IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Appellant, vs. LAS VEGAS REVIEW-JOURNAL, Respondent.	SUPREME COURT CASE NO.: 74604 DISTRICT COURT CASE NO.: A-17-758501-W **REPLY TO RESPONSE TO REVIEW-JOURNAL's MOTION TO EXPEDITE APPEAL**

Respondent Las Vegas Review-Journal ("Review-Journal"), by and through its counsel, Margaret A. McLetchie, hereby submits this reply to the Clark County Officer of the Coroner's response (the "Opposition") to the Review-Journal's motion requesting that this Court expedite the above-captioned appeal Pursuant to Nevada Rule of Appellate Procedure 2,

DATED this the 27th day of December, 2017.

/s/ Margaret A. McLetchie

Margaret A. McLetchie, Nevada Bar No. 10931
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Just as it ignored the directives of this Court and the Nevada Legislature to interpret the Nevada Public Records Act (Nev. Rev. Stat. § 239.001 *et seq.* ("NPRA")) broadly and any limitations narrowly, in its Opposition, the Coroner's Office ignores the importance of speedy access to records and, more broadly, the importance of the NPRA. As detailed in the Motion to Expedite, the NPRA reflects that the public has a right to obtain almost immediate access to public records. That right is necessarily jeopardized if a public entity denies records, requires the requester to file suit to get records, appeals if the district court orders access, and obtains a stay for the duration of the appeal. As this Court is aware, appeals can take quite some time and, meanwhile, if a stay of an order directing the production of records is granted, the public is left without access to records. This is so even though the public is presumptively entitled to the records. In this case, such delay also impinges on the First Amendment rights of the Review-Journal and its reporters to cover matters of concern and disseminate information about public records to the very public that owns those records.

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II. ARGUMENT

A. The NPRA Reflects a Mandate to Make Records Available Without Delay.

The Coroner's Office entirely ignores the text and purpose of the NPRA in contending that there is no reason to expedite an NPRA appeal. To support its arguments against speedy resolution of this appeal, the Coroner's Office posits hat Nev. Rev. Stat. § 239.011(2)'s directive that "[t]he court should give this matter priority over other civil matters" only applies to district courts. (Opp., p. 7:2-20.) Even if the Coroner's narrow reading of § 239.011(2) is correct, the provision is reflective of the overriding directive of the NPRA: to allow the public speedy access to public records. This interest in speedy access constitutes good cause to expedite this appeal pursuant to Nev. R. App. P. 2.

This Court can and should take the nature of this matter into consideration in determining whether it should be expedited, and the fact that it is a public records case necessarily supports expeditious scheduling. In arguing to the contrary, the Coroner's Office reveals its lack of understanding and respect for the public's presumptive right of access to its own records. For example, the Coroner's Office contends that because a public entity can, within five (5) days, let a requester know that records will not be immediately available, there is no mandate in the NPRA to provide swift access. Yet, nowhere in the NPRA does it state that a public entity can "take a lengthy time to complete [a] request" (Opp., p. 8:1-2.) Instead of giving

entities unfettered discretion to delay providing records, the NPRA in fact mandates that an entity provide a date certain by which records can be produced. Nev. Rev. Stat. § 239.0107(c). Furthermore, the Coroner Officer's argument ignores the fact that the NPRA also provides that "all public books and public records of a governmental entity must be open at all times during office hours to inspection by any person." Nev. Rev. Stat. § 2309.010.

Most markedly, the Coroner Officer's argument that the NPRA does not provide for speedy access to public records entirely ignores the directives the Nevada Legislature saw fit to include in the NPRA. To stop the very type of disrespect for public access evidenced by the Coroner's Office in this case, the Nevada Legislature explicitly included a statement of intent when it amended the NPRA in 2007.[1] In its very first provision, the NPRA states in pertinent part:

> 1. The purpose of this chapter is to foster democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law;
> 2. The provisions of this chapter must be construed liberally to carry out this important purpose;

[1]As this Court has explained, the Legislature made these amendments in 2007 to expand access. *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 878, 266 P.3d 623, 626 (2011). "[B]y virtue of the 2007 amendments to the NPRA, '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.'" *Id.* at 880, 627 (citing *Reno Newspapers v. Sheriff*, 126 Nev. 218, 234 P.3d 922, 926 (2010)).

> 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…

Nev. Rev. Stat. 239.001 ("Legislative findings and declaration."); *see also Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 878, 266 P.3d 623, 626 (2011) (holding that "the provisions of the NPRA are designed to promote government transparency and accountability").

Meaningful transparency and accountability cannot and should not be delayed. Any interpretation of the NPRA that does not recognize the need for speedy access is at odds with the Legislature's stated purpose and intent. Again, the Review-Journal has waited over nine months to obtain access to public records and cannot report on records it does not receive.[2] The normal appellate process could add many months or more of additional delay. Thus, in accordance with the intent of the NPRA, the Review-Journal contends that this Court remove this matter from the

[2] The Coroner's Office makes much ado about the fact that the records sought go back to 2012 (Opp., pp. 9-10 ("No Prejudice to The LVRJ in Proceeding with Appeal in Ordinary Course"). However, that the Review-Journal is engaging in investigative journalism and attempting to access historical as well as current records heightens, rather than lessens, the interests in immediate access. In any case, why the Review-Journal wants records and what it wants them for is not relevant because there is a presumed right to access all records. In short, there is a "presumption that all government-generated records are open to disclosure," *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011), and a requester need not justify the reasons for a request.

Settlement Program, suspend the normal briefing schedule, and expedite its consideration and resolution of this appeal.

B. The Importance of the Issues at Hand Does Not Weigh in Favor of Delay.

Every NPRA case involves a "unique document" and, where a document is not declared confidential by law and a governmental entity resists disclosure, every NPRA matter will always necessarily involve an unsettled question of law. Thus, the Coroner's Officer's arguments against speedy handling of this case (Opp., pp. 8:3-9:17) are unavailing. Moreover, rewarding the tact that the Coroner has taken in this case would necessarily incentivize entities to delay and then appeal—and would make it even harder than it already is for the Review-Journal and other members of the public to get access to public records from governmental agencies.

What is not unsettled— and what the Coroner's Office has ignored throughout the course of the request at issue and the subsequent litigation to obtain access to records—is the fact that both this Court and the Nevada Legislature have directed the Coroner's Office to read the NPRA liberally, and any exceptions to it narrowly. As this Court explained in the *Gibbons* case:

> Our jurisprudence has ... established a framework for testing claims of confidentiality under the backdrop of the NPRA's declaration that its provisions "must be construed liberally" to facilitate access to public records, NRS 239.001(2), and that any restrictions on access "must be construed narrowly." NRS 239.001(3). 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. NRS 239.0113; []. Next, in the absence of a statutory provision that explicitly declares a record to be confidential, any limitations on disclosure must be based upon a broad balancing of the interests involved, [] and the state entity bears the burden to prove that its interest in nondisclosure clearly outweighs the public's interest in access. [] Finally, our caselaw stresses that the state entity cannot meet this burden with a non-particularized showing, [], or by expressing hypothetical concerns. []

Gibbons, 127 Nev. at, 880, 266 P.3d at 628 (citations omitted). Thus, governmental entities have a heavy burden, and it is one they should take seriously.

Yet, despite the presumptions in favor of access articulated by both the Nevada Legislature and this Court, governmental entities such as the Coroner's Office continue to misread *Donrey* and flip the applicable burden on its head. Here, there is no statute that explicitly makes the records at issue confidential and the Coroner's Office was required to explain how and why its arguments for confidentiality outweigh the *presumed* right of access.

The Coroner's Office did not meet its burden. Despite the arguments made in its Opposition, as the District Court recognized, none of the arguments set forth by the Coroner justify non-disclosure. Specifically: (1) a non-binding *1982* Attorney General Opinion (predating the amendments to the NPRA) does not trump access; (2) nothing in Nev. Rev. Stat. § 432B.407(6) indicates that records obtained by child death review teams are automatically forever confidential in all forms and from all sources simply because the Coroner's Office transmitted those records at some point

in time to a child death review team; (3) the Coroner's Office is not a covered entity under HIPAA (45 C.F.R. § 160.103) and privacy interests do not outweigh the interests in access; and (4) the fact the Legislature, via 2017 Assembly Bill 57, amended Nev. Rev. Stat. § 244.162(3) and Nev. Rev. Stat. § 259.0045(2) to clarify next of kin notification provisions does not reflect a legislative intent to deny access to records.[3]

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[3] This findings by the district court is consistent with decisions from courts around the country holding that autopsy reports are public records. *See, e.g.*, *Bozeman v. Mack*, 744 So.2d 34, 37(La. App. 1 Cir. 1998) (holding that "an autopsy report is a public record when it is prepared by a coroner in his public capacity as coroner"); *Swickard v. Wayne Cty. Med. Exam'r*, 438 Mich. 536, 545, 475 N.W.2d 304, 308 (1991) (Autopsy report and toxicology test results prepared by the county medical examiner's office were prepared "in the performance of an official function" and were "public records" for purpose of Freedom of Information Act); *Schoeneweis v. Hamner*, 223 Ariz. 169, 174, 221 P.3d 48, 53 (Ct. App. 2009) (holding that an autopsy report is a public record and not statutorily privileged under Arizona's public records law); *State ex rel. Findlay Publishing Co. v. Schroeder*, 76 Ohio. St. 3d 580, 583, 669 N.E.2d 835, 839 (1996) (holding that a county coroner's records in which the cause of death was suicide were "unquestionably public records" under Ohio's public records laws); *Denver Pub. Co. v. Dreyfus*, 184 Colo. 288, 295, 520 P.2d 104, 108 (1974) (en banc) (holding that autopsy reports are public records, and may only be withheld from public inspection by application for a court order permitting refusal of disclosure on the ground of "substantial injury to the public interest"); *Hearst Television, Inc. v. Norris*, 617 Pa. 602, 619, 54 A.3d 23, 33–34 (2012) (holding that manner of death records prepared by county coroner was not exempt from disclosure under Pennsylvania's Right to Know Law); *Home News Pub. Co. v. State, Dep't of Health*, 239 N.J. Super. 172, 178–79, 570 A.2d 1267, 1271 (App. Div. 1990) (holding that death certificates are public records under New Jersey's right to know law); *Journal/Sentinel, Inc. v. Aagerup*, 145 Wis. 2d 818, 429 N.W.2d 772 (Ct. App. 1988) (autopsy reports are public records subject to public inspection unless they are implicated in a "criminal detection effort".)

In short, the Coroner's Office failed to explain how any of the interests it cited clearly outweighed the public's right to access and, thus, it failed to meet its burden. Indeed, each of its arguments would require a contortion of the approach set forth by the Legislature and this Court. For example, reading a limitation into a provision expanding the next of kin notification provisions would run afoul of the mandate to interpret exceptions to the NPRA narrowly. Similarly, not only are Attorney General opinions not binding,[4] it would be nonsensical to apply the NPRA framework in place before 2007. Further, regarding the child death review team argument, this Court has already recognized that, even where an explicit statute makes records confidential in one form, that does not render the information confidential elsewhere. *See PERS v. Reno Newspapers Inc*., 129 Nev. Adv. Op. 88, 313 P.3d 221, 224 (2013) (rejecting a governmental entity's efforts to resist disclosure based on a broad reading of a statute providing confidentiality because confidentiality statutes "must be construed narrowly" and finding there that the statute "only protects as confidential the individuals' files …, not all information contained in separate media that also happens to be contained in individuals' files.").

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[4] *See Univ. & Cmty. Coll. Sys. of Nevada v. DR Partners*, 117 Nev. 195, 203, 18 P.3d 1042, 1048 (2001) (*citing Goldman v. Bryan*, 106 Nev. 30, 42, 787 P.2d 372, 380 (1990)); *accord Redl v. Secretary of State*, 120 Nev. 75, 80, 85 P.3d 797, 800 (2004).

Each of the arguments set forth by the Coroner's Office relied on an approach to the NPRA that has been explicitly rejected by both the Nevada Legislature and this Court. Thus, particularly on the facts of this case, it would be unjust to require the Review-Journal to wait indefinitely for resolution of this matter before it gets access to presumptively open records. In any case, the importance of the issues at hand argue in favor of prompt consideration, not against it.

C. Additional Litigation Does Not Weigh In Favor of Delay.

As discussed in the Coroner's Opposition, the Review-Journal, along with the Associated Press, has recently initiated a new petition in the district court for access to autopsy records pertaining to the victims and shooter of 1 October tragedy in Las Vegas. (Opp., p. 8:22-26.) The fact that the Review-Journal has once again had to seek judicial intervention to gain access to public records does not, however, militate against expedited treatment of this appeal by the Court. Rather, the new litigation heightens the need for a resolution of the issues in this appeal. The Coroner's Office argues there are "identical overlapping issues" between the instant appeal and the new public records matter. While the issues are not all identical, the Coroner's Officer's argument weighs in favor of expedited treatment: an expeditious resolution of the instant appeal could provide the district court presiding over the new public records matter with clear guidance about how to assess the Coroner's assertions of confidentiality, and would conserve judicial resources by preventing unnecessary

appeals over legal issues already pending before this Court. It would also potentially provide the public with speedier access to records in both matters.

D. Judicial Efficiency Weights in Favor of Prompt Resolution.

The parties have already briefed the legal issues at hand extensively in the district court. Thus, it would not be burdensome to the parties to be required to brief this matter relatively quickly. Indeed, the Coroner's Office recently argued in the district court:

> The law surrounding the NPRA is not particularly sophisticated or specialized. It entails a handful of Nevada Supreme Court cases a relatively small chapter of the NRS.

(Coroner's Office's Opposition to Motion for Attorney Fees, filed in district court 12/14/17.) While the Review-Journal disagrees with the Coroner's Office's efforts to minimize the importance of and the nature of the work involved in fighting recalcitrant public entities for access to records, the Coroner's Office cannot have it two ways. It has represented that this is a simple and straightforward matter. There is no reason it cannot and should not submit its opening brief without delay; indeed, nowhere in its Opposition does the Coroner's Office ever explain why an expedited briefing schedule would not tenable. The Review-Journal is prepared to follow whatever briefing schedule this Court determines is appropriate.

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E. The First Amendment Right of Access to Public Records Weighs in Favor of Expedited Treatment.

In its Motion, the Review-Journal additionally argued that the denial of access to public records impinges on its First Amendment right to access public records and report on them. (Mot., pp. 5-6.) Although the Coroner's Opposition does not address this argument, the Review-Journal's First Amendment right of access to public records—and the irreparable harm caused by delayed access—is another factor which weighs heavily in favor of expedited treatment of this appeal.[5] Because even a much shorter delay than the one here is a "total restraint on the public's first amendment right of access," *Associated Press v. U.S. Dist. Court for Cent. Dist. of California*, 705 F.2d 1143, 1147 (9th Cir. 1983),[6] expedited treatment is necessary to mitigate the constitutional harm the Review-Journal has suffered and will continue to suffer during the pendency of this appeal.

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[5] Pursuant to this Court's case law, the Court should interpret the Coroner's Office's failure to address this argument as a concession that the continued denial of access to the requested records impinges on the Review-Journal's First Amendment right of access. *See Polk v. State*, 126 Nev. 180, 181, 233 P.3d 357, 357–58 (2010)(discussing the "unforgiving consequences" of failing to respond to a constitutional claim raised on appeal and finding that failing can be construed as a confession of error) (citing NRAP 31(d)).

[6] Holding that a 48-hour delay in access to court records violated the public's first amendment right of access to criminal proceedings.

IV. CONCLUSION

Because over nine months have passed since the Review-Journal made its records request at issue in this appeal, and because the district court's recent decision to grant a stay of its order pending appeal will further delay access to the requested records, this court should expedite its resolution of this appeal pursuant to Nev. R. App. P. 2. The NPRA and the First Amendment demand nothing less.

Dated this the 27th day of December, 2017.

/s/ Margaret A. McLetchie

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Counsel for Respondent, Las Vegas Review-Journal

CERTIFICATE OF SERVICE

I hereby certify that the foregoing REPLY TO RESPONSE TO REVIEW-JOURNAL's MOTION TO EXPEDITE APPEAL was filed electronically with the Nevada Supreme Court on the 27th day of December, 2017. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Steven B. Wolfson and Laura Rehfeldt
Clark County District Attorney's Office
Counsel for Appellant,
Clark County Office of the Coroner/Medical Examiner

Further, I hereby certify that on the 27th day of December, 2017, a true and correct copy of the REPLY TO RESPONSE TO REVIEW-JOURNAL's MOTION TO EXPEDITE APPEAL was also served on the Settlement Judge in the above-captioned case by First Class United States Mail, postage fully prepaid to:

Israel Kunin
3551 E. Bonanza Rd. # 110
Las Vegas, NV 89110
Settlement Judge

/s/ Pharan Burchfield
Employee of McLetchie Shell LLC

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Appellant, vs. LAS VEGAS REVIEW-JOURNAL, Respondent.	SUPREME COURT CASE NO.: 74604 DISTRICT COURT CASE NO.: A-17-758501-W

MOTION FOR LEAVE TO FILE RESPONSE IN EXCESS OF PAGE/TYPE VOLUME LIMITATION

Respondent Las Vegas Review-Journal, by and through its counsel, Margaret A. McLetchie, hereby moves this Court, pursuant to Nevada Rule of Appellate Procedure ("NRAP") 32(a)(7)(D), to file a Reply to the Clark County Office of the Coroner's Opposition to the Review-Journal's Motion to Expedite Appeal that exceeds the five-page limit imposed by NRAP 27(d)(2). This Motion is supported by the attached declaration of counsel.

Dated this the 27th day of December, 2017.

/s/ Margaret A. McLetchie

Margaret A. McLetchie, Nevada Bar No. 10931
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MCLETCHIE SHELL LLC
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Las Vegas, Nevada 89101
Counsel for Respondent, Las Vegas Review-Journal

DECLARATION OF MARGARET A MCLETCHIE

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, Margaret A. McLetchie, declare, pursuant to Nev. Rev. Stat. § 53.330, as follows:

1. I am counsel for Respondent Las Vegas Review-Journal ("Review-Journal") in this matter. I have personal knowledge of all matters contained herein and am competent to testify thereto.

2. The Clark County Office of the Coroner/ Medical Examiner ("Coroner's Office") is appealing an order of a district court for the Eighth Judicial District Court granting the Review-Journal's petition for a writ of mandamus filed pursuant to the Nevada Public Records Act, Nev. Rev. Stat. § 239.011.

3. On December 15, 2017, the Review-Journal filed a motion requesting this Court expedite resolution of the appeal.

4. On December 22, 2017, the Coroner's Office filed an 11-page Opposition to the Review-Journal's motion to expedite.

5. Appended hereto is a copy of the Review-Journal's proposed Reply to the Opposition. The proposed Reply is 13 pages long.

6. Pursuant to Nevada Rule of Appellate Procedure 27(d)(2), a reply to a response to a motion may not exceed 5 pages absent leave from the Court.

7. In preparing the proposed Reply to the Coroner's Office Opposition, I endeavored to present the arguments as succinct as possible.

8. I believe that any reduction to this Reply would materially detract from the Review-Journal's presentation of the grounds justifying expedited treatment of the Coroner's Office's appeal. Given the number of arguments raised in the Opposition, and the novelty and importance of the issues presented in the appeal, I required the additional 7 pages to adequately present the grounds which necessitate expedited treatment.

9. I therefore respectfully request that this Court grant the Review-Journal leave to file a Reply in excess of the normal page limitations.

10. This Motion is not made for the purposes of delay, or any other improper purpose, but only to ensure that I provide competent and effective representation to the Review-Journal. *See* Nev. R. Prof. Conduct 1.1.

I certify under the penalty of perjury that the foregoing is true and correct.

Executed this the 27th day of December, 2017.

/s/ Margaret A. McLetchie

Margaret A. McLetchie, Nevada Bar No. 10931
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Counsel for Respondent, Las Vegas Review-Journal

CERTIFICATE OF SERVICE

I hereby certify that the foregoing MOTION FOR LEAVE TO FILE RESPONSE IN EXCESS OF PAGE/TYPE VOLUME LIMITATION was filed electronically with the Nevada Supreme Court on the 27th day of December, 2017. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Steven B. Wolfson and Laura Rehfeldt
Clark County District Attorney's Office
Counsel for Appellant,
Clark County Office of the Coroner/Medical Examiner

Further, I hereby certify that on the 27th day of December, 2017, a true and correct copy of the MOTION FOR LEAVE TO FILE RESPONSE IN EXCESS OF PAGE/TYPE VOLUME LIMITATION was also served on the Settlement Judge in the above-captioned case by First Class United States Mail, postage fully prepaid to:

Israel Kunin
3551 E. Bonanza Rd. # 110
Las Vegas, NV 89110
Settlement Judge

/s/ Pharan Burchfield
Employee of McLetchie Shell LLC