IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY SCHOOL DISTRICT Appellant, vs. THE LAS VEGAS REVIEW-JOURNAL, Respondent.	Electronically Filed Jan 25 2018 09:44 a.m. Elizabeth A. Brown Clerk of Supreme Court CASE NO.: 73525

RESPONDENT'S ANSWERING BRIEF

Appeal from Eighth Judicial District Court, Clark County
The Honorable Timothy C. Williams, District Judge
District Court Case No. A-17-750151-W

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

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

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

DATED this 24th day of January, 2018.

/s/ Margaret A. McLetchie
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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether Clark County School District ("CCSD") failed to meet its burden under the Nevada Public Records Act (the "NPRA") of proving by a preponderance of the evidence that the public records it is withholding from the Las Vegas Review-Journal ("Review-Journal") are subject to a claim of confidentiality, and that its interest in withholding the records outweighs the presumption in favor of access.

2. Whether the district court's ordered redactions addressed CCSD's concerns regarding protecting employees from retaliation.

I. STATEMENT OF THE CASE

A. Nature of the Case

After CCSD ignored the Review-Journal's requests for public records regarding allegations of misconduct by CCSD school board trustee Kevin Child, the Review-Journal was forced to petition the district court pursuant to Nev. Rev. Stat. § 239.011(1) for an order mandating production of the records. After multiple orders and the production of documents, CCSD now appeals a portion of the final July 11, 2017 Order ("July Order") entered by the district court requiring it to produce—with appropriate redactions to protect complaining CCSD employees—documents prepared by CCSD's Office of Diversity and Affirmative Action.

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B. Response to CCSD's Description of the Procedural History

CCSD's terse description of the course of the proceedings of this case (Opening Brief ("OB"), pp. 3-4) omits relevant procedural history regarding the proceedings in the district court which demonstrate CCSD's pattern of ignoring and evading its obligations under the NPRA, Nev. Rev. Stat. § 239.001 *et seq.* Starting in December 2016, the LVRJ made several requests to CCSD pursuant to the NPRA targeting documents pertaining to the alleged misbehavior of School Board Trustee Kevin Child (the "Requests"). As described in the statement of facts below, for over a year, CCSD has demonstrated a recalcitrant attitude toward NPRA compliance, including failing to respond to records requests in a manner consistent with the letter and spirit of the NPRA, unilaterally limiting searches for responsive records, resisting production of a privilege log, and refusing to disclose public records about the alleged improprieties of an elected official tasked with making decisions about the operations of the largest school district in Nevada.

II. STATEMENT OF FACTS

A. CCSD's Obligation to Timely and Meaningfully Respond to Public Records Requests.

The starting point for evaluating CCSD's claims in this appeal is understanding CCSD's obligations to respond to public records requests under the NPRA. The NPRA is a comprehensive statutory scheme governing the public's access to governmental records. The overarching purpose of the NPRA is to "foster

democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law." Nev. Rev. Stat. § 239.001(1). Pursuant to Nev. Rev. Stat. § 239.001(2)-(3), the provision of the NPRA "must be construed liberally" to ensure the presumption of openness and explicitly declares that any restriction on disclosure "must be construed narrowly."

If a statute explicitly makes a record confidential or privileged, the public entity need not produce it. *Id.* A governmental entity seeking to withhold or redact records on some other basis, however, has a heavy burden. It must prove—by a preponderance of evidence—that the records are confidential or privileged and that the interest in nondisclosure outweighs the strong presumption in favor of public access. *See, e.g., Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011). Moreover, the NPRA specifies that a governmental entity cannot withhold a public record in its entirety on the basis that it contains confidential information "if the governmental entity can redact, delete, conceal or separate the confidential information from the information included in the public record that is not otherwise confidential." Nev. Rev. Stat. § 239.010(3). Thus, the NPRA places an unmistakable emphasis on access to public records in the quickest and fullest manner possible.

If it believes that withholding records is warranted, the NPRA provides that a governmental entity must provide timely and specific notice to the member of the

public seeking access. Specifically, the NPRA dictates that, if a governmental entity refuses to provide part or all of a request on the grounds that it is confidential, the NPRA states that, within five (5) business days of receiving a request, the governmental entity must:

> … provide to the person, in writing: (1) Notice of that fact; and (2) A citation to the specific statute or other legal authority that makes the public book or record, or a part thereof, confidential.

Nev. Rev. Stat. § 239.0107(1)(d).

B. The Public Records Requests

Despite the clear mandate in the NPRA that governmental entities must provide access to public records as quickly and fully as possible, the history of this case demonstrates that CCSD consistently ignored that mandate, and that the district court properly directed CCSD to comply with its NPRA obligations.

As CCSD notes in its Opening Brief (OB, pp. 7-8), the genesis of this case is a December 5, 2016 memorandum prepared by CCSD Superintendent Pat Skorkowsky and obtained by Review-Journal Reporter Amelia Pak-Harvey. The memorandum set forth a series of guidelines curtailing CCSD School Board Trustee Kevin Child's ability to visit CCSD's administrative offices and schools without prior written invitation, and limiting his ability to meet with CCSD staff members regarding official business. (II AA337 (photograph of memorandum contained in December 5, 2016 Review-Journal article); *see also* I AA61-64 (October 19, 2016

memorandum detailing the purpose, findings, and recommendations resulting from a formal investigation of Trustee Child by CCSD's Office of Diversity and Affirmative Action).)

On December 5, 2016, Ms. Pak-Harvey sent CCSD a records request pursuant to the NPRA seeking certain documents pertaining to CCSD Trustee Kevin Child. (I AA66[1] (December 5, 2016 records request).) Ms. Pak-Harvey supplemented that records request on December 9, 2016. (I AA68.) The combined requests asked CCSD to produce:

- All incident reports filed by CCSD staff, CCSD police, or any other CCSD officials that involve grief counselors and Trustee Kevin Child;
- All emails from CCSD staff, CCSD police, or CCSD officials regarding school visits conducted by Kevin Child;
- All emails and correspondence relating to the guidelines issued to CCSD staff on December 5, 2016 regarding Kevin Child's visits to schools and interaction with staff; and
- Any written complaints CCSD had received regarding Kevin Child.

(I AA66 and AA68.)

[1] CCSD's Opening Brief indicates Ms. Pak-Harvey's initial records request is at page 58 of its Appendix. This is inaccurate. Indeed, many of the record citations throughout CCSD's Opening Brief do not correspond to the pagination its Appendices.

On December 13, 2016, Cynthia Smith-Johnson, the Public Records Officer for CCSD, responded to Ms. Pak-Harvey's request and indicated that CCSD was unable to provide the requested records within five business days, and "anticipate[d] a further response" by December 16, 2016. (I RA018.) On December 15, 2016, Ms. Pak-Harvey contacted Ms. Smith-Johnson via email to check on the status of her records request. (I RA020.) On December 19, 2016, three days after the December 16 date for a "further response" had come and gone, Ms. Pak-Harvey again contacted Ms. Smith-Johnson to check on the status of the request. (I RA022.) That same day, Ms. Smith-Johnson responded by emails that she would get back to Ms. Pak-Harvey by December 21, 2016. (I RA024.) However, on December 21, 2016, Ms. Smith-Johnson emailed Ms. Pak-Harvey that she would "get back" to her the next day, December 22, 2016. (I RA030.)

On December 22, 2016, however, rather than providing Ms. Pak-Harvey with the requested records or specific statutory or legal bases for why CCSD was not producing the records, Ms. Smith-Johnson emailed her that "[a]dditional time is needed regarding the information requested" and indicated she would follow up with her on January 9, 2017. (I RA032.) On January 9, 2017, however, Ms. Smith-Johnson again delayed production of the requested records, stating that she "anticipated a further response on January 13, 2017." (I RA036.) Ms. Pak-Harvey

emailed Ms. Smith-Johnson two additional times to obtain the requested records, but received no response. (I RA038 and RA040.)

CCSD offered no explanation for this delay. It was only months later—after the Review-Journal filed its public records petition and after the district court entered the order at issue in this appeal—that the Review-Journal learned the delay was caused by CCSD general counsel. In the portion of the district court's order not appealed by CCSD, the court ordered CCSD to make Public Information Officer Cynthia Smith-Johnson available for deposition to provide information regarding CCSD's efforts to search for, collect, and produce the records requested by the Review-Journal. (II AA310, ¶ 96.) Ms. Smith-Johnson testified at her deposition that CCSD general counsel was responsible for CCSD's failure to respond to the Review-Journal's records request, explaining that she could not respond to the Review-Journal's records request without direction from CCSD general counsel (S*ee* IV RA0466 (testifying that she was "waiting [on] legal for direction on what to do"); *see also* IV RA0470; RA475-76; RA477 (confirming she could not disclose the requested records without general counsel approval); and IV RA471; RA474-75; RA477-78 (she relied on general counsel to search for and provide her with documents responsive to the Review-Journal's records request).

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C. The Review-Journal is Forced to Initiate a Public Records Petition to Obtain the Requested Records.

On January 26, 2017, after CCSD failed to either provide the Review-Journal with the requested public records or deny the records requests in a manner that complied with the NPRA, the Review-Journal filed a petition for writ of mandamus pursuant to Nev. Rev. Stat. § 239.011(1). (I RA001-040.) On February 3, 2017, eight weeks after its records request and only after the Review-Journal filed its petition, CCSD produced thirty-six pages of documents, but withheld twenty-three additional pages on the basis that they required redaction. (II AA 295.)

On February 8, 2017, the district court directed CCSD to either fully produce the requested records in unredacted form, or the matter would proceed to a hearing. (II AA 295.) CCSD did not do so. Instead, CCSD opted to produce the redacted records and a corresponding unredacted set to the district court. (*Id.*) On February 10 and 13, 2017, CCSD provided versions of the redacted records with fewer redactions, and also produced additional, previously unidentified records. (*Id.*) However, CCSD continued to withhold responsive records. (*Id.*)

Additionally, on February 13, 2017, CCSD produced its first privilege log listing the following purported bases for the redactions: Nev. Rev. Stat. § 386.350, and CCSD Regulations 1212 and 4110. 1 (I RA222-224, ¶ 10.) CCSD did not, however, disclose that it was withholding responsive records or that it unilaterally decided to search for records in a limited selection of email inboxes. (II AA297, ¶¶

19-20.)

On February 14, 2017, the district court heard oral argument on the Review-Journal's petition. (II AA296, ¶ 9.) Following that hearing, the district court entered an order on February 22, 2017 ("February Order") granting the Review-Journal's petition. (I AA001-008.) In its February Order, the district court found that CCSD had failed to comply with the NPRA's requirement to assert claims of confidentiality within five days as required by Nev. Rev. Stat. § 239.0107(1)(d), thereby waiving its ability to assert any applicable privileges. (I AA006, ¶ 29.) Further, the district court concluded that even if CCSD had failed to prove by a preponderance of the evidence that the records are confidential or privileged, it failed to articulate the application to each piece of information it sought to redact. (I AA007, ¶ 31.) The court directed CCSD to provide the Review-Journal with new versions of the redacted records with only "the names of direct victims of sexual harassment or alleged sexual harassment, students, and support staff" redacted. (I AA007, ¶ 30.) CCSD produced these records subject to the February Order with fewer redactions on February 24 and February 27, 2017. (II RA160-192.)

D. The Review-Journal's February 2017 Records Request and Amended Petition

On February 10, 2017, while the Review-Journal's petition was pending, the Review-Journal sent CCSD a records request expanding on the December records requests. (I AA 70-73.) This request was sent because the Review-Journal was

concerned that CCSD was not being forthcoming. (I AA034-035.) The detailed request asked CCSD disclose any and all records, including:

> investigative memos, notes, reports, summaries, interviews (written or recorded), emails, correspondence, and communications to or from CCSD staff and police[] that have not previously been provided to the Las Vegas Review-Journal and that pertain to, discuss, or reference concerns about the actions and behavior of Trustee Kevin Child.

(I AA 70; *see also* I AA 70-71 (specifying categories of records requested).) The Review-Journal also requested CCSD produce a log of the documents it was withholding. (I AA072; I RA097.)

CCSD responded to this request by email on February 17, 2017. (I RA107-09.) CCSD indicated it would not be able to provide the requested records within five business days as mandated by Nev. Rev. Stat. § 239.0107, and "anticipate[d] a further response by March 3, 2017." (I RA107.) The March 3 correspondence from CCSD also included boilerplate objections to the records requests, but did not specify which requests each objection pertained to. (II RA252-254.) Indeed, during a telephonic conversation with counsel for the Review-Journal regarding the February 17 letter, CCSD counsel conceded that its objections were placeholders. (I RA111.) Additionally, CCSD's February 17 correspondence did not respond to the Review-Journal's request for a privilege log. (*See generally* I RA107-09.)

In the weeks following its February 10 records request, counsel for the Review-Journal repeatedly inquired regarding CCSD's efforts to search for

responsive documents, and also repeatedly requested CCSD produce a privilege log. (I RA111-12 (February 21, 2017 letter); I RA119 (March 1, 2017 email).)

On March 1, 2017, after it became apparent the parties would not be able to resolve their disputes over the Review-Journal's February request, the Review-Journal filed an amended petition with the district court. (I AA009-028; I RA083-119 (exhibits).)

On March 3, 2017, CCSD provided the Review-Journal with some documents responsive to the February request. (II AA297.) That same day, the Review-Journal again requested CCSD provide it (1) a log describing withheld documents responsive to the February request, and (2) information regarding CCSD's search for responsive documents. (II RA256.)

CCSD finally responded to the Review-Journal on March 13, 2017. (II RA269-276.) In its letter to the Review-Journal, CCSD revealed for the first time that it had unilaterally limited the custodians and sources it had searched for responsive records. (II RA270.) Later that same day, CCSD notified the Review-Journal via email that it was withholding an "investigative report" consisting of an eight-page report and seven pages of notes prepared by Cedric Cole, the Director of CCSD's Diversity and Affirmative Action Program, "concerning allegations of harassment and discrimination by Trustee Child." (II RA278.)

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The Review-Journal responded to CCSD by letter on March 2, 2017. (II RA281-85.) In that letter, the Review-Journal requested CCSD conduct additional email searches for responsive records from additional custodians. (II RA282.) The Review-Journal also requested CCSD produce Mr. Cole's report and hard copy records pertaining to the Diversity and Affirmative Action Program's investigation of Trustee Child. (II RA282-84.)

CCSD produced a supplemental privilege log on March 24, 2017. (II RA288-291.) Although the supplemental log did provide information about the nature of the documents CCSD was withholding, it did not sufficiently indicate the statutory or legal bases for withholding each document; instead, the log simply relied on assertions of confidentiality it had previously asserted in its March 13, 2017 correspondence to the Review-Journal. (*Id.*; *see also* II RA293-98 (relevant portion of March 13, 2017 letter).)

The Review-Journal filed an opening brief in support of its amended public records petition on March 29, 2017. (I AA29-77; II RA120-311.) CCSD filed an answering brief on April 13, 2017 (I AA078-121), and the Review-Journal submitted a reply brief on April 24, 2017. (I AA122-51.)

The district court conducted a hearing on the amended petition on May 9, 2017. (III RA312-446 (transcript of hearing).) On June 6, 2017, the court entered an order granting the Review-Journal's amended petition. (I AA152-62.) In that order,

the court found that CCSD had violated the NPRA by limiting the records it searched and produced, and "also violated the NPRA by failing to timely inform the Review-Journal of its unilateral decision to limit its search for responsive records." (I AA160.) The court then directed CCSD to conduct emails searches of a list of additional custodians, and directed CCSD to conduct a search for hard copy records from the Diversity and Affirmative Action Program's hard copy file on Trustee Child, as well as any hard copy records CCSD maintains on Trustee Child responsive to the December and February 2017 requests. (I AA160-61.) The court additionally directed CCSD to provide the court and the Review-Journal with a privilege log identifying withheld and redacted documents, as well as a *specific explanation of the basis for withholding each document*. (I AA161, ¶ 47.) Additionally, the court directed CCSD to provide the court with a certification attesting to the accuracy of the searches it conducted. (*Id.*, ¶ 48.)

On May 30, 2017, CCSD submitted the redacted documents to the district court *in camera*. (II AA300, ¶ 35.) On June 5, 2017, CCSD provided the Review-Journal with an additional 38 pages of previously withheld documents. (*Id.* at ¶ 37.) On June 6, 2017, CCSD provided the Review-Journal with the court-ordered privilege log (I AA182-92), along with certifications from Ms. Smith-Johnson and Chief Technology Officer Dan Wray. (II AA300, ¶¶ 39-40.)

III. THE WITHHELD RECORDS

For the sake of clarity and to facilitate this Court's consideration of the issues on appeal, below is a list of the documents the district court ordered CCSD to produce in the July Order (the "Withheld Records") and that are at issue in this appeal:

- A draft eight-page memorandum prepared by Cedric Cole on October 5, 2016 regarding the Office of Diversity and Affirmative Action's investigation of allegations of misconduct by Trustee Child. (I AA183);
- Typed investigative notes written by Mr. Cole on various dates between January 28 and October 4, 2016 (*Id.*);
- A four-page investigative memorandum written by Mr. Cole on October 19, 2016 and directed to CCSD Superintendent Pat Skorkowsky and the CCSD Board of Trustees (*Id.*);
- Three pages of Mr. Cole's handwritten notes regarding the investigation of Trustee Child dated January 26, 2017 (*Id.*);
- Nineteen pages of case notes authored by Mr. Cole between January 28, 2016 and May 25, 2017 (I AA184);
- An undated one-page document described as "ID of employees" (*Id.*);
- A four-page draft investigative memorandum authored by Mr. Cole on October 5, 2016 (*Id.*);

- Five pages of Mr. Cole's typed notes created on February 10 and February 26, 2016 (*Id.*);
- A seven-page investigative memorandum created by Mr. Cole on October 5, 2016 (I AA185);
- Fourteen pages of investigative notes created by Mr. Cole between January 28, 2016 and October 4, 2016 (*Id.*);
- A twenty-page complaint dated May 5, 2017 directed to Mr. Cole regarding harassment by Trustee Child (*Id.*);
- A two-page May 22, 2017 addendum to the complaint (*Id.*);
- A three-page draft investigative memorandum authored by Mr. Cole on May 16, 2017 (*Id.*);
- A two-page investigative memorandum prepared by Mr. Cole on May 26, 2017 for Superintendent Skorkowsky and the Board of Trustees (*Id.*); and
- Three pages of "[p]ersonal notes regarding K. Child site visits and interactions" prepared by an unidentified author or authors between September 20, 2014 and April 4, 2017." (I AA186.)[2]

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[2] These records are hereinafter referred to as the "Withheld Records."

A. The Final Privilege Log

As noted above, CCSD produced the final privilege log in this matter to the district court on May 30, 2017, and to the Review-Journal on June 6, 2017. (I AA182-92.) Although the final privilege log provided more detail about the precise documents CCSD was withholding, it was stuff insufficient and failed to provide the Review-Journal with specific information about how CCSD's claimed privileges applied to each document, instead relying on a grab bag of inapplicable and generalized claims of confidentiality. For example, with regard to the investigative documents and memorandum prepared by CCSD's Diversity and Affirmative Action Program Director (I AA183), CCSD broadly argued that the documents were subjected to an alleged investigatory privilege (I AA190-191), but did not specify how this alleged privilege applied to each document.

B. The July 11, 2017 Order

On June 30, 2017, the district court held a hearing on CCSD's final log and May 30, 2017 *in camera* submission. (I AA302, ¶ 57.) On July 11, 2017, the district court entered the order at issue in this appeal ("July Order"). (II AA294-310.) In the July Order, the district court found CCSD had failed to meet its legal burden under the NPRA, and ordered CCSD to produce the Withheld Records to the court. (II AA304-08, ¶¶ 69-88.)

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The Court also found the certifications submitted by CCSD regarding its renewed searches for responsive documents were inadequate, and ordered CCSD to make the two CCSD employees who authored the certifications available to be deposed by the Review-Journal as to their efforts to search for, collect, and produce the requested records. (*Id.* AA308-10, ¶¶ 89-96.) CCSD did not appeal this portion of the order. (*See,* OB at pp. 2-3 (listing issues presented for this Court's review).)

On July 12, 2017, CCSD filed a notice of appeal from the July Order. (II AA311-12.) That same day, CCSD filed its Motion requesting a stay of enforcement of the Order pending appeal. (II AA313-28.) On July 27, 2017, CCSD filed a motion with this Court requesting a stay of enforcement of the order.[3] (*See* Doc. No. 17-24906.) This Court referred the motion to the Court of Appeals on July 27, 2017. (Doc. No. 17-24905; *see also* Doc. No. 17-24910 (notice of transfer).) On July 28, 2017, the Court of Appeals entered an order granting CCSD's request for a stay.

IV. SUMMARY OF ARGUMENT

The Review-Journal has been fighting for access to records regarding alleged harassment and other serious misconduct by CCSD Trustee Kevin Child pursuant to the Nevada Public Records Act ("NPRA"), Nev. Rev. Stat. § 239.001 *et seq.*, since

[3] In its motion to this Court, CCSD specified that it was appealing only the portion of the district court's order "that requires disclosure of the 'withheld documents' which consist of the investigative file of CCSD's Office of Diversity and Affirmative Action regarding its investigation of alleged discrimination of [sic] CCSD employees by Trustee Kevin Child." (Doc. No. 17-24906, p. 4.)

December 2016. In contravention of the NPRA, CCSD has delayed and resisted disclosure at every step of the way.

The public has a vital interest in governmental records. Understanding the exact facts and circumstances of alleged misconduct of officials—and the responses to that misconduct—is vital to building public confidence in the institutions and governmental bodies that make decisions that affect the public. Transparency is especially important in this case. While CCSD is responsible for preventing harassment of employees by employee supervisors, Kevin Child is not an employee and does not supervise employees. Nor can CCSD fire him. Only the voters can, and they are entitled to know what the facts are. Further, consistent with the democratic principles underlying the NPRA, the public is not required to blindly trust that CCSD engaged in an adequate investigation, that CCSD adequately protects staff or, most importantly, that CCSD adequately protects students from inappropriate behavior, including sexual misconduct.

Without any citation to evidence supporting its claims, CCSD takes an everything-but-the-kitchen-sink approach and relies on inapplicable claims of confidentiality. For example, it relies on an inapplicable administrative code prevision that pertains to record destruction schedules, as well as inapplicable and nonbinding internal CCSD regulations. It also relies on—again, without evidence—the contention that great harm will come to pass if they release records pertaining to

the investigation of Kevin Child, even though CCSD admits that much of the information is already in the public domain. CCSD's efforts to avoid transparency fail. The District Court properly applied the terms of the NPRA and this Court's precedent in ordering production of the records, subject to appropriate redactions. CCSD should be required to produce the records without delay—particularly in light of the history of this case.

V. ARGUMENT

A. Legal Standard

1. CCSD Bears a Heavy Burden.

CCSD bears a very heavy burden to establish its entitlement to relief in this appeal. Specifically, CCSD must both: (1) establish by a preponderance of the evidence that the records are confidential; and (2) prove that its "interest in disclosure clearly outweighs the public's interest in access." *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011). In the *Gibbons* case, this Court analyzed the NPRA, surveyed its prior cases, and set forth the applicable steps and burdens a withholding entity must satisfy to withhold records:

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

the public's interest in access. []

Gibbons, 127 Nev. at 880, 266 P.3d at 628 (citations omitted). Thus, as noted above, in addition to first establishing by a preponderance of the evidence that the records are confidential, a governmental entity also bears the burden of establishing that the interest in withholding documents outweighs the interest in disclosure pursuant to the balancing test first articulated in *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990); *see also DR Partners v. Bd. of Cty. Comm'rs of Clark Cty.*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) ("Unless a statute provides an absolute privilege against disclosure, the burden of establishing the application of a privilege based upon confidentiality can only be satisfied pursuant to a balancing of interests."). This burden is as heavy intentionally heavy because "the provisions of the NPRA place an unmistakable emphasis on disclosure." *Id.* at 882, 629.

2. 2007 Amendments Strengthened the NPRA.

In 2007, the NPRA was amended to strengthen its provisions (the "2007 Amendments"). *Gibbons*, 127 Nev. at 882, 266 P.3d at 628. The purpose of the NPRA is to "foster democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law[.]" Nev. Rev. Stat. § 239.001(1). Importantly, the 2007 Amendments followed the *Donrey* and *DR Partners* decisions relied upon by CCSD throughout its brief, but CCSD entirely ignored them. The 2007 Amendments to the NPRA were

designed to strengthen the law, and made the burden on governmental entities resisting disclosure heavier. As the *Gibbons* Court explained:

> In 2007, in order to better effectuate these purposes, the Legislature amended the NPRA to provide that its provisions must be liberally construed to maximize the public's right of access. NRS 239.001(1)-(2); 2007 Nev. Stat., ch. 435, § 2, at 2061. Conversely, any limitations or restrictions on the public's right of access must be narrowly construed. NRS 239.001(3); 2007 Nev. Stat., ch. 435, § 2, at 2061. In addition, the Legislature amended the NPRA to provide that if a state entity withholds records, it bears the burden of proving, by a preponderance of the evidence, that the records are confidential. NRS 239.0113; 2007 Nev. Stat., ch. 435, § 5, at 2062.

Reno Newspapers, Inc. v. Gibbons, 127 Nev. 873, 878, 266 P.3d 623, 626 (2011).

3. The 2007 Amendments Impacted the Balancing Test.

In *Reno Newspapers v. Sheriff*, this Court detailed exactly how the 2007 Amendments changed the balancing test first set forth in *Donrey* and *DR Partners*:

> Prior to the amendment of the Act, this court routinely employed a balancing test when a statute failed to unambiguously declare certain documents to be confidential. *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 635–36, 798 P.2d 144, 147–48 (1990). This balancing test equally weighed the general policy in favor of open government against privacy or law enforcement policy justifications for nondisclosure. *See id*. However, in light of the Legislature's declaration of the rules of construction of the Act—requiring the purpose of the Act to be construed liberally and any restriction to government documents to be construed narrowly—the balancing test under Bradshaw now requires a narrower interpretation of private or government interests promoting confidentiality or nondisclosure to be weighed against the liberal policy for an open and accessible government. *See* NRS 239.001. We emphasize that the balancing test must be employed in accordance with the underlying policies and rules of construction required by the Nevada Public Records Act. *See id.*

Reno Newspapers v. Sheriff, 126 Nev. 211, 217–18, 234 P.3d 922, 926 (2010). Thus, instead of the general and broad balancing set forth in *Donrey* and *DR Partners*, the more exacting standard set forth above applies.

4. Hypothetical Concerns Do Not Suffice.

As CCSD acknowledges (OB, p. 44:5-6), a governmental entity cannot rely on conjecture or hypothetical concerns to justify nondisclosure of public records. *DR Partners*, 116 Nev. at 628, 6 P.3d at 472–73 (holding that County cannot meet "its burden by voicing non-particularized hypothetical concerns") (citing *Star Pub. Co. v. Parks*, 178 Ariz. 604, 875 P.2d 837, 838 (1993)); *see also Reno Newspapers v. Sheriff*, 126 Nev. 211, 218, 234 P.3d 922, 927 (2010) ("A mere assertion of possible endangerment does not 'clearly outweigh' the public interest in access to these records.") (quotation omitted).

5. Exceptions Must Be Construed Narrowly.

At every stage of analysis, the NPRA must be construed liberally; government records are presumed public records subject to the act, and any limitation on the public's access to public records must be construed narrowly. Nev. Rev. Stat. § 239.001(2)-(3). Privileges and claims of confidentiality must be construed narrowly. *DR Partners*, 116 Nev. at 621, 6 P.3d at 468 ("It is well settled that privileges, whether creatures of statute or the common law, should be interpreted and applied narrowly"); *see also* Nev. Rev. Stat. § 239.001(3) (requiring that any limitation on the public's

access to public records "must be construed narrowly"). Further, as set forth above, if a public record contains confidential or privileged information only in part, in response to a request for access to the record, a governmental entity shall redact the confidential information and produce the record in redacted form. Nev. Rev. Stat. § 239.010(3).

6. Information in the Public Domain Must Be Disclosed.

Further, CCSD is incorrect that it is absolved of its NPRA obligations if part of what is at issue in an NPRA is publicly available from other sources. In fact, where information is in the public domain, that dissolves any claim of confidentiality. *See, e.g.*, *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) ("Under our public-domain doctrine, materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record.") (citation omitted); *In re Search Warrants Issued on June 11, 1988*, 15 Media L. Rep. (BNA) 1980, 1982 (D. Minn. 1988) ("The government has no overriding interest in continued sealing of information already in the public domain.") (warrant unsealing case); *see also Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144, n 11 (2d Cir. 2004) ("Once the cat is out of the bag, the ball game is over.") (citation omitted) (warrant sealing case). Likewise, here, there can be no valid claim under the NPRA that the need for confidentiality outweighs the presumption in favor of access because so much information is already in the public domain.

On a related note, CCSD cannot argue that, because *some* public records are already available, it is not required to produce other records. The NPRA establishes a presumption that *all* records of public agencies are public records, unless expressly declared otherwise. *See* Nev. Rev. Stat. § 239.010 (subject to limited exceptions, not applicable in this case, "all public books and public records of a governmental entity […] may be fully copied[.]". The NPRA's heavy burdens keep custodians from cherry-picking and concealing information from the public without any accountability under the law.

B. Case Law From Other Jurisdictions Supports Disclosure.

While this Court has not addressed this specific issue, other courts have found that records pertaining to school districts' investigations and findings of sexual harassment are public records pursuant to state public records acts. *See, e.g.*, *Marken v. Santa Monica-Malibu Unified Sch. Dist.*, 202 Cal. App. 4th 1250, 136 Cal. Rptr. 3d 395 (Cal. App. 2012) (finding that release of an investigation report and disciplinary record of a sexually harassing teacher was warranted under California's public records act due to the public's right to know, even where an explicit privacy statute was also implicated); *Deseret News Pub. Co. v. Salt Lake County*, 182 P.3d 372, 27 IER Cases 1099 (Utah 2008) (holding that a sexual harassment investigation report should be produced because the report "provides a window ... into the conduct of public officials.").

Marken is particularly instructive here. In that case, a "reverse" public records action, a teacher challenged a school district's planned disclosure concerning an investigation and finding that a teacher violated the district's policy regarding sexual harassment. The documents at issue were remarkably similar to those that CCSD seeks to keep confidential: a report finding sexual harassment and related documents. Specifically, a UCLA professor had requested "copies of all public records ... concerning the investigation of Santa Monica High School teacher Ari Marken and the resulting decision to place him on leave in December 2008 for sexually harassing a thirteen-year-old girl, in violation of [school district policy]." *Id.* at 400. The professor also sought records "regarding any substantial complaints about Marken's improper behavior toward students." *Id.* at 401.

As in this case, the school district in the *Marken* case had found that sexual harassment had occurred and took corrective action. *Id.* at 400-401. The lower court ordered that the records be released, and the teacher appealed. Applying a balancing test similar to this Court's *Donrey* test, the *Marken* court found the public interest in the requested records prevailed:

> [R]elease of the investigation report and disciplinary record (redacted as directed by the superior court) is required under the CPRA. Under governing case law, summarized above, the public's interest in disclosure of this information-the public's right to know-outweighs Marken's privacy interest in shielding the information from disclosure.

Id. at 416-417. In this case, just as in *Marken*, the public interest in disclosure

likewise outweighs any interest in keeping the records secret, and, as discussed below, none of CCSD's arguments against disclosure outweigh the public's interest.

C. CCSD's Privilege Log Does Not Establish How Its Claims of Confidentiality Apply to Each Document it is Withholding.

Pursuant to the NPRA, a governmental entity bears the burden of proving by a preponderance of the evidence that *each public record* ***or a part thereof*** *is confidential*. Nev. Rev. Stat. § 239.0113 (emphasis added); *see also Gibbons*, 127 Nev. at 882, 266 P.3d at 629 ("In harmony with the overarching purposes of the NPRA, the burden of proof is imposed on the state entity to prove that a withheld record is confidential.") This Court has repeatedly emphasized that a governmental entity cannot meet this burden "with a non-particularized showing . . . or by expressing hypothetical concerns. *Gibbons*, 127 Nev. at 880, 266 P.3d at 628 (citing *DR Partners*, 116 Nev. at 627–28, 6 P.3d at 472–73, and *Reno Newspapers v. Sheriff*, 126 Nev. at 219, 234 P.3d at 927).

The facts of *Gibbons* are instructive. In that case, the Reno Gazette-Journal submitted a records request to the State of Nevada for e-mail communications sent over a six-month period between Governor Gibbons and ten individuals. *Gibbons*, 127 Nev. at 876, 266 P.3d at 625. In the event that the State denied the request, the Gazette-Journal asked the State to provide it with a log "identifying, for each e-mail, the sender, all recipients, the message date, and the legal basis upon which the State was denying access." *Id.* The State denied both requests. *Id.* Rather than providing

the Gazette-Journal with specific bases for withholding the requested emails, the State "summarily listed *DR Partners*, California caselaw, a Nevada Attorney General Opinion, and the State of Nevada Policy on Defining Information Transmitted via E-mail as a Public Record." *Id.*

The Gazette-Journal then filed a petition for a writ of mandamus with the district court to obtain the requested records. *Id.*, 127 Nev. at 877, 266 P.3d at 625. Following a hearing on the petition, the district court denied the Gazette-Journal's request for a log or index of the requested records. *Id.*, 127 Nev. at 877, 266 P.3d at 626.

In reversing the district court and holding that the State should have provided the Gazette-Journal with a privilege log, this Court emphasized that the NPRA "place[s] an unmistakable emphasis on disclosure," "and that its interpreting jurisprudence places an "[e]qually unmistakable" emphasis on adversarial testing. *Id.*, 127 Nev. at 882, 266 P.3d at 629. "In sum," the Court concluded, "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." *Id.*

To meet its burden under the NPRA and to permit the requesting party to assess claims of confidentiality, the Court declared that after the commencement of litigation, a governmental entity is "generally required to provide the requesting

party with a log detailing the records it is withholding and providing the requesting party with sufficient information about the bases for withholding." *Gibbons*, 127 Nev. at 882-83, 266 P.3d at 629. Although this Court declined to "spell out an exhaustive list of what such a log must contain or the precise form that this log must take," it has specifically required that a privilege log must, "at a minimum, a general factual description of *each record withheld and a specific explanation for nondisclosure*." *Id*. (emphasis added).

In this case, CCSD's final privilege log fails to comply with this Court's mandate in *Gibbons* that a privilege log must include a general factual description of each withheld record. Instead, the log entries pertaining to the Withheld Records list provide overbroad descriptions of the documents. (*See generally* I AA184-86.) Indeed, for several entries, rather than individually listing the Withheld Records and providing a description of each one, CCSD lumped together broad categories of documents. For example, as described above, the final privilege log indicates CCSD is withholding eight pages of typed notes created on thirteen separate dates by Mr. Cole. (I AA185.) Under this Court's precedent, each individual document should be listed separately.

Of equal importance, CCSD's final log does not provide "a specific explanation for nondisclosure" for each document as required by *Gibbons*. Instead, CCSD's final privilege log includes an approximately five-page statement of

confidentiality it asserts is "[a]pplicable to [all of the documents], which have been withheld in their entirety." (I AA188.) This generalized assertion of confidentiality is plainly at odds with *Gibbons*, and deprives the Review-Journal—and this Court—of the ability to meaningful assess how CCSD's claims of confidentiality attach to each individual record.

The flaws of CCSD's final privilege log become even more troubling when compared to its description of the Withheld Records in its Opening Brief. (*Compare* I AA183-86 *and* OB, pp. 5-7.) CCSD's explanation of the Withheld Records—without any supporting record citations—in the Opening Brief is the most detailed description it has ever provided in the convoluted history of this case. That fact alone—that the Review-Journal has had to litigate this matter for almost a full calendar year to get this much information about what public records CCSD is withholding—merits affirming the district court's order. Furthermore, to the extent this information is accurate, CCSD should not benefit from its delay in disclosing it so late in the course of this case.

Moreover, this Court's rules dictate that the Court should disregard or strike CCSD's factual descriptions of the Withheld Records because they lack record support. Pursuant to Nev. R. App. P. 28(a)(8), the statement of facts in an appellant's brief must include "appropriate references to the record." CCSD provides no record support for its description of the Withheld Records, and undersigned counsel could

not locate any of the factual descriptions in the voluminous record of this case. Therefore, at least this portion of CCSD's Opening Brief should be disregarded or stricken. *See* Nev. R. App. P. 28(j) (providing that "[b]riefs that are not in compliance [with Rule 28] may be disregarded or stricken"). Representations of counsel are not evidence, and should not be considered by this Court.

D. There Is No Blanket Protection for Reports and Related Documents Pertaining to Sexual Harassment.

CCSD dedicates a substantial section of its Opening Brief to a discussion of federal case law and guidance from the Equal Employment Opportunity Commission ("EEOC") regarding preventing and investigating sexual harassment. (OB, pp. 15-21.) CCSD's citations and arguments all pertain to the general idea that, *while a sexual harassment investigation is being conducted*, the best practice is to maintain confidentiality regarding complaints and witnesses during the investigation. (*See, e.g.*, OB, pp. 18-21 (discussion of EEOC guidance regarding confidentiality of investigations).)

While interesting, CCSD's discussion of its *Faragher*[4] duties under Title VII (to promptly investigate sexual harassment claims and provide appropriate relief) does not establish that it is entitled to withhold documents pertaining to Trustee Child from the public. Indeed, the public has a right to know what its elected official

[4] (OB, p. 18, citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275 (1998).)

did and why CCSD made the decisions it did regarding said elected official.

CCSD does not cite any applicable case law but asserts that, as part of its duty under Title VII, it is required to keep the Withheld Records confidential. (OB, pp. 18-19.) In making this argument, it relies almost entirely on EEOC Notice 915.002[5], and interprets this as a blanket entitlement to withhold any documents that pertain to harassment complaints. (OB, pp. 18-19.) EEOC Notice 915.002 does state that "information about the allegation of harassment should be shared only with those who need to know about it" and "[r]ecords relating to harassment complaints should be kept confidential on the same basis." (*Id.*, p. 19 (quoting EEOC Notice 915.002(V)(1).) However, CCSD ignores two critical facts regarding the EEOC Notice on which it so heavily relies.

First, CCSD ignores that EEOC Notice 915.002 pertains to "Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment By Supervisors." The record here does not demonstrate that Trustee Child is a "supervisor" of any CCSD employee. EEOC Notice 915.002 provides that "[a]n individual qualifies as an employee's 'supervisor' *only if:*

- *the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or*
- *the individual has authority to direct the employee's daily work activities.*

[5] Available online at https://www.eeoc.gov/policy/docs/harassment.html (last accessed January 24, 2018).

EEOC Notice 9.15002, § III(A) (emphases added). The United States Supreme Court has refined this definition, holding that "an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim." *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013); *see also Baldenegro v. Tutor-Saliba Corp.*, No. 2:11-CV-00714-JCM, 2013 WL 459203, at *5 (D. Nev. Feb. 4, 2013) ("An individual will qualify as a supervisor for purposes of imputing liability for sexual harassment onto an employer when that individual has the power and authority to ***directly affect the terms and conditions of the plaintiff's employment***, *i.e.* the authority to make decisions affecting the plaintiff with regard to hiring, firing, promotion, discipline, or reassignment to significantly different duties.") (emphasis added; citations omitted).

The record here shows that Trustee Child is not a supervisor of any CCSD employee. Trustee Child is an elected school board trustee. As CCSD discusses in its Opening Brief, pursuant to Nev. Rev. Stat. § 386.350, CCSD's board of trustees is empowered to make decisions regarding the "establishment and operation of schools and classes." Trustee Child and his fellow trustees are not empowered to make decisions that directly affect the terms and conditions of a complainant's employment. CCSD reluctantly conceded as much at the June 27 hearing. In response to inquiry from the Court regarding this precise issue, counsel for CCSD

stated: "To answer your question directly. Can he walk down to Andre Long, head of human resources for the school district, and say, I want you to fire this person right now? ***No, he doesn't.***" (II AA240) (emphasis added).

Second, CCSD ignores is that the admonition falls under the heading "Policy and Complaint Procedures." Indeed, the entire Policy provides guidance on how to conduct investigations and otherwise act to avoid vicarious liability for sexual harassment. *See* EEOC Notice 915.002. Thus, while it is true that during investigations information is not to be disseminated, here the investigation is complete.

In short, EEOC Notice 915.002 does not "require" CCSD to keep the Withheld Records secret, other than protecting the type of information the district court recognized should be redacted in its February Order. Thus, CCSD has not and cannot identify any authority for the proposition that a closed investigation pertaining to an investigation of a public official (with necessary redactions) must be forever secret in any context—let alone the context we are dealing with here.

To bolster its contention that it may withhold documents, rather than rely on cases that have anything to do with Title VII (again, because there are no cases that support its position), CCSD relies on *Prudential Locations LLC v. United States Dep't of Housing and Urban Dev.*, 739 F.3d 424 (9th Cir. 2013). (OB, pp. 19-20.) While the court in that case did hold that the authors of communications sent to the

Department of Housing and Urban Development had a cognizable privacy interest under the Freedom of Information Act, the court did not hold that this privacy interest justified wholesale non-production of documents. Rather, the court concluded that it was proper to withhold the identities of the authors of those documents. *Id.* at 435. In the instant case, redaction of information that might identify those who have cognizable privacy interests is an option for CCSD. Mere redaction of that identifying information, rather than complete non-production of documents, would be sufficient to eliminate the risk of harassment, retaliation, stigma or embarrassment caused by revelation of such information.

The other case cited by CCSD, *Cameranesi v. United States Dep't of Defense*, 839 F.3d 751 (9th Cir. 2016)[6], is unavailing for similar reasons. That case involved planned disclosure of the names of foreign students and instructors at the Western Hemisphere Institute for Security Cooperation. *Id.* at 755. The court ruled that disclosing the names of these students and instructors "would give rise to a 'clearly unwarranted' invasion of privacy." *Id.* at 770. In the instant case, CCSD can comply with the spirit of *Cameranesi* by simply redacting the names and identifying information contained within responsive documents instead of refusing to produce those responsive documents.

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[6] (OB, p. 20.)

CCSD also asserts that the records must be kept confidential because CCSD employees expressed concerns about alienating Trustee Child and requested anonymity. (OB, pp. 20-21.) However, CCSD fails to explain how redaction of employee names as ordered by the district court would not ameliorate these concerns. Moreover, although CCSD raises the specter of "retaliation" against complaining employees by Trustee Child, it has not provided this Court with specific information that Trustee Child could use retaliate against any complaining employee, or which records it is withholding to prevent this alleged possible retaliation (or why other measures CCSD has taken are insufficient to prevent retaliation). Under the NPRA and this Court's case law, this sort of rank speculation is insufficient to overcome the presumption of public access. *DR Partners*, 116 Nev. at 628, 6 P.3d at 472–73.

E. CCSD Regulations Do Not Trump the NPRA.

CCSD's internal regulations are not "laws" that allow CCSD to exempt itself from the NPRA and such an interpretation would not be consistent with the NPRA. Even if the law worked the way CCSD imagines, CCSD has failed to establish that its regulations even apply to all the records at issue.[7]

[7] Adding to the myriad issues which plague CCSD's Appendix, CCSD appears to have omitted CCSD Regulations 4110, 1212, and 4311, all of which it relies on in its Opening Brief. (*See generally* OB, pp. 24-33.) This is yet another violation of Fed. R. App. P. 28. To facilitate this Court's understanding of the facts and claims pertinent to CCSD's regulation arguments, the Review-Journal has included these

1. CCSD Regulations Are Not "Law."

CCSD asserts that its Regulations, including Regulation 4110, which, *inter alia*, dictates CCSD procedures regarding sexual harassment investigations, "are laws with legal effect." (OB, p. 21.) However, this Court's case law and CCSD's own explanation of its policies and regulations—including CCSD internal Regulation 4110—contradict this assertion.

First, pursuant to this Court's opinion in *Gibbons*, an internal policy "does not have the force of law." *Gibbons*, 127 Nev. at 885, 266 P.3d at 631 (citing *State v. City of Clearwater*, 863 So.2d 149, 154 (Fla. 2003) (explaining that a "Computer Resources Use Policy" could not alter the statutory definition of what constitutes a public record under Florida law)); *see also Gibbons*, 127 Nev. at 880, 226 P.3d at 628 (…in the absence of a statutory provision that explicitly declares a record to be confidential, any limitations on disclosure must be based upon a broad balancing of the interests involved."). Thus, this Court's precedent squarely forecloses CCSD's argument that its internal regulations are "laws."

Second, even if this Court's case law did not foreclose CCSD's arguments, CCSD's own policies demonstrate that its regulations are not laws. Specifically, Policy 0101 (Introduction to Policies and Regulations) explains that "[T]he purpose of these Policies and Regulations is to provide directions regarding the details of

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regulations in its Respondent's Appendix. (IV RA651-660.)

District Operations. Policies are more general principles, while Regulations contain specific details and procedures." (IV RA660 (CCSD Policy 0101).) Nothing within Policy 0101 indicates that CCSD Regulations carry the force of law. Rather, the Regulations are meant to provide "details and procedures" for CCSD operations. (*Id.*)

2. As a Matter of Preemption, CCSD's Arguments Fail.

It is beyond argument that the Nevada legislature, by adopting the NPRA, has "see[n] fit to adopt a general scheme for the regulation of particular subject"—namely, a statutory scheme for allowing the greatest possible access to public records. *Lamb v. Mirin*, 90 Nev. 329, 332, 526 P.2d 80, 82 (1974). As discussed above, the Nevada legislature in 2007 amended the NPRA to ensure this presumption of access. *Reno Newspapers v. Sheriff*, 126 Nev. at 214, 234 P.3d at 924. Given that the legislature has acted to provide the greatest possible access to governmental records, it would be contrary to the NPRA, this Court's precedent, and public policy to allow a local governmental entity like CCSD to adopt regulations that would contravene the NPRA, or allow the entity to sidestep the NPRA by adopting regulations that dictate details and procedures for implementing policies that could then be used to shield governmental records from public view. The NPRA itself does not provide for regulations to serve as exemptions and it should not be interpreted in such narrow fashion. *See* Nev. Rev. Stat. § 239.001(3) ("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.").

3. CCSD Regulation 4110(X) Does Not Merit Non-Disclosure.

Given that CCSD Regulations are not "laws," CCSD's remaining arguments that it can rely on them to withhold records cannot prevail. CCSD asserts that CCSD Policy 4110(X), which provides that CCSD will keep confidential information gathered during an investigation of an alleged unlawful discriminatory practice, carries the force of law and dictates the records must be kept confidential. (OB, pp. 24.) According to CCSD, because Regulation 4110 is a "law," it falls within the exception outlined by Nev. Rev. Stat. § 239.010(1). (*Id.*, pp. 31.)

However, as noted above, CCSD Regulations are procedural guidelines—not laws. Thus, this internal "policy" is of no bearing. Moreover, applying it would be inconsistent with the directives of the NPRA. Finally, CCSD has failed to explain how all the records it is withholding fall within Regulation 4110 and, again, CCSD is withholding many more responsive documents by refusing to perform full searches.

In rejecting CCSD's arguments, the district court held that disclosure of the Withheld Records was necessary to serve the "significant need of providing the public information about the alleged misconduct of an elected official and CCSD's handling of the related investigation." (II AA304, ¶ 73.) Further, the court found that

disclosure of the Withheld Records was necessary to "comply with law" (in this case, the NPRA) as contemplated by Regulation 4110(X). (II RA304, ¶ 74.)

Addressing first the "significant needs" language, CCSD argues that the district court read this term too broadly, and that "other significant needs" should only be interpreted to mean "the needs of the school district to fulfill its statutory duty to educate children," and protect students and employees. (OB, p. 26.) CCSD, however, provides no support for this limiting interpretation, because none exists.

CCSD next argues that the district court's finding that disclosure of the Withheld Records served the significant need of providing the public information about Trustee Child's alleged misconduct and CCSD's investigation was erroneous because the Review-Journal has published several articles regarding Trustee Child's misconduct. (OB, p. 26.) According to CCSD, this significant need "is something far less than significant because the alleged misconduct is already well known throughout the community." (OB, p. 27.)

This specious argument ignores the fact that while the Review-Journal may have been able to report on the *results* of CCSD's investigation, it has not been able to provide the public with any information regarding CCSD's investigation contained in the Withheld Records. The public should not have to rely on the post-investigation information CCSD has chosen to trickle out—it has a right to access the underlying public records to assess the facts for itself, including facts about

Trustee Child's alleged conduct and the sufficiency of CCSD's investigation of that conduct. For example, it is still unclear how many complaints CCSD received from employees regarding Trustee Child's behavior, the precise nature of those complaints, how many employees, students, or parents Mr. Cole interviewed, what information he relayed to Superintendent Skorkowsky about his investigation, and how that information influenced Superintendent Skorkowsky's decision to limit Trustee Child's access to CCSD schools and administrative offices. All of this information is of vital importance to the public interest, and this interest cannot be outweighed by CCSD's reliance on nonbinding internal regulations.

With regard to the district court's finding that disclosure of the Withheld Records was necessary to "comply with law"—in this instance, the NPRA—CCSD asserts that the district court interpreted the Nev. Rev. Stat. § 239.001(2) and (3) (the portions of the NPRA requiring liberal construction of the NPRA and narrow construction of exceptions to disclosure) "so stringently it rendered the 'unless otherwise declared by law to be confidential' portion of [Nev. Rev. Stat. §] 239.010(1) inoperative." (OB, p. 30.) This argument, of course, is premised on the faulty assumption that Regulation 4110(X) is a "law." As discussed in *Gibbons*, however, the internal regulations of a governmental entity are not "laws." *Gibbons*, 127 Nev. at 885, 266 P.3d at 631. Thus, this argument necessarily fails.

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CCSD also attempts to argue that the district court's partial reliance on *Lamb* in finding that Regulation 4110(X) did not weigh against disclosure of the requested records was erroneous because it overlooked the provision in "unless otherwise declared confidential by law" provision in Nev. Rev. Stat. § 239.010(1). Yet again, however, this argument is premised on the faulty assumption that Regulation 4110(X) is a law—an assumption foreclosed by *Gibbons*.

4. The Withheld Records Are Not "Confidential Employee Personnel Information" Under CCSD Regulations 1212 and 4311.

CCSD also argues that Regulations 1212 and 4311 exempt the records sought from disclosure. These Regulations provide "details and procedures" (IV RA660), and cannot operate to shield CCSD records from public review. Regulation 1212 simply states "[c]onfidential information concerning all personnel will be safeguarded." (IV RA651.) Regulation 4311, which outlines details and procedures for the availability of personnel records, similarly indicates that "personnel information regarding district employees is confidential." (IV RA658.)

As acknowledged by CCSD, Regulation 4311 does not define what constitutes a "personnel record." However, CCSD argues this Court should look to an inapplicable provision of the Nevada Administrative Code for guidance. (OB, p. 32.) According to CCSD, the Withheld Records are "personnel records" pursuant to NAC 284.718(5). (OB, p. 32.) NAC 284.718 is part of the NAC chapter pertaining to the

state personnel system, and designates as confidential "[a]ny 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." (*Id.* (citing NAC 248.718(5)).)

However, NAC 284.718(5) specifies only that notes, records, recordings, or finding pertaining to a claim against government personnel that "are provided to an appointing authority" are confidential. NAC 284.718(5). NAC 284.022 defines "appointing authority" as "an official, board or commission having the legal authority to make appointments to positions in the state service, or a person to whom the authority has been delegated by the official, board or commission." By CCSD's admission, Trustee Child is not a CCSD employee. (II RA296 (noting that Trustee Child is "a corporate officer and not subject to internal corrective action").) Thus, any records pertaining to CCSD's investigation of a non-employee do not fall within the ambit of NAC 284.718. Moreover, to the extent that any of the requested records contain confidential personnel information, CCSD could protect that information through redaction as ordered by the district court rather than wholesale withholding. Nev. Rev. Stat. § 239.010(3).

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F. The Documents Are Not Subject to the Deliberative Process Privilege.

CCSD has not established by a preponderance of the evidence that the deliberative process privilege applies and, even if it did, it would not outweigh the interest in disclosure. In *DR Partners v. Board of County Commissioners of Clark County*, 116 Nev. 616, 6 P.3d 465 (2000), decided before the 2007 Amendments to the NPRA, the Nevada Supreme Court explained that the deliberative process privilege could allow governmental entities to conceal public records 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*, 116 Nev. at 623. "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); *see also Nevada v. U.S. DOE*, 517 F. Supp. 2d 1245, 1265 (D. Nev. 2007) (noting that the "deliberative process privilege" applies to draft documents that involve "significant policy judgments"). Further, "to qualify as part of 'deliberative' process, the materials requested must consist of opinions, recommendations, or advice about agency policies." *DR Partners*, 116 Nev. at 623, 6 P.3d at 469 (citation omitted).

"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)). As

the Supreme Court explained in *Gibbons*, "[a] state entity cannot meet this burden with a non-particularized showing." *Gibbons*, 127 Nev. at 880, 266 P.3d at 628. (citing *DR Partners*, 116 Nev. at 627–28, 6 P.3d at 472–73). As CCSD points out, it has the burden of establishing that the document was predecisional. Even if CCSD meets that threshold showing, the privilege is conditional, and this Court must still determine whether the public's interest in accessing the documents outweighs CCSD's interest in preventing their disclosure. As explained in *DR Partners*:

> Once the court determines that a document is privileged, it must still determine whether the document should be withheld. Unlike some other branches of the executive privilege, the deliberative process privilege is a qualified privilege. Once the agency demonstrates that documents fit within it, the burden shifts to the party seeking disclosure. It must demonstrate that its need for the information outweighs the regulatory interest in preventing disclosure.

DR Partners, 116 Nev. at 626, 6 P.3d at 471 (quoting *Capital Info. Group v. Office of the Governor*, 923 P.2d 29, 36 (Alaska 1996)) (citations omitted).

Here, CCSD asserts that the Withheld Records were predecisional and deliberative because the Report and materials were used to help determine the actions that would be taken with regard to Trustee Child's conduct. (OB, p. 37.) However, CCSD has failed to make a particularized showing, and has failed to provide evidence that the deliberative process applies. Instead, CCSD baldly asserts the materials relied upon were predecisional and deliberative. For example, its argument appears to be that because the document is dated earlier than the decisions

made by the Superintendent, the documents must all be predecisional and deliberative. (OB, p. 37:20-22.) This does not satisfy the particularized showing requirement articulated by *DR Partners*, nor the current test applicable in NPRA cases. Thus, CCSD has not met its burden of establishing that the deliberative process privilege applies to each document withheld. It does not point to any evidence that each document withheld was the basis for a specific decision.[8] Arguments of counsel are not evidence and merely pointing to timing does not establish that the deliberative process applies.

Even if CCSD did meet its initial burden, contrary to CCSD's characterization of the interests in disclosure as "quite small" (OB, p. 40:20), the needs of the public and the Review-Journal outweigh the deliberative process privilege. Trustee Child is an elected official charged with making important decisions about the administration of one of the largest school districts in the country. As CCSD noted in its April 13, 2017 Answering Brief to the Review-Journal's Amended Public Records Act Application submitted in District Court: pursuant to Nev. Rev. Stat. § 386.350, as an elected official with the Clark County School District Board of Trustees, Trustee Child has been given "such reasonable and necessary powers, not conflicting with the Constitution and the laws of the State of Nevada, as may be

[8] CCSD citations to its Appendix that correspond to briefs and other documents that do not appear to be relevant.

requisite to attain the ends for which the public schools . . . are established and to promote the welfare of school children."[9] Trustee Child's alleged behavior towards CCSD students, teachers, administrators, and other employees indicate that Trustee Child may not be the sort of official who should be entrusted with such an important responsibility. Thus, the public is entitled to additional information about Trustee Child's alleged misconduct to allow the voters to determine whether he should entrusted with the powers granted by Nev. Rev. Stat. § 386.350.

The deliberative process is at best a conditional one—and the Review-Journal overcomes its application within the first instance. Moreover, *DR Partners*—which was decided before the 2007 Amendments and thus applied a less stringent test—rejected the application of the deliberative process privilege. In light of the 2007 Amendments, CCSD must not only meet the legal test to determine whether this Court should even apply the deliberative process privilege "by a preponderance of the evidence," but it must also prove that its "interest in disclosure clearly outweighs the public's interest in access." *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011). It has not, and cannot, do so.

G. The Documents Sought Are Not "Nonrecords."

In an attempt to avoid the terms of the NPRA, CCSD claims that various withheld documents are worksheets, drafts, ad hoc reports, or other materials that do

[9] (I AA094.)

not serve as the record of an official action of a local governmental entity under NAC 239.051. (OB, p:42:18-43:20.) Without specifying exactly which of the Withheld Records it refers to, CCSD argues that "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." OB, p. 43.

NAC 239.051 does provide that certain documents are "nonrecord materials." However, CCSD ignores that it does not correspond to the provisions of Chapter 239 that address requests from the public for public records (Nev. Rev. Stat. §§ 239.001 and 239.020). Instead, the definition it relies on is only relevant to record retention and destruction matters (*see* Nev. Rev. Stat. § 239.051 (addressing "requirements before destruction")) and pertaining in particular to electronic recordkeeping systems. Adopted Regulation, LCB File No. R118-12, Sec. 30(1)[10] addresses the "the electronic recordkeeping system described in NRS 239.051 of a governmental entity," and makes clear that the definition CCSD relies on is only relevant to that section. *Id.,* Sec. 30(3).

CCSD fails to cite another administrative code provision, NAC 239.101, which provides a broader definition of "record" that is not restricted in its

[10] Available at:
http://nsla.nv.gov/uploadedFiles/nslanvgov/content/Records/Resources/R_118_12_AmendMarch.pdf (last accessed January 24, 2018);
see also https://www.leg.state.nv.us/register/RegsReviewed/$R118-12S.pdf (last accessed January 24, 2018).

applications. NAC 239.101 defines record as "information that is created or received pursuant to a law or ordinance, or in connection with the transaction of the official business of any office or department of a local governmental entity." NAC 239.101. Under this definition, the Withheld Records—which were created pursuant to CCSD's statutory duty to investigate claims of Trustee Child's alleged misdeeds and were made in connection with CCSD's official business of taking corrective action with regard to Trustee Child's alleged misdeeds—qualify as "records." Thus, the withheld documents cannot be considered "nonrecords" under the Nevada Administrative Code.[11]

Further, as detailed above, the provisions of the NPRA must be interpreted broadly to effectuate its important purpose (promoting transparency and democracy), and any limitations must be interpreted narrowly. Nev Rev. Stat. §§ 239.001(1), (2), (3). Consistent with these mandates, as detailed in Section E of the Argument in this brief, administrative code cannot trump the explicit terms of the NPRA or this Court's precedent.

In fact, CCSD cannot rely on *any* administrative code provision (particularly an inapplicable one) to argue that records fall outside the reach of the NPRA. "[I]n

[11] CCSD's position that only documents reflecting high-level decisions of high-level officials (OB, p.43:16-20 (arguing that the records need not be produced because they "do not serve as 'the official action' of CCSD") is not compatible with the terms or spirit of the NPRA, let alone NAC 239.101.

the absence of a *statutory provision* that explicitly declares a record to be confidential, any limitations on disclosure must be based upon a broad balancing of the interests involved." *Gibbons*, 127 Nev. at 880, 266 P.3d at 628. (emphasis added). The Nevada Administrative Code, though promulgated under the authority of statutory provisions, does not contain statutory provisions. *See, e.g.*, *LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608, 614 (2015) ("The balancing-of-competing-interests test is employed 'when the requested record is not explicitly made confidential *by a statute*.'") (quoting *Gibbons*, 127 Nev. at 880, 266 P.3d at 628) (emphasis added); *see also State, Dep't of Bus. & Indus., Fin. Institutions Div. v. Nevada Ass'n Servs., Inc.*, 128 Nev. 362, 368, 294 P.3d 1223, 1227 (2012) (noting that an agency "could adopt regulations to supplement, as well as interpret, the statutory provisions of [NRS Chapter 116]."). Because the Nevada Administrative Code does not contain statutes, CCSD cannot use its provisions to justify nondisclosure under the NPRA.

H. The Balancing Test Requires Disclosure.

As noted above, CCSD fails to recognize the burden it carries in NPRA matters, particularly the impact of the 2007 Amendments to the NPRA. It must both: (1) establish by a preponderance of the evidence that the records are confidential; and (2) prove that its "interest in disclosure clearly outweighs the public's interest in access." *Gibbons*, 127 Nev. at 880, 266 P.3d at 628 (citation omitted). And, "the

balancing test under *Bradshaw* now requires a narrower interpretation of private or government interests promoting confidentiality or nondisclosure to be weighed against the liberal policy for an open and accessible government." *Reno Newspapers v. Sheriff*, 126 Nev, at 217-18, 234 P.3d at 926 (citing Nev. Rev. Stat. § 239.001).

The now-applicable balancing test, contrary to CCSD's argument (OB, p. 43:21-45), does not allow for a general assertion of an interest. *See DR Partners*, 116 Nev. at 628, 6 P.3d at 472–73 (holding that County cannot meet "its burden by voicing non-particularized hypothetical concerns) (citation omitted). CCSD relies on hearsay assertions about general concerns, which is of course not evidence.[12] *See* Nev. Rev. Stat. § 239.002(2) ("… 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"). Moreover, CCSD fails to recognize that disclosure and transparency can promote the goal it represents it wants to further: protecting employees. As noted above, there is a great public interest in transparency, particularly in light of the unique facts of this case, where the allegations pertain to a trustee accountable only to the voters and not CCSD management. Finally, CCSD fails to ever explain why redacting does not satisfy any need for confidentiality. *See* Nev. Rev. Stat. § 239.010(3).

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[12] Moreover, App. pp. 106-111 do not correspond to the Cedric Cole declaration.

In any case, for each of the non-statutory claims of confidentiality CCSD asserts (and in this case, that is every claim as there is no statute declaring the records confidential), CCSD must meet its burden. *See Gibbons*, 127 Nev. at 880, 266 P.3d at 628 (2011). ("**In the absence of a statutory provision** that explicitly declares a record to be confidential, any limitations on disclosure must be based upon a broad balancing of the interests involved… and the state entity bears the burden to prove that its interest in nondisclosure clearly outweighs the public's interest in access.") (emphasis added) (citations omitted). Even assuming that CCSD has established the existence of any claim of confidentiality by the required preponderance of the evidence, it has not established the next step, i.e., that the interest in secrecy outweighs the interest in disclosure. Applying the correct test to this case, it is evident that the presumption in favor of access weighs against any claimed confidentiality in this case. Again, Trustee Child is an elected official and the public—including people in his district—have the right to know about the wrongful conduct CCSD appears to concede he has committed. The public also has a heightened right to know what its schoolchildren may have been subjected to, and to scrutinize the efficacy of the investigation itself and other measures CCSD did or did not take.

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Finally, CCSD argues that because no other court has specifically found the records at issue in this case to be public records and because it is unaware of other such records being produced (OB, p. 44:25-45:10), the records should be kept secret. This argument is absurd in light of the fact that all public records are presumed to be open to the public, and in light of the fact that it is CCSD's burden to establish that it can keep records secret. Again, "we begin with the presumption that all government-generated records are open to disclosure." *Gibbons*, 127 Nev. at 880, 266 P.3d at 628 (citations omitted).

I. The Redaction Ordered by the District Court is Sufficient to Protect CCSD Employees.

Relying on nonrecord information and speculation, CCSD argues that should this Court order disclosure of the Withheld Records, it should permit CCSD to redact "any information that identifies a CCSD employee including but not limited to the names of job titles and schools." (OB, p. 47.) CCSD's unsupported and speculative arguments do not demonstrate that redacting the Withheld Records in a manner consistent with the district court's February Order is in sufficient to address CCSD concerns about protecting employees. Accordingly, this Court should deny CCSD's request to allow it to redact the Withheld Records in such a broad manner.

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As a preliminary matter, CCSD's argument for broad redaction relies on facts that are not part of the record in this matter regarding the content of the Withheld Records. (OB, p. 46, ll. 8-17.) This is the same unsupported and previously undisclosed information cited by CCSD in the procedural section of its brief. (*Compare* OB, pp. 5-7.) Accordingly, this Court should strike or disregard any facts in this argument that are not supported by the record. Nev. R. App. P. 28(j).

Turning to the substance of CCSD's argument, CCSD asserts that disclosing the records will "strip" employees who made complaints against regarding Trustee Child of confidentiality. (OB, p. 48.) Without support, CCSD asserts this loss of confidentiality will discourage employees from reporting incidents of discrimination and "undercut their federally mandated right to be free from sexual harassment in the workplace." (*Id.*)

This argument fails for two reasons. First, the orders entered by the district court provide explicit protection for complaining employees. CCSD is explicitly permitted to redact the "names of direct victims of sexual harassment or alleged sexual harassment, students, and support staff." (II AA308, ¶ 88.)

Second, CCSD's argument—that employees will be sexually harassed if the records are produced—is of course too speculative. Pursuant to the NPRA, a governmental entity bears the burden of proving by a preponderance of the evidence that *each public record or a part thereof is confidential*. Nev. Rev. Stat. § 239.0113

(emphasis added); *see also Gibbons*, 127 Nev. at 882, 266 P.3d at 629 ("In harmony with the overarching purposes of the NPRA, the burden of proof is imposed on the state entity to prove that a withheld record is confidential.") A governmental entity cannot meet that burden with broad generalizations. Indeed, as the *Gibbons* decision recognizes, permitting an entity to rely on such broad generalizations runs contrary to the NPRA and "seriously distorts the traditional adversary nature of our legal system's form of dispute resolution." *Id.* (quotation omitted).

The only "evidence" CCSD muster of the alleged irreparable injury it will suffer if it complies with the district court's July order is a conclusory declaration from Cedric Cole, the Executive Manager of CCSD's Office of Diversity and Affirmative Action Programs. (OB, p. 48 (failing to actually cite to the declaration in its Appendix).) Aside from this "evidence," however, CCSD has presented this Court with nothing that indicates CCSD or any CCSD employee has been or will be injured if CCSD complies with the district court's July 11, 2017 order. In any case, as noted above, the declaration is hearsay and conclusory and does not meet CCSD's heavy burden in this case.

VI. CONCLUSION

CCSD has failed to meet its legal burden. It has also delayed this matter—both with regard to the Review-Journal's initial requests, made over a year ago, and with regard to the litigation. Its Opening Brief fails to provide evidence to support

its claims for confidentiality but notes that it could submit the Withheld Records *in camera*. (OB, p. 4, n. 3; p. 21, n. 11.) Enough is enough. This Court should not countenance any further delays. CCSD has had every opportunity and over a year to meet its burden. It has failed to do so. Its request for relief must be denied. The NPRA demands no less.

DATED this 24th day of January, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to Nev. R. App. P. 28.2:

I hereby certify that this brief complies with the formatting requirements of Nev. R. App. P. 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5) and the type style requirements of Nev. R. App. P. 32(a)(6) because the ANSWERING BRIEF has been prepared in a proportionally spaced typeface (14 point Times New Roman font).

I further certify that this ANSWERING BRIEF complies with the type-volume limitation of Nev. R. App. P. 32(a)(7)(A)(ii) because it contains 12,622 words.

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

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

DATED this 24th day of January, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing RESPONDENT'S ANSWERING BRIEF was filed electronically with the Nevada Supreme Court on the 24th day of January, 2018. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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