

1                   **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2           **CLARK COUNTY SCHOOL**  
3           **DISTRICT,**

4                   Appellant.

5                   vs.

6           **LAS VEGAS REVIEW-JOURNAL,**

7                   Respondent.

Supreme Court No. 73525

District Court No. A750151

District Court Dept. No. XVI

**FILED**

**FEB 21 2018**

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT

BY  DEPUTY CLERK

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14                   **ERRATA TO APELLANT'S OPENING BRIEF**

15  
16           Appeal from Eighth Judicial District Court, Clark County, Order Granting  
17                   Writ of Mandamus as to Withheld Records  
18                   and Requiring Depositions

19  
20  
21           Carlos McDade, Nevada State Bar No. 11205  
22           Adam Honey, Nevada State Bar No. 9588  
23           Clark County School District  
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28

18-06750

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1 discriminatory conduct by a school board trustee against CCSD employees  
2 must be disclosed pursuant to a public records request under NRS Chapter  
3 239. Appellant's App. II 308 at ¶88.

4  
5 This matter involves important public policy concerns regarding the  
6 right of public employees to raise concerns of all forms of discriminatory<sup>1</sup>  
7 conduct without the loss of confidentiality and with it fear of retaliation from  
8 the subject of the complaint. These issues are presented in the context of a  
9 public records request made to CCSD by the Las Vegas Review-Journal,  
10 (hereinafter "LVRJ").  
11

#### 12 **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

- 13  
14 1) Whether the district court erred in holding that the investigative  
15 materials of CCSD's ODAA related to the investigation of Trustee  
16 Kevin Child should be disclosed under the Nevada Public Records  
17 Law when the documents in the file are confidential and/or privileged.  
18  
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21 <sup>1</sup> Per the appealed Order, it appears the district court's position is that  
22 discrimination is separate and distinct from harassment and sexual  
23 harassment rather than the umbrella under which all forms of discrimination  
24 fall. Appellant's App. pp. II 304 at ¶72. And therefore all the investigative  
25 materials must be produced under CCSD Regulation 4110(X) as the same is  
26 inapplicable because it only applies to discrimination but not harassment or  
27 sexual harassment. Id. The district court's interpretation of discrimination  
28 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/>

1 2) Whether the district court erred in holding that only the names of  
2 “direct victims of sexual harassment or alleged sexual harassment,  
3 students, and support staff” may be redacted from the investigative  
4 file of CCSD’s ODAA related to the investigation of Trustee Kevin  
5 Child. Appellant’s App. II 308 at ¶88.  
6

7  
8 3) Whether the district court erred when it ordered the release of CCSD’s  
9 ODAA file related to the investigation of Trustee Kevin Child,  
10 thereby stripping employees of confidentially afforded to other  
11 similarly situated government employees and exposing CCSD  
12 employees to potential retaliatory action or contravention of the law  
13 including agency guidance issued by the U.S. Equal Employment  
14 Opportunity Commission.  
15  
16

## 17 **STATEMENT OF THE CASE**

### 18 **A. Nature of the case**

19  
20 This is an appeal from a decision by Eighth Judicial District Court,  
21 Judge Timothy C. Williams presiding, ruling on an amended petition for writ  
22 of mandamus and directing CCSD to provide the entire investigative file and  
23 memoranda and recommendations from CCSD’s ODAA regarding  
24 allegations of discriminatory conduct by school board trustee Kevin Child.  
25  
26

### 27 **B. Course of Proceedings**

1 This matter arose under an amended petition for writ of mandamus  
2 under the Nevada Public Records Law, Chapter 239 of the Nevada Revised  
3 Statutes. No discovery was undertaken; rather the matter was tried on briefs  
4 and oral arguments of the parties.<sup>2</sup> The district court also reviewed the  
5 investigative file and memoranda and recommendations at issue *in camera*.<sup>3</sup>  
6  
7 Upon filing of the Notice of Entry of Order on July 12, 2017, CCSD filed its  
8 appeal of the Order dated July 11, 2017. Appellant's App. II 311-312.  
9

10 **C. Disposition Below**  
11

12 At the hearing on June 27, 2017, the relevant issue as to the instant  
13 appeal was LVRJ's request for the investigative file and memoranda and  
14 recommendations of the ODAA relative to complaints about Trustee Kevin  
15 Child.<sup>4</sup>  
16

17 On July 11, 2017, the Honorable Timothy C. Williams, District Judge,  
18 filed an Order Granting Writ of Mandamus as to Withheld Records.  
19 Appellant's App. II 294-310. CCSD is appealing the July 11, 2017, Order  
20 that requires disclosure of the "withheld documents" which consist of the  
21

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22 <sup>2</sup> There were two depositions conducted 2.5 months after the Order  
23 appealed was issued relative to how electronic searches were performed  
24 rather than the issue at bar in this appeal, which is the investigatory  
25 materials.

26 <sup>3</sup> The ODAA investigative file, memoranda and recommendations at issue  
27 are available upon request for in camera review by the Nevada Supreme  
28 Court.

1 investigative file and two (2) memoranda and recommendations dated  
2 October 19, 2016 and May 26, 2017<sup>5</sup> prepared by CCSD's ODAA.

3  
4 Appellant's App. II 308 at ¶88.

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

9  
10 In particular, the District Court's Order requires the release of notes  
11 and the "Key" to employee names and memoranda and recommendations  
12 including multiple drafts of the memoranda prepared by CCSD's ODAA.

13  
14 Appellant's App. I 184.

15  
16 The documents ordered to be released breakdown as follows:

- 17 1) The notes include handwritten notes dated from September  
18 7, 2016 – January 26, 2017, which identify nineteen (19)  
19 people by name of which only four (4) names would be  
20 redacted under the terms of the district court Order;  
21  
22 Appellant's App. I 183 & Withheld Docs. see FN3.

23  
24  
25  
26 <sup>5</sup> Multiple drafts of the investigative reports are contained in the ODAA file  
27 including handwritten comments by CCSD counsel all of which has been  
28 ordered to be disclosed by the district court.

- 1                   2) Typed notes dated from January 28, 2016 through October  
2                   4, 2016, and identifies twenty-three (23) employees by  
3                   letters of which only four (4) of the employees would  
4                   qualify for redaction of their names; Appellant's App. I 183,  
5                   185 & Withheld Docs. see FN3.  
6  
7  
8                   3) Additional typed notes titled, "Case Notes – Confidential"  
9                   dated from January 28, 2016 through May 25, 2017. These  
10                  notes identify employees using letters A-Z and AA-CC. Per  
11                  the terms of the twenty-nine (29) names only eight (8)  
12                  would be redacted; Appellant's App. I 184 & Withheld  
13                  Docs. see FN3.  
14  
15  
16                  4) A single page "Key" is used by ODAA on the typed notes  
17                  and "Confidential Notes" using letters to identify the  
18                  employees and protect confidentiality;<sup>6</sup> Appellant's App. I  
19                  184 & Withheld Docs. see FN3.  
20  
21

22  
23                  <sup>6</sup> The district court has ordered that the "Key" be produced subject to the  
24                  limited redactions. The key identifies twenty-nine (29) employees yet only  
25                  eight (8) qualify for the district court's redacting as support staff members or  
26                  direct victims of sexual harassment or alleged sexual harassment.  
27                  Additionally, the handwritten notes include ten (10) names not included in  
28                  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.

- 1                   5) Memoranda and recommendations dated October 19, 2016<sup>7</sup>  
2                   and May 26, 2017, with four (4) drafts; Appellant's App. II  
3                   183-185 & Withheld Docs. see FN3.  
4  
5                   6) Complaint of harassment against Trustee Child dated May 5,  
6                   2017 and typed notes from complainant dated May 22,  
7                   2017; Appellant's App. II 185 & Withheld Docs. see FN3.  
8  
9                   7) Employee typed notes of alleged discriminatory conduct of  
10                  Trustee Child during school visits dated September 20, 2014  
11                  through April 14, 2017. Appellant's App. II 186 &  
12                  Withheld Docs. see FN3.  
13

14               **D. Statement of Facts**  
15

16               On December 5, 2016, LVRJ published its first article relative to the  
17               allegations of Trustee Child's conduct and CCSD's response titled, "CCSD  
18               bars Trustee Child from making school visits," Appellant's App. II 336-  
19               339.<sup>8</sup> This same article, in its electronic version, included the memo from  
20

21  
22               <sup>7</sup> LVRJ published the October 19, 2016, report and recommendations online  
23               on December 23, 2016. Appellant's App. II 56-64.

24               <sup>8</sup> This Court may take judicial notice of newspaper articles published by  
25               LVRJ regarding Mr. Child's alleged misconduct within CCSD and the steps  
26               taken by CCSD to protect its employees for the limited purpose of what the  
27               articles contain (but not for determining the truth of those articles) pursuant  
28               to NRS 47.130 and case law. Appellant's App. II 336-382, published news



1 Superintendent Pat Skorkowsky also dated December 5, 2016, with the  
2 subject, "Guidelines for Trustee Visits." Appellant's App. II 337.  
3

4 Also, on December 5, 2016, LVRJ submitted an initial request for  
5 public records (which was supplemented on December 9). Appellant's App.  
6 I 66 & 68. The district court Order dated February 22, 2017, relative to the  
7 December 2016, record requests are not under appeal. CCSD produced  
8 responsive documents on its own accord and also in compliance with the  
9 district court's Order.  
10  
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12  
13 article. Courts may take judicial notice of publications introduced to  
14 "indicate what was in the public realm at the time, not whether the contents  
15 of those articles were in fact true." *Von Saher v. Norton Simon Museum of*  
16 *Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. Cal. Jan. 14, 2010) citing  
17 *Premier Growth Fund v. Alliance Capital Mgmt.*, 435 F.3d 396, 401 n.15  
18 (3d Cir. 2001); accord *Heliotrope Gen. Inc. v. Ford Motor Co.*, 189 F.3d  
19 971, 981 n.1 18 (9th Cir. 1999) (taking judicial notice "that the market was  
20 aware of the information contained in news articles submitted by the  
21 defendants.") "And courts may take judicial notice of documents such as the  
22 newspaper articles at issue here for the limited purpose of determining which  
23 statements the documents contain (but not for determining the truth of those  
24 statements)." *United States ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805,  
25 812 (11th Cir. Fla. Jan. 16, 2015) citing *Bryant v. Avado Brands, Inc.*, 187  
26 F.3d 1271, 1278 n. 10 (11th Cir. Ga. Sept. 3, 1999). Additionally, LVRJ  
27 made articles published on December 23, 2016 and May 23-25, 2017, part of  
28 the court record in district court.

1 On or about December 23, 2016, LVRJ obtained the “four-page report  
2 dated Oct. 19”, which is the memorandum and recommendations prepared by  
3 CCSD’s ODAA that LVRJ would later request again as part of its February  
4 10, 2017, public records request related to Trustee Child. Appellant’s App. I  
5 56-64 & 70-73. LVRJ published the October 19, 2016, memo online on  
6 December 23, 2016, as well. Appellant’s App. I 56-64.  
7  
8

9 On February 10, 2017, LVRJ submitted a new detailed NPRA request,  
10 which included a request for the investigative file at issue in the instant  
11 appeal. Appellant’s App. I 70-73.  
12

13 In the February records request, LVRJ formally requested the entire  
14 investigative file at issue in this case including the four-page report dated Oct.  
15 19 they already were in possession of. Appellant’s App. I 61-64 & 70-73. The  
16 February request was in excess of three (3) pages long and contained 15  
17 distinct categories of records regarding Trustee Child in addition to  
18 investigatory materials of all types. Appellant’s App. I 70-73.  
19  
20

21 On February 17, 2017, CCSD replied to LVRJ’s February 10 NPRA  
22 request stating additional time was necessary to locate records and a reply was  
23 anticipated by March 3. Appellant’s App. I 75-77. The February 17 response  
24 was on the 5<sup>th</sup> business day as mandated by NRS 239.0107(1).  
25  
26  
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1 LVRJ filed its Amended Application on March 1, 2017. Appellant's  
2 App. I 9-28.

3  
4 On March 3, 2017, as indicated in the February 17 correspondence,  
5 CCSD produced records responsive to the February 10 NPRA request and  
6 included specific objections and privileges. Appellant's App. I 110-112.

7  
8 LVRJ filed its Opening Brief on its Writ of Mandamus in District  
9 Court on March 29, 2017. Appellant's App. I 29-77. CCSD filed its  
10 Answering Brief on April 13, 2017, and the Reply Brief was filed by LVRJ on  
11 April 24, 2017. Appellant's App. I 78-121 & I 122-151.

12  
13 On May 30, 2017, CCSD produced an updated privilege log to  
14 chambers per the District Court's directive in open court on May 9, 2017.  
15 Appellant's App. I 182-192.

16  
17 On **June 5, 2017**, the District Court issued an Order directing an  
18 updated privilege log be produced to both the district court and LVRJ by **May**  
19 **30, 2017**. Appellant's App. I 152-162.

20  
21 CCSD provided LVRJ the privilege log previously provided to  
22 chambers on June 6, 2017.

23  
24 On June 16, 2017, CCSD provided LVRJ a letter dated May 31, 2017,  
25 from Superintendent Pat Skorkowsky to Trustee Child, which reiterated prior  
26  
27  
28

1 guidelines and contains additional directives to the trustee. Appellant's App. I  
2 195 at 3:19-23 & Appellant's App. II 334-335.

3  
4 On June 26, 2017, CCSD provide LVRJ two (2) additional letters  
5 dated November 30, 2016 and April 24, 2017, from Superintendent Pat  
6 Skorkowsky to Trustee Child addressing the trustee's conduct. Appellant's  
7 App. II 195 at 3:23-4:11 & Appellant's App. II 330-331 & 333.

8  
9 On June 27, 2017, oral arguments were heard before District Court  
10 Judge Timothy C. Williams. Appellant's App. II 193-290.

11  
12 Judge Williams issued an Order following the June 27<sup>th</sup> hearing on  
13 July 11, 2017, which is now under appeal before this Court. Appellant's App.  
14 II 291-312.

## 15 16 STANDARD OF REVIEW

17 A writ petition arising from a public records request is generally  
18 reviewed for an abuse of discretion. *Las Vegas Taxpayer Comm. v. City*  
19 *Council*, 125 Nev. 165, 208 P.3d 429, 433-34 (2009); see also *Veil v Bennett*,  
20 121 Nev. Adv. Op. 22, 348 P.3d 684, 686 (2015). Nonetheless, this Court  
21 reviews the district court's decision de novo when the subject of the appeal on  
22 the writ petition when the issue is one of statutory construction. *Las Vegas*  
23 *Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. \_\_\_, 343 P.3d 608  
24  
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1 (Nev. 2015); see also *State v. Barren*, 128 Nev. Adv. Op. 31, 279 P.3d 182,  
2 184 (2012).

### 3 SUMMARY OF ARGUMENT

4  
5 This Court should reverse the district court's Order to turn over the  
6 investigative material produced by the ODAA under any one or combination  
7 of the following basis:  
8

- 9 1) CCSD has a duty under federal law to investigate allegations of  
10 discrimination and federal guidelines and case law support  
11 maintaining confidentiality for various reasons including to not  
12 produce a chilling effect on future reporting of discrimination by  
13 employees and avoiding stigma and embarrassment to witnesses  
14 and victims;  
15
- 16 2) Under CCSD Regulation 4110(X) investigations of discrimination  
17 shall remain confidential but for limited exceptions that do not  
18 apply under the facts of this case;  
19
- 20 3) The investigative file should remain confidential under CCSD  
21 Regulations 1212 and 4311 as personnel information, which would  
22 be consistent with how the same information would be handled for  
23 State employees under NAC 284.718(5) and the "unless otherwise  
24 confidential by law" portion of NRS 239.010(1);  
25  
26  
27  
28

- 1 4) The investigative file and reports compiled by the ODAA are  
2 confidential under the deliberative process privilege because the  
3 recommendations and opinions of the ODAA were predecisional  
4 and deliberative while serving as the basis of later policies  
5 regarding Trustee Child's visits to schools and administrative  
6 offices. Furthermore, the file itself is intertwined with the final  
7 reports to such an extent to disclose either the file or the reports but  
8 not the other has the effect of in essence disclosing both;  
9  
10  
11  
12 5) Even if this Court determined the final memoranda, only, were  
13 protected under the deliberative process privilege, the investigative  
14 file created by the ODAA should remain confidential as non-  
15 record materials under NAC 239.051 and NAC 239.705 because  
16 they "do not serve as the record of an official action of a local  
17 government entity." NAC 239.051;  
18  
19  
20 6) The investigative file and reports should remain confidential under  
21 the *Donrey* balancing test because the concerns are particularized  
22 rather than hypothetical and the interests of non-disclosure  
23 outweigh the general policy in favor of open government. This is  
24 particularly true in the case where the LVRJ has already reported  
25 extensively on the alleged misconduct of Trustee Child and the  
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28

1 potential damage to employees and CCSD is great. *Donrey of*  
2 *Nevada, Inc. v Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990); and

3  
4 7) Alternatively, even if this Court were to rule disclosure is required,  
5 it should be done in a manner consistent with prior precedent that  
6 would allow for disclosure of the final memoranda, only.

7  
8 Additionally, redactions should be allowed for all information that  
9 identifies complainants and witnesses so as to ensure future  
10 reporting of misconduct in order to protect employees from  
11 retaliation, stigma and embarrassment.  
12

### 13 ARGUMENT

14  
15 This matter involves important public policy concerns regarding the  
16 right of public employees to raise concerns of all forms of discrimination<sup>9</sup>  
17 including harassment and sexual harassment without the loss of  
18 confidentiality and the resultant chilling effect. These issues are presented  
19 in the context of a public records request made to CCSD by the Las Vegas  
20 Review-Journal ("LVRJ") under the provisions of NRS Chapter 239.  
21

22  
23 On July 11, 2017, the district court filed an Order Granting Writ of  
24 Mandamus as to Withheld Records. Appellant's App. II 294-310. In its  
25

26  
27 <sup>9</sup> See <https://www.eeoc.gov/laws/types/> for list of categories of  
28 discrimination.

1 Order, the district court directed CCSD to produce “withheld documents”,  
2 which consist of the entire investigative file and memoranda and  
3 recommendations<sup>10</sup> and stated: “CCSD may redact the names of direct  
4 victims of sexual harassment or alleged sexual harassment, students, and  
5 support staff.” Appellant’s App. II 308 at ¶ 88 (emphasis added). Pursuant  
6 to a February 22, 2017 Order: “CCSD may not make any other redactions,  
7 and must unredact the names of schools, all administrative level employees,  
8 including but not limited to deans, principals, assistant principals, program  
9 coordinators, and teachers.” Appellant’s App. I 8 at ¶ 35.

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

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



1 future reporting of alleged discrimination, which will promote the  
2 continuation of discriminatory conduct.  
3

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

8 It is an unlawful employment practice for an employer to  
9 discriminate against an individual with regard to the terms and conditions of  
10 that employment on the basis of the employee's race, color, religion, sex, or  
11 national origin. 42 U.S.C. § 2000e-2(a)(1). In *Meritor Savings Bank v.*  
12 *Vinson*, 477 U.S. 57 (1986), the Supreme Court held that sexual  
13 harassment constitutes sex discrimination in violation of Title VII.  
14 Courts have recognized different forms of sexual harassment. In "hostile  
15 work environment" cases, employees work in offensive or abusive  
16 environments. *Ellison v. Brady*, 924 F.2d 872, 875 (9<sup>th</sup> Cir. 1991). "[A]  
17 hostile environment exists when an employee can show (1) that he or she was  
18 subjected to sexual advances, requests for sexual favors, or other verbal or  
19 physical conduct of a sexual nature, (2) that this conduct was unwelcome, and  
20 (3) that the conduct was sufficiently severe or pervasive to alter the conditions  
21 of the victim's employment and create an abusive working environment." *Id.*  
22 at 875-76.  
23  
24  
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1            “[E]mployers are liable for failing to remedy or prevent a hostile or  
2 offensive work environment of which management-level employees knew, or  
3 in the exercise of reasonable care should have known.” *Dawson v. Entek Int’l*,  
4 630 F.3d 928, 940 (9th Cir. 2011) (alteration in original) (quoting *Ellison*, 924  
5 F.2d at 881)).

6  
7            It is well-established that “notice of the sexually harassing conduct  
8 triggers an employer’s duty to take prompt corrective action that is reasonably  
9 calculated to end the harassment.” *Swenson v. Potter*, 271 F.3d 1184, 1192  
10 (9<sup>th</sup> Cir. 2001). (internal quotation marks omitted). **Once an employer is on**  
11 **notice of a sexual harassment complaint, it must conduct an investigation.**  
12 *Id.* at 1193 (emphasis added).

13  
14            “Employers should impose sufficient penalties to assure a workplace  
15 free from sexual harassment. In essence, then . . . the reasonableness of an  
16 employer's remedy will depend on its ability to stop harassment by the person  
17 who engaged in harassment.” *Ellison*, 924 F.2d at 882. Employers therefore  
18 have a duty to undertake a remedy that is likely to be effective. *Fuller v. City*  
19 *of Oakland*, 47 F.3d 1522, 1528-29 (9<sup>th</sup> Cir. 1995). “In evaluating the  
20 adequacy of the remedy, the court may also take into account the remedy's  
21 ability to persuade potential harassers to refrain from unlawful conduct.”  
22 *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 (9<sup>th</sup> Cir. 1997); *Trent v. Valley Electric Ass'n, Inc.*, 41 F.3d 524, 526 (9<sup>th</sup> 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**

1 **complain to management due to fear of retaliation.** *See* U.S., Equal  
2 Employment Opportunity Commission, EEOC Notice No. 915.002,  
3  
4 *Enforcement Guidance on Vicarious Employer Liability for Unlawful*  
5 *Harassment by Supervisors*, at § V(D)(1) re Failure to Complain (dated  
6 6/18/99, in effect until rescinded or superseded) (emphasis added); *Faragher*  
7 *v. City of Boca Raton*, 118 S. Ct. 2275 (1998).

9       Regarding confidentiality of an investigation, EEOC has stated that  
10 “[a]n employer should make clear to employees that it will protect the  
11 confidentiality of harassment allegations to the extent possible. An employer  
12 cannot guarantee complete confidentiality, since it cannot conduct an effective  
13 investigation without revealing certain information to the alleged harasser and  
14 potential witnesses. However, **information about the allegation of**  
15 **harassment should be shared only with those who need to know about it.**  
16 **Records relating to harassment complaints should be kept confidential on**  
17 **the same basis.”** *See* EEOC Notice No. 915.002, at § V(C)(1) re  
18 Confidentiality (emphasis added).

22       “To assure employees that such a fear is unwarranted, the employer  
23 must clearly communicate and enforce a policy that no employee will be  
24 retaliated against for complaining of harassment.” *See* EEOC Notice No.  
25 915.002, at § V(D)(1) re Failure to Complain.  
26  
27  
28

1 In a case involving the Freedom of Information Act, the Ninth Circuit  
2 found that the authors of communications sent to a federal agency  
3 complaining about violations of law had a cognizable personal privacy interest  
4 under 5 U.S.C. § 552(b)(6) (relevant factors included the agency's  
5 confidentiality policy). *Prudential Locations LLC v. United States Dep't of*  
6 *Housing and Urban Dev.*, 739 F.3d 424, 429-34 (9<sup>th</sup> Cir. 2013). The court  
7 also found the authors faced a significant risk of harassment, retaliation,  
8 stigma, or embarrassment if their identities were revealed. There was no  
9 cognizable public policy interest served by revealing their identities, so it  
10 would have constituted a clearly unwarranted invasion of personal privacy  
11 under Exemption 6. *Id.*; *Cameranesi v. United States Dep't of Defense*, 839  
12 F.3d 751 (9<sup>th</sup> Cir. 2016) (names of foreign students and instructors were  
13 exempt under FOIA Exemption 6, because disclosure would constitute a  
14 clearly unwarranted invasion of personal privacy; disclosure could cause  
15 harassment, stigma, or violence which is exactly the type of risk that  
16 courts have recognized as nontrivial) (emphasis added).

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

26 Here, as Trustee Child is a corporate officer and not subject to internal  
27 employer corrective action, the only manner in which CCSD may act to fulfill  
28

1 its obligation to protect its employees against potential retaliation is to  
2 withhold the identity of the employees and withhold the internal information  
3 received or gathered by CCSD in the course of its investigation. CCSD and  
4 the public have an interest in a strong system to address complaints of  
5 discrimination and harassment that encourages reporting without fear of  
6 retaliation.  
7  
8

9 CCSD employees have expressed legitimate fear of being identified  
10 and/or retaliated against by Trustee Child both **verbally** to Cedric Cole  
11 (Executive Manager, ODAA) and **in writing** in emails previously produced to  
12 LVRJ in this matter. Appellant's App. I 114-119 (One employee states:  
13 "Again, we are hesitant to report these issues because we don't want to  
14 alienate our Trustee." Another employee requests: "Could you please keep  
15 this statement completely anonymous?" Yet another employee expresses  
16 concerns with an environment that is not "supportive." Another document  
17 reveals similar concerns of intimidation by a member of the public.)<sup>11</sup>  
18  
19

20 Therefore, based upon the above federal law and EEOC guidance related to  
21 discrimination and harassment, the investigatory information should remain  
22 confidential in this case.  
23  
24

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25  
26 <sup>11</sup> See also Withheld Documents at 210 upon request of the Court for in  
27 camera review.  
28

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

3                   **1. CCSD regulations are laws with legal effect**

4           The purpose of NRS Chapter 239 is to “foster democratic principles  
5  
6 by providing members of the public with access to inspect and copy public  
7 books and records to the extent permitted by **law.**” NRS 239.001(1)  
8 (emphasis added).  
9

10           NRS 239.010(1) states:

11           Except as otherwise provided in this section and NRS 1.4683, . . . and  
12           section 2 of chapter 391, Statutes of Nevada 2013 and **unless**  
13           **otherwise declared by law** to be confidential, all public books and  
14           public records of a governmental entity must be open at all times . . .  
15           (emphasis added).

16           Federal courts have repeatedly held the terms “law” or “laws” are far  
17           broader than just statutes and includes regulations. “[L]aws includes  
18           regulations. We generally assume that when Congress uses different words in  
19           a statute, it intends them to have different meanings.” *Save Our Valley v.*  
20           *Sound Transit*, 335 F.3d 932, 960 (9th Cir. 2003) (citing *S.E.C. v. McCarthy*,  
21           322 F.3d 650, 656 (9th Cir. 2003)). “Congress used the phrase ‘Constitution  
22           and laws’ rather than ‘Constitution and statutes,’ yet referred elsewhere in the  
23           same sentence to “any statute, ordinance, regulation, custom or usage . . . .”  
24           *Id.* (citing 42 U.S.C. § 1983).  
25  
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1 While today's large federal bureaucracy did not exist when § 1983  
2 was enacted in 1874, the 1874 Congress was quite aware, as § 1983  
3 itself indicates, that there are different sources of law, including  
4 regulations. In this context, the terms "laws" and "statutes" must have  
5 different meanings. Further, the term "laws" necessarily has a broader  
6 meaning than "statutes," not an equivalent or narrower meaning.  
7 Indeed, the Supreme Court has rejected narrow interpretations of the  
8 phrase "and laws" in the past: In *Maine v. Thiboutot*, 448 U.S. 1, 7, 65  
9 L. Ed. 2d 555, 100 S. Ct. 2502 (1980), the Court made clear that the  
10 phrase does not encompass only civil rights laws but includes rights  
11 secured by other federal laws as well. *Id.* at 10. Applying the  
12 *Chrysler* presumption, "laws" in § 1983 includes regulations as well.

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

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

21 CCSD is a political subdivision of the State of Nevada. *See* NRS  
22 386.010(2). The State of Nevada enacted an enabling statute in 1973 giving  
23 each board of trustees of a school district, "such reasonable and necessary  
24 powers, not conflicting with the constitution and the laws of the State of  
25 Nevada, as may be requisite to attain the ends for which the public schools are  
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1 established and to promote the welfare of school children. . . ” NRS 386.350;  
2  
3 *see also CCSD et al v. Beebe*, 91 Nev. 165, 533 P.2d 161 (1975) and *Bartlett*  
4 *et al. v. Board of Trustees of the White Pine County School District*, 92 Nev.  
5 347, 349, 550 P.2d 416 (1976) each citing NRS 386.350.

6         Though the Nevada Supreme Court has rarely weighed in on matters  
7  
8 involving regulations created by the board of trustees of a school district  
9 pursuant to NRS 386.350, it is clear that school regulations, including those of  
10 CCSD, are laws with legal effect. If a school district’s regulations did not  
11 have legal effect, the Nevada Supreme Court would not have considered the  
12 same in cases such as *CCSD et al v. Beebe*, 91 Nev. 165, 533 P.2d 161 (1975).

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

16         Pursuant to the authority bestowed upon school district board of  
17  
18 trustees by the legislative branch, specifically, NRS 386.350, CCSD trustees  
19 have enacted numerous regulations. These include CCSD Regulation 4110  
20 which sets forth the procedures and requirements related to employment  
21 discrimination, harassment, and sexual harassment of employees. This  
22 regulation is entirely consistent with the federal authorities related to unlawful  
23 discrimination or harassment cited above and the Nevada Administrative  
24 Code regarding “Personnel Information” of State employees. NAC  
25  
26 284.718(5). Regulation 4110(X) states:  
27  
28

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

6 CCSD Reg. 4110 (emphasis added).

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

11  
12 Here, there is no dispute the investigation was conducted based on  
13 allegations of discriminatory conduct and that the information does not  
14 warrant disclosure in order to conduct an investigation or resolve a complaint.  
15  
16 There is no additional investigation such as law enforcement nor is the  
17 purpose of disclosure to resolve any complaint; rather it is a public records  
18 request. Thus, the records should remain confidential unless disclosure serves  
19  
20 "other significant needs" or it is necessary to "comply with law."

21 At the district court level, the only "significant other need" identified  
22 was the public's right to know about the conduct of an elected official.  
23  
24 Appellant's App. II 267-269 at 75:21-77:2. The simple fact the party  
25 alleged to have committed discriminatory conduct versus CCSD employees  
26 is an elected official does not create "significant other needs", which warrant  
27  
28

1 disclosure of the investigative materials. To rule the CCSD Board of School  
2 Trustees meant “significant other needs” to mean compliance with a public  
3 records request when doing so would force CCSD to violate confidentiality  
4 of Title VII investigations is not supported by the record or any precedent  
5 and is thus arbitrary and capricious. The ruling also affords CCSD  
6 employees less confidentiality and work place protections than similarly  
7 situated State employees. See part b. in this section. The preceding is  
8 contrary to basic statutory interpretation as explained further below.  
9  
10 “Significant other needs” more reasonably should be interpreted to mean the  
11 needs of the school district to fulfill its statutory duty to educate our  
12 communities’ youth in a safe environment conducive to learning and devoid  
13 of discrimination. CCSD still must protect its students and employees by  
14 maintaining confidentiality to ensure a positive learning and working  
15 environment now and in the future.

16  
17 The district court did not identify any precedent or basis for  
18 determining that because the alleged wrongdoer was an elected official the  
19 “significant other need” exception was met. And there was no weighing of  
20 the “significant other need” declared by the district court versus the  
21 employees’ right to or expectation of confidentiality when reporting alleged  
22 discrimination. Id. For example, in ¶73 of its order, the district court holds  
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1 that “the disclosure of withheld documents serves the significant need of  
2 providing the public information about the alleged misconduct of an elected  
3 official and CCSD’s handling of the related investigation.” Appellant’s  
4 App. II 304. The preceding analysis is misplaced for three (3) reasons:  
5 First, it ignores the fact the public already has extensive information about  
6 the alleged conduct of Trustee Child to the extent that at least thirteen (13)  
7 articles regarding his conduct were published by the LVRJ between  
8 December 5, 2016 and June 19, 2017. Appellant’s App. I 56-64 & II 336-  
9 382. None of these articles required breaching anyone’s confidentiality in  
10 order to inform the public of the trustee’s alleged misconduct and included  
11 reporting in regard to the measures CCSD had taken to protect its students  
12 and employees. It is clear the “significant need” is something far less than  
13 significant because the alleged misconduct is already well known throughout  
14 the community. Second, the withheld records reviewed by the district court  
15 included the October 19, 2016, memoranda and recommendations  
16 previously obtained and published by LVRJ on December 23, 2016, again  
17 demonstrating alleged misconduct and recommendations to address the  
18 behavior for all the public to consider. Finally, all letters sent to Trustee  
19 Child with additional directives regarding his conduct on school property  
20 were provided to LVRJ prior to the June 26, 2017, hearing and therefore the  
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1 withheld documents shed no additional light on “CCSD’s handling of the  
2 related investigation.” Appellant’s App. II 330-335. CCSD has released  
3 approximately 174 pages of emails and other documents that are part of the  
4 record. These disclosures were sufficient for LVRJ to publish at least fifteen  
5 (15) articles to date. The releases included many of the complaints. The  
6 Superintendent’s letters to Trustee Child and administrators documented his  
7 decision to incrementally restrict Trustee Child’s access to CCSD facilities,  
8 thereby informing the public of those official actions. There is nothing in  
9 the record revealing a “significant need” that remains unmet.  
10  
11  
12

13       There is no rational basis for ordering limited redactions to include  
14 only support staff and students. Specifically, there is no indication as to the  
15 purpose of identifying teachers, deans, assistant principals, principals or  
16 CCSD administrators’ or an appreciation of the harm to individuals and  
17 families by disclosure. To date no statute, law or case law supporting the  
18 identifying of complainants and witnesses of discrimination has been  
19 presented in this matter.  
20  
21

22       As to the exception, “or comply with law”, the district court  
23 essentially stated that there was a conflict between NRS 239.010 and CCSD  
24 Regulation 4110(X) because, “T[t]here’s an overwhelming mandate from  
25 the Nevada legislature regarding the public’s right to access governmental  
26  
27  
28

1 records” and therefore disclosure is necessary. Appellant’s App. II 269 at  
2 77:2-8.

3  
4 The preceding is inconsistent with Nevada case law precedent  
5 regarding statutory interpretations. “[T]he construction of a statute is a  
6 question of law.” *Edgington v. Edgington*, 119 Nev. 577, 582-83, 80 P.3d  
7 1282, 186-87 (2003) (citation omitted. “In interpreting a statute, ‘words . . .  
8 should be given their plain meaning unless this violates the spirit of the  
9 act.’” *Id.* (citation omitted). “Thus, when a statute’s language is clear and  
10 unambiguous, the apparent intent must be given effect, as there is no room  
11 for construction.” *Id.* (citations omitted).

12  
13 Furthermore, “[s]tatutory interpretation should avoid meaningless or  
14 unreasonable results, and ‘statutes with a protective purpose should be  
15 liberally construed in order to effectuate the benefits intended to be  
16 obtained.’” *Id.* (citations omitted). “Additionally, ‘when construing a  
17 specific portion of a statute, the statute should be read as a whole, and,  
18 where possible, the statute should be read to give meaning to all of its  
19 parts.’” *Id.* (citation omitted).

20  
21 Each term must be read to “render it meaningful within the context of  
22 the purpose of the statute.” *Redl v. Heller*, 120 Nev. 75, 78 (2004) (quoting  
23 *Bd. of County Comm’rs v. CMC of Nevada* 99 Nev 73, 744 (1983)). Thus,  
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1 in determining the scopes of NRS 239.001(2) and (3) and the language of  
2 NRS239.010(1) stating “unless otherwise declared by law to be  
3 confidential” the statute must be interpreted so that no part is rendered  
4 inoperative.” *IGT v. Dist. Ct.*, 124 Nev. 193, 200 (2008) citing *Williams v*  
5 *Clark County Dist. Attorney*, 118 Nev. 473, 484-85, 50 P.3d 536, 543-44  
6 (2002); *Matter of Estate of Thomas*, 116 Nev. 492, 998 P.2d 560 (2000).  
7  
8

9 The district court interpreted NRS 239.001(2) & (3) so stringently it  
10 rendered the “unless otherwise declared by law to be confidential” portion of  
11 NRS 239.010 (1) inoperative in this matter. It is a basic tenet of statutory  
12 construction that a statute must not be interpreted in such a manner to render  
13 other portions of the statute meaningless. The legislature included the  
14 “unless otherwise declared by law to be confidential” language in NRS  
15 239.010(1) to protect confidentiality. For the district court to declare NRS  
16 Ch. 239 an “overwhelming mandate” for disclosure to such an extent that the  
17 “unless otherwise declared by law to be confidential” language in NRS  
18 239.010 is rendered no meaning is an improper interpretation and certainly  
19 does not demonstrate that disclosure is necessary to comply with NRS Ch.  
20 239 given the language in NRS 239.010(1).  
21  
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25 Furthermore, the district court’s Order cited *Lamb v. Mirin*, 90 Nev.  
26 329, 332-333, 526 P.2d 80, 82 (1974), to support CCSD cannot create  
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28

1 policies that conflict with NRS Chapter 239.<sup>12</sup> Appellant's App. II 305 at  
2 ¶75. The preceding is obviously true, but the district court ignored the fact  
3 that under the "otherwise declared by law to be confidential . . ." language of  
4 NRS 239.010(1), the legislature allows for specific statutes and laws to make  
5 other records confidential. Under NRS 239.010(1), when an enumerated  
6 statute under NRS 239.010(1) or a "law" declares a public record  
7 confidential the record is in essence confidential under the terms of NRS  
8 239.010(1) itself. As such, the district court's reliance on *Lamb v. Mirin*, 90  
9 Nev. 329, 332-333, 526 P.2d 80, 82 (1974), where there was no statute with  
10 similar effect to NRS 239.010(1), is misplaced. *Id.* Thus, *Lamb* is  
11 distinguishable from the case at bar because NRS 239.010(1) clearly allows  
12 for "laws" to declare public records as confidential; therefore, local control  
13 over the same subject did not cease such as the case in *Lamb*.  
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18 Regulation 4110(X) does not contravene or conflict with NRS  
19 Chapter 239, as that chapter clearly provides public records may be  
20 confidential beyond those statutes specifically enumerated in NRS  
21 239.010(1). Therefore, the internal information received or gathered by  
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24 <sup>12</sup> NRS 239 does not list any federal laws but it is nevertheless subordinate  
25 to them. The Order does not set forth any plausible basis as to how the  
26 totally public investigative process the district court created, by virtue of its  
27 Order, for this matter complies with CCSD's obligation under Title VII to  
28 keep information confidential and to protect employees from retaliation.



1 CCSD in the course of investigating the alleged discriminatory conduct of  
2 Trustee Child should remain confidential under CCSD Regulation 4110(X)  
3 as intended by the legislature under NRS 239.010(1).  
4

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

8 CCSD Regulation 1212 states, “Confidential information concerning  
9 all personnel will be safeguarded.” CCSD Reg. 1212. Similarly, CCSD  
10 Regulation 4311 provides, “All personnel information regarding district  
11 employees is confidential. . . .” CCSD Reg. 4311. These regulations cannot  
12 be said to contravene or conflict with NRS Chapter 239.  
13

14 CCSD does not define what constitutes a personnel record. As such,  
15 this Court should look to Nevada Administrative Code (hereinafter, “NAC”)  
16 Chapter 284 beginning at NAC 284.702 titled, “Personnel Records” for  
17 instructive guidance as to what constitutes a personnel record for state  
18 employees in the absence of a defined list of CCSD personnel records. NAC  
19 284.718(5) provides:  
20  
21

22 Any notes, records, recordings or findings of an investigation  
23 conducted by the Division of Human Resource Management  
24 relating to sexual harassment or discrimination, or both, and  
25 any findings of such an investigation that are provided to an  
26 appointing authority are confidential.  
27  
28

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

6           By virtue of its interpretation of “significant other needs”, the district  
7 court afforded CCSD employees fewer rights than similarly situated State  
8 employees solely because the alleged discrimination came from an elected  
9 official and also discounted CCSD Regulations 1212 and 4311.  
10

11           The fact that this personnel information is maintained in the Office of  
12 Diversity and Affirmative Action does not render it non-personnel. In the 21<sup>st</sup>  
13 Century technology allows information to be maintained in specific locations.  
14 In a matter such as this it makes perfect sense for the sensitive information  
15 and the identities of the complainants and witnesses to be maintained in a  
16 single location with limited access as opposed to a digital personnel file in  
17 human resources where a multitude of employees would have access.  
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21                   **C. The investigative file should remain confidential under**  
22                   **the deliberative process privilege.**

23           The investigative material is also not required to be disclosed because  
24 it is protected under the deliberative process privilege. *DR Partners v.*  
25 *Board of County Commissioners of Clark County*, 116 Nev. 616, 621  
26 (2000). The Nevada Supreme Court has recognized an “executive privilege”  
27  
28

1 in Nevada in determining whether public records are “confidential by law.”  
2 “The deliberative process or ‘executive’ privilege is one of the traditional  
3 mechanisms that provide protection to the deliberative and decision-making  
4 processes of the executive branch of government. . . .” *Id.* at 622. As  
5 recognized by LVRJ itself, the deliberative process privilege protects high-  
6 level decision-making. Appellant’s App. I 49 at 21:2-3 (citing *DR Partners*  
7 at 623). The privilege has been adopted because “public disclosure of  
8 certain communications would deter the open exchange of opinions and  
9 recommendations between government officials, and it is intended to protect  
10 the government’s decision-making process, its consultative functions, and  
11 the quality of its decisions.” *City of Colorado Springs v. White*, 967 P.2d  
12 1042, 1047 (Colo. 1998); se also *DOI v. Klamath Water Users Prot. Ass’n.*,  
13 532 U.S. 1, 8-9 (2001).

14 This privilege “shields from mandatory disclosure ‘inter-agency or  
15 intra-agency memorandums or letters which would not be available by law  
16 to a party other than an agency in litigation with the agency[.] It also  
17 permits ‘agency decision-makers to engage in that frank exchange of  
18 opinions and recommendations necessary to the formulation of policy  
19 without being inhibited by fear of later public disclosure.’” *Id.* at 622-23  
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1 (quoting *Paisley v. C.I.A.*, 712 F.2d 686, 697-98 (D.C. Cir. 1983)) (emphasis  
2 added).

3  
4 “The deliberative process privilege allows governmental entities to  
5 conceal public records only if the entity can prove that the relevant public  
6 records were part of a predecisional and deliberative process that led to a  
7 specific decision or policy.” *DR Partners* at 623; see also *NLRB v. Sears,*  
8 *Roebuck & Co.*, 421 U.S. 132, 151 (1974) (“the lower courts have uniformly  
9 drawn a distinction between predecisional communications, which are  
10 privileged, and communications made after the decision and designed to  
11 explain it, which are not.”) (internal citations omitted); *White*, 967 P.2d at  
12 1051. Furthermore, to be deliberative the material must consist of opinions,  
13 recommendations, or advice about agency policies and the Court must be  
14 able to pinpoint an agency decision or policy to which the documents  
15 contributed. *DR Partner* at 623-24 (emphasis added); see also *Nat’l Wildlife*  
16 *Fed’n v. U.S. Forest Serv.*, 861 F.2d 1114, 1117 (9<sup>th</sup> Cir. 1988) (“In  
17 furtherance of this objective the courts have allowed the government to  
18 withhold memoranda containing advice, opinions, recommendations and  
19 subjective analysis.”) (quoting *Julian v. U.S. Dep’t of Justice*, 806 F.2d  
20 1411, 1419 (9<sup>th</sup> Cir. 1986), *aff’d* 486 U.S. 1 (1988). Courts also examine  
21 whether “the document is so candid or personal in nature that public  
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1 disclosure is likely in the future to stifle honest and frank communication  
2 within the agency. *DR Partners*, at 624; *White*, 967 P.2d at 1051-52.  
3

4 The agency bears the burden of establishing the character of the  
5 decision, the deliberative process involved, and the role played by the  
6 documents in the course of that process. *Id.* Once an agency, such as  
7 CCSD, establishes the documents fall under deliberative process, the burden  
8 shifts to the party seeking disclosure who must demonstrate the need for the  
9 information exceeds the agency's interest in preventing disclosure. *DR*  
10 *Partners* at 626.  
11

12  
13 As a general rule, the privilege does not protect purely factual matters  
14 unless they are "inextricably intertwined with the policy making process."  
15 *Id.* at 623. Nevertheless, facts are also protected when their "disclosure . . .  
16 may so expose the deliberative process . . . that it must be exempted." *Mead*  
17 *Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 256 (D.C. Cir.  
18 1977); *White* 967 P.2d at 1052 ("The deliberative process privilege protects  
19 factual material that is so inextricably intertwined with the deliberative  
20 sections of the documents that its disclosure would inevitably reveal the  
21 government's deliberations") (citing *In re Sealed Case*, 121 F.3d 729, 737  
22 (D.C. Circuit 1997).  
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1           The Superintendent has authority to set policy. *See Lytle v. Carl*, 382  
2 F.3d 978, 981-983 (9th Cir. Nev. 2004) (holding in a §1983 case that  
3 CCSD's Superintendent and assistant superintendent had final policymaking  
4 authority as delegated to them by board of trustees; "the term 'policy'  
5 includes . . . not only policy in the ordinary sense of a rule or practice  
6 applicable in many situations. It also includes 'a course of action *tailored to*  
7 *a particular situation* and not intended to control decisions in later  
8 situations.'" *Lytle* at 983 citing *Pembaur v. Cincinnati*, 475 U.S. 469, 483,  
9 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986).  
10

11  
12  
13           In this case the Superintendent is CCSD's highest level executive and  
14 is directly hired by the Board of Trustees. Superintendent Skorkowsky  
15 became aware of alleged issues regarding Trustee Child's conduct and asked  
16 the ODAA to investigate for the purpose of determining if the trustee's  
17 behavior amounted to discrimination and to advise whether the conduct rose  
18 to the level of discrimination and to make recommendations to protect  
19 students and employees, if necessary. Appellant's App. I 114-115 & 61-64.  
20  
21           The contents of the investigative file formed the basis for Mr. Cole's  
22 recommendations to the Superintendent, which have been heavily relied  
23 upon in preparation and distribution of specific policies directed to Trustee  
24 Child. Appellant's App. I 114-115 & II 330-335.  
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1           The original memorandum was provided to the Superintendent on or  
2 about October 19, 2016. Appellant's App. I 61-64. The October 19, 2016,  
3 memorandum was predecisional and deliberative as it predates any action or  
4 institution of policy or directives. Appellant's App. II 330-335.

5  
6 Furthermore, the memorandum contains the precise "advice, opinions,  
7 recommendations and subjective analysis" allowing for withholding of  
8 memoranda under *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114,  
9 1419 (9<sup>th</sup> Cir. 1988). Appellant's App. I 61-64. Thereafter, ODAA's  
10 opinions and recommendations were utilized in the decision making process  
11 that resulted in correspondence to Trustee Child on November 30, 2016 and  
12 guidelines for Trustee Child's visits to schools dated December 5, 2016.  
13 Appellant's App. II 330-332. The November 30, 2016, correspondence and  
14 December 5, 2016 guidelines are the pinpointed agency decision or policy  
15 referenced in *DR Partners at 623-24*.

16  
17           Thereafter, allegations of misconduct by Trustee Child continued.  
18  
19 Further investigating was performed by the ODAA as evidenced in the  
20 withheld documents. Appellant's App. I 183-185. The investigative  
21 material generated as part of the ongoing investigation of alleged  
22 misconduct led to correspondence to Trustee Child dated April 24, 2017.  
23 Appellant's App. II 333. Furthermore, the continued investigation resulted  
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1 in a second memorandum from the ODAA to Superintendent Skorkowsky  
2 dated May 26, 2017. Appellant's App. I 185 and Withheld Documents at  
3 229-30 available for in camera review upon request. Similar to the original  
4 memorandum of October 19, 2016, the May 2017 memorandum also  
5 includes "advice, opinions, recommendations and subjective analysis"  
6 consistent with *Nat'l Wildfire Fed'n v. U.S. Forest Service* cited above. Id.  
7 The May 26, 2017, memorandum predates the May 31, 2017 correspondence  
8 and directive to Trustee Child and Superintendent Skorkowsky's eventual  
9 trespassing of Trustee Child from CCSD property on October 24, 2017.  
10 Appellant's App. II. 334-335 & 372-376.  
11

12 LVRJ's need for the "withheld documents" is outweighed by CCSD's  
13 interest in non-disclosure for the purpose of protecting students and  
14 employees' privacy and encouraging future reporting of discriminatory  
15 conduct. LVRJ has had the original memoranda and recommendations to  
16 Superintendent Skorkowsky dated October 19, 2016, since at least  
17 December 23, 2016, as it was published as part on an article on Trustee  
18 Child and his alleged misconduct on December 23, 2016. Appellant's App.  
19 I 56-64. Furthermore, the article references Superintendent Skorkowsky's  
20 "guidelines" issued on December 5, 2016, that specifically banned Trustee  
21 Child from school visits without written permission. Id. LVRJ published  
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1 an article in regard to the December 5, 2016, "guidelines" on December 5,  
2 2016, as well. Appellant's App. II 336-339. Additional articles on the topic  
3 of Trustee Child's alleged misconduct were published by LVRJ on  
4 December 6, 24, 30, 31, 2016, February 8, 9 and 13, 2017, March 13, 2017  
5 and June 19, 2017. App. Appendix 11 340-371.  
6  
7

8 Most recently, the "withheld documents" were relied upon, along with  
9 the ongoing conduct of Trustee Child, in Superintendent Pat Skorkowsky  
10 being compelled to trespass Trustee Child on October 24, 2017, in a further  
11 attempt to protect CCSD students and employees. Appellant's App. II 372-  
12 376. The preceding steps taken by CCSD including the trespassing of the  
13 trustee has been reported by LVRJ. Id. There is no indication that the lack  
14 of any names of employees was a detriment to the reporting or that  
15 publishing their names would have served any purpose that would exceed  
16 the employees interest in privacy. LVRJ has published two (2) additional  
17 articles on Trustee Child being trespassed on October 26, 2017 and  
18 November 2, 2017, wherein in the latter the Superintendent clarified a partial  
19 basis of banning Trustee Child was that CCSD had been notified by an  
20 outside governmental agency that it had received a complaint regarding  
21 Trustee Child and an investigation is underway. Appellant's App. II 377-  
22 382.  
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1           The preceding demonstrates that the need for the additional  
2 information sought by LVRJ is quite small when weighed against the  
3 detriment CCSD employees will suffer if their identities are revealed and  
4 ability to report alleged misconduct confidentially to the ODAA is  
5 eliminated. Additionally, CCSD's ability to learn of, investigate and take  
6 corrective action to stop and prevent future discrimination would also be  
7 greatly hindered. This may endanger not just CCSD employees but students  
8 as well given the fact that some of the previous published allegations against  
9 Trustee Child include his impromptu discussions with students regarding  
10 suicide and prison snitches. Appellant's App. II 352-355 & 364-367. If  
11 employee confidentiality is stripped, employees would be better served by  
12 foregoing any report with the ODAA and filing directly to the Nevada Equal  
13 Rights Commission or the U.S. Equal Employment Opportunity  
14 Commission where confidentiality would be provided. A decision  
15 dismantling employee confidentiality to report allegations of discrimination  
16 would potentially result in all investigative files of the ODAA and similarly  
17 situated public bodies being public. CCSD is required by the Title VII to  
18 investigate allegations of discrimination, keep the information confidential  
19 and prevent retaliation. If the district court's Order is upheld, making every  
20 scrap of paper that is part of the investigation into public records, CCSD will  
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1 be in violation of Title VII. NRS Chapter 239 cannot be read to require  
2 CCSD to violate federal law.

3  
4 Therefore, the entire investigative file is subject to the deliberative  
5 process privilege because the investigation and resulting file and memoranda  
6 were completed at the direction of CCSD's highest ranking employee,  
7 Superintendent Pat Skorkowsky. Furthermore, the November 30 2016,  
8 April 24, 2017 and May 31, 2017 letters to Trustee Child and guidelines  
9 authored by the Superintendent were based on the recommendations and  
10 opinions contained in the memoranda. Appellant's App. I 114-115.  
11  
12 Furthermore, the memoranda were utilized for "a course of action *tailored to*  
13 *a particular situation* and not intended to control decisions in later  
14 situations." Finally, the need for LVRJ to obtain the investigative file is  
15 minimal when compared to the potential damage to CCSD. To rule that  
16 memoranda, only, are confidential under the deliberative process privilege  
17 but not the notes, drafts and chronological summaries would render the  
18 confidentiality privilege under the deliberative process meaningless in this  
19 matter because the file itself is the sole basis of the memoranda prepared by  
20 the ODAA. To make one but not the other confidential essentially provides  
21 no or insufficient confidentiality to the CCSD employees because the  
22 investigative file is so tightly intertwined to the memoranda.  
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1                   **D. Nonrecord materials are not required to be produced.**

2  
3           NAC 239.051 provides that certain materials of a local government  
4 entity are “nonrecord materials.” Those materials are not public records and  
5 are not required to be disclosed. Nonrecord materials “means published  
6 materials printed by a governmental printer, worksheets, unused blank forms  
7 except ballots, brochures, newsletters, magazines, catalogs, price lists, drafts,  
8 convenience copies, ad hoc reports, reference materials not relating to a  
9 specific project and any other documentation that does not serve as the record  
10 of an official action of a local governmental entity.” NAC 239.051 (emphasis  
11 added). A similar definition is applied to state agencies under NAC 239.705  
12 (nonrecord materials include informal notes, drafts, and ad hoc reports).  
13 These NAC provisions are found in Chapter 239 which pertains to public  
14 records, and should be applied here.  
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19           Here, to the extent that any remaining information constitutes drafts or  
20 informal notes, it falls within the definition of “nonrecord materials” and is  
21 not required to be produced. In particular, the notes related to the  
22 memorandums and recommendations and the draft versions of memoranda are  
23 drafts and informal notes and therefore are nonrecords and not required to be  
24 produced under the NPRA. Those materials also do not serve as the “official  
25 action” of CCSD. The official action was the December 5, 2016, interoffice  
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28

1 memorandum and letters to Trustee Child from Superintendent Skorkowsky.  
2 Appellant's App. II 332.  
3

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

6 Even if the Court does not find that any federal, state or CCSD law or  
7 regulation makes the documents confidential, they should still be protected  
8 under the common law *Donrey* balancing test. The Supreme Court of Nevada  
9 has recognized that a "limitation on the general disclosure requirements of  
10 NRS 239.010 must be based upon a balancing or 'weighing' of the interests of  
11 non-disclosure against the general policy in favor of open government." *DR*  
12 *Partners v. Board of County Comm'rs*, 116 Nev. 616, 622 (2000) (citing  
13 *Donrey*, 106 Nev. at 635-36). A government entity cannot meet its burden by  
14 "voicing non-particularized hypothetical concerns." *DR Partners*, 116 Nev. at  
15 628.  
16  
17

18 Here, CCSD's interest in investigating employees' reports of and  
19 protecting them from, a hostile work environment, intimidation, and  
20 retaliation clearly outweighs the public's interest in obtaining access to  
21 internal investigatory information regarding the alleged conduct of Trustee  
22 Child. Revealing the internal investigatory information would be detrimental  
23 to the work environment and well-being of employees and create a chilling  
24 effect on future reporting. The fears of hostile work environment,  
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1 intimidation, and retaliation are not hypothetical or speculative. Employees  
2 have expressed legitimate fear of being identified and/or retaliated against by  
3  
4 Trustee Child both **verbally** to Cedric Cole (Executive Manager, ODAA) and  
5 **in writing** in emails. Appellant's App. II 114-115 & Withheld Documents at  
6 210 upon request by Court for in camera review.  
7

8         Furthermore, in *Donrey* the petitioner sought an investigative report,  
9 only, created by a law enforcement agency regarding to whether bribery of a  
10 public official took place. *Donrey*, 106 Nev. 630, 631, 798 P.2d 144, 145  
11 (1990). Presently, LVRJ wants the entire investigative file including  
12 handwritten notes, typed notes and drafts regarding an investigation of alleged  
13 discrimination against CCSD employees **and** the resulting memoranda and  
14 recommendations. As such the weighing of the parties interests is clearly in  
15  
16 favor of CCSD because interests of non-disclosure. To the best of CCSD's  
17 knowledge, no such investigative file has ever been produced as part of a  
18  
19 public records request in Nevada to date.  
20

21         The purpose of the public record law is to foster democratic principles.  
22 CCSD believes the public's interest in access to documents is to examine the  
23 functions of a public agency, and while this is an important interest, it may be  
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1 accomplished with the documents that have already been provided.<sup>13</sup> The  
2 public's interest in reading internal investigation files is outweighed under  
3 *Donrey* by CCSD's need to meet its statutory duty to have a confidential  
4 system for internal investigation of alleged employment issues, enabling it to  
5 discover and correct problems in the workplace, while protecting employees  
6 who report allegations of unwelcome conduct.  
7

8  
9 **F. If the Court orders disclosure of any documents or**  
10 **memoranda from the ODAA, the Court should order**  
11 **redactions to remove all identifiers that would**  
12 **reasonably identify any complainants and witnesses.**

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

16 The investigative file and memoranda and recommendations include  
17 the names of CCSD employees who are not protected by the July 11 Order  
18 because the district court has ordered that the "Key" be disclosed, as well.  
19 Appellant's App. I 183-186 & see FN 3, Withheld Docs. Even with the  
20 limited redactions allowed by the district court, the investigative file and  
21 memoranda and recommendations would divulge the names of thirty (30)  
22  
23

24  
25 <sup>13</sup> CCSD has previously provided approximately 174 pages of documents  
26 and emails in addition to three (3) correspondences from the Superintendent  
27 to Trustee Child and the guidelines dated December 5, 2016, pertaining to  
28 Trustee Child's school visits.

1 administrators and teachers who were witnesses to conduct by Trustee Child  
2 that concerned them to a sufficient degree that they felt it necessary to report  
3 their concerns. See FN 3, Withheld Docs.  
4

5 Furthermore, even if the names of all of the victims and witnesses  
6 were redacted by eliminating the “Key” from disclosure, the investigative  
7 file is replete with personally identifiable facts that lead directly to the  
8 identity of victims of discrimination and witnesses. It is not possible to  
9 redact enough information to protect an employee who is either a victim or a  
10 witness to discrimination from retaliation as is required by Title VII, 42  
11 U.S.C. § 2000e-3(a). For example, it does little good to redact a name but  
12 still leave in the person’s title, such as Principal and the name of the school  
13 as there is obviously just one principal for a school. The same is true for  
14 deans and vice principals as there are so few of those positions at a particular  
15 school. Additionally, some of the allegations pertain to specific school  
16 sponsored events or locations making identifying of the complainants and  
17 witnesses subject to easy determination by the accused if not the public. If  
18 any disclosure is upheld, any information that identifies a CCSD employee  
19 including but not limited to the names of job titles and schools should be  
20 redacted to protect the individuals. Further support for withholding the  
21 entire investigative file is that it is still an ongoing investigation, and if  
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1 CCSD is required to release the investigative file, it may prejudice future  
2 complaints and/or witness statements.

3  
4 CCSD has a duty to protect employees from retaliation. The fears of  
5 retaliation and persons considering against reporting in the future are not  
6 speculative. In his declaration, the Director of the ODAA testified to  
7 concrete and actual fears of retaliation. Retaliation was a particular concern  
8 of administrators because those are the employees who work in close  
9 proximity with Trustee Child and it is administrators who are required to  
10 have their promotions approved by the Board of Trustees. Specifically, Mr.  
11 Cole testified that:  
12  
13

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

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

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

25 App. Appendix I 114-115 & Withheld Documents at 210 upon request.

26 CCSD employees' confidence in their ability to report sexual  
27 harassment and discrimination (or provide witness statements on behalf of  
28 such reports) without fear of retaliation, loss of further professional

1 advancement and public exposure will be undermined if the status quo is not  
2 maintained. The chilling effect of stripping the employees of confidentiality  
3 due to a public records request will irreparably injure CCSD and its  
4 employees and undercut their federally mandated right to be free from  
5 sexual harassment in the workplace. *See* Title VII, 42 U.S.C. § 2000e *et.*  
6 *seq.*; U.S., Equal Employment Opportunity Commission, EEOC Notice No.  
7 915.002, *Enforcement Guidance on Vicarious Employer Liability for*  
8 *Unlawful Harassment by Supervisors*, at § V(D)(1) re Failure to Complain  
9 (dated 6/18/99, in effect until rescinded or superseded) (emphasis added);  
10 *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998).

### 14 CONCLUSION

15  
16 The district court's decision ordering disclosure of all investigative  
17 materials including memoranda and recommendations with limited  
18 redactions to include direct victims of sexual harassment and alleged sexual  
19 harassment and support staff and students, only, but no alleged victims or  
20 witnesses of any other types of discrimination should be reversed. Stripping  
21 any group of employees, public or private, of their ability to report  
22 discrimination confidentially is poor public policy as it creates a further  
23 chilling effect on reporting of discrimination and as a result further  
24 perpetuates discrimination.  
25  
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28

1 Respectfully submitted, this 7<sup>th</sup> day of February, 2018.  
2  
3

4 /s/Adam Honey

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Adam Honey, Nevada State Bar No. 9588

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11  
12  
13

14 **COMBINED NRAP 28.2 AND NRAP 32 CERTIFICATE OF**  
15 **ATTORNEY AND CERTIFICATE OF COMPLIANCE**

- 16 1. I hereby certify that this brief complies with the formatting  
17 requirements of NRAP 32(a)(4), the typeface requirements of NRAP  
18 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:  
19  
20

21 [X] This brief has been prepared in a proportionally spaced  
22 typeface using Microsoft Word 2010 in Times New  
23 Roman 14 pt. font; or  
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1 2. I further certify that this brief complies with the page- or type-volume  
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3 briefs exempted by NRAP 32(a)(7)(c), it is either:  
4

5  
6 [X] Proportionately spaced, has a typeface of 14 points or  
7 more, and contains 10,475 words; or

8 [ ] Monospaced, has 10.5 or fewer characters per inch, and  
9 contains \_\_\_\_ words or \_\_\_\_ lines of text, or

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

11 3. Finally, I hereby certify that I have read this Appellant's Opening  
12 Brief, and to the best of my knowledge, information, and belief, it is  
13 not frivolous or interposed for any improper purpose. I further certify  
14 that this brief complies with all applicable Nevada Rules of Appellate  
15 Procedure, in particular NRAP 28(e)(1), which requires every  
16 assertion in the brief regarding matters in the record to be supported  
17 by a reference to the page and volume number, if any, of the transcript  
18 or appendix where the matter relied on is to be found. I understand  
19 that I may be subject to sanctions in the event that the accompanying  
20 brief is not in conformity with the requirements of the Nevada Rules  
21 of Appellate Procedure.  
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**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 7<sup>th</sup> day of February, 2018.

/s/Adam Honey

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