 and (a)(11) (2017 version effective as of October 1, 2017). The principal issue at bar is whether the internal investigative materials, which consist of an investigative file and two (2) memorandums and recommendations compiled and drafted by CCSD's Office of Diversity and Affirmative Action, (hereinafter, "ODAA"), pertaining to allegations of

discriminatory conduct by a school board trustee against CCSD employees must be disclosed pursuant to a public records request under NRS Chapter 239. Appellant App. pp. 300 at ¶88.

This matter involves important public policy concerns regarding the right of public employees to raise concerns of all forms of discriminatory[1] conduct without the loss of confidentiality and with it fear of retaliation from the subject of the complaint. These issues are presented in the context of a public records request made to CCSD by the Las Vegas Review-Journal, (hereinafter "LVRJ").

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1) Whether the district court erred in holding that the investigative materials of CCSD's ODAA related to the investigation of Trustee Kevin Child should be disclosed under the Nevada Public Records Law when the documents in the file are confidential and/or privileged.

[1] Per the appealed Order, it appears the district court's position is that discrimination is separate and distinct from harassment and sexual harassment rather than the umbrella under which all forms of discrimination fall. Appellant's App. pp. 296 at ¶72. And therefore all the investigative materials must be produced under CCSD Regulation 4110(X) as the same is inapplicable because it only applies to discrimination but not harassment or sexual harassment. Id. The district court's interpretation of discrimination is inconsistent with the U.S. Equal Employment Opportunity Commission, which lists twelve (12) distinct types of discrimination including harassment and sexual harassment. https://www.eeoc.gov/laws/types/

2) Whether the district court erred in holding that only the names of "direct victims of sexual harassment or alleged sexual harassment, students, and support staff" may be redacted from the investigative file of CCSD's ODAA related to the investigation of Trustee Kevin Child. Appellant's App. p. 300 at ¶88.

3) Whether the district court erred when it ordered the release of CCSD's ODAA file related to the investigation of Trustee Kevin Child, thereby stripping employees of confidentially afforded to other similarly situated government employees and exposing CCSD employees to potential retaliatory action or contravention of the law including agency guidance issued by the U.S. Equal Employment Opportunity Commission.

STATEMENT OF THE CASE

A. Nature of the case

This is an appeal from a decision by Eighth Judicial District Court, Judge Timothy C. Williams presiding, ruling on an amended petition for writ of mandamus and directing CCSD to provide the entire investigative file and memoranda and recommendations from CCSD's ODAA regarding allegations of discriminatory conduct by school board trustee Kevin Child.

B. Course of Proceedings

This matter arose under an amended petition for writ of mandamus under the Nevada Public Records Law, Chapter 239 of the Nevada Revised Statutes. No discovery was undertaken; rather the matter was tried on briefs and oral arguments of the parties.[2] The district court also reviewed the investigative file and memoranda and recommendations at issue *in camera.*[3] Upon filing of the Notice of Entry of Order on July 12, 2017, CCSD filed its appeal of the Order dated July 11, 2017. Appellant's App. pp. 283-302.

C. Disposition Below

At the hearing on June 27, 2017, the relevant issue as to the instant appeal was LVRJ's request for the investigative file and memoranda and recommendations of the ODAA relative to complaints about Trustee Kevin Child.[4]

On July 11, 2017, the Honorable Timothy C. Williams, District Judge, filed an Order Granting Writ of Mandamus as to Withheld Records. Appellant's App. pp. 286-302. CCSD is appealing the July 11, 2017, Order that requires disclosure of the "withheld documents" which consist of the

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[2] There were two depositions conducted 2. 5 months after the Order appealed was issued relative to how electronic searches were performed rather than the issue at bar in this appeal, which is the investigatory materials.

[3] The ODAA investigative file, memoranda and recommendations at issue are available upon request for in camera review by the Nevada Supreme Court.

investigative file and two (2) memoranda and recommendations dated October 19, 2016 and May 26, 2017[5] prepared by CCSD's ODAA. Appellant's App. p. 300 at ¶88.

The Order allows for limited redacting to include direct victims of sexual harassment or alleged sexual harassment, students and support staff, only. Id. Victims and witnesses of all other forms of discrimination are not provided any protections whatsoever. Id.

In particular, the District Court's Order requires the release of notes and the "Key" to employee names and memoranda and recommendations including multiple drafts of the memoranda prepared by CCSD's ODAA. The documents ordered to be released breakdown as follows:

1) The notes include handwritten notes dated from September 7, 2016 – January 26, 2017, which identify nineteen (19) people by name of which only four (4) names would be redacted under the terms of the district court Order;
2) Typed notes dated from January 28, 2016 through October 4, 2016, and identifies twenty-three (23) employees by

[5] Multiple drafts of the investigative reports are contained in the ODAA file including handwritten comments by CCSD counsel all of which has been ordered to be disclosed by the district court.

letters of which only four (4) of the employees would qualify for redaction of their names;

3) Additional typed notes titled, "Case Notes – Confidential" dated from January 28, 2016 through May 25, 2017. These notes identify employees using letters A-Z and AA-CC. Per the terms of the twenty-nine (29) names only eight (8) would be redacted;

4) A single page "Key" is used by ODAA on the typed notes and "Confidential Notes" using letters to identify the employees and protect confidentiality;[6]

5) Memoranda and recommendations dated October 19, 2016[7] and May 26, 2017, including four (4) drafts;

6) Complaint of harassment against Trustee Child dated May 5, 2017 and typed notes from complainant dated May 22, 2017; and

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[6] The district court has ordered that the "Key" be produced subject to the limited redactions. The key identifies twenty-nine (29) employees yet only eight (8) qualify for the district court's redacting as support staff members or direct victims of sexual harassment or alleged sexual harassment. Additionally, the handwritten notes include ten (10) names not included in the "Key" whose identities may not be redacted under the district court Order. In total the investigative materials include thirty-nine (39) names of which only nine (9) are allowed to be redacted.

[7] LVRJ published the October 19, 2016, report and recommendations online on December 23, 2016. Appellant's App. pp. 48-56.

7) Employee typed notes of alleged discriminatory conduct of Trustee Child during school visits dated September 20, 2014 through April 14, 2017.

D. Statement of Facts

On December 5, 2016, LVRJ published its first article relative to the allegations of Trustee Child's conduct and CCSD's response titled, "CCSD bars Trustee Child from making school visits," Appellant's App. pp. 328-331.[8] This same article, in its electronic version, included the memo from

[8] This Court may take judicial notice of newspaper articles published by LVRJ regarding Mr. Child's alleged misconduct within CCSD and the steps taken by CCSD to protect its employees for the limited purpose of what the articles contain (but not for determining the truth of those articles) pursuant to NRS 47.130 and case law. Appellant's App. at pp. 328-374, published news article. Courts may take judicial notice of publications introduced to "indicate what was in the public realm at the time, not whether the contents of those articles were in fact true." *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. Cal. Jan. 14, 2010) citing *Premier Growth Fund v. Alliance Capital Mgmt.*, 435 F.3d 396, 401 n.15 (3d Cir. 2001); accord *Heliotrope Gen. Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n.l 18 (9th Cir. 1999) (taking judicial notice "that the market was aware of the information contained in news articles submitted by the defendants.") "And courts may take judicial notice of documents such as the newspaper articles at issue here for the limited purpose of determining which statements the documents contain (but not for determining the truth of those

Superintendent Pat Skorkowsky also dated December 5, 2016, with the subject, "Guidelines for Trustee Visits." Appellant's App. at p. 329.

Also, on December 5, 2016, LVRJ submitted an initial request for public records (which was supplemented on December 9). Appellant's App. pp. 58 & 60. The district court Order dated February 22, 2017, relative to the December 2016, record requests are not under appeal. CCSD produced responsive documents on its own accord and also in compliance with the district court's Order.

On or about December 23, 2016, LVRJ obtained the "four-page report dated Oct. 19", which is the memorandum and recommendations prepared by CCSD's ODAA that LVRJ would later request again as part of its February 10, 2017, public records request related to Trustee Child. Appellant's App. pp. 48-56 & 62-65. LVRJ published the October 19, 2016, memo online on December 23, 2016, as well. Appellant's App. at 48-56.

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statements)." *United States ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805, 812 (11th Cir. Fla. Jan. 16, 2015) citing *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1278 n. 10 (11th Cir. Ga. Sept. 3, 1999). Additionally, LVRJ made articles published on December 23, 2016 and May 23-25, 2017, part of the court record in district court.

On February 10, 2017, LVRJ submitted a new detailed NPRA request, which included a request for the investigative file at issue in the instant appeal. Appellant's App. pp. 62-65.

In the February records request, LVRJ formally requested the entire investigative file at issue in this case including the four-page report dated Oct. 19 they already were in possession of. Appellant's App. pp. 53-56 & 62-65. The February request was in excess of three (3) pages long and contained 15 distinct categories of records regarding Trustee Child in addition to investigatory materials of all types. Appellant's App. pp. 62-65.

On February 17, 2017, CCSD replied to LVRJ's February 10 NPRA request stating additional time was necessary to locate records and a reply was anticipated by March 3. Appellant's App. pp. 67-69. The February 17 response was on the 5th business day as mandated by NRS 239.0107(1).

LVRJ filed its Amended Application on March 1, 2017. Appellant's App. pp. 1-20.

On March 3, 2017, as indicated in the February 17 correspondence, CCSD produced records responsive to the February 10 NPRA request and included specific objections and privileges. Appellant's App. pp. 102-104.

LVRJ filed its Opening Brief on its Writ of Mandamus in District Court on March 29, 2017. Appellant's App. pp. 21-69. CCSD filed its

Answering Brief on April 13, 2017, and the Reply Brief was filed by LVRJ on April 24, 2017. Appellant's App. pp. 70-143.

On May 30, 2017, CCSD produced an updated privilege log to chambers per the District Court's directive in open court on May 9, 2017. Appellant's App. pp. 174-184.

On June 5, 2017, the District Court issued an Order directing an updated privilege log be produced to both the District Court and LVRJ by May 30, 2017. Appellant's App. at 144-154.

CCSD provided LVRJ the privilege log previously provided to chambers on June 6, 2017.

On June 16, 2017, CCSD provided LVRJ a letter dated May 31, 2017, from Superintendent Pat Skorkowsky to Trustee Child, which reiterated prior guidelines and contains additional directives to the trustee. Appellant's App. p. 187 at 3:19-23 & Appellant's App. pp. 326-327.

On June 26, 2017, CCSD provide LVRJ two (2) additional letters dated November 30, 2016 and April 24, 2017, from Superintendent Pat Skorkowsky to Trustee Child addressing the trustee's conduct. Appellant's App. p. 187 at 3:23-4:11 & Appellant's App. pp. 322-323 & 325.

On June 27, 2017, oral arguments were heard before District Court Judge Timothy C. Williams. Appellant's App. pp. 185-282.

Judge Williams issued an Order following the June 27th hearing on July 11, 2017, which is now under appeal before this Court. Appellant's App. pp. 283-304.

STANDARD OF REVIEW

A writ petition arising from a public records request is generally reviewed for an abuse of discretion. *Las Vegas Taxpayer Comm. v. City Council*, 125 Nev. 165, 208 P.3d 429, 433-34 (2009); see also *Veil v Bennett*, 121 Nev. Adv. Op. 22, 348 P.3d 684, 686 (2015). Nonetheless, this Court reviews the district court's decision de novo when the subject of the appeal on the writ petition when the issue is one of statutory construction. *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc*., 131 Nev. ___, 343 P.3d 608 (Nev. 2015); see also *State v. Barren*, 128 Nev. Adv. Op. 31, 279 P.3d 182, 184 (2012).

SUMMARY OF ARGUMENT

This Court should reverse the district court's Order to turn over the investigative material produced by the ODAA under any one or combination of the following basis:

1) CCSD has a duty under federal law to investigate allegations of discrimination and federal guidelines and case law support maintaining confidentiality for various reasons including to not

produce a chilling effect on future reporting of discrimination by employees and avoiding stigma and embarrassment to witnesses and victims;

2) Under CCSD Regulation 4110(X) investigations of discrimination shall remain confidential but for limited exceptions that do not apply under the facts of this case;

3) The investigative file should remain confidential under CCSD Regulations 1212 and 4311 as personnel information, which would be consistent with how the same information would be handled for State employees under NAC 284.718(5) and the "unless otherwise confidential by law" portion of NRS 239.010(1);

4) The investigative file and reports compiled by the ODAA are confidential under the deliberative process privilege because the recommendations and opinions of the ODAA were predecisional and deliberative while serving as the basis of later policies regarding Trustee Child's visits to schools and administrative offices. Furthermore, the file itself is intertwined with the final reports to such an extent to disclose either the file or the reports but not the other has the effect of in essence disclosing both;

5) Even if this Court determined the final memoranda, only, were protected under the deliberative process privilege, the investigative file created by the ODAA should remain confidential as non-record materials under NAC 239.051 and NAC 239.705 because they "do not serve as the record of an official action of a local government entity." NAC 239.051;

6) The investigative file and reports should remain confidential under the *Donrey* balancing test because the concerns are particularized rather than hypothetical and the interests of non-disclosure outweigh the general policy in favor of open government. This is particularly true in the case where the LVRJ has already reported extensively on the alleged misconduct of Trustee Child and the potential damage to employees and CCSD is great. *Donrey of Nevada, Inc. v Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990); and

7) Alternatively, even if this Court were to rule disclosure is required, it should be done in a manner consistent with prior precedent that would allow for disclosure of the final memoranda, only. Additionally, redactions should be allowed for all information that identifies complainants and witnesses so as to ensure future

reporting of misconduct in order to protect employees from retaliation, stigma and embarrassment.

ARGUMENT

This matter involves important public policy concerns regarding the right of public employees to raise concerns of all forms of discrimination[9] including harassment and sexual harassment without the loss of confidentiality and the resultant chilling effect. These issues are presented in the context of a public records request made to CCSD by the Las Vegas Review-Journal ("LVRJ") under the provisions of NRS Chapter 239.

On July 11, 2017, the district court filed an Order Granting Writ of Mandamus as to Withheld Records. Appellant's App. pp. 283-302. In its Order, the district court directed CCSD to produce "withheld documents", which consist of the entire investigative file and memoranda and recommendations[10] and stated: "CCSD may redact the names of direct victims of sexual harassment or alleged sexual harassment, students, and support staff." Appellant's App. pp. 300 at ¶ 88 (emphasis added). Pursuant

[9] See https://www.eeoc.gov/laws/types/ for list of categories of discrimination.

[10] The preceding is an important distinction between the matter at bar and cases such as *Donrey* because unlike *Donrey* in this case LVRJ sought and the district court ordered release of the entire investigative file rather than memoranda and recommendations, only.

to a February 22, 2017 Order: "CCSD may not make any other redactions, and must unredact the names of schools, all administrative level employees, including but not limited to deans, principals, assistant principals, program coordinators, and teachers." Appellant's App. p. 8 at ¶ 35.

If upheld, the district court's Order will result in the release of the identity of CCSD employees who were victims or witnesses to allegedly discriminatory conduct including any teacher, principal, counselor, dean, or district administrator unless they were direct victims of sexual harassment or alleged sexual harassment. The district court's decision is contrary to the guidelines of the Equal Employment Opportunity Commission, CCSD regulations 4110 (X), 1212 and 4311, the deliberative process privilege, non-record materials as defined by NAC 239.051 and NAC 239.705 and the *Donrey* balancing test and will result in CCSD employees being chilled from future reporting of alleged discrimination, which will promote the continuation of discriminatory conduct.

A. The investigative file should remain confidential due to CCSD's obligation under federal law to investigate and protect employees with regard to unlawful discrimination and harassment

It is an unlawful employment practice for an employer to discriminate against an individual with regard to the terms and conditions of that employment on the basis of the employee's race, color, religion, sex, or

national origin. 42 U.S.C. § 2000e-2(a)(l). In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the Supreme Court held that sexual harassment constitutes sex discrimination in violation of Title VII. Courts have recognized different forms of sexual harassment. In "hostile work environment" cases, employees work in offensive or abusive environments. *Ellison v. Brady*, 924 F.2d 872, 875 (9th Cir. 1991). "[A] hostile environment exists when an employee can show (1) that he or she was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, (2) that this conduct was unwelcome, and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Id.* at 875-76.

"[E]mployers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known." *Dawson v. Entek Int'l*, 630 F.3d 928, 940 (9th Cir. 2011) (alteration in original) (quoting *Ellison*, 924 F.2d at 881)).

It is well-established that "notice of the sexually harassing conduct triggers an employer's duty to take prompt corrective action that is reasonably calculated to end the harassment." *Swenson v. Potter*, 271 F.3d 1184, 1192

(9th Cir. 2001). (internal quotation marks omitted). **Once an employer is on notice of a sexual harassment complaint, it must conduct an investigation.** *Id*. at 1193 (emphasis added).

"Employers should impose sufficient penalties to assure a workplace free from sexual harassment. In essence, then . . . the reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment." *Ellison*, 924 F.2d at 882. Employers therefore have a duty to undertake a remedy that is likely to be effective. *Fuller v. City of Oakland*, 47 F.3d 1522, 1528-29 (9th Cir. 1995). "In evaluating the adequacy of the remedy, the court may also take into account the remedy's ability to persuade potential harassers to refrain from unlawful conduct." *Ellison*, 924 F.2d at 882.

1. Liability for the conduct of non-employees

The Ninth Circuit has held that an employer may be held liable for sexual harassment on the part of a private individual, such as a casino patron, where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct. *Folkerson v. Circus Circus Enterprises, Inc.*, 107 F.3d 754, 756 (9th Cir. 1997); *Trent v. Valley Electric Ass'n, Inc.*, 41 F.3d 524, 526 (9th Cir. 1994) (when outside trainer harasses employees, company may be

liable under Title VII); *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1028 (D. Nev. 1992) (where employer mishandled employees repeated complaints about harassment from casino customers, employer either ratified or was complicitous in harassment); 29 C.F.R. § 1604.11(e) (employers may be liable for sexual harassment by nonemployees "in the workplace, where the employer . . . knows or should have known of the conduct, and fails to take immediate and appropriate corrective action.").

a) Investigation duties and confidentiality

The United States Equal Employment Opportunity Commission ("EEOC") has stated **employers are obligated to investigate and address instances of harassment, including sexual harassment. The EEOC has also stated employees who are subjected to harassment frequently do not complain to management due to fear of retaliation**. *See* U.S., Equal Employment Opportunity Commission, EEOC Notice No. 915.002, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, at § V(D)(1) re Failure to Complain (dated 6/18/99, in effect until rescinded or superseded) (emphasis added); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998).

Regarding confidentiality of an investigation, EEOC has stated that "[a]n employer should make clear to employees that it will protect the

confidentiality of harassment allegations to the extent possible. An employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses. However, **information about the allegation of harassment should be shared only with those who need to know about it. Records relating to harassment complaints should be kept confidential on the same basis**." *See* EEOC Notice No. 915.002, at § V(C)(1) re Confidentiality (emphasis added).

"To assure employees that such a fear is unwarranted, the employer must clearly communicate and enforce a policy that no employee will be retaliated against for complaining of harassment." *See* EEOC Notice No. 915.002, at § V(D)(1) re Failure to Complain.

In a case involving the Freedom of Information Act, the Ninth Circuit found that the authors of communications sent to a federal agency complaining about violations of law had a cognizable personal privacy interest under 5 U.S.C. § 552(b)(6) (relevant factors included the agency's confidentiality policy). *Prudential Locations LLC v. United States Dep't of Housing and Urban De*v., 739 F.3d 424, 429-34 (9th Cir. 2013). **The court also found the authors faced a significant risk of harassment, retaliation, stigma, or embarrassment if their identities were revealed**. There was no

cognizable public policy interest served by revealing their identities, so it would have constituted a clearly unwarranted invasion of personal privacy under Exemption 6. *Id*.; *Cameranesi v. United States Dep't of Defense*, 839 F.3d 751 (9th Cir. 2016) (names of foreign students and instructors were exempt under FOIA Exemption 6, because disclosure would constitute a clearly unwarranted invasion of personal privacy; **disclosure could cause harassment, stigma, or violence which is exactly the type of risk that courts have recognized as nontrivial**) (emphasis added).

b) Based upon the above federal authorities, the court should find in this case that the investigatory information is confidential and not required to be disclosed.

Here, as Trustee Child is a corporate officer and not subject to internal employer corrective action, the only manner in which CCSD may act to fulfill its obligation to protect its employees against potential retaliation is to withhold the identity of the employees and withhold the internal information received or gathered by CCSD in the course of its investigation. CCSD and the public have an interest in a strong system to address complaints of discrimination and harassment that encourages reporting without fear of retaliation.

CCSD employees have expressed legitimate fear of being identified and/or retaliated against by Trustee Child both **verbally** to Cedric Cole

(Executive Manager, ODAA) and **in writing** in emails previously produced to LVRJ in this matter. Appellant's App. pp. 106-111 (One employee states: "Again, we are hesitant to report these issues because we don't want to alienate our Trustee." Another employee requests: "Could you please keep this statement completely anonymous?" Yet another employee expresses concerns with an environment that is not "supportive." Another document reveals similar concerns of intimidation by a member of the public.)[11] Therefore, based upon the above federal law and EEOC guidance related to discrimination and harassment, the investigatory information should remain confidential in this case.

B. The documents sought are confidential pursuant to legally enforceable regulations

1. CCSD regulations are laws with legal effect

The purpose of NRS Chapter 239 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**." NRS 239.001(1) (emphasis added).

NRS 239.010(1) states:

> Except as otherwise provided in this section and NRS 1.4683, . . . and section 2 of chapter 391, Statutes of Nevada 2013 and **unless**

[11] See also Withheld Documents at 210 upon request of the Court for in camera review.

> **otherwise declared by law** to be confidential, all public books and public records of a governmental entity must be open at all times . . . (emphasis added).

Federal courts have repeatedly held the terms "law" or "laws" are far broader than just statutes and includes regulations. "[L]aws includes regulations. We generally assume that when Congress uses different words in a statute, it intends them to have different meanings." *Save Our Valley v. Sound Transit*, 335 F.3d 932, 960 (9th Cir. 2003) (citing *S.E.C. v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003)). "Congress used the phrase 'Constitution and laws' rather than 'Constitution and statutes,' yet referred elsewhere in the same sentence to "any statute, ordinance, regulation, custom or usage . . . ." *Id*. (citing 42 U.S.C. § 1983).

> While today's large federal bureaucracy did not exist when § 1983 was enacted in 1874, the 1874 Congress was quite aware, as § 1983 itself indicates, that there are different sources of law, including regulations. In this context, the terms "laws" and "statutes" must have different meanings. Further, the term "laws" necessarily has a broader meaning than "statutes," not an equivalent or narrower meaning. Indeed, the Supreme Court has rejected narrow interpretations of the phrase "and laws" in the past: In *Maine v. Thiboutot*, 448 U.S. 1, 7, 65 L. Ed. 2d 555, 100 S. Ct. 2502 (1980), the Court made clear that the phrase does not encompass only civil rights laws but includes rights secured by other federal laws as well. *Id.* at 10. Applying the *Chrysler* presumption, "laws" in § 1983 includes regulations as well.

Save Our Valley, 335 F.3d at 960-961.

The Nevada Legislature is tasked with the duty of creating and passing statutes that are then enacted by the Governor. In fulfilling this duty, the legislature frequently creates enabling statutes granting rule making authority to State governmental agencies, local governments and boards, such as a board of trustees of a school district, with the authority to create legally enforceable regulations. Rulemaking powers permit, and sometimes require, the agency or board to establish and enforce regulations.

CCSD is a political subdivision of the State of Nevada. *See* NRS 386.010(2). The State of Nevada enacted an enabling statute in 1973 giving each board of trustees of a school district, "such reasonable and necessary powers, not conflicting with the constitution and the laws of the State of Nevada, as may be requisite to attain the ends for which the public schools are established and to promote the welfare of school children. . . " NRS 386.350; *see also CCSD et al v. Beebe*, 91 Nev. 165, 533 P.2d 161 (1975) and *Bartlett et al. v. Board of Trustees of the White Pine County School District*, 92 Nev. 347, 349, 550 P.2d 416 (1976) each citing NRS 386.350.

Though the Nevada Supreme Court has rarely weighed in on matters involving regulations created by the board of trustees of a school district pursuant to NRS 386.350, it is clear that school regulations, including those of CCSD, are laws with legal effect. If a school district's regulations did not

have legal effect, the Nevada Supreme Court would not have considered the same in cases such as *CCSD et al v. Beebe*, 91 Nev. 165, 533 P.2d 161 (1975).

a) The documents are confidential investigatory information under CCSD Regulation 4110

Pursuant to the authority bestowed upon school district board of trustees by the legislative branch, specifically, NRS 386.350, CCSD trustees have enacted numerous regulations. These include CCSD Regulation 4110 which sets forth the procedures and requirements related to employment discrimination, harassment, and sexual harassment of employees. This regulation is entirely consistent with the federal authorities related to unlawful discrimination or harassment cited above and the Nevada Administrative Code regarding "Personnel Information" of State employees. NAC 284.718(5). Regulation 4110(X) states:

> All information gathered by the District in the course of its **investigation of an alleged unlawful discriminatory practice will remain confidential** except to the extent necessary to conduct an investigation, resolve the complaint, serve other significant needs, or comply with law.

CCSD Reg. 4110 (emphasis added).

Therefore, the information gathered by CCSD's ODAA must remain confidential if the investigation was done in regard to alleged discriminatory conduct unless the information is needed to conduct an investigation, resolve the complaint, serve other significant need, or comply with the law.

Here, there is no dispute the investigation was conducted based on allegations of discriminatory conduct and that the information does not warrant disclosure in order to conduct an investigation or resolve a complaint. There is no additional investigation such as law enforcement nor is the purpose of disclosure to resolve any complaint; rather it is a public records request. Thus, the records should remain confidential unless disclosure serves "other significant needs" or it is necessary to "comply with law."

At the district court level, the only "significant other need" identified was the public's right to know about the conduct of an elected official. Appellant's App. pp. 259-261 at 75:21-77:2. The simple fact the party alleged to have committed discriminatory conduct versus CCSD employees is an elected official does not create "significant other needs", which warrant disclosure of the investigative materials. To rule the CCSD Board of School Trustees meant "significant other needs" to mean compliance with a public records request when doing so would force CCSD to violate confidentiality of Title VII investigations is not supported by the record or any precedent and is thus arbitrary and capricious. The ruling also affords CCSD employees less confidentiality and work place protections than similarly situated State employees. See part b. in this section. The preceding is contrary to basic statutory interpretation as explained further below.

"Significant other needs" more reasonably should be interpreted to mean the needs of the school district to fulfill its statutory duty to educate our communities' youth in a safe environment conducive to learning and devoid of discrimination. CCSD still must protect its students and employees by maintaining confidentiality to ensure a positive learning and working environment now and in the future.

The district court did not identify any precedent or basis for determining that because the alleged wrongdoer was an elected official the "significant other need" exception was met. And there was no weighing of the "significant other need" declared by the district court versus the employees' right to or expectation of confidentiality when reporting alleged discrimination. Id. For example, in ¶73 of its order, the district court holds that "the disclosure of withheld documents serves the significant need of providing the public information about the alleged misconduct of an elected official and CCSD's handling of the related investigation." Appellant's App. p. 296. The preceding analysis is misplaced for three (3) reasons: First, it ignores the fact the public already has extensive information about the alleged conduct of Trustee Child to the extent that at least thirteen (13) articles regarding his conduct were published by the LVRJ between December 5, 2016 and June 19, 2107. Appellant's App. pp. 48-56 & 328-

374. None of these articles required breaching anyone's confidentiality in order to inform the public of the trustee's alleged misconduct and included reporting in regard to the measures CCSD had taken to protect its students and employees. It is clear the "significant need" is something far less than significant because the alleged misconduct is already well known throughout the community. Second, the withheld records reviewed by the district court included the October 19, 2016, memoranda and recommendations previously obtained and published by LVRJ on December 23, 2016, again demonstrating alleged misconduct and recommendations to address the behavior for all the public to consider. Finally, all letters sent to Trustee Child with additional directives regarding his conduct on school property were provided to LVRJ prior to the June 26, 2017, hearing and therefore the withheld documents shed no additional light on "CCSD's handling of the related investigation." Appellant's App. at pp. 322-327. CCSD has released approximately 174 pages of emails and other documents that are part of the record. These disclosures were sufficient for LVRJ to publish at least fifteen (15) articles to date. The releases included many of the complaints. The Superintendent's letters to Trustee Child and administrators documented his decision to incrementally restrict Trustee Child's access to CCSD facilities, thereby informing the public of those official actions.

There is nothing in the record revealing a "significant need" that remains unmet.

There is no rational basis for ordering limited redactions to include only support staff and students. Specifically, there is no indication as to the purpose of identifying teachers, deans, assistant principals, principals or CCSD administrators' or an appreciation of the harm to individuals and families by disclosure. To date no statute, law or case law supporting the identifying of complainants and witnesses of discrimination has been presented in this matter.

As to the exception, "or comply with law", the district court essentially stated that there was a conflict between NRS 239.010 and CCSD Regulation 4110(X) because, "T[t]here's an overwhelming mandate from the Nevada legislature regarding the public's right to access governmental records" and therefore disclosure is necessary. Appellant's App. pp. 261at 77:2-8.

The preceding is inconsistent with Nevada case law precedent regarding statutory interpretations. "[T]he construction of a statute is a question of law." *Edgington v. Edgington*, 119 Nev. 577, 582-83, 80 P.3d 1282, 186-87 (2003) (citation omitted. "In interpreting a statute, 'words . . . should be given their plain meaning unless this violates the spirit of the

act.'" *Id*. (citation omitted). "Thus, when a statute's language is clear and unambiguous, the apparent intent must be given effect, as there is no room for construction." *Id*. (citations omitted).

Furthermore, "[s]tatutory interpretation should avoid meaningless or unreasonable results, and 'statutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained.'" *Id*. (citations omitted). "Additionally, 'when construing a specific portion of a statute, the statute should be read as a whole, and, where possible, the statute should be read to give meaning to all of its parts.'" *Id*. (citation omitted).

Each term must be read to "render it meaningful within the context of the purpose of the statute." *Redl v. Heller*, 120 Nev. 75, 78 (2004) (quoting *Bd. of County Comm'rs v. CMC of Nevada* 99 Nev 73, 744 (1983)). Thus, in determining the scopes of NRS 239.001(2) and (3) and the language of NRS239.010(1) stating "unless otherwise declared by law to be confidential" the statute must be interpreted so that no part is rendered inoperative." *IGT v. Dist. Ct.*, 124 Nev. 193, 200 (2008) citing *Williams v Clark County Dist. Attorney*, 118 Nev. 473, 484-85, 50 P.3d 536, 543-44 (2002); *Matter of Estate of Thomas*, 116 Nev. 492, 998 P.2d 560 (2000).

The district court interpreted NRS 239.001(2) & (3) so stringently it rendered the "unless otherwise declared by law to be confidential" portion of NRS 239.010 (1) inoperative in this matter. It is a basic tenet of statutory construction that a statue must not be interpreted in such a manner to render other portions of the statute meaningless. The legislature included the "unless otherwise declared by law to be confidential" language in NRS 239.010(1) to protect confidentiality. For the district court to declare NRS Ch. 239 an "overwhelming mandate" for disclosure to such an extent that the "unless otherwise declared by law to be confidential" language in NRS 230.010 is rendered no meaning is an improper interpretation and certainly does not demonstrate that disclosure is necessary to comply with NRS Ch. 239 given the language in NRS 239.010(1).

Furthermore, the district court's Order cited *Lamb v. Mirin*, 90 Nev. 329, 332-333, 526 P.2d 80, 82 (1974), to support CCSD cannot create policies that conflict with NRS Chapter 239.[12] Appellant's App. p. 297 at ¶75. The preceding is obviously true, but the district court ignored the fact that under the "otherwise declared by law to be confidential . . ." language of

[12] NRS 239 does not list any federal laws but it is nevertheless subordinate to them. The Order does not set forth any plausible basis as to how the totally public investigative process the district court created, by virtue of its Order, for this matter complies with CCSD's obligation under Title VII to keep information confidential and to protect employees from retaliation.

NRS 239.010(1), the legislature allows for specific statutes and laws to make other records confidential. Under NRS 239.010(1), when an enumerated statute under NRS 239.010(1) or a "law" declares a public record confidential the record is in essence confidential under the terms of NRS 239.010(1) itself. As such, the district court's reliance on *Lamb v. Mirin*, 90 Nev. 329, 332-333, 526 P.2d 80, 82 (1974), where there was no statute with similar effect to NRS 239.010(1), is misplaced. Id. Thus, *Lamb* is distinguishable from the case at bar because NRS 239.010(1) clearly allows for "laws" to declare public records as confidential; therefore, local control over the same subject did not cease such as the case in *Lamb*.

Regulation 4110(X) does not contravene or conflict with NRS Chapter 239, as that chapter clearly provides public records may be confidential beyond those statutes specifically enumerated in NRS 239.010(1). Therefore, the internal information received or gathered by CCSD in the course of investigating the alleged discriminatory conduct of Trustee Child should remain confidential under CCSD Regulation 4110(X) as intended by the legislature under NRS 239.010(1).

b) The investigative file constitutes confidential employee personnel information under CCSD Regulation 1212 and Regulation 4311.

CCSD Regulation 1212 states, "Confidential information concerning all personnel will be safeguarded." CCSD Reg. 1212. Similarly, CCSD Regulation 4311 provides, "All personnel information regarding district employees is confidential. . . ." CCSD Reg. 4311. These regulations cannot be said to contravene or conflict with NRS Chapter 239.

CCSD does not define what constitutes a personnel record. As such, this Court should look to Nevada Administrative Code (hereinafter, "NAC") Chapter 284 beginning at NAC 284.702 titled, "Personnel Records" for instructive guidance as to what constitutes a personnel record for state employees in the absence of a defined list of CCSD personnel records. NAC 284.718(5) provides:

> Any notes, records, recordings or findings of an investigation conducted by the Division of Human Resource Management relating to sexual harassment or discrimination, or both, and any findings of such an investigation that are provided to an appointing authority are confidential.

Clearly, State employees in the same situation as presented in this case would not have their confidentiality broken for a public records request as the records would be "otherwise declared by law to be confidential" pursuant to NAC 284.718(5). NRS 239.010(1).

By virtue of its interpretation of "significant other needs", the district court afforded CCSD employees fewer rights than similarly situated State

employees solely because the alleged discrimination came from an elected official and also discounted CCSD Regulations 1212 and 4311.

The fact that this personnel information is maintained in the Office of Diversity and Affirmative Action does not render it non-personnel. In the 21st Century technology allows information to be maintained in specific locations. In a matter such as this it makes perfect sense for the sensitive information and the identities of the complainants and witnesses to be maintained in a single location with limited access as opposed to a digital personnel file in human resources where a multitude of employees would have access.

C. The investigative file should remain confidential under the deliberative process privilege.

The investigative material is also not required to be disclosed because it is protected under the deliberative process privilege. *DR Partners v. Board of County Commissioners of Clark County*, 116 Nev. 616, 621 (2000). The Nevada Supreme Court has recognized an "executive privilege" in Nevada in determining whether public records are "confidential by law." "The deliberative process or 'executive' privilege is one of the traditional mechanisms that provide protection to the deliberative and decision-making processes of the executive branch of government. . . ." *Id*. at 622. As recognized by LVRJ itself, the deliberative process privilege protects high-level decision-making. Appellant's App. p. 41 at 21:2-3 (citing *DR Partners*

at 623). The privilege has been adopted because "public disclosure of certain communications would deter the open exchange of opinions and recommendations between government officials, and it is intended to protect the government's decision-making process, its consultative functions, and the quality of its decisions." *City of Colorado Springs v. White*, 967 P.2d 1042, 1047 (Colo. 1998); se also *DOI v. Klamath Water Users Prot. Ass'n.*, 532 U.S. 1, 8-9 (2001).

This privilege "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[.] It also permits 'agency decision-makers to engage in that frank exchange of opinions and recommendations necessary to the formulation of policy without being inhibited by fear of later public disclosure.'" *Id*. at 622-23 (quoting *Paisley v. C.I.A.*, 712 F.2d 686, 697-98 (D.C. Cir. 1983)) (emphasis added).

"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." *DR Partners* at 623; see also *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 151 (1974) ("the lower courts have uniformly

drawn a distinction between predecisional communications, which are privileged, and communications made after the decision and designed to explain it, which are not.") (internal citations omitted); *White*, 967 P.2d at 1051. Furthermore, to be deliberative the material must consist of opinions, recommendations, or advice about agency policies and the Court must be able to pinpoint an agency decision or policy to which the documents contributed. *DR Partner at 623-24* (emphasis added); see also *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988) ("In furtherance of this objective the courts have allowed the government to withhold memoranda containing advice, opinions, recommendations and subjective analysis.") (quoting *Julian v. U.S. Dep't of Justice*, 806 F.2d 1411, 1419 (9th Cir. 1986), aff'd 486 U.S. 1 (1988). Courts also examine whether "the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency. *DR Partners*, at 624; *White*, 967 P.2d at 1051-52.

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*. Once an agency, such as CCSD, establishes the documents fall under deliberative process, the burden shifts to the party seeking disclosure who must demonstrate the need for the

information exceeds the agency's interest in preventing disclosure. *DR Partners* at 626.

As a general rule, the privilege does not protect purely factual matters unless they are "inextricably intertwined with the policy making process." Id. at 623. Nevertheless, facts are also protected when their "disclosure . . . may so expose the deliberative process . . . that it must be exempted." *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977); *White* 967 P.2d at 1052 ("The deliberative process privilege protects factual material that is so inextricably intertwined with the deliberative sections of the documents that its disclosure would inevitably reveal the government's deliberations") (citing *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Circuit 1997).

The Superintendent has authority to set policy. *See Lytle v. Carl*, 382 F.3d 978, 981-983 (9th Cir. Nev. 2004) (holding in a §1983 case that CCSD's Superintendent and assistant superintendent had final policymaking authority as delegated to them by board of trustees; "the term 'policy' includes . . . not only policy in the ordinary sense of a rule or practice applicable in many situations. It also includes 'a course of action *tailored to a particular situation* and not intended to control decisions in later

situations.'") *Lytle* at 983 citing *Pembaur v. Cincinnati*, 475 U.S. 469,483, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986).

In this case the Superintendent is CCSD's highest level executive and is directly hired by the Board of Trustees. Superintendent Skorkowsky became aware of alleged issues regarding Trustee Child's conduct and asked the ODAA to investigate for the purpose of determining if the trustee's behavior amounted to discrimination and to advise whether the conduct rose to the level of discrimination and to make recommendations to protect students and employees, if necessary. Appellant's App. pp. 106-107 & 53-56. The contents of the investigative file formed the basis for Mr. Cole's recommendations to the Superintendent, which have been heavily relied upon in preparation and distribution of specific policies directed to Trustee Child. Appellant's App. pp. 106-107 & 322-327.

The original memorandum was provided to the Superintendent on or about October 19, 2016. Appellant's App. pp. 53-56. The October 19, 2016, memorandum was predecisional and deliberative as it predates any action or institution of policy or directives. Appellant's App. pp. 322-327. Furthermore, the memorandum contains the precise "advice, opinions, recommendations and subjective analysis" allowing for withholding of memoranda under *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114,

1419 (9th Cir. 1988). Appellant's App. at pp. 53-56. Thereafter, ODAA's opinions and recommendations were utilized in the decision making process that resulted in correspondence to Trustee Child on November 30, 2016 and guidelines for Trustee Child's visits to schools dated December 5, 2016. Appellant's App. at pp. 322-324. The November 30, 2016, correspondence and December 5, 2016 guidelines are the pinpointed agency decision or policy referenced in *DR Partners at 623-24.*

Thereafter, allegations of misconduct by Trustee Child continued. Further investigating was performed by the ODAA as evidenced in the withheld documents. Appellant's App. at pp. 175-177. The investigative material generated as part of the ongoing investigation of alleged misconduct led to correspondence to Trustee Child dated April 24, 2017. Appellant's App. at pp. 325. Furthermore, the continued investigation resulted in a second memorandum from the ODAA to Superintendent Skorkowsky dated May 26, 2017. Appellant's App. p. 177 and Withheld Documents at 229-30 available for in camera review upon request. Similar to the original memorandum of October 19, 2016, the May 2017 memorandum also includes "advice, opinions, recommendations and subjective analysis" consistent with *Nat'l Wildfire Fed'n v. U.S. Forest Service* cited above. Id. The May 26, 2017, memorandum predates the May

31, 2017 correspondence and directive to Trustee Child and Superintendent Skorkowsky's eventual trespassing of Trustee Child from CCSD property on October 24, 2017. Appellant's App. at pp. 326-327 & 364-368.

LVRJ's need for the "withheld documents" is outweighed by CCSD's interest in non-disclosure for the purpose of protecting students and employees' privacy and encouraging future reporting of discriminatory conduct. LVRJ has had the original memoranda and recommendations to Superintendent Skorkowsky dated October 19, 2016, since at least December 23, 2016, as it was published as part on an article on Trustee Child and his alleged misconduct on December 23, 2016. Appellant's App. at 48-56. Furthermore, the article references Superintendent Skorkowsky's "guidelines" issued on December 5, 2016, that specifically banned Trustee Child from school visits without written permission. Id. LVRJ published an article in regard to the December 5, 2016, "guidelines" on December 5, 2016, as well. Appellant's App. at pp. 328-331. Additional articles on the topic of Trustee Child's alleged misconduct were published by LVRJ on December 6, 24, 30, 31, 2016, February 8, 9 and 13, 2017, March 13, 2017 and June 19, 2017. App. Appendix at 332-363.

Most recently, the "withheld documents" were relied upon, along with the ongoing conduct of Trustee Child, in Superintendent Pat Skorkowsky

being compelled to trespass Trustee Child on October 24, 2017, in a further attempt to protect CCSD students and employees. Appellant's App. pp. 364-368. The preceding steps taken by CCSD including the trespassing of the trustee has been reported by LVRJ. Id. There is no indication that the lack of any names of employees was a detriment to the reporting or that publishing their names would have served any purpose that would exceed the employees interest in privacy. LVRJ has published two (2) additional articles on Trustee Child being trespassed on October 26, 2017 and November 2, 2017, wherein in the latter the Superintendent clarified a partial basis of banning Trustee Child was that CCSD had been notified by an outside governmental agency that it had received a complaint regarding Trustee Child and an investigation is underway. Appellant's App. pp. 369-374.

The preceding demonstrates that the need for the additional information sought by LVRJ is quite small when weighed against the detriment CCSD employees will suffer if their identities are revealed and ability to report alleged misconduct confidentially to the ODAA is eliminated. Additionally, CCSD's ability to learn of, investigate and take corrective action to stop and prevent future discrimination would also be greatly hindered. This may endanger not just CCSD employees but students

as well given the fact that some of the previous published allegations against Trustee Child include his impromptu discussions with students regarding suicide and prison snitches. Appellant's App. at pp. 344-347 & 356-359. If employee confidentiality is stripped, employees would be better served by foregoing any report with the ODAA and filing directly to the Nevada Equal Rights Commission or the U.S. Equal Employment Opportunity Commission where confidentiality would be provided. A decision dismantling employee confidentiality to report allegations of discrimination would potentially result in all investigative files of the ODAA and similarly situated public bodies being public. CCSD is required by the Title VII to investigate allegations of discrimination, keep the information confidential and prevent retaliation. If the district court's Order is upheld, making every scrap of paper that is part of the investigation into public records, CCSD will be in violation of Title VII. NRS Chapter 239 cannot be read to require CCSD to violate federal law.

Therefore, the entire investigative file is subject to the deliberative process privilege because the investigation and resulting file and memoranda were completed at the direction of CCSD's highest ranking employee, Superintendent Pat Skorkowsky. Furthermore, the November 30 2016, April 24, 2017 and May 31, 2017 letters to Trustee Child and guidelines

authored by the Superintendent were based on the recommendations and opinions contained in the memoranda. Appellant's App. 106-107. Furthermore, the memoranda were utilized for "a course of action *tailored to a particular situation* and not intended to control decisions in later situations." Finally, the need for LVRJ to obtain the investigative file is minimal when compared to the potential damage to CCSD. To rule that memoranda, only, are confidential under the deliberative process privilege but not the notes, drafts and chronological summaries would render the confidentiality privilege under the deliberative process meaningless in this matter because the file itself is the sole basis of the memoranda prepared by the ODAA. To make one but not the other confidential essentially provides no or insufficient confidentiality to the CCSD employees because the investigative file is so tightly intertwined to the memoranda.

D. Nonrecord materials are not required to be produced.

NAC 239.051 provides that certain materials of a local government entity are "nonrecord materials." Those materials are not public records and are not required to be disclosed. Nonrecord materials "means published materials printed by a governmental printer, worksheets, unused blank forms except ballots, brochures, newsletters, magazines, catalogs, price lists, drafts, convenience copies, ad hoc reports, reference materials not relating to a

specific project and any other documentation that does not serve as the record of an official action of a local governmental entity." NAC 239.051 (emphasis added). A similar definition is applied to state agencies under NAC 239.705 (nonrecord materials include informal notes, drafts, and ad hoc reports). These NAC provisions are found in Chapter 239 which pertains to public records, and should be applied here.

Here, to the extent that any remaining information constitutes drafts or informal notes, it falls within the definition of "nonrecord materials" and is not required to be produced. In particular, the notes related to the memorandums and recommendations and the draft versions of memoranda are drafts and informal notes and therefore are nonrecords and not required to be produced under the NPRA. Those materials also do not serve as the "official action" of CCSD. The official action was the December 5, 2016, interoffice memorandum and letters to Trustee Child from Superintendent Skorkowsky. Appellant's App. at p. 324.

E. The documents are confidential under the common law *Donrey* balancing test.

Even if the Court does not find that any federal, state or CCSD law or regulation makes the documents confidential, they should still be protected under the common law *Donrey* balancing test. The Supreme Court of Nevada has recognized that a "limitation on the general disclosure requirements of

NRS 239.010 must be based upon a balancing or 'weighing' of the interests of non-disclosure against the general policy in favor of open government." *DR Partners v. Board of County Comm'rs*, 116 Nev. 616, 622 (2000) (citing *Donrey*, 106 Nev. at 635-36). A government entity cannot meet its burden by "voicing non-particularized hypothetical concerns." *DR Partners*, 116 Nev. at 628.

Here, CCSD's interest in investigating employees' reports of and protecting them from, a hostile work environment, intimidation, and retaliation clearly outweighs the public's interest in obtaining access to internal investigatory information regarding the alleged conduct of Trustee Child. Revealing the internal investigatory information would be detrimental to the work environment and well-being of employees and create a chilling effect on future reporting. The fears of hostile work environment, intimidation, and retaliation are not hypothetical or speculative. Employees have expressed legitimate fear of being identified and/or retaliated against by Trustee Child both **verbally** to Cedric Cole (Executive Manager, ODAA) and **in writing** in emails. Appellant's App. at pp. 106-111 & Withheld Documents at 210 upon request by Court for in camera review.

Furthermore, in *Donrey* the petitioner sought an investigative report, only, created by a law enforcement agency regarding to whether bribery of a

public official took place. *Donrey*, 106 Nev. 630, 631, 798 P.2d 144, 145 (1990). Presently, LVRJ wants the entire investigative file including handwritten notes, typed notes and drafts regarding an investigation of alleged discrimination against CCSD employees **and** the resulting memoranda and recommendations. As such the weighing of the parties interests is clearly in favor of CCSD because interests of non-disclosure. To the best of CCSD's knowledge, no such investigative file has ever been produced as part of a public records request in Nevada to date.

The purpose of the public record law is to foster democratic principles. CCSD believes the public's interest in access to documents is to examine the functions of a public agency, and while this is an important interest, it may be accomplished with the documents that have already been provided.[13] The public's interest in reading internal investigation files is outweighed under *Donrey* by CCSD's need to meet its statutory duty to have a confidential system for internal investigation of alleged employment issues, enabling it to discover and correct problems in the workplace, while protecting employees who report allegations of unwelcome conduct.

[13] CCSD has previously provided approximately 174 pages of documents and emails in addition to three (3) correspondences from the Superintendent to Trustee Child and the guidelines dated December 5, 2016, pertaining to Trustee Child's school visits.

F. If the Court orders disclosure of any documents or memoranda from the ODAA, the Court should order redactions to remove all identifiers that would reasonably identify any complainants and witnesses.

As stated herein, the district court's Order requires the release of all investigative materials and memoranda and recommendations including drafts of the investigation conducted by the ODAA.

The investigative file and memoranda and recommendations include the names of CCSD employees who are not protected by the July 11 Order because the district court has ordered that the "Key" be disclosed, as well. Even with the limited redactions allowed by the district court, the investigative file and memoranda and recommendations would divulge the names of thirty (30) administrators and teachers who were witnesses to conduct by Trustee Child that concerned them to a sufficient degree that they felt it necessary to report their concerns.

Furthermore, even if the names of all of the victims and witnesses were redacted by eliminating the "Key" from disclosure, the investigative file is replete with personally identifiable facts that lead directly to the identity of victims of discrimination and witnesses. It is not possible to redact enough information to protect an employee who is either a victim or a witness to discrimination from retaliation as is required by Title VII, 42 U.S.C. § 2000e-3(a). For example, it does little good to redact a name but

still leave in the person's title, such as Principal and the name of the school as there is obviously just one principal for a school. The same is true for deans and vice principals as there are so few of those positions at a particular school. Additionally, some of the allegations pertain to specific school sponsored events or locations making identifying of the complainants and witnesses subject to easy determination by the accused if not the public. If any disclosure is upheld, any information that identifies a CCSD employee including but not limited to the names of job titles and schools should be redacted to protect the individuals. Further support for withholding the entire investigative file is that it is still an ongoing investigation, and if CCSD is required to release the investigative file, it may prejudice future complaints and/or witness statements.

CCSD has a duty to protect employees from retaliation. The fears of retaliation and persons considering against reporting in the future are not speculative. In his declaration, the Director of the ODAA testified to concrete and actual fears of retaliation. Retaliation was a particular concern of administrators because those are the employees who work in close proximity with Trustee Child and it is administrators who are required to have their promotions approved by the Board of Trustees. Specifically, Mr. Cole testified that:

6. As part of my investigation, I interviewed several employees all of whom but one expressed fears of retaliation from Trustee Child.

7. Most but not all of the employees I spoke with referenced Trustee Child's habit of repeatedly telling them and others that he (Trustee Child) is the "boss" as the basis of their fears of retaliation.

8. At least two of the employees I spoke with orally expressed fears of repressed opportunities for promotions or advancement within the organization as a form of retaliation from Trustee Child.

App. Appendix at 106-107 & Withheld Documents at 210 upon request.

CCSD employees' confidence in their ability to report sexual harassment and discrimination (or provide witness statements on behalf of such reports) without fear of retaliation, loss of further professional advancement and public exposure will be undermined if the status quo is not maintained. The chilling effect of stripping the employees of confidentiality due to a public records request will irreparably injure CCSD and its employees and undercut their federally mandated right to be free from sexual harassment in the workplace. *See* Title VII, 42 U.S.C. § 2000e *et. seq*.; U.S., Equal Employment Opportunity Commission, EEOC Notice No. 915.002, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, at § V(D)(1) re Failure to Complain (dated 6/18/99, in effect until rescinded or superseded) (emphasis added); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998).

CONCLUSION

The district court's decision ordering disclosure of all investigative materials including memoranda and recommendations with limited redactions to include direct victims of sexual harassment and alleged sexual harassment and support staff and students, only, but no alleged victims or witnesses of any other types of discrimination should be reversed. Stripping any group of employees, public or private, of their ability to report discrimination confidentially is poor public policy as it creates a further chilling effect on reporting of discrimination and as a result further perpetuates discrimination.

Respectfully submitted, this 11th day of December, 2017.

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COMBINED NRAP 28.2 AND NRAP 32 CERTIFICATE OF ATTORNEY AND CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

    [X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 pt. font; or

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the briefs exempted by NRAP 32(a)(7)(c), it is either:

    [X] Proportionately spaced, has a typeface of 14 points or more, and contains 10,351 words; or

    [ ] Monospaced, has 10.5 or fewer characters per inch, and contains ____ words or ____ lines of text, or

    [ ] The text of this brief does not exceed thirty (30) pages.

3. Finally, I hereby certify that I have read this Appellant's Opening Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate

Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

AFFIRMATION

Pursuant to NRS 239B.030

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

Respectfully submitted, this 11th day of December, 2017.

/s/Adam Honey

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing **APPELLANT'S OPENING BRIEF** was filed electronically with the Nevada Supreme Court on the 11th day of December, 2017. I further certify that on the same date, I served a copy of this document upon Respondent's counsel by depositing a true and correct copy hereof in the United States mail at Las Vegas, Nevada, postage fully prepaid, addressed as follows:

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